



SEVENTH CIRCUIT ANALYZES DRUG AGENTS' CONDUCT DURING INVESTIGATION

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On November 22, 2016, the Seventh Circuit Court of Appeals of decided the *United States v. Thompson*, in which the court examined drug agents' conduct, in light of the Fourth Amendment, during a drug investigation. The relevant facts of *Thompson*, taken directly from the case, are as follows:

On March 6, 2013, a joint task force of the Drug Enforcement Agency and Chicago Police Department was conducting surveillance on the residence of Armando Soto in Cicero, Illinois, as part of an ongoing investigation into a drug trafficking organization. The agents (for the sake of ease, we refer to all law enforcement officials involved as "agents") received information that a man named Marvin Bausley would be arriving at Soto's house to pick up some or all of ten kilograms of cocaine. Shortly before noon, agents observed Bausley drive into the alley behind Soto's house and enter the garage. After approximately ten minutes, Bausley left the garage and, with agents following, drove to an apartment building in Chicago, Illinois.

Bausley parked on the street outside the building, and a man, later identified as Thompson, came out of the building wearing a backpack and entered Bausley's car. Bausley drove once around the block and again stopped outside the apartment building, at which time Thompson exited the car and reentered the building. The agents who saw Thompson go into the building communicated this to Special Agent David Reynolds, who was on the scene, but could not see Thompson. Agent Reynolds quickly entered the apartment building, but saw no one in the lobby. He recalled that an apartment at this address had been of interest in their ongoing investigation; he believed the relevant apartment number was 901. He saw that the elevator door was open so he rode it to the ninth floor.

When Agent Reynolds arrived on the ninth floor, he saw Thompson and a woman waiting for the elevator. Agent Reynolds had not seen Thompson earlier and did not recognize him as the man that had been in Bausley's car.

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Agent Reynolds exited the elevator, and Thompson and the woman entered. As he looked around the ninth floor common area, other agents notified Agent Reynolds that the man who was in Bausley's car was now in the lobby. Thompson did not have the backpack he was wearing earlier. Agent Reynolds returned to the lobby, approached Thompson, and asked him if he lived in the building. Thompson said he did not and that he was only there to visit a friend on the fourth floor. Agent Reynolds then asked if Thompson had just been on the ninth floor, and again, Thompson said no.

Agent Reynolds told Thompson that he was not under arrest and that he was not required to speak to the agents. Agent Reynolds conducted a patdown to ensure that Thompson had no weapons. He found no weapons, but he retrieved Thompson's key ring. Agent Reynolds testified that he could not recall whether the keys were in Thompson's pocket or in his hand. The key ring held Thompson's apartment keys, as well as an electronic fob that was required for access to the building's elevators. Again, Agent Reynolds asked whether Thompson had just been on the ninth floor and whether Thompson lived in the building. Thompson again answered "no" to both questions.

At this point, Agent Reynolds asked Thompson if he would speak to the agents on the ninth floor, and Thompson agreed. Using the fob on the key ring, Agent Reynolds accessed the elevator, and Thompson and the agents went to the ninth floor. Thompson did not ask for his keys back at any point, and Agent Reynolds testified that Thompson was not handcuffed.

Because Agent Reynolds believed that unit 901 was relevant to their investigation, the agents knocked on that door with guns drawn. The resident of that unit answered and agents ordered him to get on the floor, while they quickly swept his apartment. After approximately a minute, the agents realized this was the wrong unit and returned to the hallway.

Agent Reynolds then asked Thompson if he lived in unit 902, and Thompson said he did not. Agent Reynolds tried Thompson's key on the lock of 902 and the door opened. He then asked Thompson if there was anyone inside the apartment, and Thompson did not respond. Agent Reynolds and one other agent performed a sweep of the apartment, which lasted approximately 30 to 45 seconds, to ensure no one else was present. Finding no one in the apartment, the agents returned to the hallway. Agent Reynolds then asked Thompson if they could speak inside the apartment, and Thompson agreed.

Once inside, Agent Reynolds again told Thompson that he was not under arrest and that he did not have to talk to the agents. He then asked Thompson for consent to search the apartment. Agent Reynolds produced a written consent form and read it to Thompson. He handed it to Thompson to allow him to read it himself, and Thompson signed the form. Thompson then told the agents that there was a gun in the TV stand and that there were drugs and cash elsewhere in the apartment. The agents recovered the gun, a kilogram of cocaine, and \$10,000 in cash. Thompson was not arrested that day and agreed to cooperate with the agents in their investigation moving forward. A number of days later, when Thompson stopped answering calls from the agents, he was arrested.

Thompson was charged with one count of possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. § 841(a)(1).ⁱⁱ

Thompson filed a motion to suppress and argued that the agents violated his rights under the Fourth Amendment during the encounter. The district court, denied the motion to suppress. Thompson then pleaded guilty to the charges against him with the right to appeal the denial of the motion to suppress. He then filed a timely appeal to the Seventh Circuit Court of Appeals.

On appeal, Thompson argued that the agents violated his Fourth Amendment rights during the (1) the initial stop/detention, (2) the frisk, (3) escorting him to the Ninth Floor with his keys, and (4) entry into his apartment for the protective sweep. Fifth, Thompson argued that his consent was not free and voluntary as it was preceded by numerous Fourth Amendment violations.

At the outset, it is necessary remember that in the review of a denial of a motion to suppress, the court of appeals reviews the district court's ruling for "clear error." If the district court did not make clear error, the court of appeals cannot reverse its decision. However, this case is an excellent review of Fourth Amendment principals that are applicable in an investigation such as this.

The first issue the court examined was whether the initial stop of Thompson in the lobby and his detention violated the Fourth Amendment. The court stated

A law enforcement officer may briefly stop an individual for investigative purposes if the officer "has a reasonable suspicion supported by articulable facts that criminal activity is afoot." *United States v. Ienco*, 182 F.3d 517, 523 (7th Cir. 1999) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)). "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States v. Cortez*, 449 U.S. 411, 417 (1981).ⁱⁱⁱ [emphasis added]

The court then noted facts of the Thompson's case that are relevant to whether reasonable suspicion existed to justify his detention. The relevant facts were that shortly before Thompson's detention in the lobby, the agents witnessed Thompson get into a car with Bausley, who they had reason to believe had just picked up a large amount of cocaine. They then watched Thompson get in Bausley's car wearing a backpack and drive around the block with Bausley. Then Thompson exited the care and went back into the apartment building, and then return to the lobby without the backpack. The court said this provided sufficient reasonable suspicion to justify an investigatory detention of Thompson.

The second issue was whether the agent violated the Fourth Amendment when he frisked Thompson for weapons.

The court stated

An officer conducting a lawful *Terry* stop may not automatically frisk the subject of the stop. *United States v. Williams*, 731 F.3d 678, 686 (7th Cir. 2013) (citing *Arizona v. Johnson*, 555 U.S. 323, 323 (2009)). Such a frisk is lawful only when the officer has some articulable suspicion that the subject might be armed and dangerous. *Id.*^{iv}

As such, if the agent had a reasonable belief that Thompson was armed and dangerous, the frisk would not violate the Fourth Amendment. To this, the court stated that since it is commonly recognized that guns are “tools of the drug trade, and since the agents had a reasonable suspicion to believe that Thompson was involved in a drug transaction, the frisk was legal under the Fourth Amendment. In the words of the Seventh Circuit:

As we just explained, by the time Agent Reynolds encountered Thompson, he clearly had reason to believe that Thompson was participating in a drug trafficking operation. Based on that belief, **it was reasonable for Agent Reynolds to suspect that Thompson was armed because guns are known tools of the drug trade, as our cases have recognized.** See, e.g., *United States v. Gully*, 722 F.3d 901, 909 (7th Cir. 2013) (“[I]t is widely known that guns and drugs go hand in hand.”); see also *United States v. Askew*, 403 F.3d 496, 507 (7th Cir. 2005) (recognizing the “inherent danger in stopping those suspected of drug trafficking, for which guns are known tools of the trade.”).^v [emphasis added]

Thus, the frisk of Thompson did not violate the Fourth Amendment.

The court then examined the third issue, which was whether seizing Thompson’s keys and having him accompany the agents to the Ninth Floor constituted an unlawful warrantless arrest without probable cause in violation of the Fourth Amendment.

The court first examined this issue from the view that the agents were conducting an investigative detention (aka a Terry Stop). The court stated that even if viewed as an investigative detention, the seizure of the keys and trip to Ninth Floor was legal under the Fourth Amendment. The court articulated their rationale as follows:

Agent Reynolds asked Thompson if he would speak with the agents on the ninth floor and Thompson agreed. Agent Reynolds testified that Thompson was never handcuffed. Thompson never asked for his keys back and voluntarily accompanied the agents to the ninth floor. Based on these facts, we are not convinced that Thompson was under arrest prior to, or upon arriving on the ninth floor.^{vi}

However, the court also held that *even if the seizure and use of the keys and the trip to the Ninth Floor amounted to an arrest, it was still legal under the Fourth Amendment.* This is because, when Thompson lied to the agent who asked him if he had been on the Ninth Floor (Thompson said he had not when in fact he had), the agents then had probable cause to believe he committed a federal crime of making a materially false statement to a federal agent during an investigation. As such, even if the court viewed the seizure of the keys and trip to the Ninth Floor as an arrest, it would still be legal under the Fourth Amendment. Furthermore, they stated that this justification would still apply even though the agents told Thompson he was not under arrest and even if they did not intend, at the time, to arrest him for the false statement. That is because the Fourth Amendment is judged on the standard of “objective reasonableness” rather than the subjective intent of the agents. Regarding this issue, the court stated

But, even if we assume that Thompson was in fact under arrest at this point, we find no constitutional violation because Agent Reynolds had probable cause to arrest him. Prior to frisking him and taking his keys, Agent Reynolds knew that Thompson had lied to him

about not being on the ninth floor. Thompson repeated this lie once more before they entered the elevator. Under 18 U.S.C. § 1001(a)(2), "[m]aking a materially false statement to a federal agent is a crime." *United States v. Beltran*, 752 F.3d 671, 678 (7th Cir. 2014). When Thompson told Agent Reynolds he was not on the ninth floor, Agent Reynolds had probable cause to arrest him for violating that statute. Thompson's lies were material because they had the obvious intention of misdirecting Agent Reynolds and his investigation. See *United States v. Lupton*, 620 F.3d 790, 806-07 (7th Cir. 2010) ("When statements are aimed at misdirecting agents and their investigation, ... they satisfy the materiality requirement of 18 U.S.C. § 1001."). **It does not matter whether Agent Reynolds actually had this statute in mind at the time that Thompson lied. See *Beltran*, 752 F.3d at 678 (citing *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004)). What is important for our analysis is whether, given the facts Agent Reynolds knew at the time, he could have reasonably believed that Thompson made a false statement to him in violation of that statute. *Id.* That was clearly the case here.^{vii} [emphasis added]**

The fourth issue on appeal was whether the agents violated the Fourth Amendment when they inserted the key in Thompson's door lock to check if that was his residence and then conducted a protective sweep of his apartment.

The court first stated that inserting a key in a lock to verify a person's residence is a search under the Fourth Amendment.^{viii} However, the court also stated that the information discoverable by inserting a key in a door, particularly whether that is a person's residence, is minimal and can be obtained in other ways. As such, while this was a "search" under the Fourth Amendment, no warrant is required.

The court then considered whether the protective sweep violated the Fourth Amendment. The court first described the rules that pertain to protective sweeps as follows:

A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *Maryland v. Buie*, 494 U.S. 325, 327 (1990). An officer may perform a "cursory visual inspection of those places in which a person might be hiding" if he has a reasonable belief, based on specific and articulable facts, "that the area swept harbored an individual posing a danger to the officer or others." *Id.* The inquiry as to the reasonableness and validity of a protective sweep is necessarily fact-specific. *United States v. Burrows*, 48 F.3d 1011, 1016 (7th Cir. 1995). "The less intrusive a search, the less justification is required." *United States v. Brown*, 64 F.3d 1083, 1086 (7th Cir. 1995).^{ix}

The court then noted that the agents were conducting a large scale drug investigation with a substantial quantity of drugs. Thompson had already lied to the agents about being on the Ninth Floor and living in the building. Then when they asked him whether anyone was in the apartment, he was silent. This was sufficient to provide the agents with a reasonable belief that his apartment may harbor persons that pose a danger to them. Furthermore, the agents entered the apartment for only 30-45 while they swept it for people and did not conduct a further search and did not discover evidence during the sweep. They only stayed long enough to determine it was safe and secure. They then asked for and received consent to enter the apartment with Thompson to further discuss the matter. The court then held the agents acted reasonably under the Fourth Amendment in conducting the protective sweep.

Thompson raised one more issue with the protective sweep however. He argued that since this sweep was not conducted in conjunction with an arrest, it was not lawful under the Fourth Amendment. The court stated

First, this Court has held that an arrest is not a requirement for a valid protective sweep. *United States v. Starnes*, 741 F.3d 804, 810 (7th Cir. 2013) ("Thus the constitutionality of a protective sweep does not depend on whether that sweep is incidental to a search warrant, an arrest warrant, or a consensual search."). Second, as already discussed, the agents had probable cause for Thompson's arrest before they entered the apartment.^x

Thus, the court upheld the protective sweep as legal under the Fourth Amendment in this case.

Lastly, Thompson argued that all the previously alleged constitutional violations tainted his consent. However, the court held that previous discussed issues were not Fourth Amendment violations; as such, that argument fails. The court did examine whether Thompson's consent was voluntary, in light of the totality of the circumstances. The court stated

Whether an individual's consent to search was voluntary is a factual question, which we review for clear error." *United States v. Richards*, 741 F.3d 843, 847 (7th Cir. 2014). **The following factors are considered in determining whether consent is voluntary: (1) the age, education, and intelligence of the individual; (2) whether he was advised of his rights; (3) whether he was in custody; (4) how long the individual was detained prior to consenting; (5) whether consent was given immediately or after several requests; and (6) whether the officers used physical coercion. *Id.* at 848.** "Our determination does not depend on a single controlling factor, but carefully considers 'all of the surrounding circumstances.'" *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).^{xi}

In applying the facts of Thompson's case to the rule above, the court noted that Thompson was an adult, he was told twice he was not under arrest and did not have to speak to agents, he agreed to accompany agents to the Ninth Floor, he was read a "consent to search form" and then given the opportunity to read and sign it, which he did sign, and lastly the incident lasted about 30 minutes. There was also no threat of physical force by the agents. As such, the court held the district court did not commit clear error in holding that Thompson's consent was voluntary.

Therefore, the Seventh Circuit affirmed the denial of the motion to suppress.

ⁱ No. 16-1105 (7th Cir. Decided November 22, 2016)

ⁱⁱ *Id.* at 2-5

ⁱⁱⁱ *Id.* at 6

^{iv} *Id.* at 7

^v *Id.*

^{vi} *Id.* at 8

^{vii} *Id.* at 8-9

viii Id. at 9 (citing *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991))

ix Id. at 10

x Id. at 11

xi Id. at 12

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