3-11-1965

65/03/11 Brief of Defendant-Appellant

Louis Stokes

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

NO. 27230

THE STATE OF OHIO

Plaintiff-Appellee

- vs -

RICHARD D. CHILTON

Defendant-Appellant

BRIEF OF DEFENDANT-APPELLANT

On behalf of Plaintiff-Appellee:

Reuben Payne, Assistant County Prosecutor
1560 East 21st Street
Cleveland, Ohio

On behalf of Defendant-Appellant:

Louis Stokes, Esq.
2584 East 55th Street
Cleveland, Ohio - 44104

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

NO. 27230

THE STATE OF OHIO

Plaintiff-Appellee

- vs -

RICHARD D. CHILTON

Defendant-Appellant

BRIEF OF DEFENDANT-APPELLANT

On behalf of Plaintiff-Appellee:

Reuben Payne, Assistant County Prosecutor
1560 East 21st Street
Cleveland, Ohio

On behalf of Defendant-Appellant:

Louis Stokes, Esq.
2584 East 55th Street
Cleveland, Ohio - 44104

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARTICLES

REFERENCE BOOKS

STATUTES

STATEMENT OF THE CASE

The defendant filed a pre-trial motion to suppress the evidence herein. Upon hearing on the motion to suppress, the defendant called the arresting officer for examination.

The officer testified that his name was Martin McFadden; that he had been a police officer for 39 years and four months; and that he had been assigned to the Detective Bureau for 35 years.

He further testified that on the 31st day of October, 1963, he first observed one John Terry and one Richard Chilton standing at the corner of Huron Road and Euclid Avenue where these two streets intersect at East 13th Street in the City of Cleveland. That it was 2:20 or 2:30 p.m., and that it was broad daylight. After observing these two males standing at the corner talking, he positioned himself in the lobby of Rogoff's store, near 14th Street on Huron Road, for the purpose of further observation. During a period of some 10 to 12 minutes, he observed that one male would stand at the corner while the other one would walk up Huron Road. That this male would stop and look into either the Diamond Store or the United Airlines Office for a second or so and then continue west on Huron Road near Halle Brothers store. He would then turn around, come back to the spot where the stores were, peer in the window, and go back to the corner where he would talk with the waiting male. Then the man who had been waiting would go through this same procedure. The testimony with reference to the number of trips each man made varied from two to three times each to four to five times apiece. (R. 14, 22, 24)

During this 10 to 12 minute period of observation, the officer stated that he saw a short, white man come over to the corner, converse with these two colored males for a minute or so, and then walk west on Euclid.

He then observed the two colored males walk west on Euclid Avenue in a natural manner, and at Zucker's store, 1120 Euclid Avenue, he saw them stop in front of this store and again converse with the same white male.

The officer further testified that these three men were just standing in front of the store with their backs to the display window; that they were just talking; and that he approached them and stated that he was a police officer. He said that he asked them their names and that "they gave it to me quick." (R. 16) (At all other places in the record he says "they mumbled something.") Then without any further conversation between the officer and these men, and no overt act on the part of the men, the police officer conducted himself as follows:

> "A. . . . . I got Chilton then, not Chilton but Terry, and I turned him around and I stood in the back of them, and I searched them, and in his upper left hand pocket of his top-coat I felt a gun and I went in for it and I had a tough time getting it, so I took the coat off. I at that time informed them, the three of them, to keep their hands out of their pockets and walk into the store. When they got into the store I told them to face the wall, keep their hands away, and on searching Chilton in his left hand pocket of his top-coat I found a gun, a '38, and searching Katz I found nothing." (R. 16, 17)

The three men were then taken to the Cleveland Police Station where they were booked for "Investigation." A day or so later, Terry and Chilton were charged with "Carrying a Concealed Weapon," a felony, and Katz was charged with "Being a Suspicious Person," a misdemeanor.

The officer admitted that there were people on the street when this matter occurred and that the stores were open and that there was business as usual in the downtown area. He admitted that he did not know any of these men (R. 119); that no one had furnished him any information regarding them (R. 119); and that his reason for watching them was that "they didn't look right to me at the time." (R. 119) With reference to his reason for approaching the men in front of Zucker's and turning Terry around and patting him down, the officer testified as follows: "In the first place I didn't like their actions on Huron Road, and I suspected them of casing a job, a stick-up, that's the reason." (R. 42) He said that he patted them down". . . . .to see what they had, if they had guns." (R. 42) However, he testified under inquiry by the Court that in 39 years as a police officer and 35 years as a detective, that he had no experience in observing individuals casing a place and had never observed anybody casing a place. (R.46)

COURT'S RULING ON MOTION TO SUPPRESS

The Court found that there was no warrant for a search or frisk and further found that there was no lawful arrest here. (R. 96) However, the Court cited Ker vs. California, 374 U.S. 23, as authority for the States to develop workable rules governing searches to meet the practical demands of effective criminal investigation. It is in this vein, then, that the Court determined that a police officer has the right to stop a suspicious person for the purpose of interrogation and that the police officer has a right to frisk such a person for the purpose of his own safety, and that in so doing, his conduct is not violative of the Fourth Amendment. (R. 97)

The Court distinguishes between a stop and frisk and a search and seizure (R. 98). Further, the Court found that there was reasonable cause in this case for the police officer to approach these men and pat them (R. 98), and that the frisk was for his own protection.

The Court admits that had he gone into their pockets and obtained evidence, as an example, narcotics or illegal slips, there would be no question of an illegal search and seizure (R. 98), but distinguishes the seizure of guns from the person of the defendants on the theory that the guns are the fruit of the frisk and not of the search. (R. 98, 100)

The Court then reiterated its finding that search and seizure law cannot be applied in this case; again rejected the prosecution's contention that this was a lawful arrest, and made its finding that the arrest came subsequent to the frisk. (R. 100) However, the Court overruled the Motion to Suppress on the grounds that there is a distinction between a "frisk" and a "search and seizure."

ASSIGNMENTS OF ERROR

1. The Court erred in not sustaining defendant's Motion to Suppress upon making its finding that the arrest herein was illegal. (R. 96, 100)

2. The Court erred in refusing to apply constitutional guarantees prohibiting illegal searches and seizures and substituting therefor a doctrine of stop and frisk.

LAW AND ARGUMENT

Law As To First Assignment of Error: That the Court erred in not sustaining defendant's Motion to Suppress upon making it's finding that the arrest herein was illegal.

The Court was correct in its finding that the arrest in this case was not legal. (R. 96, 100) It was, therefore, incumbent upon the Court to suppress the evidence which was the product of an unlawful arrest, and the failure of the Court to suppress was prejudicial to this defendant.

In its findings, the Court relied upon Ker vs. California, supra, as authority for a State being able to establish its own rules and standards pertaining to search and seizure in order to meet the practical demands of criminal investigation and law enforcement. We find no quarrel with this rationale; however, Ker vs. California, supra, made it clear that constitutional guarantees could not be abandoned. At page 33, Id., the Court said:

> "We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of the Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with Federal constitutional guarantees."

We were unable, in our search of the authorities, to find any instance where a court permitted into evidence the product of an unlawful arrest. In this case, upon making its finding that the arrest was unlawful, the search incidental thereto was unreasonable.

It was Ker vs. California, supra, which clearly set forth the following principle of law:

"The evidence at issue, in order to be admissable, must be the product of a search incident to a lawful arrest, since the officers had no search warrant. The lawfulness of the search without warrant, in turn, must be based upon probable cause, which 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. Brinegar v United States, 338 U.S. 160, 175-176 (1949), quoting from Carroll v United States, 276 U.S. 132, 162, (1925); accord, People v Fischer, 49 Cal. 2d 442, 317 P. 2d 967 (1957); Bompensiero v Superior Court, 44 Cal. 2d 178, 281 P. 2d 250 (1955)."

In Ohio, under the provisions of Ohio Revised Code, Section 2935.04, when a felony has been committed, or there is reasonable grounds to believe that a felony has been committed, any person may arrest without a warrant one whom he has reasonable cause to believe is guilty of such offense, and detain him until a warrant can be obtained.

In order for a police officer to arrest for a felony not committed in his presence, he may make such arrest only if he has probable cause to believe a felony has been committed and probable cause to believe that the person arrested committed it. In the instant case, no felony had been committed. Since the police officer in this case did not conduct any interrogation of the defendant and his companions other than an inquiry as to their names, and as soon as he was answered he grabbed one of the men and ordered the three of them into the store, his purpose was to arrest and not to interrogate.

"To justify arrest without warrant, officer must believe offense is being committed and must believe on evidence

"of his own senses in case of misdemeanor and in case of felony on credible evidence of other persons." Bock vs. Cincinnati, 43 OA 257, 183 NE 119, Beck vs. Ohio, 13 L Ed 2d 144.

In considering whether the officer had probable cause for arrest, we find the following:

1. When asked at what point he considered their actions unusual, his reply was "Well, to be truthful with you, I didn't like them. I was just attracted to them, and I surmised that there was something going on when one of them left the other one and did the walking up, walk up past the store and stopped and looked in and came back again." (R. 118)

2. The following testimony is found at R. 119:

"Q. You didn't know either one of these men did you?

A. I did not.

Q. And no one had furnished you any information with regard to these two men, have they?

A. Absolutely no information regarding these two men at all. I am telling the truth when I say that."

3. The following testimony at R. 121:

"Q. Now when you saw this white man come over and talk to the two of them, there at the corner of Huron and 14th, did you know this white man?

A. No, I didn't.

Q. You had no information with reference to this white man?

A. No information on anything that I -- on anything that I seen, anything that I seen I had no information whatsoever on."

4. The following testimony at R. 129-134:

"Q. Well, you tell the court as you walked through the door you said 'Order the wagon' and as you further say you were then arresting Chilton, Terry and Katz --

A. That's right.

Q. What were Chilton and Katz being arrested for?

* * *

Q. What were Chilton and Katz being arrested for?

A. Association.

Q. Is that your complete answer, sir?

A. Well, they were found in company with a man with a revolver.

Q. So then at that point they were being arrested for association?

A. They were being arrested, yes, period.

Q. Do you know of any charge under Ohio Law entitled 'Association'?

* * *

Do you know of any charge under Ohio Law entitled 'Association'?

A. As far as I know, I don't know."

5. The following testimony at R. 45:

"Q. But when you walked up to these men and you first spoke to them you did not know that these men had guns on them, did you?

A. Absolutely not."

It is submitted that the above colloquy is illustrative of the absence of probable cause for arrest.

The after-the-event justification does not create probable cause. An arrest without a warrant by-passes the safeguards provided by an objective pre-determination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. Beck vs. Ohio, supra, 142; Wong Sun vs. United States, 371 U.S. 471, 479, 480; 9 L Ed 2d 441, 450; 83 S. Ct. 407.

Here, the police officer acted upon suspicion alone. The Supreme Court has made it clear that good faith on the part of the arresting officer is not enough. Beck vs. Ohio, supra; Henry vs. United States, 361 U.S. 98, 102; 4 L Ed 2d 134, 138; 80 S. Ct. 168.

An Ohio case in point is Rasey, et al vs. Ciccolino, Admx., 1 OAP 194; 18 CC(NS) 331; 24 CD 294, wherein the Court held:

Syllabus:

"1. A police officer is not authorized to arrest a person passing peaceably along a highway, without a warrant, on a mere venture, without any knowledge or reliable information, though in fact, as afterwards discovered, concealed weapons were found on the person so arrested.

"2. A police officer has no authority to search a person passing peaceably along a highway of a municipality until he has placed such person under arrest, and the circumstances must be such as to give reasonable and probable grounds to justify such arrest."

It was evident in this case that the police officer did not search for weapons for the purpose of conducting a safe interrogation. His sole purpose was to seize evidence to justify his suspicions. The record reveals that he did nothing but hold one of the guns on the three men until other

police arrived and that he had no further conversation with them until the following day in jail. (R. 161, et seq.)

Detective McFadden had no right to seize Terry or the other men under the facts in this record. The Court, in Green vs. United States, 259 Fed 2d 180, U. S. Court of Appeals, District of Columbia Circuit, said:

> "The Courts in various opinions have said that officers in the course of an investigation may ask questions before making an arrest. The narcotic officers were entitled to ask "Jap" Palmer, the known addict, if he were still using narcotics, and then make an effort to induce him to inform them as to his source of supply. He could have declined to talk. He could have refused to halt. The officers certainly would have had no right, whatever, then and there without more, either to seize him or search him."

In our case, the Court said in its findings, "Had he gone into their pockets and obtained evidence, as an example, narcotics or illegal slips, there would be no question of an illegal search and seizure." (R. 98) Whether the search is with or without a warrant, the general rule is that the officer may seize contraband, fruits or instrumentalities of crime, but not mere evidence. Harris vs. United States, 331 U.S. 833 (1956). There was no evidence that these guns were involved in any crime and the sole purpose for which they were used in this case was to produce evidence of the crime of carrying a concealed weapon.

The arrest herein was incidental to a search which is constitutionally prohibited. In White vs. United States, 106 U.S. App. D.C. 246; 271 F. 2d 829 (1959), at 2:00 a.m., the defendant was walking in company with another and kept looking over his shoulder; the officer stopped both men and obtained identification papers; the defendant's statements were in conflict

with his identification, so the officer "patted" the defendant down; the defendant admitted that he did not have a job and lived off gambling earnings; he was arrested for vagrancy and required to disrobe. The Court placed reliance on the fact that there was no outcry or report of a felony or misdemeanor committed in the officer's presence, and characterized the transaction an arrest incidental to a search.

Other jurisdictions have had to deal with similar situations regarding searches relating to unlawful arrests wherein a gun was found on the person of the arrestee. In Powell vs. Commonwealth, 307 Ky. 545; 211 S.W. 2d 850 (1948), which case was decided even prior to Mapp vs. Ohio, 367 U.S. 643, a constable who did not have any warrant against Powell picked him up as he was getting out of a cab in Richmond, and while he was not committing any public offense, upon arrival at the Sheriff's office, and while searching to see if any warrant was outstanding against Powell, the constable noticed that Powell "had a big bulk" about his clothing, searched him and found and lifted a pistol from his person. He was convicted of carrying a concealed deadly weapon. The case was reversed with the Court saying:

> "Neither did the Commonwealth establish that Powell was on this occasion under a legal arrest, which is a situation that can result only from the seizure of a person 1) by a warrant in hand, or 2) upon his commission of a public offense in an officer's presence or 3) upon some reasonable belief that the person has committed a felony."

We were particularly impressed with the following language used by the Court:

"It is better that a man like Powell, who certainly deserved to suffer the penalty provided by law for carrying a concealed weapon, entirely go free on such a charge rather than to sanction his present conviction by an illegal invasion of that liberty guaranteed to him and to his forefathers since that far distant day in the year 1215 when Magna Carta was wrung from King John at Runnymede out of the contrariness of that ruler's wicked and tyrannical heart."

In United States vs. DiRe, 332 U.S. 481 (1948), also decided before Mapp vs. Ohio, supra, the Court cited law which we feel is applicable. The Court was not dealing with a search which revealed a gun, but laid down certain governing principles relating to unlawful searches which are applicable in the instant case. In the cited case, there were three men in an automobile wherein the driver was suspected of selling counterfeit gas ration coupons. When approached by Federal and State of New York police officers, the informer had coupons in his hand and stated that they were obtained from the driver. Without previous information implicating respondent, and without a warrant, the State officer arrested respondent and the driver but did not search the car or state the charge of which respondent was arrested. At the police station, respondent was searched and counterfeit coupons were found on his person. Respondent was convicted of possession. Held: The search was unlawful and the conviction cannot be sustained.

The syllabus of this Supreme Court case sets out the principles which are applicable to our case:

Syllabus:

"2. By mere presence in a suspected automobile, a person does not lose immunities from search of his person to which he otherwise would be entitled.

"3. In the absence of an applicable Federal Statute the law of the State where an arrest without warrant takes place determines its validity.

"7. A search is not made legal by what it turns up; in law it is good or bad when it starts and does not change character from its success. (Emphasis supplied)

"8. That law enforcement may be made more difficult is no justification for disregarding the constitutional prohibition against unreasonable searches and seizures."

The opinion herein was written by Mr. Justice Jackson. At page 591 of this opinion is the dictum which sets forth the guideline rule which would have to be applied in our case:

"Therefore the New York Statute provides the standard by which this arrest must stand or fall. Since under that law, any valid arrest of DiRe, if for a misdemeanor must be for one committed in the officer's presence, and if for a felony must be for one which the officers had reasonable grounds to believe the suspect had committed, we seek to learn for what offense this man was then taken into custody?"

Mr. Justice Douglas also gives us an answer in this case to the State's argument with reference to an "appeal to necessity" to search persons suspected of crime. Even the argument that if the police are not permitted to search for weapons, two gun-toters will be freed, is met in the following dictum at page 595:

"We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be made more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand." (Emphasis supplied)

The Supreme Court of the State of Illinois has dealt with a case similar to ours and had no difficulty in suppressing guns that were the product of an unlawful arrest. In People vs. Henneman, 367 Illinois 151; 10 N.E. 2d 649; 357 Michigan Law Review 311, two police officers testified in this case that at about 8:00 a.m. of December 10, 1936, they were informed by other police officers that two suspicious characters were riding in a car in the neighborhood of 49th Street. At 9:15 on that day, these officers spotted two men sitting in a car parked at the curb on that street. The officers approached the car and placed the plaintiff in error, the passenger, under arrest; searched him and the automobile and found two loaded guns in the glove compartment of the car. Motions to suppress were filed and overruled by the trial court who found the plaintiff in error guilty of carrying a concealed weapon.

The Supreme Court of Illinois reversed with the Court stating at page 650:

> "The discovery of a pistol or revolver on search following an arrest cannot relate back to, and operate as a justification for, the arrest. The arrest must be legal or the search is illegal. People vs. Ford, 356 Ill. 572; 191 N.E. 315; People vs. Macklin, 353 Ill. 64; 186 N.E. 531."

In our case, we are concerned with the lack of probable cause and the arrest, search and seizure taking place because the police officer didn't like their looks. The defendants here were standing on the street, conversing in a normal manner, in broad daylight, on Euclid Avenue, with business as usual in the downtown area and people on the street. We found a similar case where men were found on the street at night and where the defendant and

his companion were searched by a police officer, after being seen in the warehouse district, at 10:40 p.m. In People vs. Simon, 290 P 2d 531, the Court held:

> "Under these circumstances, to permit an officer to justify a search on the ground that he didn't feel 'that a person on the street at night had any business there' would expose anyone to having his person searched by any suspicious officer no matter how unfounded the suspicions were. Innocent people, going to or from evening jobs or entertainment, or walking for exercise or enjoyment, would suffer along with the occasional criminal who would be turned up."

The Court in the instant case said in its findings on the Motion to Suppress:

> "I believe and I reiterate again that search and seizure law cannot be applied in this particular case, although Mr. Reuben Payne endeavored to show there was a lawful arrest, but the court cannot agree. If there was an arrest, it came subsequent to the frisk." (R. 100)

Our question then is: Can the Court refuse to apply search and seizure law where an arrest is unlawful? The obvious answer is "No." We refer the Court to Constitutional Law, American Casebook Series, by William B. Lockhart, Yale Kamisar and Jesse H. Choper, at page 751:

> "Does An Illegal Arrest--Without More--Violate the Fourth and Fourteenth Amendments? The Supreme Court has indicated that such an arrest in itself violates the Fourth Amendment. See Henry vs. United States, 361 U.S. 98, 100-101; 4 L Ed 2d 134, 137-38; 80 S. Ct. 168, 170 (1959); Giordenello vs. United States, 357 U.S. 480, 485-86; 2 L Ed 2d 1503, 1509; 78 S. Ct. 1245, 1250 (1958); Albrecht vs. United States, 273 U.S. 1, 5; 71 L Ed 505, 508; 47 S. Ct. 250, 251 (1927). Both logic and history point in the same direction. The Fourth Amendment guarantees 'The right of the people to be secure, first of all, "in their persons"' and an unreasonable seizure of the person

"seems to be a greater invasion of liberty and privacy than the similar seizure of one's effects."

Taking the evidence in this case in its best light, considering that the police officer did not know any of these men; had no information on any of them; had no knowledge of the commission of a misdemeanor or felony; had no warrant for search or arrest; and attempted no interrogation of the arrestees; this arrest occurred on the basis of suspicion alone. Such an arrest is, of course, illegal. See Mr. Justice Douglas' dissent in Draper vs. United States, 358 U.S. 307; 3 L Ed 2d 327; 79 S. Ct. 329 (1959), wherein he quoted from an article written by Professors Hogan and Snee of Georgetown University, 47 Georgetown Law Journal 1, 22:

> "It must be borne in mind that any arrest based on suspicion alone is illegal. This indisputable rule of law has grave implications for a number of traditional police investigative practices. The round-up or dragnet arrest, the arrest on suspicion, for questioning, for investigation or on an open charge all are prohibited by law. It is undeniable that if those arrests were sanctioned by law, the police would be in a position to investigate a crime and to detect the real culprit much more easily, much more efficiently, much more economically, and with much more dispatch. It is equally true, however, that society cannot confer such power on the police without ripping away much of the fabric of a way of life which seeks to give the maximum of liberty to the individual citizen. The finger of suspicion is a long one. In an individual case it may point to all of a certain race, age group or locale. Commonly it extends to any who have committed similar crimes in the past. Arrest on mere suspicion collides violently with the basic human right of liberty. It can be tolerated only in a society which is willing to concede to its government powers which history and experience teach are the inevitable accroutrements of tyranny."

When the police officer herein was querried as to what Chilton and Terry were being arrested for, his reply was "Association." (R. 129-34)

It is clear from the evidence that Chilton and Katz had not yet been patted down or searched when they were ordered off the street and into the store, and the gun had not at that point been removed from the pocket of Terry's coat. Here we invite the attention of the Court to Vagrancy and Arrest on Suspicion, by William O. Douglas, Associate Justice, United States Supreme Court, 70 Yale Law Journals, at page 12:

> "There is no crime known as 'suspicion' nor is there any Federal crime known as 'holding for investigation.' . . . .Arrests for suspicion are not countenanced by the Bill of Rights. The Fourth Amendment allows arrests—as well as searches—only for 'probable cause.' . . . .Under our system the arrest is warranted not by what the police discover afterwards but by what they knew at the time. . . .The result is that arrests on 'suspicion' are unconstitutional at the local, as well as at the federal, level."

When the police officer in this case exercised dominion over Terry by grabbing him and turning him around, the effect of this action was to submit him to the dominion of the officer. The arrest of all three was complete when all three were ordered off the street. In order for there to be an arrest, it is not necessary that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest. It is sufficient if the person arrested understands that he is in the power of the one arresting, and submits in consequence. Kelly v. United States, 111 U.S. App D.C. 396; F. 2d 310 (1961).

The same holding was reached in Henry vs. United States, 361 U.S. 98 (1954) where F.B.I. Agents had been watching the defendants load cartons

into their car. The agents followed the car as it drove off and waved it to a stop. The government conceded that the arrest took place at this point. Mr. Justice Douglas, writing for the Court, stated, "That is our view of the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest for the purposes of this case, was complete."

Law As To Second Assignment Of Error: That the Court erred in refusing to apply Constitutional guarantees prohibiting illegal searches and seizures and substituting therefor a doctrine of stop and frisk.

The Court, in its findings in this case, found that there was reasonable cause in this case for the police officer to approach these men and pat them. (R. 98) Consequently, the Court found that "He merely tapped them about the outer part of their bodies to determine if they had any weapons or guns, for his own personal protection, and by doing so, he discovered that two of the three individuals had concealed guns, and the guns are the fruit of the frisk, and not of a search." (R. 98) The Court then refused to apply search and seizure law to this situation, although making the finding that the arrests herein were unlawful, and stating, "But as I have stated, and repeat again, there is a distinction between a frisk and a search and seizure." (R. 100)

We refer this Court to page 98 of the Record wherein the trial Court made this further statement: "Had he gone into their pockets and obtained evidence, as an example, narcotics or illegal slips, there would be no question of an illegal search and seizure." In support of our contention that the Court erred, we say that he did go into their pockets and remove

guns, and these guns were used as evidence in this case. There is, therefore, no basis for the narcotics or the illegal slips being subject to the exclusionary rule, and the guns not being subject to it. With respect to Terry, the following testimony was given by the officer: (R. 18)

"Q. Did you remove the gun from his pocket?

A. I removed the coat and the gun."

With respect to Chilton, the testimony of the officer was the same: (R. 18)

"Q. Then what happened, sir?

A. At that time I told them to face the wall and keep their hands away. I then went to Chilton, and the first place I tapped I found that he had a gun, and I went in his pocket and got it. That was a .38 revolver."

In view of the above, we are confronted with the Court's refusal to apply search and seizure law to guns removed from the pockets of these men, while the Court says that if he had removed narcotics or illegal slips from their pockets, search and seizure law would apply. Certainly, this action on the part of the Court was prejudicial error.

The semantic gymnastics utilized here, to differentiate a "frisk" from a "search," caused us to consult Webster's Third New International Dictionary, Volume I, (1961) for reference material, wherein we found "frisk" defined as follows:

> ". . . .2a: to search or go through esp. for concealed weapons or stolen articles. . .esp. to search (a person) for such purpose usually by running the hand rapidly over the clothing and through the pockets. . ."

And in Webster's Collegiate Dictionary, Fifth Edition (1948) the following:

> "Frisk. . . .2. Slang. To search (a person) by running the hand over the clothing, through pockets, etc.; hence, to steal from in such a manner."

We submit that, regardless of the generic term used, i.e., "frisk," "tap," "pat," or "search," the result is a search, and a search incident to an unlawful arrest is constitutionally prohibited. If one "taps," "pats," or "frisks" for narcotics or policy slips, and the finding of the same is an illegal search, then if one "taps," "pats," or "frisks" for a gun, and finds the same, it is an illegal search.

For an analogous situation, we refer this Court to State vs. Collins, 191 A 2d 253, Decided April 30, 1963:

The defendant herein was convicted of breaking and entering. A Motion to Suppress had been overruled. The facts were as follows: At about 2:30 in the morning, two police officers observed the defendant and a companion walking down the street. One of the men carried a small canvas bag. The other man was observed turning his head and looking in the direction of the police car. The policemen drove their car up to the men. The officers got out of their cruiser and stopped the men. They inquired where the two men had been and they replied that they had been in a crap game. One of the police officers took the canvas bag and saw that it contained an electric shaver, rolled money and loose change. It was then decided that the men should be searched. The defendant was ordered to stand still and to put his hands against the police car while he was searched for possible weapons. Both men were taken to police headquarters. A few hours later, the police department

received a complaint that a business place had been broken into and articles stolen. The items in the bag were identified as being stolen from the place broken into.

The Court held that the search of the bag amounted to a partial search of the person, since the bag was a portable personal effect in the immediate possession of the defendant. The Court also held, at page 255:

> "The 'frisking' of the defendant, as he stood against the car, to see if he was armed was also a search of the person. Nothing found as a result of the frisking was offered in evidence, and thus we have no occasion to determine whether, in and of itself, that search could be held reasonable, on the facts of this case, as something done by the officers to assure their own safety." (Emphasis supplied)

In arriving at its opinion in our case, the Court stated, (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 . . ." and further in its opinion, relied upon Ballard vs. State, 43 O.S. 340 and Clark vs. DeWalt, 65 OLA 203, as authority for the right in Ohio to stop and frisk. (R. 100)

We submit that this is no longer the law of Ohio in view of Mapp vs. Ohio, supra. Reference to Ballard vs. State, supra, reveals that it was decided in 1885 under Sections 1849 and 7129 of the Revised Statutes. The Clark vs. DeWalt case, supra, did follow the rule in Ballard; however, this was a 1953 case and was prior to Mapp.

The law of the Ballard case was expressly rejected as no longer being the rule in Ohio in State vs. Rogers, 27 OO (2d) 105. This, too, was

a case in which the defendant was charged with carrying a concealed weapon. A motion to suppress the evidence, to wit, the gun, was filed and also a motion to suppress the testimony of a passenger in the car who was questioned and who is said to have said that the gun was in the possession of the defendant. The Court granted both motions to suppress. In finding here that there was no search incidental to a lawful arrest, the Court, at page 111, said:

> "Quaere—Whether the rule in Ohio is that suspicion and good faith is sufficient to justify an arrest and incidental search without a warrant. I think not."

Not only did the Court reject Ballard vs. State, supra, but also rejected Houck vs. State, 160 OS 195, 140 NE 112; Porello vs. State, 121 OS 280 and State vs. Lindway, 131 OS 166, due to the law as announced in Mapp vs. Ohio, supra, and subsequent Supreme Court decisions.

It is interesting that this decision points up the exact situation which is involved in our own case. At page 107, Id., the Court said:

> "There is no suggestion that anyone consented to the search that turned up the gun in this case and no suggestion that the search was necessary to safeguard the officer or protect evidence likely to be destroyed. Hence, this discussion is limited to the inquiries—was the search incidental to a lawful arrest, or was there probable cause to believe that a felony was committed."

In our own case there is no statement whatsoever, anywhere in the record, that the police officer searched these men for his own safety. The Court supplied this conclusion to the evidence in its opinion. We know, from the record, that the police officer did not try to have any conversation with these men on the street prior to arresting them. Let us see, then,

whether he subsequently attempted any conversation with them after removing their guns, and placing himself in a safe position. The record completely negatives any purpose to interrogate under safe conditions. (See R. 20):

"Q. Between the time you removed this gun from Chilton, and the arrival of the other members of the police department, did you have occasion to say anything further to either Chilton or Terry?

A. Not that I remember, no."

Our query then: If this police officer merely "frisked" these men for his own safety for the purpose of interrogation, where, then, is the interrogation?

It is obvious from the record that his purpose of searching these men was for the purpose of substantiating his suspicions. (R. 42, 43):

"Q. . . .When you first approached the men in front of Zucker's and you turned Terry around and patted him down, can you tell us why you did that?

A. In the first place I didn't like their actions on Huron Road, and I suspected them of casing a job, a stick-up. That's the reason.

Q. Why did you pat them down?

A. Just to see whether they were--to see what they had, if they had guns.

Q. All right. When you ordered them into the store and you patted Chilton down, can you tell us why you patted him down?

A. The same reason I patted the first man down."

The Court, in our case, took the position that the police officer had reasonable cause to approach these men and pat them. (R. 98) On this point, we wish to refer the Court to "Book Review," by Yale Kamisar, 76 Harvard Law Review 1502.

This is a scholarly treatment of Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation, by Robert V. Murray. The report discusses the evils inherent in detention of persons for investigation and questioning, along with an exhaustive treatment of the prohibition of "seizures," without probable cause, under the Fourth Amendment. At page 1505, Kamisar cites the following:

> ". . . .the fourth amendment prohibits 'seizures' without probable cause. No matter how frequently or deceptively the word 'reasonable' is utilized in formulating a standard for detentions or arrests for investigation—'reasonable circumstances,' 'reasonable suspicion,' 'reasonable grounds to suspect'—any standard less than 'probable cause' is 'unreasonable' in the constitutional sense."

Kamisar also discusses the Uniform Arrest Act and states at page 1511:

> "I submit that many of the Uniform Arrest Act provisions were fatally defective as early as Wolf vs. Colorado. . ."

Our law certainly does not countenance the type of police action which occurred in this case. If it does, then all citizens are subject to this type of illegal detention if a police officer decides that "any" citizen looks suspicious to him. An exhaustive report was published on this type of police illegality which specifically made reference to Cleveland Police Deaprtment practices in 52 Northwestern University Law Review 16, by Caleb Foote (1957): Law and Police Practice: Safeguards in the Law of Arrest.

"There is little question that when police illegality becomes an accepted everyday practice, individual liberty is threatened and cynical contempt for law is engendered in the police, the law violator and the law abider alike."

It is common knowledge now that two Supreme Court Landmark cases (Mapp and Beck) have pointed up the complete disregard the Cleveland Police Department has for law enforcement in accordance with the United States Constitution. Even before these cases, Foote's article made reference to these practices:

"The Cleveland Police Department for example, boasts that 'the Narcotics Squad has the amazing record of having obtained 613 convictions out of 614 felony narcotics cases during the past four years.' This claim becomes less meaningful when it is determined that for one of those four years (1955) for which the figures are disclosed, there were 363 narcotic suspects 'released--no formal charge,' compared with 285 persons 'arrested and charged' with narcotic offenses. For the same year, the Cleveland Police also released with no charge, 516 'suspicious persons,' some of whom may also have been narcotic suspects. Cleveland lists a total of 5,699 persons taken into custody but released without charge in 1955. It is a persuasive inference that exclusion of these detentions from the arrest statistics is, at least in part, for the purpose of improving the conviction-to-arrest ratio."

The city of Detroit also came in for attention because of its police practices regarding detention for suspicion:

"For all Class I offenses in 1955, there were 1073 'released' and 3883 'charged.' An inconspicuous footnote to the table adds this item: In addition to the above, there were. . . .22,477 persons detained for investigation."

The conclusion reached by Foote in his article, as a result of the above, was stated thusly:

"Incomplete as it is, the foregoing information warrants an hypothesis that illegal detention on suspicion is widespread in American police practice. . . ."

It is clear that the police are violating constitutional rights daily on the theory that they are preventing crime before it happens. We do not believe that the public interest in safety requires this. Foote says in his article:

"In all probablity, these questions of police efficiency and preservation of individual integrity are closely interrelated. The 1954 Cleveland Police Report complains that 'before any appreciable gain can be made to combat crime, there is a hurdle that must be surmounted, and that is the indifference, apathy and lack of interest and cooperation of the general public.' Yet, the same report casually notes that 13,540 persons were 'held for investigation' during that year, of whom the great majority were released without being charged. Apparently it has not occurred to the Cleveland police that these two facts may be related and that this may be a symptom of what has been aptly called 'the vicious circle of popular distrust and lawless enforcement.'"

Foote also discusses the argument from some quarters, that the relative inconvenience to some persons in subservient to the welfare of the general public:

"It is urged that this is a significant difference and that the effects of a detention are so much less severe than those of a conventional arrest as to warrant different constitutional treatment. . . The same attempt to distinguish a 'detention' from an 'arrest' was made by police witnesses before the British Royal Commission, and were characterized by it as 'sophistries;' the Commission said that the relationship of detention to arrest was that of 'a distinction which is without a difference.'" (Emphasis supplies)

Professor Foote's article also discusses the provision of the Uniform Arrest Act relating to searching for a dangerous weapon. He tells us, at page 40 of his article:

> "A corollary of detention is a search; the Uniform Act specifically provides that 'a peace officer may search for a dangerous weapon, any person whom he has stopped or detained. . .' and legalizes an arrest for illegal possession of any weapon which may be found. The Act is silent on what happens if the search turns up incriminating evidence other than dangerous weapons; and while, in theory, such evidence might be inadmissable, the practical result probably would be to admit such evidence and thus throw open the door to allow searches to be justified by hindsight. In the past when the Court has said that a valid arrest will support a search, it has of course referred to an arrest grounded on probable cause. An entirely different question will be raised if the arrest is on suspicion. A unanimous holding in United States vs. DiRe indicates how the Court has felt about such attempts to justify searches by what they happen to turn up."

When we consider the extent to which our Supreme Court has gone to see that the confines of one's home is constitutionally protected, is it rational to assume that one's person is not to be so protected? We think not, and Professor Foote states this with reference to the subject:

> "The core of the right to privacy is the protection of the integrity of the individual, and if the home is to be inviolate against unreasonable searches, it is because this is one way of protecting that integrity. No one stays in his home all or even most of the time, and one does not leave one's right of privacy behind merely because one steps out of doors. Freedom on the streets also has a high place in constitutional order of things: 'Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, in an attribute of personal liberty. . . .secured by the Fourteenth Amendment.'"

To our knowledge, this Court is the first Court in Ohio to announce that we have a stop and frisk doctrine in this State. See (R. 97) where the Court says that stopping and frisking is a standard set by our State. Finding no other Ohio cases specifically setting forth such a doctrine, and further finding limited case law on the subject in other jurisdictions, we looked to law review articles for authorities on the subject.

One of the more scholarly articles was "The Law Relating to 'On the Street' Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General," by Frank J. Remington, 51 Journal of Criminal Law, Criminology and Police Science 386 (1960-61).

The author of this article is Professor of Law in the University of Wisconsin. He states at page 386 of this article:

> "Almost without exception, legal rules defining the power of police officers have been developed on a case by case basis. Putting aside the Uniform Arrest Act, which has been adopted by only three states, no legislature has attempted an adequate formulation of police power in relation to issues like the right to stop and question, the right to frisk and the right to take a person into custody. . . .An Officer may stop and question a suspect under circumstances in which the Officer known he will be in danger if the suspect is armed. Current police practice under such circumstances is to frisk the suspect. If a gun is found, its admissability may be in issue in states which exclude evidence which is obtained illegally. The basic issue is whether police have a right to frisk a suspect whom they have no right to arrest."

At page 388 of his article, Professor Remington discusses arrests relating to felonies and says:

> "It is clear, however, that the fact that the person is actually guilty of the felony will not justify a

"search if there are no reasonable grounds to believe him guilty of the felony at the time the arrest is made." [1]

It seems clear that the right to frisk, if one exists, would have a direct relationship to the probable cause necessary for arrest. Therefore, an illegal frisk, i.e., one not based upon probable cause, would be subject to the exclusionary rule. Remington's article at page 392:

"On the other hand, it is frequently assumed that frisking is illegal unless, at the time, there were sufficient grounds for arrest." [2]

In reviewing the authorities with reference to other jurisdictions, we reviewed "Police Practice and the Law of Arrest," 100 University of Pennsylvania Law Review, 1203, which article cites Commonwealth vs. Bolanza, 261 PA 507, 510; 104 Atl. 683, 684 (1918), wherein the Court said:

"It being admitted that there was no warrant against the prisoner or any of his companions, the attempted search of the prisoners for weapons was an unlawful act."

We assert that the manner in which these three men were accosted on the street by the police officer, as a result of his suspicions, involved a deprivation of the liberty of these three men. Under the circumstances, in our case, an arrest occurred before these men had been patted down for weapons. See 37 Michigan Law Review 311, 313, entitled "Arrest—Stopping

---

1. People vs. Brown, 45 Cal 2d 640; 290 P 2d 528 (1955). (Here police grabbed a woman on the street and required her to open her hands revealing heroin therein.)

2. See People vs. Esposite, 194 N.Y. Supp. 326 (1922); People vs. DiDanna, 210 N.Y. Supp. 135 (1925). See Cal. Penal Code Sect. 833 (1958). This statute authorizes frisking where grounds for arrest exist even though an arrest has not been made. . .

and Questioning as an Arrest--Reasonable Suspicion from Facts Disclosed by Questioning as Justification:"

> "However, although the Courts rarely discuss the question, whether stopping and questioning is an arrest seems to be decided on the basis of whether any restraint of personal liberty is involved. Thus, where force or threats of force is used and the suspect submits to the authority of the officer for questioning, an arrest occurs." [1]

It is contemplated that the State will argue that even if the police officer did not know that these men had guns, once he discovered the fact, he was justified in arresting them for a crime committed in his presence. This position is, of course, an untenantable one. The best rationale which we found on point was "The Law of Arrest," 24 Texas Law Review 296, wherein the author cites Roberson vs. State, 43 Fla 156, 166; 29 So 535, 538 (1901), which case held that the arrest was unlawful and quoted with approval a statement from a Georgia opinion:

> "Even if the person arrested did in fact have a pistol concealed about his person, the fact not being discoverable without a search, the offense of thus carrying it was not, in legal contemplation, committed in the presence of the officer, and the latter violated a sacred constitutional right of the citizen in assuming to exercise a pretended authority to search his person in order to expose his suspected criminality."

---

1. Ramirez vs. State, 123 Tex Cr. 254; 58 S.W. (2d) 829 (1933), officers stopped car by forcing it to side of road; People vs. Scalisi, 324 Ill 131; 154 N.E. 715 (1926), officers approached defendants with drawn guns; People vs. Mirabelle, 276 Ill App 533 (1934), officers drew gun on defendant; Bonatz vs. State, 85 Tex. Cr. 292; 212 S.W. 494 (1919), officers questioned the defendant and would not have let him escape; State vs. Dunnivan, 217 Mo App 548; 267 S.W. 415 (1925), officer called to defendant to halt and ran after him.

In view of the fact that there is no legislation in Ohio, nor are there any cases under Ohio law establishing the right to stop and frisk, obviously, there is no such right inuring to police officers. See "Criminal Justice, Cases and Comments," University Casebook Series, by Fred E. Inbav and Claude R. Sowle, (Second Edition - 1964) wherein at page 624, these Professors say:

> "Of Pedestrians:
>
> "As to whether there is a right in the absence of legislative authorization, to detain pedestrians, short of an actual arrest, for the purpose of checking on their identity or inquiring into the reason for being in the locality where detained, the state courts are in disagreement. The California Courts have held that the police do have the right of detention, and some other states have at least given tacit recognition to such a right. But there are a number of courts which reject the right to detain and question a person unless an actual arrest is made."

These authors make no distinction between a frisk and a search, for at page 625 of their text, we find the following:

> "In the absence of a right to stop or to question an ordinary citizen, there is no right, obviously, to 'frisk' (i.e., search) a person for weapons, stolen property, etc., and any evidence obtained thereby is subject to suppression."

When one considers the restraints which our Courts have placed upon police stopping automobiles, are we to hold that the restraints are to be less applicable to pedestrians lawfully travelling the streets? In three cases, covering a wide span of years, the Supreme Court seems to have equated the stopping of a moving vehicle with a search or arrest, and has forbidden such restraints except in conformity with the Fourth Amendment

requirement of probable cause. Henry vs. United States, 361 U.S. 98 4 L Ed 2d 134; 80 S Ct. 168 (1959); Brinegar vs. United States, 338 U.S. 160; 93 L Ed 1879; 69 S Ct. 1302, (1949); Carroll vs. United States, 267 U.S. 132, 69 L Ed 543; 45 S Ct. 280, (1925).

We attempted to convince the lower court herein that granting of the Motion to Suppress in the instant case, on its facts, did not mean that all gun-toters would hereafter go free. But the Court can ill afford, in our humble opinion, to permit the citizenry of this state to be the daily subjects of detentions and frisks based upon the suspicions of police officers. We found illumination on this philosophy in Duke Law Journal, Volume 1962, Pg. 319, entitled "Mapp vs. Ohio at Large in the Fifty States," by Roger J. Traynor, the highly respected and often quoted Associate Justice, Supreme Court of California.

Judge Traynor begins this article by reciting how, in 1942, he wrote an opinion rejecting the exclusionary rule,[1] and in 1955, prior to "Mapp" he wrote the opinion that established it in California.[2] He then went on to explain his change of attitude by saying:

> "My misgivings about its admissability grew as I observed that time after time it (illegally obtained evidence) was being offered and admitted as a routine procedure. It becomes impossible to ignore the corollary that illegal searches and seizures were also a routine procedure aubject to no effective deterrent; else how could illegally obtained evidence come into court with such regularity?"

---

1. See People vs. Gonzales, 20 Cal 2d 165; 124 P. 2d 44 (1942).

2. People vs. Cahan, 44 Cal 2d 434; 282 P. 2d 905 (1955).

In urging the lower court to sustain our Motion to Suppress, we were cognizant that the effect of the same was to free two gun-toters. But we were also cognizant of the fact that each case must stand or fall on its own, and that application of the law of search and seizure, in this case, did not make the same applicable in all "carrying concealed weapons" cases.

Justice Traynor corroborates this in his article wherein he states:

> "It is seriously misleading, however, to suggest that wholesale release of the guilty is a consequence of the exclusionary rule."

In his treatise on the application of the exclusionary rule and its salutary effect against daily illegal police practices, he explains the following:

> "It was the cumulative effect of such routine that led us at last in the case of People vs. Cahan to reject illegally obtained evidence. . .We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers."[3]

When we consider how, in our case, the police officer admitted, under examination by the Court, (R. 46), that he had never, in 39 years' experience as a police officer, observed anyone "casing a place," we have to examine whether his conduct was such as is condoned in accordance with a standard set by our state. Justice Traynor deals with this at page 327 of

---

3. People vs. Cahan, supra.

his article where he says:

> "Any state that adopts its own exclusionary rule soon learned that the day to day responsibility of policing the police involves close and continual examination of local police practices in the context of local community problems and local statutes."

Now we come to a consideration of whether the stop and frisk doctrine, as enunciated in People vs. Rivera, 33 Law Week 2044; 38 Misc 2d 586, decided July 10, 1964, and relied upon by our trial Court, is applicable in this case. Firstly, we note that the court, in Rivera, itself, distinguished between the "stop and frisk" amendment to the New York Code of Criminal Procedure (L. 1964, Ch. 86, effective July 1, 1964) adding new section 180-A to the Code, and the facts in the record before the Court.

Note also that the police officer in the Rivera case stopped and frisked a man at 1:00 a.m., in a neighborhood with a high incidence of crime. Our case is distinguishable on the fact that our case occurred at 2:30 in the afternoon, in borad daylight, on Cleveland's main downtown street, with business occurring as usual. In our record, there is no evidence whatsoever dealing with "stick-ups" in this area of the city. The following testimony is in the record as a result of questioning of the police officer by the Court: (R. 47)

> "Q. What caused you to be in that particular neighborhood?
>
> A. I am assigned to stores in the downtown, to downtown stores, and pickpockets in the downtown area.
>
> * * *
>
> Q. What has been the activity in the downtown area, particularly

"as to stores, pertaining to criminal activities in the past few years, has it been on the up-grade, normal?

A. You mean in the stores?

Q. Yes, around the stores, in that area?

A. Well, we have always got shoplifters. We always got thieves. There are always thieves downtown, and there has been quite a few."

In view of the above testimony, high incidence of crime, as we understand the term, is negatived; and in addition thereto, not one scintilla of evidence is offered with reference to "stick-ups" of stores.

Our record is also completely devoid of any testimony by the police officer that he, at any time, "reasonably suspected" or "suspicioned" that he himself was in danger or that he conducted any questioning, whatsoever, other than cursorily asking, "What are your names."

We contend that the law of Ohio is set forth in the dissenting opinion of Rivera, wherein it is stated by Judge Fuld:

> "This power to investigate, however, does not give a policeman license to violate the individual's constitutional right not to be searched except on probable cause. In other words, although 'suspicion' may well be sufficient basis for a policeman to stop and question an individual, it furnishes no ground for an examination of his person. . . ."

Even in the Rivera case, the dissenting opinion refuses to recognize any distinction between a frisk and a search, for Judge Fuld says:

> "I cannot agree with the Court's view that the legality of the frisk (or search) of the defendant must 'necessarily' follow once the right of the officer to stop and question is recognized. . . ."

It is our contention that even if there are certain circumstances under which a police officer has the right to stop and question "suspects," that the record in our case does not warrant the application of the law of New York as set forth in the majority opinion in Rivera for the following reasons:

1. Our case involved a broad daylight pedestrian situation as opposed to an after-midnight situation there.

2. There is no evidence of a high incidence of crime neighborhood in our case as opposed to the reverse situation there.

3. The legislature of Ohio, nor the Courts of Ohio have recognized any "right to stop and question or frisk" as has been recognized in New York.

4. The facts in our case reveal that all three defendants were, in fact, arrested without probable cause and then searched.

5. Our case does not reveal, on its facts, any intention, on the part of the police officer, to question the arrestees regarding their suspicious conduct.

6. There is no evidence whatsoever, in our case, of the police officer conducting a frisk or search for any reason relating to his consideration of his own safety.

7. There was no finding, in the Rivera case, that the arrest therein was unlawful, as exists in our case.

CONCLUSION

We are not unmindful, in this case, of the fact that as a result of the action of the police officer, two of the three men arrested were apprehended with guns on them. But, we are also mindful of the fact that the third man, who was abruptly ordered off a public sidewalk, into a store, where he was ordered to face a wall and keep his hands in the air while a police officer held a gun on him, did not have a gun or any other evidence, whatsoever, of crime upon him.

The suspicion, then, of the police officer, as to this third man, was wrong. As to the other two men, the police officer can justify his suspicions by what his search turned up. But what about this other citizen who was treated to this type of indignity on the streets of the city of Cleveland? Since no gun was found on him, he was subjected to the charge of "Suspicious Person," a misdemeanor, the result of which charge does not appear in the record.

We must, of necessity, consider what would have been the consequence of the police officer's suspicions being wrong as to all three men. Is this the type of daily indignity to which our Courts are willing to subject the citizenry of this state, based upon an unconstitutional standard of "suspicion," uncorroborated by any information or knowledge whatsoever. And is this what Ohio would allow as "a minor inconvenience and petty indignity?" We think not.

It has been our intention to narrow this brief down to the essential constitutional questions upon which our contention of prejudicial error is based. The precise questions involved here are:

1. WHERE THE TRIAL COURT HAS MADE ITS FINDING THAT AN ARREST IS UNLAWFUL, CAN THE COURT THEN REFUSE TO SUPPRESS EVIDENCE SEIZED INCIDENTAL TO AND CONTEMPORANEOUS WITH SAID UNLAWFUL ARREST. WE ANSWER, NO. THE COURT IS REQUIRED TO SUPPRESS SUCH ILLEGALLY SEIZED EVIDENCE.

2. WHERE EVIDENCE HAS BEEN REMOVED FROM THE PERSON OF ONE WHO IS CHARGED WITH THE CRIME OF HAVING IN HIS POSSESSION SUCH EVIDENCE, CAN THE COURT REFUSE TO APPLY THE LAW OF SEARCH AND SEIZURE? WE ANSWER, NO. THE CONSTITUTION REQUIRES THE COURT TO APPLY SUCH LAW TO THE EVIDENCE.

I.

We contend that, in this case, when the police officer grabbed Terry on the street and completely turned him around, from that point forward, Terry was under the officer's dominion and was, therefore, under arrest. When he ordered the other two men into the store, he effected their arrest at that point. (R. 127):

> "A. When I entered the store, after the search was made and the gun found on Terry, when I entered the store I informed them to call the wagon.
>
> Q. Well, by calling the wagon, what do we understand that to mean to you?
>
> A. It means an arrest."
>
> Also see (R. 125).

We know from this, then, that in the officer's mind, he had then arrested all three men. This, of course, preceded the searching of both Chilton and Katz and the removal of the gun from the pocket of Terry's coat, which gun was removed in the store. (R. 31).

Our trial Court and the State indicated at (R. 130) that they were in accord with this legal rationale when the following colloquy took place between the Court and the Prosecutor:

"THE COURT: Let me ask Counsel this question: When an officer stops an individual based upon suspicion, suspicious circumstances, and detains him, at that particular moment isn't that in itself an arrest?

MR PAYNE: Are you asking that question of me?

THE COURT: Yes.

MR. PAYNE: Yes, your Honor.

THE COURT: So it does not make any difference as to what the officer says as to point of time of the arrest, because that is merely a statement on his part, isn't that correct?

MR. PAYNE: That is true, your Honor. I have no problem with that whatsoever."

However, in its findings on the Motion to Suppress, the Court stated, (R. 100):

"If there was an arrest, it came subsequent to the frisk."

We think that the law is clear that when a person is lawfully arrested, the police have a right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. Beck vs. Ohio, 11 L Ed 2d 780; Weeks vs. United States, 232 U.S. 383, 392; 58 L ed 652, 655;

34 S Ct 341; LRA 1915 B 834 (1914); Agnello vs. United States, 269 U.S. 20, 30; 70 L Ed 145, 148; 46 S Ct 4; 51 ALR 409 (1925). However, it is equally clear that in the absence of a lawful arrest, there is no right to search even for weapons.

It will, no doubt, be argued by the State, in connection with the Rivera case, that clear necessity and the exigency of the situation required the police officer to search for weapons. Even assuming this to be true, there being an invalid arrest, the weapons were inadmissable in evidence. See Search and Seizure and the Exclusionary Rule: A Re-Examination in the Wake of Mapp v. Ohio, by Jack G. Day and Bernard A. Berkman, Western Reserve Law Review, Volume 13:1 (1961), wherein the authors state at page 88:

> "Search Necessary to Safeguard Arrest
>
> "Another exception to the constitutional command that a search must be by warrant is that an officer may search the person of the accused and the premises within his reach for weapons, both to safeguard the arrest and the life of the arresting officer. There is no dispute about this exception because it is based upon clear necessity. Nor would there be argument if the principle were extended to include search for tools or implements, such as skeleton keys or hacksaw blades, by which the prisoner might effect an escape, or drugs or poison, by which the prisoner might injure himself.
>
> "Furthermore, it is clear that where relevant evidence is likely to be concealed or destroyed unless the officer acts with speed, a search or seizure without a warrant is justified, again on grounds of emergency and necessity. But these exceptions should apply only if the officer is rightly on the premises. He should have no right to protect an arrest which is invalid or to preserve evidence for which he is not entitled to search." (Emphasis supplied)

II.

Now, with respect to the Court's refusal to apply search and seizure law to the evidence which was ruled admissable in this case. We contend that this, too, was prejudicial error. Had the Court applied such law as required under the Fourth and Fourteenth Amendments, and then found that an application of said law led it to the conclusion that this was a reasonable search not prohibited under the Fourth and Fourteenth Amendments, our posture would be different. Here the Court stated (R. 100):

> "I believe and I reiterate again that search and seizure law cannot be applied in this particular case. . ."

Our Supreme Court made its position clear in Beck vs. Ohio, supra, when it said:

> ". . . .While the Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the state court findings, such as a finding as to the reasonableness of a search and seizure, the constitutional criteria established by the Supreme Court have been respected."

In view of this, we cannot believe that where the trial court has found an arrest to be unlawful, that it can then admit evidence seized incident to the unlawful arrest, refuse to apply search and seizure law, and justify the same on a doctrine of "stop and frisk." Justice Traynor, in his article, supra, said this:

> "The exclusionary rule of 1961 that now binds all the states is no mere rule of evidence, but part and parcel

"of the Constitution. It took time to deliver it to its destiny, but there is no longer any question that it has arrived."

Respectfully submitted,

LOUIS STOKES

Receipt of copy is hereby acknowledged this 11th day of March, 1965. 2:05 PM

PROSECUTOR