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MEMORANDUM

TO: File, CCRB Number [redacted]

FROM: Brian Krist, Assistant Deputy Executive Director of Investigations

DATE: January 28, 2014

RE: Frisk Incident to a Lawfully-Issued Summons

Question

Can a police officer conduct a frisk incident to lawfully issuing a summons?

Short Answer

Yes, a police officer may frisk a suspect in the course of lawfully issuing a non-traffic summons under both the federal and state constitutions.

Facts

In the course of a number of cases, officers have indicated a perceived power to frisk suspects for weapons incident to lawfully issuing a summons, including those for noncriminal offenses. Although individual fact patterns vary slightly, the question has arisen whether an officer may frisk a suspect for weapons incident to issuing a summons as an offshoot of the search incident to lawful arrest doctrine. As in that doctrine, the issuing officer would not be required to articulate any specific concern for his/her safety, that the suspect is armed or dangerous, or that the frisk is necessary to preserve evidence, but rather that the intrusion is concomitant with the occurring detention and summons issuance.

Discussion

As with any other search and seizure question in New York, frisk incident to summons is governed by both the federal and state constitutions in New York.

New York State Constitution

Although search and seizure is robustly regulated as a matter of state constitutional law, and New York has often provided broader privacy protections than the federally-required

threshold, New York is relatively clear that a police officer can frisk a suspect pursuant to lawfully issuing a summons for an offense other than a traffic infraction.

The leading New York case on the matter, *People v. Hazelwood*, held that a police officer who had ordered a defendant off a train so he could issue a summons for disorderly conduct could conduct a frisk of a suspect even though the officer "had no reason to fear for his safety at any time" during the encounter. *People v. Hazelwood*, 104 Misc. 2d 1121, 1122 (Crim. Ct., Queens Co. 1980). While noting the stricter search and seizure standards often imposed in New York under state law, the court held that "a pat-down search for weapons is a lesser intrusion than a formal arrest, and in order to facilitate appearance ticket issuance, same should be permissible, and that if it were to prohibit a frisk incident to summons, "there would be no incentive for any officer to issue an appearance ticket, because to do so would require him to put his life on the line by holding an individual in custody pending the issuance of the ticket without knowledge regarding possible weapons possession by the defendant." *Id.*, at 1124. The court also noted that the offense being charged in the matter was for disorderly conduct rather than a traffic infraction, distinguishing the matter from the already-established traffic infraction exception in New York. *Id.*, at 1123, citing *People v. Erwin*, 42 N.Y.2d 1064 (1977) (search of motorist and vehicle by officer who testified he initiated stop solely for a traffic infraction, and in fact intended only to warn motorist, held unlawful).

Subsequent appellate cases in New York have not addressed the issue directly in a holding. The Court of Appeals rejected a frisk conducted by Albany police after observing a defendant smash a glass bottle outside of a bar – conduct the Third Department described as "at most" disorderly conduct because the offense being investigated was a violation and thus not sufficient to justify a frisk pursuant to CPL § 140.50, and in any event, there was no evidence that the frisking officer had any safety concerns. *People v. St. Clair*, 80 A.D.2d 691, 692 (3d Dept.), *aff'd for reasons stated below*, 65 N.Y.2d 702 (1981). Although the First Department specifically cited *Hazelwood* in *People v. King* to say that if an officer "intended to issue an appearance ticket in lieu of a lawful arrest, he had the concomitant right to 'pat down' the defendant," the court was ruling on the "more narrow question [of] whether an officer has inherent or common-law authority to conduct a search for safety purposes in circumstances that reveal only the commission of a violation," relegating the *Hazelwood* discussion to dicta. *People v. King*, 102 A.D.2d 710, 710-711 (1st Dept. 1984). In *King*, the First Department also noted that the defendant had been uncooperative and distinguished *King* from *St. Clair* based upon that and *St. Clair's* emphasis on CPL § 140.50 rather than the common-law powers of the police. *Id.*, *supra*. Muddying the issue even further though, the Court of Appeals affirmed *King*, but cited its holding in *St. Clair* in doing so. *People v. King*, 65 N.Y.2d 702 (1985).

At the trial level, both *Hazelwood* and the First Department's *King* decision were cited in authorizing a frisk after the arresting officer observed what he thought to be disorderly conduct in *People v. Aponte*. Although the defendant in *Aponte* was uncooperative, the court relied on *Hazelwood* in "emphatically reject[ing] any claim that law enforcement's right to search for safety reasons suddenly disappears when a violation is involved." *People v. Aponte*, 36 Misc. 3d 1230(A), *13-14 (Sup. Ct., Bronx Co. 2012). The court went on to hold that: "as the *Hazelwood* court found, such an interpretation would be inconsistent with the police's ability to provide safety for investigating officers." *Id.*, *supra*.

The distinguishing factor that sets *Hazelwood* apart from other New York cases is that there is no indication in the case that the defendant was uncooperative or that the officer articulated a specific safety concern prior to engaging in the frisk. That said, *Aponte* adopted the

broad *Hazelwood* rule in considering the frisk. Also, it is clear in *Hazelwood* – although it can be reasonably inferred from the others – that the officer involved had already determined to at least issue a summons before approaching the defendant. In that sense, the facts in *Hazelwood* more closely fit the classically-considered arrest followed by a search rather than an investigatory *Terry* stop as contemplated in the other cases. Also, the distinction between traffic infractions and other offenses is deeply grounded in statute in New York, providing another basis for drawing a clear distinction between traffic infraction stops and violation/criminal stops defined by *Erwin*. *See* VTL § 155 (defining traffic infraction as distinct from other offenses). As such, the intrusion-shifting analysis inherent in *Hazelwood* that determines a more limited frisk is authorized based upon the more limited summons rather than an arrest in a non-traffic encounter is still intact. In light of that, a frisk incident to a lawfully-issued non-traffic summons appears authorized under New York law.

Fourth Amendment

In 1998, the Supreme Court unanimously held that a full search of an automobile incident to issuing a speeding summons violated the Fourth Amendment in *Knowles v. Iowa*. Although Iowa state law authorized officers to arrest drivers for speeding and expressly authorized to officers to conduct full searches incident to issuing summonses as if formal arrests had been made, the Court held that the two operative concerns in authorizing search incident to lawful arrest – officer safety and the need to preserve evidence – were substantially minimized in a routine traffic offense situation. *Knowles v. Iowa*, 525 U.S. 113, 114-117 (1998). In declining to extend the "bright-line rule" authorizing full searches incident to custodial arrest, the Court noted that officers in traffic stops have other options involving lesser intrusion than a formal search to protect themselves, and that all of the evidence necessary to prosecute Knowles for speeding had already been obtained. *Id.*, at 117-119. As "examples," the Court suggested ordering drivers and passengers out of stopped vehicles, conducting reasonable suspicion-based patdowns of drivers, passengers and vehicle passenger compartments, or escalating the encounter to a full-blown custodial arrest and conducting a concomitant search incident thereto. *Id.*, at 117-118.

Ten years after *Knowles*, the Supreme Court held that a search incident to arrest was valid for Fourth Amendment considerations even though the arresting officer was required under state law to issue a summons for driving with a suspended license rather than initiate a custodial arrest in *Virginia v. Moore*. Because officers had probable cause to believe the defendant had committed an offense in their presence, their arrest of the defendant was appropriate for federal purposes even if Virginia had chosen to adopt a more rigid constraint on officers as a matter of state law. *Virginia v. Moore*, 553 U.S. 164, 176-177 (2008).

In interpreting *Knowles*, some jurisdictions have compared an officer stopping a suspect for suspicion of consuming alcohol on a public street to a routine traffic stop, and applied *Knowles*. *See, e.g., Lovelace v. Commonwealth*, 258 Va. 588, 596-597 (1999) (following remand by Supreme Court in light of *Knowles*, holding that search of suspect after feeling 'squooshy' object during patdown as part of stop for suspected consumption of alcohol in public was improper, but did not rule on propriety of initial frisk) and Wayne A. Logan, *An Exception Swallows a Rule: Police Authority To Search Incident to Arrest*, 19 Yale L. & Pol'y Rev. 381, 400-405 (2001) (analyzing impact of recent developments in search incident to arrest doctrine). *Knowles* has not been relevantly cited in New York however, and as such, no binding authority on the question exists here. In the closest New York case, *People v. Harrill*, the only initially-observed offenses were traffic infractions, and in any event, the court held that the object recovered following a frisk could not have been construed as a possible weapon during the frisk.

People v. Harrill, 19 Misc. 3d 1141(A) (Supt. Ct., New York Co. 2008) (crack cocaine found during search following frisk held inadmissible). Also, although *Knowles* was unequivocal and from a unanimous Court, the *Moore* Court was unanimous in judgment and the holding suggests something of a retreat from the bright line rule outlined in *Knowles*. That the arrest in *Moore* was unlawful as a matter of state law – even subjecting the officers involved to possible civil liability – and still served as the lawful federal basis for the search, suggests that the federal rule may be slightly more flexible than originally suggested by *Knowles*. *Moore*, at 180 (Ginsburg, J., concurring in judgment).

In a similar vein to the state constitutional question, the intrusion-shifting analysis inherent in *Hazelwood* has not been directly addressed following *Knowles* in relation to frisks. With regard to the federal question, the case law primarily addresses full searches which are beyond the question presented here. *Knowles* involved what in New York would be a simple traffic infraction, and the two closest cases to the fact pattern considered here – *Lovelace* and *Harrill* – involve searches for non-weapons that escalated from frisks. Although *Lovelace* is somewhat instructive in that it applied *Knowles* to a non-traffic summons encounter, *Lovelace* concerned a full search and the officer appeared to have been stopping the defendant to investigate a possible violation rather than issue a summons for completed conduct as in *Hazelwood*. Further, *Lovelace* focused on the search following the frisk, and did not rule on the frisk itself.

Conclusion

While the courts have been relatively clear that officers cannot conduct frisks incident to issuing traffic summonses, a court is likely to determine that a frisk incident to a lawfully-issued summons for a non-traffic violation would be permitted under state and federal law.