In re J.G.

(2014) 228 Cal.App.4th 402

Issue

Did a consensual encounter between an officer and a 15-year old boy become an illegal de facto detention?

Facts

At about 8:45 P.M. a uniformed Daly City police officer noticed a 15-year old boy, identified herein as J.G., walk across a street toward J.G.'s brother. J.G. was carrying a backpack. The officer decided to engage the brothers in a consensual encounter "because he stopped and talked to people all the time on his beat." The officer's first question to J.G. was whether he was willing to speak with him, and he said yes. After some "casual conversation," the officer asked the boys "what they were up to." J.G. said they were going to a party. At about this time, another officer in a patrol car arrived and stood about five to seven feet away to "monitor" the brothers.

The first officer then asked the brothers if they "had anything illegal" in their possession; both said no and consented to a search which was unproductive. About then, two additional officers arrived in a patrol car but their purpose was not to back up the other officers. Instead, one of them was returning a rifle he had borrowed from the backup officer. And after handing the rifle to second officer, the three of them began speaking together while the first officer talked with the brothers.

The first officer asked the boys if they would be willing to sit on the curb, and they said yes. He then asked J.G. if there was anything illegal in his backpack and he said no. J.G. then consented to a search of the backpack in which the officer found a semiautomatic handgun. J.G. was arrested. After J.G.'s motion to suppress the gun was denied, the court affirmed the petition that J.G. had possessed a firearm.

Discussion

J.G. argued that the initial consensual encounter between him and the officer had been transformed into an illegal detention by the time the officer obtained consent to search the backpack. Accordingly, he contended that the handgun should have been suppressed because it was the fruit of an unlawful detention. The court agreed.

Officers may, of course, seek to engage anyone in a conversation, and their encounter will be deemed consensual if the circumstances were such that a reasonable innocent person in the suspect's position would have believed he was free "to decline the officers' requests or otherwise terminate the encounter."[1] If not, the encounter is a de facto detention which is illegal if, as here, the officer lacked grounds to detain the suspect. Consequently, the issue before the court was whether or not, at the moment the officer found the gun, a reasonable innocent person in J.G.'s position would have believed he was free to terminate the encounter.

Although the officers did not expressly say that the brothers were not free to leave, the court ruled they did four things that impliedly did so. First, they "displayed" a

[1] *Florida v. Bostick* (1991) 501 U.S. 429, 436. Also see *Brendlin v. California* (2007) 551 U.S. 249, 256-57; *Florida v. Royer* (1983) 460 U.S. 491, 519, fn.4 ["[T]he potential intrusiveness of the officers' conduct must be judged from the viewpoint of an innocent person in Royer's position."]; *United States v. Drayton* (2002) 536 U.S. 194, 202 ["The reasonable person test is objective and presupposes an *innocent* person."].

firearm; i.e., one of the officers handed a rifle to another. Second, the first officer asked the brothers if they had "anything illegal" in their possession which, according to the court, "clearly conveyed to the brothers that he suspected them of unlawful activity." Third, the arrival of three additional officers on the scene rendered the encounter "increasingly intrusive." Fourth, the officer obtained the brothers' consent to sit on the curb.

For these reasons, the court ruled that "the ensuing search of the backpack violated the Fourth Amendment, and the juvenile court's denial of J.G.'s motion to suppress was therefore improper."

Comment

There are some things about this opinion that require comment. First, the court thought it significant that "a weapon had been displayed." But ordinarily, when a court says something like that it means that an officer pointed a gun at the suspect or at least kept it in a position for immediate use. But, as noted, that is not what happened here. Instead, one of the two newly-arriving officers handed the rifle to the second officer, and all three of them began talking amongst themselves while the first officer spoke with the brothers. We think this situation was so unlike the usual "display" of a firearm that the court should have made some allowance for the difference.

Second, the court ruled that the first officer "clearly conveyed" to the brothers that he suspected them of illegal conduct because he asked if they had anything illegal in their possession. But it is difficult to understand how merely "asking" such a question would constitute the functional equivalent of an accusation. In fact, the very nature of the question demonstrates that the officer did not know the answer and therefore his words could not have reasonably been interpreted as an accusation.

On the other hand, there was substantial precedent for the court's ruling that the contact became "increasingly intrusive" as the result of the arrival of three additional officers and two patrol cars.[2] Granted, it appears the three additional officers were having a conversation amongst themselves and were not keeping a watchful eye on the brothers. Still, suspects cannot ordinarily be expected to appreciate such nuances.

Finally, the court discussed at length the fact that J.G. was only 15-years old, and that there is some authority for requiring courts to take the age of the suspect into account in determining how a reasonable innocent person would view the situation.[3] Nevertheless, the court declined to address the issue because it thought that even an adult in such circumstances would have believed he had been detained.

In conclusion, we think the court made two important points. First, officers who have contacted a suspect must keep in mind that the number and behavior of any backup officers is a relevant circumstances. Second, the age of the suspect may be a relevant circumstance in determining whether he reasonably believed he would terminate the encounter. POV

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[2] See, for example, *United States v. Mendenhall* (1980) 446 U.S. 544, 554 ["the threatening presence of several officers" is relevant]; *In re Manuel G.* (1997) 16 Cal.4th 805, 821 [the "presence of several officers" is a factor]; *U.S. v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1068 [suspect "was confronted by six officers" who were "around" him]. BUT ALSO SEE *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1314 ["while there were three officers on the scene … the officers' presence was nonthreatening"].

[3] See *J.D.B. v. North Carolina* (2011) __ U.S. __ [131 S.Ct. 2394].