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65/11/04 Brief of Amicus Curiae, Ohio Civil Liberties Union

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IN THE COURT OF APPEALS
FOR THE EIGHTH DISTRICT OF OHIO
CUYAHOGA COUNTY

CASE NO. 27230

STATE OF OHIO,

Plaintiff-Appellee

-vs-

RICHARD D. CHILTON,

Defendant-Appellant

BRIEF OF AMICUS CURIAE
OHIO CIVIL LIBERTIES UNION

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STATEMENT OF THE CASE

This is an appeal taken from a verdict of the Cuyahoga County Common Pleas Court, sitting without a jury, finding the defendant guilty of the crime of carrying a concealed weapon.

Prior to the trial on the merits, the defendant moved to suppress certain evidence, namely the gun and cartridges, because they were obtained by an illegal search and seizure. The sole witness called on hearing of this motion was the arresting officer.

The officer testified that on October 31, 1963, at about 2:30 p.m., he observed one John Terry and one Richard Chilton walking, standing, and talking to each other near the intersection of Huron Road, Euclid Avenue, and 13th Street in Cleveland, For some reason, their behavior aroused the officer's suspicion; when asked what caused him to be suspicious (R. 47), he replied "I really don't know". In any case he soon approached them while they were talking with a third man, said he was a police officer, asked their names and received a quick reply. (R. 16) He then grabbed Terry, spun him around and searched him (Ibid.). He found a gun in Terry's pocket (Ibid.) and ordered the three men into a store. A search of the other two men produced another gun in Chilton's pocket (R. 17).

The Court found that there was neither a warrant nor a lawful arrest to justify a search on the facts presented (R. 96). But defendant's motion

to suppress was denied because the "frisk" made by the officer is not a search (R. 98), and "...the guns are the fruit of the frisk, and not of a search." (Ibid.). Although the officer had testified that at the time of the frisk he did not know that any of the three suspects had a gun (R. 45), the Court justified the "frisk" "...strictly for the protection of the officer's person and his life." (R. 98).

Upon trial on the merits, the arresting officer was the sole witness for the State and his testimony was substantially identical to that at the motion to suppress. Over objection, the gun and cartridges obtained by the "frisk" was admitted into evidence. The defendant moved for a directed verdict after the State rested (R. 176) which was denied assuming the correctness of the admissibility of the gun and cartridges (R. 177). The motions were renewed after defendant rested, and were again denied. (R. 216)

Thus, although there are several exceptions herein, they all turn on whether the "fruit of a frisk" is admissible in the absence of a warrant or probable cause.

ASSIGNMENT OF ERROR

The Court erred in permitting the use of evidence which had been obtained in violation of the Fourth Amendment of the United States Constitution.

ISSUES PRESENTED

A. Is a "frisk" a "search" within the protection of the Fourth and Fourteenth Amendments?

The Court below answered "NO"

Amicus Curiae contends the answer properly is "YES"

B. Can police safety be reconciled with the inadmissibility of the fruits of an illegal search and seizure?

The Court below answered "NO"

Amicus Curiae contends the answer properly is "YES"

A. The Fourth Amendment prohibits unreasonable searches and seizures, and evidence obtained in violation thereof is inadmissible in a state prosecution.

Evidence obtained in violation of the Fourth Amendment of the United States Constitution is not admissible in a state prosecution because of the exclusionary rule of Mapp v. Ohio, 367 U.S. 643 (1961), Ker v. California, 374 U.S. 23 (1963). Therefore, to be admissible the evidence must have been obtained within the limits of the Fourth Amendment.

The Fourth Amendment does not prohibit all searches and seizures; rather by its terms only "unreasonable" searches and seizures are prohibited.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrents shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The second clause of the Fourth Amendment itself spells out the surest means of obtaining a "reasonable" search or seizure: obtaining a warrant. Since there was neither an arrest warrant nor a search warrant in the case at bar, any claim of reasonableness of the search or seizure must rest upon one of the well-defined exceptions to this requirement which the United States Supreme Court has developed over time.

The most frequently used exception to the requirement of a warrant for a search occurs when the search is incident to a lawful arrest. Such a

search does not violate the Fourth Amendment. Abel v. United States, 362 U.S. 217 (1960); United States v. Rabinowitz, 339 U.S. 56 (1950). However, the lawfulness of the arrest is also tested by the Fourth Amendment, and if the arrest is without a warrant it must be based upon "probable cause." Wong Sun v. United States, 371 U.S. 471 (1963). Since there was no arrest warrant in the instant case, the arrest could be lawful only if it were based on "probable cause."

The final exception to the requirement of a warrant to make a search lawful is that of "probable cause." Henry v. United States, 361 U.S. 98 (1959). Note that this standard is the same as that used to justify a warrantless arrest; and the Supreme Court does not differentiate between "probable cause" as a requirement of a warrantless search or of a warrantless arrest. Carroll v. United States, 267 U.S. 132 (1925); Brinegar v. United States, 338 U.S. 160 (1949). Thus if at the time and place that a warrantless search of the person occurred "probable cause" existed, it is irrelevant (in the constitutional sense) whether the arrest technically preceded the search or not; both are lawful so long as they are "substantially contemporaneous." Agnello v. United States, 269 U.S. 20 (1925). If there was no probable cause, neither is lawful.

Therefore, a finding of no "probable cause" has two effects. First the arrest is unlawful. Second, the search is unlawful. Neither can be lawful if the other is unlawful. So when Common Pleas stated that there was no lawful arrest (R. 96),

> I believe it would be stretching the facts beyond reasonable comprehension and foolhardy to say there was a lawful arrest, because there wasn't, from the facts as presented.

it necessarily determined that there was no probable cause for a warrantless arrest. And therefore there necessarily was no probable cause for a warrantless search.

Probable cause is one of the Constitutionally required elements in obtaining a lawful warrant. The standard applicable to a search or seizure without a warrant, as stated in Wong Sun v. United States, 371 U.S. 471 at 479-80 (1963):

> ...surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed.

"Probable cause" has been discussed many times by the United States Supreme Court. For example, in Stacey v. Emery, 97 U.S. 642 at 645 (1878):

> The question of malice or good faith is not an element in the case. It is not a question of motive. If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient. (Emphasis supplied)

or, as stated in Brinegar v. United States, 338 U.S. 160 at 175-76 (1949):

> "The substance of all the definitions" of probable cause "is a reasonable ground for the belief of guilt." ...(It) has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their (the 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. (Emphasis supplied)

Or, more recently, in Henry v. United States, 361 U.S. 98 at 101-02 (1959):

> ...common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest...good faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed...And while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause.

A court must test the existence of probable cause at the moment of the search or arrest; it cannot be retroactively justified by the evidence uncovered. Rios v. United States, 364 U.S. 253 (1960); Henry v. United States, 361 U.S. 98 (1959); Johnson v. United States, 333 U.S. 10 (1948); City of Lakewood v. Smith, 1 Ohio St. 2d 128 (1965).

Once the lawfulness of the arrest or search is put in issue by the defendant, the prosecution must bear the burden of proving all elements of the existence of probable cause at the moment of arrest or search. Beck v. Ohio, 379 U.S. 89 (1964).

Although the officer herein may have suspected that a crime was about to be committed by the accused, he had no probable cause to believe a crime had been, or was being committed. In fact, when he first approached the accused he did not know that they carried guns (R.45). So his only suspicions could be with respect to a prospective crime which they were "casing" (R.46); indeed, the officer could not say why he was suspicious (R.47). Thus, not only are we forced to surrender "probable cause" for "suspicion" as the

standard, we are asked to sanction a warrantless arrest or search based upon a prospective crime. As the quote in Brinegar v. United States, supra, shows, this is improper.

In City of Lakewood v. Smith, 1 Ohio St. 2d 128 (March 10, 1965), the Supreme Court held (third syllabus):

> 3. In considering whether an officer at the moment of arrest without warrant had reasonable ground for believing that a crime had been committed so as to justify an incidental search of defendant's person, only facts within the officer's knowledge and obtained without violation of the suspect's rights under the Fourth and Fourteenth Amendments to the United States Constitution may be considered.

In explaining this syllabus the Court states, 1 Ohio St. 2d at 130-31, "... we are still unable to justify a conclusion by the officers that a crime probably had been or was being committed." (Emphasis supplied)

Thus, under rulings of both the United States Supreme Court and the Ohio Supreme Court, not only must there be "probable cause", as discussed above, but such reasonable belief must relate to a past or contemporaneous crime--a prospective crime cannot suffice. Therefore, the search involved in the instant case must fail for two reasons, either of which would justify reversal: (1) no probable cause of (2) a committed crime.

Since the search violated the Fourth Amendment, the fruits of the unlawful search must be subject to the exclusionary rule of Mapp v. Ohio, 367 U.S. 643 (1961), Ker v. California, 374 U.S. 23 (1963).

B. The Constitution is not subject to attrition by semantics: a frisk is a search, and is reasonable and lawful only if it meets the standards of the Fourth Amendment.

As shown above, there can be no question that the search involved herein was unlawful, and that the fruits of that search cannot be admitted in evidence. The sole real issue in this case is whether what is in fact a search may be deemed a non-search for purposes of the Fourth Amendment.

In proscribing "unreasonable" searches the Fourth Amendment thereby recognizes only two types of searches: "reasonable" and "unreasonable". The basic definition of what is a reasonable search---one pursuant to a lawful warrant---is stated in the second clause of the Amendment itself. As shown above, the United States Supreme Court has waived the requirement of a warrant in those emergency situations where it would not be feasible to obtain a prior warrant. But in requiring "probable cause" to be shown even in these emergency situations, the Court maintains the integrity of the Fourth Amendment. The requirement of probable cause permits a constitutionally valid warrantless search because it assumes, in effect, that if a magistrate were present at that specific time and place and under such emergency conditions, he would have issued a warrant. See McDonald v. United States, 335 U.S. 451 at 455-56 (1948). In other words, in the constitutional sense, a reasonable search must <u>always</u> be based upon probable cause either with or without a warrant.

The instant case is an attempt to erode the probable cause requirement of the Constitution by semantics. Since only a "search" is afforded the protection of the Fourth Amendment, if the actions of the officer did not constitute a "search", the Constitutional protections would not be involved. Olmstead v. United States, 277 U.S. 438 (1928). Thus, it held below (R. 989) that the officer's acts were a "frisk", and such "frisk" is not a "search" in the Constitutional sense.

What is a so-called "frisk"? Webster's Third New International Dictionary, at p. 912, defines the verb "frisk" as follows:

> to search or go through esp. for concealed weapons or stolen articles... esp. to search (a person) for such purpose usu. by running the hand rapidly over the clothing and through the pockets.

In short, a frisk is just a kind of search.

But the United States Supreme Court has never differentiated among different kinds of searches. Indeed, only one case has specifically done so. In People v. Rivera, 14 N.Y. 2d 441, 201 N.E. 2d 32 (1964), cert. den. 855 Ct. 679, 13 L ED 2d 568 (Jan. 18, 1965), the New York Court of Appeals did distinguish a "frisk" from a "search". It did so, 201 N.E. 2d at 35, as follows:

> 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 constitutional protection that would surround a full-blown search of the person.
>
> That kind of search would usually require sufficient

evidence of a committed crime to justify an arrest or be an incident to a lawful arrest... (Emphasis supplied)

Thus, even to the only court specifically distinguishing a "frisk" from a "full-blown search", the "frisk" seems to be only a "kind of search". Apparently, the New York court felt that probable cause applies only to a "full-blown" search; some lesser standard applies to a "frisk". As the dissent in Rivera stated, 201 N.E. 2d at 37:

> But, the prosecution goes on to say, a "frisk", not a search, was here involved and, consequently, "suspicion" on the part of the officer, not probable cause, was all that was required to justify his action.
>
> This is nothing but an exercise in semantics; a search by any other name is still a search. Viewed in the perspective of constitutionally protected interests, a police tactic--call it a search or, more enphemistically, a "frisk"--which leads to discovery of a gun in an individual's pocket by trespassing on his person is indisputably an invasion of privacy. A "frisk" is only a species of search and, in point of fact, both decisions and dictionaries so define it. (Emphasis supplied)

Ignoring the specific language of the Fourth Amendment which requires "probable cause", the New York court in Rivera said, 201 N.E. 2d at 36:

> 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. A similar police procedure has long been sustained in California (People v. Martin, 46 Cal. 2d 106, 293 P. 2d 52 (1956).
>
> The development of statutory implementation in the similarly grounded "stop and frisk" statute has had some impressive acceptance in professional

> discussion (Kuh, Richard H., New York's 'Stop and Frisk" Law, N.Y.L.J., May 29, 1964, p. 4, Col. 1; Siegel, William I., The New York "Frisk" and "Knock-Not" Statutes: Are they Constitutional?, 30 Brooklyn L. Rev. 274; Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315, 317-324), although there are dissenting views (eg., The "No-Knock" and "Stop and Frisk" Provisions of the New York Code of Criminal Procedure, 38 St. John's Rev. 392, 398-405)...

It is easy to meet the authority cited above in Rivera. For example the Martin case did not involve a physical trespass to the person, and in any case the defendants' sudden flight could easily have raised mere suspicion to the level of probable cause in fact. And the "impressive acceptance in professional discussion" somehow seems less impressive when it is known that two of the three authors (Kuh and Siegel) are Assistant District Attorneys in New York City (as the biographic sketches with their articles show), and the third was the Reporter of the Interstate Commission on Crime, which authored the Uniform Arrest Act (discussed below).

Both Rivera, 201 N.E. 2d at 36, and Common Pleas in the instant case (R.96-97), justified their departure from "probable cause" in a paraphrase of one sentence from Ker v. California, 374 U.S. 23, 34 (1963):

> The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. (Emphasis Supplied)

It is respectfully submitted that neither court gave sufficient weight to the

proviso emphasized above. While the states need not uniformly adopt the Federal Standard as their own, whatever "workable rules" they do develop must at least meet the standards of the Fourth Amendment. Thus Ker cannot be used to justify even a "minor" deviation from the Federal standard. See Fahy v. Connecticut, 375 U.S. 85 (1963) where the Federal Standard was held to override the state "harmless error" statute; Aguilar v. Texas, 378 U.S. 108 (1964) where the Court looked behind a search warrant and denied its validity under Ker because there was no probable cause by Federal Standards. See also Stoner v. California, 376 U.S. 483 (1964), where the Court uses pre-Mapp Federal decisions, at 488-90, to test the validity of a search, by state officers, thus showing that the states are now held to the Federal standards regarding searches and seizures.

Another problem inherent in the semantic attrition approach is that once it is condoned, the second step inevitably follows. Suppose that a "frisk" is determined to be outside the protection of the Fourth Amendment. Any search which can be categorized as a "frisk" would thereby be beyond Constitutional protection. Possibly other exceptions could be deemed to be "non-searches" for purposes of the Constitution.

For example, in People v. Pugach, 15 N.Y. 2d 65, 204 N.E. 2d 176 (1964), several New York policemen "picked up" the accused (the court felt no need to decide if there was a lawful arrest) and "frisked" him in the squad car. Presumably such actions were permissible in New York's view

under Rivera. As they proceeded to the police station, one officer took the accused's brief case from his lap, and then unzipped the fastener, finding a gun therein. The accused was then convicted of carrying a concealed weapon. The majority considered the search of the brief case as another part of the "frisk" designed to protect the lives of the officers. Possibly the officers in Pugach did fear for their lives; but once the briefcase was in an officer's possession would not this allay their fears?

Pugach is cited solely to illustrate the extreme to which the "fruit of the frisk" doctrine can be pushed. Once a semantic exception to a "search" is created, the pressure mounts to expand the exception. It is submitted that preventing the first inch of intrusion on the constitutional standard will prevent losing a yard later.

It would be pointless to mention the verbal exercises engaged in below as to whether the officer "patted", "searched", or "frisked" the accused. It is clear that the State is trying to avoid the categorization of the officer's acts as a "search" (eg. R. 110), as well it might. The court below is similarly concerned with avoiding the "search" characterization (eg. R. 98-100). The reason for such semantic gymnastics is obvious. There was no probable cause herein, and therefore a "search" is not permitted under the Fourth Amendment. Or, phrased differently, since the United States Supreme Court has required probable cause for every lawful search without exception, in order to sustain admissibility herein one is compelled to argue that a "frisk" is not a "search".

A recent comment on Rivera by Professor Norman Redlich, 16 Syracuse L. Rev. 211, 219, (1964), written before the denial of certiorari, concludes:

> If the United States Supreme Court reviews this decision, Judge Fuld's (dissent) is likely to prevail. It is now completely clear that federal search and seizure standards have been made applicable to the states, (citing Ker v. California) and it is most unlikely that the Supreme Court would sanction a procedure which permits this type of invasion of an individual's personal privacy under conditions so removed from the normal requirements of a warrantless search that the only basis for upholding the police conduct is the claim that there has been no search at all. Neither the Rivera decision nor the "Stop and Frisk" law measures up to constitutional standards.

C. The "practical problems" of police enforcement do not require admission of evidence which is illegally obtained.

As has been said, the Supreme Court has never deviated from "probable cause" as the standard of lawfulness of a warrantless search. Ignoring the semantic quibbling, the decisions below and in Rivera really rest on an assumption that under certain circumstances some exception may be made from "probable cause". That is, while it has been shown that saying a "frisk" is not a "search" is absurd, it is not absurd in theory to argue that some overriding public policy could justify use of a lesser criterion of reasonableness even though the Supreme Court has never yet permitted use of any such lesser criterion.

The exclusionary rule was adopted in Mapp to regulate police behavior; the Court recognizes, 367 U.S. at 656:

> ...that the purpose of the exclusionary rule "is to deter--- to compel respect for the constitutional guaranty in the only effectively available way---by removing the incentive to disregard it". Elkins v. United States (364 U.S. 206 at 217)

> ...And nothing could be more certain than that when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police, "slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.?

Or, as the Court concludes, 367 U.S. at 660:

> ...Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise....we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

Thus, we see that both Common Pleas (R.99) and the Rivera court, 201 N.E. 2d at 36 (quoted supra p.11) are in error in justifying admissibilty of the "fruit of the frisk" by "balancing interests" of society against the "minor inconvenience" of the one frisked. They both ignored the Fourth Amendment in striking the balance. It is not merely a question of balancing

"public order" against a "minor inconvenience". The Fourth Amendment adds an overpowering weight to the balance.

As Professor Caleb Foote observed, 51 J. Crim. Law, Criminology and Pol. Sci 402-403, the proponents of expanded police power phrase the question, "In the absence of sufficient grounds for an arrest, should the police have a right to stop and question...if the appearance or conduct of that person has reasonably aroused police suspicion?" The true question is "Should a policeman be allowed to stop and detain even if his action would be unreasonable under the fourth amendment...?" The seductiveness of the former question disappears when it is used to justify unconstitutional behavior.

A closer and more personal view of the reasoning behind the exclusionary rule is given by Justice Roger J. Traynor of the California Supreme Court in Mapp v. Ohio at Large in the Fifty States, 1962 Duke Law Journal 319. In 1942 he had written an opinion permitting illegally obtained evidence to be used in California because of "the overwhelming relevance of the evidence". (Id. at 321) If this opinion, in his words (Ibid.):

> ...was hardly a ringing endorsement of illegally obtained evidence, it was all that was needed as a ticket of admission. ...time after time it was being offered and admitted as a routine procedure. It became impossible to ignore the corollary that illegal searches and seizures were also a routine procedure subject to no effective deterrent; else how could illegally obtained evidence come into court with such regularity? It was one thing to condone an occasional constable's blunder, to accept his illegally obtained evidence so that the guilty would not go free. It was quite another to condone a steady course of illegal police procedures that deliberately and flagrantly violated the Constitution of the United States as well as the state constitution. (Emphasis supplied)

But does not exclusion of illegally obtained evidence permit the guilty to go free? Not necessarily, he continues (Id. at 322):

> It is a large assumption that the police have invariably exhausted the possibilities of obtaining evidence legally when they have relied upon illegally obtained evidence. It is more rational to assume the opposite when the offer of illegally obtained evidence becomes routine. (Emphasis Supplied)

Thus, in 1955 he overruled himself, and California adopted the exclusionary rule six years before Mapp.

What is the function of the exclusionary rule? Justice Trayor continues (Id. at 334):

> ...the raison d'etre of the exclusionary rule is the deterrence of lawless law enforcement...The objective of exclusion is certainly not to afford criminals a right to escape prosecution. At most the exclusionary rule will afford them a fortuitous escape when there is no way of obtaining evidence against them constitutionally. The objective of the exclusionary rule is certainly not to compensate the defendant for the past wrong done to him any more than it is to penalize the officer for the past wrong he has done. The emphasis is forward.

A similar conclusion was reached by one of the "impressive authorities" relied on by the Rivera Court. Assistant District Attorney (of New York County) Kuh, in 151 N.Y. Law Journal # 106, page 4 (May 29, 1964), column 4 stated that police do conform to court sanctions; in New York they now in fact get search warrants whereas they rarely did before Mapp.

Thus it should be clear that the decision herein will go much beyond determining the fate of the defendants. The result will effectively determine the pattern of police behavior in the future. See also, Mr. Justice Douglas' concurrence in Mapp v. Ohio, 367 U.S. 643, 666 especially at 670.

The convenience of the police should not set the standards for police behavior (see Mapp quote, supra p.16). But society cannot ignore the growth of crime, and the possibility that procedures developed in medieval England might be wanting in twentieth century America. However, it will be shown that the interests of society are best served by the probable cause standard.

In general, there have been three major attempts in recent years to allow a deviation from probable cause as the standard for warrantless searches and seizures. Each of these---the Uniform Arrest Act, New York's "Stop and Frisk" Law, and the judicially created exception of Rivera -and Common Pleas Court in the case at bar recognize the problems of enforcement under the probable cause requirement. Since the interplay of forces underlying each of these attempts to dilute the Fourth Amendment, is the same as that in this case--the extent to which personal freedom must be curtailed in the interest of society, and vice versa--a brief study of each will be made.

The Uniform Arrest Act is discussed fully, and its text appears, in Warner, the Uniform Arrest Act, 28 Va. L. Rev. 315 (1942). Section 2 of the Act permits a "detention" if a peace officer stops a person "whom he

has reasonable ground to suspect is committing, has comitted or is about to commit a crime...", and he is not satisfied with the suspect's answers to his preliminary questions. Such "detention" "...shall not exceed two hours... (and) is not an arrest..." For purposes of simplicity this will hereinafter be referred to as the "reasonable suspicion" standard. This began the attrition of "probable cause" by semantics; since a "detention" is not an "arrest", it does not invoke the standards developed to handle arrests. Obviously "reasonable suspicion" is intended to be found where no probable cause exists; otherwise the provision is superfluous. Section 3 then goes on to permit a "search for a dangerous weapon" of anyone stopped or detained pursuant to section 2, if the officer "...has reasonable ground to believe that he is in danger..." if the suspect possesses such weapon. The Uniform Act has been enacted in only three states. Note that it did not attempt any semantic quibbling about a "frisk" not being a search.

The first test of the constitutionality of this Act in any state Supreme Court occurred in De Salvatore v. State, 52 Del. 550, 163 A. 2d 244 (1960). The defendant therein argued that "probable cause" which is "reasonable ground to believe" is the constitutional standard as opposed to "reasonable suspicion" in the Uniform Act. The court said, 163 A. 2d at 249:

> We can find nothing in (section 2 of the Act) which infringes on the rights of a citizen to be free from detention except, as appellant says, "for probable cause". Indeed, we think appellant's attempt to draw

> a distinction between an admittedly valid detention upon "reasonable ground to believe" and the requirement of (section 2) of "reasonable ground to suspect" is a semantic quibble. (sic!)... In this context, the words "suspect" and "believe" are equivalents.

As said by Professor Caleb Foote in "The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?", 51 Journal of Crim. Law, Criminology and Police Sci. 402 (1960) at 403:

> Such a construction of the Uniform Arrest Act, of course, saves its constitutionality at the expense of negating its whole purpose. Clearly this is (not intended)... by the act, the objective of which was to increase and not just to restate police power... The word "reasonable" as a qualifyer of suspicion in these proposals must be understood to include at least part of what would be unreasonable under present law. It is perhaps poetic justice that this little deception has backfired in its first court test.

Rhode Island has adopted the identical construction of section 2, extensively quoting from De Salvatore. Kavanaugh v. Stenhouse, _____ R.I._____, 174 A. 2d 560, 563 (1961). New Hampshire, the third state which has the Uniform Act, apparently has not construed this phrase.

It is therefore obvious that the privilege of "detention", and the derivative privilege of frisking, under the Uniform Act is constitutional only if it is construed to require probable cause. And since these cases were both pre-Mapp, there can be little doubt that this result would be even more obvious today. It is submitted that unless probable cause is engrafted onto the Uniform Act, sections 2 and 3 must fail constitutionally, since

they would otherwise violate the proviso in Ker v. California (quoted supra at p. 12). There is simply no way to ignore the two words---probable cause---in the Fourth Amendment.

New York's so-called "Stop and Frisk" Law, N.Y. Code Crim. Proc. 180 a, went into effect on July 1, 1964. While the highest court in New York, the Court of Appeals, has not yet ruled on its constitutionality, that court's opinions in Rivera and Pugach (supra) can leave no doubt that the statute will be upheld, unless the Court changes its 6-1 mind or unless the United States Supreme Court finds the New York law contrary to the Fourth Amendment.

The first clause of this section permits a police officer to:

> ...stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or (certain misdemeanors, eg. carrying a dangerous weapon), and may demand of him his name, address and an explanation of his actions.

It is readily apparent that this is far short of the two-hour "detention" of the Uniform Act. But it is certainly arguable that any such "stopping" is an arrest (or a Fourth Amendment "seizure") and therefore must meet the test of probable cause, or be unconstitutional. For example in Henry v. United States, 361 U.S. 98 (1959), at 104, the Court says:

> Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest.

And although the government conceded the time of arrest in Henry as the time the officers stopped the automobile (361 U.S. at 103), the government's reservation at footnote 7 (Ibid.) coupled with its later concession of the same point in Rios v. United States, 364 U.S. 253 at 261-62 (1960), implies that the stopping is enough to constitute an arrest.

Although the Supreme Court has not squarely held that an arrest occurs at the first instant of restraint upon the victim (because of the above concessions in Henry and Rios), the lower courts have done so. Long v. Ansell, 69 F. 2d 386, 388-89 (D.C. Cir. 1934); United States v. Scott, 149 F. Supp. 837, 840 (D.C. Dist. 1957). See also Professor Foote's discussion in 51 J. of Crim. Law, Criminology and Pol. Sci. at 402-08.

Thus, if a "stopping" is an "arrest", unless "reasonable suspicion" is equated with "probable cause" (as occurred with the Uniform Arrest Act (supra)) the first clause of New York's 'Stop and Frisk" Law is unconstitutional. Since the second clause on "frisking" (quoted below) is dependent upon the lawful stopping in the first clause, that would necessarily fail also.

But even if it is conceded that a policeman may, under circumstances which fall somewhat short of probable cause, have a limited right to stop a "suspicious" person and ask his name and his business, it does not necessarily follow that this limited right of inquiry necessarily confers the right to "lay hands on a citizen". (Henry quote supra). That is, even if

the "stopping" contemplated by the first clause of the New York Statute does not rise to the dignity of an arrest in the constitutional sense, and is therefore lawful if there is only "reasonable suspicion", it does not necessarily follow that a frisk incident to such stopping is similarly lawful.

The second clause of the "Stop and Frisk" statute provides:

> 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.

As with the Uniform Act there is no hairsplitting; a "search" not a "frisk" for a weapon is permitted. And as De Salvatore (supra) showed, it is "semantic quibbling" to differentiate between "reasonable suspicion" and "reasonable belief". Since Brinegar found "probable cause" to be " a reasonable ground for the belief of guilt" (quote, supra p. 6), the standard for a frisk is therefore probable cause. That is, while a mere inquiry may not be an "arrest" for purposes of the first clause, a "search" as stated in the second clause must be a search; therefore the protection of the Fourth Amendment is invoked. Is it logical to assume that "reasonably suspects" in the statute means "probable cause"? It is submitted that this is the only logical construction, since it is the only construction which assures the constitutionality of the frisk clause under the "laying of hands" language of

Henry (supra).

How does this work out in practice? Assume that an officer has lawfully "stopped" a suspect and made the permitted inquiries. He may proceed further---either to search or to arrest---only if the actions and answers (or lack thereof) of the suspect, combined with the previous factors which generated "reasonable suspicion", now have reached the point of "probable cause". This construction is the only one which gives full effect to both clauses of the Stop and Frisk law and still stays within the "proviso" of Ker (quote supra p.12).

The third attack on the "probable cause" requirement is that made by judicial interpretation, as in Rivera in New York, and in the instant case below. In general, these standards are quite similar to those in the Stop and Frisk Statute. Indeed, one wonders if the New York statute is really necessary in that state because of the decision in Rivera.

Testing the case at bar in terms of the above analysis of the New York statute, it is clear that identical reasoning applies. First, the officer's actions are separable into (1) the stop-inquiry stage and (2) the frisk stage. Each may stand or fall on its own---except that the frisk cannot stand if the stop is illegal. Thus the court below is in error when it said (R. 97):

> Our courts in Ohio have on many occasions expressed that a police officer has the right to stop a suspicious person for the purpose of interrogation. Therefore, can it be said that the frisking of said person by the officer for the purpose of his own safety is a standard set by our State that is violative of the Fourth Amendment....(Emphasis supplied)

It does not follow therefore at all. As shown above, there is no logical inconsistency in allowing an inquiry and in barring a search unless the inquiry raises "reasonable suspicion" to the level of "probable cause".

The uncited Ohio decisions mentioned in the above quote must obviously be prior to Mapp and Ker. It is now clear that Ohio must conform to the Federal constitutional standard; therefore these prior cases are no longer applicable. While the states are free to develop their own procedures under the Ker proviso, supra p. 12 , this proviso limits them minimally to the Federal standard. Beck v. Ohio, 379 U.S. 89 at 92 (1964). Only within these constitutional limits are states free to develop their own "workable rules".

If the frisk must meet the standards of probable cause independently of the stop-inquiry, on the facts of the instant case this has clearly not been approached. If there had been probable cause, Common Pleas could not have found that there was no lawful arrest (R. 100). And as shown above p.22-23, this conclusion was correct under the "laying of hands" doctrine of Henry.

The question of police safety cannot be handled at the same academic level as much of the rest of this brief. For one thing, the job of the police is hazardous enough without imposing unrealistic limits on their self-protection. For another, the frisk is not meant, we are told, to gather evidence; it is done solely to protect the lives of police. (R. 98). It is submitted however, that there is no necessary correlation between protecting the lives of police and the admissibility of the "fruit of the frisk" into evidence.

Assume that the sole function of the frisk is to protect the lives of the police; and therefore upon reasonable fear of his life, a police officer may lawfully frisk a suspect without probable cause. How is the sole purpose of protecting police lives aided by permitting the introduction of the evidence obtained thereby at the trial of the accused? If this "protection" were the sole purpose, it could be completely achieved by conferring upon a police officer a privilege to search for dangerous weapons based upon a reasonable fear of his life---he would be immune from suit or other punishment for such "petty indignity" to the one searched so long as his fear was in fact reasonable. There would be no need to permit use of the fruits of the frisk to protect the police.

The truth is that, as it exists today, a frisk generally is not designed solely to protect the police. To some degree or other, most frisks also have the function of a preliminary or exploratory search. For example in People v. Pugach, 15 N.Y. 2d 65, 204 N.E. 2d 176 (1964), the "frisk"

consisted of opening the suspect's briefcase after he had been "patted down" and was seated in the back seat of a moving police car between two officers, with another officer in front. If the sole motive of the "frisk" was self-protection, it is apparent that this was accomplished at the time one officer in the back took the briefcase from the suspect; if the officer was still insecure, he could have put the briefcase in front of the car. In no way was the search of the briefcase needed to protect the lives of the police.

In most situations, the officer's fear will be more reasonable than in Pugach. But also in most cases it must be recognized that there is more than a protection-of-life factor involved in a "frisk".

It is submitted that the only way to balance the just rights of the police with the constitutional rights of suspects is to use the former to test the privilege of the frisk, but the latter to test the admissibility of its fruits. That is, a frisk would be permitted whenever the officer reasonably feared for his life; but the fruits thereof would be admissible only if probable cause for an arrest or a search existed at the time of the frisk. This would assure that a frisk would be used only if the officers in fact feared for his life. It would not be a routine police procedure to gather evidence in violation of the Constitution.

In other words, while police have a valid interest in self-protection, such interest should not be used as a blanket justification of unconstitutional police action in the production of evidence. Possibly the frisk is today

universally used by police as a matter of routine; but this must be"... overridden without regard to 'the incidence of such conduct by the police', slight or frequent." Mapp v. Ohio, 367 U.S. at 656. The realities of life will demand that an officer will in fact always frisk a suspect if he fears for his life, regardless of the constitution. And he should properly have this privilege of self-protection if his fear is reasonable. But this privilege does not overcome the suspect's constitutional right to be free of illegal searches and seizures. Balancing the interests of the police and of the people, the solution proposed above satisfies both. To assure the guarantees of the constitution the fruit of the frisk must be excluded from evidence; protection of police lives is not relevant to the issue of admissibility of evidence illegally seized.

Finally, it is argured (R.97) "...police officers have a job to do, and they must do the job in connection with crime which has been on the increase." And reversal of the decision herein would not (Ibid.) "...meet the practical demands of effective criminal investigation." It is frequently argued that legal "technicalities" give undue advantage to criminals, and that police should be "unshackled" to fight crime effectively. It seems obvious that every restriction on police hampers law enforcement.

However this view confuses the long-run and the short-run. As the Supreme Court said in Mapp, 367 U.S. at 658 (quoting Miller v. United States, 357 U.S. 301, 313 (1958):

> However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness.

And this view impliedly measures "effectiveness" in terms of the number of convictions. But as Professor Foote says, 51 J. Crim. Law, Criminology and Pol. Sci. at 405:

> In a democracy police effectiveness is measured even more by what the police do not do than by their positive accomplishments (quoting Schwartz, On Current Proposals to Legalize Wiretapping, 103, V. Pa. L. Rev. 157, 158 (1954):
>
> > " ...the worth of a society will eventually be reckoned not in proportion to the number of criminals it crucifies, burns, hangs or imprisons, but rather by the degree of liberty experienced by the great body of its citizenry. There have never been more determined law enforcers than Nazi Germany or the Soviet."

But even if it is conceded that law enforcement is not as "effective" as it could be, it is fallacious to argue that it would necessarily be improved if the "short cuts" methods (see Mapp quote supra) were approved. As the Mapp decision stated, 367 U.S. at 659-60:

> ...Nor can it lightly be assumed that, as a practical matter, adoption of the exclusionary rule betters law enforcement. Only last year this Court expressly considered that contention and found that "pragmatic evidence of a sort" to the contrary was not wanting, Elkins v. United States (364 U.S. 206, 218). The Court noted that
>
> "The federal courts themselves have operated

> under the exclusionary rule of Weeks for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation (citing remarks of J. Edgar Hoover quoted in Elkins supra at 218-19) has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted..." Id. 364 U.S. at 218, 219.

Similarly, Professor Foote (supra at 405-406) argues that improved law enforcement may be had by improving the quality of policemen, also using the F.B.I. as an example. Or it may be improved by increasing the quantity of police in areas of high crime. He concludes (Ibid.):

> The chief disadvantages of these alternatives is that they cost money and require the exercise of political and administrative statesmanship, whereas enacting new arrest laws offers the illusion of doing something about crime without financial or political complications and has a natural appeal to political expediency. I suspect that in police work, as elsewhere one generally gets no more than he pays for, and that legislation on police power is a wholly inadequate substitute for responsible police fiscal and personnel policy.

Finally, the then-Attorney General (now Governor) Brown of California commented upon the effect of the exclusionary rule in California as follows (Note, 9 Stanford L. Rev. 515 at 538, (1959):

> The over-all effects of the Cahan decision...have been excellent. A much greater education is called for on the part of all peace officers of California. As a result, I am confident they will be much better police officers. I think there is more cooperation with the District Attorneys and this will make for better administration of criminal justice.

Conclusion

There can be no question that if the officer had "searched" the accuseds in this case the fruits of the unlawful search would be excluded under the Mapp rule. Semantic hairsplitting creating an exception because "a 'frisk' is not a search" should not be permitted to erode the Constitution.

Adherence to the Constitution will neither hamper law enforcement nor endanger the lives of the police.

Amicus Curiae, therefore, respectfully urges this court to reverse the conviction of the accuseds.

Respectfully Submitted

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