



## Cruiser Lights Can Hold A Suspect in Place for Fourth Amendment Purposes



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When does a seizure occur for purposes of the Fourth Amendment? That was the question before the United States Court of Appeals for the Tenth Circuit in *United States v. Gaines*, \_\_\_ F.3d \_\_\_, 2019 WL 1120405 (10th Cir. Mar. 12, 2019). The relevant facts are as follows.

One morning, the police in Kansas City, Kansas, received a 911 call reporting that a man dressed in red had just sold drugs in a parking lot. Based on this information, police officers Carl Rowland and Shenee Davis responded.

The police officers pulled into the parking lot in two separate police cars and turned on their squad cars' roof lights. The officers parked behind a car in which a man in red clothing (Defendant Desmond Gaines) was seated. Officer Rowland gestured for Mr. Gaines to get out of the car. After Mr. Gaines exited his car, Officer Rowland confronted Mr. Gaines with the report that he was selling drugs. The police officers soon observed an open container of alcohol and smelled PCP. When they said that they were going to detain him, Mr. Gaines grabbed a pouch from his car and fled. The officers caught Mr. Gaines and discovered the evidence that formed the basis for this appeal. Specifically, the officers found cocaine, marijuana, PCP, drug paraphernalia, over \$640.00, and a handgun in Mr. Gaines' possession. Mr. Gaines unsuccessfully moved to suppress this evidence in the United States District Court for the District of Kansas after he was indicted on drug charges. Mr. Gaines, then, appealed the denial of his suppression to the Tenth Circuit.

The Tenth Circuit stated that Mr. Gaines appeal raised two issues, but this article will only discuss the first issue: whether the officers seized Mr. Gaines for purposes of the Fourth Amendment. The Tenth Circuit set forth both the issue and the answer at the beginning of its opinion as such: "Two uniformed police officers approached Mr. Gaines with flashing roof lights and confronted him about a report that he was selling PCP. Did this confrontation entail a seizure? The answer turns on whether a reasonable person would have felt free to leave or terminate the encounter. We answer 'no' and characterize the encounter as a seizure." *Id.* at \* 1.

The Tenth Circuit explained that the Fourth Amendment applied in this appeal only if the police seized Mr. Grains. The Fourth Amendment would not apply if the officers' encounter with Mr. Gaines was consensual. The District Court had characterized the entire encounter as consensual.

The Tenth Circuit opined that the determination of whether someone has been seized for purposes of the Fourth Amendment is a question of law. Accordingly, the Tenth Circuit had to determine whether or not Mr.

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Gaines yielded to a police officer's show of authority. To answer this question of law, the Tenth Circuit applied an objective test, considering whether a reasonable person would have felt free to leave or to terminate the encounter. The Tenth Circuit stated that it applied this objective test to the historical facts, which in this case were largely undisputed. However, the Tenth Circuit further noted that, even if a reasonable person would not have felt free to leave, a seizure would occur only if the suspect yielded to a police officer's show of authority.

The Tenth Circuit found that a reasonable person in Mr. Gaines' position would not have felt free to leave under the circumstances and that Mr. Gaines yielded to the officers' authority, and therefore, Mr. Gaines was seized for purposes of the Fourth Amendment. The encounter began with Mr. Gaines sitting in his car in a parking lot. Two uniformed police officers arrived in marked police cars, both flashing their roof lights. The Tenth Circuit believed that the flashing roof lights, two marked police cars, and two uniformed officers would undoubtedly have cast at least some doubt on a reasonable person's belief in his or her freedom to leave.

This doubt would likely have intensified in Kansas (where Mr. Gaines was stopped) because of Kansas's traffic laws. Under Kansas law, motorists must stop whenever a police officer flashes his or her emergency lights.

According to the Tenth Circuit, the District Court minimized the impact of the flashing roof lights, crediting testimony by the police officers that they had activated their lights only because their cars were blocking a lane of traffic. But, the Tenth Circuit noted that the officers' subjective intent had little bearing on whether a reasonable person would have thought that he or she could leave.

Nevertheless, the Tenth Circuit assumed that a reasonable person would have felt free to drive away at that point of the encounter. One of the police officers then exited his car and gestured for Mr. Gaines to get out of the car. A reasonable person in Mr. Gaines' circumstances would have seen an armed police officer approaching him and ordering him to exit the vehicle. At a minimum (according to the Tenth Circuit), the police officer's gesture would have cast further doubt on a reasonable person's belief that he or she was free to drive away.

Nevertheless, the Tenth Circuit again assumed for purposes of this appeal that a reasonable person would still have felt free to leave at this point of the encounter. As Mr. Gaines exited his car, one police officer stood just a few feet away and said that they had come because of a report that Mr. Gaines was "up here selling some dope." The police officer then asked Mr. Gaines whether he had been selling "wet" (street-language for PCP). Meanwhile, another uniformed police officer circled the car and looked inside. The Tenth Circuit determined that, at a minimum, this accusatory question would have added to the reasonable person's doubt about his or her freedom to return to the car and drive away.

The Tenth Circuit then summarized the five circumstances that confronted Mr. Gaines: (1) He was sitting in his car when two marked police cars approached and stopped right behind him with their roof lights flashing; (2) Both police officers were uniformed; (3) One police officer gestured for Mr. Gaines to get out of his car; (4) Mr. Gaines exited his car, and one of the police officers said that they had come based on a report that he was selling PCP in the parking lot; and (5) While one police officer told Mr. Gaines that someone had accused him of selling PCP, the other police officer circled Gaines's car and looked inside. The Tenth Circuit concluded that, viewing these circumstances as a whole, (1) the police officers showed their authority, and (2) no reasonable person would have felt free to leave.

However, the Tenth Circuit went on to provide that the encounter would constitute a Fourth Amendment seizure only if Mr. Gaines had yielded to the show of the officers' authority. Mr. Gaines ultimately fled, and so, the Government denied that Mr. Gaines had yielded. The Tenth Circuit disagreed. The Tenth Circuit noted that one officer gestured for Mr. Gaines to get out of his car, and Mr. Gaines complied. When Mr. Gaines was

asked questions, he responded. And, when Mr. Gaines was asked for his identification, he opened his car trunk to look for his identification.

True, Mr. Gaines then fled, but by that point, the Tenth Circuit concluded that Mr. Gaines had already yielded to the show of authority. As a result, the Tenth Circuit concluded Mr. Gaines was seized for purposes of the Fourth Amendment and that the District Court erred in holding otherwise.

From there, the Tenth Circuit addressed the Government's argument that the attenuation doctrine precluded Mr. Gaines' argument that the District Court erred in denying his motion to suppress. Under the attenuation doctrine, a constitutional violation leading to the discovery of evidence does not require exclusion when only an attenuated connection exists between the constitutional violation and discovery of the evidence. The Tenth Circuit rejected the Government's argument that the attenuation doctrine saved the evidence from being suppressed in this case.

In short, the Tenth Circuit held that the police had effected a seizure of Mr. Gaines when two uniformed police officers pulled behind him in marked police cars, using their roof lights and pointedly told Mr. Gaines that they had come because of a report that he was selling drugs in the parking lot. After conducting the search, the police learned of an outstanding warrant and arguably obtained probable cause during their discussion with Mr. Gaines. But, neither the arrest warrant nor the later existence of probable cause attenuate the causal connection between the seizure and discovery of the evidence. Therefore, the Tenth Circuit vacated the denial of Mr. Gaines' motion to suppress and remanded the case to the District Court to determine whether a reasonable suspicion existed for the search conducted by the police.