Recent Case Report

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People v. Smith

(2009) __ Cal.App.4th __ [2009 WL 943963]

Issue

Under what circumstances may officers conduct a "reach in" search of a parolee?

Facts

At about 11:30 A.M., two Vallejo police officers detained two suspected burglars outside a hotel in an area with a "high incidence of drug activity." When one of the men, Smith, admitted that he was on parole for possession of drugs for sale, an officer decided to conduct a parole search. Although he found nothing during a pat search and a search of Smith's car, the officer testified he had a "gut feeling" that Smith was concealing drugs in his underwear. So he told him that he was "gonna check his pants and see if he had anything in there." At that point, Smith became "uncooperative" and had to be restrained.

After Smith calmed down, the officer decided that, in order to protect Smith's privacy, it would be best to search him in the back of the hotel's parking lot. When they arrived, the officer positioned Smith "inside the crook of the open back door of a patrol car" while two other officers positioned themselves so as to block the view.

As for the search itself, the officer testified that he "removed Smith's belt, unbuttoned and unzipped Smith's pants and pulled them down 'a foot or so.'" He then pulled the elastic waistband of Smith's underwear "out away from his body," at which point he saw a "large bag the size of a baseball 'sitting right on top of his penis.'" The officer removed the bag and found that it contained 12 baggies of heroin, cocaine, and methamphetamine.

Smith's motion to suppress the evidence was denied, and he was convicted.

Discussion

Smith acknowledged that the officer had a right to search him pursuant to the terms of parole, but he argued that the search was unlawful because it exceeded the permissible scope of a parole search. The court disagreed.

It is settled that officers who are searching a parolee may conduct a reasonably thorough search, but they may not conduct a search that is "extreme or patently abusive."[1] Smith contended that the search in the parking lot was abusive because it constituted a "strip search," and the law does not permit routine strip searches of parolees.

But was it really a "strip search?" Smith argued it was because the Penal Code broadly defines a "strip search" as any search in which the person is required "to remove or arrange some of all of his or her clothing so as to permit a visual inspection of the

[1] See *United States* v. *Robinson* (1973) 414 U.S. 218, 236; *People* v. *Laiwa* (1983) 34 Cal.3d 711, 726.

underclothing, breasts, buttocks, or genitalia of such person."[2] But the court pointed out that this particular definition of "strip search" was intended to apply only to booking searches of people who were arrested for misdemeanors and infractions. It does not, said the court, override the rule that officers may conduct parole searches that are "reasonable" in scope.[3]

As a general rule, a search is reasonable in scope if the need for the exploration outweighed its intrusiveness. And because the need for parole searches is beyond question, the issue in *Smith* was whether this particular search was impermissibly intrusive. The court began by pointing out that the officers thoughtfully moved Smith from a busy street to a location where it was unlikely that any passerby would observe the search. Said the court:

> [The search] was conducted in the back of a hotel parking lot in an area that did not face the street, was fenced-off on at least one side, and was not heavily frequented. Before the search, the officers also moved Smith to a less exposed location, inside the crook between the open rear door of the patrol car and the body of the car, and stood around him to obstruct visibility. There is no evidence that any civilian in the vicinity observed the search or that a passerby could have caught a glimpse of anything more revealing than Smith's underwear, assuming that was visible.

The court also noted that the search was "limited to that necessary to determine whether Smith was concealing narcotics." "The evidence shows," said the court, that the officer "lowered Smith's pants 'a foot or so' and pulled back the elastic waistband of his underwear, permitting a visual inspection of his crotch area. Smith's belt was the only item of clothing removed, his private parts were not exposed, and there is no evidence that [the officer] touched Smith's private area—he simply retrieved the bag of drugs."

Although it was apparent that the officer did not have probable cause or even reasonable suspicion to believe that Smith was carrying drugs, the court noted that the search was not arbitrary, noting "the high level of illegal drug activity in the area, Smith's prior narcotics conviction, [and] the failure of the first two searches to disclose any illegal substances." The court also pointed out that it is recognized "as a matter of law that dealers frequently hide drugs near their genitals."

Finally, the court observed that, based on decisions in other jurisdictions, it appears that "the courts are particularly likely to deem a 'reach in' search tolerable when the police take proper steps to diminish the invasion of a suspect's privacy during a search in a public area."[4]

Consequently, Smith's conviction was affirmed.

Comment

The ruling in *Smith* raises an interesting question: May officers also conduct "reach ins" of arrestees when searching them incident to arrest. There does not appear to be any logical reason to prohibit them, as the privacy interests of parolees and arrestees are about the same. But we will have to wait to see how this issue develops. POV

[2] Pen. Code § 4030(c).
[3] At fn. 8.
[4] **Citing** *Jenkins* v. *State* (Fla. Supreme 2009) 978 So.2d 116, 125-28; *U.S.* v. *Williams* (8th Cir. 2007) 477 F.3d 974, 977; *U.S.* v. *Ashley* (D.C. Cir. 1994) 37 F.3d 678, 682.