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Criminal Law - Search and Seizure - Scope of the Term - "Frisk"; State v. Henry

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CRIMINAL LAW—SEARCH AND SEIZURE—SCOPE OF THE TERM—"FRISK"

State v. Henry, 51 Ohio Op. 2d 303, 256 N.E. 2d 269 (C.P. 1969).

State v. Henry[1] is a case involving prosecution for the unlawful possession of narcotic drugs. Henry was convicted on evidence obtained as a result of a "frisk." It should be made clear at the outset that a "frisk" is not a "full" search as is permitted in situations where there is probable cause for arrest. The "frisk" is limited to a protective search or pat-down of the outer clothing for the purpose of detecting weapons.[2] Even though probable cause is not a condition precedent to a "frisk," the "frisk" is, nevertheless, governed by the Reasonableness Clause of the Fourth Amendment. Where the "frisk" is deemed unreasonable, its fruits are held to be inadmissible.[3] The casenote will set forth two tests or standards the courts use to determine reasonableness vis a vis the Fourth Amendment. The casenote will also establish the *Henry*[4] court's failure to distinguish its case from *Sibron v. State of New York*,[5] and thus the court's failure to justify its holding.

The facts in *Henry*[6] reveal that during the process of routine investigation for a traffic violation, the police officer was informed by radio that the driver and motor vehicle were allegedly carrying forged prescriptions. Defendant, a passenger in the car, voluntarily alighted with his right hand in his coat pocket. The officer requested defendant to remove his hand and upon refusal the officer removed the hand and "frisked" defendant. Allegedly clutched in defendant's hand, in plain sight of the officer, was a small, yellow envelope containing heroin.

When does there arise a right to "frisk"? In *Terry v. State of Ohio*,[7] the police officer observed suspects "casing" a store and after a "mumbled" [8] response to the officer's inquiries, the officer

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[1] *Henry*, 51 Ohio Op. 2d 303, 256 N.E. 2d 269 (C.P. 1969).

[2] *Sibron v. State of New York*, 392 U.S. 40 (1968).

[3] *Id.*

[4] *Supra*, note 1.

[5] *Supra*, note 2.

[6] *Supra*, note 1.

[7] *Terry*, 392 U.S. 1 (1968).

[8] *Id.*

grabbed Terry and patted down the outside of his clothing. It was established that from these facts, the officer had reason to believe the suspects were contemplating a violent crime—robbery, and that he therefore had reason to believe that they may have been armed and dangerous. The court held that a "frisk" under these circumstances, is reasonable and therefore weapons found as a result of such a "frisk" are admissible in evidence. The court is careful to point out that, "In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." [9]

Justice Harlan in his concurring opinion clarifies the rationale for the holding in *Terry*.[10] He states,

> Ohio has not clothed its policemen with routine authority to frisk and disarm on suspicion, in the absence of state authority, policemen have no more right to "pat down" the outer clothing of passers-by, or of persons to whom they address casual questions, than does any other citizen. Consequently, the Ohio courts did not rest the constitutionality of this frisk upon any general authority in Officer McFadden to take reasonable steps to protect the citizenry, including himself, from dangerous weapons.
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> The state courts held instead, that when an officer is lawfully confronting a possibly hostile person in the line of duty he has a right, springing only from the necessity of the situation and not from any broader right to disarm, to frisk for his own protection.[11]

The logical corollary from this holding is that where a "stop" on less than probable cause is reasonable, the right to frisk must be immediate and automatic where, as in *Terry*,[12] the stop was predicated on an articulable suspicion of a violent crime. There

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[9] *Terry*, 392 U.S. at 21. This requirement is based on the rationale that "The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." In evaluating the reasonableness of the search or seizure the courts use the following objective standard: "would the facts available to the officer at the moment of the . . . search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this court has consistently refused to sanction."

[10] *Supra*, note 7.

[11] *Terry*, 392 U.S. at 32.

[12] *Supra*, note 7.

is no reason why the officer, under the above circumstances, should have to ask one question before commencing a "frisk." [13]

In *Sibron*,[14] the officer observed the defendant over an eight-hour period and saw him talking to known narcotics addicts although the officer overheard no conversations and observed nothing being transferred. When the officer confronted the defendant the latter thrust his hand into his pocket and came out with a packet of heroin. In holding that the evidence should have been suppressed, the court citing *Terry*,[15] stated, "In the case of a self-protective search for weapons, he (the officer) must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous." [16] The court went on to say that, "The suspects mere act of talking with a number of known narcotics addicts over an eight-hour period no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime." [17]

It is apparent that the court in *Sibron*[18] is denying the reasonableness of the "frisk" on the *Terry*[19] standard of suspicion of a violent crime. The inference is that the court does so because it could not be gainsaid that a crime involving narcotics is that type of crime whose nature creates a substantial likelihood that the suspect is armed. The question the author poses is this: If an officer cannot reasonably believe that his life would be endangered when approaching Sibron, a suspect who suddenly thrusts his hand into his pocket, is his belief any more justified when he approaches Henry, a passenger in a car who alights with his hand in his pocket? With both crimes involving the same subject matter—narcotics, only a strained interpretation could lead to an affirmative response. One may then logically conclude that the "frisk" in *Henry*,[20] as in *Sibron*,[21] could not be validated on the *Terry* standard of suspicion of a violent crime.

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[13] See J. Harlan's concurring opinion in *Terry*, 392 U.S. 1.

[14] *Supra*, note 2.

[15] *Supra*, note 7.

[16] *Sibron*, 392 U.S. at 64.

[17] *Id.*

[18] *Supra*, note 2.

[19] *Supra*, note 7.

[20] *Supra*, note 1.

[21] *Supra*, note 2.

The court in *Sibron*[22] implies another situation which would authorize a limited protective "frisk." This situation would allow a "frisk" notwithstanding the nature of the crime, where an officer feels his life may be in jeopardy. There is some doubt in the author's mind however, that this test could be applied in Ohio in light of Justice Harlan's concurring opinion in *Terry*.[23] The author will concede the benefit of the doubt and will show notwithstanding, that the *Henry*[24] "frisk" under this standard was also unreasonable.

Under this second test the courts still require the police officer to point to specific facts and circumstances that would justify a fear of bodily harm.[25] The courts allow such a "frisk" during field interrogation on the ground that, "The answer to the question propounded by the policeman may be a bullet . . ." [26] The *Sibron*[27] court also denied justification for the frisk of Sibron on this ground because no facts and circumstances were offered by the officer to show a belief that he acted to protect himself. The court said, "Nor did Patrolman Martin urge that when Sibron put his hand in his pocket, he feared that he was going for a weapon and acted in self-defense." [28] The court held that under these circumstances, "An unarticulated 'finding' by an appellate court . . . apparently to the effect that the officer's invasion of Sibron's person comported with the Constitution because of the need to protect himself, is not deserving of controlling deference." [29] Again the court in *Henry*[30] fails to distinguish *Sibron*.[31] The *Henry*[32] court states ". . . Thus when the hand didn't come out after one or more routine questions by the officer, he certainly by this time had probable cause to initiate reasonable precaution for his own safety." [33] Clearly then the court is *assuming* the officer was in fear of his life. The Supreme Court's ruling in

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22 *Supra,* note 2.

23 *Supra,* note 7.

24 *Supra,* note 1.

25 C.F. *Supra,* note 9.

26 *People v. Rivera,* 252 N.Y.S. 2d 458, 463, 201 N.E. 2d 32, 35 (1964).

27 *Supra,* note 3.

28 *Supra,* note 7.

29 *Id.*

30 *Supra,* note 1.

31 *Supra,* note 2.

32 *Supra,* note 1.

33 51 Ohio Op. 2d at 304, 256 N.E. 2d at 270.

Sibron[34] expressly denies the validity of any such assumption. (Emphasis added)

The conclusion reached is that the evidence in the principal case should have been suppressed under either of the two tests expounded by the Supreme Court in *Terry*[35] and *Sibron.*[36] As is made readily apparent by the foregoing, the facts and circumstances in both *Sibron*[37] and *Henry*[38] are, for all intents and purposes, the same, and consequently the *Henry*[39] court's endeavor to distinguish the two cases amounts to a distinction without a difference. One may therefore conclude that the holding in the principal case has unjustifiably expanded the right to "frisk" and in so doing has contravened a citizen's Fourth Amendment right to be free from unreasonable searches.

State v. Henry may present further problems with regard to due process. Let us assume, arguendo, that the officer in *Henry* would have had, under one or the other tests set forth, the right to frisk.

The majority in both *Terry*[40] and *Sibron*[41] did not directly rule on whether or not contraband other than weapons discovered during a limited search could be used in a criminal prosecution.[42] However, they did say a limited protective search permits only a pat down of the outer garments in an effort to determine if the person is carrying a weapon and therefore, by implication, one may assume that an officer may not himself extract anything that does not feel like a gun, knife, or some other form of weapon.[43]

Is it not curious then, that in cases such as *Henry*[44] where the defendant is in fact carrying no weapon, he nevertheless manages to be holding the contraband in his hand in plain sight of the officer or it falls to the ground and becomes admissible as

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[34] *Supra,* note 2.

[35] *Supra,* note 3.

[36] *Supra,* note 2.

[37] *Id.*

[38] *Supra,* note 1.

[39] *Supra,* note 1.

[40] *Supra,* note 3.

[41] *Supra,* note 2.

[42] 35 Brooklyn L. Rev. 147 (1968).

[43] *Peters v. State of New York,* 392 U.S. 41 (1968).

[44] *Supra,* note 1.

"dropsy" as in *State v. Mericle.*[45] Curiosity is elevated to suspicion in light of certain reports written by judges and investigators telling of perjured testimony given by a number of police when testifying as to how incriminating evidence was obtained.[46] In these situations the standard to determine admissibility of evidence comes down to the officer's word against that of the accused. Who then is the court invariably to believe? No doubt the officer. But should this be the case in view of investigations which reveal more than infrequent use of perjured testimony?

The author is not contending that these police are necessarily motivated by malice, but merely that in their overly zealous desire to maintain law and order, they may lose sight of the rules and guidelines that are so vital to a sound functioning of our constitutional system. It is incumbent then upon our courts to enforce objective standards and to regard incriminating testimony with more than mere cursory consideration. For to allow the abuse of due process prevalent in this area to continue is to allow that which the law proscribes directly to be accomplished indirectly—an obvious absurdity.

The author is cognizant of the great increase in drug traffic and is of the opinion that the continued use of drugs by young people would certainly have a deleterious effect on society. But, this adverse situation does not merit abrogation or even temporary relaxation of constitutional safeguards. If in an effort to thwart the evil, basic constitutional guarantees are brushed aside and society becomes content to let the end justify the means, the effect would most assuredly go beyond deleterious, indeed, the effect would be pernicious.

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[45] 43 Ohio Op. 2d 361, 235 N.E. 2d 150 (C.P. 1968).

[46] Younger, "The Perjury Routine," vol. 204, *The Nation*, p. 596 (May 8, 1967); Chevigny, "Police Abuses in Connection with the Law Of Search and Seizure," 5 Crim. L. Bull. 3 (1969).