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Criminal Law—Stop and Frisk—*Terry v. Ohio* Rationale Applied to Stop and Frisk in New York

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CRIMINAL LAW—STOP AND FRISK—*Terry v. Ohio* RATIONALE APPLIED TO STOP AND FRISK IN NEW YORK.

In March, 1966, a New York City patrolman while on foot patrol was told by an anonymous passerby of an occurrence involving a man with a pistol. The patrolman's investigation led him to a bar in the area where he obtained a description of the suspect, said to have discharged a firearm or firecracker moments earlier on the street. As the officer was leaving the bar, a second passerby pointed to the defendant identifying him as the man with the gun. The patrolman ordered the defendant, who fit the description given in the bar, to stop. The officer then proceeded to pat the defendant's outer clothing and felt what appeared to be a gun. The officer reached into the defendant's jacket, removed a loaded .25 caliber automatic, and then arrested the defendant charging him with unlawful possession of a weapon. The defendant moved to suppress the introduction of the pistol into evidence on the grounds that the search was not incident to a lawful arrest based on probable cause. This motion was denied by the lower court and the defendant was subsequently convicted. The Appellate Division affirmed without opinion.[1] The New York Court of Appeals also affirmed rejecting the argument as to the legality of the search. *Held*, although the officer had no probable cause to arrest the defendant until after the gun was found, the information supplied by the anonymous passerby was sufficient to create that degree of reasonable suspicion required to justify a constitutionally permissible stop and frisk. *People v. Arthurs*, 24 N.Y.2d 688, 249 N.E.2d 462, 301 N.Y.S.2d 614 (1969).

The fourth amendment to the United States Constitution protects an individual from unreasonable searches and seizures.[2] A search or seizure is deemed reasonable if executed pursuant to a warrant issued upon probable cause.[3] In order for a police officer to obtain an arrest or search warrant, he must demonstrate to the issuing magistrate that he has substantial reason to believe that an offense has been committed, is being committed, or will be committed.[4] If he relies upon an informer's disclosure, the officer must clearly articulate in his affidavit the reasons he believes the informer to be reliable[5] and the informer's reasons for believing that illegal activity is occurring.[6] The lack of a warrant does not necessarily make a search or seizure unreasonable. In the case of a warrantless arrest, the existence of probable cause may be found after the fact by deciding that, had the officer an opportunity to get an arrest

1. People v. Arthurs, 30 A.D.2d 916 (2d Dep't 1969).

2. The above provision is made applicable to the states via the due process clause of the fourteenth amendment. Wolf v. Colorado, 338 U.S. 25 (1949).

3. Henry v. United States, 361 U.S. 98 (1959); Brinegar v. United States, 338 U.S. 160 (1949); United States v. Di Re, 332 U.S. 581 (1948); Carroll v. United States, 267 U.S. 132 (1925).

4. Carroll v. United States, 267 U.S. 132, 162 (1925).

5. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

6. Spinelli v. United States, 393 U.S. 410 (1969); Note, 55 A.B.A.J. 360, 361 (1969).

warrant, one would have been granted.[7] As long as the arrest is lawful, an incidental warrantless search is sanctioned.[8] Such searches are justified to protect the officer from danger which might result if the suspect were armed and, in addition, to insure that any contraband which the suspect might possess will not be destroyed. Furthermore, warrantless searches are deemed reasonable if made with the consent of the accused[9] or if made in hot pursuit of the suspect.[10]

In an effort to combat the ever rising crime rate, some states, both by judicial decision[11] and by statute,[12] have sanctioned a procedure which is commonly known as "stop and frisk." This procedure permits a police officer to stop, question and "frisk" persons whom he reasonably suspects are involved in criminal activity. After such a stop, an officer who reasonably suspects that he is in physical danger, is permitted to search such persons for dangerous weapons. In 1964 the New York Court of Appeals, in *People v. Rivera*,[13] had its first occasion to determine the constitutional validity of stop and frisk.[14] In *Rivera*, three New York City detectives observed two men acting suspiciously in front of a tavern.[15] When the defendant realized that he was being observed by the police he quickly walked away. One of the detectives stopped and frisked him finding a loaded weapon. The defendant was arrested and charged with unlawful possession of a dangerous weapon. The Court of Appeals held that stopping suspicious individuals for questioning is not equivalent to an

7. Wong Sun v. United States, 371 U.S. 471 (1963).

8. Bumper v. North Carolina, 391 U.S. 543 (1968); Stoner v. California, 376 U.S. 483 (1964); Wong Sun v. United States, 371 U.S. 471 (1963); Ker v. California, 374 U.S. 23, 41 (1961); Henry v. United States, 361 U.S. 98 (1959); United States v. Rabinowitz, 339 U.S. 56, 65 (1950).

9. Bumper v. North Carolina, 391 U.S. 543 (1968); Stoner v. California, 376 U.S. 483 (1964).

10. Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967).

11. *See, e.g.*, State v. Terry, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966); Commonwealth v. Ballou, 350 Mass. 751, 217 N.E.2d 187, *cert. denied*, 385 U.S. 1031 (1966); Commonwealth v. Hicks, 201 Pa. Super. 1, 223 A.2d 873 (1966); People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955); Cannon v. State, 53 Del. 284, 168 A.2d 108 (1961); People v. Martin, 46 Cal. 2d 106, 293 P.2d 52 (1956). For a thorough discussion of the stop and frisk doctrine, *see* Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, 57 J. CRIM. L., C. & P.S. 257 (1966); Schwartz, *Stop and Frisk: A Case Study in Judicial Control of the Police*, 58 J. CRIM. L., C. & P.S. 433 (1967); LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40 (1969).

12. *See, e.g.*, CAL. PEN. CODE § 833 (1957); DEL. CODE ANN. tit. 11 §§ 1902-1903; HAWAII REV. LAWS, §§ 255-4 & 5 (1955); MASS GEN. LAWS ANN. ch. 41, § 98 (1961); MO. REV. STAT. § 544.170 (1959); NEB. LAWS, ch. 132, at 471 (1965); N.H. REV. STAT. ANN. §§ 594:2-594:3 (1960); R.I. GEN. LAWS ANN. §§ 12-7-1, 12-7-2 (1956).

13. 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458, *cert. denied*, 379 U.S. 978 (1964); Note, 50 CORNELL L.Q. 529 (1965).

14. It is important to note that the decision in *Rivera* was not based on the New York stop and frisk law (N.Y. CODE CRIM. PROC. § 180-a (McKinney Supp. 1967)) although the statute was already in effect, since the facts of the case occurred before July 1, 1964 (the date the statute became effective).

15. The arresting officer described the behavior of the two men as follows: "They walked up in front, outside a bar and grill, stopped, looked in the window, continued to walk a few steps, came back, and looked in the window again." People v. Rivera, 14 N.Y.2d 441, 444, 201 N.E.2d 32, 33, 252 N.Y.S.2d 458, 460 (1964).

arrest and does not have to be based upon probable cause. The majority concluded that a frisk is not tantamount to a search and is permissible if made pursuant to a lawful stop.[16] In rejecting the defendant's contention that his fourth amendment rights had been violated the court stated:

> The constitutional restriction is against unreasonable searches, not against all searches. And what is reasonable always involves a balancing of interests: here the security of the public order and the lives of the police are to be weighed against a minor inconvenience and petty indignity.[17]

In *People v. Peters*[18] and *People v. Sibron*,[19] the New York Court of Appeals upheld the constitutionality of New York's stop and frisk law.[20] In *Peters*, an off-duty policeman heard strange noises outside the door of his apartment. Looking through a peephole in his door, he observed two men tiptoeing strangely towards the stairs. Suspecting that the men were contemplating a burglary, the officer gave chase and apprehended one defendant. The officer frisked him and felt a hard object which proved to be an envelope containing burglar's tools. In *Sibron*, a police officer, over a period of several hours, observed the defendant conversing with known narcotics addicts. Although the officer heard no part of these conversations nor saw the physical transfer of what might have been narcotics, he followed the defendant into a restaurant and ordered him to step outside. Once outside, the officer said: "You know what I am looking for."[21] Defendant mumbled inaudibly and reached into his pocket. Simultaneously, the officer thrust his hand into the same pocket and recovered several glassine envelopes which, upon examination, were found to contain heroin. In both cases, the New York Court of Appeals affirmed the convictions. In both, the court categorized the frisk by the officer as a self-protecting one, thereby indicating that the authority conferred upon the police by section 180-a would be broadly construed. Under the *Sibron* and *Peters* rationale, as long as the frisk can be justified under the statute as self-protective, the fruits

16. People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964).
17. *Id.* at 447, 201 N.E.2d at 36, 252 N.Y.S.2d at 464.
18. 18 N.Y.2d 238, 219 N.E.2d 595, 273 N.Y.S.2d 217 (1966).
19. 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966). On subsequent appeal to the United States Supreme Court, Sibron's conviction was reversed. The Court found that on the facts of the case the officer engaged in a search for evidence, rather than a self-protective search. The issue of the validity of section 180-a was not decided. For further discussion of the Court's reasoning in the reversal *see* text accompanying notes 24-27 *infra*.
20. N.Y. CODE CRIM. PROC. § 180-a (McKinney Supp. 1967).
1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the offenses specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.
2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.
21. 18 N.Y.2d at 603, 219 N.E.2d at 197, 272 N.Y.S.2d at 376.

of the frisk, whether dangerous weapons or other contraband, provide an adequate basis for arrest and are admissible into evidence against the accused.

The court ended all doubt as to how liberally it would construe the statute with its decision in *People v. Taggart*.[22] In *Taggart*, the police were informed by an anonymous telephone call that a youth with a loaded revolver in his jacket pocket was standing at a particular corner. The youth was carefully described by the informer and an officer was dispatched to the scene. Upon spotting the youth standing in the midst of a group of children, the officer approached him and, without questioning or frisking, immediately inserted his hand into the youth's pocket, removing a loaded weapon. The New York Court of Appeals, in affirming the defendant's conviction, held that, although the anonymous tip did not give the officer probable cause to arrest and search the defendant, the search was nevertheless valid under the stop and frisk law. The majority reasoned that the officer had reasonable suspicion to believe that the defendant was armed and hence dangerous. Faced with the difficult problem of justifying a search not preceded by a preparatory frisk, the court stated:

> [I]n all but one of the court's decisions on this point, the arresting officers engaged in "searches" rather than "frisks" in order to obtain inculpating evidence. In People v. Pugach, the evidence was discovered in a closed briefcase. The officer in People v. Sibron, without first frisking the defendant, reached into his pocket and pulled out the narcotics. In People v. Teams, it appears only that the officers "searched" Teams and found a revolver. . . . In short, there is ample authority to uphold the legality of the search in this case.[23]

In so holding, the court explicitly overturned the careful distinction between a frisk and a search which it formulated in the *Rivera* case. In effect the court held that section 180-a authorizes not only a frisk but, under certain circumstances, an actual search of the suspect based on reasonable suspicion alone.

The Supreme Court of the United States has taken a different view regarding the practice of stop and frisk. In *Terry v. Ohio*[24] the Court upheld, within narrowly circumscribed boundaries, the constitutionality of stop and frisk. In *Terry* a veteran detective observed three men acting suspiciously in front of a jewelry store.[25] Suspecting that a robbery was about to take place, the officer stopped the defendant and frisked him. The frisk produced a loaded weapon. The Court affirmed the defendant's conviction for possession of an unlawful weapon, and held that where a police officer observes an individual engaging in unusual conduct, which leads him to reasonably believe that criminal activity may be afoot, he may stop the individual and make reasonable inquiries as to his activities. In addition, if the officer believes that his own safety and the safety of others may be in danger, he may conduct a carefully limited search of

22. 20 N.Y.2d 335, 229 N.E.2d 581, 283 N.Y.S.2d 1 (1967).
23. *Id.* at 342, 229 N.E.2d at 586, 283 N.Y.S.2d at 8.
24. 392 U.S. 1 (1968); Note, 82 HARV. L. REV. 178 (1968).
25. 392 U.S. at 6.

the outer clothing of the suspect in an attempt to discover dangerous weapons.[26] In reaching this conclusion, the Court rejected the contention that a stop and frisk is a lesser form of restraint than a traditional arrest and search and, as such, should not be governed by the fourth amendment.[27] While recognizing that the practice of stop and frisk comes within the scope of the fourth amendment, the Court also realized that a purely protective search for weapons predicated upon on the spot police observation and requiring prompt police action was necessary to protect the officer from physical harm. Hence, the Court authorized such a search if the judgment of a *reasonably prudent man* would support the assertion that he was in physical danger.

On appeal, the Court reversed the conviction in *Sibron v. New York*.[28] Basing its reversal upon a narrow construction of its newly formed reasonable man test, the Court concluded that upon the facts presented, the search could not be regarded as a purely protective search for weapons, but rather as a search for evidence. As such, the probable cause requirement rather than the reasonable man test was the criterion which the police had to meet. The Court affirmed defendant's conviction in *Peters v. New York*,[29] concluding that the facts demonstrated that the officer had probable cause to arrest the defendant. By finding the requisite probable cause to be present, the Court avoided the issue of whether contraband, other than weapons discovered as a result of stop and frisk, would be admissible evidence.[30] In both *Sibron* and *Peters*, the Court, had it wished to, could have ruled upon the constitutionality of section 180-a but, in both cases, avoided the issue. In *Sibron*, the Court explicitly stated that it would not "be drawn into what we view as the abstract and unproductive exercise of laying the extraordinarily elastic categories of § 180-a next to the categories of the Fourth Amendment in an effort to determine whether [they] are . . . compatible."[31]

In the instant case, the New York Court of Appeals held that the police officer had the requisite reasonable suspicion to effectuate a constitutionally permissible stop and frisk. The court based its decision on the *Terry* rationale rather than on the broadly construed New York stop and frisk statute. Apparently the court realized that the Supreme Court would not go along with a broad construction of the statute since it reversed in *Sibron*, and avoided deciding the reasonableness of the stop and frisk altogether in *Peters*. Furthermore, the court may have been influenced by the Supreme Court's refusal to rule upon the constitutionality of section 180-a in both the *Sibron* and *Peters*

26. *Id.* at 30-31.
27. This contention had been previously accepted by some federal courts. *See, e.g.*, United States v. Bonanno, 180 F. Supp. 71, 77-79 (S.D.N.Y. 1960).
28. 392 U.S. 40 (1968); Note, 82 HARV. L. REV. 178 (1968).
29. 392 U.S. 40 (1968); Note, 37 FORDHAM L. REV. 300 (1968).
30. It should be noted that Justice Harlan's concurring opinion was based on his finding that there had been a valid stop and frisk, rather than that the officer had probable cause to arrest. Peters v. New York, 392 U.S. 40, 74-79 (1968).
31. Sibron v. New York, 392 U.S. 40, 59 (1968).

cases. The court concluded that the officer had engaged in a protective search for weapons. The fact that he did not observe the defendant's conduct, but relied on information supplied by an anonymous passerby, did not detract from the reasonableness of his actions. The court found that the information supplied was highly reliable since it was detailed and specific. In addition it was given ". . . by a number of individuals, who because of their physical separation were not likely to have been acting in concert."[32] Although the court granted that the absence of the names of the informers made it impossible to verify the officer's testimony, it regarded such corroboration unnecessary. Pointing out that the occurrence upon which it was asked to rule was a street encounter, the court concluded that it would be "requiring the impossible" from the police to document the names of every person from whom they obtained information.[33]

In light of the increasing incidence of crime in our society the practice of "stop and frisk" is essential to the maintenance of law and order. By permitting law enforcement agents to detain and frisk individuals whom they reasonably suspect to be involved in criminal activity, the dual objectives of deterring violent crimes and protecting officers from physical harm are advanced. Simultaneously, however, the most stringent precautions must be taken in order to insure the individual's right to be protected from unreasonable searches and seizures. Toward safeguarding these fourth amendment rights, the basis for the stop and frisk in each individual case should be carefully analyzed. A distinction must be drawn between a protective stop and frisk which is based on the officer's personal observation and reasonable assessment that a crime is about to be perpetrated, and a stop and frisk based on an informer's disclosure. In the former, specialized training and experience in law enforcement is said to enable the officer to make a fairly reliable determination that given behavior is reasonably suspicious. For example, in *Terry*, a veteran detective personally observed the defendant casing the store, thereby concluding that the defendant was about to commit a robbery.

In the informer situation, a layman's judgment serves as the basis for the officer's action. Since the practice of stop and frisk generally occurs in the context of a street encounter, the police officer has neither the opportunity to determine whether the informer is reliable, nor the opportunity to question the informer as to his reasons for believing that a crime has been or is being committed. For example, the officer in the instant case did not base his belief that a crime had been committed upon his own observations. His actions were solely based on the anonymous information he received. In *Spinelli v. United States*[34] the Supreme Court concluded that if an officer relies upon an informer's disclosure in order to obtain a search warrant, the officer in his affidavit must clearly articulate his reasons for believing that the informer is reliable, as well

32. People v. Arthurs, 24 N.Y.2d 688, 692; 249 N.E.2d 462, 465; 301 N.Y.S.2d 614, 618 (1969).
33. *Id.* at 693, 249 N.E.2d at 465, 301 N.Y.S.2d at 619.
34. 393 U.S. 410 (1969).

as the informer's reasons for believing the occurrence of illegal activity. The underlying reason for these requirements was to subject the reliability and the motive of the informer to judicial scrutiny. In *Terry v. Ohio*[35] the Court left no doubt that a careful exploration of the outer surfaces of a person's clothing, however denominated by the police or statute, is a search. Chief Justice Warren speaking for the majority said:

> . . . it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.'[36]

Similarly, in *People v. Taggart*[37] the New York Court of Appeals also equated a "frisk" with a search. Arguably, therefore, the *Spinelli* requirements for a search warrant (in an informer situation) are applicable to frisks based upon an informer's disclosures. It is clear that in *Arthurs*, neither of the *Spinelli* requirements were met. Neither the reliability of the informer, nor his reasons for believing that the defendant was armed were subjected to judicial scrutiny. In fact, the officer himself could not attest to the reliability of the informers since he was unacquainted with them. Not only does the instant case fail to meet the *Spinelli* requirements, but it fails to meet the *Terry* test as well. The officer did not engage in a self-protective search based on his own observations but relied entirely on the unsubstantiated disclosures of informers. For the above reasons, the United States Supreme Court, if and when they are called upon to decide a case similar to *Arthurs*, may find it very difficult to agree with the Court of Appeals that as a matter of law the officer possessed the requisite reasonable suspicion to effectuate a constitutionally permissible stop and frisk.

Although the instant case does not comply with the requirements set down in *Spinelli* for the issuance of a warrant based on an informer's disclosures, it is at least conceivable that the Supreme Court would uphold the procedures followed by the police in the instant case. The Court may be persuaded that where a search warrant is requested time is not the crucial element. The police have the opportunity to collect and substantiate their information carefully before taking action against the criminal activity involved. The intervention of a neutral and disinterested magistrate is desirable where time is not of the essence and threat of harm to innocent citizens is remote. Conversely, in the "on the street" situation time is of the essence; the potential threat to life and property is much greater. In *Arthurs* the defendant was in possession of a deadly weapon which allegedly he had already used at least once previously. Similarly, *Terry* involved the potentially violent crime of armed robbery. These situations dictate rapid and effective police action to negate the potential danger involved. The Court may be unwilling to transplant the requirement of judicial

35. 392 U.S. 1 (1968).
36. *Id.* at 16.
37. 20 N.Y.2d 335, 229 N.E.2d 581, 283 N.Y.S.2d 1 (1967).

scrutiny which it considered desirable in the warrant situation. It may conclude that what in one instance reflects the proper balance between the rights of the individual and society would unduly jeopardize the rights of society in the other.

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