



LGIT'S ROLL CALL REPORTER OCTOBER 2009

Merely Detaining A Suspect Based Upon Probable Cause Does Not Mean That An Arrest Has Been Made

QUESTION: If an officer briefly detains a suspect based upon probable cause, is the detention automatically considered a custodial arrest?

ANSWER: No. For an arrest to occur there must be intent to arrest under police authority, accompanied by a seizure or detention of the suspect, which is understood by the person arrested. Merely detaining a suspect upon probable cause and then releasing him may not be deemed an arrest if the officer's objective actions during the encounter did not clearly reflect an intent to arrest. Under such circumstances, the officer's subjective intent in detaining the suspect becomes more significant.

CASE: *Antonio Belote v. State*, Court of Appeals of Maryland
Decided October 13, 2009

In this case, the Court of Appeals, in the context of an arrest made two months after the suspect's encounter with the police, was called upon to consider the requirements of a custodial arrest. The facts established that on the night of July 21, 2006, Salisbury Police Officer James D. Russell was on bicycle patrol near Baker Street, a part of a neighborhood that was known for open-air drug transactions and recently had been the site of several shootings. Antonio Belote and Kevin Lacato were in the immediate vicinity, seated next to one another on a porch. Officer Russell recognized Lacato and believed there was an outstanding warrant for his arrest. As Officer Russell approached Lacato, he smelled a strong odor of raw marijuana emanating from Belote. Officer Russell asked Belote if he had anything on him that he needed to know about, and Belote said he had nothing. Officer Russell patted Belote down for weapons, and, as he did so, he noticed a bulge in one of Belote's pockets. Officer Russell removed what turned out to be a bag of marijuana from Belote's pocket. The bag contained six individually wrapped bags of marijuana. Because he was on bicycle patrol, and because Belote had no weapons, Officer Russell simply seized the marijuana and completed an application for statement of charges approximately two months later. Belote was charged with Possession with the Intent to Distribute Marijuana. On October 12, 2006, Belote was taken into custody pursuant to the arrest warrant.

Prior to his criminal trial, Belote moved to suppress the evidence. During his testimony, Officer Russell testified that he did not place Belote under arrest on the date of the search and seizure. The circuit court, however, denied the motion on grounds that the search of

Belote's pockets was incident to a lawful arrest. The court reasoned that, despite the testimony concerning the absence of an arrest, Officer Russell had probable cause to arrest Belote based upon the odor of raw marijuana coming from Belote's person. The fact that the arrest was not made until months later had no bearing on the validity of the search. Belote was found guilty and sentenced to five years' imprisonment, with all but eighteen months suspended. Belote appealed.

On appeal, the Court of Special Appeals affirmed the judgment of conviction. The Court of Appeals then agreed to review the case. The Court of Appeals reversed the judgment of conviction. It did so upon examination of the cases in which the elements of a custodial arrest had been established. In Maryland, an arrest ordinarily requires: (1) an intent to arrest; (2) under a real or pretended authority; (3) accompanied by a seizure or detention of the person; and (4) which is understood by the person arrested. There are both objective and subjective considerations in determining whether a custodial arrest has been made. If, however, an officer's objective conduct (such as announcing "You're under arrest" or removing a handcuffed suspect from the scene) demonstrates the intent to arrest, then a reviewing court will be far less concerned with what the officer was actually thinking. In other words, actions speak louder than intentions. Guided by these principles, the Court of Appeals concluded that Officer Russell's encounter with Belote did not result in an arrest. After retrieving the marijuana, Officer Russell had not taken Belote into custody; instead, he let him continue on his way. Nothing in the record demonstrated that Officer Russell ever informed Belote that he was under arrest or that he had been placed in handcuffs. There also was no indication that Belote's identification or address was obtained or verified for later contact. As to Officer Russell's subjective intent, he testified at the suppression hearing that he had not arrested Belote that night. In light of this evidence, the Court could not conclude from Officer's Russell's conduct that he had arrested Belote. Absent an arrest, the search of Belote's pockets could not be justified as a search incident to arrest. For this reason, the search and seizure violated the Fourth Amendment.

NOTE: It should be noted that the circuit court found that Officer Russell lacked "reasonable suspicion" to conduct a *Terry* frisk for weapons, a conclusion agreed with by the appellate courts. The *Terry* frisk was invalid because Officer Russell had no reasonable, articulable suspicion to believe that Belote was armed and dangerous at the time he began the frisk. The "bulge" in Belote's pocket was observed only *after* the frisk was underway. Of equal importance is the impact of this case on police task force operations, during which a suspect or suspects may be released after drug buys to avoid alerting other potential drug dealers to the task force's operations. In regards to these operations, the Court of Appeals stated that "task force operations that conduct 'mass sweeps' after a custodial arrest are still valid in Maryland." However, this pronouncement rests upon specific undercover investigative procedures generally utilized during task force operations. These procedures include: the initial physical restraint of the suspect by members of the "identification teams"; the request for the suspect's identification; detaining the suspect for a period of time to determine his/her identification when none is provided; searching the suspect's person; photographing the suspect; and filling out an identification form for later use in the charging process. These

procedures, often utilized at the scenes of undercover buys, make the officers' intent to effect an arrest quite clear, despite the fact that the suspect is released. If there had been evidence in this case that Officer Russell had taken similar actions in regards to Belote, the outcome likely would have been different.

By John F. Breads, Jr., Director of Legal Services, Local Government Insurance Trust

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