United States v. Drayton
(June 17, 2002) __ US __

ISSUE

When "contacting" passengers on a bus as part of a drugs-weapons interdiction effort, must officers inform the passengers that they are free to go and are not required to cooperate?

FACTS

Drayton and Brown were traveling together from Ft. Lauderdale to Detroit on a Greyhound bus. During a stopover in Tallahassee, shortly before the bus was scheduled to depart, three Tallahassee plainclothes police officers boarded the bus. The officers were assigned to a drugs-weapons interdiction program.

One of the officers stayed up front, kneeling on the driver's seat and watching the passengers. He did not block the aisle or doorway. The other two officers walked to the rear of the bus where one of them remained while the other started walking back up the aisle.

As he did so, he spoke to individual passengers, identifying himself, asking about their travel plans and whether they had any luggage in the overhead racks. He, too, was careful not to block the aisle. Although the passengers were free to leave the bus and were not required to cooperate, they were not told this.

When the officer reached Drayton and Brown, he identified himself, explained his reason for boarding, and obtained Brown's consent to search his luggage. No drugs were found.

The officer noticed that Drayton and Brown were both wearing heavy jackets and baggy pants, a suspicious circumstance because the weather was warm and the officers were aware that drug couriers often wear baggy clothing to conceal drugs and weapons. So the officer asked Brown, "Do you mind if I check your person?" Brown said "sure," and leaned up in his seat and opened his jacket. The officer then reached over and patted him down. While patting both thighs, the officer felt "hard objects similar to drug packages detected on other occasions." Brown was then arrested.

After Brown was removed from the bus, the officer asked Drayton, "Mind if I check you?" Drayton responded by lifting his hands about eight inches from his legs. During the patdown of Drayton's thighs, the officer felt hard objects similar to those on Brown. Drayton was arrested.

It turned out the "hard" objects were five plastic bundles, wrapped in duct tape, containing almost 800 grams of cocaine.

DISCUSSION

Drayton and Brown contended the cocaine must be suppressed because they were being detained unlawfully when they consented to the searches. The Court disagreed.

A suspect is "detained" when an officer's words or actions would have communicated to a reasonable person in the suspect's position—a reasonable *innocent* person[1]–that he was not free to leave or ignore the officer's questions or instructions.[2] In making this

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[1] See *Florida* v. *Bostick* (1991) 501 US 429, 438; *In re Kemonte H.* (1990) 223 Cal.App.3d 1507, 1512; *People* v. *Cartwright* (1999) 72 Cal.App.4th 1362, 1374.

[2] See *Florida* v. *Bostick* (1991) 501 US 429, 438; *Wilson* v. *Superior Court* (1983) 34 Cal.3d 777, 784; *In re Chrisopher B.* (1990) 219 Cal.App.3d 455, 460; *People* v. *Ross* (1990) 217 Cal.App.3d 879, 884; *People* v. *Bailey* (1985) 176 Cal.App.3d 402, 406; *People* v. *Divito* (1984) 152 Cal.App.3d 11, 14; *People* v. *Franklin* (1987) 192 Cal.App.3d 935, 940; *People* v. *Gonzalez* (1992) 7 Cal.App.4th 381, 383; *Ford* v. *Superior Court* (2001) __ Cal.App.4th __; *People* v. *Bouser* (1994)

determination, the courts will consider the totality of circumstances surrounding the encounter. Circumstances that are especially important—often crucial—are whether officers issued commands or merely requests, whether the suspect was physically prevented from leaving, whether officers drew their weapons, the number of officers who spoke with the suspect, and the nature and tone of questioning; e.g., whether it was accusatory or merely investigatory.[3]

Another relevant circumstance is whether officers told the suspect he was free to leave, free to disregard their questions, or otherwise free to refuse to cooperate.

In *Drayton*, the U.S. Court of Appeals zeroed in on this last circumstance, ruling that when officers board a bus to question the passengers, a detention automatically results unless the officers notify the passengers that they weren't required to cooperate. Not so, said the U.S. Supreme Court, noting that it has repeatedly instructed lower courts that most Fourth Amendment determinations must be based on an assessment of the totality of circumstances, and that strict *per se* rules are inappropriate.[4] In *Drayton*, the Court was forced to repeat these instructions: "[I]t appears that the Court of Appeals would suppress any evidence obtained during suspicionless drug interdiction efforts aboard buses in the absence of a warning that passengers may refuse to cooperate. The Court of Appeals erred in adopting this approach."

The Court then examined the totality of circumstances and concluded that Drayton and Brown were not being detained when they consented to the searches. As the Court observed, "There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice."

Consequently, the Court ruled the encounter was merely a contact until the officers developed probable cause to arrest, which happened when they felt the hard objects that they reasonable believed were drugs. And because it also appeared the defendants' consent to search was voluntary, the cocaine was seized lawfully and was, therefore, admissible.

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26 Cal.App.4th 1280, 1283. **NOTE: The "free to leave" test:** In the past, the "free to leave" test was the only test for determining whether an encounter was a contact. And it is still the most commonly cited test, although it has technically been superseded by the "free to terminate" test. See *Florida* v. *Bostick* (1991) 501 US 429, 438 [the free to terminate test "applies equally to police encounters that take place on trains, planes, and *city streets*." Emphasis added. The problem with the "free to leave" test is that it can lead to bizarre results if the suspect happens to be contacted while he is on a bus, in an airplane, at his workplace, at his home, or in any other location in which it is impossible or impractical for the suspect to leave, or where the suspect does not want to leave. In these situations, the suspect may not be exactly "free to leave" but that does not mean he is being detained. See *Florida* v. *Bostick* (1991) 501 US 429.

[3] See, for example, *United States* v. *Mendenhall* (1980) 446 US 544, 554; *In re Kemonte H.* (1990) 223 Cal.App.3d 1507, 1512; *People* v. *Jones* (1991) 228 Cal.App.3d 519, 523; *People* v. *Franklin* (1987) 192 Cal.App.3d 935, 941-2; *Ford* v. *Superior Court* (2001) 91 Cal.App.4th 112, 128; *People* v. *Profit* (1986) 183 Cal.App.3d 849; *In re Manuel G.* (1997) 16 Cal.4th 805, 821; *INS* v. *Delgado* (1984) 466 US 210, 219 [Court noted the "presence of agents by the exits posed no reasonable threat of detention to these workers while they walked throughout the factories on job assignments."]; *People* v. *Epperson* (1996) 187 Cal.App.3d 115, 120; *People* v. *Boyer* (1989) 48 Cal.3d 247, 268.

[4] See, for example, *Illinois* v. *Gates* (1983) 462 US 213, 230-1; *United States* v. *Arvizu* (2002) 534 US __ [151 L.Ed.2d 740, 749] ["(W)e have said repeatedly that [the courts] must look at the totality of the circumstances of each case. . . ."]; *United States* v. *Sokolow* (1989) 490 US 1, 8; *Massachusetts* v. *Upton* (1984) 466 US 727, 732 ["[The trial court] insisted on judging bits and pieces of information in isolation . . . ."].