Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, as part of our "Listen and Learn" series, we're talking about Criminal Procedure. Specifically, we'll be talking about stop and frisk. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience, so you'll be the best law student and lawyer you can be. We're the co-creators of the Law School Toolbox, the Bar Exam Toolbox, and the career-related website CareerDicta. Alison also runs The Girl's Guide to Law School. If you enjoy the show, please leave a review or rating on your favorite listening app. And if you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on LawSchoolToolBox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: So, today we're going to talk about stop and frisk, which for anyone interested in policing, or even generally in the criminal legal system, you might have some sense of, because it is, or was, a frequent tactic used by police departments around the nation, most notoriously by the NYPD.

Lee Burgess: We'll begin by going through an attack plan for how you might approach a stop and frisk issue on an exam question, and then look at specific rules you'll want to address in your answer. Then we'll end with looking at a few examples and taking our turn at seeing if we can apply what we've learned to some real bar questions.

Lee Burgess: The first question we want to ask whenever a Fourth Amendment Criminal Procedure issue might be present in a fact pattern is whether there was a search or seizure. If there was an incident where someone was searched or something was seized, then you know a Fourth Amendment Criminal Procedure issue is highly likely going to be something you'll address in your answer. Of course, it is always helpful to also read the question stems, which could clue you in to this as well.

Lee Burgess: If there was a search or seizure, the next question you want to determine is if the Fourth Amendment protection against unreasonable searches and seizures could be used as a basis for suppressing any incriminating evidence obtained in the search or seizure – which can be thought of as standing. For example, if someone was stopped and frisked and the police officer found a weapon on them, the question might be whether that weapon can be used as evidence in a trial against that individual. In order for the individual to determine whether they can suppress this evidence under the Fourth Amendment, they need to show they have standing. In order to have standing for a Fourth Amendment claim, the individual needs to show, (1) there was government action – that is, the government (typically a police officer) was involved in the search or seizure;

and (2) the individual had a reasonable expectation of privacy as to the place searched and/or the items seized.

Lee Burgess: Important to know is that individuals typically have a reasonable expectation of privacy for the things that they own or possess. But this isn't always the case. The key case for this point is *Rawlings v. Kentucky*. In *Rawlings*, the court determined that even though the defendant owned the drugs that were being used against him, he did not have standing to challenge the admissibility of the drugs, because the drugs were found in a woman's purse – a place where he had no reasonable expectation of privacy. The court also noted that ownership or possession of items is just one factor in the standing analysis.

Lee Burgess: Now, once you've established standing, you'll want to determine whether there was a valid warrant issued for the search or seizure. Sometimes the fact pattern will either say a warrant was issued, or describe a warrant being issued but having several flaws in which you'll do analysis on the warrant itself. But in the scenario when the fact pattern doesn't say anything about a warrant, you can assume that there was no warrant for the search or seizure.

Lee Burgess: In the common case that a warrant was not issued, the next big question you'll want to ask is whether any exceptions to a search warrant would apply. This is where stop and frisk comes in. There are a number of exceptions to a search warrant, but we'll focus on stop and frisks today. Before we get into the rules, I want to quickly outline what an exception to a search warrant means. If an exception applies, that means the search and seizure was constitutional and the evidence will not be suppressed, or will be admitted at trial, even though police did not obtain a warrant. If no exception applies, that means the search and seizure was unconstitutional (remember, because you need a warrant!) and the evidence will likely be suppressed.

Lee Burgess: Under the stop and frisk exception, there are essentially two parts that you'll want to analyze: the stop, and the frisk. An officer can stop a person if he has a reasonable suspicion that the person is engaged in criminal activity, or that "criminal activity may be afoot". Such reasonable suspicion must be more than a hunch, but doesn't need to reach the level of probable cause. Reasonable suspicion can be met by examining the totality of the circumstances the officer is presented with, including any knowledge of incidents leading up to the stop that might make the officer believe criminal activity is afoot.

Lee Burgess: If the officer also reasonably believes that the person may be armed and presently dangerous, he may frisk the individual. Frisks are governed by two additional rules: (1) the officer may conduct a protective frisk of the outer clothing of the individual; and (2) the officer may reach into the person's

clothing if he has probable cause to believe, based on plain feel, the object is a weapon or contraband, but he cannot manipulate the clothing to get a better feel.

Lee Burgess: If the stop and frisk exception applies, then the evidence is not suppressed and is admissible at trial. However, if the stop and frisk exception does not apply, then the evidence was obtained in violation of the Fourth Amendment and is subject to the exclusionary rule.

Lee Burgess: Under the exclusionary rule, any evidence obtained in violation of the Fourth Amendment is inadmissible, as well as any "fruit of the poisonous tree", which is any evidence that is derived from the illegal government action, unless an exception to the exclusionary rule applies. I know, exceptions on exceptions! Should this be a song?

Lee Burgess: A quick note on the "fruit of the poisonous tree" doctrine: To best understand this, consider this example. Say an officer stops and frisks an individual and finds a note in their pocket that offers directions to a locker that contains cocaine, and so the police go and seize the cocaine. But it turns out that the stop and frisk was unconstitutional. Under the exclusionary rule and the "fruit of the poisonous tree" doctrine, not only is the note inadmissible at trial, but the cocaine is also inadmissible.

Lee Burgess: But of course, the exceptions! I won't cover these too in-depth, but wanted to briefly go over them, just so you have some sense of what they are. If the evidence was discovered by an independent source unrelated to the taint, then it is admissible. This might be, using the same example as above, some random person popping that locker open to find the cocaine irrespective of the note, and informing the police.

Lee Burgess: If the evidence would have been discovered through a legal means, despite the illegal action, the evidence would be admissible. Here, this might be that the police could have obtained a search warrant to open the locker, and in such case, they would have eventually legally found out about the cocaine anyway. Saying that the police could have obtained a warrant probably won't be enough to meet the inevitable discovery exception. To get the evidence admitted, the government has to prove by a preponderance of the evidence that the evidence would have inevitably been discovered. It's likely that some group of police officers would already have to be obtaining a warrant to prevail on inevitable discovery in this example. If we just rely on what police could have done, then police might be incentivized to conduct searches and seizures without a warrant, and use the excuse that they could have obtained a warrant.

Lee Burgess: If sufficient time has passed in between the illegal action and the discovery of the evidence, the evidence may be admissible. In this scenario, although there is no defined amount of time for the rule – say 60 days go by before the police can identify the locker and seize the cocaine – in such a scenario the exception might apply. There are several more factors in addition to time. The egregiousness of the constitutional violation, the presence of intervening circumstances, and, in some cases, giving Miranda warnings are all factors in determining whether the evidence is sufficiently attenuated from the constitutional violation.

Lee Burgess: The final exception doesn't apply to the scenario above because there was no warrant, but it essentially covers for when there's a defect in the warrant issued.

Lee Burgess: Okay, let's try a few practice problems. Here's hypo number one:

Lee Burgess: "Police Officer Bakari saw Jim walking down the street. Officer Bakari decided to stop Jim because Jim looked nervous. When Jim turned around, Officer Bakari noticed a bulge under his shirt. Officer Bakari then patted Jim down and found a gun. Officer Bakari arrested Jim for possession of a concealed firearm and seized the gun. Can Jim successfully move to suppress his gun from being introduced into evidence at trial?"

Lee Burgess: Okay, let's go through our attack plan together.

1. Was there a search or seizure? Yes, Officer Bakari stopped Jim, frisked him, and confiscated his gun. So, we know there's a Fourth Amendment issue to analyze here.
2. Does Jim have standing to bring a Fourth Amendment claim to suppress the gun from being introduced into evidence at trial? Likely yes. Here, there was government action because Officer Bakari is a police officer employed by a government entity, and Jim had a reasonable expectation of privacy for the gun because it's something he owns and possesses. He also has standing because he was the person who was stopped by the officer.
3. Was there a valid warrant issued? No mention of a warrant here, so likely no.
4. Does an exception to a search warrant apply? Here's where it gets exciting! Of course, the stop and frisk exception might apply here, because we know from the fact pattern that Jim was stopped and frisked by Officer Bakari. So, let's do that analysis.

Lee Burgess: First, to the stop: Did Officer Bakari have a reasonable suspicion that Jim was engaged in criminal activity? Given these facts, the only reason stated for stopping Jim was because he looked nervous. The officer had no knowledge of

any preceding events that might lead him to believe that criminal activity was afoot. A person looking nervous is likely not enough for a reasonable suspicion to stop them. An officer must be able to articulate the specific facts and circumstances that led him to believe criminal activity was afoot. Being nervous by itself would not lead to suspicion of criminal activity under a totality of the circumstances analysis. Therefore, the stop of Jim was likely unconstitutional, and any incriminating evidence seized should be suppressed.

Lee Burgess: Now, to the frisk: In the event that the stop was constitutional, then we would have to determine whether Officer Bakari conducted a proper frisk. Did Officer Bakari reasonably believe Jim may have been armed and presently dangerous? Likely yes, because the facts suggest that the officer noticed a bulge under Jim's shirt. It's likely that based on the officer's experience, he had justifiable grounds for believing the "bulge" could be a weapon, and therefore supporting his reasonable belief that Jim may have been armed and presently dangerous.

Lee Burgess: No facts suggest there was any issue with the frisk itself, since Officer Bakari simply patted Jim down and found the gun. It could be assumed that he conducted a protective frisk of the outer clothing, and likely based on plain feel, he had probable cause to believe that the object was a gun, which would allow him to reach into Jim's clothing and confiscate it.

Lee Burgess: Now, under the exclusionary rule, any evidence obtained in violation of the Fourth Amendment is inadmissible, as well as any "fruits of the poisonous tree". Here, because the stop of Jim was likely unconstitutional, even though the frisk of Jim was proper, any incriminating evidence found at and after the stop would be considered the "fruit of the poisonous tree" and should be inadmissible. Therefore, the gun that was seized from Jim would be inadmissible as evidence at trial.

Lee Burgess: No facts suggest that any exceptions to the exclusionary rule would apply. So, given this analysis, Jim can likely successfully move to suppress his gun from being introduced into evidence at trial.

Lee Burgess: Okay, on to hypo number two:

Lee Burgess: "One summer afternoon, Officer Prowl saw Dan, wearing a fully buttoned-up heavy winter coat, running down the street. Officer Prowl ordered Dan to stop. Dan complied. As Officer Prowl began to pat down Dan's outer clothing, a stolen car radio fell out from underneath. Officer Prowl arrested Dan and took him to the police station. Can Dan successfully move to suppress the radio from being introduced into evidence at trial?"

Lee Burgess: Now, the call of the question on this one is identical to the last – we want to know whether Dan can successfully move to suppress the radio from being introduced into evidence at trial. So, what's the first question we want to answer based on our attack plan?

1. Was there a search or seizure? Yes, Officer Prowl stopped Dan, frisked him, and confiscated the car radio. So, we know there's a Fourth Amendment issue to analyze here.
2. Does Dan have standing to bring a Fourth Amendment claim to suppress the car radio from being introduced into evidence at trial? Likely yes. Here, there was government action because Officer Prowl is a police officer employed by a government entity, and Dan had a reasonable expectation of privacy for the car radio because it's something he possessed, and also because he was the person who was seized by the officer.
3. Was there a valid search warrant issued? No mention of a warrant here either, so likely no.
4. Does an exception to a search warrant apply? Likely yes. So, let's move on to stop and frisk.

Lee Burgess: First, to the stop: Did Officer Prowl have a reasonable suspicion that Dan was engaged in criminal activity? Here, Dan was running down the street wearing a fully buttoned-up heavy coat on a summer afternoon. It is unusual to see someone wearing such a coat during the summer, and Officer Prowl's experience likely indicates to him that people may wear such coats to conceal stolen property or drugs. Additionally, Dan was running in the summer with a heavy winter coat on, which altogether makes it more unlikely that he was running for exercise, particularly during a hot day. Given these facts, it is likely that Dan was acting sufficiently suspicious, rising above a mere hunch, to meet the reasonable suspicion standard for Officer Prowl to stop him.

Lee Burgess: And frisk: Did Officer Prowl reasonably believe Dan may have been armed and presently dangerous to justify conducting a protective frisk? Here, there are no facts to suggest that Dan did anything to suggest he could be armed and presently dangerous. There is also no indication that Officer Prowl had prior knowledge that would make it reasonable to believe that Dan was armed. The facts also do not indicate that any discussion ensued after Dan was stopped to suggest there was reason to believe he was armed, but instead, Officer Prowl immediately began to pat down Dan's outer clothing. Therefore, Dan's frisk was likely unconstitutional.

Lee Burgess: Now, under the exclusionary rule, any evidence obtained in violation of the Fourth Amendment is inadmissible, as well as any "fruit of the poisonous tree". Here, because Officer Prowl had no reason to believe that Dan was armed and presently dangerous, he was not authorized to frisk Dan, and any evidence

obtained during the frisk is inadmissible at trial. Therefore, the stolen car radio that fell out from underneath Dan's coat while he was being frisked should be suppressed.

Lee Burgess: And no facts suggest that any exceptions to the exclusionary rule would apply. Given this analysis, Dan can likely successfully move to suppress the stolen car radio from being introduced into evidence at trial.

Lee Burgess: And that's all that we have time for today. I hope you have a better sense of stop and frisk. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website contact form at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

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