

Unedited transcript of

## **Recent Guidance from the SJC on Pat Frisks and the Seizure of the Driver's Car Following his Arrest**

from **District Court Judicial Forum 2020: Criminal Cases**

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### **Speaker(s)**

Hon. Emily A. Karstetter, Malden District Court, Commonwealth of Massachusetts, Medford

>>: OK. Judge Karstetter, the case of Terry v. Ohio brought the court to look at pat frisks. That was a decision issued, of course, by the United States Supreme Court. And it's come up regularly what has to be shown with a pat frisk. But the SJC recently took the occasion to really go through what's needed for a pat frisk. And if you could tell us about that please, Judge Karstetter.

>>: The question on the agenda is when can a police officer conduct a pat frisk of someone? And there is, of course, a flip answer to that but let me pull up my PowerPoint for this topic. So hopefully everyone can see this. Somebody tell me if you can see what's - the PowerPoint. J., can you see my PowerPoint?

>>: Excellent.

>>: All right. Wonderful. So this is, of course, a Fourth amendment analysis and an Article 14 analysis having to do with unreasonable searches and seizures. And of course the seminal case is Terry v. Ohio, which in 1968 allowed for a limited search of outer clothing of a person to discover weapons for safety purposes. And of course there has to have been a reasonable, articulable suspicion that a crime was being committed or was about to be committed. And so that's still the standard. And the reason we have such a stringent standard is - as the SJC remarked in Commonwealth v. Almeida - it is a serious intrusion on the sanctity of the

person. It is not to be undertaken lightly. Despite the fact that we all get searched in airports and occasionally pat frisk there, as well. I just have a little - hopefully this will work - video to give you a sense of what a pat frisk looks like.

>>: (VIDEO PLAYING)

>>: So that was a pat frisk. It was conducted in New York City during the stop-and-frisk era when police would do just that. They would stop people, walk up to them, and touch their outer clothing. And then leave them to do whatever it was that they were doing before or potentially arrest them. That, of course, is not something that is allowed now. And so we're going to talk a little bit about the SJC's decision in Torres-Pagan - it was decided in January. And this was a case that was focused on clarifying the standards for an exit order versus a pat frisk. Because in their view there had been some confusion regarding the standards for the two but they differ. And so in Torres-Pagan, officers stopped the car driven by the defendant in what was found by the motion judge to be a high-crime area for a cracked windshield and an expired inspection sticker. This was a valid stop - traffic stop based on a violation - like a cracked windshield or an expired inspection sticker is valid. The defendant pulled into a private driveway and as the officers were coming up on him, he got out of the car and stood between the open driver's side door and the front seat looking at the officers, and stood there. The defendant looked into the car a couple of times in the cabin where he had just stepped out. But he complied with the officers' instruction to stay right where he was. The officers placed him in handcuffs. They pat frisked him and they recovered a knife from his pants' pocket. They asked him if he had any other weapons and he said that he did. And they found a firearm, which was the subject of the motion to suppress. A district court judge allowed the defendant's motion. This was in Springfield. So the SJC looked at past decisions that they had written involving exit orders and pat frisks. they they understood - or they conceded that prior articulations of the pat frisks standard have not always been fair. And they noted that at times they've completed the two standards. And so here are some of the examples. In Commonwealth v. Johnson in 2009, the court wrote that a pat frisk was justified when an officer feared for his safety or the safety of the public. And then used the

conjunction, or when the police officer reasonably believed that the individual was armed and dangerous. That or is incorrect. And another example the SJC gave was - not Torres-Pagan but Torres. In 2001, the court wrote that the standard for a pat frisk was the same as that required to justify an exit order, which, of course, was also incorrect. So to clarify, an exit order from a motor vehicle is justified where police are warranted in the belief that the safety of officers or others is threatened - this is an exit order. Or they have reasonable suspicion of criminal activity or they are conducting a search of the vehicle on some other grounds. That's for an exit order. To conduct a pat frisk, police must have a reasonable suspicion based on specific and articulable facts - right from Terry v. Ohio - or that the suspect is armed and dangerous. The officer must also have a reasonable suspicion that the defendant has committed, is committing, or is about to commit a criminal offense in order to conduct a pat frisk. Again, right from Terry v. Ohio. And they cited their own decision in Narcisse, which involved the stop of a young man who they then frisked and I think found a firearm in his shorts if I remember that case correctly. And so it is true that a pat frisk is not justified unless an officer has safety concerns, which sounds like the exit order. And it is true that a pat frisk may be conducted in the absence of probable cause to arrest because this is a Terry Stop. But to justify a pat frisk, an officer needs more than safety concerns. The officer must have a reasonable suspicion that the suspect is armed and dangerous. And so the SJC noted, in this case, that having different standards for exit orders and pat frisks makes some sense because in an exit order they're viewed as less intrusive than a pat frisk, which they viewed as a severe intrusion upon cherished personal security. That must surely be an annoying, frightening and perhaps humiliating experience. And so they have now clarified for us the difference between exit orders and pat frisks. They also noted that the only legitimate reason for an officer to subject a suspect to a pat frisk is to determine whether there is a concealed weapon. So it's all about weapons. And there were no specific and articulable facts in Torres-Pagan that the defendant was armed and dangerous despite him looking back into the car, despite him getting out of the car when officers approached. This was insufficient. They did not think that it was furtive for him to be looking back into the car. Furtive movements being one of those catch phrases that we all hear in motions to suppress as being a reason for suspicion of criminal activity.

And they actually quoted from Merriam-Webster - I think it was. The definition of furtive that it was not done by stealth or in secret. And then turning to look in the vehicle added little for them because it could just suggest that the defendant had something of interest in his vehicle, not that he had a weapon on his person. Which is sort of a remarkable turn of phrase when you think about all of the cases that talk about what's within arm's reach of a defendant being a reason for officers to be concerned about their own safety in the context of a motor vehicle stop but that language is there. And so while his behavior may have been unexpected in stepping out of the car and facing the officers, Justice Budd wrote that surprise in response to an unexpected behavior is not the same as suspicion that the person is actually armed and dangerous. And so in, of course, *Torres-Pagan*, I think we've all figured out by now the pat frisk was ruled improper and so was the consequent search of the vehicle. And the SJC affirmed the district court judge who had allowed a motion to suppress. I thought it would be interesting to point out as well that in *Torres-Pagan*, there is a three-factor test from a Supreme Court case having to do with high-crime areas. There has to be a nexus between the crime suspected and the type of crime prevalent in the area. There are - geographic boundaries to the high-crime area must be defined. And there must be a temporal - that is a time proximity - between the crime suspected and the heightened criminal activity. And so they noted this in *Torres-Pagan*. They also cited a law review article arguing that the high-crime area factor is misused and potentially abused. And it's something that I would say defense counsel - at least who appear before me on motions to suppress - don't spend a whole lot of time thinking about or cross-examining about. And there may actually be something that they can work with in the cross-examination of a police officer who writes in his report simply that it happened in a high-crime area. Of course you don't want to go down the road of asking too many questions because maybe it really is a very high-crime area and the officers really thought about that. But I do think it's worthy of some examination by defense counsel in motions to suppress it because it is one of these plus factors in deciding whether there is reasonable, articulable suspicion, whether the officer's safety is implicated for purposes of an exit order, and whether or not another person may be armed and dangerous for that matter. So I think that's all - oh, I had one more thing to say. Yes. Suppression motion judges

have to look beyond high crime area to determine whether there are inferences to be drawn from that. And I think this is something the Defense Counsel needs to be ready to argue in motions to suppress that judges shouldn't just simply cite a high-crime area finding in their factual findings. They need to talk about inferences to be drawn from that as well. And the Commonwealth should likewise be ready to support any evidence of a high-crime area. So with that, any questions, Jay, or comments, anyone else?

>>: I'd open it up to any comments by your colleagues on this articulation by the SJC on the standard required to do a pat-frisk for weapons.

>>: Jay, for many years, lawyers who practiced before me know that in my decisions, I often talk about the intent of the police officers, which isn't really relevant according to the SJC, at least so far. But as we know, sometimes the law moves very slow, and a topical issue might be now that sometimes the intent of a police officer in either stopping the car, asking a person to get out of the car, and ultimately pat-frisking someone might be something that the SJC now may think about considering. So I would suggest the defense counsel may want to throw some questions or evidence regarding that into their argument if they can.

>>: Excellent. OK. Judge Howard-Hogan, are you with us? Because I can't see you.

>>: I think she dropped out, came back in and is gone again, Jay.

>>: OK.

>>: Yes, there are only five of you, at this point in time, connected to the webcast.