

# THE LOCAL GOVERNMENT LIABILITY BEAT



Presented by Local Government Risk Management Services, Inc.  
A Service Organization of the Association County Commissioners of Georgia and the Georgia Municipal Association Risk Management Programs

## Eleventh Circuit Upholds Admission of Evidence in Consensual Encounter

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On January 7, 2019, the Eleventh Circuit Court of Appeals decided the *United States v. Debona*,<sup>1</sup> in which the court examined whether Debona was subjected to an illegal detention or a consensual encounter. The relevant facts of *Debona* are as follows:

Just before 6:30 p.m. on July 6, 2015, the owner of a gun store located at the Star Plaza in North Fort Meyers, Florida, called 911 about a suspicious, red Ford Focus parked in the plaza parking lot. The gun-store owner reported the vehicle had two occupants, one male and one female, and that the female passenger had injected a needle into her arm.

Deputy Katherine McCann responded to the call several minutes later. According to McCann, the area where the Star Plaza was located was known for narcotics use, prostitution, and burglaries. Upon arrival, she identified the Focus and without activating her overhead lights or siren, parked her marked squad car in the driving lane of the parking lot, perpendicular to the Focus but not blocking its exit. She got out and approached the Focus from the driver's side. The windows of the Focus were down and there were three occupants: Debona in the driver's seat; Shawna Spring in the front passenger seat; and William Santoro in the back seat, sitting next to a flat-screen television.

McCann identified herself as law enforcement and explained that a concerned business owner had called about the Focus. She asked Debona if "he would mind stepping out of the vehicle so [they] could talk." Debona responded, "yeah," opened the door, and got out. McCann was armed and in uniform, but her firearm remained holstered throughout the encounter.

While Debona was exiting the Focus, Deputy Julian Chala arrived on the scene in another marked squad car. Without activating his lights or siren, he parked in the parking aisle opposite the Focus and without blocking



it. He exited his car, walked over to the Focus, and asked Debona if he would mind coming to the front of Chala's squad car to talk. Debona complied, leaving McCann with the other two passengers. Chala was armed and in uniform, with his firearm holstered.

Once Chala and Debona arrived near the front of Chala's patrol car, Chala explained why he was there and that he wanted to talk to Debona. Chala read Debona his Miranda rights, which was Chala's standard practice even if he was not arresting someone, and he explained that this did not mean Debona was in trouble, under arrest, or going to jail. Debona said he understood. Chala then asked Debona what he was doing at the Star Plaza. Debona responded that he was there to buy a television from his friend, Santoro (the back-seat passenger).

During this brief discussion, Chala observed that Debona was acting "very nervous," was "sweating a lot," and was not making eye contact. Chala also noticed Debona touching his front pockets. At one point, Debona put his hand inside his pocket, prompting Chala to tell Debona "please do not put your hands in [your] pockets." Debona pulled his hand out but then put it back in again. Chala again asked him to please not put his hands in his pockets.

Chala testified that, based on Debona's demeanor, he suspected that Debona might have a weapon, so he decided to conduct a patdown search. Before doing so, Chala asked Debona if he had any weapons or illegal substances. Debona answered "no." Chala then told Debona that he was going to pat him down. Without being asked, Debona turned around and put his hands on the hood of Chala's squad car.

During the patdown, Chala felt what appeared to be a pill bottle in Debona's front pocket. Chala asked for permission to check Debona's pockets, and Debona consented. In Debona's pockets, Chala found a wallet, multiple small plastic baggies, around \$1,000 in cash, and a pill bottle with someone else's name on it. Debona acknowledged that the pill bottle did not belong to him. When Chala finished the search, Debona turned around and faced Chala. At that point, Chala noticed a rectangular-shaped bulge behind Debona's front zipper. Chala asked Debona what he had behind his zipper, but Debona didn't respond. Chala stepped forward and again asked about the bulge. Debona took one step back and then took off running, exclaiming "I'm not going back to jail."

Chala chased after Debona and eventually brought him down with a taser. McCann came up and handcuffed Debona. When they returned to the parking lot, another deputy showed Chala a gun on the ground near his squad car in the same direction that Debona had fled. Two witnesses saw Debona drop the gun."<sup>ii</sup>

Debona was subsequently indicted under federal law for being a convicted felon in possession of a firearm. He filed a motion to suppress and argued that the firearm was the fruit of an unlawful detention because the officers did not have sufficient reasonable suspicion to detain him and conduct a frisk. The district court held that the encounter was consensual, and Debona fled and abandoned the firearm; therefore, the court denied the motion to suppress. Debona stood trial and was convicted by a jury. He appealed the denial of the motion to suppress to the Eleventh Circuit Court of Appeals.

Debona raised two arguments on appeal. First, he argued that he was seized without reasonable suspicion from the moment Deputy McCann asked him to step out of his vehicle. Second, he argued that, even if the initial encounter with Deputy McCann was consensual, he was seized without reasonable suspicion when Deputy Chala ordered him to keep his hands out of his pockets.

The court of appeals first examined the law that was relevant to the Debona's arguments. The court stated

A seizure under the Fourth Amendment happens when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *United States v. Franklin*, 323 F.3d 1298, 1301 (11th Cir. 2003). A seizure triggers constitutional scrutiny and must be justified by either reasonable suspicion or probable cause, depending on the severity of the intrusion. *United States v. Jordan*, 635 F.3d 1181, 1185 (11th Cir. 2011).

Not all interactions between law enforcement and citizens, however, implicate the scrutiny of the Fourth Amendment." *Id.* Even without particularized suspicion, officers may approach individuals on the street or other public places, ask them questions if they are willing, ask for identification, and request consent to search—"provided they do not induce cooperation by coercive means." *United States v. Drayton*, 536 U.S. 194, 200-01 (2002). Such "consensual" encounters do not trigger Fourth Amendment scrutiny. *Jordan*, 635 F.3d at 1186. <sup>iii</sup> [emphasis added]

The court of appeals then discussed various factors that a court should consider when determining whether an encounter is consensual. The court stated

We discern the dividing line between a consensual encounter and a seizure by considering whether a "reasonable person would feel free to decline



the officers' requests or otherwise terminate the encounter." *Drayton*, 536 U.S. at 202 (quotation marks omitted). This test is "objective and presupposes an innocent person." *Id.* (quotation marks omitted) (emphasis in original). In applying this test, we must consider the "totality of the circumstances." *Jordan*, 635 F.3d at 1186. Relevant factors to this analysis may include (1) whether the suspect's path is blocked; (2) whether identification is retained; (3) the suspect's age, education, and intelligence; (4) the length of the detention and questioning; (5) the number of police officers present; (6) whether weapons are displayed; (7) any physical touching of the suspect; and (8) the language and tone of the officers. *Id.* <sup>iv</sup> [emphasis added]

Additionally, the court discussed the legal requirements of a seizure. The court stated that when an officer has reasonable suspicion that criminal activity is afoot, he may conduct a brief stop to investigate. Therefore, the stop must first be justified at its inception, meaning supported by reasonable suspicion. Second, the stop must be reasonable in scope to the circumstances that justified the stop. Additionally, an officer may conduct a frisk of the suspect if he reasonably believes the suspect is armed and dangerous. Particularly, the court stated

[W]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, the officer may conduct a pat down search to determine whether the person is in fact carrying a weapon." *Id.* <sup>v</sup>

Lastly, the court discussed the legal standard of reasonable suspicion. The court stated that this standard was "considerably less" than the preponderance of evidence. As a reminder, the "preponderance of evidence" means "more likely than not;" therefore, "reasonable suspicion" does not require a significant amount of proof of wrongdoing. The court stated

Reasonable suspicion is a less demanding standard than probable cause and requires only a "minimal level of objective justification" that is "considerably less than" the preponderance of the evidence. *United States v. Acosta*, 363 F.3d 1141, 1145 (11th Cir. 2004). While pertinent facts may be subject to an innocent interpretation when considered individually, such facts may still collectively give rise to reasonable suspicion. *United States v. Arvizu*, 534 U.S. 266, 274-75 (2002). Reasonable-suspicion analysis is not concerned with hard certainties but with probabilities, and officers may rely on inferences and deductions "that might well elude an untrained person." *United States v. Cortez*, 449 U.S. 411, 418 (1981). <sup>vi</sup> [emphasis added]

The court then set out to examine Debona's first argument, particularly, that he was seized the moment he was asked to step out of his vehicle.

It was first noted that a law enforcement officer did not need reasonable suspicion to approach Debona's vehicle, which was stopped in a parking space, and ask Debona if he would talk to him about the complaint. The court also noted that Deputy McCann, when she approached Debona, did not display a weapon, did not activate blue lights or sirens, did not act overbearing, did not block Debona's path, and did not ask for identification. As such, the court of appeals concluded that Deputy McCann's initial encounter with Debona was a consensual encounter and therefore, no reasonable suspicion was required.

The court then considered Debona's second argument, particularly, that he was seized when Deputy Chala told him not to put his hands in his pockets.

Regarding this argument, the court first noted that Deputy Chala's first request to Debona was that he "please" not put his hands in his pockets. The court stated that this would not convert the consensual encounter into a seizure. The court also noted that the deputy's "language" and "tone of voice" are factors to consider, but the evidence, as construed by the trial court, did not show that the deputy acted inappropriately. In fact, the court noted that Debona disregarded the deputy's request and put his hands in his pockets again, which prompted the second request to not put his hands in his pockets. The court then stated

Moreover, at the point Debona placed his hand in his pocket despite Chala's request not to, it was reasonable for Chala to conduct a brief protective patdown search to check Debona for weapons. See *Dickerson*, 508 U.S. at 373. The Star Plaza was known for burglaries, and there was a flat-screen television in the back seat of the Focus. Chala also testified that Debona was acting "very nervous," he was "sweating a lot," he was not making eye contact, and he was touching his front pockets. Faced with these facts, it would not be unreasonable for an officer to be concerned that Debona was carrying a weapon in one of his pockets. <sup>vii</sup>

Additionally, after the frisk, Debona voluntarily consented to the search of his pockets, which uncovered contraband that would authorize a seizure. Further, at this point, Deputy Chala also observed a suspicious bulge, and when he asked Debona about the bulge, he replied he wasn't going back to jail and fled. The court held this clearly provided reasonable suspicion at this point.

As such, the court upheld the denial of the motion to suppress.

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### Citations

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|---|-----------------------|
| i. No. 17-14020 (11th Cir. Decided January 7, 2019 Unpublished) | iv. <i>Id.</i> at 7-8 |
| ii. <i>Id.</i> at 2-5   | v. <i>Id.</i> at 8    |
| iii. <i>Id.</i> at 6-7  | vi. <i>Id.</i> at 8-9 |
|   | vii. <i>Id.</i> at 12 |

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# Consensual Encounters

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