

**Rule 3, Ariz. R. Crim. P.**

***Terry v. Ohio* Investigatory stop – *State v. Wyman* – Consensual encounter with police does not violate Fourth Amendment, but officer's "repeated requests" that defendant stop and talk to him violated defendant's Fourth Amendment rights.....Revised 2/2010**

In *Terry v. Ohio*, the United States Supreme Court held that an officer may stop an individual based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. 1, 21 (1968). Subjective good faith is not enough; the facts must be considered on an objective basis. The question is, "would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?" *Id.* at 21-22 [internal quotation marks omitted]. "If an officer has a reasonable suspicion, based upon specific and articulable facts, that a suspect is involved or wanted in connection with a crime, then a brief stop to investigate that suspicion in fact may be the best and most sensible response." *State v. Romero*, 178 Ariz. 45, 49, 870 P.2d 1141, 1145 (App. 1993).

No single factor is conclusive in determining when a *Terry* stop based on reasonable suspicion becomes an "arrest" requiring probable cause. *State v. Clevidence*, 153 Ariz. 295, 298, 736 P.2d 379, 382 (App. 1987). A person is under arrest when a reasonable person, innocent of any crime, would reasonably believe that he was not free to leave. *State v. Winegar*, 147 Ariz. 440, 448, 711 P.2d 579, 587. However, "there is no 'bright line rule' to apply when making this determination, only the approach of reason and common sense applied to the totality of the particular circumstances." *Romero*, 178 Ariz. 45 at 49, 870 P.2d at 1145. Relevant factors include the proximity between the location of the crime and the scene of the stop, the

amount of time between the crime and the stop, and the duration of the stop, *State v. Solano*, 187 Ariz. 512, 516, 930 P.2d 1315, 1319 (App. 1996), as well as “the officer’s display of authority, the extent to which defendant’s freedom was curtailed, and the degree and manner of force used,” *State v. Acinelli*, 191 Ariz. 66, 70, 952 P.2d 304, 308 (App. 1997), *citing State v. Ault*, 150 Ariz. 459, 464, 724 P.2d 545, 550 (1986).

A single command is sufficient to constitute an seizure. For example, in *State v. Canez*, 202 Ariz. 133, 151, ¶ 54, 42 P.3d 564, 582 (2002), the Arizona Supreme Court found that the defendant was seized for Fourth Amendment purposes when the officers confronted him in the bathroom of his home and told him he needed to come outside. Similarly, in *State v. Rogers*, 186 Ariz. 508, 924 P.2d 1027 (1996), an officer displayed his badge and said, “Police officers, we need to talk to you.” The defendant stared at the officer and then turned and ran; the officer chased and caught him. The Arizona Supreme Court held that under the circumstances, this was not a request, but a command, reasoning that a reasonable person would not have felt free to disregard the officer. The Court stated, “The fact that an officer pursued defendant when he did leave shows just how reasonable it was for defendant to believe his freedom was being restricted.” *Id.* at 510, 924 P.2d at 1029.

The form of the officer’s statement – whether the officer says “We have to talk to you” or “we would like to talk to you” – is not conclusive. The courts determine whether the defendant was seized by whether a reasonable person under the circumstances would have felt free to ignore the officer and go about his business. *See Kaupp v. Texas*, 538 U.S. 626 (2003). In *Kaupp*, officers had no probable cause or warrant to arrest the juvenile murder suspect. Nevertheless, officers with a flashlight woke him in

his bedroom at 3:00 a.m. and told him, “We need to go and talk.” The suspect said “Okay.” The officers handcuffed him and led him out of the house, shoeless and wearing only boxer shorts, and into a police car. They took him to where the body was found and then to the police station, where they questioned him and he confessed. *Id.* at 628. The United States Supreme Court said the suspect was clearly seized without probable cause or a warrant, and therefore the officers violated his Fourth Amendment rights. “Such involuntary transport to a police station for questioning is sufficiently like arrest to invoke the traditional rule that arrests may constitutionally be made only on probable cause.” *Id.* at 630 [internal quotation marks and brackets omitted]. The suspect’s saying “Okay” was merely a submission to lawful authority, not consent. *Id.* at 631.

Even a request to speak with a suspect can become a seizure if the officer repeats the request. The Arizona Court of Appeals has held that an officer illegally detained and seized a defendant by making “repeated requests” that the defendant stop and talk to him. *State v. Wyman*, 197 Ariz. 10, 3 P.3d 392 (App. 2000). In *Wyman*, a store clerk told an officer that the defendant and another man were outside the store “acting nervous.” *Id.* at 12, ¶ 3, 3 P.3d at 394. The officer went to his police car and the two men walked away, looking over their shoulders at the officer. The officer drove his car within earshot of the two men, got out, and yelled, “Hey, can I talk to you?” *Id.* The men ignored the officer. The officer yelled at them “several times” before they stopped and approached the officer’s car. He asked what they were doing, and, when they said they were going shooting, he asked them if they had any weapons. The defendant admitted having a handgun in his pocket. “The officer then searched [the defendant]

and found a pistol.” *Id.* Based on the possession of the gun, the defendant was convicted of possessing a firearm as a prohibited possessor.

The defendant in *Wyman* moved to suppress the gun, arguing that the officer violated his Fourth Amendment rights. The trial court denied the motion to suppress, reasoning that the officer’s actions were neither oppressive nor unreasonable. The trial court also found that the officer did not compel the defendant to do anything until the defendant admitted he had a concealed weapon, and at that point, the officer had probable cause to believe the defendant was illegally carrying a concealed weapon.” *Id.* at 13, ¶ 4, 3 P.3d at 395.

The Court of Appeals reversed the defendant’s conviction, finding that his admission was the fruit of an earlier constitutional violation. The Court reasoned that because neither the clerk nor the officer saw any possible criminal activity, the officer had no basis for a *Terry* stop. *Id.* The Court recognized that consensual interactions between police and others do not implicate the Fourth Amendment, citing *Florida v. Bostick*, 501 U.S. 429 (1991) and *Florida v. Royer*, 460 U.S. 491 (1983). The Court further recognized that the officer’s initial request to talk with the men “was itself well within the bounds of a consensual encounter” because the officer used no force and did not order the men to speak with him. *Wyman*, 197 Ariz. at 13, ¶ 4, 3 P.3d at 395. However, by repeating the request, the officer transformed the “request” into an order to stop and talk with him:

Initially, [the men] did feel free to ignore the officer and walk away; in fact, this is exactly what they did. However, when the officer incessantly repeated his request after the men refused to respond, he clearly demonstrated that they were not free to ignore him and go about their business.

*Id.* at 13, ¶ 8, 3 P.3d at 395.

Citing *Matter of Appeal in Maricopa County Juvenile Action No. JT30243*, 186 Ariz. 213, 920 P.2d 779 (App. 1996), the *Wyman* Court said that a consensual encounter with an uncooperative subject can become a Fourth Amendment seizure when the subject's participation is ultimately obtained through more than one request for voluntary cooperation. "[P]olice must allow a person to go on about his or her business when it is clear that the person does not wish to voluntarily cooperate." *Wyman*, 197 Ariz. at 14, ¶ 12, 3 P.3d at 396. The Court noted that there was no evidence that the men had failed to hear or understand the officer, and concluded:

At least three times, [the defendant] walked away from the officer. In each instance, the officer's response was to yell at him. A reasonable person in this situation would not have felt free to leave in the face of the officer's repeated summons. Thus, when [the defendant] finally complied with the officer's shouting and went to talk to him at the patrol car, he had been seized for Fourth Amendment purposes. The officer had no reasonable suspicion for an investigatory stop; the seizure was therefore unreasonable. Because the officer obtained appellant's confession and pistol as a direct result of his unreasonable seizure, that evidence should have been suppressed.

*Id.* at 14, ¶ 13, 3 P.3d at 396.

By contrast, an officer's waving his hand and making eye contact with the driver of a moving vehicle was not a seizure, but an invitation to a consensual encounter. The officer did not use or threaten to use any force, and the defendant did not submit to the officer's authority. *State v. Guillory*, 199 Ariz. 462, 465-466, ¶ 10, 18 P.3d 1261, 1264–1265 (App. 2001).