1969

Criminal Law--Stop and Frisk--The Need for Legislative Reform

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Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol57/iss3/14

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Gambling is defined as risking something of value upon the outcome of a contest of chance or a future contingent event not under control of the player. Advancement would include any type of conduct that would establish, create or aid any form of gambling. Generally "advancing" would include any activity that goes beyond being a player. (2) Profiting from unlawful gambling. Profiting is the receipt of money or other property other than as a player. These two terms encompass any form of exploitive gambling. The player is not penalized as long as he does not receive any profit other than personal winnings. The defense of being a player is controlled by requiring the defendant to raise the issue. This would mean that he would have to testify as to the circumstances that resulted in his indictment. 28

A statute of this nature would benefit Kentucky. The process of framing an indictment would be simplified, which would increase the efficiency of the law. It would allow people to engage in gambling while preventing this activity from being exploited.

Shelby C. Kinkead, Jr.

CRIMINAL LAW—STOP AND FRISK—THE NEED FOR LEGISLATIVE REFORM.—A man walks slowly down a residential street at an extremely late hour in an area where there have been numerous reports of break-ins. Can a municipal or county police officer in the state of Kentucky stop this person and require of him his name, his address, and his purpose for being out so late? If the officer does not receive satisfactory answers can he frisk the person? Under present Kentucky law, he may not. At the present there is no codified law in Kentucky governing the procedure known as "stop and frisk." There are no cases directly in point, but there are some that set up guidelines for a police officer's actions in dealing with suspected offenders. These cases deal with arrest and search without a warrant. They have variously held

(Footnote continued from preceding page)

(a) Engaging in Bookmaking to the extent that he receives or accepts in any one day more than 5 bets totaling more than 500 dollars; or
  (b) Receiving in connection with a Lottery or mutuel scheme or enterprise (i) money or written records from a person other than a player whose chances or plays are represented by such money or records, or (ii) more than 500 dollars in any one day of money played in the scheme or enterprise.

2.) Promoting gambling in the first degree is a class C felony. The maximum sentence for a class C felony is 5 years and the maximum fine is $2,500.

28 MICH. REV. CRIM. CODE § 6101; §§ 6115-20, Comment (1967).
that where a crime is being committed in the presence of the officer an arrest and search may be made without a warrant,¹ that incident to a lawful arrest a right to search the person arises,² or that when a person is rightfully arrested in his car, the car may be searched.³ A pre-1900 Court in Kentucky went so far as to hold that mere suspicion did not authorize a search.⁴ In recent times the Court has been taking a somewhat more permissive viewpoint. In Boles v. Commonwealth,⁵ the Court held that the United States Constitution guarantees security to a citizen from unreasonable searches and seizures, but not against a search and seizure springing from the rationality of stated facts molded into probable cause.⁶ The Kentucky Court of Appeals went one step further in 1966 and held that the constitutional guarantee which affords protection from an illegal search does not prevent seizure without a search warrant where there is no need for a search (i.e., where the objects sought are visible, open, and obvious to anyone who is casually observing).⁷ Therefore, by implication, it appears that the courts in Kentucky have joined the majority of the other states that do not have a "stop and frisk" law by holding that there must be a lawful arrest connected with the search before said search will be valid.

The Kentucky Crime Commission in its proposal for revising Kentucky’s criminal law, has not specifically commented upon a stop and frisk law for Kentucky. It has instead been incorporated in Section 3701—Arrest by Peace Officer—a subsection dealing with stop and frisk.⁸ By some oversight, this section, in fact all of part IV, has been omitted from the commentary and one must therefore rely on the materials indicated in its index as the sources for the proposal. By using this approach it appears that the Kentucky Crime Commission is suggesting that the legislature consider a stop and frisk law much like the one adopted by New York.⁹ This law states that an officer may stop any person in a public place who he reasonably suspects is committing, has committed, or is about to commit a felony. He may demand of that person his name, address, and an explanation of his

¹ United States v. Stafford, 296 F. 702 (E.D. Ky. 1923).
³ Combs v. Commonwealth, 271 Ky. 794, 113 S.W.2d 438 (1938).
⁴ Hugh v. Commonwealth, 19 Ky. L. Rptr. 497, 41 S.W. 294 (1897).
⁵ 304 Ky. 216, 200 S.W.2d 467 (1947).
⁶ Id. at 217, 200 S.W.2d at 468.
⁸ KENTUCKY CRIME COMM’N OUTLINE FOR PROPOSED CRIMINAL LAW REVISION § 3701 (1968).
actions. The law further states that the officer may search the suspect only if he reasonably feels that he is in danger of life and limb.10

The historical development of stop and frisk laws has been very interesting. The English common law stated that a night watchman in a village could stop an unfamiliar person on the street late at night and detain him until morning, at which time he would be arrested if a crime had been discovered or released if there were no further grounds for detention.11 In 1839, the English Parliament extended the common law power to detain by authorizing the police to search any vessel, carriage of person who could reasonably be suspected of possessing stolen goods.12 A number of state courts have followed the English common and statutory law, and in the absence of statutory provisions have upheld the power of their police officers to stop, question, and frisk suspects under reasonable circumstances. These courts have found that the police have a duty to stop and question suspects under circumstances which reasonably require investigation, and to frisk incident to the inquiry.13 California is one of these states which has by judicial decision enacted a stop and frisk law.14 The California law is much broader than the New York law or the Delaware law,15 two of the statutory provisions that the Kentucky Crime Commission uses as support for section 3701. The courts have construed the New York law16 to permit frisking at any time there is a stop because of the risk and exposure involved for the officer (the answer to his question might be a bullet).17 Even when the officer has his gun

10 Id.
14 Gisske v. Sanders, 9 Cal. App. 13, 98 P. 43 (1908). In this case the court held that an officer has a right to make an inquiry, in a proper manner, of anyone upon the public streets at a late hour as to his identity and the occasion of his presence, if the surroundings are such as to indicate to a reasonable man that the public safety requires such identification. Id. at 16-17, 98 P. at 45. The courts went further in People v. Mickelson, 59 Cal. 2d. 448, 350 P.2d 658, 30 Cal. Rptr. 18 (1963) and said that if the circumstances warrant it, the officer in self-protection, may submit the suspect to a superficial search.
15 Del. Code Ann. tit. 11, § 1901-1912 (1965). A peace officer may stop any person whom he has reasonable grounds to suspect has committed a crime. A 1960 case, Cannon v. State, 53 Del. 284, 168 A.2d 108 (1960), has held that this is a constitutional exercise of the police power.
drawn, frisking is necessary on the grounds of elemental safety: the tables are easily turned.\textsuperscript{18} Clearly the New York law does not change the grounds for an arrest or a full-blown search. This is still “probable cause” as required by the fourth amendment of the Constitution. The New York law and its interpretation establish reasonable suspicion as the grounds for the stop and frisk. The reason for the different standards derives from the difference between stop-frisk and arrest-search situations. The stop is a relatively short, inconspicuous, and less humiliating event than an arrest, and the frisk is strictly limited to the contact or superficial patting down of the outer clothing of the suspect.\textsuperscript{19} This appears to be a reasonable interpretation, one that in fact is made mandatory if the stop and frisk laws are not to run afoul of the fourth amendment.

The United States Supreme Court has recently validated two states’ stop and frisk laws. In \textit{Terry v. Ohio},\textsuperscript{20} the Court held that a police officer may under appropriate circumstances and surroundings approach and stop a person for the purpose of investigating possible criminal behavior, even though there is no probable cause to make an arrest. It further held that any search for weapons must be strictly accompanied by circumstances which justify its initiation and must be limited to that which is necessary for discovery of weapons which might be used to harm the officer or others nearby.\textsuperscript{21} On the same day that the \textit{Terry} opinion was handed down, the Court upheld the New York law in deciding jointly the cases of \textit{Sibron v. New York} and \textit{Peters v. New York}.

\textsuperscript{\textit{Peters}}, the Court upheld the requirement that some grounds to raise a suspicion or at least an inference of suspicion be present before the stop can legally be made. In sustaining the lower court’s decision, the Court held that there must be some activity on the part of a person to make him suspect and therefore give a reason for the officer to stop him.\textsuperscript{23} The lower court’s decision in \textit{Sibron} was

\begin{itemize}
  \item \textsuperscript{18} Id.
  \item \textsuperscript{20} 88 U.S. 1868 (1968).
  \item \textsuperscript{21} In this case a police officer observed two men whom he had not seen in the long time he was on that beat, walking back and forth peering into a store window. They would, one at a time, pass by the store, then return to where the other was waiting, confer briefly, then pass by the store again. A third man appeared, but left shortly after conferring with the other two. After about a dozen trips to the front of the store and back, the two departed. The officer followed them and upon seeing them confer with the third man about four or five blocks away, stopped them and asked what they were doing. Upon receiving unsatisfactory answers, he proceeded to frisk the three. On two of them he found concealed deadly weapons which led to their arrest. \textit{Id.} at 1871-72.
  \item \textsuperscript{23} \textit{Id.} at 1904.
\end{itemize}
reversed for the same reason; in this instance the officer only witnessed the defendant talking to persons known to be dope addicts. The Court held that this did not warrant stopping and frisking the defendant.24

The Model Code of Pre-Arraignment Procedure § 2.01-.02 seems to follow the New York law. It states:

2.02(2): A policeman may stop a person if that person is observed in circumstances which suggest that he has committed or is about to commit a felony or misdemeanor.

2.02(5): If there is reasonable belief that the policemen's safety so requires it, he may frisk the suspect.25

The Uniform Arrest Act26 provides for a new category of detention in the course of investigation which is not an arrest. The detention is just a "street stop" which may occur at any place and at any time in order for the officer to make a superficial investigation of the suspect. This detention may be for a lengthy period of time as under New York law and may even include removal from the place of apprehension. In contrast, the Model Code permits a maximum investigation of only twenty minutes on the spot of the detention.27

Are the stop and frisk laws an answer to a historical problem or are they just one more step on the road to a police-state? Viewpoints will differ depending upon an individual's personal feeling, but the inevitable pro and con dichotomy is already evident. The forces against the enactment, judicial or legislative, cite as the basis of their argument the law of torts where arrest is used to refer to any interference with the liberty of a person, no matter how slight.28 Using this as a springboard one must then turn to the fourth amendment to find the standard to be applied. There is found the "probable cause" requirement which effectively destroys the rationale behind the stop and frisk law.29 Those opposed to stop and frisk laws further state that such laws will

24 Id. at 1902.
25 MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Tent. Draft no. 1, 1966) [Hereinafter cited as MODEL CODE].
26 UNIFORM ARREST ACT § 2(3) (1967).
29 The stop and frisk law must be narrowly construed to preserve its constitutionality. The stop, if it is a simple inquiry about the suspect's actions, probably is permissible. But, if any actual restraint or detention occurs, it must be based on probable cause. Furthermore, regardless of semantic gymnastics, a frisk is a search and also must meet the standard of probable cause. Schoenfield, The "Stop and Frisk" Law is Unconstitutional, 17 SYRACUSE L. REV. 627 (1967).
cause increased tensions between police and citizens, especially those of minority groups. Many leaders of these groups have already expressed their concern that the stop and frisk laws will be applied unequally to members of minority groups whose habits, dress, or environment make them appear more suspicious to the patrolmen.\textsuperscript{30} Admittedly this law places a considerable amount of coercive pressure in the hands of the local patrolman who walks the beat.\textsuperscript{31} The proponents of stop and frisk do not see the problem this way. They feel the laws will remove the necessity of actually arresting a person if he appears suspicious. Clearly any increased activity by the police unaccompanied by an increase in public relations efforts will serve to antagonize minority groups.

Historically the police have been able to stop and question a suspicious person.\textsuperscript{32} This has been an English common law provision that has been carried up to the present, and there does not appear to have been any ill effects flowing from the practice. Countering the arguments of the constitutionalists, the basis of the stop and frisk law is reasonable suspicion, which is, by definition, just one step removed from belief. Realistically the stop is less serious than an arrest and therefore should require less justification. The purpose of the frisk is a safety measure and as such is not a "full blown" search; it should therefore require less justification than does the search. The purported benefits from giving the police the power to stop rather than arrest can be summarized as follows: 1) avoiding a dilution of the probable


\textsuperscript{31} If the choice, then, is between permitting the legislature to promulgate what is in effect a new standard to govern search and seizure or accepting the possibility that some courts, in an attempt to preserve the admissibility of seized evidence, will strain to find probable cause in situations where its existence is questionable, the latter seems preferable. Retaining the present standard of probable cause will limit the extension of police power to those situations in which probable cause originally exists, whereas a new standard of 'reasonable suspicion' would expand police authority to cover a multitude of new situations. Moreover, forcing police to conform to the present standard will encourage improvement in methods of investigation, the only real solution to the problem. Note, \textit{Stop and Frisk: A Perspective}, 53 \textit{Cornell L. Rev.} 889 (1968).

\textsuperscript{32} The Statute of Winchester drawn up in 1285 stated:

\ldots [F]rom the day of Ascension unto the Day of St. Michael [Watchman] shall watch the Town continually all Night, from Sunsetting Unto Sunsetting Unto Sunrising. And if any Stranger do pass by them he shall be arrested until Morning; and if no suspicion be found, he shall go quiet; and if they find suspicion they shall forthwith deliver him to the sheriff. 13 Edw. 1, Stat. Wynton, ch. 4 (1285) [cited in 1 Dawson's Statutes of the Realm 97 (1963)].
cause requirement in arrest cases; 2) avoiding the necessity of making an arrest; 3) allowing an opportunity for exculpation; and 4) reducing police lawlessness and frustration. The special benefits to be achieved from the frisk are: 1) reducing danger to policemen, and 2) preventing crime by confiscating knives, guns, and other weapons.\footnote{Swartz, \textit{Stop and Frisk}, 58 J. Crim. L.P. & P.S. 433 (1967).}

If the Kentucky legislature sees fit to pass a stop and frisk law, it is recommended that the best points of the New York law be combined with the Model Code of Pre-Arraignment Procedure and the best common law provisions found in other jurisdictions. The following proposed statute is the result of just such a combination:

(1) A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed, or is about to commit a felony or misdemeanor and may demand of him his name, address, and an explanation of his actions.\footnote{N.Y. \textit{Code Crim. Proc.} § 180a (McKinney Supp. 1966).}

(2) When a police officer has stopped a person for questioning pursuant to this section and the officer reasonably believes his safety so requires, he may frisk the suspect,\footnote{Model Code § 2.02(5).} strictly limiting the frisk to a superficial patting down of the suspects outer garments in search of dangerous weapons.

This writer believes that the suggested statute would be constitutionally acceptable, as the various components have already been tested by the Supreme Court and found not to be in contravention of the guarantees afforded by the fourth amendment. If it is enacted and if the various local enforcement agencies carry on an intense public relations campaign, the statute may serve to eliminate, not cause, tension presently existing between the citizens and police.

\textit{Charles D. Weaver, Jr.}

\textbf{Criminal Law—Commercial Bribery—The Need for Legislative Reform.}—The national economy has exploded by phenomenal proportions in recent years. Big business and its allies are pushing national and local economies to pinnacles of success never before experienced. Speculating as to the cause, one will eventually give partial credit to a nationally competitive life style which envisions material gain as the