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Questions Cleveland Lawyers

High Court Sifts Street Search Arguments

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By SANFORD WATZMAN
Plain Dealer Bureau

WASHINGTON — The Supreme Court listened to two Clevelanders argue yesterday about whether a policeman has the right, acting on a hunch, to stop and search a man on the street.

The nine justices were so interested in the facts and meaning of the case, which has national implications, that they constantly interrupted the lawyers with questions, cutting short their time for formal presentations.

For the lawyers on both sides, it was their first appearance in the high court. Louis Stokes, 42, older brother of Mayor Carl B. Stokes, represented the petitioner, John W. Terry Jr., the arrested man. Assistant County Prosecutor Reuben Payne spoke for the state of Ohio.

ALTHOUGH questions fired off by the justices are not an infallible guide to their thinking, it was clear that Stokes was more frequently on the defensive and thus, his position was subjected to the greater challenge.

The facts themselves appear to have armed Payne with a strong case. Terry was detained on Playhouse Square in Cleveland in 1963 by Detective Martin J. McFadden, 39 years a policeman, whose chief claim to fame had been his frequent arrests of the late Louis Finkelstein, prince of Cleveland pickpockets.

Terry's behavior on the street led McFadden to suspect that Terry was casing a store for a stickup. The detective walked over, asked the suspect his name and then frisked him. He found a gun.

Stokes' main argument was that Terry had not been observed to do anything wrong, and therefore McFadden did not have sufficient cause to deprive Terry of protection under the Fourth Amendment, which prohibits unwarranted search and seizure.

IN EARLIER cases that kept narrowing police authority, including Cleveland's Dollree Mapp case, the Supreme Court has given wide applicability to the Fourth Amendment. The questioning of Stokes did not necessarily signal a switch.

Ohio's Justice Potter Stewart observed that McFadden's hunch was that Terry was armed. He added that, since the detective chose to accost the suspect and ask "embarrassing questions," McFadden could be expected to be concerned about his own safety.

Picking up this theme, Chief Justice Earl Warren asked:

"Under these circumstances, did he have a right to ascertain whether he was in danger?"

STOKES REPLIED: "He (McFadden) didn't permit the situation to ripen (affording him probable cause for action). He was a little ahead of himself."

"I'm not arguing with you," the chief justice said at another point, explaining to Stokes the court was probing to determine how far the Fourth Amendment may properly be extended.

Justice Thurgood Marshall took a different tack. He had Payne on the griddle most of the time. Observing that McFadden had spent most of his years on the force looking for pickpockets and shoplifters, Marshall asked:

"Where did he get his expertise on robberies?"

McFADDEN had testified that he never before had occasion to witness robbers casing a store or to make that kind of arrest).

Payne replied that McFadden's lengthy career in the police department had inevitably exposed him to knowledge about robbers—"if even by osmosis."

"Now we get intuition by osmosis," Marshall shot back.

Most of the other questions centered on whether a distinction could be made between an arrest where the intention is to jail a person, and one where the purpose is merely to check out a suspect.

THE JUSTICES dissected the facts in an effort to determine at which point the arrest may be considered to have been made.

While he conceded a policeman's right to ask questions on the street, Stokes contended a citizen, too, has a right not to answer.

No one mentioned it, but the arguments occur against a background of day-by-day stop-and-frisk actions by police that are increasingly resented by Negroes and others in the big-city ghettoes.

Terry was convicted of carrying a concealed weapon. Whether this court action in Cuyahoga County will be allowed to stand is the question that the Supreme Court will rule on after it has digested the oral arguments and records of the case. Two New York cases of similar nature are being argued before the court also.