U.S. v. Orth

(1st Cir 2017) 873 F.3d 349

Issue

Did an officer have sufficient grounds to pat search a passenger in a vehicle that had been stopped for a traffic violation?

Facts

At about 10:30 P.M. an officer in New Hampshire stopped a car because it appeared the driver was impaired. There were three men in the car and, as the officer approached, two of them stared back at him like "deer-in-the-headlights." The officer asked the driver for his license and registration and he handed over his license but refused to even look for his registration. The officer then noticed that the front seat passenger, Robert Orth, was holding a "large black" cylindrical object between his legs. The officer asked the driver to identify the object but, once again, he did not respond. Orth, however, responded by becoming "noticeably aggressive verbally towards [the officer] saying 'It's a fucking flashlight.'" When asked the purpose of the flashlight, the driver said, "for sport."

At this point, the officer called for backup and told the driver to step out of the car. He also ordered Orth to put his hands on the dashboard. Orth refused and continued to shout obscenities at the officer, although he eventually complied. When the driver claimed he was not carrying any weapons, the officer pat searched him and found a large utility knife which he claimed he used in construction work. Just then, Orth, still shouting, took his hands off of the dashboard and reached toward the floorboard. The officer ordered him to put his hands back on the dashboard and Orth "reluctantly" complied.

When backup arrived, the officer ordered Orth out of the vehicle, pat searched him (finding nothing), and ordered him to stand away from the car because he was going to search it. Orth responded by stepping toward the officer, informing him he could not search the car, pushing the officer in his chest, and trying to close the car door. The officer told Orth that he was under arrest and Orth yelled to his friends to "get the shit, get the shit, run and hide it." In response, the driver reached toward the floorboard, grabbed a jacket, and ran off with it. It appears the driver was apprehended but, in any event, he dropped the jacket as he fled. Inside, the officer found a loaded pistol, a digital scale, and 248 grams of heroin.

Orth was charged with possession of heroin with intent to distribute, possession of a firearm in furtherance of drug trafficking, and possession of a firearm by a prohibited person. He filed a motion to suppress the evidence and the motion was denied. He pled guilty to all charges and was sentenced to ten years in prison.

Discussion

On appeal, Orth argued that the evidence should have been suppressed because the lawful traffic stop became an unlawful detention when the officer, without grounds to do so, ordered him to exit and said he was going to pat search him. At the outset, the court pointed out that "the circumstances and unfolding events during a traffic stop allow for an officer to shift his focus and increase the scope of his investigation by degrees with the accumulation of information." And that is what happened here because, based on the

behavior or Orth and the driver, the focus of the stop shifted almost immediately from a DUI investigation to maintaining officer safety.

As for ordering Orth to exit, this was clearly lawful because the Supreme Court has ruled that officers who are conducting traffic stops need no justification for doing so.[1] (And even if some justification were required, it certainly existed here.)

As for the pat search, it is settled that officers may pat search a detainee if they reasonably believed the detainee was armed or dangerous.[2] Because all passengers in a stopped are effectively—and legally—"detained" through the duration of the stop,[3] the only issue is whether the officer reasonably believed that Orth was armed or dangerous. The answer was yes for two reasons.

First, a detainee may be pat searched if he was aggressive or uncooperative.[4] Orth qualified on both counts when, among other things, he became verbally aggressive when the officer asked about the cylindrical object and suddenly reached toward the floorboard. Adding to the dangerousness of the situation, the driver of the car had refused to look for his vehicle registration and was carrying a large knife. These facts, said the court, provided the officer with "more than adequate reasonable suspicion to pat-frisk [Orth]."

Second, officers may also pat search a detainee if they reasonably believed he possessed an object that was being used as a weapon; a so-called "virtual weapon." In this case, the court ruled the officer's belief that the cylindrical object was a virtual weapon because of Orth's "odd response" to the officer's questions about it (it was used "for sport") and Orth was holding it at the ready between his legs.

Consequently, the court rejected Orth's argument that the pistol, digital scale, and heroin should have been suppressed.

Comment

In a similar case in California, the Court of Appeal ruled that "a long black metal object," similar to a Mag flashlight, constituted a virtual weapon because it was "located approximately nine inches from defendant's left hand in his truck."[5] Also, in Orth, as in many other cases, the courts have said that pat searches are permitted only if officers reasonably believed that the suspect was "armed *and* dangerous." And although the Supreme Court used the "armed and dangerous" language in its landmark case on pat

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[1] *Maryland v. Wilson* (1997) 519 U.S. 408, 415. Also see *People v. Lomax* (2010) 49 Cal.4th 530, 564 ["officers may order the driver and passengers out of the car pending completion of the [traffic] stop"].

[2] See *Arizona v. Johnson* (2009) 555 U.S. 323, 332 [pat search of detainee lawful "upon reasonable suspicion that [the detainee] may be armed and dangerous"].

[3] See *Brendlin v. California* (2007) 551 U.S. 249; *Arizona v. Johnson* (2009) 555 U.S. 323, 332 ["a passenger is seized, just as the driver is, from the moment a car stopped by the police comes to a halt on the side of the road"].

[4] See *People v. Mendoza* (2012) 52 Cal.4th 1056, 1082; *People v. Rios* (2011) 193 Cal.App.4th 584, 599 [detainee "belligerently refused to answer [the officer's] questions or cooperate with him"]; *In re Michael S.* (1983) 141 Cal.App.3d 814, 816-17 [defendant "displayed aggressive conduct and was either unable or unwilling to control himself"].

[5] *People v. Avila* (1997) 58 Cal.App.4th 1069, 1074. Also see *People v. Lafitte* (1989) 211 Cal.App.3d 1429, 1433 ["legal" four-inch knife "in a sheath, resting on the open glove box door, with the handle extended over the edge toward the driver's seat."]; *People v. Methey* (1991) 227 Cal.App.3d 349, 358 [detainee was carrying a pry bar].

searches, *Terry v. Ohio,*[6] the lower courts have consistently—and logically—ruled that either one will suffice. As the California Court of Appeal explained, "[A] pat-down search for weapons may be made predicated on specific facts and circumstances giving the officer reasonable grounds to believe that defendant is armed *or* on other factors creating a potential for danger to the officers."[7] POV

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[6] (1968) 392 US 1.

[7] *People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 956. Emphasis added. Also see *Michigan v. Long* (1983) 463 U.S. 1032, 1049 ["the protection of police and others can justify protective searches when police have a reasonable belief that the suspect *poses a danger*" [emphasis added] and that such a threat is based, not on grounds to believe there was a weapon in the vehicle, but on the danger that would exist if there happened to be a weapon in the vehicle; i.e., the "possible presence of weapons in the area surrounding the suspect."].