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Search and Seizure: New York vs. Federal Approach - People v. Keita

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SEARCH AND SEIZURE: NEW YORK VS. FEDERAL APPROACH

SUPREME COURT OF NEW YORK BRONX COUNTY

People v. Keita[1]
(Decided May 19, 2011)

I. INTRODUCTION

Defendant Keita was charged with criminal possession of a forged instrument in the second degree, criminal possession of stolen property in the third degree, and grand larceny in the third degree in the Supreme Court of Bronx County, New York, based on his use of a bank account with insufficient funds or "check kiting."[2] Keita moved to suppress the statements and documents that the arresting officers collected and sought to offer at trial.[3] He argued that the evidence was obtained without probable cause in violation of Article 1, section 12, of the New York Constitution and the Fourth Amendment of the United States Constitution.[4] He further alleged that the evi-

[1] No. 2862-2009, 2011 WL 1936076 (N.Y. Sup. Ct. May 19, 2011).

[2] *Id.* at *1-2.

[3] *Id.* at *1.

[4] *Id.* Article I, section 12 of the New York Constitution, in relevant part, states "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." N.Y. CONST. art. 1, § 12. The Fourth Amendment of the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

dence was obtained in violation of *Miranda*.[5] Thus, the court considered two issues of constitutional significance. The first issue was whether the agents' search and seizure was in violation of the Fourth Amendment of the United States Constitution.[6] The secondary issue was whether the *Miranda* warnings were properly given to Keita; and if they were, whether Keita properly waived them.[7]

The first issue was discussed in detail in the court's opinion. In New York, there are four levels of interaction that exist between government agents and private citizens that must be scrutinized when discussing the issue of search and seizure.[8] However, in a federal constitutional analysis, there are three levels of interaction between government agents and private citizens that the courts scrutinize when discussing this issue.[9] This note will distinguish between the federal analysis and the New York State analysis on this issue by using *People v. Keita* as an example.

II. FACTS

In 2009, the United States Postal Service ("USPS") investigated new account fraud in the Bronx and Manhattan counties of New York and set up a joint surveillance operation with Secret Service agents and fraud investigators of other agencies.[10] A postal teller at the post office was told to inform agents if anyone purchased multiple money orders in amounts less than $3,000, which would tip

[5] *Keita*, 2011 WL 1936076 at *1 (referring to right that suspected perpetrators have to remain silent and to have an attorney present when the perpetrator is being arrested first enunciated in *Miranda v. Arizona*, 384 U.S. 436 (1996)).

[6] *Id.* at *4.

[7] *Id.* at *11.

[8] People v. DeBour, 352 N.E.2d 562, 571-72 (N.Y. 1976).

[9] Bordeaux v. Lynch, 958 F. Supp. 77, 85 (N.D.N.Y. 1997).

[10] *Keita*, 2011 WL 1936076, at *2. The scheme involves a perpetrator enlisting a customer to open a new bank account to obtain a debit card. *Id.* The perpetrator then gives the customer a counterfeit check to deposit into the account. *Id.* In the next few days, the new account holder makes a number of ATM withdrawals for the perpetrator's benefit. *Id.* The perpetrator then gives the account holder a portion of the withdrawn money. *Id.* The joint surveillance operation was located at a Post Office at 588 Grand Concourse in Bronx County. *Keita*, 2011 WL 1936076, at *2. For the operation, Detective Woods from the Financial Crimes Task Force and Inspector Larco from the USPS collaborated with the Secret Service and other agencies. *Id.* at *1.

the agents off as to who was committing the new account fraud.[11] During the surveillance operation, Keita used a Citibank debit card and purchased three money orders.[12] Two of the money orders were in the amount of $1,000 each and one was in the amount of $500.[13] The postal teller grew suspicious and gave a detailed description of Defendant Keita to Detective Woods and Inspector Larco, who then approached Keita.[14]

The agents requested that Keita provide his identification, the money orders, and the Citibank debit card that he used to purchase the money orders.[15] Keita provided his student identification card, which only gave the agents Keita's name and not his address, social security number, or date of birth, and accompanied the agents to a private location.[16] The agents never drew their guns while questioning Keita nor did they ever come in physical contact with Keita.[17] During Keita's questioning, the agents learned that only days earlier two starter checks were deposited into a bank account associated with the debit card Keita provided to the agents.[18] The agents then learned that the checks were drawn from a closed Citibank account and that there was no more than a $300 balance in the new Citibank account.[19] From this, the agents suspected that Keita was involved in new account fraud because this is the type of behavior that the agents were looking for.[20] Keita was then transferred to a police precinct and was "administered *Miranda* warnings."[21] Keita provided both an oral and written waiver of his *Miranda* rights, knowingly and voluntarily waiving such rights.[22]

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[11] *Id.* at *2.

[12] *Id.*

[13] *Id.*

[14] *Keita*, 2011 WL 1936076, at *2.

[15] *Id.*

[16] *Id.* There were as many as six agents in the location at one time. *Id.*

[17] *Id.*

[18] Keita, 2011 WL 1936076, at *2-3.

[19] *Id.* at *3.

[20] *Id.* *2.

[21] *Id.* at *3.

[22] *Id.* at *3, *11. Keita was placed in an interview room where Detective Woods intended to elicit an incriminating response. Keita, 2011 WL 1936076, at *11. This is where Keita was read his *Miranda* warnings. *Id.* After hearing each of the warnings, Keita acknowledged receiving and understanding each one and voluntarily elected to waive them. *Id.* He did this through a form entitled "INTERROGATION WARNINGS TO PERSONS IN POLICE CUSTODY." *Id.* Each warning was listed on the form and Keita wrote "yes"

Keita was charged with criminal possession of a forged instrument in the second degree, criminal possession of stolen property in the third degree, and grand larceny in the third degree largely based upon statements made to and evidence obtained by the agents who arrested him.[23] Keita moved to suppress this evidence alleging that the evidence was obtained without probable cause in violation of Article 1, section 12, of the New York Constitution and the Fourth Amendment of the United States Constitution and in violation of *Miranda*.[24] The court ordered a *Mapp-Huntley* hearing to determine whether Keita's motion to suppress the evidence should be granted.[25] Ultimately, Keita's motion to suppress was denied.[26]

III. WAS KEITA'S SEARCH AND SEIZURE REASONABLE? – THE NEW YORK APPROACH

The court began its opinion by stating that in the State of New York, the People have the initial burden in a suppression hearing to present evidence to show that the officers had reasonable or probable cause to make an arrest.[27] The People must prove that the circumstances and the defendant's behavior "justified the arresting officer's intrusion."[28] Furthermore, this intrusion must comport with a four-

signed his initials after each one. *Id.* Furthermore, Keita signed his name at the bottom of the form. *Keita*, 2011 WL 1936076, at *11.

A *Miranda* Warning reads as follows:

> You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you with to speak to me?

What are your Miranda Rights?, MIRANDAWARNING.COM, http://www.mirandawarning.org/whatareyourmirandarights.html (last visited Mar. 25, 2012).

[23] *Keita*, 2011 WL 1936076, at *1.

[24] *Id.*

[25] *Id.* A *Mapp-Huntley* hearing occurs in order to determine whether to suppress statements made by a defendant to a law enforcement officer, prosecutor, or their agents on the ground that the defendant was not advised of his constitutional rights to remain silent or was forced to make the statements by either threats or coercion. *See, e.g.*, Allen N. Cowling, *Basic Criminal Procedure From Arrest Through Trial*, http://www.allencowling.com/false04B.htm (last visited Sep. 29, 2011).

[26] *Keita*, 2011 WL 1936076, at *1.

[27] *Id.* at *3 (referring to People v. Baldwin, 250 N.E.2d 62 (N.Y. 1969)).

[28] *Id.*

tiered approach set forth by the New York Court of Appeals in *People v. DeBour*.[29] The court in *DeBour* summarized "the gradation of permissible police authority with respect to encounters with citizens in public places and [the court] directly correlated the degree of objectively credible belief with the permissible scope of interference."[30]

The first level of intrusion is an approach to request information, permissible only when there is an "objective credible reason" for an interference.[31] Police do not necessarily need to suspect criminal activity.[32] The second level of intrusion is known as the "common-law right to inquire" and is permissible only when the officer has a "founded suspicion that criminal activity is afoot."[33] This is a greater intrusion because the officer can interfere with a citizen in an effort to "gain explanatory information."[34] However, at this level the intrusion must fall "short of a forcible seizure."[35] The third level of intrusion is authorized when an officer has "a reasonable suspicion that a particular person has committed, is committing, or is about to commit a felony or misdemeanor."[36] At this level, an officer is also authorized to make a forcible stop and detain the citizen for questioning.[37] Furthermore, an officer is also given the right to frisk the individual "if the officer reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed."[38] The fourth and

[29] 352 N.E.2d 562 (N.Y. 1976).

[30] *Id.* at 571-72.

[31] *Id.*

[32] *Id.* at 572.

[33] *Id.*

[34] *DeBour*, 352 N.E.2d at 572.

[35] *Id.* The court has consistently limited the power of law enforcement officers to gain explanatory information when it is "exercised solely for the basis of vague suspicion or as a means of harassment." People v. Cantor, 324 N.E.2d 872, 878 (N.Y. 1975).

[36] *Id.*

[37] *Id.* (referring to N.Y. CRIM. PROC. LAW §140.50(1)), which states:

> In addition to the authority provided by this article for making an arrest without a warrant, a police officer may stop a person in a public place located within the geographical area of such officer's employment when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.

[38] *Id.* (referring to N.Y. CRIM. PROC. LAW §140.50(3)), which states:

> When upon stopping a person under circumstances prescribed in subdi-

final level of intrusion allows the officer to make an arrest and take a citizen into custody if the officer "has reasonable cause to believe that person has committed a crime, whether in his presence or otherwise."[39] Each progressive level requires a separate degree of suspicion by the investigating officer.[40] The court in *Keita* applied these levels to determine whether Keita's search and seizure was reasonable under the circumstances of the case and is discussed in detail below.

A. The First Level of Intrusion – Request for Information

The first level of intrusion allows a state law enforcement officer to request information if there is an objective, credible, and articulate reason to request it.[41] "A request for [general] information involves basic, nonthreatening questions such as, identity, address or destination."[42] In *Keita*, the officer's inquiry was entirely proper under the first tier because she was notified by the postal teller, thus providing the officer with a credible and objective reason to question Keita.[43] Furthermore, fraudulent identification was commonly used in new account fraud so when Keita did not provide adequate identification, the officer was entitled to delve deeper and ask to see Keita's money orders and debit card.[44] Therefore, the court determined that the officers' actions were reasonable under the circumstances.[45]

> visions one and two a police officer or court officer, as the case may be, reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons. If he finds such a weapon or instrument, or any other property possession of which he reasonably believes may constitute the commission of a crime, he may take it and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

[39] *DeBour*, 352 N.E.2d at 572 (referring to N.Y. CRIM. PROC. LAW §140.10(1)(b).).

[40] People v. Hollman, 590 N.E.2d 204, 206 (N.Y. 1992).

[41] *Keita*, 2011 WL 1936076, at *3-4.

[42] *Hollman*, 590 N.E.2d at 206; *accord*, People v. Carter, 790 N.Y.S.2d 459, 460 (App. Div. 1st Dep't 2005) (questioning a suspect at a bus terminal regarding his trip was proper because the suspect was in a restricted area designated for bus passengers).

[43] *Keita*, 2011 WL 1936076, at *4.

[44] *Id.* at *5.

[45] *Id.*

B. The Second Level of Intrusion – Common Law Right of Inquiry

The second level of intrusion or "common-law right of inquiry" views the citizen more in terms of a suspected law breaker and the agent must determine whether there is a " 'founded suspicion that criminal activity is afoot.' "[46] Like the level-one approach, the officer may not make physical contact with the suspect; he may only interfere with the suspect to gain explanatory information.[47] Such questions may be used to elicit an incriminating response and may be characterized as an intimidating experience; whereas, the level one intrusion is characterized as "merely unsettling."[48]

In this case, the agents' request for certain documents moved from a level-one inquiry to a level-two inquiry when Keita gave one of the agents a non-governmental identification card that shared the same name that appeared on the Citibank debit card.[49] The identification card and the debit card created a "founded suspicion that criminal activity was afoot" in the officers' collective minds, especially since the officers had expertise in new account fraud.[50] Thus, the court held that the brief intrusion to gain explanatory information was justified by the totality of circumstances because the officers' conduct comported with a level-two common-law right of inquiry.[51]

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[46] *Id.* (quoting *DeBour*, 352 N.E.2d at 572).

[47] *Id.*

[48] *Keita*, 2011 WL 1936076, at *5 (referring to *Hollman*, 590 N.E.2d at 210).

> Once the police officer's questions become extended and accusatory and the officer's inquiry focuses on the possible criminality of the person approached, this is not a simple request for information. Where the person approached from the content of the officer's questions might reasonably believe that he or she is suspected of some wrongdoing, the officer is no longer merely asking for information. The encounter has become a common-law inquiry that must be supported by founded suspicion that criminality is afoot. No matter how calm the tone of narcotics officers may be, or how polite their phrasing, a request to search a bag is intrusive and intimidating and would cause reasonable people to believe that they were suspected of criminal conduct. These factors take the encounter past a simple request for information.

[49] *Id.*

[50] *Id.*

[51] *Id.* at *5-6.

C. The Third Level of Intrusion – Forcible Seizure

The third level of intrusion is characterized as a "forcible seizure," which is the physical or constructive detainment of an individual by virtue of significant interruption of his liberty of movement resulting from police action.[52] At this level, the officer must have a reasonable suspicion that the individual is committing, has committed, or is about to commit a crime.[53] Reasonable suspicion has been defined as that '"quantum of knowledge sufficient to induce an ordinary prudent and cautious man under the circumstances to believe criminal activity is at hand.'"[54] Hunches are not sufficient to meet the reasonable suspicion standard; the officer must be able to state the facts that caused his suspicion.[55]

New York adopted a reasonable person test to determine whether a seizure occurred.[56] In New York the question is "whether a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant limitation on his or her freedom."[57] Standing alone, a verbal command does not usually constitute a seizure.[58] However, if the verbal command is coupled with, but not limited to, physical contact, blocking the path of a vehicle, using loudspeakers, or pointing a gun, a seizure has occurred.[59]

In *Keita*, Keita voluntarily followed the officers to a private location and even though there were, at times, six officers in the room

[52] *Id.* at *6; *see also* People v. Martinez, 606 N.E.2d 951, 952 (N.Y. 1992) ("[F]orcible stops and seizures . . . take place whenever an individual's freedom of movement is significantly impeded.").

[53] *Keita*, 2011 WL 1936076, at *6.

[54] *Id.* at *6 (quoting People v. Cantor, 324 N.E.2d 872, 877 (N.Y. 1975)).

[55] United States v. Cortez, 449 U.S. 411, 417-18 (1981) ("Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like 'articulable reasons' and 'founded suspicion' are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances – the whole picture – must be taken into account. Based upon the whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.").

[56] *Keita*, 2011 WL 1936076, at *6.

[57] *Id.* (internal quotations omitted).

[58] People v. Bora, 634 N.E.2d 168, 170 (N.Y. 1994); *see, e.g.*, People v. Townes, 359 N.E.2d 402, 404-405 (1976) (finding a seizure where a police officer who was not wearing his uniform exited an unmarked car, wielded his firearm, and yelled "Freeze Police" at two men).

[59] *Keita*, 2011 WL 1936076, at *6-7.

with him, the officers never had their guns drawn.[60] The court found that the officers' conduct did not significantly limit Keita's personal liberty; thus, there was no seizure.[61] The court then needed to decide whether the officers did, in fact, have reasonable suspicion to conduct a forcible detention or probable cause to make an arrest.[62] However, because the officers gained information from an outside source, the court first had to determine if the information had sufficient reliability to justify the forcible encounter.[63]

To prove the informant's credibility, the People needed to prove that the informant was reliable and that he or she had a basis of knowledge.[64] Anonymous information is usually considered unreliable to constitute the basis for reasonable suspicion.[65] The informants in *Keita* included a postal teller, a Citibank fraud investigator, and a Capital One fraud investigator, who the court determined were all identifiable and reliable sources with experience in the field of bank accounts and fraud.[66] Furthermore, coupled with the agents' observations of Keita, information given by the informants was highly corroborated.[67] Thus, even though the agents' initial questioning satisfied the level-two inquiry, further detention after the initial inquiry was acceptable under the level-three reasonable suspicion standard allowing for a forcible seizure.[68]

D. The Fourth Level of Intrusion – Probable Cause

The fourth level of intrusion under *DeBour* allows a police officer to make a full-blown arrest as long as he has probable cause to believe that the person has committed a crime, whether in his presence or not.[69] The court in *Keita* provided two ways that probable

[60] *Id.* at *2.
[61] *Id.* at *7.
[62] *Id.*
[63] *Id.*
[64] People v. Wirchansky, 359 N.E.2d 666, 667 (N.Y. 1976) (applying the principle to a warranted arrest by the police). The court in *Keita* explained that the principle is no less relevant in a warrantless arrest and search by the police. 2011 WL 1936076, at *7.
[65] *Keita*, 2011 WL 1936076, at *7.
[66] *Id.* at *8.
[67] *Id.*
[68] *Id.*
[69] *Id.*

cause can be established.[70] First, the court stated that reasonable cause is present when "evidence or information which appears reliable discloses facts or circumstances which . . . collectively . . . convince a person of ordinary intelligence, judgment, and experience that it is reasonably likely that [the] offense was committed and . . . such person committed it."[71] Put in simpler terms, probable cause exists when it is more likely than not that a crime took place and that the arrestee was the perpetrator.[72] Probable cause does not mean that the officer knew for a fact that a crime was committed; the officer needs to be merely aware that some crime may have been committed.[73] Probable cause can also be established through an officer's observation of a perpetrator's seemingly innocent activities when the officer has expertise in the particular area of criminal activity.[74] The totality and reasonableness of the circumstances must also be taken into account because no two criminal investigations are exactly alike.[75]

Lastly, the court noted that the evidence was not unlawfully obtained.[76] The court determined that the officers had reasonable cause to arrest Keita.[77] The officers established reasonable cause when they learned of Keita's Citibank account status, the nature of the fraudulent Capital One checks, and Keita's purchase of the money orders for less than $3,000.[78] The debit card and money orders were visible when Keita used the debit card to purchase the money orders and Keita voluntarily provided them to the officers.[79] Thus, on the first issue, the court held that the officers' search and seizure of the evidence was reasonable under the circumstances.[80]

[70] *Keita*, 2011 WL 1936076, at *8. It is important to note that the court uses the terms "probable cause" and "reasonable cause" interchangeably. *Id.*

[71] *Id.* (citing N.Y. CRIM. PROC. LAW §70.10[2] (McKinney 2011)).

[72] *Id.*

[73] People v. Wilmer, 457 N.Y.S.2d 934, 935 (App. Div. 3d Dep't 1982).

[74] *Keita*, 2011 WL 1936076, at *8. "Modus operandi" is the pattern of criminal activity so distinctive that officers who have expertise in the particular field of criminal activity may attribute it to the work of the same person. *Id.*

[75] *Id.*

[76] *Id.* at *9.

[77] *Id.* at *8.

[78] *Keita*, 2011 WL 1936076, at *8.

[79] *Id.* at *9.

[80] *Id.* at *8.

IV. WAS KEITA'S SEARCH AND SEIZURE REASONABLE? – FEDERAL APPROACH

By establishing the four-tier approach, New York State expanded the Fourth Amendment protection against illegal search and seizure by relying on its State Constitution.[81] The Fourth Amendment established the minimum protection required in a criminal search and seizure.[82] For a defendant to sustain a constitutional claim, the defendant must prove that the officers acted under color of federal law to deprive the defendant of his constitutionally protected right.[83] In a federal constitutional analysis, three levels of interaction, rather than the four levels of interaction in New York, exist between government agents and private citizens.[84] The first level of interaction is a "consensual encounter," which does not require justification.[85] The second level of interaction is an "investigative detention," which requires a reasonable suspicion that crime has occurred or crime will occur in the near future.[86] Finally, the third level of interaction is a full-blown "arrest," which requires a showing of probable cause.[87] The next three sections of this note describe in detail the three levels of interaction under federal law.

A. The First Level of Interaction – Consensual Encounter

The first level of interaction, the consensual encounter, does not require justification as long as the police do not indicate that compliance with their requests is required.[88] "Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal

[81] *Compare DeBour*, 352 N.E.2d at 571-72 *with* Bordeaux v. Lynch, 958 F. Supp. 77, 85-86 (N.D.N.Y 1997).

[82] *Bordeaux*, 958 F. Supp. at 84.

[83] *Id.*

[84] *Id.* at 85.

[85] *Id.*

[86] *Id.*

[87] *Bordeaux*, 958 F. Supp. at 85.

[88] United States v. Tehrani, 49 F.3d 54, 58 (2d Cir. 1995).

prosecution his voluntary answers to such questions."[89]

For example, in *Bordeaux v. Lynch*,[90] two women, Bordeaux and Sweeney, were engaged in suspicious behavior at an airport and caught the attention of a Task Force informant while they were standing in the baggage claim area.[91] Agents then followed the women from the airport, to their motel, then to a bus station.[92] At the bus station, the agents approached the women and inquired about their identification and destination.[93] The agents were highly suspicious of a black bag that the women were traveling with and noticed that Bordeaux's airline ticket bore a different name than her own.[94] The court held that because the officers approached the women in a public place and asked them if they were willing to answer questions and the women voluntarily agreed, the officers did not violate Bordeaux's Fourth Amendment rights and their interaction was justified as a consensual encounter.[95]

B. The Second Level of Interaction – Investigative Detention

After learning more information from the consensual encounter, officers have the authority to turn the encounter into an investigative detention, the second level of interaction under federal law.[96] In the federal system, there are two levels of seizure of a person.[97] The first level, which is also the second level of interaction, is the investigative detention, which requires reasonable suspicion in the minds of the officers "that criminal activity . . . occurred or is about to occur."[98] This is known as a *Terry* stop.[99] Unlike New York, which adopted the reasonable person test discussed above to determine

[89] Florida v. Royer, 460 U.S. 491, 497 (1983).

[90] 958 F. Supp. 77 (N.D.N.Y. 1997).

[91] *Bordeaux*, 958 F. Supp. at 81. The two women were in the Syracuse Airport, and the informant was working with the Central New York Task Force. *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Bordeaux*, 958 F. Supp. at 85.

[96] *Id.*

[97] Posr v. Doherty, 944 F.2d 91, 98 (2d Cir. 1991).

[98] *Tehrani*, 49 F.3d at 58.

[99] *Posr*, 944 F.2d at 98.

whether a seizure occurred,[100] the federal courts apply a narrower definition of seizure to merely include physical restraint.[101]

In *Terry v. Ohio*,[102] the Supreme Court explained that an officer can briefly detain a person for investigative purposes if the officer has reasonable suspicion supported by articulable facts that criminal activity may be afoot, even if the officer does not have probable cause.[103] When officers conduct a *Terry* stop, they must "employ[ ] 'the least intrusive means reasonably available to verify or dispel their suspicion in a short period of time.' "[104] "Investigative detentions[ ] involve[ ] reasonably brief encounters in which a reasonable person would have believed that he or she was not free to leave."[105]

Furthermore, in this level of interaction, the Supreme Court has held that law enforcement officers may do a limited search of a suspect's outer garments if they reasonably believe that the detainee may be armed and dangerous.[106] The Court stated that this protective search for weapons is merely a brief intrusion, rather than an "inconsiderable[ ] intrusion upon the sanctity of the person."[107] Furthermore, the officer does not need to be certain that the individual is armed; it must only be true that "a reasonably prudent [person] would be warranted in the belief to believe that his safety or that of others was in danger."[108] This belief cannot come from a hunch, but from "specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience."[109]

[100] *Keita*, 2011 WL 1936076, at *6.

[101] *Id.*

[102] 392 U.S. 1 (1968).

[103] *Terry*, 392 U.S. at 33 (holding that detention and search of an individual by officers was justified, for protection of themselves and others, because the officers had reasonable grounds to believe the individual was armed and dangerous).

[104] *Posr*, 944 F.2d at 98.

[105] *Id.* (quoting United States v. Hastamorir, 881 F.2d 1551, 1556 (11th Cir. 1989)).

[106] *Terry*, 392 U.S. at 27.

[107] *Id.* at 26.

[108] *Id.* at 27.

[109] *Id.*

C. The Third Level of Interaction – Arrest

The second level of seizure is also the third level of intrusiveness under federal law, which is known as an *arrest*.[110] An arrest occurs when the totality of the circumstances indicates that the encounter between the private citizen and officer becomes too invasive to be considered an investigative detention.[111] Furthermore, the government has a greater burden at this level than it needs for an investigative detention, in that the government needs to prove probable cause, rather than merely reasonable suspicion.[112] It is sometimes difficult to determine when an actual arrest occurs because there is no set list of formalities required.[113] An arrest may even occur "if the formal words of arrest have not been spoken provided that the [individual being detained] is restrained and [that individual's] freedom of movement is restricted."[114] For example, in *Tehrani*, the court held that the officer's actions of holding the defendant in detention for more than 30 minutes in a private airport office, which caused the defendant to miss his flight, did not amount to an arrest.[115] The officer made speedy and appropriate inquiries in a reasonable way; thus, the thirty-minute detention was no longer than necessary to effectuate the officer's purpose.[116]

V. STATEMENTS GIVEN BY KEITA AFTER THE *MIRANDA* WARNINGS

Because the court in *Keita* found that the officers did have reasonable grounds for a lawful arrest of Keita, the second issue was whether the *Miranda* warnings were properly given to *Keita* upon his arrest and if they were, whether Keita properly waived them.[117] The Supreme Court enunciated warnings that need to be given before any custodial interrogation conducted by law enforcement agents in its

110 *Tehrani*, 49 F. 3d at 58.
111 *Bordeaux*, 958 F. Supp. at 86.
112 *See id.*
113 *See id.*
114 *Id.*
115 *Id.* at 87 (referring to *Tehrani*, 49 F.3d at 61).
116 *Tehrani*, 49 F.3d at 61.
117 *See Keita*, 2011 WL 1936076, at *9-11.

1966 decision, *Miranda v. Arizona*.[118] New York parallels this federal approach.[119] A suspect must be aware of the fact that, during questioning, he has the right to remain silent and he has the right to have an attorney present.[120] However, after being made aware of these rights, the suspect can waive them "voluntarily, knowingly, and intelligently."[121] The court in *Keita* broke down the *Miranda* analysis into three parts: custody, interrogation, and waiver.[122]

To determine whether a defendant is in custody, the test turns upon what a reasonable, innocent man would believe if he were in the defendant's position.[123] It is an objective test so it does not matter what a particular defendant actually thought.[124] In making this assessment, the totality of circumstances must be considered.[125] The mere fact that a defendant was interviewed in a police station does not automatically mean that he was in custody.[126] The mere fact that a defendant was interviewed in a police station does not automatically mean that he was in custody.[127] This questioning within a police station is merely one circumstance that should be considered. Other such circumstances that should be considered include "whether the defendant voluntarily appeared at, or accompanied officers to, the police station and whether the questioning was conducted in a non-coercive [manner]."[128]

Under *Miranda*, interrogation refers to express questioning and "any words or actions on the part of the police [officers] . . . that the police should know are . . . likely to elicit an incriminating response" from a defendant.[129] There are certain exemptions that are

[118] Miranda v. United States, 384 U.S. 436, 479 (1966) (holding that the accused must be clearly informed of his right to remain silent; that what he says can and will be used against him at trial; that he has the right to have an attorney present during questioning; and that if he is indigent, the court may appoint an attorney for him at no cost to him).

[119] *Keita*, 2011 WL 1936076, at *9.

[120] *Miranda*, 384 U.S. at 444.

[121] *Keita*, 2011 WL 1936076, at *9.

[122] *Id.* at *9-11.

[123] People v. Yukl, 256 N.E.2d 172, 174 (N.Y. 1969).

[124] *Id.*

[125] *Keita*, 2011 WL 1936076, at *9.

[126] *Yukl*, 256 N.E.2d at 174 (referring to United States v. Bird, 293 F. Supp. 1265, 1271-72 (1968)).

[127] *Id.*

[128] *Keita*, 2011 WL 1936076, at *9.

[129] Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980).

not considered interrogations. For example, in response to an officer's general inquires during the preliminary stages of the investigation process, the statements made are not regarded as results of an interrogation.[130] Interrogation also does not occur when statements are made by the defendant without any inducement from the law enforcement officers altogether; these statements are merely spontaneous.[131]

Like custody, an objective test is used to determine what constitutes interrogation of a suspect.[132] The test is "whether an objective observer with the same knowledge concerning the suspect as the police had would conclude that the remark or conduct of the police was reasonably likely to elicit a response."[133] The court held that the statements that Keita made "were clearly products of a custodial interrogation intended to elicit an incriminating response."[134]

The last part of the court's *Miranda* analysis involved whether Keita voluntarily, knowingly, and intelligently waived his *Miranda* rights.[135] The burden was on the People to prove that Keita "voluntarily, knowingly, and intelligently waived his . . . rights"; if he did, then the oral and written statements he made to the agents were admissible as evidence.[136] "Voluntariness centers around whether . . . [the officers] use[d] . . . coercive techniques . . . [to] extract a statement with complete disregard of whether or not [the defendant] spoke the truth."[137] The United States Supreme Court stated that "convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand."[138] Furthermore, when determining whether

[130] *Keita*, 2011 WL 1936076, at *10.

[131] *Id.*

[132] *Id.*

[133] *Id.* (quoting People v. Ferro, 62 N.Y.2d 316, 319 (1984)).

[134] *Id.* at *11.

[135] *Keita*, 2011 WL 1936076, at *10-11.

[136] *Id.*

[137] *Id.* at 10.

[138] Rogers v. Richmond, 365 U.S. 534, 540 (1961)). Defendant was brought in for questioning and the officers told him that they would take his wife into custody if he did not cooperate and confess to the crime. *Id.* at 535. The court held that the defendant's statements were inadmissible because he was subject to pressures that an accused should not be subjected to during an interrogation. *Id.* at 538. Psychological or physical coercion offends the underlying principle in our criminal justice system: that our system is an accusatorial, not an inquisitorial one. *Id.* at 540-41. Thus, the State must establish guilt by evidence freely and independently secured from the accused. *Id.* at 541. Furthermore, if the statements are invo-

the defendant voluntarily gave his statement, the court looks at the totality of circumstances.[139] Such circumstances include "interrogation techniques, [including] physical abuse [and] psychological pressure, food or sleep deprivation, and promises of immunity and payment."[140]

In *Keita*, the court found that "the People clearly established that the *Miranda* warnings were properly administered and that [Keita] voluntarily, knowingly, and intelligently waived them."[141] The agents read Keita his *Miranda* rights before Keita made his verbal and written statements, "which were clearly products of a custodial interrogation that was conducted to elicit an incriminating response."[142] After hearing each warning, Keita waived his rights when he wrote "yes" and signed his initials on the form provided for the purpose of waiving these rights.[143]

VI. CONCLUSION

The court in *Keita* ultimately held that the arresting officers properly approached Keita at the outset of the investigation, they then conducted a proper investigatory inquiry, and in due course possessed the probable cause to justify a forcible stop and arrest.[144] Furthermore, the *Miranda* rights were properly administered and voluntarily waived by Keita.[145]

Based on New York and federal case law, it is evident that the Federal process regarding illegal search and seizure is not as detailed as the New York approach. Rather than merely following federal guidelines, New York State has expanded the Fourth Amendment protection. While there are four levels that must be scrutinized in determining whether law enforcement officers conducted a reasonable

luntary, the statements are inadmissible for all purposes, including impeachment and rebuttal. *Keita*, 2011 WL 1936076, at *10.

139 *Keita*, 2011 WL 1936076, at *10.

140 *Id.* at *10-11.

141 *Id.* at *11.

142 *Id.*

143 *Keita*, 2011 WL 1936076, at *11. Furthermore, after Keita made a verbal statement, he handwrote a statement in what appeared to be his own words. *Id.*

144 *Id.*

145 *Id.*

search and seizure in New York State, there are three levels under federal law.[146] The progressive levels in both approaches require a separate degree of suspicion by the investigating officer. On the other hand, as detailed above, there are numerous differences between the two approaches. In the first level of both approaches, law enforcement officers are allowed to approach an individual and ask him or her general questions.[147] However, under the Federal approach, no justification is required so long as law enforcement officers make it clear that answering their questions is unnecessary.[148] This directly contrasts with the level one request for information in New York, which requires a law enforcement official to have an objective, credible, and articulate reason for questioning an individual.[149]

Whereas the first levels in both approaches can be seen as somewhat equivalent, the basic right to approach a citizen on the street with low levels of cause, the second level of intrusion in New York State, or the "common law right of inquiry," does not have an equivalent in the federal approach. The common law right of inquiry is allowed if the officer has "a founded suspicion that criminal activity is afoot"; this stops short of a seizure and no physical contact is permitted.[150]

However, the second level of the federal approach amounts to a seizure upon an individual, in the form of an investigative detention which requires reasonable suspicion "that criminal activity occurred or is about to occur."[151] New York law does not permit a law enforcement officer to commit a seizure until a level three intrusion, a "forcible seizure."[152] The third level of the New York approach can be easily compared to the second level of the federal approach. At the third level in New York, the "officer must have reasonable suspicion that the individual is committing, has committed, or is about to commit a crime."[153] To determine what amounts to a seizure, New York adopted a "reasonable person test" and the question is "whether a reasonable person would have believed, under the circumstances,

146 *Bordeaux*, 958 F. Supp. at 85.
147 *Tehrani*, 49 F.3d at 58; *DeBour*, 352 N.E.2d at 571-72.
148 *Tehrani*, 49 F.3d at 58.
149 *Keita*, 2011 WL 1936076, at *4.
150 *Id.* at *5.
151 *Tehrani*, 49 F.3d at 58.
152 *Keita*, 2011 WL 1936076, at *6.
153 *Id.*

that the officer's conduct was a significant limitation on his or her freedom."[154] Under this test, "a verbal command, standing alone, [does] not usually [amount to] a seizure."[155] However, if a verbal command is coupled with physical contact, blocking the path of a vehicle, using loudspeakers, or pointing a gun at the individual, courts will usually find that a seizure has occurred.[156] However, this is a broad definition compared to the narrower definition of what constitutes a seizure under federal law.[157] The federal courts apply a narrower definition of seizure to merely include physical restraint.[158]

The last level of each approach, the fourth level of intrusion in New York law and the third level of interaction under federal law, amount to a full blown arrest by the investigating officer.[159] Under New York law, a law enforcement officer must have probable cause to arrest an individual, similar to federal law where probable cause is required as well.[160] However, it is odd that the court in *Keita* used the terms "reasonable" and "probable" cause interchangeably at this level.[161] This oddity is evident when the court provided two ways to determine probable cause.[162] The opinion first referred to a New York statute and said that reasonable cause is present when "evidence or information which appears reliable discloses facts or circumstances which . . . collectively . . . convince a person of ordinary intelligence, judgment, and experience that it is reasonably likely that [the] offense was committed and . . . such person committed it."[163] The court then went on to provide that another way to prove probable cause is through the officer's observation of an individual's seemingly innocent activities, given the officer's expertise in a specific criminal activity.[164]

It is evident that the federal approach and the New York approach to determine whether there was a reasonable search and sei-

154 *Id.*
155 *Bora*, 634 N.E.2d at 170.
156 *Keita*, 2011 WL 1936076, at *6-7.
157 *Id.* at *6.
158 *Id.*
159 *Id.* at *8; *Tehrani*, 49 F.3d at 58.
160 *Keita*, 2011 WL 1936076, at *8; *Bordeaux*, 958 F. Supp. at 86.
161 *Keita*, 2011 WL 1936076, at *8.
162 *Id.*
163 *Id.* (citing N.Y. CRIM. PROC. LAW §70.10[2] (McKinney 2011)).
164 *Id.*

zure vary in numerous ways. However, both approaches assure that an individual's constitutional right against unreasonable search and seizure will be protected and both approaches must be strictly followed.

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