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Criminal Procedure—Inclusion of Briefcase in "Frisk" Does Not Create a Constitutionally Protected Search

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rule which would truly assure the defendant of a reliable jury determination of the voluntariness of his confession. The most obvious approach is to have a separate jury determine the issue of voluntariness. Although this procedure poses practical difficulties of increased expense and delay it is least vulnerable to attack on any substantive ground. The defendant would have the issue fairly and reliably determined by a jury. If they found the confession to be involuntary, the jury which ultimately determines guilt or innocence would not know that a confession existed. Only under a procedure such as this is it possible to have a jury determination of the issue of the voluntariness of a confession and be certain that if a confession has been found involuntary, it has not influenced the convicting jury.

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CRIMINAL PROCEDURE—INCLUSION OF BRIEFCASE IN "FRISK" DOES NOT CREATE A CONSTITUTIONALLY PROTECTED SEARCH

Defendant had been under investigation in connection with a matter which had occurred on June 15, 1959. Incident to this investigation three police officers went by squad car to the building in which defendant had an office. As they arrived, they saw defendant approach and enter the building. He was carrying a briefcase. Two of the officers got out of the car and followed defendant into the building where they stopped him at the elevator and questioned him about the "other matter." At the request of the officers, defendant accompanied them to the parked squad car and entered the back seat. Defendant sat in the middle with one officer on each side. The third officer was in the front seat on the passenger's side. Defendant placed the briefcase on his lap with the opening facing him. The officers on either side of defendant proceeded to "frisk"[1] him. Prior to opening his coat to facilitate the "frisk," defendant placed the briefcase between his legs. After the "frisk" had been completed defendant picked up the briefcase and placed it on his lap in the original position. One of the officers reached over and took the briefcase and placed it on the floor in front of him and opened it. Inside was a loaded revolver. At the trial defendant was convicted of illegal possession of a weapon in violation of section 1897 of the Penal Law. No mention was made as to the "other matter" for which the investigation was originally conducted.[2] Defendant contended that in the absence of disclosure of this "other matter" there were no reasonable grounds for his arrest and therefore the search of the briefcase was illegal. Defendant's motion to suppress the evidence obtained by the "frisk" was denied. The Appellate Division affirmed. The Court of Appeals *held*, affirmed; one judge dissenting. A "frisk" is

1. A frisk is a contact or patting of the outer clothing of a person to detect by the sense of touch if a concealed weapon is being carried. People v. Rivera, 14 N.Y.2d 441, 446, 201 N.E.2d 32, 35, 252 N.Y.S.2d 458, 463 (1964).

2. The defendant was later indicted and convicted for the acid blinding of his lady-friend. No mention was made of this at this trial for fear it would be prejudicial error.

distinguishable from a constitutionally protected search and is justified on grounds of safety and precaution to the police officers. The inclusion of the briefcase in the "frisk" did not make this a constitutionally protected search. *People v. Pugach*, 15 N.Y.2d 65, 204 N.E.2d 176, 255 N.Y.S.2d 833 (1964).

The fourth amendment to the United States Constitution protects "the right of the people to be secure . . . against unreasonable searches and seizures. . . ."[3] A search is reasonable within the meaning of this amendment if made incident to a lawful search warrant,[4] by consent,[5] or incident to a lawful arrest.[6] The Supreme Court has determined that in the absence of an arrest warrant or where the crime was not committed in the presence of the arresting officer an arrest is legal if made with probable cause.[7] Accordingly the court has held that probable cause exists where "the facts and circumstances within their (the arresting officers') knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.[8] Throughout the statutes and decisions of the various states the words "reasonable grounds" are often substituted for "probable cause"; although the phrases are different the effect seems to be the same.[9] This interpretation of the fourth amendment led the Supreme Court to formulate what is now called the Exclusionary Rule whereby any evidence acquired in an unreasonable search and seizure cannot be used in a criminal prosecution against the person from whom it was seized. But until 1938, a citizen of New York had no constitutional protection against an unreasonable search and seizure.[10] Under this state of affairs the New York Court of Appeals held in *People v. Defore*[11] that evidence acquired in an unreasonable search was admissible against the person from whom it was seized. That case expressly rejected United States Supreme

3. "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. By implication of course, a "reasonable" search does not violate this amendment. *Cf.* Elkins v. United States, 364 U.S. 206, 222 (1960); United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145, 150 (1947); Carroll v. United States, 267 U.S. 132 (1925).

4. Fed. R. Crim. P. 41(a).

5. *Cf.* Amos v. United States, 255 U.S. 313 (1921); Channel v. United States, 285 F.2d 217 (9th Cir. 1960).

6. Wong Sun v. United States, 371 U.S. 471 (1961); Henry v. United States, 361 U.S. 98 (1959); United States v. Lee, 274 U.S. 559 (1927).

7. *Cf.* Draper v. United States, 358 U.S. 307 (1959); Henry v. United States, 361 U.S. 98 (1959).

8. Carroll v. United States, 267 U.S. 132, 162 (1925). *But cf.* Draper v. United States, 358 U.S. 307, 311 (1959) (Douglas, J., dissenting) (language to the effect that direct, first hand information rather than circumstantial evidence is required). This language has since been rejected by the Supreme Court in Jones v. United States, 362 U.S. 257 (1960).

9. See Draper v. United States, 358 U.S. 307 (1959).

10. Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937); Hurtado v. California, 110 U.S. 516 (1884). *But see* Malloy v. Hogan, 378 U.S. 1 (1964). N.Y. Civ. Rights Law § 8 (1923) was in effect at this time and adopted the fourth amendment of the United States Constitution verbatim, however, this was by statute and not a constitutional guarantee.

11. 242 N.Y. 13, 150 N.E. 585, *cert. denied*, 270 U.S. 657 (1926).

Court cases to the contrary which were binding on the federal government only.[12] In 1938 New York adopted the language of the fourth amendment into its Constitution.[13] Yet, even with this constitutional prohibition against unreasonable search and seizure the New York Court of Appeals still retained the *Defore* case and allowed illegally seized evidence to be used in a criminal prosecution against the person from whom it was seized.[14] The Supreme Court sustained this practice,[15] until 1961. In the landmark case of *Mapp v. Ohio*,[16] the Court decided that the "exclusionary rule" as developed in earlier federal cases must be applied to the states. Therefore, any evidence obtained in an illegal search and seizure, *i.e.*, without an arrest warrant, consent or probable cause, is now inadmissible in a criminal prosecution whether in a state or federal court.[17]

When no reasonable grounds for an arrest exist, and therefore where no search could be made, some states allow a police officer to stop and "frisk" a suspect if the circumstances give the officer "reasonable grounds to suspect" that a crime has been or is being committed and if the officer has reason to believe the suspect is dangerous.[18] This position has been adopted in the Uniform Arrest Act which has been enacted into law by four states.[19] The practice of "frisking" a suspect when less than reasonable grounds for an arrest exist is standard police practice whether or not condoned by a court.[20] New York courts in the past were reluctant to accept this frisk-search distinction[21] but have since endorsed it.[22] The New York legislature has codified this distinction in its recently enacted "Stop and Frisk Law"[23] which authorizes a police officer to stop a person in a public place, demand that he identify him-

12. Agnello v. United States, 269 U.S. 20 (1925); Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383 (1914).

13. N.Y. Const. art. I, § 12.

14. People v. Richter's Jewelers, Inc., 291 N.Y. 161, 51 N.E.2d 690 (1943).

15. Wolf v. Colorado, 338 U.S. 25 (1949).

16. 367 U.S. 643 (1961).

17. People v. O'Neill, 11 N.Y.2d 148, 182 N.E.2d 95, 227 N.Y.S.2d 416 (1962); People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961). For a discussion of the exclusionary rule see generally Day & Berkman, *Search and Seizure and the Exclusionary Rule: A Re-examination in the Wake of Mapp v. Ohio*, 13 W. Res. L. Rev. 56 (1961).

18. United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960); State v. Chronister, 353 P.2d 493 (Okla. Crim. 1960); People v. Martin, 46 Cal. 2d 106, 293 P.2d 52 (1956); *cf.* State v. Zupan, 155 Wash. 80, 283 Pac. 671 (1929).

19. Cal. Pen. Code § 833 (1957); N.H. Rev. Stat. Ann. § 594:2(1955); Del. Code Ann. tit. 11, § 1902 (1953); R.I. Gen. Laws Ann. § 12-7-1 (1956).

20. Note, *Philadelphia Police Practice and The Law of Arrest*, 100 U. Pa. L. Rev. 1182 (1952); Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315 (1942).

21. *Cf.* People v. Esposito, 118 Misc. 867, 194 N.Y. Supp. 326 (County Ct. 1922); People v. Didonna, 124 Misc. 872, 210 N.Y. Supp. 135 (Ct. of Special Sessions 1925).

22. People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964).

23. N.Y. Code Crim. Proc. § 180-a. This provision became effective on July 1, 1964 and therefore did not apply to the instant case. For a discussion of this law and its constitutionality see Note, 78 Harv. L. Rev. 473 (1964); Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law*, 33 Fordham L. Rev. 211 (1964); Siegel, *The New York "Frisk" and "Knock-Not" Statutes: Are They Constitutional?*, 30 Brooklyn L. Rev. 274 (1964).

self and explain his actions if the officer "reasonably suspects" that such person has committed or is committing or is about to commit a felony or serious misdemeanor. The law further sanctions a "frisking" of the person for dangerous weapons during questioning, if the officer reasonably suspects that his life is in danger.[24] When a "frisk" is allowed on less than reasonable grounds, either by statute or case law, its scope must be limited to that which is required for the protection of the police officer, for a thorough search on less than reasonable grounds would violate the fourth amendment. The validity of this search-frisk dichotomy has never been passed on directly by the Supreme Court, although in *Henry v. United States*[25] the Court intimated that such a distinction could not constitutionally exist.[26] However, the *Henry* decision has been interpreted by some courts as an expression of the Court's supervisory powers over lower federal courts and not as an enunciation of law applicable to the states.[27] The constitutionality of the "frisk" can be reconciled with the language of *Henry* if it is read in light of the Supreme Court's policy that the states are free to formulate their own search and seizure rules as long as they conform to the "reasonableness" standard of the fourth amendment.[28]

In the instant case the majority of the Court of Appeals emphasizes that there is a distinction between a "frisk" and a "constitutionally protected search." A "frisk" conducted before there are reasonable grounds for an arrest may nonetheless be "reasonable" within the requirements of the fourth amendment.[29] The court applies a balancing of interests test; public order and police safety are to be weighed against the mere inconvenience and slight indignity to the defendant. Here, says the court, safety and security outweigh inconvenience and indignity. The majority of the court sees no difference between the facts in *People v. Rivera*[30] where the weapon was found on the defendant's person, and the facts in the instant case where the weapon was found in the briefcase which the defendant was carrying. Accordingly, the inclusion of the briefcase did not transform this "frisk" into a search.[31]

The Court of Appeals in *People v. Rivera* had described a "frisk" as a degree of search rather than as an act separate and distinguishable from a search.[32]

24. N.Y. Code Crim. Proc. § 180-a.

25. 361 U.S. 98, 100 (1959). This case dealt with the question of when an officer could stop a suspect and not when he could frisk him. This fact together with the loose language used by Mr. Justice Douglas leaves the intimation weak.

26. *See also* People v. Rivera, 14 N.Y.2d 441 448, 201 N.E. 32, 36, 252 N.Y.S.2d 458, 464 (1964) (Fuld, J., dissenting) (language to the effect that such a distinction could not exist).

27. Commonwealth v. Lehan, 196 N.E.2d 840 (Mass. 1964); People v. Mickelson, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963); People v. Rivera, *supra* note 26.

28. See Ker v. California, 374 U.S. 23, 33-34 (1963). *But cf.* Aguilar v. Texas, 378 U.S. 108 (1964).

29. Instant case at 66, 204 N.E.2d at 177, 255 N.Y.S.2d at 835.

30. 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964).

31. Instant case at 67, 204 N.E.2d at 178, 255 N.Y.S.2d at 836.

32. "The frisk is less such invasion in degree than an initial full search of the person would be. It ought to be distinguishable also on pragmatic grounds from the degree of con-

A search is reasonable within the meaning of the fourth amendment if there is probable cause; a "frisk" is reasonable on the grounds of safety of the police officer. The court in the instant case describes a "frisk" as separate and distinguishable from a search rather than as a degree of a search.[33] This latter reasoning, if carried to its logical conclusion, poses a very basic problem. The fourth amendment only protects a person against unreasonable searches, therefore if a "frisk" is not a search there would seem to be no constitutional protection against an unreasonable "frisk." If, on the other hand, a "frisk" is a lesser degree of a search (*People v. Rivera*), then it can only be justified as an exception to the "probable cause" requirement of a search if it is reasonably related to the safety of the police officer.

This decision represents the furthest point reached by the New York Court of Appeals in determining the scope of a "frisk." Although this case was not decided under New York's recently enacted "Stop and Frisk Law,"[34] the rationale underlying both is identical, *i.e.*, safety of the police officer. Under this statute, if the original stopping is justified on the grounds of "reasonable suspicion" it is apparent that this court will permit a wide range of investigation under the guise of a "frisk." Such a liberal interpretation of this word does not seem justified. It is difficult to reconcile the search of the briefcase on the grounds of safety to the officer, for as Judge Fuld pointed out in his dissent, if the officers suspected that the briefcase contained a weapon they could have protected themselves by simply placing the briefcase on the front seat of the squad car out of reach of the defendant.[35] Neither can it be justified under the traditional definition of a "frisk" as the "running of the hands rapidly over another's person." The rationale of the court in *People v. Rivera* cannot be automatically applied to justify the decision in the instant case. The facts in the two cases are not so similar as to lead to the same conclusion. Once the interpretation of the word "frisk" is extended to the point where it no longer relates to the safety of the police officer, the invasion of the individual's rights no longer seems justified by the "balancing of interests test" to which the court refers.[36]

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stitutional protection that would surround a full-blown search of the person." 14 N.Y.2d 441, 446, 201 N.E.2d 32, 35, 252 N.Y.S.2d 458, 463.

33. ". . . a 'frisk' is distinguishable from a constitutionally protected search." Instant case at 66, 204 N.E.2d at 178, 255 N.Y.S.2d at 836.

34. N.Y. Code Crim. Proc. § 180-a.

35. Instant case at 68, 204 N.E.2d at 179, 255 N.Y.S.2d at 837 (Fuld, J., dissenting). It is interesting to note that the New York Police Training Manual issued subsequent to the passage of the "Stop and Frisk Law" adopts this procedure as standard police practice. See Municipal Police Training Bulletin (June 1, 1964).

36. Instant case at 66, 204 N.E.2d at 177, 255 N.Y.S.2d at 835.