

LAWS OF ARREST - ONLINE

PREPARED BY:

DPS – Law Enforcement Academy
Santa Fe, New Mexico

Date _____

GOALS

- Students will appreciate the power – and responsibility – in their ability to make an arrest.
- Students will recognize the potential for abuse under the laws of arrest.
- Students will learn how to apply laws and procedures under New Mexico law.

OBJECTIVES

Upon completion of this course, students will be able to:

- Define reasonable suspicion and probable cause.
- Know what is needed to stop someone.
- Know what is needed in order to “frisk” someone.
- Describe what is involved in an investigatory detention.
- Know the differences in making a misdemeanor and a felony arrest.
- List the misdemeanor offenses when an officer can make an arrest although the offense did not occur in his or her presence.
- Know when to get an arrest warrant.
- Explain how location (defendant’s home or another) can affect serving an arrest warrant.
- Know what consular notification is.
- Know when the community caretaker exception applies in a vehicle stop situation.
- Explain what is involved in a DWI checkpoint.
- Learn the laws of vehicle stops.

SOURCES

- New Mexico Criminal and Traffic Manual.
- New Mexico Statutes Annotated.
- State and federal case law.

ESTIMATED TIME

Seven hours. (may go longer because topics often discussed in Search & Seizure are included).

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DATE APPROVED _____

ACCREDITATION NUMBER _____

LAWS OF ARREST

In Part I we'll discuss the following:

- 1) Introduction to Laws of Arrest.
- 2) Reasonable suspicion and probable cause.
- 3) What is needed to stop someone?
- 4) What is needed to "frisk" someone?
- 5) What is needed to arrest someone?
- 6) Issues involving an arrest.

In Part II we'll discuss the following:

- 1) What is needed to do a vehicle stop?
- 2) Issues involving a vehicle stop.

LAWS OF ARREST - PART I

INTRODUCTION

People familiar with the criminal justice system often comment on the tremendous power of Judges and ADA's. ADA's can indict people. Judges can sentence people to long periods in jail or prison. And yet ADA's and Judges will tell you that it is the police officer who has an awesome responsibility. It is the police officer and only the police officer who has the discretion to stop or not stop someone, to detain or not detain someone, to arrest or not to arrest.

We must remember that an arrest, no matter how small the offense, results in the loss of an individual's personal freedom. We must never forget that it is the power given to us out of community trust and is not to be abused or seen as the sole solution in every situation.

ARREST DEFINED

It's the taking of a person into custody to answer for a crime. To arrest someone is to deprive a person of his or her liberty by legal authority.

CONSTITUTIONAL FOUNDATIONS OF ARREST

The primary amendment is the Fourth Amendment. It is the search and seizure amendment which also refers to "seizing" people. The right of the people to be secure in their persons . . . shall not be violated. The word "persons" refers to stops, detention, and arrests.

The Fifth Amendment: No person shall be deprived of life, liberty, or property without due process of law. The term "liberty" refers to arrest.

We are going to discuss and try to understand the following questions:

- what is needed to stop someone?
- what is needed to “frisk” someone?
- what is involved in an investigatory detention?
- what is needed to arrest someone?
- what is needed to do a vehicle stop?

We will be looking for legal answers to these questions. To answer them, however, we need to understand and define legal terms such as **reasonable suspicion** and **probable cause**. Law enforcement, lawyers and the general public are all familiar with these terms. Unfortunately, it is difficult to come to a common agreement as to what these terms mean.

REASONABLE SUSPICION AND PROBABLE CAUSE

- What is reasonable suspicion?
- What is probable cause?
- What is the difference between the two?

It’s difficult to explain. That’s because reasonable suspicion and probable cause, like many legal terms, mean different things to different people.

EXAMPLE

An example may be the best way to clarify and understand reasonable suspicion and probable cause. Suppose it is 2:00 in the morning and we’re in a classroom. We’re in a high crime area. There is a business across the street. It can be any kind of business but this one sells televisions and DVD’s and so forth. The business is now closed.

NO SUSPICION

We look outside the window and see a young man walking through the parking lot in front of the store. The parking lot in front of the store is well-lit.

Would you run out and stop the young man?

Would you demand ID?

Would you arrest him for concealing ID if he refused to give you ID?

ANSWER:

An officer can question the young man and ask for ID. But the officer cannot stop (detain) the young man unless he or she has reasonable suspicion.

The young man may refuse to provide ID. If we don’t have reasonable suspicion to detain him, we cannot arrest him for Concealing ID.

REASONABLE SUSPICION

It's still 2:00 o'clock in the morning. You look outside and see a car in the well-lit parking lot.

- A young man is standing besides the car.
- The business alarm has just gone off.
- You notice a broken window in front of the business.

Do we have enough reasonable suspicion to detain this person? (yes)

To stop someone to investigate, to stop someone to the point they're not free to leave, we need more than a hunch or a gut feeling. We need a reasonable suspicion that a crime has occurred, is occurring, or is about to occur.

We're suspicious, of course. But it's not enough to say this looks suspicious. Is our suspicion reasonable? We need to **articulate** our reasons for thinking so.

- 2:00 o'clock in the morning.
- Business closed.
- Broken window.
- Man walking away is the only person in the parking lot.
- Alarm is going off.

ANSWER:

We have enough reasonable suspicion to stop this individual. At this point we do not have enough probable cause to arrest him.

A simple, common-sense definition of Reasonable Suspicion:

You're suspicious and it's reasonable that this person has done a crime or is involved in a crime.

PROBABLE CAUSE

We have sufficient reasonable suspicion to detain this person. To arrest someone, we need more: we need probable cause. We now will try to understand probable cause by continuing with this scenario. After a backup officer detains the subject, an officer might approach the crime scene investigation in the following way:

Business

- You notice fresh blood on the window sill.
- You look inside the business and note that no one is inside.
- You see a row of boxes of TV sets. In the middle of the row one TV box is missing.
- There appears to be torn clothing by the broken glass.

Vehicle

- Inside the nearby vehicle you see a box similar to the row of boxes in the business.
- You run the license plate and it comes back to John Smith.

- John Smith lives on the other side of town.
- You notice some fresh blood on the door handle.

Person

- The person appears to be nervous and sweating (it’s a cool night).
- The person has fresh blood on his hands.
- His clothing is torn and appears to match the torn clothing by the broken window.
- The person gives you his ID. His name is John Smith.
- He says he is looking for a friend’s house but doesn’t know where he lives.
- The person has conflicting stories about the TV set in the back seat of his vehicle.

Given the above factors, is there enough probable cause to arrest this person? (yes)

A simple common-sense definition of Probable Cause

A crime has been, is being, or about to be committed, and this person “probably” did it. The important word is “probably”; this person more likely than not did this crime.

There appears to be sufficient probable cause to arrest this individual.

Another difference between reasonable suspicion and probable cause. Reasonable suspicion is when an officer arrives at a crime scene; probable cause is when an officer leaves the crime scene.

Going to trial requires a higher standard: beyond a reasonable doubt. For example, we may need to get fingerprints from the subject, the broken window, and the TV set. We may want to compare blood of the subject, the door handle, and the TV set.

The following chart gives legal requirements for officers:

<u>Police-citizen Encounter</u>	<u>Stop</u>	<u>Pat down</u>	<u>Investigatory Detention</u>	<u>Arrest</u>
No fourth amendment. Officer can always approach a citizen	Need reasonable suspicion	Need reasonable suspicion person is armed		Need probable cause

Police-citizen Encounter

If a citizen is free to leave, the Fourth Amendment does not apply. A police officer can always approach and talk to a citizen.

But when officers stop people, when they’re not free to leave, the Fourth Amendment

kicks in and we have to follow court guidelines. We will discuss what happens in the following order:

- stop.
- pat down.
- investigatory detention.
- arrest.

WHAT IS NEEDED TO STOP SOMEONE?

Note: For legal purposes, “stop” and “detain” mean the same thing.

Introduction:

An officer needs reasonable suspicion to stop someone. The following case, involving an officer stopping a person to ask for ID, provides a good introduction to reasonable suspicion. Later on, when we get to vehicle stops, we will further discuss the issue of asking people for ID.

Stop - ID Request

Facts:

An officer was in a neighborhood well known for drug trafficking. Two male subjects were standing in an alley, a few feet apart. When the subjects observed the police vehicle, the two male subjects walked in different directions. The officer stopped one of the male subjects because the situation “looked suspicious.” The officer “had never seen that subject in the area before.” The subject became angry and refused to give the officer any identification. He was arrested for concealing ID.

- Was the officer correct in arresting the citizen for concealing ID? (no)

ANSWER:

This case came from the United States Supreme Court. The officer had a right to talk to defendant and ask for identification. But when the defendant didn't want to give the officer his identification, and wanted to leave, it became a stop. He was being detained.

The problem is that the officer lacked reasonable suspicion to believe the defendant had been or was involved in criminal contact. The stop, once it became non-consensual, and given the absence of reasonable suspicion, was unlawful. Brown v. Texas (1979).

Recommendation:

If we stop someone to talk to them, and they're free to leave, we need to make this clear to the court. STOP means not free to leave. More helpful words to assist the court might be:

- Approach - free to leave
- Made contact - free to leave
- Consensual encounter - free to leave

You're an officer on the witness stand. How would you answer the following questions:

- “Officer, could we agree that you stopped my client because you had a hunch he was involved in criminal activity?” (no)
- “Officer, would it be fair to say that you stopped my client because you had a gut feeling she had just committed a crime?” (no)
- “Officer, isn't it true that you stopped my client because you felt things looked suspicious?” (no)
- Many officers use these words as if they had the same meaning. Unfortunately, if you answered yes to any of the above, it may mean dismissal of the case.

Reminder:

The legal standard to STOP someone is REASONABLE SUSPICION. Anything less (a hunch, a gut feeling, it looked “suspicious”) is not enough. The important thing is to articulate – go into detail – why you made a stop.

Seizure – Free to Leave

FACTS:

At approximately 7:00 p.m., an officer in Clovis was called to a “possible domestic in progress.” The dispatcher said the caller wanted to have Joshua Garcia removed from the residence. As the officer got to the intersection nearest to the residence, he saw a man (Defendant Joshua Garcia) walking across the street.

The officer didn't know Defendant nor had a description been given of him. He shone his spotlight on Defendant, got out of his patrol car, and told Defendant to stop. Defendant continued walking. Pepper spray was used and Defendant dropped some crack cocaine to the ground. Will the cocaine be admissible as evidence? (no) State v. Garcia (2009).

Answer:

Under these facts, there was no indication a crime had been committed. Walking in the vicinity of the location where the call came from is not reasonable suspicion. Nor is the time of day (7:00 p.m.) an unusual time to be walking. Supreme Court held there was no reasonable suspicion and ordered the drugs suppressed.

Reminder:

A person is ‘seized’ if he or she is not free to leave. An officer can seize (detain) a person if there is reasonable suspicion that the person detained is breaking or has broken the law. In this instance, when the Defendant was told to stop, he had been seized without reasonable suspicion.

Recommendation:

In a situation like this, an officer can have a consensual encounter with a person, which gives the person the freedom to leave if he or she chooses to do so.

News item: Woman Arrested by APD Awarded \$65k

Albuquerque Police were dispatched to a lady's home to investigate the complaint of a tow truck driver who said her son had driven a repossessed vehicle away and caused \$4,000 damage.

The officer asked the lady for her son's birthday and she said she didn't know. The officer, believing her to be evasive, asked for her ID. When she didn't produce it, she was arrested for concealing ID.

The 10th Circuit Court said there was no probable cause for the arrest. The federal jury awarded \$65,000 in damages. The city will also pay legal fees. Albuquerque Journal, January 30, 2009.

Reasonable Suspicion - Flight

Facts:

In Albuquerque, an individual sold drugs to an undercover officer. Defendant was among a group of eight to ten people standing nearby. When members of the "arrest team" arrived, the Defendant took off running. After numerous commands, he stopped. He threw crack cocaine underneath a car. Does his sudden running and being near a drug transaction support reasonable suspicion for a stop? If not, the drugs will be inadmissible. State v. Harbison (2007).

ANSWER:

An individual walking away from a police officer, when there is no suspicion of a crime, can do so. He is "going about his business." But running, an unprovoked flight, is not "going about one's business." In fact, it's just the opposite.

Supreme Court of New Mexico held that defendant's presence near a drug transaction, combined with his unprovoked flight upon noticing police, supported reasonable suspicion for an investigatory stop. The stop being valid, the evidence seized was admissible.

WHAT IS NEEDED TO FRISK SOMEONE?

Introduction

In this section, we will look at a number of cases. If a pat down is good, the evidence will be admissible. If not, the evidence will be inadmissible. And one thing comes through in these cases, loud and clear: the extraordinary importance of articulating why we do what we do.

Facts:

Terry v. Ohio (1968). One of the most famous cases in American legal history. Stop & frisk, a pat down, a Terry stop . . . it's all the same thing. It's mid afternoon. A police officer is standing across the street from a jewelry store. He watches two men walk up to the jewelry store,

look in, and continue walking. They come back and look in again. They do this about a dozen times. Soon they talk to a third man. The officer believes a robbery is about to take place. He confronts them and asks for ID. They are wearing heavy, out of season jackets. When one starts mumbling, he pats them down. On Terry he finds a handgun. Terry v. Ohio (1968).

The Stop:

A Terry stop is a “seizure” where someone is stopped and not free to leave. To do a Terry stop or pat down, fourth amendment guidelines must be followed. The legal standard for a Terry stop is reasonable suspicion. If an officer is able to articulate facts to support reasonable suspicion, this will be a good stop.

The Frisk:

A stop and a frisk is a two step process. The justification for the stop may not justify a frisk. A frisk is a search for weapons. If the officer is able to articulate facts to support reasonable suspicion the person is armed and dangerous, this will be a good frisk.

- Are we able to articulate facts to support a stop? (yes) A pat down? (yes)

ANSWER:

The facts support reasonable suspicion for a stop. (1) Going back and forth and looking inside a jewelry store window. This suggests the three subjects are waiting for the cashier to be alone so that they can rob him or her. (2) The heavy out-of-season coats. These likely contain pockets to carry stolen jewelry.

The facts also support reasonable suspicion for a pat down: (1) a possible robbery which is a violent crime, (2) the subjects wore heavy coats which can hide weapons, (3) there were three subjects confronting one officer, and (4) mumbling. Mumbling might indicate a person under the influence of alcohol or drugs or planning to “jump” the officer to make a getaway. United States Supreme Court upheld conviction of concealing a weapon, a felony offense in Ohio.

An example of police department SOP for a stop and frisk:

A “frisk” or feeling of the outer garments of an individual with the sole purpose of detecting a weapon.

- If during the pat down for weapons we find drugs, and it is immediately apparent that we found drugs, the drugs will be admissible.

Stop and Frisk (Gangs)

Facts:

Albuquerque Police Gang Unit officers in mid-afternoon were patrolling the “War Zone,”

an area known for guns, gangs, drugs and violence. On a city sidewalk, less than a block away, they saw three males walking towards them. One male was a known gang member and drug dealer. The other two males appeared to be gang members.

They did a stop and frisk of the three males. On one of them they found cocaine.

A forcible stop or detention, more than a police-citizen encounter but less than an arrest, is a seizure under the Fourth Amendment.

- A stop must be based upon reasonable suspicion
- It must be a particularized suspicion that the person stopped has committed a particular crime.
- The officers had generalized suspicions about gang members committing crimes.
- Do the officers have anything connecting this individual defendant to a particular crime?
- Is gang membership, standing alone, sufficient to support reasonable suspicion.
Good stop? Good Frisk? Will the evidence be admissible?

ANSWER:

The state lost this case. Officers had nothing connecting this individual defendant to a particular crime. Being a member of a gang is insufficient to support reasonable suspicion. This doesn't mean officers cannot be proactive. Officers can ask for consent to search. Defendant's behavior may also be grounds for a pat down search. State v. Jones (1992).

Stop – Reasonable Suspicion

Facts:

On the streets of Roswell, an officer beheld a strange sight. A parked vehicle, engine running, yet no one appeared to be inside. As he shined his spotlight he saw a person slouched down in the driver's seat as if to hide. He said he was waiting for a friend. Meanwhile, his friend – Defendant – left a nearby house and attempted to enter the car. Officer told him to wait in front of the car. He began walking away. The officer stopped him, did a pat down, and found drugs. State v. Rivas (2006).

- Good stop? Good pat down? Will the drugs be admissible? (no)

ANSWER:

An officer can detain someone when there is reasonable suspicion that a particular individual, the one detained, is breaking, or has broken the law. In this instance, there is no

indication that the defendant had committed or was about to commit a crime. Court of Appeals held the detention was improper. The cocaine seized was inadmissible.

Stop and frisk (Violent Crimes)

Facts:

Radio dispatched a Hobbs police officer to a possible residential burglary in progress. The dispatcher advised two men were repeatedly going to the rear door of the residence and then returning to their vehicle. Officer arrived, saw two men leaving in a vehicle, and stopped them. Officer did a frisk (also known as a pat down) and found a syringe in one pocket and cocaine in the other. State v. Cobbs (1985).

- Was the stop justified? (yes)
- Was the frisk (pat down) justified? (yes)

ANSWER:

The stop was good. The dispatch plus the officer's observations formed a reasonable suspicion that the two men might be engaged in criminal activity.

The frisk was good. An officer has the right to frisk when a suspect is stopped for a type of crime for which the offender would likely be armed. Certain crimes are inherently dangerous: robbery, rape, assault with weapons, dealing in large narcotics actions, and burglary.

Stop and Frisk (Non violent crimes)

Facts:

An officer in Lea County was dispatched to a robbery in progress at a convenience store. There was no robbery. The clerk was visibly upset. A very intoxicated male subject did not have enough money to pay for the items he wanted. He cursed and harassed the clerk and walked away. The officer stopped the subject. The officer knew that he had previously fought with police officers. He kept turning his body, as if hiding something or getting ready to confront the officer. The officer did a pat down and found a pistol. State v. Haddenham (1990).

- Was the frisk justified? (yes)

ANSWER:

Our focus will be on the frisk. We need to articulate (list) reasons to justify why a frisk was done. Some reasons would include:

- The person was very intoxicated.
- The person had a record for previous disturbances with police officers.
- The person was acting evasive, with body language suggesting a confrontation.

Court of Appeals affirmed conviction of Felon in Possession of a Firearm.

Stop and frisk (Officer Safety)

Facts:

In Lea County Officer A stopped defendant for speeding (41/25). As Officer A approached the vehicle, he smelled marijuana. Defendant stated he had a rifle in his car. Upon exiting the vehicle, Officer A asked Defendant if he had any weapons on him. Defendant said he had a pocketknife on him. Defendant acted “real nervous and fidgety.” After getting Defendant’s consent, Officer A performed a pat down but didn’t find anything. The initial pat down was proper. But then . . .

Officer B arrived. With Defendant’s consent, Officer A searched the car but didn’t find anything. Officer A suspected Defendant had drugs on him and asked Officer B to do a pat down. Officer B saw a bulge in defendant’s sock and found meth. Officers testified at a motion hearing that the purpose of the second pat down was officer safety. State v. Pierce (2003).

- Was the second frisk (pat down) good? (no)
- Is “officer safety” alone enough to justify a pat down? (no)
- What facts or reasons might be used to justify officer safety?

ANSWER:

Court of Appeals held that the second pat down was illegal. Based upon the facts, the Court felt the motivation for the second search was not officer safety but to look for drugs.

“Officer safety” is a valid concern but by itself the term doesn’t mean much. We need to articulate reasons or expand on the term to make it mean something. Example: “I patted him down for officer safety because he was intoxicated, moving his arms back and forth as if to fight or reach for a weapon, and was yelling at me.”

Stop and Frisk (Limits)

Facts:

When a person is detained, and an officer has reason to believe the person is armed and dangerous, he or she may do a pat down for weapons. But the search can be for weapons only, not contraband. It sometimes happens, however, in a search for weapons, that contraband (normally drugs) is found. Will it be admissible?

It depends. An officer in Bloomfield, New Mexico (near Farmington) had reasonable suspicion to do a pat down for weapons. He felt a hard object in Defendant’s pocket but was uncertain what the object was. After more feeling or touching, he was able to determine the object was a crack pipe. Is the crack pipe admissible as evidence? State v. Johnson (2010).

ANSWER:

In this case, when the officer continued feeling and touching the object, he went beyond

the scope of a patdown. Court of Appeals held the crack pipe was illegally seized and therefore inadmissible as evidence.

Lesson learned

In these situations, the courts use a “plain feel” test to decide admissibility. If an officer feels an object and it is immediately apparent the object is contraband, the object will be admissible. If, however, the officer knows or should know the object is not a weapon, and it is not immediately apparent that the object is contraband, the officer cannot continue to explore or manipulate to determine if the object is contraband or not.

Stop and Frisk (Pockets)

Facts:

Tucumcari police stopped a car because neither defendant nor his passenger was wearing a seat belt. Passenger was acting in a nervous manner. Passenger was patted down and arrested as a result of the pat down. Instead of patting Defendant down, officer asked him to step out and empty his pockets. Drugs (cocaine and marijuana) were found. State v. Ingram (1998).

- A pat down search permits an officer to pat down the outer clothing to feel for weapons.
- Did the officer exceed the bounds of the pat down search in directing Defendant to empty his pockets? Is this a good pat down?

ANSWER:

Court of Appeals held the search was improper. A pat down search (also known as a Terry search) for weapons may not be expanded into a search for evidence of a crime. In directing Defendant to empty his pockets, the officer exceeded the bounds of a Terry search. Evidence suppressed.

Lesson learned:

Some factors used to justify a frisk:

- 1. Previous physical confrontations and reputation of the suspect.**
- 2. A bulge in the suspect’s clothing**
- 3. Furtive movements by the suspect (no eye contact, extremely nervous, hands shaking, moving hands back and forth, etc.)**
- 4. The nature of the offense (is it a violent crime?) under investigation.**

WHAT IS INVOLVED IN AN INVESTIGATORY DETENTION?

An officer can forcibly stop (detain) someone when they have reasonable suspicion that the person has committed, is committing, or is about to commit a crime. We will now discuss what happens after a person is detained, the investigatory detention.

DIFFERENT TYPES OF DETENTIONS

Detentions include the pedestrian stop, the vehicle stop, and the restraint of occupants

while a search warrant is being served. Detentions regarding search warrants will be discussed in the class on search warrants.

Stop

INVESTIGATORY DETENTION

Arrest

- Doing an investigation.
- May clear subject or lead to an arrest.
- Think of it as a “street stop” or “field stop” or “traffic stop.”
- A detention occurs when a person’s freedom of movement is restricted – he or she is not free to leave.
- Detention is meant to be as brief as possible.
- If an officer determines there is no probable cause the subject should be released from custody.

Introduction to questions on investigatory detention

Some questions we will discuss include:

- How long are we allowed to detain someone?
- What guidance is there for handcuffing people who are detained?
- What issues exist regarding asking for ID?
- What issues regarding a show-up?
- Illegal immigration and detention.

INVESTIGATORY DETENTION - HOW LONG?

Facts:

Clovis police were contacted by an informant who gave his name but asked to remain anonymous. The informant advised that defendant would be delivering meth in a pickup truck that had a personalized license plate to a named address. Information was proved accurate when defendant was stopped just prior to reaching the address.

Defendant refused to give permission to search her truck. A drug dog was called and she was told she was free to leave which she did. The dog, arriving 35 to 40 minutes later, alerted to the truck. A search warrant was obtained and meth was found in her purse and the truck.

Defendant was charged with drug trafficking. State v. Robbs (2006)

- Was this a good stop? (yes)

- Is detaining the vehicle for 35-40 minutes to wait for a drug dog too long?
- Will the evidence (drugs) seized be admissible) (yes)

ANSWER:

Court of Appeals held that the tip was sufficiently reliable because the informant was identified and the tip accurately predicted future movement of the defendant. This reliability gave the officers reasonable suspicion to stop the vehicle.

The investigatory detention was reasonable in length. This was not a typical vehicle stop; it was a stop to investigate for drugs. The truck was detained to quickly confirm or dispel the officer's suspicions. The drug dog was necessary to accomplish this and waiting 35-40 minutes for the dog was reasonable. Evidence was admissible.

Lesson Learned:

- Some officers ask if there is a set amount of time to do an investigation. There isn't because a detention can vary depending upon the complexity of the case. The courts have stressed, however, that officers are not to go on "fishing expeditions"; in other words, a person should be released if there isn't enough reasonable suspicion to detain them.
- In determining whether a detention is too long in duration, the courts will examine whether the officers did their investigation in a manner likely to quickly confirm or dispel their suspicions.

FACTS:

In Alamogordo, a police officer saw a vehicle in front of a house under investigation for drugs. Defendant was in the driver's seat and another man was leaning in the window, talking to him. The officers suspected drug activity and followed the vehicle which was stopped for a cracked windshield.

He recognized both the driver and passenger from previous drug activity. Defendant was nervous. When Defendant refused consent to search, he told him he could stay or go but he would call a drug dog. The dog arrived about ten minutes later, alerted, and defendant's father who showed up gave consent. Offices found a handgun and meth. State v. Neal (2007).

- Was there reasonable suspicion for the ten minute delay? (no)
- Will the evidence (handgun and meth) be admitted or suppressed?

ANSWER:

The initial stop for the cracked windshield was valid. But what about the ten minute detention? To detain someone there must be reasonable suspicion that the person is breaking or has broken the law. There must be reasonable suspicion, for example, that there are drugs in the vehicle.

Talking to another person in front of a drug house is not reasonable suspicion. Being

nervous is not reasonable suspicion. Having a criminal history is not reasonable suspicion. Supreme Court held that the officer did not have reasonable suspicion to detain the vehicle. Going from a cracked windshield to a vehicle search requires more. Evidence suppressed.

Facts:

On Interstate 40 New Mexico State Police stopped a vehicle going 84 in a 75. The driver gave the officer his California driver's license and a vehicle rental contract. The contract revealed that Defendant was not listed as the renter or as an authorized driver.

For about twenty-five minutes following the stop, the officer reviewed the contract, asked the driver and passenger about their travel plans, issued a speeding citation, and unsuccessfully sought to contact the rental company. At one point he asked if they had drugs and got consent to search. He looked into the trunk and found an estimated 20,000 small pills later identified as ecstasy. State v. Deng (2005).

- Was the duration of the stop longer than necessary?
- Did the officer articulate – justify – reasons for asking about drugs?
- Will the evidence (drugs) seized be admissible?

ANSWER:

The duration of the stop was reasonable. The scope of the detention, specifically whether the officer could inquire about drugs, presented a more difficult question. Fortunately, the officer was able to articulate – justify – why he was asking about drugs.

He testified his reasonable suspicion was based on his experience and the following observations: (1) Defendant was not on the rental contract, (2) inconsistent stories from Defendant and the passenger regarding travel plans, and (3) Defendant's nervousness. Supreme Court held that the scope of the detention was reasonable.

INVESTIGATORY DETENTION - HANDCUFFING

- Officers detain many people, make many traffic stops, without using handcuffs.
- But sometimes, during a routine traffic stop or investigation, handcuffs are used.
- In those cases it is helpful to articulate why a particular person was handcuffed.

How would you judge the following civil lawsuit?

Facts:

In Albuquerque, at Wal-Mart, a lady wrote a check for \$208 for groceries and art supplies. The cashier looked at her driver's license and noticed the hologram was missing. The cashier called police. An Albuquerque police officer cuffed her and she sat in the loss prevention

room for 45 minutes while police investigated. She didn't resist being handcuffed or attempt to flee. Finally, she was released and told the event would be written up as an "incident."

A federal jury ruled against the city and she settled for \$100,000. Settlements were also made with MVD Express and Wal-Mart. The Judge noted, "A generalized suspicion that a person is attempting to use a fraudulent check or driver's license . . . is not enough to justify the immediate intrusive use of handcuffs." Albuquerque Journal, June 26, 2006

- It is important to articulate – state reasons – why a person presents a threat to you.

Lesson learned

Investigative methods (handcuffing, etc.) should be the least intrusive that are reasonably available to verify or dispel an officer's suspicion in a short period of time.

Facts:

On 1-40, a witness flagged down a state police officer and told him a bald man in a white Ford Explorer had pointed a gun at him and driven off.

The officer saw a white Ford Explorer, did a felony stop, and handcuffed the driver. The vehicle was searched but no gun was found. A half hour later the witness came by (he is still handcuffed) and said the man with the gun was Hispanic and someone else.

More details: driver had been cooperative and had a valid driver's license. He was wearing his work ID. He was a photographer for the Albuquerque Journal (photo equipment in vehicle) and the vehicle was registered with them. The driver is African American and not bald. The Chief of the New Mexico State Police personally apologized to the driver. Albuquerque Journal, August 26, 2011.

Lesson learned

If no justification for continued use of handcuffs, recommend using discretion.

INVESTIGATORY DETENTION - SHOW-UP

Facts:

Eyewitnesses saw, from across the street, Defendant spraying cars with paint, and described (sort of) the men to the police. Ten days later police called the witnesses to a parking lot where they picked out the only brown car as the painter's car. Police officers then brought a man outside and from 400 to 500 yards the witnesses identified him. Reliable identification? State v. Johnson (2004).

Answer:

Court of Appeals held the identification was unreliable. The show-up was "highly suggestive" and tainted the in-court identification of the defendant.

Lesson learned:

Be careful when doing a show-up. Far too many people have been wrongly accused because of an improper ID done at a show up. Some of the following factors should be noted when doing a criminal complaint or police report:

1. The opportunity of the witness to view the suspect at the scene,
2. The witness's degree of attention,
3. The accuracy of the witness' description,
4. The degree of certainty of the witness, and
5. The time interval between the crime and the identification.

ILLEGAL IMMIGRATION & DETENTION

Police officers in New Mexico who come in contact with people who are here illegally should not detain people on that basis alone. To detain someone, there must be reasonable suspicion a person is involved in a crime. Being here illegally is a civil violation.

News item: Roswell Won't Detain Undocumented Immigrants

Roswell Police have stopped detaining undocumented immigrants for the Border Patrol. Police Chief Rob Smith said that recent conversations with the Immigration and Customs Enforcement (ICE) cast doubt on the practice.

The legal people are saying, "Well, we're not sure." The American Civil Liberties Union (ACLU) had argued that holding undocumented immigrants without a criminal charge is an unlawful detention. Being in the country without proper documents is a civil violation.

However, a few occasions exist where additional questions may be necessary:

- The person has previously been deported.
- The offense has cross-border implications.
- May need a translator and ICE is nearby, or
- There is an identity issue.

News item: Immigration eases up on minor traffic offenses

Immigration officials say they will no longer immediately detain suspected illegal immigrants who are arrested only on minor traffic violations and have no criminal history.

Immigration agents will now consider detaining people arrested on minor traffic offenses – provided they have no criminal history – only if they are convicted of those offenses. Albuquerque Journal (April 28, 2012).

ISSUES INVOLVING AN ARREST

Introduction

In the following section we will address concerns regarding arrest.

- Differences between a felony and misdemeanor arrest.
- Arrest with a warrant.
- How location (defendant's home or another) can affect an arrest warrant.
- Examples of exigent circumstances.
- Arrest and domestic violence - is an arrest mandatory or discretionary?
- Special circumstances: Protective custody, mental disorders.
- Drug overdose and arrests.
- Consular Notification – what to do when a foreign national is arrested.
- What to do with children when an adult is arrested.

But before we begin these topics, let's try to understand what a citizen's arrest is.

- A citizen's arrest, which means to detain, allows a citizen to detain an offender until police arrive.

Facts:

Defendant in Lincoln County was watching television when he noticed headlights in the driveway. Curious, he went to his porch, looked out, and saw his truck backing down the driveway! He grabbed a pistol and drove after the truck.

When he caught up with the truck, he confronted two repo men and pointed his gun at them. He fired a shot in the air and ordered the repo men to leave. They did. Neither he nor any member of his family attempted to call law enforcement. He argued that he was allowed to detain the two repo men because he had the right to make a citizen's arrest. Is there a crime here? Are his actions justified? State v. Emmons (2007).

ANSWER:

A citizen's arrest is meant to help law enforcement. Here, Defendant wasn't seeking to assist law enforcement; this was about helping himself, being the vigilante. Defendant, a former certified police officer, pled no contest to two counts of aggravated battery with a deadly weapon.

Lesson Learned

"Citizen's arrest" is not an accurate term. A citizen can detain a person but a citizen cannot arrest a person. We'll continue to call it "citizen's arrest" but it's really "citizen's detention."

Difference between felony and misdemeanor: Misdemeanor Arrest Rule

Felony

- An officer doesn't have to witness a felony to make an arrest. He or she can rely on hearsay – statements from others – as a basis for a felony arrest.

Misdemeanor

- Misdemeanors are a different matter. A peace officer, with certain exceptions, can

only make a misdemeanor arrest if it occurs in his or her presence.

- If the situation fits one of these exceptions the officer can arrest an offender even though the offense occurred outside his or her presence. We will now discuss the exceptions.

Exception: Licensed Liquor Establishments

NMSA 1978, Section 30-3-6. Reasonable detention, assault, battery, public affray or criminal damage to property.

- This offense refers to offenses (assault or battery or public affray or criminal damage to property) that occur in a licensed liquor establishment.
- “licensed premises” means all public and private rooms, facilities and areas in which alcoholic beverages are sold or served in the customary operating procedures of establishments licensed to sell or serve alcoholic beverages
- Why do we have this exception? In the old days there would be a barroom fight. Police would arrive but tell the manager they couldn’t do anything because it didn’t happen in their presence. Police would leave and the fight would start again. The “liquor lobby” was successful in getting the state legislature to pass this exception.

Exception: Falsely Obtaining Services or Accommodations

NMSA 1978, Section 30-16-16. Falsely obtaining services or accommodations.

- Falsely obtaining services or accommodations consists of any person obtaining service, food, entertainment or accommodations without paying with the intent to cheat or defraud the owner or person supplying such service, food, entertainment or accommodations.
- Any law enforcement officer may arrest without warrant any person he or she has probable cause . . . The officer doesn’t have to witness the offense; all that is needed is probable cause.
- This includes dine and dash, gas skips, sneaking into movies, etc.
- Why do we have this exception? People who own restaurants, gas stations, and so forth were upset when officers wouldn’t arrest offenders. They went to the state legislature and were successful in getting this exception passed.

Exception: Shoplifting

NMSA 1978, Section 30-16-20. Crime of shoplifting created.

- Any law enforcement officer may arrest without warrant any person he or she has

probable cause for believing has committed the crime of shoplifting. The officer doesn't have to witness the offense; all that is needed is probable cause.

- A number of factors determine whether an officer will issue a citation or make an arrest. These include the attitude of the store owner, the amount of items taken, the type of items taken (baby food or alcohol), age, whether the person has ID or not, the person's history, etc.

Exception: Gambling

NMSA 1978, Section 30-19-12. Duties of enforcement officers.

- This article refers to illegal gambling where a Judge has issued a warrant. The peace officer shall arrest without a warrant the parties therein or making their escape and who would be subject to arrest with a warrant. The officer doesn't have to witness the gambling; all that is needed is probable cause.
- Gambling became legal in New Mexico in 1997. Since then, this exception is seldom used.

Exception: Trespassers in Restricted Areas

- NMSA 1978, Section 30-21-3. Detention or arrest of trespassers upon restricted areas. This article refers to trespass in restricted areas but is seldom used.

Exception: Domestic Violence

- Before the mid-1990's, an officer would arrive at a misdemeanor domestic violence but couldn't make an arrest. This exception permits an officer to arrest for domestic violence assault and battery even though it did not occur in his or her presence. We will be providing more information on domestic violence later in this class.

Exception: Traffic Offenses

Misdemeanor traffic offenses must generally occur in the presence of a police officer to justify an arrest. There are a few exceptions:

NMSA 1978, Section 66-8-125. Arrest without warrant.

- Police may arrest without warrant any person:
 - (1) present at the scene of a motor vehicle accident.
- To arrest without a warrant, the arresting officer must have reasonable grounds, based on personal investigation which may include information from eyewitnesses, to believe the person arrested has committed a crime.

Facts:

Las Cruces police officers received a report a vehicle had crashed into a house. Both

driver and passengers were gone. One passenger, found nearby, identified Defendant as the driver. Defendant was found at his home, also nearby, unconscious on the floor. He had visible injuries consistent with the deployment of an airbag.

He was arrested for DWI and leaving the scene. Defendant argued the arrest violated the misdemeanor arrest rule because the offense did not occur in the presence of an officer.

At issue was whether section 66-8-125 permits officers to arrest an individual without a warrant who has fled the scene of an accident before officers arrive, when the officers did not encounter the individual at the scene of the accident. State v. Sanchez (2009).

Answer:

Supreme Court held that an officer can arrest individuals who either are or were present at the scene of a motor vehicle accident, when the arresting officer has reasonable grounds, through personal investigation, to believe the individual has committed a crime. The arrest, however, must take place with reasonable promptness from the time of the accident.

Exception: Police Team Concept

FACTS:

An Albuquerque Police Officer stopped Defendant for a traffic violation. After observing indications of DWI, he called a DWI officer to complete the investigation. The first officer told the DWI officer what he observed. The DWI officer also noticed indicators of DWI, did field tests, and arrested Defendant for DWI.

Is this a violation of the misdemeanor arrest rule? (no)

Answer:

The police team concept is an exception to the misdemeanor arrest rule. This exception allows multiple police officers to work together to investigate a defendant's criminal activity and use their collective efforts to support probable cause for arrest.

The first officer's primary duty was to patrol the streets, not to perform DWI investigations. Thus, his observations could properly be passed onto the DWI officer to complete the DWI investigation. State v. Mitchell (2010).

NOTE:

State v. Mitchell was filed in April of 2010. The following case (DWI exception) came out a few months later.

Exception: DWI

FACTS:

In Santa Fe, an employee at a mall saw a very intoxicated man get into a van and drive away. Based on the employee's description, an officer went to Defendant's residence. The engine was still

warm. The man staggered to the door, highly intoxicated, and admitted driving earlier. City of Santa Fe v. Martinez (2010).

- Can the person be arrested? (yes)

Answer:

Some exceptions to the misdemeanor arrest rule have been created by the legislature and some by the courts. The Supreme Court of New Mexico noted the seriousness of DWI and held that the misdemeanor arrest rule no longer applies to DWI. An arrest for DWI can be made even though it doesn't occur in the officer's presence.

Arrest with a warrant

When practicable, there are advantages to getting an arrest warrant:

- Probable cause has been decided by a Judge.
- Can be executed anywhere in the State.

Do we need a warrant in the following situation?

Facts:

Officers had been investigating subject for approximately one year and had probable cause to arrest him. Prior to arresting him the officers learned from a reliable confidential informant that the subject would be driving in Roswell, New Mexico the following day to do a drug transaction. The next day the officers saw the subject approach the intersection described by the confidential informant. The officers arrested the subject without a warrant. The officers searched the subject and his car. Seven packages of heroin were found. Campos v. State (1994).

- Was this a reasonable arrest? (no)
- Is the evidence admissible? (no)

ANSWER:

Officers had a year to get an arrest warrant. Supreme Court felt defendant's arrest was unreasonable because there were no exigent circumstances.

- An arrest without a warrant requires:
Probable Cause + Exigent Circumstances
- If an officer observes a felony, exigency is presumed.
- Officers had sufficient time to get a warrant.
- There were no emergency or exigent circumstances.

- Therefore, evidence seized at time of arrest was inadmissible.

Lesson learned: If we have time to get a warrant, we need to get a warrant.

Place of Arrest - It makes a difference whether its suspect's own house or that of another

Entry into Defendant's home to make an arrest

Supreme Court held that officers, absent consent or exigent circumstances, need an arrest warrant to enter a suspect's residence to arrest a suspect.

- If you see or have good reason to believe a person is in her/his own house, you can enter the house to make an arrest if you have an arrest warrant. Payton v. New York (1980).

Entry into Third Party's home to make an arrest

FACTS:

DEA agents received a tip that a federal fugitive was in Steagald's house, although the fugitive did not live with Steagald. The agents went to Steagald's house and searched for the fugitive, whom they did not locate. However, they did observe cocaine and Steagald was charged.

The United States Supreme Court held that:

Unless officers have the consent of the resident or exigent circumstances are present, they must obtain a search warrant to enter a third party's residence to search for a wanted person. The evidence (cocaine) was suppressed.

- If you see a subject in another person's house, you need an arrest warrant and a search warrant to enter the house. Steagald v. United States (1981).

Entry into a shelter for battered women

- A law enforcement officer needs to obtain a search warrant before attempting to serve an arrest warrant within a domestic violence safe house or shelter, absent exigent circumstances.
- Employees of domestic violence safe houses or shelters do not commit either (1) the crime of resisting, evading or obstructing an officer, or (2) the crime of harboring a felon if they request a valid search warrant before allowing a law enforcement officer to enter the safe house or shelter.

Arrest without a warrant: Need probable cause and exigent circumstances to enter house
(Consent is also an exception to the warrant requirement)

Examples of Exigent Circumstances

- hot pursuit.
- destruction of evidence.
- danger to officer or others.
- likelihood of escape.

Information regarding arrest and domestic violence

Domestic violence is discussed in a separate class. Some questions are frequently asked: when can an officer make an arrest, when is an officer required to arrest a person, and what happens if both parties in a domestic violence battery appear to be equally guilty?

When is it discretionary (up to the officer) to decide whether or not to make an arrest?

NMSA 1978, Section 31-1-7. Arrest without warrant; liability

. . . a peace officer **may** arrest a person and take that person into custody without a warrant when the officer is at the scene of a domestic disturbance and has probable cause to believe that the person has committed an assault or a battery upon a household member.

When is it mandatory (required) for an officer to make an arrest?

Chapter 40 of the New Mexico State Statutes is about domestic affairs. Article 13 relates to Family Violence Protection. In these cases, someone has already gone to see a Judge and has obtained an Order of Protection. One statute discusses a peace officer's authority to arrest:

NMSA 1978, Section 40-13-6

A peace officer **shall** arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order pursuant to this section.

What should an officer do if it looks like both offenders hit each other?

The State of New Mexico discourages dual arrests of persons involved in incidents of domestic abuse. An officer, making an arrest for domestic abuse, shall seek to identify and consider whether one of the parties acted in self-defense. NMSA 1978, Section 40-13.1.1.

Alternatives to Protective Custody

We have repeatedly stressed that we need probable cause to arrest someone. However, there are situations where we can take someone into custody without probable cause.

Alternative to Probable Cause: Protective Custody

NMSA 1978, Section 43-2-8

An intoxicated or incapacitated person may be committed to a treatment facility . . . for protective custody if the authorized person has probable cause to believe that the person to be committed:

- is disorderly in a public place;
- is unable to care for the person's own safety;
- has threatened, attempted or inflicted physical harm on himself or herself or another;
- has threatened, attempted or inflicted damage to the property of another;
- is likely to inflict serious physical harm on himself or herself; or
- is incapacitated by alcohol or drugs.

Alternative to Probable Cause: Mental Disorders

NMSA 1978, Section 43-1-10

Facts:

A police officer was given a doctor's note which authorized the officer to transport a patient to a mental health facility. The officer was concerned because of the absence of a legally valid order. What should the officer do?

ANSWER:

An officer can, in specific situations, detain and transport a person for emergency mental evaluation and care in the absence of a court order. These exceptions are:

- Person is otherwise subject to lawful arrest.
- Reasonable grounds to believe the person has just attempted suicide.
- If an officer has reasonable grounds to believe the person, as a result of a mental disorder, presents a likelihood of serious harm to himself or herself and that immediate detention is necessary to prevent such harm.
- If a licensed physician or certified psychologist has certified a similar conclusion. Such certification shall constitute authority to transport the person.

Drug overdose and arrests

New Mexico has a high drug abuse rate. The legislature has tried to be innovative in coming up with new ways to reduce drug abuse.

- A person who, in good faith, seeks medical assistance for someone experiencing a drug-related overdose shall not be charged or prosecuted for possession if the evidence was gained as a result of the seeking of medical attention.
- A person who experiences a drug-related overdose and is in need to medical assistance shall not be charged or prosecuted for possession if the evidence was gained as a result of the overdose and the need for medical assistance. NMSA 1978, Section 30-31-27.1.

Lesson learned:

The idea behind this legislation is that a person who is going through an overdose or watching another go through an overdose will ask for help.

Consular Notification: What to do when a foreign national is arrested

- According to international treaty, if a person of one country is arrested in another country, the second country has an obligation to notify a consular of the first country. A consular, similar to an ambassador, looks out for the interests of their country's citizens.
- Law enforcement has an important role in this. Once an arresting officer determines a person is a foreign national, the officer needs to advise that person of their right to consular notification.
- The officer should also inform the detention facility that the person is a foreign national and of their right to consular notification. Once done, the detention facility is responsible for consular notification.
- The officer's actions should be noted on the arrest/booking form and police report.

What do do with children when an adult is arrested

- Don't forget the obvious! When arresting an adult, an officer should assist children (present or elsewhere) who may be at risk because of the arrest. This may include arranging temporary care for the children.

CONCLUSION

We have discussed many issues in Part I. In Part II of Laws of Arrest we'll discuss:

- 1) What is needed to do a vehicle stop?
- 2) Issues involved in a vehicle stop.

