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Cover: *In order to combat violent crime problems effectively, today's police officers must be properly trained and educated.*

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Voluntary Encounters or Fourth Amendment Seizures?

Crossing the Line

By
A. LOUIS DIPIETRO, J.D.



How should an officer, who lacks reasonable suspicion to justify an investigative stop, approach a suspect to ensure that any incriminating evidence obtained during the ensuing encounter is not traceable to an unconstitutional seizure? The Supreme Court has clearly held that the fourth amendment is not implicated until a seizure occurs and that "...not all personal intercourse between policemen and citizens involves 'seizures' of persons."¹

Three types of encounters that may occur between law enforcement officers and individuals are: 1) A voluntary or consensual encoun-

ter, 2) a temporary detention based on reasonable suspicion, and 3) an arrest based on probable cause. While temporary detentions and arrests are "seizures" within the meaning of the fourth amendment, voluntary or consensual encounters do not implicate the fourth amendment. Thus, officers lacking reasonable suspicion may lawfully approach suspects to ask questions designed to elicit incriminating responses and obtain physical evidence so long as the encounter is consensual.

This article examines the factors that courts consider relevant in determining when a seizure occurs and reviews two recent Supreme

Court decisions applying those factors to police encounters with bus passengers and police chases. A better understanding of these factors can help investigating officers distinguish between voluntary encounters and fourth amendment seizures to ensure that seizures do not occur until there is a sufficient factual basis.²

Definition of "Seizure"

The Supreme Court has concluded that a seizure within the meaning of the fourth amendment occurs only when officers, by means of physical force or show of authority, restrain the liberty of a citizen.³

This definition of seizure does not forbid all contact between the police and citizens but implicitly permits consensual encounters.

A determination of whether police conduct amounts to a fourth amendment seizure must take into account all of the circumstances surrounding the incident in each individual case.⁴ In *United States v. Mendenhall*,⁵ Justice Stewart set forth the following "free to leave" test for determining whether a person has been seized:

"...a person has been 'seized' within the meaning of the Fourth Amendment only if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."⁶

What constitutes a restraint on liberty prompting persons to conclude that they are not "free to leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.⁷ This contextual analysis is necessarily imprecise and focuses on the coercive effect of police conduct taken as a whole, rather than on particular details in isolation.⁸

"Reasonable Person" Objective Standard

The Supreme Court rejects the use of a "litmus paper" test to distinguish a consensual encounter from a seizure and instead employs an objective standard, which looks to a reasonable person's interpretation of the conduct in question.⁹ This "reasonable person" standard ensures that the scope of fourth

amendment protection does not vary with the state of mind of the particular individual being approached.

Whether an encounter is a seizure turns on what the subject has reason to know, not on the officer's hidden plans. The subjective intentions of an officer during an encounter are relevant only to the extent they are conveyed to the individual approached.¹⁰ Therefore, a fourth amendment "seizure" does not occur unless the circumstances of the encounter are so intimidating, threatening, or coercive that reasonable persons would believe that they are not "free to leave."¹¹

Government Coercion Required

Courts determine whether a consensual encounter is transformed into a seizure by assessing the coercive effect of police conduct. For example, in *INS v. Delgado*,¹² INS agents conducted "factory surveys" in search of illegal aliens by positioning some agents near the factory exits while other agents moved systematically through the factory. Agents approached employees, and after identifying themselves, asked the employees from one to three questions relating to citizenship. During this "factory survey," employees continued their work and were free to walk around. The Supreme Court ruled the agents' conduct did not constitute a seizure, because when people are at work their freedom to move about is ordinarily restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers.¹³



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Similarly, police conduct did not rise to the level of a seizure in *Michigan v. Chesternut*.¹⁴ In that case, Chesternut began to run upon observing an approaching police car. A police officer followed him to see where he was going, and after catching up and driving alongside him for a short distance, observed him discard a number of packets subsequently determined to contain codeine. Finding that Chesternut was not seized when he threw down the packets, the Supreme Court stated that "[w]hile the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure."¹⁵

In *United States v. Hooper*,¹⁶ the defendant claimed he was seized when drug agents approached him, identified themselves, displayed their identification, and asked if they could speak with him. Al-

though the defendant argued that such contact cannot be consensual because an individual cannot consent to being stopped by law enforcement officers, the court disagreed and concluded that a "seizure," for purposes of the fourth amendment, is not defined by whether an individual has halted his forward progress in response to police conduct, but rather by the coercive nature of the police conduct.¹⁷

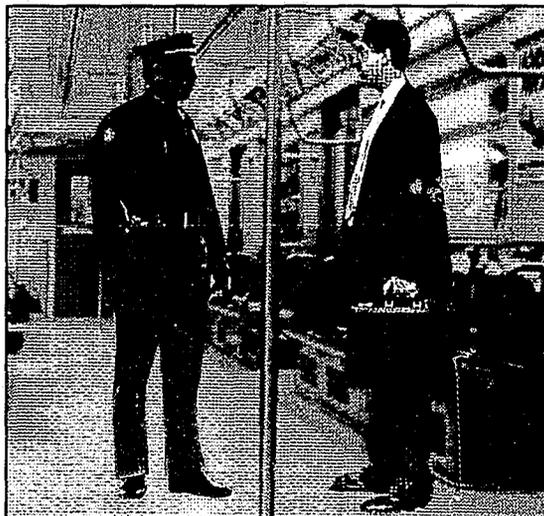
Encounter Ruled Consensual

The "free to leave" test used to determine whether a person has been seized was recently clarified by the Supreme Court. In *Florida v. Bostick*,¹⁸ two officers, with badges and insignia, one of whom was holding a recognizable zipper pouch containing a pistol, boarded Bostick's bus during a stopover in Fort Lauderdale. The officers picked out Bostick, a passenger, and asked to inspect his ticket and identification. The ticket matched Bostick's identification, and both were immediately returned to him. At no time did the officers threaten Bostick with a gun.

The officers explained their presence as drug agents looking for illegal drugs and then requested Bostick's permission to search his luggage for drugs, specifically advising him that he had the right to refuse consent. Bostick gave permission, and the officers, after finding cocaine, arrested him.

The Supreme Court was asked to decide whether this encounter on the bus necessarily constituted a sei-

zure. If the encounter had taken place in the lobby of the bus terminal before Bostick had boarded the bus, it arguably would not be a seizure. Courts generally hold that police may approach people to ask questions and to request identification or seek a consent to search, so



long as they do not convey a message that compliance with their request is required.

Nonetheless, Bostick claimed that his encounter with the police in the cramped confines of a bus was much more intimidating because there was little room to move around and the police tower over the seated passengers. Therefore, a reasonable passenger would not have felt free to leave under the circumstances because there is nowhere to go on a bus. Moreover, Bostick argued that the bus was about to depart, and that if he had disembarked, he would have risked being stranded and losing whatever baggage he had locked away in the luggage compartment.

The Supreme Court responded to these claims by stating that although the "free to leave" test is appropriate where police attempt to question a person who is walking down the street or through an airport lobby, it is not an accurate measure of the coercive effect of an encounter when a person is seated on a bus. The Court pointed out that just because Bostick did not feel free to leave does not mean the police seized him, since as a passenger, he would not have felt free to leave the bus even if the police had not been present. Bostick's movements were "confined" as the natural result of his decision to take the bus and not necessarily because the police conduct was coercive.

The Court also noted that like the factory workers in *Delgado*, Bostick's freedom of movement was restricted by a factor independent of police conduct—his being a passenger on the bus. Therefore, the Court ruled the appropriate inquiry is whether a reasonable person would feel free to decline the officer's request or otherwise terminate the encounter.

"Seizures" and Police Chases

The Supreme Court recently held that in the context of police chases, a "seizure" occurs only where there is either some application of physical force, however slight, or submission to an officer's show of authority. No seizure occurs where the subject does not yield to a show of authority, in the absence of physical force.

In *California v. Hodari D.*,¹⁹ a group of youths fled at the approach of an unmarked police car. One officer, wearing a jacket with "POLICE" embossed on its front, left the car and gave chase on foot following Hodari via a circuitous route that brought the two on a collision course. Hodari, who was looking backwards as he ran, did not see the officer until the officer was almost upon him, whereupon Hodari tossed away a small rock. A moment later, the officer tackled Hodari, handcuffed him, and radioed for assistance. Hodari was carrying \$130 in cash and a pager, and the rock he had discarded was found to be crack cocaine.

The Supreme Court assumed that the officer's pursuit qualified as a "show of authority" calling upon Hodari to halt. However, since the State had conceded that the officer lacked "reasonable suspicion" required to justify stopping Hodari, the issue before the Court was whether, at the time he dropped the drugs, Hodari had been "seized" within the meaning of the fourth amendment.

The Court ruled that a necessary condition for a seizure affected through a show of authority is a submission to that authority.²⁰ Thus, there is no seizure just because a policeman yells, "Stop, in the name of the law," at a fleeing suspect who continues to flee.²¹ Since Hodari did not comply with the show of authority, he was not seized until the officer physically tackled him. Thus, the cocaine that he abandoned while running was not the fruit of a seizure and was therefore admissible.²²

When is a Person "Seized"?

Lacking reasonable suspicion to justify a fourth amendment seizure, how should an officer approach a citizen to investigate, while at the same time ensuring the encounter remains consensual? In other words, how can officers most effectively prevent voluntary encounters from escalating into unlawful seizures?

Courts have identified the following eight factors that are relevant in determining whether a particular encounter between police and citizens is consensual or a fourth amendment seizure:

**“
Courts determine
whether a consensual
encounter is
transformed into a
seizure by assessing
the coercive effect of
police conduct.
”**

1. *Physical Contact*—The slightest application of physical force for the purpose of stopping or holding a person is likely to constitute a seizure. While unintentional or accidental contact is generally not a seizure, officers should avoid physical contact until they have established reasonable suspicion to justify a seizure.
2. *The Number of Officers*—The threatening presence of several

officers may transform an otherwise consensual encounter into a seizure. Thus, where officer safety is not jeopardized, an encounter is more likely to be deemed consensual if backup officers stay in the background where the citizen does not immediately recognize them as officers involved in the encounter.

3. *The Display of Weapons*—The display of weapons is inherently coercive and is generally interpreted by citizens as compelling compliance. Thus, pointing guns or otherwise threatening a citizen with a weapon will in most cases transform an encounter into a seizure.
4. *Interfere With Freedom of Movement*—The manner in which officers position themselves or their vehicles and the extent to which they block a citizen's pathway or freedom of movement may communicate to that person that he is not free to leave. Officers wishing to keep an encounter consensual should position themselves to provide a clear path of egress for the citizen.
5. *Movement From The Initial Site of the Encounter*—Movement from the site of the initial confrontation to another location does not necessarily escalate a consensual encounter into a fourth amendment seizure. However, officers requesting a suspect to accompany them to another location should document that the citizen had a genuine choice

and voluntarily agreed to the movement.

6. *Demeanor and Appearance*—An officer's use of coercive or intimidating language or tone of voice may be interpreted by a reasonable person as compelling compliance. A uniformed officer repeatedly flashing a badge is intimidating conduct. Requests for a consent to search should be conveyed in a manner that makes it clear that the citizen has a choice and that compliance is not required or compelled. Advising suspects that they are suspected of transporting drugs is another factor courts assess in determining the coercive effect of police conduct. Since uncommunicated suspicions generally have no bearing on whether a particular encounter is consensual or a seizure, officers should consider delaying or avoiding the expression of such suspicions until a seizure is justified.
7. *Retention of Personal Property*—Although officers may request to examine a person's identification or tickets and ask questions about any discrepancies, such items should be promptly returned. The prolonged detention of personal items can transform a consensual encounter into a seizure.
8. *Advising Citizens They Have The Right to Refuse*—Advising citizens they have a right to refuse to consent to a search or to answer questions or to

accompany officers to a different location may prevent many encounters from becoming unlawful seizures. Proof that officers advised citizens of their right to refuse is frequently cited by courts as a significant factor in upholding voluntary encounters.

Conclusion

The admissibility of evidence may depend on whether it was seized by officers during a voluntary encounter or fourth amendment seizure. Knowing the factors that

“**...a necessary condition for a seizure affected through a show of authority is a submission to that authority.**”

courts consider relevant in determining whether a seizure occurred will help officers ensure that the fourth amendment is not implicated until they have established sufficient suspicion to justify a seizure. Evidence acquired during a consensual encounter will not be rendered inadmissible simply because officers lacked reasonable suspicion. Finally, by maintaining a consensual encounter until the requisite justification for a seizure exists, officers will substantially reduce their civil liability exposure for a fourth amendment violation.

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Footnotes

- ¹*Terry v. Ohio*, 392 U.S. 1 at n.16 (1968).
- ²For a detailed discussion of the required justification for investigative seizures, see John C. Hall, "Investigative Detention: An Intermediate Response," *FBI Law Enforcement Bulletin*, November and December 1985 and January 1986.
- ³*Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).
- ⁴*Id.* at 572.
- ⁵446 U.S. 544 (1980).
- ⁶*Id.* at 554. This test has been repeatedly adopted by the Court as the test for a seizure. See *Michigan v. Chesternut*, *supra* note 3; *INS v. Delgado*, 466 U.S. 210, 215 (1984); *Florida v. Royer*, 460 U.S. 490, 502 (1983).
- ⁷486 U.S. at 572-73.
- ⁸See *United States v. McKines*, 933 F.2d 1412 (8th Cir. 1991) (en banc).
- ⁹*Florida v. Royer*, 460 U.S. 491, 506 (1983).
- ¹⁰486 U.S. at 575 n. 7.
- ¹¹*INS v. Delgado*, 466 U.S. 210 (1984).
- ¹²*Id.*
- ¹³*Id.* at 218.
- ¹⁴486 U.S. 567 (1988).
- ¹⁵*Id.* at 575.
- ¹⁶935 F.2d 484 (2d Cir. 1991).
- ¹⁷*Id.* at 489.
- ¹⁸111 S.Ct. 2382 (1991).
- ¹⁹111 S.Ct. 1547 (1991).
- ²⁰*Id.* at 1551.
- ²¹*Id.* at 1550. In *Brower v. Inyo County*, 489 U.S. 593 (1989), police cars with flashing lights chased the descendent for 20 miles—surely an adequate "show of authority"—but he did not stop until his fatal crash into a police-erected blockade. The Supreme Court ruled that a seizure did not occur during the chase because that "show of authority" did not produce his stop.
- ²²In *United States v. Morgan*, 936 F.2d 1561 (10th Cir. 1991), the court held that the existence of a police pursuit or investigation at the time of abandonment does not, of itself, render abandonment involuntary.

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

The Bulletin Notes

Law enforcement officers are challenged daily in the performance of their duties; they face each challenge freely and unselfishly while answering the call to duty. In certain instances, their actions warrant special attention from their respective departments. The *Bulletin* also wants to recognize their exemplary service to the law enforcement profession.



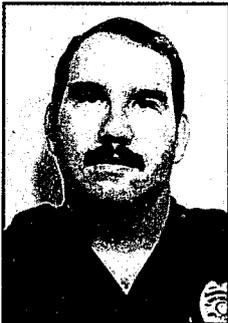
Patrolman Barnes

During the early morning hours, Patrolman Gary Barnes of the Pennfield Township, Michigan, Police Department observed smoke coming from an apartment building. After notifying the fire department, Patrolman Barnes entered the burning structure, alerted sleeping residents of the fire, and assisted many of them to safety.



Officer Marquez

The actions of Officer Pascual "Don" Marquez of The University of Texas at Austin Police Department prevented a dangerous situation from escalating. When a despondent student was informed that the university's president was unable to see him, the student pulled a handgun from his bag and aimed it at the president's administrative assistant. Without regard for his own safety, Officer Marquez approached the gunman from the rear. The gunman turned and fired a shot that barely missed the officer's head. Within moments, Officer Marquez was able to tackle and disarm the assailant.



Corporal Hodges

While off duty and driving through a remote wilderness area, Cpl. Lyn Hodges of the Las Cruces, New Mexico, Police Department responded to calls for help from a group of people who were attempting to free a pickup truck that was trapped in a rain-swollen river. When he arrived at the scene, Corporal Hodges discovered that four children in the truck's cab had been overcome by toxic exhaust fumes. The swiftly flowing river had blocked the truck's exhaust pipe, causing fumes to fill the enclosed camper shell. Corporal Hodges quickly initiated CPR and instructed assisting bystanders in proper resuscitation techniques. All four children were revived and then transported to a nearby hospital for observation.

