TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 11 | Number 3 Article 63

1995

Search & Seizure

Follow this and additional works at: https://digitalcommons.tourolaw.edu/lawreview

 Part of the Constitutional Law Commons, Criminal Law Commons, Criminal Procedure Commons, and the Law Enforcement and Corrections Commons

Recommended Citation
(1995) "Search & Seizure," *Touro Law Review*: Vol. 11: No. 3, Article 63.
Available at: https://digitalcommons.tourolaw.edu/lawreview/vol11/iss3/63

This New York State Constitutional Decisions is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

appears that New York and federal law analyze such drug testing procedures in a similar manner.

People v. Bora[51]
(decided May 3, 1994)

Defendant claimed that evidence discovered subsequent to a police officer's command to stop violated his state[52] and federal[53] constitutional right to be free from unreasonable searches and seizures. Defendant argued that the evidence should have been suppressed because the command to stop amounted to an unlawful seizure of his person, since the officer had directed him to stop without first having the prerequisite "reasonable basis" to believe that the defendant was involved in criminal activity.[54] The New York Court of Appeals held that the police officer's command to stop did not constitute a seizure under New York law, and thus the evidence was admissible in his prosecution for possession of a controlled substance.[55]

On June 1, 1989, two police officers received a report over their patrol car radio that a black male dressed in red and blue clothes was selling drugs on a Manhattan street corner.[56] Upon arriving at the corner, they saw Antonio Bora standing among a group of people.[57] He was the only individual matching the description given to the officers.[58] When one of the officers exited the patrol car, Bora looked in the direction of the officers,

---

51. 83 N.Y.2d 531, 634 N.E.2d 168, 611 N.Y.S.2d 796 (1994).

52. N.Y. CONST. art. 1, § 12 Section 12 states in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . ."

53. U.S. CONST. amend. IV. The Fourth Amendment states in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ."

54. *Bora*, 83 N.Y.2d at 534, 634 N.E.2d at 169, 611 N.Y.S.2d at 797.

55. *Id.* at 536, 634 N.E.2d at 171, 611 N.Y.S.2d at 799.

56. *Id.* at 533, 634 N.E.2d at 169, 611 N.Y.S.2d at 797.

57. *Id.*

58. *Id.*

and moved away as the officer approached him.[59] The officer directed Bora to stop, but Bora fled, discarding a paper bag containing crack cocaine.[60] The police subsequently apprehended and arrested Bora, and recovered the bag.[61] Bora made a motion to suppress the crack cocaine recovered by police officers.[62] He asserted that the officer's direction to stop was improper since the officer lacked the reasonable suspicion required for a lawful seizure.[63] Accordingly, Bora argued that the cocaine should be suppressed because it was the fruit of unlawful police conduct.[64] The motion was denied[65] and Bora pled guilty to criminal possession of a controlled substance.[66]

The appellate division upheld Bora's conviction, stating that the officers had a sufficient basis to make a common-law inquiry into his conduct and that Bora's attempt to flee provided them with the requisite reasonable suspicion to pursue him.[67] The appellate division ruled that reasonable suspicion was adequately formed based upon several factors: the officers' observations, including the matching description, the defendant's presence at the scene, and his conduct upon observing the approaching officers.[68]

Before the court of appeals, Bora argued that the officers lacked reasonable suspicion *at the moment* they directed him to

---

59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. 191 A.D.2d 384, 385-86, 595 N.Y.S.2d 437, 438-39 (1st Dep't 1993) *aff'd*, 83 N.Y.2d 531, 634 N.E.2d 168, 611 N.Y.S.2d 796 (1994). The court denied Bora's motion, which relied upon much of the same state precedent in the instant appeal, because the officers, having received a tip, had a common-law right to inquire that he had been "'activated by a founded suspicion that criminal activity is afoot.'" *Id.* at 385, 595 N.Y.S.2d at 439 (citation omitted). Bora's attempt to flee and the officer's corroboration of the tip supplied them with reasonable suspicion of Bora's criminal activity. *Id.* In this appeal, Bora did not explicitly raise any state or federal constitutional issues.
68. *Id.* at 386, 595 N.Y.S.2d at 439.

stop.[69] He claimed that under the New York Constitution and New York's common law rules on seizure and investigative inquiry, reasonable suspicion is required at the time the command to stop is made, otherwise evidence obtained thereafter should be inadmissible as the product of an illegal seizure.[70]

In affirming the lower court's decision, the New York Court of Appeals acknowledged that there were no "bright line" rules available for resolving the issue of whether an officer's command to stop constitutes an unlawful seizure.[71] To answer this question, the court utilized a test enunciated in *People v. Hicks*,[72] which asks "whether a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant limitation on his or her freedom."[73] Several factors are considered when such a test is to be applied.[74] In *Bora*, the court held that the language used by the officer was not so intimidating and forceful as to constitute a seizure.[75]

Although the court recognized that the text pertaining to search and seizure in both the State and Federal Constitutions is identical, it noted that New York interprets these words differently than the federal courts.[76] The court explained New

---

69. *Bora*, 83 N.Y.2d at 533-34, 634 N.E.2d at 169-70, 611 N.Y.S.2d at 797-98.

70. *Id.*

71. *Id.* at 535-36, 634 N.E.2d at 170-71, 611 N.Y.S.2d at 798-99.

72. 68 N.Y.2d 231, 240, 500 N.E.2d 861, 864, 508 N.Y.S.2d 163, 166 (1986) (considering "what a reasonable man, innocent of any crime, would have thought had been in the defendant's position").

73. *Id.* at 535, 634 N.E.2d at 170, 611 N.Y.S.2d at 798.

74. *Id.* at 535-36, 634 N.E.2d at 170, 611 N.Y.S.2d at 798. The court has considered whether the officer's gun was drawn, if the defendant's movement was interrupted, the number of verbal commands given by the officer, the tone and content of these commands, the number of officers involved, and the place of the encounter. *Id.*

75. *Id.* at 536, 634 N.E.2d at 171, 611 N.Y.S.2d at 799.

76. *Id.* at 534, 634 N.E.2d at 170, 611 N.Y.S.2d at 798. *See* People v. Keta, 79 N.Y.2d 474, 496-497, 593 N.E.2d 1328, 1342, 583 N.Y.S.2d 920, 934 (1992) (holding that while language of both Federal and State Constitutions pertaining to unreasonable searches and seizures is generally uniform, New York interprets its constitution independently to protect its citizens adequately from unreasonable governmental intrusions).

York's interpretation by referring to *People v. De Bour*,[77] in which it was held that a seizure can take place even where the individual is *not* physically restrained by officers, or where he has submitted to "a show of authority."[78] In New York, a seizure may occur when an officer's actions merely result in a "significant interruption [of the] individual's liberty of movement."[79] The court also cited *People v. Cantor*[80] and *United States v. Mendenhall*,[81] in which these courts stated that an interruption of an individual's movement can be found in the actual use of force by an officer or by the individual's submission to the authority of an officer.

Bora claimed that a uniformed officer's direction to stop is a sufficient showing of authority and, as a matter of law, constitutes an unlawful seizure of his person prior to his attempt to flee.[82] Under New York law, the court recognized that an officer's command to stop, when coupled with certain behavior by an officer, may sometimes amount to a seizure.[83] However,

---

77. 40 N.Y.2d 210, 216, 352 N.E.2d 562, 567, 386 N.Y.S.2d 375, 380 (1976).

78. *Id.* at 217, 352 N.E.2d at 567-68, 386 N.Y.S.2d at 380-81.

79. *De Bour*, 40 N.Y.2d at 216, 352 N.E.2d at 567, 386 N.Y.S.2d at 380.

80. 36 N.Y.2d 106, 111, 324 N.E.2d 872, 876, 365 N.Y.S.2d 509, 515 (1975) (holding that detention of an individual can occur "physically or constructively" by force or by his or her submission "to the authority of the badge").

81. 446 U.S. 544, 554-55 (1980). The Supreme Court held that plainclothes agents who identified themselves to an individual at an airport and requested her identification was not a seizure, where she could not have objectively maintained a reason to believe that she was not free to leave. *Id.* at 555. The Court determined whether an individual is seized by inquiring whether a reasonable person, in view of the totality of the circumstances, would not feel free to leave, and whether the person is in fact free to ignore such questions and walk away. *Id.*

82. *Bora*, 83 N.Y.2d at 535, 634 N.E.2d at 170, 611 N.Y.S.2d at 798.

83. *Id. See* People v. May, 81 N.Y.2d 725, 727-28, 609 N.E.2d 113, 114-15, 593 N.Y.S.2d 760, 761-62 (1992) (holding that an individual was seized when officers ordered him over a loudspeaker to pull over his car); *see also* People v. Boodle, 47 N.Y.2d 398, 400-01, 391 N.E.2d 1329, 1330, 418 N.Y.S.2d 352, 354 (1979) (stating that a defendant was seized when he entered patrol car at request of detectives, who ordered him to keep his hands visible and, without explanation, began driving away), *cert. denied*, 444 U.S.

even though an officer's direction to stop may be considered a seizure in New York, it usually will not constitute a seizure unless the police conduct poses a significant limitation on the individual's freedom, or the language of the officer is so forceful and intimidating as to constitute a seizure.[84] The New York Court of Appeals relied on the lower courts' findings that no seizure took place and that the officer's direction to Bora to stop was neither forceful nor intimidating.[85] Thus, the officer's direction to stop, standing alone, was not a seizure.[86]

Under federal law, the counterpart case to *De Bour* and *Hicks* is *California v. Hodari D.*[87] In *Hodari D.*, an officer pursued the defendant, a juvenile, who fled after seeing him approach in an unmarked car.[88] The youth discarded a small rock of crack cocaine when the officer was nearly upon him.[89] Hodari argued that the evidence should have been suppressed as a fruit of an illegal seizure because he had been unlawfully seized at the point when the officer ran toward him.[90] The Supreme Court held that a seizure requires the use of physical force or a *significant* submission to authority.[91] Under this test, Hodari was not seized until the pursuing officer had actually tackled him, which occurred *after* Hodari had abandoned the contraband; therefore the cocaine discarded moments earlier was admissible since it was obtained *before* any possible seizure by the police officer.[92]

---

969 (1979); People v. Townes, 41 N.Y.2d 97, 99-100, 359 N.E.2d 402, 404-05, 390 N.Y.S.2d 893, 895-96 (1976) (holding that a seizure occurred when plainclothes officer in unmarked car, with gun drawn, approached two individuals and shouted, "Freeze, police.").

84. *Bora*, 83 N.Y.2d at 534-36, 634 N.E.2d at 170-71, 611 N.Y.S.2d at 798-99.

85. *Id.* at 535-36, 634 N.E.2d at 170-71, 611 N.Y.S.2d at 798-99.

86. *Id.* at 536, 634 N.E.2d at 170-71, 611 N.Y.S.2d at 798-99.

87. 499 U.S. 621, 626 ("[Seizure] does not remotely apply . . . to the prospect of a policeman yelling 'Stop in the name of the law!' at a fleeing form that continues to flee.").

88. *Id.* at 622-23.

89. *Id.* at 623.

90. *Id.* at 625-26.

91. *Id.* at 626.

92. *Id.* at 629.

The facts in *Bora* are comparable to those in *Hodari D.* The text of the Federal and State Constitutions regarding the right against unreasonable search and seizure is identical. The outcome of the case is the same as it would have been under federal law. The difference between federal and state law on this issue is the narrow rule that a New York court may interpret an officer's forceful command to stop as a seizure, whereas a federal court may not make such an interpretation.[93]

93. *See* Terry v. Ohio, 392 U.S. 1, 16, 30 (1968) (holding that a seizure exists anytime an officer restrains an individual's freedom, and that a brief seizure may be supported by reasonable suspicion that criminal activity is afoot coupled with the officers reasonable fear for his own safety and the safety of others); *see also* People v. Martinez, 80 N.Y.2d 444, 449, 606 N.E.2d 951, 953, 591 N.Y.S.2d 823, 825 (1992) (holding that a defendant had no grounds to object to the opening of a box that the defendant abandoned during a police pursuit); People v. Hollman, 79 N.Y.2d 181, 193, 590 N.E.2d 204, 211, 581 N.Y.S.2d 619, 626 (1992) (ruling that officer's questioning of two bus passengers about their luggage, whether they were together, and what their destinations were, was held to be reasonably related to the previously observed nervous conduct of the passengers and thus was permissible although such conduct was not necessarily demonstrative of criminal activity); People v. Leung, 68 N.Y.2d 734, 736, 497 N.E.2d 687, 688, 506 N.Y.S.2d 320, 321-22 (1986) (holding that an officer may pursue or stop an individual if the officer has a reasonable suspicion that criminal activity is afoot); People v. De Bour, 40 N.Y.2d 210, 220-21, 352 N.E.2d 562, 570, 386 N.Y.S.2d 375, 383 (1976) (holding that an officer's questioning of an individual need not depend upon indications of criminal activity, but that there must be reasonable suspicion to justify a seizure or pursuit where the officer stopped an individual, late at night in an area known for drug trafficking, and after noticing a conspicuous bulge under the individual's jacket, asked him to open his jacket revealing a gun).