Recent Case Report

Fisher v. City of San Jose

(9th Cir. 2006) __ F.3d __ [2007 WL 92689]

ISSUE

Did exigent circumstances justify a warrantless entry into Fisher's apartment to arrest him?

FACTS[1]

At about midnight, a security guard at an apartment complex in San Jose was walking by Fisher's apartment when he saw him inside and motioned for him to step out. It appears the guard wanted to talk to him about a noisy neighbor. When Fisher walked outside, he was carrying a rifle and moving it around "in various positions." At one point, he might have aimed it at the guard.

Fisher was "generally unresponsive" and apparently intoxicated. He also kept talking about his Second Amendment rights. The guard notified his supervisor who called San Jose police.

The situation developed as follows (times are approximate):

Midnight	Officers began arriving. Eventually 60 were called in.
2 A.M.	While standing at the door to his apartment, Fisher spoke to an officer "in a rambling fashion" about his Second Amendment rights. A little later, Fisher's wife walked outside and told officers that he had 18 rifles in the apartment.
3 A.M.-	A police negotiator tried to speak with Fisher. He threatened to shoot her. Officers saw Fisher "walking around with a rifle in his hand." An officer saw him "point one of his rifles toward [two officers] twice between 2:45 A.M. and 4 A.M." An officer saw Fisher "moving the rifles around his apartment." Fisher repeatedly told officers to "go away" and "leave me alone."
6:23 A.M.	Officers saw Fisher apparently loading a rifle.
6:30 A.M.	Officers began asking Fisher to leave his apartment. No response.
7:30 A.M.	The complex was evacuated.
9 A.M.	Officers broke the sliding glass door to the apartment and tossed in a phone. No response.
11 A.M.	Officers tossed a flashbang into the apartment. No response.
1 P.M.	Officers tossed CS gas canisters into the apartment. No response.
2 P.M.	Fisher exited and was arrested.

[1] **NOTE**: Some facts were taken from the dissenting opinion.

After pleading no contest to a misdemeanor charge of brandishing a firearm, Fisher sued the city, claiming the officers' actions constituted an unlawful arrest in violation of the Fourth Amendment. The jury reached a unanimous verdict: the officers had *not* violated Fisher's Fourth Amendment rights.

But the trial judge, U.S. Magistrate Judge Patricia Trumbull, overturned the verdict, ruling that Fisher had been unlawfully arrested because the officers should have obtained an arrest warrant at some point before they arrested him. The judge then awarded Fisher nominal damages of $1 and ordered the police department to train its officers on the laws she thought they violated.

DISCUSSION

The issues on appeal to the Ninth Circuit were essentially as follows: (1) Was Fisher arrested inside his apartment, or only after he exited? (2) If he was arrested inside, did the officers violate the rule of *Payton* v. *New York*[2] by entering his home without a warrant?

Where was Fisher arrested?

Although Fisher was physically arrested outside his apartment, the court ruled that a de facto arrest occurred inside when he was ordered to exit. This ruling was based on an earlier Ninth Circuit case, *U.S.* v. *Al-Azzawy,* in which the court said, "[Because the] police had completely surrounded appellee's trailer with their weapons drawn and ordered him through a bullhorn to leave the trailer . . . the arrest occurred while he was still inside his trailer."[3]

Thus, the court in *Fisher* ruled that "in a standoff situation such as this one, any seizure takes place *inside* the home for *Payton* purposes as opposed to outside of it, because the police officers, through their coercive action, constructively enter into a person's home and force him outside, to be taken into custody."

Were there exigent circumstances?

Because Fisher was arrested inside his home, the legality of the officers' "entry" depended on whether they complied with *Payton,* which says that officers may not enter a suspect's home to arrest him without a warrant or consent unless there was no time to obtain a warrant due to exigent circumstances.

Did exigent circumstances exist? The jury unanimously found they did because, (1) Fisher was arrested at or before 6:30 A.M. when he was ordered to step outside, and (2) the situation at that time was still in its precarious early stages.

The court, however, viewed things quite differently. Although it agreed that Fisher was arrested at 6:30 A.M., it ruled that he was also technically arrested "at least" three times after that. And because there had been time to obtain a warrant before these latter arrests, there were no exigent circumstances, which meant the "entries" resulting from these "arrests" were unlawful.

The court's analysis was based on the U.S. Supreme Court's opinion in *California* v. *Hodari D.*[4] in which the Court ruled that if an arrested suspect temporarily escapes from officers, he is not in custody until he is recaptured. Based on *Hodari*, the court ruled that after Fisher was arrested at 6:30 A.M., he "escaped" because he "continued to go about his

[2] (1980) 445 U.S. 573. ALSO SEE *People* v. *Ramey* (1976) 16 Cal.3d 263.
[3] (9th Cir. 1985) 784 F.2d 890, 893.
[4] (1991) 499 U.S. 621.

business in his apartment." He was then "re-arrested" sometime after 7 A.M. when officers broke the glass door and tossed in a phone. But, once again, he "escaped" when he continued to "go about his business."

The third "arrest" occurred about 1 P.M. when officers set off the CS canisters, but Fisher then "escaped" when the gas did not force him out. The court indicated there were other "arrests" when, for example, officers cut off the power to Fisher's apartment and set off a flashbang. In any event the final "arrest" occurred at 2:35 P.M. when Fisher exited and was physically arrested. Summing up its ruling, the court said, "Fisher continued to go about his business in his apartment. His doing so was the equivalent to the escape envisioned by *Hodari D."*

The court then ruled that there was sufficient time to obtain a warrant, at least before the 1 P.M. "arrest." This was because "[t]he evidence undisputedly shows that there were enough officers working on Fisher's case, with enough time to obtain a warrant before the police sent the first of the CS gas canisters into Fisher's apartment."

Thus, the court affirmed the ruling of the trial judge that the jury's verdict should be overturned.

COMMENT

This decision is fundamentally unsound. There are a variety of reasons for this, starting with the glaring failure of the two judges in the majority—Marsha Berzon and David Thompson—to comprehend the nature of the incident. Although the officers certainly had probable cause to arrest Fisher, it is apparent that their primary objective was to diffuse a dangerous situation, as demonstrated by their evacuation of the apartment complex. Such a precaution was well warranted considering that, from all appearances, the incident had the potential of ending tragically, possibly with the deaths of officers and Fisher.

Just consider what the officers knew: Fisher appeared to be irrational or deranged, and he was armed with a small arsenal of weapons. In addition, he was seen "moving the rifles around his apartment," loading at least one of them, and pointing one at officers outside the apartment. And they knew that he had threatened to kill a police negotiator.

In contrast to judges Berzon and Thompson, the dissenting judge, Consuelo Callahan, concluded that the officers "had ample grounds to be seriously concerned about their own safety as well as the safety of the public, particularly since the events took place in an apartment complex."

One reason that judges Berzon and Thompson failed to grasp the situation is that, instead of considering only the facts known to the officers—as they are required to do[5]—they viewed the situation from *their* perspective and that of Fisher. For instance, they began by listing various circumstances that the officers could not have known:

> On the afternoon of Saturday, October 23, 1999, Fisher bought two twelve-packs of beer and settled in at home for an evening of watching the World Series and cleaning rifles from his collection of approximately eighteen World War II-era firearms.

[5] See *Ker* v. *California* (1963) 374 U.S. 23, 35 [probable cause depends on "the facts and circumstances within [the officers'] knowledge"]. ALSO SEE *Illinois* v. *Gates* (1983) 462 U.S. 213, 232 ["[T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."].

Thus, the judges set the stage for their decision by insinuating that Fisher was just a regular guy, maybe a history buff, who had "settled in" for an enjoyable afternoon and evening of watching a World Series game, while cleaning his collection of vintage guns and maybe enjoying a few beers. The implication, of course, was that Fisher was not actually dangerous, and that he was unjustly drawn into a police standoff by a meddlesome security guard and a bunch of overzealous officers.

But even if the incident had involved nothing more than an attempt by officers to arrest a harmless, barricaded suspect, the judges' analysis would still have been wide of the mark. For one thing, they disregarded the United States Supreme Court's instructions on how to determine when a police action constitutes an arrest if the suspect was located in a place he does not want to leave, such as inside a bus or his apartment. In these situations, said the Court, the suspect is not arrested if a "reasonable person" in his position would have felt free "to decline the officers' request or otherwise *terminate the encounter.*"[6] As it explained in *United States* v. *Drayton,* "If a reasonable person would feel free to terminate the encounter, then he or she has not been seized."[7]

If judges Berzon and Thompson had followed *Drayton*, they would have understood that Fisher was under continuous arrest from the time he became aware that his apartment was surrounded, probably around 2 A.M., but no later than 6:30 A.M. when officers began ordering him to leave. After all, it seems rather apparent that a reasonable person would not feel free to terminate an encounter that consisted of over 60 armed police officers surrounding his home for hours, repeatedly demanding through a bullhorn that he step outside, and refusing to comply with his requests to "go away" and "leave me alone."

Second, the judges concluded that Fisher was not under continuous arrest because he "continued to go about his business." Here, the judges resorted to blatant speculation. Like the officers outside the apartment, judges Berzon and Thompson had no way of knowing what Fisher was doing when he was not visible through a window. Moreover, unless Fisher's "business" was staying up all night, moving rifles "around his apartment," aiming guns at officers, dodging flashbangs, and choking on CS gas, he most certainly did not "go about his business."

(Ironically, the judges acknowledged the continuing nature of the seizure when, elsewhere in their opinion, they said, "Given this barrage of police threats outside the home and intrusions of objects and materials into the apartment, a reasonable person certainly would have felt constrained in continuing his daily activities at home.")

Third, the judges' conclusion that a suspect inside his home "escapes" from custody whenever officers cannot see him, or whenever he refuses their commands, is flat-out preposterous. As Judge Callahan aptly observed:

> To say that a suspect escapes every time he or she retreats from public view even though the officers know that he or she is in the building and surrounded, creates an analytical nightmare for law enforcement agencies. For example, may a bank robbery suspect trapped in a bank "escape" under the majority's analysis by ducking behind a counter, requiring the police to obtain an arrest warrant . . . ?

Fourth, although the officers might have had time to obtain a warrant at some point before Fisher surrendered, the courts routinely rule that if a situation was truly exigent, and if the officers were diligent in defusing it, a warrant will not be required until the

[6] See *Florida* v. *Bostick* (1991) 501 U.S. 429, 436.
[7] (2002) 536 U.S. 194, 201.

incident is, from all outward appearances, terminated. For example, if the exigency is a large warehouse fire, the courts permit arson investigators to enter the premise after the fire is completely extinguished in order to determine its cause.[8] But under the procedure advocated by judges Berzon and Thompson, the investigators' entry would be unlawful because they could have easily obtained a warrant after the fire was contained, or after it was brought under control, and certainly before the start of mop up operations.

The incident in this case did not present complex factual or legal issues. Yet, the judges' lengthy, rambling, and almost incoherent analysis demonstrated an intent to reach the conclusion they fancied. And they were so desperate to reach this result that they were willing to ignore the law, engage in wild speculation, concoct a sham "entry," fabricate a series of bogus "arrests" and several phantom "escapes."

The jurors in this case reached a sensible verdict: there was only one arrest—and it occurred at the outset of the incident when exigent circumstances clearly existed. Their verdict should have been upheld. POV

[8] See *Michigan* v. *Tyler* (1978) 436 U.S. 499, 510; *Michigan* v. *Clifford* (1984) 464 U.S. 287, 297.