



High court overturns gun conviction, says frisk violated 4th Amendment

By: Steve Lash Daily Record Legal Affairs Writer August 6, 2019

A divided Maryland high court on Tuesday overturned an ex-felon's gun possession conviction, saying Baltimore police violated his constitutional rights by frisking him without reasonable suspicion he was armed.

In its 5-2 decision, the Court of Appeals said Tamere Thornton's furtive movements during a traffic stop provided the officers with at most an "unparticularized hunch" that he was armed, a level of suspicion that does not rise to the objectively reasonable belief required for a pat-down for weapons under the Fourth Amendment.

The high court rejected the arresting officers' assertion that based on their years of training and experience Thornton's drastic movement of his shoulder up and down upon being approached by them was indicative of an armed individual trying to conceal a weapon, thus justifying the frisk.

"We repeat what has been said before, this Court (of Appeals) will not rubber stamp conduct simply because the officer believed he had to right to engage in it," Judge Clayton Greene Jr. wrote for the majority.

Thornton's shoulder movement was "not, by itself, dispositive to our reasonable suspicion analysis," added Greene, a retired judge sitting by special assignment. "Rather, it is but one factor to be considered among the totality of the circumstances. To hold otherwise would effectively allow law enforcement's narrowly drawn authority to conduct a limited frisk for weapons to swallow the general rule that warrantless searches are presumptively unreasonable."

The controversial frisk occurred after police officers approached Thornton in his car at about 2 p.m. on New Year's Day 2016 to ask why he was parked in the wrong direction in the 5200 block of Midwood Avenue. Officer Jeffrey Zimmerman later testified that he frisked Thornton after officers noticed Thornton's furtive movements.

Thornton was convicted in Baltimore City Circuit Court of possessing a firearm after having been convicted of a disqualifying crime, second-degree murder. He was sentenced to four years in prison with the possibility of parole.

The intermediate Court of Special Appeals upheld the conviction, ruling that even if the initial search was illegal, the gun could still be admitted into evidence because its discovery occurred not during the frisk but when the officers tackled Thornton when he tried to flee.

Rejecting that conclusion, the high court held that the only reason Thornton bolted – and that the gun was found under his prone body – was because of the unconstitutional frisk. The court added that the officers might have been goading Thornton to run, thus proving more reason for a judge to invoke the exclusionary rule that bars ill-gotten evidence from being introduced in court.

"Based on the officers' conduct, it appears that they were looking to prompt a reaction from (Thornton) and, perhaps, create probable cause or reasonable suspicion to search him," Greene wrote. "We note that their investigation was fraught with the danger of giving the appearance of having been calculated to cause surprise, fright and confusion. This is precisely the sort of police misconduct in most need of deterrence, thereby appealing to the primary purpose behind the exclusionary rule."

Thornton's appellate attorney, public defender Michael T. Torres, hailed the court's "thorough analysis of the facts in this case" in concluding the frisk was unconstitutional and was exploited by the police to goad his client into trying to flee.

"We think it (the decision) will provide helpful guidance to the courts and lawyers moving forward and to the police as well," Torres said.

Greene was joined in the opinion by Chief Judge Mary Ellen Barbera and Judges Michele D. Hotten, Joseph M. Getty and Sally D. Adkins, a retired jurist sitting by special assignment.

In dissent, Judge Shirley M. Watts stated that the frisk was valid because Thornton's behavior gave the officers "reasonable articulable suspicion" that he was armed. Watts called "concerning" the majority's refusal to defer to the officers' training that quick movements – such as drastically moving one's shoulder – are uncharacteristic of car passengers being approached by police unless they are attempting to conceal something.

"As a precursor to finding reasonable articulable suspicion that Thornton was armed, the majority opinion seems to require that Officer Zimmerman's testimony demonstrate with certainty that Thornton was concealing a gun in his waistband," wrote Watts, who was joined in dissent by Judge Robert N. McDonald. "This is too high a standard for the establishment of reasonable articulable suspicion."

The Maryland attorney general's office declined to comment on the court's ruling.

The high court rendered its decision in *Tamere Thornton v. State of Maryland*, No. 51, September Term 2018.

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