In re Jeremiah S.

(2019) __ Cal.App.5th __ [2019 WL 5302782]

Issue

May officers pat search a suspect who had been lawfully detained to investigate a violent crime if there was no direct evidence that he was carrying a weapon?

Facts

Late one night in downtown San Francisco, a teenager and a young man accosted a woman on Market Street and knocked her to the ground. As they stood over her, one of them demanded, "Give me your phone, bitch." The woman resisted but they grabbed her purse and phone, then fled. When SFPD officers arrived a few minutes later, they used the woman's "Find My iPhone" app and located the phone a few blocks away near Pier 19. Other officers were dispatched to that location where they detained two men who matched the descriptions of the perpetrators. While pat searching the teenager, Jeremiah, an officer found the victim's phone and arrested him.

Jeremiah filed a motion to suppress the phone on grounds that the pat search was unlawful. The motion was denied and the robbery allegation was affirmed.

Discussion

On appeal, Jeremiah argued that the victim's phone should have been suppressed because the officer had no reason to believe he was armed and, therefore, the pat search was unlawful. The court agreed. We emphatically do not.

In the Supreme Court's seminal case on pat searches, *Terry v. Ohio,*[1] the Court ruled that officers may pat search detainees who are reasonably believed to be "armed and dangerous." While the Court used the conjunctive "and" instead of the disjunctive "or," it did not rule that pat searches of dangerous detainees were prohibited absent some indication that they were also armed. This is demonstrated by the facts of the case.

One afternoon, an officer in downtown Cleveland noticed that Terry was acting as if he might be casing a jewelry store for a robbery. So the officer detained him and, during a pat search, found two firearms. Like Jeremiah, Terry claimed the pat search was unlawful because the officer had no reason to believe he was armed. The Court disagreed, ruling that the nature of the crime under investigation—robbery—provided the officer with sufficient reason to believe that Terry was armed since robbery is the type of crime that "would be likely to involve the use of weapons." Consequently, the Court ruled that officers "need not be absolutely certain that the individual is armed" because "the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."

Thus in discussing this ruling, the Tenth Circuit recently observed, "*Terry* does not demand definitive evidence of a weapon or absolute certainty that an individual is armed. Reasonable suspicion is not concerned with hard certainties but with probabilities, and law enforcement officers may rely on common sense conclusions."[2] Similarly, the Sixth Circuit observed that "[t]he focus of judicial inquiry is whether the officer reasonably

[1] (1968) 392 U.S. 1.

[2] *U.S. v. Bishop* (11th Cir. 2019) 940 F.3d 1242, __ .

perceived the subject of a frisk as potentially dangerous, not whether he had an indication that the defendant was in fact armed."[3]

The California Supreme Court also addressed this issue in the case of *People v. Mendoza.*[4] Here, the defendant shot and killed a Pomona police officer who had detained him and two companions, apparently because they were acting suspiciously. Mendoza was found guilty of murdering an officer in the performance of the officer's duties. On appeal, he argued that the officer was not acting lawfully because, when he shot him, the officer was pat searching one of his companions and that the pat search was unlawful because the officer lacked grounds to believe that his companion was armed. The California Supreme Court disagreed, saying, "even assuming [the officer] did not know if any of the three were armed," the pat search "was perfectly appropriate" because the "totality of the circumstances gave rise to a reasonable apprehension of danger on the officer's part, and the detention and pat search were reasonably designed to discover weapons."[5] Other dangerous crimes have been found to warrant pat searches include burglary, car theft, and drug trafficking.[6]

This brings us back to *Jeremiah S.* Contrary to the decisions just discussed, the court ruled that the pat search was unlawful because "there was nothing about Jeremiah's appearance, behavior, or actions to make [the officer] believe that Jeremiah was armed and dangerous." The court went further and indicated there might have been insufficient reason to believe that Jeremiah was dangerous because, said the court, he was only "5 feet 5 inches tall and weighed 130 pounds." (For reference, Charles Manson was 5 feet 2 inches tall.) It even suggested that robbery is not necessarily a violent crime because it "encompasses a broad range of conduct and includes a variety of unacceptable behavior." (As far as we know, robbery is still classified as a "violent" felony,[7] not "unacceptable behavior.")

Comment

There are two other things that should be noted. First, the court indicated that Jeremiah was not even "dangerous." This was because, said the court, he was only "5 feet 5 inches tall and weighed 130 pounds." (For reference, Charles Manson was 5 feet 2 inches tall.) The court even suggested that robbery is not necessarily a violent crime because it "encompasses a broad range of conduct and includes a variety of unacceptable

[3] *U.S. v. Bell* (6th Cir. 1985) 762 F.2d 495, 500, fn.7.
[4] (2011) 52 Cal.4th 1056.
[5] Also see *People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 956 ["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"]; *U.S. v. Brown* (7th Cir. 2000) 232 F.3d 589, 592 [pat search of strangely-behaving detainee upheld even though there "was the lack of specific facts indicating that [he] possessed a weapon"].
[6] See, for example, *Richards v. Wisconsin* (1997) 520 U.S. 385, 391, fn.2; *People v. Glaser* (1995) 11 Cal.4th 354, 367 ["In the narcotics business, firearms are as much 'tools of the trade' as are most commonly recognized articles of narcotics paraphernalia."]; *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1061 [burglary]; *U.S. v. Snow* (7th Cir. 2011) 656 F.3d 498, 501 ["burglary is the type of offense that likely involves a weapon"].
[7] See Pen. Code § 667.5(c)(9).

behavior." (As far as we know, robbery is still classified as a "violent" felony", not "unacceptable behavior."[8])

As noted, the ruling in *Jeremiah S*. is contrary to decisions of the United States Supreme Court, the California Supreme Court, other California Courts of Appeal, the Sixth Circuit, the Ninth Circuit, and the Eleventh Circuit. Nevertheless, we decided to report on it because officers need to know there is substantial legal authority for pat searching *all* suspects who have been detained to investigate violent crimes. POV

Date posted: December 9, 2019

[8] See Pen. Code § 667.5(c)(9).