



DeBour Levels

CHIEF ED ACKLEY

March In-Service Training
2024

Topics:

1. Review of Debour
2. Understanding meaning of each level
3. Practical skill of DeBour
4. Federal v. NYS
5. Case Law
6. Body Searches



HERE WE GO!

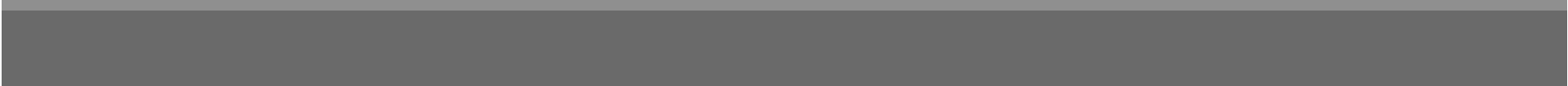
Contacts & Temporary Detentions

Consensual Encounter :

When an officer contacts an individual but does not create a detention through words, actions, or other means.

In other words, a reasonable individual would believe that his/her contact with an officer is voluntary.

For the purposes of this policy, consensual encounters include Level 1 (Request for Information) and Level 2 (Common Law Right of Inquiry) contacts.



Contacts & Temporary Detentions

Field Interview (FI):

The brief detainment of an individual, whether on foot or in a vehicle, based on reasonable suspicion for the purpose of determining the individual's identity and resolving the officer's suspicions.

Contacts & Temporary Detentions

Field Photographs:

Posed photographs taken of a person during a contact, temporary detention, or arrest in the field.

Undercover surveillance photographs of an individual.

Recordings captured by the normal operation of a Mobile Audio/Video (MAV) System, Body-Worn Camera (BWC) or Public-Safety Camera when persons are not posed for the purpose of photographing are not considered field photographs.

Contacts & Temporary Detentions

Pat-Down Search:

A type of search of used by officers in the field to check an individual for dangerous weapons.

It involves a thorough patting-down of clothing to locate any weapons or dangerous items that could pose a danger to the officer, the detainee, or others.

Contacts & Temporary Detentions

Reasonable Suspicion:

When, under the totality of the circumstances, an officer has articulable facts that criminal activity may be at hand and a particular person is connected with that possible criminal activity.

4th Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

“Unreasonable Searches and Seizures”

What is unreasonable?

- It is unreasonable if there is no warrant, consent or exception.

What is a search?

- A government intrusion on a reasonable expectation of privacy or a government trespass on a person, paper, house or effect with the intent to gain information or obtain evidence.

What is a seizure?

- When the police officer’s action constitutes a significant interruption of the individual’s liberty of movement. People v. Bora, 83 NY2d 531 (1994).

** All of these are decided based on the facts of each individual case. So you must be able to say in detail what happened, what you did and why you did it.

People v. De Bour Levels

40 NY 2d 210 (1976)

Level One	Level Two	Level Three	Level Four
<ul style="list-style-type: none"> • Objective Credible Reason • To approach someone and ask them basic questions. • Requires an “articulable basis.” 	<ul style="list-style-type: none"> • Founded Suspicion • Common Law Right to Inquire • To ask accusatory questions and request a consent to search. • Requires “founded suspicion of criminal activity.” 	<ul style="list-style-type: none"> • Reasonable Suspicion • To stop and/or detain a person and ask questions. • Stop and (if in fear of a weapon) Frisk 	<ul style="list-style-type: none"> • Arresting someone. • Requires “probable cause.” • Arrest & Full Search

In People v. DeBour, 40 NY2d 210 (1976) the Court of Appeals articulated its well-known four-tier test for assessing street encounters initiated by the police.

DeBour, supra at 223.

People v. DeBour, 40 N.Y.2d supra at 215

People v. Cantor, 36 N.Y.2d 106, 324 N.E.2d 872, 365 N.Y.S.2d 509 [1975]

1



What is permissible under Level One?

P.O. may ask basic, non-threatening questions such as a person's name, address, destination or reason for being in an area, coming from, if person is carrying something unusual?

These are questions that a reasonable person would not feel are accusatory of wrongdoing.

Encounter should be brief and non-threatening. There should be the absence of harassment and intimidation.

May not request a consent to search.

A person may refuse to answer questions and walk away.

If a person flees, the police do not have the right to pursue them (to pursue, you must have at least Level Three suspicion).

- To approach someone and ask them basic questions.
- Requires an “articulable basis.”
 - Police must have an objective, credible reason in order to approach an individual and ask questions when acting within their law enforcement capacities.
 - Need to have something more than “it looked odd.”
 - Difference between “law enforcement capacity” and “public service capacity.”

Level One Case Law



Police may do a level one inquiry of a person at the wheel of a stationary car blocking a fire hydrant. People v. Thomas, 19 AD3d 32 (1st Dept. 2005).

Asking a driver of a car he stopped "Why are you so nervous?" is a proper level one question. People v. Faines, 297 AD2d 590 (1st Dept. 2002).

Need something more than merely being parked in a high crime area for level one inquiry. People v. Mobley, 48 AD3d 374 (1st Dept. 2008).

Can you pull over a suspicious vehicle by pulling in front of the vehicle and blocking the driver's ability to leave? People v. Lopez, 75 AD3d 610 (2nd Dept. 2010).

2

- To ask accusatory questions and request a consent to search.
- Requires “founded suspicion of criminal activity.”
 - An officer must be able to articulate the reason why they suspect criminal activity.

What is permissible under Level Two?

May ask more intrusive, accusatory and potentially incriminating questions.

Can ask pointed questions that would reasonably lead one to believe that he/she is suspected of a crime.

Questions can be more extended and accusatory – Focus on possible criminality.

A person may feel accused of wrongdoing in this situation.

What constitutes a “search” under this level?

What constitutes a “seizure”?

Asking for Consent to Search – not asking “to check the vehicle” – must be articulated as a “Search.”

Consent – Verbal vs. Written

- Is verbal consent still legal in NYS?

Voluntary Consent – what determines voluntariness of consent?

- Must be freely and voluntarily given
- Does anything affect this?

2



What is permissible under Level Two?

A person may still refuse to answer questions or consent and walk away.

P.O. can not pursue.

P.O. can not forcibly detain.

P.O. can request permission to search.

Any request for a consent to search must be supported by "founded suspicion of criminal activity." People v. Dunbar, 5 NY3d 834 (2005).



Level Two Case Law



May means DON'T ADVISE!



An obvious false response to a level one question or an obvious lie establishes founded suspicion [People v. Carter, 199 AD2d 817 (3rd Dept. 1993)] but a minor discrepancy about an unrelated matter does not [People v. Abernathy, 224 AD2d 826 (3rd Dept. 1996)].

If a person flees, the police may pursue them because that action combined with the already present “founded suspicion of criminal activity” brings it to level three. People v. Soscia, 96 AD3d 1081 (2nd Dept. 2012).

During a traffic stop, police may not ask questions unrelated to the stop unless there is “founded suspicion of criminal activity.” People v. Woods, 189 AD2d 838 (2nd Dept. 1993).

A lawful stop and then a person providing what the police rationally concluded was a false identification constitutes “founded suspicion of criminal activity.” People v. Battaglia, 86 NY2d 755 (1995).

Seeing a passenger in a taxi cab making nervous body movements and push a bag he was carrying away constitute “founded suspicion of criminal activity?” People v. Nobles, 63 AD3d 528 (1st Dept. 2009).

3

- To stop and/or detain a person and ask questions.
- Requires “reasonable suspicion” to believe that a crime has, is, or is about to be committed. CPL 140.50
- “Reasonable Suspicion” is that quantum of knowledge sufficient to induce an ordinarily prudent and cautious person to believe criminal activity is at hand.

What is permissible under Level Three?

P.O. may temporarily stop and detain a person, stop a car, initiate a pursuit, or prevent a person or motorist from leaving an encounter. People v. Pines, 99 NY2d 525 (2002).

P.O. can forcibly detain if necessary at this level

P.O. can conduct pat frisk for weapons (if in fear individual may be carrying a weapon).

Articulation. Articulation. Articulation.

P.O. can pull vehicle out of flow of traffic.

P.O. can order individual to lie on the ground (for good reason).

P.O. can handcuff (for good reason).

P.O. can pursue the individual.

Once stopped, when can you do a frisk?

- Only if the stop is for a violent crime or if you can articulate reasonable suspicion of a weapon. The purpose of the frisk is to remove weapons, not contraband. NY does not use the “plain feel” exception. People v. Diaz, 81 NY2d 106 (1993).

Level Three Case Law



Using handcuffs does not necessarily move it from detention to arrest [People v. Allen, 73 NY2d 378 (1989); People v. Foster, 85 NY2d 1012 (1995); People v. Williams, 305 AD2d 804 (3rd Dept. 2003)] but using handcuffs is a drastic limitation of liberty and can only be used where the facts strongly justify, if there is no probable cause [People v. Acevedo, 179 AD2d 465 (1st Dept. 1992)].



Can you do a pat frisk if you see a bulge in a pocket? How about in the waistband? People v. Hill 262 AD2d 870 (3rd Dept. 1999); People . Stevenson, 7 AD3d 820 (2nd Dept. 2004).



Anonymous tips, by themselves, do not give reasonable suspicion to stop and frisk; but if the caller can be identified even if it was initially anonymous it may provide justification. People v. Herold, 282 AD2d 1 (1st Dept. 2001).

4



What is permissible under Level Four?

May arrest and conduct a Search Incident to Lawful Arrest of a person pursuant to the Criminal Procedure Law.

Probable Cause can come from your own observation or through your investigation.

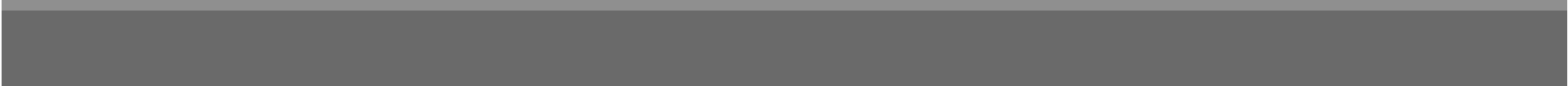
- A person is under arrest when “a reasonable person, in the defendant’s position, innocent of any crime, would believe they are under arrest.” People v. Yukl, 25 NY2d 585 (1969).
- PC exists when evidence or information which appears reliable discloses fact or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. CPL 70.10(2).

Federal Law vs. State Law

“Good Faith Doctrine”

Under Federal Law, evidence seized pursuant to a defective search warrant will not be suppressed if the police believed the warrant was valid at the time. US v. Leon 468 US 897 (1984).

Under New York State Law, a defective search warrant will result in suppression of the evidence no matter what the officer thought. People v. Bigelow, 66 NY2d 417 (1985).



Federal Law vs. State Law

“Search Incident to Arrest”

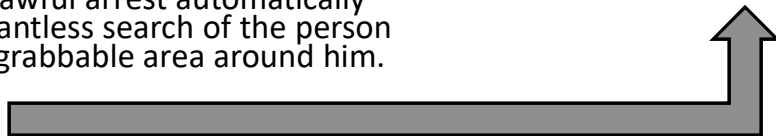
Under Federal Law, to protect from a potential weapon and to prevent the destruction of evidence, a police officer may conduct a search of an arrested person and the immediate area around him from which the suspect could either grab a weapon or destroy evidence (grabbable area) when the search is conducted at the time of the arrest. Chimel v. California, 395 US 752 (1969).

A search incident to arrest requires that when the search is conducted, an arrest has already been, or is about to be made. If an arrest has not yet occurred, the police officer must have intended to make an arrest, or the exception does not apply.

This is an exception to both the probable cause requirement and the warrant requirement. As long as there is probable cause for the arrest, police do not need a reason to believe that the search will actually uncover a weapon, evidence, or contraband. The lawful arrest automatically authorizes a warrantless search of the person arrested and the grabbable area around him.

BUT

Under New York State Law, police can only search closed containers in the possession of one who is arrested if there are exigent circumstances concerning the safety of the public or police, or to prevent evidence being destroyed. People v. Gokey, 60 NY2d 309 (1983); People v. Evans, 84 AD3d 573 (1st Dept. 2011); People v. Hernandez, 40 AD3d 777 (2nd Dept. 2007).



Federal Law vs. State Law

“Search Incident to Arrest”

Under Federal Law, the use of a dog during a valid traffic stop is not a search and does not violate the Fourth Amendment.



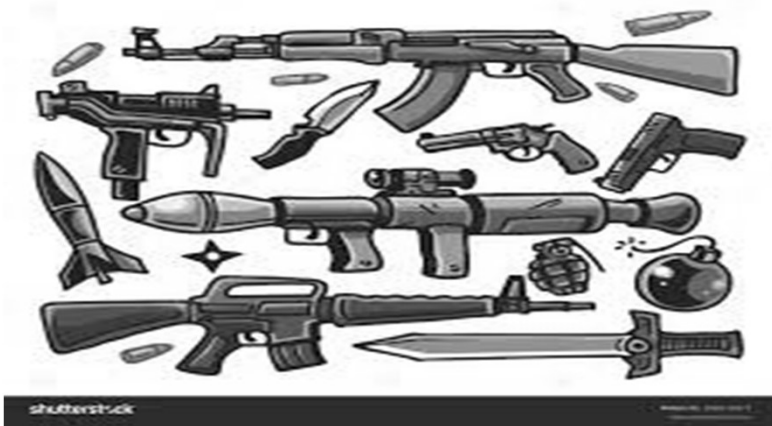
Under New York State Law, a dog sniff outside of a lawfully stopped vehicle is a search under the New York Constitution requiring “founded suspicion of criminal activity.” People v. Devone, 15 NY3d 106 (2010).

Federal Law vs. State Law “Search Incident to Arrest”

Under Federal Law, contraband detected by touch during a lawful arrest may be seized. Minnesota v. Dickerson, 508 US 366 (1993).



Under New York State Law, police may not seize an item during frisk unless the item feels like a weapon. People v. Diaz, 81 NY2d 106 (1993).



Exceptions

Inevitable Discovery (but in NY it cannot be used to save primary evidence, i.e. the drugs or the weapon).

Independent Source (evidence was admissible because it was obtained with a warrant untainted by initial illegality. *Murray v. United States*, 487 U.S. 533 (1988))

Attenuation (evidence is admissible at trial as an exception to the exclusionary rule)

Abandoned Property

Plain View

Consent



US v. Jones

132 S.Ct. 945 (2012)

Court ruled that a GPS on a vehicle constituted a search. The language of the law may have a bigger impact because....

Now we have a new definition of what constitutes a search under the Fourth Amendment. In addition to a government intrusion on a reasonable expectation of privacy, a search now occurs whenever a government official engages in a trespass upon an **EFFECT** of a person when there is an intent to find something or to obtain information.

What does that mean for us? We need to be more careful with what we search under the theory of abandonment. If it's in the garbage can on the side of the road that may not be abandonment because the garbage can is their "effect."

Body Searches

1. Strip Search

- May be conducted if the police has reasonable suspicion that the person arrested is concealing evidence under clothing. Search must be done in a reasonable manner.

What about searches of a person?

2. Visual Body Cavity Search

- May be conducted when the police has reasonable suspicion to believe that contraband, evidence, or a weapon is hidden inside the body of the person arrested

3. Manual Body Cavity Search

- Police must have PC to believe an object is concealed inside the body of the person arrested and must get a search warrant unless there are exigent circumstances. The warrant must specifically authorize bodily intrusion. People v. Hall, 10 NY3d 303 (2008); People v. Mothershell, 14 NY3d 358 (2010).

Conclusion

1. Review of Debour
2. Understanding meaning of each level
3. Practical skill of DeBour
4. Federal v. NYS
5. Case Law
6. Body Searches