

02-082

**CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE
ADMINISTRATION OF JUSTICE.**

Law-enforcement officer conducting lawful stop to investigate alleged criminal activity may not arrest for obstruction of justice suspect who refuses to identify himself to officer. Depending on circumstances, suspect may be detained for purpose of determining his identity.

The Honorable Marsha L. Garst
Commonwealth's Attorney for the City of Harrisonburg
October 10, 2002

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether a law-enforcement officer, who is engaged in a valid investigative stop of the kind permitted by *Terry v. Ohio*,¹ may arrest a person for obstruction of justice under § 18.2-460(A), when such person refuses to provide information concerning his identity to the officer.

Response

It is my opinion, under the specific facts you have presented, that a law-enforcement officer conducting a lawful investigative stop may not arrest a suspect for obstruction of justice under § 18.2-460(A), when the suspect refuses to identify himself to the officer. Depending on the circumstances, however, there may be justification to detain a suspect for the purpose of determining his identity.

Background

You relate a situation where a law-enforcement officer in your jurisdiction lawfully stops an unidentified individual whom the officer reasonably suspects has committed a criminal offense. The individual refuses to provide identifying information, thereby frustrating the progress of the investigation.

Applicable Law and Discussion

Section 18.2-460(A) provides:

If any person without just cause knowingly obstructs a ... law-enforcement officer in the performance of his duties as such or fails or refuses without just cause to cease such obstruction when requested to do so by such ... law-enforcement officer, he shall be guilty of a Class 1 misdemeanor.

In interpreting a former statute involving the obstruction of an officer performing his duty, the Supreme Court of Virginia has distinguished that which constitutes "obstruction":

[T]here is a broad distinction between avoidance and resistance or obstruction.... "To constitute obstruction of an officer in the performance of his duty, it is not necessary that there be an actual or technical assault upon the officer, but there must be acts clearly indicating an intention on the part of the accused to prevent the officer from performing his duty, as to 'obstruct' ordinarily implies opposition or resistance by direct action.... It means to obstruct the officer himself not merely to oppose or impede the process with which the officer is armed."^{2]}

Additionally, the Supreme Court held that an attempt to escape the custody of an officer by running away does not provide a basis for a conviction for obstruction under the former statute.³

The Court of Appeals of Virginia has held that "obstruction of justice does not occur when a person fails to cooperate fully with an officer or when the person's conduct merely renders the officer's task more difficult but does not impede or prevent the officer from performing that task."⁴ In applying § 18.2-460(A), the Court has also determined that providing inconsistent information, even if the information has the effect of frustrating the investigation, is not sufficient to warrant a conviction for obstructing justice.⁵ Similarly, the Court has held that providing false information is not grounds for a conviction for obstruction of justice.⁶

If providing inconsistent information that, in effect, frustrates an investigation is not sufficient for a conviction for obstruction of justice, then it would also appear that failing to provide any information would not provide a basis for an arrest for obstructing justice.⁷ Such a failure to respond does not constitute the requisite "opposition or resistance by direct action."⁸

Virginia courts have set a high threshold for a conviction under § 18.2-460(A). Given this precedent, I am compelled to conclude that a law-enforcement officer, even when armed with reasonable suspicion that criminal activity may be occurring, may not arrest a suspect for obstruction of justice on the basis that the suspect refuses to identify himself. The officer may, of course, pursue any other lawful avenues of investigation to determine the individual's identity. Those avenues, however, depend on the facts of each individual case.⁹ A suspect's refusal or inability to provide his identification in some circumstances may prolong the justified period of detention. Reasonable suspicion about a suspect permits that he "be stopped in order to identify him, to question him briefly, ... while attempting to obtain additional information."¹⁰ If the suspect's identity is material to confirming or dispelling the suspicion that led to the detention, depending upon the circumstances, the detention may be continued for a reasonable period to establish his identity.¹¹ Additionally, an officer may, pursuant to § 46.2-104, demand identification of a motorist he stops for a traffic violation.

Conclusion

Accordingly, it is my opinion, under the specific facts you have presented, that a law-enforcement officer conducting a lawful investigative stop may not arrest a

suspect for obstruction of justice under § 18.2-460(A), when the suspect refuses to identify himself to the officer. Depending on the circumstances, however, there may be justification to detain a suspect for the purpose of determining his identity.

¹392 U.S. 1 (1968). A *Terry* stop allows an officer to approach and briefly detain an individual that the officer has reason to suspect is engaging in criminal activity. *Id.* at 27-31.

²*Jones v. Commonwealth*, 141 Va. 471, 478-79, 126 S.E. 74, 77 (1925) (citation omitted). In *Jones*, the accused was charged with violating § 55-c, which provided that "[a]ny person who shall hinder or obstruct any officer of this State charged with the duty of inspecting baggage for ardent spirits ... shall be deemed guilty of a misdemeanor." 1918 Va. Acts ch. 388, at 578, 611.

³*Jones*, 141 Va. at 478, 126 S.E. at 76. The accused in *Jones* was transporting barley, sugar, hops and yeast, and fled when stopped by the police officer, because he believed he had violated former § 55-c, which made it unlawful to "hinder or obstruct any officer" charged with inspecting any vehicle transporting ardent spirits. *Id.* at 477-78, 126 S.E. at 76 (quoting 1918 Va. Acts, *supra*, at 611).

⁴*Ruckman v. Com.*, 28 Va. App. 428, 429, 505 S.E.2d 388, 389 (1998).

⁵*Id.* at 431, 505 S.E.2d at 390.

⁶*Dobson v. Commonwealth*, No. 2802-97-2, 1999 Va. App. LEXIS 350, at *1 (June 15, 1999).

⁷A concurring opinion in *Terry v. Ohio* notes that a person detained in a *Terry* stop "[i]s not obligated to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued *observation*." 392 U.S. at 34 (White, J., concurring) (emphasis added). Relying on this concurrence, several courts have held that to arrest someone for failure to identify himself during a *Terry* stop violates the Fourth Amendment. *Accord Martinelli v. City of Beaumont*, 820 F.2d 1491 (9th Cir. 1987); see, e.g., *Timmons v. City of Montgomery, Ala.*, 658 F. Supp. 1086, 1092, 1093 (M.D. Ala. 1987) (vagrancy offense).

⁸*Jones*, 141 Va. at 479, 126 S.E. at 77.

⁹For example, the officer could approach others who are present and inquire about the suspect's identity, provided those individuals consent to such questioning. Additionally, if appropriate, the officer could follow the suspect home and determine who lives at that address. The options available to a police officer depend on the circumstances of each case. Accordingly, these examples are offered only to demonstrate other ways in which an officer may obtain this information if a suspect refuses to provide his identity, upon request, during a *Terry* stop.

¹⁰*Hayes v. Florida*, 470 U.S. 811, 816 (1985).

¹¹See *Washington v. Com.*, 29 Va. App. 5, 13-15, 509 S.E.2d 512, 516-17 (1999) (noting that officer could further detain person he reasonably suspected to be person named in capias, to establish his identity); see also *United States v. Jones*, 759 F.2d 633 (8th Cir. 1985) (holding that officers' further detention of burglary suspect who refused to identify himself did not convert investigative stop into arrest); *State v. Flynn*, 285 N.W.2d 710, 717-18 (Wis. 1979) (holding that police officer with reasonable suspicion could remove and search wallet of verbally abusive robbery suspect who refused to identify himself).

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