

## ISSUES

(1) Did a CHP officer successfully convert a traffic stop into “contact” at the time he sought the suspect’s consent to search? (2) If not, did the suspect’s extreme nervousness and failure to make eye contact give the officer a right to detain him?

## FACTS

A CHP officer stopped Chavez-Valenzuela for following too close on a freeway. As Chavez-Valenzuela was handing over his driver’s license and registration, the officer noticed that his hand was “shaking severely.” Curious, the officer asked if he was taking any medication or suffering from some medical problem. Chavez-Valenzuela said no.

Although the officer had decided not to cite Chavez, he asked his dispatcher to run a warrant check and also check DMV records to make sure his license and registration were in order. While waiting for the results, the officer asked Chavez-Valenzuela some questions, such as where he was coming from, his destination, and where he worked. As they talked, the officer noticed that Chavez-Valenzuela’s “entire body was trembling and he avoided making eye contact.”

The DMV and warrant inquiry came back negative about seven minutes later. The officer then returned Chavez-Valenzuela’s license and registration. It was at that point that he asked Chavez-Valenzuela he had any drugs in his car. He said no. The officer then asked if he could search the car. Chavez-Valenzuela said okay and signed a consent form. By this time, Chavez-Valenzuela’s body was, according to a backup officer, “shaking uncontrollably.”

During the search, the officer found six packages containing methamphetamine.

## DISCUSSION

Like any other kind of detention, a traffic stop must be terminated when officers have completed their lawful duties. If, for whatever reason, they want to continue questioning the suspect about a matter for which grounds to detain do not exist, they must convert the detention into a “contact.”

Consequently, the CHP officer who stopped Chavez-Valenzuela would have had a legal right to seek consent to search from him if one of the following circumstances existed: (1) the officer converted the detention into a “contact,” or (2) the officer developed reasonable suspicion to detain Chavez-Valenzuela to investigate drug possession or some other criminal matter.

Chavez-Valenzuela contended that neither of these circumstances existed. The court agreed.

Detention or contact?

To convert a detention into a “contact,” officers must somehow communicate to the suspect that the nature of the encounter has changed—that he is now free to leave. How can this be done? As a practical matter, three things must happen.

(1) **Return documents:** Officers must return to the suspect his ID and any other documents he had given the officer.<sup>1</sup>

(2) **“Free to go”:** Officers should tell the suspect he is free to go. Although this is not technically an absolute requirement,<sup>2</sup> it is a virtual requirement because how else can the suspect be sure he can now leave?<sup>3</sup>

(3) **No circumstances indicate suspect not free to leave:** Even if the suspect was told he was free to go, there must not have been other circumstances that reasonably indicated he must stay.<sup>4</sup>

The court noted that although the officer returned Chavez-Valenzuela’s license and registration, he did not say or do anything to let him know he was free to go. In fact, the nature of the officer’s questions indicated he was not free to go. Said the court:

Upon returning Chavez-Valenzuela’s documents, [the officer] then asked him a question implying that he suspected Chavez-Valenzuela of criminal activity. Confronted with this situations, a reasonable motorist—even with license and registration in hand—most likely would not have believed he could disregard the officer’s inquiry and end the conversation.

Thus, the court ruled the initial detention was not at any point converted into a “contact.”

#### Grounds to detain?

Having ruled that Chavez-Valenzuela was being detained when he consented to the search, the court had to determine whether grounds to detain existed; specifically, whether the officer reasonably believed he was in possession of drugs.<sup>5</sup> The government argued that reasonable suspicion did, in fact, exist based on Chavez-Valenzuela’s extreme nervousness and his failure to make eye contact.

<sup>1</sup> See *Florida v. Royer* (1983) 460 US 491 504; *United States v. Mendenhall* (1980) 446 US 544, 555.

<sup>2</sup> See *Ohio v. Robinette* (1996) 519 US 33; *United States v. Mendenhall* (1980) 446 US 544, 555; *People v. Profit* (1986) 183 Cal.App.3d 849, 877; *U.S. v. Anderson* (10<sup>th</sup> Cir. 1997) 114 F.3d 1059, 1064.

<sup>3</sup> See *Berkemer v. McCarty* (1984) 468 US 420, 436 [“Certainly few motorists would feel free [to] leave the scene of a traffic stop without being told they might do so.”]; *People v. Profit* (1986) 183 Cal.App.3d 849, 877 [“(D)elivery of such a warning weighs heavily in favor of finding voluntariness and consent.”]; *People v. Daugherty* (1996) 50 Cal.App.4<sup>th</sup> 275, 280 [officer “advised Daugherty she was not under arrest, she was free to go at any time, and she did not have to speak with him.”]; *U.S. v. Beck* (8<sup>th</sup> Cir. 1998) 140 F.3d 1129,1135; *Morgan v. Woessner* (9<sup>th</sup> Cir. 1993) 997 F.2d 1244, 1254 [“Although an officer’s failure to advise a citizen of his freedom to walk away is not dispositive of the question of whether the citizen knew he was free to go, it is another significant indicator of what the citizen reasonably believed.”].

<sup>4</sup> See *U.S. v. Sandoval* (10<sup>th</sup> Cir. 1994) 29 F.3d 537, 540 [“After the point at which the driver has his or her other documentation back, the touchstone of our analysis is simply whether . . . the driver has an objective reason to believe that he was not free to end his conversation with the law enforcement officer and proceed on his way.”]; *U.S. v. Beck* (8<sup>th</sup> Cir. 1998) 140 F.3d 1129, 1136-7; *U.S. v. Ramos*, (8<sup>th</sup> Cir. 1994) 42 F.3d 1160, 1162-4; *U.S. v. Galvan-Muro* (8<sup>th</sup> Cir. 1998) 141 F.3d 904, 906 [in discussing *Ramos*, the court noted, “[W]hen the officer in *Ramos* asked for permission to search the vehicle, the brothers were separated. Even though the officer had returned the driver’s license, the separation of the driver and passenger prevented the driver from terminating the encounter such that a reasonable person would not feel free to leave.”]; *U.S. v. Sullivan* (4<sup>th</sup> Cir. 1998) 138 F.3d 126; *U.S. v. White* (8<sup>th</sup> Cir. 1996) 81 F.3d 775, 779.

<sup>5</sup> See *United States v. Cortez* (1981) 449 US 411, 417-8; *Delaware v. Prouse* (1979) 440 US 648, 663; *United States v. Hensley* (1985) 469 US 221, 229; *Whren v. United States* (1996) 517 US 806, 810 [“As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”]; *In re Tony C.* (1978) 21 Cal.3d 888, 893; *People v. Conway* (1990) 222 Cal.App.3d 806, 812; *People v. Butler* (1988) 202 Cal.App.3d 602, 606-7; *People v. Conway* (1994) 25 Cal.App.4<sup>th</sup> 385, 389; *People v. Superior Court (Simon)* (1972) 7 Cal.3d 186, 200; *People v. Ramirez* (1996)

**NERVOUSNESS:** Although nervousness is a circumstance that may be considered in determining whether grounds to detain exist—especially if it’s extreme or unusual nervousness—the courts are leery of giving nervousness much weight in the absence of other suspicious circumstances.<sup>6</sup> This is because nervousness is a fairly common response for people who have been detained, regardless of whether they are guilty of the crime under investigation. As the court in *Chavez-Valenzuela* noted:

[N]ervousness during a traffic stop—even the extreme nervousness Chavez-Valenzuela exhibited here—in the absence of other particularized, objective factors, does not support a reasonable suspicion of criminal activity, and does not justify an officer’s continued detention of a suspect after he has satisfied the purpose of the stop.

**EYE-CONTACT:** A suspect’s failure to make eye contact, like nervousness, doesn’t carry much weight with the courts. As the court noted in *U.S. v. Montero-Camargo*, “[A]lthough eye contact, or the lack thereof, may be considered as a factor establishing reasonable suspicion, we have noted that whether the contact is suspicious or not is highly subjective and must be evaluated in light of the circumstances of each case. The skepticism with which this factor is treated is in large part due to the fact that reliance upon ‘suspicious’ looks can so easily devolve into a case of damned if you do, equally damned if you don’t.”<sup>7</sup>

Consequently, the court ruled that the combination of nervousness and lack of eye contact did not add up to grounds to detain. And, said the court, there were really no other suspicious circumstances: “None of Chavez-Valenzuela’s answers provided grounds for suspicion and, once the dispatch report came back clean, there was nothing to justify further detention or questioning . . .”

The methamphetamine was, therefore, suppressed.

---

41 Cal.App.4<sup>th</sup> 1608, 1613; *People v. Long* (1987) 189 Cal.App.3d 77, 83; *People v. Bell* (1996) 43 Cal.App.4<sup>th</sup> 754, 761; *People v. Castellon* (1999) 76 Cal.App.4<sup>th</sup> 1369, 1373.

<sup>6</sup> See *People v. Garcia* (1981) 121 Cal.App.3d 239, 245; *Flores v. Superior Court* (1971) 17 Cal.App.3d 219, 224; *People v. Brown* (1985) 169 Cal.App.3d 159, 164-5; *People v. Moore* (1968) 69 Cal.2d 674, 683; *People v. One 1960 Cadillac* (1964) 62 Cal.2d 92, 96; *People v. Valenzuela* (1994) 28 Cal.App.4<sup>th</sup> 817, 828; *People v. Daugherty* (1996) 50 Cal.App.4<sup>th</sup> 275, 288; *U.S. v. Withers* (7<sup>th</sup> Cir. 1992) 972 F.2d 837, 843.

<sup>7</sup> (9<sup>th</sup> Cir. 2000) 208 F.3d 1122, 1136. ALSO SEE *U.S. v. Moreno-Chaparro* (5<sup>th</sup> Cir. 1999) 180 F.3d 629, 632; *U.S. v. Davis* (10<sup>th</sup> Cir. 1996) 94 F.3d 1465, 1468; *U.S. v. Mallides* (9<sup>th</sup> Cir. 1973) 473 F.2d 859, 861, fn.4 [“Here, the officers concluded that not looking was suspicious. In *People v. Williams* (1971) 20 Cal.App.3d 590, the officer testified that defendant’s looking at an approaching police car was suspicious.”]; *Nicacio v. INS* (9<sup>th</sup> Cir. 1986) 797 F.2d 700, 704 [“Although routine reliance on lack of eye contact is inappropriate, we also recognize that special circumstances may make innocent avoidance of eye contact improbable and thus a factor contributing to a reasonable suspicion justifying a stop.”]; *Gonzalez-Rivera v. INS* (9<sup>th</sup> Cir. 1994) 22 F.3d 1441, 1446-7; *U.S. v. Garcia-Camacho* (9<sup>th</sup> Cir. 1995) 53 F.3d 244, 246-7.