Recent Case Report

U.S. v. Barnes

(1st Cir. 2007) __ F.3d __ [2007 WL 3133807]

ISSUE

Did officers have sufficient grounds to conduct a visual body cavity search of an arrestee?

FACTS

Officers in Woonsocket, Rhode Island arrested Barnes for driving with a suspended license. During an inventory search of his car, they found a "large bag" of marijuana and a digital scale in the trunk. At the police station, the arresting officer strip searched Barnes by having him remove his clothing and lower his underwear. No contraband was observed. At that point, the officer decided to conduct a visual body cavity search because he suspected that Barnes was a marijuana dealer, and he knew that "some drug dealers concealed drugs between their buttocks." But Barnes refused to comply with the officer's instructions to "turn around, bend over, and spread his buttocks."

Just then a narcotics investigator walked into the room. The investigator, having learned that Barnes had been arrested, wanted to make sure that Barnes's buttocks were checked because the officer "had received a tip from some sources that Barnes was reputed to deal in drugs and, specifically, known to 'cheek' drugs—i.e., conceal drugs between his buttocks." When the investigator told Barnes that the visual cavity search "was protocol" with the department, Barnes "reached behind his back and removed a bag containing cocaine base from between his buttocks."

DISCUSSION

Barnes contended that the cocaine should have been suppressed because, (1) he produced the cocaine only because the investigator had informed him that he would be subjected to a visual body cavity search, and (2) the investigator lacked grounds to conduct such a search. The court agreed.

Under federal and California law, officers may not subject arrestees to visual body cavity searches unless they have specific reason to believe that the arrestee is concealing a weapon or contraband in the cavity.[1] As the court explained, "[A] visual body cavity search involves a greater intrusion into personal privacy. Accordingly, prior to conducting a visual body cavity search, we require a more particularized suspicion that contraband is

[1] See Penal Code § 4039(f); *People* v. *Wade* (1989) 208 Cal.App.3d 304, 307; *Edgerly* v. *San Francisco* (9th Cir. 2007) 495 F.3d 645; *Way* v. *County of Ventura* (9th Cir. 2006) 445 F.3d 1157, 1162; *Arpin* v. *Santa Clara Valley Transportation Agency* (9th Cir. 2001) 261 F.3d 912, 922.

concealed." (California has an additional requirement: the supervising officer on duty must give prior, written authorization, and such authorization must include a listing of the circumstances upon which reasonable suspicion was based.[2])

Although the arresting officer in *Barnes* lacked grounds to conduct the search (he merely knew that "some drug dealers concealed drugs between their buttocks"), the narcotics investigator had more specific information; i.e., his sources had reported that Barnes was "cheeking" drugs.[3]

The question, then, was whether this information constituted reasonable suspicion. It would have if the investigator had explained to the court why he believed his sources were reliable or "tested." He might have testified, for example, that their tips had led to arrests, convictions, or productive search warrants. But instead, he merely testified that they "had been reliable sources in the past." Such testimony, observed the court, "is completely lacking in any factual detail regarding the informant's tip. [T]he law requires more than naked assertions of reliability to support reasonable suspicion."

The court did not, however, suppress the cocaine. Instead, it remanded the case to the district court to determine whether the investigator had sufficient reason to believe his sources were reliable. POV

[2] See Penal Code § 4039(f).

[3] **NOTE**: Although the narcotics investigator did not convey this information to the arresting officer, the court ruled that the investigator's information could be imputed to the arresting officer under the so-called "collective knowledge" rule. Under this rule, if two or more officers were generally communicating as to the facts developed in the course of an investigation, a court may presume that they pooled their information before the detention or arrest. Accordingly, the court ruled that because the investigator and arresting officer were generally communicating about the matter, and because the investigator told the arresting officer that Barnes "needed to be strip searched," the arresting officer would be deemed to have known about the "cheeking." See *Illinois* v. *Andreas* (1983) 463 U.S. 765, 771, fn.5; *People* v. *Gomez* (2004) 117 Cal.App.4th 531, 540; *People* v. *Rodgers* (1976) 54 Cal.App.3d 508, 518; *U.S.* v. *Jensen* (9th Cir. 2005) 425 F.3d 698, 705 [2005 WL 2456930] *Bailey* v. *Newland* (9th Cir. 2001) 263 F.3d 1022, 1031 ["Here it is clear from the record that there was communication between the officers at the scene of the arrest"]. COMPARE *U.S.* v. *Ellis* (7th Cir. 2007) 499 F.3d 686, __ ["As there was no communications from Officers Chu and McNeil at the front door to Lopez at the side door, it was improper to impute their knowledge to Lopez."], ALSO SEE *U.S.* v. *Valez* (2nd Cir. 1986) 796 F.2d 24, 28 ["The rule exists because, in light of the complexity of modern police work, the arresting officer cannot always be aware of every aspect of an investigation; sometimes his authority to arrest a suspect is based on facts known only to his superior or associate."].