[Editorial Forward: Kenton Mustain is an officer with the Whitestown Metropolitan Police Department, and has written this article specifically for ILEJ. He reminds us that the ability to recognize and articulate the underlying facts for reasonable suspicion and probable cause can make or break a case. This article would make a fine roll call training subject.]

How do I know if I have enough for a “Terry” stop?

By

Officer Kenton Mustain

Any officer who has suffered through a legal update has mumbled “how am I supposed to remember all of this stuff?” or “how in the world does all this pertain to me?” We, as Indiana police officers, take a two week-long criminal law course through the Academy, then are bombarded with updates and articles that may or may not be easily digested. If we were to be completely honest, we would rather be at the range or on the EVO course than reading a computer screen. With this in mind, I think it’s time to simplify one of the more confusing police related topics. The distinction between reasonable suspicion and probable cause confuses some officers and the goal of this article is to reduce that confusion.

Let’s start with the basics, “what is the difference between ‘reasonable suspicion’ and ‘probable cause’”? Probable cause, as we know, is the standard of proof needed to arrest a person or to obtain a warrant. The amount of proof to reach probable cause isn’t staggering and nowhere near the ‘beyond a reasonable doubt’ standard. The Supreme Court in Brinegar v. US, 338 U.S. 160 (1949), defined probable cause as a set of factual circumstances that would lead any prudent person to the same conclusion that a crime was committed. Simply put, we take the total sum of the facts we have discovered and if they all add up in a way that anyone else looking at those facts would come to the same conclusion, then we have probable cause. A common example is that of a drunk driver; we observe erratic driving behavior, we smell the odor of an alcoholic beverage, we hear slurring of words, the driver admits to drinking, and we observe the driver fail SFSTs. If any sensible person were to observe the same set of facts, s/he would also come to the same conclusion that the driver was drunk. This constitutes probable cause that a crime was committed. This same process applies to any other alleged crime under investigation as long as the investigator is able to explain facts in a way that can be understood by any sensible (prudent) person.

Reasonable suspicion is the standard of proof needed to perform actions such as “Terry stops” or temporary detentions. The Supreme Court in Alabama v. White, 496 U.S. 325 (1990), affords a good definition of reasonable suspicion. In that case the Court stated that the standard for reasonable suspicion is a less demanding standard than probable cause and involves a lesser quantity and “less reliable” accumulation of facts. Although these facts needn’t rise to the level of probable cause, the investigator must still articulate those facts, both verbally and in writing. The explanation of the facts must be capable of understanding by civilians (prudent persons) so that any reasonable person would come to the same conclusion. As an example consider a report of a person painting graffiti on a wall. The dispatcher provides a generic description of a white male. Upon arrival at the scene the officer observes the graffiti but doesn’t observe anyone in the vicinity. Later the officer sees a person matching the very general description and whose hands have paint on them that appears to be the same color as the graffiti. These facts establish reasonable suspicion to detain this person for investigation. This standard allows us to string together imperfect facts in order to give us an opportunity to investigate to either confirm or dispel suspicions although such facts fall short of probable cause to arrest. In other words, any reasonably prudent person would feel impelled to stop the person because he may have been involved in the crime.

The Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968), admonishes officers to accurately articulate the facts and circumstances at hand to effectively enforce the law while protecting citizens’ rights. Specifically, the Court found that Officer McFadden had reasonable suspicion to believe that three individuals were “casing” a store and may be planning to commit a crime. The Court believed that the training and experience of the officer was paramount in his decision-making process. When Officer McFadden detained the subjects he patted them down for weapons. The Court said that this was justifiable because the officer explained that he believed, dictated by his observations of the behaviors of the three subjects, that a crime may occur and that for his own protection and that of others he wanted to ensure that the subjects were not armed. The Court came to these conclusions due to Officer McFadden’s ability to explain the facts as he perceived them based on his experience and training. The big take-away from this case is that verbal and writing skills in expressing observations and the conclusions drawn from them in a manner that anyone can understand is key to making a great case. The Court distinguishes reasonable suspicion from a “hunch”: a “hunch” cannot be explained with articulable facts and is more akin to a ‘gut-feeling’ experienced by only one person, whereas reasonable suspicion relies on identifiable facts and circumstances upon which every sensible person would arrive at the same conclusion.

This article cannot outline every possible scenario but, hopefully, remind officers that if we can point to and explain the facts we can survive court challenges. I’m not suggesting that any officer ignore her/his ‘gut’; we develop this ability through our experiences and it does serve us well. Rather, take this ‘feeling’ one step further to accurately describe what it is that the officer perceives so that the sensible (prudent) person would understand.