VIRGINIA DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL

U.S. Law and ABC Policy

Applicable Law

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…" The Fourth Amendment "does not proscribe all searches and seizures, but only those that are unreasonable." Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989). In Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court of the United States "held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." Illinois v. Wardlow, 528 U.S. 119, 123 (2000). "Reasonable, articulable suspicion" requires more than an officer's "inchoate and unparticularized suspicion or 'hunch.'" Terry, 392 U.S. at 17. However, it requires "considerably less than proof of wrongdoing by a preponderance of the evidence" and "obviously less" than probable cause. United States v. Sokolow, 490 U.S. 1, 7 (1989). To justify a Terry stop, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21.

"It is well established that whether reasonable suspicion 'exists to warrant an investigatory stop is determined by the totality of the circumstances.'" Gregory v. Commonwealth, 22 Va. App. 100, 107, 468 S.E.2d 117, 121 (1996) (quoting Smith v. Commonwealth, 12 Va. App. 1100, 1103, 407 S.E.2d 49, 51 (1991)). "The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed the principal function of his investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal — to 'enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges.'" Raab v. Commonwealth, 50 Va. App. 577, 581-582, 652 S.E. 2d 144, 147 (2007). A citizen does not have the right to resist an investigative detention, even an unlawful one. Hill v. Commonwealth, 264 Va. 541, 570 S.E. 2d 805 (2002).

In the April 11 incident, the investigating officer observed a woman, who based upon her training and experience she believed to be younger than the legal drinking age, in possession of a package she suspected contained an alcoholic beverage. The package, which turned out to contain twelve twelve-ounce cans of sparkling water, was identical in shape, size, and construction to twelve packs of canned beer. A survey of the merchandise at the Barracks Road Harris Teeter revealed 25 items packaged in that particular configuration. Twenty of them were beer, and the other five were flavors of LaCroix sparkling water. The purchased water was colored similarly to popular brands of canned beer similarly packaged. The agent's suspicion was not unreasonable, and she had a right to perform an investigative detention to confirm or dispel that suspicion.

Graham v. Connor , 490 U.S. 386 (1989), is the landmark United States Supreme Court case that defines reasonable use of force by police officers in the line of duty. It holds that all claims

that law enforcement officials have used excessive force in the course of an arrest, investigatory stop, or other "seizure" of a free citizen, are properly analyzed under the Fourth Amendment's "objective reasonableness" standard. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the "20/20 vision of hindsight."

The test of reasonableness is not capable of precise definition or mechanical application. Its proper application requires careful attention to the facts and circumstances of each particular case, including:

1. The severity of the crime at issue;
2. Whether the suspect poses an immediate threat to the safety of the officers or others; and
3. Whether he is actively resisting arrest or attempting to evade arrest by flight.

The question is whether the "totality of the circumstances" justifies a particular use of force applied in the situation. The most important factor is the second—whether the suspect poses an immediate threat to the safety of the officer or others.

When the occupants of a vehicle are actively resisting and attempting flight, and officers are in the path of the moving vehicle, a reasonable officer could perceive an immediate threat to the safety of the officers.

Agency Policy

Regardless of the appropriateness of the agents' response under the Graham v. Connor analysis, the actions of the agent who drew his service weapon and the one who attempted to break a window with his flashlight were not in keeping with ABC Bureau of Law Enforcement policy. The following are excerpts from General Order 5, Use of Force:

> IV. PROCEDURE
> …
> A. Parameters for the Use of Force:
> …
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> 6. Agents shall not employ as a means of force flashlights, radios, or any other item(s) not issued specifically as defensive weapon as a means of force, except when there is reason to believe that the imminent threat of death or serious physical injury exists, and no other option is available.
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> V. FIRING AT OR FROM VEHICLES
> A. Firearms shall not be discharged at a moving vehicle unless a person in the vehicle poses an immediate threat to the agent or other person with the use of deadly force by means other than the vehicle. For the purposes of this section, the moving vehicle itself shall not presumptively constitute a threat that justifies an agent's use of deadly force. An agent threatened by an oncoming vehicle should move out of its path instead of discharging a firearm at it or any of its occupants.
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> VI. ADDITIONAL RESTRICTIONS ON THE USE OF FIREARMS:

A. An agent shall only draw or display his/her Bureau-approved firearm when circumstances cause the agent to reasonably believe that it may be necessary to use the weapon.

Taken together, these policies indicate that no agent should have drawn his weapon in this situation, since its use would not have been authorized. There was no evidence of any immediate threat to the agent or other persons by means other than the vehicle. The agent who used his flashlight as a means of force was also out of compliance with bureau policy.