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Analyzing Seizures Under the Louisiana Constitution After State v. Tucker: A Different Perspective

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Analyzing Seizures Under the Louisiana Constitution After *State v. Tucker*:[1] A Different Perspective

I. INTRODUCTION

The Louisiana Constitution, specifically the Declaration of Rights, lays down the foundation for the operating rules of this state government and dictates how that government conducts its fundamental relationships with citizens within the state. While most students and practitioners of the law would consider participation in the development of constitutional law to be a milestone in a successful career, Clarence Tucker may have a different view.

Tucker's involvement in the development of Louisiana constitutional law stems from the second of his two arrests within a three-day span during February and March of 1990. The first arrest occurred on February 28 and involved charges of possession of a firearm by a convicted felon[2] and possession of marijuana with intent to distribute.[3] The second arrest occurred the night of March 2, during a drug sweep of the area surrounding Roby's Arcade in Shreveport by both the Shreveport and Louisiana State Police. After a dozen police cars had converged on the area, an officer stepped from his car and ordered Tucker to "halt" and "prone out."[4] Before complying with the police order, Tucker took a few steps away from the officer and threw aside a plastic bag. Upon retrieving the bag, the officer discovered marijuana in it and arrested Tucker for possession of marijuana with intent to distribute.[5]

Tucker was convicted on both possession counts, from which he appealed. The Louisiana Second Circuit Court of Appeal affirmed his conviction on the first count of possession with intent to distribute, but reversed the second count.[6] The appellate court found that the officer's commands would cause a reasonable person to believe that a detention was imminent,[7] and that under the circumstances those commands invaded Clarence Tucker's "right to be left alone."[8] The appellate court found the officer lacked reasonable suspicion to detain Tucker;[9] therefore, the detention of his person was a violation of Article I, section 5 of the Louisiana Constitution.[10] The court held the marijuana should

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1. 626 So. 2d 707 (La.), *aff'd on reh'g*, 626 So. 2d 720 (1993).
2. La. R.S. 14:95.1 (1986).
3. La. R.S. 40:966 (1992).
4. State v. Tucker, 604 So. 2d 600, 606-7 (La. App. 2d Cir.), *aff'd in part, rev'd in part*, 626 So. 2d 707, *aff'd on reh'g*, 626 So. 2d 720 (1993).
5. La. R.S. 40:966 (1992).
6. *Tucker*, 604 So. 2d at 613.
7. *Id.* at 608.
8. *Id.*
9. *Id.* at 609.
10. *See infra* text accompanying note 21.

have been excluded at trial, relying, though not explicitly, on the exclusionary rule.[11]

Both the State and Tucker applied for writs to the Louisiana Supreme Court. The supreme court upholds the appellate court decision affirming the conviction for the first count of possession of marijuana with intent to distribute, but reverses the appellate court and reinstates the conviction on the second count.[12] The ruling on the second conviction is affirmed on rehearing.[13] The Louisiana Supreme Court observes the factual circumstances of the encounter, relies on the United States Supreme Court's decision in *California v. Hodari D.*,[14] and creates a new test for defining seizure under the Louisiana Constitution.

Although the majority's application of the new seizure test to the Tucker encounter is questionable,[15] Tucker's individual situation is not the focus of this note. Even if upon rehearing the Louisiana Supreme Court had reversed itself on the second conviction, Tucker would not be in a better situation: the conviction for the first count of possession of marijuana with intent to distribute was upheld on appeal.[16] Rather, the purposes of this note are to analyze how the new test narrows the categories of constitutionally protected interactions between the state government and its citizens, and to propose a remedy for the narrowing effect. Part II will examine the right involved in seizure situations, the type of government/citizen interactions that impact that right, and the use of the exclusionary rule to protect the citizen's rights. Part III includes an examination of the prior test for seizure, a discussion of the elements of the new test, a clarification of the differences between the two tests, and a proposed remedy for the narrowing effect on constitutionally protected rights by the new test.

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11. State v. Tucker, 604 So. 2d 600, 609 (La. App. 2d Cir.), *aff'd in part, rev'd in part*, 626 So. 2d 707, *aff'd on reh'g*, 626 So. 2d 720 (1993). Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 (1961), made the exclusionary rule used in the federal jurisprudence applicable to state courts in cases involving violations by the police of a citizen's Fourth Amendment rights. By denying the state the benefit of any evidence obtained through unconstitutional actions, the courts seek to deter such actions. Louisiana also employs the exclusionary rule as a matter of state law. See La. Code Crim. P. art. 703, which states in Part A: "A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was unconstitutionally obtained."

12. State v. Tucker, 626 So. 2d 707 (La.), *aff'd on reh'g*, 626 So. 2d 720 (1993).

13. State v. Tucker, 626 So. 2d 720 (La. 1993).

14. 499 U.S. 621, 111 S. Ct. 1547 (1991).

15. In his dissent, Chief Justice Calogero reviews the facts in light of the factors suggested by the majority to be used in determining the "virtual certainty" of the occurrence of an actual stop. He then criticizes the majority's application of the new test and its conclusion that Tucker had not been seized: "It is hard to imagine a situation in which the seizure of a suspect could be any closer to virtually certain." *Tucker*, 626 So. 2d at 716 (Calogero, C.J., dissenting).

16. Tucker received a twenty-five year sentence for the first conviction because he was adjudged to be a third-felony offender. State v. Tucker, 604 So. 2d 600, 611-13 (La. App. 2d Cir.), *aff'd in part, rev'd in part*, 626 So. 2d 707, *aff'd on reh'g*, 626 So. 2d 720 (1993). The sentence for the second conviction for possession of marijuana with intent to distribute will be concurrent with the first sentence. *Tucker*, 626 So. 2d at 709, 714.

II. WHAT RIGHT IS AT STAKE?

The first step in the analysis of seizures under the Louisiana Constitution is the identification of the right to be protected. The Louisiana Constitution provides more protections for the rights of its citizens than the United States Constitution.[17] Justice Dennis eloquently stated this premise in *State v. Hernandez*:[18] "This constitutional declaration of right is not a duplicate of the Fourth Amendment or merely coextensive with it; it is one of the most conspicuous instances in which our citizens have chosen a higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution."[19] A textual comparison of the Fourth Amendment[20] and Article I, section 5 of the Louisiana Constitution illustrates the greater protection afforded by state law. While debate still exists on which specific liberties the Fourth Amendment protects, the state constitution is more explicit. Article I, section 5 is captioned "Right to Privacy," and reads:

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.[21]

When compared with the Fourth Amendment, Article I, section 5 protects additional subjects ("communications" and "property"), covers additional government actions ("invasions of privacy"), and broadens the class of persons with standing to assert a violation of this right ("any person adversely affected").[22] The seizure of Tucker's person without probable cause or reasonable

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17. *See* Richard P. Bullock, *The Declaration of Rights of the Louisiana Constitution of 1974: The Louisiana Supreme Court and Civil Liberties*, 51 La. L. Rev. 787, 788 (1991). Bullock quotes from the Louisiana Supreme Court opinion in Guidry v. Roberts, 335 So. 2d 438, 448 (La. 1976), to illustrate the difference in scope between the federal and state constitutional protections: "As the plaintiff contends, the individual rights guaranteed by our state constitution's declaration of individual rights (Article I) represent more specific protections of the individual against governmental power than those found in the federal constitution's bill of rights, and they represent broader protection of the individual." Bullock, *supra*, at 788.

18. 410 So. 2d 1381 (La. 1982).

19. *Id.* at 1385.

20. The 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.

21. La. Const. art. I, § 5.

22. This author was surprised to discover that the bulk of the records of the debates during the

suspicion would give him standing to raise in court a violation of his right to privacy. The logical question becomes: what government action constitutes a seizure?

A. *What is a Seizure?*

The two forms of government action that meet the criteria for a seizure are arrests and investigatory stops. Louisiana statutory law defines an arrest as "the taking of one person into the custody of another. To constitute arrest there must be actual restraint of the person. The restraint may be imposed by force or may result from the submission of the person arrested to the custody of the one arresting him."[23] The law also requires the existence of probable cause prior to the execution of an arrest.[24] When the officer sprang from his car at Roby's Arcade, his action did not constitute an arrest since Tucker's freedom of action was not restrained to "a degree associated with a full custody arrest."[25] Theoretically, if the officer had found no evidence sufficient to establish probable cause, Tucker would have been free to walk away from the scene.

In *Terry v. Ohio*,[26] the United States Supreme Court, interpreting the Fourth Amendment, held that some police encounters with citizens falling short of arrests may still constitute seizures.[27] To be lawful seizures, these investigatory stops must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[28] Although the Court in *Terry* made no specific pronouncement, such investigatory

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Louisiana Constitutional Convention on Article I, Section 5 dealt with the meaning of "any person adversely affected." This enhanced standing provision was intended to give greater effect to the exclusionary rule. *See* 6 Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts 1072-77 (1977).

23. La. Code Crim. P. art. 201.

24. La. Code Crim. P. art. 202 ("A warrant of arrest . . . shall be issued when: . . . (2) The magistrate has probable cause to believe that an offense was committed and that the person against whom the complaint was made committed it."), and La. Code Crim. P. art. 213 ("A peace officer may, without a warrant, arrest a person when: . . . (3) The peace officer has reasonable cause to believe that the person to be arrested has committed an offense . . . ."). State v. Thomas, 349 So. 2d 270, 272 (La. 1977), reinforced this point and provided a definition of probable cause: "Probable cause exists when facts and circumstances within the arresting officer's knowledge and of which he has reasonable and trustworthy information are sufficient to justify a man of average caution in the belief that the person to be arrested has committed or is committing an offense."

25. Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 3150 (1984) (citing California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520 (1983)). Justice Marshall's opinion dealt with the issue of whether *Miranda* "custody" warnings are required for traffic stops. While Justice Marshall gave no specific test for custody, his opinion that routine traffic stops do not constitute custody focused on the duration of the detention, the public exposure of the encounter, and the reasonable perception of the event by the detained person. *Berkemer*, 468 U.S. at 437, 438, 442, 104 S. Ct. at 3149, 3151.

26. 392 U.S. 1, 88 S. Ct. 1868 (1968).

27. *Id.* at 19, 88 S. Ct. at 1879.

28. *Id.* at 21, 88 S. Ct. at 1880.

detention may be distinguished from arrests by the lower level of justification (reasonable suspicion, as compared to probable cause), the limited duration, and the limited scope of the encounter.

The Louisiana legislature has codified the holding of *Terry*.[29] The courts on both appellate levels found that, at the time of the initial encounter with Tucker, the officer did not have the statutorily-required reasonable suspicion to justify the seizure.[30] The lack of reasonable suspicion deprives the officer of the authority to initiate the encounter; thus, the encounter impacted Tucker's constitutional rights in a manner which required judicial protection. The next step in the seizure analysis examines how this judicial protection is accomplished.

B. Protecting the Privacy Right

In addition to codifying the reasoning of the United States Supreme Court in *Terry*, Louisiana has also codified the exclusionary rule as a mechanism to protect privacy rights.[31] This protection is achieved by excluding from trial any evidence the government obtains when violating a person's constitutional rights. By using the rule to exclude illegally seized evidence, the courts seek to deter the governmental actor from engaging in unconstitutional activity. The Louisiana Supreme Court expressed this idea succinctly in *State v. Ryan*,[32] while following the reasoning of an earlier Louisiana case, *State v. Saia*:[33] "At the foundation of *Saia* is the proposition that police officers may not reap the benefits of their unlawful intrusion into a citizen's freedom of movement."[34]

The Louisiana Constitution protects a person's privacy interests in his property as well as that person's privacy interests in his person.[35] If property is abandoned prior to an unlawful seizure of the person, such abandoned property can be seized by the police and used against the person at trial.[36] The courts reason that there is no expectation of privacy attached to abandoned property; therefore, no violation of constitutional rights occurs when the abandoned property is taken by police.[37]

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29. "A law enforcement officer may stop a person in a public place whom he reasonably suspects is committing, has committed, or is about to commit an offense and may demand of him his name, address, and an explanation of his actions." La. Code Crim. P. art. 215.1(A). *See generally* John P. Murrill, *Louisiana and the Justification for a Protective Frisk for Weapons*, 54 La. L. Rev. 1369 (1994).

30. State v. Tucker, 626 So. 2d 707, 709-10 (La.), *aff'd on reh'g*, 626 So. 2d 720 (1993).

31. La. Code Crim. P. art. 703.

32. 358 So. 2d 1274 (La. 1978).

33. 302 So. 2d 869 (La. 1974), *cert. denied*, 420 U.S. 1008, 95 S. Ct. 1454 (1975).

34. *Ryan*, 358 So. 2d at 1276.

35. La. Const. art. I, § 5.

36. State v. Andrishok, 434 So. 2d 389, 391 (La. 1983).

37. State v. Chopin, 372 So. 2d 1222, 1224 (La. 1979).

The Louisiana Supreme Court in *Tucker* accepts the findings of the court of appeal that the officer, springing from his car, lacked probable cause to arrest Tucker or reasonable suspicion to stop him.[38] In applying the exclusionary rule/abandoned property formulation to the facts in *Tucker*, two crucial and closely related questions, which will determine the admissibility of the seized marijuana, form the next phase of the seizure analysis: (1) When did the seizure occur? and (2) Did the defendant abandon the property before his person was seized by the police?

III. SEIZURE? WHAT SEIZURE?

A. *The Pre-*Tucker *Test*

The Louisiana Supreme Court answered the first question differently before *Tucker*. As expressed in Justice Calogero's dissent in *Tucker*, the test was understood to be: "[A] suspect is seized whenever there has been a display of police authority which would lead a reasonable person to believe that he is about to be detained, whether or not he has submitted to that display of authority."[39] The standard, which is based upon the perception of a reasonable person, is an adoption of an earlier decision by the United States Supreme Court in *United States v. Mendenhall*,[40] in which the Supreme Court expressed the test for seizure: "We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[41]

Another formulation of the test for seizure was given in *State v. Saia*. Justice Dixon evaluated a police encounter with a person who had just left a residence known to be a center for illegal drug distribution under the Fourth Amendment. After deciding the seizure occurred when the "police officers sprang from their car and overtook the defendant,"[42] Justice Dixon declared: "The police cannot approach citizens under circumstances that *make it seem* that some form of detention is imminent . . . ."[43]

These formulations of the test for seizure stress the importance of the accosted citizen's perceptions of the governmental actor. In quoting *State v.*

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38. State v. Tucker, 626 So. 2d 707, 713 (La.), *aff'd on reh'g*, 626 So. 2d 720 (1993). *See* State v. Tucker, 604 So. 2d 600, 609 (La. App. 2d Cir.), *aff'd in part, rev'd in part*, 626 So. 2d 707, *aff'd on reh'g*, 626 So. 2d 720 (1993).

39. *Tucker*, 626 So. 2d at 714 (citing State v. Belton, 441 So. 2d 1195, 1198-99 (La. 1983), *cert. denied*, 466 U.S. 953, 104 S. Ct. 2158 (1984)).

40. 446 U.S. 544, 100 S. Ct. 1870 (1980).

41. *Id.* at 554, 100 S. Ct. at 1877.

42. State v. Saia, 302 So. 2d 869, 873 (La. 1974), *cert. denied*, 420 U.S. 1008, 95 S. Ct. 1454 (1975).

43. *Id.* (emphasis added).

Sims[44] in his dissent in *Tucker*, Justice Dennis argues the pre-*Tucker* test contemplated protecting even more than a person's freedom of movement. The "more" that is protected is the Louisiana constitutional right to privacy: "the right to be let alone."[45]

B. *The* Tucker *test*

Justice Kimball, writing for the majority in *Tucker*, develops the new test by beginning with the same source as the dissenters: *State v. Belton*.[46] The key language the majority draws from *Belton* is: "[I]t is only when the citizen is *actually stopped* without reasonable cause or when a stop without reasonable cause is *imminent* that the 'right to be left alone' is violated, thereby rendering unlawful any resultant seizure of abandoned property."[47] An examination of the definitions of "actual stop" and "imminent actual stop" is the next step in the seizure analysis.

The majority looks to the United States Supreme Court decision in *California v. Hodari D.* to determine criteria for an actual stop.[48] In *Hodari D.*, Justice Scalia applied the common-law understanding of an arrest in finding that a fleeing suspect's Fourth Amendment rights had not been violated by the police.[49] The common law contemplates the defining moment for an arrest to be physical contact between the person and the police, or submission by the person to a show of police authority.[50] As a result of the court's adoption of *Hodari D.*, an actual stop under the Louisiana Constitution is now defined as physical contact or submission to a show of police authority.[51]

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44. 426 So. 2d 148 (La. 1983). The relevant passage states: "A person is 'seized' within the meaning of the Fourth Amendment and La. Const. art. 1, § 5 only when the law enforcement official, by means of physical force or show of authority, *has in some way restrained the liberty of the citizen*." *Id.* at 152 (emphasis added). The text of the Louisiana Constitution provides a reasonable basis for this broad interpretation of liberty.

45. State v. Tucker, 626 So. 2d 707, 720 (La.) (Dennis, J., dissenting), *aff'd on reh'g*, 626 So. 2d 720 (1993) (citing Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 572 (1928) (Brandeis, J., dissenting)). This right is usually described in Louisiana jurisprudence as "the right to be *left* alone." This is more likely a unique interpretation, in keeping with the spirit of the state's distinct constitution, than it is a misquotation.

46. 441 So. 2d 1195 (La. 1983), *cert. denied*, 466 U.S. 953, 104 S. Ct. 2158 (1984).

47. *Tucker*, 626 So. 2d at 710-11 (citing *Belton*, 441 So. 2d at 1199).

48. For a helpful discussion of the effect of *California v. Hodari D.* on Fourth Amendment seizure analysis, see Randolph A. Piedrahita, *A Conservative Court Says "Goodbye to All That" and Forges a New Order in the Law of Seizure*-California v. Hodari D., 52 La. L. Rev. 1321 (1992).

49. California v. Hodari D., 499 U.S. 621, 628, 111 S. Ct. 1547, 1552 (1991). As was the case in *Tucker*, the police in *Hodari D.* did not have even reasonable suspicion of the commission of a crime when they approached the defendant. The encounters were also similar in that they involved citizens who did not submit to any show of police authority, officers who did not physically restrain the citizens until after the disputed evidence had been abandoned, and charges of drug possession. *Cf. Tucker*, 626 So. 2d at 709, *with Hodari D.*, 499 U.S. at 622-23, 111 S. Ct. at 1549.

50. *Hodari D.*, 499 U.S. at 626, 111 S. Ct. at 1551.

51. *Tucker*, 626 So. 2d at 712.

Justice Scalia's opinion replaced the *Mendenhall* standard for Fourth Amendment purposes by reducing the *Mendenhall* criteria to "a *necessary*, but not *sufficient* condition for seizure."[52] By adopting the *Hodari D.* standard and overruling prior conflicting decisions,[53] the Louisiana Supreme Court has likewise downgraded the *Mendenhall* standard.

The use of federal interpretations of the federal constitution by the Louisiana Supreme Court in deciding state constitutional issues is well founded.[54] However, to the extent the Louisiana Constitution provides more protection of individual liberty than that afforded by the Fourth Amendment, such an adoptive approach is inappropriate. The protection against unreasonable imminent actual stops purports to reflect this additional safeguard of liberty.[55]

In *Tucker*, the Louisiana Supreme Court redefines "imminent actual stop" in terms of a virtual certainty that an actual stop will occur. Virtual certainty is objectively determined by viewing the degree of police force used in the encounter. If the police force employed were such that an actual stop would be virtually certain to occur, regardless of a person's attempts to avoid the encounter, then the person would be seized. The court then expounds a non-exhaustive list of factors to be considered in the determination:

> (1) the proximity of the police in relation to the defendant at the outset of the encounter; (2) whether the individual has been surrounded by the police; (3) whether the police approached the individual with their weapons drawn; (4) whether the police and/or the individual are on foot or in motorized vehicles during the encounter; (5) the location and characteristics of the area where the encounter takes place; and (6) the number of police officers involved in the encounter.[56]

When the Louisiana Supreme Court applies the new actual stop and imminent actual stop factors to Tucker's encounter, it concludes the facts did not show a seizure occurred prior to the abandonment of the drugs.[57] There had been no physical contact or submission to a show of police authority; therefore, no actual stop occurred. The court notes that the encounter occurred at night, in a commercial area, where several feet (and possibly a car) separated the officer and Tucker. The court also notes that no testimony was available on whether weapons were drawn and that the other officers in the area were probably

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52. *Hodari D.*, 499 U.S. at 627-28, 111 S. Ct. at 1551.

53. *Tucker*, 626 So. 2d at 713.

54. *Id.* at 714 (Marcus, J., concurring).

55. *Id.* at 712. Justice Kimball writes: "We believe this two-pronged inquiry reflects the aforementioned additional protections of our constitution. That is, while the Fourth Amendment only protects individuals from 'actual stops,' . . . our constitution also protects individuals from 'imminent actual stops.'" *Id.*

56. *Id.* at 712-13.

57. *Id.* at 713.

focused on other individuals.[58] Thus, the majority found neither an actual stop nor an imminent actual stop occurred when Tucker tossed away the drugs.

Because no seizure of the person occurred, there was no violation of Tucker's Article I, section 5 rights when he abandoned the property. Therefore, the drugs should not have been excluded as the product of an unlawful seizure.[59] The court's finding that Tucker abandoned the property before any seizure occurred answers the second question on the admissibility of the marijuana The court's shift in emphasis from the perceptions of a reasonable person to the virtual certainty of an actual stop occurring materially affects Tucker's case.[60] This note will examine the further effects this shift will have upon the seizure analysis.

C. *Comparison of the Pre- and Post-*Tucker *tests*

Justice Dennis argues fiercely in his dissent that, prior to *Tucker*, the Louisiana Supreme Court interpreted Article I, section 5 to embody the protection of a person's reasonable expectation of privacy found in the reasoning of *Katz v. United States*.[61] This expectation of privacy is discussed in that case in the context of electronic eavesdropping by the state, but the expectation of privacy warrants constitutional protection outside that narrow field. This idea is summed up by the following:

> In other words, . . . this court wholly endorsed the principle that under Article I [Section] 5 of our state constitution a person suffers an unconstitutional "search", "seizure" or "invasion of privacy" whenever the state invades his reasonable expectation of privacy, regardless of whether his person or property physically has been seized or interfered with.[62]

Standing alone, the objective factors in the *Tucker* test for imminent actual stop do not adequately respect a person's reasonable expectation of privacy. The prior Louisiana test (drawn from *Mendenhall*) examined the encounter with the police from the perspective of a reasonable person expecting to be let alone.[63] If that person could not walk away from the encounter (actual stop), or reasonably felt the police were attempting to prevent him from walking away (imminent actual stop), then an Article I, section 5 seizure had occurred.

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58. *Id.*

59. *Id.*

60. "Thus, at the time Tucker abandoned the marijuana he had not been unconstitutionally seized. . . . Accordingly, the decision of the court of appeal on count two is reversed. The trial court's conviction of Tucker on this count is reinstated." *Id.*

61. 389 U.S. 347, 88 S. Ct. 507 (1967).

62. State v. Tucker, 626 So. 2d 707, 717 (La.) (Dennis, J., dissenting), *aff'd on reh'g*, 626 So. 2d 720 (1993).

63. State v. Belton, 441 So. 2d 1195, 1198-99 (La. 1983), *cert. denied*, 466 U.S. 953, 104 S. Ct. 2158 (1984).

The use of the term "imminent" is ambiguous and causes the split between the majority opinion and prior interpretations of the extent of state constitutional protections. Using the majority's test, the focus of the court becomes the probability the police will succeed in actually stopping a suspect. Under the prior reasoning, the focus of the court fell on whether the police were attempting to effect an unreasonable seizure.

Furthermore, the shifting of the judicial focus from attempt to likelihood of success does not serve the crucial goal of deterring police from making the illicit attempt in the first place. The question of the application of the exclusionary rule is rendered moot in *Tucker* by the majority's finding that the police action was insufficient to constitute a seizure under the Louisiana Constitution and, thus, insufficient to trigger application of the rule. By narrowing the number of encounters between the government and citizens that fall within the scope of the exclusionary rule, this shift of judicial focus will also limit the effectiveness of that rule.

1. The Narrowing Effect of Tucker

A hypothetical situation may clarify the distinction between the approaches of focusing upon attempt and focusing on likelihood of success. Track Star is walking down a city sidewalk at dusk. Lone Officer, lacking probable cause or reasonable suspicion, pulls his patrol car in front of the path of Track Star just before Track Star gets to the intersection crosswalk. Without drawing his weapon, Lone Officer gets partially out of his unit, while calling to Track Star in an authoritative voice, "Hold it right there. Yes, you. Don't move." Track Star hesitates five yards from the car, which is parked between the officer and Track Star, before giving a universal signal of defiance.

Under the *Hodari D.* analysis, no seizure of Track Star has occurred because there has been no physical contact and no submission to the show of police authority. Under the *Tucker* analysis, there would be no actual stop (same as the analysis under *Hodari D.*), nor would there be an imminent actual stop. Applying the non-exhaustive list of elements to the facts, a court could not say that it would be virtually certain Lone Officer would catch Track Star or make him submit to a similar show of police authority. However, applying the hypothetical facts to a pre-*Tucker* test that focuses on whether Track Star could reasonably perceive that Lone Officer was attempting to restrain his right to privacy, a court would find that a seizure occurred.

2. The Reasonable Person Standard: Another Argument

The encounter between Track Star and Lone Officer would also require constitutional protection if classified as an invasion of privacy. When the controverted governmental action constitutes an invasion of privacy, *State v.*

Reeves[64] could be cited for the proposition that the standard based upon the perceptions of the reasonable man still applies in Louisiana. After *Tucker*, the courts face the incongruity of applying different standards (virtual certainty for seizures and perceptions of the reasonable person for invasions of privacy) for alleged violations of the same constitutional right to privacy. While the facts in *Reeves*[65] are distinguishable from the hypothetical facts, the holding in *Tucker* could likewise be limited by its exclusive focus on the meaning of a seizure. Nevertheless, the result under the Louisiana Constitution should still be the same whether the Track Star/Lone Officer encounter were classified as an invasion of privacy or as a seizure: Track Star's Louisiana constitutional right to privacy would have been violated. Violations of the right to privacy should be judged by the single, consistent standard of the perceptions of a reasonable person.

The majority in *Tucker*, in formulating its test for seizure, observes the need to balance the constitutional rights of the individual against the compelling interest of the state in combatting the spread of drug-related criminal activity. Though this necessary balancing purports to honor the greater protection the Louisiana Constitution extends to its citizens, the announced test does not achieve the desired result.[66] The reduced effectiveness of the exclusionary rule is an unfortunate product of the balance.

D. A Remedy for the Narrowing Effect of Tucker

A simple, yet direct, solution would be to overrule *Tucker* by replacing the virtual certainty aspect of the imminent actual stop test with the perception of the reasonable person that a police officer is attempting to violate the right to privacy. This solution would answer criticism that the new test is merely the mirror of the current test used for Fourth Amendment violations.[67] The solution would also serve to solidify the adoption of the protection of a reasonable expectation of privacy (expressed by the United States Supreme Court opinion in *Katz*), as a matter of state constitutional law. Such an adoption would allow

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64. 427 So. 2d 403 (La. 1982).

65. *Reeves* involved covert electronic surveillance of the defendant by the government. A conversation was recorded by equipment hidden, with the person's consent, on the body of a party of the conversation. *Id.* at 404. The Louisiana Supreme Court initially ruled that such eavesdropping by the government required a warrant to avoid being an unconstitutional invasion of privacy. *Id.* The court later reversed itself on rehearing, and determined that the defendant had exhibited no reasonable expectation of privacy in conducting a consensual conversation; therefore, no invasion of privacy occurred. *Id.* at 410.

66. As the hypothetical is intended to illustrate, an analysis under the *Tucker* test for seizure would not extend constitutional protection to an encounter that would have previously (before the decision in *Tucker*) enjoyed such protection.

67. "But the outcome of this case itself vividly illustrates that the majority's cumbersome system . . . quickly collapses into nothing more than the common law theory of arrest adopted in *Hodari*." State v. Tucker, 626 So. 2d 707, 719 (La.) (Dennis, J., dissenting), *aff'd on reh'g*, 626 So. 2d 720 (1993).

the courts to apply the same analysis to a government/citizen encounter regardless of whether that encounter is classified as a seizure or as an invasion of privacy.

The non-exhaustive list of factors used by the majority in *Tucker* is still consistent with the suggested solution; it is merely inadequate to meet the constitutional demands. Indeed, these factors should be retained as a tool to assist a court in gauging the objective reasonableness of the suspect's perception of an attempted interference with his privacy interests.

IV. CONCLUSION

This state's constitution is a reflection of the fundamental values of its citizens. In some instances, the Louisiana Constitution mirrors its federal counterpart in determining the method and extent of the interactions between the state and its citizens. In other areas, such as protection of privacy interests, the state constitution goes further in restricting governmental action and goes further in expanding the categories of protected rights. However, because of the virtual certainty element of the new test for a seizure announced in *Tucker*, the Louisiana Constitution will not protect citizens against some encounters where the police lack probable cause or reasonable suspicion. While providing a logical interpretation of the meaning of the term "imminent," the virtual certainty aspect of the *Tucker* test weakens the effectiveness of the exclusionary rule in deterring unlawful police action. A standard based upon the perceptions of a reasonable person strengthens the effectiveness of the exclusionary rule; furthermore, the reasonable person standard provides the courts with a uniform test which does not depend upon classifying a state/citizen encounter as either an invasion of privacy or as a seizure.

Trevor V. Davis