9-9-1966

66/09/21 Motion to Dismiss Appeal Filed as of Right and Memorandum Opposing Jurisdiction

John T. Corrigan

Reuben M. Payne

OCT 4 1966

TAFT, C. J.

No. 40,312.

In the Supreme Court of Ohio

APPEAL FROM
THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

STATE OF OHIO,
Plaintiff-Appellee,
vs.
JOHN W. TERRY, and
RICHARD D. CHILTON,
Defendants-Appellants.

MOTION TO DISMISS APPEAL FILED AS OF RIGHT
and
MEMORANDUM OPPOSING JURISDICTION.

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vs.

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Defendants-Appellants.

MOTION TO DISMISS APPEAL FILED AS OF RIGHT.

Now comes the appellee herein and moves this Court for an order dismissing the appeal as of right filed by the appellant, for the reason that no debatable constitutional question is involved in this case.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County,
REUBEN M. PAYNE,
Assistant Prosecuting Attorney,
Attorneys for Appellee.

Notice of Motion.

The appellants herein will take notice that appellee is filing in the Supreme Court of Ohio a motion to dismiss the appeal as of right by the appellants, a copy of which motion to dismiss is hereto attached, and that said motion to dismiss will be heard by the Supreme Court along with the motion for leave to appeal.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County,
REUBEN M. PAYNE,
Assistant Prosecuting Attorney,
Attorneys for Appellee.

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MEMORANDUM OPPOSING JURISDICTION.

1. The appellate court has not decided any question in a way not in accordance with applicable decisions.

2. The appellee moves that the motions for leave to appeal be dismissed.

3. The judgment of the Court of Appeals rests on an adequate non-constitutional basis.

QUESTION OF LAW.

The question of law presented by the appellant is taken out of context and infers a distorted impression of the true and correct facts of record.

The only question involved is whether the Court of Appeals was correct in affirming the trial court's overruling of appellant's motion to suppress and defendants' judgment of conviction.

STATEMENT OF CASE.

Detective Martin McFadden, a member of the Cleveland Police Department for 39 years and 4 months (R. 11) and assigned to the Detective Bureau for the past 35 years, on the 31st day of October, 1963 between 2:20 and 2:30 p.m. while on duty in the Cleveland downtown area at the intersection of Huron Road, Euclid Avenue and East 13th Street, observed two men (the defendants in this case). Upon observing these two men, for the metaphysical reason called a "hunch," the officer decided to position himself in the doorway of Rogoff's Store and further observe them. He continued to do so for some 10 or 12 minutes and their conduct was this: One would remain at the corner, the other would walk up Huron Road a short way and peer into either the Diamond Store or the United Air Lines office, look up and down the street, return to his companion, have a short conversation, whereupon his companion would indulge in the same course of conduct while the first one remained on the corner. This conduct was repeated two to four times respectively by each of the men prior to their being joined by a third party. All three engaged in a short conversation, whereupon the third party departed and took a position across the street; the two men resumed their pattern of conduct previously described, each making four to six trips. Det. McFadden testified, "In the first place I didn't like their actions on Huron Road, and I suspected them of casing a job, a stickup, that's the reason" (R. 42).

The two men then proceeded west on Euclid and at 1120 Euclid they encountered the third male who had spoken with them previously. All three were standing

there conversing when Detective McFadden approached, identified himself as a police officer, asked them their names. A mumbled, incoherent response was made by one or all (R. 28). Thereupon the officer took hold of one of the men, later identified as Terry, turned him around in front of the officer and facing the other two. He then patted Terry, the man in front of him. At no time did his hands reach into any of the men's pockets (R. 29-30). In patting the defendant Terry, in the upper left pocket of the top coat the officer felt a gun (R. 29).

At this time all three men were ordered from the street to the interior of a nearby store. All were ordered to place the palms of their hands against the wall. Detective McFadden had the defendant Terry by the collar of his coat when they reached the interior of the store, and after ordering them to place their hands upon the wall, pulled the coat from the shoulder of Terry. A loaded revolver was exposed in the upper left inside coat pocket and was removed by Detective McFadden. The officer then proceeded to the defendant Chilton, and in patting on the outside of his clothing, felt an object in the left overcoat pocket which felt like a gun. He removed the object which turned out to be a loaded revolver. The third party was patted in the same manner, no items being found.

All three were conveyed to Central Police Station and booked under Suspicious Person Warrants.

CHRONOLOGY.

Subsequently, Terry and Chilton were charged with the offense of carrying concealed weapons and the third man was released on signing a waiver. Separate indictments were returned on December 18, 1963 against the two men for carrying concealed weapons. They were arraigned on December 23, 1963 and entered pleas of not guilty. Thereafter, on September 22, 1964, counsel for the defendants filed his motion for suppression of evidence, claiming illegal search and seizure. The matter came on for hearing on September 22, 1964, at which time it was stipulated by counsel for defendants and the state that for purpose of hearing the motion to suppress, the two cases be consolidated and it was so ordered by the court. Testimony was then taken.

The trial court on September 22, 1964 in overruling defendants' motion to suppress and subsequently finding them guilty on October 2, 1964 of the charge of carrying concealed weapons, set forth a memorandum opinion.

Thereafter these judgments were affirmed by the Court of Appeals, Eighth Judicial District of Ohio, Cuyahoga County, on May 25, 1966. The Court of Appeals published this opinion in conjunction with the affirmance of these convictions and the same is reported as *State v. Terry*, 5 O. App. 2d 122. These judgments were ordered into execution May 25, 1966.

ARGUMENT AND LAW.

Appellee contends:

(1) That the appellants were indicted and convicted of the crime of carrying a concealed weapon, Section 2923.01 of the Ohio Revised Code;

(2) That prior to trial appellants moved the court to suppress as a product of claimed illegal search and seizure, certain properties seized, which arrest and seizure the trial court upheld as being constitutional;

(3) That the court properly denied appellants' motion to suppress upon hearing of the same;

(4) That while the question of law presented is one of public importance, the decision by the Court of Appeals was correct and should be affirmed.

The trial court, in overruling defendants' motions to suppress, rendered a memorandum opinion (Appellants' Appendix C) in which he expressed the hope that counsel will have the question determined by the appellate courts.

The issues and the applicable law are so thoroughly discussed in the opinion of the Court of Appeals (5 O. S. 2d 122) (Appellants' Appendix F), that further argument on the points decided is not required in this brief. Notwithstanding that opinion, defendants erroneously interpret the facts and evidence of record in their argument. They infer that the arrest was actually made before the officers frisked the men. They infer that the trial court found that the arrest was not legal. The Court of Appeals, in dealing with the same erroneous inferences, had this to say:

"The appellant contends, however, that in the instant case, despite a right of inquiry, the arrest took place the moment the defendant was questioned by the detective. According to his argument, since the arrest took place at the time of the initial inquiry, there was at that time no adequate 'reasonable grounds' to arrest and therefore under the exclusionary rule of Mapp vs. Ohio, 367 U. S. 643 (1961), the evidence must be suppressed. In support of this the defendant appellant's brief states: 'Since the police officers in this case did not conduct any interrogation of the defendant and his companions other than an inquiry of their names * * * his purpose was to arrest and not to interrogate.'

A principal cause of the difficulty here is the ambiguous nature of the word 'arrest.' Some courts have used the term 'arrest' to signify the mere act of stopping or restraining a person. But the term 'arrest' is more commonly used in the technical criminal law sense as the seizure of an alleged offender to answer for a crime. Note, 39 N. Y. U. L. Rev. 1093, 1096 (1964); Commonwealth v. Lehan, 347 Mass. 197 (1964). The cases decided by the United States Supreme Court appear to have adopted this latter usage, see Carroll vs. United States, 267 U. S. 132, 136 (1925); Brinegar vs. United States, 338 U. S. 160, 163 (1949), and it is the usage that has been adopted by the courts of Ohio. In 5 Ohio Jurisprudence (2d), Arrest, Sec. 3, p. 19, 'arrest' is defined as follows:

> 'An arrest as the term is used in criminal law signifies the apprehension or detention of the person of another in order that he may be forthcoming to answer an alleged or supposed crime.'

Similarly, in State vs. Milam, 108 Ohio App. 254, 268 (1959), this court quoted with approval the following definition of arrest:

'To constitute an "arrest," four requisites are involved: A purpose to take the person into custody of the law, under real or pretended authority and an actual or constructive seizure or detention of his person, so understood by the person arrested.'

It is readily apparent that a required element of an arrest is the intent of the officer to arrest. United States vs. Bonanno, supra, at 81-83. In the instant case, when the detective approached the defendant, he had, as shown by uncontradicted testimony, no intention at all to arrest, but only to inquire as to the defendant's activities. As stated in the record:

'Q. You 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. * * * after they left the corner and you observed them again in front of * * * (the store where the three men met) * * * what did you do?

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

As to the exact time when the arrest took place, the record shows:

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

A. That's right.'

The defendants, however, contend that the case of Henry vs. United States, 361 U. S. 98 (1959), establishes the point that the arrest in the instant case took place the moment the defendant was stopped by the detective. However, in the Henry case, the government conceded in the lower courts, see 259 F. (2d) 725 (7th Cir. 1958), and adhered to the concession before the Supreme Court, that the 'arrest' occurred the moment the car in which Henry was riding was stopped by the federal agents. The Supreme Court in its opinion stated:

> 'The prosecution conceded below, and adheres to that concession here, that the arrest took place when the federal agents stopped the car. This is our view of the facts of this particular case.' 361 U. S. at 103.

When the opinion in Henry is read in light of this concession, it is apparent that the court was only deciding that, in the circumstances of that case, there was no probable cause to justify an 'arrest' at the time the car in which Henry was riding was stopped. See, United States vs. Bonanno, supra, at p. 85; Busby vs. United States, supra. Therefore, we hold that, in the instant case, the actual arrest did not occur until the defendant was ordered into the store after the loaded gun was discovered concealed on his person; Cf. Rios vs. United States, 364 U. S. 253 (1960)."

What the court actually said was that if the arrest had preceded the frisking of the defendant, such arrest would then have been illegal. The trial court and the Court of Appeals both determined that there is a distinction between stopping and frisking and search and seizure and both the trial and appellate court determined that in this case the arrest followed and was the result of a frisking operation and was made upon probable cause.

Defendants' argument ignores the suspicious conduct observed by the officers, ignores the officer's testimony of 39 years of police experience, ignores the officer's testimony that in his judgment they were "casing" an establishment for a holdup. The argument ignores the testimony of the officer that he identified himself as a police officer before asking them questions, it ignores the mumbled, incoherent response given by the defendants when they were asked their names, ignores the frisking procedure and the officer's testimony that in his judgment they were casing an establishment for a holdup and he wanted to determine if they had guns, ignores the testimony of the officer that he frisked and felt a hard object, which object, based on his 39 years of police experience, he concluded was a gun. The argument ignores the fact that even then, no search or entrance was made into the pockets of the defendant. The officer, retaining one defendant by the collar and arm, ordered the others inside the store and commanded them to place their hands on the wall. The back of the coat collar was then pulled down to the defendant's arms and there exposed was the object felt by the officer, the gun, as he had so previously determined based on his 39 years of experience. They continue to ignore the fact that the possession of the gun discovered by the frisking operation coupled with the other conduct observed by the officer prior thereto, furnished the probable cause for the officer to arrest the man and consequently the subsequent search was legal. Had the officer found nothing when he frisked the man, then and only then would there have been no grounds for the subsequent arrest. It is quite clear, and the facts of the record are set forth, that the manifest intention of the officer was to interrogate and not to arrest.

Defendants' argument of after-the-event justification.

In this connection two points should be noted: defendants have inserted a portion of the testimony from the record out of context that would appear to infer after-the-event justification. A reading of the entire record and the finding of both the trial court and the Court of Appeals obviously refute such an inference and argument on the part of the defendants. The police officer had observed strange, suspicious conduct of three men, which conduct led him to believe that a holdup was imminent. A basic moral obligation as a police officer dictated that he make an inquiry. Upon doing so he received incoherent, mumbled responses. The sum total of all that had transpired up to this point was sufficient probable cause for the officer's next move of "frisking" for his own protection. Upon his frisking and feeling the bulge, 39 years of police experience forced this officer to conclude that the defendant was armed and carrying a concealed weapon and thereby was committing a felony in the presence of the officer. The aggregate facts and knowledge now possessed by the officer give rise to probable cause for the valid arrest which followed.

The Court of Appeals has held that such arrest was a valid arrest and that even if the arrest took place as appellant contends, it does not necessarily follow that this evidence must be suppressed. The opinion discusses the reason for the imposition of the *Mapp* exclusionary rule upon the States and the necessity for developing "workable rules" governing arrests, searches and seizures, to meet the practicable demands of effective criminal investigation and law enforcement, provided these rules do not violate the constitutional proscriptions against unreason-

able searches and the concomitant command that evidence so seized is inadmissible against one who is standing to complain. The opinion wisely concludes that the necessity of law enforcement in large urban areas requires the procedures utilized in the instant case.

Finally, defendant labels the distinction between a frisk and a search as contained in the opinions of the trial and appellate court as "semantic gymnastics," and again attempts to equate a search which produces narcotics or policy slips with a frisk for a dangerous weapon. Common sense, in the interest of society, repels such a conclusion.

> "The business of the police is to prevent crime if they can. Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of city police to be alert to things going wrong in the streets; if they were to be denied the right of such summary inquiry, a normal power and a necessary duty would be closed off."
>
> *People v. Rivera* (7/10/64, N. Y. Court of Appeals, U. S. Law Week, July 28, Vol. 33 #4.)

At this point the distinction made by the trial court comes into this case. The decisions in *White v. U. S.*, 271 F. 2d 829 (1959); *U. S. v. Hahmn*, 163 F. Supp. 4 (1958), and the decision in the *Mapp* case will not outlaw a state officer's frisking or even a search of the person made prior to arrest. Under the Uniform Arrest Act adopted with modifications in Delaware, New Hampshire, and Rhode Island, "the police officer may search for a dangerous weapon any person whom he has stopped or detained to question as provided in Section 2. Whenever he has

reasonable ground to believe that he is in danger if the person possesses a dangerous weapon, if the officer finds a weapon he may take and keep it until the completion of the questioning when he shall either return it or arrest the person." The Uniform Arrest Act, 28 *Va. Law Review* 315 at 344 (1942). If we recognize the authority of the police to stop a person and inquire concerning unusual street events we are required to recognize the hazards involved in this kind of public duty. The answer to the question propounded by the policeman may be a bullet; in any case, the exposure to danger could be great. The frisk is a reasonable and constitutionally permissible precaution to minimize that danger. We ought not, in deciding what is reasonable, close our eyes to the actualities of street dangers in performing this kind of public duty for the protection of society.

CONCLUSION.

The trial court properly found that there is a distinction between a frisk and a search, and that in the circumstances of this case the frisk preceded the arrest, and further, that the arrest and search in connection therewith were legal. The opinion of the Court of Appeals and the authorities cited therein support that conclusion. The defendant has not shown any valid reason why these findings should be disturbed. The motion for leave to appeal should therefore be overruled.

Respectfully submitted,

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REUBEN M. PAYNE,
Assistant Prosecuting Attorney,
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