

FILED
United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ANTHONY GAULT,

Defendant-Appellee.

No.95-2196

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CR 95-229-JP)**

Richard A. Friedman, United States Department of Justice, Washington, D.C.,
(John J. Kelly, United States Attorney; Charles L. Barth, Assistant United States
Attorney, Albuquerque, New Mexico with him on the briefs), for Plaintiff-Appellant.

Joseph W. Gandert, Assistant Federal Public Defender, Albuquerque, New Mexico, for
Defendant-Appellee.

Before **BALDOCK, HENRY** and **MURPHY**, Circuit Judges.

MURPHY, Circuit Judge.

Defendant was charged with possession of phencyclidine (PCP) with intent to distribute, in violation of 21 U.S.C. § 841(a). At a pre-trial hearing, the district court granted defendant's motion to suppress evidence seized after a search of defendant's gym bag. We reverse.

On April 3, 1995, DEA agent Kevin Small boarded an Amtrak train that had stopped in Albuquerque, New Mexico, en route to Chicago from Los Angeles. Agent Small, looking for evidence of drug trafficking, noticed a zippered nylon gym bag on the floor in front of aisle seat number 29. Small testified that his attention was drawn to the bag because it appeared to be new. He kicked and lifted the bag to determine its weight. He testified that the bag was heavy, which in his experience was consistent with the presence of drugs. Agent Small then knelt down and sniffed the seam of the bag to see if he could detect an odor of marijuana coming from the bag. He testified that he smelled ether, which is used in the manufacture of PCP.

When the defendant, Anthony Gault, re-boarded the train and sat down in seat number 29, Agent Small, wearing plainclothes, approached him and initiated a conversation. During this conversation, Small testified, his firearm was concealed in his "fanny pack" and he "stood to the rear of the seat [in order] not to block [Gault's] exit getting out of the seat." After identifying himself as a DEA agent, Small asked the defendant his destination and where he had boarded the train. The defendant told Small that he had boarded the train in Los Angeles and that he was going to Chicago. Agent Small then asked to see Gault's ticket. The one-way ticket Gault produced indicated that

it had been purchased the day before, for cash. Agent Small testified that Gault's boarding and destination points, and the one-way ticket, purchased for cash, were characteristics he associated with drug couriers.

Agent Small then asked Gault for consent to search his bag, which Gault refused. The bag, Gault indicated, contained a case of brandy, which he was taking to his alcoholic father. Thereafter, Small asked Gault if he could smell the bag. Gault, unaware of Small's previous sniff of the bag, responded, "Go ahead, smell." After kneeling down to smell the bag, Small told Gault, "I smell what I know to be PCP coming out of that suitcase." Gault responded, "Smell all you want." Agent Small advised Gault that he was going to detain the bag and attempt to obtain a warrant to search it. Small told Gault that he was not under arrest and that Small would mail the bag to him if no evidence of contraband was found.

Small then obtained a warrant to search the bag, which was found to contain six whiskey bottles filled with PCP. Gault was subsequently arrested, when his train stopped in Las Vegas, New Mexico, and thereafter charged with possession of PCP with intent to distribute, in violation of 21 U.S.C. § 841(a). At a pre-trial hearing, the district court granted the defendant's motion to suppress the PCP on the grounds that Gault had a reasonable expectation of privacy in his bag. The district court based its decision on the fact that Gault's bag was placed directly in front of his seat and not in the common baggage area or overhead compartment. Conceding that Gault had no reasonable expectation of privacy in the air surrounding his bag, the district court nevertheless held

that because Agent Small's "unconstitutional snooping, i.e., the kicking and lifting of defendant's bag without consent or a search warrant, piqued his curiosity and precipitated the sniff," any evidence obtained as a result of the sniff was tainted and had to be suppressed. The district court did not address the issue of whether Gault's consent to the subsequent sniff was sufficient to purge the alleged taint flowing from Small's initial kicking and lifting of the bag.

This court reviews the district court's determination that a search has occurred *de novo*. *United States v. Lambert*, 46 F.3d 1064, 1067 (10th Cir. 1995). The ultimate determination of reasonableness under the Fourth Amendment is also a question of law reviewed *de novo*. *Id.*

The Government argues that Agent Small's kicking and lifting of Gault's bag did not constitute a search. Moreover, the Government contends, even if Agent Small's actions are held to constitute an unlawful search, the PCP evidence should not be suppressed as "fruit of the poisonous tree" because Gault's subsequent consent to Small's sniff of the bag was sufficient to purge any taint. Because the court finds that Gault's consent was voluntary and that the evidence obtained as a result of the consensual sniff was sufficiently attenuated to purge any taint resulting from Small's conduct, the court need not reach the issue of whether Small's actions constituted a search under the Fourth Amendment. Accordingly, for purposes of this discussion, the court will assume, without deciding, that Small's initial kicking and lifting of Gault's bag constituted an unlawful search.

In *United States v. Melendez-Garcia*, 28 F.3d 1046 (10th Cir. 1994), this court held:

When a consensual search is preceded by a Fourth Amendment violation, as in this case, the government must prove not only the voluntariness of the consent under the totality of the circumstances, *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047, 36 L. Ed 2d 854 (1973), but the government must also “establish a break in the causal connection between the illegality and the evidence thereby obtained.”

Id. at 1053 (quoting *United States v. Recalde*, 761 F.2d 1448, 1458 (10th Cir. 1985)) (footnotes omitted). Thus, the government must meet the “dual requirement of voluntariness and sufficient independence” from the prior illegal search to purge the taint of that search. *Id.* at 1054.

To establish the voluntariness of consent under the totality of the circumstances, this court has held that:

(1) There must be clear and positive testimony that consent was “unequivocal and specific” and “freely and intelligently” given; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) the courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.

United States v. Muldrow, 19 F.3d 1332, 1336 (10th Cir.) (quoting *United States v. Abbott*, 546 F.2d 883, 885 (10th Cir. 1977)), *cert denied*, 115 S. Ct. 175 (1994).

In determining whether a consensual search has been tainted by an earlier, illegal

search, at least three factors are relevant: “1) the temporal proximity between the police illegality and the consent to search; 2) the presence of intervening circumstances; and particularly 3) the purpose and flagrancy of the official misconduct.” *Melendez-Garcia*, 28 F.3d at 1054 (citing *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975); *Recalde*, 761 F.2d at 1458).

Applying the test for voluntariness, Agent Small testified that Gault told him to “[g]o ahead, smell” when Small asked Gault whether he could smell Gault’s bag. Small’s testimony is confirmed by a tape recording and verified transcript of the conversation admitted at the suppression hearing. Agent Small testified that he stood to the rear of the seat in order “not to block [Gault’s] exit getting out of the seat,” and that his firearm was concealed in his “fanny pack.” At no point during the conversation did Agent Small disclose his prior contact with the bag. *See Moran v. Burbine*, 475 U.S. 412, 422 (1986) (“Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.”). Indulging every reasonable presumption against Gault’s waiver of his Fourth Amendment rights, the court is satisfied that his consent to Small’s sniff of his bag was voluntary under the totality of the circumstances.

Having established that Gault voluntarily consented to Agent Small’s second sniff of his bag, the remaining question is whether the government has demonstrated “a break in the causal connection between the illegality and the evidence thereby obtained.” *Melendez-Garcia*, 28 F.3d at 1053 (citation and internal quotation marks omitted).

Applying the factors set forth in *Melendez-Garcia*, the record indicates that Agent Small's second sniff occurred shortly after the initial kicking and lifting of the bag, with no significant intervening circumstances. These facts would normally weigh against a finding that the causal connection between an initial illegality and a subsequent consensual search had been sufficiently attenuated. Nevertheless, temporal proximity and the absence of intervening circumstances are not dispositive in this case because Gault was unaware of Small's initial kicking and lifting of the bag.

With respect to the third factor referenced in *Melendez-Garcia*, the purpose and flagrancy of the official misconduct, without necessarily endorsing Small's methods, the court finds Small's actions not so extreme that Gault's voluntary consent was insufficient to purge the taint of the initial kicking and lifting of the bag. The court does not hold that in every case in which the defendant is unaware of the prior unlawful search, the defendant's consent to a subsequent search will necessarily purge the taint of the initial illegality; such a holding would subvert the deterrence purposes of the exclusionary rule. In this case, however, the *Melendez-Garcia* factors, taken together, do not support a finding that Small's second, consensual sniff of Gault's bag was tainted by the initial search.

For the foregoing reasons, the district court's order is REVERSED and the case REMANDED for further proceedings.

95-2196, U.S. v. Gault

HENRY, concurring

Although I agree with the result reached by the majority, I reach that result for different reasons. The majority assumes without deciding that Agent Small's initial kick, lift, and sniff of Mr. Gault's bag constituted an unlawful search. It then proceeds to conclude that Agent Small's second sniff of Mr. Gault's bag was a search, to which Mr. Gault voluntarily consented, purging any taint resulting from Agent Small's initial kick, lift, and sniff of Mr. Gault's bag. Because I conclude that the evidence obtained from Agent Small's second, consensual sniff of Mr. Gault's bag was not sufficiently attenuated from his initial kick, lift, and sniff of the bag to purge any resulting taint, I find it necessary to determine the lawfulness of the initial kick, lift, and sniff. I conclude that neither Agent Small's kick and lift of the bag nor either of his sniffs of the bag constituted a search under our Fourth Amendment cases. For this reason, I agree that the district court's grant of Mr. Gault's motion to suppress should be reversed.

The test to determine whether evidence must be suppressed as "fruit of the poisonous tree" is "whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 488 (1963). If "the connection between the illegal police conduct and the discovery

and seizure of the evidence is ‘so attenuated as to dissipate the taint,’” the evidence is not to be excluded. Segura v. United States, 468 U.S. 796, 805 (1984) (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)); see also id. at 815 (suggesting that the tainting illegality must at least be the “but for” cause of the discovery of the evidence, as would be true here if the initial search were illegal). In the instant case, accepting the majority’s assumption that Agent Small’s initial kick, lift, and sniff of Mr. Gault’s bag constituted an unlawful search, there are several reasons why the discovery and seizure of the evidence here was not “so attenuated as to dissipate the taint.” See id.

First, as the majority notes, there was only a slight temporal separation between Agent Small’s kick, lift, and sniff and his subsequent sniff of Mr. Gault’s bag. Further, the only intervening circumstance between Agent Small’s initial conduct and the discovery of the evidence was Agent Small’s exit from the train to await an announcement that passengers should reboard. More importantly, unlike the majority, I am not convinced that the fact that Mr. Gault was “unaware of Small’s initial kicking and lifting of the bag” is relevant to the attenuation analysis.

In focusing on Mr. Gault’s lack of awareness of Agent Small’s activities, the majority relies on Moran v. Burbine, 475 U.S. 412 (1986). In Moran, the Court held that the failure of the police to inform the defendant in custody of the public defender’s phone call to detectives to inquire about the defendant’s status did not invalidate the defendant’s waiver of his Fifth Amendment right to remain silent. The Court ruled that the defendant’s unawareness of events occurring outside his presence had “no bearing on the

capacity to comprehend and knowingly relinquish a constitutional right” under the Fifth Amendment. Id. at 422.

Moran’s Fifth Amendment analysis does not seem applicable to the Fourth Amendment question before us. Cf. Brown v. Illinois, 422 U.S. 590, 601 (1975) (“The exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth [Amendment].”). The purpose of the exclusionary rule, to discourage unlawful police conduct in obtaining evidence, see id. at 599-600, is not furthered by linking attenuation of the taint of an unlawful search to the defendant’s lack of awareness. Therefore, Fourth Amendment analysis should not disregard unlawful searches of which the defendant is unaware. In my view, the defendant’s unawareness of an unlawful search by the police does not purge the taint of that unlawful search.

Because Agent Small’s initial kick, lift, and sniff were not sufficiently attenuated from his discovery of the evidence seized, it is necessary to determine the lawfulness under the Fourth Amendment of the initial kick, lift, and sniff. For purposes of the Fourth Amendment, an unconstitutional search occurs when the government invades one’s reasonable expectation of privacy. See, e.g., Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). To hold an expectation of privacy that is “reasonable,” an individual must have an actual subjective expectation of privacy, and society must be prepared to recognize that expectation as objectively reasonable. Id. Assuming Mr. Gault had an actual subjective expectation that his bag would not be

kicked, lifted, or sniffed as it was in this case, such expectation was not objectively reasonable.

Three factors in combination indicate the unreasonableness of Mr. Gault's assumed subjective expectation that his bag would not be kicked or lifted: the bag was left unattended, with no one there to watch it or protect it from being kicked or lifted; the bag was in front of an aisle seat, so that a window seat passenger next to that seat would have to pass over it to reach his seat, possibly kicking it in the process, or lifting it to avoid it; and, perhaps most importantly, the bag protruded into the aisle of the train car, making it more likely that those passing down the aisle would kick the bag, or lift it to avoid kicking it, cf. United States v. Harvey, 961 F.2d 1361, 1363 (8th Cir.), cert. denied, 506 U.S. 883 (1992) (referring to the aisle of a bus as a "public area").

It is irrelevant that Mr. Gault's bag was kicked and lifted by Agent Small for the specific law enforcement purpose of determining its weight, instead of by a train passenger or employee who could have kicked and lifted the bag for non-law enforcement purposes. See California v. Ciraolo, 476 U.S. 207, 213-14 (1986) (suggesting that one's expectations of privacy should not differ under the Fourth Amendment depending on the purpose, law enforcement versus civilian, behind the conduct of the alleged Fourth Amendment violator). The information that Agent Small learned from the kick and lift of the bag -- the heaviness and solidity of the bag's contents -- was the same information that anyone else would have learned in kicking the bag when passing it or in lifting the bag in order to pass it.

The same analysis is applicable to Agent Small's two sniffs. According to our cases, Mr. Gault can have no reasonable expectation of privacy in the air surrounding his bag. See United States v. Garcia, 42 F.3d 604, 606 (10th Cir. 1994) (holding that although the defendant, at the time he checked his luggage, had a reasonable expectation that the contents of his luggage would not be exposed without his consent or a warrant, his expectation of privacy did not extend to the air surrounding the luggage), cert. denied, 115 S. Ct. 1713 (1995); United States v. Garcia, 849 F.2d 917, 919 (5th Cir. 1988) (holding that a border patrol agent's squeeze and sniff of the suspect's bag removed from a baggage holding area was not a search); cf. United States v. Place, 462 U.S. 696, 707 (1983) (holding that exposure of luggage located in a public place to a trained canine is not a search); United States v. Brown, 24 F.3d 1223, 1225 (10th Cir. 1994) (holding that a dog sniff of a car is not a search).¹ Accordingly, Agent Small's sniffs were not searches under the Fourth Amendment. Therefore, it is unnecessary to determine, as does the majority, the voluntariness of Mr. Gault's consent to the second sniff of his bag because Agent Small was not required to obtain such consent before sniffing Mr. Gault's bag. Cf. United States v. Chavira, 9 F.3d 888, 890 n.1 (10th Cir. 1993) (holding that consent is not

¹Though I do not suggest Agent Small's sniffs are also "sui generis," see Place, 462 U.S. at 707, his olfactory senses appear to rival that of most canines, see Rec. vol. III, at 19-20 (explaining that, prior to and including this case, Agent Small has detected the odor of ether on nine occasions, with each one resulting in the seizure of PCP, and that in this case, another officer who smelled Mr. Gault's bag "couldn't smell anything").

required for a dog sniff of a lawfully detained vehicle even absent individualized reasonable suspicion).

Because I conclude that Agent Small's kick, lift, and sniffs of Mr. Gault's bag were not a search of the bag under the Fourth Amendment, I concur in the result of the majority's opinion, which reverses the district court's order granting Mr. Gault's motion to suppress the evidence seized from his bag.