CHAPTER 5

SEARCH AND SEIZURE

5.1 GENERAL CONSIDERATIONS

5.101 Themes. The Supreme Court and appellate courts analyzed Fourth Amendment issues largely through the lens of the "reasonable expectation of privacy" doctrine articulated in *Katz v. United States*[1] in the years that followed the ruling. More recently, the Supreme Court placed increased emphasis on the pre-*Katz*, property-based analysis, focusing on governmental intrusion on private property and trespassory conduct by law enforcement, although certainly not abandoning the principles applied in *Katz* and its progeny.[2] "The *Katz* reasonable-expectations test 'has been added to, not substituted for,' the traditional property-based understanding of the Fourth Amendment . . . ."[3]

Emerging technologies, sophisticated forms of surveillance and tracking, and evolving means of acquiring evidence will continue to change Fourth Amendment jurisprudence. Appellate courts, often wrestling with the application of the Fourth Amendment years after the technology or methods at issue are obsolete or outdated, will continue to create some degree of unpredictability for both the government and citizens with respect to the validity of a particular search when using contemporary technologies to obtain evidence.

While the constitutional landscape changed in recent years with respect to the Fourth Amendment, so has the Commonwealth of Virginia from a statutory perspective. The Virginia legislature recently enacted significant statutory changes regarding searches, seizures, warrants, primary offenses, consent, and available remedies when law enforcement violates certain statutes.

This chapter seeks to provide a general overview of the Fourth Amendment, with insight into applicable case law and statutes within the Commonwealth. The authors do not intend, nor endeavor, to create a comprehensive

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[1] 389 U.S. 347 (1967).

[2] *See, e.g.*, *Florida v. Jardines*, 569 U.S. 1, 11 (2013); *United States v. Jones*, 565 U.S. 400 (2012).

[3] *Jardines*, 569 U.S. at 11 (emphasis in original).

review of the Fourth Amendment here. To do so would require significantly more than a chapter. However, we do attempt to provide readers with a basic outline of the aforementioned topics, specifically focusing on Virginia practice and procedure, hopefully allowing practitioners to "issue spot" and find direction on an array of search and seizure topics rooted in both case law and the Virginia Code.

5.102 Fourth Amendment Continuum and Seizures.

A. In General. Many interactions between law enforcement and a citizen will take place on a continuum under the Fourth Amendment. The Fourth Amendment, however, does not shield a citizen from a truly consensual interaction with law enforcement. An officer may approach anyone and strike up a voluntary conversation. The nature of that interaction, the manner of approach, how the parties are physically situated, the display of weapons, the number of law enforcement officers, and a variety of other factors may change the nature of that conversation from a consensual interaction to a seizure or, perhaps, an arrest. Notably, the terms "seizure" and "arrest" are not fungible under the Fourth Amendment. While every arrest is a seizure, the opposite is not true. Similarly, a party that is "detained" is not necessarily "in custody" for Fourth Amendment purposes.

The Supreme Court recognizes three forms of interactions between the police and citizens: (i) brief consensual encounters, requiring no objective justification or suspicion; (ii) brief investigatory stops, supported by reasonable articulable suspicion; and (iii) an arrest, supported by probable cause.[4] What begins as a consensual encounter may evolve into an investigatory stop or arrest, depending on the dynamics of the interaction.

B. Seizures and the Exclusionary Rule. Although covered more thoroughly elsewhere in this chapter, a brief note on the exclusionary rule is prudent here. Why does the nature of an interaction between law enforcement and a citizen and where it falls on our continuum matter? Why do we care about how and when evidence is seized or obtained? Ultimately, and subject to various exceptions expanded on in this chapter, evidence and statements obtained during unconstitutional police-citizen encounters is subject to potential suppression. Simply put, unconstitutionally obtained evidence, subject to numerous exceptions of course, typically cannot be used during the prosecution of the aggrieved party's criminal case.

[4] *Branham v. Commonwealth*, 283 Va. 273, 279, 720 S.E.2d 74, 77 (2012) (citations omitted).

To deter misconduct by law enforcement, and subject to several exceptions discussed herein, the United States Supreme Court adopted a prophylactic approach toward unconstitutionally obtained evidence stemming from unlawful seizures, sometimes requiring the exclusion of evidence and their direct "fruits." The exclusionary rule is not a constitutional right, but a judicially created mechanism for deterring unconstitutional police conduct. The Court has rejected a broad "[i]ndiscriminate application" of the rule, applying it when the "deterrence benefits outweigh the 'substantial social costs.'"[5] The Court's cases "hold that society must swallow this bitter pill when necessary, but only as a 'last resort.'"[6]

However, the violation of statutory rights or obligations by law enforcement does not automatically create a suppression remedy for a defendant. "[U]nless the statute expressly provides for an evidentiary exclusion remedy," a violation of a statute does not require suppression of "the offending evidence."[7] "[T]he Virginia Supreme Court has consistently declined to impose an exclusionary rule where no deprivation of the defendant's constitutional rights occurred."[8] Notably, the General Assembly recently created statutory suppression remedies for violations of search warrant protocol, secondary offenses, and searches based upon the odor of marijuana, discussed more thoroughly below.

C. Consensual Encounters. Not every citizen encounter with law enforcement will rise to a seizure for Fourth Amendment purposes. Voluntary conversation and questioning does not constitute a seizure, and an officer's words and conduct must be evaluated to determine if the encounter transitions to an involuntary interaction.

A consensual encounter occurs when an officer approaches "to ask [the party] questions" if "a reasonable person would understand that he or she could refuse to cooperate."[9] Consensual encounters remain consensual "as long as the citizen voluntarily cooperates with the police."[10] The application of

[5] *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (citing *United States v. Leon*, 468 U.S. 897 (1984)).

[6] *Davis v. United States*, 564 U.S. 229, 237 (2011) (citations omitted).

[7] *Park v. Commonwealth*, 74 Va. App. 635, 648-49, 871 S.E.2d 629, 635 (2022) (quoting *Seaton v. Commonwealth*, 42 Va. App. 739, 757 n.7, 595 S.E.2d 9, 17 n.7 (2004)).

[8] *Thompson v. Commonwealth*, 10 Va. App. 117, 122, 390 S.E.2d 198, 201 (1990).

[9] *Payne v. Commonwealth*, 14 Va. App. 86, 88, 414 S.E.2d 869, 870 (1992) (citations omitted).

[10] *Id.* (citations omitted).

Fourth Amendment scrutiny only occurs when the encounter "loses its consensual nature."[11] If the questioned person "remains free to disregard the questions and walk away," the interaction does not constitute a seizure as long as there is no "demonstrable restriction on the person's liberty."[12]

Consensual questioning does not create a seizure even when there is a request for identification.[13] The Supreme Court "acknowledge[s] that most individuals will feel obligated to respond when asked questions by a police officer, but . . . that . . . fact alone will not convert a consensual encounter into a seizure."[14] An encounter between the police and a citizen does not constitute a seizure unless, "taking into account all the circumstances of the encounter, 'a reasonable person would . . . believe[] that he was not free to leave.'"[15]

5.103 What Is a Seizure?

A. In General. Prior to expanding on these police-citizen encounters, identifying what constitutes a seizure is necessary. True constitutional scrutiny begins when an actual seizure takes place (namely, something other than a consensual encounter). A seizure occurs in one of three ways (or a combination thereof):

1. The application of physical force or acquisition of the person by law enforcement;[16]

2. Submission of the person to a claim of law enforcement authority;[17] or

3. Facts and circumstances that indicate, objectively, that a person is not free to leave.[18]

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[11] *Id.*

[12] *Montague v. Commonwealth*, 278 Va. 532, 539, 684 S.E.2d 583, 587 (2009).

[13] *Branham v. Commonwealth*, 283 Va. 273, 279, 720 S.E.2d 74, 77 (2012).

[14] *Montague*, 278 Va. at 538, 684 S.E.2d at 587.

[15] *Id.* at 539, 684 S.E.2d at 587 (citations omitted).

[16] *Brower v. County of Inyo*, 489 U.S. 593 (1989).

[17] *California v. Hodari*, 499 U.S. 621 (1991); *Hill v. Commonwealth*, 297 Va. 804, 832 S.E.2d 33 (2019).

[18] *United States v. Mendenhall*, 446 U.S. 544 (1980).

B. Investigatory Stops: Reasonable Articulable Suspicion. Law enforcement may conduct a limited and temporary detention of a person based on less than probable cause (namely, reasonable articulable suspicion) in order to confirm or dispel that criminal activity is afoot.[19] Those brief investigatory detentions are known as "*Terry* stops."

Reasonable suspicion to justify a *Terry* stop requires that officers have a "'particularized and objective basis for suspecting the particular person stopped' of breaking the law."[20] The justification for the brief stop "must be based upon specific and articulable facts of criminal activity."[21] Reviewing courts determine whether reasonable suspicion exists for suspected wrongdoing based upon the totality of circumstances, considering the whole picture, and taking into account the particular officer's experience.[22]

Additional principles also guide the court's inquiry when determining whether a *Terry* stop was constitutionally sound. "First, the facts and circumstances on which the officer relies must have been available to him at the moment of the stop, not discovered thereafter."[23] Second, although the officer's experience contributes to the inquiry, "the officer's subjective thoughts are irrelevant."[24] "The test is not what the officer thought, but rather whether the facts and circumstances apparent to him at the time of the stop were such as to create in the mind of a reasonable officer in the same position a suspicion that a violation of the law was occurring or was about to occur."[25]

Although the disruption of an ongoing crime warrants a seizure based upon reasonable articulable suspicion, a seizure is also permitted if a person is about to commit a crime. "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."[26]

Importantly, an officer does not need to observe any elements of a crime or be investigating a particular crime to conduct a limited detention. "A

[19] *Terry v. Ohio*, 392 U.S. 1 (1968).

[20] *Mason v. Commonwealth*, 291 Va. 362, 368, 786 S.E.2d 148, 151 (2016) (citations omitted).

[21] *Id.* (citations omitted).

[22] *Id.*

[23] *Id.*; *see Terry*, 392 U.S. at 21-22.

[24] *Mason v. Commonwealth*, 291 Va. at 368, 786 S.E.2d at 151 (citations omitted).

[25] *Id.* (citations omitted).

[26] *United States v. Cortez*, 449 U.S. 411, 417 (1981).

general suspicion of some criminal activity is enough, as long as the officer can, based on the circumstances before him at the time, articulate a reasonable basis for his suspicion."[27] The observation of otherwise innocuous or lawful behavior may still contribute to the formation of reasonable articulable suspicion.[28] In *Terry*, "an investigative stop was held objectively reasonable where the officer observed no elements of any crime whatever, but only an entirely lawful course of conduct which gave rise to a reasonable suspicion that the defendant was *preparing to commit a crime*."[29] "[T]he relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts."[30]

C. Investigatory Stops: Frisks. Practitioners and law enforcement officers alike sometimes fail to recognize that an initial justification for an investigatory detention does not automatically justify a frisk that often follows the initial seizure. Law enforcement must be able to articulate facts justifying both the initial detention and, if applicable, the associated frisk.

The primary focus of a protective frisk in the context of a *Terry* stop is the officer's safety and "the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him."[31] The same reasonable articulable threshold for the initial seizure also applies to frisks. Whether a suspect "may have been" or "could have been" armed, based upon reasonable articulable suspicion, "reflect[s] the appropriate probabilistic formulation" when scrutinizing a frisk for weapons.[32]

The reasonable suspicion standard articulated in *Terry* is intended to "to govern an officer's protected interest in assuring his own safety."[33] In *Terry*, a 30-year department veteran observed "curious back-and-forth movements by the men on a public walkway while peering into a store window," prompting the officer to believe that a potential "stick-up" may ensue and that

[27] *Hatcher v. Commonwealth*, 14 Va. App. 487, 490, 419 S.E.2d 256, 258 (1992).

[28] *United States v. Sokolow*, 490 U.S. 1, 5, 8-11 (1989).

[29] *Mason*, 291 Va. at 369, 786 S.E.2d at 152 (emphasis added); *see Terry v. Ohio*, 392 U.S. 1, 23, 28 (1968).

[30] *Sokolow*, 490 U.S. at 10 (citation omitted).

[31] *Terry*, 392 U.S. at 23; *Hill v. Commonwealth*, 297 Va. 804, 813-15, 832 S.E.2d 33, 38-39 (2019).

[32] *Hill*, 297 Va. at 815, 832 S.E.2d at 39.

[33] *Id.* at 813-14, 832 S.E.2d at 38.