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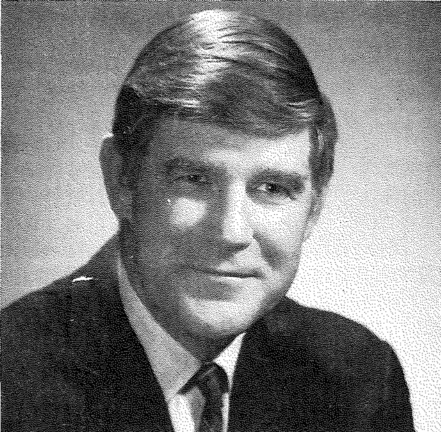
DECEMBER 1971

ALERT

CRIMINAL DIVISION

FROM THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF MAINE.

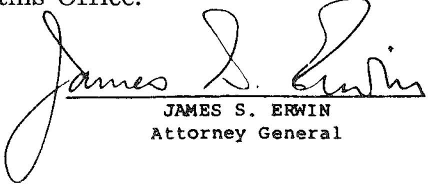


MESSAGE FROM THE ATTORNEY GENERAL JAMES S. ERWIN

I am pleased to announce that the Criminal Division of the Attorney General's Office has recently received a substantial grant from the Maine Law Enforcement Planning and Assistance Agency for the Law Enforcement Education Section. This grant will be used to finance the improvement and expansion of educational services for all law enforcement personnel in the State.

Most important for the law enforcement officer will be the creation of a permanent loose-leaf law enforcement manual which will contain guidelines for dealing with all legal matters arising in the course of an officer's duties. The manual will be designed to be carried on the officer's person at all times and will be kept up to date as changes occur in the Criminal Law. More will be said about the manual and the other educational services in the future.

At this time, I would like to ask all law enforcement officers for their suggestions regarding the layout and content of the manual. We want to make it a practical, useful tool and we need your help in determining your needs. Please send all ideas and suggestions to the Law Enforcement Education Section of the Criminal Division of this Office.



JAMES S. ERWIN
Attorney General

In the main article of last month's ALERT, we discussed general aspects of the law of "stop and frisk." The discussion centered around the **Terry, Sibron,** and **Peters** cases and attempted to set out some basic guidelines for the law enforcement officer.

Since the term "stop and frisk" covers an infinite variety of possible situations, a mere statement of general guidelines may not be sufficient to clearly indicate what behavior is or is not appropriate for a law enforcement officer in a given situation. Therefore, this month's article will deal with specific fact situations involving "stop and frisk" and will discuss the ways in which courts throughout the country have responded to these situations. Emphasis will be placed on cases illustrating factors which a law enforcement officer might consider in determining the reasonableness of both the "stop" and the "frisk." Also, several miscellaneous matters having to do with other legal issues related to "stop and frisk" will be considered.

SPECIFIC CIRCUMSTANCES IN "STOP AND FRISK"

In discussing specific circumstances in "stop and frisk", we will discuss actual court cases and go into the reasoning of why the court felt that the actions of the law enforcement officers in each case were either reasonable or unreasonable. In each situation, an attempt will be made to emphasize (1) the indications of possible criminal behavior which caused the officer to stop the suspect in the first place, and (2) the circumstances which caused the officer to reasonably believe that his safety or that of others was in danger, thus necessitating a frisk of the suspect.

It should be noted that this article is designed to be read in conjunction with the main article of the November 1971 ALERT, and officers should consult that article to clear up any points that are not clear in this article.

The cases to be discussed will be grouped under various headings, each indicating the chief factor which caused a law enforcement officer to either stop or to frisk a suspect. In most cases, this will not be the only factor present in a case, but it is a convenient way of classifying the cases and should help to make the presentation more meaningful.

Bulge

In a District of Columbia case, two officers in plain clothes approached the entrance of a delicatessen to investigate a robbery of an earlier date. On their way in, they passed by defendant who was standing outside the store. When inside the store, the officers overheard the store owner and some other people discussing the defendant and a companion, who was concealed behind a truck nearby. It was mentioned that they were acting in a suspicious manner. The owner then went outside and told defendant that everyone was watching him and that he had better leave.

The officers then approached defendant, identified themselves, and asked for his identification. Defendant said "Why? My name is Lee." When the officers again requested some identification, defendant reached back with his left hand into his left rear pocket to get his wallet. At this point a bulge was observed under the defendant's shirt, sticking in the waistband of his pants. The object was immediately seized and it turned out to be a loaded pistol.

The Court found the "stop and frisk" in this instance to be a reasonable one. With respect to the "stop", the Court said that the action of the officers here

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"is the kind of momentary contact which is and must be recognized as necessary to a sound police-community relationship and its commensurate effective law enforcement. It cannot be said that the accused was so inconvenienced or restricted that the delicate balance between individual freedom and legitimate police activity has been unduly weighted against him." **U. S. v. Lee,** 271 A.2d 566 at 567-8 (District of Columbia Court of Appeals, 1970)

In approving the seizure of the gun, the Court stated that the officer

"had no other choice. He was justifiably concerned for his own safety when the accused revealed that he had something concealed under his waistband . . . Surely then, under the considerations discussed in **Terry v. Ohio,** supra, the in-depth search for and seizure of the gun was reasonable—clearly as reasonable as the in-depth search for and seizure of Terry's gun when its presence was discovered by Officer McFadden's sense of touch during the so-called "frisk". (271 A.2d 569)

Hand Concealed in Pocket

During a routine investigation for a traffic violation, an officer was informed from police headquarters via radio that the driver and the car he was investigating were carrying forged prescriptions for narcotic drugs. Defendant, a passenger in the car, while talking with the officer, voluntarily got out of the car with his right hand concealed in his coat pocket. The officer then requested defendant to remove his hand from his pocket. Upon his refusal, the officer removed the hand and frisked defendant. At no time did the officer go into any hidden places upon defendant's person. However, clutched in the removed hand was a small yellow envelope which the officer seized and upon observing its contents, arrested defendant for the possession of heroin.

This case presents no problems as far as the initial stop is concerned. The facts indicate that it was a routine traffic investigation. The information received over the police radio certainly gave the officer good reason to at least investigate the situation further.

The real question in this case is whether the frisk was reasonable. On this issue the Court said,

"A person does not ordinarily alight from an automobile with a hand inserted in a pocket. When the hands are free such person has better maneuverability to accomplish this task. 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. Under such facts and circumstances the frisk for weapons was not unreasonable." **State v. Henry,** 256 N.E. 2d 269 at 270 (Court of Common Pleas of Ohio, 1969)

Thus, the Court felt in this case that upon the whole of the facts and circumstances presented, the officer had reasonable grounds to believe that Henry was armed and dangerous. Furthermore, the Court held that the heroin taken from defendant was admissible in evidence against him because as a result of a reasonable frisk, defendant **himself** brought the envelope containing the heroin from his pocket, after which it was then in plain view.

Admission by Defendant of Concealed Weapon

Defendant, while driving an automobile, was stopped by a police officer for speeding. After stopping the vehicle, the officer walked up to it. The defendant got out holding his right hand in the pocket of his knee-length coat. The pocket was baggy and sagged. The officer grabbed defendant's arm and asked him if he had a gun. The defendant answered "yes". The officer then removed the gun and arrested defendant.

Here, again, the Court assumed, without discussion, that the stop was reasonable because it was a routine traffic stop. In dealing with the frisk, the Court cited **Terry v. Ohio:**

"**Terry v. Ohio** . . . tells us that when a police officer has reason to believe that he is dealing with an armed individual he has a right to search for weapons regardless of whether he has probable cause to arrest that individual for a crime. Here the officer did not merely think he was dealing with an armed person—he knew he was." **State v. Hall,** 476 P.2d at 931 (Court of Appeals of Oregon, 1970)

The gun was held to be admissible in evidence and defendant's concealed firearm was upheld.

Citizen Informant

Two officers were crusing in a patrol car at about 9:00 at night. As they proceeded along a street, a taxicab driver coming from the opposite direction hailed them and said, "I just saw a guy up the street tuck a gun inside his belt." The cabdriver pointed to three men down a street which was otherwise empty. He did not say which of the men he had seen with the gun.

The officers drove up to the three men, stopped them, searched defendant, and found a gun in his left coat pocket. The other two men were also searched and the officers seized a knife from one and narcotics paraphernalia from the other. All three were arrested.

The "stop and frisk" was found to be reasonable. The Court felt that there were but two courses open to the officers: (1) to let the three men pass in the night because the officers were not told which of the three had the gun and therefore they may have lacked the legal authority to search any of them, or (2) to stop the three and determine which, if any, was carrying a weapon. The officers were justified in taking the latter action.

The Court said,

"In stopping the three the police were not required to confine their efforts to interrogation to the crucial question. Based on the information they had, there was only one realistic way to proceed and that was the usual method of 'frisking' or, if a bulge were noticed, of seizing the gun . . .

A forcible stop of the three was warranted and the necessity to frisk appellant (and the other two) for a weapon was immediate if the stop was to have meaning. Questions leading toward a frisk might have brought a shooting." **Gaskins v. U.S.,** 262 A.2d 810 at 811-12 (District of Columbia Court of Appeals, 1970)

Violent Crime

Police had received a report of an armed robbery minutes after it happened. It was about 3:30 A.M. and the officers on patrol in the area of the robbery had only seen one moving car in the vicinity of the place of the robbery. Police

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approached the car and noticed that one of the passengers fit the description of the robber given over the radio. The car was stopped and the two occupants instructed to get out. No questions were asked at this moment but one of the officers immediately began a pat-down search of defendant for weapons. Bullets were found and defendant was arrested. On the basis of further evidence that was found, defendant was convicted of armed robbery.

The court found that the stop was justified by the information the police had received over the radio.

> "It is well established that circumstances short of probable cause to make an arrest may justify an officer's stopping motorists for questioning, and, if the circumstances warrant it, the officer may in self-protection request a suspect to alight from an automobile and to submit to a superficial search for concealed weapons." **People v. Anthony,** 86 Cal. Rptr. 767, 773 (Court of Appeal of California, 1970)

However, the important point in this case is that the court authorized an immediate frisk for weapons without any questions being asked.

> "If the reason for the stop is an articulate suspicion of a crime of violence, and the officer has reason to fear for his personal safety, he may immediately proceed to make a pat-down search for weapons without asking any prior questions . . .
>
> 'There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet'. . ." (86 Cal. Rptr. 767 at 773)

This case, therefore, stands for the principle that an officer need not ask questions before frisking a suspect if the nature of the crime being investigated is violent and the officer has a reasonable fear for his own safety.

Questionable Objects Felt in Frisk

Police had a certain residence under surveillance as a receiving point for marijuana shipments. They also had probable cause to arrest its occupant, who was absent at the time.

Defendants entered the driveway of the residence in a car, proceeded up the driveway and then attempted to back out when the police stopped them. The officers knew that the defendants were neither occupants of the residence nor were they subjects of the investigation. Nevertheless, they caused defendants to be spread-eagled against the car and searched. One of the officers patted down the defendants' outer clothing and frisked the defendants' inner clothing. During the patdown and frisk of one defendant, the officer felt a lump in his shirt pocket. A further search disclosed that the lump was a plastic baggie containing marijuana seeds and a package of roll-your-own cigarette papers. Defendants were arrested and convicted of possession of marijuana.

The Court approved the stop in this case, stating,

> "Admittedly the police officers would have been derelict in their duty had they not stopped the defendants' vehicle to determine whether the occupant of the residence, or any other known subject of the investigation, was in the car. Likewise, the officers could have detained the defendants long enough to ascertain why they were on the premises." **People v. Nevran,** 483 P.2d 228 at 230 (Supreme Court of Colorado, 1971)

However, the Court found the frisk in this case to be unreasonable.

> "It is apparent that the search conducted herein was not the 'reasonable search for weapons' contemplated by the **Terry** case . . . The right to "stop and frisk" is not an open invitation to conduct an unlimited search incident to arrest or a means to effect a search to provide grounds for an arrest. Rather, it is a right to conduct a limited search for weapons . . . The seeds and cigarette papers seized were not shown by any evidence produced at the hearing to have been taken from the defendants under circumstances which would permit a search for weapons." 483 P. 228 at 232.

In another case involving objects felt in a frisk, an officer received a broadcast that a murder had just been committed at a certain intersection. The officer proceeded to the scene of the crime and in the general area spotted defendant in a dark jacket, fitting the description that the officer had received on his radio.

The officer stopped defendant and conducted a frisk for offensive weapons. Just after he started the search around defendant's waistband, defendant abruptly grabbed his outside upper jacket pocket. The officer moved defendent's hand away from the pocket and from the outside felt a round cylindrical object which he thought was a 12 gauge shotgun shell. He reached into the pocket to remove it and at the same time pulled out a marijuana cigarette. The cylindrical object turned out to be a lipstick container. Defendant was convicted of unauthorized possession of marijuana.

The reasonableness of the stop was not in question here. Certainly, the officer had a duty to investigate defendant on the basis of the description given over his police radio. The court addressed itself therefore to the reasonableness of the frisk. Without deciding if a shotgun shell alone could be used as a weapon, the court found that the officer could have reasonably believed that his safety was in danger and that the frisk was justified.

> "Though there is some confusion in the record, it is susceptible of the inference that at the moment the officer had not yet eliminated the possibility that defendant was hiding a relatively short shotgun under his jacket. In any event a shotgun was not necessarily the only object which, in combination with a shell, could be used as a weapon. The officer could reasonably believe that any sharp object could be used as a detonator." **People v. Atmore,** 91 Cal. Rptr. 311, 311, 313-14 (Court of Appeal of California, 1971)

The Court further stated:

> "Hindsight may suggest that, in order to combine maximum personal safety for the officer with a minimum invasion of defendant's privacy, the officer should first have ascertained what else defendant was carrying. We do not believe, however, that under the circumstances the officer was required to proceed in the coldly logical sequence which may suggest itself after the event. It appears from

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the record that his reaching into the pocket was almost a reflexive motion, provoked by defendant's sudden gesture toward the pocket and his own feeling of the contents. We cannot say that under all of the circumstances defendant's constitutional rights were violated." (91 Cal. Rptr. at 314)

Other Unusual Circumstances

After a high speed chase, an officer stopped defendant's vehicle for speeding. The officer came up to the passenger side of the vehicle and asked defendant to get out of the vehicle. While the officer was at the car, he could smell an odor of alcohol. Defendant started to unbutton his coat. He turned towards the police officer and proceeded to take off his coat while he was still seated in the car. As he got out of the car he dropped the coat on the passenger seat where he had been sitting.

Since it was a cold November night, the officer thought it was peculiar for the defendant to remove his coat and the officer grabbed the coat as the defendant was getting out. When the officer started to follow defendant, he suddenly noticed a pistol on the passenger seat which had been covered by the overcoat. The pistol was introduced as evidence in the Court below and defendant was convicted of carrying a concealed deadly weapon.

On appeal, the Superior Court of Delaware analyzed the reasonableness of both the stop and the frisk.

"The question then becomes whether or not the policeman acted legally when he reached into the car and picked up the defendant's coat. It should be noted that this case involves an incident where the police had a duty to act in stopping the vehicle. It is not a case of general exploratory investigation. Since the police had a duty to act, they also had a right to take reasonable measures to see that their safety was not endangered (citing **Terry v. Ohio**). In view of the lateness of the hour, the high speed chase, the number of men in the car (3), the fact that the men had been drinking, the police acted reasonably in self protection in asking the gentlemen to get out of the car. Moreover, under these facts, it was reasonable for the police to conduct a limited pat-down search for weapons. A person cannot avoid such a search of his clothing by removing his clothing when it necessarily remains in the general vicinity where he is to remain. The police do not have to risk watching three men to make sure that they did not at any time go back to the clothing left in the car. And the mere fact that the coat was removed is another circumstance justifying a self protective frisk search." **Modesti v. State,** 258 A.2d 287, 288 (Superior Court of Delaware, 1969)

* * * * *

In another case, two police officers had received information over the police radio that a shooting had occurred. The suspects were described as two negroes in dark clothing and one Puerto Rican in light clothing. The officers proceeded to the area of the shooting and a while later spotted a negro in dark clothing and a Puerto Rican in light clothing, walking together near the scene and acting in a normal manner. The only reason the police had to connect them with the reported shooting was that they were walking in the general area and they fit the limited description police had been given. The police had no information of the physical makeup or characteristics of the men they were seeking.

The officers stopped the two men and frisked them on the spot. A gun was found in defendant's belt and defendant was convicted of carrying a concealed deadly weapon.

The court discussed the "stop and frisk" aspects of the case together.

"A policeman may legally stop a person and question him. But he may not without a warrant restrain that person from walking away and 'search' his clothing, unless he has 'probable' cause' to arrest that person or he observes such unusual and suspicious conduct on the part of the person who is stopped and searched that the policeman may reasonably conclude that criminal activity may be afoot, and that the person with whom he is dealing may be armed and dangerous." **Commonwealth v. Berrios,** 263 A.2d 342, 343 (Supreme Court of Pennsylvania, 1970)

The court felt that the circumstances disclosed in this case would **not** warrant a reasonably prudent man in the belief that his safety or that of others was in danger.

"If the policemen were justified in searching Berrios under these circumstances, then every Puerto Rican wearing light clothing and walking with a negro in this area could likewise be validly searched. This, we cannot accept." (263 A.2d at 344)

MISCELLANEOUS ISSUES IN STOP AND FRISK

Stop and Frisk and Miranda

As discussed in the May and June 1971 issues of ALERT, the familiar **Miranda** warnings must be given before any questioning of a person when that person has been taken into custody or otherwise deprived of his freedom of action in any **significant** way. The question arises as to whether the warnings are required to be given before questioning in connection with a 'stop and frisk."

Most courts seem to agree that a short period of on-the-scene questioning pursuant to a "stop and frisk" does not require the **Miranda** warnings. The reasoning behind this is that the **Miranda** decision was designed to protect against the dangers of compulsion which exist when a suspect is swept from familiar surroundings and questioned in a coercive, police-dominated atmosphere. This compelling atmosphere is usually not present in a "stop and frisk" situation. First of all the questions in a "stop and frisk" situation are not considered to be interrogative but rather are usually brief and neutral in scope. Secondly, and more important, an ordinary "stop and frisk" situation does not involve taking a person into custody, nor does it involve a significant deprivation of his freedom of action. The key word here is **significant.** Although there is definitely a deprivation of a person's freedom of action, because the detention and questioning is brief, casual, and limited in scope, courts have usually not considered it significant enough to require the **Miranda** warnings.

This is not to say that questioning in connection with a "stop and

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frisk" could never require the warnings. Circumstances might develop which would create a coercive and compelling atmosphere resulting in a significant deprivation of a person's freedom of action. For example, if the police outnumber the suspects, questioning is sustained and accusatory, force is used, or other similar factors are present, alone or in combination, then very likely, the warnings would be required.

It is difficult to formulate any cut and dried rules for determining when questioning in connection with a "stop and frisk" will require the **Miranda** warnings. Hopefully, the following cases will give some guidance.

Police officers had been alerted via radio to be on the lookout for a white Mustang with California license plates believed to be driven by a person involved in a robbery in a nearby town. When the officers spotted a car fitting that description, they stopped defendant, asked him for identification and if he had been in the town where the robbery occurred. Defendant replied that he had. No **Miranda** warnings had been given prior to the questions. Defendant was convicted of robbery and appealed.

The court felt there was nothing in the questioning which amounted to an in-custody interrogation calling for **Miranda** warnings.

> "Miranda does not bar all inquiry by authorities without previous warnings . . . In our opinion Miranda was not intended to prohibit police officers from asking suspicious persons such things as their names and recent whereabouts without fully informing them of their constitutional rights." **Utsler v. State,** 171 N.W. 2d 739 (Supreme Court of South Dakota, 1969)

* * * * *

Another case illustrates that law enforcement officers do not have to give the **Miranda** warnings before asking questions related to their immediate physical protection. The police in this case had evidence that defendant had robbed a store at gunpoint and they were looking for him. By luck, several days after the robbery, of the eye-witnesses recognized defendant in public and tipped police as to his whereabouts. Police then crashed defendant's apartment and placed him under arrest. One officer handcuffed defendant while the other proceeded to give him **Miranda** warnings. A third officer interrupted asking "Do you have the gun?" Defendant replied "I don't have the gun. I wouldn't be dumb enough to have it here." A jury subsequently found defendant guilty of armed robbery.

Defendant claimed on appeal that this potentially incriminating statement should not have been admitted in court because he had not been given the **Miranda** warnings. The court felt, however, that the questions were not designed to elicit incriminating information but were apparently for one reason only—the physical protection of the police. The police had good reason to believe defendant was armed and dangerous because he had an extensive past history of robbery and burglary.

The Court cited the following passage in **Terry v. Ohio:**

> "It would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." (392 U.S. at 24)

The Court went on to say

> "Although **Terry v. Ohio** involved a 'stop and frisk' situation which was tested by the reasonableness standard of the Fourth Amendment, we believe the concern there expressed is equally applicable when the Fifth Amendment is involved. Accordingly, we hold that it is not a violation of either the letter or spirit of **Miranda** for police to ask questions which are strictly limited to protecting the immediate physical safety of the police themselves and which could not reasonably be delayed until after warnings are given." **State v. Lane,** 467 P.2d 304 (Supreme Court of Washington, 1970)

Frisking of Women

A very delicate situation presents itself when the object of a potential frisk is a woman. There are certainly situations which may arise where a law enforcement officer could reasonably fear that his personal safety is endangered by an armed woman. However, if routine frisk procedures are used, the officer may be subject to a claim of indecent handling by any woman he frisks and the further embarrassment of a possible law suit. Therefore, an examination of a woman's clothing should not be undertaken without some degree of certainty that the woman is armed. She may be asked to remove her overcoat and handbags may be squeezed. But a woman's bag may be opened only after a hard bulge is felt or if she is placed under arrest.

It is difficult to give any specific guidelines with respect to the frisking of women. Suffice it to say that the officer should use his common sense and discretion.

Packages

The variety of situations which are covered under the general category of "stop and frisk" is illustrated by a rather unusual Supreme Court case involving packages. A postal clerk advised a policeman that he was suspicious of two packages of coins which had just been mailed. The policeman immediately noted that the return address was fictitious and that the individual who mailed the packages had Canadian license plates. Later investigation disclosed that the addresses (one in California, the other in Tennessee) were under investigation for trafficking in illegal coins. Upon this basis, a search warrant for both packages was obtained, but not until the packages had been held for slightly more than a day. Defendants were convicted of trafficking in illegal coins.

The court upheld the warrantless detention of the packages while the investigation was made, recognizing nevertheless that "a detention of mail could at some point become an unreasonable seizure of 'papers' or 'effects' within the meaning of the Fourth Amendment. The court emphasized, however, that in this case the investigation was conducted promptly and that most of the delay was attributable to the fact that because of the time differential, the Tennessee authorities could not be reached until the following day. **U.S. v. Van Leeuwen,** 397 U.S. 249 (U.S. Supreme Court, 1970). We therefore see that the authority to detain for investigation is not confined to persons but applies also to things.

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Summary

The law of "stop and frisk" as it applies to the law enforcement officer may be summarized as follows.

A law enforcement officer may intrude upon a person's freedom of action and "stop" him for purposes of investigating possible criminal behavior even though the officer does not have probable cause to arrest the person. The officer must, however, be able to point to specific circumstances which show that the investigation was appropriate. He may use his experience and training to explain why the circumstances indicated to him that possible criminal activity was afoot in a given situation.

The extent of the "stop" as to length of time, duration of questioning, and use of force, must also be reasonable under the circumstances.

A law enforcment officer may, upon less than probable cause, intrude upon a person's privacy for purposes of conducting a protective search for weapons or frisk. A frisk is not automatically authorized whenever there is a stop. The officer must be able to demonstrate that the circumstances reasonably indicated that the person might be armed. Also, the frisk must be very strictly limited to the protective purpose, although evidence of a crime obtained from a properly conducted frisk will be admissible in court.

The standard to be applied for both the stop and the frisk is whether the action taken by the officer was reasonable at its inception and limited in scope to the accomplishment of the lawful purpose.

The guidelines that the Supreme Court has set out in the area of "stop and frisk" have arisen from a careful balancing of the needs of the police in performing their function of protecting society and the needs of the individual in maintaining his constitutional liberties undiminished. There are still, however, many aspects of "stop and frisk" which need further clarification such as the appropriateness of the use of force, the significance of a refusal to answer questions, and the searching of automobiles. These issues, and others, will have to be resolved by the courts on a case by case basis. The ALERT Bulletin will cover these developments as they arise through the reporting of recent decisions.

IMPORTANT RECENT DECISIONS

Note: Cases that are considered especially important to a particular branch of the law enforcement team will be designated by the following code: J - Judge, P - Prosecutor, L - Law Enforcement Officer.

Search and Seizure; Automobiles L

A reliable informant called a detective and told him that a '67 or '68 red Cadillac was parked at a certain place; that the car had a Texas license number NJP-867; that the driver was white, dressed with a yellow shirt and brown trousers; that underneath the driver's seat was a bag of heroin; and that in the trunk was a sawed-off shotgun. This information was relayed to two other detectives who proceeded to the described place in an unmarked car. There they found the red Cadillac with the same plate numbers the informant had given them. They also saw a white man with a yellow shirt and brown trousers open and shut the trunk and then get behind the wheel. The officers then followed the car a short distance until the suspect parked, at which time they identified themselves and searched the car and the suspect while holding him at gunpoint. The search turned up the shotgun, but not the heroin. At that time, they formally placed the suspect under arrest (the actual arrest occurred prior to this, since they had the man in their custody without intending to let him go).

The suspect was tried and convicted for possession of a sawed-off shotgun and causing this firearm to be transported in interstate commerce, both in violation of federal law.

On appeal, the defendant claimed the evidence of the shotgun should not have been admitted into evidence because the officers did not have probable cause to arrest the defendant and search his car. The court disagreed, stating that because the officers' observations agreed exactly with the information given by a reliable informant, they had probable cause to arrest the defendant and search his car. U.S. v. Harrelson, 442 F.2d 290 U.S. Court of Appeals, 8th Cir., May, 1971).

Search and Seizure: A Conflict JPL

The following two cases illustrate the difficulty courts and law enforcement officials have in determining the areas constitutionally protected by Seventh Amendment. Law officers would be well-advised to exercise caution in situations such as those described below and obtain a warrant, except in an emergency situation where key evidence is likely to be destroyed.

Case 1: Police officers, relying on an anonymous tip, put defendants' home under observation for evidence of drug abuse activity. At one point the officers observed trash barrels on the sidewalk outside the defendants' home and also noticed the garbage collectors approaching. They requested the collectors to empty the truck and then pick up the defendants' trash so it could be easily examined and identified. In the subsequent search, they discovered marijuana. After one defendant retrieved the trash barrels, the officers entered the home and seized more marijuana. At trial, defendants' motion to suppress the evidence being granted, the People appealed.

The Court, in a 4-3 decision, affirmed the dismissal and motion to suppress, relying on the test of "whether the person (the defendant) has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable governmental intrusion." (Relying on Katz v. United States, 389 U.S. 347). The Court held that the fact that the officers had not trespassed to obtain the evidence was not conclusive on the issue of whether or not the search violated the Fourth Amendment. The Court also concluded that people have an interest in keeping their trash private and may not wish to have it examined "at least not until the trash had lost its identity and meaning by becoming part of large conglomeration of trash elsewhere." Here the defendants' trash had not lost its identity since it was examined in the empty well of the garbage truck. The effect of the decision is to extend the protection of the Fourth Amendment even to dis-

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carded refuse on the presumption that people should be able to expect that their trash, just like private correspondence and telephone calls, will not be interfered with by government investigation. **People v. Krivda,** 96 Cal. Rptr. 2d 1262 (Supreme Court of California, July, 1971).

Case 2: A security officer for the defendant's employer, suspecting that the defendant might be stealing merchandise, put defendants' home under his surveillance. During this observation, the officer examined a cardboard box which was left as part of the trash on the sidewalk outside defendant's home. On another date, the same officer examined more of the defendant's trash and seized material and invoices which indicated that the carton and invoices held or referred to the merchandise stolen. This was turned over to the F.B.I. who arrested the defendant based on the trash seized and other evidence later obtained through use of a warrant. At the trial the defendant claimed the seizure of his garbage was a violation of his Fourth Amendment rights to be free from unreasonable searches and seizures. The lower court denied the motion ruling that the items taken had been abandoned by the defendant.

The Court of Appeals agreed that there was nothing unlawful about the seizure since the trash had been abandoned. The Court also discarded the argument that since the local town had an ordinance that limited those authorized "to rummage into, pick up, collect, move, or otherwise interfere with articles or materials placed on the right of way of any public street", therefore no policeman or security officer may examine abandoned garbage. **U.S. v. Dzialak** 441 F2d. 212 (2d Circuit Court of Appeals, March, 1971)

Testimony of Officers on the Stand L

Defendant was convicted of the murder of his wife in 1957. He had been given a lie detector test which he failed. In California, the result of a lie detector test is inadmissible in court.

At the preliminary hearing and again at the trial, the police officer who investigated the case testified that the Defendant had failed the lie detector test. The officer had not been questioned on this issue by the prosecutor; rather he volunteered the information by himself in both instances.

The appellate court reversed the conviction because it felt that the officer's unsolicited testimony concerning the lie detector test prejudiced the case. (**People v. Schiers,** 19 Cal. App. 3d. 102)

COMMENT: Law enforcement officers who take the stand should not offer any information which they have not been asked about by the attorneys. By doing so, an officer risks causing a mistrial or a reversal of the conviction in the future.

Miranda Warnings; Custodial Interrogation J L

A police officer stopped a car for a traffic violation and asked the driver where he was going, and then asked his passenger to check the story. While on the scene, it was determined that the car was stolen and the passenger was arrested. The defendant was found guilty and appealed, claiming the story he first gave to the police officer cannot be used in evidence since he was not given the Miranda warnings. The court disagreed, stating that even though the police officer had not intended to release the defendant, it was not a custodial interrogation. The court cited the rule from **Lowe v. U.S.,** 407 F.2d 1391. 1934 (9th Circuit Court of Appeals, 1969)

"The questioning of a driver of a stopped car on an open highway by one policeman, without more, cannot be characterized as a 'police dominated' situation or as 'incommunicado' in nature. * * * When a law enforcement officer stops a car and asks the driver for identification, a vehicle registration slip, and upon receiving unsatisfactory answers further asks the driver's destination and business, no in-custody' interrogation, as discussed in **Miranda,** takes place. **U.S. v. Smith,** 441 F.2d 539 (U.S. Court of Appeals, 9th Cir., April 1971)."

Right to Counsel; Police Officer L

Two Chicago police officers were charged with brutality by a citizen who claimed he had been beaten and kicked by the officers. The men were ordered to submit to a polygraph (lie-detector) test without the presence of a lawyer which they refused to do. A disciplinary panel, which also refused the officers the representation of an attorney, recommended temporary suspension. The officers sued their supervisor, demanding damages, reinstatement, and the clearing of their records. Their argument was based in part on the invalidity of the proceedings since they were deprived of their Sixth Amendment right to counsel.

The District Court rejected this contention and dismissed the suit. The Court held that the order to submit to a polygraph test was not violative of the right against self-incrimination since the Supreme Court had held that testimony of a police officer given under threat of removal from office for failure to testify, cannot be used against him later in a criminal trial anyway. Furthermore, the denial of counsel during the polygraph test and the hearing was not a violation of the right to legal representation since the disciplinary hearing was not a criminal proceeding. The Court also noted "that a law enforcement officer is in a peculiar and unusual position of public trust and responsibility, and by virtue thereof, the public body has an important interest in expecting the officer to give frank and honest replies to questions relevant to his fitness to hold public office."

Therefore a police officer must answer questions by his superior relating to his duties, and has no right to attorney during such questioning. Furthermore, he may be dismissed for failure to respond to such questioning, although if he does answer, his responses may not be used against him in a criminal proceeding. **Grabinger v. Coulish** (320 F. Supp. 1213, U.S. District Court, Northern District of Illinois, December, 1970)

MAINE COURT DECISIONS

Entrapment; Possession J P L

Defendant appealed his conviction of possession of marijuana on the basis he was entrapped by a government agent into committing the crime. The court rejected his claim on the basis that the defendant was not charged with selling marijuana, but only with possession. The court noted: "If Gellers possessed and controlled the marijuana, he did so independently of the police activity, so there is no room for the argument, i.e. 'possess and have under his control' marijuana was in any way induced

(continued on page 8)

by police activity." The rule is that "where the criminal intent originates in the mind of the accused and the accused is furnished an opportunity to commit a crime or was aided in the commission thereof by an agent of the State in order to secure evidence necessary to the prosecution, it constitutes no defense."

The court also discussed what amounts to possession of marijuana. In this case, the State did not claim that the defendant had had personal exclusive possession of the marijuana, but rather that the defendant had the marijuana under his control and in his **constructive** possession. If the State can prove that the defendant was aware of the presence and character of the drug and was subject to either his exclusive or joint (with another) dominion or control, then the State meets the requirements of the possession statute. This may mean that he has the drug on his person, but also that the drug is subject to his immediate physical possession and control. Here the defendant at his home was asked by an informer to furnish the undercover agent with marijuana. With that, the defendant ordered his friend to go into another room and roll the agent six sticks. The friend returned and handed the marijuana to the agent, although the defendant was then out of the room. The court reasoned that the jury was entitled to decide that the defendant had constructive possession of marijuana from the following facts:

1. Although marijuana had been discussed by the agent and the defendant's friend, it was not produced until the defendant came home.
2. The word "go" is a word of instruction.
3. The word "roll" is a term from which the jury could properly conclude that the defendant wanted the drug in a certain form.
4. "Six sticks" is a specific amount.

Again, from these circumstances, the jury could properly conclude that the "friend" fetched the marijuana at the defendant's express direction, and thus the defendant had constructive possession of the marijuana.

The court also decided that the fact that at the time of the offense, the crime was a felony, but at the time of trial the crime was a misdemeanor, would not warrant dismissal of the charge. **State v. Gellers,** 282 A.2d 173 (Supreme Judicial Court of Maine, October 1971).

Right of Appeal J

Maine Rules of Criminal Procedure, Rule 37 (c) requires that an indigent defendant be advised at the time of sentencing that he has a right to appeal to the Law Court if his counsel was court appointed. In this case, the state conceded and the court ruled that compliance with Rule 37 (c) is a matter of fundamental importance and that the defendant was entitled to some form of post-conviction relief, but what type of relief? The defendant argued that the state be ordered to provide him with a transcript, not as a necessary incident to a reinstated appeal, but rather as an exploratory tool looking for issues upon which some post-conviction relief may be obtained. The court disagreed, stating that the Law Court's practice has been to reinstate the appeal, which it ordered. It also decided that the time for taking an appeal from the Superior Court in a criminal case will not commence to run until Rule 37 (c), where applicable, has been complied with. As for the transcript, since the appeal has been reinstated, the transcript would be furnished at the state's expense in accordance with the provisions applicable to appeals by indigent defendants. **Boyd v. State,** 282 A.2d 169 (Supreme Judicial Court of Maine, October, 1971).

Search Warrant; Affidavit JPL

Defendant was indicted for possession of stolen property. His motion to suppress evidence was denied by a trial court on the grounds that the search warrant under which the evidence was obtained was valid. The search warrant had been obtained on the basis of two affidavits from a police officer.

The Supreme Judicial Court found that the search warrant was invalid for the following reasons:

1. In the search warrant, no other ground was suggested for a search other than that the property was "concealed" on the premises. The warrant made no reference to the property described as "stolen" propertv. This was in violation of the plain requirements of the Maine Rules of Criminal Procedure, Rule 41 (c), which states that the search warrant "shall state the grounds of probable cause for its issuance."

2. Furthermore, the affidavits supporting the warrant were deficient. The affiant merely stated that property described "is stolen property". He did not purport to speak from personal knowlege nor did he present any underlying circumstances. He later testified that his conclusion was based entirely on information furnished by an informer. However, this informer had no more than a lively **suspicion** that the items he observed **might** have been stolen. Therefore the affidavit was insufficient in that it contained only conclusory statements as to an essential element, and it did not "contain all the information on which the magistrate's judgment is based as to the existence of probable cause. (Maine Rules of Criminal Procedure, Rule 41(c)). **State v. Benoski,** 281 A.2d 128 (Supreme Judicial Court of Maine, September, 1971).

Comments directed toward the improvement of this bulletin are welcome. Please contact the Law Enforcement Education Section, Criminal Division, Department of the Attorney General, State House, Augusta, Maine.

ALERT

The matter contained in this bulletin is intended for the use and information of all those involved in the criminal justice system. Nothing contained herein is to be construed as an official opinion or expression of policy by the Attorney General or any other law enforcement official of the State of Maine unless expressly so indicated.

Any change in personnel or change in address of present personnel should be reported to this office immediately.

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This bulletin is funded by a grant from the Maine Law Enforcement Planning and Assistance Agency.