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Search and Seizure: People v. May

for purposes of Fourth Amendment protection.[2553] Therefore, evidence procured when one does not yield to physical force or a show of authority cannot be considered "fruit of a seizure," because no seizure exists.[2554]

Accordingly, in the case at hand, both New York and Federal law would permit the vials of cocaine found by the police officers to be admitted as evidence, without violating defendant's constitutional rights.

People v. May[2555]
(decided December 16, 1992)

Defendant appealed the trial court's denial of his motion to suppress evidence which he claimed was "the fruit[] of an illegal stop and seizure[,]"[2556] taken in violation of his state[2557] and federal[2558] constitutional rights. The appellate division affirmed the trial court's decision.[2559] The New York Court of Appeals reversed, holding that the police did not have a reasonable suspicion that criminal activity existed, therefore the evidence obtained from the unconstitutional search should have been suppressed.[2560]

In *May*, defendant was parked with a companion on a deserted street early in the morning in an area known for its high crime activity.[2561] As two police officers, who were patrolling the area, approached the car with their "red turret lights and spotlight on,

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2553. *Id.*

2554. *Id.* at 629.

2555. 81 N.Y.2d 725, 609 N.E.2d 113, 593 N.Y.S.2d 760 (1992).

2556. *Id.* at 727, 609 N.E.2d at 114, 593 N.Y.S.2d 761.

2557. N.Y. CONST. art. I, § 12. ("The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . but upon probable cause . . . .").

2558. U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

2559. People v. May, 176 A.D.2d 484, 484, 574 N.Y.S.2d 958, 958 (1st Dep't 1991).

2560. *May*, 81 N.Y.2d at 728, 609 N.E.2d at 115, 593 N.Y.S.2d at 762.

2561. *Id.* at 727, 609 N.E.2d at 114, 593 N.Y.S.2d at 761.

defendant started the engine of the [car] and slowly pulled away."[2562] When the officers demanded that defendant stop the vehicle, he complied and was asked to produce his driver's license and registration.[2563] While the officers waited for the documents, "they noticed that a towel was draped over the steering wheel column."[2564] After calling in the license plate number of the vehicle, the officers were informed that the car was stolen and the defendant was placed under arrest.[2565] The police officers subsequently searched the defendant and his car, finding vials of crack on his person, and a broken steering column hidden under the towel.[2566] At trial, defendant unsuccessfully moved to suppress the evidence found by the police during this search.[2567]

The court of appeals held "that when the police, using red turret lights, a spotlight and a loudspeaker, ordered defendant to pull the car over, defendant was effectively 'seized'" within the meaning of the Constitution.[2568] However, the court reasoned that the act of slowly moving the car away from the police did not create the requisite reasonable suspicion necessary to seize defendant,[2569] and thus, the police "had no legal basis to stop the car when they did."[2570] In short, the police officers needed a "reasonable suspicion of criminal activity" in order to validate the seizure at hand.[2571] An alternative suggested by the court, which would have effectuated a lawful seizure, would have been for the police to have followed the car while checking on the license plate to ascertain whether the car had been stolen.[2572]

2562. *Id.*
2563. *Id.*
2564. *Id.*
2565. *Id.*
2566. *Id.*
2567. *Id.*
2568. *Id.*
2569. *Id.* at 728, 609 N.E.2d at 115, 593 N.Y.S.2d at 762.
2570. *Id.*
2571. *Id.*
2572. *Id.*

To determine what constitutes "reasonable suspicion" the court examined the rule stated in *People v. Sobotker*[2573] and *People v. De Bour*.[2574] In essence, the police officer's "knowledge possessed at that moment and any reasonable inferences" are to be examined to determine if reasonable suspicion exists.[2575]

The *De Bour* court articulated standard which set forth four levels of permissible police intrusion to determine whether a seizure is valid. First, the court of appeals stated that "[t]he minimal intrusion of approaching to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality."[2576] The second level of police intrusion is the common-law right to

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2573. 43 N.Y.2d 559, 373 N.E.2d 1218, 402 N.Y.S.2d 993 (1978). In *Sobotker*, the court found no reasonable suspicion existed when police stopped defendants' car after the occupants had slowed down and glanced at a bar while driving in a high-crime neighborhood. *Id.* at 562-63, 373 N.E.2d at 1219, 402 N.Y.S.2d at 995. The court of appeals stated that:

> Except for routine checks to enforce automobile regulations . . . our repeated decisions make abundantly clear that, absent at least a reasonable suspicion that its occupants had been, are then, or are about to be, engaged in conduct in violation of law, the stopping of an automobile by the police constitutes an impermissible seizure.

Id. at 563, 373 N.E.2d at 1220, 402 N.Y.S.2d at 996; *see also* People v. Ingle, 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975). The *Ingle* court noted that:

> A single automobile traveling on a public highway may be stopped for a 'routine traffic check' when a police officer reasonably suspects a violation of the Vehicle and Traffic Law. Absent reasonable suspicion of a vehicle violation, a 'routine traffic check' to determine whether or not a vehicle is being operated in compliance with the Vehicle and Traffic Law is permissible only when conducted according to nonarbitrary, nondiscriminatory, uniform procedures for detecting violations. It should be emphasized that, in the context of a motor vehicle inspection 'stop', the degree of suspicion required to justify the stop is minimal. Nothing like probable cause as that term is used in the criminal law is required.

Id. at 414-15, 330 N.E.2d at 40, 369 N.Y.S.2d at 69.

2574. 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375.

2575. *Id.* at 216, 352 N.E.2d at 567, 386 N.Y.S.2d at 380.

2576. *Id.* at 223, 352 N.E.2d at 571-72, 386 N.Y.S.2d at 384.

inquire.[2577] This level of intrusion gives the police officer the right to question a citizen, but does not rise to the level of a seizure.[2578] The third level of police intrusion is valid "[w]here a police officer entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor . . . ."[2579] In such a situation, a police officer has the authority to stop and frisk an individual.[2580] "Finally a police officer may arrest and take into custody a

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2577. *Id.* at 223, 352 N.E.2d at 572, 386 N.Y.S.2d at 385.

2578. *Id.*

2579. *Id.*; *see also* N.Y. CRIM. PROC. LAW § 140.50 (McKinney 1992). This section provides that:

1. 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.
2. Any person who is a peace officer and who provides security services for any court of the unified court system may stop a person in or about the courthouse to which he is assigned 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.
3. When upon stopping a person under circumstances prescribed in subdivisions 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.

Id.

2580. *De Bour*, 40 N.Y.2d at 223, 352 N.E.2d at 572, 386 N.Y.S.2d at 385.

person when he has probable cause to believe that person has committed a crime, or offense in his presence."[2581]

Based on the facts in *May*, the court found that the police officers "knew only that defendant and another person were sitting in a car parked on a desolate street, a fact which provided them with no information regarding criminality."[2582] The court further found defendant's pulling away from the curb did not create a "reasonable suspicion of criminal activity."[2583]

2581. *Id.*; *see also* N.Y. CRIM. PROC. LAW § 140.10 (McKinney 1992). Section 140.10 states that:

1. Subject to the provisions of subdivision two, a police officer may arrest a person for:
   (a) Any offense when he has reasonable cause to believe that such person has committed such offense in his presence; and
   (b) A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise.
2. A police officer may arrest a person for a petty offense, pursuant to subdivision one, only when:
   (a) Such offense was committed or believed by him to have been committed within the geographical area of such police officer's employment; and
   (b) Such arrest is made in the county in which such offense was committed or believed to have been committed or in an adjoining county; except that the police officer may follow such person in continuous close pursuit, commencing either in the county in which the offense was or is believed to have been committed or in an adjoining county, in and through any county of the state, and may arrest him in any county in which he apprehends him.
3. A police officer may arrest a person for a crime, pursuant to subdivision one, whether or not such crime was committed within the geographical area of such police officer's employment, and he may make such arrest within the state, regardless of the situs of the commission of the crime. In addition, he may, if necessary, pursue such person outside the state and may arrest him in any state the laws of which contain provisions equivalent to those of section 140.55.

Id.

2582. *May*, 81 N.Y.2d at 727-28, 609 N.E.2d at 115, 593 N.Y.S.2d at 762.

2583. *Id.* at 728, 609 N.E.2d at 115, 593 N.Y.S.2d at 762.

The court concluded its opinion by stating that its holding should not be construed such that a police officer "may not make a common-law inquiry of those in a vehicle based upon a founded suspicion . . . ."[2584] However,

> [t]he police may not forcibly detain civilians in order to question them . . . without a reasonable suspicion of criminal activity and once defendant indicated, by pulling away from the curb, that he did not wish to speak with the officers, they should not have forced him to stop without legal grounds to do so.[2585]

The reasoning behind this limitation, according to the court, lay in the belief that "[a]ny other rule would permit seizures solely if circumstances existed presenting a potential for danger."[2586]

In dissent, Judge Bellacosa stated that:

> [t]he officers did nothing unlawful, unreasonable, uncalled for or unconstitutional. The police should have the right to reasonably, peacefully and safely secure a potentially very dangerous situation like this while they do their jobs. The circumstances here were certainly suspicious and the police were attempting to conduct a concededly permissible standard motorist inquiry.[2587]

Judge Bellacosa based his dissent on the fact that the issue in *May* was not an inquiry under the third level of the *De Bour* model.[2588] Rather, he asserted that the inquiry should be analyzed from the perspective of the second tier, "common-law right of inquiry in an analogous police-civilian street encounter involving a vehicle."[2589] As noted in *De Bour*, this inquiry is "activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a police [officer] is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible

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2584. *Id.*

2585. *Id.*

2586. *Id.*

2587. *Id.* at 730, 609 N.E.2d at 116, 593 N.Y.S.2d at 763 (Bellacosa, J., dissenting) (citation omitted).

2588. *Id.* at 728, 609 N.E.2d at 115, 593 N.Y.S.2d at 762 (Bellacosa, J., dissenting).

2589. *Id.* (Bellacosa, J., dissenting).

seizure."[2590] The dissent agreed that the officers had the requisite "founded suspicion that criminal activity might be afoot and, therefore, only the common-law right of inquiry was activated."[2591] However, the order by the police officers for defendant "'to pull over' and the brief, ordinary inquiry addressed to the motorist was 'short of a forcible seizure' under our pertinent precedents for the purposes of the issue to be decided in this case."[2592] Thus, the dissent found that no seizure had occurred which would justify the suppression of evidence.[2593]

The United States Supreme Court has articulated the definition of a seizure in *Terry v. Ohio*.[2594] According to *Terry*, a person is seized within the meaning of the Fourth Amendment "whenever a police officer accosts an individual and restrains his freedom to walk away . . . ."[2595] The Court noted, however, that "[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."[2596] Thus, according to the United States Supreme Court, a seizure has been effectuated when an officer, by actual force or a display of authority, has restrained an individual's liberty.[2597]

2590. *De Bour*, 40 N.Y.2d at 223, 352 N.E.2d at 572, 386 N.Y.S.2d at 385.

2591. *May*, 81 N.Y.2d at 729, 609 N.E.2d at 116, 593 N.Y.S.2d at 763 (Bellacosa, J., dissenting).

2592. *Id.* Judge Bellacosa further stated that:

> The conduct of the officers, among the range of options available in the given circumstances, did not violate the "overriding requirement of reasonableness." Moreover, reversal in this case may engender new confusion and squeeze the commonsense meaning out of the common-law right to inquire where the individual to be inquired of happens to be in a vehicle.

Id.

2593. *Id.* (Bellacosa, J., dissenting).

2594. 392 U.S. 1 (1968).

2595. *Id.* at 16.

2596. *Id.* at 19 n.16.

2597. *Id.* at 16.

The *Terry* Court utilized an objective standard to determine the constitutionality of a police officer's actions. Thus, the necessary question is: "[W]ould the facts available to the officer at the moment of the seizure . . . 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"[2598] To answer this question, the *Terry* Court put forth a dual test to determine whether a seizure is reasonable or not. It stated that one must first determine whether the police officer's action was justified at its undertaking, and second, whether the seizure was "reasonably related in scope to the circumstances which justified the interference in the first place."[2599]

Under this federal analysis, it would be up to interpretation as to whether *Terry* would authorize the seizure of the defendant in *May*. While the police obviously used some show of authority by utilizing their turret lights and loudspeaker, the question of reasonableness of the seizure remains unanswered. In short, under both the State and Federal Constitutions, the key to the validity of a seizure is the circumstances surrounding the encounter.

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

People v. Bora[2600]
(decided March 13, 1993)

Defendant alleged that his State[2601] and Federal[2602] Constitutional right to remain free from unreasonable

2598. *Id.* at 21-22. The Court noted that "[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Id.* at 22.

2599. *Id.* at 19-20.

2600. 191 A.D.2d 384, 595 N.Y.S.2d 437 (1st Dep't), *leave to appeal granted by*, 81 N.Y.2d 1070, 619 N.E.2d 667, 601 N.Y.S.2d 589 (1993).

2601. N.Y. CONST. art. I, §12. Article I, § 12 provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and