CRIMINAL LAW REVISION COMMISSION
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Salem, Oregon

CRIMINAL PROCEDURE

PART II. PRE-ARRAIGNMENT PROVISIONS

ARTICLE 2. INVESTIGATION OF CRIME

Stopping of Persons

Preliminary Draft No. 1; November 1971

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Subcommittee No. 1

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Section 1. Stopping of persons; definitions. As used in this Article, unless the context requires otherwise:

(1) "Felony" has the meaning provided for this term in ORS 161.525.

(2) A "frisk" is an external patting of a person's outer clothing.

(3) "Peace officer," "deadly weapon," "public place" and "person" have the meaning provided for those terms in ORS 161.015.

(4) "Reasonably suspects" means that a peace officer holds a belief that is reasonable under the totality of the circumstances existing at the time and place he acts as authorized in this Article.

(5) A "stop" is a temporary restraint of a person's liberty in a public place by a peace officer.

COMMENTARY

A. Summary

Section 1 defines three terms that are peculiar to the stopping of persons and incorporates the new Criminal Code definition of five other terms. The terms also clarify what constitute a "frisk" and a "stop."

Subsection (1) incorporates the Criminal Code definition of "felony" and applies it to these provisions.

Subsection (2) defines a "frisk" so as to distinguish this procedure from a full search.

Subsection (3) incorporates the Criminal Code definition of "peace officer," "deadly weapon," "public place" and "person" to give these terms the same meaning in the stopping of persons.

Subsection (4) defines "reasonably suspects" as a police investigative technique used in stopping and frisking of persons.

Subsection (5) defines the term "stop" as distinguished from other police techniques like arrest.

B. Derivation

Subsections (1) and (3) are derived from ORS 161.525 and 161.015.

Subsection (2) is derived from the Model Code of Pre-Arraignment Procedure (MCPP) section 2.02 (4), Approved Draft No. 2, 1969 and Terry v. Ohio, 392 US 1 (1968).

Subsection (4) is in part an original draft and in part derived from ORS 161.239.

Subsection (5) is an original draft based on Terry v. Ohio, ~~infra~~.

C. Relationship to Existing Law

ORS 161.525 defines "deadly weapon," "peace officer," "person" and "public place" as follows:

> "Subsection (2). 'Deadly weapon' means any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury."
>
> "Subsection (4). 'Peace officer' means a sheriff, constable, marshal, municipal policeman or member of the Oregon State Police and such other persons as may be designated by law."
>
> "Subsection (5). 'Person' means a human being...."
>
> "Subsection (9). 'Public place' means a place to which the general public has access and includes, but is not limited to, hallways, lobbies and other parts of apartment houses and hotels not constituting

> rooms or apartments designed for actual residence, and highways, streets, schools, places of amusement, parks, playgrounds and premises used in connection with public passenger transportation."

ORS 161.525 defines "felony" as follows:

> "Except as provided in ORS 161.585 and 161.705, a crime is a felony if it is so designated in any statute of this state or if a person convicted under a statute of this state may be sentenced to a maximum term of imprisonment of more than one year."

The terms "frisk," "stop" and "reasonable suspicion" are not found in current Oregon statutes but have been mentioned in a few Oregon appellate cases. The Supreme Court of the United States sets out some guidelines for a "stop" and a "frisk" in Terry v. Ohio, 392 US 1 (1968), and Sibron v. New York, 392 US 40 (1968). However, there are no Oregon cases specifically concerning the manner of the "frisk."

Since the frisk is premised upon the safety of the officer, the manner and extent of the frisk has been limited to something less than a full blown search. In Terry the court stated:

> "The search must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a full search...."

Since a full search is premised upon an arrest which in turn is premised upon probable cause, logic and fairness compel a search (or "frisk") when based upon less than probable cause, (or what is sometimes called reasonable suspicion) to be limited in scope and manner. The Supreme Court in Terry defines what limit they think is reasonable:

> "The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police." 392 US at 29.

Therefore, the extent of the "frisk" permitted by Terry is limited to weapons that can assault the police officer. Also, the manner of the "frisk" is limited to an external patting of clothing that would reveal the presence of a weapon:

> "...he is entitled for the protection of himself and others in the area to conduct a carefully limited search of outer clothing of such persons in an attempt to discover weapons which might be used to assault him."

A "stop" is defined for clarity and distinction from "arrest." The court in Terry termed the stop a seizure of that person:

> "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."

The "stop" is termed "temporary" because the underlying purpose of the stop is to allow the officer to investigate a suspicious circumstance. If the officer discovers his suspicions are baseless, the person is free to go. On the other hand, if there is a basis for suspicion then this suspicion would ripen into a belief of criminal activity and hence constitute a probable cause for arrest. Either situation could result from a temporary stop.

"Reasonably suspects" is defined initially to show that the suspicious belief must be based on a totality of the circumstances. This requirement was stated in similar terms in Terry. There must be some facts or circumstances that distinguish the conduct of the individual stopped from that of other individuals who are not stopped:

> "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 these facts, reasonably warrant that intrusion...." 392 US at 21.

ORS 161.239 deals with the use of deadly force in making an arrest or in preventing an escape. The officer has justification to use deadly force when he reasonably believes that:

> "(d) The crime committed by the person was a felony or an attempt to commit a felony and under the totality of the circumstances existing at the time and place, the use of such force is necessary;...."

The reasonable suspicion is similar in nature to the reasonable belief standard of ORS 161.239 but of different quantum. If the officer has such reasonable belief he would also have probable cause to arrest.

Section 2. Stopping of persons. (1) A peace officer who reasonably suspects that a person has committed or is about to commit a felony may stop the person and, after informing the person that he is a peace officer, make a reasonable inquiry.

(2) The detention and inquiry shall be conducted in the vicinity of the stop and for no longer than a reasonable time.

(3) The inquiry shall be considered reasonable only if limited to the immediate circumstances that aroused the officer's suspicion.

COMMENTARY

A. Summary

Section 2 provides the legal basis for the stopping of a person. This section must be effected in light of the definitions in section 1. If the officer cannot justify a stop under this situation,then he cannot restrain a person nor frisk his body. In other words, reasonable suspicion that a person has committed or is "about to commit a felony" is the condition precedent to any interference of a person's liberty by a peace officer.

B. Derivation

Subsection (1) is derived from MCPP section 2.02 (1)(a), Approved Draft No. 2 (1969).

Subsections (2) and (3) are partially derived from 38 Ill Rev Stat section 107-14 and MCPP section 2.02 (1) and partially an original draft.

C. Relationship to Existing Law

In Terry v. Ohio, 392 US 1 (1968), the Supreme Court of the United States held that the stopping of a person was in fact a seizure of that person and within the Fourth Amendment protection from unreasonable searches and seizures. However, the Court stated that the stopping of a person may be justified if reasonable. The determination of reasonableness will depend upon the circumstances of the stop and the ability of the officer to articulate specific facts explaining these circumstances.

The specific and articulable facts that the officer must point to to justify the stop should indicate to the officer that there is some type of criminal activity afoot and that this particular person is somehow involved:

> "...where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot...he identifies himself as a policeman and makes reasonable inquiries...." 392 US at 30.

The Supreme Court does not use the term "reasonable suspicion" but as discussed above sets out a standard for inquiry and stopping on somewhat less than probable cause. The standard has the same effect whether or not it is called reasonable suspicion or reasonable inference or whatever.

In State v. Cloman, 254 Or 1, 456 P2d 67 (1969), the Oregon Supreme Court partially explained what reasonable suspicion was in relation to the stopping of a vehicle:

> "This 'reasonable suspicion' we deem to be of less quantum than probable cause to arrest." 254 Or at 6.

> "Our approval of an officer's right to stop to investigate should not be interpreted as drastically broadening an officer's power to restrain persons when the officer has no probable cause to arrest. The officer must have reasonable grounds to stop the person or car and the right to stop does not necessarily create a right to search." 254 Or at 9.

The court in Terry defines the guidelines to be followed but does not use the term "reasonable suspicion." The court in Cloman uses the term but does not clearly define what this means except that it is less than probable cause. Assuming that the guidelines in Terry are less than probable cause and that the reasonable suspicion in Cloman is less than probable cause, it would be reasonable to state that the guidelines in Terry are the guidelines for reasonable suspicion.

Therefore, when an officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity is afoot and when he is able to point to specific and articulable facts which give rise to the inference that criminal activity is afoot, the officer has "reasonable suspicion" and hence can stop the individual for investigation.

However, the court in Terry placed a caveat on the reasonable conclusions or inferences of the officer leading to a stop:

> "...would the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate... simple good faith on the part of the arresting officer is not enough...." 392 US at 22.

This caveat apparently places an objective test in the forefront of the stop determination. In other words, the test should be what a reasonable officer would think in this situation and not what this particular arresting officer thought.

Subsection (1) proposes a codification of the peace officer's ability to stop a person as close to the Terry and Cloman rationale as possible while giving the courts leeway to interpret the protean situations that arise and giving the officer limited "stopping" powers.

The peace officer may stop a person only if the officer suspects felonious activity. Therefore, the officer cannot stop a person suspected of any misdemeanor. This is a substantial limitation on stopping powers but it appears desirable because the possibilities of abuse rise dramatically if an officer could stop a person suspected of any misdemeanor.

In many instances society recognizes the severity of a person's conduct. Initially a division is made between felonies and misdemeanors. This division, which is employed in the substantive Criminal Code, recognizes that murder or arson causes much greater harm to society than stealing $20. Therefore the society will deal more severely with the conduct that causes greater societal harm. The authorized penalties for the respective crimes reflects their relative gravity.

The Criminal Code allows a peace officer to use deadly force to arrest a person who has committed a felony. A peace officer may only use physical force, not deadly force, to arrest a person for a misdemeanor.

When a person is stopped, he loses his liberty for the duration of the stop. A person's loss of liberty is an intangible loss that can never be replaced. Therefore, society must have a compelling interest to justify an intrusion of a person's liberty when a peace officer reasonably suspects criminal activity.

The compelling interest should be the possibility of serious harm to the society. Since society, in many other instances, recognizes the difference in societal harm in a felony versus a misdemeanor, the draft also uses this same rationale for stopping or not stopping a person.

The New York statute allows a stop only for a suspected felony or Class A misdemeanor, while the Illinois statute allows a stop for a suspected violation of any penal statute. The American Law Institute in its Model Code of Pre-Arraignment Procedure (MCPP) limits the stops only to a felony or a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property. (MCPP section 2.02 (1) (a) (i)).

Subsections (2) and (3) codify the idea that a stop is a limited situation by its very nature. If a person is taken to the station for questioning he should be either under arrest or voluntarily cooperating with law enforcement officials.

This distinction is important because the person is not free to leave the presence of the officer who has reasonable suspicion; however, the officer is not free to forcibly take the person to the station upon mere suspicion.

The thrust of the Terry decision is to constitutionally recognize the "less than arrest situations" and incorporate them under the Fourth Amendment. As mentioned above, the stop will be constitutional if it is reasonable. The limitations as to the location of the stop and the content of the inquiry are designed as guidelines for reasonableness. Therefore, if the guidelines are adopted and followed, the stop would presumably be reasonable and hence constitutional.

Oregon cases:

State v. Huddleston, 91 Adv Sh 1815, ____ Or App ____ (1971), holds that the police can stop a vehicle upon reasonable suspicion that the car or its occupants have a connection with criminal activity. The facts in Huddleston show that there were several recent burglaries in the northwest area of the city. One of the items stolen was a power mower; a burglary had just occurred that resulted in theft of groceries, and officers had surmised that a covered

pickup or van had been used in the previous burglaries. With this information in mind the arresting officer was proceeding to the scene of the most recent grocery larceny at 5:30 a.m. As the officer came near the area he noticed a pickup driving in the opposite direction from the area where the last burglary occurred. Following the pickup he observed what appeared to be the handle of a power mower and several items in the rear of the truck. The officer then decided to stop the truck and investigate further and found that, indeed, the truck and the occupants were involved in the latest larceny of groceries.

The Oregon Court of Appeals upheld this stop on reasonable suspicion as articulated in Cloman. This stop would appear to be within the Terry requirements because there are sufficient facts that the officer can specifically point to as raising a reasonable suspicion in his mind that the pickup truck was involved in criminal activity. The Huddleston case appears to be an example of good police work and well within proper police action in detecting crime.

In State v. Fisher, 92 Adv Sh 881, ____ Or App ____, 484 P2d 865 (1971), the Court of Appeals did not reach the question of whether the stop was justifiable or not when defendants were stopped for a routine traffic matter. The matter was to advise defendant that his rear license plate was loose. It later developed that the officer became suspicious and searched the car, finding contraband. The court held that a routine traffic stop is of itself not sufficient cause for making a warrantless search and hence the contraband found was not admissible.

See also:

State v. Parks, 92 Adv Sh 1497, ____ Or App ____ (1971).

State v. Murphy, 2 Or App 251, 465 P2d 900 (1970), (cert den, 400 US 944).

State v. Rater, 253 Or 109, 453 P2d 680 (1969).

City of Portland v. James, 251 Or 8, 444 P2d 554 (1968).

State v. Taylor, 249 Or 268, 437 P2d 853 (1968).

Section 3. Frisk of stopped persons. (1) A peace officer may frisk a stopped person for deadly weapons if the officer reasonably suspects that the person is armed and presently dangerous to the officer or other person present.

(2) If, in the course of the frisk the peace officer feels an object which he reasonably suspects is a deadly weapon, he may take such action as is reasonably necessary to take possession of the weapon.

COMMENTARY

A. Summary

Section 3 explains the basis, extent, and, incorporating the definition in section 1 of "frisk," the manner of the frisk. The provisions on "frisk" are separated from the provisions of "stop" so as to make it clear that a frisk does not always follow a stop. A frisk is a distinct procedure from a stop and must be justified on completely separate grounds. However, as was the case in Terry, the stop and frisk can occur simultaneously.

B. Derivation

Section 3 is derived from MCPP section 2.02 (4), Approved Draft No. 2 (1969).

C. Relationship to Existing Law

In Terry v. Ohio, 392 US 1 (1968), the court specified the basis for a frisk of a stopped person. The reason for a frisk was premised upon the safety of the officer and others in the immediate area who could suffer harm. Associate Justice Harlan succinctly stated the reason behind the frisk:

> "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." 392 US at 33.

Therefore, the reason the police officer may conduct a frisk is to protect himself and others from harm. However, the officer must have a reason for being in fear of his safety.

> "...where he has reason to believe that he is dealing with an armed and dangerous individual... whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.
>
> "And in determining whether the officer acted reasonably in such circumstances, due weight must be given...to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." 392 US at 27.

Terry allows a frisk of the individual that is stopped only if the officer fears for his safety or the safety of others and further if this fear is reasonable in light of the circumstances and inferences that can be drawn from the situation.

In State v. Hall, 91 Adv Sh 823, ____ Or App ____, 476 P2d 930 (1970), the Court of Appeals held than when an officer has reason to believe that he is dealing with an armed individual he has a right to search for weapons. Here, the defendant was arrested for violation of the basic speed law. After stopping the vehicle and while the officers were walking up to the vehicle, the defendant got out holding his right hand in the pocket of his knee-length coat. The right pocket was baggy and sagged. The officers asked if he had a gun to which the defendant replied "yes." The officers removed the gun and arrested the defendant.

Here, the baggy pocket and the hand in the baggy pocket would be reason enough under Terry to justify the frisk. Although the stop was not a Terry stop in the traditional sense, because the officers stopped the vehicle for speeding, the search was a Terry type search because it was done out of fear for safety and not related to the speeding violation. (You don't expect a speeder to shoot.)

A recent decision by the Oregon Court of Appeals, State v. Fisher, 92 Adv Sh 881, ____ Or App ____, 484 P2d 865 (1971), declined to disturb the trial court's finding of fact. The trial judge found that the reason for the officer's suspicions "appears to be more subjective on the part of the officer than based upon any objective observations made by him." At 883.

The state had urged that the conduct of the defendant and his passenger was of a sufficiently suspicious character that the officer was justified in conducting a weapons search. The Court of Appeals, in refusing to upset the finding of fact of the trial court, cited Sibron v. New York, 392 US 40 (1968), as the basis for a search for weapons:

> "In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous...." 392 US at 64.

The suspicious movements in question in Fisher were sudden hand movements by the passenger towards the glove compartment which were repeated two more times, coupled with placing the hand underneath a blanket on the front seat. The passenger, while acknowledging some hand movements, denied moving toward the glove compartment or placing his hand underneath the blanket. Therefore, this became a question of fact that was decided by the judge by granting a motion to suppress the evidence obtained through the search.

The Court of Appeals apparently approved the Terry and Sibron test for "frisking" a person or vehicle when the officer reasonably fears for his own safety.

In Sibron the Supreme Court held that the officer did not have a reasonable suspicion or fear for his safety when he thrust his hand into Sibron's pocket, finding contraband. The officer was not acquainted with Sibron and had no information concerning him. He merely saw Sibron talking to a number of known narcotics addicts over a period of eight hours. The officer was completely ignorant regarding the content of the conversations and saw nothing pass between the addicts and Sibron.

> "The suspect's mere act of talking with a number of known 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." 392 US at 64.

In Sibron the court reiterated the limited manner of the frisk because the officer that searched Sibron immediately stuck his hand into Sibron's pocket without any preliminary search:

> "The search for weapons approved in Terry consisted solely of a limited patting of the

outer clothing of the suspect for concealed objects which might be used as instruments of assault.

"The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception - the protection of the officer by disarming a potentially dangerous man." 392 US at 65.

There are no Oregon cases commenting upon the scope and manner of the frisk. However, there is a Ninth Circuit Court of Appeals case that discusses the question. In Tinney v. Wilson, 408 F2d 912 (1969), the court held that the officer had no business squeezing soft objects that he comes across during the course of the frisk.

"Officer McGill specifically directed his attention to the pocket and 'could feel by gently squeezing' the object 'that it felt to be pills or capsules.'...While Officer McGill's 'frisk' of Tinney for weapons was constitutionally valid at its inception, the officer's 'squeezing' action transgressed the limits of a search which must be 'confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.' " 392 US at 29, 408 F2d at 916.

Related cases:

State v. Riley, 240 Or 521, 402 P2d 741 (1965).

Police officers, one of whom flashed a light in vehicle stopped for defective taillights and who noticed part of a gun protruding from under front seat of driver's side while driver was still near the vehicle, were justified in seizing the weapon on the ground that it was reasonably necessary to their safety.

"To justify the seizure of a weapon which could be used against the arresting officer we shall not draw a fine line measuring the possible risk to the officer's safety." 240 Or at 524.

State v. O'Neal, 251 Or 163, 444 P2d 951 (1968).

A search incident to an arrest is justified only for safety of arresting officer or because it has relevance to the crime for which the accused is arrested.

Where arresting officers had frisked defendant immediately after his arrest on traffic charges and inspection of a defendant's wallet did not reasonably relate to defendant's actions of driving without a license plate.

See also:

State v. Rater, 253 Or 109, 453 P2d 680 (1969).

State v. Shaw, 90 Adv Sh 2093, ____ Or App ____, 473 P2d 159 (1970).

Section 4. Report of persons stopped. (1) A peace officer, who has stopped a person, shall with reasonable promptness submit a written report to his supervising superior concerning the circumstances of the stop.

(2) The circumstances of the stop may include, but need not be limited to, the time, date, location, the name of the person stopped, and the reason for the stop.

COMMENTARY

A. Summary

Section 4 requires that an officer report any stop he has conducted during his patrol. The purpose of this requirement is to provide for administrative review of the individual actions of peace officers when they stop persons.

The person stopped and later arrested will be able to bring out any peace officer abuse during a preliminary hearing or trial. However, a person unjustly stopped and not arrested has no legal recourse. Therefore, requiring reports of all stops would impose additional controls to help prevent possible abuse of the stop and frisk authority.

B. Derivation

MCPP section 2.02 (7), Approved Draft No. 2 (1969).

Section 5. Admissibility of items seized during frisk. Except for deadly weapons, no item discovered during a stop and frisk shall be admissible as evidence in any criminal proceeding.

COMMENTARY

A. Summary

Section 5 codifies an exclusionary rule for all items, except deadly weapons, discovered in the course of a frisk. The express purpose of the frisk is to assure the officer's safety during the stop. Numbers slips, counterfeit bills and marijuana baggies do not threaten an officer's safety, and consequently, would not be admissible as evidence in a subsequent criminal proceeding against the person frisked.

B. Derivation

Section 5 is an original draft based on Terry v. Ohio, 392 US 1 (1968), and Sibron v. New York, 392 US 40 (1968).

C. Relationship to Existing Law

During a search incident to an arrest, an officer may seize any item which he has probable cause to believe was used in commission of a crime. State v. Brown, 251 Or 126, 444 P2d 957 (1968). However, in a stop situation the officer has only reasonable suspicion of criminal activity and not probable cause. Therefore, the scope of the frisk would be limited as stipulated in section 3 and not allowed to be a general search for evidence of criminal activity. To insure a limited frisk the exclusionary rule is applied to prevent introduction into evidence of items other than deadly weapons.

In many instances the item confiscated will be returned once the officer ascertains that no criminal activity is involved. However, the problem that is most perplexing is the disposition of contraband discovered in the course of the frisk. If the stop was reasonable and there was reason to frisk the person then the final hurdle to admissibility would be first, whether the item seized was similar to a weapon or in fact a weapon, and second if the item was not a weapon, whether it should be admissible anyway because it was a "windfall." The windfall item would obviously be

contraband because a normal article would have no value in a criminal prosecution (except as an instrument of crime). Among the normal windfall items are narcotics, numbers tickets and counterfeit money.

The court in Terry stated that the weapons seized in such a frisk may be properly introduced in evidence:

> "Such a search is a reasonable search under the Fourth Amendment and any weapons seized may properly be introduced in evidence against the person from whom they were taken."

Therefore, in Terry the weapons seized by the officer during his frisk of Terry and his companions were admissible against the persons who possessed them. However, it is unclear if contraband had been discovered on Terry whether it would have been admissible.

In Sibron the court excluded the heroin because there was no reasonable fear for safety on the part of the officer. Therefore, in Sibron the question of windfall evidence was not decided. However, in the case of Chimel v. California, 395 US 752 (1969), the court commented upon the Sibron case. Justice Stewart stated:

> "...a policeman's action in thrusting his hand into a suspect's pocket had been neither motivated by nor limited to the objective of protection. Rather, the search had been made in order to find narcotics, which were in fact found."

This comment would imply that the frisk is limited to only weapons and anything else that is found would not be admissible. This is so because the entire underlying theory of stop and frisk is investigation of suspicious actions and protection of the officer during such investigation. The frisk to secure the officer from bodily harm must therefore be limited to the original goal and not elevated to a full search by the discovery of contraband.

> "Evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." Warren v. Hayden, 387 US 294, 310 (1966), [cited in Terry].

In a case cited above from the Ninth Circuit, Tinney v. Wilson, the Court of Appeals stated that an officer has no business squeezing soft objects that are obviously not weapons. The court also cited Terry as to the scope of the frisk:

> "Such a search must be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of police officers." 392 US at 29.

Illinois limits the frisk to weapons by just mentioning weapons in the statute: "... he may search the person for weapons." Illinois says nothing about contraband discovered as a windfall. An assumption could be made that the courts would have the decision since there is a lack of legislative guidelines.

On the other hand, New York provides that any property found during the frisk can be used:

> "If he finds such a weapon or instrument, or any other property possession of which he reasonably believes may constitute the commission of a crime, he may take it and keep it until the completion of questioning, at which time he shall either return it, if lawfully possessed, or arrest such person." (NYCPL section 140.50 (2)).

The New York provision seems to go far beyond Terry and Sibron in allowing the use of windfall evidence.

The MCPP states that "If in the course of such search he feels an object which he reasonably believes to be a dangerous weapon he may take such action as is necessary to take possession of such weapon." This appears to limit the frisk to weapons but fails to deal with the problem of windfall evidence.

Section 5 excludes the windfall evidence to insure a limited frisk. Although section 3 alone may be sufficient basis to exclude windfall evidence, because section 3 limits the frisk to weapons, the exclusionary rule of section 5 clarifies any doubt concerning admissibility of items other than deadly weapons.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Code of Pre-Arraignment Procedure (Approved Draft No. 2, 1969)

Section 2.02. Stopping of Persons.

(1) Cases in Which Stop is Authorized. A law enforcement officer, lawfully present in any place, may, in the following circumstances, order a person to remain in the officer's presence near such place for such period as is reasonably necessary for the accomplishment of the purposes authorized in this subsection, but in no case for more than twenty minutes:

(a) Persons in suspicious circumstances relating to certain felonies and misdemeanors.

(i) Such person is observed in circumstances such that the officer reasonably suspects that he has just committed or is about to commit a felony or misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, and

(ii) such action is reasonably necessary to obtain or verify the identification of such person, to obtain or verify an account of such person's presence or conduct, or to determine whether to arrest such person.

(b) Witnesses near scene of certain felonies and misdemeanors.

(i) The officer has reasonable cause to believe that a felony or misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property has just been committed near the place where he finds such person, and

(ii) the officer has reasonable cause to believe that such person has knowledge of material aid in the investigation of such crime, and

(iii) such action is reasonably necessary to obtain or verify the identification of such person, or to obtain an account of such crime.

Text of Model Code of Pre-Arraignment Procedure (Cont'd)

(Approved Draft No. 2, 1969)

(c) Suspects sought for certain previously committed felonies.

(i) The officer has reasonable cause to believe that a [felony] [felony or misdemeanor] involving danger of injury to persons or of appropriation of or damage to property has been committed, and

(ii) he reasonably suspects such person may have committed it, and

(iii) such action is reasonably necessary to obtain or verify the identification of such person for the purpose of determining whether to arrest him for such crime.

(2) Stopping of Vehicles at Roadblock. A law enforcement officer may, if

(a) he has reasonable cause to believe that a felony has been committed; and

(b) stopping all or most vehicles moving in a particular direction or directions is reasonably necessary to permit a search for the perpetrator or victim of such felony in view of the seriousness and special circumstances of such felony,

order the drivers of such vehicles to stop, and may search such vehicles to the extent necessary to accomplish such purpose. Such action shall be accomplished as promptly as possible under the circumstances.

(3) Use of Force. In order to exercise the authority conferred in subsections (1) and (2) of this section, a law enforcement officer may use such force, other than deadly force, as is reasonably necessary to stop any person or vehicle or to cause any person to remain in the officer's presence.

(4) Frisk for Dangerous Weapons. A law enforcement officer who has stopped any person pursuant to this section may, if the officer reasonably believes that his safety or the safety of others then present so requires, search for any

Text of Model Code of Pre-Arraignment Procedure (Cont'd)

(Approved Draft No. 2, 1969)

dangerous weapon by an external patting of such person's outer clothing. If in the course of such search he feels an object which he reasonably believes to be a dangerous weapon, he may take such action as is necessary to take possession of such weapon.

(5) Questioning of Suspects.

(a) Warnings. If a law enforcement officer stops any person whom he suspects or has reasonable cause to suspect may have committed a crime, the officer shall warn such person as promptly as is reasonable under the circumstances, and in any case before engaging in any sustained questioning

(i) that such person is not obliged to say anything, and anything he says may be used in evidence against him,

(ii) that within twenty minutes he will be released unless he is arrested,

[(iii) that if he is arrested he will be taken to a police station where he may promptly communicate by telephone with counsel, relatives or friends, and

(iv) that he will not be questioned unless he wishes, and that if he wishes to consult a lawyer or have a lawyer present during questioning, he will not be questioned at this time, and that after being taken to the stationhouse a lawyer will be furnished him prior to questioning if he is unable to obtain one.]

(b) Limitations on Questioning. No law enforcement officer shall question a person detained pursuant to the authority in this section who he suspects or has reasonable cause to suspect may have committed a crime, if such person has indicated in any manner that

Text of Model Code of Pre-Arraignment Procedure (Cont'd)

(Approved Draft No. 2, 1969)

he does not wish to be questioned, or that he wishes to consult counsel before submitting to any questioning.

(6) Action to be Taken After Period of Stop. Unless an officer acting hereunder arrests a person during the time he is authorized by subsections (1) and (2) of this section to require such person to remain in his presence, he shall, at the end of such time, inform such person that he is free to go.

(7) Records Relating to Persons Stopped. In accordance with regulations to be issued pursuant to Section 1.03, a law enforcement officer, who has ordered any person to remain in his presence pursuant to this section, shall with reasonable promptness thereafter make a record of the circumstances and purposes of the stop.

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Text of Illinois Revised Statutes

107-14. Temporary questioning without arrest. A peace officer, after having identified himself as a peace officer, may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit or has committed an offense as defined in Section 102-15 of this Code, and may demand the name and address of the person and an explanation of his actions. Such detention and temporary questioning will be conducted in the vicinity of where the person was stopped.

108-1.01. Search during temporary questioning. When a peace officer has stopped a person for temporary questioning pursuant to Section 107-14 of this Code and reasonably suspects that he or another is in danger of attack, he may search the person for weapons. If the officer discovers a weapon, he may take it until the completion of the questioning, at which time he shall either return the weapon, if lawfully possessed, or arrest the person so questioned.

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Text of New York Criminal Procedure Law

§ 140.50 Temporary questioning of persons in public places; search for weapons

1. In addition to the authority provided by this article for making an arrest without a warrant, a police officer may stop a person in a public place located within the geographical area of such officer's employment when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a class A misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.

2. When upon stopping a person under circumstances prescribed in subdivision one a police officer reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons. If he finds such a weapon or instrument, or any other property possession of which he reasonably believes may constitute the commission of a crime, he may take it and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

L.1970, c. 996, § 1, eff. Sept. 1, 1971.

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