The Bill Blackwood
Law Enforcement Management Institute of Texas

Time to Petition Legislation for Change in Texas Statute Penal Code 38.02 Failure to Identify

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By
Brian R. Gordon

Big Spring Police Department
Big Spring, Texas
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ABSTRACT

Unfortunately at this time, law enforcement officers have no authority to arrest an individual who has been lawfully detained for failing to identify himself. In a time of when the United States of America is being attacked by terrorists on U.S. soil, mass shootings to include movie theatre and school shootings, drug cartels and other criminal gangs infiltrating Texas borders etc., it does not serve in the interest of the government to have one of these individuals lawfully detained and have no recourse when they refuse to identify themselves. It is not responsible nor reasonable to ask a law enforcement officer to remain alone in the presence of a person lawfully detained and twice the size of the peace officer in a dark alley at 2:00 A.M., with no way of learning of the propensity of violence or the presence of an arrest warrant for the person detained, while attempting to investigate a crime. The relevance of this topic is overwhelming when you think of the repercussions of walking away from an individual with malicious intent, only to know after the fact that a statute making it a criminal offense to refuse to identify yourself when lawfully detained could have prevented the malicious act.

It is time for Texas law enforcement agencies and officers to petition legislators for change in the current Failure to Identify Statute 38.02 Texas Penal Code. Fortunately for Texas, in 2004 the Supreme Court of the United States heard *Hiibel v. Sixth Judicial District of Nevada* and the ruling paved way for Texas to create a law criminalizing a person who is lawfully detained and refuses to identify themselves. By petitioning legislators for change in the current failure to identify statute, Texas officers will gain the ability to better serve in the interest of the government without having to substitute officer safety over the liberty interests of the person lawfully detained.

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INTRODUCTION

It is time for Texas law enforcement agencies and officers to petition legislators for change in the current Failure to Identify Statute 38.02 Texas Penal Code. Currently, the Failure to Identify Statute 38.02 informs that a person commits an offense if that person intentionally refuses to give his name while under lawful arrest, and gives a fictitious or false name while lawfully detained (*Texas Criminal and Traffic Law Manual*, 2013, 124-125). United States Supreme Court decisions have deemed stop and identify statutes constitutional by taking into consideration the government interest and individual's civil liberties.

There is no question that Texas law enforcement agencies are faced with a difficult and dangerous job. Daily, law enforcement officers are expected to stop and detain individuals who are believed to be suspected of criminal activity, and while maintaining in the presence of the suspected party, attempt to investigate the suspicious activity. It is known within the law enforcement community that the purpose of this expectation is for the protection of the people served and to investigate suspicious activity to see if in fact a crime has been, is being, or will be committed.

To not have a law requiring an individual to identify him/herself inevitably subjects law enforcement officers to grave safety concerns and hinder their ability to serve in the interest of the government. If a person lawfully detained does not consensually release his/her identity to the law enforcement officer, unless law enforcement officers have other ways of identifying the detained individual, the law enforcement officer has no way to run a criminal history on the detained individual to see if the individual has a propensity of violence. The law enforcement officer has no

way to check a wanted database to determine if the detained individual is wanted for a violent offense. When reasonable suspicion to stop and detain an individual for minor in possession of alcohol presents itself and the minor refuses to identify himself, the law enforcement officer cannot effectively complete his obligation when serving government interests.

The people and government that law enforcement officers serve expect suspected crimes to be investigated and government interests to be taken into consideration. Law enforcement officers and agencies should petition their legislators to amend the failure to Identify statute, making it unlawful for a person lawfully detained to refuse to give his/her name, date of birth or address and eliminate some of the safety concerns with law enforcement officers. In addition, an amendment to the Failure to Identify Statute, should allow law enforcement officers the ability to continue to serve the public by investigating suspected crimes in the interest of the public and government without the hindrance of not knowing the identity of the person detained.

POSITION

The Fourth Amendment to the United States Constitution establishes the right of the people to be free from unreasonable searches and seizures and states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” (U.S. Const. amend. IV). When a law enforcement officer seizes an individual, that seizure must comply with the Fourth Amendment of the United States Constitution. Referencing (United States Courts, n.d., para. 1). The Fourth Amendment is not a guaranteed right against searches and seizures but a right against “unreasonable” searches and seizures. The

Fourth Amendment protects individuals from the government against “unreasonable” searches and seizures. The determination is a balancing test, based on the governments interests and the interests on the individuals rights (United States Courts, n.d., para. 1).

On the 10th of June 1968 the United States Supreme Court ruled in *Terry v. Ohio (1968)* that police can stop and detain individuals based on reasonable suspicion and further gave the police the right to frisk an individual based on articulable suspicion that the officer suspected the individual of being armed and dangerous (*Terry v. Ohio,* 1968). Referencing *Terry v. Ohio* (1968), the decision by the United States Supreme Court Magistrates articulated the government interest in the ability of the police to stop suspected criminals for the purpose of inquiring or asking questions. The magistrates concurring opinions also verbalized that the government interest and officer safety in this instance is reasonable and outweighs any liberty interest citing the “balance test” (*Terry v. Ohio*, 1968). The *Terry v. Ohio* United States Supreme Court decision was a landmark case for law enforcement officers across the nation (*Terry v. Ohio,* 1968). *Terry v. Ohio (1968),* in essence laid the foundation for the rules that law enforcement officers have to play by when stopping individuals. With this decision an officer could have a consensual encounter with an individual and that individual would not be restricted to any detention by a law enforcement officer. An officer could have developed reasonable suspicion that criminal activity is afoot and suspect a particular person to be involved in the criminal activity, giving the law enforcement officer reasonable suspicion to stop and lawfully detain the individual. Although that person is not under arrest, the law enforcement officer can temporarily detain that individual while

investigating criminal activity for a reasonable amount of time. Law enforcement officers can also develop probable cause and arrest an individual, taking him into custody for the purpose of bringing that person before a magistrate to answer for the alleged violation of law.

Law enforcement agencies around the country including Texas believed the United States Supreme Court Decision on *Terry v. Ohio* (1968) supported the belief that it was lawful for law enforcement officers to stop and detain individuals based on reasonable suspicion for the purpose of inquiring and investigating suspected criminal activity. State governments, including Texas, had signed into laws, statutes prohibiting persons who were lawfully detained to refuse to identify themselves. Texas signed into law statute 38.02 Failure to Identify by Witness, which made it illegal for a person lawfully stopped to refuse to give their name, address or date of birth when requested. The Bill, titled S.B. 34, was signed by Governor Dolph Briscoe on the 14th of June 1973 (*SB34*, 1973).

COUNTER POSITION

Opposition to state laws requiring persons to identify themselves while lawfully detained began filtering into the lower court systems citing a violation of a person(s) First, Fourth, Fifth and 14th constitutional rights. One particular opposition to the state laws was specific to the State of Texas (*Brown v. Texas,* 1979) and challenged whether the Texas statute was valid in regards to the First, Fourth, and Fifth Amendments of the United States Constitution. Referencing *Brown v. Texas* (1979), on February 21, 1979, the United States Supreme Court heard *Brown v. Texas* and attorneys argued the statute which stated “lawfully stopped” did not define lawfully detained with the

understanding of a stop based on reasonable suspicion that a crime has been committed, therefore questioning the intent of the Texas Legislature on what the intent of the law meant. Attorneys for Brown also questioned the legality of a person legally obligated to respond to a question regardless of whether the person is lawfully detained or simply a consensual encounter, believing the First Amendment applies and regardless of the situation the person has a right to remain silent or mute (*Brown v. Texas,* 1979). Attorneys for Brown alleged a person compelled to answer any questions is a violation of that persons First, Fourth And Fifth Amendment to the United States Constitution and shall not be compelled to answer any questions based on an individual's First and Fifth Amendment right regarding freedom of speech, the right to not say anything, and self-incrimination, and any person required to be seized and detained for the purpose of answering questions was unreasonably seized based on the Fourth Amendment (*Brown v. Texas*, 1979).

Again referencing *Brown v. Texas* (1979), although the United States Supreme Court in 1979 did not rule on the actual allegations presented by Brown's Attorney, they did rule that the law enforcement officers failed to have the reasonable suspicion required that criminal activity was afoot and lacked reasonable suspicion to believe that Mr. Brown was involved in the suspected criminal conduct as required under *Terry v. Ohio*. The opinion also partially rebutted the counter position when the court noted in dicta that the balance in question of the government's interest and the liberty interest of Brown is struck when an officer's actions are based on objective facts that provide the officer with the reasonable suspicion needed to suspect that Mr. Brown was engaged in criminal activity and in the absence of suspecting any criminal activity

the balance tilts in favor of freedom from police interference. The decision by the court answered that the stop and identify statute is not lawful without the presence of reasonable suspicion which constituted the detention (*Brown v. Texas*, 1979). What the justices failed to conclude is if it is constitutional to require a person to answer questions when lawfully detained, and if it is unreasonable to require a person to be detained for the purpose of answering the questions and further, if requiring a person to identify himself while detained, would that information self-incriminate that individual.

Another case heard by the United States Supreme Court on the 8th of November 1982 was *Kolender v. Lawson*. Referencing *Kolender v. Lawson* (1983), in this case, the court was tasked in deciding whether the California law requiring a person lawfully detained be mandated to provide "credible and reliable" identification is constitutional in regards to the 14th Amendment to the United States Constitution. Attorneys for Kolender argued that the law Mr. Kolender was arrested for was a violation of the Vagueness Doctrine which rests on the due process clause within the 14th Amendment (*Kolender v. Lawson*, 1983). The Vagueness Doctrine prohibits laws that promote arbitrary enforcement and lack clear guidance for what is and is not illegal (Vagueness doctrine, n.d.).

The court found and decided in 1983 that the law was unconstitutionally vague as it does not provide a clear standard of enforcement (*Kolender v. Lawson,* 1983). The ruling also noted that the law failed to clarify what is contemplated by the requirement that a person provide "credible and reliable" identification and that this particular law gave the police complete discretion as to whether the person satisfied the law (*Kolender v. Lawson,* 1983). The partial rebuttal to the opposition is what justices also noted in

the ruling that any law requiring criminalizing a person for refusing to identify themselves when lawfully detained must provide guidance for an officer to evaluate compliance by the person detained when determining whether that person is compliant in regard to the law (*Kolender v. Lawson,* 1983). The ruling partially rebutted the opposition of the statute in the affect that a clear and precise statute may be constitutional.

In 1987, Texas was found to also oppose a law requiring an individual to identify himself when lawfully detained (*HB 826*, 1987). House Bill 826 bill was introduced to legislation by Representative Dan Morales on the 17th of February 1987. The bill was ultimately signed by Governor Clements on the 19th of June 1987 amending the Failure to Identify by Witness Statute 38.02 to just Failure to Identify (*HB 826*, 1987). The amended statute also decriminalized a person refusing to provide their name, address or date of birth while lawfully "stopped" or detained (*HB 826*, 1987). In the bill analysis provided by Representative Morales, Morales gave a background for the reasons for the suggested amendment and advised: "There have been several occasions where trial courts have ruled this section vague and dismissed cases because on this" (*HB 826,* 1987, 6, para. 1). Law enforcement agencies can assume this stance by the Texas legislative process was a result of the controversy in cases heard at the state and federal level.

Fortunately, in regards to *Brown v. Texas*, *Kolender v. Lawson* and *HB 826*, which decriminalized the Texas statute requiring persons lawfully stopped to identify themselves, referencing *Hiibel v. Sixth Judicial District* (2004) on March 22, 2004, the United States Supreme Court heard *Hiibel v. Sixth Judicial District of Nevada*, which

had also questioned the constitutionality of a stop and identify statute dealing with the Fourth and Fifth Amendments. *Hiibel v. Sixth Judicial District* is significant to law enforcement because it brought up specific questions regarding the constitutionality of the stop in regards to all previous oppositions and answered questions with additional clarity that previous justices failed to do. In *Hiibel v. the Sixth Judicial District*, the United States Supreme Court addressed issues regarding the constitutionality of an arrest of an individual lawfully detained and failing to provide his identity taking into consideration the law was not vague and the law enforcement officer had lawfully detained the individual (*Hiibel v. the Sixth Judicial District,* 2004).

The decision made, refutes previous opposition to the statutes and their constitutionality. The United States Supreme Court found that no Fourth Amendment violation occurred due to the requirement properly balances the intrusion interest of the individual against the promotion of legitimate government interests (*Hibel v. Sixth Judicial District,* 2004). Referencing *Hiibel v. Sixth Judicial District* (2004), the United States Supreme Court found that the requirement of providing identification did nothing to alter the nature of the stop itself finding it did not extend the stops duration or location. The United States Supreme Court also ruled that the argument of a Fifth Amendment violation fails because the providing of one's identity poses no reasonable danger of incrimination citing the Fifth Amendment prohibits only compelled testimony that is incriminating *(Hiibel v. Sixth Judicial District,* 2004). One could argue that it is not the identity of the individual that commits the crime as incriminating but the act of committing the crime that is relevant in relation to testimony given. Although the justices did not specifically address the First Amendment of the United States

Constitution, since the ruling that criminalizing a statute prohibiting an individual from refusing to identify themselves while lawfully detained was determined constitutional, then one can also assume there is no Constitutional violation relating to the First Amendment and an individuals right to remain mute.

RECOMMENDATION

As previously discussed there is no absolute right from searches and seizures, though there is a right against “unreasonable” searches and seizures (United States Courts, n.d., para. 1-3). *Terry v. Ohio* (1968) established a foundation for police to operate, establishing constitutional conduct for law enforcement officers to stop and detain an individual based on reasonable suspicion that the individual was involved in criminal activity. The purpose of this precedent was to give law enforcement officers the tools needed to effectively do their jobs in the interest of the government taking into consideration the safety of the law enforcement officers involved.

Law enforcement agencies in many states legislated laws criminilizing a person refusing to identify himself at the request of a law enforcement officer when lawfully detained. At the time Texas was one of the states to criminalize the behavior. States are believed to have interprited *Terry v. Ohio*, that the United States Supreme Court believed an interest in the government and safety for officers was more important than the limited intrusiveness of law enforcement officers, with reasonable suspicion, stopping and detaining individuals on the basis of the reasonable suspicion for the purpose of inquiring and investiagting crimes.

From the lower courts to the United States Supreme Court, opposition to the constitutionality of forcing an individual to identify himself when lawfully detained was

brought to question. The First, Fourth, Fifth and 14th Amendments to the United States Constitutions was challenged with *Brown v. Texas*, *Kolender v. Lawson* and *Hiibel v. Sixth Judicial District* and in 2004, the United States Supreme Court heard arguments, ultimately deciding that a specific statute criminilizing a person for refusing to identify himself when lawfully detained by a law enforcement officer was constitutional and tipped the balance in favor of government interest. Law enforcement officers and Agencies have continued to enforce such statutes since the finding. On March 11, 2015, Texas House of Representative Abel Herrero submitted House Bill 3046 to the 84th Regular Session Texas Legislation (*HB 3046*, 2015). The bill filed by Representative Herrero is requesting the criminilization for failing to provide the name, address or date of birth to a peace officer who has lawfully requested the information when the person is lawfully detained (*HB 3046*, 2015). Although law enforcement officers would prefer the statute to criminalize a failure to provide the name "and" date of birth, this is a step in the right direction. Referencing *Hiibel v. Sixth Judicial District* (2004), Justice Kennedy read the opinion of the court which he replied the court held the requirement for a person to identify himself while lawfully detained was constitutional. Justice Kennedy specifically said while reading the opinion of the court the following: Obtaining the suspect's name in a course of a Terry-stop serves important government interests (*Hiibel v. Sixth Judicial District,* 2004). Knowledge of identity may inform an officer that a suspect is wanted for another offense or has a record of violence or of a mental disorder (*Hiibel v. Sixth Judicial District,* 2004).

The justices had expressed a government interest when deciding Hiibel and contended the decision in part was to inform an officer that a suspect is wanted for

another offense or has a record of violence or of a mental disorder. It is common knowledge within the law enforcement community that a name alone serves little purpose when identifying a person for the purpose of running a criminal history or wanted check. Law enforcement officers and agencies should petition their elected officials for not only the passing of *HB 3046* (2015) in the 84th Regular Session but to also petition for an additional amendment criminilizing a person refusing to give his name “and” date of birth while lawfully detained.

REFERENCES

Brown v. Texas 443 U.S. 47 (1979).

HB826: Relating to the offense of failing to identify oneself to a peace officer, 70th R.S. ch. 869 (1987).

HB3046: Relating to the prosecution of the offense of failure to identify; creating a criminal offense, 84th L.S. (2015).

Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County 542 U.S. 177 (2004)

Kolender v. Lawson 461 U.S. 352 (1983).

SB34: Reforming the penal law; enacting a new penal code setting out general principles, defining offenses, and affixing punishments, making necessary conforming amendments to outside law; repealing replaced law, 63rd R.S. ch. 399 (1973).

Terry v. Ohio 392 U.S. 1 (1968).

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