

SECOND CIRCUIT REVIEW

Expert Analysis

Court Shifts on Effect of Using Handcuffs During Police Encounters

The Fourth and Fifth Amendments to the U.S. Constitution protect individuals against unreasonable searches and seizures, and compelled self-incrimination. The Supreme Court's holdings in *Miranda v. Arizona* and *Terry v. Ohio* have left circuit courts at a crossroads in determining what conduct is appropriate to ensure that both the public, and a criminal suspect's constitutional rights, are protected.

The use of handcuffs on a suspect during a *Terry* stop further complicates the analysis required to determine whether an individual is deemed to be in custody for purposes of *Miranda*. Decisions by the U.S. Court of Appeals for the Fourth and Ninth Circuits endorse the view



By
Martin
Flumenbaum



And
Brad S.
Karp

that the use of handcuffs does not constitute custody, while the Sixth, Eighth, and Tenth Circuits have held that handcuffing a suspect can create a custodial environment thereby requiring that the suspect be informed of his *Miranda* rights. The Second Circuit has generally taken the position that the use of handcuffs during *Terry* stops converts the stop into an arrest, thereby triggering *Miranda* rights. That is, until it's recent decision in *U.S. v. Fiseku*.

Supreme Court Precedent

In *Miranda*, the court ruled that when an individual is taken into custody or otherwise

significantly deprived of his freedom by the authorities, and subjected to questioning, procedural safeguards must be employed to protect the individual's privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 445 (1966). The court reasoned that these safeguards were necessary to balance the coercive pressures imposed on suspects during police interrogations. *Id.* at 467.

Later, the court in *Terry* ruled that a police officer may, in certain circumstances, search a suspect to investigate possible criminal activity without probable cause, provided the search is reasonable. *Terry v. Ohio*, 392 U.S. 1, 22 (1968). According to the court, reasonableness must be determined by objectively ascertaining if "the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the

MARTIN FLUMENBAUM and BRAD S. KARP are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison. KANDICE PURDY, an associate at the firm, assisted in the preparation of this article.

belief that the action taken was appropriate.” Id.

For decades, courts have been divided in determining whether the methods employed to search and seize an individual in a stop rise to a level of custody, thereby triggering *Miranda* to ensure the admissibility of statements made, and evidence acquired, during the encounter.

Previous Second Circuit Cases

'U.S. v. Newton.' The Second Circuit first addressed the issue of the effect of handcuffs in *U.S. v. Newton*, which held that a police officer may use handcuffs during a *Terry* stop if the officer reasonably believes that (1) the person detained poses a present physical threat, and (2) handcuffing was the least intrusive means to protect against that threat. 369 F.3d 659 (2d Cir. 2004).

In *Newton*, officers searched the home of a parolee for an illegal firearm, pursuant to information provided by the parolee's mother. Id. at 662. Upon arrival, an officer asked the parolee to step into the hallway, where he handcuffed him, informing him that he was not under arrest but was being restrained for both the officers' safety and his own. Id. at 663. During the search, another officer asked the handcuffed parolee if there was

any contraband in the house, to which the parolee responded that there was a gun in the home for protection. Id. The gun was located and seized by the officers, and the parolee was placed under arrest. Id. at 663-64. At no point during the encounter was the parolee advised of his *Miranda* rights. Id. at 664. The court held that the use of handcuffs placed the parolee in custody because they restrained him to a degree that would indicate to a reasonable person that the interrogation was being con-

The Second Circuit has generally taken the position that the use of handcuffs during *Terry* stops converts the stop into an arrest, thereby triggering *Miranda* rights. That is, until its recent decision in '*U.S. v. Fiseku*.'

ducted pursuant to arrest-like restraints. Id.

'U.S. v. Bailey.' Ten years later, the Second Circuit addressed this issue again in *U.S. v. Bailey*, following remand from the Supreme Court. *U.S. v. Bailey*, 743 F.3d 322, 327 (2d Cir. 2014). In *Bailey*, at almost 10 p.m., two police officers stopped a car occupied by two men in the parking lot of a fire station. The officers followed the car from

an apartment for which they possessed a search warrant to locate drugs and a firearm believed to be on the premises based on information from an informant. The officers instructed the men to exit the car, conducted a search of their persons which revealed no weapons, and asked them basic identification questions. The men were then handcuffed, transported back to the apartment in a summoned patrol car, and arrested upon arrival at the apartment after police located the firearm and drugs during their search. Id. at 327-28.

The Second Circuit held that, while the initial stop was constitutional, the police exceeded the permissible scope of a *Terry* stop when they handcuffed the suspects because the officers faced no present physical threat, given the fact that (1) they had already subjected each man to a pat down and confirmed that neither was armed, and (2) the men were outside of the vehicle and there was no threat that they could obtain any weapon from the car. Id. at 341.

'U.S. v. Fiseku.' The Second Circuit's recent decision in *Fiseku* deviates from its prior rulings on the effect of handcuffing a suspect during a *Terry* stop. In *Fiseku*, a police officer approached Bekim

Fiseku, one of three individuals suspected to be in the process of committing a robbery, in a tree-lined area of a parking lot at approximately 1:15 a.m. While the officer questioned Fiseku at the rear of the vehicle containing the other suspects, two additional officers approached the scene in separate patrol cars. The officers then instructed the driver to exit the car and, following preliminary questioning, proceeded to handcuff him and Fiseku, prior to instructing another passenger to exit the vehicle.

The suspects were questioned separately, with the driver and passenger in separate patrol cars, and Fiseku remaining outside of the vehicle. While the suspects were handcuffed, one officer asked if there was “anything in the car that shouldn’t be there,” to which the driver responded, “[n]o, you can look.” Upon searching the vehicle, the officer discovered several items that confirmed his suspicions, and the suspects were charged with conspiracy to commit robbery. Fiseku and the vehicle’s driver moved to suppress their statements and the physical evidence discovered during the encounter based on alleged violations of their Fourth and Fifth Amendment rights.

The district court suppressed the two men’s statements, reasoning that they had not been informed of their *Miranda* rights prior to being questioned while handcuffed. Interestingly, the court refused to suppress the physical evidence, finding that the use of handcuffs was reasonable to secure the officers’ safety during the investigatory stop. Fiseku ultimately pled guilty.

It remains to be seen how district courts in the Second Circuit will reconcile the court’s ruling in *Fiseku* with the court’s prior filings in *Bailey* and *Newton*—and the *Fiseku* court’s rationale that the use of the handcuffs is less intrusive and intimidating than holding a suspect at gunpoint.

On appeal, *Fiseku* argued that the officers’ use of handcuffs converted the *Terry* stop into an arrest without probable cause, in violation of the Fourth Amendment. The Second Circuit affirmed the district court’s ruling that officers are permitted to handcuff suspects to ensure officer safety, and the lower court’s finding that the handcuffing in *Fiseku* was less restrictive than holding the suspects at gunpoint would have been.

Implications of ‘Fiseku’

The Second Circuit’s holding in *Fiseku* signifies a break from the court’s prior holdings in *Bailey* and *Newton*, despite the similarities among the three cases. The *Fiseku* court distinguished the facts in *Bailey*, ostensibly because (1) the encounter occurred in a tree-lined area of a parking lot, rather than an open area of a parking lot, and (2) the officer approached the suspects in an area in which they were already stationary, rather than an area selected by the officer. It remains to be seen how district courts in the Second Circuit will reconcile the court’s ruling in *Fiseku* with the court’s prior filings in *Bailey* and *Newton*—and the *Fiseku* court’s rationale that the use of the handcuffs is less intrusive and intimidating than holding a suspect at gunpoint. Taken further, the court’s rationale could be used to permit officers to infringe upon individuals’ constitutional rights so long as the method used is less intrusive than the officer pulling his gun on an unarmed suspect. How far the ruling will be stretched will be up to district courts.