

Tuesday, February 27, 2007

### **Scalia on Terry searches.**

Terry wrongfully tramples on civil liberties. Justice Scalia recognizes Terry's flaws in permitting a frisk before an arrest. (Image from FBI's website). In the Dickerson case discussed in today's previous blog entry, Justice Scalia criticized the reasoning of Terry for allowing a Terry frisk in the first place, as follows: "I am unaware, however, of any precedent for a physical search of a person thus temporarily detained for questioning. Sometimes, of course, the temporary detention of a suspicious character would be elevated to a full custodial arrest on probable cause -- as, for instance, when a suspect was unable to provide a sufficient accounting of himself. [Editorial: The last sentence is very troubling, particularly when considering that any suspect has a right to remain silent under the Fifth Amendment and a right to refuse searches under the Fourth Amendment; the assertion of such rights cannot contribute to probable cause to detain or search.] At that point, it is clear that the common law would permit not just a protective 'frisk,' but a full physical search incident to the arrest. When, however, the detention did not rise to the level of a full-blown arrest (and was not supported by the degree of cause needful for that purpose), there appears to be no clear support at common law for physically searching the suspect. See Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 324 (1942) ('At common law, if a watchman came upon a suspiciously acting nightwalker, he might arrest him and then search him for weapons, but he had no right to search before arrest'); Williams, *Police Detention and Arrest Privileges -- England*, 51 J. Crim. L., C. & P. S. 413, 418 (1960) ('Where a suspected criminal is also suspected of being offensively armed, can the police search him for arms, by tapping his pockets, before making up their minds whether to arrest him? There is no English authority . . .'). I frankly doubt, moreover, whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere suspicion of being armed and dangerous, to such indignity -- which is described as follows in a police manual: "Check the subject's neck and collar. A check should be made under the subject's arm. Next a check should be made of the upper back. The lower back should also be checked. "A check should be made of the upper part of the man's chest and the lower region around the stomach. The belt, a favorite concealment spot, should be checked. The inside thigh and crotch area also should be searched. The legs should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject." J. Moynahan, *Police Searching Procedures* 7 (1963) (citations omitted)." *Minnesota v. Dickerson*, 508 U.S. 366, 381-82 (Scalia, J., concurring). Too many judges, lawyers and cops accept Terry as the gospel, and often misconstrue Terry to defendants' detriment. In that context, Justice Scalia's criticism of Terry's analysis is all the more important to have at the ready. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00