New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 264—NO. 40
WEDNESDAY, AUGUST 26, 2020

SECOND CIRCUIT REVIEW

Expert Analysis

Holding Police Accountable: Second Circuit Issues Opinion in 'Walker'

By **Martin Flumenbaum** And **Brad S. Karp**

Last month, the U.S. Court of Appeals for the Second Circuit issued its decision in *United States* v. *Walker*, 965 F.3d.180 (2d Cir. 2020), reversing the district court's denial of Jaquan Walker's motion to suppress statements made and narcotics discovered during a search incident to arrest. In an opinion written by Circuit Judge Rosemary S. Pooler and joined by Circuit Judges Guido Calabresi and Susan L. Carney, the court held that the officers lacked an objectively reasonable belief that Walker had participated in criminal activity because their stop was based on Walker's alleged match to a photograph that "provided little meaningful identifying information to the police besides the race of a suspect." In finding this justification to be "woefully short of what the Fourth Amendment requires[,]" in addition to being based on "impermissible and manifest stereotyping, which c[ould not] be characterized as merely negligent conduct," the court further held that the narcotics and statements discovered as a result of the search were insufficiently attenuated from the unconstitutional stop and therefore inadmissible.

This decision comes at a pivotal moment, as demands to transform policing have spread across the nation and the role of police and the consequences of law enforcement overstepping legal boundaries are under increased scrutiny.

Background

On Sept. 1, 2017, Troy Police Department Sergeant Peter Montanino (Montanino) received an email from a colleague, stating: "trying to ID suspect #2 in this photo," which contained an image of a thin Black man with "medium to dark skin."

The next day, as he was patrolling the Central Business District, Montanino observed Walker and his friend, Javone Hopkins (Hopkins), pass by. Montanino then reviewed the email from the previous day and concluded that Walker or Hopkins could be "suspect #2" as both were "medium to dark skin toned Black males" with a "thin build[,]" "facial hair[,]" "glasses[,]" and near the scene of a recent shooting. Based on this information, Montanino summoned two of his subordinates—officers Owen Conway (Conway) and Martin Furciniti (Furciniti)—and inquired whether they recognized Walker or Hopkins. When neither did, Montanino told Conway and Furciniti to conduct a "stop out," a practice of the Troy Police Department where "officers stop and exit their vehicle, approach pedestrians, request information and identification, and check for outstanding warrants." The officers blocked Walker and Hopkins with their vehicles, while Montanino

MARTIN FLUMENBAUM *and* BRAD S. KARP *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison specializing in complex commercial and white-collar defense litigation. Karp is the chairman of the firm.* AGBEKO C. PETTTY, *a litigation associate at the firm, assisted in the preparation of this column.*

parked his vehicle behind them. The officers then approached the men and requested identification, which Walker and Hopkins provided.

Although Montanino was able to confirm that neither Walker nor Hopkins was the individual identified as "suspect #2," the officers took their identification and conducted a search for outstanding warrants. Hopkins was allowed to leave as he had no outstanding warrants. Walker, by contrast, had an outstanding arrest warrant. He was then placed in handcuffs and taken to the police station where Furciniti conducted a search incident to arrest. During this search, Furciniti uncovered marijuana and 50 grams of crack cocaine. Walker was charged with possession with intent to distribute a controlled substance.

District Court Proceedings

During pretrial proceedings, Walker moved to suppress the statements made and narcotics uncovered during his arrest, arguing that the officers lacked reasonable suspicion of a crime when they stopped him. In denying the motion, the district court held that the officers had reasonable suspicion to stop Walker because Montanino thought Walker resembled the alleged shooter identified as suspect #2, and Walker was walking near the scene of a recent shooting. Accordingly, the district court concluded that the stop was constitutional and that the subsequent arrest and search were lawful based on the arrest warrant. Following the denial of his suppression motion, Walker entered a conditional guilty plea, preserving the right to appeal the denial.

The Second Circuit's Decision

On appeal, Walker argued that the officers' stop was unconstitutional on the ground that the officers lacked reasonable suspicion of a crime. In support of this argument, Walker asserted that: the email that Montanino relied on did not contain specific or articulable facts to suggest that the depicted individual had committed any crime; and even assuming the email could provide reasonable suspicion of criminal activity, the photograph was not detailed enough and matched too many individuals to provide reasonable suspicion to stop Walker.

On appeal, Walker argued that the officers' stop was unconstitutional on the ground that the officers lacked reasonable suspicion of a crime.

The Second Circuit reversed the district court's order denying Walker's suppression motion, holding that the officers lacked an objectively reasonable belief of criminal activity to justify stopping Walker.

Reasonable Suspicion

The Fourth Amendment protects individuals from unreasonable searches and seizures by the government. The Fourth Amendment generally requires individualized suspicion and probable cause to perform a search. In certain situations, such as investigatory stops, a reasonable suspicion standard may be sufficient to perform a search. Under this standard, police officers may stop and search an individual if the officer can point to specific and articulable facts that would warrant an officer of reasonable caution to believe that criminal activity is afoot or has already been committed.

The Second Circuit set forth three reasons as to why the officers lacked reasonable suspicion to stop Walker.

First, in discussing the photograph of suspect #2, the court was "simply not convinced that the description fits a narrow enough subset of individuals to constitute a specific, articulable fact upon which reasonable suspicion may be based." The panel emphasized that "race, when considered by itself and sometimes even in tandem with other factors, does not generate reasonable suspicion for a stop."

Second, the panel rejected the government's argument that Walker's proximity to the scene of a prior shooting raised a reasonable suspicion that he was involved in the shooting. Relying on the testimony of the officers themselves, the Court explained that it was not "unusual" for individuals to walk around the Central Business District, where Walker was stopped.

Third, the panel found the district court's conclusion that Montanino believed suspect #2 to be involved in a shooting as "clearly

erroneous." The Second Circuit determined that the email did not reference any crime, much less a shooting, or indicate suspect #2's criminal activity. Absent any sign that suspect #2 participated in a shooting, the court found that Montanino lacked reasonable suspicion to stop Walker based on any purported match to the photograph.

The Attenuation Doctrine

The panel also rejected the government's argument that the seized evidence was admissible under the attenuation doctrine. Under this doctrine, even if an initial stop is deemed unconstitutional, the seized evidence is admissible if the link between the illegal police action and the evidence is sufficiently weak or has been interrupted by an intervening fact. Application of the doctrine turns on three factors: temporal proximity between the illegal conduct and the discovery of evidence, the presence of intervening circumstances, and the purpose or flagrancy of the police misconduct.

The Second Circuit found that the first factor—temporal proximity—weighed against attenuation because only 10 minutes transpired between the unconstitutional stop and search of Walker. Because Walker had an outstanding arrest warrant for an unrelated offense—a factor recognized as an intervening circumstance—the panel concluded that the second factor favored attenuation. Nevertheless, the Second Circuit determined that the third factor, whether the officers' actions were purposeful or flagrant, weighed against attenuation. The panel found this factor to be dispositive, explaining that the officers' conduct was "most in need of deterrence" because the justification for stopping Walker fell "woefully short of what the Fourth Amendment requires," and "involved impermissible and manifest stereotyping, which [could not] be characterized as merely negligent conduct." The court further explained that any suspicion that Walker was suspect #2 dissipated once Montanino approached him and confirmed he was not the photographed individual. That the officers continued to question Walker in spite of this was purposeful or flagrant. The court reasoned that after "the dissipation of any reasonable suspicion, there was simply no cause to run Walker and Hopkins identifications for warrants." Accordingly, the court labeled the officers' conduct as "a mere fishing expedition 'in the hope that something would turn up.'"

As cities, states, and the federal government are considering police reform proposals, this opinion is an important reminder that police departments are not above the law.

In holding that the attenuation doctrine was inapplicable, the court found the seized evidence to be inadmissible and reversed the district court's denial of Walker's suppression motion.

Conclusion

Here, the Second Circuit had "little trouble" determining that the officers lacked specific and articulable facts giving rise to a reasonable suspicion of criminal wrongdoing. In underscoring the danger of basing reasonable suspicion on racial traits, the panel indicated that racial profiling is impermissible and that the exercise of unfettered police discretion to stop individuals only serves to "exacerbate" police-community tensions.

As people of color are stopped, searched, and arrested by police at far higher rates than other demographics, the Second Circuit highlighted the harm minority communities face if officers can justify a stop based on a nondescript photograph that could resemble any Black man. This opinion is particularly timely as the nation is reexamining the role of police and their interaction with communities of color. Sparked by the recent murder of George Floyd, and countless other individuals of color who have lost their lives at the hands of police, America's epidemic of racialized police violence is under the spotlight. As cities, states, and the federal government are considering police reform proposals, this opinion is an important reminder that police departments are not above the law.