Robey v. Superior Court

(2013) 56 Cal.4th 1218

Issue

If officers have probable cause to believe that a package in their possession contains evidence of a crime, does the mobility of the package constitute an exigent circumstance that justifies a warrantless search?

Facts

A FedEx employee notified police in Santa Maria that she could smell marijuana emanating from a package that had been dropped off for shipment. The odor was so strong that the responding officer could smell it from 25 feet away. The employee said that FedEx would not deliver a package containing drugs, so the officer took it to the police station where it was opened without a warrant. Inside, officers found 444 grams of marijuana. Robey was arrested when he returned to the FedEx office to find out why his package had not been delivered.

The trial court denied Robey's motion to suppress the evidence, but the Court of Appeal ruled the search was illegal because the officers had not obtained a warrant. The Santa Barbara County DA's Office (DA) appealed to the California Supreme Court.

Discussion

The DA argued that the officers did not need a warrant because (1) they had probable cause to believe the package contained marijuana, and (2) there were exigent circumstances; specifically, a package can be easily moved and might therefore be lost or destroyed. The California Supreme Court seemed to agree with the DA that the officers had probable cause. Consequently, the main issue was whether the inherent mobility of a package containing drugs or other evidence constitutes an exigent circumstance that justifies a warrantless search.

There is, in fact, a case from 1972—*People v. McKinnon*—in which the California Supreme Court ruled that such mobility does constitute an exigent circumstance.[1] But, as the court in *Robey* pointed out, *McKinnon* was based on the court's interpretation of a decision by the U.S. Supreme Court that the high court had subsequently rejected.[2] Thus, although *McKinnon* had not been expressly overturned prior to *Robey*, its validity was doubtful. Moreover, the *Robey* court noted that *McKinnon* was based on dubious reasoning. As it pointed out, a container that had been seized by officers is no longer "mobile" in the sense that it is vulnerable to loss or tampering. As a result, there is no reason why officers cannot simply take the package to the police station and apply for a warrant. Consequently, the court ruled that "the police had no derivative authority to search the package later at the police station without a warrant."

There is, however, an exception to this rule. As the court explained, an immediate search is permitted if there are "unusual circumstances where transporting or storing a container poses practical difficulties for law enforcement." For example, a warrantless search would undoubtedly be permitted if officers had probable cause to believe the package contained hazardous materials or explosives. But because there were no such exigent circumstances in *Robey,* the court ruled the search was unlawful.

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[1] (1972) 7 Cal.3d 899.

[2] See *United States v. Jacobsen* (1984) 466 U.S. 109, 114.

Comment

We do not disagree with the court's ruling that the opening of the package without a warrant was not justified by exigent circumstances. But we do not think a warrant was required because the contents of the package were self-evident and, therefore, the opening of the package did not constitute a "search."

Although this principle is commonly known as "plain view" (or, as here, "plain smell"), it is also often expressed in terms of privacy expectations; that is, a search does not result if officers intruded into a place or thing in which a person did not have a reasonable expectation of privacy.[3] But, whatever it is called, its reasoning is pertinent to the case at hand. Specifically, if officers *know* that a package in their possession contains specific evidence of a crime, their act of opening it up does not constitute a search because they were not *looking* for anything, nor were they trying to obtain information about anything.[4] They were simply retrieving what they *knew* to be inside. The U.S. Supreme Court seemed to have this principle in mind when it said in *United States v. Johns*, "Whether respondents ever had a privacy interest in the packages reeking of marihuana is debatable. We have previously observed that certain containers may not support a reasonable expectation of privacy because their contents can be inferred from their outward appearance . . . ."[5]

Consequently, in determining whether the officers had "searched" Robey's package, the following circumstances seem pertinent:

(1) The package contained 444 grams of marijuana and (not surprisingly) "reeked" of it.
(2) The odor was so strong that it was detected, not by a K9 or sophisticated detection device, but by a FedEx employee at the drop-off store.
(3) The officer detected the odor from 25 feet away.
(4) There was nothing in the record to indicate that Robey had taken any precautions to prevent the odor of marijuana from escaping.[6]

Despite these facts, Justice Goodwin Liu, writing for the court, said that "[n]either the District Attorney nor the defense offered evidence that provided any depth or detail concerning the intensity or other qualities of the smell detected by the officers," and that "the record in this case does not permit us to resolve [the privacy] issue one way or the other." But it is hard to imagine what more "depth" or "detail" was necessary or even possible. After all, even back in 1985 the notoriously staid justices of the U.S. Supreme Court acknowledged that marijuana has a "distinct odor."[7] And today, 28 years later, its odor has become as universally recognizable as popcorn.

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[3] See *United States v. Jacobsen* (1984) 466 U.S. 109, 113 ["A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."].

[4] Compare *Florida v. Jardines* (2013) __ US __ [133 S.Ct. 1409] ["search" occurs when officers trespass for the purpose of obtaining information]. **NOTE**: It is likely that the opening of the package would be permitted if officers merely had probable cause. See *Arizona v. Hicks* (1987) 480 US 321, 326-28; *Texas v. Brown* (1983) 460 U.S. 730, 742. But even if something more were required, it seems apparent that the officers in *Robey* had it (whatever it might be called).

[5] (1985) 469 U.S. 478, 486.

[6] See *Rawlings v. Kentucky* (1980) 448 U.S. 98, 105 ["the precipitous nature of the transaction hardly supports a reasonable inference that petitioner took normal precautions to maintain his privacy"].

[7] *United States v. Johns* (1985) 469 U.S. 478, 482.

Justice Liu also appended to the court's protracted decision a lengthy concurring opinion which, although largely academic in nature, included the following:

> It may seem commonsensical to say that petitioner here could not have had a reasonable expectation of privacy in a sealed package that reeked of marijuana and turned out to contain marijuana. But it is a cardinal Fourth Amendment principle that "the 'reasonable person' test presupposes an *innocent* person."

According to Justice Liu, this "cardinal principle" was announced by the U.S. Supreme Court in the case of *Florida v. Bostick*. That is not correct.

In *Bostick,* the issue was whether a person who had been contacted by officers would have reasonably interpreted the surrounding circumstances as indicating he had been "detained"; i.e., that he was not free to leave. And the Court simply ruled that, in making this determination, the courts must examine the circumstances as they would have appeared to a person who was innocent of the crime under investigation. That is because a person who was guilty of the crime would necessarily view the circumstances much more ominously than an innocent person and might erroneously conclude that any perceived restriction on his freedom was an indication that he had been detained.[8]

Thus, the Court in *Bostick* did not even remotely suggest—much less announce a "cardinal principle"—that officers, having found evidence that a person committed a crime, must presume that the evidence is ambiguous or inconclusive, or that the person is actually innocent. So if we remove the nonexistent cardinal principle from the equation, we would be left with the sensible conclusion that Robey could not reasonably expect privacy in a package that "reeked of marijuana" and, therefore, the search of the package did not constitute a search.

Notwithstanding the soundness of that conclusion, Justice Liu later suggested that it did not matter because "it is not difficult to conjure scenarios in which the smell of marijuana emanating from an otherwise nondescript package does not reveal its contents with a level of clarity akin to plain view." To prove this, he conjured up a scenario in which the package might have reeked of marijuana, not because it contained marijuana, but because someone had stored it in "a place where marijuana was consumed."

That is certainly a possibility. But it is not the job of reviewing courts to "conjure scenarios" that contradict common experience. Furthermore, such an analysis violates an actual cardinal principle of Fourth Amendment law: In making determinations as to whether officers had grounds to conduct a search or make an arrest, the courts must make a "practical," "nontechnical" assessment, and avoid "library analysis by scholars."[9]

Finally, Justice Liu contended that the court was prohibited from even considering whether the opening of the package constituted a search because the DA had failed to raise the issue in the trial court. Although he acknowledged that a reviewing court can "decide the merits of an alternate ground for affirming the judgment of a trial court," he said that such a review would be inappropriate in this case because "the parties had no occasion to put forward the most probative evidence" on the issue. But, as enumerated above, the evidence presented by the DA in the trial court was overwhelming and,

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[8] *Florida v. Bostick* (1991) 501 U.S. 429, 437-38 ["We do reject, however, Bostick's argument that he must have been seized because no reasonable person would freely consent to a search of luggage that he or she knows contains drugs. This argument cannot prevail because the 'reasonable person' test presupposes an *innocent* person."]. ALSO SEE *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."].

[9] *Illinois v. Gates* (1983) 462 U.S. 213, 231-232.

apparently, undisputed. Furthermore, both the DA and Robey had fully briefed and argued this precise issue in the Court of Appeal.

To summarize: Although the officers' opening of the package was not justified under the exigent circumstances exception to the warrant requirement, we do not think they needed a warrant because their actions did not constitute a "search." POV