

2-21-2018

## Precap: *City of Missoula v. Marcy Jane Kroschel*

Kirsi Luther

*Alexander Blewett III School of Law*

Follow this and additional works at: [https://scholarship.law.umt.edu/mlr\\_online](https://scholarship.law.umt.edu/mlr_online)

---

### Recommended Citation

Kirsi Luther, Oral Argument Preview, *Precap: City of Missoula v. Marcy Jane Kroschel*, 79 Mont. L. Rev. Online 8, [https://scholarship.law.umt.edu/mlr\\_online/vol79/iss1/2](https://scholarship.law.umt.edu/mlr_online/vol79/iss1/2).

This Oral Argument Preview is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review Online by an authorized editor of The Scholarly Forum @ Montana Law.

**PRECAP; *City of Missoula v. Marcy Jane Kroschel*****Kirsi Luther**

Oral arguments are scheduled for February 28, 2018, at 9:30 a.m. in the Supreme Court Chambers, Joseph P. Mazurek Justice Building, Helena, Montana.

**I. INTRODUCTION**

*City of Missoula v. Kroschel* asks the Court to define the parameters of an officer's lawful questioning during a non-vehicular investigatory stop.<sup>1</sup> Montana's *Terry*<sup>2</sup> stop statute, articulated in Section 46-5-401 of the Montana Code Annotated (the "Terry statute"), authorizes an officer to request a person's name and address and an explanation of the person's actions when the officer has a particularized suspicion that the person is committing or has committed a crime.<sup>3</sup> Kroschel argues that an officer is limited to the questions specifically enumerated in the statute and an individual may decline to answer free of consequence.<sup>4</sup>

**II. FACTUAL & PROCEDURAL BACKGROUND**

20-year old Marcy Kroschel ("Kroschel") was detained and questioned by officers at a Griz football game upon suspicion that she had been drinking alcohol under the age of 21, in violation of Montana's Minor in Possession ("MIP") statute.<sup>5</sup> Officer Shannon Parsons ("Officer Parsons") first noticed that Kroschel was having difficulty walking and was leaning on her friend for support.<sup>6</sup> Officer Parsons approached to check on Kroschel's welfare.<sup>7</sup> Upon smelling alcohol on her breath, the officer asked both young women for identification.<sup>8</sup> Only Kroschel was

---

<sup>1</sup> Appellant's Reply Brief at 2, *City of Missoula v. Kroschel*, <https://supremecourtdocket.mt.gov/view/DA%2017-0184%20Appellant%20Reply%20--%20Brief?id=%7B90D40960-0000-C718-91BE-40D983005C6B%7D> (Mont. Nov. 29, 2017) (No. DA 17-0184).

<sup>2</sup> Refers to *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>3</sup> Mont. Code Ann. § 46-5-401 (2017); *see also* *State v. Ballinger*, 366 P.3d 668, 673 (Mont. 2016).

<sup>4</sup> Appellant's Opening Brief at 1-5, *City of Missoula v. Kroschel*, <https://supremecourtdocket.mt.gov/view/DA%2017-0184%20Appellant's%20Opening%20--%20Brief?id=%7B8001A25C-0000-CF18-BE17-D84D200E77AC%7D> (Mont. June 9, 2017) (No. DA 17-0184).

<sup>5</sup> *Id.* at 2.

<sup>6</sup> Appellee's Response Brief at 2-3, *City of Missoula v. Kroschel*, <https://supremecourtdocket.mt.gov/view/DA%2017-0184%20Appellee's%20Response%20--%20Brief?id=%7B4016075F-0000-CE1B-8DF3-EDFB9AAF3538%7D> (Mont. Oct. 6, 2017) (No. DA 17-0184).

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 2-3.

unable to produce it.<sup>9</sup> Kroschel told the officer that it was in her seat.<sup>10</sup> Officer Parsons asked Kroschel for her student ID number, but Kroschel could not recall it.<sup>11</sup> After numerous attempts to evade the question, Kroschel provided a false spelling of her name and an incorrect date of birth.<sup>12</sup> Officer Parsons was unable to verify her identify with dispatch, which is often the result of false information, and again asked Kroschel to provide correct information.<sup>13</sup> To help Kroschel make an informed decision, Officer Parsons explained that an MIP is a citable offense, while obstruction of justice is a jailable offense.<sup>14</sup> Kroschel was uncooperative, hostile, and tried to walk away.<sup>15</sup> Wanting to get away from the crowd, Officer Parsons brought Kroschel downstairs into a quiet supply room.<sup>16</sup> There, in the presence of another officer, Kroschel revealed her correct name, allowing officers to learn that she was twenty.<sup>17</sup>

Kroschel was charged with an MIP and obstruction of justice and pleaded not guilty to both charges in Missoula Municipal Court.<sup>18</sup> Kroschel moved to suppress her statements, arguing that Officer Parsons improperly expanded the scope of her investigatory stop and conducted a custodial interrogation without Mirandizing her.<sup>19</sup> The Municipal Court reasoned that although Kroschel was “arrested,” no *Miranda* warning was required because the “booking exception” applied, and thus denied the motion.<sup>20</sup> On January 28, 2016, at a bench trial, Kroschel was found guilty of the MIP charge alone.<sup>21</sup> Kroschel then appealed to the Missoula County District Court, which affirmed the decision.<sup>22</sup> Kroschel appeals again.<sup>23</sup>

---

<sup>9</sup> *Id.* at 3.

<sup>10</sup> Appellant’s Opening Brief, *supra* note 4, at 2.

<sup>11</sup> Appellee’s Response Brief, *supra* note 6, at 3.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.* at 3–4.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 24.

<sup>17</sup> Appellant’s Opening Brief, *supra* note 4, at 4–5.

<sup>18</sup> Appellee’s Response Brief, *supra* note 6, at 6.

<sup>19</sup> Appellant’s Opening Brief, *supra* note 4, at 1.

<sup>20</sup> *Id.* at 27; the Montana Supreme Court has acknowledged that *Miranda* does not apply to questions “normally attendant to arrest and custody.” *State v. Morrissey*, 214 P.3d 708 (Mont. 2009). This stems from the “routine booking question” exception to *Miranda*, established by the U.S. Supreme Court in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990). There, the Court provided a class of exceptions to *Miranda* for questions designed to elicit the “biographical data necessary to complete booking or pretrial services.” *Id.* at 601.

<sup>21</sup> Appellant’s Opening Brief, *supra* note 4, at 1.

<sup>22</sup> *Id.* at 2.

<sup>23</sup> Notice of Appeal, *City of Missoula v. Kroschel*, <https://supremecourtdocket.mt.gov/view/DA%2017-0184%20Notice%20of%20Appeal%20Filed%20--%20Notice%20-%20Incoming?id=%7B70C2345B-0000-CC19-A2CB-151CECDDFDA5%7D> (Mont. Apr. 3, 2017) (No. DA 17-0184).

### III. SUMMARY OF THE ARGUMENTS

#### A. Appellant Marcy Kroschel

Kroschel's argument is factually persuasive: after Officer Parsons was unable to verify Kroschel's identity, Kroschel was brought into a small supply room, isolated from her friend, and threatened with jail time until she finally provided officers with her name.<sup>24</sup> This, Kroschel argues, violates the permissive scope of Montana's *Terry* statute and *Miranda* and requires suppression of her statements.<sup>25</sup>

First, Kroschel argues that she was seized by Officer Parsons under an analysis of the *Mendenhall*<sup>26</sup> factors, which include the presence of several officers, the display of a weapon, physical touching, and the officer's language or tone of voice indicating that compliance might be compelled.<sup>27</sup> These factors are non-exclusive and indicate circumstances under which a reasonable person would not feel free to leave.<sup>28</sup> Such circumstances constitute a seizure under the Fourth Amendment.<sup>29</sup> A *Terry* stop seizure is lawful when an officer has particularized suspicion to believe that a person is committing, has committed, or is about to commit a crime.<sup>30</sup> Kroschel does not dispute that Officer Parsons lacked particularized suspicion to stop her but rather objects to what occurred during the stop.<sup>31</sup>

Specifically, Kroschel argues that police questioning exceeded the lawful scope of Montana's *Terry* stop statute because Officer Parsons demanded unauthorized information and engaged in extensive questioning.<sup>32</sup> A lawful *Terry* stop permits an officer's brief, non-custodial detention of an individual to quickly confirm or dispel the officer's suspicion that a crime has been committed.<sup>33</sup> Montana's statute provides that an officer conducting a non-vehicular stop may "request the person's name and present address and an explanation of the person's actions," in order to "verify" an account of the person's presence.<sup>34</sup> According to Kroschel, officers did more than request her name: they asked to verify her identity through numerous means, including her student ID number, her phone number, and her parent's phone number, when in reality,

---

<sup>24</sup> See Appellant's Opening Brief, *supra* note 4, at 2–5.

<sup>25</sup> *Id.* at 9.

<sup>26</sup> *United States v. Mendenhall*, 446 U.S. 544 (1980).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 10 (citing *Mendenhall*, 446 U.S. at 554).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 12–15.

<sup>32</sup> *Id.* at 12.

<sup>33</sup> Appellee's Response Brief, *supra* note 6, at 12.

<sup>34</sup> Appellant's Opening Brief, *supra* note 4, at 12–13.

Kroschel was within her rights not to tell the officer anything.<sup>35</sup> Kroschel further cites the statutes' legislative history to bolster her argument.<sup>36</sup>

Kroschel next argues that the Montana Supreme Court's opinion in *State v. Driscoll*<sup>37</sup> is on-point and controls the outcome of her case.<sup>38</sup> In *Driscoll* officers suspect a young man of committing an MIP offense because they observed him at a bar, holding a beer.<sup>39</sup> Officers approached Driscoll to ask how old he was.<sup>40</sup> Driscoll told the officers that he was 22.<sup>41</sup> The officers then asked Driscoll to step outside the bar while they verified his information.<sup>42</sup> This, the Court held, exceeded the scope of Montana's *Terry* statute because at the time the officers brought Driscoll outside the officers had no justification to expand the scope of their investigation.<sup>43</sup>

Thus, Kroschel argues, the evidence in the present case must also be suppressed.

### B. Appellee City of Missoula

The City does not dispute that Officer Parsons seized Kroschel within the confines of a *Terry* stop but disagrees that the stop was anything other than a temporary detention which conformed to the requirements of Montana's *Terry* statute.<sup>44</sup>

The City argues that, at the outset, the stop was lawful because Officer Parsons had particularized suspicion to believe that Kroschel was committing an MIP offense.<sup>45</sup> Officer Parsons observed a young woman struggling to walk by herself, which authorized a brief investigation to quickly confirm or dispel this suspicion.<sup>46</sup> However, when Kroschel provided a false name, Officer Parsons acquired a new suspicion that Kroschel was obstructing justice.<sup>47</sup>

The City counters Kroschel's interpretation of the *Terry* statute for three reasons: (1) although the statute authorizes an officer to request certain information, it does not limit the officer to requesting *only* that information;<sup>48</sup> (2) the statute permits the officer to use this information to "verify" the detainee's presence, making it presumptively unreasonable to assume that the officer should have to accept any answer, including a false

---

<sup>35</sup> *Id.* at 14–15.

<sup>36</sup> *Id.* at 13–14.

<sup>37</sup> 303 P.3d 788 (Mont. 2013).

<sup>38</sup> *Id.* at 16.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Appellee's Response Brief, *supra* note 6, at 8–9.

<sup>45</sup> *Id.* at 11.

<sup>46</sup> *Id.* at 15–16.

<sup>47</sup> *Id.* at 11.

<sup>48</sup> *Id.* at 16.

one;<sup>49</sup> (3) lastly, Kroschel erred in looking to legislative history when the statute was clear on its face.<sup>50</sup>

The City then pivots and makes a counter-argument: even if the Court finds that Officer Parsons' line of questioning exceeded the scope of Montana's *Terry* statute, the Court must still look to the *Mendenhall* factors to determine whether a seizure occurred in the first place.<sup>51</sup> The City argues that an analysis of those factors indicates that the encounter between Kroschel and Officer Parsons was consensual.<sup>52</sup> Therefore, under its counter-analysis, the City concludes that the Court could find that regardless of Officer Parsons' questioning, she never seized Kroschel within the meaning of the Fourth Amendment.<sup>53</sup>

Further, according to the City, *State v. Driscoll* is easily distinguished.<sup>54</sup> In *Driscoll*, the young man provided officers with a false name after the officers asked him to step outside.<sup>55</sup> In this case, however, Kroschel provided Officer Parsons with a false name during their initial encounter.<sup>56</sup> Officer Parsons was justified in expanding the scope of the stop after her resulting particularized suspicion that Kroschel was obstructing justice.

Thus, the City concludes there is no grounds to reverse.<sup>57</sup>

#### IV. ANALYSIS

The Montana legislature enacted the *Terry* statute to provide greater protection to Montana citizens than provided under federal law.<sup>58</sup> In debate, the legislature specifically rejected the idea that an officer should be able to demand a person's name if the person is not using a motor-vehicle.<sup>59</sup> This background, while helpful, is not necessary to Kroschel's claim. The plain language of the statute alone provides support for Kroschel's reading of it. The permissive language provides an initial gateway: an officer can request but cannot demand certain information, and an individual can consent or decline to provide that information free of consequence.

What's problematic for Kroschel is that she lied. The City's argument on this point is solid: as soon as Kroschel provided a false name to authorities, Officer Parsons had particularized suspicion to investigate whether Kroschel was obstructing justice. Thus, the outcome of this case

---

<sup>49</sup> *Id.* at 17.

<sup>50</sup> *Id.* at 18.

<sup>51</sup> *Id.* at 22–24.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 26 (citing *Driscoll*, 303 P.3d at 790).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 42.

<sup>58</sup> Appellant's Opening Brief, *supra* note 4, at 13–14.

<sup>59</sup> *Id.*

may depend on how the Court interprets the statute and characterizes the period-of-time after Kroschel was seized and before she was brought downstairs:

**Scenario 1:** The City prevails. The Court entertains but ultimately rejects the argument that this was a consensual “mere police-citizen encounter” and finds that Kroschel was seized the moment that Officer Parsons, “armed and in uniform, display[ed] [her] authority” by approaching Kroschel and asking to see identification.<sup>60</sup>

Because Kroschel was seized, the *Terry* statute applies. The Court notes the statute’s permissive language, and centers its analysis on the words “may request,” noting the absence of the word “only” which would naturally restrict the officer’s questioning. With some fancy-footwork, the Court describes that the purpose of the permissive language is to define the detainee’s obligations to answer rather than to limit the officer’s ability to ask. This is consistent with the general notion that the purpose for the stop is to allow the officer to conduct a brief investigation. A different interpretation of the statute would severely restrict the state’s interests and risk undermining the very purpose of the statute itself. While the Court is largely left without precedent for its decision, the Court looks to *State v. Nelson* to for support. In *Nelson*, the Court stated that during a *Terry* stop an officer may briefly question a detainee, but the “detainee is not obligated to respond.”<sup>61</sup>

Because Kroschel volunteered aspects of her identity, the officer was permitted to ask reasonable follow-up questions in order to “verify” the information. Thus, the Court concludes that Officer Parsons’ questioning fell within the bounds of the *Terry* statute.

**Scenario 2:** Kroschel prevails. The Court entertains, though ultimately rejects the notion that Officer Parsons’ mere request for identification violated Kroschel’s rights. The Court notes dicta in *State v. Driscoll*, which implies it was wrong for the officer to have asked for an ID, rather than a name, address, or an explanation of a person’s actions.<sup>62</sup> However, the Court declines to answer whether the mere request for identification violates the *Terry* statute, finding error in another place.

The Court explains that its decision is grounded in the Fourth Amendment and Section 11 of the Montana Constitution’s imperative that any search and seizure be “reasonable” under the circumstances.<sup>63</sup> When Section 11 is read with Montana’s constitutional right of privacy,<sup>64</sup>

---

<sup>60</sup> *State v. Bar-Jonah*, 102 P.3d 1229, 1239 (Mont. 2004).

<sup>61</sup> *State v. Nelson*, 101 P.3d 261, 265 (Mont. 2004).

<sup>62</sup> See *Driscoll*, 303 P.3d at 790 (stating that “the officers approached Driscoll and asked for his age and an ID, rather than for his name, address, or an explanation for his actions,” and concluding that officers “improperly expanded their investigation by taking Driscoll outside.”).

<sup>63</sup> U.S. Const. amend. IV; Mont. Const. art. II, § 11.

<sup>64</sup> Mont. Const. art. II, § 10.

Montanans are afforded heightened protection against government intrusion.<sup>65</sup> The Court quotes *State v. Morrissey*, analogizing Kroschel's rights under the statute to an arrestee's rights under *Miranda*:

A "suspect need not speak with the discrimination of an Oxford don. Nor need [she] rely on talismanic phrases or any special combination of words to invoke [her right to silence] . . . . Lay people are not learned in constitutional principle or legal nicety, and to require that precise words be uttered would elevate form over substance."<sup>66</sup>

While Kroschel's statements indicating that she left her ID in her seat and did not recall her student ID number likely do not amount to an "unambiguous and unequivocal"<sup>67</sup> statement that she declined to answer Officer Parsons' questions, her subsequent statements that she wanted to leave, wanted to go home, and her persistent refusal to provide a correct name were the "imprecise" and "substantive" equivalent of telling Officer Parsons that she was exercising her rights to decline to answer. Officer Parsons' persistence that Kroschel provide her correct name thus transformed the Officer's request into a demand and exceeded the scope of the *Terry* statute. Thus, the Court reverses with instructions to grant Kroschel's motion to suppress.

## V. CONCLUSION

These are merely two of the numerous ways the Court might decide this case. Both parties raised additional arguments in their briefing, and it is possible the Court will resolve the case by finding that officer questioning rendered Kroschel "in custody" and required a *Miranda* warning. Regardless of how the Court decides the case and regardless of its outcome, the Court's analysis of the *Terry* statute is likely to resolve the ambiguities surrounding *State v. Driscoll* and provide needed guidance regarding the scope of questioning permitted by the statute. For these reasons, the case is likely to be notable.

---

<sup>65</sup> *State v. Nixon*, 298 P.3d 408, 415 (Mont. 2013).

<sup>66</sup> *State v. Morrissey*, 214 P.3d 708, 722 (Mont. 2009) (internal citations and quotation marks omitted).

<sup>67</sup> *Nixon*, 298 P.3d at 416.