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Introduction

Not all police/citizen contacts require specific legal justification for the contact. However, most police/citizen contacts are not purely voluntary and do involve some degree of detention. To determine whether the encounter was lawful, courts examine whether the officer has effected a seizure, the motive for the contact, and the quantum of information (such as reasonable suspicion or probable cause) known to the officer at the time of the encounter. Courts generally describe police/citizen contacts by reference to one of three levels: level one, a purely voluntary encounter; level two, an investigative detention; and level three, a custodial arrest. Traffic detentions will be covered in a separate chapter.

Voluntary Encounters

Street contacts

An officer may approach a citizen and have a consensual conversation and ask questions without any level of suspicion—as long as no detention is involved. An officer/citizen contact remains "voluntary" as long as the officer does not restrict the freedom of the citizen, either by physical conduct or verbal direction. Another question courts consider in assessing the voluntariness of an officer/citizen contact is whether a reasonable person would feel free to turn and walk away from the encounter. As long as a reasonable person believes that he or she can "disregard the police and go about his or her business," the encounter remains voluntary. *Florida v. Bostick*, 501 U.S. 429 (1991). If a reasonable person in similar circumstances would not feel free to leave, then the encounter has turned into a "seizure." *United States v. Ringold*, 335 F.3d 1168 (10th Cir. 2003), *cert. denied*, 540 U.S. 1026 (2003). Simply asking a citizen for identification, without any command or show of force, remains a voluntary encounter. *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt County*, 542 U.S. 177 (2004) ("In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment."); *United States v. Drayton*, 536 U.S. 194 (2002). "A police officer does not have to inform the citizen they are free to disregard any further questioning for the encounter to be consensual." *United States v. Manjarrez*, 348 F.3d 881 (10th Cir. 2003), *cert. denied*, 541 U.S. 911 (2004).

The United States Supreme Court has ruled that mere questioning by police does not create a detention. *Muehler v. Mena*, 544 U.S. 93 (2005). The Supreme Court upheld the officers' questioning of Mena, whom they were detaining while officers executed a search warrant in her residence. Officers asked Mena questions about her immigration status during a search for weapons and suspects connected to a shooting. The lower court ruled that the officers were required to have independent reasonable suspicion in order to question her about her immigration status because her status was not related to the purpose of the search warrant. The Supreme Court reversed, holding that "mere police questioning does not constitute a seizure" under the Fourth Amendment. "Even when officers have no basis for suspecting a particular individual, they may generally ask questions of that

individual; ask to examine the individual's identification; and request consent to search his or her luggage." Though Mena was detained and handcuffed for approximately three hours, the questioning about her immigration status did not prolong her detention and did not create an additional seizure. Therefore, no independent reasonable suspicion was required to support the questioning. The Court relied on its decision in *Illinois v. Caballes*, wherein the Court ruled that conducting a drug detector dog sniff during a traffic stop does not violate the Fourth Amendment if it does not extend the stop beyond the time normally required to complete the purpose of the original detention. *Illinois v. Caballes*, 543 U.S. 405 (2005).

For example, an officer walks up to a group of high school students at a football game, suspicious that some of the students may have been throwing water balloons into the crowd. The officer greets the students and asks their names. As long as the officer does not do anything such as block the exit path, give nonverbal signals of detention, or use command language, the encounter remains voluntary. The officer may ask the students if they were involved in the balloon tossing or if they have any information, and still no detention will be created.

If the officer approaches the students and tells them not them not to move, or waves them to stop or come toward him, the officer has exercised enough control that the encounter may well be ruled a seizure. Thus, reasonable suspicion of criminal activity will be required to make the detention lawful. The difference between seizure and voluntary encounter, as well as the difference between encouraging cooperation or generating hostility, often depends on the officer's tone and language. Remember: you can be perfectly tactically aware with a smile on your face!

Community Caretaking

An officer may approach a person to check on the person's welfare, without any criminal investigative purpose, and the encounter is not an investigatory detention. For example, if an officer sees a person slumped over the steering wheel of a car with the engine running, the officer may check on the person's welfare without creating a detention. *In re Matter of Clayton*, 748 P.2d 401 (Idaho 1988). Knocking on the window, waking the person, and asking the person to step out and show identification will not create a detention when the purpose is to check on welfare. *People v. Murray*, 560 N.E.2d 309 (Ill. 1990); *State v. Kersh*, 313 N.W.2d 566 (Iowa 1981).

Officers found a crash victim seated, staring straight ahead, and completely unresponsive to questions about how he was doing. In an effort to find something that might explain the driver's odd condition and to find some identification, one of the officers opened the glove box and found an illegally possessed handgun. The court upheld the search under the community caretaker doctrine. Because there was no Fourth Amendment violation, the gun could be admitted into evidence against the driver. *United States v. Johnson*, 410 F.3d 137 (4th Cir. 2005).

Investigative Detention

Reasonable suspicion

An investigative detention must be based on reasonable suspicion of criminal activity. *United States v. Cortez*, 449 U.S. 411 (1981). The first question is whether there was even a seizure by the officer. If so, the second question is whether the seizure was supported by adequate reasonable suspicion.

What constitutes a "seizure"?

A seizure of a person occurs when a reasonable person, considering the totality of the circumstances, would not believe that he or she is free to leave. *Florida v. Royer*, 460 U.S. 493 (1991). A seizure does not automatically happen when a person flees from an officer. No seizure occurs until the officer touches the person in an attempt to seize him or her ("Tag, you're it!"), or until the person submits to the officer. *California v. Hodari D.*, 499 U.S. 621 (1991). A seizure is not accomplished until "there is a governmental termination of freedom of movement through means *intentionally applied*." *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). A person who flees upon seeing officers, without any commands or actions by officers, is not seized even when officers follow. *Michigan v. Chesternut*, 486 U.S. 567 (1988). However, even a brief submission to a command to stop—followed by immediate flight—can constitute a seizure, even though the officer may not have been able to grab the suspect. *United States v. Coggins*, 986 F.2d 651 (3d Cir. 1993). Other factors that would likely lead to a ruling that a seizure occurred, even when the subject did not try to flee, include the threatening presence of several officers, the display of a weapon by an officer, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *United States v. Mendenhall*, 446 U.S. 544 (1980).

Deciding when a reasonable innocent person would feel free to leave or to refuse an officer's request during an encounter is highly fact-dependent. For example, one court held that a man was not seized when several officers strode toward him and shouted loud commands. Officers were conducting directed enforcement in response to a request for additional patrol. The officers were aware the parking lot was the location of many fights and drug deals.

The officers saw Roberson and drove toward his car but did not block his exit path. They shone takedown and spotlights on Roberson and his companion. As two officers strode "resolutely" toward the car, Roberson hastily began shoving things under the seat. The officers told Roberson and his passenger to show their hands. The passenger immediately complied. The officers repeated their commands, drew their guns and advanced toward Roberson. Even facing drawn guns, Roberson continued to push something under the seat.

After three or four commands from the officers, Roberson put his hands on the steering wheel. The officers could smell marijuana coming from the car. They searched the car and found a gun under Roberson's seat where he had been making stuffing motions. They also found a bag of marijuana in the center console.

Roberson claimed that he was "seized" without reasonable suspicion, and that the drug and gun evidence should be suppressed. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that a "seizure" occurs when an "officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." Later, the Court held that a person is seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544 (1980).

Roberson claimed he was seized when officers shouted commands—before officers smelled the marijuana and before they had reasonable suspicion to seize him. Courts have found that blocking a person's path, holding onto a person's identification or other property, displaying pointed guns or using emergency lights can all lead to finding a person was seized. However, not every encounter where an officer gives instructions or asks questions means a person is actually seized.

Despite the number of officers and the use of spotlights and takedown lights, the court held Roberson was not seized at the time officers told him to show his hands. Foremost, Roberson didn't comply; he didn't submit to the officers' authority. The Supreme Court has held that there is no seizure when a person doesn't actually submit to the officers' commands or show of force. *Brendlin v. California*, 551 U.S. 249 (2007).

Two judges in the majority agreed that Roberson was not seized prior to the point that officers had reasonable suspicion of criminal activity. The concurring opinion went so far as to state that the officers' commands to show hands did not even constitute a show of authority. Additionally, the court felt the number of officers was reasonable when factoring the time of night and the high-crime location.

Though the officers were rightfully cautious, they were careful to not block Roberson in. Nor did they show force, drawing their weapons, until Roberson began stuffing something—later found to be a gun—under his seat. The concurring judge observed, "If there is a less 'intrusive' way to safely and effectively patrol such an area and conduct consensual interviews, it is not apparent to me." *United States v. Roberson*, 864 F.3d 1118 (10th Cir. 2017).

Concerned about gang members frequenting his business, the owner of a roller rink installed a metal detector at the entrance. The owner hired off-duty, uniformed police officers to staff the entrance and monitor the metal detector. No dump site for illegal weapons was provided. If a person approached the metal detector and decided to leave rather than pass through the detector, no officer would follow or stop the person. When a man holding cash and cocaine activated the metal detector, he was not "seized." When the man attempted to leave, was stopped by the off-duty officer and told to raise his hands, the man was "seized." *United States v. Ford*, 333 F.3d 839 (7th Cir. 2003).

A man was loading cardboard boxes into a car trunk. There had been several burglaries in the area. An officer drove by and saw the man at the same time that the man began to back out of the single-lane driveway. The officer pulled into the driveway, blocking the exit. The officer approached the car, and the man got out and walked up to the officer and produced identification without being asked to

do so. Shortly thereafter, the officer discovered a methamphetamine lab in the barn at the end of the driveway. The man was "seized" when the officer pulled into the driveway, blocking his exit. Thus, all information and evidence gathered after the seizure was suppressed because the court found that there was no reasonable suspicion for the seizure. *United States v. Kerr*, 817 F.2d 1384 (9th Cir. 1987).

What made the difference between the *Kerr* case's outcome and that of the following case? An officer stopped a car for speeding. While the officer wrote a warning and waited for computer warrant checks, the driver told the officer that he needed to use the bathroom. The officer told the driver that he was "free to go," and then followed him to a gas station. The officer told him that he would stop him again if the computer showed that he was a wanted person. The officer drove into the gas station parking lot and parked, though not directly behind the suspect's car. The officer approached the driver and told him that he had been informed of a criminal conviction for drug distribution. The officer asked for consent to search the car, and the driver refused. The driver then went into a restaurant. The officer called for a narcotics detector dog. A canine sniff indicated the odor of controlled substances. A warrant search subsequently revealed 20 pounds of marijuana in the car. The court refused to suppress the drugs, ruling that the driver was not seized at the time of the dog sniff or at the time of the search. *State v. Gronau,* 31 P.3d 601 (Utah App. 2001); *United States v. Ringold*, 335 F.3d 1168 (10th Cir. 2003) (driver not seized when officer parked at an angle to and not blocking the driver's car parked at gas station), *cert. denied*, 540 U.S. 1026 (2003).

A seizure of property, covered in depth in a later section, occurs when "there is some meaningful interference with an individual's possessory interests in that property." *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Jacobsen*, 466 U.S. 109 (1984).

What does "reasonable suspicion" mean?

An officer may stop a person when the officer has reasonable suspicion to believe that the person has committed or is committing or is attempting to commit a crime. *United States v. Jones*, 432 F.3d 34 (1st Cir. 2005). Courts have attempted to define reasonable suspicion on many occasions; however, no court has been able to provide a black-letter, one-size-fits-all definition of reasonable suspicion. "Articulating precisely what 'reasonable suspicion' means is not possible. It is a commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Illinois v. Gates*, 462 U.S. 213 (1983).

Reasonable suspicion is substantially less than probable cause and considerably less than proof of wrongdoing by preponderance of evidence. *Immigration & Naturalization Service v. Delgado*, 466 U.S. 210 (1984). Reasonable suspicion is always more than a simple "hunch" or "mere suspicion." *United States v. Williams*, 876 F.2d 1521 (11th Cir. 1989). Reasonable suspicion must be particular; that is, it must be directed at a specific person in order to detain that person. *Ybarra v. Illinois*, 444 U.S. 85 (1979).

Reasonable suspicion requires "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" a detention. *Terry v. Ohio*, 392 U.S. 1 (1968). Reasonable suspicion is measured by the "totality of the circumstances" and from the collective knowledge of the officers involved in the stop. *United States v. Sokolow*, 490 U.S. 1 (1989). Both the quantity and quality of the information are important to assessing reasonable suspicion. *United States v. Forte*, 412 F. Supp. 2d 258 (W.D.N.Y. 2006). Courts recognize that what may not be suspicious to a citizen could be suspicious to an officer. An officer is entitled to use experience and training in formulating reasonable suspicion to detain. *United States v. Tinoco*, 304 F.3d 1088 (11th Cir. 2002), *cert. denied sub nom. Hernandez v. United States*, 538 U.S. 909 (2003); *United States v. Williams*, 271 F.3d 1262 (10th Cir. 2001).

Can an officer demand that a person identify himself?

There is no expectation of privacy in one's identity. *Commonwealth v. Campbell*, 862 A.2d 659 (Pa. Super. 2004), *appeal denied*, 882 A.2d 1004 (Pa. 2005) ("A person's name, like his voice or handwriting, is revealed in a variety of daily interactions and there is no legitimate expectation of privacy associated with one's identity."). The United States Supreme Court has held that a person detained upon reasonable suspicion of criminal activity may be compelled to give his or her name. *United States v. Hiibel*, 543 U.S. 177 (2004). Nevada rancher Larry Hiibel was detained after a report that a man in a pickup truck was assaulting a woman. The officer asked for Hiibel's name, and Hiibel refused. As the officer tried to persuade Hiibel to identify himself, Hiibel put his hands behind his back and told the officer to arrest him and book him in jail. Hiibel claimed that he had done nothing illegal. He was convicted of willfully obstructing an officer. No charges of assault against the woman (who turned out to be his daughter) were filed. The Court stated: "Knowledge of identity may inform an officer that a suspect is wanted and help clear a suspect and allow the police to concentrate their efforts elsewhere."

Not all states have statutes requiring that a person identify himself or herself to law enforcement officers. Though *Hiibel* holds that there is no Fourth Amendment right to refuse to identify oneself, that does not mean that an officer may arrest for failure to identify. Such an arrest must be authorized by statute. *Kaufman v. Higgs*, 697 F.3d 1297 (10th Cir. 2012); *Marrs v. Tuckey*, 362 F. Supp. 2d 927 (E.D. Mich. 2005). The *Hiibel* decision does not go so far as to uphold a requirement that a suspect give an explanation of his or her actions, and the Fifth Amendment privilege against self-incrimination still applies. Thus, an officer may detain a person for failure to provide a name, assuming that there is reasonable suspicion of a criminal activity, but should not arrest a person for failure to provide a name, address, or explanation of actions without specific statutory authority. The detention can last as long as the officer is making reasonable efforts, through whatever means, to identify the suspect.

When an officer requests identification documents from a person, the documents should be returned as soon as possible. Consider writing down the name, date of birth, and driver license number and immediately returning it to

the person. Holding onto the license may itself create a seizure where no seizure is intended. *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Mendez*, 118 F.3d 1426 (10th Cir. 1997) ("officer must return a driver's documentation before the detention can end"); *United States v. Turner*, 928 F.2d 956 (10th Cir. 1991) ("If the officer retains the driver's license, he or she must have reasonable and articulable suspicion to question the driver about drugs or weapons."), *cert. denied*, 502 U.S. 881 (1991). Not all courts share this view. The Fourth Circuit Court of Appeals noted that "while it is without question that a driver's license is one of the most valuable pieces of personal identification possessed by any citizen, it does not logically follow that any time an officer retains someone's driver's license that such retention blossoms into an unconstitutional seizure. Under the totality of the circumstances, however, something more is required." *United States v. Weaver*, 282 F.3d 302 (4th Cir.), *cert. denied*, 537 U.S. 847 (2002).

How long may a reasonable suspicion detention last?

A detention may last as long as it takes to investigate the circumstances that led to the initial stop. However, even a momentary detention requires reasonable suspicion. *Florida v. Royer*, 460 U.S. 491 (1983). The detention may be extended if the officer develops additional reasonable suspicion of criminal activity. While investigating the original reason for the detention, the wise approach is to limit the intrusiveness and the length of the detention as much as possible while keeping the officer and public safe.

Many courts have found 20 minutes to be a reasonable amount of time for an investigative detention. However, the Supreme Court has refused to set any hard-and-fast time limit on the length of an investigative stop, ruling that whether the stop is too long depends on the circumstances of each case. *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Soto-Cervantes*, 138 F.3d 1319 (10th Cir. 1998). Even longer detentions may be appropriate when calling for a drug detector dog (*see* Canine Search chapter). A key issue is whether officers are "diligently pursuing their investigation." Extending the detention beyond the time required to investigate may diminish the reasonableness of the detention. *Byndloss v. State*, 893 A.2d 1119 (Md. 2006).

Sources of reasonable suspicion

Reasonable suspicion usually arises from a number of related factors. Even if each fact appears to have an innocent and legitimate explanation, courts look at the totality of the circumstances, including the officer's training and experience. *United States v. Sokolow*, 490 U.S. 1 (1989); *Oliver v. Woods*, 209 F.3d 1179 (10th Cir. 2000). The fact that an event may have an innocent explanation does not necessarily defeat a conclusion of reasonable suspicion. *Cibula v. Driver and Motor Vehicle Services Branch*, 123 P.3d 382 (Or. App. 2005), *cert. denied*, 132 P.3d 28 (Or. 2006). Factors that commonly lead to reasonable suspicion include:

- **Time of day.** Obviously, a person loitering outside a business late at night when the business is closed is more suspicious than a person hanging around the front door when the business is open or is about to open.

Bennett v. City of Eastpointe, 410 F.3d 810 (6th Cir. 2005). Courts are generally more likely to find reasonable suspicion in late-night and early-morning stops. Being in a high-crime area late at night, without other indicators of criminal activity, may not be enough for a detention. *Brown v. Texas*, 443 U.S. 47 (1979).

- **Dress.** A person in a black ninja suit will surely generate suspicion at any time of day (except, perhaps, while near a martial arts studio). *People v. Jackson*, 742 P.2d 929 (Colo. App. 1987). Almost as suspicious is a person wearing unusually heavy or bulky clothing in warm weather. *United States v. Williams*, 714 F.2d 777 (8th Cir. 1983).
- **Suspicious conduct.** The *Terry* decision was based on a case where a veteran detective saw suspicious behavior, believed that a crime was about to occur, and detained and frisked a suspect. An officer may, indeed must, apply experience and training to determine whether conduct is "suspicious." *United States v. Lujan*, 188 F.3d 520 (10th Cir. 1999).
- **Crimes in the area.** The crime history of an area, particularly recently reported criminal activity, is an important factor in assessing reasonable suspicion. *State v. Griffin*, 61 P.3d 112 (Kan. App. 2003). There may also be correlation between the type of crime (auto burglaries), the suspect (a person walking alone with tools in his back pocket), and the conduct (walking through the aisles of a parking lot) to further add to the reasonable suspicion. Mere presence in a high-crime area is not sufficient suspicion for a detention. *Illinois v. Wardlow*, 528 U.S. 119 (2000).
- **Location.** A person walking in a Wal-Mart parking lot will be less suspicious than a person walking through a manufacturing business parking lot, particularly if it is not a meal or break time at the manufacturing plant. If the area is fenced and the property owner has posted trespass warnings, the presence of a person in the area may be a more significant factor. *Griffin v. Runyon*, 2006 WL 1344818 (M.D. Ga. 2006) (climbing residential yard fence a factor in reasonable suspicion calculation); *State v. Little*, 806 P.2d 749 (Wash. 1991) (breaching posted trespass warnings contributes to reasonable suspicion).
- **Known criminal history.** *State v. Thirty Thousand Six Hundred Sixty Dollars*, 136 S.W.3d 392 (Tex. App. 2004). Any reasonable officer will be very interested in the activity of a person previously convicted of burglary when the officer spots the convicted burglar in a neighborhood other than the burglar's. Similarly, a registered sex offender might arouse particular suspicions at a park or school function. Knowledge of a criminal history by itself usually will not justify a detention. *United States v. Johnson*, 427 F.3d 1053 (7th Cir. 2005).
- **Tips.** The Supreme Court of the United States has rejected the argument "that reasonable cause for a[n investigative stop] can only be based on the officer's personal observation, rather than on information supplied by another person." *Navarette v. California*, 572 U.S. 393, 397 (2014). While an anonymous tipster's veracity is "by hypothesis largely unknown, and unknowable," but, "under appropriate circumstances, an anonymous tip

can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.'" *Id.* In this case, an anonymous caller reported that she was run off the road. *See id.* at 399. The caller described the truck, had the license plate number, her personal knowledge of the driving, and the mile marker. *See id.* at 395. The Court concluded that the call bore adequate indicia of reliability for the officer to credit the caller's account; therefore, the officer was justified in pulling over the truck. *See id.* at 398. However, a "bare-bones" tip from an anonymous source that provided no details about how the source knew about the gun, no predictions of future behavior of the suspect, and did not actually see the gun was not reliable to justify investigative detention. *See Florida v. J.L.,* 529 U.S. 266 (2000). The more detailed, the more recent, and the more reliable the source, the stronger the reasonable suspicion. *Commonwealth v. Kelly*, 180 S.W.3d 474 (Ky. 2005).

- **Nervousness.** Considered by itself, nervous behavior at the sight of law enforcement officers is *never* enough to create reasonable suspicion to detain. Many people who are violating no law become nervous around law enforcement officers. Even so, an officer should not discount an averted gaze, changed direction, lack of eye contact, or other nervous behavior. Nervousness is of "limited significance" in the reasonable suspicion calculation. *United States v. Wood*, 106 F.3d 942 (10th Cir. 1997). Refusal to voluntarily cooperate with officers also cannot establish reasonable suspicion.
- **Unprovoked flight upon seeing police.** *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Whitfield v. Commonwealth*, 576 S.E.2d 463 (Va. 2003) (flight when illuminated by police car spotlight); *Wilson v. United States*, 802 A.2d 367 (D.C. 2002) (suspect twice walking rapidly away from different sets of officers within moments held to justify stop). As repeatedly cited by the United States Supreme Court, "The wicked flee when no man pursueth." *Illinois v. Wardlow*, 528 U.S. 119 (2000) (quoting *Proverbs* 28:1). Although running from the police cannot, by itself, constitute reasonable suspicion to detain, it is a significant factor.
- **Walking away from officers.** A suspect's attempt to walk away has been held to be a valid factor supporting a finding of reasonable suspicion. *United States v. Holloway*, 962 F.2d 451 (5th Cir. 1992); *Lee v. Immigration and Naturalization Service*, 590 F.2d 497 (3d Cir. 1979).
- **Wanted flyers.** As long as the issuing officer or agency has reasonable suspicion to issue a wanted flyer or radio broadcast, a person meeting the description may be stopped and detained in order to determine identity and involvement in the crime under investigation. *Ornelas v. United States*, 517 U.S. 690 (1996).
- **Collective knowledge of multiple officers.** "Officers are entitled to rely upon information relayed to them by other officers in determining whether reasonable suspicion exists to justify an investigative detention." *United States v. Mullane*, 123 Fed. Appx. 877 (10th Cir. 2005); *United States v. Cervine*, 347 F.3d 865 (10th Cir. 2003) (In determining reasonable suspi-