

Consent vs. Authority: An Examination of the Tenth Circuit’s View of Consensual Police Encounters [United States v. Hernandez, 847 F.3d 1257 (10th Cir. 2017)]

Tim Carney

The Tenth Circuit Court of Appeals held two Denver Police Officers did not have reasonable suspicion to detain an individual. The court also found the officers did not have proper consent when they used a “show of authority” in requesting the individual stop walking while talking with them. The court erred in finding that consent did not exist in this case.

I. INTRODUCTION

Consent plays a large role in Fourth Amendment jurisprudence, as it is generally considered the simplest and most common form of a warrantless search.¹ Additionally, consent acts as a significant investigatory tool for law enforcement. Despite being a cornerstone of criminal law, its fluid and ever-changing nature often invokes intense debate in individual cases. In *United States v. Hernandez*,² the Tenth Circuit Court of Appeals once again dove headfirst into this debate. The court found that two Denver Police Officers failed to gain proper consent from an individual throughout their interaction, despite a great deal of evidence suggesting otherwise.³

II. BACKGROUND

A. Case Description

On October 20, 2014, around 7:43 p.m., Denver Police Officers Wile Morghem and Daniel Walton were on patrol in a marked police car.⁴ It was

1. See Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 509 (2015).

2. 847 F.3d 1257 (10th Cir. 2017).

3. See *United States v. Hernandez*, 847 F.3d 1257, 1257 (10th Cir. 2017).

4. *Id.* at 1260.

already dark out, and as they approached an intersection they observed Mr. Hernandez walking next to a fenced-off construction site.⁵ Both officers considered this area of the city a high-crime area due to the frequency of thefts and drug dealing in the neighborhood.⁶ Additionally, Officer Morghem was aware of thefts to construction sites in the area, and had arrested an individual trespassing on this same site in the past month.⁷ Officer Morghem's suspicion was also piqued because Mr. Hernandez was dressed entirely in black, carried two backpacks, and walked directly next to the construction site fence despite a usable sidewalk immediately across the street.⁸

With these observations in mind, the officers decided to make contact with the individual, whom they later discovered was Mr. Hernandez.⁹ The officers pulled up next to Mr. Hernandez in their cruiser and began talking with him.¹⁰ During this initial encounter, the officers' tone was conversational.¹¹ They did not shine any light on Mr. Hernandez, and their firearms remained holstered.¹² Officer Morghem asked Mr. Hernandez if they could talk, to which Mr. Hernandez replied, "Yeah, what's up?"¹³ Mr. Hernandez continued walking as the officers drove alongside him in their cruiser, asking him questions.¹⁴ Eventually, Officer Morghem asked Mr. Hernandez where he was coming from, and Mr. Hernandez said he was heading home from his grandmother's house.¹⁵ However, when asked for his grandmother's address, Mr. Hernandez was unable to provide it.¹⁶

At this point, Officer Walton asked Mr. Hernandez if he would stop walking so they could talk further.¹⁷ Mr. Hernandez stopped walking and continued to speak with the officers.¹⁸ Upon being asked, Mr. Hernandez provided the officers his real name, but a false date of birth.¹⁹ Despite the partially incorrect information, the officers were able to look up Mr. Hernandez

5. *Id.*

6. *Id.* Courts often recognize high crime areas as a factor in a reasonable suspicion analysis. *See Adams v. Williams*, 407 U.S. 143, 155 (1972); *see also Illinois v. Wardlow*, 528 U.S. 119, syl. (2000) ("An individual's presence in a high crime area, standing alone, is not enough to support a reasonable, particularized suspicion of criminal activity, but a location's characteristics are relevant in determining whether the circumstances are sufficiently suspicious to warrant further investigation." (citations omitted)).

7. *Hernandez*, 847 F.3d at 1260.

8. *Id.* at 1260–61.

9. *Id.* at 1261.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Hernandez*, 847 F.3d at 1261.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Hernandez*, 847 F.3d at 1261.

on their in-car computer and determined he had an active warrant for a parole violation.²⁰

Upon learning about the active warrant, the officers parked their car and exited.²¹ Once Mr. Hernandez saw the officers exit the car, he began to walk away.²² Officer Morghem noticed Mr. Hernandez reach for his waistband and asked if he had a gun.²³ Mr. Hernandez stated that he did, and Officer Walton quickly grabbed his arm.²⁴ When a black revolver fell to the ground, the officers placed Mr. Hernandez under arrest.²⁵ Ultimately, Mr. Hernandez was charged with being a felon in possession of a firearm.²⁶

B. Legal Background

Warrantless searches based on consent are a key part of investigations conducted by law enforcement, and these consensual encounters have been explicitly allowed by the Supreme Court.²⁷ The Court has made clear that “officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen”²⁸ In determining whether a particular encounter between law enforcement and an individual is consensual, the key test is whether, in the totality of the circumstances, the conduct of the officer would “have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.”²⁹

The Tenth Circuit compiled a list of factors to consider in determining whether an encounter is consensual:

- (1) the threatening presence of several officers;
- (2) the brandishing of a weapon by an officer;
- (3) physical touching by an officer;
- (4) aggressive language or tone of voice by an officer indicating compliance is compulsory;
- (5) prolonged retention of an individual’s personal effects;
- (6) a request to accompany an officer to the police station;
- (7) interaction in a small, enclosed, or non-public place; and
- (8) absence of other members of the public.³⁰

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Hernandez*, 847 F.3d at 1261.

26. *Id.* Colorado law makes it a felony to knowingly possess, use, or carry a firearm if you have previously been convicted of, or pled guilty to, a felony. COLO. REV. STAT. ANN. § 18-12-108 (West 2018).

27. *See generally* *Mapp v. Ohio*, 367 U.S. 643, 660 (1961); *INS v. Delgado*, 466 U.S. 210, 215 (1984) (“The Fourth Amendment does not proscribe all contact between the police and citizens”).

28. *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion)).

29. *Id.* at 437.

30. *United States v. Rogers*, 556 F.3d 1130, 1137–38 (10th Cir. 2009).

Although this list is not exhaustive, it provides significant guidance when examining a consent issue.³¹

Whether or not, or to what extent, an officer uses a “show of authority” is also considered when examining whether or not proper consent was rendered.³² In *Delgado*, the Supreme Court stated that “[u]nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment.”³³

The Supreme Court held factory workers are generally not seized when a government agent enters into their workplace.³⁴ In *Delgado*, INS agents were conducting an investigation into the employment of illegal aliens at a garment factory, and, as a part of the investigation, asked questions of some employees walking around the factory.³⁵ Especially relevant is the fact that when one of the workers was “[w]alking from one part of the factory to another, [she] was stopped by [a government] agent and asked where she was born.”³⁶ Although the woman was stopped, the Supreme Court held she was not “stopped” in the Fourth Amendment sense.³⁷ Thus, the initially consensual encounter between law enforcement and the worker remained consensual even after the agent questioned the worker.³⁸

III. COURT’S DECISION

In Mr. Hernandez’s case, the majority held that when the officers requested Mr. Hernandez to stop walking, the encounter was no longer consensual.³⁹ Further, it found the officers did not have reasonable suspicion to detain Mr. Hernandez, and thus the detention violated the Fourth Amendment.⁴⁰

Regarding consent, the majority came to its conclusion largely because it believed that a reasonable person in Mr. Hernandez’s position would not have felt free to leave after Officer Walton requested that he stop walking.⁴¹ The majority also pointed to other factors that seemed to indicate the encounter was not consensual: it was dark, no one else was around, and the two uniformed

31. *Id.*

32. *See Delgado*, 466 U.S. at 215.

33. *Id.* at 216.

34. *Id.* at 220–21.

35. *Id.* at 210.

36. *Id.* at 220.

37. *Id.* at 221.

38. *Delgado*, 466 U.S. at 219–21.

39. *United States v. Hernandez*, 847 F.3d 1257, 1266 (10th Cir. 2017).

40. *Id.* at 1270. This Comment focuses on the consent aspect of the court’s ruling, not the reasonable suspicion aspect, because it concludes the encounter was consensual—despite the court’s contrary ruling—and therefore reasonable suspicion was not necessary for the stop.

41. *Id.* at 1266.

officers were driving beside him in a marked police car.⁴² In addition to those factors, the majority stated “that Mr. Hernandez did not stop walking until one officer asked him to stop even though he was answering the officers’ questions”⁴³ The majority concluded that this “show of authority” was enough to turn an initially consensual encounter into a non-consensual encounter, although it also admitted that it considered the decision a very close call.⁴⁴

IV. COMMENTARY

The majority admitted that law enforcement officers are allowed to approach citizens with questions.⁴⁵ Reasonable suspicion is only required once law enforcement stops an individual from leaving.⁴⁶ Despite the majority’s claims to the contrary, Mr. Hernandez gave his consent throughout the encounter until he was arrested—at which point the consent was no longer required.⁴⁷ The majority primarily focused on Officer Walton’s request that Mr. Hernandez stop walking to speak with them.⁴⁸ It considered that act a “show of authority” that a reasonable person would not feel comfortable disobeying.⁴⁹

Of course Officer Walton’s request was not the only “show of authority” in this case, and the totality of the circumstances must be considered. Here, while “there were two uniformed police officers driving closely alongside Mr. Hernandez in the dark with no one else around,”⁵⁰ there is far more indicating the officers did not appear intimidating.

The *Rogers* factors are instructive in this case.⁵¹ The officers’ presence was not threatening; although they were in a marked car, they did not use the car to aggressively cut off Mr. Hernandez.⁵² Instead, they slowly drove

42. *Id.*

43. *Id.*

44. *Id.* at 1267.

45. *Hernandez*, 847 F.3d at 1263. “[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen” *Id.* (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)).

46. *United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (“We adhere to the view that a person is ‘seized’ only when, by means of physical force or a show of authority, his freedom of movement is restrained.”).

47. *See Hernandez*, 847 F.3d at 1264–67.

48. *Id.* at 1263–67.

49. *Id.* at 1267 (“We admit this is a close case and there is a dearth of case law directly on point with the facts here . . . [but] we cannot say the district court erred in concluding that a reasonable person in Mr. Hernandez’s circumstances would not have felt free to leave.”).

50. *Id.* at 1266.

51. *See United States v. Rogers*, 556 F.3d 1130, 1137–38 (10th Cir. 2009).

52. *Hernandez*, 847 F.3d at 1260. If they had aggressively cut off Mr. Hernandez, that would have weighed in favor of the encounter being non-consensual. *See Rogers*, 556 F.3d at 1137–38.

alongside him.⁵³ The officers did not brandish their weapons at any point during the conversation.⁵⁴ They also did not physically touch Mr. Hernandez until after obtaining probable cause to arrest him.⁵⁵

As noted in the officers' report, their tone was conversational and light throughout the interaction, only escalating after they discovered Mr. Hernandez was an armed felon with an active warrant.⁵⁶ Before his arrest, the officers did not retain Mr. Hernandez's personal effects.⁵⁷ Nor did they request that he accompany them to a police station, and the entire interaction took place in a open, public area.⁵⁸ The only *Rogers* factor weighing against consent is that no other members of the public were near the interaction.⁵⁹ However, that factor alone is not sufficient to show a reasonable person would feel compelled to comply with Officer Walton's request.⁶⁰ The totality of the circumstances must be considered in this type of case and must weigh in favor of a consensual encounter.⁶¹

In fact, Mr. Hernandez exhibited behavior indicating he reasonably believed the interaction was consensual.⁶² Mr. Hernandez verbally agreed to speak to the officers at the initiation of the interaction and then implicitly consented to further questions when he stopped walking and spoke further.⁶³ Mr. Hernandez made an ill-conceived attempt to withdraw his consent when the officers exited the vehicle.⁶⁴ When they exited, the officers knew Mr. Hernandez had an active warrant, but Mr. Hernandez did not know the officers had this information.⁶⁵ Mr. Hernandez's decision to walk away at that point was a likely attempt to withdraw consent to further questioning. Unfortunately for Mr. Hernandez, the officers no longer needed his consent because they had probable cause to arrest him.⁶⁶ Nonetheless, simply walking away clearly shows how non-coercive the situation was.⁶⁷ In short, Mr. Hernandez may not

53. *Hernandez*, 847 F.3d at 1261.

54. *Id.* at 1260–61.

55. *Id.* at 1261.

56. *Id.*

57. *Id.*

58. *Id.* at 1260–61.

59. *Hernandez*, 847 F.3d at 1260.

60. *Rogers*, 556 F.3d at 1137–38.

61. See *United States v. Rogers*, 556 F.3d 1130, 1138 (10th Cir. 2009) (“We must review the totality of the circumstances to determine whether ‘a reasonable person would have believed that he was not free to terminate an encounter with government officials.’”) (quoting *United States v. Thompson*, 546 F.3d 1223, 1226 (10th Cir. 2008)).

62. See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (“As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person’s liberty or privacy as would require some particularized and objective justification.”).

63. *Hernandez*, 847 F.3d at 1260–61.

64. *Id.*

65. *Id.*

66. *Gerstein v. Pugh*, 420 U.S. 103, 116 n.18 (1975) (“A person arrested under a warrant would have received a prior judicial determination of probable cause.”).

67. A *Miranda* analysis is instructive here; the test for a custodial interrogation states that custody exists when a reasonable person would not feel free to leave. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). In

validly claim consent was withheld because police made no significant show of authority.

V. CONCLUSION

In the end, Mr. Hernandez was unable to adequately show the stop was anything but consensual. Mr. Hernandez verbally consented to being asked questions, and subsequently indicated he was somewhat aware of the consent given as he tried to revoke it by walking away. Additionally, the officers' actions fail to qualify as a show of authority when viewed in the totality of the circumstances. Consensual encounters are a key part of police-work, both in a community involvement sense regarding accessibility, and in an investigatory function.⁶⁸ Despite the Tenth Circuit finding otherwise, all that occurred in this case was a consensual encounter between police and a member of the public.

this case, Mr. Hernandez clearly felt free to leave as he walked—not ran—away from the officers, illustrating that he felt this was a police encounter he could terminate whenever he saw fit.

68. See Sarah Lawrence & Bobby McCarthy, *What Works in Community Policing?*, CHIEF JUST. EARL WARREN INST. ON L. & SOC. POL'Y, (Nov. 2013), https://www.law.berkeley.edu/files/What_Works_in_Community_Policing.pdf [<https://perma.cc/9AJQ-BCLM>].