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ISSUES TO DEVELOP AT TRIAL

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It is a common street encounter scenario: A police officer starts to approach your client, on a hunch, perhaps a little more than a hunch, or maybe for no reason at all. Your client begins to walk away, but when the cop yells for him to stop, your client does. Claiming to see the handle of knife, or a bulge in a pocket, the cop recovers evidence, and your client is arrested and charged. This month's ITD alerts you to an argument you should make in seeking suppression of the evidence: Your client's submission to the officer's command to stop itself constituted a seizure that required reasonable suspicion (which the cop did not have). You may win this issue if you litigate it. At a minimum, you will have preserved an important claim for appeal.

Background: The key to this issue is to understand the two-pronged test governing seizures. The prosecution will try to confuse the issue; your job is to help the court see the light!

The Supreme Court has repeatedly held that a seizure (a detention) occurs when two conditions are met:

- PRONG 1: "a reasonable person" would not feel "free to leave"; **AND**
- PRONG 2: the person "submits" to the police authority.

Brendlin v. California, 551 U.S. 249, 254-55 (2007); *Hodari D. v. California*, 499 U.S. 621 626-29 (1991).

Applying this standard to our fact pattern—an officer yells "stop" (or something to that effect) and the client submits by stopping (instead of fleeing)—the answer is clear. A "reasonable person" would not feel "free to leave" when an officer (especially an armed one) commands an individual to "stop!" So, Prong 1 is satisfied. And if the individual does, in fact, stop, then he/she has submitted to authority. Prong 2 is satisfied too. Therefore, a command to stop that results in the individual actually stopping constitutes a seizure.

Favorable law in this area suggests that whether the individual has been seized or not depends on whether the officer's conduct can be characterized as a "command" or order or, rather, something less coercive. *Compare Matter of Brandon D.*, 95 A.D.3d 776, 777 (1st Dept. 2012) ("Appellant was seized when he exited the store and complied with the officer's order to stop. It is apparent that appellant was not free to leave"), *and People v. Taveras*, 155 A.D.2d 133, 136-37 & n.5 (1st Dept. 1991) ("[The officer's] authoritative act of ordering defendant to turn around, with which defendant immediately complied, constituted a forcible seizure. . . . While the dissent states [that the officer's] instruction to turn around [was] no more than a request for information, this command cannot be construed as an inquiry, nor is there any responsive answer to be given,

as would be in a true request for information."), *with People v. Giles*, 223 A.D.2d 39, 42 (1st Dept. 1996) (rejecting a seizure argument because the officer did not "issue a command") (comparing *Taveras*, 155 A.D.2d 151).

Out-of-state cases support this result too. *E.g.*, *United States v. Wood*, 981 F.2d 536, 540 (D.C. Cir. 1992) (a uniformed officer's command to "stop" is hardly "benign" and would cause a reasonable person to believe he/she was not free to leave) (citing *Hodari D.*, 499 U.S. at 627 ("policemen do not command 'Stop!' expecting to be ignored")); *State v. Quezada*, 141 N.H. 258, 260 (1996) (officer said, "Hey, you, stop," which "indicat[ed] that compliance was not optional"; "no reasonable person would have believed he was free to ignore the officer and simply walk away").

The Problem: You may ask – why are we devoting an ITD newsletter to this issue if the law is so straightforward? The answer lies in two, decades-old cases from the Court of Appeals that the prosecution will wrongly read to support the opposite, and which courts, if not set straight, will latch onto to deny relief.

In *People v. Bora*, 83 N.Y.2d 531 (1994), the Court said that that "a verbal command, standing alone, will not usually constitute a seizure." *Id.* at 535. From this bare statement, the prosecution will no doubt argue that the officer's "verbal command" to stop did not effect a seizure of your client.

However, in *Bora*, the defendant fled after the command was issued – he did not submit to the officer's authority. This is a critical distinction, as *Bora* did not consider or decide whether a seizure occurs where the defendant submits to the command to stop. If an individual flees, he has not submitted to the police authority and so has not been seized; if a person stops, he has. *Bora*'s commentary on verbal commands when the individual flees in response thus has no application when there is actual submission to the show of authority.

People v. Reyes, 83 N.Y.2d 945, 946 (1994), is to the same effect. There, there was *no submission*, so a command to stop was not a seizure. *Id.* (affirming the Appellate Division's decision that there was no "submission to police authority").

THE TAKEAWAY: When an officer testifies at a suppression hearing that your client stopped after being ordered to do so, the fruits of that seizure should be suppressed under the Fourth Amendment, unless the officer had reasonable suspicion for that seizure. When arguing the point, highlight the two-pronged standard governing seizures and explain how both prongs are met in your case. And cite some of the favorable cases. Next, distinguish *Bora* on the grounds that your client did in fact submit to authority. Then argue that a seizure (here a Level-3 detention) requires reasonable suspicion, and here there was none. Specifically detail the evidence that should be suppressed. Do not just say "the fruits should be suppressed"—be hyper-specific.

Argue that even if your claim fails under the Fourth Amendment, the long tradition of interpreting Article I § 12 of the State Constitution more broadly than the Fourth Amendment

mandates a distinct result under the New York Constitution. Round off the argument by reminding the court that your argument is modest: that uniformed and armed officers must refrain from commanding pedestrians to halt unless they have reasonable suspicion of criminality. If you are asked – what's an officer to do? – respond that their actions should match their level of suspicion: they should simply ask the citizen to speak with them instead of ordering them to stop. And if the citizen wishes to walk away, they are free to do so. *People v. Bilal*, 170 A.D.3d 83 (1st Dept 2019). This is not too much to ask in a free society.