Recent Case Report

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U.S. v. Struckman

(9th Cir. 2010) __ F.3d __ [2010 WL 1757874]

Issue

Did officers have sufficient grounds to enter a backyard to investigate a neighbor's report of a possible burglary in progress?

Facts

At 11:45 a.m., Wendy Grimes phoned 9-1-1 in Portland, Oregon and reported that she had just seen a man jump the fence into her neighbors' backyard. She said the man was white, wearing a black jacket, and carrying a red backpack. Although she said she could not see what the man was doing, she thought he was trying to break in because her neighbors were not at home—they were at work.

The first two officers who arrived immediately headed for the backyard: one walked along the west side of the house, the other took the east side. Before entering the backyard, one of them looked over the fence and the other looked into the yard through a hole in the fence. They both saw a man—later identified as Struckman—who matched the description of the suspected burglar. They also saw the red backpack on the ground. When they first saw Struckman he was just "walking inside the backyard," but when he saw one of the officers he responded by taking off his jacket.

At that point, the officer drew his firearm and ordered Struckman to get down on his knees. He complied. The officers then entered the backyard and handcuffed Struckman who was now "cursing sporadically" at them and trying to pull away. After forcing Struckman to the ground, one of the officers conducted a pat search and found an unloaded handgun magazine. So he asked Struckman if there was a gun inside the backpack. Struckman was evasive, responding, "I don't know. It's not mine." The officer then searched the backpack and found a handgun. He also searched Struckman's jacket and found methamphetamine, a digital gram scale, and another unloaded magazine. As things progressed, the officers learned that Struckman lived in the house with his parents, that he was high on methamphetamine, that he possessed methamphetamine, and that he was a convicted felon. He was charged in federal court with being a felon in possession of a firearm and, when his motion to suppress the gun was denied, he was found guilty by a jury. He appealed to the Ninth Circuit.

Discussion

The court ruled that the officers' entry into the backyard constituted an unlawful search and, therefore, the gun should have been suppressed. Specifically, it ruled that the officers did not have probable cause to enter for the purpose of arresting Struckman for burglary or attempted burglary because, before climbing over the fence, they had not seen any signs that someone had actually entered or attempted to enter the house; and also because the court felt that Ms. Grimes' report was not sufficiently specific to justify the entry without further investigation.

The court then announced a new Fourth Amendment rule: In determining whether probable cause exists, "officers may not solely rely on the claim of a citizen witness, but must independently investigate the basis of the witness' knowledge or interview other witnesses."

The court did, however, agree to assume—although it felt the assumption was "weak"—that the officers might have had probable cause to arrest Struckman for trespassing. But even if so, said the court, their entry into the backyard would still have been unlawful because they could have determined that Struckman was not a trespasser if, before climbing the fence, they had questioned him about his unusual activities. Consequently, the court reversed Struckman's conviction.

Comment

Enquiring minds are probably wondering how, in light of all the classic signs of a residential burglary in progress, the court was able to reach the conclusion that the officers did not even have grounds to detain Struckman to investigate that possibility. There are actually two reasons.

First, the judge who wrote this opinion, Marsha Berzon, is the same judge who penned the senseless opinion in *Green* v. *Camreta*[1] in which she ruled, among other things, that a child in elementary school was "detained"—just like a criminal—when a school employee escorted her from her classroom to meet with a social services worker. She also ruled that officers must obtain a court order to speak with a child in school about a report that the child had been sexually abused by her parents.

Second, as we will now discuss, Judge Berzon was able to reach her legal conclusions in *Struckman* by distorting the facts, violating several basic principles of Fourth Amendment analysis, and concocting a new rule that the Supreme Court expressly rejected in 1983.[2]

Spin, not analysis

It is settled that, in determining whether probable cause exists, the courts must consider the overall force of all relevant circumstances.[3] This means that judges must not evaluate the circumstances by isolating each one, looking for ways to trivialize its significance, and then announcing that probable cause did not exist because none of the individual circumstances were very incriminating.[4] Another Ninth Circuit judge put it this way: "Individual factors that may appear innocent in isolation may constitute suspicious behavior when aggregated together."[5]

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[1] (9th Cir. 2009) 588 F.3d 1011.

[2] **NOTE**: It is true that two other Ninth Circuit judges signed this opinion. But because of the opinion's blatant distortions of fact, and because the opinion was based on an assortment of principles that the Supreme Court has rejected, and because Judge Berzon purported to announce a new rule that the Supreme Court has expressly repudiated, and because neither judge filed a concurring opinion acknowledging at least some of Judge Berzon's transgressions, it is possible that they were merely inattentive.

[3] See *U.S.* v. *Arvizu* (2002) 534 US 266, 273 ["[W]e have said repeatedly that [the lower courts] must look at the totality of the circumstances of each case."].

[4] See *U.S.* v. *Arvizu* (2002) 534 US 266, 276 [Court repudiates "divide and conquer analysis."]; *Massachusetts* v. *Upton* (1984) 466 U.S. 727, 732 ["[The trial court] insisted on judging bits and pieces of information in isolation"].

[5] *U.S.* v. *Diaz-Juarez* that (9th Cir. 2002) 299 F.3d 1183, 1141.

It appears, however, that Judge Berzon was unfamiliar with this principle, as she either ignored, belittled, or tried to explain away every circumstance upon which the officers' judgment was based. Here, in her own words, is how she viewed each one:

- *"[T]he officers knew only that a neighbor had reported seeing a white male wearing a black jacket throw a red backpack over a fence and climb over the fence into the backyard when the owners were reportedly not home."* Note Judge Berzon's use of the word "only" as a device to scoff at the importance of these circumstances. But scoffing is a poor substitute for reasoning which, had she employed it, would have produced a highly suspicious combination of circumstances: (1) burglars prefer to make their forcible entries from the backyard in order to avoid being observed by passersby, (2) burglars often carry containers (such as backpacks) for carrying burglar tools and loot from their burglaries, and (3) burglars almost always commit their crimes when the residents are not at home.
- *"Ms. Grimes' report was very general; she did not say that she knew who all the occupants of the house were."* For one thing, Ms. Grimes' report was *not* general. She described the suspect, his race, the color of his jacket, the color of his backpack, his precise location, and his activities. But the judge was not satisfied with merely misrepresenting the facts. She decided to concoct a preposterous rule, to wit: When a citizen phones 9-1-1 and reports that a stranger had just entered the yard or home of her next-door neighbors who are not at home, officers must assume the following: (1) the caller was a blithering idiot who was incapable of recognizing the people who live next door; or (2) the stranger was actually a family member who, for some mysterious reason, had heretofore been kept under wraps.
- *"[I]nnocent reasons could have explained what [Ms. Grimes] did see, including the actual explanation—a family member who lived at the house did not have his key. Indeed, many of us can recount tales about getting locked out of his or her own house, or the house of a relative where one is staying, and having to devise some creative way to get into the house."* It is noteworthy that Judge Berzon admitted—although inadvertently—that Struckman's actions were consistent with those of a person who was looking for "some creative way to get into the house." It apparently did not occur to her that many of the people who look for creative ways to get into houses after jumping fences are burglars. In any event, the Supreme Court has expressly rejected Judge Berzon's premise that the possibility of an innocent explanation will defeat, or even undermine, probable cause or reasonable suspicion.[6] As the Court observed in *New Jersey* v. *T.L.O.*, "[I]t is irrelevant that other [innocent] hypotheses were also consistent" with the facts."[7] Or, as another Ninth Circuit judge aptly explained, "It is of no moment that the acts of [the defendant] and his confederates, if viewed separately, might be consistent with innocence."[8]
- *"[One of the officers] testified that there were no indications that Struckman had entered or attempted to enter the home, as there were no signs of forced entry or the presence of any tools consistent with a possible burglary."* Let us step back for a

[6] See *U.S.* v. *Arvizu* (2002) 534 US 266, 277 ["A determination that reasonable suspicion exists need not rule out the possibility of innocent conduct."]; *People* v. *Ledesma* (2003) 106 Cal.App.4th 857, 863 ["[The US Supreme Court] has been sharply critical of lower court decisions precluding police reliance on facts consistent with an innocent as well as a guilty explanation."].
[7] (1985) 469 US 325, 346.
[8] *U.S.* v. *Del Vizo* (9th Cir. 1990) 918 F.2d 821, 827.

moment and visualize the scene: Two officers have just seen a suspected burglar in the backyard. One officer is looking over a six foot tall fence; the other is looking through a hole in the fence. The officers are, of course, focusing all of their attention on the suspect to make sure he does not draw a gun and shoot them. Nevertheless, Judge Berzon decided that officers in such a situation should take no action until they had focused all of their attention on the various doors and windows, looking for some sign of a burglary, or at least some kind of burglar tool. She also ignored the fact that the officers were hardly in a position to conduct such an examination from their precarious vantage points atop and behind a fence.

- *"Struckman's presence in the backyard and his reaction to abruptly seeing [one of the officers] unannounced and peering over his six-foot tall fence—stopping, looking surprised, and shrugging off or allowing his jacket to fall to the ground—have no bearing on whether Struckman was attempting a burglary at the home."* Note how Judge Berzon attempts to downplay the suspicious nature of Struckman's response by insinuating that he might have merely "allowed" his jacket to fall to the ground, as if the sudden appearance of a police officer naturally causes a person's apparel to descend. Back to the real world: Struckman did not "allow" his jacket to fall. As one of the officers testified, Struckman "took off his jacket" and the other testified that he "shook his jacket off his shoulders." Despite the testimony of these two officers (whose credibility was never questioned), Judge Berzon dodged the issue by saying the record is "murky" as to whether Struckman actually took off his jacket.
- *"It is unclear why Struckman shrugged off his jacket."* It does not matter *why* he took off his jacket—what matters is that he did it; that it was an unusual reaction under the circumstances; and that it supported the officers' belief that Struckman was a burglar because, as one of the officers testified, his actions were consistent with those of a burglar who was getting ready to "flee or fight the officers free of an encumbrance." Judge Berzon also ruled that the officers' belief as to Struckman's reasons for removing his jacket was inconsequential. Said the judge, "[A]n officer's subjective motivation for his actions is irrelevant in determining whether his actions are reasonable under the Fourth Amendment." This was blatant sophistry as the officer's testimony was not offered to prove his motivation—it was properly offered to prove the reasonableness of his belief that Struckman was a burglar. As the United States Supreme Court explained in the landmark case of *Illinois* v. *Gates,* "The evidence must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."[9] By the way, there is one other reason why Struckman might have reacted in such an unusual way, although Judge Berzon buried it in a footnote: Struckman testified that he was "high on methamphetamine."

Unrealistic second-guessing

In addition to Judge Berzon's failure to evaluate the circumstances as required by the Supreme Court, she ignored another fundamental principle: When reviewing the actions of officers in the field who reasonably believe they are in imminent danger (as when they come upon a burglary in progress), judges are not supposed to engage in unrealistic second-guessing. As the Supreme Court observed in *U.S.* v. *Sharpe,* "A creative judge engaged in post hoc evaluation of police conduct can almost always imagine some

[9] (1983) 462 US 213, 232. ALSO SEE *U.S.* v. *Arvizu* (2002) 534 US 266, 273; *Ornelas* v. *U.S.* (1996) 517 US 690, 699.

alternative means by which the objectives of the police might have been accomplished."[10] Thus, in *People* v. *Osuna* the court pointed out, "Of course, from the security of our lofty perspective, and despite our total lack of practical experience in the field, we might question whether or not those who physically confronted the danger in this instance, selected the 'best' course of action available."[11]

These principles were lost on Judge Berzon who blithely dismissed the various circumstances and concluded that the officers were negligent because there was "much else the officers could have done to investigate the reported activity" before climbing over the fence. For example, she suggested that they should have done nothing until they had interviewed Ms. Grimes and "asked her questions in order to gain information beyond her cursory and conclusory statements." For one thing, Ms. Grimes' report was not "cursory and conclusory." As noted, she provided a description of the suspect, his clothing, and backpack; and she recounted his actions in detail. More to the point, there is nothing that Ms. Grimes could have told the officers that would have dispelled their suspicions. After all, her decision to phone 9-1-1 and report a possible burglary in progress demonstrates that she did not recognize the man, and there is nothing that the officers could have said to her that could have changed that.

Judge Berzon also faulted the officers for not questioning Struckman before entering the backyard. Said the judge, "[T]he officers could have asked Struckman a few simple questions, such as 'What's your name?' 'Do you live here?' 'What are you doing in the backyard?'" Let's imagine how this would have played out:

> **Struckman**: Yeah, man, my name's Struckman. I live here with my parents. I locked myself out and I'm trying to find some way to get inside.
>
> **Officer**: Oh. Well, we're sorry to have bothered you. Have a nice day.

Judge Berzon's new rule is unconstitutional

In addition to ignoring basic Fourth Amendment principles, Judge Berzon devised a new constitutional rule: Probable cause can no longer be based on information from an eyewitness who simply reports to officers what she saw or heard. Instead, said the judge, such information cannot be considered unless officers "independently investigate the basis of the witness' knowledge or interview other witnesses." She went on to say that "[s]tatements from a witness, without further investigation by the police, are insufficient to support probable cause."[12]

Judge Berzon's new rule might be of interest to the Supreme Court inasmuch as the Court expressly rejected it in 1983. Specifically, in *Illinois* v. *Gates* the Court ruled that "if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary.[13] Moreover, the court's new rule is contrary to Ninth Circuit precedent. In *Ewing* v. *City of Stockton*[14] the court ruled that "citizen informants, identified bystanders, victims and crime scene witnesses may generally be presumed credible by police in a way that professional informants are not."

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[10] (1985) 470 US 675, 686-87.
[11] (1986) 187 CA3 845, 855. ALSO SEE *U.S.* v. *Russell* (9th Cir. 2006) 436 F.3d 1086, 109 ["It is unreasonable to expect the police to piece together a perfectly coherent picture in the scant minutes they had to digest the constantly-updated and conflicting information."].
[12] Quoting *Hopkins* v. *Bonvicino* (9th Cir. 2009) 573 F.3d 752, 767.
[13] (1983) 462 U.S. 213, 233 [citing *Adams* v. *Williams* (1972) 407 US 143, 146].
[14] (9th Cir. 2009) 588 F.3d 1218, 1225.

We decided to report on this case for two reasons. One is that it provided an opportunity to review several important principles of search and seizure law. The other—the main reason—was that the public needs to know when judges disregard or distort facts and the law, and decide cases based on their extreme ideology—regardless of the nature of that ideology. Although it doesn't happen often, it is deplorable because, in addition to perverting justice, it degrades the courts and undermines respect for the rule of law. POV