

Recent Case Report

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Fisher v. City of San Jose

(9th Cir. en banc 2009) __ F.3d __ [2009 WL 606132]

Issue

Did officers violate Fisher's civil rights when they arrested him without a warrant inside his apartment?

Facts

At about 1 A.M., Fisher was inside his apartment in San Jose, drinking beer and cleaning his firearms. A security guard for the apartment complex wanted to talk to him about loud music that a neighbor was playing, so the guard motioned to Fisher through the window. When Fisher stepped outside, he was carrying a rifle which he pointed at the guard or in his direction. The guard asked him if he knew the people who were making the noise, at which point Fisher's tone "became aggressive," he began "ranting about the Second Amendment" and saying his neighbors were "vampires." It appeared to the guard that Fisher was drunk. Fearing for his safety, the guard notified his supervisor who called San Jose police. The situation developed as follows (times are approximate):

1 A.M.: Officers surrounded the apartment. A sergeant persuaded Fisher to walk onto the patio to discuss the situation, but Fisher "lapsed into a rambling, belligerent diatribe about his Second Amendment rights" and threatened to shoot the sergeant, saying he had 18 guns in his apartment. After Fisher went back inside, his wife walked out and confirmed that he had 18 rifles in the apartment and that he was drunk. At various times during the next few hours, Fisher shouted such things as, "I have guns. I will use them," "Leave me the fuck alone. I don't believe in your laws."

2:25 A.M.: An officer saw Fisher loading cartridges into a rifle, and then holding the weapon while "pacing through his apartment." Another officer saw Fisher loading several magazines with ammunition, and "strategically placing his guns around his apartment."

3 A.M.: A police negotiator tried to speak with Fisher, but he pointed a rifle at her and threatened to shoot.

6:30 A.M.: An officer saw Fisher holding a rifle.

7:00 A.M.: The SJPd MERGE unit assumed tactical control of the scene. Some of the first-responding officers returned to the police station to write their reports.

7:00 A.M. – 2:00 P.M.: Officers tried to end the standoff by, among other things, shutting off the power to the apartment; driving an armored vehicle, siren blaring, in front of Fisher's patio; tossing a "throw phone" onto the patio; and utilizing flashbangs and tear gas. Nothing worked.

2:15 P.M.: Fisher exited and was arrested.

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 acted properly. 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. The city appealed.

Although Fisher was not physically arrested until he stepped outside, it was conceded that he was, for Fourth Amendment purposes, "arrested" when officers surrounded his apartment. Thus, the legality of the arrest depended on whether the officers complied with the so-called *Ramey-Payton* rule which prohibits officers from arresting a suspect inside his home unless, (1) they had an arrest warrant, (2) an occupant consented to their entry, or (3) there were exigent circumstances. Because the officers did not have a warrant or consent, the issue was whether there were exigent circumstances.¹

The city took the position that Fisher was arrested at or before 6:30 A.M. when the situation was still in its precarious early stages. But a divided three-judge panel viewed the situation much 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. Moreover, it concluded that after 6:30 A.M., exigent circumstances no longer existed, mainly because that was the last time anyone had seen Fisher holding a gun; and shortly after that, some officers left the scene to write their reports. Thus, the panel concluded that all of the subsequent "arrests" were unlawful under *Ramey-Payton* because exigent circumstances no longer existed when they occurred. The Ninth Circuit granted en banc review of the panel's decision.

Discussion

At the outset, the court summarized the rule that the panel had adopted and which Fisher was now advocating: "Implicit in Fisher's argument is the following premise: in an armed standoff, once a suspect is seized by virtue of being surrounded and ordered to surrender, the passage of time may operate to liberate that suspect, re-kindle the arrest warrant requirement, and require police to assess with each passing minute whether the circumstances remain exigent."

The court ruled that such an interpretation of armed standoffs makes no sense, as such incidents are not composed of discrete episodes, each requiring a new threat assessment. Said the court:

[D]uring such a standoff, once exigent circumstances justify the warrantless seizure of the suspect in his home, and so long as the police are actively engaged in completing his arrest, police need not obtain an arrest warrant before taking the suspect into full physical custody. This remains true regardless of whether the exigency that justified the seizure has dissipated by the time the suspect is taken into full physical custody.

The court also noted the patent absurdity of the panel's rule requiring that officers at armed standoffs consult with a judge to determine the best course of action. In the words of the court, "But suggesting that a magistrate judge should be telling police in the middle of the standoff that they must withdraw or what tactics are permissible does not

¹ See *Payton v. New York* (1980) 445 U.S. 573; *People v. Ramey* (1976) 16 Cal.3d 263, 275.

strike us as a reasonable role for a judicial officer under the Fourth Amendment.” Consequently, the court ruled that Fisher’s civil rights were not violated when officers arrested him without a warrant.

Comment

Because the court’s analysis was so sensible, it is astonishing that four judges dissented, thus demonstrating a willful blindness or mind-boggling confusion as to the nature of armed standoffs. According to the dissenters, officers on the scene should be required to assess each passing moment for signs that the deadly exigent circumstances that existed at the outset had diminished to the point that one phase of the incident had concluded and another, a less deadly one, had begun.

Thus, it was hardly surprising that one of the dissenters was Steven Reinhardt, a judge whose legal judgment has been repeatedly called into question by the United States Supreme Court. In fact, he is reputed to be the most overruled judge in the history of the nation.

The inability of Judge Reinhardt and the other three to appreciate the difficulties that officers face in such a standoff was demonstrated 10 days after this opinion was filed when a parolee shot and killed two Oakland police officers, and then engaged SWAT officers in an armed standoff, during which he killed two more. We are fairly certain that, unlike the dissenting judges, most people believe that officers who are confronting armed and barricaded suspects should be permitted to focus their *full* attention on keeping themselves and others safe. POV