Recent Case Report

U.S. v. Hauk

(10th Cir. June 24, 2005) __ F.3d __ [2005 WL 1499676]

ISSUE

When officers entered a house to arrest a parole violator, did they have grounds to conduct a protective sweep?

FACTS

An anonymous caller notified the FBI's Violent Crimes Fugitive Task Force of the following: Hauk was an at-large parole violator who was selling drugs out of his house in Kansas City, Kansas; the caller had been inside Hauk's house to buy drugs and he knew that Hauk kept cocaine and marijuana in the ceiling, in a hall closet by the bedroom, in a night stand next to his bed, and in a duffle bag; there are guns in the house; Hauk sells drugs at night and sleeps during the day; and he has a "runner" named Spencer.

The tip was relayed to Kansas City police who confirmed that Hauk was a parole violator. The next day, an officer who was watching Hauk's house saw someone drive up in a Camaro and park in the driveway. The officer could not see whether the driver went into the house. Additional officers soon arrived, some surrounded the house while others went to the front door and knocked. Hauk answered the door wearing boxer shorts. When he saw the officers, he tried to close the door but they forced their way in.

After arresting Hauk on the parole warrant, officers conducted a protective sweep of the house, seeing drugs in plain view in several locations. Based on these observations, they obtained a search warrant and seized the drugs.

When Hauk's motion to suppress the drugs was denied, he pled guilty to possession with intent to distribute.

DISCUSSION

On appeal, Hauk contended his motion should have been granted because the protective sweep was unlawful. His argument was based on the testimony of an officer who was a witness at the hearing on his suppression motion. The officer testified that the sweep was conducted as a matter of routine—that when Kansas City officers enter a home to make an arrest, they *always* sweep it. The following in an excerpt from the transcript:

> Q: So, as a general policy of the police department, when you folks effect an arrest warrant, you routinely do a protective sweep, right?
>
> A: For officer safety, absolutely.

Hauk had a good point. The United States Supreme Court has expressly rejected the idea that protective sweeps can be conducted as a matter of routine whenever officers are

lawfully inside a residence to make an arrest.[1] Instead, sweeps are permitted only if officers reasonably believed, (1) there was someone on the premises other than the arrestee, and (2) that person posed a threat to the officers.[2]

Because the prosecution mistakenly thought the sweep was justified because it was standard procedure, there was no direct testimony as to whether the officers reasonably believed that someone on the premises constituted a threat. It was therefore necessary for the Court of Appeals to see if this was proved circumstantially.

At the outset, the court noted that the prosecution need only prove there was "reasonable suspicion" to believe a threat existed. This is a fairly low level of proof which, as the court noted, "is essentially the same 'reasonable suspicion' standard that justifies [pat searches]."

With that in mind, the court pointed out that the record showed the following: (1) the anonymous caller reported that Hauk was a drug dealer, (2) the caller said he had an accomplice ("Spencer"), and (3) an officer testified he saw someone arrive outside Hauk's house shortly before officers entered.

These three pieces of information might justify a sweep if there was reason to believe the caller was reliable. Accordingly, the first order of business was to determine if the record provided some basis for judging his reliability.

The most common method of crediting information from any anonymous caller or other untested informant is to corroborate it; i.e., to prove that some of it was accurate. As the U.S. Supreme Court observed, "Because an informant is right about some things, he is more probably right about other facts."[3] It is not enough, however, to simply prove that some of the things the caller said were accurate. What counts is whether the corroborated information was such that it would probably have been known only by someone who was familiar with the suspect's criminal operations.[4] In *Hauk*, there were two bits of information that fell into this category, namely:

Hauk was a parole violator: Although this does not necessarily qualify as "inside" information, the court noted it "suggests something more than casual observation by a member of the general public . . . [suggesting] more intimate familiarity with [Hauk's] affairs."

Hauk was a day sleeper: As noted, when Hauk answered the door he was wearing boxer shorts. This, said the court, tended to corroborate the caller's tip

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[1] See *Maryland* v. *Buie* (1990) 494 U.S. 325.

[2] *Ibid*; *In re Sealed Case* (D.C. Circ. 1998) 153 F.3d 759, 769; *Sharrar* v. *Felsing* (3d Cir. 1997) 128 F.3d 810, 825 ["[T]he possible presence of anyone being (on the premises is) the touchstone of the protective sweep analysis."].

[3] *Illinois* v. *Gates* (1983) 462 U.S. 213, 244.

[4] See *People* v. *McCarter* (1981) 117 Cal.App.3d 894, 902 [the caller "had independent information as to a crime detail not reported by the news media, i.e., that the murder victim was black."]; *Massachusetts* v. *Upton* (1984) 466 U.S. 727 [officers verified that property fitting the description furnished by the caller had, in fact, been taken in recent burglaries; that, as stated by the informant, officers had executed a warrant to search a certain motel room]; *Alabama* v. *White* (1990) 496 U.S. 325, 332 [caller's accurate prediction "demonstrated inside information—a special familiarity with respondent's affairs."]. COMPARE *Florida* v. *J.L.* (2000) 529 U.S. 266, 271 [caller did not supply "any basis for believing he had inside information about J.L."].

because Hauk's "state of undress supported a reasonable (though of course not certain) inference that he had been in bed."

There was more. The caller gave very specific details about where Hauk kept his drugs. This is significant because the U.S. Supreme Court has noted that an informant's "explicit and detailed description of alleged wrongdoing . . . entitled his tip to greater weight than might otherwise be the case."[5]

All things considered, said the court, this was sufficient corroboration to credit the caller's tip. It was, therefore, reasonable for the officers to believe that Hauk was a drug dealer and that he had an accomplice. But was it also reasonable for them to believe that this accomplice was inside Hauk's house, and that he posed a threat to the officers?

Based on three additional pieces of information, the answer was yes. First, shortly before the officers entered, someone driving a Camaro parked in Hauk's driveway, then disappeared from view. This information, said the court, gave the officers "reason to suspect that there was an unidentified person lurking somewhere in the house."

Second, when Hauk opened the door and saw the officers on the porch, he tried to shut them out. "Mr. Hauk's attempt to slam the door on the officers," said the court, "gave them reason to suspect that *something* was going on in the house that Mr. Hauk did not want them to see and that any third party in the house might also resist their efforts to serve the warrant."

Third, the caller said there were guns in the house, plus the court noted it is well-known that, "[u]nlike some other crimes, involvement in the drug trade is not uncommonly associated with violence."

Consequently, the court ruled the sweep was lawful, and Hauk's conviction was affirmed. POV

[5] *Illinois* v. *Gates* (1983) 462 U.S. 213, 234. ALSO SEE *U.S.* v. *Sierra-Hernandez* (9th Cir. 1978) 581 F.2d 760, 763 ["The tip here was neither vague as to the time of the criminal activity, nor imprecise as to the kind of crime being committed."]. COMPARE *U.S.* v. *Roberson* (3d Cir. 1996) 90 F.3d 75, 80 ["bare-bones tip"].