

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No.00-4060

UNITED STATES OF AMERICA,

Appellee,

v.

DONTE HAMMOND

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AT BALTIMORE

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 18 U.S.C. § 3231. The District Court entered final judgment as to Mr. Hammond on January 12, 2000. J.A. at _____. Mr. Hammond filed a timely notice of appeal on January 20, 2000. J.A. at _____.

STATEMENT OF THE ISSUES

Did the District Court commit reversible error when it declined to make a crucial factual finding and instead denied Mr. Hammond's motion to suppress based on an erroneous application of the law?

STATEMENT OF THE CASE

Defendant Donte Hammond was indicted in case number HNM-99-0073 in the United States District Court for the District of Maryland on February 25, 1999. Mr. Hammond was charged in the one-count indictment with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). On April 15, 1999, Mr. Hammond filed a Motion to Suppress Tangible and Derivative Evidence alleging that the firearm he was accused of having possessed should be suppressed because it was the fruit of an unconstitutional arrest. The District Court conducted an evidentiary hearing on Mr. Hammond's motion on June 10, 1999. At the conclusion of the hearing, the Court denied Mr. Hammond's motion. The case proceeded to trial on June 14, 1999. On June 15, 1999, Mr. Hammond was convicted of the pending charge. On January 12, 2000, the District Court sentenced him to serve 77 months in the custody of the Bureau of Prisons, to be followed by three years of supervised release. On January 20, 2000, Mr. Hammond filed a timely notice of appeal.

STATEMENT OF FACTS

On June 10, 1999, around 9:30 or 10:00 p.m., Donte Hammond attracted the attention of two law enforcement officers in the Cherry Hill area of Baltimore. Those officers, Baltimore City Police Officers Omar Wright and Jimmie Dease, happened to drive up to the street on which Mr. Hammond was standing at approximately the same time. J.A. at ___ (t. 80). They were in uniform and driving marked cars. J.A. at ___ (t. 15). Officer Wright was

drawn to Mr. Hammond, whom he did not recognize, because he was standing among a group of people in a high drug area. J.A. at ___ (t. 17). According to Officer Wright's testimony, he had no reasonable suspicion of illegal activity but wanted to identify Mr. Hammond. J.A. at ___ (t. 16-17). Officer Dease, on the other hand, immediately made the decision to arrest Mr. Hammond for the offense of loitering. J.A. at ___ (t. 94). He intended to arrest Mr. Hammond for this offense despite the fact that the ordinance prohibiting loitering requires a warning and no warning had been given. J.A. at ___ (t. 100-02). As the government conceded and the Court found at the hearing, neither officer at this point had reasonable suspicion to conduct a Terry stop or to arrest Mr. Hammond. J.A. at ___ (t. 143-144).

As the two police cars arrived in the area, the group of people in which Mr. Hammond was standing dispersed, and Mr. Hammond proceeded toward a residence. J.A. at ___ (t. 17, 23). Officer Wright followed Mr. Hammond. J.A. at ___ (t.23). When he was close enough, Officer Wright initiated a conversation with Mr. Hammond. According to Officer Wright, he simply asked Mr. Hammond what his name was and whether he lived at the residence in front of which he was standing. J.A. at ___ (t. 24). According to Mr. Hammond, Officer Wright then told Mr. Hammond to "come to him" and Mr. Hammond began to comply. J.A. at ___ (t. 126). At that point, Mr. Hammond began to run. J.A. at ___ (t. 24).

No consensus emerged at the hearing as to what happened when Mr. Hammond began to run. According to Officer Wright, Mr. Hammond ran within two arms lengths of Officer Dease. J.A. at ___ (t. 25, 68). According to Officer Dease, the closest he got to Mr. Hammond was five or ten feet, but Officer Wright's cruiser was closer. J.A. at ___ (t. 83,

110). According to Mr. Hammond, he got close enough that Officer Wright tried to grab his left arm. J.A. at ___ (t. 126-129). Mr. Hammond yanked his arm away, leaving his coat in Officer Wright's grasp, and continued to run. J.A. at ___ (t. 126-27). It was undisputed that, still lacking reasonable suspicion of a crime, both officers nevertheless took off in hot pursuit. J.A. at ___ (t. 25).

As they ran, Officer Wright heard a metal sound hit the concrete, heard Officer Dease say that Mr. Hammond had dropped a weapon, and saw a handgun on the ground. J.A. at ___ (t. 26). Officer Wright stopped to recover the weapon, while Mr. Hammond and Officer Dease continued to run through the alley. J.A. at ___ (t. 28). Officer Dease ultimately stopped and arrested Mr. Hammond. J.A. at ___ (t. 29).

The parties' arguments at the end of the hearing focused on the question of whether the Court should believe the testimony of the officers to the effect that they did not touch Mr. Hammond or the testimony of Mr. Hammond to the effect that he was grabbed on the left arm as he started to run. J.A. at ___ (t. 139-144). Based on Supreme Court precedent, both parties proceeded on the assumption that it was the answer to this question that would determine the outcome of the Motion to Suppress.

The District Court disagreed and found it unnecessary to address the question of whether Mr. Hammond had been physically touched and therefore legally arrested at the outset of his flight. Instead, the District Court found that the answer to this question was irrelevant once the officers saw the gun fall from his waistband. The District Court explained its ruling as follows:

What we have here is that even should the initial chase and possible ensuing arrest be improper, we have here an intervening illegal act. Specifically, if a – I’m going to quote now, there is a case almost directly on point, *United States v. Sprinkle*, 106 F.3d 613, 1997. If a suspect’s response to an illegal stop is itself a new and distinct crime, then the police constitutionally may arrest the suspect for the crime. There is a strong policy reason for holding that a new and distinct crime, even if triggered by an illegal stop, is a sufficient intervening event to provide independent ground for arrest ... We have a new and distinct crime involved here, and I think the footnote in *Sprinkle* is rather relevant, Footnote 4, and I am quoting, examples of cases where a new and distinct crime purges the taint of any initial police misconduct include *Bailey* (assuming that first arrest was illegal, the second arrest was legal because the defendant, when caught after fleeing, struck the DEA agent with his fist and tried to grab the agent’s gun.) Another case, although police entered suspect’s house trailer illegally, the suspect commenced new illegal activity when he aimed semi-automatic rifle and so on and so on. In other words, the fact that the testimony before this court indicates that the defendant had a gun in his possession, which he threw to the ground, is itself an intervening cause, providing probable cause for the arrest. Given that, the motion to suppress will be denied.

J.A. at ___ (t. 144-45).

SUMMARY OF ARGUMENT

As the District Court found in this case, law enforcement officers had no legitimate reason to detain or arrest Donte Hammond at the moment they first encountered him. If they did arrest him, therefore, that arrest violated the Fourth Amendment to the United States Constitution and all of its fruits must be suppressed. Under the law, contraband abandoned by Mr. Hammond during flight from such an illegal arrest constitutes such a fruit. The District Court erred in finding that it did not have to determine whether Mr. Hammond was illegally arrested at the outset of his encounter with the police officers because Mr. Hammond was

legally arrested after the officers witnessed him abandon a handgun. As the cases make clear, the precedent relied upon by the District Court applies only when a suspect commits an entirely new offense while being illegally pursued by law enforcement officers – not when evidence that he was already committing an offense simply becomes apparent during the illegal pursuit. Thus this case must be remanded to the District Court for a factual finding as to whether Mr. Hammond was arrested at the outset of his flight and a reconsideration of Mr. Hammond’s Motion to Suppress in light of that factual finding.

ARGUMENT

I. Because The Gun Must Be Suppressed If Mr. Hammond Was Arrested Prior To His Flight, This Case Must Be Remanded For Further Factual Findings And Reconsideration Of The Motion To Suppress In Light Of Those Findings.

A. Standard of Review

Legal conclusions involved in a district court’s suppression determination are reviewed de novo on appeal. Factual findings underlying the legal conclusions are subject to the clearly erroneous standard. United States v. Rusher, 966 F.2d 868, 873 (4th Cir. 1992).

B. Whether Mr. Hammond was arrested depends on the unresolved question of whether he was physically touched by either officer at the outset of his flight.

At the conclusion of the testimony at the hearing on Mr. Hammond’s motion to suppress, both parties devoted their comments to the Court to the question of whether Mr. Hammond was arrested as he began to flee the scene of his encounter with Officers Wright and Dease. Both parties suggested that the question should be resolved by reference to the case of California v. Hodari D., 499 U.S. 621 (1991). In that case, the Supreme Court held that no arrest occurs when

a suspect is ordered to stop but does not yield to the show of authority. The Supreme Court specifically distinguished the facts underlying its holding from a situation in which the encounter involves an order to stop and “the slightest application of physical force.” Id. at 624-25. Even where a suspect is not subdued, “the mere grasping or application of physical force with lawful authority . . . [is] sufficient [to constitute an arrest].” Id. at 624, citing Whitehead v. Keys, 85 Mass. 495, 501 (1862). In other words, an arrest “is accomplished by merely touching, however slightly, the body of the accused, by the party making the arrest and for that purpose, although he does not succeed in stopping or holding him even for an instant.” Id. at 625, citing A. Cornelius, Search and Seizure 163-64 (2d ed. 1930).

Mr. Hammond testified that one of the officers grabbed his arm and, in doing so, caused him to slip out of his coat before running away. The officers, on the other hand, testified that they did not physically touch Mr. Hammond. The case thus presented a classic credibility question concerning whether Mr. Hammond was arrested before the gun was found. As discussed in the following sections, this question was crucial to the outcome of Mr. Hammond’s Motion to Suppress because any such arrest was illegal and any gun dropped by Mr. Hammond during flight from such an illegal arrest was a fruit of the illegality.

C. If Mr. Hammond was arrested at the outset of his flight, that arrest was illegal.

At the hearing on Mr. Hammond’s Motion to Suppress, it became apparent to all concerned that Officers Wright and Dease did not have a legitimate basis to stop or arrest Mr. Hammond before the time that they allegedly saw a gun fall from his waistband. Officer Wright did not even purport to have reasonable suspicion or probable cause to believe that Mr.

Hammond was committing a crime, testifying instead that he approached Mr. Hammond wanting only to discern his identify. J.A. at ___ (t. 23). Officer Dease, on the other hand, testified that it was his intent from the beginning to arrest Mr. Hammond for loitering. J.A. at ___ (t. 93-94, 96). On cross-examination, Officer Dease admitted that the ordinance he intended to enforce by arresting Mr. Hammond made it illegal to loiter only after having been asked to leave by a police officer, and that no police officer had asked Mr. Hammond to leave. J.A. at ___ (t. 100-102).

Based on these facts, the government conceded at the hearing that Officer Dease's intended arrest of Mr. Hammond "may not have been the proper thing," and suggested that "if [Officer Dease] had arrested him for loitering, we probably wouldn't be here right now." J.A. at ___ (t. 143). The Court, too, specifically found that "in the event either police officer had arrested the defendant, Mr. Hammond, based on loitering, or based on his running away, that stop would be illegal." J.A. at ___ (t. 144). Thus it was conclusively resolved at the hearing that any arrest of Mr. Hammond prior to the discovery of a handgun that allegedly fell from his person was illegal.

D. If Mr. Hammond was illegally arrested at the outset of his flight, the gun that allegedly fell from his waistband during the flight must be suppressed as a fruit of the illegality.

If Mr. Hammond was illegally arrested, the gun that he allegedly abandoned during flight from that illegal arrest must be suppressed. Under the "fruit of the poisonous tree" doctrine first enunciated in Wong Sun v. United States, 371 U.S. 471 (1963), evidence gathered as a result of an unlawful search or seizure must be suppressed at trial. Significantly for Mr. Hammond, when the abandonment of property is precipitated by an unlawful seizure, that property is

considered a fruit of the unlawful seizure and must also be excluded. United States v. Coggins, 986 F.2d 651, 653 (3rd Cir. 1993). In Coggins, the defendant abandoned several bags of cocaine while fleeing with a law enforcement officer in hot pursuit. The Third Circuit Court of Appeals observed that, if the defendant had been illegally seized before he abandoned this evidence, the evidence would have to be suppressed. Id. at 653. As in this case, “the central issue” was “whether [the defendant] was unlawfully seized.” Id. It was the resolution of that question, ultimately found against the defendant, that led to the decision on the motion to suppress.

The principle applied in Coggins has been upheld in many cases throughout the years. For example, in United States v. Beck, 602 F.2d 726, 728 (5th Cir. 1979), two individuals were subjected to a traffic stop that was later determined to have been illegal. During the stop, they threw marijuana and drug paraphernalia out of the window of their car. This marijuana, found outside the car by police officers, was held to be a fruit of the illegal stop, and ordered suppressed, because it was clearly abandoned only because of the illegal stop. The Fifth Circuit Court of Appeals noted that “had [the arresting officer] observed these items inside the [car] during an unlawful stop they would be suppressed [citation omitted]; the fact that [the defendant] threw them out the window onto the ground after the commencement of an illegal stop and just prior to an unlawful arrest does not change this result.” Beck, 602 F.2d at 729-30.

Finally, in Fletcher v. Wainwright, 399 F.2d 62, 64 (5th Cir. 1989), the Fifth Circuit Court of Appeals required the suppression of evidence that had been thrown out of a motel room window during the course of an illegal entry by law enforcement officers into the room.

In doing so, the Court of Appeals noted that “several courts have considered this situation and have uniformly held that the initial illegality tainted the seizure of the evidence since the throwing was the direct consequence of the illegal entry.” Id., citing Commonwealth of Massachusetts v. Painten, 368 F.2d 142 (1st Cir. 1966); United States v. Merritt, 293 F.2d 742 (3rd Cir. 1961); Hobson v. United States, 226 F.2d 890 (8th Cir. 1955); and United States v. Blank, 251 F. Supp. 166 (N.D. Ohio 1966).

The law thus establishes that, if Mr. Hammond was illegally arrested at the time he fled from police, any contraband that he dropped during flight from the illegal arrest must be suppressed.

E. The District Court’s decision that it did not need to determine whether Mr. Hammond was illegally arrested prior to his flight was based on an erroneous application of the law.

The District Court found that it did not have to decide whether Mr. Hammond was illegally arrested at some point before the officers allegedly saw a weapon fall from his person. Instead, it held that “even should the initial chase and possible ensuing arrest have been improper,” Mr. Hammond’s subsequent arrest was proper because it occurred only after the officers found the gun. The District Court based its reasoning on a line of cases holding that “if a suspect’s response to an illegal stop ‘is itself a new, distinct crime, then the police constitutionally may arrest the [suspect] for that crime.’” United States v. Sprinkle, 106 F.3d 613, 619 (4th Cir. 1997), quoting United States v. Bailey, 691 F.2d 1009, 1017 (11th Cir. 1982).

In making this ruling, the District Court misunderstood Mr. Hammond’s position. Mr. Hammond was not contending that his ultimate arrest, following his alleged abandonment of a

handgun, was illegal. He was contending that his initial arrest, at the moment that his arm was grabbed before the officers had reasonable suspicion of any crime, was illegal, and that the handgun was a fruit of that illegal initial arrest. The line of cases relied upon by the District Court is plainly inapplicable to the analysis governing this contention. In Sprinkle, Bailey, and each of the remaining cases cited in Sprinkle's footnote 4 (referred to by District Judge in his oral ruling), the "new, distinct crime" was an assault on the arresting officers, and the evidence sought to be suppressed was contraband found either because it was used in the commission of the new offense or because it became apparent during a search incident to an arrest for the assault. In Sprinkle, the suspect pulled out a gun and shot at the pursuing officer, and the defendant sought to suppress the gun on the theory that it was the fruit of the initial illegal arrest. Sprinkle, 106 F.3d at 619. In Bailey, the suspect turned around and physically struck the pursuing officer in the head. Bailey, 691 F.2d at 1012. The evidence he sought to arrest consisted of illegal controlled substances found on his person in a search incident to his arrest for the assault. The remaining cases cited in Sprinkle's footnote 4 are similar. See United States v. Waupekenay, 973 F.2d 1533, 1535 (10th Cir. 1992) (suspect aimed a rifle at pursuing officers; evidence sought to be suppressed was that surrounding assault); United States v. Udey, 748 F.2d 1231, 1240 (8th Cir. 1984) (suspects shot at pursuing officers; evidence sought to be suppressed was found by officers while investigating shooting); United States v. King, 724 F.2d 253, 255 (1st Cir. 1984) (suspect fired shot at pursuing officer; evidence sought to be suppressed was gun used in shooting and other guns found during inventory search in connection with arrest for shooting); United States v. Nooks, 446 F.2d 1283, 1288 (5th Cir. 1971) (suspect shot directly at pursuing officer; defendant sought to suppress evidence found during search of his car pursuant to his arrest for the assault).

Significantly, the cases cited by the District Court are careful to distinguish their facts from situations such as Mr. Hammond's, where the flight merely causes the defendant to reveal evidence of a crime he was allegedly already committing when first illegally approached. In Bailey, for example, the Eleventh Circuit noted that the facts it was called upon to consider were different from Beck and its progeny because

in Beck the defendant's response to the illegal police conduct (i.e., tossing the marijuana out of the car window) was not itself a new, distinct crime. The defendant in Beck was in possession of the marijuana before the police misconduct occurred and his response to the misconduct only revealed this extant crime and did not itself constitute a crime – i.e., tossing marijuana is not a crime, possessing it is. If a noncriminal act that merely reveals a crime that has been or is being committed by the time of the official misconduct constituted the basis for an exception to the fruits doctrine, then cases such as Beck . . . would have been decided differently.

Bailey, 691 F.2d at 1016-1017. In Waupekenay, too, the Tenth Circuit pointed out that “an effort to dispose of preexisting contraband following an illegal entry does not validate the seizure of the contraband because the disposal effort is viewed not as a new or independent criminal act but rather as an extension of the previously initiated illegal activity.” Waupekenay, 973 F.2d at 1537.

In this case, Mr. Hammond allegedly abandoned an illegal handgun during flight from an illegal arrest. He is not accused of having used the handgun in any way before, during, or after the flight. He is not accused of having done anything illegal before, during, or after the flight, other than merely possessing the handgun. Accordingly, contrary to the ruling of the District Court, this case is not governed by Sprinkle, Bailey, and their progeny. This case is governed by Coggins, Beck, and other cases in which a defendant simply abandons contraband during flight

from an illegal arrest. As explained in Coggins and Beck, the evidence in this case must be suppressed if it was abandoned during flight from an illegal arrest.

CONCLUSION

The District Court found that law enforcement officers in this case had no reasonable suspicion or probable cause to arrest Mr. Hammond until they allegedly saw a firearm fall from his person. Under the law, there is no question that if Mr. Hammond was nonetheless arrested by them prior to that time, any evidence that he abandoned during his flight from that illegal arrest must be suppressed. The only debatable question in this case was whether Mr. Hammond was arrested. The parties agreed on the law to be applied in answering this question. Three witnesses gave differing testimony about the facts. It was the District Court's duty to determine whom he believed, and to apply the law to the facts as he found them. Because of an erroneous understanding of a related body of case law, the District Court failed to make this crucial credibility determination. This Court cannot apply the law without a factual finding on which to make it. Therefore, this Court should remand the case to the District Court for factual findings and reconsideration of the motion to suppress in accordance with those findings.

REQUEST FOR ORAL ARGUMENT

Mr. Hammond respectfully requests oral argument on the matters presented in this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___th day of May, 2000, a copy of the foregoing Brief of Appellant was mailed to Jane Erisman, Assistant United States Attorney, 6625 United States Courthouse, 101 West Lombard Street, Baltimore, Maryland 21201.

ELIZABETH L. PEARL

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