Fourth Amendment Forum

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Judge John Roberts' Short Story

By Milton Hirsch and David Oscar Markus

"I like younger men," Mae West is alleged to have said; "Their stories are shorter."

Maybe Mae West said it and maybe she didn't. Mae West is alleged to have said a lot of things.1 But there's no maybe about George W. Bush. He likes judges whose stories are shorter. His first nominee to the United States Supreme Court is Judge John D. Roberts of the United States Court of Appeals for the D.C. Circuit. Judge Roberts has been a judge for only three years, and has authored only three majority opinions and one dissent offering any view of his Fourth Amendment jurisprudence. On that subject, here's his short story.

United States v. Holmes

Anthony Holmes was stopped for speeding.2 In the time it took the police to pull Holmes over, they observed him reaching under the driver's seat repeatedly, in a manner they thought suggestive of placing, or retrieving, a gun.3 The two officers "exited their patrol car and approached [Holmes's] vehicle."4 One of the officers asked Holmes if he had been drinking, and Holmes obligingly admitted that he had.5 The officers then ordered Holmes out of his car. One of the policemen, an Officer Phillip, told Holmes that he was going to pat Holmes down. In the course of the pat-down Phillip felt what he would later describe as a hard, square object in the pocket of Holmes's parka.6 Phillip asked Holmes what was in the pocket; Holmes told him it was a scale. At the hearing on the ensuing motion to suppress, Officer Phillip testified that he believed Holmes - he thought the object was a scale, not a

firearm.7 And when Phillip reached into Holmes's pocket and took the object out, a scale was what it turned out to be.

Officer Phillip continued his frisk of Holmes. At some point during the process, Holmes threw an elbow at the officer, and a brannigan ensued.8 There were three officers on the scene, and Holmes was "restrained."9 Afterward, the officers searched Holmes's car and found a gun and ammunition for the possession of which Holmes was charged. They also searched Holmes's person10 and found cocaine, for the possession of which he was also charged.

The first issue Judge11 Roberts's opinion addresses is whether Officer Phillip's seizure of the hard, square object he felt in Holmes's pocket was reasonable for Fourth Amendment purposes. As to that issue, "Holmes argue[d] that he told the officer that the object was a scale, that Phillip thought it was a scale, and therefore there was no threat to the officers' safety that justified removing it. Indeed, Phillip testified that he did not think the object was a firearm."12

But the question, Judge Roberts points out, is not what Officer Phillip actually thought, but what a reasonable officer similarly situated would have thought. Such an officer, says Judge Roberts, would have been justified (and therefore Phillip was justified) in seizing the scale from Holmes's pocket. Because the hard, square object "could have been .

. . [a] weapon - a box cutter, for example," it was reasonable for Officer Phillip to seize it from Holmes's pocket.13 Judge Roberts cites to a 2002 Department of Justice report documenting the inherently dangerous nature of traffic stops.14

Undoubtedly any "hard, square object" has the potential to be a weapon, in the sense that Holmes could have tried (but didn't) to hit Phillip on the head with it. The same could be said of any hard pointed object, any hard triangular object, any hard pentagonal object, any hard hexagonal object, and so on to the limits of geometry. It does not follow that any officer conducting a pat-down of any detainee has a justification to seize any hard object he feels. Undoubtedly traffic stops are inherently dangerous. It does not follow that any officer conducting a traffic stop has a justification to seize any object in any pocket of any driver.

The objective facts known to the court were that Holmes consistently answered truthfully the questions asked him by the officers (even to the extent of inculpating himself when asked if he had been drinking); that he identified the object in his pocket as a scale; and that Officer Phillip believed it to have been a scale. (Officer Phillip's belief was subjective at the time Officer Phillip entertained it, but when the matter came before the court the existence of that subjective belief was an objective fact.) Appellate opinions are replete with admonitions that deference should be afforded the on-the-spot judgments of highly-trained, highly-experienced police officers, and that the true test of Fourth Amendment reasonableness is not what any objective observer would have believed in the circumstances but what a highly-trained, highly-experienced objective police officer would have believed in the circumstances. The best - although admittedly not the determinative - evidence of that in this case is what Officer Phillip actually believed.

From Anthony Holmes's point of view, less significance attaches to the seizure of the scale than Judge Roberts suggests. The ensuing searches of Holmes' person and automobile would have been just as justifiable if Officer Phillip had never seized the scale, or even if the court determined Officer Phillip's seizure of the scale to be unlawful. Once Holmes decided to throw an elbow, all bets were off. The police were then justified in making a full-custody arrest, which of course included a thorough search of the person. And as to the search of the car, Judge Roberts quite properly does no more than cite to Thornton v. United

States,15 after which motions to suppress searches of cars are longshots at best.16

Hedgepeth v. Washington Metropolitan Area Transit Authority

If the name "Ansche Hedgepeth" rings a bell, it isn't because she's a character from a Harry Potter novel (although with a name like that she'd make a good one). You read about her in your newspaper. What you read was something like what Judge Roberts wrote in beginning his

opinion:

No one is very happy about the events that led to this litigation. A twelve-year-old girl was arrested, searched, and handcuffed. Her shoelaces were removed, and she was transported in the windowless rear compartment of a police vehicle to a juvenile processing center, where she was booked, fingerprinted, and detained until released to her mother some three hours later - all for eating a single french fry in a Metrorail station. The child was frightened, embarrassed, and crying throughout the ordeal. The district court described the policies that led to her arrest as "foolish," and indeed the policies were changed after those responsible endured the sort of publicity reserved for adults who make young girls cry.17

It would have been nice if such a well-written exordium had led to some important jurisprudence. That it didn't is no fault of Judge Roberts.

Hedgepeth was a civil case, seeking damages for deprivation of civil rights on a variety of theories. Violation of the Fourth Amendment was, apparently, the last of those theories. Judge Roberts recognized that the merits of Hedgepeth's Fourth Amendment claim were entirely controlled, and entirely deracinated, by the Supreme Court's opinion in Atwater v. City of Lago

Vista.18

We have discussed Atwater previously on these pages.19 Attentive readers will recall that Gail Atwater was driving in her own residential neighborhood when she was pulled over for the misdemeanor of not securing her children in seatbelts. That offense carried a maximum penalty of a $50 fine. The arresting officer, however, subjected Mrs.

Atwater to a full-custody arrest. She later brought suit, claiming that her warrantless arrest for such a minor offense violated her rights under the Fourth Amendment.

In a 5-4 opinion that has been criticized here and elsewhere, the Supreme Court held that, "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."20 That holding in particular, and Atwater in general, left little wiggle room for the court of appeal in Hedgepeth. Whether Judge Roberts would have availed himself of wiggle room if there had been any is anybody's guess. Justice O'Connor, wrote the dissent in Atwater. We are hard-pressed to know from his Hedgepeth decision how Judge Roberts would have voted had he been on the Atwater court.

United States v. Lawson

In the wake of a series of bank robberies in the Washington, D.C. area, FBI agents arrested Willie Lawson.21 At the time of his arrest, Lawsondirected FBI agents to the apartment of his brother, Joseph, where Willie Lawson kept some personal property. Outside that apartment agents noticed a gray Oldsmobile that matched a description of the getaway vehicle in the Bank of America robbery, with temporary tags matching four out of five numbers from a license plate identification from that robbery. . . . When asked about the car, Joseph Lawson told the agents that it belonged to the mother of Willie Lawson's child, and that Willie had loaned it to him two weeks prior to the agents' arrival.22

The agents told Joseph Lawson that they needed to seize the Oldsmobile, and Joseph handed them the keys. A search of the car turned up various items of physical evidence linking Willie Lawson to the bank

robberies.23 Prior to trial Lawson moved to suppress these items of physical evidence. The district court denied the motion on the grounds that Lawson had no expectation of privacy in the car and thus was without standing to contest the search.24

In his opinion affirming the denial of the motion to suppress, Judge Roberts ignored the standing issue and resolved the case on probable cause grounds; this, despite the prosecution never having argued that the search was supported by probable cause.

Here FBI agents were justified in seizing the Oldsmobile and in conducting the subsequent search. The vehicle matched a physical description of the getaway car in the Bank of America robbery - the crime for which Willie Lawson initially had been arrested. Four out of five numbers on the temporary license plate matched a witness account of the getaway car's tags.

. . . Further, prior to seizing the car, agents "saw some latex gloves laying in the right front passenger area." . . . In light of these circumstances, it was reasonable for agents to believe the vehicle contained contraband or instrumentalities of crime.25

United States v. Jackson

In Jackson, Judge Roberts dissented from the panel's decision suppressing evidence for lack of probable cause.26 Police officers stopped a car for a missing tag light and arrested him upon discovering that he did not have a driver's license and that the car's license plates were stolen. The police then searched the trunk and found a gun.

The question here was whether the officers had probable cause to search the Jackson's trunk.

The majority (Judges Rogers and Edwards) found no probable cause to search the trunk (for the crimes charged - no license, stolen tags, stolen property) and reversed the conviction. Judge Roberts dissented, arguing that under the circumstances the officers could have concluded that the car was stolen and that they would find relevant evidence in the trunk: "The officers encountered at 1:00 a.m. an unlicensed driver operating an unregistered car with a broken tag light and stolen tags.

The experienced district court concluded - and I agree - that the circumstances were suspicious enough to amount to probable cause to search the trunk."27 There is no question that Judge Roberts can be

witty: "Sometimes a car being driven by an unlicensed driver, with no registration and stolen tags, really does belong to the driver's friend, and sometimes dogs do eat homework, but in neither case is it reasonable to insist on checking out the story before taking other appropriate

action."28

Mae West would have liked that one.

Other Cases And Conclusion

Judge Roberts has also written the majority opinion in a civil case involving Fourth Amendment issues.29 And he has been a part of four other majority opinions dealing with the Fourth Amendment.30

No one really believed that a Bush nominee would be sympathetic to individuals claiming violations of the Fourth Amendment. And in each of the above opinions, Judge Roberts sided with law enforcement. But Roberts demonstrated that he writes well, that he is smart, and importantly, is not always going to take the most expansive law enforcement reading of a Fourth Amendment issue.

Notes

1. Notably: "I've been in more laps than a napkin." "When choosing between two evils, I always like to try the one I've never tried before." "Those who are easily shocked should be shocked more often."

"When women go wrong, men go right after them." And of course, "A hard man is good to find." See http://en.thinkexist.com/ quotes/ mae_west/ visited July 28, 2005.

2. United States v. Holmes, 385 F.3d 786, 787 (D.C. Cir. 2004).

3. Id.

4. Apparently Judge Roberts is not above adopting the copspeak in which officers invariably testify. In the history of the world, no policeman has ever gotten out of his police car and walked over to the other car.

He has always "exited [his] patrol car and approached [the other] vehicle." Cf. United States v. Marshall, 488 F.2d 1169, 1170 n.1 (9th Cir. 1973): "The agents involved speak in an almost impenetrable jargon.

They do not get into their cars; they enter official government vehicles. They do not get out of or leave their cars, they exit them.

They do not go somewhere; they proceed. They do not go to a particular place; they proceed to its vicinity." 5. Holmes, 385 F.3d at 788.

6. Id.

7. Id.

8. Id.

9. Id. The restraining must have been performed allegro con molto brio, because Holmes was, as a result of being restrained, taken to D.C.

General Hospital.

10. Id. There was actually a series of three searches of Holmes, or the area around him - one on the scene of the arrest, another of the police transport van, and yet another at D.C. General Hospital. Each such search unearthed cocaine.

11. We use the nomenclature "Judge Roberts," recognizing that he is, at the time we write this article, "Justice-Nominee Roberts" and will likely be, at the time you read this article, "Justice Roberts." He was Judge Roberts when he wrote the opinions discussed herein.

12. Id. at 790.

13. Id. at 791.

14. Id.

15. 541 U.S. 615 (2004).

16. See Milton Hirsch and David Oscar Markus, Amendment Non-Grata, The Champion (Sept./Oct. 2004) p.34.

17. Hedgepeth v. Washington Metropolitan Area Transit Authority et. al.,

386 F.3d 1148, 1150 (D.C. Cir. 2004).

18. 532 U.S. 318 (2001).

19. See Milton Hirsch and David Oscar Markus, Atwater v. City of Lago Vista - The Perfect Case, The Champion (Sept./Oct. 2001) p. 46.

20. Atwater at ___.

21. United States v. Lawson, 410 F.3d 735, ___, (D.C. Cir. 2005).

22. Id. at ___.

23. Id. at ___.

24. Id. at ___.

25. Id. at ___.

26. United States v. Jackson, 2005 U.S. App. LEXIS 14951 (D.C. Cir.

2005).

27. Id. at ___.

28. Id. at ___.

29. Stewart v. Evans, 351 F.3d 1239 (D.C. Cir. 2003).

30. United States v. Moore, 394 F.3d 925 (D.C. Cir. 2005) (upholding stop of a taxicab that repeatedly stopped and started in an unusual location late at night); United States v. Brown, 374 F.3d 1326 (D.C.

Cir. 2004) (holding that credit card and driver's license with false names created probable cause for a search of defendant's trunk); United States v. Riley, 351 F.3d 1265 (D.C. Cir. 2003) (finding that reliable tip alone sufficient for a Terry stop).