Fourth Circuit Sets Out Authority to Frisk When a State's Law Permits Possession of Concealed Firearm

Author : Bob Farb

Categories : Search and Seizure, Uncategorized

Tagged as : concealed handgun, fourth amendment, fourth circuit, frisk, robinson

Date : February 14, 2017

The Fourth Circuit Court of Appeals, on a rehearing of a case en banc, held in United States v. Robinson, 2017 WL 280727 (Jan. 23, 2017), that an officer had the authority to conduct a frisk of a lawfully-stopped person whom the officer reasonably believed to be armed with a concealed firearm, regardless of whether the person may have been legally entitled to carry the firearm. This post discusses the ruling and its possible influence in the development of the law of frisk in North Carolina state courts. [For those who received my summary of this case as a subscriber to the criminal law listserv, this is the same summary but with the addition of an analysis and comment section at the end of this post.]

Facts. On March 24, 2014, an unidentified man called the Ranson, West Virginia police department and said that he had just seen a black male in a bluish green Camry load a firearm and conceal it in his pocket while in the parking lot of a 7-Eleven on North Mildred Street. The caller also said that the car was being driven by a white woman and had just left the 7-Eleven parking lot and was headed south on North Mildred Street. Evidence presented by officers at the suppression hearing showed that this area constitutes the highest crime area in Ranson and is well-known to the officers for drug trafficking.

An officer spotted a car matching the description traveling on North Mildred Street and noticed that the two occupants (white female driver with black male passenger) were not wearing seatbelts, a violation of West Virginia law. He stopped the car for the violation. It had been two to three minutes since the anonymous call and about three-quarters of a mile from the 7-Eleven. The female driver provided her license and registration. The defendant passenger was asked to step out of the car. Another officer who had arrived there asked him if he had any weapons. In response, he gave a "weird look" or, more specifically, an "oh, crap look" (as described by the officer). The officer took the look to mean, "I don't want to lie to you, but I'm not going to tell you anything [either]." The officer then frisked him for weapons, discovering a firearm in the defendant's pants pocket. (The officers did not know the defendant was a convicted felon before he was frisked.)

Legal proceedings. The defendant was tried in a West Virginia federal district court of being a felon in possession of a firearm. The trial court denied his motion to suppress the incriminating evidence based on an unconstitutional frisk. The defendant was convicted and appealed to the fourth circuit, and the three-judge panel reversed his conviction (814 F.3d 201 (4th Cir. 2016)). It held that the frisk violated the Fourth Amendment because there was insufficient evidence of dangerousness. However, the government's petition for a rehearing en banc (which means a panel of all the fourth circuit's judges) was granted, and the three-judge panel's judgment and opinion were vacated.

Fourth circuit's en banc opinion. Before the en banc court, the defendant acknowledged that: (1) the officers had the right to stop the vehicle for the seat belt violation; (2) to order him to exit the vehicle; (3) the anonymous call was sufficiently reliable to justify the officers' reliance on it; and (4) the district court was correct in concluding that the officers had reasonable suspicion to believe he was armed with a concealed firearm. The defendant argued, however, that while the officers may well have had good reason to suspect the defendant was carrying a loaded concealed weapon, they lacked objective facts indicating that he was also dangerous to justify a frisk for weapons, because an officer must reasonably suspect that the person to be frisked is both armed and dangerous. The defendant noted that

West Virginia permits a person to lawfully carry a concealed firearm if they have a license to do so. And because the officers did not know whether he possessed such a license, the anonymous call was a report of innocent behavior that was insufficient to indicate that he posed a danger to others. In addition, the defendant argued that his behavior during the stop did not create a belief he was dangerous.

The en banc court rejected the defendant's arguments and held that the officer's frisk of the defendant was justified under the Fourth Amendment. The court analyzed various United States Supreme Court rulings on frisk and stated that they impose two requirements to conduct a frisk: (1) an officer had conducted a lawful stop, which includes a traditional Terry v. Ohio, 392 U.S. 1 (1968), stop as well as a traffic stop; and (2) that during a valid but forcible encounter, the officer reasonably suspects that the person is armed and therefore dangerous [the court's underlining]. The court continued that in both *Terry* and Pennsylvania v. Mimms, 434 U.S. 106 (1977),

the Court deliberately linked "armed" and "dangerous," recognizing that the frisks in those cases were lawful because the stops were valid and the officer reasonably believed that the person stopped "was armed and thus" dangerous. The use of "and thus" recognizes that the risk of danger is created simply because the person, who was forcibly stopped, is armed. In this case, both requirements—a lawful stop and a reasonable suspicion that [the defendant] was armed—were satisfied, thus justifying [the officer's] frisk under the Fourth Amendment as a matter of law. [Quotation marks and underlining are the court's]

The court continued that the presumptive lawfulness of a person's gun possession in a particular state does not negate an officer's reasonable concern for his or her own safety when forcing an encounter with a person who is armed with a firearm and whose propensities are unknown. The court added that while not necessary to the conclusions in this case of the frisk's legality, the facts (e.g., anonymous report of defendant loading firearm and concealing it in his pocket, drug trafficking area, the defendant's evasive response when confronted by the officer) confirm the officer's reasonable suspicion that the defendant was dangerous and therefore should be frisked to protect the officer and others present.

Analysis and comment. Fourth circuit rulings are binding on federal district courts within the circuit, including North Carolina's. If a North Carolina state or local law enforcement officer conducts a frisk affected by this ruling and a resulting federal prosecution (e.g., drug and firearm crimes) occurs in a North Carolina federal district court, the *Robinson* ruling will govern the officer's conduct. However, North Carolina state courts are not bound to follow fourth circuit rulings on federal constitutional issues such as search and seizure; they are only bound to follow United States Supreme Court rulings. But North Carolina state courts will often give weight to fourth circuit rulings on issues that they have not decided. I am unaware of a case that has decided the precise issue in *Robinson*. Perhaps additional weight may be given to *Robinson* because it was decided en banc, with 11 of the 16 participating judges agreeing with the court's opinion and an additional judge concurring with the frisk's legality but on different grounds. The dissenting opinion consisted of four judges.

Although the court's opinion stated that it was consistent with prior U.S. Supreme Court rulings, I think it laid new ground by saying that a frisk is justified when an officer makes a lawful, forcible stop of a person and has reasonable suspicion that the person possesses a firearm, thus making armed and dangerous a unitary concept. The concurring opinion rejected the court's unitary concept theory and also raised an issue whether the court's opinion was intended to apply to weapons other than firearms; the concurrence would limit the scope of the court's ruling solely to firearms.

The dissenting opinion in *Robinson* completely disagreed with the court's ruling. It emphasized the requirement that an officer must have reasonable suspicion that a person is armed and dangerous. And particularly disagreed with the court's application of its ruling to states like West Virginia where public gun possession is presumptively legal, and there is no reason to believe that a person carrying a gun during a traffic stop is anything but a perfectly law-abiding person (absent contrary evidence). Interestingly, the dissenting opinion said that states have the right to address safety concerns with generally applicable and evenhanded laws imposing modest burdens on all those who choose to arm themselves in public. It noted that many states (but not West Virginia) seek to reconcile public safety and the right to

public carry of a weapon by “duty to inform” laws requiring a person carrying a weapon to so inform officers whenever he or she is stopped or in response to officer queries. It cited statutes of several states, include North Carolina’s G.S. 14-415.11, which provides that a person who has a concealed handgun permit must carry it and valid identification whenever carrying a concealed handgun, must disclose that he or she holds a valid permit and is carrying a concealed handgun when approached or addressed by an officer, and must display both the permit and identification at an officer’s request. The dissenting opinion said that if a person fails to disclose a suspected weapon to an officer as required by state law, that failure itself may give rise to reasonable suspicion of dangerousness, justifying a protective frisk.

This is an interesting case, with the three opinions (court, concurrence, and dissent) articulately and forcefully expressing their positions. The case reveals divergent views about a frisk vis-à-vis officer safety, gun rights, and potential abuse by officers of the rights of law-abiding people.

One final comment: officers should rely on the advice of their agency’s legal advisor or other legal source concerning the exercise of their frisk authority based on this case, particularly because the court’s opinion is not binding on North Carolina state courts.