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Criminal Procedure - Search and Seizure of Person and Property: State v. Lovato

Julie M. Bardacke

CRIMINAL PROCEDURE—Search and Seizure of Person and Property: *State v. Lovato*

I. INTRODUCTION

In *State v. Lovato*,[1] the New Mexico Court of Appeals dealt with the controversial issue of how far an investigative stop may go before it constitutes an arrest. The court held that, as a matter of law, actions by police officers which included handcuffing suspects at gunpoint did not constitute an unlawful arrest within the meaning of the Fourth Amendment of the United States Constitution.[2] This casenote examines the historical background of the investigatory detention versus unlawful arrest as defined by both the United States Supreme Court and the New Mexico courts. Next, this casenote describes and analyzes the New Mexico Court of Appeals' decision in *Lovato*. Finally, the policy utilized by the court of appeals is examined.

II. HISTORICAL BACKGROUND

The Fourth Amendment to the United States Constitution protects persons against unreasonable searches and seizures by the United States government.[3] In *Mapp v. Ohio*,[4] the United States Supreme Court extended the Fourth Amendment's protection against unreasonable searches and seizures to the state level through the Fourteenth Amendment's Due Process Clause, which protects state citizens from deprivation of life, liberty, or property without due process of law.[5] The New Mexico Constitution contains a provision protecting against unreasonable searches and seizures almost identical to the United States Constitution's Fourth Amendment.[6]

In the leading United States Supreme Court case distinguishing between an investigatory stop and an arrest, *Terry v. Ohio*,[7] the Court held that

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1. 112 N.M. 517, 817 P.2d 251 (Ct. App.), *cert. denied*, 112 N.M. 388 (1991).
2. *Id.*
3. The Fourth Amendment provides that:
   [t]he 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.

U.S. CONST. amend. IV.
4. 367 U.S. 643 (1961).
5. *Id.*
6. This provision states that:
   [t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.

N.M. CONST. art. II, § 10.
7. 392 U.S. 1 (1967).

when an officer grabbed the defendant, spun him around, conducted a frisk of his outer clothing, ordered him into a store upon feeling a gun in his jacket, removed the gun along with his jacket, and, finally, ordered him to face the wall with his hands raised, the defendant had not been "arrested" so as to require a finding of probable cause for the search and seizure. Instead, the Court found that it is not always necessary for a policeman to have probable cause for an arrest to detain a person properly and to conduct a limited search for weapons upon that person.[8] The *Terry* Court held that where a police officer has a reasonable suspicion "that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . he is entitled for the protection of himself and others . . . to conduct a carefully limited search" without this suspicion rising to the level of probable cause.[9] In *Terry*, therefore, the Court took a restricted view of Fourth Amendment protections by allowing officers great leeway in detaining suspects and by allowing them to take measures that are reasonably necessary to provide for their safety under the circumstances without this action constituting an actual arrest.[10]

New Mexico courts adopted the *Terry* Court's definitions of an arrest;[11] however, the New Mexico Court of Appeals further restricted Fourth Amendment rights with its decision in *Lovato*. In *Boone v. State*,[12] the New Mexico Supreme Court held that a person has been seized when his freedom is restricted by a police officer and he is under the control of that officer.[13] In *Boone*, the court found that the defendant was arrested when he was ordered to take a field sobriety test, even though the arrest was not formal.[14] The *Boone* court cited *State v. Frazier*[15] as precedent for the proposition that an arrest has occurred when a person's freedom of action is restricted by a police officer and he is subject to the constraint of that officer.[16] In *Frazier*, the court of appeals held that the defendant was arrested when police seized her as she ran out of her motel room after the police attempted to help the motel owner evict her. The court determined that the defendant's actions in that case did not warrant the actions taken by the police officer; thus, it was an illegal arrest.[17] This holding overturned the lower court's refusal to suppress incriminating evidence because it was obtained as a result of an illegal search and seizure.[18]

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8. *Id.* at 1-3.
9. *Id.* at 30.
10. *Id.*; *see also* United States v. Maez, 872 F.2d 1444, 1450 (10th Cir. 1989) ("An arrest or seizure occurs 'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen . . . .'"); United States v. Espinosa, 782 F.2d 888 (10th Cir. 1986); United States v. McDevitt, 508 F.2d 8 (10th Cir. 1974).
11. *See* State v. Frazier, 88 N.M. 103, 105, 537 P.2d 711, 713 (Ct. App. 1975).
12. 105 N.M. 223, 731 P.2d 366 (1986).
13. *Id.*
14. *Id.* at 227, 731 P.2d at 370.
15. 88 N.M. 103, 537 P.2d 711 (Ct. App. 1975).
16. *Boone*, 105 N.M at 227, 731 P.2d at 370.
17. *Frazier*, 88 N.M. at 105, 537 P.2d at 713.
18. *Id.* at 104, 537 P.2d at 712.

The court of appeals in *Lovato*, however, departed from the less restrictive view of Fourth Amendment rights found in *Boone* and *Frazier*.

III. STATEMENT OF THE CASE

On October 31, 1989, Albuquerque city police officers received a report of a drive-by shooting in an area known as "Martineztown." A radio dispatch to police officers in the vicinity described a car seen leaving the area as a white Chevrolet Impala.[19]

Officer Lucero testified that he was in a patrol car driven by another officer when he received the dispatch. As the officers were driving north toward Martineztown, they observed a 1976 white Impala pulling out of a side street in the Martineztown area and heading south. No other vehicles were in the area. The police car turned around and followed the Impala for less than a minute before stopping it. There were five males in the car; three in front and two in back.[20]

Lucero further testified that after stopping the car, the officers commenced "felony stop" procedures. He called for back-up and then requested that the five men in the car lace their fingers behind their necks. When back-up units arrived, he directed the men to get out of the car one at a time from the driver's door and walk backwards toward the back of the car. He then handcuffed all five of the men. The officers had their guns drawn during this procedure.[21]

After the five men got out of the car, Lucero testified that he suspected that one more person might still be in the car hiding or lying on the floor. Two officers moved toward the car on either side with their guns drawn. As Lucero opened the door on the right side of the car, a shotgun fell out onto the ground. The shotgun was seized as evidence and the men were arrested.[22]

The defendants moved to suppress the shotgun evidence at a pre-trial hearing. At that hearing, Officer Lucero stated that the radio dispatch described the suspect vehicle as an "older model" Impala. A tape recording was then played of testimony given by Lucero at an earlier hearing where he stated that the dispatch described the car seen leaving the area of the shooting as a "late" or "later model" car. Officer Lucero testified further that he thought "late" model was synonymous with "older" model.[23]

The police broadcast failed to indicate how many occupants were in the car, the number of people involved in the shooting, the car's license plate number, or the direction in which the car was believed to be traveling. Following the hearing, the court ordered that the evidence be suppressed. In so doing, the trial court determined that the facts available

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19. *Lovato*, 112 N.M. at 518, 817 P.2d at 252.
20. *Id.* at 518-19, 817 P.2d at 252-53.
21. *Id.* at 518, 817 P.2d at 252.
22. *Id.* at 518-19, 817 P.2d at 252-53.
23. *Id.* at 519, 817 P.2d at 253.

to the officer making the stop were insufficient to infer that the vehicle was connected with any illegal activity.[24] The State appealed.

IV. DISCUSSION OF THE COURT'S ANALYSIS

The court of appeals addressed four issues in its review of the trial court's decision. One of these issues was whether the trial court should be affirmed on alternative grounds because, as a matter of law, the stop constituted an arrest requiring a showing of probable cause.[25] Because this issue was not raised in the trial court, the court of appeals did not have the benefit of the trial court's findings of fact, which would have been pertinent to determining whether or not the stop constituted an arrest. The court indicated that prior case law held that a determination regarding whether or not an arrest has occurred during a stop depends on the particular facts of the case.[26]

The defendants argued that the stop constituted an arrest because they were forced at gunpoint to remain in the car with their hands laced behind their heads, were then forced to get out of the car and walk backwards toward the officers, and finally were handcuffed without any prior questioning or investigation.[27]

The court of appeals disagreed. The court first stated that the level of intrusiveness accompanying a stop may vary depending on the facts justifying the stop.[28] The ultimate question determining whether or not a stop constitutes an arrest is whether the actions of the officers during the stop were reasonable under the circumstances.[29] The court held that "the level of force used by the officers in effecting the investigative detention in this case did not, as a matter of law, convert the initial stop into an arrest."[30] In so doing, the court quoted with approval the Tenth Circuit Court of Appeals in *United States v. Merritt*:[31] "'Whenever the police confront an individual reasonably believed to present a serious and imminent danger to the safety of the police and public, they are justified in taking reasonable steps to reduce the risk [of injury].'"[32] The use of force in conducting an investigative stop does not necessarily turn that stop into an arrest.[33]

The court's decision in *Lovato* extended the point at which an investigative stop, which requires reasonable suspicion, turns into an arrest,

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24. *Id.*

25. *Id.* at 521, 817 P.2d at 255. The other issues the court addressed, which will not be the focus of this casenote, were: 1) whether there was reasonable suspicion for the stop; 2) whether the trial court's order suppressing evidence was supported by substantial evidence; and 3) whether opening the door of the car by police amounted to an illegal search and seizure. *Id.* at 519-24, 817 P.2d at 253-59.

26. *See* State v. Cobbs, 103 N.M. 623, 711 P.2d 900 (Ct. App. 1985).

27. *Lovato*, 112 N.M. at 522, 817 P.2d at 256.

28. *Id.*

29. *Id.*

30. *Id.* at 523, 817 P.2d at 257.

31. 695 F.2d 1263 (10th Cir. 1982), *cert. denied*, 461 U.S. 916 (1983).

32. *Lovato*, 112 N.M. at 523, 817 P.2d at 257 (quoting United States v. Merritt, 695 F.2d 1263, 1274 (10th Cir. 1982)).

33. *Id.*

which requires probable cause. In laying out the historical legal background of arrest versus investigative stop, the court of appeals relied on *State v. Cobbs*[34] to support the principle that "whether an arrest has occurred depends on the facts of each particular case."[35] In *Cobbs*, however, it was not the arrest that was in dispute; rather the issue was whether the Fourth Amendment required an officer to conduct preliminary questioning before he took measures pursuant to an investigatory stop in light of the surrounding circumstances.[36] The *Cobbs* court held that a determination of reasonableness under the circumstances should weigh the state's interest against the defendant's right to be free of arbitrary interference by police officers.[37] The outcome of this balancing test will depend on the facts and circumstances of each particular case.[38] The *Lovato* court applied the *Cobbs* premise—whether prior questioning is required before a patdown depends on the facts and circumstances of each particular case—to the detention measures used in this case to decide whether or not an arrest had occurred.

The issue of whether the stop constituted an arrest was not raised in the trial court; thus, the court of appeals did not have the benefit of the trial court's findings of fact pertaining to that issue.[39] The trial court made no findings of fact on the issue as to whether the stop constituted an arrest. The court of appeals, therefore, was faced with a determination of "whether, *as a matter of law*, the intrusive nature of the stop renders the encounter an arrest rather than a stop."[40] The court's holding that the stop did not constitute an arrest as a matter of law hinged on the question of whether the officers' actions in stopping the car and ordering its occupants out of the car were reasonable under the circumstances.[41]

The court relied on a United States Supreme Court detention case, *Pennsylvania v. Mimms*,[42] in which the Court stated that, even in routine traffic stops, police are allowed to take measures to protect themselves as long as these measures are addressed to reasonable fears.[43] In *Mimms*, the defendant's vehicle was stopped because its license plates were expired. When the defendant stepped out of the car at the officers' request, the officers noticed a bulge in his jacket, frisked him, and discovered a loaded gun.[44] The Court reasoned that the frisk was addressed to the officers' reasonable fear that they could be in danger and, thus, it was not an unlawful search and seizure.[45] The court in *Lovato* used the

34. 103 N.M. 623, 711 P.2d 900 (Ct. App. 1985).
35. *Lovato*, 112 N.M. at 521, 817 P.2d at 255 (citing State v. Cobbs, 103 N.M. 623, 711 P.2d 900 (Ct. App. 1985)).
36. *Cobbs*, 103 N.M. at 627, 711 P.2d at 904.
37. *Id.*
38. *See id.*
39. *Lovato*, 112 N.M. at 521, 817 P.2d at 255.
40. *Id.* (emphasis added).
41. *Id.* at 522, 817 P.2d at 256.
42. 434 U.S. 106 (1977).
43. *Id.*
44. *Id.*
45. *Id.*

Mimms decision to support the notion that the facts in the instant case were even more supportive of a reasonable fear of imminent danger because of the nature of the stop in response to a dispatch describing a drive-by shooting. If precautionary measures can be taken even in routine traffic stops, a situation such as the one in *Lovato* definitely warranted the precautionary measures taken by the officers. The occupants of the car were believed to be armed; thus, the actions of the officers in calling for backup and taking such steps to determine whether the occupants were armed did not constitute a level of intrusion that was inappropriate given the danger the officers could reasonably have believed existed.[46]

The court rejected the defendants' reliance on *United States v. Strickler*[47] to argue the stop constituted an arrest without probable cause.[48] In *Strickler*, the Ninth Circuit Court of Appeals found that an officer's actions in stopping a car and requiring its occupants to get out of the car at gunpoint constituted an arrest.[49] The *Lovato* court concluded that the reliance on *Strickler* was misplaced because that decision had been eroded by subsequent decisions of the same court which explained the case as based on the use of excessive force under circumstances in which the court determined that no threat to the safety of the officers existed.[50]

Finally, the court compared the facts in *Lovato* to the facts in a Tenth Circuit Court of Appeals case, *United States v. Merritt*.[51] In *Merritt*, police officers, who had a reasonable suspicion based on specific facts that the suspect-defendant was one of three men in a pick-up truck, surrounded the truck with their guns drawn and demanded the occupants get out of the truck.[52] Ultimately, twelve to fifteen officers were at the scene, with two or three of them carrying shotguns, and at least one pointing his gun.[53] The *Merritt* court held that the manner of this stop did not transform it into an arrest.[54] In holding this, the court reasoned that the officers' need for safety was such that the amount of force used was reasonable under the circumstances.[55] The *Lovato* court applied the

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46. *Lovato*, 112 N.M. at 522, 817 P.2d at 256.
47. 490 F.2d 378 (9th Cir. 1974).
48. *Lovato*, 112 N.M. at 522, 817 P.2d at 256.
49. *Strickler*, 490 F.2d at 379-80.
50. *Lovato*, 112 N.M. at 522, 817 P.2d at 256. The court referred to United States v. Patterson, 648 F.2d 625, 633 (9th Cir. 1981), stating,"[t]he Ninth Circuit noted that *Strickler* should not be read as indicating that every forceful detention turns a stop into an arrest." *Lovato*, 112 N.M. at 522, 817 P.2d at 256. The court also referred to United States v. Taylor, 716 F.2d 701 (9th Cir. 1983), stating,"the [*Taylor*] court explained that the use of drawn guns does not automatically turn a vehicle stop into an arrest." *Lovato*, 112 N.M. at 522, 817 P.2d at 256; *see also* United States v. Taylor, 716 F.2d 701 (9th Cir. 1983) (policemen making investigatory stops should be able to protect themselves from attack by hostile suspects and, depending on the circumstances, the intrusiveness of an investigatory stop does not transform it into an arrest requiring probable cause).
51. 695 F.2d 1263 (10th Cir. 1982), *cert. denied*, 461 U.S. 916 (1983).
52. *Id.* at 1265-67.
53. *Id.*
54. *Id.* at 523, 817 P.2d at 257.
55. *Id.*

principle used in the *Merritt* decision to determine that the investigatory stop did not go far enough to convert it into an unlawful arrest.[56]

Specifically, the court determined that the facts in *Lovato* were so similar to the situation present in *Merritt* that the amount of force used by Officer Lucero in effecting the investigatory stop was reasonable and, as a matter of law, did not constitute an arrest. The *Merritt* court did not, however, have to deal with the fact that the defendants were handcuffed. In *Lovato*, the defendants were handcuffed before they were formally arrested and the court held that this action still did not constitute an arrest.[57] No other New Mexico case, holding that no arrest occurred, exists in which similar actions were taken by police officers during an investigatory detention *and* the suspects were handcuffed prior to formal arrest. In this respect, *Merritt* is not factually similar to *Lovato*. In *Lovato*, police officers took the investigatory stop one step further than did the officers in *Merritt* by handcuffing the suspects. Thus, the court of appeals, by using *Merritt* as precedent, allowed even more intrusive actions by police officers against suspects without these actions constituting an arrest in violation of the Fourth Amendment. This expansion of the holding in *Merritt* could greatly facilitate New Mexico police action during investigatory detentions in the future by indicating that police can, under certain circumstances, lawfully handcuff suspects prior to formal arrest without intruding on a suspect's Fourth Amendment rights.

V. CONCLUSION

The court of appeals did not announce any policy for their holding in *Lovato*. One possible reason for this, however, may be that it is responding to a national trend of courts being "tough on crime," especially in the Fourth Amendment context. The most important proponent of this trend is the United States Supreme Court, which has "generally continued to be unreceptive to Fourth Amendment claims."[58]

Another reason for the *Lovato* decision might rest in the judges' desire to avoid the public uproar that is always likely to occur when blatantly guilty defendants are let off on perceived legal "technicalities." Judges at the state level would have an interest in avoiding such public disapproval because of the election and retention system that exists for the New Mexico judiciary.[59]

These policy theories, however, must also take into consideration the disparity of the holdings in recent New Mexico cases which have dealt with search and seizure issues. On one hand, New Mexico courts have recently narrowed citizens' rights in the context of seizures of their person

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56. *Id.*

57. *Id.* at 518-19, 817 P.2d at 252-53.

58. Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 123 (1989).

59. *See* N.M. CONST. art. VI, § 33 (providing for retention and rejection elections in New Mexico).

and property.[60] By comparison, however, New Mexico courts have afforded greater protection in the area of searches of private residences.[61] Therefore, *Lovato*, by holding that the actions taken by the officers in that case did not *as a matter of law* constitute an unlawful arrest, is consistent with recent law in narrowing the protection of Fourth Amendment rights in the area of seizure of persons and their property.[62] In the analysis of applicable case law dealing with the same and similar issues, the *Lovato* court stretched this precedent to a fact pattern that was the most intrusive of a suspect's Fourth Amendment rights against unreasonable seizure that has come before the New Mexico courts to date.

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60. *See, e.g.*, State v. Boswell, 111 N.M. 240, 804 P.2d 1059 (1991) (seizure and search of wallet valid under inventory search theory, even though wallet was at location separate from arrested defendant, because the governmental interests involved in inventory searches justified the officer's unauthorized seizure and search of the wallet). For a more detailed discussion of *Boswell*, see Stanley N. Harris et al., Survey, *Criminal Procedure*, 22 N.M. L. REV. 713 (1992).

61. *See* State v. Cordova, 109 N.M. 211, 784 P.2d 30 (1989) (court adopted, under New Mexico Constitution, more stringent search warrant test than that adopted by United States Supreme Court under federal Constitution). For a more detailed discussion of *Cordova*, see Michael J. Dekleva et al., Survey, *Criminal Procedure*, 21 N.M. L. REV. 623, 625-27 (1991).

62. *See, e.g.*, State v. Boswell, 111 N.M. 240, 804 P.2d 1059 (1991).