In re S.F.

(2014) 224 Cal.App.4th 1575

Issue

Did an officer have probable cause to arrest a minor for possessing a graffiti device with intent to vandalize?

Facts

While detaining a 17-year old for jaywalking, an Orange PD officer asked him if he "had anything illegal on him." The minor, identified herein as S.F., responded that he had a "streaker" which, according to the court, is "an oil-based marker commonly used as a graffiti tool." S.F. told the officer that "he knew it was illegal to have" streakers and that "people use them to vandalize property." So, after seizing the streaker, the officer arrested S.F. for violating Penal Code section 594.2(a) which, among other things, makes it a misdemeanor to possess such a device with the intent to "commit vandalism or graffiti." The officer then drove S.F. to his home so that he could be released to his parents. En route, the officer asked him if he had "anything illegal in his bedroom" and he said yes.

When they arrived at the house, the officer explained to S.F.'s father what had happened and that his son had admitted there was something illegal in his bedroom. S.F.'s father then consented to a search of the bedroom in which the officer found, in addition to more graffiti materials, marijuana and over $1,200 in cash. S.F. was subsequently charged with possession of marijuana for sale and, after the trial court denied his motion to suppress, he was found guilty.

Discussion

On appeal, S.F. contended that the officer lacked probable cause to arrest him for violating Penal Code section 594.2(a) and, therefore, the marijuana and cash discovered in his bedroom should have been suppressed as the fruit of an unlawful arrest. Although the court acknowledged that S.F. possessed a graffiti device as defined by the statute, and although S.F. admitted that he was using it for an illegal purpose, the court ruled the officer did not have probable cause to arrest him because there was insufficient proof that S.F. actually intended to use the streaker to commit graffiti vandalism. Here are the court's words: "In this case, no evidence was presented at the suppression hearing to support a finding that [the officer] could reasonably infer S.F. possessed the streaker with the intent to commit vandalism or graffiti." Consequently, the court ruled that, even if the officer had grounds to detain S.F., he "did not have probable cause to arrest S.F. for violating section 594.2(a)" and therefore the evidence found in his bedroom should have been suppressed.

Comment

In an article that will appear in the Fall 2014 *Point of View*, we will examine in more detail the subject of probable cause to arrest. But the case of *In re S.F.* will not be included in the discussion. In fact, it will not even be cited. The reason is that the court's analysis was plain wrong. . . . No, it was much worse than wrong—it was irrational. And that's because the court was able to reach its conclusion by blatantly ignoring the most basic principle of probable cause: *The circumstances must be evaluated by applying common sense, not hypertechnical analysis*. As the United States Supreme Court observed in *Illinois v. Gates*:

> Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a practical, nontechnical conception. In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.[1]

In total disregard of this principle, the court in *S.F.* concluded that, although the streaker that S.F. possessed fell into the category of a graffiti device, and although S.F. admitted that he possessed it for an illegal purpose, and even though the court acknowledged that streakers are "commonly used as a graffiti tool," no reasonable and prudent person would believe that S.F. possessed it for that purpose.

This ruling might have been sustainable if the court had been able to list so many other illegal uses of streakers that it would have been objectively unreasonable for the officer to conclude that S.F. was using his for graffiti vandalism. Not surprisingly, the court did not do so. In fact, it didn't even list one. So, in the interest of exploring the possibility that the court's ruling might have been correct, we gave the matter some thought and compiled a list of the other illegal uses that a 17-year old might find for a streaker. Here they are:

(1) Write a holdup note for a robbery of the local video store
(2) Write a ransom demand after kidnapping his English teacher
(3) Create a phony high school diploma (might come in handy)
(4) Write a fan letter to Kim Kardashian (not technically illegal, but it should be)

Of course, if we had more time to waste we might have found a few more illegal—and equally nutty—uses for streakers. But we will conclude by saying with confidence that when an officer finds a streaker in the possession of a 17-year old boy who admits he is using it for an illegal purpose, there exists a "fair probability" that he is using it to paint something nonsensical on someone else's property. And, according to the United States Supreme Court, that was all an officer would have needed to lawfully arrest him.[2] POV

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[1] (1983) 462 US 213, 231. Also see *United States v. Cortez* (1981) 449 U.S. 411, 418 ["Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers."].

[2] See *Illinois v. Gates* (1983) 462 U.S. 213, 238 [probable cause requires only a "fair probability"]; *Safford Unified School District v. Redding* (2009) 557 U.S. 364, 371 ["Perhaps the best that can be said generally about the required knowledge component of probable cause for a law enforcement officer's evidence search is that it raise a 'fair probability' or a 'substantial chance'"]; *People v. Rosales* (1987) 192 Cal.App.3d 759, 767-68 ["We see no reason why the full *Gates* ['fair probability'] rationale ... should not be as fully applicable to the question of probable cause to support an arrest as it is to a search."]; *Garcia v. County of Merced* (9th Cir. 2011) 639 F.3d 1206, 1209 ["All that is required is a 'fair probability'"]; *U.S. v. Brooks* (9th Cir. 2004) 367 F.3d 1128, 1133-34 ["probable cause exists when there is a fair probability or substantial chance of criminal activity"]; *Tatum v. City of San Francisco* (9th Cir. 2006) 441 F.3d 1090, 1094 [probable cause to arrest exists "if the available facts suggest a 'fair probability' that the suspect has committed a crime"].