No. 15-1384

In The
Supreme Court of the United States

JEFFREY R. GILLIAM,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

On Petition For A Writ Of Certiorari To The Nebraska Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the sole act of a police officer activating the overhead lights constitutes a show of authority such that the encounter automatically makes the contact a "seizure" for Fourth Amendment purposes.

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STATEMENT

Contact and Arrest

Officer Wagner of the Lincoln, Nebraska Police Department was dispatched at 5:39 a.m. on May 26, 2013 to investigate a report of a white Dodge Ram pickup truck, license plate number SYD417, parked partially on the curb and partially in the street in the area of 9th and "A" Streets in Lincoln, Nebraska. He arrived in about two minutes, but did not find the truck. Wagner testified it is not legal to park on the curb at 9th and "A" Street because 9th Street is a one-way street and there is no parking at any time. Had he personally observed the truck parked there, he would have been concerned because the truck would be a traffic hazard and it was still dark on early Saturday morning, meaning more people who had been drinking and driving were on the streets.

Since he did not locate the truck, Wagner turned to go back to the police station, but about four minutes after the original dispatch and three and one half blocks from the originally dispatched location of 9th and "A" Street, Wagner saw in front of him a white Dodge Ram pickup, license plate number SYD417 – the truck which had been the subject of the earlier dispatch. It was parked on the south side of Washington Street between 13th and 14th, with its engine running and headlights on. Wagner said the truck was not legally parked, as it was further away from the curb than it should have been.

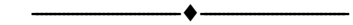
The sun was just starting to come up at the time Wagner found the truck. Wagner activated his overhead lights, pulled up behind the truck, got out and knocked on the driver's window, and Gilliam, the driver and sole occupant, rolled down the window. As soon as Gilliam rolled down the window, Wagner caught a strong odor of alcohol on Gilliam's breath, and observed other signs of intoxication. Further investigation led to Gilliam's arrest for driving under the influence of alcohol. Wagner was dressed in his police uniform including badge and gun throughout the encounter with Gilliam.

State District Court Proceedings

The state district court rejected Gilliam's claim that a person in a parked vehicle is seized from the moment the officer activates the emergency lights, noting that there are a myriad of circumstances under which police are authorized to use overhead lights that have nothing to do with a seizure. (Petitioner's App. 30) The district court found that Gilliam's position that a seizure occurs the moment that police emergency lights are activated fails to consider all of the circumstances surrounding a particular encounter, and cited several state statutes authorizing use of emergency lights which do not involve a seizure. The district court concluded that the contact between Officer Wagner and Gilliam was a tier one encounter, and did not constitute a seizure.

Direct Appeal – State Supreme Court

The Nebraska Supreme Court noted that the determination whether an encounter between an officer and a citizen amounts to a seizure requires consideration of the totality of the circumstances of the encounter, and whether a reasonable person would believe he or she was not free to leave under those circumstances. The Supreme Court agreed with the district court that Wagner was simply questioning Gilliam while Gilliam was voluntarily parked in a public place, and the encounter was a "tier one" contact which does not implicate the Fourth Amendment.



REASONS TO DENY THE PETITION

It would be unwise to attempt to fashion a hard-and-fast rule to the effect that activation of police emergency lights constitutes, *ipso facto*, a seizure. Fourth Amendment issues turn on their own peculiar underlying facts, something recognized by this Court long ago when it found that determination whether a contact constitutes a seizure requires consideration of the totality of the circumstances of that contact, and a seizure occurs only if a reasonable person would think he was not free to leave. *U.S. v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

A. The Conclusions and Reasoning of the Nebraska Supreme Court is Correct

It is not entirely clear if Petitioner is advocating for an entirely new rule or whether he only is asserting that the reasoning and conclusion of the Nebraska Supreme Court is incorrect. If it is the latter, we think the record clearly shows otherwise. A review of the court's opinion shows that the court applied the correct test on review and reached the correct conclusion based on the relevant facts.

The Nebraska Supreme Court, adopting the factual findings of the district court and using the totality of the circumstances test (Petitioner's App. 9), concluded that the record showed Wagner activated the overhead lights to alert the occupant of the parked vehicle that he was going to approach, and to warn oncoming vehicles of a potential traffic hazard. For Officer Wagner to have done otherwise would have put both him and other drivers at risk because it was still dark at the time he contacted Petitioner in his truck.

Wagner's activation of his overhead lights does not transform what would otherwise be a consensual encounter into a seizure under the Fourth Amendment. As the Nebraska Supreme Court noted, there are a variety of reasons an officer might activate his overhead lights, including officer safety, that have nothing to do with a seizure, and an ordinary, reasonable person would understand that. The court's conclusion in that regard is supported by the Seventh Circuit's opinion in *U.S. v. Clements*, 522 F.3d 790 (7th Cir. 2008). The

Clements court observed that there are multiple reasons to activate the overhead lights on a police vehicle, other than to seize the occupant of another vehicle. Lights can serve to alert the other vehicle that an officer is going to approach and to warn other vehicles in the area that there is a potential impediment to the flow of traffic. The Nebraska Supreme Court's decision was not an anomaly, as portrayed by the Petitioner's petition; *see*, *e.g.*, *U.S. v. Dockter*, 58 F.3d 1284 (8th Cir. 1995) (defendants were not seized by officer pulling in behind their parked car and activating warning lights) and *Jacobs v. U.S.*, 981 A.2d 579, 582 (D.C. App. 2009) ("It is important to recognize that the police did not use their lights to pull over appellant's car. Instead, he had already parked the car of his own volition, and the police needed no Fourth Amendment justification to approach the parked car and ask him some questions. There may have been non-coercive and safety-related reasons for turning on the lights that night, not the least of which may have been to signal passing motorists to use caution to avoid striking the officers and appellant at the side of the road.").

Respondent submits that the Nebraska Supreme Court applied the correct test and reached the correct conclusion and this Court should not grant the petition.

B. There is no conflict among the state courts

Petitioner asserts that there is a conflict among the state high courts regarding what constitutes a

seizure. Petitioner claims that most of the state high courts have found a seizure occurs from the moment the emergency lights are activated. But the state cases cited by Petitioner are not as one dimensional as he claims. Nearly all of them specifically rely on the totality of the circumstances as the test to determine whether or not the contact was a seizure; but each court weighs the totality differently (as they are surely entitled to do) and comes to a conclusion based on the totality of the circumstances in that individual case. We quote from the cases cited by Petitioner:

Hammons v. State, 940 S.W.2d 424, 426 (Ark. 1997) "in reviewing a trial court's denial of a motion to suppress, this court makes an independent determination based on the totality of the circumstances . . . ";

State v. Donahue, 742 A.2d 775, 782 (Conn. 1999) "We are unpersuaded that the totality of circumstances in this case reach the level of a reasonable suspicion found in our precedents.";

People v. Laake, 809 N.E.2d 769, 772 (Ill. 2004) "the standard for determining whether a detention has occurred during a police-citizen encounter is: 'whether a reasonable, innocent person in the circumstances would believe that he or she would be free to leave.' [citations omitted] If the answer is no, the citizen was detained for fourth amendment purposes. Courts must evaluate 'all of the circumstances surrounding the incident' when making this determination";

State v. Willoughby, 211 P.3d 91, 95 (Id. 2009) "The test to determine if an individual is seized for Fourth

Amendment purposes is an objective one" requiring an evaluation of "the totality of the circumstances.";

Commonwealth v. Smigliano, 694 N.E.2d 341, 343 (Mass. 1998) "A seizure takes place within the meaning of the Fourth Amendment to the United States Constitution . . . if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." [Internal citations omitted];

State v. Icard, 677 S.E.2d 822, 826 (N.C. 2009) "A reviewing court determines whether a reasonable person would feel free to decline the officer's request or otherwise terminate the encounter by examining the totality of circumstances.";

State v. Graham, 175 P.3d 885, 888 (Mont. 2007) "A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he [or she] was not free to leave."

The Tennessee cases cited by Petitioner require a bit of explanation, although they did, and still do, utilize the totality of the circumstances test. *State v. Moats*, 403 S.W.3d 170, 182 (Tenn. 2013) held "Consistent with *Mendenhall* and the constitutional standards developed in our state, this Court has adopted a totality of the circumstances test for determining whether a seizure has occurred." *Moats* was overruled literally the day before Petitioner's Petition for Writ of Certiorari was filed with this Court by *State v.*

McCormick, 2016 WL 2742841, at 8 (Tenn. May 10, 2016). *State v. Williams*, 185 S.W.3d 311 (Tenn. 2006), also cited by Petitioner, was abrogated by *McCormick* as well, but the Tennessee Supreme Court did not alter the "totality of the circumstances" test in changing its mind that the community caretaking function plays no role in determining whether a seizure occurred.

Petitioner's citation to *State v. Morris*, 72 P.3d 570 (Kan. 2003) and *State v. Greever*, 183 P.3d 788 (Kan. 2008) is inapposite. After *Greever* and *Morris* were decided, the Kansas Supreme Court made very clear that it had adopted totality of the circumstances to evaluate whether a seizure has occurred: "The United States Supreme Court has developed a "totality of the circumstances" test to determine if there is a seizure, or instead a consensual encounter 'Only if the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.'" *State v. McGinnis*, 233 P.3d 246, 251 (Kan. 2010). [Internal citations omitted.]

Two other cases cited by Petitioner in support of his claim that there is a split of authority in the state courts regarding the effect of an officer's activation of the emergency or overhead lights on a cruiser also rely on the totality of circumstances to resolve the question of seizure, but they are less than explicit in doing so. The North Dakota Supreme Court held that "When analyzing if a seizure has occurred, the Court looks at whether there was the 'threatening presence of several

officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.'" *State v. Thompson*, 793 N.W.2d 185, 187 (N.D. 2011). While not expressly using the totality of the circumstances test, the factors listed are the criteria often cited by other courts in looking at the totality of the circumstances. *See, e.g., State v. Icard*, *supra*, citing *Bostick*, *supra*, *Mendenhall*, *supra* at 554, and *Terry v. Ohio*, 392 U.S. 1, 20, n16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and *U.S. v. Dockter*, *supra*.

Petitioner also cites *State v. Burgess*, 657 A.2d 202 (Vt. 1995), but there, the Vermont Supreme Court relied on its earlier case of *State v. Sutphin*, 614 A.2d 792 (Vt. 1992) in which it observed that it must consider the totality of the circumstances. "*Florida v. Bostick* commands that we consider the totality of circumstances in judging whether a seizure occurred, not whether each separate element of police conduct, by itself, constituted a seizure." *Id.*, at 794. *Burgess*, *supra* at 203.

C. Petitioner's approach has already been rejected by this Court

Petitioner's test would radically alter the nature of a court's determination whether a seizure occurred from the totality of the circumstances to a one dimensional analysis – whether the police turned on emergency lights. If the answer to that is yes (as it nearly

always will be, often for reasons utterly unrelated to whether a seizure occurred) then the citizen has been seized for Fourth Amendment purposes, and that would be the end of the inquiry, whether or not there are other legitimate reasons the officer used the emergency lights.

This Court long ago expressly rejected the idea of a single factor test. In *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991), this Court stated: "The Florida Supreme Court rested its decision on a single fact – that the encounter took place on a bus – rather than on the totality of the circumstances. We remand so that the Florida courts may evaluate the seizure question under the correct legal standard." *Id.*, at 437. *Bostick* reinforced that the totality of circumstances test is the appropriate inquiry when determining whether a citizen has been seized, and observed that the test had been established long before that, citing *U.S. v. Mendenhall*, 446 U.S. 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.) *Id.*, at 554. This Court has shown no inclination since *Bostick* to alter the test in favor of a single factor test, and it should not consider doing so now.

Petitioner wants to create a "one size fits all" test, but as long ago as *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) this court noted that not all interactions between police and citizens involves a seizure. "Only when the officer, by means of physical

force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.*, at 20, n16. Petitioner's single question analysis would eradicate the more logical and analytical framework of the totality of the circumstances, which takes into account all the reasons for the police action, not just whether the emergency lights were activated, and it would eliminate the consideration of other legitimate reasons for the use of the emergency lights that have nothing to do with a seizure.

CONCLUSION

For the foregoing reasons, the Respondent requests that certiorari be denied.

Respectfully submitted,

State of Nebraska, Respondent

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