SUPREME COURT, U.S.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,

Petitioner,

VS.

LEMON MONTREA JOHNSON,

Respondent.

On Petition for Writ of Certiorari to the Arizona Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the context of a vehicular stop for a minor traffic infraction, may an officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?

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PETITION FOR WRIT OF CERTIORARI

The State of Arizona respectfully petitions for a writ of certiorari to review the Arizona Court of Appeals' September 10, 2007, opinion holding that the pat-down search conducted in this case was not authorized because the seizure of the passenger pursuant to an investigative stop of a car had evolved into a consensual encounter at the time police officer conducted the search.

OPINIONS BELOW

The Arizona Court of Appeals' opinion is reported as *State v. Lemon Montrea Johnson*, 217 Ariz. 58, 170 P.3d 667 (App. 2007). Pet. App. A. The Arizona Supreme Court's order denying review without comment is not reported. Pet. App. B.

STATEMENT OF JURISDICTION

The Arizona Court of Appeals, Division Two, entered its judgment on September 10, 2007. Pet. App. A. The Arizona Supreme Court denied discretionary review on November 29, 2007. Pet. App. B. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

In November 2005, a jury in Pima County, Arizona, found Lemon M. Johnson guilty of possession of a weapon by a prohibited possessor and possession of marijuana. The trial court imposed an enhanced but mitigated prison term of eight years on the prohibited possessor conviction and a concurrent prison term of one year on the conviction for possession of marijuana.

A. Suppression Hearing.

Prior to trial, Johnson filed a motion to suppress evidence discovered during a pat-down search of his person. The following facts adduced at the suppression hearing are undisputed. Officer Maria Trevizo of the Oro Valley Arizona Police Department, who arrested Johnson as a prohibited possessor of a firearm, testified that she was a member of the state gang task force. She had attended basic and advanced training in gang enforcement and had two years' on-the-job experience. On April 19, 2002, she was on patrol with two other members of the gang task force in an area of Tucson, Arizona, known for Crips street gang activity. Crips gang members, she testified, were known to possess firearms.

The task force members initiated a traffic stop on a vehicle for an insurance violation. The vehicle had three occupants. While Officer Trevizo approached the vehicle on foot, she noticed Johnson, the back-seat passenger, look back at the police car, say something to the people in the front seat, and then maintain eye contact with the officers.

Trevizo testified that this was unusual behavior because in her experience people normally look front during a traffic stop.

While Detective Machado made contact with the driver, Trevizo made contact with Johnson. The occupants averred that there were no weapons in the vehicle. Johnson had no identification with him. He had a police scanner in his jacket pocket. Trevizo testified: "It caused me concern because most people don't carry around a scanner in their jacket pocket unless they're going to be involved in some kind of criminal activity or going to try to evade the police by listening to the scanner."

Trevizo also noted Johnson's blue shirt, shoes, and bandanna. She said that Crips announce their gang affiliation by wearing blue clothing. She saw particular significance in Johnson's bandanna because bandannas sporting gang colors are an insignia for the gang.

While Johnson was still seated in the back seat, he volunteered that he was from Eloy, Arizona. Trevizo knew from experience in gang interdiction that the predominant street gang in Eloy was the "Trekkle Park Crips." Johnson also told Trevizo that he had done prison time for burglary and had been out about a year.

Trevizo asked Johnson to exit the vehicle. She intended to speak with Johnson away from the other occupants to gather intelligence about his gang. She testified that in her opinion Johnson was free to refuse to exit the vehicle. Once Johnson was out of the vehicle, she asked him to turn around because she was going to pat him down. She said she did this solely for reasons of officer safety "because I

had a lot of information that would lead me to believe he might have a weapon on him." She stated that the search was not based on suspicion of criminal activity but solely on a concern for officer safety. Trevizo patted down Johnson's exterior clothing and felt the butt of a handgun in his pants' waist. Johnson began to struggle a bit, and Trevizo handcuffed him. A subsequent search of his person incident to arrest for weapons misconduct turned up a small amount of marijuana.

Trevizo's contact with Johnson occurred simultaneously with Detective Machado's investigative detention of the driver. The driver was outside the car during the encounter between Trevizo and Johnson.

Trevizo enumerated the circumstances that led her to suspect that Johnson might have a gun: (1) he watched the officers as they approached the vehicle instead of looking front like most traffic stop subjects; (2) he did not have identification; (3) he had a scanner in his pocket; (4) he was wearing blue Crips colors; (5) the traffic stop took place near a known Crips area; and (6) he told her he was a convicted felon. In addition, Johnson told her he was from Eloy, and she knew the Crips were a dominant gang in Eloy. Trevizo said that it was the totality of these circumstances that contributed to her concern for officer safety. The trial court denied the motion to suppress.

B. Arizona Court of Appeals' Opinion.

On direct appeal, Johnson contended that the trial court erred in denying his motion to suppress evidence because Officer Trevizo lacked reasonable suspicion to conduct a protective frisk of his person, and even if

supported by reasonable suspicion in this case, a protective frisk was unconstitutional during a consensual encounter. Two judges of the Arizona Court of Appeals reversed Johnson's convictions and sentences, finding that Johnson was seized pursuant to a lawful traffic stop of the driver, but that Officer Trevizo's encounter with Johnson had "evolved" from an investigative stop to a consensual encounter when Johnson exited the back seat of the vehicle to talk with Officer Trevizo. The majority held that "when an officer initiates an investigative encounter with a passenger that was consensual and wholly unconnected to the original purpose of the routine traffic stop of the driver, that officer may not conduct a *Terry* frisk of the passenger without reasonable cause to believe 'criminal activity may be afoot.'" Pet. App. A at 15, ¶ 29 (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

One judge dissented, concluding that "[v]iewing the evidence under the totality of the circumstances realistically and in a light favorable to upholding the trial court's determination, Trevizo was lawfully in Johnson's presence, the encounter was nonconsensual, and the officer had a reasonable basis to consider him dangerous and therefore conduct a brief pat-down of his person." Pet. App. A at 20, ¶ 39 (citation omitted).

ARGUMENT

In this case, the Arizona Court of Appeals has decided an important question of Fourth Amendment law that has not been, but should be, settled by this Court—whether a pat-down search of a passenger for officer safety, conducted while the passenger is detained as part of a lawful investigative stop, is permissible under the Fourth Amendment. The Arizona court has decided this

important federal question contrary to relevant decisions of this Court. This Court should take review because the opinion substantially inhibits a search for weapons based on officer safety concerns—creating an unworkable, impractical, and dangerous precedent for vehicle stops—and deters officers from acting with appropriate caution when conducting legitimate traffic stops.

I. The State Court Ruled Contrary To This Court's Precedent.

The Arizona Court of Appeals held contrary to this Court's precedent when it determined that a passenger is not detained along with the driver for the full duration of a lawful investigative stop. Pet. App. A at 13–15, ¶¶ 27, 29. Thus the opinion draws the incongruous conclusion that a passenger is not necessarily subject, like the driver, to a pat down search for weapons when the officer reasonably believes the passenger is armed and presently dangerous. Pet. App. A at 13–15, ¶¶ 27, 29.

This Court has held that the driver of a vehicle that is the subject of a traffic stop is seized within the meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809–10 (1996). Just last term, this Court held that a passenger is seized equally with the driver during an automobile stop. *Brendlin v. California*, 127 S. Ct. 2400, 2410 (2007). An officer may also ask a passenger to exit the vehicle without the need for justification so long as it does not prolong the stop. *Maryland v. Wilson*, 519 U.S. 408, 410 (1997). In *Wilson*, this Court found that the interest in officer safety outweighs the minor intrusion on passengers who are "already stopped by virtue of the stop of the vehicle." *Id.* at 414.

Whenever the circumstances of an on-the-street encounter are such that a police officer reasonably believes he may be dealing with someone who is armed and dangerous, the officer is justified in conducting a pat-down search of that individual for weapons for his own protection and for that of others nearby. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). The driver of a car and his passengers can be physically searched pursuant to a stop for traffic violations if an officer has a reasonable suspicion that they might be carrying weapons. *Pennsylvania v. Mimms*, 434 U.S. 106, 111–12, (1977). A pat-down search is reasonable when the officer "has reason to believe that the suspect is armed and dangerous." *Adams v. Williams*, 407 U.S. 143, 146 (1972). "[P]olice may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous." *Michigan v. Long*, 463 U.S. 1032, 1047–48 (1983).

Under the Fourth Amendment, an officer can pat down a driver when the driver is detained if the officer has reasonable suspicion that the driver is armed and dangerous. Also under the Fourth Amendment, a passenger is detained along with the driver during a traffic investigation. Therefore, it stands to reason that an officer does not violate the Fourth Amendment when she pats down a passenger while the driver is detained if the pat down is based on a reasonable suspicion the passenger is armed and dangerous.

Indeed, this Court has stated as much in *Knowles v. Iowa*, 525 U.S. 113, 118 (1998), albeit in *dictum*. In *Knowles*, this Court stated that police officers "may order out of a vehicle both the driver, and any passengers; [and]

perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous."

Depending on the specific circumstances present, some courts have not found weapons searches reasonable. *See United States v. Wilson*, 506 F.3d 488 (6th Cir. 2007); *United States v. McKoy*, 428 F.3d 38 (1st Cir. 2005). But because all circuit courts examine searches under a totality of the circumstances standard, the analyses are highly fact bound. Thus, other federal courts have approved protective pat-down searches of vehicle passengers even in the absence of obvious criminal activity. *See United States v. Rice*, 483 F.3d 1079, 1084 (10th Cir. 2007) (reasonable suspicion existed for pat-down search of vehicle passenger for weapons); *Holeman v. City of New London*, 425 F.3d 184, 192 (2nd Cir. 2005) (under the circumstances, once the passenger was out of the car, the officers were justified in performing a pat down); *United States v. Moorefield*, 111 F.3d 10, 13 (3rd Cir. 1997) (police officers lawfully ordered passenger to remain in the car and put his hands in the air while the traffic stop was being conducted); *United States v. Fryer*, 974 F.2d 813, 819 (7th Cir. 1992) (search of passenger compartment and occupants of vehicle justified by passenger's furtive movements); *United States v. Woodall*, 938 F.2d 834, 837 (8th Cir. 1991) (same); *United States v. Colin*, 928 F.2d 676, 678 (5th Cir. 1991) (police lawfully searched passenger after stopping car for seatbelt infraction).

Even before *Brendlin*, a majority of federal circuit courts had embraced a *per se* rule that the passenger is seized at the moment the driver submits to an official show of authority. *E.g., United States v. Twilley*, 222 F.3d 1092,

1095 (9th Cir. 2000); *United States v. Eylicio-Montoya*, 70 F.3d 1158, 1163–64 (10th Cir. 1995); *United States v. Kimball*, 25 F.3d 1, 5 (1st Cir. 1994); *United States v. Roberson*, 6 F.3d 1088, 1091 (5th Cir. 1993); *United States v. Powell*, 929 F.2d 1190, 1195 (7th Cir.1991). Many state courts have held the same. *E.g. State v. Hernandez*, 718 So.2d 833, 836 (Fla. App. 1998); *People v. Bunch*, 796 N.E.2d 1024, 1029 (Ill. 2003); *State v. Eis*, 348 N.W.2d 224, 226 (Iowa 1984); *State v. Carter*, 630 N.E.2d 355, 360 (Ohio 1994); *Josey v. State*, 981 S.W.2d 831, 837–38 (Tex. App. 1998).

Thus, using the standards enunciated by this Court, many lower courts have upheld limited weapon pat downs of passengers where no criminal behavior is suspected but where the police had individualized suspicion that the passenger might be armed and dangerous. These are precisely the facts in the present case. That the Arizona Court of Appeals held contrary to the majority of courts on these facts is attributable partly to the absence of an express holding from this Court that a vehicle passenger, detained along with a lawfully stopped driver, may be patted down when the pat down is based on a reasonable belief that the passenger is armed and potentially dangerous. Opinions like the present one demonstrate that this is an area of Fourth Amendment jurisprudence that is in need of this Court's guidance.

The instant case is a good example. The state court opinion turns on characterizing the encounter between Trevizo and Johnson as consensual. Even though it occurred during an ongoing and lawful investigative detention, the majority reaches the conclusion that Johnson reasonably believed he was free to leave the

encounter. Pet App. A at 10–11, ¶¶ 20–22. The majority reaches this conclusion based solely on Trevizo's subjective beliefs. But the officer's subjective beliefs are not the standard. This Court has clearly held that the inquiry is an objective one, not dependant on the particular officer's subjective beliefs. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Thus, courts employ a reasonable person standard. *See INS v. Delgado*, 466 U.S. 210, 215 (1984) (whether a particular encounter constitutes a consensual encounter or an investigative detention depends on whether a reasonable person under the circumstances would believe he was not free to leave or disregard the official's request for information).

In *Brendlin*, this Court fully explained the reasonable person standard as it applies to passengers in a traffic stop:

> A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on "privacy and personal security" does not normally (and did not here) distinguish between passenger and driver. An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only

> bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place.

Brendlin, 127 S. Ct. at 2407 (internal citation omitted). This Court also observed that "[i]t is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety." *Id.*

Using the proper standard, a reasonable person in Johnson's situation would not believe he was free to leave. Three officers approached the vehicle, ordered the occupants to display their hands and the driver to exit the car. An investigation of the driver ensued, and Johnson was seized along with the driver. Moreover, Trevizo wanted to ask him questions about gang and criminal activity. Thus, her questions were inquisitive and potentially inculpatory. A reasonable person would not believe that he could ignore the officers' directives and go about his business. The conclusion of the Arizona court that Johnson's encounter with Officer Trevizo was consensual does not accord with this Court's view of such encounters.

II. The Pat Down Was Reasonable Under The Fourth Amendment.

Because this case involves an investigative stop from start to finish, the only question is what a reasonably prudent police officer would have done under the same circumstances. *Terry*, 392 U.S. at 27. "The touchstone of

the Fourth Amendment is reasonableness." *Samson v. California*, 547 U.S. 843, 126 S. Ct. 2193, 2201 n.4 (2006). Whether a search is reasonable despite the lack of a warrant requires "assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other hand, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

In this case, Officer Trevizo acted with reasonable prudence by patting Johnson down for weapons. Articulable facts known to or observed by her justified her belief that Johnson might be armed and potentially dangerous to the officers. Johnson watched the officers out the rear of the car as they approached the vehicle. This alerted Trevizo because most people involved in a traffic stop look frontward instead of maintaining eye contact with officers who are behind them. Johnson did not have identification. This lent some uncertainty as to his true identity. Johnson carried a police scanner in his jacket pocket. This strongly indicated possible criminal activity because of the ready nature of the device for the purpose of evading law enforcement. Johnson was wearing clothing that was blue, a color affiliated with the Crips. Trevizo knew that Crips were known to carry firearms. Moreover, the traffic stop took place near a known Crips neighborhood, and Johnson said he was from Eloy where the Crips were a dominant gang. Finally, Johnson told her he was a convicted felon.

Taking the facts together, as this Court must, any prudent person would be entitled to proceed with caution believing, as Trevizo believed, that Johnson had connections to a violent street gang known to carry guns.

Therefore, whether or not criminal activity was present, the officer acted within the Fourth Amendment when she patted him down for officer safety.

III. The State Court's Opinion Substantially Inhibits A Search For Weapons Based On Officer Safety Concerns.

This case illustrates the need for this Court to establish a rule of law whereby police officers are permitted to protect themselves when they conduct traffic stops. Officer Trevizo suspected Johnson was armed and potentially dangerous *before* he exited the back seat of the car. The state court of appeals' two-judge majority recommended that under the circumstances presented by these facts "[a]ny person, including a policeman, is at liberty to avoid a person he considers dangerous." Pet. App. A at 7, ¶ 15 (citing *Terry*, 392 U.S. at 32 (Harlan, J., concurring)). This suggests that the recommended course of action for Officer Trevizo would have been to walk away. But requiring Officer Trevizo to walk away from a potentially armed and dangerous passenger would do nothing to address the hazard posed to the public. In this instance, if Officer Trevizo had walked away, even though she reasonably believed Johnson was armed and potentially dangerous, she would have left the two other officers present (who were engaged in processing the driver) in the same danger Trevizo would have avoided. The opinion creates an unworkable, impractical, and dangerous precedent for vehicle stops and deters officers from acting with appropriate caution when conducting legitimate traffic stops.

With this case, this Court can establish that a pat-down search of a passenger for officer safety, conducted while the passenger is detained as part of an investigative stop, is permissible under the Fourth Amendment.

CONCLUSION

For these reasons, the State respectfully requests that this Court accept review of the Arizona court's opinion.

Respectfully submitted

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