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Criminal Procedure - Fourth Amendment Requirement of Probable Cause for Custodial Interrogation - Dunaway v. New York

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CRIMINAL PROCEDURE—FOURTH AMENDMENT REQUIREMENT OF PROBABLE CAUSE FOR CUSTODIAL INTERROGATION —*Dunaway v. New York*, 442 U.S. 200 (1979).

On March 26, 1971, an attempted robbery of a pizza parlor in Rochester, New York, resulted in the proprietor of the establishment being killed. Five months later, pursuant to information from another police officer that an informant had provided a possible lead to the crime, a detective from the Rochester Police Department questioned the informant. Another informant, himself an inmate awaiting trial for burglary, was also questioned and was unable to give the detective enough information from which to obtain a warrant for petitioner Dunaway's arrest.[1] Nevertheless, the detective ordered other detectives to "pick up" Dunaway and "bring him in."

Three detectives located Dunaway at a neighbor's house and took him "into custody."[2] He was not told that he was under arrest, although he would have been physically restrained if he had attempted to leave.[3] He was taken by the officers in a police car to police headquarters and placed in an interrogation room. After being questioned Dunaway made inculpatory statements and drew sketches pertaining to the crime. Prior to any questions being asked of him, however, he was given *Miranda*[4] warnings, whereupon he waived counsel and answered questions of the officers.[5]

At his trial for attempted robbery and felony murder, Dunaway moved to suppress the statements[6] and sketches. His motion was de-

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[1]An informant told another detective that a James Cole had stated that he and a man whose first name was Irving were involved in the crime. The informant identified Dunaway from the police file photos. Upon learning this information, a detective interviewed Cole. Cole denied that he had been involved in the crime, but said that he had been told about it by an inmate named Hubert Adams. Adams had supposedly mentioned to Cole that Adams' brother had told Adams that he and a man named Irving, who was also known as "Axelrod," were involved in the crime. Dunaway v. New York, 442 U.S. 200, 203 n.1 (1979).

[2]*Id.* at 203.

[3]*Id.*

[4]Miranda v. Arizona, 384 U.S. 436 (1966). Generally, *Miranda* emphasized the constitutional protections of the right to remain silent, the right to consult with an attorney and have him present during questioning, and the right to have counsel appointed if an accused cannot afford to hire his own. *Miranda* further requires an affirmative acknowledgment that one understands his rights, combined with a knowing, willing, and intelligent waiver of these rights.
Id.

[5]442 U.S. at 203.

[6]*Id.* Dunaway made one statement within an hour after being picked up and being placed in the interrogation room. The following morning he made a second, more complete statement. *Id.* at 203 n.2.

nied and he was convicted.[7] Initially, the New York Supreme Court, Appellate Division, and the New York Court of Appeals affirmed the conviction without opinion.[8] The United States Supreme Court granted certiorari, vacated the judgment, and remanded the case[9] for further consideration in light of the Court's intervening decision in *Brown v. Illinois*.[10]

Upon remand the trial court was directed to make further factual findings as to whether there had been a detention of Dunaway, and whether there had been probable cause for such detention.[11] Further, the trial court was directed, in the event that there had been a detention without probable cause, to determine the further question of whether the confessions were then tainted by the illegal arrest or whether they had been sufficiently removed so as to purge the taint.[12]

The trial court, subsequent to a supplementary suppression hearing, determined that Dunaway's motion to suppress had merit although the confessions were made in full compliance with *Miranda v. Arizona*.[13] The trial court held that the police lacked probable cause sufficient to support Dunaway's arrest and further, that the compliance with *Miranda*, by itself, did not purge the taint of the defendant's illegal arrest.[14] The court rejected the state's reliance and argument on *People v. Morales*[15] as a justification for Dunaway's detention; the argument being that the detention had been only investigatory and outside the requirement of probable cause for arrest. Accordingly, Dunaway's motion to suppress was then granted.[16]

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[7]*Id.* at 203.

[8]People v. Dunaway, 42 App. Div. 2d 689, 346 N.Y.S.2d 779 (1973), *aff'd*, 35 N.Y.2d 741, 320 N.E.2d 646, 361 N.Y.S.2d 912 (1974).

[9]422 U.S. 1053 (1975).

[10]422 U.S. 590 (1975). Brown was formerly arrested on less than probable cause, received *Miranda* warnings, confessed and was convicted. The Court reversed, holding that in order to use a confession obtained following an illegal arrest, it must be shown that the confession met fifth amendment standards of voluntariness and that the causal connection between the illegal arrest and the confession was sufficiently broken to purge the primary taint of the illegal arrest. *Id.* at 601-04.

[11]38 N.Y.2d 812, 813-14, 345 N.E.2d 583, 583-84. 382 N.Y.S.2d 40, 40-41 (1975).

[12]*Id.*

[13]384 U.S. 436.

[14]442 U.S. at 205.

[15]22 N.Y.2d 55, 238 N.E.2d 307, 290 N.Y.S.2d 898 (1968). The New York Court of Appeals upheld Morales' conviction and custodial questioning as being investigatory and not requiring probable cause. *Id.* at 64-65, 238 N.E.2d at 314, 290 N.Y.S.2d at 907-08. The United States Supreme Court vacated and remanded, but reserved the issue of what constitutes investigatory detention, which is the same issue in the instant case. Morales v. New York, 396 U.S. 102, 105-06 (1969). Upon remand, the New York courts determined that Morales had gone to police headquarters and submitted to questioning voluntarily. People v. Morales, 42 N.Y.2d 129, 366 N.E.2d 248, 397 N.Y.S.2d 587 (1977), *cert. denied*, 434 U.S. 1018 (1978).

[16]442 U.S. at 206.

A divided state appellate division reversed.[17] The appellate division majority relied on the New York Court of Appeals' reaffirmation in *Morales* that, "[l]aw enforcement officials may detain an individual upon reasonable suspicion for questioning for a reasonable and brief period of time under carefully controlled conditions which are ample to protect the individual's Fifth and Sixth Amendment rights."[18] The appellate division further held that if Dunaway's detention were illegal, the taint of that illegal detention was sufficiently purged to allow admission of the sketches and statements into evidence. The New York Court of Appeals dismissed Dunaway's application for leave to appeal.[19]

The United States Supreme Court once again granted certiorari "to clarify the Fourth Amendment's requirements as to the permissible grounds for custodial interrogation."[20] The Court viewed the intrusion to Dunaway's privacy as a seizure of his person and it said that his seizure was for all practical purposes indistinguishable from a traditional arrest. The Court explained this viewpoint by discussing the "facts" surrounding his arrest, i.e. he was not questioned where he was found, he was taken from a friend's house, transported in a police car and placed in an interrogation room and never informed that he was "free to go," and if he had attempted to leave, he would have been restrained. The Court continued its analysis by a historical overview of the requirement of probable cause saying that probable cause had roots deep in American history and hostility to seizures made "on mere suspicion was a prime motivation for the adoption of the Fourth Amendment."[21]

The Court stated that a seizure of persons, including investigatory detention for custodial interrogation, is only "reasonable" if supported by probable cause, unless the seizure falls within the narrowly defined limitations emphasized in cases employing a balancing test.[22]

The Court quoted from two decisions it had rendered since *Terry v. Ohio*[23] which confirm the conclusion that the treatment of the petitioner, whether technically characterized as an arrest, must be supported by probable cause.[24]

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[17]61 App. Div. 2d 299, 402 N.Y.S.2d 490 (1978).

[18]*Id.* at 302, 402 N.Y.S.2d at 492 (quoting People v. Morales, 42 N.Y.2d at 135, 366 N.E.2d at 251, 397 N.Y.S.2d at 590 and later quoted in Dunaway v. New York, 442 U.S. at 206).

[19]442 U.S. at 206.

[20]*Id.*

[21]*Id.* at 213.

[22]*Id.* at 214. Cases that have applied a balancing test include: Delaware v. Prouse, 440 U.S. 648 (1979); Pennsylvania v. Mimms, 434 U.S. 106 (1977); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1 (1968).

[23]392 U.S. 1 (1968).

[24]442 U.S. at 214.

Quoting from *Davis v. Mississippi*,[25] the Court said:

> [T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harrassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'[26]

The Court reviewed *Brown v. Illinois*[27] and stated that in that case:

> The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was 'for investigation' or for 'questioning' . . . . The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up.[28]

The Court concluded that any detention for custodial interrogation requires police to have probable cause prior thereto. Therefore, the Rochester police violated the fourth and fourteenth amendments when they seized the petitioner without probable cause and transported him to police headquarters for interrogation.[29] The Court ruled that Dunaway's confessions and sketches were not admissible since there had been no intervening event sufficient to break the connection between his "illegal detention" and his confessions. Accordingly, the Court reversed his conviction.[30]

Mr. Justice Rehnquist, who was joined by Mr. Chief Justice Burger, dissented maintaining that if the majority had done no more than decide the legality of custodial questioning on less than probable cause for a full arrest he could have agreed with the Court. However, since the majority did not decide the custodial questioning issue, but rather held that there had been a "seizure" within the meaning of the fourth amendment and that the evidence was tainted, the majority had failed to answer the question that they had proposed to answer.[31]

ANALYSIS

The Court determined that Dunaway had in fact been "seized" within the meaning of the fourth amendment. Accordingly the evi-

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[25]394 U.S. 721 (1969).

[26]442 U.S. at 214-15 (quoting Davis v. Mississippi, 394 U.S. at 726-27).

[27]422 U.S. at 590 (1975).

[28]*Id.* at 605, *quoted in* 442 U.S. at 216.

[29]442 U.S. at 216.

[30]*Id.* at 218-19.

[31]442 U.S. at 22 (Rehnquist, J., dissenting) (quoting Morales v. New York, 396 U.S. at 106).

dence against him, his confessions and sketches, were suppressed as being tainted by an illegal arrest; such evidence having failed to be sufficiently purged so as to dissipate the taint of the illegal arrest.[32]

Further, the Court purports "to clarify the Fourth Amendment's requirements as to the permissible grounds for custodial interrogation . . . ."[33] And finally, the Court attempts to compare the instant case with that of *Brown*,[34] and to distinguish the instant case from those cases employing a balancing test.[35]

It is the author's opinion that the Court's decision fails to take into account several factors. First, it fails to distinguish arrest, and the elements of arrest, from investigative procedure. Secondly, the Court mistakenly compares facts of the instant case with those in *Brown*. Finally, the Court fails to decide the issue at bar and to clarify the "grounds" for anything other than actual arrest.

Police investigative powers

Criminal investigation involves the gathering of facts for the purpose of protecting citizens and solving crimes. Generally, police officers have four basic investigative powers.[36] These powers are stop, frisk,[37] question, and detain. It is well established that police officers may temporarily detain and question suspects during the general investigation of a crime.

Terry v. Ohio[38] established the test for determining when police-citizen encounters become a restraint sufficient to be a seizure under the prescription of the fourth amendment. A seizure occurs when an officer by means of physical force or by a show of authority has in some manner restrained the liberty of a citizen.[39]

Reviewing the guarantee against unreasonable seizures of persons, it is noted that prior to *Terry*, this safeguard was analyzed in terms of arrest, the probable cause supporting that arrest, and the warrants

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[32]*Id.*

[33]*Id.* at 206.

[34]*Id.* at 215-19.

[35]*Id.* at 208-14.

[36]J. CREAMER, THE LAW OF ARREST, SEARCH, AND SEIZURE 22, 40 (1968). These four investigative powers are listed under the heading of investigative powers and are distinguished from the arrest powers of police which are search, seizure, and force-restraint. It is noted that although these investigative powers and arrest powers are not per se itemized, they are each referred to and distinguished from one another in *Terry v. Ohio*, 392 U.S. 1.

[37]It should be noted that in order for a police officer to conduct a lawful frisk of an individual, the officer must follow the prerequisites established in *Terry*. These prerequisites are that the officer have some valid reason for stopping the individual and some reason to fear for his (the officer's) safety. In other words the officer must reasonably suspect that the individual is concealing a weapon on his person. Probable cause is not required to frisk.

[38]392 U.S. 1.

[39]*Id.* at 19 n.16.

based upon probable cause.[40] The term "arrest" was synonymous with, and construed to be "those seizures governed by the Fourth Amendment."[41] And whereas warrants were not required in every situation,[42] the requirement of probable cause was treated as an absolute necessity.[43]

The Court recognized for the first time in *Terry* an exception to the absolute requirement of probable cause prior to seizures of persons. The Court established a narrow exception to permit an officer to search for weapons when the officer has reason to believe that "he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime."[44] This limited intrusion for the protection of the officer was balanced against the privacy rights of the individual suspect and the necessity of protecting the officer was found to outweigh the intrusion.

In *Escobedo v. Illinois*,[45] the Court was asked to decide at what point in police investigatory procedure a suspect's right to counsel under the sixth amendment attached. The Court held that when the police investigation shifts from that of a general nature and begins to focus its attention in an accusatory manner on the particular suspect, the suspect must be given the warnings under guidelines later set out in *Miranda*, or anything else the suspect may say during questioning may not be used as evidence against him.[46]

In *Davis*, cited by the Court majority in the instant case, an "investigatory detention" was held unreasonable and therefore prohibited by the fourth amendment. The case involved a young black youth who was indiscriminately "picked up," as were other young blacks, and subjected to interrogation and fingerprinting for the purpose of matching the fingerprints with those taken from the crime scene in an effort to find a suspect. There was no probable cause for any of the seizures and the state, at no time, asserted or offered evidence that Davis voluntarily accompanied police.[47] The police simply went out and picked up everyone they saw who possibly matched the description of a "young black man."

Since *Terry* the Court has held that on the basis of an informant's unverified tip, a police officer was justified in the forcible stop and

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[40]*See e.g.*, Carroll v. United States, 267 U.S. 132 (1925).

[41]442 U.S. at 208.

[42]*See e.g.*, United States v. Watson, 423 U.S. 411 (1976); Warden v. Hayden, 387 U.S. 294 (1967).

[43]*See e.g.*, Ker v. California, 374 U.S. 23 (1963); Henry v. United States, 361 U.S. 98 (1959); Johnson v. United States, 333 U.S. 10 (1948).

[44]392 U.S. at 27.

[45]378 U.S. 478 (1963).

[46]*Id.* at 490-91.

[47]394 U.S. at 728.

seizure of a person for the purpose of frisking him for narcotics and a gun.[48] Mr. Chief Justice Burger recently stated:

> We have recognized that in some circumstances an officer may detain a suspect briefly for questioning although he does not have 'probable cause' to believe that the suspect is involved in criminal activity, as is required for a traditional arrest. . . . However, we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.[49]

The Court recently decided several cases regarding investigative stops of vehicles and persons. In each of the cases[50] the one significant common factor was an actual restraint or seizure of the person during the initial stage of police contact. In the cases examined, regardless of whether the seizure was physical, forceful, temporary, flagrantly unreasonable, or one requiring a balance of interests, each case "lived or died" on the determination as to the reasonableness of the seizure under the fourth amendment. The cases where seizure was held unconstitutional were cases involving involuntary submission[51] to authority or questioning rather than voluntary submission[52] as in the instant case. To the contrary, all the cases involving voluntary submissions were held to be constitutional.[53]

Proper investigation v. improper seizure

It can be argued that the instant case, and *Morales v. New York*, and many other cases involving police investigations are not seizures and do not fall within the purview of the fourth amendment at the initial stage of the police encounter.[54]

The question of whether a person's assent to accompany a police officer becomes a "seizure" within the fourth amendment or whether it is simply a voluntary proceeding is determined by the police officer's conduct; that is, whether the officer's conduct is coercive or phys-

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[48]Adams v. Williams, 407 U.S. 143 (1972).

[49]Brown v. Texas, 443 U.S. 47, 51 (1979).

[50]443 U.S. 47; Delaware v. Prouse, 440 U.S. 648; United States v. Martinez-Fuerte, 428 U.S. 543; United States v. Brignoni-Ponce, 422 U.S. 873.

[51]*See e.g.*, Delaware v. Prouse, 440 U.S. 648; Brown v. Illinois, 422 U.S. 590; Davis v. Mississippi, 394 U.S. 721.

[52]*See e.g.*, People v. Morales, 42 N.Y.2d 129, 366 N.E.2d 248, 397 N.Y.S.2d 587 (1977). After remand from the United States Supreme Court the trial court determined that Morales had voluntarily submitted himself to police for questioning and this decision was upheld by the appellate division and by the state supreme court.

[53]Pennsylvania v. Minns, 434 U.S. 106; United States v. Martinez-Fuerte, 428 U.S. 543; United States v. Brignoni-Ponce, 422 U.S. 873; Adams v. Williams, 407 U.S. 143.

[54]*Compare* United States v. Martinez-Fuerte, 428 U.S. 543; United States v. Brignoni-Ponce, 422 U.S. 873; Adams v. Williams, 407 U.S. 143; Terry v. Ohio, 392 U.S. 1; Warden v. Hayden, 387 U.S. 294.

ically threatening, or is authoritative enough on a person's freedom so as to render him "in custody."[55]

The United States Court of Appeals for the Ninth Circuit in 1968 stated that "brief, informal detentions for a limited inquiry are not arrests and the peace officer need not possess the probable cause necessary to make an arrest."[56] It is submitted that this decision correctly states the law of police investigatory procedure, as previously established by the United States Supreme Court.

It is a common police procedure to investigate crimes by approaching witnesses and possible suspects and inquiring as to whether they are willing to answer questions pertaining to a particular matter.[57] An officer cannot indiscriminantly stop and question citizens. However, where there is a sufficient reason, such as a reasonable suspicion or where the public safety and security demands, reasonable inquiries into the identity of persons and their reasons for being where they are have generally been upheld. These inquiries are generally referred to as field interviews.[58]

In addition to the above mentioned investigative powers, police officers have three arrest powers. The arrest powers are (a) forces, (b) search, and (c) seizure or restraint.[59] Anytime an officer uses one of these powers he has made an arrest, and unless that arrest is justified by sufficient probable cause prior to invoking the power, the arrest is illegal.[60]

To better understand the exact nature of an arrest and to better illuminate the Court's failure to distinguish *Dunaway's* so-called seizure from that of a real arrest, it is appropriate to examine the four basic elements of a criminal arrest. First, the person making the arrest must have the lawful authority to do so (authority vested in him by common law or statute). Second, there must be an intent to use this authority by the person making the arrest. Third, there must be an actual or constructive seizure or restraint of the person to be arrested. Fourth, there must be a comprehension and understanding by the ar-

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[55]*See generally* Oregon v. Mathiason, 429 U.S. 492 (1977); Terry v. Ohio, 392 U.S. 1. The court in *Mathiason* defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 429 U.S. at 495 (citing Miranda v. Arizona, 384 U.S. at 444).

[56]Wartson v. United States, 400 F.2d 25, 28 (9th Cir. 1968).

[57]*See generally* I. GARDNER & V. MANIAN, PRINCIPALS AND CASES OF THE LAW OF ARREST, SEARCH, AND SEIZURE (1974); K. MCCREEDY, THEORY AND METHODS OF POLICE PATROL (1974); INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, THE PATROL OPERATION (2d ed. 1970).

[58]392 U.S. at 14, 26-27. *Compare* People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), *cert. denied*, 379 U.S. 978 (1965), for an excellent discussion of this subject matter.

[59]J. CREAMER, *supra* note 36, at 50.

[60]U.S. CONST. amend. IV. *See* 392 U.S. at 22.

rested person of the fact that he is being arrested and why he is being arrested.[61] Arrest does not include the questioning of a witness to a crime who is not in custody. Only when custody occurs does the "stopping" of a person escalate to the status of an arrest.[62]

A defendant does not have a constitutional right to be arrested. For example, in *Hoffa v. United States*,[63] the defendant argued that once police had sufficient probable cause to arrest him, they were required to do so, and any evidence collected after they had probable cause to arrest was inadmissible because he was not given fifth and sixth amendment warnings. The Court rejected this argument and said that police do not have to guess at the precise moment when they have probable cause to arrest a suspect.[64] Police risk violating the fourth amendment requirement of prior, sufficient probable cause if they act too soon and risk violation of the sixth amendment right to counsel if they wait too long. Law enforcement officials are under no constitutional duty to halt a criminal investigation the moment they have the minimum evidence to establish probable cause.

In a six-three decision the Court in *Adams v. Williams*,[65] extended and reaffirmed stop and frisk as a legitimate police power. Of even more importance however was the Court's discussion of a policeman's duty to follow up information given to him by an informant about a crime. In *Adams*, an officer was informed that a man seated in a car was armed with a pistol and had narcotics in his possession. The person was seated in the front passenger seat of the car. The officer went to the car, tapped on the window and told the defendant to roll the window down. When the window was rolled down the officer immediately reached in and seized a gun from the waistband of the defendant's trousers. The officer arrested the suspect. A search was then made of the defendant and the automobile. A machete was found under the front seat. Twenty-one cellophane packets of white powder were found in the defendant's wallet and six packets were found in a jar in the defendant's coat pocket. Ten of the packets contained heroin.

The Court upheld the arrest and seizure of evidence.[66] It is to be noted however, that the initial contact was nothing more than an officer's investigation based on an informant's unverified tip. The Court stated that the fourth amendment does not require a policeman who

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[61]Gustafson v. State, 243 So. 2d 615, 618 (Fla. Dist. Ct. App. 1971) (citing Melton v. State, 75 So. 2d 291 (Fla. 1954)). Note that *Gustafson* was subsequently appealed to the United States Supreme Court, which held that a full search of a person made incident to a lawful custodial arrest did not violate the fourth and fourteenth amendments. Gustafson v. Florida, 414 U.S. 260 (1973).

[62]392 U.S. at 16.

[63]385 U.S. 293 (1966).

[64]*Id.* at 310.

[65]407 U.S. 143 (1972).

[66]*Id.* at 147-49.

lacks the precise level of information necessary for probable cause for arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. The Court stated that a brief stop of a suspicious individual may be reasonable in light of the facts known to the officer at the time.[67]

In *Beckwith v. United States*,[68] the Court reviewed a tax fraud prosecution and conviction wherein IRS agents went to a man's house and advised him they were agents and were investigating possible criminal violations involving him. The agents did not, per se, advise the man of the *Miranda* warnings, although they did read certain fifth and sixth amendment rights to him. The man answered questions for approximately three hours and made certain statements. The man later, at the agent's request, went to his place of business, where he supplied certain books and records to the agents. At his trial, the district court denied his motion to suppress and the court of appeals affirmed his conviction.[69]

The United States Supreme Court, in affirming the court of appeals, distinguished the "non-custodial police investigation" from the "custodial-type" investigation requiring *Miranda* warnings.[70] The Court again stated that the "critical stage" when the investigation begins to "focus" on the particular individual only occurs when "questioning [is] initiated by law enforcement officers *after* a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[71] The Court recognized that there were some situations where non-custodial interrogation might lead to confessions not freely self-determined, but the IRS case was not one of that type because "the entire interview was free of coercion."[72]

Scrutinizing the majority opinion

In *Dunaway*, the majority relied heavily on the conclusion of the trial court. It must be noted that the trial court was reversed twice, and after remand, it changed its earlier position and held that Dunaway had been unlawfully detained without probable cause.[73] It is likewise interesting to note that the majority ignores the recital of the officer's testimony by the New York Appellate Division, wherein it is shown that Dunaway voluntarily agreed to accompany the officers and to talk with them.[74]

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[67]*Id.* at 146.

[68]425 U.S. 341 (1976).

[69]United States v. Beckwith, 510 F.2d 741 (1975).

[70]425 U.S. at 344.

[71]*Id.* at 347 (quoting Miranda v. Arizona, 384 U.S at 444).

[72]*Id.* at 348 (citing with approval language from the court of appeals, 510 F.2d at 743).

[73]442 U.S. at 205-06.

[74]61 App. Div. 2d 299, 301-02, 492 N.Y.S.2d 490, 492 (1978).

The Court indicated that the constitutional propriety of an investigative seizure upon less than probable cause for purposes of detention and/or interrogation were not specifically addressed in *Terry*.[75] The Court refused the State of New York's urging that the balancing test of *Terry* and its progeny[76] applied to the instant case. The Court reasoned that "[t]he narrow intrusions involved in those cases were judged by a balancing test"[77] rather than the traditional requirement of probable cause because the limited intrusions in *Terry* and following cases "fell far short of the kind of intrusions associated with an arrest."[78] However, the constitutional propriety of investigative seizures on less than probable cause, as heretofore shown, is exactly what *Terry* addressed. Furthermore, the actions of the IRS agents in *Beckwith* were much more involved, more accusatory and more probing than the actions of the officers in the instant case. Likewise, *Beckwith* appears to be more "custodial" in nature.

Petitioner Dunaway was not seized within the meaning of the fourth amendment. He was neither "seized without probable cause," nor "illegally detained." In fact, Dunaway was not "seized" nor "detained," lawfully or unlawfully, within the legal definition of those words. Detention, when applied to persons, implies that the person has been in some manner prevented against his will from going where he desires.[79]

As Mr. Justice Rehnquist reasonably observes in his dissent to the instant case:

> There is obviously nothing in the Fourth Amendment that prohibits police from calling from their vehicle to a particular individual on the street and asking him to come over and talk with them; nor is there anything in the Fourth Amendment that prevents the police from knocking on the door of a person's house and when the person answers the door, inquiring whether he is willing to answer questions they wish to put to him. 'Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons.' [Citation omitted.] Voluntary questioning not involving any seizure for Fourth Amendment purposes may take place under any number of varying circumstances. And the occasions will not be few when a particular individual agrees voluntarily to answer questions that the police wish to put to him either on the street, at the station, or in his house, and later regrets his willingness to answer those questions. However, such morning-after regrets do not render involuntary responses that they were voluntary at the time they were made.[80]

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[75]442 U.S. at 210 n.12.

[76]*See* note 22, *supra*.

[77]442 U.S. at 212.

[78]*Id.*

[79]Everett, Ridley & Co. v. Holcomb, 1 Ga. App. 794, 58 S.E. 287, 289 (1907).

[80]442 U.S. at 222 (Rehnquist, J., dissenting).

When the police officers went to interview Dunaway they searched for him at a neighbor's house. Dunaway answered the door, whereupon the officer identified himself and asked him his name. Then the officer asked Dunaway if he would accompany the officers to police headquarters for questioning. Dunaway agreed. He was not arrested. Neither was he informed of arrest, nor warned not to resist or flee. No weapons were displayed by the officers and Dunaway was not handcuffed. Dunaway was not touched, nor was his freedom of action restrained by the police in any way.[81]

It is noteworthy that in *Brown*, contrary to the Court's factual comparison with *Dunaway*, two detectives of the Chicago police broke into Brown's apartment and searched it. When Brown entered the apartment, he was told that he was under arrest, and was searched at gunpoint. Brown was then handcuffed and transported by police vehicle to police headquarters where he was interrogated.[82]

The real issue in *Dunaway* is whether or not he was arrested. It is submitted that from the evidence, the testimony, and the facts surrounding the initial encounter, that Dunaway was not arrested. The officer's words and acts did not indicate any intent to exercise his lawful authority to arrest, nor could Dunaway have understood that he was "under arrest."

"As a general rule, every person who is arrested and transported in a police vehicle should be handcuffed. The officer has a responsibility not only to himself but to the person he has arrested."[83] In a custody situation an officer "is dealing with an unknown human variable and cannot be too cautious."[84] Even a docile drunk may be a wanted felon, or may become violent. Further, since handcuffing eliminates the possibility of suicide, an officer does not have to face the difficult task of explaining how a person in custody was able to take his own life while in police custody. "The handcuffed suspect presents less danger to himself and the officer."[85] It can be assumed that if detectives, dispatched to bring in a suspect thought to be guilty of attempted robbery and felony murder, reasonably believed that the suspect was a prime suspect, thereby "focusing" on him, they would at least draw their guns and handcuff him.

In its eagerness to examine causal connections between confessions and accusatory restraints or "custodial interrogations" resulting in confessions after an illegal arrest, the Court failed to distinguish between actual "seizures" of persons and investigative procedures, where police officers, during investigations of a general nature, go out and question

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[81] *Id.* at 222-23.

[82] 422 U.S. at 593.

[83] K. McCREEDY, THEORY AND METHODS OF POLICE PATROL, 97 (1974).

[84] *Id.*

[85] *Id.*

witnesses and possible suspects who are willing to answer questions in a "non-custodial" situation.

The Court has failed to "clarify the Fourth Amendment's requirements as to the permissible grounds for custodial interrogation . . . ."[86] The majority has in fact held that detention for custodial interrogation intrudes so severely on fourth amendment interests that the traditional safeguards against illegal arrest must be triggered.[87] By so holding the Court has totally confused any intelligent understanding of exactly what is "custodial."

A dangerous precedent

It is submitted that the Court's failure to distinguish between voluntary submission to questioning and detention for the purpose of interrogation has established a dangerous precedent. Foreseeably, every time a person is stopped during an investigation for either a driver's license check,[88] a field interview,[89] or during general questioning pertaining to an unsolved crime of any nature, or for any reason other than "protective frisks," traffic violations, or to prevent aliens from entering the country, the police-citizen encounter can be successfully challenged as an unlawful detention.

The obvious result of such a precedent would be that it would enable the suspect who has voluntarily answered questions and later regrets his decision to simply allege that he was "seized," whereupon his confessions, and any other evidence so obtained will be suppressed as "tainted," thereby making them inadmissible.

When police officers encounter persons during an investigation, those persons may simply refuse to answer questions, especially if doing so would incriminate them. However, if during a police-citizen encounter, a police officer without a show of force, a threat, or coercive intimidation, asks a citizen to answer questions or to accompany the officer to police headquarters, whereupon the citizen voluntarily agrees to do so and later makes a knowing and intelligent waiver of his rights and confesses to a crime, then the action is not an unlawful seizure and the confession is not tainted. For a court to hold otherwise is to suggest that police officers should never approach any witness or possible suspect and ask him questions pertaining to any crime unless the officer already has sufficient probable cause to arrest.

Likewise, until such time as a person who has voluntarily submitted to questions is knowingly detained or prevented from exercising his freedom to walk away, it is difficult to characterize as "detention," "seizure," or "arrest," the voluntary exercise of answering questions. It

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[86]442 U.S. at 206.

[87]*Id.* at 216.

[88]Delaware v. Prouse, 440 U.S. 648.

[89]Brown v. Texas, 443 U.S. 47.

simply is not a restriction on a person's liberty when he answers questions or accompanies police knowing he is free to leave at any time.

It is predicted that police officers will adjust and compensate for the confusion surrounding investigative procedure by making certain all of their police-citizen encounters fall within those types of situations which have been found acceptable by the Court. We will begin to see a considerable number of cases involving "bulges," "furtive movement," "moving violations," and other activities necessitating frisks or vehicular stops and arrests, followed by interrogation. To be sure, many arrests will occur, and pretextual though they may be, these arrests will result in confessions, convictions, and litigation.

It is suggested that there is a major difference between seizures amounting to custodial situations and those temporary detentions involving frisks and the like. Further, there is a difference between these types of police actions and those situations where citizens voluntarily submit to police questions. In essence, there is a major difference between "seizures" and investigations. Police officers should not be hindered in the investigation of crimes by a decision which creates a state of confusion as to what is expected or required of an officer in performing his duties. Nor should a decision allow criminals to walk free simply because they have had their voluntary confessions suppressed by successfully arguing that they had been compelled to talk to the police. Instead the Court should hand down a decision which correctly differentiates among police investigative procedures and sets forth lucid guidelines therefor.

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