

## Can it be a Seizure When a Person isn't "Seized"?

### Description

Today's case comes to us from the D.C Circuit Court and asks the question: can a Fourth Amendment seizure take place when there is no physical seizure taking place? Our suspect today argued that officers had no reason to search his satchel, nor did they have probable cause to seize him. But it is important to note that even when you do not physically restrain a suspect, a show of authority and submittal to that authority still counts as a full Fourth Amendment seizure.

According to the courts, a seizure of a person, within the meaning of the Fourth Amendment, occurs when an officer's conduct would communicate to a reasonable person, taking into account the circumstances surrounding the encounter, that the person is not free to ignore the police presence and leave at his or her will.

Two elements must be present to constitute a seizure of a person: first, there must be a show of authority by the police officer. Presence of handcuffs or weapons, the use of forceful language, and physical contact are each strong indicators of authority. Second, the person being seized must submit to the authority. An individual who ignores the officer's request and walks away has not been seized for Fourth Amendment purposes.

Let's break down the facts of this to further illustrate the point at hand.

### FACTS

On April 21, 2018, shortly after 10:00 pm, three officers of the Metropolitan Police Department's Crime Suppression Team were patrolling an area where gun and drug-related crime was prevalent. When the officers saw three men "hanging out on the sidewalk", they exited their car to talk with them. As the officers approached, one of the three men began to walk away, and Officer Goss approached him as he did. Mabry (our suspect) and the third man stayed where they were on the sidewalk in front of a fence. Officer Volcin approached Mabry and Officer Tariq approached the third man. The man who had tried to walk away became irate as Officer Goss spoke with him, so Officer Tariq walked over to help and patted the man down.

Meanwhile, Officer Volcin stayed with Mabry and the third man. Officer Volcin asked the third man for permission to pat him down. Although the body-camera footage does not capture an audio response, it shows that Officer Volcin proceeded to pat the third man down with one hand while holding a flashlight in his other. Seeing this, Mabry raised his shirt and said, "I've got nothing on me," and "you have no probable cause to search me."

At that point Officer Volcin noticed Mabry was carrying a satchel secured by a strap across his body. According to Officer Goss, his team "ha[d] run into many individuals who are keeping firearms and narcotics ... in satchels because they're more concealable than carrying a backpack." Officer Volcin asked Mabry what he had in the satchel. Mabry told Officer Volcin that he had nothing in his satchel. As Officer Volcin persisted to ask questions about the satchel, Mabry continued to tell him there was nothing in it. Near the end of the exchange Mabry appeared to remove some headphones from his

jacket pocket and show them to Officer Volcin. Mabry then took off running.

Officers Volcin and Goss chased Mabry. As they were running, Mabry discarded the satchel, which Officer Goss recovered. Mabry eventually stopped running and Officer Volcin handcuffed him. Officer Goss handed the unopened satchel to Officer Volcin. Officers Goss and Volcin walked Mabry back toward the site of their initial encounter. As they did so, Officer Volcin opened the satchel and discovered a spring for a large-capacity magazine. While walking, Mabry made two unsolicited statements indicating he was in possession of a firearm. He later said the police were lucky he did not start shooting. In response to questions about what he had in his pockets, Mabry said he had drugs. As officers were discussing the satchel, Mabry said it also contained drugs. The officers seized a handgun, ammunition, an extended magazine, crack cocaine, and amphetamines from Mabry and the satchel.

The government charged Mabry with drug and firearm offenses. Mabry filed a motion to suppress the physical evidence and the incriminating statements that he made to the officers.

Mabry argued that his flight from the officers came after he had been seized for Fourth Amendment purposes. Accordingly, because the officers had neither probable cause nor reasonable suspicion when they seized him, Mabry claimed all evidence obtained after he fled should be suppressed. The district court denied Mabry's motion and he appealed.

### **D.C. CIRCUIT COURT OPINION**

The District of Columbia Court of Appeals noted that a Fourth Amendment seizure occurs when physical force is used to restrain a person's movement or when a person submits to an officer's show of authority. As the officers did not physically restrain Mabry, the court found that in this case Mabry was seized "if and only if (1) the police made a show of authority, and (2) Mabry submitted to that show of authority."

The court held that the officers made a show of authority. First, by the time Officer Volcin noticed the satchel, Mabry had already seen Officer Goss prevent one of the other men from walking away. Afterward, Mabry saw Officer Tariq help Officer Goss pat the man down and then saw Officer Volcin pat down the third man who had remained near Mabry. Second, even assuming that Officer Volcin did not command Mabry to show him the satchel, the persistent nature of his questioning, which continued despite Mabry's attempts to end the encounter, communicated to Mabry that Officer Volcin was not taking no for an answer. Finally, the court found that examining the officers' interaction with Mabry and the other men in a broader context intensified the coercive nature of the encounter. For example, the encounter occurred at night, with uniformed officers shining their flashlights at the three men, while Mabry's avenues of egress were at least partially restricted by the officers, their car, and a fence. Considering all the circumstances, the court concluded a reasonable person in Mabry's position would not have felt free to ignore Officer Volcin and walk away.

The court also held that by staying where he was, even as Officer Volcin's questioning grew more persistent and not leaving although he clearly wanted to, Mabry submitted to Officer Volcin's show of authority, even if it was only for a brief time. As a result, the court held that Mabry was seized for Fourth Amendment purposes prior to fleeing from the officers; therefore, the district court denied his motion to suppress the evidence obtained during the exchange.

### **TAKEAWAYS**

Body-worn cameras were present during this seizure which absolutely helped this become an open and shut case. There are also multiple signs of authority from our officers here, as noted by the court. An arrest warrant is preferred, but not required, to make a lawful arrest under the Fourth Amendment. A warrantless arrest may be justified where probable cause and urgent need are present prior to the arrest and that is obvious when these guys were out patrolling an area known for crime. Probable cause was present because our officers had reasonable belief in the guilt of the suspect based on the facts and information prior to the arrest. It also didn't help that our suspect's case that he ran and ditched his satchel, but it did help prove reasonable doubt in Mabry's innocence and that he absolutely felt the authority of these officers.

**United States v. Mabry, 997 F.3d 1239 (D.C. Cir. 2021)**

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