Recent Case Report

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People v. Thomas

(2011) __ Cal.App.4th __ [2011 WL 5110251]

Issue

Under what circumstances may officers utilize a ruse to obtain a DNA sample from a suspect?

Facts

Between 2006 and 2008, several homes in Beverly Hills, Bel Air, and other affluent neighborhoods in the Los Angeles area were burglarized by a gang that became known in the media as the "Bel Air Burglars." All told, the gang stole more than $10 million worth of property and cash from the homes of, among others, Hollywood celebrities and professional athletes. At five of the crime scenes, investigators found DNA evidence, but they were unable to obtain a hit.

Then they got two breaks: a witness to one of the burglaries identified Troy Thomas as one of the burglars; and they received an anonymous tip (the crime spree had been featured on America's Most Wanted) that Thomas was involved.

While conducting surveillance on Thomas, an officer stopped him for a traffic violation. Having noticed that Thomas's eyes were bloodshot and watery, the officer asked if he would blow into a PAS device which would confirm or dispel the officer's suspicion that he was impaired. Thomas agreed and passed the test. After releasing Thomas, the officer took the PAS mouthpiece into evidence, and it was later subjected to DNA testing. The test produced a match. Detectives then obtained a warrant to search Thomas's home, and found additional incriminating evidence.

Thomas was subsequently charged with six counts of burglary. When his motion to suppress the DNA test results was denied, he pled no contest.

Discussion

Thomas urged the court to announce three new rules that would, if adopted, have resulted in the suppression of the DNA evidence: (1) a search warrant is required to seize DNA evidence, (2) a warrant is required to test DNA evidence, and (3) officers are prohibited from using a ruse to obtain a DNA sample from a suspect. The court declined.

OBTAINING A DNA SAMPLE WITHOUT A WARRANT: In response to Thomas's argument that officers should be required to obtain a search warrant to seize DNA evidence from a suspect, the court acknowledged that a warrant would be required if a suspect were *required* to submit the sample.[1] But absent some compulsion, said the court, the acquisition of such a sample would not constitute a "search" if the suspect effectively abandoned it and had thereby surrendered any reasonable expectation of privacy in it or its evidentiary fruits. The question, then, was whether Thomas had abandoned the saliva on the PAS mouthpiece.

[1] Citing *Skinner* v. *Railway Labor Executives' Assn.* (1989) 489 U.S> 602, 616-17 [collection of urine samples for compelled drug testing was a search].

Although the Court of Appeal previously ruled that a murder suspect had abandoned saliva on a cigarette he discarded in a public place,[2] the situation here was somewhat different. As the court pointed out, Thomas did not intentionally discard his saliva; instead, he failed to assert a privacy interest by, for example, wiping off the mouthpiece, asking to take the mouthpiece with him, or even inquiring as to what the officer intended to do with it. In analyzing the issue, the court took note of a case in which the Supreme Judicial Court in Massachusetts ruled that a murder suspect had abandoned a saliva sample on a can of soda pop and a cigarette that detectives had given him during interrogation. The Massachusetts court observed that "the critical act is not the making available of cigarettes and soda, if requested. Rather, it is the abandonment of the cigarette butts and soda can, and the officers promised the defendant nothing in exchange for abandonment."[3]

Based on this logic, the court ruled that Thomas had also abandoned the saliva he had deposited on the PAS device when he failed to make any effort to protect it from seizure.

WARRANTLESS TESTING: As noted, Thomas also argued that a warrant should be required to subject the saliva sample to DNA analysis. He reasoned that, while he might have abandoned the saliva, it could not be tested unless he knowingly consented to the testing. But the court ruled that abandoned evidence is not subject to the restrictions imposed by the Fourth Amendment, including the one that consent to search must be made knowingly.

OBTAINING DNA BY A RUSE: Finally, Thomas argued that officers should not be permitted to obtain DNA samples through "fraud and deceit." Obviously, the traffic stop and request to submit to a PAS test were pretexts for obtaining a DNA sample. Nevertheless, the court noted that such a ruse is permissible so long as it was not coercive and the officer had a legal right to obtain the sample. And both of these requirements were met in this case because (1) the traffic stop was lawful (Thomas did not challenge the legality of the stop), (2) there was no evidence that he was pressured into taking the PAS test, and (3) the officer did not say anything to indicate the saliva residue would not be used for some other investigative purpose.

Accordingly, the court affirmed Thomas's conviction. POV

[2] *People* v. *Gallego* (2010) 190 Cal.App.4th 388.
[3] *Com*. v. *Perkins* (2008) 450 Mass. 834, 842.