



LGIT'S ROLL CALL REPORTER **AUGUST 2006**

A POLICE-CITIZEN ENCOUNTER DURING WHICH THE OFFICER COMMUNICATES THROUGH WORDS OR ACTIONS THAT THE CITIZEN IS NOT FREE TO LEAVE IS A SEIZURE UNDER THE FOURTH AMENDMENT

QUESTION: Is police-citizen contact that does not involve physical restraint, but communicates to the citizen that he or she is not free to leave, a consensual encounter or a seizure under the Fourth Amendment?

ANSWER: If a reasonable person in the place of the citizen would not have felt free to leave, a seizure under the Fourth Amendment has occurred. A consensual encounter between officer and citizen is merely the voluntary cooperation of the citizen in response to non-coercive questioning by the officer. The citizen remains free not to answer and walk away at any time. If by physical force or show of police authority, however, a reasonable person in the citizen's place would not feel free to decline the officer's requests and leave, the citizen has been "seized" within the meaning of the Fourth Amendment.

CASE: *Swift v. State*, No. 98, Sept. Term, 2005, Court of Appeals of Maryland
Decided June 2, 2006

In *Swift v. State*, the Court of Appeals of Maryland was called upon to determine whether the police-citizen contact under review was a consensual encounter which did not implicate the Fourth Amendment, or whether the citizen had been "seized" within the meaning of the Fourth Amendment, requiring the officer to have had a reasonable suspicion of criminal activity or probable cause to arrest.

The facts in *Swift* established that on August 9, 2003, Deputy Jason Dykes was on routine patrol, in uniform, in a marked police cruiser in Fruitland, Maryland. At approximately 3:13 a.m., Deputy Dykes was patrolling a location he characterized as a high crime area with an open air drug market. He first saw Logan Swift in this area walking northbound on Poplar Street toward Elizabeth Street. Deputy Dykes observed Swift approximately three times within the three to five minutes he was patrolling the area. Deputy Dykes noted that Swift continually looked over his shoulder at him each time he drove by. Swift was walking five feet from the edge of the pavement, in the direction of any oncoming traffic. As Swift was walking on the side of Elizabeth Street, Deputy Dykes stopped his cruiser about ten feet in front of him. Deputy Dykes did not activate his emergency equipment or his siren, nor did he draw his weapon, but his headlights were on, shining in Swift's direction. Swift continued to walk toward the deputy's car, and the deputy, with his gun holstered, exited his car and asked Swift for permission to talk to him "in order to perform a field interview stop" and obtain Swift's information. Deputy Dykes observed that Swift

was wearing a black ball cap and a long white tee shirt that concealed his waistband. The area was fairly dark, and the deputy and Swift were the only two individuals on the street. Swift agreed to speak to the deputy, who asked him for his identification. Swift produced his identification and Deputy Dykes called in a wanted check over his radio. Swift was not restrained and was standing about two feet away from the deputy. Another officer contacted Deputy Dykes by radio and informed him that Swift was “known for drugs and weapons”. In response, Deputy Dykes asked Swift if he had any weapons or drugs on his person, and Swift said that he did not. Swift said only that he was on his way home. Deputy Dykes then asked Swift if he could search him. Swift did not reply, but removed some money from his pocket, and placed his hands on the hood of the deputy’s car. Deputy Dykes viewed Swift’s actions as consent, and moved forward to conduct a pat down. Before the deputy could begin the pat down, Swift suddenly pushed off from the hood and fled. Deputy Dykes pursued on foot, caught Swift, and placed him under arrest. Another officer arrived and searched Swift. During the search, the officer recovered four individually wrapped, small bags of crack cocaine in Swift’s pant leg and eighty dollars. Swift was charged with possession of controlled dangerous substance with intent to distribute and related offenses.

Prior to his criminal trial, Swift moved to suppress the controlled dangerous substances seized from him, contending that he had been unreasonably seized in violation of the Fourth Amendment. The circuit court denied Swift’s motion, finding that, based upon the totality of the circumstances, “there was a voluntary encounter, an accosting, a field interview, whatever term you want to place on it, but it’s one which I think a reasonable person under the facts of this case would have felt free to leave. . . .” Swift proceeded to trial on a not guilty plea, agreed statement of facts, and was found guilty of possession of a controlled dangerous substance. The Court of Special Appeals affirmed the conviction, and the Court of Appeals agreed to review the case.

After briefing and oral argument, the Court of Appeals ordered the reversal of the conviction for possession of a controlled dangerous substance. It did so on grounds that the facts established that the contact between Deputy Dykes and Swift was not a consensual encounter, and that Swift’s cooperation with the deputy, such as it was, was the result of coercive police tactics. The court concluded that, because a reasonable person in Swift’s position would not have felt free to leave under the circumstances, and because the deputy lacked any reasonable suspicion to stop Swift, the Fourth Amendment had been violated. Consequently, the contraband seized from Swift’s person should have been suppressed.

In reaching its conclusion, the court reviewed the law governing police-citizen encounters. The court noted that many courts analyze the applicability of the Fourth Amendment in terms of three tiers of interaction between citizen and police. The first, and most intrusive, interaction is an arrest, which must be based upon probable cause. The second tier of interaction is the investigatory stop or detention, known commonly as the *Terry* stop. This type of detention must be based upon a reasonable, articulable suspicion of criminal activity. The third, and least intrusive, police-citizen contact, and the type involved in *Swift*, is the consensual encounter, which involves no restraint of liberty and seeks an individual’s voluntary cooperation through non-coercive police contact. Encounters are consensual where the police merely approach a person in a public place, engage the person in conversation, request information, and the person is free not to answer and walk away. A consensual encounter need not be supported by any suspicion, and, because an individual is free to leave at any time during the encounter, the Fourth Amendment

does not apply because no “seizure” has occurred. The Fourth Amendment would apply to a consensual encounter only if, at some point, the officer, by physical force or other show of authority, restrained the person’s liberty so that a reasonable person would not feel free to leave. The test for determining whether police-citizen contact is a consensual encounter or a seizure takes into account all of the circumstances. If the police conduct had communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business, and the person yielded to the officer’s requests, a seizure would have occurred.

In the *Swift* case, the Court of Appeals’ conclusion that a seizure had occurred was based upon the following factors: the time of night of the encounter, the deputy’s conduct before he approached Swift, the blocking of Swift’s path with the police cruiser, the headlights shining on Swift, the deputy’s testimony that he was conducting an investigatory field stop, the fact that Swift was never told he was free to leave, the request for the warrant check, and the implication from the deputy’s testimony that Swift was not free to leave until the warrant check had been completed. These facts, taken together, led the court to conclude that Swift had been seized without reasonable suspicion or probable cause.

NOTE: It should be noted that the individual components of the encounter between Deputy Dykes and Swift, when viewed in isolation, did not establish a seizure. For example, the Fourth Amendment does not prevent an officer from approaching an individual and seeking permission to ask a few questions. An officer may also ask a person for identification. And simply conducting a warrants check does not create a seizure. This said, however, the test to determine whether a seizure has occurred takes into account *all* of the circumstances surrounding the incident, and certain police actions do communicate that a person is not free to leave. Examples include activation of a siren or flashers, commanding a citizen to halt, a display of weapons, and the operation of a police car in an aggressive manner to block a person’s course or otherwise control direction or speed of the person’s movement. Courts will also assess the time and place of the encounter, the number of officers present and whether they were uniformed, whether the police removed the person to a different location or isolated him or her from others, whether the person was informed that he or she was free to leave, whether the police indicated that the person was suspected of a crime, whether the police retained the person’s identification documents, and whether the police exhibited threatening behavior or physical contact that would suggest to a reasonable person that he or she was not free to leave. If a consensual encounter is converted into an investigatory stop or detention, the officer must have a reasonable suspicion to do so. If such encounter is converted to an arrest, the officer must have probable cause.

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