Thomas v. Dillard

(9th Cir. 2016) 818 F.3d 864

Issues

When responding to a domestic violence call, do officers automatically have a right to pat search the aggressor?

Facts

At Palomar College in Escondido a campus police officer was dispatched to investigate a caller's report that a man had just pushed a woman near some storage containers located on the south side of the college's campus. The only other information furnished by the caller was that the man was wearing purple shirt and he was black.

When the officer arrived, he saw a black man wearing a purple shirt walking with a woman from behind the same storage containers. The officer saw nothing to indicate that the woman had been harmed or that she was upset. The man was later identified as Correll Thomas. In response to the officer's questions, Thomas said he was carrying ID, he was not carrying a weapon, and that he would not consent to a weapons search. The officer then explained the reason for his questions, and Thomas's girlfriend responded that she and Thomas were just kissing behind the storage containers, and denied that he had pushed her or "done anything wrong."

The officer again asked Thomas if he would consent to a weapons search, and Thomas again said no. At that point, the officer attempted to grab Thomas in order to conduct a pat search, but Thomas stepped away. The officer then unholstered his Taser, pointed it at Thomas, and ordered him to submit to a frisk for weapons. Thomas still would not consent but he was "not aggressive or belligerent." After requesting backup, the officer told Thomas to put his hands in the air and drop to his knees. Thomas raised his hands but refused to get on his knees. The officer then tazed him. Now temporarily immobilized, Thomas was handcuffed and searched. No weapons were found. Thomas was initially charged with delaying or obstructing an officer in the performance of his duties,[1] but the charges were dropped.

Thomas sued the officer in federal court, alleging that the officer had violated his Fourth Amendment right to be free from unlawful seizure and excessive force. After Thomas filed a motion for summary judgment, the court ruled that the officer had, in fact, illegally detained Thomas and had used excessive force. It then denied the officer's motion that he be granted qualified immunity from prosecution on grounds that the law pertaining to pat searches in domestic violence situations was not clearly established. The officer appealed.

Discussion

While Thomas did not challenge the legality of the initial detention, he contended it became unlawful when the officer pointed his Taser at him and ordered him to submit to a pat search. The court agreed.[2]

It is settled that officers may pat search a detainee if they reasonably believed that the detainee was armed or otherwise dangerous,[3] and that such a belief may be based on

[1] See Pen. Code § 148.

[2] **NOTE**: Because the trial court ruled in favor of Thomas, the Court of Appeal was required to take the facts and inferences in favor of Thomas.

direct or circumstantial evidence.[4] One of the circumstances that is especially relevant is the nature of the crime for which the suspect was detained.[5] As the Court of Appeal observed, "Courts have consistently recognized that certain crimes carry with them the propensity for violence, and individuals being investigated for those crimes may be pat searched without further justification."[6] For example, a pat search is warranted whenever officers have lawfully detained a person to investigate a crime of violence; e.g., homicide, assault with a deadly weapon, robbery, carjacking, or shots fired.[7]

As noted, the issue in *Thomas* was whether domestic violence is such a crime. While the term "domestic violence" contains the word "violence," the court pointed out that it is a "term of art" that involves "widely varying degrees of dangerousness" and, accordingly, it "encompasses too broad an array of crimes to categorically justify reasonable suspicion" for a pat search. Thus, the court concluded that, while the nature of a domestic violence call "is certainly relevant to an officer's assessment of whether to conduct a search for weapons," grounds for a pat search are "not established merely because an officer perceives a call as falling under the broad rubric of 'domestic violence.'"

While it seems likely that the courts will not require much in the way of additional circumstances to justify a pat search in such cases, there must be *something*. For example, the court pointed out that a pat search might be appropriate if an officer had to enter the home of a domestic violence suspect "and intervene in the middle of a heated fight or vicious attack," or if an angry suspect was "threatening a responding officer to get off his property."

In *Thomas*, however, the court ruled there were no additional circumstances that would have warranted a pat search. Specifically, Thomas was "not aggressive or belligerent;" he "stood still and his hands were empty and plainly visible;" he had "no suspicious bulges suggesting he had a weapon, there had been no report he had a

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[3] See *Arizona v. Johnson* (2009) 555 U.S. 323, 332; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1082.

[4] See *People v. Thurman* (1989) 209 Cal.App.3d 817, 823 [it would be "utter folly" to require an officer "to await an overt act of hostility before attempting to neutralize the threat of physical harm"]; *People v. Samples* (1992) 11 Cal.App.4th 389, 393 ["Our courts have never held that an officer must wait until a suspect actually reaches for an apparent weapon before he is justified in taking the weapon."].

[5] See *U.S. v. Flatter* (9th Cir. 2006) 456 F.3d 1154, 1158 ["[I]ndeed, some crimes are so frequently associated with weapons that the mere suspicion that an individual has committed them justifies a pat down search."]; *U.S. v. $109,179* (9th Cir. 2000) 228 F.3d 1080 ["We have noted that even in Terry the Court determined that it was reasonable to assume, from the nature of the offense contemplated, that Terry was armed and dangerous even though the officer had not observed a weapon or any physical indication of a weapon."].

[6] *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1059.

[7] See *Terry v. Ohio* (1968) 392 U.S. 1, 28 [robbery "would be likely to involve the use of weapons"]; *People v. Campbell* (1981) 118 Cal.App.3d 588, 595 [officer testified "there had been killings in connection with this investigation"]; *People v. Atmore* (1970) 13 Cal.App.3d 244, 247, fn.1 [murder]; *People v. Rico* (1979) 97 Cal.App.3d 124, 132 [ADW]; *People v. Stone* (1981) 117 Cal.App.3d 15, 19 [strong-arm robbery]; *People v. Orozco* (1981) 114 Cal.App.3d 435, 445 [shots fired]; *People v. Lindsey* (2007) 148 Cal.App.4th 1390, 1401 [shots fired]; *U.S. v. Hartz* (9th Cir. 2006) 458 F.3d 1011, 1018 [carjacking]; *U.S. v. George* (4th Cir. 2013) 732 F.3d 296, 300 [passenger's car was "aggressively chasing the vehicle in front of it"]; *U.S. v. Simmons* (2nd Cir. 2009) 560 F.3d 98, 108 [ADW].

weapon;" and he had been "forthright with [the officer] from the beginning, providing his identity and answering his questions directly." In addition, his girlfriend "was adamant that Thomas had done nothing wrong." Although Thomas did refuse to consent to a search or get down on his knees, the court said that his "steadfast, passive resistance to [the officer's] insistence that he offer himself to be searched does not tip the balance in favor of reasonable suspicion to frisk."

Although the court ruled that "the perceived domestic violence nature of the call did not automatically and categorically give [the officer] reason to believe Thomas was armed and dangerous," it also ruled that, because this rule was not "clearly established" when the detention occurred, the officer was entitled to qualified immunity. As for the use of the Taser, the court ruled that, under the circumstances, it was not justified but, again, this rule had not been clearly established at the time and, therefore the officer was entitled to qualified immunity.

Comment

Two things. First, the two rules announced by the court are now "clearly established" (at least in our federal courts) which means that officers cannot expect to be as fortunate as the officer in *Thomas*. Second, the court in *Thomas* and many other courts have routinely said that pat searches are permissible only if officers reasonably believed that the detainee was both armed *and* dangerous. This is *not* the law and we wish the courts would stop parroting this line which, if given a little thought, would be recognized as patently untrue. As we have noted many times before, if officers detain a suspect whose words or actions plainly demonstrated an imminent threat of violence, it would be absurd to say that a pat search would not be permissible merely because the officer had not seen a weapon in his possession. In fact, the courts routinely uphold pat searches of unarmed detainees who were reasonably believed to present an imminent threat to the officer. The court in *Thomas* acknowledged this when it observed that the purpose of pat searches is to protect officers when they confront "potentially dangerous individuals," that a pat search might be appropriate if an officer had to enter a home to break up a heated fight between the parties and when the suspect made "gestures or other actions indicative of an intent to commit an assault."[8] POV

Date posted: November 28, 2016

[8] Quoting from *Ybarra v. Illinois* (1979) 444 U.S. 85, 93