IS DEBOUR’S MULTI-TIER ANALYTICAL FRAMEWORK AT RISK OF TUMBLING DOWN?

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INTRODUCTION

Nearly a half century ago, the Court of Appeals, in *People v DeBour*/ *People v LaPene*, (40 NY2d 210 [1976]) constructed a four-tier approach to analyzing the propriety of police-initiated encounters with private citizens in public settings.

Unlike the federal model which requires a seizure of the individual before constitutional considerations come into play, (*Terry v Ohio*, 392 US 1 [1968]), the *DeBour* Court determined that even those less intrusive encounters that fall short of forcible detentions based on reasonable suspicion of criminality require judicial oversight to ensure that a proper balance is struck between effective police investigation/officer and public safety and every individual’s right, as plainly stated by Greta Garbo, to be let alone (see *People v DeBour* at 218 and “Grand Hotel” [1932]).

As noted in *People v Hollman* (79 NY2d 181, 196, [1992]), “police encounters that are not Fourth Amendment seizures should continue to be evaluated under *DeBour* because judicial scrutiny of these encounters best serves the aims of predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of the public.”

Considering the divergence of opinions among prosecutors, defense attorneys and judges at the trial and appellate levels regarding the nature and degree of permissive police intrusion in any given case (see, for example, *People v Hollman*, supra, *People v Samuels*, 50 NY2d 1035 [1980], *People v Reyes*, 83 NY2d 945, [1994], *People v Ginty*, 204 AD3d 1487 [4th Dept 2022], *People v Thorne*, 207 AD3d 73 [1st Dept 2022], *People v Gates*, 152 AD3d 1222 [4th Dept 2017], *People v Garcia*, 20 NY3d 317 [2012]) it is difficult to conclude with confidence that analyzing street encounters through the prism of *DeBour* is particularly predictable or precise.

A BRIEF RECAP

As noted in *DeBour*, when evaluating police intrusions on a person’s freedom of movement (which results in the seizure of incriminating evidence from his/her person or parked vehicle), courts must first be satisfied that the police conduct was justified from the start and, thereafter, reasonably related in scope to the circumstances thar gave rise to the encounter (citing *People v Cantor*, 36 NY2d 106 [1975]).

Courts must then determine the level of permissible intrusion and inquiry based on information possessed and observations made by the police of the individual’s conduct in the context of the time, place, and circumstances of the encounter.

So, if an officer has an OBJECTIVE CREDIBLE REASON (beyond speculation, idle curiosity, or an unsubstantiated hunch), not necessarily indicative of criminality, he she may approach an individual and ask relatively innocuous questions such as “what’s your name, where are you coming from and where are you going?” (LEVEL 1).

Of course, the individual would be within his/her rights to say nothing or “none of your business,” and keep on walking (*People v Howard*, 50 NY2d 583, [1980]). That does not guarantee, however, that the officer will simply give up without further inquiry. Odds are the encounter will escalate.

At level 2, according to *DeBour*, an officer may make more pointed inquiries if he/she has a FOUNDED SUSPICION of criminal activity afoot. If, for example, the police observe a suspect walking quickly away from the scene of a very recent crime (e.g., residential burglary) carrying a stereo, they would likely be justified in asking, “where did you get that stereo?”

If the police have a REASONABLE SUSPICION of criminality at hand (e.g., person matches the description of a suspect in a robbery of a nearby deli that just occurred), they would most likely be justified in forcibly detaining the individual, asking him/her questions about his/her recent activities and forcibly detaining him/her long enough to transport him/her to the scene for a show-up identification procedure. (*People v Hicks*, 68 NY2d 234 [1986]). (LEVEL 3).

If during the encounter the officer has reason to believe that the suspect is armed (e.g., based on information that the robber had a weapon, observation of a bulge in the suspect’s clothing or other furtive behaviors giving the officer pause for his/her safety), he/she may conduct a pat-down search of the suspect (*Terry v Ohio*, 392 US 1 [1968]).

Finally, if the officer has PROBABLE CAUSE to believe thar the suspect has committed, is committing or is about to commit a crime (e.g., leaving the scene of an arson fire with a gas can and lighter in hand), he/she may arrest the individual and search him/her incident thereto.

 DEBOUR APPROACH CALLED INTO QUESTION

As a practical matter, attempting to pigeon-hole what are often fluid and fast-moving confrontations into discreet categories of permissible intrusion is neither easy nor demonstrably effective. Just recently, at least one member of the Court of Appeals in *People v Johnson* (\_NY3d\_, 2023 NY Slip Op 02734 [2023, Rivera. J., concurring]) recommended that the *DeBour* framework be dismantled and disregarded as antiquated, ineffectual, and counterproductive in terms of protecting the privacy rights of individuals (in particular, minorities) from overly aggressive police investigative tactics on something less than reasonable suspicion.

In that case, two officers on patrol in an area beset by a spike in violent crime noticed a Ford Explorer legally parked about 50 feet ahead of their patrol car. As they pulled up behind the vehicle, they observed the sole occupant (the defendant) shimmy over from the driver’s seat to the passenger side after which he leaned his upper torso back over toward the driver’s side. (One of the officers testified that he suspected that the defendant might have been reaching for or disposing of a weapon).

The officers exited their cruiser and approached the vehicle whereupon the defendant got out of the passenger side and started walking away. As he did so, he was pulling up his trousers which were undone.

One of the officers asked the defendant to “hold up,” but the defendant continued walking. As they caught up to him, one asked the defendant, “are you nervous,” to which he replied “no.” He was then asked, “do you have any weapons on you?” He replied, “nothing.” One of the officers frisked the defendant and felt what he thought might be a bag of drugs. No outline of any weapon was observed.

The officer asked, “what’s in your pocket?” The defendant said, “nothing.” He then began emptying his pockets which included two bags of marijuana. He also had a bag of heroin balled up in his fist.

The trial court denied the defendant’s motion to suppress, rejecting the defendant’s argument that the approach, inquiry, and pat down violated levels one, two and three of *DeBour*. The court concluded that the defendant’s movements inside the vehicle followed by his evasive conduct and adjusting his trousers were consistent with possession of a weapon. Following a bench trial, the court found the defendant guilty of Criminal Possession of a Controlled Substance 3d degree for which a 5-year determinate sentence was imposed.

The Fourth Department affirmed the conviction, finding that the officer’s actions were justified from the start and at every stage of the encounter leading up to the arrest (206 AD3d 1702 [4th Dept 2022]).

The Court of Appeals reversed, concluding that the frisk was not based on any reasonable suspicion that the defendant had committed, was committing or was about to commit a crime (citing *People v Benjamin*, 57 NY2d 267 [1980]), and *People v DeBour* supra). Considering its conclusion that the defendant’s conduct did not warrant a level three intrusion, the Court saw no need to determine whether the initial approach, pursuit, and inquiry of the defendant satisfied levels one and two of *DeBour.*

CONCURRING OPINION: NO REASONABLE SUSPICION, THEN NO POLICE-INITIATED ENCOUNTERS

While agreeing with suppression, the concurring judge deemed it critical to the development of search and seizure jurisprudence to evaluate the police conduct at every stage of the encounter rather than leapfrog over levels one and two.

In this judge’s view, this encounter was no good from the start since the defendant’s vehicle was legally parked and there was nothing about his behavior inside (changing seats and leaning back) that provided an objective credible reason to approach and inquire of his activities (citing, inter alia, *People v DeBour*, supra at 216, *People v Hollman*, 79 NY2d at 190-191, and *People v Harrison*, 57 NY2d 470, [1982]). That the defendant might be ditching or reaching for a gun, according to this judge, was pure speculation.

Nor did the defendant’s exiting of his vehicle from the passenger side amount to anything so suspicious as to warrant pursuit and inquiry under level 2 of *DeBour*. The fact that the defendant was in a high-crime neighborhood was equally unpersuasive (citing *People v McIntosh*, 96 NY2d 521 [2001]).

The concurring judge also did not believe that the defendant’s pulling up and refastening his pants supported the conclusion that he might have a gun since one is unlikely to secrete a weapon in a pair of pants that are open and unbuckled.

That the defendant may have appeared nervous provided no justifiable basis for suspicion of criminality since most people (criminals or otherwise) are generally spooked by uniformed officers bearing down on them (citing *People v Garcia*, 20 NY3d 217,323 [2017], and *People v Hollman*, 79 NY2d at 192).

When the defendant said that he had nothing on him, there were no grounds, in this judge’s view, to detain him further or ask him why he appeared to be nervous (citing *People v Moore*, 6 NY3d 496 [2006]). And, as found by the majority, there was no reasonable suspicion to frisk the defendant when he did not manifest the presence of a weapon or behave in a manner that suggested he had one on him.

While *DeBour* may be broader in scope than the federal model, its “atomized” approach, in the concurring judge’s opinion, no longer (if ever) provides sufficient (let alone consistent) protection for individual freedom of movement and the right to be left alone. It also invites a blurring of the lines between levels of intrusion (citing *People v Reyes*, 83 NY2d 945 [1994]) and *People v Samuels*, 50 NY2d 1035, 1040 [1980, Fuchsberg, J. dissenting]) where the dissenter observed:

“The mushrooming lexicographical distinctions into which the reasonableness of street stops and seizures are categorized present a disturbing problem. Since…no two stops are the same, the semantics necessarily engaged to effect such compartmentalization (however well intended) in the end make it all the easier to substitute labels for liberties.”

In *Samuels*, the majority of the Court upheld a pat-down search leading to the discovery of a handgun in the defendant’s pocket after police observed him buying a holster from a novelty store. When they approached him, he put his hand in his pocket and refused to remove it after officers asked why he bought the holster and commanded him to show his hand. In the Court’s view, the officer’s safety was implicated by the defendant’s behavior.

In the dissenter’s view, there would have been no safety issue had the police not confronted him without just cause in the first place.

In *Johnson*, supra, the concurring judge, noting the realities of police-citizen encounters (most of which involve minorities) concluded that the right to walk away from armed police officer is illusory, and the decision whether or not to engage with an officer is no choice at all since as *DeBour* noted, “ it is difficult to understand how any person is not intimidated or otherwise believes that (he/she) can leave when approached by a uniformed officer…who tells (him/her) to stop.” (40 NY2d at 219).

To the concurring judge, *DeBour’s* framework “has proven…to be an unworkable one that creates more questions than it resolves” (citing *People v Taylor*, 9 NY3d 129 [2009]). It has also, according to this judge, “calcified into an archaic and obsolete doctrine (that) has lost touch with reality” (citing *People v Hobson*, 39 NY2d 479 [1976]).

PROPOSED SOLUTION

To ensure better public safety and protection of individual rights, the concurring judge recommended that courts require all police encounters to be justified by REASONABLE SUSPICION based on actual signs of criminality. Absent the requisite suspicion, the law should not allow police officers to approach private individuals (except those from whom helpful, non-self-incriminating information may be sought) to request information or engage in common law inquiry.

As the concurring judge observed, “…Despite its best intentions…the (*DeBour*) framework…has failed to generate the predictability and precision in judicial review for which it strove. Instead, experience has shown that, because the bar is set so low, courts often treat an officer’s speculation or hunch as some objective credible reason for an approach under level one. Similarly, level 2 is based on a right to inquire that permits targeted questioning without a (demonstrable nexus) to criminal activity. Whether driven by animus or implied bias, the results are the erosion of the right to be left alone and increased risk to the safety of police officers and private individuals” (citing *People v DeBour* supra).

Long story short, if an officer lacks reasonable suspicion of criminality, there should be no basis to buttonhole a citizen on the street and press him/her for information, let alone pat him/her down for a weapon.

SORTING THROUGH DEBOUR’S OVERLAPPING LEVELS OF INTRUSION

In *People v Creary*, 75 Misc.3d 857 (Sup. Ct., Queens County 2022), the court wrestled with a situation in which the police responded to 911 calls five hours apart, the first one at 4:00am involving a call of domestic violence/gun threat after which the defendant left his girlfriend’s apartment and drove off in his Ford Explorer. In the second call, the complainant reported that the defendant’s bedroom door was now closed behind which his cell phone was ringing, leading her to believe that he had returned.

While the Emergency Services Unit went into the dwelling, other police officers approached the defendant’s vehicle which was legally parked across the street. When they arrived, they did not have a clear view inside the vehicle because the windows were tinted.

A police sergeant knocked on the driver’s door window and observed a single occupant (the co-defendant, Hamilton who was identified by the complainant) asleep behind the wheel. The sergeant ordered him to open the door (for safety reasons). When he did so, the sergeant observed a handgun in the pocket of the driver’s door. Both defendants were charged with Criminal Possession of a Weapon 3rd degree and Creary was also charged with menacing for the earlier threat.

Addressing what it described as the “*DeBour* conundrum,” the court observed that wading through the four levels of street encounters was a “thorny” proposition. The court noted that judges sometimes “conflate” the different levels, thus permitting a forcible detention and frisk (level 3) when only a common law inquiry (level 2) is warranted (citing *People v Abdul-Mateen*, 126 AD3d 986 [2nd Dept 2015]).

The court also questioned why a police officer can only frisk a suspect upon reasonable suspicion (and some indicia of a weapon) but not at levels one or two where safety, as a practical matter, is no less a concern (citing *People v Benjamin*, 51 NY2d 267 [1980]).

It should be noted, however, that in *DeBour*, the officers who observed the defendant suddenly cross the street in a high-crime neighborhood late at night were deemed to have had an objective credible reason to approach him (level one) and were justified in directing him to open his jacket when they observed what they perceived to be the outline of a handgun.

In his motion to suppress, the defendant argued that since his vehicle was lawfully parked, and the co-defendant was not suspected of any criminality (in or out of the vehicle), there was no justification for ordering the codefendant to open the door (citing *People v Eugenio*, 185 AD2d 1050 [2nd Dept 2020]).

The court held that the police had an objective credible reason to approach the vehicle and request information of the co-defendant (level one inquiry) but they went too far in having him open the door because there was no indication of any criminal activity afoot (Level 2).

The co-defendant was not a suspect in any crime, he did not engage in conduct that triggered any concern for officer safety, the defendant was not inside the vehicle (in fact the police believed he was in the dwelling) and there was no reason to believe that evidence of a crime was inside the vehicle several hours after the defendant reportedly threatened the complainant with a gun.

The court also dismissed the automobile exception, concluding that there was no probable cause (independent of an arrest) to search the vehicle nor was there any nexus between probable cause to search (which was lacking in any event) and the arrest (citing *United States v Ross*, 456 US 798 [1982], and *People v Francois*, 138 AD3d 1165 [3rd Dept 2016]).

Noting the hazards of allowing greater intrusions than are warranted by the level of information actually possessed, the court observed that “*DeBour’s* enigmatic uncertainty has descended into a psychedelic fusion of confusion” (citing *People v Benjamin*, supra at 270 and *People v Lypka*, 236 NY2d 210 [1975]).

FINAL THOUGHT

Despite ongoing criticism as being unrealistic, artificial, and confusing, *DeBour* still provides the (seemingly fragile) framework for evaluating police-citizen encounters that result in the seizure of incriminating evidence.

Whether the Court of Appeals eventually adopts the concurring judge’s recommendation in *Johnson* to permit police-initiated encounters only upon reasonable suspicion of criminality (arguably limiting law enforcement’s ability nip criminal activity in the bud) remains to be seen.

In the meantime, prosecutors, defense lawyers and judges will continue to wrangle over multiple levels of permissible police conduct in what are often dynamic, fast-moving situations that don’t easily lend themselves to clear-cut categorization.