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

NO. 27180

THE STATE OF OHIO

Plaintiff-Appellee

vs.

JOHN W. TERRY

Defendant-Appellant

STIPULATION OF FACT AND EVIDENCE

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

By stipulation and agreement by and between Reuben Payne, Assistant County Prosecutor, on behalf of the State of Ohio, and Louis Stokes, on behalf of the defendants, Motions to Suppress the Evidence filed by the said Louis Stokes on behalf of the defendants, John W. Terry and Richard D. Chilton, were consolidated for the purpose of hearing on the Motions to Suppress.

The defendants had each been indicted for the offense of Carrying Concealed Weapons under separate indictments. The defendant John W. Terry had been indicted in the Court of Common Pleas, Criminal Branch, under case number 79491. The defendant Richard D. Chilton had been indicted in the Court of Common Pleas, Criminal Branch, under case number 79432.

Upon hearing, defense counsel, Mr. Stokes, called Detective Martin McFadden for direct examination, whereupon the said witness testified as follows:

"By Mr. Stokes:

Q Sir, would you state your name for the record?

A Martin McFadden.

Q. Your occupation is what?

A Cleveland Police Department, Detective Bureau.

Q. How long have you been a police officer?

A Oh, 39 years and four months.

Q. How long have you been assigned to the Detective Bureau, sir?

A Thirty-five years.

THE COURT: Is it 35 years as a detective?

THE WITNESS: Yes, 35 years.

Q Now, sir, calling your attention to the 31st of October, 1963, did you have occasion to see one John Terry and one Richard Chilton that day?

A I did.

Q Where did you first see them?

A I first noticed them standing at the corner of Huron Road and Euclid Avenue. That is about 13th and Euclid.

Q I see. About what time was that, Mr. McFadden?

A Oh, I imagine around 2:20, 2:25, 2:30, something in that vicinity, P.M.

Q Pardon?

A P.M.

Q Would you tell us what they were doing at that time?

A At that time when I first noticed them they were standing there at the corner talking.

Q Just standing there talking?

A Yes.

Q. Was anyone else with them at that time?

A Not at that time, no.

Q Where were you standing, sir?

A I was walking northeast on the south side of Huron Road.

Q You would have been approximately how far from the two of them?

A Well, that would be maybe, oh, maybe three or four hundred feet.

Q I see. Now, how long did they remain where you first observed them?

A You mean the whole time that I observed them?

Q Well, so that I have it clear for you, after you made your first observation, how long did they then remain where they were standing where you first observed them?

A Well, one or another was in the same spot, oh, between ten to twelve minutes.

Q Now, did you position yourself there on the street, in a standing position, or did you continue walking?

A No, I positioned myself in the doorway down near 14th Street on Huron Road.

Q I see, and it is from --

A As a matter of fact, I was in the lobby of Rogoff's.

Q Lobby of what, sir?

A Rogoff's.

Q Now, is it from this point that you continued to observe them for say ten to twelve minutes?

A That's right.

Q Now, after this ten to twelve minute period what next occurred with respect to these two men?

A One would stay on the corner. The other walked up Huron Road. Several stores up from the corner he would look in through the window for a second or so, and then continued west on Huron Road to pretty near Halle Brothers.

And then he would walk down and at the same spot again he would peer in the window, come down to the corner and meet the other man, and they would talk there for a second or two.

Then the other man would do the same thing.

THE COURT: Let me get this straight. You are talking about the other man twice. Were there three men?

THE WITNESS: I am thinking either of the two men would leave one another.

THE COURT: You are referring only to the two parties involved?

THE WITNESS: Just these two men.

Q How long did they continue this, Mr. McPadden, this one leaving and then the other leaving?

A Well, I would say in that ten to twelve minutes, it must have been at least four or five times apiece.

Q So that we understand, you first made reference to this ten to twelve minute period?

A That's right.

Q I see. Now, after this ten to twelve minute period, is this when they are leaving one another and then returning?

A That's right.

Q I see. Now, after this ten to twelve minute period, then what happened?

A They walked west on Euclid Avenue.

Q Together?

A That's right.

Q How far did they go there on Euclid Avenue?

A They went to I think it is 1120 Euclid which is right opposite the Statler Hotel, Zucker's.

Q Now, on their way down to Zucker's there, what manner were they conducting themselves?

A Like anybody else.

Q Just walking naturally?

A That's right.

Q Then after arriving at Zucker's did something occur there?

A Yes, they met a white man.

Q Do you know his name, sir?

A His name is Katz, K-a-t-z, Carl Katz.

Q Did they meet him there in front of Zucker's?

A That's right.

Q After they met him what occurred?

A After they met him?

Q Yes, sir.

A They were standing there talking to him, and I approached them.

Q The three of them?

A That's right.

Q Now, how much time would you say elapsed between the time they left 14th and Euclid, or 13th, wherever it was where they were standing together, and arrived at Zucker's?

A You mean in the whole time, you mean the twelve minutes combined or just --

Q No.

A From the time they left the corner until they got to Zucker's?

Q Right.

A Well, I imagine around, it would take three minutes' anyway.

Q When you approached the three of them, what were the three of them doing?

A They were talking.

Q To one another?

A That's right.

Q Well, when you approached them did you speak to them first or did they speak to you?

A I approached them and I told them I was a police officer.

Q You were speaking to the three of them?

A All three of them.

Q Will you tell us exactly what you said to them, Detective McFadden?

A I said I was a police officer. I asked each one their name, and they gave it to me quick. 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 topcoat 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 topcoat I found a gun, a '38, and searching Katz I found nothing.

In examining the gun, they were all loaded, both guns were loaded.

Q Now, taking you back for a moment to the point where you said you were a police officer and you asked their names, did each of them give you their names?

A They said something.

Q Was this the point at which time you grabbed Terry and spun him around as you described?

A That's right.

Q Now, had you said, other than saying to them, "I am a police officer," and further saying to them, "What are your names?" Did you say anything else at all to them before you spun Terry around?

A No, I didn't, but I will say this --

Q No, wait a minute, you have answered my question.

A All right, okay.

Q Now, this gun that you found on Terry was located where?

A In his upper left-hand topcoat pocket.

Q It was not visible to you just looking at him, was it?

A No.

Q Did you remove the gun from his pocket?

A I removed the coat and the gun.

Q What type of gun was it, sir?

A An automatic, .38.

Q And it was loaded?

A Yes, it was.

Q After you took the gun from him what did you do to him?

A I ordered the three of them into the store, Zucker's store. The three of them went in, Zucker's Men's Store, 1120 Euclid.

Q The three of them obeyed your order and went into the store?

A That's right.

Q After they went into the store you followed them into the store?

A That's right.

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.

Q Did he have on a topcoat, also?

A Yes, he did.

Q The gun Chilton had was found in his left topcoat pocket?

A That's right, inside.

Q On the inside?

A And the other one was on the outside.

Q Wait, so I understand.

A The coat, in the outer coat on the outside pocket.

THE COURT: Which one of the defendants had it on the outside pocket?

A Terry, the first one, had it in his inside pocket of his topcoat. The Other fellow had it in the outside pocket of his topcoat.

Q I see. Now, did you remove the gun from Chilton's pocket, also?

A I sure did.

Q What type of gun did he have?

A He had a .38 revolver.

Q And was it also loaded?

A That's right.

Q Then did you proceed to search Katz?

A I did.

Q And did you find anything on Katz?

A I found no weapons.

Q Now, did you at that point say anything further to these three men?

A Not at the time, no.

Q Did you have occasion to call the Police Department?

A I informed the store to call the Police Department.

Q Did the other police arrive?

A They did.

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.

Q Do you recall ever saying to them, "You are under arrest"?

A No, I don't.

Q Well, now, they were not free to go, were they?

A That's right.

Q So then they were placed under arrest by you, weren't they?

A Automatically when I call the wagon they are under arrest.

Q I see. Then in this situation you considered them to be under arrest when you ordered the store people to call for a wagon?

A That's right.

Q I see. Now, sir, as a result of the arrest of these two men that day, has any other charge other than carrying a concealed weapon been placed against them?

A You mean at that time?

Q As a result of your arrest.

A Or since?

Q I mean from --

A From my arrest was there any other cleanups made, is that what you mean?

Q No, I am asking you with reference to these two men, your having arrested them that day, have you placed or caused to be placed any charge against these two men other than carrying a concealed weapon?

A Me myself, no, personally no.

MR. STOKES: I think I have no further questions,
your Honor.

THE COURT: Mr. Payne?

CROSS-EXAMINATION OF DETECTIVE MARTIN McFADDEN

By Mr. Payne:

Q Detective McFadden, when your attention was directed to this person or persons at the original outset, how many persons did you observe?

A Two at first.

Q Now, sir, I want you again to reiterate to the Court from the moment you first observed them what then did they do, the two persons?

A Well, I observed them as they were walking northeast on Huron Road, about catty-corner away from the corner on the other side of the street, and they were, the two of them, they were standing on the corner talking.

One, as I started down to get a place to observe them, one man had left the other man, and I noticed that as he went by this window he stopped and

looked in, proceeded again west pretty near as far as Halle's, and then coming back stopped at the same place and looked in, and then proceeded to the corner where he talked to the man that was standing on the corner for a second or so. Then that man would do the same thing.

Q The other man would do the same thing?

A The other man who made the first trip would stand on the corner. The man who was standing on the corner while the other man was making the trip, he would make the trip, and vice versa.

Q Now, to the best of your recollection, approximately how many times did you see them do that, that particular occasion?

A Well, I seen them do it maybe two or three times, and then as they were standing on the corner --

Q Was the same mode of conduct engaged in, the stopping and looking in the window, as they did it on the subsequent occasions?

A That's right.

THE COURT: May I interrupt?

MR. PAYNE: Yes.

THE COURT: You are talking about looking in a window. Can you be more specific as to what particular window, what particular store window?

THE WITNESS: From my point of view, your Honor, the only thing I could say, it would be either the Diamond Store or the United Airlines, either one of those two, from the position I was in.

THE COURT: You may proceed.

Q Did they stop and look in the window each time they made the trip?

A That's right.

Q Can you tell me whether there were any other persons who came to the corner there at that time, or in that proximity of time that they were there?

A Yes, There was a man, a white man, short white man, came down the north side of Huron Road, and came directly over to where these two men were at, after one of them had come back, and it wasn't half a second, and this white man came over and talked to these two colored men, and he was there for about a minute or so talking to them, and then he left. He went west on Euclid.

Q After he left, then what did these two men that you observed do, if anything?

A They proceeded to each make two to three trips back and forth.

Q In the manner that you described originally?

A That's right.

Q Was the mode of conduct the same, did they stop and look in the windows?

A That's right.

Q Did they alternate?

A That's right.

Q Now, these two men that you observed doing this, are they in the courtroom now?

A They are.

Q Would you point them out to the Court?

A Well, there is Chilton, the first man, and Terry the second man.

Q All right. Now, after they proceeded to do this on the second occasion, after the white man left, what then did they do if anything?

A They proceeded to do the same thing two or three times apiece.

Q After that what did they do?

A After that they left the corner and proceeded west on Euclid.

Q And then what happened?

A On the south side of the street, where they met the same white man that talked to them at the corner of Huron Road and Euclid, they met him standing in front of Zucker's Store at about 1120 Euclid.

Q Approximately how long were they talking to this same white man there at that time?

A Oh, I imagine a minute or two.

Q Now, Detective McFadden, you have been a police officer how long?

A Thirty-nine years.

Q When you observed the pattern of conduct that you observed and have described to us, and the length of time that you observed it, did you consider it as suspicious activities?

MR. STOKES: Objection.

THE COURT: Objection sustained.

MR. PAYNE: This is cross-examination, your Honor.

THE COURT: I know, but you are asking for a conclusion, Mr. Payne.

MR. PAYNE: On the basis of his experience, yes.

THE COURT: The Court would have to draw the conclusion from the facts.

Q You have been a police officer how long?

A Thirty-nine years.

Q You had observed these men for some ten to twelve minutes?

A That's right.

Q You observed the mode of conduct that you have described to us?

A That's right.

Q Did you, sir, as a police officer consider that you should investigate it?

A I sure did.

Q What then did you do if anything when you observed them in front of Zucker's?

A What did I do?

Q Yes, after they left the corner and you observed them then again in front of Zucker's, what then did you do?

A I stopped them and went over and talked to them.

Q When you went over and talked to them, what did you say to them?

A I told them I was a police officer. Those were the first words I said.

Q And then what happened?

A Then I said, "What is your name?" and they mumbled something and I turned --

Q All right, they mumbled something. Now, Detective McFadden, I would like for you to get down from the witness stand, please.

(Witness steps down.)

Q As you approached them, at Zucker's, allowing myself to represent one of the men -- Officer, would you step over here? -- and the officer representing the other man, I would like for you to place us in the position that the men were and that you were as you approached them.

A Facing the sidewalk up against the display window, Zucker's ---

Q Up against the display window?

A And facing Euclid Avenue.

Q Were both men facing the display window?

A That's right, the three men.

Q The three men, all right.

A Katz was here, Chilton was here.

Q I will be Chilton.

A And Terry was here.

Q The officer will be Terry.

A Yes.

MR. STOKES: Excuse me, Reuben, can we have this described in the record as you go along?

MR. PAYNE: Yes.

Q Were you facing them as we are facing now, or how?

A I came over at an angle, like.

MR. PAYNE: May the record show and indicate that the officer is describing the three men with their backs to a display window.

THE WITNESS: That's right.

MR. PAYNE: And that he is standing at the angle which would be to the left of the man, Terry, I guess it is.

THE WITNESS: That's right.

THE COURT: Let the record furthermore show it has been stated that Zucker's is at 1120 Euclid Avenue, and I think it is on the south side of the street.

THE WITNESS: On the south side of the street.

THE COURT: And the display window faces the
avenue, is that correct, Euclid Avenue, on the south side of the street?

THE WITNESS: That's right.

THE COURT: And Chilton was --

THE WITNESS: Chilton was in the middle.

THE COURT: And Terry was on the right side.

THE WITNESS: That's right.

THE COURT: Proceed.

Q Now, I want you to demonstrate to the Court precisely and exactly
what you did, after you asked them your name and they responded something.

A Then I pulled what's his name over in front of me and I searched them,
that is Terry.

MR. PAYNE: Just a minute. May the record show
and indicate the officer turned the individual represented as Terry
around.

THE WITNESS: That's right.

Q Now, when you turned him around I want you to show us exactly what you
did.

A Well, I patted him down and up in here I felt something.

MR. PAYNE: May the record show that the officer
is patting on the outside of the individual.

Q Officer, at that time did you go into the inner pockets of any of
the men, or were you patting them on the outside of their clothing?

A I was patting them on the outside of their clothing.

Q And when you were patting them on the -- the man Terry, on the outside of his clothing as you are demonstrating to us at this time, what if anything did you notice?

A I felt a gun.

Q You felt a gun?

A That's right. Something -- I felt something that seemed like a gun.

Q Where did you feel this?

A In his topcoat pocket on the inner pocket, on the inner pocket on the left-hand side.

MR. PAYNE: May the record show that the officer in demonstrating is standing to the rear of the person being designated as Terry, and that he was patting underneath the arms of the person represented and designated as Terry, and indicates that he felt something in the left breast pocket.

THE WITNESS: That's right, yes.

Q All right. Upon your feeling that something which felt like a gun in the left breast pocket, what then did you do?

A I pulled the coat back, put my hand in there, and I couldn't get the gun. I felt the handle of the gun.

Q At any time before that, Detective McFadden, before putting your hand in, had you gone into any of the men's pockets?

A No, I hadn't.

Q Was the only time that you went into the men's pocket after you first patted them down?

A That's right.

Q Then, after putting your hand on the inside and feeling the handle, what then did you do?

A I tried to take the gun out of the pocket, and I couldn't get it out, so I pulled the coat off the man.

Q And then what happened?

A Then I ordered the three of them inside the store and told them to keep their --

Q When you took their coat off did you recover the object that was in the pocket?

A After we got in the store I took the gun out of the pocket.

Q Then when you ordered them into the store what then did you do?

A I told them to face east towards the wall, that would be facing east, and I told them to keep their hands up.

Q In what manner, will you step over here, Officer, and place us or tell us or show us how, you told them to face where.

A That would be east.

Q Assuming this is east, what did you tell them to do?

A I told them to face the wall and keep their hands away.

Q They had their hands up like this?

A Yes.

MR. PAYNE: May the record show and indicate that the officer is describing that the individuals had their hands in the air.

THE WITNESS: Yes.

Q Did they have their hands in the air or were they leaning against anything?

A No, they weren't leaning against anything.

Q Then what did you do?

A I then searched -- I went over and I patted --

Q All right, I am Chilton now; show the Court what you did.

A I felt an object --

Q Show it on me, because I am representing Chilton.

A I felt an object in his outer topcoat pocket.

Q Did you pat him on the outside?

A I sure did.

Q At any time up to that point had you gone into any of the men's pockets?

A I had gone --

Q With the exception of --

A Into Terry.

Q Had you gone into Chilton's pocket at any time before that?

A No, I hadn't. This is the first time.

MR. PAYNE: May the record show and indicate the officer demonstrated by patting the person represented as Chilton.

Q When you patted the person, when you patted Chilton did you feel something?

A I did.

Q Where?

A In his left-hand outer coat pocket, that is, of his topcoat.

Q After feeling that then what did you do?

A I put my hand in his pocket and I came out with a gun.

MR. PAYNE: You may be seated, you may resume
the witness stand, Detective.

(Witness resumes witness chair.)

Q These men then were in your custody, is that correct?

A Pardon?

Q These men then were in your custody?

A That's right.

Q Was a police wagon called?

A That's right.

Q Were they subsequently booked at the Police Station?

A They were.

Q And were they charged with the offense -- what offense, if any?

A They were.

Q Of carrying a concealed weapon?

A That's right.

Q Officer McFadden, after these men, well, anytime during your checking
of these men or in the police station subsequently, did you have the occasion
to inquire of these men if they were employed?

MR. STOKES: Objection.

MR. PAYNE: I would like to be heard on it
before the Court rules, your Honor. I have this thought in mind.
The charge here is one of carrying a concealed weapon. The motion has
been filed for a suppression of the evidence.

MR. STOKES: Judge, excuse me just one moment,
Reuben, I am sorry. I am wondering if this argument might not take place
then out of the presence of the witness, if you are going to argue this?

MR. PAYNE: Well, perfectly well, I don't think

it makes -- it is a legal point I am going to establish on the basis of the question. I don't think it would have any bearing on the factual situation. Well, maybe it is better if we should exclude him for just a moment.

THE COURT: Stop outside a moment.

(Thereupon the witness left the courtroom.)

MR. PAYNE: The motion for suppression of the evidence has been filed. I further direct the Court's attention to the fact that one of the escape clauses under this Statute for the carrying of a concealed weapon is that the man is engaged in a legitimate business or occupation with large sums of money, and had the right to carry such a weapon.

Now, your Honor, I further submit that the question that I have asked as to whether or not he questioned these men as to their employment and they indicated that they had some legitimate employment which maybe they could take refuge in the savings clause under the concealed weapon, then they probably would not be in violation of the law.

The second proposition, which is most important here, is this, that if they have no legitimate employment or reason for carrying the gun, then the carrying of a concealed weapon, a pistol, falls into that category of a breach of the peace, and, therefore, it being a breach of the peace would give the officer every right in the world to arrest them for the protection of society and the community.

Therefore, I submit that the question should be allowed to be answered.

THE COURT: Mr. Stokes?

MR. STOKES: Thank you, your Honor. The question, as I recall the question, your Honor, was did he after taking these men into custody and over at the police station, subsequently have occasion to question them regarding their employment.

And then counsel has advanced one of his reasons for asking such a question, the fact that these men can avail themselves of that part of the carrying concealed weapons statute which relates to justification.

I submit to your Honor, we are not now in trial. We are here merely on a motion to suppress the evidence, the sole question being before this Court was the search an illegal search, in accordance with constitutional standards, so that it then becomes admissible upon the trial of this matter, which will or will not take place subsequent to the hearing on this motion.

Now, let me advance this, he is going further unconstitutional with this question, because we are now -- the men have been taken into custody, have evidently been taken to the police station, and we are now getting into conversation which took place between the police officer and some men who have now been arrested and have become accused men, and we do not know whether they have been availed of the opportunity for counsel, whether they have ever been instructed as to their legal rights, and they are about to get

into some conversation that does not even relate to the motion here at all.

I say to your Honor that the question is constitutionally wrong twice.

MR. PAYNE: Let me submit this, first of all, this witness was called as the defendant's witness, and I am in the present position of cross-examining the witness.

Number two, one of the incidents of unlawful search and seizure is the question of valid arrest, of the officer making the arrest, and so forth, etcetera, and one of the very circumstances and one of the very rules of law that an officer has to make an arrest is as to whether or not there is a breach of the peace, and if there is a breach of peace an officer can make an arrest and such subsequent arrest is valid all the way.

THE COURT: Mr. Payne, you must realize that if there was a breach of the peace, the breach of the peace occurred after the incident.

MR. PAYNE: No, sir, that is the point and that is the law I am trying to make, because I have case law on it, your Honor.

If he in effect is carrying a weapon all along, all the time, and he has no legal right to carry that weapon, then he is in breach of the peace whether the officer knows it or not, and I can provide the Court with cases on such.

THE COURT: Mr. Payne, may I ask you this, let's assume that I have a gun in my possession, and I am walking down

the street, and an officer for some reason best known to himself decides to stop and frisk me, would you say that I have committed a breach of the peace?

MR. PAYNE: Yes, your Honor, that is the cases I have read.

THE COURT: I have committed a breach of the peace, only on one condition, of the stopping and the frisking of me, of the individual, me.

MR. PAYNE: Your Honor, I will like to differ with the Court in this respect.

THE COURT: Let me say this to you, Mr. Payne, be that as it may, to me the problem arises, the question of whether or not the circumstances surrounding this situation in this case, an officer who has had long experience as a detective is justified based upon what he saw and observed to stop and frisk an individual.

Another question comes to my mind, in spite of the fact what counsel, Mr. Stokes, has stated, whether or not stopping and frisking is a search, or whether or not there isn't a different meaning, the stopping and frisking and searching.

Those are the problems.

MR. PAYNE: I agree, your Honor, and I humbly submit to the Court --

THE COURT: I think your questions pertaining, as to the questions that were asked or interrogation by the officer after he stopped and frisked them and found the so-called guns on their

person, I think any evidence pertaining to the questions as to employment or other things of that nature would have to go to the merits of the charge with which these gentlemen are faced, if the Court finds that the search or frisking is lawful.

MR. PAYNE: If the Court so rules, but I humbly submit to the Court that in a research of cases only as recently, some of them which I read only as recently as this morning, your Honor, sustains the proposition that the carrying of a concealed weapon falls in that kind of a category which constitutes a breach of the peace.

THE COURT: I am not arguing that.

MR. PAYNE: And therefore, your Honor, goes to the essence of a question of this problem, of this nature.

THE COURT: Mr. Payne, I am not arguing with you at all, although I am in agreement with you that it may constitute a breach of the peace.

But we are not faced with that question, because we are faced with an entirely different situation.

MR. PAYNE: All right, your Honor.

THE COURT: Whether or not this search and frisking was reasonable or unreasonable.

MR. PAYNE: I will abide by the Court's ruling, whatever —

MR. STOKES: Did the Court rule, how did the Court rule?

THE COURT: I have ruled that the question is improper.

MR. PAYNE: All right.

THE COURT: I have sustained your objection.
(Thereupon the witness resumed the witness stand.)

MR. PAYNE: I have forgotten what my line of questioning was.

(Last question was ready by the reporter.)

By Mr. Payne:

Q Detective McFadden, you recovered a gun from the person --

A Pardon?

Q You recovered a gun from the person of each of these two defendants, is that right?

A That's right.

Q The man that you recovered the guns from, the person of each of them, are they in the courtroom?

A Yes.

Q Will you point them out to the Court?

A Number two man is Chilton, and number three man is Terry.

MR. PAYNE: May the record show and indicate the witness is identifying the persons that he recovered the guns from.

THE COURT: Yes.

Q Did you do anything with those guns subsequently, Detective?

A Pardon?

Q Did you do anything in reference to those guns subsequently?

A What do you mean by that?

Q All right, let me come back to it in just a moment, Detective McFadden.

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.

Q Now, after recovering those guns did you check the guns out at the police station or anywhere else?

MR. STOKES: Objection.

THE COURT: Objection sustained.

MR. PAYNE: Your witness.

THE COURT: He has had him. Do you have anything to ask further?

MR. STOKES: Yes, your Honor.

RE-DIRECT EXAMINATION OF DETECTIVE MARTIN McFADDEN

By Mr. Stokes:

Q Mr. McFadden, you just said you suspected them of casing a job, is that correct?

A That's right.

Q You were basing this --

A Pardon?

Q You were basing this, suspecting them of casing a job, upon your observations of them, sir?

A That's right.

Q Now, you had had no one come up to you and given you any information regarding them, had you?

A Nobody said anything to me.

MR. PAYNE: Objection.

THE COURT: Objection sustained.

MR. STOKES: That is all right, it was leading and improper.

Q Had anyone come up to you and given you any information regarding these two men?

MR. PAYNE: I am going to object and state to the Court my reason for objection is this is counsel's witness, and therefore cross-examination would be improper.

THE COURT: Well, he is leading him somewhat as his own witness.

Will you read the question?

(Last question was read by the reporter.)

THE COURT: You may answer.

A Absolutely no.

Q Did you know these two men previously, sir?

A I do not, I didn't know the men from Adam.

Q This would include the white fellow, Officer?

A I did not know the white man either. I never seen the three men before.

Q Now, you told Mr. Payne that in patting John Terry you felt a gun.

Now, when you first had this feeling did you know at this time that this was a gun?

A You mean when I felt it?

Q When you felt it from outside.

A Well, I had some idea, yes.

Q When did you first know that it was definitely a gun?

A When I got my hand on the handle.

Q And at this point it was still within the coat, wasn't it?

A That's right.

Q Now, by patting a person down, will you tell the Court what you mean by patting?

A Well, I don't go into their pockets. I just -- the man is standing and I will pat him down (indicating) any place on his body, just pat him, see whether he has anything.

Q You pat with both hands simultaneously on all parts of the body?

A Oh yes. You can pat with both hands, you can pat with one hand.

Q Prior to removing guns from both men's coats you patted them down, after which you removed a gun from the coats?

A That's right.

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.

MR. STOKES: Thank you, Mr. McFadden.

THE COURT: Anything further?

MR. STOKES: I have nothing further of this
witness.

MR. PAYNE: Nothing further.

THE COURT: The Court would like to ask you a
few questions, Mr. McFadden.

By the Court:

Q You have mentioned about casing a place. In ordinary language what
do you mean by casing?

A I mean waiting for an opportunity.

Q Of doing what?

A Of sticking the place up.

Q In your thirty-nine years of experience as an officer, and I believe
you testified thirty-five years as a detective -- is that correct?

A That's correct.

Q Have you ever had any experience in observing the activities of
individuals in casing a place?

A To be thruthful with you, no.

Q You never observed anybody casing a place?

A No.

Q But you have had the experience of a detective in apprehending, and
doing your police job as assigned?

A That's right, and observing.

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 How long have you been assigned to that area?

A Thirty years, from 14th Street to the Square.

Q And I presume you have had a lot of experience in that direction over thirty years, is that correct?

A That's right.

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.

Q What caused you specifically to be attracted to those two individuals at the location that you have mentioned, or let me put it to you this way:

Supposing those two defendants here that are now in court were standing across the street from here, and doing the same activities that you observed them on Huron and Euclid, would you have had any cause for suspicion?

A I really don't know.

THE COURT: Anything further gentlemen?

MR. PAYNE: Nothing further.

MR. STOKES: We have nothing further of this witness, your Honor.

THE COURT: You may step down.

MR. STOKES: If your Honor, please, we rest with respect to this motion.

MR. PAYNE: I don't have any witnesses to present, your Honor. I do have argument that I would like to make to the Court.

THE COURT: All right."

Thereupon, after the hearing as above described, the Court ruled as follows:

THE COURT: I understand your viewpoint, I understand Mr. Stokes' viewpoint.

Gentlemen, it was suggested yesterday that briefs be filed and I stated that it was not necessary, in light of the fact that I have given this matter considerable attention to the law, and the only question before me was to determine the facts so the proper law can be applied.

There is no question about the facts in this case, so I don't think it is necessary for me to repeat at length save and except to state that the police officer of many years of service and experience had observed the action of defendants which indicated to him that they were casing a robbery.

There is no doubt in my mind that the officer, based upon his training, length of service, and experience as a police officer and detective, assigned in the area which he had been placed, and doing the job he had been doing, had reasonable cause to believe and to suspect that the defendants were conducting themselves suspiciously, and some

interrogation should be made of their action.

The Supreme Court of the United States has in many cases of recent years expressed itself clearly and distinctly that a general search and seizure is in violation of the Fourth Amendment unless the search is done with a proper warrant from the Court, or if the search is made in connection with a lawful arrest and is contemporaneous and incidental to such arrest. *Henry vs. U.S.*, 361 U.S. 98. *Kerr vs. California*, 374 U.S. 23, *Mapp vs. Ohio*, 367 U.S. 643.

There is no evidence that any warrant had been issued for a search or frisk and I am not going to stretch the facts and say that there was a lawful arrest prior to the frisk of the defendants. 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 has been frequently stated by the U.S. Supreme Court that a state may establish its own rules and standards pertaining to search and seizure so long as these rules and standards do not violate the substance and spirit of the Fourth Amendment. It would certainly follow that the same rule would apply to the problem of "stopping and frisking" of an individual by a police officer where the facts justify.

In the case of *Kerr vs. California*, 374 U.S. 23, the court pronounced: "A state is not precluded from developing workable rules governing searches to meet the practical demands of effective criminal investigation and law enforcement that does not violate the constitutional standards of what is reasonable search and seizure."

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, or is it a proper guidance to meet the practical demands of effective criminal investigation and the safety of the officer performing his sworn duty? This Court believes that it is the latter view that would be prevailing and that such conduct would not be held as a violation of the Fourth Amendment.

We cannot forego and forget that police officers have a job to do, and they must do the job in connection with crime which has been on the increase.

At the same time a police officer cannot -- as far as this Court is concerned -- and will not be permitted to stop and frisk an individual simply because he has a suspicion, a mere suspicion, unless there are reasonable circumstances justifying a frisk.

This Court believes there is a distinction between stopping and frisking, and search and seizure.

A search is primarily for the purpose of trying to obtain evidence in connection with the commission of a crime, that the police officer may reasonably believe that a crime has been committed or might be committed.

A frisking is strictly for the protection of the officer's person and his life.

There was reasonable cause in this case for the officer, Detective McFadden, to approach these individuals and pat them. He approached them, and for his own protection frisked them. He did not go into their pockets. 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.

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.

In the case of *People vs. Rivera* (7/10/64) decided by New York Court of Appeals, U.S. Law Week July 28, Volume 33, No. 4, the court stated that a policeman has the authority to stop and question a suspect. "Prompt inquiry into suspicious or unusual conduct is an indispensable power in the orderly government of large urban communities."

The frisk is essential to the stop for without the latter the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible.

In the case of *People vs. Martin*, 46 California, 2nd, 106, the court similarly upheld stop and frisk by an officer, and the court in effect stated the security of public order and lives of the police are to be weighed against a minor inconvenience and petty indignity.

I may say at this time, I am a great believer of the personal rights propounded by our Supreme Court, reiterated and reaffirmed, neglected over the years, and given to us under the Fourth Amendment, the Fourteenth Amendment, and other amendments of the U.S. and State Constitutions.

But police officers in a community also have rights under the Constitution, and rights given to them by virtue of their office, and one of their rights as I have indicated is the right when the circumstances justify and there is a reasonable suspicion, and for his own personal protection, to stop the individual or individuals and not search, but to frisk, to determine if there are weapons for his own personal safety; and finding the weapon by frisking is the fruit of the stop and frisk, in the same relation that the courts refer to the fruits of the crime on a search and seizure. *Ballard vs. State*, 43 O.S. 340. *Clark vs. DeWalt*, 65 O.L.A. 203.

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.

But as I have stated, and I repeat again, there is a distinction between a frisk and a search and seizure.

This matter is of great importance and of great concern, and I certainly hope that counsel will endeavor to have this question determined by the Appellate Courts, for it is most desirable that we have clearness with respect to this problem and that police officers

know what they may do and can do in a stop and frisk matter.

The motion in each case is overruled, and exception to the defendants. It is so ordered.

The Court then called the case of the State of Ohio vs. John W. Terry, Case No. 79491, for trial, the defendant, Richard D. Chilton, having also had a separate trial. Whereupon, Mr. Stokes, on behalf of the defendant, John W. Terry, renewed his Motion to Suppress filed herein, which motion was overruled by the Court. Mr. Stokes then entered a plea of "not guilty" on behalf of said defendant, John W. Terry.

Mr. Payne and Mr. Stokes then entered upon a stipulation on behalf of the State and the defendant as follows:

MR. PAYNE: If it please the Court, there is a stipulation between counsel for the State and counsel for the defendant, that all of the testimony which has previously been given in the case of the State of Ohio vs. Richard D. Chilton by Detective McFadden, the arresting officer here, may be fully incorporated into the case of John W. Terry as though it was fully testified to from the stand under oath; with the additional stipulation to the Court that after Detective McFadden observed these men in front of the area of the Diamond Store, or Airline Office, and after they had left that area and gone to the area of Zucker's on Euclid Avenue, that he approached them, asked for identification, in which something was said by each of them, at which time he then turned the defendant Terry around, patted him down, Terry having on an overcoat and a suitcoat, and in patting him down felt an object in the upper region of the left breast pocket;

That thereupon feeling the object which felt in the nature of a weapon, that he reached in under the overcoat into the upper breast area pocket of the coat, inside pocket of the coat, your Honor, and removed from the inside pocket of the coat a revolver containing a clip, and seven shells, which will be marked for purposes of identification as State's Exhibit 3.

(State's Exhibit 3 was marked for identification by the reporter.)

THE COURT: It may be received.

MR. PAYNE: I haven't finished the stipulation.

MR. STORES: Go ahead.

MR. PAYNE: That it may be received --

THE COURT: Well, I am a little ahead of myself.

MR. PAYNE: Well, it is offered into evidence, and there is an objection by counsel for the defense as to its admission into evidence. There is an objection by counsel for defense as to its admission which we will ask the Court to rule on in view of the stipulation as to the other facts.

It is further stipulated that the officer would testify that the weapon was concealed in the inside pocket of Terry, that he removed the same, and that subsequently the defendant Terry was arrested and charged with the offense of carrying concealed weapon, which he is on trial here for at this time; and that the offense was committed in the State of Ohio, County of Cuyahoga, and City of Cleveland.

THE COURT: As testified by Detective McFadden?

MR. PAYNE: Yes, as testified by Detective McFadden.

MR. STOKES: We will enter into those stipulations which have just been enunciated by Mr. Payne, your Honor.

THE COURT: But you are objecting to the introduction of State's Exhibit 3?

MR. STOKES: Yes, that's correct. Is it 3-A, too?

MR. PAYNE: I just marked it all Exhibit 3.

MR. STOKES: I see.

THE COURT: The Court will accept the stipulation as agreed to by counsel for defendant Terry. And the Court at this time will accept into evidence State's Exhibit 3, which constitutes the revolver and the seven bullets.

MR. PAYNE: And the clip.

THE COURT: And the clip. You may have your exception.

MR. STOKES: Yes, your Honor.

MR. PAYNE: With those agreed stipulations, your Honor, having been entered into, the State would rest its case at this time.

The testimony given by Detective McFadden in the case of the State of Ohio vs. Richard D. Chilton which related to John W. Terry is as follows:

DIRECT EXAMINATION OF MARTIN McFADDEN

By Mr. Payne:

Q Will you state your name, please?

A Martin J. McFadden.

Q Where are you employed?

A Cleveland Police Department, Detective Bureau.

Q How long have you been so employed?

A 39 years and four months, a little over four months.

Q Directing your attention to on or about the 31st day of October, 1963, do you recall what your assignment was on that day?

A Well, I am assigned to stores and pickpockets in the downtown area.

Q Were you so assigned on that day?

A I was.

Q Do you remember your hours of duty, sir, on that date?

A Well, it would either be -- 9 to 5:30, quarter to six. Store hours.

Q Now, Detective McFadden, did you have the occasion to participate in the investigation of the matter before the Court?

A I did.

Q Will you tell us where, when, and approximately what time did you first come into the investigation of this matter?

A On October 31, 1963, about 2:30 P.M., at Huron Road and Euclid.

Q While you were at Huron Road and Euclid Avenue, can you tell us what if anything you observed?

A I was walking northeast on the south side of Huron Road, and approximately 3 to 400 feet away from the corner on the opposite side of the street I saw two men standing at the corner of Huron and Euclid.

As I was walking down I observed one man leave the other man at the corner, and walk up, that is, southwest on the north side of Huron Road.

As he passed either the United Airline or the Diamond Shop, which is right next door, he stopped for a second and then continued a couple of doors

down, that is, west, and he come back and he did the same thing. He came back to the man.

In the meantime I positioned myself at Rogoff's which is about two doors from the corner from 14th on Huron Road. There is a restaurant on one corner -- or a restaurant and then Milgrim's and then Rogoff's.

I watched these men. I seen them each make three to four trips up Huron Road, and between one of these trips a white man approached them on the corner and stopped and talked with them for a minute or so, and then he walked, left them and walked west on Euclid.

These two men then proceeded to go through the same routine and going up Huron Road, making the stop, going a couple of doors down, and then come back and making a stop a second or so in front of either of these two windows, and then when they left this corner, after they both had made several trips, a couple of trips, three or four trips --

Q All right. Hold it right there, Detective. One of the men that was making these trips, is he in the courtroom now?

A Yes.

Q Will you point him out to the Court?

A Chilton, the man behind Mr. Stokes.

MR. PAYNE: May the record show and indicate the witness is identifying the defendant in this case?

THE COURT: The record may so show.

Q Did you subsequently learn his name?

A Yes, I learned his name.

Q And what did you learn his name to be?

A Richard Chilton.

Q Is that the same man that you observed on the day in question as you just described?

A It is.

Q Now, did I understand you to say, Detective, that the two men then left the corner?

A That's right.

Q Where did they proceed to?

A They proceeded west on Euclid on the south side of Euclid Avenue.

Q What then did you do if anything, what happened there?

A At about 1120 Euclid Avenue they saw this white man standing in front of Zucker's Store, and they went over and they were talking to him.

Q Was this the same man that had talked to them previously, when you were observing them?

A Absolutely the same man.

Q What then did you do, if anything?

A I then went over and I informed them that I was a policeman, and I asked each one their name, and they muttered something, I just can't recall what they said their name was.

And I turned -- he was the third, he was the further one west standing up against the window, Terry, and I pulled him in front of me and I tapped him down and I felt --

Q You tapped Terry down?

A That's right.

Q When you tapped Terry down what do you mean by tapping him down?

A I just went over his clothing on the outside, just tapping him, to see whether he had any weapons, to see whether he had any weapons.

Q What happened as a result of that?

A I felt a weapon in his outer topcoat pocket, lefthand upper pocket, inside.

Q What then did he do, if anything?

A I put my hand in there and felt the gun, the handle of the gun. I tried to get it out and it stuck, so I took the whole coat off of him.

I then put him in front of me and ordered the other two men into Zucker's Store, where I informed them to face east with their hands up.

I then went over and searched Chilton.

Q Will you tell us how you -- you used the word searched -- will you tell us how you searched him?

A Pardon me, I should have said I tapped him down, too, and then I felt that gun.

Q You say you tapped him down; did you tap him down or did you search him?

A I tapped him down first and then searched him.

Q All right. Now, will you tell us what you mean by tapping him down, again?

A Just feeling on the outside of his clothing.

Q As a result of feeling on the outside of his clothing, what if anything did you discover?

A I felt a gun in his left-hand topcoat pocket.

Q And upon feeling that object, what then did you do if anything?

A I put my hand in his pocket and pulled out a .38 caliber revolver.

Q And this was from whom?

A From Richard Chilton.

MR. PAYNE: Let the record show that the witness is pointing to and indicating the defendant Chilton at this time.

THE COURT: The record may so show.

(State's Exhibit 1 was marked for identification by the reporter.)

Q Detective McFadden, handing you what has been marked for purposes of identification as State's Exhibit 1, can you identify State's Exhibit 1?

A Yes, this is the gun that I took out of Chilton's pocket.

Q And where was this gun?

A In his outer pocket, that is, he had a topcoat on, and it was in the left-hand pocket of the outer pocket of his topcoat.

Q Could you see the gun at any time before you patted him down?

A No, sir.

Q Can you tell me what was the condition of the gun in respect to being loaded or unloaded at the time that you removed it from the defendant's pocket.

MR. STOKES: Pardon me. If your Honor, please may I show an objection to all questions pertaining to this gun, a continuing objection.

THE COURT: I thought you were going to object to what might be considered a leading question, but in light of the fact that you are not objecting to that phase of it, but you are making an objection to all questions pertaining to this gun -- is that correct?

MR. STOKES: Yes, your Honor.

THE COURT: A continuing objection?

MR. STOKES: Yes.

THE COURT: Let the record so show, and the objection is overruled.

MR. PAYNE: Fine.

Q I am sorry, your last response to my question, do you recall the question?

THE COURT: Read the question.

(Following question was read by the reporter:)

"Can you tell me what was the condition of the gun in respect to being loaded or unloaded at the time that you removed it from the defendant's pocket?"

A Loaded.

Q Handing you what further will be marked as State's Exhibit 1-A, can you identify State's Exhibit 1-A?

A These are five pellets.

MR. STOKES: Objection to this also, your Honor.

A These are the five --

MR. STOKES: And a continuing objection to this exhibit.

THE COURT: Your objection will be noted for the record, that it is a continuing objection, as to the gun and what was contained in the gun.

MR. STOKES: Yes, your Honor.

THE COURT: Objection overruled. You may
have your exception.

Q What are State's Exhibit 1-A?

A These are pellets found in the gun.

Q After finding State's Exhibit 1 and 1-A, what if anything did you do
with respect to the defendants?

A I then went over and tapped the third man down who was Karl Katz, but
I found no weapons.

Q Then what did you do, if anything?

A I kept them there with their backs turned toward me until I received
help.

Q Did you consider them under arrest at that time, officer?

A I sure did. As a matter of fact, I told them to call the wagon.

Q Was the defendant subsequently charged with the offense of carrying
a concealed weapon?

A Yes, sir.

Q On the street you tapped down Terry and found the pistol and then you
asked them to go into the store, is that right?

A Yes.

Q Then you patted down or tapped down Richard Chilton, is that correct?

A Yes.

Q Can you tell us why you tapped down Richard Chilton?

MR. STOKES: Objection.

THE COURT: It has already been testified to as to
the tapping down of Richard Chilton.

Objection is sustained.

Q Detective McFadden, after finding the weapon on the person of Richard Terry, you then --

THE COURT: Richard who?

MR. PAYNE: I am sorry.

MR. STOKES: Chilton.

Q After finding the weapon on the person of John Terry, you asked all the defendants to go into the store, is that correct?

A That's right.

Q Can you tell the Court what was in your mind when you tapped down Richard Chilton?

MR. STOKES: Objection.

THE COURT: Objection sustained.

Q Did you tap Richard Chilton down for the purpose of ascertaining whether he had any weapons on his person?

MR. STOKES: Objection.

Q Yes or no?

THE COURT: Objection sustained.

Q Detective McFadden, the store that you took Richard Chilton into, is that in the city of Cleveland, County of Cuyahoga, and state of Ohio?

A It is.

MR. PAYNE: Your witness.

CROSS EXAMINATION OF DETECTIVE MARTIN McFADDEN

By Mr. Stokes:

Q Detective McFadden, October 31st at 2:30 P.M. was broad daylight, wasn't it?

A That's right.

Q And the area in which you saw these men at 2:30 that afternoon was literally filled with people, wasn't it?

A Well, I wouldn't say it was filled with people. It isn't like being down on the Square.

I would say there were people down there, but on that particular day I couldn't tell you.

As a matter of fact any day you never find the number of people there that you would downtown, that is, down in the west end of the Square, around the Square.

Q Well, with relation to that particular area that day, what was the situation with respect to pedestrians there?

A Oh, I wouldn't say there would be many.

Q Well, can you give us some estimate as to about how many people you would say were in and around that vicinity as pedestrians?

A Well, if I would give you the number of people, I don't know whether I would be lying or telling you the truth. I wouldn't know exactly how many people were there.

Q At any rate, this particular area is flooded with stores, isn't it, there are plenty of stores in that particular area?

A That's right.

Q There are people going in and out of those stores at that hour of day, with a great deal of frequency, aren't there?

A Can I answer that question in my own way?

Q Yes, surely.

A You know, those stores extend, this particular section, they extend, there are doors on the Huron Road side and there are doors on the Euclid side.

There is a lot more people go in through the Euclid Side that there is through the Huron Road side, of any of these stores.

Q At any rate, we are talking about the area where you saw these men at Huron and Euclid at 2:30 in the afternoon, and my question is this, weren't there other people on the street?

A Yes, there were some, a few people on the street, yes, naturally.

Q Now, when you first saw these two men, there was nothing unusual about two colored men standing on the corner talking, was there?

A No.

Q When did you first draw the conclusion that their actions were unusual?

A Well, when I saw them standing on the corner, and I was on the opposite side of the street walking towards the direction, that is, towards where they were at, they were talking.

I walked slow and then I observed the one leave the other and walk up, as I was walking down, and I noticed him peer into a window, go by, come back, and do the same thing, and then I walked a little bit faster and went to the Rogoff Store which as I said is about the third store from the corner of 14th Street, and that is where I observed them more.

Q Well, at what point did you consider their actions unusual?

A 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.

When he come back, then I observed the other man doing the same thing.

Q Well, would this be a fair statement, then, that it was at this point

then that you decided you ought to watch them further?

A Well, I will be truthful with you, I will stand and watch people or walk and watch people at many intervals of the day.

Some people that don't look right to me, I will watch them.

Now, in this case when I looked over they didn't look right to me at the time.

Q So this was your purpose then for watching them because they just didn't look right to you?

A I get more purpose to watch them when I seen their movements.

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 respect 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.

Q I believe you, Mr. McFadden. Now, you can't tell us, can you, whether when they walked over as you described --

A When they walked over where?

Q To either United Airlines or the Diamond Shop, which store they were actually looking into?

A No, I can't, to be truthful with you, no. It was either one of those two.

Q And at no time did either one of them enter either one of those stores, did they?

A No, no.

Q Now, how long a period of time did you observe them there at Huron and 14th?

A Oh, I imagine around twelve or fifteen minutes, something in that vicinity, ten to fifteen minutes.

Q During this time how many trips would you say each of them made away from the corner over to the two stores you have referred to?

A Oh, I would say about four trips, three to four trips, maybe four to five, I didn't count them.

Q Are you talking about each person?

A Well, between them, between the two of them, maybe half a dozen trips, maybe a little more, it might be a little less. I don't know, I didn't count the trips.

Q These trips would be a matter of this fellow walking over, looking into each one of these stores, you don't know which --

A That's right.

Q -- and then walking back to where the other stood, is that correct?

A That's right.

Q There was nothing unusual about their dress, was there, their appearance?

A No.

Q And both men had on topcoats?

A That's right.

Q Were they wearing a hat?

A To be truthful with you I don't remember.

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.

Q Now, you have described their leaving Huron and Euclid and walking west on Euclid?

A That's right.

Q Was there anything unusual about the manner in which they walked down Euclid?

A No, they walked in a natural gait.

Q And how long would you say it took them to get from the point where they were at Huron and Euclid down to Zucker's?

A Oh, I imagine it would take a minute.

Q Now, was this white fellow already standing in front of Zucker's when they got there?

A That's right.

Q You had left your spot at Rogoff's, is that it, where you were standing in the doorway?

A Yes, when I come across the street.

Q And you were following behind them now?

A Yes, but I run across the street.

Q You ran across the street?

A That's right.

Q But they were walking?

A That's right, and then when I -- I walked about 20 feet, maybe 25 feet behind them.

Q How long were they standing in front of Zucker's talking to this white person when you went up to them?

A I couldn't be between -- between a minute and two minutes, maybe less than that. I couldn't say.

Q Can you describe for us the manner in which the three men were standing in front of Zucker's?

A The white man was at the easterly end of the display window. Chilton was in the middle. And the other man, Terry, was on the west side of Chilton.

Q The three of them were just standing there talking?

A That's right.

Q You were in plain clothes that day, weren't you?

A That's correct.

Q By plain clothes we mean in regular dress?

A That's right.

Q When you identified yourself as a police officer, did you take out your badge?

A No, I did not.

Q In what manner did you identify yourself as a police officer?

A I said, "I am a police officer."

Q But you showed no identification?

A No, I showed no identification.

Q After saying, "I am a police officer," what did you next say to these men?

A- I said, well, "What is your name, your name and your name?" and they mumbled something. I don't remember what the names were that they mumbled.

They said something but I don't recall what it was at that time.

Q Then what is the very next thing that was said or happened?

A The next thing I took Terry and put him in front of me, and we were both facing the other two men.

Q By taking Terry and putting him in front of you, did you have to put your hands on him?

A Yes, I did.

Q Would it be fair to say that you grabbed him with both of your hands, would that be fair?

A Well, I wouldn't say. I just put him -- I don't say I went at him like that and grabbed him. I just took him and put him in front of me.

Q But in doing so you had to touch him with both your hands?

A I imagine I touched him with both of my hands, that's right.

Q What you actually did, you completely reversed his position that he was standing in, because you turned him around as to have his back to you?

A That's right.

Q Then you say you tapped him down?

A That's right.

Q By tapping him down, do you mean that you patted on and about his body with your hands?

A On the outer part of his body, on the outer part of his clothing.

Q And when you felt this weapon, you then removed his coat from his body, didn't you?

A No, sir, I did not. I put my hand in and I felt a handle of a weapon, and I couldn't get the weapon out of the inside pocket, and I took the coat off.

Q You removed the coat from Terry's body, didn't you?

A That's right, that's right.

Q Now, all of this is taking place out on Euclid Avenue?

A That's right.

Q With people passing by?

A Well, naturally.

Q Now, when we talk about Zucker's Store, we are getting close to Ninth and Euclid, aren't we?

A Well it is about 1100, 1120, well, it is a little distance from Ninth Street.

Q That is a pretty heavily populated area, isn't it, sir?

A Euclid and Ninth, yes.

Q Now, did you ask them to go into the store, or did you order them into the store?

A I ordered them into the store.

Q As a result of your order, did these men follow your order?

A They did.

Q Now, had you at that point drawn your gun?

A No. I had it handy.

Q At that point, had anyone been placed under arrest, and by that point I have in mind these three men being ordered into Zucker's, at that point had anyone been placed under arrest by you?

A Before I made the second search, when I entered that store, I informed -- I hollered out to the men in the store, "Call the wagon." That was enough to say that they were under arrest.

Q When did this occur now?

A Pardon?

Q When did this occur?

A When I first brought the men, when they first went in there, after I got the first gun and I ordered them in, and at that time when I was going in, as soon as I told them to face east and put their hands out, I told him to call the wagon before I made the second search.

Q This is after you had searched Terry but before you had searched Chilton and Katz?

MR. PAYNE: Objection. Just a minute.

THE COURT: What is your objection?

MR. PAYNE: My objection, your Honor, is that the testimony of Detective McFadden described on direct examination was that he tapped them down. My objection is to the use of the terminology.

THE COURT: He described what he had stated, but the Detective sort of interchanges the word searching.

MR. PAYNE: I am aware of that, and I do want to keep the record straight since the officer --

THE COURT: The Court is aware.

MR. PAYNE: I acknowledge to the Court that he has used them interchangeably.

THE COURT: The Court is aware of how he described it, and I am fully aware that the Detective feels a search and a tapping can be used interchangeably. The Court has a different feeling.

MR. STOKES: I have this statement, that he tapped him down first and then searched him.

Has a ruling been made?

MR. PAYNE: I think he was waiting on an affirmative ruling on the objection your Honor.

THE COURT: Well, the objection is overruled.

MR. STOKES: May we have the question read back, please?

THE COURT: Read the question.

(Following question was ready by the reporter:)

"This is after you had searched Terry but before you had searched Chilton and Katz?"

A Are you referring to the call for the wagon, are you referring to the arrest?

Q Yes, the arrest.

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.

Q Whom were you arresting?

A I am arresting the whole three of them.

Q Detective McFadden, you testified approximately a week ago in this very courtroom before this same judge on a motion to suppress, didn't you, sir?

A That's right.

Q And at that time do you recall that I asked you this question, and you gave this answer, "At what point did you consider them to be under arrest?" And you said, "When I ordered the wagon," didn't you?

A That's right.

Q Do you recall that you testified in that matter that you told the store people to order the wagon after you had searched Chilton and Katz up against the wall in Zucker's Store, do you recall that testimony, sir?

A I don't remember.

Q Well, do you recall that in that testimony you said after entering the store you ordered the three men up against the wall?

A Yes.

Q Do you recall that you said, "I then patted Chilton down, and I felt a gun in his left topcoat pocket and I reached in his pocket and took the gun out," do you recall that?

A That's right.

Q You said, "I then searched Katz and I found nothing"?

A That's right.

Q "And that at this point I ordered the wagon," do you recall that?

A I don't recall. I remember saying something about calling the wagon, but whether it was at that point or whether it was at the other I don't recall.

But I remember distinctly when I went in there, after I got that first gun and got those men in there, I told them to call the wagon.

It would be a natural thing for me to do, I got three men.

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

A What were Chilton and Katz being arrested for?

MR. PAYNE: I am going to enter an objection at this time, your Honor.

THE COURT: What is the basis for your objection?

MR. PAYNE: As a matter of law, your Honor, I think the subsequent following of this matter will show that those men were arrested initially and charged with investigation and then to carrying concealed weapons.

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.

THE COURT: In light of the fact that there have been some questions elicited by you, I have permitted Mr. Stokes to

continue with his questioning, and the Court is fully aware of the situation as to what the law is in that connection. Even the officer seems to be expressing his viewpoint as to point of time of the arrest.

MR. PAYNE: I make my objections for clarification of the record, your Honor, so I abide by whatever the Court's ruling is.

THE COURT: Mr. Stokes, you may continue.

MR. STOKES: Read the question.

(Following question was read by the reporter:)

"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"?

MR. PAYNE: I must object now.

THE COURT: Mr. Stokes, I think we have gone into this question. You are questioning the officer on questions of law, whereas the questions should be directed as to the facts and circumstances pertaining to the arrest.

As I have indicated, the question as to what constitutes an arrest is not for the officer's determination, but is strictly based upon the facts that occurred, and the Court will determine whether an arrest actually occurred from those facts. It is not what was in his mind as to when the arrest occurred.

MR. STOKES: I think I know what the Court means with reference to certain acts at that point, regardless of what the officer calls it, would probably constitute an arrest.

But I think it is important and bearing upon this whole question as to what this officer actually did, and his reasons for having done so certainly bear upon this whole question.

THE COURT: Well, you may proceed.

MR. STOKES: Thank you, your Honor. Would the reporter please read that question back, please?

MR. PAYNE: Pardon me, your Honor, if it is to go back to the same question I would have to renew this same objection.

I have no problem in my own mind of Mr. Stokes going in, as he stated, as to what the officer actually did.

But when it comes to questioning the officer on that which is a matter of law, and I think the last question related to the fact as to whether the officer knew of any law on the books pertaining to association, or something of that nature, I think is improper, because first of all it has not been established that this officer has training and background in the law to be so qualified to give such an opinion in this way.

I think it is purely a matter of law.

Now, his actions and conduct I admit are important.

THE COURT: Let me say this to you, Mr. Payne, if this were a matter before the jury, if counsel objected or even if counsel would not object, in light of the fact that I have indicated

in my previous decision on the question of the motion to suppress, that I felt this to be a most interesting and novel question pertaining to the circumstances in this case, and what occurred on the basis of the so-called tapping, stopping and tapping, and I indicated to counsel that I would like to see the matter of the frisking by the police officer be determined, so that police officers will know what they can do and what they cannot do.

MR. PAYNE: I take it then that the Court is of mind to allow a wide latitude?

THE COURT: Therefore I am permitting wide latitude in that direction so Counsel will feel and defendant will feel that everything that they desire to present to the Court has been presented.

MR. PAYNE: All right, your Honor.

THE COURT: You may proceed.

MR. STOKES: Would you repeat that last question for us, please Mr. Reporter?

(Following question was read by the reporter:)

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

THE COURT: You may answer that yes or no, Mr. McFadden.

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

THE COURT: You never graduated from law school, did you?

THE WITNESS: No, Sir.

Q Detective McFadden, were all three of these men taken to the police station?

A Pardon?

Q Were all three men taken to the police station?

A They were.

Q Nothing was found in the search of Katz, was there?

A That's right.

Q But he was taken to the police station, wasn't he?

A That's right.

Q And as a result of this arrest which you made that day of Karl Katz, has he from that date until now ever been charged with anything as a result of that arrest?

A He was.

Q What was he charged with?

A Being a suspicious person.

Q Is that a misdemeanor or felony?

A Misdemeanor.

Q By the way, have you had occasion to ascertain whether or not this gun will shoot?

A If I had the occasion to ask him where he got it?

Q No, ascertain whether or not this gun will shoot?

A No.

Q At what point in this whole thing did you take your gun out?

A At what point was it?

Q Yes, at what point during this arrest did you actually pull your gun out?

A I never had to pull it.

Q You never pulled yours?

A No.

Q Detective McFadden, you held these three men in the store while you waited for the wagon to come, didn't you?

A Did I what?

Q You held these three men in the store there?

A That's right, I held them at bay with one of their guns.

Q You were holding one of their guns on them?

A That's right.

MR. STOKES: I have no further questions.

RE-DIRECT EXAMINATION OF DETECTIVE MARTIN MCFADDEN

By Mr. Payne:

Q Detective McFadden, you indicated that the person by the name of Katz was charged with the offense of being a suspicious person, is that correct?

A That's right.

Q Do you know whether John Terry or Richard Chilton were charged with that offense prior to being charged with the offense of carrying a concealed weapon?

MR. STOKES: Objection.

THE COURT: He may answer.

A No.

THE COURT: I will indicate the basis --

A They were charged with --

THE COURT: Just a minute. Let me give the basis for my ruling in light of the fact that the door was opened by you on that particular question.

A They weren't charged with being suspicious persons. Just charged with carrying concealed weapons, both.

Q Detective McFadden, directing your attention back to the time that you walked up to these men in front of Zucker's, you indicated that when you first walked up to them and you asked them their names, that you were facing them all at that time, is that correct?

A That's correct.

Q Then you turned John Terry around, having him face the other two men, is that correct?

A That's right.

Q Detective McFadden, can you tell us why you turned John Terry around facing the other two men, with you behind him?

MR. STOKES: Objection.

THE COURT: You may answer.

A Due to my observation, the observation on Huron Road of these two men, I felt as though they were going to pull a stick-up and they may have a gun.

Q Now, after finding the gun on John Terry, and then ordering all three into the store, you testified that you then patted Richard Chilton down?

A That's right.

Q Tell us why you patted Richard Chilton down?

MR. STOKES: Objection.

THE COURT: He may answer.

A For the same reason I patted Terry down.

Q And that was --

A That was on account of the observation of both of them walking up and down Huron Road and peering into windows, and I suspected they were waiting for an opportunity to pull a stick-up.

MR. STOKES: I am going to object to that answer as not being responsive, and ask that it be stricken.

THE COURT: Objection overruled. You may have an exception.

At the close of the State's case, defense counsel, Mr. Stokes, renewed all motions made by the defense in this case; whereupon, the Court overruled the motions in connection with the search and seizure and directed verdict of acquittal, and exceptions saved. Thereupon, the defense also rested and the defendant did not take the stand to testify. The Court made the following ruling:

FRIEDMAN J.: Gentlemen, in light of the fact that the testimony as adduced in court relating to Robert Chilton was stipulation agreed to between both counsel for the State and counsel for the defendant, as being the testimony of John W. Terry, with the exception of one item which counsel took exception to, the introduction of State's Exhibit 3 which is the pistol, the chamber, and the bullets -- is that correct?

MR. PAYNE: That's correct, your Honor.

THE COURT: Therefore, my decision will be relating as to both defendants, making it such.

The two defendants have been charged with violation under Section 2923.01 relating to concealed weapons. That section provides and reads as follows, and I will read it verbatim, the pertinent part thereof:

"No person shall carry a pistol or other dangerous weapon concealed on or about his person."

And then it has a provision pertaining to exceptions, and the exceptions do not apply in this particular case.

The elements required under this section of the statute for the State to prove its case beyond a reasonable doubt are to knowingly have concealed on or about his person a pistol; and the venue.

Since the defendants had waived a jury and have tried this matter before the Court, it is incumbent upon me to evaluate the testimony and determine if the State has proved its case beyond a reasonable doubt whether the defendants have violated the law as prescribed by statute.

What is the testimony in this case? Detective McRadden, a member of the Cleveland Police Department for 39 years, a detective for approximately 35 years, assigned to the downtown district for many years, specialized in the field of observing shoplifters and pickpockets, on or about the 31st day of October, 1963, while on Euclid Avenue observed suspicious conduct of the defendants Chilton and Terry

and a fellow by the name of Karl Katz, in the areas of East 13th and Euclid and Huron, and also in the area of approximately E. 12th Street and Euclid.

He testified that either the defendant Chilton or Terry would walk up to a jewelry shop or United Airlines store, look around it, come back, and consult with each other.

Then the other person would do the same. This continued for approximately five to six times, as I recall the testimony.

After doing so for about ten to fifteen minutes they walked towards 11th or 12th Street and Euclid, at the location of Zucker's Men's Shop, and met there with a fellow by the name of Karl Katz and conversed with that gentleman.

That was the time when Detective McFadden decided to approach the defendants for the purpose of interrogation and determine what they were up to, and he identified himself when he approached them as a police officer.

That he made the defendant Terry turn around, patted him, discovered a gun in his pocket while patting him down.

That he ordered all three persons into Zucker's store, patted each one down, discovered a gun in the left-hand pocket of the defendant Chilton, which gun was not observable, and removed the same. Each of the guns were loaded.

He called the wagon, took them to jail, and placed them on a charge of investigation.

The defendant Richard Chilton, which the Court has to take, is the testimony of defendant Terry, also, in light of the stipulation.

Richard Chilton is 27 years of age. He has testified that he is a printer by trade, was married, has been divorced, has worked for the Grand Printing Company from 1953 to 1961; that he lives with his mother, and that he is not presently employed. He has never been arrested before.

That he got downtown early in the morning and was looking for a job. He went to several restaurants and printing shops, but was rather hazy about the places he went to.

That he met John Terry at East 9th and Euclid; that in the alley between Prospect and Euclid Avenue separating the Halle's store, he found a bag containing two guns. He unwrapped the bag, put both pistols in his pocket. When he found his pocket too bulky he gave one of the guns to the defendant Terry; that he was on his way to sell or pawn the gun when he was stopped. This is the testimony of Chilton.

That the officer patted him down, and found a gun inside his left coat pocket.

The testimony in this case, as I have stated, is that at the present time he is unemployed, that the last regular job he had was in 1962 in Chicago where he worked for six months, and he came to Cleveland in August of 1962 to work temporarily as a car washer and has no steady employment.

As I said, the testimony of Terry would have to be the same as to the surrounding circumstances, save and except as to employment and as to the places where he lives.

In light of the facts before me, and in view of my decision which was so strenuously and eloquently argued by counsel for the defendants -- I want to commend you, Mr. Stokes --

MR. STOKES: Thank you, your Honor.

THE COURT: And I sincerely meant that your argument which you presented to the Court was as eloquent an argument that I have ever heard from a counsel representing an individual, and I am quite sure that Chief Justice Potter Stewart of the Supreme Court, if you would argue the same way he probably would commend you in the same manner.

MR. STOKES: Thank you, your Honor.

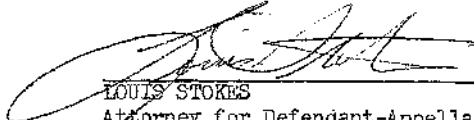
THE COURT: And that goes for you too Mr. Payne.

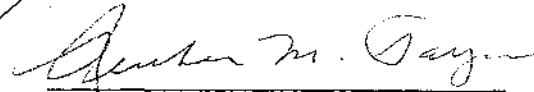
MR. PAYNE: Thank you, your Honor.

THE COURT: Don't take it so nonchalantly. I am sincere in saying it, both of you represented your respective sides in a very fine manner.

Considering the facts as stated, and in light of my decision, I can see no other alternative save and except to find each of the defendants guilty of the crime as charged of carrying a concealed weapon.

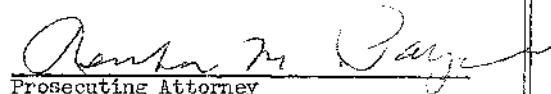
The above stipulated testimony constituted all of the evidence offered on the Motion to Suppress and trial, the defendant, John Terry, not having offered himself as a witness in said matter.


LOUIS STOKES
Attorney for Defendant-Appellant


REUBEN PAYNE
Prosecuting Attorney

ACKNOWLEDGEMENT

Receipt of copy of the foregoing Stipulation of Fact and Evidence is hereby acknowledged this 11th day of March, 1965. 2:05 PM


Prosecuting Attorney