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Search and Seizure: People v. Bora

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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. Bora²⁶⁰⁰
(decided March 13, 1993)

Defendant alleged that his State²⁶⁰¹ and Federal²⁶⁰² 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

governmental seizures was violated when the police approached him pursuant to an anonymous tip. The officers chased as defendant fled, dropping a bag containing 101 vials of crack cocaine, which the officers retrieved.²⁶⁰³ Because the officers had received and responded to a tip, and made observations to corroborate such tip, the court held that the police had a common-law right to inquire.²⁶⁰⁴ The court further held that the defendant's own behavior in refusing to respond to the police officer's requests to stop, in fleeing the scene, and in abandoning the cocaine during his flight, gave the police the requisite reasonable suspicion to pursue the defendant, and thereafter, to seize "the bag containing the vials of cocaine" ²⁶⁰⁵

While patrolling the streets in their automobile, two police officers received a report over their radio that an individual was in possession of a weapon and was selling drugs on a particular street corner known to those officers as a "drug-prone location."²⁶⁰⁶ The suspect was described as a "male black, wearing red and blue."²⁶⁰⁷ Responding to the call, the police went to the location and observed only one person out of ten who fit the radio description.²⁶⁰⁸ Officer Stuller, who was in uniform, got out of the car. As he approached defendant, the defendant started to walk away from the approaching officer.²⁶⁰⁹ The police officer told him to stop, but instead, defendant started

effects, against unreasonable searches and seizures, shall not be violated" *Id.*

2602. U.S. CONST. amend. IV. The Fourth Amendment provides 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" *Id.*

2603. *Bora*, 191 A.D.2d at 385, 595 N.Y.S.2d at 438.

2604. *Id.* at 386, 595 N.Y.S.2d at 439.

2605. *Id.* (citing *People v. Martinez*, 80 N.Y.2d 444, 447, 606 N.E.2d 951, 952, 591 N.Y.S.2d 823, 824 (1992); *People v. Leung*, 68 N.Y.2d 734, 736, 497 N.E.2d, 687, 688, 506 N.Y.S.2d 320, 321 (1986)).

2606. *Id.* at 385, 595 N.Y.S.2d at 438.

2607. *Id.*

2608. *Id.*

2609. *Id.*

running away; dropping the paper bag in the process.²⁶¹⁰ The officers picked up the bag and found that it contained 101 vials of cocaine.²⁶¹¹ Thereafter, the officers gave chase and arrested the defendant.²⁶¹²

The majority stated that an anonymous tip, including a general description and locale, such as the one repeated over the radio, to which the officers in the instant case responded, gave the police a “common-law right to inquire [that] . . . is activated by a founded suspicion that criminal activity is afoot”²⁶¹³ This allows the police “to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure.”²⁶¹⁴ Thus, the *Bora* court found that the anonymous tip, corroborated by observations of defendant in the location, gave rise to this common-law right to inquire.²⁶¹⁵

The court further reasoned that the suspicion raised by the corroborated tip, combined with the defendant’s flight, gave rise to the “reasonable suspicion necessary to pursue the defendant.”²⁶¹⁶ Concluding that the seizure of the defendant, based on the foregoing events, constituted “appropriate, lawful police conduct,” the majority held that the motion to suppress the bag and its illegal contents, abandoned by the defendant while he was in flight, was properly denied. Therefore, the court affirmed his conviction.²⁶¹⁷

²⁶¹⁰. *Id.*

²⁶¹¹. *Id.*

²⁶¹². *Id.*

²⁶¹³. *Id.* (quoting *People v. De Bour*, 40 N.Y.2d 210, 223, 352 N.E.2d 562, 572, 386 N.Y.S.2d 375, 384-85 (1976)) (citation omitted).

²⁶¹⁴. *Id.* (quoting *De Bour*, 40 N.Y.2d at 223, 352 N.E.2d at 572, 386 N.Y.S.2d at 385) (citation omitted).

²⁶¹⁵. *Id.* at 386, 595 N.Y.S.2d at 439.

²⁶¹⁶. *Id.* (citing *Martinez*, 80 N.Y.2d at 448, 606 N.E.2d at 953, 591 N.Y.S.2d at 825; *Leung*, 68 N.Y.2d at 736, 497 N.E.2d at 688, 506 N.Y.S.2d at 321; *People v. Wieder*, 172 A.D.2d 573, 574, 568 N.Y.S.2d 141, 141-42 (1991); *People v. Jackson*, 172 A.D.2d 561, 561-62, 567 N.Y.S.2d 887, 887-88 (1991)).

²⁶¹⁷. *Id.* In a concurring opinion, Judge Asch framed the issue as:

[W]hether a request by a policeman to ‘stop’ made to an individual who begins to walk away after the police approach to question him pursuant

In its reasoning, the court relied on *People v. Martinez*.²⁶¹⁸ The *Martinez* court upheld the standard that “the police may pursue a fleeing defendant if they have a reasonable suspicion that defendant has committed or is about to commit a crime.”²⁶¹⁹

to their common law right of inquiry, constitutes a ‘seizure’ of that individual in violation of his rights under [A]rticle 1, § 12 of the New York State Constitution

Id. at 387, 595 N.Y.S.2d at 439 (Asch, J., concurring). Judge Asch opined that the actions of the police in approaching the defendant to inquire did not rise to the level of a seizure, despite the fact that police uniforms and the directive to halt might be considered a “show of authority.” *Id.* at 387, 595 N.Y.S.2d at 440 (Asch, J., concurring) (citing *California v. Hodari D.*, 499 U.S. 621, 629 (1991)). Judge Asch pointed out that it remains an open question as to whether such pursuit would have been proper had the defendant merely walked away calmly, ignoring the officer’s directions to stop. *Id.* at 389, 595 N.Y.S.2d at 441 (Asch, J., concurring). He concluded that the answer to the issue he posed was that the exercise of the common-law right of the police to inquire, if based upon founded suspicion, is not a seizure under the New York State Constitution. *Id.* (Asch, J., concurring).

2618. 80 N.Y.2d 444, 606 N.E.2d 951, 591 N.Y.S.2d 823 (1992). Two police officers were patrolling in a high-crime area in a marked police car. *Id.* at 446, 606 N.E.2d at 951, 591 N.Y.S.2d at 823. The officers saw the defendant remove a hide-a-key box from above a store. *Id.* They watched the defendant for a short time more, and then got out of their car and approached the defendant. *Id.* at 446, 606 N.E.2d at 951-52, 591 N.Y.S.2d at 823-24. Although the officers were in plain clothes, one of the officers displayed a badge so that the defendant could see that he was an officer. *Id.* at 446, 606 N.E.2d at 951-52, 591 N.Y.S.2d at 823-24. The defendant ran into a grocery store, and the officers chased him inside. *Id.* at 446, 606 N.E.2d at 952, 591 N.Y.S.2d at 824. They saw the defendant pass the box to the codefendant, and the codefendant throw the box to the floor. *Id.* The officer retrieved the box, which contained 17 vials of crack cocaine. *Id.*

2619. *Id.* at 446, 606 N.E.2d at 952, 591 N.Y.S.2d at 824 (citing *People v. Leung*, 68 N.Y.2d 734, 736, 497 N.E.2d 687, 688, 506 N.Y.S.2d 320, 321 (1986)). The standard that governs police encounters with citizens is stated in *People v. De Bour*, 40 N.Y.2d 210, 223, 352 N.E.2d 562, 572, 386 N.Y.S.2d 375, 384-85 (1976). In that case, the court explained that there are four levels of intrusion.

The minimal intrusion of approaching to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality. The next degree, the common-law right to inquire, is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion

Based upon the facts of that case, the court held that it was proper for the police to retrieve a box which contained 17 vials of crack cocaine, which the defendant had thrown away while pursued by the police.²⁶²⁰

The federal standard in this area is stated in *California v. Hodari D.*,²⁶²¹ according to which, a seizure occurs where there has been a showing of “either physical force or . . . submission to the assertion of authority.”²⁶²² The *Hodari* Court held that no seizure of the defendant occurred where the officers tried to approach, but where the defendant ran away and did not respond to the officer’s request to stop.²⁶²³ According to the Court, since defendant did not submit to the police officers’ showing of authority, no seizure of the defendant took place when the officers told him to stop.²⁶²⁴ Therefore, the Court concluded that

in that a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure. Where a police officer entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor, the CPL authorizes a forcible stop and detention of that person. A corollary of the statutory right to temporarily detain for questioning is the authority to frisk if the officer reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed. Finally a police officer may arrest and take into custody a person when he has probable cause to believe that person has committed a crime, or offense in his presence.

Id. at 223, 352 N.E.2d at 571-72, 386 N.Y.S.2d at 384-85 (citations omitted).

2620. *Martinez*, 80 N.Y.2d at 448-49, 606 N.E.2d at 953, 591 N.Y.S.2d at 825.

2621. 499 U.S. 621 (1991). Police officers were doing routine patrol in a high crime area. *Id.* at 622. They were wearing jackets that had “Police” sewn on them, but otherwise were in plain clothes. *Id.* They were in an unmarked car and saw a group of young people in a circle, one of whom was Hodari. *Id.* As the police approached, everyone ran away, including Hodari. *Id.* at 622-23. One of the officers followed Hodari. *Id.* at 623. As the officer approached, Hodari threw away what looked like a rock. *Id.* The officer tackled Hodari and handcuffed him. *Id.* The rock was found to be crack cocaine. *Id.* Hodari was carrying \$130 in cash. *Id.*

2622. *Id.* at 626, 628.

2623. *Id.* at 629.

2624. *Id.*

the cocaine thrown away by the defendant was not obtained as the result of a seizure, and could be used at trial.²⁶²⁵

The state standard is more protective of the defendant because it requires the officer to have “reasonable suspicion” of criminal activity before there can be a constitutional seizure. Under the federal standard, a seizure does not occur unless the police officer actually touches the defendant, or the defendant submits to the officer’s verbal commands. The federal standard provides the police with more leeway than the state standard because a defendant’s act of running away is not considered submission to the officer, and therefore, no seizure exists.

People v. Monegro²⁶²⁶
(decided October 19, 1993)

The court reversed defendant’s conviction of criminal possession of a controlled substance in the second degree.²⁶²⁷ The issue was whether the police pursuit was one in which the warrant requirement could be dispensed with.²⁶²⁸ The court held that the pursuit was unconstitutional and a warrant was required.²⁶²⁹

In this case, there was a “verbal street corner argument” in which the defendant was involved.²⁶³⁰ The defendant left the scene and the officers pursued him, arrested him, and found drugs.²⁶³¹

The court stated that “[a]ll of defendant’s actions . . . were at least as capable of an innocent explanation as of indicating that he

²⁶²⁵. *Id.*

²⁶²⁶. 197 A.D.2d 437, 603 N.Y.S.2d 1 (1st Dep’t 1993).

²⁶²⁷. *Id.* at 437, 603 N.Y.S.2d at 2. *See* 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”); N.Y. CONST. art. I, § 12 (“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated”).

²⁶²⁸. *Monegro*, 197 A.D.2d at 437, 603 N.Y.S.2d at 2.

²⁶²⁹. *Id.*

²⁶³⁰. *Id.*

²⁶³¹. *Id.*