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# Recent Developments: State v. Smith: Incriminating Evidence Detected in a Secondary Frisk Is Not Admissible When No Weapons Are Detected in the Original Frisk

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# State v. Smith:

## INCRIMINATING EVIDENCE DETECTED IN A SECONDARY FRISK IS NOT ADMISSIBLE WHEN NO WEAPONS ARE DETECTED IN THE ORIGINAL FRISK

By John Magee

In a 4-3 decision, the Court of Appeals of Maryland in *State v. Smith*, 345 Md. 460, 693 A.2d 749 (1997), held that when a police officer frisked the outer clothing of a suspect and detected no weapons, a secondary, more intrusive search was unreasonable and violated the suspect's Fourth Amendment protection against unreasonable searches and seizures.

On May 22, 1994, Baltimore City Police Officer Sean White responded to a call involving individuals selling drugs and firing weapons on a street corner. Officer White observed four to five men on the corner, none of whom fit the description of the individual suspected of firing the weapon. Officer White did, however, observe the respondent, William L. Smith ("Smith"), place an unidentifiable object in the back waistband of his pants. Based on Officer White's experience and the nature of the call, he believed the object was a handgun. Officer White detained Smith and conducted an initial protective frisk for weapons which revealed nothing. Although Officer White had patted-down the back waistband of Smith in his original search, he double checked his search by pulling Smith's shirt out to see whether he had missed a weapon. Upon pulling out Smith's shirt, a plastic bag containing cocaine fell out.

The Circuit Court of Maryland for Baltimore City denied Smith's motion to suppress the cocaine on the grounds that lifting Smith's shirt was within the permissible scope of a protective search for weapons. Smith was convicted of possession with intent to distribute cocaine. The Court of Special Appeals of Maryland reversed the decision and held that the circuit court improperly denied Smith's motion to suppress the cocaine because Officer White exceeded the lawful bounds of a proper protective frisk when he double checked his original pat-down. Certiorari was granted and the sole issue before the Court of Appeals of Maryland was whether a police officer could further verify that a suspect was not armed after an initial pat-down revealed no weapons.

Because this case involved a frisk for weapons in the absence of probable cause to arrest, the court reviewed and incorporated into its decision the principles established in *Terry v. Ohio*, 392 U.S. 1 (1968). *Smith* at 464, 693 A.2d at 751. In *Terry*, the United States Supreme Court held that a police officer may briefly detain and conduct a "carefully limited" frisk of a suspect's outer clothing if the facts support an objectively reasonable suspicion that the suspect is involved in criminal activity and may be armed. *Id.* at 465, 693 A.2d at 751. The Supreme Court noted that the purpose of a *Terry* frisk is to ensure the safety of the police officer as well as bystanders, but it is not an evidence-gathering search. *Id.* The Supreme Court further determined that a police officer should limit the search to what is minimally necessary to balance the competing interests of the officer's self-protection and the individual's Fourth Amendment rights. *Id.* at 465-66, 693 A.2d at 751.

Although a pat-down frisk alone is an acceptable intrusion, the Court of Appeals of Maryland has recognized, as have other courts, that under certain circumstances, a more intrusive search may be necessary. *Id.* at 466, 693 A.2d at 751. In situations where the suspect refuses to obey the officer's commands or where there are other exigent circumstances the officer may dispense with the pat-down and proceed with a more intrusive search. *Id.* at 466-68, 693 A.2d at 751-52. However, a police officer may not immediately dispense with a pat-down frisk and proceed with a more intrusive search unless the officer is prevented from conducting an effective pat-down search. *Id.* at 466, 693 A.2d at 752 (citing 4 Wayne R. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* § 9.5(b) at 272 (3d ed. 1996)).

In completing its review of *Terry*, the court of appeals concluded that a police officer must use the least intrusive means of discovering concealed weapons to balance the

competing interests of officer safety and a suspect's constitutional rights. *Id.* at 468, 693 A.2d at 753. However, the court next reviewed the circumstances which prompted the secondary search and determined that Officer White exceeded the permissible scope of a *Terry* search. *Id.* at 470-71, 693 A.2d at 754.

The court conceded that Officer White had a reasonable, articulable suspicion that Smith was armed and therefore was justified in conducting a "minimally intrusive" frisk. *Id.* at 462, 693 A.2d at 753. However, when the pat-down revealed no weapons, the risk of harm to the officer no longer outweighed the suspect's competing interest against unreasonable searches and seizures. *Id.* at 469, 693 A.2d at 753. The court concluded that "when Officer White failed to detect a weapon-like object, his frisk of Smith should have ceased." *Id.* at 470, 693 A.2d at 754. Therefore, because the cocaine was the fruit of the illegal search, the court deemed it inadmissible. *Id.* at 472, 693 A.2d at 754.

In the dissenting opinion, Judge Raker acknowledged that an officer's right to conduct a *Terry* frisk has limitations and not every frisk justifies a more intrusive search beyond the suspect's outer clothing. *Id.* at 474, 693 A.2d at 755. However, based on Officer White's experience and the nature of the call, she found that Officer White was justified in conducting the secondary, "limited intrusion," when the original pat-down did not satisfy his reasonable fear that Smith was armed. *Id.* at 474, 693 A.2d at 755. Judge Raker reasoned that it does not necessarily follow that there is less risk after a standard *Terry* frisk, particularly if an experienced officer such as Officer White had a continued suspicion that a weapon was present despite the negative pat-down. *Id.* at 473, 693 A.2d at 755.

The close decision in *State v. Smith,* which could have easily weakened *Terry* in Maryland, reflects the difficulty in distinguishing between the competing interests of officer safety and a suspect's constitutional rights. Because non-arrest searches involve swift action based upon on-the-spot observations by the police officer, each step of the search process must be independently justified. To allow the secondary search in the case at bar would entitle police officers to conduct evidence gathering searches in virtually any situation in the name of officer safety. Although officer safety is an essential and necessary concern, it should not be used as a justification to conduct multiple searches of a suspect when no weapons were detected in the initial search. Respect for a suspect's constitutional guarantee against unreasonable searches and seizures is paramount when the initial frisk uncovers no weapons.