

Recent Case Report

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Friedman v. Boucher

(9th Cir. 2009) __ F.3d __ [2009 WL 1758366]

Issue

In the absence of statutory authorization, must officers have a warrant to forcibly take a saliva sample from a county jail inmate for DNA testing?

Facts

A deputy district attorney in Clark County, Nevada asked a Las Vegas police officer to obtain a sample of Kenneth Friedman's saliva for DNA testing. It appears that Friedman was not a suspect in any current case, and that the prosecutor merely wanted the sample to add Friedman's DNA profile to a database "as an aid to solve cold cases." Because Friedman was in custody at the time, the officer visited him in the county jail and asked if he would provide a sample. Friedman said no. The officer told him that a deputy DA "had authorized [the officer] to obtain a DNA sample from Friedman," and another officer added, "we can force you, we're authorized and you can get hurt pretty bad." Friedman continued to refuse, so one of the officers "forced Friedman's jaw open and forcefully took a buccal swab from the inside of Friedman's mouth."

Friedman later filed a federal civil rights lawsuit against the officer and the prosecutor, claiming the warrantless taking of the DNA sample violated his Fourth Amendment rights. When the district court ruled that the officer and prosecutor were entitled to qualified immunity from the lawsuit, Friedman appealed to the Ninth Circuit.

Discussion

Before addressing the issue of qualified immunity, the court sought to determine whether the officer and prosecutor had, in fact, violated Friedman's Fourth Amendment rights. At the outset, it ruled that the taking of a DNA sample—by means of a buccal swab or otherwise—constitutes a "search." Said the court, "There is no question that the buccal swab constituted a search under the Fourth Amendment. The Supreme Court has held that invasions of the body are searches and, thus, are entitled to the protections of the Fourth Amendment."

Consequently, officers are prohibited from taking a DNA sample from a suspect unless, (1) the suspect consented, (2) officers had a search warrant, (3) a statute expressly authorized the search, or (4) the search was otherwise "reasonable." None of the first three exceptions applied, as the officers had neither consent nor a warrant, and Nevada law contained no statutory authorization for the search. Consequently, its legality depended on whether the taking of a DNA sample from Friedman was "reasonable" under the circumstances.

At the outset, the court pointed out that Friedman was not on parole, and that the Nevada authorities extracted the DNA from him "not because they suspected he had committed a crime, nor to aid in his reintegration into society, nor as a matter of his continuing supervision. Their purpose was simply to gather human tissue for a law enforcement databank, an objective that does not cleanse an otherwise unconstitutional search."

Nevertheless, the officer and prosecutor argued the search was reasonable because “pre-trial detainees have limited privacy rights that must yield to the desires of law enforcement to collect DNA samples for use in law enforcement databases.” The court disagreed, pointing out that “[n]either the Supreme Court nor our court has permitted general suspicionless, warrantless searches of pre-trial detainees on grounds other than institutional security or other legitimate penological interests.” Accordingly, the court ruled “there is no support for the government’s contention that Friedman’s status as a pre-trial detainee justified forcible extraction of his DNA.”

Having determined that the warrantless search of Friedman was unlawful, the court also ruled that the officer and prosecutor were not entitled to qualified immunity. This was because qualified immunity cannot be granted if the officers’ conduct violated a law that was “clearly established” at the time. And here, said the court, there was clearly insufficient justification for such a search. As it pointed out, “Shacking a detainee, chaining him to a bench, and forcibly opening his jaw to extract a DNA sample without a warrant, court order, reasonable suspicion, or concern about facility security is a violation of the detainee’s clearly established rights under the Fourth Amendment.”

Comment

In contrast to Nevada, California law provides that the following people must provide buccal swab samples without a warrant:

Convicted felons: Any person, including a juvenile, who is convicted of, or plead guilty or no contest to, any felony.

Arrestees: Any person arrested for any of the following crimes: Murder, attempted murder, voluntary manslaughter, attempted voluntary manslaughter, or any of the felony sex offenses specified in Penal Code § 290.¹ POV

¹ Penal Code § 296