

Street Encounters Made Simple

By Patrick L. McCloskey

The leading New York case on street encounters is People v. De Bour¹, where the Court of Appeals set forth four levels of permissible police conduct when confronting individuals on the street.

Level 1 deals with a police officer who has an objective credible reason to approach someone. If a police officer has such a reason, De Bour says he may approach that person to request information. Level 2 involves a founded suspicion regarding a person. If a police officer has a founded suspicion, he may engage that person in the common law right of inquiry. Level 3 deals with a police officer who has a reasonable suspicion regarding an individual. In such case, the police officer may forcibly stop such person and if the police officer is in fear of weapons, may frisk the person for such weapons. Level 4 deals with a police officer who has probable cause regarding a person. If a police officer has probable cause, he may arrest and search such person.

The foregoing rules are easily listed but not so easily applied. The dynamics of street encounters are such that a police officer may have a founded suspicion (Level 2) and then, because of something the defendant does, (e.g. reach to his waistband) the police officer may be at Level 3 in an instant. It also frequently happens that a police officer will approach a person with, eg, a Level 2 predicate (founded suspicion) but will engage in Level 3 conduct (forcible stop). If that happens, ie, if the police officer's conduct exceeds his predicate, such conduct is unreasonable and any evidence seized thereafter will be suppressed. For these reasons, it is important to know exactly what

constitutes the 4 levels of predicate information and exactly what police conduct is permitted at each level. Here goes.

Level 1: An objective credible reason is virtually any reason a police officer can articulate that would lead a reasonable person to believe that his purpose in approaching an individual is not based upon an illicit motive. A Level 1 encounter may involve criminality but may also involve the police public service function². At Level 1, a police officer may approach a car at a red light or an individual on the street.³ A police officer may ask non-threatening questions regarding a person's name, address and destination.⁴ Depending upon the police officer's tone of voice, he may say "Stop".⁵ If the person is carrying something unusual (e.g. a television set in a pillowcase), the police officer may ask about it.⁶ If the person is carrying something not unusual (e.g. a briefcase or a knapsack) the police officer should not ask about it.⁷ A Level 1 encounter should be brief and non-threatening. There should be an absence of harassment and intimidation.⁸ No matter how calm and polite the tone of the questions, the police officer may not cause the individual to reasonably believe that he is suspected of crime.⁹ Most importantly, the police officer may not request the person's permission to search.¹⁰ Even if an otherwise valid consent to such a request is granted, the fruits of the resultant search will be suppressed.¹¹

Level 2: A founded suspicion involves criminality but is difficult to pin down. I suggest that if a police officer can articulate a good faith reason to believe that he suspects a particular person of criminal activity (something beyond a mere hunch or police intuition) he has a founded suspicion. In addition, it is clear that if a police officer receives an anonymous tip about a person's criminality and goes to the designated

location and sees such a person, he has a founded suspicion.¹² At Level 2, a police officer can ask pointed questions that would reasonably lead one to believe that he is suspected of crime. The questions can be more extended and accusatory.¹³ They may and usually do focus on criminality. A police officer may request permission to search at Level 2¹⁴, but he cannot forcibly detain the person.¹⁵ Finally, because pursuit has been held to be the equivalent of seizure in New York State¹⁶, a police officer may not pursue a person if he is only at Level 2.

Level 3: Whenever a police officer observes unusual conduct that leads him reasonably to conclude that criminality may be afoot, he has reasonable suspicion.¹⁷ Further, if a reliable confidential informant, who does not give his basis of knowledge to a police officer, advises the police officer as to an individual involved in criminality at a given location, and if the police officer confirms that such a person is present at the location, he has reasonable suspicion.¹⁸ Finally, if an anonymous tipster gives the police information about a person's criminality, including a prediction about such person's future behavior, and if the police go to the designated location and corroborate non criminal detail about such person and then further corroborate the predicated future behavior of such person (e.g. that he moved from point A to point B) they have reasonable suspicion.¹⁹ If the police have reasonable suspicion, they may approach a person on the street or may pull a single moving car out of the flow of traffic.²⁰ They may forcibly detain such person.²¹ They may frisk such person for weapons if they are in fear for their safety, but they may not frisk for evidence.²² For good reason in a particular circumstance, they may order a person to lie on the ground²³ or handcuff a person.²⁴ They may pursue.²⁵

Level 4: Probable cause is information sufficient to warrant a person of reasonable caution in the belief that the defendant has committed a crime, or that the fruits, evidence or instrumentalities of crime can be found at a given location. If a police officer has probable cause with respect to an individual, he may arrest that person on the street without an arrest warrant²⁶ and he may search him incident to arrest without a search warrant.²⁷

A final word about pursuit is necessary. Since pursuit is the equivalent of a seizure in New York State, it is permitted only at Level 3 or 4. The tricky part is that pursuit goes hand in hand with a defendant's flight and, generally speaking, if a defendant flees while the police are engaging him in a street encounter, the flight will raise the police predicate to the next higher level. Thus if the police are at Level 1 and the defendant flees, they will be at Level 2. At Level 2 they may not pursue him.²⁸ If they are at Level 2, however, and the defendant flees, they may pursue him, not because they can pursue at Level 2, but because Level 2 plus flight will put the police at Level 3, where pursuit is permissible.²⁹ This area is murky because in at least three cases³⁰, the Court of Appeals has seemingly said that Level 1 plus flight equals Level 3. It is submitted, however, that a reading of those three cases reveals facts that clearly placed the police at Level 2 before the defendant fled. I hope the foregoing is useful to both my prosecutorial and defense friends. In any event, that's my story about street encounters and I'm sticking to it.

¹ 40 N.Y. 2d 210

² As the De Bour court noted: "No one would quarrel with a police officer's right to make inquiry of passers-by to find the parents of a lost child." Id, at 218

³ People v. Ocasio 85 N.Y. 2d 982

People v. Harrison 57 N.Y. 2d 470
⁴ People v. Hollman 79 N.Y. 2d 181 at 185
⁵ People v. Bora 83 N.Y. 2d 531
⁶ Hollman at 191
⁷ Id
⁸ Id at 190 – 191
⁹ Id at 185
¹⁰ Id at 191-192
¹¹ Id at 194
¹² People v. Stewart 41 N.Y. 2d 65 at 69
¹³ Hollman at 191
¹⁴ Id at 191-192
¹⁵ De Bour at 223
¹⁶ People v. Martinez 80 N.Y. 2d 444 at 447
¹⁷ Terry v. Ohio 392 US 1
¹⁸ Adams v. Williams 407 US 143
¹⁹ Florida v. J.L. 529 US 266
²⁰ People v. Ingle 36 N.Y. 2d 413
²¹ Terry. See also NYCPL § 140.50
²² Id
²³ People v. Chestnut 51 N.Y. 2d 14
²⁴ People v. Allen 73 N.Y. 2d 378
²⁵ Martinez at 447
²⁶ U.S. v. Watson 423 US 411
²⁷ Chimel v California 395 US 752
²⁸ People v. Howard 50 N.Y. 2d 583
People v Holmes 81 N.Y. 2d 1056
²⁹ People v Martinez 80 N.Y. 2d 444
³⁰ People v. Leung 68 N.Y. 2d 734
People v. Matienzo 81 N.Y. 2d 778
People v. Sierra 83 N.Y. 2d 928