

U.S. v. Weaver

(2nd Cir. 2020) __ F.3d __ [2020 WL 5523210]

Issue

If a detainee attempts to hide something down his pants, is it unreasonable for officers to believe that he might be trying to hide a firearm?

Facts

At about 5 P.M., two officers with the Syracuse Police Department in New York stopped a vehicle for a minor traffic violation. The stop occurred in an area where, as one of the officers testified, there is a “typically high volume of shots fired and gun-related crime” including “multiple homicides.” As the car came to a stop, a passenger sitting in the back seat on the driver’s side suddenly opened the door into traffic as if he “was about to flee from the vehicle.” One of the officers ordered him to stay inside and he complied.

As the officer approached the driver’s side window, he noticed that the front-seat passenger—later identified as Calvin Weaver—was “slouched down [and] pushing down his pelvic area and kind of squirming in his seat.” Weaver was also using both hands in a “downward motion, trying to push something down.” For these reasons, the officer ordered him to step outside, put both hands on the trunk, and spread his legs.

Although Weaver briefly complied, he “immediately stepped forward and pressed his pelvic area against the quarter panel of the vehicle,” thus making it impossible for the officer to determine what Weaver had been hiding under his clothing. When the officer ordered him to step back from the car, he again briefly complied but, as before, immediately pressed his body into the car. Having run out of patience, the officer handcuffed Weaver, patsearched him and discovered a “fully loaded semiautomatic handgun with a detachable magazine locked into place, ready for use.”

When Weaver’s motion to suppress the weapon was denied, he pled guilty to possession of a firearm by a felon. He appealed the denial of his suppression motion to the Second Circuit.

Discussion

Weaver argued that the firearm should have been suppressed because his suspicious conduct did not provide the officer with grounds to conduct a pat search. In a split decision, two of the three judges on the panel agreed. As we will explain, the judges were able to reach this conclusion by ignoring Supreme Court precedent and disregarding the realities of everyday life on the streets.

DON’T WORRY WHEN A DETAINEE HIDES AN UNKNOWN OBJECT: Although the judges acknowledged that “[w]e have no doubt that [the officer] reasonably suspected that Weaver was hiding *something* based on his downward motion and wiggling,” they ruled that this did not justify a pat search because “there are no specific or articulable facts that Weaver was hiding something *dangerous*.” Elsewhere they said, “It is not enough that officers rely on a suspicion that a suspect was hiding something, even if that something is contraband, like drugs.”

Let this sink in: According to these judges, when officers see a detainee desperately or furtively trying to hide an unknown object under his clothing, the law requires that they ignore the possibility that the object was a dangerous weapon. Don’t laugh. These people appear to be serious. Meanwhile, the Ninth Circuit recently rejected this precise argument in *U.S. v. Bontemps* when it said:

A concealed weapon is necessarily obscured by something, typically clothing, A rule that always required more than a suggestive bulge, or that required the concealed weapon be revealed, would run counter to [the Supreme Court's] fact-based standard and pose obvious safety concerns.¹

THE POSSIBILITY OF AN “INNOCENT” EXPLANATION: The judges also claimed that a detention or pat search is illegal if there might have been an innocent explanation for the suspect's suspicious conduct. For example, they ruled that his desperate attempt to hide something down his pants was not suspicious because these actions “were equally consistent with the act of secreting drugs or other nonhazardous contraband.” Later, the judges said it was unimportant that Weaver had been “tugging at his waistband” because it did not suggest “that Weaver was attempting to make that item inaccessible.”

Apart from the fact that the judges were only guessing as to Weaver's intentions, their analysis violated the Supreme Court's consistent rulings that an otherwise lawful search or seizure does not become unlawful merely because there was a possibility of an innocent explanation for the suspect's conduct. As the Court explained in *United States v. Arvizu*, “A determination that reasonable suspicion exists need not rule out the possibility of innocent conduct.”²

For example, the Court recently chastised a panel of the D.C. Circuit because it “mistakenly believed that it could dismiss outright any circumstances that were susceptible of innocent explanation [since] probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts.”³ Similarly, in *Kansas v. Glover*⁴ the Court reversed a ruling by a court in Kansas that officers cannot stop a car based solely on a computer alert that the license of the registered owner had been suspended. This was because of the possibility that the driver was someone other than the registered owner. This ruling was incorrect, said the Supreme Court, because “[t]he fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of [the officer's] inference.”

IGNORING THE TOTALITY OF CIRCUMSTANCES: The judges also ignored one of the fundamental rules pertaining to searches and seizures: In determining whether probable cause or reasonable suspicion exist, the courts must consider the totality of relevant circumstances. The purpose of this rule is to prevent judges from isolating the various facts known to officers, belittling the importance of each one, then ruling that the resulting search or seizure was unlawful because none of the facts were sufficiently suspicious or incriminating.

In rejecting this type of analysis, the Supreme Court observed in *Ryburn v. Huff*, “But it is a matter of common sense that a combination of events each of which is mundane

¹ *U.S. v. Bontemps* (9th Cir. 2020) __ F.3d __ [2020 WL 6040044].

² (2002) 534 U.S. 266, 277

³ *District of Columbia v. Wesby* (2018) __ U.S. __ [138 S.Ct. 577, 588].

⁴ (2020) __ U.S. __ [140 S.Ct. 1183]. Also see *Illinois v. Wardlow* (2000) 528 U.S. 119, 126 [the Constitution “accepts the risk that officers may stop innocent people”]; *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 346 [“it is irrelevant that other [innocent] hypotheses were also consistent”]; *United States v. Arvizu* (2002) 534 U.S. 266, 277 [“A determination that reasonable suspicion exists need not rule out the possibility of innocent conduct.”]; *Garcia v. County of Merced* (9th Cir. 2011) 639 F.3d 1206, 1209 [“For information to amount to probable cause, it does not have to be conclusive of guilt, and it does not have to exclude the possibility of innocence.”].

when viewed in isolation may paint an alarming picture.”⁵ The dissenting judge in *Weaver* took note of her colleagues’ violation of this rule when she pointed out that they had “improperly evaluat[ed] these facts piecemeal, discarding each as insufficient to create reasonable suspicion.”

A PAT SEARCH BEGINS BEFORE IT BEGINS: As noted, when Weaver was ordered to put his hands against the car, he pressed his body against it so as to prevent the patdown. The officer then ordered him to step back, and he complied. But when the officer touched Weaver’s waist area, he did it again. So the officer handcuffed him, conducted the pat search, and found the gun.

It would have been difficult—if not impossible—for the judges to suppress Weaver’s firearm if they were forced to consider his desperate attempt to prevent the frisk. So, in an equally desperate move, they ruled that the search had actually occurred *before* Weaver attempted to prevent it; and therefore his subsequent attempt to hide “something” down his pants was irrelevant. As the judges put it, “[T]ouching the suspect with the intention of frisking him constitutes a search,” and that “ordering someone to spread-eagle on a car is a search!” (Don’t be fooled by the exclamation point. It was simply a device to create a false impression of certainty.) It is also noteworthy that the judges indicated that the pat search began at the moment when Weaver subjectively believed that a search was imminent. But because Weaver did not testify at the suppression hearing, it is a mystery how the judges were able to determine his beliefs and intentions.

In any event, the Supreme Court has consistently ruled that an officer’s subjective intentions are irrelevant in such a context. As the Court explained in *United States v. Mendenhall*, “[T]he subjective intention of the DEA agent in this case to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent.”⁶ Or, as the California Supreme Court put it, “The officer’s uncommunicated state of mind [is] irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred.”⁷ Thus, the dissenting judge in *Weaver*, Chief Judge Debra Ann Livingston, pointed out that “the majority’s conclusion that a frisk commences when an officer (supposedly) decided to perform a frisk and orders a suspect to assume what the majority terms an ‘in search’ position, is both erroneous and problematic.” She concluded, “I am unwilling to send police and judges into a new thicket of Fourth Amendment law that requires them to assess the propriety of a frisk based on the likely judgments of appellate courts regarding an officer’s intent in issuing an order or appellate judges’ view as to what constitutes an ‘in search’ position.”

For all of these reasons, we do not think the judges’ ruling in *Weaver* will stand.

Comment

Although we think the judges in *Weaver* were out of line, we do not question the obligation of the courts to make sure that officers conduct pat searches only if they reasonably believed that the detainee was armed or dangerous.⁸ But, judging from some

⁵ (2012) 565 U.S. 469, 476-77. Also see *District of Columbia v. Wesby* (2018) __ US __ [138 S.Ct. 577, 588] [“the panel majority viewed each fact in isolation rather than as a factor in the totality of circumstances”]; *United States v. Arvizu* (2002) 534 U.S. 266, 273 [“[W]e have said repeatedly that [the lower courts] must look at the totality of the circumstances of each case”].

⁶ (1980) 446 U.S. 544, 554, fn.6.

⁷ *In re Manuel G.* (1997) 16 Cal.4th 805, 821.

⁸ **“Armed and dangerous”?** Pat searches are permitted if officers reasonably believed that the suspect was “armed or dangerous”—not “armed and dangerous.” Although the Supreme Court

of the police reality shows on television, officers frequently pat search detainees as a matter of routine. This is not only illegal, it is one of the things that are responsible for the anger and mistrust that we are seeing today. As the Supreme Court observed, a pat search, “performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.”⁹ POV

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used the term “armed and dangerous” at one point in its seminal case on pat searches—*Terry v. Ohio* 1968) 392 U.S. 1, 28—elsewhere it said that “a reasonably prudent man would have been warranted in believing [the detainee] was armed and thus presented a threat.” And in *Michigan v. Long* (1983) 463 U.S. 1032, 1049 the Court noted that its pat-search cases have shown that “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.” Also see *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 112 [“The bulge in the jacket permitted the officer to conclude that Mimms was armed *and thus* posed a serious and present danger to the safety of the officer.” Emphasis added].

⁹ *Terry v. Ohio* 1968) 392 U.S. 1, 16-17.