It’s All in the Hips: A Suspect’s Suspicious Movements Lead to A Reasonable Frisk

Description

Before we get into our case, let’s review the Supreme Court’s two objective tests for identifying a Fourth Amendment search. These two tests include whether police: (1) “physically intrud[es] on a constitutionally protected area” (under *United States v. Jones*); or (2) violate a person’s “reasonable expectation of privacy” (under *Katz v. United States*). These are different from a seizure, which is legally defined as “the forcible taking of property by a government law enforcement official from a person who is suspected of violating, or is known to have violated, the law.” The facts surrounding our case today happened in a high crime area where officers had previously stated that they had personally responded to shootings, stabbings, and homicides and that the area was known as an open-air drug market notorious for a high volume of shots fired and other gun-related crimes. Keeping all of these details in mind, let’s take a look at our case, which happened on February 15, 2016.

FACTS

Three officers assigned to the Syracuse Police Department’s Gang Violence Task Force were on patrol in an unmarked car in a high crime area. Near dusk, the officers saw Calvin Weaver walking along the curb and staring into their patrol car. Weaver’s stare persisted, unbroken as the patrol car approached and passed, and one officer used the side view mirror to note that Weaver was still staring after arriving to stand outside the passenger’s side door of a gray sedan. The officer saw Weaver give an “upward tug” to his waistband before getting into the sedan’s front passenger’s seat and riding away from the scene.

Later that evening, the three officers encountered the gray sedan a second time when they stopped it for failing to properly signal a turn. As the car stopped, the rear passenger’s side door quickly swung open into traffic, causing the officers to worry that the passenger was getting ready to flee. After being ordered to remain in the vehicle, the passenger complied and closed the door, which enabled the officers to approach the car.

Inside the car, the officers found the driver, the back seat passenger, and Weaver, who was in the front passenger’s seat. Recognizing Weaver from the dusk encounter, one officer saw Weaver use both hands to push down on his pelvic area, squirm from left to right in the seat, and shift his hips as if he was “trying to push something down.” Consequently, that officer ordered Weaver to show his hands. Weaver responded by raising his hands and saying, “I don’t got nothin’.”

After safely obtaining Weaver’s identification, the officer ordered Weaver out of the car. Then, without touching Weaver, the officer told Weaver to stand at the rear quarter panel with his hands on the trunk and his feet spread apart. Although Weaver moved his feet apart and placed his hands on the trunk, the officers noticed that Weaver stood unusually close to the car, pressed his pelvic area only “a few inches” from the quarter panel, and continuously moved his torso against the vehicle. When an officer asked Weaver to step back from the quarter panel, Weaver objected, saying that the ground was too slippery. After examining the ground underneath Weaver’s feet and finding nothing slippery, the officer insisted that Weaver step back.

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Weaver then “shuffled backward,” but again tried to press his body to the car at least once before the officer’s hands touched Weaver for the frisk. According to the officer, with each subsequent touch, Weaver pressed his pelvis closer to the car. Ultimately, the frisk revealed a loaded semi-automatic handgun with a detachable magazine hidden in Weaver’s groin area, which resulted in Weaver’s federal prosecution for possession of a firearm by a convicted felon, among other offenses.

During that prosecution, Weaver asked the court to suppress the gun because he said the officers lacked a reasonable suspicion that he was armed and dangerous at the time of the stop. Arguing that the officer’s verbal command for Weaver to stand at the sedan’s rear quarter panel for the frisk Weaver was, in itself, a Fourth Amendment search, Weaver insisted that the court could not consider any facts discovered thereafter to explain why the officers’ suspicions were reasonable. Moreover, Weaver claimed, even if the facts that the officers knew were sufficient to show a reasonable suspicion that Weaver was hiding something when the frisk occurred, the facts did not warrant the conclusion that the thing that Weaver was hiding might be something that could endanger the officers.

SECOND CIRCUIT COURT OPINION

The court disagreed, overturning an earlier panel’s decision. Acknowledging that officers seized Weaver’s person when they stopped the sedan and intruded additionally “into his liberty” by ordering him to the rear of the car, the court noted that seizing a person was very different from searching a person. Merely ordering Weaver to stand at the rear quarter panel, the court said, even when the officers had the subjective intent to position Weaver for a frisk, simply was not a search under either *Jones* or *Katz*. Consequently, the court concluded that no Fourth Amendment search occurred until the frisking officer’s “hands physically came into contact with Weaver[‘s]” person.

Moreover, the court said that when the facts support a reasonable suspicion that a suspect has a weapon, as they did here, an officer need not rule out alternative explanations for a suspect’s behavior before frisking. Instead, the court explained that because the purpose of a *Terry* frisk is to enable officers to do their jobs safely, officers simply are “not tasked with sorting through multiple possible scenarios and conducting a frisk for weapons only if that is the sole, or even the most likely, possibility.”

TAKEAWAYS

We have had cases before where officers can go off of reasonable suspicion to enact a seizure and *Terry* frisk. Today’s case was no different; officers were specifically patrolling this area because of the high crime rate and Weaver more than gave himself away with his suspicious behavior. Unlike last week’s case, these officers did not stretch their limits; they stayed within what is legally acceptable under the Fourth Amendment and did not perform a full search. As always stay vigilant and go with your gut; as long as your gut is following good procedure that is.

United States v. Weaver, 2021 U.S. App. LEXIS 24251 (2d Cir. NY Aug. 16, 2021)

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Date Created
03/01/2022

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