Blue to Gold
LAW ENFORCEMENT TRAINING

# CASE LAW

## Searching Cars & Occupants

Table Of Contents:


| | |
|---|---|
| Arizona v Johnson | (Page 3) |
| Brendlin v California | (Page 9) |
| Cady v Dombrowski | (Page 17) |
| California v Carney | (Page 26) |
| California v Carney | (Page 38) |
| Chambers v Maroney | (Page 52) |
| Maryland v Wilson | (Page 62) |
| Michigan v Thomas | (Page 70) |
| People v Harshbarger | (Page 72) |
| South Dakota v Opperman | (Page 75) |
| State v Chang | (Page 90) |
| State v Greenslit | (Page 96) |
| State v Lee | (Page 99) |
| State v Smith | (Page 107) |
| State v Wallace | (Page 110) |
| United States v Landeros | (Page 120) |
| US v Di Re | (Page 126) |
| US v Gastiaburo | (Page 132) |
| US v Hill | (Page 139) |
| US v Ornelas-Ledesma | (Page 150) |
| Western Resources Inc v FERC | (Page 157) |

129 S.Ct. 781
Supreme Court of the United States

ARIZONA, Petitioner,

v.

Lemon Montrea JOHNSON.

No. 07–1122.
|
Argued Dec. 9, 2008.
|
Decided Jan. 26, 2009

**Synopsis**

**Background:** Defendant was convicted in the Superior Court, Pima County, No. CR–20021357, Ted B. Borek, J., of unlawful possession of weapon as prohibited possessor. He appealed. The Court of Appeals of Arizona, 217 Ariz. 58, 170 P.3d 667, reversed, and the Arizona Supreme Court denied review. Certiorari was granted.

The Supreme Court, Justice Ginsburg, held that patdown of defendant was lawful.

Reversed and remanded.

****781** *Syllabus*[*]

In *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, this Court held that a "stop and frisk" may be conducted without violating the Fourth Amendment's ban on unreasonable searches and seizures if two conditions are met. First, the investigatory stop (temporary detention) must be lawful, a requirement met in an on-the-street encounter when a police officer reasonably suspects that the person apprehended is committing or has committed a crime. Second, to proceed from a stop to a frisk (patdown for weapons), the officer ****782** must reasonably suspect that the person stopped is armed and dangerous. For the duration of a traffic stop, the Court recently confirmed, a police officer effectively seizes "everyone in the vehicle," the driver and all passengers. *Brendlin v. California,* 551 U.S. 249, 255, 127 S.Ct. 2400, 168 L.Ed.2d 132.

While patrolling near a Tucson neighborhood associated with the Crips gang, police officers serving on Arizona's gang task force stopped an automobile for a vehicular infraction warranting a citation. At the time of the stop, the officers had no reason to suspect the car's occupants of criminal activity. Officer Trevizo attended to respondent Johnson, the back-seat passenger, whose behavior and clothing caused Trevizo to question him. After learning that Johnson was from a town with a Crips gang and had been in prison, Trevizo asked him to get out of the car in order to question him further, out of the hearing of the front-seat passenger, about his gang affiliation. Because she suspected that he was armed, she patted him down for safety when he exited the car. During the patdown, she felt the butt of a gun. At that point, Johnson began to struggle, and Trevizo handcuffed him. Johnson was charged with, *inter alia,* possession of a weapon by a prohibited possessor. The trial court denied his motion to suppress the evidence, concluding that the stop was lawful and that Trevizo had cause to suspect Johnson was armed and dangerous. Johnson was convicted. The Arizona Court of Appeals reversed. While recognizing that Johnson was lawfully seized, the court found that, prior to the frisk, the detention had evolved into a consensual conversation about his gang affiliation. Trevizo, the court therefore concluded, had no right to pat Johnson down even if she had reason to suspect he was armed and dangerous. The Arizona Supreme Court denied review.

*Held:* Officer Trevizo's patdown of Johnson did not violate the Fourth Amendment's prohibition on unreasonable searches and seizures. Pp. 786 – 788.

(a) *Terry* established that, in an investigatory stop based on reasonably grounded suspicion of criminal activity, the police must be positioned to act instantly if they have reasonable cause to suspect that the persons temporarily detained are armed and dangerous. 392 U.S., at 24, 88 S.Ct. 1868. Because a limited search of outer clothing for weapons serves to protect both the officer and the public, a patdown is constitutional. *Id.,* at 23–24, 27, 30–31, 88 S.Ct. 1868. Traffic stops, which "resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry,*" *Berkemer v. McCarty,* 468 U.S. 420, 439, n. 29, 104 S.Ct. 3138, 82 L.Ed.2d 317, are "especially fraught with danger to police officers," *Michigan v. Long,* 463 U.S. 1032, 1047, 103 S.Ct. 3469, 77 L.Ed.2d 1201, who may minimize the risk of harm by exercising " 'unquestioned command of the situation,' " *Maryland v. Wilson,* 519 U.S. 408, 414, 117 S.Ct. 882, 137 L.Ed.2d 41. Three decisions cumulatively portray *Terry*'s application in a

  

traffic-stop setting. In *Pennsylvania v. Mimms,* 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 *(per curiam),* the Court held that "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendmen[t]," *id.,* at 111, n. 6, 98 S.Ct. 330, because the government's "legitimate and weighty" interest in officer safety outweighs the "*de minimis*" additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle, *id.,* at 110–111, 98 S.Ct. 330. Citing *Terry,* the Court further held that a driver, once outside the stopped vehicle, may be patted down for weapons if the officer reasonably concludes ****783** that the driver might be armed and dangerous. 434 U.S., at 112, 98 S.Ct. 330. *Wilson,* 519 U.S., at 413, 117 S.Ct. 882, held that the *Mimms* rule applies to passengers as well as drivers, based on "the same weighty interest in officer safety." *Brendlin,* 551 U.S., at 263, 127 S.Ct. 2400, held that a passenger is seized, just as the driver is, "from the moment [a car stopped by the police comes] to a halt on the side of the road." A passenger's motivation to use violence during the stop to prevent apprehension for a crime more grave than a traffic violation is just as great as that of the driver. 519 U.S., at 414, 117 S.Ct. 882. And as "the passengers are already stopped by virtue of the stop of the vehicle," *id.,* at 413–414, 117 S.Ct. 882, "the additional intrusion on the passenger is minimal," *id.,* at 415, 117 S.Ct. 882. Pp. 786 – 787.

(b) The Arizona Court of Appeals recognized that, initially, Johnson was lawfully detained incident to the legitimate stop of the vehicle in which he was a passenger, but concluded that once Officer Trevizo began questioning him on a matter unrelated to the traffic stop, patdown authority ceased to exist, absent reasonable suspicion that Johnson had engaged, or was about to engage, in criminal activity. The court portrayed the interrogation as consensual, and, Johnson emphasizes, Trevizo testified that Johnson could have refused to exit the vehicle and to submit to the patdown. But Trevizo also testified that she never advised Johnson he did not have to answer her questions or otherwise cooperate with her. A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. An officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as the inquiries do not measurably extend the stop's duration. See *Muehler v. Mena,* 544 U.S. 93, 100–101, 125 S.Ct. 1465, 161 L.Ed.2d 299. A reasonable passenger would understand that during the time a car is lawfully stopped, he or she is not free to terminate the encounter with the police and move about at will. Nothing occurred in this case that would have conveyed to Johnson that, prior to the frisk, the traffic stop had ended or that he was otherwise free "to depart without police permission." *Brendlin,* 551 U.S., at 257, 127 S.Ct. 2400. Trevizo was not required by the Fourth Amendment to give Johnson an opportunity to depart without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her. Pp. 787 – 788.

217 Ariz. 58, 170 P.3d 667, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court.

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**Opinion**

Justice GINSBURG delivered the opinion of the Court.

***326** This case concerns the authority of police officers to "stop and frisk" a passenger in a motor vehicle temporarily seized upon police detection of a traffic infraction. In a pathmarking decision, *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the Court considered whether an investigatory stop (temporary detention) and frisk (patdown for weapons) may be conducted without violating the Fourth Amendment's ban on unreasonable searches and seizures. The Court upheld "stop and frisk" as constitutionally permissible if two conditions are met. First, the investigatory stop must be lawful. That requirement is met in an on-

  

the-street encounter, *Terry* determined, when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense. Second, to proceed from a stop to a frisk, the police ***327** officer must reasonably suspect that the person stopped is armed and dangerous.

For the duration of a traffic stop, we recently confirmed, a police officer effectively seizes "everyone in the vehicle," the driver and all passengers. *Brendlin v. California,* 551 U.S. 249, 255, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). Accordingly, we hold that, in a traffic-stop setting, the first *Terry* condition—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation. The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity. To justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.

I

On April 19, 2002, Officer Maria Trevizo and Detectives Machado and Gittings, all members of Arizona's gang task force, were on patrol in Tucson near a neighborhood associated with the Crips gang. At approximately 9 p.m., the officers pulled over an automobile after a license plate check revealed that the vehicle's registration had been suspended for an insurance-related violation. Under Arizona law, the violation for which the vehicle was stopped constituted a civil infraction warranting a citation. At the time of the stop, the vehicle had three occupants—the driver, a front-seat passenger, and a passenger in the back seat, Lemon Montrea Johnson, the respondent here. In making the stop the officers had no reason to suspect anyone in the vehicle of criminal activity. See App. 29–30.

The three officers left their patrol car and approached the stopped vehicle. Machado instructed all of the occupants to keep their hands visible. *Id.,* at 14. He asked whether there were any weapons in the vehicle; all responded no. ***328** *Id.,* at 15. Machado then directed the driver to get out of the car. Gittings dealt with the front-seat passenger, who stayed in the vehicle throughout the stop. See *id.,* at 31. While Machado was getting the driver's license and information about the vehicle's registration and insurance, see *id.,* at 42–43, Trevizo attended to Johnson.

Trevizo noticed that, as the police approached, Johnson looked back and kept ****785** his eyes on the officers. *Id.,* at 12. When she drew near, she observed that Johnson was wearing clothing, including a blue bandana, that she considered consistent with Crips membership. *Id.,* at 17. She also noticed a scanner in Johnson's jacket pocket, which "struck [her] as highly unusual and cause [for] concern," because "most people" would not carry around a scanner that way "unless they're going to be involved in some kind of criminal activity or [are] going to try to evade the police by listening to the scanner." *Id.,* at 16. In response to Trevizo's questions, Johnson provided his name and date of birth but said he had no identification with him. He volunteered that he was from Eloy, Arizona, a place Trevizo knew was home to a Crips gang. Johnson further told Trevizo that he had served time in prison for burglary and had been out for about a year. 217 Ariz. 58, 60, 170 P.3d 667, 669 (App.2007).

Trevizo wanted to question Johnson away from the front-seat passenger to gain "intelligence about the gang [Johnson] might be in." App. 19. For that reason, she asked him to get out of the car. *Ibid.* Johnson complied. Based on Trevizo's observations and Johnson's answers to her questions while he was still seated in the car, Trevizo suspected that "he might have a weapon on him." *Id.,* at 20. When he exited the vehicle, she therefore "patted him down for officer safety." *Ibid.* During the patdown, Trevizo felt the butt of a gun near Johnson's waist. 217 Ariz., at 60, 170 P.3d, at 669. At that point Johnson began to struggle, and Trevizo placed him in handcuffs. *Ibid.*

***329** Johnson was charged in state court with, *inter alia,* possession of a weapon by a prohibited possessor. He moved to suppress the evidence as the fruit of an unlawful search. The trial court denied the motion, concluding that the stop was lawful and that Trevizo had cause to suspect Johnson was armed and dangerous. See App. 74–78. A jury convicted Johnson of the gun-possession charge. See 217 Ariz., at 60–61, 170 P.3d, at 669–670.

A divided panel of the Arizona Court of Appeals reversed Johnson's conviction. *Id.,* at 59, 170 P.3d, at 668. Recognizing that "Johnson was [lawfully] seized when the officers stopped the car," *id.,* at 62, 170 P.3d, at 671, the court nevertheless concluded that prior to the frisk the detention had "evolved into a separate, consensual encounter stemming from an

  

unrelated investigation by Trevizo of Johnson's possible gang affiliation," *id.,* at 64, 170 P.3d, at 673. Absent "reason to believe Johnson was involved in criminal activity," the Arizona appeals court held, Trevizo "had no right to pat him down for weapons, even if she had reason to suspect he was armed and dangerous." *Ibid.*

Judge Espinosa dissented. He found it "highly unrealistic to conclude that merely because [Trevizo] was courteous and Johnson cooperative, the ongoing and virtually simultaneous chain of events [had] somehow 'evolved into a consensual encounter' in the few short moments involved." *Id.,* at 66, 170 P.3d, at 675. Throughout the episode, he stressed, Johnson remained "seized as part of [a] valid traffic stop." *Ibid.* Further, he maintained, Trevizo "had a reasonable basis to consider [Johnson] dangerous," *id.,* at 67, 170 P.3d, at 676, and could therefore ensure her own safety and that of others at the scene by patting down Johnson for weapons.

The Arizona Supreme Court denied review. No. CR–07–0290–PR, 2007 Ariz. LEXIS 154 (Nov. 29, 2007). We granted certiorari, 554 U.S. 916, 128 S.Ct. 2961, 171 L.Ed.2d 884 (2008), and now reverse the judgment of the Arizona Court of Appeals.

****786** ***330** II

A

We begin our consideration of the constitutionality of Officer Trevizo's patdown of Johnson by looking back to the Court's leading decision in *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *Terry* involved a stop for interrogation of men whose conduct had attracted the attention of a patrolling police officer. The officer's observation led him reasonably to suspect that the men were casing a jewelry shop in preparation for a robbery. He conducted a patdown, which disclosed weapons concealed in the men's overcoat pockets. This Court upheld the lower courts' determinations that the interrogation was warranted and the patdown, permissible. See *id.,* at 8, 88 S.Ct. 1868.

*Terry* established the legitimacy of an investigatory stop "in situations where [the police] may lack probable cause for an arrest." *Id.,* at 24, 88 S.Ct. 1868. When the stop is justified by suspicion (reasonably grounded, but short of probable cause) that criminal activity is afoot, the Court explained, the police officer must be positioned to act instantly on reasonable suspicion that the persons temporarily detained are armed and dangerous. *Ibid.* Recognizing that a limited search of outer clothing for weapons serves to protect both the officer and the public, the Court held the patdown reasonable under the Fourth Amendment. *Id.,* at 23–24, 27, 30–31, 88 S.Ct. 1868.

"[M]ost traffic stops," this Court has observed, "resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*." *Berkemer v. McCarty,* 468 U.S. 420, 439, n. 29, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Furthermore, the Court has recognized that traffic stops are "especially fraught with danger to police officers." *Michigan v. Long,* 463 U.S. 1032, 1047, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). " 'The risk of harm to both the police and the occupants [of a stopped vehicle] is minimized,' " we have stressed, " 'if the officers routinely exercise unquestioned command of the situation.' " *Maryland v. Wilson,* 519 U.S. 408, 414, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997) (quoting ***331** *Michigan v. Summers,* 452 U.S. 692, 702–703, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981)); see *Brendlin,* 551 U.S., at 258, 127 S.Ct. 2400. Three decisions cumulatively portray *Terry*'s application in a traffic-stop setting: *Pennsylvania v. Mimms,* 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) *(per curiam); Maryland v. Wilson,* 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997); and *Brendlin v. California,* 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007).

In *Mimms,* the Court held that "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." 434 U.S., at 111, n. 6, 98 S.Ct. 330. The government's "legitimate and weighty" interest in officer safety, the Court said, outweighs the "*de minimis*" additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle. *Id.,* at 110–111, 98 S.Ct. 330. Citing *Terry* as controlling, the Court further held that a driver, once outside the stopped vehicle, may be patted down for weapons if the officer reasonably concludes that the driver "might be armed and presently dangerous." 434 U.S., at 112, 98 S.Ct. 330.

*Wilson* held that the *Mimms* rule applied to passengers as well as to drivers. Specifically, the Court instructed that "an officer making a traffic stop may order passengers to get out of the car pending completion of the stop." 519 U.S., at 415, 117 S.Ct. 882. "[T]he same weighty interest ****787** in officer safety," the Court observed, "is present regardless of whether

the occupant of the stopped car is a driver or passenger." *Id.,* at 413, 117 S.Ct. 882.

It is true, the Court acknowledged, that in a lawful traffic stop, "[t]here is probable cause to believe that the driver has committed a minor vehicular offense," but "there is no such reason to stop or detain the passengers." *Ibid.* On the other hand, the Court emphasized, the risk of a violent encounter in a traffic-stop setting "stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop." *Id.,* at 414, 117 S.Ct. 882. "[T]he motivation of a passenger to employ violence to prevent apprehension of such a crime," the Court stated, "is every bit as great as ***332** that of the driver." *Ibid.* Moreover, the Court noted, "as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle," *id.,* at 413–414, 117 S.Ct. 882, so "the additional intrusion on the passenger is minimal," *id.,* at 415, 117 S.Ct. 882.

Completing the picture, *Brendlin* held that a passenger is seized, just as the driver is, "from the moment [a car stopped by the police comes] to a halt on the side of the road." 551 U.S., at 263, 127 S.Ct. 2400. A passenger therefore has standing to challenge a stop's constitutionality. *Id.,* at 256–259, 127 S.Ct. 2400.

After *Wilson,* but before *Brendlin,* the Court had stated, in dictum, that officers who conduct "routine traffic stop[s]" may "perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous." *Knowles v. Iowa,* 525 U.S. 113, 117–118, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998). That forecast, we now confirm, accurately captures the combined thrust of the Court's decisions in *Mimms, Wilson,* and *Brendlin*.

B

The Arizona Court of Appeals recognized that, initially, Johnson was lawfully detained incident to the legitimate stop of the vehicle in which he was a passenger. See 217 Ariz., at 64, 170 P.3d, at 673. But, that court concluded, once Officer Trevizo undertook to question Johnson on a matter unrelated to the traffic stop, *i.e.,* Johnson's gang affiliation, patdown authority ceased to exist, absent reasonable suspicion that Johnson had engaged, or was about to engage, in criminal activity. See *id.,* at 65, 170 P.3d, at 674. In support of the Arizona court's portrayal of Trevizo's interrogation of Johnson as "consensual," Johnson emphasizes Trevizo's testimony at the suppression hearing. Responding to the prosecutor's questions, Trevizo affirmed her belief that Johnson could have "refused to get out of the car" and "to turn around for the pat down." App. 41.

It is not clear why the prosecutor, in opposing the suppression motion, sought to portray the episode as consensual. Cf. *Florida v. Bostick,* 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) (holding that police ***333** officers' search of a bus passenger's luggage can be based on consent). In any event, Trevizo also testified that she never advised Johnson he did not have to answer her questions or otherwise cooperate with her. See App. 45. And during cross-examination, Trevizo did not disagree when defense counsel asked "in fact, you weren't seeking [Johnson's] permission ...?" *Id.,* at 36. As the dissenting judge observed, "consensual" is an "unrealistic" characterization of the Trevizo–Johnson interaction. "[T]he encounter ... took place within minutes of the stop"; the patdown followed "within mere moments" of Johnson's exit from the vehicle; beyond ****788** genuine debate, the point at which Johnson could have felt free to leave had not yet occurred. See 217 Ariz., at 66, 170 P.3d, at 675.[1]

A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. See *Brendlin,* 551 U.S., at 258, 127 S.Ct. 2400. An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop. See *Muehler v. Mena,* 544 U.S. 93, 100–101, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005).

In sum, as stated in *Brendlin,* a traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will. See 551 U.S., at 257, 127 S.Ct. 2400. Nothing occurred in ***334** this case that would have conveyed to Johnson that, prior to the frisk, the traffic stop had ended or that he was otherwise free "to depart without police permission." *Ibid.* Officer Trevizo surely was not constitutionally required to give Johnson an opportunity to depart the scene after he exited the vehicle without first

  

ensuring that, in so doing, she was not permitting a dangerous person to get behind her.[2]

* * *

For the reasons stated, the judgment of the Arizona Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

**All Citations**

555 U.S. 323, 129 S.Ct. 781, 172 L.Ed.2d 694, 77 USLW 4096, 09 Cal. Daily Op. Serv. 975, 2009 Daily Journal D.A.R. 1168, 21 Fla. L. Weekly Fed. S 620

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The Court of Appeals majority did not assert that Johnson reasonably could have felt free to leave. Instead, the court said "a reasonable person in Johnson's position would have felt free to remain in the vehicle." 217 Ariz. 58, 64, 170 P.3d 667, 673 (2007). That position, however, appears at odds with our decision in *Maryland v. Wilson,* 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997). See *supra,* at 786 – 787.

2 The Arizona Court of Appeals assumed, "without deciding, that Trevizo had reasonable suspicion that Johnson was armed and dangerous." 217 Ariz., at 64, 170 P.3d, at 673. We do not foreclose the appeals court's consideration of that issue on remand.

127 S.Ct. 2400
Supreme Court of the United States

Bruce Edward BRENDLIN, Petitioner,

v.

CALIFORNIA.

No. 06–8120.
|
Argued April 23, 2007.
|
Decided June 18, 2007.

**Synopsis**

**Background:** Defendant entered a negotiated plea of guilty to manufacturing methamphetamine, after the Superior Court, Sutter County, No. CRF012703, Christopher R. Chandler, J., denied defendant's motion to suppress evidence found in the automobile in which he was riding following a traffic stop. The Court of Appeal reversed. The California Supreme Court, 38 Cal.4th 1107, 136 P.3d 845, 45 Cal.Rptr.3d 50, granted review and reversed, holding that defendant, as passenger, could not challenge traffic stop. Certiorari was granted.

The United States Supreme Court, Justice Souter, held that defendant, as passenger, was seized and was entitled to challenge stop, abrogating *People v. Jackson,* 39 P.3d 1174, and *State v. Mendez,* 137 Wash.2d 208, 970 P.2d 722.

Vacated and remanded.

****2401 *249** *Syllabus*[*]

After officers stopped a car to check its registration without reason to believe it was being operated unlawfully, one of them recognized petitioner Brendlin, a passenger in the car. Upon verifying that Brendlin was a parole violator, the officers formally arrested him and searched him, the driver, and the car, finding, among other things, methamphetamine paraphernalia. Charged with possession and manufacture of that substance, Brendlin moved to suppress the evidence obtained in searching his person and the car, arguing ****2402** that the officers lacked probable cause or reasonable suspicion to make the traffic stop, which was an unconstitutional seizure of his person. The trial court denied the motion, but the California Court of Appeal reversed, holding that Brendlin was seized by the traffic stop, which was unlawful. Reversing, the State Supreme Court held that suppression was unwarranted because a passenger is not seized as a constitutional matter absent additional circumstances that would indicate to a reasonable person that he was the subject of the officer's investigation or show of authority.

*Held:* When police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and so may challenge the stop's constitutionality. Pp. 2405 – 2410.

(a) A person is seized and thus entitled to challenge the government's action when officers, by physical force or a show of authority, terminate or restrain the person's freedom of movement through means intentionally applied. *Florida v. Bostick,* 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389; *Brower v. County of Inyo,* 489 U.S. 593, 597, 109 S.Ct. 1378, 103 L.Ed.2d 628. There is no seizure without that person's actual submission. See, *e.g., California v. Hodari D.,* 499 U.S. 621, 626, n. 2, 111 S.Ct. 1547, 113 L.Ed.2d 690. When police actions do not show an unambiguous intent to restrain or when an individual's submission takes the form of passive acquiescence, the test for telling when a seizure occurs is whether, in light of all the surrounding circumstances, a reasonable person would have believed he was not free to leave. *E.g., United States v. Mendenhall,* 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (principal opinion). But when a person "has no desire to leave" for reasons unrelated to the police presence, the "coercive effect of the encounter" can be measured better by asking whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Bostick, supra,* at 435–436, 111 S.Ct. 2382. Pp. 2405 – 2407.

***250** b) Brendlin was seized because no reasonable person in his position when the car was stopped would have believed himself free to "terminate the encounter" between the police and himself. *Bostick, supra,* at 436, 111 S.Ct. 2382. Any reasonable passenger would have understood the officers to be exercising control to the point that no one in the car was free to depart without police permission. A traffic stop necessarily curtails a passenger's travel 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. *United States v. Martinez–Fuerte,* 428 U.S. 543,

554, 96 S.Ct. 3074, 49 L.Ed.2d 1116. An officer who orders a 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 the 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 would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place. It is also reasonable for passengers to expect that an officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety. See, *e.g.*, ****2403** *Maryland v. Wilson,* 519 U.S. 408, 414–415, 117 S.Ct. 882, 137 L.Ed.2d 41. The Court's conclusion comports with the views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on the question. Pp. 2406 – 2408.

(c) The State Supreme Court's contrary conclusion reflects three premises with which this Court respectfully disagrees. First, the view that the police only intended to investigate the car's driver and did not direct a show of authority toward Brendlin impermissibly shifts the issue from the intent of the police as objectively manifested to the motive of the police for taking the intentional action to stop the car. Applying the objective *Mendenhall* test resolves any ambiguity by showing that a reasonable passenger would understand that he was subject to the police display of authority. Second, the state court's assumption that Brendlin, as the passenger, had no ability to submit to the police show of authority because only the driver was in control of the moving car is unavailing. Brendlin had no effective way to signal submission while the car was moving, but once it came to a stop he could, and apparently did, submit by staying inside. Third, there is no basis for the state court's fear that adopting the rule this Court applies would encompass even those motorists whose movement has been impeded due ***251** to the traffic stop of another car. An occupant of a car who knows he is stuck in traffic because another car has been pulled over by police would not perceive the show of authority as directed at him or his car. Pp. 2408 – 2410.

(d) The state courts are left to consider in the first instance whether suppression turns on any other issue. P. 2410.

38 Cal.4th 1107, 45 Cal.Rptr.3d 50, 136 P.3d 845, vacated and remanded.

SOUTER, J., delivered the opinion for a unanimous Court.

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**Opinion**

Justice SOUTER delivered the opinion of the Court.

When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. The question in this case is whether the same is true of a passenger. We hold that a passenger is seized as well and so may challenge the constitutionality of the stop.

***252** I

Early in the morning of November 27, 2001, Deputy Sheriff Robert Brokenbrough and his partner saw a parked Buick with expired registration tags. In his ensuing conversation with the police dispatcher, ****2404** Brokenbrough learned that an application for renewal of registration was being processed. The officers saw the car again on the road, and this time Brokenbrough noticed its display of a temporary operating permit with the number "11," indicating it was legal to drive the car through November. App. 115. The

officers decided to pull the Buick over to verify that the permit matched the vehicle, even though, as Brokenbrough admitted later, there was nothing unusual about the permit or the way it was affixed. Brokenbrough asked the driver, Karen Simeroth, for her license and saw a passenger in the front seat, petitioner Bruce Brendlin, whom he recognized as "one of the Brendlin brothers." *Id.,* at 65. He recalled that either Scott or Bruce Brendlin had dropped out of parole supervision and asked Brendlin to identify himself.[1] Brokenbrough returned to his cruiser, called for backup, and verified that Brendlin was a parole violator with an outstanding no-bail warrant for his arrest. While he was in the patrol car, Brokenbrough saw Brendlin briefly open and then close the passenger door of the Buick. Once reinforcements arrived, Brokenbrough went to the passenger side of the Buick, ordered him out of the car at gunpoint, and declared him under arrest. When the police searched Brendlin incident to arrest, they found an orange syringe cap on his person. A patdown search of Simeroth revealed syringes and a plastic bag of a green leafy substance, and she was also formally arrested. Officers then searched the car and found tubing, a scale, and other things used to produce methamphetamine.

***253** Brendlin was charged with possession and manufacture of methamphetamine, and he moved to suppress the evidence obtained in the searches of his person and the car as fruits of an unconstitutional seizure, arguing that the officers lacked probable cause or reasonable suspicion to make the traffic stop. He did not assert that his Fourth Amendment rights were violated by the search of Simeroth's vehicle, cf. *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), but claimed only that the traffic stop was an unlawful seizure of his person. The trial court denied the suppression motion after finding that the stop was lawful and Brendlin was not seized until Brokenbrough ordered him out of the car and formally arrested him. Brendlin pleaded guilty, subject to appeal on the suppression issue, and was sentenced to four years in prison.

The California Court of Appeal reversed the denial of the suppression motion, holding that Brendlin was seized by the traffic stop, which the court held unlawful. 8 Cal.Rptr.3d 882 (2004) (officially depublished). By a narrow majority, the Supreme Court of California reversed. The State Supreme Court noted California's concession that the officers had no reasonable basis to suspect unlawful operation of the car, 38 Cal.4th 1107, 1114, 45 Cal.Rptr.3d 50, 136 P.3d 845, 848 (2006),[2] but still held suppression unwarranted because a passenger "is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the ****2405** subject of the peace officer's investigation or show of authority," *id*., at 1111, 45 Cal.Rptr.3d 50, 136 P.3d, at 846. The court reasoned that Brendlin was not seized by the traffic stop because Simeroth was its exclusive target, *id*., at 1118, 45 Cal.Rptr.3d 50, 136 P.3d, at 851, that a passenger cannot submit to an officer's show of authority while the driver controls the car, ***254** *id*., at 1118–1119, 45 Cal.Rptr.3d 50, 136 P.3d, at 851–852, and that once a car has been pulled off the road, a passenger "would feel free to depart or otherwise to conduct his or her affairs as though the police were not present," *id*., at 1119, 45 Cal.Rptr.3d 50, 136 P.3d, at 852. In dissent, Justice Corrigan said that a traffic stop entails the seizure of a passenger even when the driver is the sole target of police investigation because a passenger is detained for the purpose of ensuring an officer's safety and would not feel free to leave the car without the officer's permission. *Id*., at 1125, 45 Cal.Rptr.3d 50, 136 P.3d, at 856.

We granted certiorari to decide whether a traffic stop subjects a passenger, as well as the driver, to Fourth Amendment seizure, 549 U.S. 1177, 127 S.Ct. 1145, 166 L.Ed.2d 910 (2007). We now vacate.

II

A

A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, " 'by means of physical force or show of authority,' " terminates or restrains his freedom of movement, *Florida v. Bostick,* 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) (quoting *Terry v. Ohio,* 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)), "*through means intentionally applied,*" *Brower v. County of Inyo,* 489 U.S. 593, 597, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) (emphasis in original). Thus, an "unintended person ... [may be] the object of the detention," so long as the detention is "willful" and not merely the consequence of "an unknowing act." *Id*., at 596, 109 S.Ct. 1378; cf. *County of Sacramento v. Lewis,* 523 U.S. 833, 844, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (no seizure where a police officer accidentally struck and killed a motorcycle passenger during a high-speed pursuit). A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure,

  

so far as the Fourth Amendment is concerned. See *California v. Hodari D.,* 499 U.S. 621, 626, n. 2, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991); *Lewis, supra,* at 844, 845, n. 7, 118 S.Ct. 1708.

***255** When the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not. The test was devised by Justice Stewart in *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), who wrote that a seizure occurs 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, 100 S.Ct. 1870 (principal opinion). Later on, the Court adopted Justice Stewart's touchstone, see, *e.g.*, *Hodari D., supra,* at 627, 111 S.Ct. 1547; *Michigan v. Chesternut,* 486 U.S. 567, 573, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988); *INS v. Delgado,* 466 U.S. 210, 215, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984), but added that when a person "has no desire to leave" for reasons unrelated to the police presence, the "coercive effect of the encounter" can be measured better by asking whether "a reasonable person would feel ****2406** free to decline the officers' requests or otherwise terminate the encounter," *Bostick, supra,* at 435–436, 111 S.Ct. 2382; see also *United States v. Drayton,* 536 U.S. 194, 202, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002).

The law is settled that in Fourth Amendment terms a traffic stop entails a seizure of the driver "even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse,* 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); see also *Whren v. United States,* 517 U.S. 806, 809–810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). And although we have not, until today, squarely answered the question whether a passenger is also seized, we have said over and over in dicta that during a traffic stop an officer seizes everyone in the vehicle, not just the driver. See, *e.g., Prouse, supra,* at 653, 99 S.Ct. 1391 ("[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth and Fourteenth] Amendments"); *Colorado v. Bannister,* 449 U.S. 1, 4, n. 3, 101 S.Ct. 42, 66 L.Ed.2d 1 (1980) *(per curiam)* ("There can be no question that the stopping of a vehicle and the detention of its occupants constitute a 'seizure' within the meaning of the Fourth Amendment"); ***256** *Berkemer v. McCarty,* 468 U.S. 420, 436–437, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) ("[W]e have long acknowledged that stopping an automobile and detaining its occupants constitute a seizure" (internal quotation marks omitted)); *United States v. Hensley,* 469 U.S. 221, 226, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) ( "[S]topping a car and detaining its occupants constitute a seizure"); *Whren, supra,* at 809–810, 116 S.Ct. 1769 ("Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]").

We have come closest to the question here in two cases dealing with unlawful seizure of a passenger, and neither time did we indicate any distinction between driver and passenger that would affect the Fourth Amendment analysis. *Delaware v. Prouse* considered grounds for stopping a car on the road and held that Prouse's suppression motion was properly granted. We spoke of the arresting officer's testimony that Prouse was in the back seat when the car was pulled over, see 440 U.S., at 650, n. 1, 99 S.Ct. 1391, described Prouse as an occupant, not as the driver, and referred to the car's "occupants" as being seized, *id.*, at 653, 99 S.Ct. 1391. Justification for stopping a car was the issue again in *Whren v. United States,* where we passed upon a Fourth Amendment challenge by two petitioners who moved to suppress drug evidence found during the course of a traffic stop. See 517 U.S., at 809, 116 S.Ct. 1769. Both driver and passenger claimed to have been seized illegally when the police stopped the car; we agreed and held suppression unwarranted only because the stop rested on probable cause. *Id.*, at 809–810, 819, 116 S.Ct. 1769.

B

The State concedes that the police had no adequate justification to pull the car over, see n. 2, *supra,* but argues that the passenger was not seized and thus cannot claim that the evidence was tainted by an unconstitutional stop. We resolve this question by asking whether a reasonable person ***257** in Brendlin's position when the car stopped would have believed himself free to "terminate the encounter" between the police and himself. *Bostick,* 501 U.S., at 436, 111 S.Ct. 2382. We think that in these circumstances any reasonable ****2407** passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.

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. *United States v. Martinez–Fuerte,* 428 U.S. 543, 554, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). 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. Cf. *Drayton, supra,* at 197–199, 203–204, 122 S.Ct. 2105 (finding no seizure when police officers boarded a stationary bus and asked passengers for permission to search for drugs).[3]

***258** It 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. In *Maryland v. Wilson,* 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), we held that during a lawful traffic stop an officer may order a passenger out of the car as a precautionary measure, without reasonable suspicion that the passenger poses a safety risk. *Id.*, at 414–415, 117 S.Ct. 882; cf. *Pennsylvania v. Mimms,* 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) *(per curiam)* (driver may be ordered out of the car as a matter of course). In fashioning this rule, we invoked our earlier statement that " '[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.' " *Wilson, supra,* at 414, 117 S.Ct. 882 (quoting *Michigan v. Summers,* 452 U.S. 692, 702–703, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981)). What we have said in these opinions probably reflects a societal expectation of " 'unquestioned [police] command' " at odds with any notion that a passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission. *Wilson, supra,* at 414, 117 S.Ct. 882.[4]

Our conclusion comports with the views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on ****2408** the question. See *United States v. Kimball,* 25 F.3d 1, 5 (C.A.1 1994); *United States v. Mosley,* 454 F.3d 249, 253 (C.A.3 2006); *United States v. Rusher,* 966 F.2d 868, 874, n. 4 (C.A.4 1992); *United States v. Grant,* 349 F.3d 192, 196 (C.A.5 2003); *United States v. Perez,* 440 F.3d 363, 369 (C.A.6 2006); *United States v. Powell,* 929 F.2d 1190, 1195 (C.A.7 1991); *United States v. Ameling,* 328 F.3d 443, 446–447, n. 3 (C.A.8 2003); ***259** *United States v. Twilley,* 222 F.3d 1092, 1095 C.A.9 2000); *United States v. Eylicio–Montoya,* 70 F.3d 1158, 1163–1164 (C.A.10 1995); *State v. Bowers,* 334 Ark. 447, 451–452, 976 S.W.2d 379, 381–382 (1998); *State v. Haworth,* 106 Idaho 405, 405–406, 679 P.2d 1123, 1123–1124 (1984); *People v. Bunch,* 207 Ill.2d 7, 13, 277 Ill.Dec. 658, 796 N.E.2d 1024, 1029 (2003); *State v. Eis,* 348 N.W.2d 224, 226 (Iowa 1984); *State v. Hodges,* 252 Kan. 989, 1002–1005, 851 P.2d 352, 361–362 (1993); *State v. Carter,* 69 Ohio St.3d 57, 63, 630 N.E.2d 355, 360 (1994) *(per curiam); State v. Harris,* 206 Wis.2d 243, 253–258, 557 N.W.2d 245, 249–251 (1996). And the treatise writers share this prevailing judicial view that a passenger may bring a Fourth Amendment challenge to the legality of a traffic stop. See, *e.g.,* 6 W. LaFave, Search and Seizure § 11.3(e), pp. 194, 195, and n. 277 (4th ed.2004 and Supp.2007) ("If either the stopping of the car, the length of the passenger's detention thereafter, or the passenger's removal from it are unreasonable in a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car which is their fruit" (footnote omitted)); 1 W. Ringel, Searches & Seizures, Arrests and Confessions § 11:20, p. 11–98 (2d ed. 2007) ("[A] law enforcement officer's stop of an automobile results in a seizure of both the driver and the passenger").[5]

C

The contrary conclusion drawn by the Supreme Court of California, that seizure came only with formal arrest, reflects three premises as to which we respectfully disagree. First, the State Supreme Court reasoned that Brendlin was not seized by the stop because Deputy Sheriff Brokenbrough only intended to investigate Simeroth and did not direct a ***260** show of authority toward Brendlin. The court saw Brokenbrough's "flashing lights [as] directed at the driver," and pointed to the lack of record evidence that Brokenbrough "was even aware [Brendlin] was in the car prior to the vehicle stop." 38 Cal.4th, at 1118, 45 Cal.Rptr.3d 50, 136 P.3d, at 851. But that view of the facts ignores the objective *Mendenhall* test of what a reasonable passenger would understand. To the extent that there is anything ambiguous in the show of force (was it fairly seen as directed only at the driver or at the car and its occupants?), the test resolves the ambiguity, and here it leads

  

to the intuitive conclusion that all the occupants were subject to like control by the successful display of authority. The State Supreme Court's approach, on the contrary, shifts the issue from the intent of the police as objectively manifested to the motive of the police for taking the intentional action to stop the car, and we have repeatedly rejected attempts to introduce this kind of subjectivity into Fourth Amendment analysis. See, *e.g., Whren,* 517 U.S., at 813, 116 S.Ct. 1769 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"); ****2409** *Chesternut,* 486 U.S., at 575, n. 7, 108 S.Ct. 1975 ("[T]he subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted"); *Mendenhall,* 446 U.S., at 554, n. 6, 100 S.Ct. 1870 (principal opinion) (disregarding a Government agent's subjective intent to detain Mendenhall); cf. *Rakas,* 439 U.S., at 132–135, 99 S.Ct. 421 (rejecting the "target theory" of Fourth Amendment standing, which would have allowed "any criminal defendant at whom a search was directed" to challenge the legality of the search (internal quotation marks omitted)).

California defends the State Supreme Court's ruling on this point by citing our cases holding that seizure requires a purposeful, deliberate act of detention. See Brief for Respondent 9–14. But *Chesternut, supra,* answers that argument. The intent that counts under the Fourth Amendment ***261** is the "intent [that] has been conveyed to the person confronted," *id*., at 575, n. 7, 108 S.Ct. 1975, and the criterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized. Our most recent cases are in accord on this point. In *Lewis,* 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043, we considered whether a seizure occurred when an officer accidentally ran over a passenger who had fallen off a motorcycle during a high-speed chase, and in holding that no seizure took place, we stressed that the officer stopped Lewis's movement by accidentally crashing into him, not "through means intentionally applied." *Id*., at 844, 118 S.Ct. 1708 (emphasis deleted; internal quotation marks omitted). We did not even consider, let alone emphasize, the possibility that the officer had meant to detain the driver only and not the passenger. Nor is *Brower,* 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628, to the contrary, where it was dispositive that "Brower was meant to be stopped by the physical obstacle of the roadblock—and that he was so stopped." *Id*., at 599, 109 S.Ct. 1378. California reads this language to suggest that for a specific occupant of the car to be seized he must be the motivating target of an officer's show of authority, see Brief for Respondent 12, as if the thrust of our observation were that Brower, and not someone else, was "meant to be stopped." But our point was not that Brower alone was the target but that officers detained him "through means intentionally applied"; if the car had had another occupant, it would have made sense to hold that he too had been seized when the car collided with the roadblock. Neither case, then, is at odds with our holding that the issue is whether a reasonable passenger would have perceived that the show of authority was at least partly directed at him, and that he was thus not free to ignore the police presence and go about his business.

Second, the Supreme Court of California assumed that Brendlin, "as the passenger, had no ability to submit to the deputy's show of authority" because only the driver was in control of the moving vehicle. ***262** 38 Cal.4th, at 1118, 1119, 45 Cal.Rptr.3d 50, 136 P.3d, at 852. But what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away. Here, Brendlin had no effective way to signal submission while the car was still moving on the roadway, but once it came to a stop he could, and apparently did, submit by staying inside.

Third, the State Supreme Court shied away from the rule we apply today for fear that it "would encompass even those motorists following the vehicle subject to the traffic stop who, by virtue of the original detention, are forced to slow down and perhaps even come to a halt in order to accommodate that vehicle's submission to police authority." ****2410** *Id.,* at 1120, 45 Cal.Rptr.3d 50, 136 P.3d, at 853. But an occupant of a car who knows that he is stuck in traffic because another car has been pulled over (like the motorist who cannot even make out why the road is suddenly clogged) would not perceive a show of authority as directed at him or his car. Such incidental restrictions on freedom of movement would not tend to affect an individual's "sense of security and privacy in traveling in an automobile." *Prouse,* 440 U.S., at 662, 99 S.Ct. 1391. Nor would the consequential blockage call for a precautionary rule to avoid the kind of "arbitrary and oppressive interference by [law] enforcement officials with the privacy and personal security of individuals" that the Fourth Amendment was intended to limit. *Martinez–Fuerte,* 428 U.S., at 554, 96 S.Ct. 3074.[6]

***263** Indeed, the consequence to worry about would not flow from our conclusion, but from the rule that almost all courts have rejected. Holding that the passenger in a

  

private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal.[7] The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passengers would be a powerful incentive to run the kind of "roving patrols" that would still violate the driver's Fourth Amendment right. See, *e.g., Almeida–Sanchez v. United States,* 413 U.S. 266, 273, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973) (stop and search by Border Patrol agents without a warrant or probable cause violated the Fourth Amendment); *Prouse, supra,* at 663, 99 S.Ct. 1391 (police spot check of driver's license and registration without reasonable suspicion violated the Fourth Amendment).

Brendlin was seized from the moment Simeroth's car came to a halt on the side of the road, and it was error to deny his suppression motion on the ground that seizure occurred only at the formal arrest. It will be for the state courts to consider in the first instance whether suppression turns on any other issue. The judgment of the Supreme Court of California is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

**All Citations**

551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132, 75 USLW 4444, 07 Cal. Daily Op. Serv. 6928, 2007 Daily Journal D.A.R. 8896, 20 Fla. L. Weekly Fed. S 365

* * *

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The parties dispute the accuracy of the transcript of the suppression hearing and disagree as to whether Brendlin gave his name or the false name "Bruce Brown." App. 115.

2 California conceded that the police officers lacked reasonable suspicion to justify the traffic stop because a " 'vehicle with an application for renewal of expired registration would be expected to have a temporary operating permit.' " 38 Cal.4th, at 1114, 45 Cal.Rptr.3d 50, 136 P.3d, at 848 (quoting Brief for Respondent California in No. S123133 (Sup.Ct.Cal.), p. 24).

3 Of course, police may also stop a car solely to investigate a passenger's conduct. See, *e.g.*, *United States v. Rodriguez–Diaz,* 161 F.Supp.2d 627, 629, n. 1 (D.Md.2001) (passenger's violation of local seatbelt law); *People v. Roth,* 85 P.3d 571, 573 (Colo.App.2003) (passenger's violation of littering ordinance). Accordingly, a passenger cannot assume, merely from the fact of a traffic stop, that the driver's conduct is the cause of the stop.

4 Although the State Supreme Court inferred from Brendlin's decision to open and close the passenger door during the traffic stop that he was "awar[e] of the available options," 38 Cal.4th 1107, 1120, 45 Cal.Rptr.3d 50, 136 P.3d 845, 852 (2006), this conduct could equally be taken to indicate that Brendlin felt compelled to remain inside the car. In any event, the test is not what Brendlin felt but what a reasonable passenger would have understood.

5 Only two State Supreme Courts, other than California's, have stood against this tide of authority. See *People v. Jackson,* 39 P.3d 1174, 1184–1186 (Colo.2002) (en banc); *State v. Mendez,* 137 Wash.2d 208, 222–223, 970 P.2d 722, 729 (1999).

6 California claims that, under today's rule, "all taxi cab and bus passengers would be 'seized' under the Fourth Amendment when the cab or bus driver is pulled over by the police for running a red light." Brief for Respondent 23. But the relationship between driver and passenger is not the same in a common carrier as it is in a private vehicle, and the expectations of police officers and passengers differ accordingly. In those cases, as here, the crucial question would be whether a reasonable person in the passenger's position would feel free to take steps to terminate the encounter.

  

7 Compare *Delaware v. Prouse,* 440 U.S. 648, 663, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (requiring "at least articulable and reasonable suspicion" to support random, investigative traffic stops), and *United States v. Brignoni–Ponce,* 422 U.S. 873, 880–884, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (same), with *Whren v. United States,* 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) ("[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred"), and *Atwater v. Lago Vista,* 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001) ("If 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").

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93 S.Ct. 2523
Supreme Court of the United States

Elmer O. CADY, Warden, Petitioner,

v.

Chester J. DOMBROWSKI.

No. 72—586.
|
Argued March 21, 1973.
|
Decided June 21, 1973.

**Synopsis**

Petition for writ of habeas corpus. The District Court, 319 F.Supp. 530, denied the petition, and the Court of Appeals for the Seventh Circuit, 471 F.2d 280, reversed, and certiorari was granted. The Supreme Court, opinion of the Court by Mr. Justice Rehnquist, announced by Mr. Justice Blackmun, held that where accused's vehicle was disabled as result of accident and constituted a nuisance along highway and accused, being intoxicated and later comatose, could not make arrangements to have the vehicle towed and stored and at direction of police and for elemental reasons of safety automobile was towed to private garage, search of trunk pursuant to standard procedure of that police department to retrieve revolver which officer reasonably believed to be contained therein was not unreasonable within meaning of Fourth and Fourteenth Amendments solely because a warrant had not been obtained, and further held that where search warrant was validly issued and police were authorized to search automobile and seizures of sock and floor mat occurred while the valid warrant was outstanding, it was not constitutionally significant that they were not listed in the return of the warrant.

Reversed.

Mr. Justice Brennan, with whom Mr. Justice Douglas, Mr. Justice Stewart and Mr. Justice Marshall joined, filed dissenting opinion.

****2524** ***433** Syllabus*

Respondent had a one-car accident near a small Wisconsin town, while driving a rented Ford. The police had the car towed to a garage seven miles from the police station, where it was left unguarded outside. Respondent was arrested for drunken driving. Early the next day, an officer, looking for a service revolver which respondent (who had identified himself as a Chicago policeman) was thought to possess, made a warrantless search of the car and found in the trunk several items, some bloodied, which he removed. Later, on receipt of additional information emanating from respondent, a blood-stained body was located on respondent's brother's farm in a nearby county. Thereafter, through the windows of a disabled Dodge which respondent had left on the farm before renting the Ford, an officer observed other bloodied items. Following issuance of a search warrant, materials were taken from the Dodge, two of which (a sock and floor mat) were not listed in the return on the warrant among the items seized. Respondent's trial for murder, at which items seized from the cars were introduced in evidence, resulted in conviction which was upheld on appeal. In this habeas corpus action, the Court of Appeals reversed the District Court and held that certain evidence at the trial had been unconstitutionally seized. Held:

1. The warrantless search of the Ford did not violate the Fourth Amendment as made applicable to the States by the Fourteenth. The search was not unreasonable since the police had exercised a form of custody of the car, which constituted a hazard on the highway, and the disposition of which by respondent was precluded by his intoxicated and later comatose condition; and the revolver search was standard police procedure to protect the public from a weapon's possibly falling into improper hands. Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777, distinguished; Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067, followed. Pp. 2527—2531.

2. The seizure of the sock and floor mat from the Dodge was not invalid, since the Dodge, the item "particularly described," was the subject of a proper search warrant. It is not constitutionally significant that the sock and mat were not listed in the warrant's return, which (contrary to the assumption of the Court of Appeals) was not filed prior to the search, and the warrant was thus validly outstanding at the time the articles were discovered. Pp. 2531—2532.

471 F.2d 280, reversed.

**Attorneys and Law Firms**

***434** LeRoy L. Dalton, Madison, Wis., for petitioner.

William J. Mulligan, Milwaukee, Wis., for respondent.

  

**Opinion**

Opinion of the Court by Mr. Justice REHNQUIST, announced by Mr. Justice BLACKMUN.

Respondent Chester J. Dombrowski was convicted in a Wisconsin state court of first-degree murder of Herbert McKinney and sentenced to life imprisonment. The conviction was upheld on appeal, State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969), the Wisconsin Supreme Court rejecting respondent's contention that certain evidence ****2525** admitted at the trial had been unconstitutionally seized. Respondent then filed a petition for a writ of habeas corpus in federal district court, asserting the same constitutional claim. The District Court denied the petition but the United States Court of Appeals for the Seventh Circuit reversed, holding that one of the searches was unconstitutional under Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), and the other unconstitutional ***435** for unrelated reasons. 471 F.2d 280 (1972). We granted certiorari, 409 U.S. 1059, 93 S.Ct. 556, 34 L.Ed.2d 510 (1972).

I

On September 9, 1969, respondent was a member of the Chicago, Illinois, police force and either owned or possessed a 1960 Dodge automobile. That day he drove from Chicago to West Bend, Wisconsin, the county seat of Washington County, located some hundred-odd miles northwest of Chicago. He was identified as having been in two taverns in the small town of Kewaskum, Wisconsin, seven miles north of West Bend, during the late evening of September 9 and the early morning of September 10. At some time before noon on the 10th, respondent's automobile became disabled, and he had it towed to a farm owned by his brother in Fond du Lac County, which adjoins Washington County on the north. He then drove back to Chicago early that afternoon with his brother in the latter's car.

Just before midnight of the same day, respondent rented a maroon 1967 Ford Thunderbird at O'Hare Field outside of Chicago, and apparently drove back to Wisconsin early the next morning. A tenant on his brother's farm saw a car answering the description of the rented car pull alongside the disabled 1960 Dodge at approximately 4 a.m. At approximately 9:30 a.m. on September 11, respondent purchased two towels, one right brown and the other blue, from a department store in Kewaskum.

From 7 to 10:15 p.m. of the 11th, respondent was in a steak house or tavern in West Bend. He ate dinner and also drank, apparently quite heavily. He left the tavern and drove the 1967 Thunderbird in a direction away from West Bend toward his brother's farm. On the way, respondent had an accident, with the Thunderbird breaking through a guard rail and crashing into a ***436** bridge abutment. A passing motorist drove him into Kewaskum, and, after being let off in Kewaskum, respondent telephoned the police. Two police officers picked him up at a tavern and drove to the scene of the accident. On the way, the officers noticed that respondent appeared to be drunk; he offered three conflicting versions of how the accident occurred.

At the scene, the police observed the 1967 Thunderbird and took various measurements relevant to the accident. Respondent was, in the opinion of the officers, drunk. He had informed them that he was a Chicago police officer. The Wisconsin policemen believed that Chicago police officers were required by regulation to carry their service revolvers at all times. After calling a tow-truck to remove the disabled Thunderbird, and not finding the revolver on respondent's person, one of the officers looked into the front seat and glove compartment of that car for respondent's service revolver. No revolver was found. The wrecker arrived and the Thunderbird was towed to a privately owned garage in Kewaskum, approximately seven miles from the West Bend police station. It was left outside by the wrecker, and no police guard was posted. At 11:33 p.m. on the 11th respondent was taken directly to the West Bend police station from the accident scene, and, after being interviewed by an assistant district attorney, to whom respondent again stated he was a Chicago policeman, respondent was formally arrested for drunken driving. Respondent was "in a drunken condition" and "incoherent at times." Because of his injuries sustained in the accident, the same two officers took respondent to a local hospital. He lapsed into an unexplained ****2526** coma, and a doctor, fearing the possibility of complications, had respondent hospitalized overnight for observation. One of the policemen remained at the hospital as a guard, and the other, Officer Weiss, drove at some time after ***437** 2 a.m. on the 12th to the garage to which the 1967 Thunderbird had been towed after the accident.

The purpose of going to the Thunderbird, as developed on the motion to suppress, was to look for respondent's service revolver. Weiss testified that respondent did not have a revolver when he was arrested, and that the West Bend authorities were under the impression that Chicago police

  

officers were required to carry their service revolvers at all times. He stated that the effort to find the revolver was "standard procedure in our department."

Weiss opened the door of the Thunderbird and found, on the floor of the car, a book of Chicago police regulations and, between the two front seats, a flashlight which appeared to have "a few spots of blood on it." He then opened the trunk of the car, which had been locked, and saw various items covered with what was later determined to be type O blood. These included a pair of police uniform trousers, a pair of gray trousers, a nightstick with the name "Dombrowski" stamped on it, a raincoat, a portion of a car floor mat, and a towel. The blood on the car mat was moist. The officer removed these items to the police station.

When, later that day, respondent was confronted with the condition of the items discovered in the trunk, he requested the presence of counsel before making any statement. After conferring with respondent, a lawyer told the police that respondent "authorized me to state he believed there was a body lying near the family prinic area at the north end of his brother's farm."

Fond du Lac County police went to the farm and found, in a dump, the body of a male, later identified as the decedent McKinney, clad only in a sportshirt. The deceased's head was bloody; a white sock was found near the body. In observing the area, one officer looked through the window of the disabled 1960 Dodge, located ***438** not far from where the body was found, and saw a pillowcase, backseat, and briefcase covered with blood. Police officials obtained, on the evening of the 12th, returnable within 48 hours, warrants to search the 1960 Dodge and the 1967 Thunderbird, as well as orders to impound both automobiles. The 1960 Dodge was examined at the farm on the 12th and then towed to the police garage where it was held as evidence. On the 13th, criminologists came from the Wisconsin Crime Laboratory in Madison and searched the Dodge; they seized the back and front seats, a white sock covered with blood, a part of a bloody rear floor mat, a briefcase, and a front floor mat. A return of the search warrant was filed in the county court on the 14th, but it did not recite that the sock and floor mat had been seized. At a hearing held on the 14th, the sheriff who executed the warrant did not specifically state that these two items had been seized.

At the trial, the State introduced testimony tending to establish that the deceased was first hit over the head and then shot with a .38-caliber gun, dying approximately an hour after the gunshot wound was inflicted; that death occurred at approximately 7 a.m. on the 11th, with a six-hour margin of error either way; that respondent owned two .38-caliber guns; that respondent had type A blood; that the deceased had type O blood and that the bloodstains found in the 1960 Dodge and on the items found in the two cars were type O.

The prosecution introduced the nightstick discovered in the 1967 Thunderbird, and testimony that it had traces of type O blood on it; the portion of the floor mat found in the 1967 car, with testimony that it matched the portion of the floor mat found in the 1960 Dodge; the bloody towel found in the 1967 car, with ****2527** testimony that it was identical to one of the towels purchased by respondent on the 11th; the police uniform trousers; and the sock ***439** found in the 1960 Dodge, testimony that it was identical in composition and stitching to that found near the body of the deceased.

The State's case was based wholly on circumstantial evidence. The Supreme Court of Wisconsin, in reviewing the conviction on direct appeal, stated that "even though the evidence that led to his conviction was circumstantial, we have seldom seen a stronger collection of such evidence assembled and presented by the prosecution." State v. Dombrowski, 44 Wis.2d, at 507, 171 N.W.2d, at 360.

II

The Fourth Amendment provides:
"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 Warrants 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."

The ultimate standard set forth in the Fourth Amendment is reasonableness. In construing this command, there has been general agreement that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." (Camara v. Municipal Court, 387 U.S. 523, 528—529, 87 S.Ct. 1727, 1731, 18 L.Ed.2d 930 (1967). See Coolidge v. New Hampshire, 403 U.S. 443, 454—455, 91 S.Ct. 2022, 2031, 29 L.Ed.2d 564 (1971). One class of cases which constitutes at least a partial exception to this general rule is automobile searches. Although vehicles are "effects" within the meaning of the Fourth Amendment, "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars." Chambers v. Maroney,

399 U.S. 42, 52, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970). See ***440** Carroll v. United States, 267 U.S. 132, 153—154, 45 S.Ct. 280, 69 L.Ed. 543 (1925). In Cooper v. California, 386 U.S. 58, 59, 87 S.Ct. 788, 790, 17 L.Ed.2d 730 (1967), the identical proposition was stated in different language:
"We made it clear in Preston (Preston v. United States) that whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case and pointed out, in particular, that searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece of property. 376 U.S., at 366—367, 84 S.Ct., at 882—883."

While these general principles are easily stated, the decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web.

Since this Court's decision in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), which overruled Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), and held that the provisions of the Fourth Amendment were applicable to the States through the Due Process Clause of the Fourteenth Amendment, the application of Fourth Amendment standards, originally intended to restrict only the Federal Government, to the States presents some difficulty when searches of automobiles are involved. The contact with vehicles by federal law enforcement officers usually, if not always, involves the detection or investigation of crimes unrelated to the operation of a vehicle. Cases such as Carroll v. United States, supra, and Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949), illustrate the typical situations in which federal officials come into contact with and ****2528** search vehicles. In both cases members of a special federal unit charged with enforcing a particular federal criminal ***441** statute stopped and searched a vehicle when they had probable cause to believe that the operator was violating that statute.

As a result of our federal system of government, however, state and local police officers, unlike federal officers, have much more contact with vehicles for reasons related to the operation of vehicles themselves. All States require vehicles to be registered and operators to be licensed. States and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways.

Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Although the original justification advanced for treating automobiles differently from houses, insofar as warrantless searches of automobiles by federal officers was concerned, was the vagrant and mobile nature of the former, Carroll v. United States, supra; Brinegar v. United States, supra; cf. Coolidge v. New Hampshire, supra; Chambers v. Maroney, supra, warrantless searches of vehicles by state officers have been sustained in cases in which the possibilities of the vehicle's being removed ***442** or evidence in it destroyed were remote, if not nonexistent. See Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968) (District of Columbia police); Cooper v. California, supra. The constitutional difference between searches of and seizures from houses and similar structures and from vehicles stems both from the ambulatory character of the latter and from the fact that extensive, and often noncriminal contact with automobiles will bring local officials in "plain view" of evidence, fruits, or instrumentalities of a crime, or contraband. Cf. United States v. Biswell, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972).

Here we must decide whether a "search"[*] of the trunk of the 1967 Ford ****2529** was unreasonable solely because the local officer had not previously obtained a warrant. And, if that be answered in the negative, we must then determine whether the warrantless search was unreasonable within the meaning of the Fourth and Fourteenth Amendments. In answering these questions, two factual considerations deserve emphasis. First, the police had exercised ***443** a form of custody or control over the 1967 Thunderbird. Respondent's vehicle was disabled as a result of the accident, and constituted a nuisance along the highway. Respondent,

  

being intoxicated (and later comatose), could not make arrangements to have the vehicle towed and stored. At the direction of the police, and for elemental reasons of safety, the automobile was towed to a private garage. Second, both the state courts and the District Court found as a fact that the search of the trunk to retrieve the revolver was "standard procedure in (that police) department," to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands. Although the trunk was locked, the car was left outside, in a lot seven miles from the police station to which respondent had been taken, and no guard was posted over it. For reasons not apparent from the opinion of the Court of Appeals, that court concluded that as "no further evidence was needed to sustain" the drunk-driving charge, "(t)he search must therefore have been for incriminating evidence of other offenses." 471 F.2d, at 283. While that court was obligated to exercise its incependent judgment on the underlying constitutional issue presented by the facts of this case, it was not free on this record to disregard these findings of fact. Particularly in nonmetropolitan jurisdictions such as those involved here, enforcement of the traffic laws and supervision of vehicle traffic may be a large part of a police officer's job. We believe that the Court of Appeals should have accepted, as did the state courts and the District Court, the findings with respect to Officer Weiss' specific motivation and the fact that the procedure he followed was "standard."

The Court of Appeals relied, and respondent now relies, primarily on ***444** Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), to conclude that the warrantless search was unconstitutional and the seized items inadmissible. In that case, the police received a telephone call at 3 a.m. from a caller who stated that "three suspicious men acting suspiciously" had been in a car in the business district of Newport, Kentucky, for five hours; four policemen investigated and, after receiving evasive explanations and learning that the suspects were unemployed and apparantly indigent, arrested the three for vagrancy. The automobile was cursorily searched, then towed to a police station and ultimately to a garage, where it was searched after the three men had been booked. That search revealed two revolvers in the glove compartment; a subsequent search of the trunk resulted in the seizure of various items later admitted in a prosecution for conspiracy to rob a federally insured bank. In that case the respondent attempted to justify the warrantless search of the trunk and seizure of the items therein "as incidental to a lawful arrest." Id., at 367, 84 S.Ct., at 883. The Court rejected the asserted "search incident" justification for the warrantless search in the following terms:

"But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." Ibid.

It would be possible to interpret Preston broadly, and to argue that it stands for the proposition that on those facts there could have been no constitutional justification advanced for the search. But we take the opinion as written, and hold that it stands only for the proposition that the search challenged there could not be justified as one incident to an arrest. ****2530** See Chambers v. Maroney, supra; Cooper v. California, supra. We believe that the instant case in controlled by principles ***445** that may be extrapolated from Harris v. United States, supra, and Cooper v. California, supra.

In Harris, petitioner was arrested for robbery. As petitioner's car had been identified leaving the site of the robbery, it was impounded as evidence. A regulation of the District of Columbia Police Department required that an impounded vehicle be searched, that all valuables be removed, and that a tag detailing certain information be placed on the vehicle. In compliance with this regulation, and without a warrant, an officer searched the car and, while opening one of the doors, spotted an automobile registration card, belonging to the victim, lying face up on the metal door stripping. This item was introduced into evidence at petitioner's trial for robbery. In rejecting the contention that the evidence was inadmissible, the Court stated:
"The admissibility of evidence found as a result of a search under the police regulation is not presented by this case. The precise and detailed findings of the District Court, accepted by the Court of Appeals, were to the effect that the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances.

"Once the door had lawfully been opened, the registration card . . . was plainly visible. It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." 390 U.S., at 236, 88 S.Ct., at 993.

In Cooper, the petitioner was arrested for selling heroin, and his car impounded pending forfeiture proceedings. A week later, a police officer searched the car ***446** and found, in the glove compartment, incriminating evidence subsequently

  

admitted at petitioner's trial. This Court upheld the validity of the warrantless search and seizure with the following language:

"This case is not Preston, nor is it controlled by it. Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car—whether the State had 'legal title' to it or not—was closely related to his reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained. The forfeiture of petitioner's car did not take place until over four months after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it." 386 U.S., at 61—62, 87 S.Ct., at 791.

These decisions, while not on all fours with the instant case, lead us to conclude that the intrusion into the trunk of the 1967 Thunderbird at the garage was not unreasonable within the meaning of the Fourth and Fourteenth Amendments solely because a warrant had not been obtained by Officer Weiss after he left the hospital. The police did not have actual, physical custody of the vehicle as in Harris and Cooper, but the vehicle had been towed there at the officers' directions. These officers in a rural area were simply reacting to the effect of an accident—one of the recurring practical situations that results from the operation of motor vehicles and with which local police officers must deal every day. The Thunderbird was not parked adjacent ***447** to the dwelling place of the owner as in ****2531** Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), nor simply momentarily unoccupied on a street. Rather, like an obviously abandoned vehicle, it represented a nuisance, and is no suggestion in the record that the officers' action in exercising control over it by having it towed away was unwarranted either in terms of state law or sound police procedure.

In Harris the justification for the initial intrusion into the vehicle was to safeguard the owner's property, and in Cooper it was to guarantee the safety of the custodians. Here the the justification, while different, was as immediate and constitutionally reasonable as those in Harris and Cooper: concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle. The record contains uncontradicted testimony to support the findings of the state courts and District Court. Furthermore, although there is no record basis for discrediting such testimony, it was corroborated by the circumstantial fact that at the time the search was conducted Officer Weiss was ignorant of the fact that a murder, or any other crime, had been committed. While perhaps in a metropolitan area the responsibility to the general public might have been discharged by the posting of a police guard during the night, what might be normal police procedure in such an area may be neither normal nor possible in Kewaskum, Wisconsin. The fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable. Cf. Chambers v. Maroney, supra.

The Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking "search" conducted here of a vehicle that was neither in the custody nor on ***448** the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained. The Framers of the Fourth Amendment have given us only the general standard of "unreasonableness" as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required. Very little that has been said in our previous decisions, see Cooper v. California, supra; Harris v. United States, supra; Chambers v. Maroney, supra, and very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this. Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments.

III

The Wisconsin Supreme Court ruled that the sock and the portion of the floor mat were validly seized from the 1960 Dodge. The Fond du Lac county officer who looked through the window of the Dodge after McKinney's body had been found saw the bloody seat and briefcase, but not the sock or floor mat. Consequently, these two items were not listed in the application for the warrant, but the Dodge was the item "particularly described" to be searched in the warrant. The warrant was validly issued and the police were authorized to search the car. The reasoning of the Wisconsin Supreme Court was that although these items were not listed to be

  

seized in the warrant, the warrant was valid and in executing it the officers discovered the sock and mat in plain view and therefore could constitutionally seize them without a warrant.

***449** The Court of Appeals held that the seizure of the two items on September 13 could not be justified under the plain-view doctrine. The reasoning of that court hinged on its understanding that the warrant to search the Dodge had been returned and was functus officio by the time Officer Mauer of the ****2532** Crime Laboratory came upon the sock and the floor mat. The court stated:

"There was no continuing authority under the warrant issued the previous night (the 12th). First, these items were not described in the warrant and presumably were not observed that night (the 12th). Second, when the warrant was returned —before Mauer came on the scene—it was functus officio. A 'new ball game,' so to speak, began when Mauer made his 'inspection.' " 471 F.2d, at 286.

The record is so indisputably clear that the return of the warrant was filed on the 14th, not sometime prior to Mauer's search on the 13th, that we are somewhat at a loss to understand how the Court of Appeals arrived at its factual conclusion. The warrant to search the Dodge was issued on the 12th, and, although a return of the warrant was prepared by a Fond du Lac County officer at some time on the 13th (whether before or after Mauer's search is impossible to determine), it was not filed in the state court until the 14th, at which time a hearing was held. The seizures of the sock and the floor mat occurred while a valid warrant was outstanding, and thus could not be considered unconstitutional under the theory advanced below. As these items were constitutionally seized, we do not deem it constitutionally significant that they were not listed in the return of the warrant. The ramification of that "defect," if such it was, is purely a question of state law.

We therefore need not reach the question of whether the seizure of the two items from the Dodge would have ***450** been valid because the entire car had been validly seized as evidence and impounded pursuant to a valid warrant, cf. Harris v. United States, supra; Cooper v. California, supra, or whether a search of the back seat of this car, located as it was in an open field, required a search warrant at all. See Hester v. United States, 265 U.S. 57, 59, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924).

The judgment of the Court of Appeals is reversed.

Judgment reversed.

Mr Justice BRENNAN, with whom Mr. Justice DOUGLAS, Mr. Justice STEWART, and Mr. Justice MARSHALL join, dissenting.

In upholding the warrantless search of respondent's rented Thunderbird, the Court purports merely to rely on our prior decisions dealing with automobile searches. It is clear to me, however, that nothing in our prior decisions supports either the reasoning or the result of the Court's decision today. I therefore dissent and would hold the search of the Thunderbird unconstitutional under the Fourth and Fourteenth Amendments.

The relevant facts are these. Respondent, an off-duty Chicago policeman, was arrested by police on a charge of drunken driving following a one-car automobile accident in which respondent severely damaged his rented 1967 Thunderbird. The car was towed from the scene of the accident to a private garage and, some two and one-half hours later, one of the arresting officers drove to the garage and, without a search warrant or respondent's consent, conducted a thorough search of the car for the alleged purpose of finding respondent's service revolver which was not on respondent's person and had not been found during an initial search of the car at the scene of the accident. In the trunk of the car, the officer found and seized numerous items that eventually linked respondent to the death of one Herbert McKinney and ***451** ultimately contributed to respondent's conviction for murder.

The Court begins its analysis by recognizing, as clearly it must, that the Fourth Amendment's prohibition against 'unreasonable searches and seizures' is shaped by the warrant clause, and thus that a warrantless search of private property is per se "unreasonable" under the Fourth Amendment unless within ****2533** one of the few specifically established and well-delineated exceptions. Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973); Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967); Camara v. Municipal Court, 387 U.S. 523, 528—529, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967). At the same time, the Court also recognizes that one of the established exceptions to the warrant requirement is the search of an automobile on the highway where there is probable cause to support the search and "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." Carroll v. United States, 267 U.S. 132, 153, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925). See also Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct.

  

2022, 29 L.Ed.2d 564 (1971); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed.2d 538 (1968). But the search of the Thunderbird plainly cannot be sustained under the "automobile exception," for our prior decisions make it clear that where, as in this case, there is no reasonable likelihood that the automobile would or could be moved, the "automobile exception" is simply irrelevant. Coolidge v. New Hampshire, supra, 403 U.S. at 461, 91 S.Ct. at 2035; Carroll v. United States, supra, 267 U.S. at 156, 45 S.Ct. at 286.

Another established exception to the warrant requirement is a search incident to a valid arrest. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). But the search of the Thunderbird cannot be sustained under this exception, because even assuming that such a search would have been within the permissible scope of a search incident to ***452** an arrest for drunken driving, it is clear that under Preston v. United States, 376 U.S. 364, 368, 84 S.Ct. 881, 883, 11 L.Ed.2d 777 (1964), "the search was too remote in time or place to have been made as incidental to the arrest."

A third exception to the warrant requirement is the seizure of evidence in "plain view." Thus, in Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968), we upheld the seizure of an automobile registration card that fell within plain view of a police officer as he opened the door of an impounded automobile to roll up the window. But, as we cautioned in Coolidge, supra, 403 U.S. at 466, 91 S.Ct. at 2038, '(w)hat the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused.' In Harris, the prior justification for the intrusion by the police was to roll up the windows and lock the doors 'to protect the car while it was in police custody.' 390 U.S., at 236, 88 S.Ct. at 993. '(T)he discovery of the card was not the result of a search,' we said, and 'in these narrow circumstances' the 'plain view' exception to the warrant requirement was fully applicable. In the present case, however, the sole purpose for the initial intrusion into the vehicle was to search for the gun. Thus, the seizure of the evidence from the trunk of the car can be sustained under the 'plain view' doctrine only if the search for the gun was itself constitutional. Reliance on the 'plain view' doctrine in this case is therefore misplaced since the antecedent search cannot be sustained.

Another exception to the warrant requirement is that which sustains a search in connection with the seizure of an automobile for purposes of forfeiture proceedings. In Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967), the Court upheld the warrantless search of an automobile after it had been lawfully impounded pursuant to a California statute mandating the seizure and forfeiture of any ***453** vehicle used to facilitate the possession or transportation of narcotics. There, however, the police ****2534** were authorized to treat the car in their custody as if it were their own, and the search was sustainable as an integral part of their right of retention. This case, of course, is poles away from Cooper. The Thunderbird was not subject to forfeiture proceedings. On the contrary, ownership of the car remained exclusively in respondent's lessor and the sole reason that the police took even temporary possession of the car was to remove it from the highway until respondent could claim it.

Clearly, therefore, the Court's decision today finds no support in any of the established exceptions. The police knew what they were looking for and had ample opportunity to obtain a warrant. Under those circumstances, our prior decisions make it clear that the Fourth Amendment required the police to obtain a warrant prior to the search. Carroll v. United States, supra, 267 U.S., at 156, 45 S.Ct., at 286. Thus, despite the Court's asserted adherence to the principles of our prior decisions, in fact the decision rests on a subjective view of what is deemed acceptable in the way of investigative functions performed by rural police officers. But the applicability of the Fourth Amendment cannot turn on fine-line distinctions between criminal and investigative functions. On the contrary, "(i)t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior," Camara v. Municipal Court, supra, 387 U.S., at 530, 87 S.Ct., at 1732, for "(t)he basic purpose of (the Fourth) Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Id., at 528, 87 S.Ct., at 1730. Thus, the fact that the professed purpose of the contested search was to protect the public safety rather than to gain incriminating evidence ***454** does not of itself eliminate the necessity for compliance with the warrant requirement. Although a valid public interest may establish probable cause to search, Camara, supra, and See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967), make clear that, absent exigent circumstances, the search must be conducted pursuant to a "suitably restricted search warrant." Camara, supra, 387 U.S., at 539, 87 S.Ct., at 1727. See also Almeida-Sanchez v. United States, supra. And certainly there were no

exigent circumstances to justify the warrantless search made of the Thunderbird. For even assuming that the officer had reason to believe that respondent's service revolver was in the Thunderbird, the police had left the car in the custody of a private garage and did not return to look for the gun until two and one-half hours later. Moreover, although the arresting officers were at all times aware that respondent was an off-duty Chicago policeman, the officers never once inquired of respondent as to whether he was carrying a gun and, if so, where it was located. I can only conclude, therefore, that what the Court does today in the name of an investigative automobile search is in fact a serious departure from established Fourth Amendment principles. And since in my view that departure is totally unjustified, I would affirm the judgment of the Court of Appeals invalidating the search of the Thunderbird and remand the case to the District Court for determination whether the evidence seized during the search of the Dodge and the farm was the fruit of the unlawful search of the Thunderbird. See Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

**All Citations**

413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

* Petitioner argued before this Court that unlocking the trunk of the Ford did not constitute a “search” within the meaning of the Fourth Amendment. The thesis is that only an intrusion, into an area in which an individual has a reasonable expectation of privacy, with the specific intent of discovering evidence of a crime constitutes a search. Compare Haerr v. United States, 240 F.2d 533 (CA5 1957), with District of Columbia v. Little, 85 U.S.App.D.C. 242, 178 F.2d 13 (1949), aff'd on other grounds, 339 U.S. 1, 70 S.Ct. 468, 94 L.Ed. 599 (1950). But see Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). Arguing that the officer's conduct constituted an ‘inspection’ rather than a ‘search,’ petitioner relies on our decision in Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968), to validate the initial intrusion into the trunk, and then the plain-view doctrine to justify the warrantless seizure of the items.

We need not decide this issue. Petitioner conceded in the Court of Appeals that this intrusion was a search. Inasmuch as we believe that Harris and other decisions control this case even if the intrusion is characterized as a search, we need not deal with petitioner's belated contention.

105 S.Ct. 2066
Supreme Court of the United States

CALIFORNIA, Petitioner
v.
Charles R. CARNEY.

No. 83-859.
|
Argued Oct. 30, 1984.
|
Decided May 13, 1985.

**Synopsis**

After unsuccessful motions to suppress evidence and to dismiss, defendant pleaded in the Superior Court, San Diego County, William T. Low, J., nolo contendere to charge of possession of marijuana for sale, and he appealed. The California Supreme Court, Mosk, J., 34 Cal.3d 597, 194 Cal.Rptr. 500, 668 P.2d 807, reversed and remanded, and certiorari was granted. The Supreme Court, Chief Justice Burger, held that: (1) warrantless search of mobile motor home did not violate Fourth Amendment, and (2) search was not unreasonable.

Reversed and remanded.

Justice Stevens filed a dissenting opinion in which Justices Brennan and Marshall joined.

****2066** ***386** *Syllabus*[*]

A Drug Enforcement Administration (DEA) agent, who had information that respondent's mobile motor home was being used to exchange marihuana for sex, watched respondent approach a youth who accompanied respondent to the motor home, which was parked in a lot in downtown San Diego. The agent and other agents then kept the vehicle under surveillance, and stopped the youth after he left the vehicle. He told them that he had received marihuana in return for allowing respondent sexual contacts. At the agents' request, the youth returned to the motor home and knocked on the door; respondent stepped out. Without a warrant or consent, one agent then entered the motor home and observed marijuana. A subsequent search of the motor home at the police station revealed additional marihuana, and respondent was charged with possession of marihuana for sale. After his motion to suppress the evidence discovered in the motor home was denied, respondent was convicted in California Superior Court on a plea of *nolo contendere.* The California ****2067** Court of Appeal affirmed. The California Supreme Court reversed, holding that the search of the motor home was unreasonable and that the motor vehicle exception to the warrant requirement of the Fourth Amendment did not apply, because expectations of privacy in a motor home are more like those in a dwelling than in an automobile.

*Held:* The warrantless search of respondent's motor home did not violate the Fourth Amendment. Pp. 2068-2071.

(a) When a vehicle is being used on the highways or is capable of such use and is found stationary in a place not regularly used for residential purposes, the two justifications for the vehicle exception come into play. First, the vehicle is readily mobile, and, second, there is a reduced expectation of privacy stemming from the pervasive regulation of vehicles capable of traveling on highways. Here, while respondent's vehicle possessed some attributes of a home, it clearly falls within the vehicle exception. To distinguish between respondent's motor home and an ordinary sedan for purposes of the vehicle exception would require that the exception be applied depending on the size of the vehicle and the quality of its appointments. Moreover, to fail to apply the exception to vehicles such as a motor home would ignore the fact that a motor home lends itself easily to use as an instrument of illicit drug traffic or other illegal activity. Pp. 2068-2071.

***387** (b) The search in question was not unreasonable. It was one that a magistrate could have authorized if presented with the facts. The DEA agents, based on uncontradicted evidence that respondent was distributing a controlled substance from the vehicle, had abundant probable cause to enter and search the vehicle. P. 2071.

34 Cal.3d 597, 194 Cal.Rptr. 500, 668 P.2d 807 (1983), reversed and remanded.

**Attorneys and Law Firms**

*Louis R. Hanoian,* Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *John K. Van de Kamp,* Attorney General, *Steve White,* Chief Assistant Attorney General, and *Michael D. Wellington* and *John W. Carney,* Deputy Attorneys General.

  

*Thomas F. Homann* argued the cause for respondent. With him on the brief was *A. Dale Manicom.**

* Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey, Alan I. Horowitz,* and *Kathleen A. Felton;* and for the State of Minnesota et al. by *Hubert H. Humphrey III,* Attorney General of Minnesota, and *Thomas F. Catania, Jr.,* and *Paul R. Kempainen,* Special Assistant Attorneys General, *Jim Smith,* Attorney General of Florida, *Tany S. Hong,* Attorney General of Hawaii, and *Michael A. Lilly,* First Deputy Attorney General.

*Frank O. Bell, Jr.,* and *George L. Schraer* filed a brief for the California State Public Defender as *amicus curiae* urging affirmance.

**Opinion**

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to decide whether law enforcement agents violated the Fourth Amendment when they conducted a warrantless search, based on probable cause, of a fully mobile "motor home" located in a public place.

I

On May 31, 1979, Drug Enforcement Agency Agent Robert Williams watched respondent, Charles Carney, approach ***388** a youth in downtown San Diego. The youth accompanied Carney to a Dodge Mini Motor Home parked in a nearby lot. Carney and the youth closed the window shades in the motor home, including one across the front window. Agent Williams had previously received uncorroborated information that the same motor home was used by another person who was exchanging marihuana for sex. Williams, with assistance from other agents, kept the motor home under surveillance for the entire one and one-quarter hours that Carney and the youth remained inside. When the youth left the motor home, the agents followed and stopped him. The youth told the agents that he had received marijuana in return for allowing Carney sexual contacts.

At the agents' request, the youth returned to the motor home and knocked on its door; Carney stepped out. The agents identified themselves as law enforcement officers. Without a warrant or consent, one agent entered the motor home and observed marihuana, plastic bags, and a scale of the kind used in weighing drugs on a table. Agent Williams took Carney into custody and took possession of the motor home. A subsequent search of the motor home at the police station revealed additional marihuana in the cupboards and refrigerator.

Respondent was charged with possession of marihuana for sale. At a preliminary hearing, he moved to suppress the evidence ****2068** discovered in the motor home. The Magistrate denied the motion, upholding the initial search as a justifiable search for other persons, and the subsequent search as a routine inventory search.

Respondent renewed his suppression motion in the Superior Court. The Superior Court also rejected the claim, holding that there was probable cause to arrest respondent, that the search of the motor home was authorized under the automobile exception to the Fourth Amendment's warrant requirement, and that the motor home itself could be seized without a warrant as an instrumentality of the crime. Respondent ***389** then pleaded *nolo contendere* to the charges against him, and was placed on probation for three years.

Respondent appealed from the order placing him on probation. The California Court of Appeal affirmed, reasoning that the vehicle exception applied to respondent's motor home. 117 Cal.App.3d 36, 172 Cal.Rptr. 430 (1981).

The California Supreme Court reversed the conviction. 34 Cal.3d 597, 194 Cal.Rptr. 500, 668 P.2d 807 (1983). The Supreme Court did not disagree with the conclusion of the trial court that the agents had probable cause to arrest respondent and to believe that the vehicle contained evidence of a crime; however, the court held that the search was unreasonable because no warrant was obtained, rejecting the State's argument that the vehicle exception to the warrant requirement should apply.[1] That court reached its decision by concluding that the mobility of a vehicle "is no longer the prime justification for the automobile exception; rather, 'the answer lies in the diminished expectation of privacy which surrounds the automobile.' " *Id.,* at 605, 194 Cal.Rptr., at 504, 668 P.2d, at 811. The California Supreme Court held that the expectations of privacy in a motor home are more like those in a dwelling than in an automobile because the primary function of motor homes is not to provide transportation but to "provide the occupant with living quarters." *Id.,* at 606, 194 Cal.Rptr., at 505, 668 P.2d, at 812.

We granted certiorari, 465 U.S. 1098, 104 S.Ct. 1589, 80 L.Ed.2d 122 (1984). We reverse.

***390** II

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This fundamental right is preserved by a requirement that searches be conducted pursuant to a warrant issued by an independent judicial officer. There are, of course, exceptions to the general rule that a warrant must be secured before a search is undertaken; one is the so-called "automobile exception" at issue in this case. This exception to the warrant requirement was first set forth by the Court 60 years ago in *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). There, the Court recognized that the privacy interests in an automobile are constitutionally protected; however, it held that the ready mobility of the automobile justifies a lesser degree of protection of those interests. The Court rested this exception on a long-recognized distinction between stationary structures and vehicles:

> "[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of Government, as recognizing a necessary ****2069** difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be *quickly moved* out of the locality or jurisdiction in which the warrant must be sought." *Id.,* at 153, 45 S.Ct., at 285 (emphasis added).

The capacity to be "quickly moved" was clearly the basis of the holding in *Carroll,* and our cases have consistently recognized ready mobility as one of the principal bases of the automobile exception. See, *e.g., Cooper v. California,* 386 U.S. 58, 59, 87 S.Ct. 788, 789, 17 L.Ed.2d 730 (1967); *Chambers v. Maroney,* 399 U.S. 42, 52, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419 (1970); *Cady v. Dombrowski,* 413 U.S. 433, 442, 93 S.Ct. 2523, 2528, 37 L.Ed.2d 706 (1973); ***391** *Cardwell v. Lewis,* 417 U.S. 583, 588, 94 S.Ct. 2464, 2468, 41 L.Ed.2d 325 (1974); *South Dakota v. Opperman,* 428 U.S. 364, 367, 96 S.Ct. 3092, 3096, 49 L.Ed.2d 1000 (1976). In *Chambers,* for example, commenting on the rationale for the vehicle exception, we noted that "the opportunity to search is fleeting since a car is readily movable." 399 U.S., at 51, 90 S.Ct., at 1981. More recently, in *United States v. Ross,* 456 U.S. 798, 806, 102 S.Ct. 2157, 2163, 72 L.Ed.2d 572 (1982), we once again emphasized that "an immediate intrusion is necessary" because of "the nature of an automobile in transit...." The mobility of automobiles, we have observed, "creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible." *South Dakota v. Opperman, supra,* 428 U.S., at 367, 96 S.Ct., at 3096.

However, although ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for the exception. The reasons for the vehicle exception, we have said, are twofold. 428 U.S., at 367, 96 S.Ct., at 3096. "Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *Ibid.*

Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception. See, *e.g., Cady v. Dombrowski, supra.* In some cases, the configuration of the vehicle contributed to the lower expectations of privacy; for example, we held in *Cardwell v. Lewis, supra,* 417 U.S., at 590, 94 S.Ct., at 2469, that, because the passenger compartment of a standard automobile is relatively open to plain view, there are lesser expectations of privacy. But even when enclosed "repository" areas have been involved, we have concluded that the lesser expectations of privacy warrant application of the exception. We have applied the exception in the context of a locked car trunk, *Cady v. Dombrowski, supra,* a sealed package in a car trunk, *Ross, supra,* a closed compartment under the dashboard, *Chambers* ***392** *v. Maroney, supra,* the interior of a vehicle's upholstery, *Carroll, supra,* or sealed packages inside a covered pickup truck, *United States v. Johns,* 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985).

These reduced expectations of privacy derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways. *Cady v. Dombrowski, supra,* 413 U.S., at 440-441, 93 S.Ct., at 2527-2528. As we explained in *South Dakota v. Opperman,* an inventory search case:

  

> "Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are ****2070** noted, or if headlights or other safety equipment are not in proper working order." 428 U.S., at 368, 96 S.Ct., at 3096.

The public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation. Historically, "individuals always [have] been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts." *Ross, supra,* 456 U.S., at 806, n. 8, 102 S.Ct., at 2163, n. 8. In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met.

When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes-temporary or otherwise-the two justifications for the vehicle exception ***393** come into play.[2] First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling. At least in these circumstances, the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable.

While it is true that respondent's vehicle possessed some, if not many of the attributes of a home, it is equally clear that the vehicle falls clearly within the scope of the exception laid down in *Carroll* and applied in succeeding cases. Like the automobile in *Carroll,* respondent's motor home was readily mobile. Absent the prompt search and seizure, it could readily have been moved beyond the reach of the police. Furthermore, the vehicle was licensed to "operate on public streets; [was] serviced in public places; ... and [was] subject to extensive regulation and inspection." *Rakas v. Illinois,* 439 U.S. 128, 154, n. 2, 99 S.Ct. 421, 436, n. 2, 58 L.Ed.2d 387 (1978) (POWELL, J., concurring). And the vehicle was so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle.

Respondent urges us to distinguish his vehicle from other vehicles within the exception because it was *capable of functioning as a home.* In our increasingly mobile society, many vehicles used for transportation can be and are being used not only for transportation but for shelter, *i.e.,* as a "home" or "residence." To distinguish between respondent's motor home and an ordinary sedan for purposes of the vehicle exception would require that we apply the exception depending upon the size of the vehicle and the quality of its appointments. Moreover, to fail to apply the exception to vehicles ***394** such as a motor home ignores the fact that a motor home lends itself easily to use as an instrument of illicit drug traffic and other illegal activity. In *United States v. Ross,* 456 U.S., at 822, 102 S.Ct., at 2171, we declined to distinguish between "worthy" and "unworthy" containers, noting that "the central purpose of the Fourth Amendment forecloses such a distinction." We decline today to distinguish between "worthy" and "unworthy" vehicles which are either on the public roads and highways, or situated such that it is reasonable to conclude that the vehicle is not being used as a residence.

Our application of the vehicle exception has never turned on the other uses to which a vehicle might be put. The exception has historically turned on the ready mobility of the vehicle, and on the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for ****2071** transportation.[3] These two requirements for application of the exception ensure that law enforcement officials are not unnecessarily hamstrung in their efforts to detect and prosecute criminal activity, and that the legitimate privacy interests of the public are protected. Applying the vehicle exception in these circumstances allows the essential purposes served by the exception to be fulfilled, while assuring that the exception will acknowledge legitimate privacy interests.

III

The question remains whether, apart from the lack of a warrant, this search was unreasonable. Under the vehicle exception to the warrant requirement, "[o]nly the prior approval of the magistrate is waived; the search otherwise

  

[must be such] as the magistrate could authorize." *Ross, supra,* at 823, 102 S.Ct., at 2172.

***395** This search was not unreasonable; it was plainly one that the magistrate could authorize if presented with these facts. The DEA agents had fresh, direct, uncontradicted evidence that the respondent was distributing a controlled substance from the vehicle, apart from evidence of other possible offenses. The agents thus had abundant probable cause to enter and search the vehicle for evidence of a crime notwithstanding its possible use as a dwelling place.

The judgment of the California Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

The character of "the place to be searched"[1] plays an important role in Fourth Amendment analysis. In this case, police officers searched a Dodge/Midas Mini Motor Home. The California Supreme Court correctly characterized this vehicle as a "hybrid" which combines "the mobility attribute of an automobile ... with most of the privacy characteristics of a house."[2]

The hybrid character of the motor home places it at the crossroads between the privacy interests that generally forbid warrantless invasions of the home, *Payton v. New York,* 445 U.S. 573, 585-590, 100 S.Ct. 1371, 1379-1382, 63 L.Ed.2d 639 (1980), and the law enforcement interests that support the exception for warrantless searches of automobiles based on probable cause, *United States v. Ross,* 456 U.S. 798, 806, 820, 102 S.Ct. 2157, 2163, 2170, 72 L.Ed.2d 572 (1982). By choosing to follow the latter route, the Court errs in three respects: it has entered new ***396** territory prematurely, it has accorded priority to an exception rather than to the general rule, and it has abandoned the limits on the exception imposed by prior cases.

I

In recent Terms, the Court has displayed little confidence in state and lower federal court decisions that purport to enforce the Fourth Amendment. Unless an order suppressing evidence is clearly correct, a petition for certiorari is likely to garner the four votes required for a grant of plenary review-as the one in this case did. Much ****2072** of the Court's "burdensome" workload is a product of its own aggressiveness in this area. By promoting the Supreme Court of the United States as the High Magistrate for every warrantless search and seizure, this practice has burdened the argument docket with cases presenting fact-bound errors of minimal significance.[3] It has also encouraged state legal officers to file petitions for certiorari in even the most frivolous search and seizure cases.[4]

The Court's lack of trust in lower judicial authority has resulted in another improvident exercise of discretionary ***397** jurisdiction.[5] In what is at most only a modest extension of our Fourth Amendment precedents, the California Supreme Court held that police officers may not conduct a nonexigent search of a motor home without a warrant supported by probable cause. The State of California filed a petition for certiorari contending that the decision below conflicted with the authority of other jurisdictions.[6] Even a cursory examination of the cases alleged to be in conflict revealed that they did not consider the question presented here.[7]

***398** ****2073** This is not a case "in which an American citizen has been deprived of a right secured by the United States Constitution or a federal statute. Rather, ... a state court has upheld a citizen's assertion of a right, finding the citizen to be protected under both federal and state law." *Michigan v. Long,* 463 U.S. 1032, 1067-1068, 103 S.Ct. 3469, 3490, 77 L.Ed.2d 1201 (1983) (STEVENS, J., dissenting). As an unusually perceptive study of this Court's docket stated with reference to *California v. Ramos,* 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), "this ... situation ... rarely presents a compelling reason for Court review in the absence of a fully percolated conflict."[8] The Court's decision to forge ahead ***399** has established a rule for searching motor homes that is to be followed by the entire Nation. If the Court had merely allowed the decision below to stand, it would have only governed searches of those vehicles in a single State. The breadth of this Court's mandate counsels greater patience before we offer our binding judgment on the meaning of the Constitution.

Premature resolution of the novel question presented has stunted the natural growth and refinement of alternative principles. Despite the age of the automobile exception and

  

the countless cases in which it has been applied, we have no prior cases defining the contours of a reasonable search in the context of hybrids such as motor homes, house trailers, houseboats, or yachts. In this case, the Court can barely glimpse the diverse lifestyles associated with recreational vehicles and mobile living quarters.[9] The line or lines separating mobile homes from permanent structures might have been drawn in various ways, with consideration given to whether the home is moving or at rest, whether it rests on land or water, the form of the vehicle's attachment to its location, its potential speed of departure, its size and capacity to serve as a domicile, and its method of locomotion. Rational decisionmaking strongly counsels against divining the uses and abuses of these vehicles in the vacuum of the first case raising the question before us.

Of course, we may not abdicate our responsibility to clarify the law in this field. Some caution, however, is justified when every decision requires us to resolve a vexing "conflict ... between the individual's constitutionally protected interest in privacy and the public interest in effective law **2074 enforcement." *United States v. Ross,* 456 U.S., at 804, 102 S.Ct., at 2161. "The certainty that is supposed to come from speedy resolution *400 may prove illusory if a premature decision raises more questions than it answers."[10] The only true rules governing search and seizure have been formulated and refined in the painstaking scrutiny of case-by-case adjudication. Consideration of this matter by the lower courts in a series of litigated cases would surely have facilitated a reasoned accommodation of the conflicting interests. To identify rules that will endure, we must rely on the state and lower federal courts to debate and evaluate the different approaches to difficult and unresolved questions of constitutional law.[11] Deliberation on the question over time winnows out the unnecessary *401 and discordant elements of doctrine and preserves "whatever is pure and sound and fine."[12]

II

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." We have interpreted this language to provide law enforcement officers with a bright-line standard: "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967) (footnotes omitted); *Arkansas v. Sanders,* 442 U.S. 753, 758, 99 S.Ct. 2586, 2590, 61 L.Ed.2d 235 (1979).

In *United States v. Ross,* the Court reaffirmed the primary importance of the general rule condemning warrantless searches, and emphasized that the exception permitting the search of automobiles without a warrant is a narrow one. 456 U.S., at 824-825, 102 S.Ct., at 2172-2173. We expressly endorsed "the general rule," stated in *Carroll v. United States,* 267 U.S. 132, 156, 45 S.Ct. 280, 286, 69 L.Ed. 543 (1925), that " '[i]n cases where the securing of a warrant is reasonably practicable, it must be used.' " 456 U.S., at 807, 102 S.Ct., at 2163. Given this warning and the presumption of regularity that attaches to a warrant,[13] it is hardly unrealistic to **2075 expect experienced law enforcement officers to obtain a search warrant when one can easily be secured.

The ascendancy of the warrant requirement in our system of justice must not be bullied aside by extravagant claims of necessity:

> " 'The warrant requirement ... is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part *402 of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly overzealous executive officers" who are a part of any system of law enforcement.' [*Coolidge v. New Hampshire,* 403 U.S. 443, 481, 91 S.Ct. 2022, 2045, 29 L.Ed.2d 564 (1971).]
>
> "... By requiring that conclusions concerning probable cause and the scope of a search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime' *Johnson v. United States,* 333 U.S. 10, 14 [68 S.Ct. 367, 369, 92 L.Ed. 436] (1948), we minimize the risk of unreasonable assertions of executive authority." *Arkansas v. Sanders,* 442 U.S., at 758-759, 99 S.Ct., at 2590.

If the motor home were parked in the exact middle of the intersection between the general rule and the exception for automobiles, priority should be given to the rule rather than the exception.

  

III

The motor home, however, was not parked in the middle of that intersection. Our prior cases teach us that inherent mobility is not a sufficient justification for the fashioning of an exception to the warrant requirement, especially in the face of heightened expectations of privacy in the location searched. Motor homes, by their common use and construction, afford their owners a substantial and legitimate expectation of privacy when they dwell within. When a motor home is parked in a location that is removed from the public highway, I believe that society is prepared to recognize that the expectations of privacy within it are not unlike the expectations one has in a fixed dwelling. As a general rule, such places may only be searched with a warrant based upon probable cause. Warrantless searches of motor homes are only reasonable when the motor home is traveling on the public streets or highways, or when exigent circumstances otherwise require an immediate search without the expenditure of time necessary to obtain a warrant.

***403** As we explained in *Ross,* the automobile exception is the product of a long history:

> "[S]ince its earliest days Congress had recognized the impracticability of securing a warrant in cases involving the transportation of contraband goods. It is this impracticability, viewed in historical perspective, that provided the basis for the *Carroll* decision. Given the nature of an automobile in transit, the Court recognized that an immediate intrusion is necessary if police officers are to secure the illicit substance. In this class of cases, the Court held that a warrantless search of an automobile is not unreasonable." 456 U.S., at 806-807, 102 S.Ct., at 2163 (footnotes omitted).[14]

The automobile exception has been developed to ameliorate the practical problems associated with the search of vehicles that have been stopped on the streets or public highways because there was probable cause to believe they were transporting contraband. Until today, however, the Court has never decided whether the practical justifications that apply to a vehicle that is stopped in transit on a public way apply with the same force to a vehicle parked in a lot near a court house where it could easily be detained while a warrant is ****2076** issued.[15]

***404** In this case, the motor home was parked in an off-the-street lot only a few blocks from the courthouse in downtown San Diego where dozens of magistrates were available to entertain a warrant application.[16] The officers clearly had the element of surprise with them, and with curtains covering the windshield, the motor home offered no indication of any imminent departure. The officers plainly had probable cause to arrest the respondent and search the motor home, and on this record, it is inexplicable why they eschewed the safe harbor of a warrant.[17]

In the absence of any evidence of exigency in the circumstances of this case, the Court relies on the inherent mobility of the motor home to create a conclusive presumption of exigency. This Court, however, has squarely held that mobility of the place to be searched is not a sufficient justification for abandoning the warrant requirement. In *United States v. Chadwick,* 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), the Court held that a warrantless search of a footlocker violated the Fourth Amendment even ***405** though there was ample probable cause to believe it contained contraband. The Government had argued that the rationale of the automobile exception applied to movable containers in general, and that the warrant requirement should be limited to searches of homes and other "core" areas of privacy. See *id.,* at 7, 97 S.Ct., at 2481. We categorically rejected the Government's argument, observing that there are greater privacy interests associated with containers than with automobiles,[18] and that there are less practical problems associated with the temporary detention of a container than with the detention of an automobile. See *id.,* at 13, and n. 7, 97 S.Ct., at 2484, and n. 7.

We again endorsed that analysis in *Ross:*

> ****2077** "The Court in *Chadwick* specifically rejected the argument that the warrantless search was 'reasonable' because a footlocker has some of the mobile characteristics that support warrantless searches of automobiles. The Court recognized that 'a person's expectations of privacy in personal luggage are substantially greater than in an automobile,' [433 U.S., at 13, 97 S.Ct., at 2484], and noted that the practical problems associated with the temporary detention of a piece of luggage during the period of time necessary to obtain a warrant are significantly less than those associated with the detention of an automobile. *Id.,* at 13, n. 7 [97 S.Ct., at 2484, n. 7]." 456 U.S., at 811, 102 S.Ct., at 2165-2166.

  

It is perfectly obvious that the citizen has a much greater expectation of privacy concerning the interior of a mobile home than of a piece of luggage such as a footlocker. If "inherent mobility" does not justify warrantless searches ***406** of containers, it cannot rationally provide a sufficient justification for the search of a person's dwelling place.

Unlike a brick bungalow or a frame Victorian, a motor home seldom serves as a permanent lifetime abode. The motor home in this case, however, was designed to accommodate a breadth of ordinary everyday living. Photographs in the record indicate that its height, length, and beam provided substantial living space inside: stuffed chairs surround a table; cupboards provide room for storage of personal effects; bunk beds provide sleeping space; and a refrigerator provides ample space for food and beverages.[19] Moreover, curtains and large opaque walls inhibit viewing the activities inside from the exterior of the vehicle. The interior configuration of the motor home establishes that the vehicle's size, shape, and mode of construction should have indicated to the officers that it was a vehicle containing mobile living quarters.

The State contends that officers in the field will have an impossible task determining whether or not other vehicles contain mobile living quarters. It is not necessary for the Court to resolve every unanswered question in this area in a single case, but common English usage suggests that we already distinguish between a "motor home" which is "equipped as a self-contained traveling home," a "camper" which is only equipped for "casual travel and camping," and an automobile which is "designed for passenger transportation."[20] Surely the exteriors of these vehicles contain clues about their different functions which could alert officers in the field to the necessity of a warrant.[21]

***407** The California Vehicle Code also refutes the State's argument that the exclusion of "motor homes" from the automobile exception would be impossible to apply in practice. In its definitional section, the Code distinguishes campers and house cars from station wagons, and suggests that they are special categories of the more general terms-motor vehicles and passenger vehicles.[22] A "house car" is "a motor vehicle originally designed, or permanently altered, and equipped for human habitation, or to which a camper has been permanently attached."[23] Alcoholic beverages ****2078** may not be opened or consumed in motor vehicles traveling on the highways, except in the "living quarters of a housecar or camper."[24] The same definitions might not necessarily apply in the context of the Fourth Amendment, but they do indicate that descriptive distinctions are humanly possible. They also reflect the California Legislature's judgment that "house cars" entertain different kinds of activities than the ordinary passenger vehicle.

In my opinion, searches of places that regularly accommodate a wide range of private human activity are fundamentally different from searches of automobiles which primarily serve a public transportation function.[25] Although it may not be a castle, a motor home is usually the functional equivalent of a hotel room, a vacation and retirement home, or a hunting and fishing cabin. These places may be as spartan ***408** as a humble cottage when compared to the most majestic mansion, 456 U.S., at 822, 102 S.Ct., at 2171; *ante,* at 2070, but the highest and most legitimate expectations of privacy associated with these temporary abodes should command the respect of this Court. *Stoner v. California,* 376 U.S. 483, 490, 84 S.Ct. 889, 893, 11 L.Ed.2d 856 (1964); *Payton v. New York,* 445 U.S., at 585, 100 S.Ct., at 1379; *United States v. Karo,* 468 U.S. 705, 714-715, 104 S.Ct. 3296, 3302-3303, 82 L.Ed.2d 530 (1984).[26] In my opinion, a warrantless search of living quarters in a motor home is "presumptively unreasonable absent exigent circumstances." *Ibid.*

I respectfully dissent.

**All Citations**

471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406, 53 USLW 4521

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Respondent contends that the state-court decision rests on an adequate and independent state ground, because the opinion refers to the State as well as the Federal Constitutions. Respondent's argument is clearly foreclosed by our opinion in *Michigan v. Long,* 463 U.S. 1032, 1040-1041, 103 S.Ct. 3469, 3476-3477, 77 L.Ed.2d 1201 (1983), in which

  

we held, "when ... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." We read the opinion as resting on federal law.

2 With few exceptions, the courts have not hesitated to apply the vehicle exception to vehicles other than automobiles. See, *e.g., United States v. Rollins,* 699 F.2d 530 (CA11) (airplane), cert. denied, 464 U.S. 933, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983).

3 We need not pass on the application of the vehicle exception to a motor home that is situated in a way or place that objectively indicates that it is being used as a residence. Among the factors that might be relevant in determining whether a warrant would be required in such a circumstance is its location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road.

1 The Fourth Amendment provides:

> "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 Warrants 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."

2 34 Cal.3d 597, 606, 194 Cal.Rptr. 500, 505, 668 P.2d 807, 812 (1983).

3 *E.g., United States v. Johns,* 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985); *United States v. Sharpe,* 471 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985); *Oklahoma v. Castleberry,* 471 U.S. 146, 105 S.Ct. 1859, 85 L.Ed.2d 112 (1985). Cf. *Florida v. Rodriguez,* 469 U.S. 1, 12-13, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984) (STEVENS, J., dissenting, joined by BRENNAN, J.).

4 See, *e.g., State v. Caponi,* 12 Ohio St.3d 302, 466 N.E.2d 551 (1984), cert. denied, 469 U.S. 1209, 105 S.Ct. 1174, 84 L.Ed.2d 324 (1985). The Court's inventiveness in the search and seizure area has also emboldened state legal officers to file petitions for certiorari from state court suppression orders that are explicitly based on independent state grounds. See, *e.g., Jamison v. State,* 455 So.2d 1112 (Fla.App.1984), cert. denied, 469 U.S. 1127, 105 S.Ct. 811, 83 L.Ed.2d 804 (1985); *Ex parte Gannaway,* 448 So.2d 413 (Ala.1984), cert. denied, 469 U.S. 1207, 105 S.Ct. 1168, 84 L.Ed.2d 320 (1985); *State v. Burkholder,* 12 Ohio St.3d 205, 466 N.E.2d 176, cert. denied, 469 U.S. 1062, 105 S.Ct. 545, 83 L.Ed.2d 432 (1984); *People v. Corr,* 682 P.2d 20 (Colo.), cert. denied, 469 U.S. 855, 105 S.Ct. 181, 83 L.Ed.2d 115 (1984); *State v. Von Bulow,* 475 A.2d 995 (R.I.), cert. denied, 469 U.S. 875, 105 S.Ct. 233, 83 L.Ed.2d 162 (1984).

5 *Michigan v. Long,* 463 U.S. 1032, 1065, 103 S.Ct. 3469, 3489, 77 L.Ed.2d 1201 (1983) (STEVENS, J., dissenting); *California v. Ramos,* 463 U.S. 992, 1029, 103 S.Ct. 3446, 3468, 77 L.Ed.2d 1171 (1983) (STEVENS, J., dissenting); *Watt v. Western Nuclear, Inc.,* 462 U.S. 36, 72-73, 103 S.Ct. 2218, 2238-2239, 76 L.Ed.2d 400 (1983) (STEVENS, J., dissenting); *Watt v. Alaska,* 451 U.S. 259, 273, 101 S.Ct. 1673, 1681, 68 L.Ed.2d 80 (1981) (STEVENS, J., concurring). See also Stevens, Some Thoughts on Judicial Restraint, 66 Judicature 177, 182 (1982).

6 Pet. for Cert. 15-17, 21, 24-25. The petition acknowledged that the decision below was consistent with dictum in two recent Ninth Circuit decisions. See *United States v. Wiga,* 662 F.2d 1325, 1329 (1981), cert. denied, 456 U.S. 918, 102 S.Ct. 1775, 72 L.Ed.2d 178 (1982); *United States v. Williams,* 630 F.2d 1322, 1326, cert. denied, 449 U.S. 865, 101 S.Ct. 197, 66 L.Ed.2d 83 (1980).

7 Only one case contained any reference to heightened expectations of privacy in mobile living quarters. *United States v. Cadena,* 588 F.2d 100, 101-102 (CA5 1979) (*per curiam* ). Analogizing to automobile cases, the court upheld the warrantless search of an oceangoing ship while in transit. The court observed that the mobility "exception" required probable cause *and* exigency, and that "the increased measure of privacy that may be expected by those aboard a vessel mandates careful scrutiny both of probable cause for the search and the exigency of the circumstances excusing the failure to secure a warrant." *Id.,* at 102.

  

In all of the other cases, defendants challenged warrantless searches for vehicles claiming either no probable cause or the absence of exigency under *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). *United States v. Montgomery,* 620 F.2d 753, 760 (CA10) ( "camper"), cert. denied, 449 U.S. 882, 101 S.Ct. 232, 66 L.Ed.2d 106 (1980); *United States v. Clark,* 559 F.2d 420, 423-425 (CA5) ("camper pick-up truck"), cert. denied, 434 U.S. 969, 98 S.Ct. 516, 54 L.Ed.2d 457 (1977); *United States v. Lovenguth,* 514 F.2d 96, 97 (CA9 1975) ("pick up with ... camper top"); *United States v. Cusanelli,* 472 F.2d 1204, 1206 (CA6) (*per curiam* ) (two camper trucks), cert. denied, 412 U.S. 953, 93 S.Ct. 3003, 37 L.Ed.2d 1006 (1973); *United States v. Miller,* 460 F.2d 582, 585-586 (CA10 1972) ("motor home"); *United States v. Rodgers,* 442 F.2d 902, 904 (CA5 1971) ("camper truck"); *State v. Million,* 120 Ariz. 10, 15-16, 583 P.2d 897, 902-903 (1978) ("motor home"); *State v. Sardo,* 112 Ariz. 509, 513-514, 543 P.2d 1138, 1142 (1975) ("motor home"). Only *Sardo* involved a vehicle that was not in transit, but the motor home in that case was about to depart the premises.

Two State Supreme Courts have upheld the warrantless search of mobile homes in transit, notwithstanding a claim of heightened privacy interests. See *State v. Mower,* 407 A.2d 729, 732 (Me.1979); *State v. Lepley,* 343 N.W.2d 41, 42-43 (Minn.1984). Those cases-which were not cited in the petition for certiorari-are factually distinguishable from the search of the parked motor home here. In any case, some conflict among state courts on novel questions of the kind involved here is desirable as a means of exploring and refining alternative approaches to the problem.

8 Estreicher & Sexton, New York University Supreme Court Project, A Managerial Theory of the Supreme Court's Responsibilities (1984) (to be published in 59 N.Y.U.L.Rev. 677, 761 (1984)). The study elaborated:

"[T]he Court should not hear cases in which a state court has invalidated state action on a federal ground should not be heard by the Court in the absence of a conflict or a decision to treat the case as a vehicle for a major pronouncement of federal law. Without further percolation, there is ordinarily little reason to believe that the issue is one of recurring national significance. In general, correction of error, even regarding a matter of constitutional law, is not a sufficient basis for Supreme Court intervention. This last category differs from a federal court's invalidation of state action in that a structural justification for intervention is generally missing, given the absence of vertical federalism difficulties and the built-in assurance that state courts functioning under significant political constraints are not likely to invalidate state action lightly even on federal grounds.... [The Court] should not grant ... merely to correct perceived error." *Id.,* at 738-739 (footnote omitted).

Chief Justice Samuel Roberts, Retired, of the Pennsylvania Supreme Court has expressed similar concerns. Roberts, The Adequate and Independent State Ground: Some Practical Considerations, 17 IJA Rep., No. 2, pp. 1-2 (1985).

9 See generally 45 Trailer Life, No. 1 (1985); *id.,* No. 2; 22 Motor Home, No. 1 (1985); *id.,* No. 2; 1 R V Lifestyle Magazine, No. 3 (1985).

10 Hellman, The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?, 11 Hastings Const.L.Q. 375, 405 (1984).

11 "Although one of the Court's roles is to ensure the uniformity of federal law, we do not think that the Court must act to eradicate disuniformity as soon as it appears.... Disagreement in the lower courts facilitates percolation-the independent evaluation of a legal issue by different courts. The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, had the benefit of the experience of those lower courts. Irrespective of docket capacity, the Court should not be compelled to intervene to eradicate disuniformity when further percolation or experimentation is desirable.

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"Our system is already committed in substantial measure to the principle of percolation. This is one justification for the absence of intercircuit stare decisis. Similarly, state and federal courts daily engage in a process of 'dialectical federalism' wherein state courts are not bound by the holdings of lower federal courts in the same geographical area. But more than past practice and the structure of the judicial system supports a policy of awaiting percolation before Supreme Court intervention. A managerial conception of the Court's role embraces lower court percolation as an affirmative value. The views of the lower courts on a particular legal issue provide the Supreme Court with a means

  

of identifying significant rulings as well as an experimental base and a set of doctrinal materials with which to fashion sound binding law. The occurrence of a conflict acts as a signaling device to help the Court identify important issues. Moreover, the principle of percolation encourages the lower courts to act as responsible agents in the process of development of national law." Estreicher & Sexton, *supra* n. 8, at 716, 719 (footnotes omitted).

12 B. Cardozo, The Nature of the Judicial Process 179 (1921).

13 *United States v. Leon,* 468 U.S. 897, 913-914, 104 S.Ct. 3405, 3415-3416, 82 L.Ed.2d 677 (1984); *Illinois v. Gates,* 462 U.S. 213, 236-237, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983).

14 "As we have stated, the decision in *Carroll* was based on the Court's appraisal of practical considerations viewed in the perspective of history." 456 U.S., at 820, 102 S.Ct., at 2170.

15 In *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2045, 99 L.Ed.2d 564 (1971), a plurality refused to apply the automobile exception to an automobile that was seized while parked in the driveway of the suspect's house, towed to a secure police compound, and later searched:

"The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of *Carroll v. United States* -no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant.' [267 U.S., at 153, 45 S.Ct., at 285,] and the 'automobile exception' despite its label, is simply irrelevant." *Id.,* at 461-462, 91 S.Ct., at 2036 (opinion of Stewart, J., joined by Douglas, BRENNAN, and MARSHALL, JJ.).

In *Cardwell v. Lewis,* 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974), a different plurality approved the seizure of an automobile from a public parking lot, and a later examination of its exterior. *Id.,* at 592-594, 94 S.Ct., at 2470-2471 (opinion of BLACKMUN, J.). Here, of course, we are concerned with the reasonableness of the search, not the seizure. Even if the diminished expectations of privacy associated with an automobile justify the warrantless search of a parked automobile notwithstanding the diminished exigency, the heightened expectations of privacy in the interior of a motor home require a different result.

16 See Suppression Hearing Tr. 7; Tr. of Oral Arg. 27. In addition, a telephonic warrant was only 20 cents and the nearest phone booth away. See Cal.Penal Code Ann. §§ 1526(b), 1528(b) (West 1982); *People v. Morrongiello,* 145 Cal.App.3d 1, 9, 193 Cal.Rptr. 105, 109 (1983).

17 This willingness to search first and later seek justification has properly been characterized as "a decision roughly comparable in prudence to determining whether an electrical wire is charged by grasping it." *United States v. Mitchell,* 538 F.2d 1230, 1233 (CA5 1976) (en banc), cert. denied, 430 U.S. 945, 97 S.Ct. 1578, 51 L.Ed.2d 792 (1977).

18 "The factors which diminish the privacy aspects of an automobile do not apply to respondent's footlocker. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile." 433 U.S., at 13, 97 S.Ct., at 2484.

19 Record, Ex. Nos. 102, 103.

20 Webster's Ninth New Collegiate Dictionary 118, 199, 775 (1983).

21 In refusing to extend the California Supreme Court's decision in *Carney* beyond its context, the California Court of Appeals have had no difficulty in distinguishing the motor home involved there from a Ford van, *People v. Chestnut,* 151 Cal.App.3d 721, 726-727, 198 Cal.Rptr. 8, 11 (1983), and a cab-high camper shell on the back of a pickup truck, *People v. Gordon,*

  

156 Cal.App.3d 74, 82, 202 Cal.Rptr. 566, 570 (1984). There is no reason to believe that trained officers could not make similar distinctions between different vehicles, especially when state vehicle laws already require them to do so.

22 Cal.Veh. Code Ann. §§ 243, 362, 415, 465, 585 (West 1971 and Supp.1985).

23 § 362 (West 1971).

24 §§ 23221, 23223, 23225, 23226, 23229 (West Supp.1985).

25 Cf. *Cardwell v. Lewis,* 417 U.S., at 590, 94 S.Ct., at 2469 (opinion of BLACKMUN, J.):

> "One has a lesser expectation of privacy in a motor vehicle because its function is transportation, and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view."

26 "At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances." *United States v. Karo,* 468 U.S., at 714-715, 104 S.Ct., at 3303.

45 S.Ct. 280
Supreme Court of the United States.

CARROLL et al.

v.

UNITED STATES.

No. 15.
|
Reargued and Submitted March 14, 1924.
|
Decided March 2, 1925.

**Synopsis**

Error to the District Court of the United States for the Western District of Michigan.

George Carroll and John Kiro were convicted of transporting intoxicating liquor, and they bring error. Affirmed.

This is a writ of error to the District Court under section 238 of the Judicial Code (Comp. St. § 1215). The plaintiffs in error, hereafter to be called the defendants, George Carroll and John Kiro, were indicted and convicted for transporting in an automobile intoxicating spirituous liquor, to wit, 68 quarts of socalled bonded whisky and gin, in violation of the National Prohibition Act (Comp. St. Ann. Supp. 1923, § 10138 ¼ et seq.). The ground on which they assail the conviction is that the trial court admitted in evidence two of the 68 bottles, one of whisky and one of gin, found by searching the automobile. It is contended that the search and seizure were in violation of the Fourth Amendment, and therefore that use of the liquor as evidence was not proper. Before the trial a motion was made by the defendants that all the liquor seized be returned to the defendant Carroll, who owned the automobile. This motion was denied.

The search and seizure were made by Cronenwett, Scully, and Thayer, federal prohibition agents, and one Peterson, a state officer, in December, 1921, as the car was going westward on the highway between Detroit and Grand Rapids at a point 16 miles outside of Grand Rapids. The facts leading to the search and seizure were as follows: On September 29th, Cronenwett and Scully were in an apartment in Grand Rapids. Three men came to that apartment, a man named Kurska, and the two defendants, Carroll and Kiro. Cronenwett was introduced to them as one Stafford working in the Michigan Chair Company in Grand Rapids, who wished to buy three cases of whisky. The price was fixed at $130 a case. The three men said they had to go to the east end of Grand Rapids to get the liquor and that they would be back in half or three-quarters of an hour. They went away, and in a short time Kruska came back and said they could not get it that night, that the man who had it was not in, but that they would deliver it the next day. They had come to the apartment in an automobile known as an Oldsmobile roadster, the number of which Cronenwett then identified, as did Scully. The proposed vendors did not return the next day, and the evidence disclosed no explanation of their failure to do so. One may surmise that it was suspicion of the real character of the proposed purchaser, whom Carroll subsequently called by his first name when arrested in December following. Cronenwett and his subordinates were engaged in patrolling the road leading from Detroit to Grand Rapids, looking for violations of the Prohibition Act. This seems to have been their regular tour of duty. On the 6th of October, Carroll and Kiro going eastward from Grand Rapids in the same Oldsmobile roadster, passed Cronenwett and Scully some distance out from Grand Rapids. Cronenwett called to Scully, who was taking lunch, that the Carroll boys had passed them going toward Detroit, and sought with Scully to catch up with them to see where they were going. The officers followed as far as East Lansing, half way to Detroit, but there lost trace of them. On the 15th of December, some two months later, Scully and Cronenwett, on their regular tour of duty with Peterson, the state officer, were going from Grand Rapids to Ionia, on the road to Detroit, when Kiro and Carroll met and passed them in the same automobile, coming from the direction of Detroit to Grand Rapids. The government agents turned their car and followed the defendants to a point some 16 miles east of Grand Rapids, where they stopped them and searched the car. They found behind the upholstering of the seats, the filling of which had been removed, 68 bottles. These had labels on them, part purporting to be certificates of English chemists that the contents were blended Scotch whiskies, and the rest that the contents were Gordon gin made in London. When an expert witness was called to prove the contents, defendants admitted the nature of them to be whisky and gin. When the defendants were arrested, carroll said to Cronenwett, ‘Take the liquor and give us one more chance, and I will make it right with you,’ and he pulled out a roll of bills, of which one was for $10. Peterson and another took the two defendants and the liquor and the car to Grand Rapids, while Cronenwett, Thayer, and Scully remained on the road looking for other cars, of whose coming they had information. The officers were not anticipating that the defendants would be coming through on

  

the highway at that particular time, but when they met them there they believed they were carrying liquor, and hence the search, seizure, and arrest.

**Attorneys and Law Firms**

****281** ***136** Messrs. Thomas E. Atkinson and Clare J. Hall, both of Grand Rapids, Mich., for plaintiffs in error.

***143** The Attorney General and Mr. James M. Beck, Sol. Gen., of Washington, D. C., for the United States.

**Opinion**

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

The constitutional and statutory provisions involved in this case include the Fourth Amendment and the National Prohibition Act.

The Fourth Amendment is in part as follows:
'The right of the people to be secure in their persons, houses, papers and effects ****282** against unreasonable searches and seizures shall not be violated, and no warrants 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.'

Section 25, title 2, of the National Prohibition Act, c. 85, 41 Stat. 305, 315, passed to enforce the Eighteenth Amendment, makes it unlawful to have or possess any liquor intended for use in violating the act, or which has been so used, and provides that no property rights shall exist in such inquor. A search warrant may issue and such liquor, with the containers thereof, may be seized under the warrant and be ultimately destroyed. The section further provides:
'No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boaring house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied not transiently but solely as ***144** a residence in an apartment house, hotel, or boarding house.'

Section 26, title 2, under which the seizure herein was made, provides in part as follows:

'When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof.'

The section then provides that the court upon conviction of the person so arrested shall order the liquor destroyed, and except for good cause shown shall order a sale by public auction of the other property seized, and that the proceeds shall be paid into the Treasury of the United States.

By section 6 of an act supplemental to the National Prohibition Act (42 Stat. 222, 223, c. 134 [Comp. St. Ann. Supp. 1923, § 10184a]) it is provided that if any officer or agent or employee of the United States engaged in the enforcement of the Prohibition Act or this Amendment, 'shall search any private dwelling,' as defined in that act, 'without a warrant directing such search,' or 'shall without a search warrant maliciously and without reasonable cause search any other building or property,' he shall be guilty of a misdemeanor and subject to fine or imprisonment or both.

In the passage of the supplemental act through the Senate, amendment No. 32, known as the Stanley Amendment, was adopted, the relevant part of which was as follows:
'Sec. 6. That any officer, agent or employee of the United States engaged in the enforcement of this act or ***145** the National Prohibition Act, or any other law of the United States, who shall search or attempt to search the property or premises of any person without previously securing a search warrant, as provided by law, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not to exceed $1,000, or imprisoned not to exceed one year, or both so fined and imprisoned in the discretion of the court.'

This amendment was objected to in the House, and the judiciary committee, to whom it was referred, reported to the House of Representatives the following as a substitute:
'Sec. 6. That no officer, agent or employee of the United States, while engaged in the enforcement of this act, the National Prohibition Act, or any law in reference to the manufacture or taxation of, or traffic in, intoxicating liquor,

  

shall search any private dwelling without a warrant directing such search, and no such warrant shall issue unless there is reason to believe such dwelling is used as a place in which liquor is manufactured for sale or sold. The term 'private dwelling' shall be construed to include the room or rooms occupied not transiently, but solely as a residence in an apartment house, hotel, or boarding house. Any violation of any provision of this paragraph shall be punished by a fine of not to exceed $1,000 or imprisonment not to exceed one year, or both such fine and imprisonment, in the discretion of the court.'

In its report the committee spoke in part as follows:
'It appeared to the committee that the effect of the Senate amendment No. 32, if agreed to by the House, would greatly cripple the enforcement of the National Prohibition Act and would otherwise seriously interfere with the government in the enforcement of many other laws, as its scope is not limited to the prohibition law, ***146** but applies equally to all laws where prompt action is necessary. There are on the statute books of the United States a number of laws authorizing search without a search warrant. Under the common law and agreeable to the Constitution search may in many cases be legally made without a warrant. The Constitution does not forbid search, as some parties contend, but it does forbid unreasonable search. This provision in regard to search is as a rule contained in the various state Constitutions, but notwithstanding that fact search without a warrant is permitted in many cases, and especially is that true in the enforcement of liquor legislation.

'The Senate amendment prohibits all search or attempt to search any property or premises without a search warrant. The effect of that would necessarily be to prohibit all search, as no search can take place if it is not on some property or premises.

'Not only does this amendment prohibit ****283** search of any lands but it prohibits the search of all property. It will prevent the search of the common bootlegger and his stock in trade, though caught and arrested in the act of violating the law. But what is perhaps more serious, it will make it impossible to stop the rum-running automobiles engaged in like illegal traffic. It would take from the officers the power that they absolutely must have to be of any service, for if they cannot search for liquor without a warrant they might as well be discharged. It is impossible to get a warrant to stop an automobile. Before a warrant could be secured the automobile would be beyond the reach of the officer with its load of illegal liquor disposed of.'

The conference report resulted, so far as the difference between the two houses was concerned, in providing for the punishment of any officer, agent, or employee of the government who searches a 'private dwelling' without a warrant, and for the punishment of any such officer, ***147** etc., who searches any 'other building or property' where, and only where, he makes the search without a warrant 'maliciously and without probable cause.' In other words, it left the way open for searching an automobile or vehicle of transportation without a warrant, if the search was not malicious or without probable cause.

The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles in the enforcement of the Prohibition Act is thus clearly established by the legislative history of the Stanley Amendment. Is such a distinction consistent with the Fourth Amendment? We think that it is, The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.

The leading case on the subject of search and seizure is Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746. An Act of Congress of June 22, 1874 (18 Stat. 187), authorized a court of the United States in revenue cases, on motion of the government attorney, to require the defendant to produce in court his private books, invoices, and papers on pain in case of refusal of having the allegations of the attorney in his motion taken as confessed. This was held to be unconstitutional and void as applied to suits for penalties or to establish a forfeiture of goods, on the ground that under the Fourth Amendment the compulsory production of invoices to furnish evidence for forfeiture of goods constituted an unreasonable search even where made upon a search warrant, and was also a violation of the Fifth Amendment, in that it compelled the defendant in a criminal case to produce evidence against himself or be in the attitude of confessing his guilt.

In Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, it was held that a court in a criminal prosecution could not retain letters of the accused seized in his house, in his absence and without his authority, by a United States marshal ***148** holding no warrant for his arrest and none for the search of his premises, to be used as evidence against him, the accused having made timely application to the court for an order for the return of the letters.

  

In Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, a writ of error was brought to reverse a judgment of contempt of the District Court, fining the company and imprisoning one Silverthorne, its president, until he should purge himself of contempt in not producing books and documents of the company before the grand jury to prove violation of the statutes of the United States by the company and Silverthorne. Silverthorne had been arrested, and while under arrest the marshal had gone to the office of the company without a warrant and made a clean sweep of all books, papers, and documents found there and had taken copies and photographs of the papers. The District Court ordered the return of the originals, but impounded the photographs and copies. This was held to be an unreasonable search of the property and possessions of the corporation and a violation of the Fourth Amendment and the judgment for contempt was reversed.

In Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647, the obtaining through stealth by a representative of the government from the office of one suspected of defrauding the government of a paper which had no pecuniary value in itself, but was only to be used as evidence against its owner, was held to be a violation of the Fourth Amendment. It was further held that when the paper was offered in evidence and duly objected to it must be ruled inadmissible because obtained through an unreasonable search and seizure and also in violation of the Fifth Amendment because working compulsory incrimination.

In Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654, it was held that where concealed liquor was found by government officers without a search warrant in the home of the defendant, ***149** in his absence, and after a demand made upon his wife, it was inadmissible as evidence against the defendant, because acquired by an unreasonable seizure.

In none of the cases cited is there any ruling as to the validity under the Fourth Amendment of a seizure without a warrant of contraband goods in the course of transportation and subject to forfeiture or destruction.

On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that ****284** is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

In Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746, as already said, the decision did not turn on whether a reasonable search might be made without a warrant; but for the purpose of showing the principle on which the Fourth Amendment proceeds, and to avoid any misapprehension of what was decided, the court, speaking through Mr. Justice Bradley, used language which is of particular significance and applicability here. It was there said (page 623 [6 S. Ct. 528]): 'The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ toto coelo. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the ***150** common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duites, the Act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category. Common-welath v. Dana, 2 Metc. (Mass.) 329. Many other things of this character might be enumerated.'

It is noteworthy that the twenty-fourth section of the act of 1789 to which the court there refers provides:

  

'That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any ***151** particular dwelling house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the daytime only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited.' 1 Stat. 43.

Like provisions were contained in the Act of August 4, 1790, c. 35, §§ 48–51, 1 Stat. 145, 170; in section 27 of the Act of February 18, 1793, c. 8, 1 Stat. 305, 315; and in sections 68–71 of the Act of March 2, 1799, c. 22, 1 Stat. 627, 677, 678.

Thus contemporaneously with the adoption of the Fourth Amendment we find in the First Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant. Compare Hester v. United States, 265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898.

Again, by the second section of the Act of March 3, 1815, 3 Stat. 231, 232, it was made lawful for customs officers, not only to board and search vessels within their own and adjoining districts, but also to stop, search, and examine any vehicle, beast, or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law, whether by the person in charge of the vehicle or beast or otherwise, and if they should find any goods, wares or merchandise thereon, which they had probable cause to believe had been so unlawfully brought into the country, to seize and secure the same, and the vehicle or beast as well, for trial ***152** and forfeiture. This act was renewed April 27, 1816 (3 Stat. 315), for a year and expired. The Act of February 28, 1865, revived section 2 of the Act of 1815, above described, 13 Stat. 441, c. 67. The substance of this section was re-enacted in the third section of the Act of July 18, 1866, c. 201, 14 Stat. 178, and was thereafter embodied in the Revised Statutes as section 3061 (Comp. St. § 5763). Neither section 3061 nor any of its earlier counterparts has ever been attacked as unconstitutional. ****285** Indeed, that section was referred to and treated as operative by this court in Cotzhausen v. Nazro, 107 U. S. 215, 219, 2 S. Ct. 503, 27 L. Ed. 540. See, also, United States v. One Black Horse (D C.) 129 F. 167.

Again by section 2140 of the Revised Statutes (Comp. St. § 4141) any Indian agent, subagent or commander of a military post in the Indian country, having reason to suspect or being informed that any white person or Indian is about to introduce, or has introduced, any spirituous liquor or wine into the Indian country, in violation of law, may cause the boats, stores, packages, wagons, sleds and places of deposit of such person to be searched and if any liquor is found therein, then it, together with the vehicles, shall be seized and and proceeded against by libel in the proper court and forfeited. Section 2140 was the outgrowth of the Act of May 6, 1822, c. 58, 3 Stat. 682, authorizing Indian agents to cause the goods of traders in the Indian country to be searched upon suspicion or information that ardent spirits were being introduced into the Indian country to be seized and forfeited if found, and of the Act of June 30, 1834, § 20, c. 161, 4 Stat. 729, 732, enabling an Indian agent having reason to suspect any person of having introduced or being about to introduce liquors into the Indian country to cause the boat, stores or places of deposit of such person to be searched and the liquor found forfeited. This court recognized the statute of 1822 as justifying such a search and seizure in American Fur Co. v. United States, 2 Pet. 358, 7 L. Ed. 450. By the Indian ***153** Appropriation Act of March 2, 1917, c. 146, 39 Stat. 969, 970, automobiles used in introducing or attempting to introduce intoxicants into the Indian territory may be seized, libeled, and forfeited as provided in the Revised Statutes, § 2140.

And again in Alaska, by section 174 of the Act of March 3, 1899, c. 429, 30 Stat. 1253, 1280, it is provided that collectors and deputy collectors or any person authorized by them in writing shall be given power to arrest persons and seize vessels and merchandise in Alaska liable to fine, penalties, or forfeiture under the act and to keep and deliver the same, and the Attorney General, in construing the act, advised the government:

'If your agents reasonably suspect that a violation of law has occurred, in my opinion they have power to search any vessel within the three-mile limit according to the practice of customs officers when acting under section 3059 of the Revised Statutes [Comp. St. § 5761], and to seize such vessels.' 26 Op. Attys. Gen. 243.

  

We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable ***154** if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. Section 26, title 2, of the National Prohibition Act, like the second section of the act of 1789, for the searching of vessels, like the provisions of the act of 1815, and section 3601, Revised Statutes, for searching vehicles for smuggled goods, and like the act of 1822, and that of 1834 and section 2140, R. S., and the act of 1917 for the search of vehicles and automobiles for liquor smuggled into the Indian country, was enacted primarily to accomplish the seizure and destruction of contraband goods; secondly, the automobile was to be forfeited; and, thirdly, the driver was to be arrested. Under section 29, title 2, of the act the latter might be punished by not more than $500 fine for the first offense, not more than $1,000 fine and 90 days' imprisonment for the second offense, and by a fine of $500 or more and by not more than 2 years' imprisonment for the third offense. Thus he is to be arrested for a misdemeanor for his first and second offenses, and for a felony if he offends the third time.

The main purpose of the act obviously was to deal with the liquor and its transportation, and to destroy it. The mere manufacture of liquor can do little to defeat the policy of the Eighteenth Amendment and the Prohibition Act, unless the for ***155** bidden product can be distributed for illegal sale and ****286** use. Section 26 was intended to reach and destroy the forbidden liquor in transportation and the provisions for forfeiture of the vehicle and the arrest of the transporter were incidental. The rule for determining what may be required before a seizure may be made by a competent seizing official is not to be determined by the character of the penalty to which the transporter may be subjected. Under section 28, title 2, of the Prohibition Act, the Commissioner of Internal Revenue, his assistants, agents and inspectors are to have the power and protection in the enforcement of the act conferred by the existing laws relating to the manufacture or sale of intoxicating liquors. Officers who seize under section 26 of the Prohibition Act are therefore protected by section 970 of the Revised Statutes (Comp. St. § 1611), providing that:
'When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: Provided, that the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent.'

It follows from this that, if an officer seizes an autombile or the liquor in it without a warrant, and the facts as subsequently developed do not justify a judgment of condemnation and forfeiture, the officer may escape costs or a suit for damages by a showing that he had reasonable or probable cause for the seizure. Stacey v. Emery, 97 U. S. 642, 24 L. Ed. 1035. The measure of legality of such a seizure is, ***156** therefore, that the seizing officer shall have reasonable or probable cause for believing that the antomobile which he stops and seizes has contraband liquor therein which is being illegally transported.

We here find the line of distrinction between legal and illegal seizures of liquor in transport in vehicles. It is certainly a reasonable distinction. It gives the owner of an automobile or other vehicle seized under section 26, in absence of probable cause, a right to have restored to him the automobile, it

  

protects him under the Weeks and Amos Cases from use of the liquor as evidence against him, and it subjects the officer making the seizures to damages. On the other hand, in a case showing probable cause, the government and its officials are given the opportunity which they should have, to make the investigation necessary to trace reasonably suspected contraband goods and to seize them.

Such a rule fulfills the guaranty of the Fourth Amendment. In cases where the securing of a warrant is reasonably practicable, it must be used and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause. United States v. Kaplan (D. C.) 286 F. 963, 972.

But we are pressed with the argument that if the search of the automobile discloses the presence of liquor and leads under the staute to the arrest of the person in charge of the automobile, the right of seizure should be limited by the common-law rule as to the circumstances justifying an arrest without a warrant for a misdemeanor. The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed ***157** in his presence. Kurtz v. Moffitt, 115 U. S. 487, 6 S. Ct. 148, 29 L. Ed. 458; John Bad Elk v. United States, 177 U. S. 529, 20 S. Ct. 729, 44 L. Ed. 874. The rule is sometimes expressed as follows:

'In cases of misdemeanor, a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence.' Halsbury's Laws of England, vol. 9, part. III, 612.

The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace (1 Stephen, History of Criminal Law, 193), while the reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant (Rohan v. Sawin, 5 Cush. [Mass.] 281). The argument for defendants is that, as the misdemeanor to justify arrest without warrant must be committed in the presence of the police officer, the offense is not committed in his presence unless he can by his senses detect that the liquor is being transported, no matter how reliable his previous information by which he can identify the automobile as loaded with it. Elrod v. Moss (C. C. A.) 278 F. 123; Hughes v. State, 145 Tenn. 544, 238 S. W. 588, 20 A. L. R. 639.

So it is that under the rule contended for by defendants the liquor if carried by one who has been already twice convicted of the same offense may be seized on information other than the senses, while if he has been only once convicted it may not be seized unless the presence of the liquor is detected ****287** by the senses as the automobile concealing it rushes by. This is certainly a very unsatisfactory line of difference when the main object of the section is to forfeit and suppress the liquor, the arrest of the individual being only incidental as shown by the lightness ***158** of the penalty. See Commonwealth v. Street, 3 Pa. Dist. and Co. Ct. Rep.783. In England at the common law the difference in punishment between felonies and misdemeanors was very great. Under our present federal statutes, it is much less important and Congress may exercise a relatively wide discretion in classing particular offenses as felonies or misdemeanors. As the main purpose of section 26 was seizure and forfeiture, it is not so much the owner as the property that offends. Agnew v. Haymes, 141 F. 631, 641, 72 C. C. A. 325. The language of the section provides for seizure when the officer of the law 'discovers' any one in the act of transporting the liquor by automobile or other vehicle. Certainly it is a very narrow and technical construction of this word which would limit it to what the officer sees, hears or smells as the automobile rolls by and excludes therefrom when he identifies the car the convincing information that he may previously have received as to the use being made of it.

We do not think such a nice distinction is applicable in the present case. When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution. Weeks v. United States, 232 U. S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Dillon v. O'Brien and Davis, 16 Cox, C. C. 245; Getchell v. Page, 103 Me. 387, 69 A. 624, 18 L. R. A. (N. S.) 253, 125 Am. St. Rep. 307; Kneeland v. Connally, 70 Ga. 424; 1 Bishop, Criminal Procedure, § 211; 1 Wharton, Criminal Procedure (10th Ed.) § 97. The argument of defendants is based on the theory that the seizure in this case can only be thus justified. If their theory were sound, their conclusion would be. The validity of the seizure then would turn wholly on the validity of the arrest without a seizure. But the theory is unsound. The right to search and the validity of the seizure are

  

not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer ***159** has for belief that the contents of the automobile offend against the law. The seizure in such a proceeding comes before the arrest as section 26 indicates. It is true that section 26, title 2, provides for immediate proceedings against the person arrested and that upon conviction the liquor is to be destroyed and the automobile or other vehicle is to be sold, with the saving of the interest of a lienor who does not know of its unlawful use; but it is evident that if the person arrested is ignorant of the contents of the vehicle, or if he escapes, proceedings can be had against the liquor for destruction or other disposition under section 25 of the same title. The character of the offense for which, after the contraband liquor is found and seized, the driver can be prosecuted does not affect the validity of the seizure.

This conclusion is in keeping with the requirements of the Fourth Amendment and the principles of search and seizure of contraband forfeitable property; and it is a wise one because it leaves the rule one which is easily applied and understood and is uniform. Houck v. State, 106 Ohio St. 195, 140 N. E. 112, accords with this conclusion. Ash v. United States (C. C. A.) 299 F. 277, and Milam v. United States (C. C. A.) 296 F. 629, decisions by the Circuit Court of Appeals for the Fourth Circuit take the same view. The Ash Case is very similar in its facts to the case at bar, and both were by the same court which decided Snyder v. United States (C. C. A.) 285 F. 1, cited for the defendants. See, also, Park v. United States (1st C. C. A.) 294 F. 776, 783, and Lambert v. United States (9th C. C. A.) 282 F. 413.

Finally, was there probable cause? In The Apollon, 9 Wheat. 362, 6 L. Ed. 111, the question was whether the seizure of a French vessel at a particular place was upon probable cause that she was there for the purpose of smuggling. In this discussion Mr. Justice Story, who delivered the judgment of the court, said (page 374):

'It has been very justly observed at the bar that the court is bound to take notice of public facts and geographical ***160** positions, and that this remote part of the country has been infested, at different periods, by smugglers, is matter of general notoriety, and may be gathered from the public documents of the government.'

We know in this way that Grand Rapids is about 152 miles from Detroit, and that Detroit and its neighborhood along the Detroit river, which is the international boundary, is one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior. It is obvious from the evidence that the prohibition agents were engaged in a regular patrol along the important highways from Detroit to Grand Rapids to stop and seize liquor carried in automobiles. They knew or had convincing evidence to make them believe that the Carroll boys, as they called them, were so-called 'bootleggers' in Grand Rapids; i. e., that they were engaged in plying the unlawful trade of selling such liquor in that city. The officers had soon after noted their going from Grand Rapids half way to Detroit, and attempted to follow them to that city to see where they went, but they escaped observation. Two months later these officers suddenly met the same ****288** men on their way westward presumably from Detroit. The partners in the original combination to sell liquor in Grand Rapids were together in the same automobile they had been in the night when they tried to furnish the whisky to the officers, which was thus identified as part of the firm equipment. They were coming from the direction of the great source of supply for their stock to Grand Rapids, where they plied their trade. That the officers, when they saw the defendants, believed that they were carrying liquor, we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so. Emphasis is put by defendants' counsel on the statement made by one of the officers that they were not looking for defendants at the particular time when they appeared. We do not perceive that it has any weight. As soon as they did appear, ***161** the officers were entitled to use their reasoning faculties upon all the facts of which they had previous knowledge in respect to the defendants.

The necessity for probable cause in justifying seizures on land or sea, in making arrests without warrant for past felonies, and in malicious prosecution and false imprisonment cases has led to frequent definition of the phrase. In Stacey v. Emery, 97 U. S. 642, 645 (24 L. Ed. 1035), a suit for damages for seizure by a collector, this court defined probable cause as follows:

'If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient.'

See Locke v. United States, 7 Cranch, 339, 3 L. Ed. 364; The George, 1 Mason, 24, Fed. Cas. No. 5328; The Thompson, 3 Wall. 155, 18 L. Ed. 55.

It was laid down by Chief Justice Shaw, in Commonwealth v. Carey, 12 Cush. 246, 251, that:

  

'If a constable or other peace officer arrest a person without a warrant, he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful.' Commonwealth v. Phelps, 209 Mass. 396, 95 N. E. 868, Ann. Cas. 1912B, 566; Rohan v. Sawin, 5 Cush. 281, 285.

In McCarthy v. De Armit, 99 Pa. 63, the Supreme Court of Pennsylvania sums up the definition of probable cause in this way (page 69):
'The substance of all the definitions is a reasonable ground for belief of guilt.'

In the case of the Director General v. Kastenbaum, 263 U. S. 25, 44 S. Ct. 52, 68 L. Ed. 146, which was a suit for false imprisonment, it was said by this court (page 28 [44 S. Ct. 53]):
'But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent, ***162** which in the judgment of the court would make his faith reasonable.'

See, also, Munn v. De Nemours, 3 Wash. C. C. 37, Fed. Cas. No. 9926.

In the light of these authorities, and what is shown by this record, it is clear the officers here had justification for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.

Counsel finally argue that the defendants should be permitted to escape the effect of the conviction because the court refused on motion to deliver them the liquor when, as they say, the evidence adduced on the motion was much less than that shown on the trial, and did not show probable cause. The record does not make it clear what evidence was produced in support of or against the motion. But, apart from this, we think the point is without substance here. If the evidence given on the trial was sufficient, as we think it was, to sustain the introduction of the liquor as evidence, it is immaterial that there was an inadequacy of evidence when application was made for its return. A conviction on adequate and admissible evidence should not be set aside on such a ground. The whole matter was gone into at the trial, so no right of the defendants was infringed.

Counsel for the government contend that Kiro, the defendant who did not own the automobile, could not complain of the violation of the Fourth Amendment in the use of the liquor as evidence against him, whatever the view taken as to Carroll's rights. Our conclusion as to the whole case makes it unnecessary for us to discuss this aspect of it.

The judgment is affirmed.

***163** Mr. Justice McKENNA, before his retirement, concurred in this opinion.

The separate opinion of Mr. Justice McREYNOLDS.

1. The damnable character of the 'bootlegger's' business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. 'To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; * * * in short, to procure an eminent good by means that are unlawful, is as ****289** little consonant to private morality as to public justice.' Sir William Scott, The Le Louis, 2 Dodson, 210, 257.

While quietly driving an ordinary automobile along a much frequented public road, plaintiffs in error were arrested by federal officers without a warrant and upon mere suspicion—ill-founded, as I think. The officers then searched the machine and discovered carefully secreted whisky, which was seized and thereafter used as evidence against plaintiffs in error when on trial for transporting intoxicating liquor contrary to the Volstead Act. 41 Stat. 305, c. 85. They maintain that both arrest and seizure were unlawful and that use of the liquor as evidence violated their constitutional rights.

This is not a proceeding to forfeit seized goods; nor is it an action against the seizing officer for a tort. Cases like the following are not controlling: Crowell v. McFadon. 8 Cranch, 94, 98, 3 L. Ed. 499; United States v. 1960 Bags of Coffee, 8 Cranch, 398, 403, 405, 3 L. Ed. 602; Otis v. Watkins, 9 Cranch, 339, 3 L. Ed. 752; Gelston v. Hoyt, 3 Wheat. 246, 310, 318, 4 L. Ed. 381; Wood v. United States, 16 Pet. 342, 10 L. Ed. 987; Taylor v. United States, 3 How. 197, 205, 11 L. Ed. 559. They turned upon express provisions of applicable acts

  

of Congress; they did not involve the point now presented and afford little, if any, assistance toward its proper solution. The Volstead Act does not, in terms, authorize arrest or seizure upon mere suspicion.

***164** Whether the officers are shielded from prosecution or action by Rev. Stat. § 970, is not important. That section does not undertake to deprive the citizen of any constitutional right or to permit the use of evidence unlawfully obtained. It does, however, indicate the clear understanding of Congress that probable cause is not always enough to justify a seizure.

Nor are we now concerned with the question whether by apt words Congress might have authorized the arrest without a warrant. It has not attempted to do this. On the contrary, the whole history of the legislation indicates a fixed purpose not so to do. First and second violations are declared to be misdemeanors—nothing more—and Congress, of course, understood the rule concerning arrests for such offenses. Whether different penalties should have been prescribed or other provisions added is not for us to inquire; nor do difficulties attending enforcement give us power to supplement the legislation.

2. As the Volstead Act contains no definite grant of authority to arrest upon suspicion and without warrant for a first offense, we come to inquire whether such authority can be inferred from its provisions.

Unless the statute which creates a misdemeanor contains some clear provision to the contrary, suspicion that it is being violated will not justify an arrest. Criminal statutes must be strictly construed and applied, in harmony with rules of the common law. United States v. Harris, 177 U. S. 305, 310, 20 S. Ct. 609, 44 L. Ed. 780. And the well-settled doctrine is that an arrest for a misdemeanor may not be made without a warrant unless the offense is committed in the officer's presence.

Kurtz v. Moffitt, 115 U. S. 487, 498, 6 S. Ct. 148, 152 (29 L. Ed. 458):
'By the common law of England, neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime not committed in his presence, except in the case ***165** of felony, and then only for the purpose of bringing the offender before a civil magistrate.'

John Bad Elk v. United States, 177 U. S. 529, 534, 20 S. Ct. 729, 731 (44 L. Ed. 874):
'An officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence.'

Commonwealth v. Wright, 158 Mass. 149, 158, 33 N. E. 82, 85 (19 L. R. A. 206, 35 Am. St. Rep. 475):
'It is suggested that the statutory misdemeanor of having in one's possession short lobsters with intent to sell them is a continuing offence, which is being committed while such possession continues, and that therefore an officer who sees any person in possession of such lobsters with intent to sell them can arrest such person without a warrant, as for a misdemeanor committed in his presence. We are of opinion, however, that for statutory misdemeanors of this kind, not amounting to a breach of the peace, there is no authority in an officer to arrest without a warrant, unless it is given by statute. * * * The Legislature has often empowered officers to arrest without a warrant for similar offenses, which perhaps tends to show that, in its opinion, no such right exists at common law.'

Pinkerton v. Verberg, 78 Mich. 573, 584, 44 N. W. 579, 582 (7 L. R. A. 507, 18 Am. St. Rep. 473):
'Any law which would place the keeping and safe-conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees. These are rights which existed long before our Constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land.' 'If persons can be restrained of their liberty, and assaulted and imprisoned, under such circumstances, without complaint or warrant, then there is no limit to the power of a police officer.'

3. The Volstead Act contains no provision which annuls the accepted common-law rule or discloses definite intent ***166** to authorize arrests ****290** without warrant for misdemeanors not committed in the officer's presence.

To support the contrary view section 26 is relied upon.
'When * * * any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or

  

possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof.'

Let it be observed that this section has no special application to automobiles; it includes *any* vehicle—buggy, wagon, boat, or air craft. Certainly, in a criminal statute, always to be strictly construed, the words 'shall discover * * * in the act of transporting in violation of the law' cannot mean shall have reasonable cause to suspect or believe that such transportation is being carried on. To discover and to suspect are wholly different things. Since the beginning apt words have been used when Congress intended that arrests for misdemeanors or seizures might be made upon suspicion. It has studiously refrained from making a felony of the offense here charged; and it did not undertake by any apt words to enlarge the power to arrest. It was not ignorant of the established rule on the subject, and well understood how this could be abrogated, as plainly appears from statutes like the following:
'An act to regulate the collection of duties on imports and tonnage,' approved March 2, 1789, 1 Stat. 627, 677, 678, c. 22; 'An act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported ***167** into the United States, and on the tonnage of ships or vessels,' approved August 4, 1790, 1 Stat. 145, 170, c. 35; 'An act further to provide for the collection of duties on imports and tonnage,' approved March 3, 1815, 3 Stat. 231, 232, c. 94.

These and similar acts definitely empowered officers to seize upon suspicion and therein radically differ from the Volstead Act, which authorized no such thing.

'An act supplemental to the National Prohibition Act,' approved November 23, 1921, 42 Stat. 222, 223, c. 134, provides:
'That any officer, agent, or employee of the United States engaged in the enforcement of this act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment.'

And it is argued that the words and history of this section indicate the intent of Congress to distinguish between the necessity for warrants in order to search private dwelling and the right to search automobiles without one. Evidently Congress regarded the searching of private dwellings as matter of much graver consequence than some other searches and distinguished between them by declaring the former criminal. But the connection between this distinction and the legality of plaintiffs in error's arrest is not apparent. Nor can I find reason for inquiring concerning the validity of the distinction under the Fourth Amendment. Of course, the distinction is ***168** valid, and so are some seizures. But what of it? The act made nothing legal which theretofore was unlawful, and to conclude that by declaring the unauthorized search of a private dwelling criminal Congress intended to remove ancient restrictions from other searches and from arrests as well, would seem impossible.

While the Fourth Amendment denounces only unreasonable seizures unreasonableness often depends upon the means adopted. Here the seizure followed an unlawful arrest, and therefore became itself unlawful—as plainly unlawful as the seizure within the home so vigorously denounced in Weeks v. United States, 232 U. S. 383, 391, 392, 393, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177.

In Snyder v. United States, 285 F. 1, 2, the Court of Appeals, Fourth Circuit, rejected evidence obtained by an unwarranted arrest, and clearly announced some very wholesome doctrine: 'That an officer may not make an arrest for a misdemeanor not committed in his presence, without a warrant, has been so frequently decided as not to require citation of authority. It is equally fundamental that a citizen may not be arrested on suspicion of having committed a misdemeanor and have his person searched by force, without a warrant of arrest. If, therefore, the arresting officer in this case had no other justification for the arrest than the mere suspicion that a bottle, only the neck of which he could see protruding from the pocket of defendant's coat, contained intoxicating liquor, then it would seem to follow without much question that the arrest and search, without first having secured a warrant, were illegal. And that his only justification was his suspicion is admitted by the evidence of the arresting officer himself. If the bottle had been empty or if it had contained any one of a dozen innoxious liquids, the act of the officer would, admittedly, have been an unlawful invasion of the personal

  

liberty of the defendant. That it happened in this instance to contain whisky, we think, ***169** neither ****291** justifies the assault nor condemns the principle which makes such an act unlawful.'

The validity of the seizure under consideration depends on the legality of the arrest. This did not follow the seizure, but the reverse is true. Plaintiffs in error were first brought within the officers' power, and, while therein, the seizure took place. If an officer, upon mere suspicion of a misdemeanor, may stop one on the public highway, take articles away from him and thereafter use them as evidence to convict him of crime, what becomes of the Fourth and Fifth Amendments?

In Weeks v. United States, supra, through Mr. Justice Day, this court said:
'The effect of the Fourth Amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. * * * The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have ***170** resulted in their embodiment in the fundamental law of the land.'

Silverthorne Lumber Co. v. United States, 251 U. S. 385, 391, 40 S. Ct. 182, 64 L. Ed. 319:
'The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. Weeks v. United States, 232 U. S. 383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U. S. 393. The essence of a provision forbidling the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.'

Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647, and Amos v. United States, 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654, distinctly point out that property procured by unlawful action of federal officers cannot be introduced as evidence.

The arrest of plaintiffs in error was unauthorized, illegal, and violated the guaranty of due process given by the Fifth Amendment. The liquor offered in evidence was obtained by the search which followed this arrest and was therefore obtained in violation of their constitutional ***171** rights. Articles found upon or in the control of one lawfully arrested may be used as evidence for certain purposes, but not at all when secured by the unlawful action of a federal officer.

4. The facts known by the officers who arrested plaintiffs in error were wholly insufficient to create a reasonable belief that they were transporting liquor contrary to law. These facts were detailed by Fred Cronenwett, chief prohibition officer. His entire testimony as given at the trial follows:
'I am in charge of the federal prohibition department in this district. I am acquainted with these two respondents, and first saw them on September 29, 1921, in Mr. Scully's apartment on Oakes street, Grand Rapids. There were three of them that came to Mr. Scully's apartment, one by the name of Kruska, George Krio, and John Carroll. I was introduced to them under the name of Stafford, and told them I was working for the Michigan Chair Company, and wanted to buy three cases of whisky, and the price was agreed upon. After they thought I was all right, they said they would be back in half or three-quarters of an hour; that they had to go out to the east end of

  

Grand Rapids to get this liquor. They went away and came back in a short time, and Mr. Kruska came upstairs and said they couldn't get it that night; that a fellow by the name of Irving, where they were going to get it, wasn't in, but they were going to deliver it the next day, about ten. They didn't deliver it the next day. I am not positive about the price. It seems to me it was around $130 a case. It might be $135. Both respondents took part in this conversation. When they came to Mr. Scully's apartment they had this same car. While it was dark and I wasn't able to get a good look at this car, later, on the 6th day of October, when I was out on the road with Mr. Scully, I was waiting on the highway while he went to Reed's Lake to get a light ***172** lunch, and they drove by, and I had their license number and the appearance of their car, and knowing the two boys, seeing them on the 29th day of September, I was satisfied when I seen the car on December 15th it was the same car I had seen on the 6th day of October. On the 6th ****292** day of October it was probably twenty minutes before Scully got back to where I was. I told him the Carroll boys had just gone toward Detroit and we were trying to catch up with them and see where they were going. We did catch up with them somewhere along by Ada, just before we got to Ada, and followed them to East Lansing. We gave up the chase at East Lansing.

'On the 15th of December, when Peterson and Scully and I overhauled this car on the road, it was in the country, on Pike 16, the road leading between Grand Rapids and Detroit. When we passed the car we were going toward Ionia, or Detroit, and the Kiro and Carroll boys were coming towards Grand Rapids when Mr. Scully and I recognized them and said, 'There goes the Carroll brothers,' and we went on still further in the same direction we were going and turned around and went back to them—drove up to the side of them. Mr. Scully was driving the car; I was sitting in the front seat, and I stepped out on the running board and held out my hand and said, 'Carroll, stop that car,' and they did stop it. John Kiro was driving the car. After we got them stopped, we asked them to get out of the car, which they did. Carroll referred to me, and called me by the name of 'Fred,' just as soon as I got up to him. Raised up the back part of the roadster; didn't find any liquor there; then raised up the cushion; then I struck at the lazyback of the seat and it was hard. I then started to open it up, and I did tear the cushion some, and Carroll said, 'Don't tear the cushion; we have only got six cases in there;' and I took out two bottles and found out it was liquor; satisfied it was liquor. Mr. Peterson and a fellow by the ***173** name of Gerald Donker came in with the two Carroll boys and the liquor and the car to Grand Rapids. They brought the two defendants and the car and the liquor to Grand Rapids. I and the other men besides Peterson stayed out on the road, looking for other cars that we had information were coming in. There was conversation between me and Carroll before Peterson started for town with the defendants. Mr. Carroll said, 'Take the liquor, and give us one more chance, and I will make it right with you.' At the same time he reached in one of his trousers pockets and pulled out money; the amount of it I don't know. I wouldn't say it was a whole lot. I saw a $10 bill and there was some other bills; I don't know how much there was; it wasn't a large amount.

'As I understand, Mr. Hanley helped carry the liquor from the car. On the next day afterwards, we put this liquor in boxes, steel boxes, and left it in the marshal's vault, and it is still there now. Mr. Hanley and Chief Deputy Johnson, some of the agents and myself were there. Mr. Peterson was there the next day that the labels were signed by the different officers; those two bottles, Exhibits A and B.

'Q. Now, those two bottles, Exhibits A and B, were those the two bottles you took out of the car out there, or were those two bottles taken out of the liquor after it got up here? A. We didn't label them out on the road; simply found it was liquor and sent it in; and this liquor was in Mr. Hanley's custody that evening and during the middle of the next day when we checked it over to see the amount of liquor that was there. Mr. Johnson and I sealed the bottles, and Mr. Johnson's name is on the label that goes over the bottle with mine, and this liquor was taken out of the case to-day. It was taken out for the purpose of analyzation. The others were not broken until to-day.

***174** 'Q. And are you able to tell us, from the label and from the bottles, whether it is part of the same liquor taken out of that car? A. It has the appearance of it; yes, sir. Those are the bottles that were in there that Mr. Hanley said was gotten out of the Carroll car.'

Cross-examination:
'I think I was the first one to get back to the Carroll car after it was stopped. I had a gun in my pocket; I didn't present it. I was the first one to the car and raised up the back of the car, but the others were there shortly afterward. We assembled right around the car immediately.

'Q. And whatever examination and what investigation you made you went right ahead and did it in your own way? A. Yes, sir.

  

'Q. And took possession of it, arrested them, and brought them in? A. Yes, sir.

'Q. And at that time, of course, you had no search warrant? A. No, sir. We had no knowledge that this car was coming through at that particular time.'

Redirect examination:
'The lazyback was awfully hard when I struck it with my fist. It was harder than upholstery ordinarily is in those backs; a great deal harder. It was practically solid. Sixty-nine quarts of whisky in one lazyback.'

The negotiation concerning three cases of whisky on September 29th was the only circumstance which could have subjected plaintiffs in error to any reasonable suspicion. No whisky was delivered, and it is not certain that they ever intended to deliver any. The arrest came 2 ½ months after the negotiation. Every act in the meantime is consistent with complete innocence. Has it come about that merely because a man once agreed to deliver whisky, but did not, he may be arrested whenever thereafter he ventures to drive an automobile on the road to Detroit!

5. When Congress has intended that seizures or arrests might be made upon suspicion it has been careful to say ***175** so. The history and terms of the Volstead Act are not consistent with the suggestion that it was the purpose of Congress to grant the power here claimed for enforcement officers. The facts known when the arrest occurred were wholly insufficient to engender reasonable belief that plaintiffs in error were committing a misdemeanor, and the legality of the arrest cannot be supported by facts ascertained through the search which followed.

To me it seems clear enough that the judgment should be reversed.

I am authorized to say that Mr. Justice SUTHERLAND concurs in this opinion.

**All Citations**

267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790

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90 S.Ct. 1975
Supreme Court of the United States

Frank CHAMBERS, Petitioner,

v.

James F. MARONEY, Superintendent, State Correctional Institution.

No. 830.
|
Argued April 27, 1970.
|
Decided June 22, 1970.
|
Rehearing Denied Oct. 12, 1970.

See 91 S.Ct. 23.

**Synopsis**

Habeas corpus proceeding. The United States District Court for the Western District of Pennsylvania denied petition without a hearing, and petitioner appealed. The Court of Appeals, 3 Cir., 408 F.2d 1186 affirmed, and certiorari was granted. The Supreme Court, Mr. Justice White, held that where police, as result of talking to victim and teen-age observers, had probable cause to believe that robbers, carrying guns and fruits of crime, had fled scene in light blue compact station wagon carrying four men, one wearing a green sweater and another wearing a trench coat, officers had probable cause to stop automobile and search it for guns and stolen money, and search of automobile at station house without warrant was not improper.

Affirmed.

Mr. Justice Stewart concurred and filed opinion.

Mr. Justice Harlan concurred in part and dissented in part and filed opinion.

**Attorneys and Law Firms**

****1977** ***43** Vincent J. Grogan, Pittsburgh, Pa., for petitioner.

Carol Mary Los, Pittsburgh, Pa., for respondent, pro hac vice, by special leave of Court.

**Opinion**

Mr. Justice WHITE delivered the opinion of the Court.

The principal question in this case concerns the admissibility of evidence seized from an automobile, in which petitioner was riding at the time of his arrest, after the automobile was taken to a police station and was there thoroughly searched without a warrant. The Court of Appeals for the Third Circuit found no violation of petitioner's Fourth Amendment rights. We affirm.

***44** I

During the night of May 20, 1963, a Gulf service station in North Braddock, Pennsylvania, was robbed by two men, each of whom carried and displayed a gun. The robbers took the currency from the cash register; the service station attendant, one Stephen Kovacich, was directed to place the coins in his right-hand glove, which was then taken by the robbers. Two teen-agers, who had earlier noticed a blue compact station wagon circling the block in the vicinity of the Gulf station, then saw the station wagon speed away from a parking lot close to the Gulf station. About the same time, they learned that the Gulf station had been robbed. They reported to police, who arrived immediately, that four men were in the station wagon and one was wearing a green sweater. Kovacich told the police that one of the men who robbed him was wearing a green sweater and the other was wearing a trench coat. A description of the car and the two robbers was broadcast over the police radio. Within an hour, a light blue compact station wagon answering the description and carrying four men was stopped by the police about two miles from the Gulf station. Petitioner was one of the men in the station wagon. He was wearing a green sweater and there was a trench coat in the car. The occupants were arrested and the car was driven to the police station. In the course of a thorough search of the car at the station, the police found concealed in a compartment under the dashboard two .38—caliber revolvers (one loaded with dumdum bullets), a right-hand glove containing small change, and certain cards bearing the name of Raymond Havicon, the attendant at a Boron service station in McKeesport, Pennsylvania, who had been robbed at gunpoint on May 13, 1963. In the course of a warrant-authorized search of petitioner's home the day after petitioner's arrest, police found and ***45** seized certain .38-

  

caliber ammunition, including some dumdum bullets similar to those found in one of the guns taken from the station wagon.

**1978 Petitioner was indicted for both robberies.[1] His first trial ended in a mistrial but he was convicted of both robberies at the second trial. Both Kovacich and Havicon identified petitioner as one of the robbers.[2] The materials taken from the station wagon were introduced into evidence, Kovacich identifying his glove and Havicon the cards taken in the May 13 robbery. The bullets seized at petitioner's house were also introduced over objections of petitioner's counsel.[3] Petitioner was sentenced to a term of four to eight years' imprisonment for the May 13 robbery and to a term of two to seven years' imprisonment for the May 20 robbery, the sentences to run consecutively.[4] Petitioner did not take a direct appeal from these convictions. In 1965, petitioner sought a writ of habeas corpus in the state court, which denied the writ after a brief evidentiary hearing; the denial of *46 the writ was affirmed on appeal in the Pennsylvania appellate courts. Habeas corpus proceedings were then commenced in the United States District Court for the Western District of Pennsylvania. An order to show cause was issued. Based on the State's response and the state court record, the petition for habeas corpus was denied without a hearing. The Court of Appeals for the Third Circuit affirmed, 408 F.2d 1186 and we granted certiorari, 396 U.S. 900, 90 S.Ct. 225, 24 L.Ed.2d 177 (1969).[5]

II

We pass quickly the claim that the search of the automobile was the fruit of an unlawful arrest. Both the **1979 courts below thought the arresting officers had probable cause to make the arrest. We agree. Having talked to the teen-age observers and to the victim Kovacich, the police had ample cause to stop a light blue compact station wagon carrying four men and to arrest the occupants, one of whom was wearing a green sweater *47 and one of whom had a trench coat with him in the car.[6]

Even so, the search that produced the incriminating evidence was made at the police station some time after the arrest and cannot be justified as a search incident to an arrest: 'Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.' Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed.2d 777 (1964). Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed.2d 538 (1968), is to the same effect; the reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer obtain when the accused is safely in custody at the station house.

There are, however alternative grounds arguably justifying the search of the car in this case. In Preston, supra, the arrest was for vagrancy; it was apparent that the officers had no cause to believe that evidence of crime was concealed in the auto. In Dyke, supra, the Court expressly rejected the suggestion that there was probable cause to search the car, 391 U.S., at 221—222, 88 S.Ct. 1475—1476. Here the situation is different, for the police had probable cause to believe that the robbers, carrying guns and the fruits of the crime, had fled the scene in a light blue compact station wagon which would be carrying four men, one wearing a green sweater and another wearing a trench coat. As the state courts correctly held, there was probable cause to arrest the occupants of the station wagon that the officers stopped; just as obviously was *48 there probable cause to search the car for guns and stolen money.

In terms of the circumstances justifying a warrantless search, the Court has long distinguished between an automobile and a home or office. In Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the issue was the admissibility in evidence of contraband liquor seized in a warrantless search of a car on the highway. After surveying the law from the time of the adoption of the Fourth Amendment onward, the Court held that automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize. The Court expressed its holding as follows:

'We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

**1980 'Having thus established that contraband goods concealed and illegally transported in an automobile or other

  

vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. * * * (T)hose lawfully within the country, entitled to use ***49** the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. * * *

'The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.' 267 U.S., at 153—154, 155-156, 45 S.Ct. at 285—286.

The Court also noted that the search of an auto on probable cause proceeds on a theory wholly different from that justifying the search incident to an arrest:
'The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law.' 267 U.S., at 158—159, 45 S.Ct. at 287.

Finding that there was probable cause for the search and seizure at issue before it, the Court affirmed the convictions.

Carroll was followed and applied in Husty v. United States, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629 (1931), and Scher v. United States, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151 (1938). It was reaffirmed and followed in Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). In 1964, the opinion in Preston, supra, cited both Brinegar and Carroll with approval, 376 U.S., at 366—367, 84 S.Ct. at 882—883. In Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967),[7] ***50** the Court read Preston as dealing primarily with a search incident to arrest and cited that case for the proposition that the mobility of a car may make the search of a car without a warrant reasonable 'although the result might be the opposite in a search of a home, a store, or other fixed piece of property.' 386 U.S., at 59, 87 S.Ct. at 790. The Court's opinion in Dyke, 391 U.S., at 221, 88 S.Ct. at 1475, recognized that '(a)utomobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office,' citing Brinegar and Carroll, supra. However, because there was insufficient reason to search the car involved in the Dyke case, the Court did not reach the question of whether those cases 'extend to a warrantless search, based upon probable cause, of an automobile which, having been stopped originally on a highway, is parked outside a courthouse.' 391 U.S., at 222, 88 S.Ct. at 1476.[8]

Neither Carroll, supra, nor other cases in this Court require or suggest that in ****1981** every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. But the circumstances that ***51** furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable. Where this is true, as in Carroll and the case before us now, if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.[9]

In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable-cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. Carroll, supra, holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible.

Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.' But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety ***52** of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

  

On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained.[10] The same consequences **1982 may not follow where there is unforeseeable cause to search a house. Compare Vale v. Louisiana, ante, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409. But as Carroll, supra, held, for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars.

III

Neither of petitioner's remaining contentions warrants reversal of the judgment of the Court of Appeals. One of them challenges the admissibility at trial of the .38-caliber ammunition seized in the course of a search of petitioner's house. The circumstances relevant to this *53 issue are somewhat confused, involving as they do questions of probable cause, a lost search warrant, and the Pennsylvania procedure for challenging the admissibility of evidence seized. Both the District Court and the Court of Appeals, however, after careful examination of the record, found that if there was error in admitting the ammunition, the error was harmless beyond a reasonable doubt. Having ourselves studied this record, we are not prepared to differ with the two courts below. See Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

The final claim is that petitioner was not afforded the effective assistance of counsel. The facts pertinent to this claim are these: The Legal Aid Society of Allegheny County was appointed to represent petitioner prior to his first trial. A representative of the society conferred with petitioner, and a member of its staff, Mr. Middleman, appeared for petitioner at the first trial. There is no claim that petitioner was not then adequately represented by fully prepared counsel. The difficulty arises out of the second trial. Apparently no one from the Legal Aid Society again conferred with petitioner until a few minutes before the second trial began. The attorney who then appeared to represent petitioner was not Mr. Middleman but Mr. Tamburo, another Legal Aid Society attorney. No charge is made that Mr. Tamburo was incompetent or inexperienced; rather the claim is that his appearance for petitioner was so belated that he could not have furnished effective legal assistance at the second trial. Without granting an evidentiary hearing, the District Court rejected petitioner's claim. The Court of Appeals dealt with the matter in an extensive opinion. After carefully examining the state court record, which it had before it, the court found ample grounds for holding that the appearance of a different attorney at the second trial had not resulted in prejudice to petitioner. The claim that Mr. Tamburo *54 was unprepared centered around his allegedly inadequate efforts to have the guns and ammunition excluded from evidence. But the Court of Appeals found harmless any error in the admission of the bullets and ruled that the guns and other materials seized from the car were admissible evidence. Hence the claim of prejudice from the substitution of counsel was without substantial basis.[11] In this posture of the case we are not inclined to disturb the judgment of the Court of Appeals as to what the state record shows with respect to the adequacy of counsel. Unquestionably, the courts should make every effort to effect early appointments of counsel in all cases. But we are not disposed to fashion a per se rule requiring reversal of every **1983 conviction following tardy appointment of counsel or to hold that, whenever a habeas corpus petition alleges a belated appointment, an evidentiary hearing must be held to determine whether the defendant has been denied his constitutional right to counsel. The Court of Appeals reached the right result in denying a hearing in this case.

Affirmed.

Mr. Justice BLACKMUN took no part in the consideration or decision of this case.

Mr. Justice STEWART, concurring.

I adhere to the view that the admission at trial of evidence acquired in alleged violation of Fourth Amendment *55 standards is not of itself sufficient ground for a collateral attack upon an otherwise valid criminal conviction, state or federal. See Harris v. Nelson, 394 U.S. 286, 307, 89 S.Ct. 1082, 1094—1095, 22 L.Ed.2d 281 (dissenting opinion); Kaufman v. United States, 394 U.S. 217, 242, 89 S.Ct. 1068, 1082, 22 L.Ed.2d 227 (dissenting opinion). But until the Court adopts that view, I regard myself as obligated to consider the merits of the Fourth and Fourteenth Amendment claims in a

  

case of this kind. Upon that premise I join the opinion and judgment of the Court.

Mr. Justice HARLAN, concurring in part and dissenting in part.

I find myself in disagreement with the Court's disposition of this case in two respects.

I

I cannot join the Court's casual treatment of the issue that has been presented by both parties as the major issue in this case: petitioner's claim that he received ineffective assistance of counsel at his trial. As the Court acknowledges, petitioner met Mr. Tamburo, his trial counsel, for the first time en route to the courtroom on the morning of trial. Although a different Legal Aid Society attorney had represented petitioner at his first trial, apparently neither he nor anyone else from the society had conferred with petitioner in the interval between trials. Because the District Court did not hold an evidentiary hearing on the habeas petition, there is no indication in the record of the extent to which Mr. Tamburo may have consulted petitioner's previous attorney, the attorneys for the other defendants, or the files of the Legal Aid Society. What the record does disclose on this claim is essentially a combination of two factors: the entry of counsel into the case immediately ***56** before trial, and his handling of the issues that arose during the trial.[1]

As respondent must concede, counsel's last-minute entry into the case precluded his compliance with the state rule requiring that motions to suppress evidence be made before trial, even assuming that he had sufficient acquaintance with the case to know what arguments were worth making. Furthermore, the record suggests that he may have had virtually no such acquaintance.

****1984** In the first place, he made no objection to the admission in evidence of the objects found during the search of the car at the station house after the arrest of its occupants, although that search was of questionable validity under Fourth Amendment standards, see infra.

Second, when the prosecution offered in evidence the bullets found in the search of petitioner's home, which had been excluded on defense objection at the first trial, Mr. Tamburo objected to their admission, but in a manner that suggested that he was a stranger to the facts of the case. While he indicated that he did know of the earlier exclusion, he apparently did not know on what ground the bullets had been excluded, and based his ***57** objection only on their asserted irrelevance.[2] Later in the trial he renewed his objection on the basis of the inadequacy of the warrant, stating, 'I didn't know a thing about the search Warrant until this morning.' App. 130.[3]

Third, when prosecution witness Havicon made an in-court identification of petitioner as the man who had ***58** threatened him with a gun during one of the robberies, Mr. Tamburo asked questions in cross-examination that suggested that he had not had time to settle upon a trial strategy or even to consider whether petitioner would take the stand. Mr. Tamburo asked whether, at a pretrial lineup, a detective had not told Havicon that petitioner 'was the man with the gun.' After Havicon's negative answer, this colloquy ensued:
'THE COURT: I take it you will be able to disprove that, will you?

'MR. TAMBURO: What?

'THE COURT: You shouldn't ask that question unless you are prepared to disprove that, contradict him.

'MR. TAMBURO: I have the defendant's testimony.

'THE COURT: Disprove it in any way at all.

'MR. MEANS (the prosecutor): I don't understand how the defendant would know what the detectives told him.

'THE COURT: He said he is going to disprove it by the defendant, that's all right, go ahead.' App. 34.

****1985** The next witness was a police officer who had been present at the lineup, and who testified that no one had told Havicon whom to pick out. Petitioner's counsel did not cross-examine, and petitioner never took the stand.

On this state of the record the Court of Appeals ruled that, although the late appointment of counsel necessitated close scrutiny into the effectiveness of his representation, petitioner 'was not prejudiced by the late appointment of counsel' because neither of the Fourth Amendment claims belatedly raised justified reversal of ***59** the conviction. 408 F.2d 1186, 1196. I agree that the strength of the search-and-seizure claims is an element to be considered in the assessment of whether counsel was adequately prepared to make an effective defense, but I cannot agree that the relevance of

  

those claims in this regard disappears upon a conclusion by an appellate court that they do not invalidate the conviction.

This Court recognized long ago that they duty to provide counsel 'is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.' Powell v. Alabama, 287 U.S. 45, 71, 53 S.Ct. 55, 65, 77 L.Ed. 158 (1932); Hawk v. Olson, 326 U.S. 271, 278, 66 S.Ct. 116, 322, 90 L.Ed. 61 (1945). While 'the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial,' the Court has recognized that
'the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel.' Avery v. Alabama, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1940).

Where counsel has no acquaintance with the facts of the case and no opportunity to plan a defense, the result is that the defendant is effectively denied his constitutional right to assistance of counsel.

It seems to me that what this record reveals about counsel's handling of the search and seizure claims and about the tenor of his cross-examination of the government witness Havicon, when coupled with his late entry into the case, called for more exploration by the District Court before petitioner's ineffective assistance of counsel claim could be dismissed. Such an exploration should ***60** have been directed to ascertaining whether the circumstances under which Mr. Tamburo was required to undertake petitioner's defense at the second trial were such as to send him into the courtroom with so little knowledge of the case as to render him incapable of affording his client adequate representation. The event of that exploration would turn, not on a mere assessment of particular missteps or omissions of counsel, whether or not caused by negligence, cf. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), but on the District Court's evaluation of the total picture, with the objective of determining whether petitioner was deprived of rudimentary legal assistance. See Williams v. Beto, 354 F.2d 698 (C.A.5th Cir. 1965). And, of course, such an exploration would not be confined to the three episodes that, in my opinion, triggered the necessity for a hearing.

It is not an answer to petitioner's claim for a reviewing court simply to conclude that he has failed after the fact to show that, with adequate assistance, he would have prevailed at trial. Glasser v. United States, 315 U.S. 60, 75—76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942); cf. White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963); Reynolds v. Cochran, 365 U.S. 525, 530—533, 81 S.Ct. 723, 726—727, 5 L.Ed.2d 754 (1961). Further inquiry might show, of course, that counsel's opportunity for preparation was adequate to protect petitioner's ****1986** interests,[4] but petitioner did, in my view, raise a sufficient doubt on that score to be entitled to an evidentiary hearing.[5]

***61** II

In sustaining the search of the automobile I believe the Court ignores the framework of our past decisions circumscribing the scope of permissible search without a warrant. The Court has long read the Fourth Amendment's proscription of 'unreasonable' searches as imposing a general principle that a search without a warrant is not justified by the mere knowledge by the searching officers of facts showing probable cause. The 'general requirement that a search warrant be obtained' is basic to the Amendment's protection of privacy, and "the burden is on those seeking (an) exemption * * * to show the need for it." E.g., Chimel v. California, 395 U.S. 752, 762, 89 S.Ct. 2034, 2039 (1969); Katz v. United States, 389 U.S. 347, 356—358, 88 S.Ct. 507, 514—515, 19 L.Ed.2d 576 (1967); Warden v. Hayden, 387 U.S. 294, 299, 87 S.Ct. 1642, 1646, 18 L.Ed.2d 782 (1967); Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed.2d 777 (1964); United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59 (1951); McDonald v. United States, 335 U.S. 451, 455—456, 69 S.Ct. 191, 193—194, 93 L.Ed. 153 (1948); Agnello v. United States, 269 U.S. 20, 33 46 S.Ct. 4, 6—7, 70 L.Ed. 145 (1925).

Fidelity to this established principle requires that, where exceptions are made to accommodate the exigencies of particular situations, those exceptions be no broader than necessitated by the circumstances presented. For example, the Court has recognized that an arrest creates an emergency situation justifying a warrantless search of the arrestee's person and of 'the area from within which he might gain possession of a weapon or destructible evidence'; however, because the exigency giving rise to this exception extends only that far, the search may go no further. Chimel v. California, 395 U.S., at 763, 89 S.Ct. at 2040; Trupiano v.

  

United States, 334 U.S. 699, 705, 708, 68 S.Ct. 1229, 1232—1234, 92 L.Ed. 1663 (1948). Similarly we held in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), that a warrantless search in a 'stop and frisk' situation must 'be strictly circumscribed ***62** by the exigencies which justify its initiation.' Id., at 26, 88 S.Ct. at 1882. Any intrusion beyond what is necessary for the personal safety of the officer or others nearby is forbidden.

Where officers have probable cause to search a vehicle on a public way, a further limited exception to the warrant requirement is reasonable because 'the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' Carroll v. United States, 267 U.S. 132, 153, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925). Because the officers might be deprived of valuable evidence if required to obtain a warrant before effecting any search or seizure, I agree with the Court that they should be permitted to take the steps necessary to preserve evidence and to make a search possible.[6] Cf. ALI, Model Code of ****1987** Pre-Arraignment Procedure s 6.03 (Tent. Draft No. 3, 1970). The Court holds that those steps include making a warrantless search of the entire vehicle on the highway—a conclusion reached by the Court in Carroll without discussion—and indeed appears to go further and to condone the removal of the car to the police station for a warrantless search there at the convenience of the police.[7] I cannot agree that this result is consistent ***63** with our insistence in other areas that departures from the warrant requirement strictly conform to the exigency presented.

The Court concedes that the police could prevent removal of the evidence by temporarily seizing the car for the time necessary to obtain a warrant. It does not dispute that such a course would fully protect the interests of effective law enforcement; rather it states that whether temporary seizure is a 'lesser' intrusion than warrantless search 'is itself a debatable question and the answer may depend on a variety of circumstances.' Ante, at 1981.[8] I believe it clear that a warrantless search involves the greater sacrifice of Fourth Amendment values.

The Fourth Amendment proscribes, to be sure, unreasonable 'seizures' as well as 'searches.' However, in the circumstances in which this problem is likely to occur, the lesser intrusion will almost always be the simple seizure of the car for the period—perhaps a day—necessary to enable the officers to obtain a search warrant. In the first place, as this case shows, the very facts establishing probable cause to search will often ***64** also justify arrest of the occupants of the vehicle. Since the occupants themselves are to be taken into custody, they will suffer minimal further inconvenience from the temporary immobilization of their vehicle. Even where no arrests are made, persons who wish to avoid a search—either to protect their privacy or to conceal incriminating evidence—will almost certainly prefer a brief loss of the use of the vehicle in exchange for the opportunity to have a magistrate pass upon the justification for the search. To be sure, one can conceive of instances in which the occupant, ****1988** having nothing to hide and lacking concern for the privacy of the automobile, would be more deeply offended by a temporary immobilization of his vehicle than by a prompt search of it. However, such a person always remains free to consent to an immediate search, thus avoiding any delay. Where consent is not forthcoming, the occupants of the car have an interest in privacy that is protected by the Fourth Amendment even where the circumstances justify a temporary seizure. Terry v. Ohio, supra. The Court's endorsement of a warrantless invasion of that privacy where another course would suffice is simply inconsistent with our repeated stress on the Fourth Amendment's mandate of "adherence to judicial processes." E.g., Katz v. United States, 389 U.S., at 357, 88 S.Ct., at 514.[9]

Indeed, I beleive this conclusion is implicit in the opinion of the unanimous Court in ***65** Preston v. United States, 376 U.S. 364, 84 S.Ct. 881 (1964). The Court there purported to decide whether a factual situation virtually identical to the one now before us was 'such as to fall within any of the exceptions to the constitutional rule that a search warrant must be had before a search may be made.' Id., at 367, 84 S.Ct., at 883 (emphasis added). The Court concluded that no exception was available, stating that 'since the men were under arrest at the police station and the car was in police custody at a garage, (there was no) danger that the car would be moved out of the locality or jurisdiction.' Id., at 368, 84 S.Ct., at 884. The Court's reliance on the police custody of the car as its reason for holding 'that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment,' ibid., can only have been based on the premise that the more reasonable course was for the police to retain custody of the car for the short time necessary to obtain a warrant. The Court expressly did not rely, as suggested today, on the fact that an arrest for vagrancy provided 'no cause to believe that evidence of crime was concealed in the auto.' Ante, at 1979; see 376 U.S., at 368; Wood v. Crouse, 417 F.2d 394, 397—398 (C.A.10th Cir. 1969). The Court now discards the approach taken in Preston, and creates a special rule for automobile searches that is seriously at odds with generally applied Fourth Amendment principles.

  

III

The Court accepts the conclusion of the two courts below that the introduction of the bullets found in petitioner's home, if error, was harmless. Although, as explained above, I do not agree that this destroys the relevance of the issue to the ineffectiveness of counsel claim, I agree that the record supports the lower courts' conclusion that this item of evidence, taken alone, was harmless beyond a reasonable doubt.

**All Citations**

399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419

Footnotes

1 Petitioner was indicted separately for each robbery. One of the other three men was similarly indicted and the other two were indicted only for the Gulf robbery. All indictments and all defendants were tried together. In a second trial following a mistrial, the jury found all defendants guilty as charged.

2 Kovacich identified petitioner at a pretrial stage of the proceedings, and so testified, but could not identify him at the trial. Havicon identified petitioner both before trial and at trial.

3 The bullets were apparently excluded at the first trial. The grounds for the exclusion do not clearly appear from the record now before us.

4 The four-to-eight-year sentence was to be served concurrently with another sentence, for an unrelated armed robbery offense, imposed earlier but vacated subsequent to imposition of sentence in this case. The two-to-seven-year term was to be consecutive to the other sentences. It appears that the offenses here at issue caused revocation of petitioner's parole in connection with a prior conviction. Apparently petitioner has now begun to serve the first of the two sentences imposed for the convictions here challenged.

5 Since Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), the federal courts have regularly entertained and ruled on petitions for habeas corpus filed by state prisoners alleging that unconstitutionally seized evidence was admitted at their trials. See, e.g., Mancusi v. DeForte, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968); Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968); Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). As for federal prisoners, a divided Court held that relief under 28 U.S.C. s 2255 was available to vindicate Fourth Amendment rights. Kaufman v. United States, 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed.2d 227 (1969). Right-to-counsel claims of course have regularly been pressed and entertained in federal habeas corpus proceedings.

It is relevant to note here that petitioner Chambers at trial made no objection to the introduction of the items seized from the car; however his Fourth Amendment claims with respect to the auto search were raised and passed on by the Pennsylvania courts in the state habeas corpus proceeding. His objection to the search of his house was raised at his trial and rejected both on the merits and because he had not filed a motion to suppress; similar treatment was given the point in the state collateral proceedings, which took place before the same judge who had tried the criminal case. The counsel claim was not presented at trial but was raised and rejected in the state collateral proceedings.

6 In any event, as we point out below, the validity of an arrest is not necessarily determinative of the right to search a car if there is probable cause to make the search. Here as will be true in many cases, the circumstances justifying the arrest are also those furnishing probable cause for the search.

7 Cooper involved the warrantless search of a car held for forfeiture under state law. Evidence seized from the car in that search was held admissible. In the case before us no claim is made that state law authorized that the station wagon be held as evidence or as an instrumentality of the crime; nor was the station wagon an abandoned or stolen vehicle. The question here is whether probable cause justifies a warrantless search in the circumstances presented.

8 Nothing said last term in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), purported to modify or affect the rationale of Carroll. As the Court noted:

  

'Our holding today is of course entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants 'where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' Carroll v. United States, 267 U.S. 132, 153, 45 S.Ct. 280, 285, 69 L.Ed. 543; see Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879.' 395 U.S., at 764 n. 9, 89 S.Ct. at 2040.

9 Following the car until a warrant can be obtained seems an impractical alternative since, among other things, the car may be taken out of the jurisdiction. Tracing the car and searching it hours or days later would of course permit instruments or fruits of crime to be removed from the car before the search.

10 It was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owner's convenience and the safety of his car to have the vehicle and the keys together at the station house.

11 It is pertinent to note that each of the four defendants was represented by separate counsel. The attorney for Lawson, who was the car owner and who was the only defendant to take the stand, appears to have been the lead counsel. As far as the record before us reveals, no counsel made any objection at the trial to the admission of the items taken from the car. Petitioner's counsel objected to the introduction of the bullets seized from petitioner's house.

1 Respondent concedes in this Court that 'no other facts are available to determine the amount and the quality of the preparation for trial pursued by Mr. Tamburo or the amount of evidentiary material known by and available to him in determining what, if any, evidentiary objections were mandated or what, if any, defenses were available to petitioner.' Brief for Respondent 13. The Court of Appeals stated: 'We do not know what preparation, if any, counsel was able to accomplish prior to the date of the trial as he did not testify in the state habeas corpus proceeding and there was no evidentiary hearing in the district court. From the lower court opinion, as will appear later, we are led to believe that counsel was not wholly familiar with all aspects of the case before trial.' 408 F.2d 1186, 1191.

2 Mr. Tamburo stated to the trial court: 'Your Honor, at the first trial, the District Attorney attempted to introduce into evidence some .38 calibre bullets that were found at the Chambers' home after his arrest. * * * At that trial, it was objected to and the objection was sustained, and I would also like to object to it now, I don't think it is good for the Jury to hear it. I don't feel there is any relevancy or connection between the fact there were .38 calibre bullets at his home and the fact that a .38 calibre gun was found, not on the person of Chambers, but in the group.' App. 82.

This was the only instance in which Mr. Tamburo expressed any knowledge of what had transpired at the first trial, and it does not appear whether he learned of the exclusion from his brief talk with petitioner en route to the courtroom or from sources within the Legal Aid Society. The record does not disclose the reason for the exclusion of the bullets at the first trial.

3 This colloquy followed the renewed objection:

'THE COURT: Well, of course, you have known about this from the other trial three weeks ago.

'MR. TAMBURO: I wasn't the attorney at the other trial.

'THE COURT: But, you knew about it?

'MR. TAMBURO: I didn't know a thing about the search Warrant until this morning.

'THE COURT: You knew about the evidence about to be introduced, you told me about it.

'MR. TAMBURO: It wasn't admitted.

'THE COURT: That doesn't mean I have to exclude it now.' Id., at 130.

  

The court proceeded to overrule the objection on the ground that it had not been made in a pretrial motion, adding that 'I think there is reasonable ground for making a search here, even without a Warrant.' Id., at 130—131.

4 In Avery, this Court concluded on the basis of a hearing: 'That the examination and preparation of the case, in the time permitted by the trial judge, had been adequate for counsel to exhaust its every angle is illuminated by the absence of any indication, on the motion and hearing for new trial, that they could have done more had additional time been granted.' 308 U.S., at 452, 60 S.Ct. at 325.

5 The absence of any request by counsel for a continuance of the trial should not, in my opinion, serve to vitiate petitioner's claim at this juncture.

6 Where a suspect is lawfully arrested in the automobile, the officers may, of course, perform a search within the limits prescribed by Chimel as an incident to the lawful arrest. However, as the Court recognizes, the search here exceeded those limits. Nor was the search here within the limits imposed by pre-Chimel law for searches incident to arrest; therefore, the retroactivity of Chimel is not drawn into question in this case. See Preston v. United States, 376 U.S. 364, 84 S.Ct. 881 (1964).

7 The Court disregards the fact that Carroll and each of this Court's decisions upholding a warrantless vehicle search on its authority, involved a search for contraband. Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949); Scher v. United States, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151 (1938); Husty v. United States, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629 (1931); see United States v. Di Re, 332 U.S. 581, 584—586, 68 S.Ct. 222, 223—225, 92 L.Ed. 210 (1948). Although subsequent dicta have omitted this limitation, see Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221, 88 S.Ct. 1472, 1475, 20 L.Ed.2d 538 (1968); United States v. Ventresca, 380 U.S. 102, 107 n. 2, 85 S.Ct. 741, 745, 13 L.Ed.2d 684 (1965); United States v. Rabinowitz, 339 U.S. 56, 61, 70 S.Ct. 430, 433, 94 L.Ed. 653 (1950), id., at 73, 70 S.Ct., at 438 (Frankfurter, J., dissenting), the Carroll decision has not until today been held to authorize a general search of a vehicle for evidence of crime, without a warrant, in every case where probable cause exists.

8 The Court, unable to decide whether search or temporary seizure is the 'lesser' intrusion, in this case authorizes both. The Court concludes that it was reasonable for the police to take the car to the station, where they searched it once to no avail. The searching officers then entered the station, interrogated petitioner and the car's owner, and returned later for another search of the car—this one successful. At all times the car and its contents were secure against removal or destruction. Nevertheless the Court approves the searches without even an inquiry into the officers' ability promptly to take their case before a magistrate.

9 Circumstances might arise in which it would be impracticable to immobilize the car for the time required to obtain a warrant —for example, where a single police officer must take arrested suspects to the station, and has no way of protecting the suspects' car during his absence. In such situations it might be wholly reasonable to perform an on-the-spot search based on probable cause. However, where nothing in the situation makes impracticable the obtaining of a warrant, I cannot join the Court in shunting aside that vital Fourth Amendment safeguard.

117 S.Ct. 882
Supreme Court of the United States

MARYLAND, Petitioner,
v.
Jerry Lee WILSON.

No. 95–1268.
|
Argued Dec. 11, 1996.
|
Decided Feb. 19, 1997.

**Synopsis**

Passenger in automobile moved to suppress crack cocaine obtained after police officer ordered him to step out of car during traffic stop. The Circuit Court, Baltimore County, Thomas J. Bollinger, J., granted motion. State appealed. The Maryland Court of Special Appeals, Moylan, J., 106 Md.App. 24, 664 A.2d 1, affirmed. State sought and the Maryland Court of Appeals denied certiorari. State sought certiorari. After granting certiorari, the Supreme Court, Chief Justice Rehnquist, held that police officer making traffic stop may order passengers to get out of car pending completion of stop.

Reversed and remanded.

Justice Stevens filed dissenting opinion in which Justice Kennedy joined.

Justice Kennedy filed separate dissenting opinion.

****883** *Syllabus*[*]

After stopping a speeding car in which respondent Wilson was a passenger, a Maryland state trooper ordered Wilson out of the car upon noticing his apparent nervousness. When Wilson exited, a quantity of cocaine fell to the ground. He was arrested and charged with possession of cocaine with intent to distribute. The Baltimore County Circuit Court granted his motion to suppress the evidence, deciding that the trooper's ordering him out of the car constituted an unreasonable seizure under the Fourth Amendment. The Maryland Court of Special Appeals affirmed, holding that the rule of *Pennsylvania v. Mimms,* 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331, that an officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle, does not apply to passengers.

*Held:* An officer making a traffic stop may order passengers to get out of the car pending completion of the stop. Statements by the Court in *Michigan v. Long,* 463 U.S. 1032, 1047–1048, 103 S.Ct. 3469, 3480, 77 L.Ed.2d 1201 *(Mimms* "held that police may order *persons* out of an automobile during a [traffic] stop" (emphasis added)), and by Justice Powell in *Rakas v. Illinois,* 439 U.S. 128, 155, n. 4, 99 S.Ct. 421, 436, n. 4, 58 L.Ed.2d 387 *(Mimms* held "that *passengers* ... have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made" (emphasis added)), do not constitute binding precedent, since the former statement was dictum, and the latter was contained in a concurrence. Nevertheless, the *Mimms* rule applies to passengers as well as to drivers. The Court therein explained that the touchstone of Fourth Amendment analysis is the reasonableness of the particular governmental invasion of a citizen's personal security, 434 U.S., at 108–109, 98 S.Ct., at 332, and that reasonableness depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by officers, *id.,* at 109, 98 S.Ct., at 332. On the public interest side, the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver, as in *Mimms,* see *id.,* at 109–110, 98 S.Ct., at 332–333, or a passenger, as here. Indeed, the danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car. On the personal liberty side, the case for passengers is stronger than that for the driver in the sense that there is probable cause to believe that the driver has committed a minor vehicular offense, see *id.,* at 110, 98 S.Ct., at 333, but there is no such reason to stop or detain ***409** passengers. But as a practical matter, passengers are already stopped by virtue of the stop of the vehicle, so that the additional intrusion upon them is minimal. Pp. 884–886.

106 Md.App. 24, 664 A.2d 1, reversed and remanded.

****884** REHNQUIST, C.J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, SOUTER, THOMAS, SCALIA, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which KENNEDY, J., joined. KENNEDY, J., filed a dissenting opinion.

  

**Attorneys and Law Firms**

J. Joseph Curran, Jr., Baltimore, MD, for petitioner.

Janet Reno, for the United States as amicus curiae, by special leave of the Court.

Byron L. Warnken, Baltimore, MD, appointed by this Court, for respondent.

**Opinion**

***410** Chief Justice REHNQUIST delivered the opinion of the Court.

In this case we consider whether the rule of *Pennsylvania v. Mimms,* 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (*per curiam*), that a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle, extends to passengers as well. We hold that it does.

At about 7:30 p.m. on a June evening, Maryland state trooper David Hughes observed a passenger car driving southbound on I–95 in Baltimore County at a speed of 64 miles per hour. The posted speed limit was 55 miles per hour, and the car had no regular license tag; there was a torn piece of paper reading "Enterprise Rent–A–Car" dangling from its rear. Hughes activated his lights and sirens, signaling the car to pull over, but it continued driving for another mile and a half until it finally did so.

During the pursuit, Hughes noticed that there were three occupants in the car and that the two passengers turned to look at him several times, repeatedly ducking below sight level and then reappearing. As Hughes approached the car on foot, the driver alighted and met him halfway. The driver was trembling and appeared extremely nervous, but nonetheless produced a valid Connecticut driver's license. Hughes instructed him to return to the car and retrieve the rental documents, and he complied. During this encounter, Hughes noticed that the front-seat passenger, respondent Jerry Lee Wilson, was sweating and also appeared extremely ***411** nervous. While the driver was sitting in the driver's seat looking for the rental papers, Hughes ordered Wilson out of the car.

When Wilson exited the car, a quantity of crack cocaine fell to the ground. Wilson was then arrested and charged with possession of cocaine with intent to distribute. Before trial, Wilson moved to suppress the evidence, arguing that Hughes' ordering him out of the car constituted an unreasonable seizure under the Fourth Amendment. The Circuit Court for Baltimore County agreed, and granted respondent's motion to suppress. On appeal, the Court of Special Appeals of Maryland affirmed, 106 Md.App. 24, 664 A.2d 1 (1995), ruling that *Pennsylvania v. Mimms* does not apply to passengers. The Court of Appeals of Maryland denied certiorari. 340 Md. 502, 667 A.2d 342 (1995). We granted certiorari, 518 U.S. 1003, 116 S.Ct. 2521, 135 L.Ed.2d 1046 (1996), and now reverse.

In *Mimms,* we considered a traffic stop much like the one before us today. There, Mimms had been stopped for driving with an expired license plate, and the officer asked him to step out of his car. When Mimms did so, the officer noticed a bulge in his jacket that proved to be a .38–caliber revolver, whereupon Mimms was arrested for carrying a concealed deadly weapon. Mimms, like Wilson, urged the suppression of the evidence on the ground that the officer's ordering him out of the car was an unreasonable seizure, and the Pennsylvania Supreme Court, like the Court of Special Appeals of Maryland, agreed.

We reversed, explaining that "[t]he touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental ****885** invasion of a citizen's personal security,' " 434 U.S., at 108–109, 98 S.Ct., at 332 (quoting *Terry v. Ohio,* 392 U.S. 1, 19, 88 S.Ct. 1868, 1878–1879, 20 L.Ed.2d 889 (1968)), and that reasonableness "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers,' " 434 U.S., at 109, 98 S.Ct., at 332 (quoting ***412** *United States v. Brignoni–Ponce,* 422 U.S. 873, 878, 95 S.Ct. 2574, 2579, 45 L.Ed.2d 607 (1975)). On the public interest side of the balance, we noted that the State "freely concede[d]" that there had been nothing unusual or suspicious to justify ordering Mimms out of the car, but that it was the officer's "practice to order all drivers [stopped in traffic stops] out of their vehicles as a matter of course" as a "precautionary measure" to protect the officer's safety. 434 U.S., at 109–110, 98 S.Ct., at 332–333. We thought it "too plain for argument" that this justification—officer safety—was "both legitimate and weighty." *Id.,* at 110, 98 S.Ct., at 333. In addition, we observed that the danger to the officer of standing by the driver's door and in the path of oncoming traffic might also be "appreciable." *Id.,* at 111, 98 S.Ct., at 333.

  

On the other side of the balance, we considered the intrusion into the driver's liberty occasioned by the officer's ordering him out of the car. Noting that the driver's car was already validly stopped for a traffic infraction, we deemed the additional intrusion of asking him to step outside his car "*de minimis*." *Ibid.* Accordingly, we concluded that "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable seizures." *Id.,* at 111, n. 6, 98 S.Ct., at 333, n. 6.

Respondent urges, and the lower courts agreed, that this *per se* rule does not apply to Wilson because he was a passenger, not the driver. Maryland, in turn, argues that we have already implicitly decided this question by our statement in *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), that "[i]n [*Mimms* ], we held that police may order *persons* out of an automobile during a stop for a traffic violation," *id.,* at 1047–1048, 103 S.Ct., at 3479 (emphasis added), and by Justice Powell's statement in *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), that "this Court determined in [*Mimms* ] that *passengers* in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made," *id.,* at 155, n. 4, 99 S.Ct., at 436, n. 4 (Powell, J., joined by Burger, C.J., concurring) (emphasis added). We agree with respondent that the former statement was dictum, and the ***413** latter was contained in a concurrence, so that neither constitutes binding precedent.

We must therefore now decide whether the rule of *Mimms* applies to passengers as well as to drivers.[1] On the public interest side of the balance, the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger. Regrettably, traffic stops may be dangerous encounters. In 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops. Federal Bureau of Investigation, Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted 71, 33 (1994). In the case of passengers, the danger of the officer's standing in the path of oncoming traffic would not be present except in the case of a passenger in the left rear seat, but the fact that there is more than one occupant of the vehicle increases the possible sources of harm to the officer.[2]

****886** On the personal liberty side of the balance, the case for the passengers is in one sense stronger than that for the driver. There is probable cause to believe that the driver has committed a minor vehicular offense, but there is no such reason to stop or detain the passengers. But as a practical ***414** matter, the passengers are already stopped by virtue of the stop of the vehicle. The only change in their circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car. Outside the car, the passengers will be denied access to any possible weapon that might be concealed in the interior of the passenger compartment. It would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.

We think that our opinion in *Michigan v. Summers,* 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), offers guidance by analogy here. There the police had obtained a search warrant for contraband thought to be located in a residence, but when they arrived to execute the warrant they found Summers coming down the front steps. The question in the case depended "upon a determination whether the officers had the authority to require him to re-enter the house and to remain there while they conducted their search." *Id.,* at 695, 101 S.Ct., at 2590. In holding as it did, the Court said:

> "Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.,* at 702–703, 101 S.Ct., at 2594 (footnote omitted).

In summary, danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car. While there is not the same basis for ordering the passengers out of the car as there is ***415** for ordering the driver out, the additional intrusion on the passenger is minimal. We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.[3]

The judgment of the Court of Special Appeals of Maryland is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

*It is so ordered.*

  

Justice STEVENS, with whom Justice KENNEDY joins, dissenting.

In *Pennsylvania v. Mimms,* 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (*per curiam*), the Court answered the "narrow question" whether an "incremental intrusion" on the liberty of a person who had been lawfully seized was reasonable. *Id.,* at 109, 98 S.Ct., at 332. This case, in contrast, raises a separate and significant question concerning the power of the State to make an initial seizure of persons who are not even suspected of having violated the law.

My concern is not with the ultimate disposition of this particular case, but rather with the literally millions of other cases that will be affected by the rule the Court announces. ****887** Though the question is not before us, I am satisfied that—under the rationale of *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)—if a police officer conducting a traffic stop has an articulable suspicion of possible danger, the officer may order passengers to exit the vehicle as a defensive tactic without running afoul of the Fourth Amendment. Accordingly, I assume that the facts recited in the majority's opinion provided a valid justification ***416** for this officer's order commanding the passengers to get out of this vehicle.[1] But the Court's ruling goes much farther. It applies equally to traffic stops in which there is not even a scintilla of evidence of any potential risk to the police officer. In those cases, I firmly believe that the Fourth Amendment prohibits routine and arbitrary seizures of obviously innocent citizens.

I

The majority suggests that the personal liberty interest at stake here, which is admittedly "stronger" than that at issue in *Mimms,* is outweighed by the need to ensure officer safety. *Ante,* at 886. The Court correctly observes that "traffic stops may be dangerous encounters." *Ante,* at 885. The magnitude of the danger to police officers is reflected in the statistic that, in 1994 alone, "there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops." *Ibid.* There is, unquestionably, a strong public interest in minimizing the number of such assaults and fatalities. The Court's statistics, however, provide no support for the conclusion that its ruling will have any such effect.

Those statistics do not tell us how many of the incidents involved passengers. Assuming that many of the assaults were committed by passengers, we do not know how many occurred after the passenger got out of the vehicle, how many took place while the passenger remained in the vehicle, or indeed, whether any of them could have been prevented ***417** by an order commanding the passengers to exit.[2] There is no indication that the number of assaults was smaller in jurisdictions where officers may order passengers to exit the vehicle without any suspicion than in jurisdictions where they were then prohibited from doing so. Indeed, there is no indication that any of the assaults occurred when there was a complete absence of any articulable basis for concern about the officer's safety—the only condition under which I would hold that the Fourth Amendment prohibits an order commanding passengers to exit a vehicle. In short, the statistics are as consistent with the hypothesis that ordering passengers to get out of a vehicle increases the danger of assault as with the hypothesis that it reduces that risk.

Furthermore, any limited additional risk to police officers must be weighed against the unnecessary invasion that will be imposed on innocent citizens under the majority's rule in the tremendous number of routine stops that occur each day. We have long recognized that "[b]ecause of the extensive regulation of motor vehicles and traffic ... the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office." ****888** *Cady v. Dombrowski,* 413 U.S. 433, 441, 93 S.Ct. 2523, 2528, 37 L.Ed.2d 706 (1973).[3] Most traffic ***418** stops involve otherwise law-abiding citizens who have committed minor traffic offenses. A strong interest in arriving at a destination—to deliver a patient to a hospital, to witness a kickoff, or to get to work on time—will often explain a traffic violation without justifying it. In the aggregate, these stops amount to significant law enforcement activity.

Indeed, the number of stops in which an officer is actually at risk is dwarfed by the far greater number of routine stops. If Maryland's share of the national total is about average, the State probably experiences about 100 officer assaults each year during traffic stops and pursuits. Making the unlikely assumption that passengers are responsible for one-fourth of the total assaults, it appears that the Court's new rule would provide a potential benefit to Maryland officers in only roughly 25 stops a year.[4] These stops represent a minuscule portion of the total. In Maryland alone, there are something on the order of one million traffic stops each year.[5] Assuming

  

that there are passengers in about half of the cars stopped, the majority's rule is of some possible advantage to police in only about one out of every twenty thousand traffic stops in which there is a passenger in the car. And, any benefit is extremely marginal. In the overwhelming majority of cases posing a real threat, the officer would almost ***419** certainly have some ground to suspect danger that would justify ordering passengers out of the car.

In contrast, the potential daily burden on thousands of innocent citizens is obvious. That burden may well be "minimal" in individual cases. *Ante,* at 886. But countless citizens who cherish individual liberty and are offended, embarrassed, and sometimes provoked by arbitrary official commands may well consider the burden to be significant.[6] In all events, the aggregation of thousands upon thousands of petty indignities has an impact on freedom that I would characterize as substantial, and which in my view clearly outweighs the evanescent safety concerns pressed by the majority.

II

The Court concludes today that the balance of convenience and danger that supported its holding in *Mimms* applies to passengers of lawfully stopped cars as well as drivers. In *Mimms* itself, however, the Court emphasized the fact that the intrusion into the driver's liberty at stake was "occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the order to get out of the car." 434 U.S., at 111, 98 S.Ct., at 333. The conclusion that "this additional intrusion can only be described as *de minimis* " rested on the premise that the ****889** "police have already lawfully decided that the driver shall be briefly detained." *Ibid.*[7]

***420** In this case as well, the intrusion on the passengers' liberty occasioned by the initial stop of the vehicle is not challenged. That intrusion was a necessary by-product of the lawful detention of the driver. But the passengers had not yet been seized at the time the car was pulled over, any more than a traffic jam caused by construction or other state-imposed delay not directed at a particular individual constitutes a seizure of that person. The question is whether a passenger in a lawfully stopped car may be seized, by an order to get out of the vehicle, without any evidence whatsoever that he or she poses a threat to the officer or has committed an offense.[8]

To order passengers about during the course of a traffic stop, insisting that they exit and remain outside the car, can hardly be classified as a *de minimis* intrusion. The traffic violation sufficiently justifies subjecting the driver to detention and some police control for the time necessary to conclude the business of the stop. The restraint on the liberty of blameless passengers that the majority permits is, in contrast, entirely arbitrary.[9]

In my view, wholly innocent passengers in a taxi, bus, or private car have a constitutionally protected right to decide whether to remain comfortably seated within the vehicle rather than exposing themselves to the elements and the observation of curious bystanders. The Constitution should not be read to permit law enforcement officers to order innocent passengers about simply because they have the misfortune ***421** to be seated in a car whose driver has committed a minor traffic offense.

Unfortunately, the effect of the Court's new rule on the law may turn out to be far more significant than its immediate impact on individual liberty. Throughout most of our history the Fourth Amendment embodied a general rule requiring that official searches and seizures be authorized by a warrant, issued "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[10] During the prohibition era, the exceptions for warrantless searches supported by probable cause started to replace the general rule.[11] In 1968, in the landmark "stop and frisk" case *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the Court placed its stamp of approval on seizures supported by specific and articulable facts that did not establish probable cause. The Court crafted *Terry* as a narrow exception to the general rule that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." *Id.,* at 20, 88 S.Ct., at 1879. The intended scope of the Court's major departure from prior practice was reflected in its statement that the "demand for specificity in the information upon which police action is predicated is the central teaching of ****890** this Court's Fourth Amendment jurisprudence." *Id.,* at 21, n. 18, 88 S.Ct., at 1880, n. 18; see also *id.,* at 27, 88 S.Ct., at 1883. In the 1970's, the Court twice rejected attempts to justify suspicionless seizures that caused only "modest" intrusions on the liberty of passengers in automobiles. *United States v. Brignoni–Ponce,* 422 U.S. 873, 879–880, 95 S.Ct. 2574, 2579–2580, 45 L.Ed.2d 607 (1975); ***422** *Delaware v. Prouse,* 440 U.S. 648, 662–663, 99 S.Ct.

1391, 59 L.Ed.2d 660 1979).[12] Today, however, the Court takes the unprecedented step of authorizing seizures that are unsupported by any individualized suspicion whatsoever.

The Court's conclusion seems to rest on the assumption that the constitutional protection against "unreasonable" seizures requires nothing more than a hypothetically rational basis for intrusions on individual liberty. How far this ground-breaking decision will take us, I do not venture to predict. I fear, however, that it may pose a more serious threat to individual liberty than the Court realizes.

I respectfully dissent.

Justice KENNEDY, dissenting.
I join in the dissent by Justice STEVENS and add these few observations.

The distinguishing feature of our criminal justice system is its insistence on principled, accountable decisionmaking in individual cases. If a person is to be seized, a satisfactory explanation for the invasive action ought to be established by an officer who exercises reasoned judgment under all the circumstances of the case. This principle can be accommodated even where officers must make immediate decisions to ensure their own safety.

Traffic stops, even for minor violations, can take upwards of 30 minutes. When an officer commands passengers innocent of any violation to leave the vehicle and stand by the side of the road in full view of the public, the seizure is serious, not trivial. As Justice STEVENS concludes, the command to exit ought not to be given unless there are objective circumstances making it reasonable for the officer to issue the order. (We do not have before us the separate question whether passengers, who, after all, are in the car by choice, ***423** can be ordered to remain there for a reasonable time while the police conduct their business.)

The requisite showing for commanding passengers to exit need be no more than the existence of any circumstance justifying the order in the interests of the officer's safety or to facilitate a lawful search or investigation. As we have acknowledged for decades, special latitude is given to the police in effecting searches and seizures involving vehicles and their occupants. See, *e.g., Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *New York v. Class,* 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986); *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). Just last Term we adhered to a rule permitting vehicle stops if there is some objective indication that a violation has been committed, regardless of the officer's real motives. See *Whren v. United States,* 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). We could discern no other, workable rule. Even so, we insisted on a reasoned explanation for the stop.

The practical effect of our holding in *Whren,* of course, is to allow the police to stop vehicles in almost countless circumstances. When *Whren* is coupled with today's holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police. If the command to exit were to become commonplace, the Constitution would be diminished in a most public way. As the standards suggested in dissent are adequate to protect the safety of the police, we ought not to suffer so great a loss.

Since a myriad of circumstances will give a cautious officer reasonable grounds for commanding passengers to leave the vehicle, it might be thought the rule the Court adopts today will be little different in its operation ****891** than the rule offered in dissent. It does no disservice to police officers, however, to insist upon exercise of reasoned judgment. Adherence to neutral principles is the very premise of the rule of law the police themselves defend with such courage and dedication.

Most officers, it might be said, will exercise their new power with discretion and restraint; and no doubt this often ***424** will be the case. It might also be said that if some jurisdictions use today's ruling to require passengers to exit as a matter of routine in every stop, citizen complaints and political intervention will call for an end to the practice. These arguments, however, would miss the point. Liberty comes not from officials by grace but from the Constitution by right.

For these reasons, and with all respect for the opinion of the Court, I dissent.

**All Citations**

519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41, 65 USLW 4124, 97 Cal. Daily Op. Serv. 1162, 97 Daily Journal D.A.R. 1668, 97 CJ C.A.R. 255, 10 Fla. L. Weekly Fed. S 292

  

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Respondent argues that, because we have generally eschewed bright-line rules in the Fourth Amendment context, see, *e.g., Ohio v. Robinette,* 519 U.S. 33, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996), we should not here conclude that passengers may constitutionally be ordered out of lawfully stopped vehicles. But, that we typically avoid *per se* rules concerning searches and seizures does not mean that we have always done so; *Mimms* itself drew a bright line, and we believe the principles that underlay that decision apply to passengers as well.

2 Justice sTEVENS' dissenting opinion points out, *post,* at 887, that these statistics are not further broken down as to assaults by passengers and assaults by drivers. It is, indeed, regrettable that the empirical data on a subject such as this are sparse, but we need not ignore the data which do exist simply because further refinement would be even more helpful. Justice STEVENS agrees that there is "a strong public interest in minimizing" the number of assaults on law officers, *post,* at 887, and we believe that our holding today is more likely to accomplish that result than would be the case if his views were to prevail.

3 Maryland urges us to go further and hold that an officer may forcibly detain a passenger for the entire duration of the stop. But respondent was subjected to no detention based on the stopping of the car once he had left it; his arrest was based on probable cause to believe that he was guilty of possession of cocaine with intent to distribute. The question which Maryland wishes answered, therefore, is not presented by this case, and we express no opinion upon it.

1 The Maryland Court of Special Appeals held, *inter alia,* that the State had not properly preserved this claim during the suppression hearing. See App. to Pet. for Cert. 4a. The State similarly fails to press the point here. Pet. for Cert. 4, n. 1; Brief for Petitioner 4, n. 1. The issue is therefore not before us, and I am not free to concur in the Court's judgment on this alternative ground. See *Caldwell v. Mississippi,* 472 U.S. 320, 327, 105 S.Ct. 2633, 2638–2639, 86 L.Ed.2d 231 (1985); this Court's Rule 14.1(a).

2 I am assuming that in the typical case the officer would not order passengers out of a vehicle until after he had stopped his own car, exited, and arrived at a position where he could converse with the driver. The only way to avoid all risk to the officer, I suppose, would be to adopt a routine practice of always issuing an order through an amplified speaker commanding everyone to get out of the stopped car before the officer exposed himself to the possibility of a shot from a hidden weapon. Given the predicate for the Court's ruling—that an articulable basis for suspecting danger to the officer provides insufficient protection against the possibility of a surprise assault—we must assume that every passenger, no matter how feeble or infirm, must be prepared to accept the "petty indignity" of obeying an arbitrary and sometimes demeaning command issued over a loud speaker.

3 See also *New York v. Class,* 475 U.S. 106, 113, 106 S.Ct. 960, 965, 89 L.Ed.2d 81 (1986); *South Dakota v. Opperman,* 428 U.S. 364, 368, 96 S.Ct. 3092, 3096, 49 L.Ed.2d 1000 (1976); cf. *Whren v. United States,* 517 U.S. 806, 810, 818, 116 S.Ct. 1769, 1772-1773, 1776-1777, 135 L.Ed.2d 89 (1996).

4 This figure may in fact be smaller. The majority's data aggregate assaults committed during "[t]raffic [p]ursuits and [s]tops." Federal Bureau of Investigation, Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted 71 (1994). In those assaults that occur during the *pursuit* of a moving vehicle, it would obviously be impossible for an officer to order a passenger out of the car.

5 Maryland had well over one million nontort motor vehicle cases during a 1–year period between 1994 and 1995. Annual Report of the Maryland Judiciary 80 (1994–1995). Though the State does not maintain a count of the number of stops performed each year, this figure is probably a fair rough proxy. The bulk of these cases likely represent a traffic stop, and this total does not include those stops in which the police officer simply gave the driver an informal reprimand. I presume that these figures are representative of present circumstances.

  

6 The number of cases in which the command actually protects the officer from harm may well be a good deal smaller than the number in which a passenger is harmed by exposure to inclement weather, as well as the number in which an ill-advised command is improperly enforced. Consider, for example, the harm caused to a passenger by an inadequately trained officer after a command was issued to exit the vehicle in *Brown v. Board of County Commissioners of Bryan County,* 67 F.3d 1174 (C.A.5 1995), cert. granted, 517 U.S. 1154, 116 S.Ct. 1540, 134 L.Ed.2d 645 (1996).

7 Dissenting in *Mimms,* I criticized the Court's reasoning and, indeed, predicted the result that the majority reaches today. 434 U.S., at 122–123, 98 S.Ct., at 339.

8 The order to the passenger is unquestionably a "seizure" within the meaning of the Fourth Amendment. As we held in *United States v. Brignoni–Ponce,* 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607 (1975): "The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *Davis v. Mississippi,* 394 U.S. 721 [89 S.Ct. 1394, 22 L.Ed.2d 676] (1969); *Terry v. Ohio,* 392 U.S. 1, 16–19 [88 S.Ct. 1868, 1877–1879, 20 L.Ed.2d 889] (1968)."

9 Cf. *Ybarra v. Illinois,* 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." (citing *Sibron v. New York,* 392 U.S. 40, 62–63, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968))).

10 See, *e.g., Amos v. United States,* 255 U.S. 313, 315, 41 S.Ct. 266, 267, 65 L.Ed. 654 (1921); *Weeks v. United States,* 232 U.S. 383, 393, 34 S.Ct. 341, 344, 58 L.Ed. 652 (1914).

11 See, *e.g., Carroll v. United States,* 267 U.S. 132, 149, 45 S.Ct. 280, 283–284, 69 L.Ed. 543 (1925) (automobile search). We had also recognized earlier in dictum the now well-established doctrine permitting warrantless searches incident to a valid arrest. See *Weeks,* 232 U.S., at 392, 34 S.Ct., at 344; see also J. Landynski, Search and Seizure and the Supreme Court 87 (1966).

12 Dissenting in *Delaware v. Prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), then-Justice REHNQUIST characterized the motorist's interest in freedom from random stops as "only the most diaphanous of citizen interests." *Id.,* at 666, 99 S.Ct., at 1403.

102 S.Ct. 3079
Supreme Court of the United States

MICHIGAN

v.

Lamont Charles THOMAS.

No. 81-593.
|
June 28, 1982.

**Synopsis**

Defendant was convicted in the Oakland County Circuit Court of carrying a concealed weapon, and he appealed. The Michigan Court of Appeals, 106 Mich.App. 601, 308 N.W.2d 170, reversed, and certiorari was granted. The Supreme Court held that: (1) justification to conduct a warrantless search of a car stopped on the road does not vanish once the car has been immobilized, nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant, and (2) where police officers, after stopping car, were justified in conducting an inventory search of the car's glove compartment, which led to the discovery of contraband, such discovery gave the officers probable cause to believe there was contraband elsewhere in the vehicle and to conduct a warrantless search thereof, even though both the car and its occupants were already in police custody.

Petition for certiorari and motion of respondent to proceed in forma pauperis granted; judgment of Michigan Court of Appeals reversed; case remanded to that court for further proceedings.

Justice Brennan and Justice Marshall would grant the petition for writ of certiorari and set the case for oral argument.

**Opinion**

****3080** ***259** PER CURIAM.

While respondent was the front-seat passenger in an automobile, the car was stopped for failing to signal a left turn. As two police officers approached the vehicle, they saw respondent bend forward so that his head was at or below the level of the dashboard. The officers then observed an open bottle of malt liquor standing upright on the floorboard between respondent's feet, and placed respondent under arrest for possession of open intoxicants in a motor vehicle. The 14-year-old driver was issued a citation for not having a driver's license. Respondent claimed ownership of the car.

***260** Respondent and the driver were taken to the patrol car, and a truck was called to tow respondent's automobile. One of the officers searched the vehicle, pursuant to a departmental policy that impounded vehicles be searched prior to being towed. The officer found two bags of marihuana in the unlocked glove compartment. The second officer then searched the car more thoroughly, checking under the front seat, under the dashboard, and inside the locked trunk. Opening the air vents under the dashboard, the officer discovered a loaded, .38-caliber revolver inside.
Respondent was convicted of possession of a concealed weapon. He moved for a new trial, contending that the revolver was taken from his car pursuant to an illegal search and seizure; the trial court denied the motion.

The Michigan Court of Appeals reversed, holding that the warrantless search of respondent's automobile violated the Fourth Amendment. 106 Mich.App. 601, 308 N.W.2d 170 (1981). The court acknowledged that in *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), this Court upheld the validity of warrantless inventory searches of impounded motor vehicles. Moreover, the court found that, since respondent had been placed under arrest and the other occupant of the car was too young to legally drive, it was proper for the officers to impound the vehicle and to conduct an inventory search prior to its being towed. However, in the view of the Court of Appeals, the search conducted in this case was "unreasonable in scope," because it extended to the air vents which, unlike the glove compartment or the trunk, were not a likely place for the storage of valuables or personal possessions. 106 Mich.App., at 606, 308 N.W.2d, at 172.

The Court of Appeals also rejected the State's contention that the scope of the inventory search was properly expanded when the officers discovered contraband in the glove compartment. The court concluded that, because both the car and its occupants were already in police custody, there were ***261** no "exigent circumstances" justifying a warrantless search for contraband.[1]

  

We reverse. In *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), we held that when police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. We firmly reiterated this holding in *Texas v. White*, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975). See also *United States v. Ross*, 456 U.S. 798, 807, n.9, 102 S.Ct. 2157, 2163, n.9, 72 L.Ed.2d 572 (1982). It is thus clear that the justification to conduct such a warrantless ****3081** search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant.[2] See *ibid.*

Here, the Court of Appeals recognized that the officers were justified in conducting an inventory search of the car's ***262** glove compartment, which led to the discovery of contraband. Without attempting to refute the State's contention that this discovery gave the officers probable cause to believe there was contraband elsewhere in the vehicle, the Court of Appeals held that the absence of "exigent circumstances" precluded a warrantless search. This holding is plainly inconsistent with our decisions in *Chambers* and *Texas v. White.*

The petition for certiorari and the motion of respondent to proceed *in forma pauperis* are granted, the judgment of the Michigan Court of Appeals is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

*It is so ordered.*

Justice BRENNAN and Justice MARSHALL would grant the petition for a writ of certiorari and set the case for oral argument.

**All Citations**

458 U.S. 259, 102 S.Ct. 3079, 73 L.Ed.2d 750

Footnotes

1 The Court of Appeals did not directly address the State's contention that the discovery of marihuana in the glove compartment provided probable cause to believe there was contraband hidden elsewhere in the vehicle. However, the court apparently assumed that the officers possessed information sufficient to support issuance of a warrant to search the automobile; the court's holding was that the officers were required to obtain such a warrant, and could not search on the basis of probable cause alone. See 106 Mich.App., at 606-608, 308 N.W.2d, at 172-173.

2 Even were some demonstrable "exigency" a necessary predicate to such a search, we would find somewhat curious the Court of Appeals' conclusion that no "exigent circumstances" were present in this case. Unlike the searches involved in *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), and *Texas v. White*, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975)-which were conducted at the station house-the search at issue here was conducted on the roadside, before the car had been towed. As pointed out by Judge Deneweth, in dissent, "there was a clear possibility that the occupants of the vehicle could have had unknown confederates who would return to remove the secreted contraband." 106 Mich.App., at 609, 308 N.W.2d, at 174.

24 Ill.App.3d 335
Appellate Court of Illinois, Fifth District.

PEOPLE of the State of Illinois, Appellee,

v.

Richard E. HARSHBARGER, Appellant.

No. 73—332.
|
Nov. 7, 1974.

**Synopsis**

Defendant was convicted before the Circuit Court, Christian County, Robert J. Sanders, J., of possession of marijuana and amphetamines, and he appealed. The Appellate Court, Crebs, J., held that arrest of defendant and search of his person were violative of his constitutional rights, and that there was no probable cause to issue search warrant for defendant's automobile.

Reversed.

**Attorneys and Law Firms**

****139** ***336** Frederick F. Cohn, Chicago, for appellant.

John H. Ward, State's Atty., Christian County, Taylorville, James J. Jerz, Principal Atty., Martin P. Moltz, Staff Atty., Illinois State's Attorneys Ass'n, Elgin, of counsel, for appellee.

**Opinion**

CREBS, Justice.

In a jury trial in the Circuit Court of Christian County defendant was convicted on a two-count indictment charging possession of a controlled substance (marijuana), and possession of amphetamines. He was sentenced to concurrent terms of one to three years on each count. In this appeal defendant contends, among other things, that his arrest was unlawful and in violation of his constitutional rights and that a search warrant against his automobile was improperly issued.

Prior to trial defendant's motions to quash the warrant and to suppress all evidence obtained in a search of his person and his car were denied. At the hearing on these motions one police officer testified and it was stipulated that the testimony of another officer would be the same. It appears that in response to information received by the police that Robert Leads had a large quantity of marijuana in his possession, they went to his house about 4:00 o'clock in the afternoon on September 26, 1972. They knew him and when he answered the door they asked and received his consent to search his car. Finding nothing of consequence, they then asked and were permitted to check the house. When they entered they observed three other young men seated in the living room, one of whom was the defendant, Richard Harshbarger. Also, they noticed what they believed to be a strong smell of burning marijuana. In a check of the house no marijuana was found, but nonetheless all four men were informed that they were under arrest for possession and they were immediately taken to the police station in a squad car. In answer to specific inquiries ****140** the officer stated that they had no arrest or search warrant, that they had never seen defendant before, that they did not see defendant in possession of any marijuana, that they did not find any on the premises, and that they did not observe that defendant was violating any city ordinance, ***337** state statute, or federal law. The officer also testified that he did not consider himself an expert on the subject of burning marijuana, but that he was aware that burning tea bags and burning marijuana have a similar odor which he was not sure he would be able to distinguish.

On reaching the station the officer stated that each of the individuals was searched prior to being placed in a detention cell. In the search of defendant an old fashioned pocket watch was found in his undershorts, and when the lid was pried open, it was found to contain 25 1/2 small, grey compressed tablets of unknown content (later determined to be amphetamines). Defendant was asked for permission to search his car, which in the meantime had been towed to a garage, but he refused. A guard was placed on the car until the next day when a search warrant was obtained. In the search of the car two brief cases containing a number of cellophane packages of marijuana were found in the trunk. The affidavit in support of the complaint read as follows:

'Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the (person and) premises set forth above; The Taylorville City Police Officers arrested Richard Harshbarger and found him to have in his possession controlled substances and it is believed that there may be more controlled substances in his automobile; said subject was arrested on September 26, 1972 and the controlled substance was found at that time. Subject had just left his automobile immediately prior to his arrest.'

  

We shall first consider defendant's contentions relative to his arrest and the search of his person incident thereto. The rules pertinent to this issue are well established. An officer making an arrest without a warrant must have probable cause to believe that a criminal offense has been committed and that the person to be arrested has committed it, that is, he must have some reasonable grounds or have knowledge of some facts upon which to base his belief that such person is guilty of or implicated in a crime, and a mere suspicion in the officer's mind unsupported by such facts is insufficient to support an arrest or a search incident thereto. (People v. Henneman, 373 Ill. 603, 27 N.E.2d 448.) Further, as stated in this latter case, while it is necessary in the interest of crime prevention to give substantial latitude to police officers in making a warrentless arrest, yet, in doing so, the constitutional guaranty to all citizens to be secure in their persons, houses, property and effects against unreasonable searches and seizures, must be observed. It is also clear that the lawfulness of an arrest depends upon the existence of reasonable grounds for the arrest at the time it is made, and after discovered evidence upon a search does not relate back to operate as a justification. ( ***338** People v. Roebuck, 25 Ill.2d 108, 183 N.E.2d 166.) Finally, neither can a search or a seizure made without a warrant be justified as incident to an arrest unless the arrest was constitutionally valid. Johnson v. United States 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed.2d 436.

Applying these rules to the facts before us we can find no justification for defendant's arrest at the time it was made, nor for the search of his person occuring sometime subsequent thereto at the station house. The officers had never seen or heard of defendant before. He was merely one of four persons sitting in the living room of a house in which the officers thought they smelled burning marijuana. They had no idea which one of them, or for that matter, if any of them had actually been smoking marijuana. Nor did defendant by his actions, furtive or otherwise, give any indication that he may have ****141** been violating any law. In effect, defendant's arrest was prompted by a mere suspicion that someone must have been smoking marijuana because of the odor believed to be present, and, therefore, the best thing to do was to arrest and search everybody. This we believe to have been unwarranted and unlawful, constituting a patent violation of defendant's constitutional rights.

In United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210, federal officers had information that a certain individual was selling counterfeit gasoline ration coupons. The informer sent to make a purchase from him did so in the presence of the defendant, Di Re, who happened to be in the seller's car. The officers then arrested both the seller and Di Re, and, in a search of Di Re incident to his arrest, they found a large number of counterfeit coupons on him concealed between his shirt and underwear. Quoting the rules above cited the court held such arrest and search unlawful because at the time of the arrest the officers had no information implicating Di Re in any crime nor any information pointing to his possession of counterfeit coupons, and under such circumstances they had no probable cause to arrest him. In answer to a government argument the court specifically found that the mere fact that Di Re was sitting in the parked car when the sale was made to the informer could not, of itself, constitute probable cause to believe him guilty of committing a crime or of even raising an inference of guilt. Of further interest is the court's explanatory comment that though in some instances the application of such rules may appear to make law enforcement more difficult and uncertain, nonetheless it was the specific design of our constitution to place obstacles in the way of a too permeating police surveillance which was believed to be an even greater danger to a free people than the escape of some criminals. See also Johnson v. United States, supra.

We conclude that the arrest of defendant and the search of his ***339** person were unlawful as violative of his constitutional rights, and we find that the trial court erred in refusing to suppress the evidence obtained in said search.

We now proceed to a consideration of the validity of the search warrant. While it is true that a reviewing court should pay substantial deference to a judicial determination of probable cause for issuance of a warrant, nonetheless approval thereof is not automatic. The requirement still remains that the magistrate must be shown to have acted independently, in a neutral and detached manner, basing his judgment upon the underlying facts presented to him rather than merely accepting the beliefs, inferences and conclusions of the complainant. (Aguilar v. State of Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723.) A warrant issued upon the sworn allegation that an affiant 'has cause to suspect and does believe' that certain merchandise was in a specified location has been held insufficient as a mere affirmation of suspicion and belief without any statement of adequate supporting facts. (Nathanson v. United States, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159.) To permit a warrant to be issued upon an affiant's inferences and beliefs without any supporting facts constitutes a violation of the very purpose of the constitutional requirement that the inferences must be drawn by a neutral and detached magistrate and not by a police officer engaged in the often competitive enterprise of ferretting out crime.

  

Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503.

Again applying these rules to the facts before us we find that the affidavit contains little more than a statement of affiant's belief or inference that because controlled substances were found on defendant's person there 'may be more controlled substances in his automobile'. No other background facts were presented to the judge. He was not informed of the circumstances of defendant's arrest and consequently he had no opportunity to judge the lawfulness or unlawfulness of either **142 his arrest or the search of his person. Had he been given these facts and had he determined defendant's arrest to have been unlawful surely he would not have allowed the fruits of the unlawful search to give rise to a further violation of defendant's constitutional right to privacy.

We conclude that the search warrant should not have been issued because the affidavit did not provide a sufficient basis for a finding of probable cause, and further, because, under the particular circumstances of this case the fruits of an original unlawful search cannot be used to furnish probable cause for a subsequent search any more than the results of a search can be used to justify an unlawful arrest. Accordingly, we find that the trial court committed error in refusing to suppress the evidence obtained in the search of defendant's automobile.

*340 With all evidence against defendant suppressed we find no reason for remandment. The judgment of the Circuit Court of Christian County is reversed.

Reversed.

GEORGE J. MORAN, P.J., and CARTER, J., concur.

**All Citations**

24 Ill.App.3d 335, 321 N.E.2d 138

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96 S.Ct. 3092
Supreme Court of the United States

SOUTH DAKOTA, Petitioner,

v.

Donald OPPERMAN.

No. 75-76.
|
Argued March 29, 1976.
|
Decided July 6, 1976.

**Synopsis**

Defendant was convicted before the District County Court, Second Judicial District, Clay County, South Dakota, of possession of less than one ounce of marijuana, and he appealed. The South Dakota Supreme Court, 228 N.W.2d 152, reversed, and certiorari was granted. The Supreme Court, Mr. Chief Justice Burger, held that routine inventory search of defendant's locked automobile, which had been lawfully impounded for multiple violations of municipal parking ordinances, did not involve an "*unreasonable*" search in violation of the Fourth Amendment, especially since inventory was prompted by presence in plain view of a number of valuables inside the vehicle and there was no suggestion that the procedure utilized, which procedure is standard throughout the country, was a pretext concealing investigatory police motive and that once the officer was lawfully inside the vehicle to secure the personal property in plain view it was not unreasonable to open the unlocked glove compartment, to which vandals would have had ready and unobstructed access once inside the vehicle and in which the subject marijuana was discovered.

Reversed and remanded.

Mr. Justice Powell filed concurring opinion.

Mr. Justice Marshall filed a dissenting opinion in which Mr. Justice Brennan and Mr. Justice Stewart joined.

Mr. Justice White filed dissenting statement.

****3094** ***364** *Syllabus*[*]

After respondent's car had been impounded for multiple parking violations the police, following standard procedures, inventoried the contents of the car. In doing so they discovered marihuana in the glove compartment, for the possession of which respondent was subsequently arrested. His motion to suppress the evidence yielded by the warrantless inventory search was denied, and respondent was thereafter convicted. The State Supreme Court reversed, concluding that the evidence had been obtained in violation of the Fourth Amendment as made applicable to the States by the Fourteenth. *Held:* The police procedures followed in this case did not involve an "unreasonable" search in violation of the ****3095** Fourth Amendment. The expectation of privacy in one's automobile is significantly less than that relating to one's home or office, *Cardwell v. Lewis*, 417 U.S. 583, 590, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325. When vehicles are impounded, police routinely follow caretaking procedures by securing and inventorying the cars' contents. These procedures have been widely sustained as reasonable under the Fourth Amendment. This standard practice was followed here, and there is no suggestion of any investigatory motive on the part of the police. Pp. 3095-3100.

S.D., 228 N.W.2d 152, reversed and remanded.

**Attorneys and Law Firms**

William J. Janklow, Pierre, S. D., for petitioner.

Robert C. Ulrich, Vermillion, S. D., for respondent, pro hac vice, by special leave of Court.

**Opinion**

***365** Mr. Chief Justice BURGER delivered the opinion of the Court.

We review the judgment of the Supreme Court of South Dakota, holding that local police violated the Fourth Amendment to the Federal Constitution, as applicable to the States under the Fourteenth Amendment, when they conducted a routine inventory search of an automobile lawfully impounded by police for violations of municipal parking ordinances.

(1)

Local ordinances prohibit parking in certain areas of downtown Vermillion, S. D., between the hours of 2 a. m. and 6 a. m. During the early morning hours of December

  

10, 1973, a Vermillion police officer observed respondent's unoccupied vehicle illegally parked in the restricted zone. At approximately 3 a. m., the officer issued an overtime parking ticket and placed it on the car's windshield. The citation warned:
"Vehicles in violation of any parking ordinance may be towed from the area."

At approximately 10 o'clock on the same morning, another ***366** officer issued a second ticket for an overtime parking violation. These circumstances were routinely reported to police headquarters, and after the vehicle was inspected, the car was towed to the city impound lot.

From outside the car at the impound lot, a police officer observed a watch on the dashboard and other items of personal property located on the back seat and back floorboard. At the officer's direction, the car door was then unlocked and, using a standard inventory form pursuant to standard police procedures, the officer inventoried the contents of the car, including the contents of the glove compartment which was unlocked. There he found marihuana contained in a plastic bag. All items, including the contraband, were removed to the police department for safekeeping.[1] During the late afternoon of December 10, respondent appeared at the police department to claim his property. The marihuana was retained by police.

Respondent was subsequently arrested on charges of possession of marihuana. His motion to suppress the evidence yielded by ****3096** the inventory search was denied; he was convicted after a jury trial and sentenced to a fine of $100 and 14 days' incarceration in the county jail. On appeal, the Supreme Court of South Dakota reversed ***367** the conviction. 228 N.W.2d 152. The court concluded that the evidence had been obtained in violation of the Fourth Amendment prohibition against unreasonable searches and seizures. We granted certiorari, 423 U.S. 923, 96 Ct. 264, 46 L.Ed.2d 248 (1975), and we reverse.

(2)

This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are "effects" and thus within the reach of the Fourth Amendment, *Cady v. Dombrowski*, 413 U.S. 433, 439, 93 S.Ct. 2523, 2527, 37 L.Ed.2d 706 (1973), warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not. *Cardwell v. Lewis*, 417 U.S. 583, 589, 94 S.Ct. 2464, 2468, 41 L.Ed.2d 325 (1974); *Cady v. Dombrowski*, *supra*, 413 U.S., at 439-440, 93 S.Ct. at 2527; *Chambers v. Maroney*, 399 U.S. 42, 48, 90 S.Ct. 1975, 1979, 26 L.Ed.2d 419 (1970).

The reason for this well-settled distinction is twofold. First, the inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible. *Carroll v. United States*, 267 U.S. 132, 153-154, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *Coolidge v. New Hampshire*, 403 U.S. 443, 459-460, 91 S.Ct. 2022, 2034, 29 L.Ed.2d 564 (1971). But the Court has also upheld warrantless searches where no immediate danger was presented that the car would be removed from the jurisdiction. *Chambers v. Maroney*, *supra*, 399 U.S., at 51-52, 90 S.Ct. at 1981; *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967). Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office.[2] In discharging their varied responsibilities ***368** for ensuring the public safety, law enforcement officials are necessarily brought into frequent contact with automobiles. Most of this contact is distinctly noncriminal in nature. *Cady v. Dombrowski*, *supra*, 413 U.S. at 442, 93 S.Ct. at 2528. Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.

The expectation of privacy as to automobiles is further diminished by the obviously public nature of automobile travel. Only two Terms ago, the Court noted:
"One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view." *Cardwell v. Lewis*, *supra*, 417 U.S., at 590, 94 S.Ct. at 2469.

****3097** In the interests of public safety and as part of what the Court has called "community caretaking functions,"

  

*Cady v. Dombrowski*, *supra*, 413 U.S. at 441, 93 S.Ct. at 2528, automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities.Police ***369** will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic.[3] The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.

When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody, *United States v. Mitchell*, 458 F.2d 960, 961 (CA9 1972); the protection of the police against claims or disputes over lost or stolen property, *United States v. Kelehar*, 470 F.2d 176, 178 (CA5 1972); and the protection of the police from potential danger, *Cooper v. California*, *supra*, 386 U.S., at 61-62, 87 S.Ct., at 790. The practice has been viewed as essential to respond to incidents of theft or vandalism. See *Cabbler v. Commonwealth*, 212 Va. 520, 522, 184 S.E.2d 781, 782 (1971), cert. denied, 405 U.S. 1073, 92 S.Ct. 1501, 31 L.Ed.2d 807 (1972); *Warrix v. State*, 50 Wis.2d 368, 376, 184 N.W.2d 189, 194 (1971). In addition, police frequently attempt to determine whether a vehicle has been stolen and thereafter abandoned.

These caretaking procedures have almost uniformly been upheld by the state courts, which by virtue of the localized nature of traffic regulation have had considerable occasion to deal with the issue.[4] Applying the ***370** Fourth Amendment standard of "reasonableness,"[5] the state courts have overwhelmingly concluded that, even if an inventory is characterized as a "search,"[6] ****3098** the ***371** intrusion is constitutionally permissible. See, *e. g.*, *City of St. Paul v. Myles*, 298 Minn. 298, 300-301, 218 N.W.2d 697, 699 (1974); *State v. Tully*, 166 Conn. 126, 136, 348 A.2d 603, 609 (1974); *People v. Trusty*, 183 Colo. 291, 292-297, 516 P.2d 423, 425-426 (1973); *People v. Sullivan*, 29 N.Y.2d 69, 73, 323 N.Y.S.2d 945, 948, 272 N.E.2d 464, 466 (1971); *Cabbler v. Commonwealth*, *supra*; *Warrix v. State*, *supra*; *State v. Wallen*, 185 Neb. 44, 173 N.W.2d 372, cert. denied, 399 U.S. 912, 90 S.Ct. 2211, 26 L.Ed.2d 568 (1970); *State v. Criscola*, 21 Utah 2d 272, 444 P.2d 517 (1968); *State v. Montague*, 73 Wash.2d 381, 438 P.2d 571 (1968); *People v. Clark*, 32 Ill.App.3d 898, 336 N.E.2d 892 (1975); *State v. Achter*, 512 S.W.2d 894 (Mo.Ct.App.1974); *Bennett v. State*, 507 P.2d 1252 (Okl.Cr.App.1973); *People v. Willis*, 46 Mich.App. 436, 208 N.W.2d 204 (1973); *State v. All*, 17 N.C.App. 284, 193 S.E.2d 770, cert. denied, 414 U.S. 866, 94 S.Ct. 51, 38 L.Ed.2d 85 (1973); *Godbee v. State*, 224 So.2d 441 (Fla.Dist.Ct.App.1969). Even the seminal state decision relied on by the South Dakota Supreme Court in reaching the contrary result, *Mozzetti v. Superior Court*, 4 Cal.3d 699, 94 Cal.Rptr. 412, 484 P.2d 84 (1971), expressly approved police caretaking activities resulting in the securing of property within the officer's plain view.

The majority of the Federal Courts of Appeals have likewise sustained inventory procedures as reasonable police intrusions. As Judge Wisdom has observed:
"[W]hen the police take custody of any sort of container [such as] an automobile . . . it is reasonable to search the container to itemize the property to be held by the police. [This reflects] the underlying principle that the fourth amendment proscribes only *unreasonable* searches." *United States v. Gravitt*, 484 F.2d 375, 378 (CA5 1973), cert. denied, 414 U.S. 1135, 94 S.Ct. 879, 38 L.Ed.2d 761 (1974) (emphasis in original).

***372** See also *Cabbler v. Superintendent*, 528 F.2d 1142 (CA4 1975), cert. pending, No. 75-1463; *Barker v. Johnson*, 484 F.2d 941 (CA6 1973); *United States v. Mitchell*, 458 F.2d 960 (CA9 1972); *United States v. Lipscomb*, 435 F.2d 795 (CA5 1970), cert. denied, 401 U.S. 980, 91 S.Ct. 1213, 28 L.Ed.2d 331 (1971); *United States v. Pennington*, 441 F.2d 249 (CA5), cert. denied, 404 U.S. 854, 92 S.Ct. 97, 30 L.Ed.2d 94 (1971); *United States v. Boyd*, 436 F.2d 1203 (CA5 1971); *Cotton v. United States*, 371 F.2d 385 (CA9 1967). Accord, *Lowe v. Hopper*, 400 F.Supp. 970, 976-977 (SD Ga.1975); *United States v. Spitalieri*, 391 F.Supp. 167, 169-170 (ND Ohio 1975); *United States v. Smith*, 340 F.Supp. 1023 (Conn.1972); *United States v. Fuller*, 277 F.Supp. 97 (DC 1967), conviction aff'd, 139 U.S.App.D.C. 375, 433 F.2d 533 (1970). These cases have recognized that standard inventories often include an examination of the glove compartment, since it is a customary place for documents of ownership and registration, *United States v. Pennington*, *supra*, at 251, as well as a place for the temporary storage of valuables.

  

(3)

The decisions of this Court point unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures **3099 are reasonable. In the first such case, Mr. Justice Black made plain the nature of the inquiry before us:

"But the question here is not whether the search was *authorized* by state law. The question is rather whether the search was *reasonable* under the Fourth Amendment." *Cooper v. California*, 386 U.S. at 61, 87 S.Ct., at 790 (emphasis added).

And, in his last writing on the Fourth Amendment, Mr. Justice Black said:

"[T]he Fourth Amendment does not require that every search be made pursuant to a warrant. It *373 prohibits only '*unreasonable* searches and seizures.' The relevant test *is not the reasonableness of the opportunity to procure a warrant,* but the reasonableness of the seizure under all the circumstances. The test of reasonableness cannot be fixed by *per se* rules; each case must be decided on its own facts." *Coolidge v. New Hampshire*, 403 U.S., at 509-510, 91 S.Ct. 2022, 2059, 29 L.Ed.2d 564 (concurring and dissenting) (emphasis added).

In applying the reasonableness standard adopted by the Framers, this Court has consistently sustained police intrusions into automobiles impounded or otherwise in lawful police custody where the process is aimed at securing or protecting the car and its contents. In *Cooper* v. California, supra, the Court upheld the inventory of a car impounded under the authority of a state forfeiture statute. Even though the inventory was conducted in a distinctly criminal setting[7] and carried out a week after the car had been impounded, the Court nonetheless found that the car search, including examination of the glove compartment where contraband was found, was reasonable under the circumstances. This conclusion was reached despite the fact that no warrant had issued and probable cause to search for the contraband in the vehicle had not been established. The Court said in language explicitly applicable here:

"It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it." 386 U.S., at 61-62,[8] 87 S.Ct. at 791.

*374 In the following Term, the Court in *Harris v. United States*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968), upheld the introduction of evidence, seized by an officer who, after conducting an inventory search of a car and while taking means to safeguard it, observed a car registration card lying on the metal stripping of the car door. Rejecting the argument that a warrant was necessary, the Court held that the intrusion was justifiable since it was "taken to protect the car while it was in police custody." *Id.*, at 236, 88 S.Ct. at 993.[9]

Finally, in *Cady v. Dombrowski*, *supra*, The Court upheld a warrantless search of an automobile towed to a private garage even **3100 though no probable cause existed to believe that the vehicle contained fruits of a crime. The sole justification for the warrantless incursion was that it was incident to the caretaking function of the local police to protect the community's safety. Indeed, the protective search was instituted solely because the local police "were under the impression" that the incapacitated driver, a Chicago police officer, was required to carry his service revolver at all times; the police had reasonable grounds to believe a weapon might be in the car, and thus available to vandals. 413 U.S., at 436, 93 S.Ct. at 2525. The Court carefully noted that the protective search was *375 carried out in accordance with *standard procedures* in the local police department, *ibid.*, a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function. See *United States v. Spitalieri*, 391 F.Supp., at 169. In reaching this result, the Court in *Cady* distinguished *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), on the grounds that the holding, invalidating a car search conducted after a vagrancy arrest, "stands only for the proposition that the search challenged there could not be justified as one incident to an arrest." 413 U.S., at 444, 93 S.Ct. at 2529. *Preston*therefore did not raise the issue of the constitutionality of a protective inventory of a car lawfully within police custody.

The holdings in *Cooper*, *Harris*, and *Cady* point the way to the correct resolution of this case. None of the three cases, of course, involves the precise situation presented here; but, as in all Fourth Amendment cases, we are obliged to look to all the facts and circumstances of this case in light of the principles set forth in these prior decisions.

"[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case . . . ." *Cooper v. California*, 386 U.S., at 59, 87 S.Ct., at 790.

The Vermillion police were indisputably engaged in a caretaking search of a lawfully impounded automobile. Cf. *United States v. Lawson*, 487 F.2d 468, 471 (CA8 1973). The inventory was conducted only after the car had been impounded for multiple parking violations. The owner, having left his car illegally parked for an extended period, and thus subject to impoundment, was not present to make other arrangements for the safekeeping of his belongings. The inventory itself was prompted by the presence in plain view of a number of ***376** valuables inside the car. As in *Cady*,there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive.[10]

On this record we conclude that in following standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts, the conduct of the police was not "unreasonable" under the Fourth Amendment.

The judgment of the South Dakota Supreme Court is therefore reversed, and the ****3101** case is remanded for further proceedings not inconsistent with this opinion.

*Reversed and remanded*.

Mr. Justice POWELL, concurring.

While I join the opinion of the Court, I add this opinion to express additional views as to why the search conducted in this case is valid under the Fourth and Fourteenth Amendments. This inquiry involves two distinct questions: (i) whether routine inventory searches are impermissible, and (ii) if not, whether they must be conducted pursuant to a warrant.

***377** I

The central purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. See, *e. g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 2573, 45 L.Ed.2d 607 (1975); *Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967). None of our prior decisions is dispositive of the issue whether the Amendment permits routine inventory "searches"[1] of automobiles.[2] Resolution of this ***378** question requires a weighing of the governmental and societal interests advanced to justify such intrusions against the constitutionally protected interest of the individual citizen in the privacy of his effects. *United States v. Martinez-Fuerte*, 428 U.S. 543, at 555, 96 S.Ct. 3074, at 3081, 49 L.Ed.2d 1116; *United States v. Brignoni-Ponce*, *supra*, 422 U.S. at 878-879, 95 S.Ct. at 2573 (1975); *United States v. Ortiz*, 422 U.S. 891, 892, 95 S.Ct. 2585, 2573, 45 L.Ed.2d 623 (1975); *Cady v. Dombrowski*, 413 U.S. 433, 447-448, 93 S.Ct. 2523, 2531, 37 L.Ed.2d 706 (1973); *Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968). Cf. *Camara v. Municipal Court*, *supra*, 387 U.S. at 534-535, 87 S.Ct. at 1734. As noted in the Court's opinion, see *ante* at 3096, three interests generally have been advanced in support of inventory searches: (i) protection of the police from danger; (ii) protection of the police against claims and disputes over lost or stolen property; and (iii) protection of the owner's property while it remains in police custody.

Except in rare cases, there is little danger associated with impounding unsearched automobiles. But the occasional danger that may exist cannot be discounted entirely. ****3102** See *Cooper v. California*, 386 U.S. 58, 61-62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967). The harmful consequences in those rare cases may be great, and there does not appear to be any effective way of identifying in advance those circumstances or classes of automobile impoundments which represent a greater risk. Society also has an important interest in minimizing the number of false claims filed against police since they may diminish the community's respect for law enforcement generally and lower department morale, thereby impairing the effectiveness of the police.[3] It ***379** is not clear, however, that inventories are a completely effective means of discouraging false claims, since there remains the possibility of accompanying such claims with an assertion that an item was stolen prior to the inventory or was intentionally omitted from the police records.

The protection of the owner's property is a significant interest for both the policeman and the citizen. It is argued that an inventory is not necessary since locked doors and rolled-up windows afford the same protection that the contents of a parked automobile normally enjoy.[4] But many owners might leave valuables in their automobile temporarily that they would not leave there unattended for the several days that police custody may last. There is thus a substantial gain in security if automobiles were inventoried and valuable items removed for storage. And, while the same security could be attained by posting a guard at the storage lot, that alternative may be prohibitively expensive, especially for smaller jurisdictions.[5]

  

Against these interests must be weighed the citizen's interest in the privacy of the contents of his automobile. Although the expectation of privacy in an automobile is significantly less than the traditional expectation of privacy in an automobile is significantly less than the traditional expectation of privacy associated with the home, *United States v. Martinez-Fuerte*, 428 U.S., at 561–562, 96 S.Ct., at 3084; *United States v. Ortiz, supra*, 422 U.S., at 896 n. 2, 95 S.Ct., at 2588; see *Cardwell v. Lewis*, 417 U.S. 583, 590–591, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325 (1974) (plurality opinion), the unrestrained search ***380** of an automobile and its contents would constitute a serious intrusion upon the privacy of the individual in many circumstances. But such a search is not at issue in this case. As the Court's opinion emphasizes, the search here was limited to an inventory of the unoccupied automobile and was conducted strictly in accord with the regulations of the Vermillion Police Department.[6] Upholding searches of this type provides no general license for the police to examine all the contents of such automobiles.[7]

****3103** I agree with the Court that the Constitution permits routine inventory searches, and turn next to the question whether they must be conducted pursuant to a warrant.

***381** II

While the Fourth Amendment speaks broadly in terms of "unreasonable searches and seizures,"[8] the decisions of this Court have recognized that the definition of "reasonableness" turns, at least in part, on the more specific dictates of the Warrant Clause. See *United States v. United States District Court*, 407 U.S. 297, 315, 92 S.Ct. 2125, 2135, 32 L.Ed.2d 752 (1972); *Katz v. United States*, 389 U.S. 347, 356, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967); *Camara v. Municipal Court*, 387 U.S., at 528, 87 S.Ct. at 1730. As the Court explained in *Katz v. United States*, *supra*, 389 U.S. at 357, 88 S.Ct. at 514, "[s]earches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' *Agnello v. United States*, 269 U.S. 20, 33, 46 S.Ct. 4, 6, 70 L.Ed. 145, for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . ..' *Wong Sun v. United States*, 371 U.S. 471, 481-482, 83 S.Ct. 407, 414, 9 L.Ed.2d 441." Thus, although "[s]ome have argued that '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable,' *United States v. Rabinowitz*, 339 U.S. 56, 66, 70 S.Ct. 430, 435, 94 L.Ed. 653 (1950)," "[t]his view has not been accepted." *United States v. United States District Court*, *supra*, 407 U.S., at 315, and n. 16, 92 S.Ct., at 2136. See *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Except in a few carefully defined classes of cases, a search of private property without valid consent is "unreasonable" unless it has been authorized by a valid search warrant. See, *e. g.*, *Almeida-Sanchez v. United States*, 413 U.S. 266, 269, 93 S.Ct. 2535, 2537, 37 L.Ed.2d 596 (1973); *Stoner v. California*, 376 U.S. 483, 486, 84 S.Ct. 889, 891, 11 L.Ed.2d 856 (1964); ***382** *Camara v. Municipal Court, supra*, 387 U.S., at 528, 87 S.C at 1730; *United States v. Jeffers*, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59 (1951); *Agnello v. United States*, 269 U.S. 20, 30, 46 S.Ct. 4, 10, 70 L.Ed. 145 (1925).

Although the Court has validated warrantless searches of automobiles in circumstances that would not justify a search of a home or office, *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973); *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), these decisions establish no general "automobile exception" to the warrant requirement. See *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964). Rather, they demonstrate that " 'for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars,' " *Cady v. Dombrowski*, *supra*, 413 U.S., at 439, 93 S.Ct. at 2527, quoting *Chambers v. Maroney*, *supra*, 399 U.S. at 52, 90 S.Ct. at 1981, a difference that may in some cases justify a warrantless search.[9]

****3104** The routine inventory search under consideration in this case does not fall within any of the established exceptions to the warrant requirement.[10] But examination of the interests which are protected when searches are ***383** conditioned on warrants issued by a judicial officer reveals that none of these is implicated here. A warrant may issue only upon "probable cause." In the criminal context the requirement of a warrant protects the individual's legitimate expectation of privacy against the overzealous police officer. "Its protection consists in requiring that those inferences [concerning probable cause] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948). See, *e. g.*, *United States v. United States District Court*, *supra*, 407 U.S. at 316-318, 92 S.Ct. at 2136. Inventory searches, however, are not conducted in order to discover evidence of crime. The officer does not make a discretionary determination to search based on a judgment that certain

  

conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized. There are thus no special facts for a neutral magistrate to evaluate.

A related purpose of the warrant requirement is to prevent hindsight from affecting the evaluation of the reasonableness of a search. See *United States v. Martinez-Fuerte*, 428 U.S., at 565, 96 S.Ct., at 3086; cf. *United States v. Watson*, 423 U.S. 411, 455 n. 22, 96 S.Ct. 820, 843, 46 L.Ed.2d 598 (1976) (Marshall, J., dissenting). In the case of an inventory search conducted in accordance with standard police department procedures, there is no significant danger of hindsight justification. The absence of a warrant will not impair the effectiveness of post-search review of the reasonableness of a particular inventory search.

Warrants also have been required outside the context of a criminal investigation. In *Camara v. Municipal Court*, the Court held that, absent consent, a warrant was necessary to conduct an areawide building code inspection, ***384** even though the search could be made absent cause to believe that there were violations in the particular buildings being searched. In requiring a warrant the Court emphasized that "[t]he practical effect of [the existing warrantless search procedures had been] to leave the occupant subject to the discretion of the official in the field," since
"when [an] inspector demands entry, the occupant ha[d] no way of knowing whether enforcement of the municipal code involved require[d] inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself [was] acting under proper authorization." 387 U.S., at 532, 87 S.Ct. at 1732.

In the inventory search context these concerns are absent. The owner or prior occupant of the automobile is not present, nor, in many cases, is there any real likelihood that he could be located within a reasonable period of time. More importantly, no significant discretion is placed in the hands of the individual officer: he usually has no ****3105** choice as to the subject of the search or its scope.[11]

In sum, I agree with the Court that the routine inventory search in this case is constitutional.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN and Mr. Justice STEWART join, dissenting.

The Court today holds that the Fourth Amendment permits a routine police inventory search of the closed ***385** glove compartment of a locked automobile impounded for ordinary traffic violations. Under the Court's holding, such a search may be made without attempting to secure the consent of the owner and without any particular reason to believe the impounded automobile contains contraband, evidence, or valuables, or presents any danger to its custodians or the public.[1] Because I believe this holding to be contrary to sound elaboration of established Fourth Amendment principles, I dissent.

As Mr. Justice POWELL recognizes, the requirement of a warrant aside, resolution of the question whether an inventory search of closed compartments inside a locked automobile can ever be justified as a constitutionally "reasonable" search[2] depends upon a reconciliation of the owner's constitutionally protected privacy interests against governmental intrusion, and legitimate governmental interests furthered by securing the car and its contents. *Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 534-535, 536-537, 87 S.Ct. 1727, 1733, 18 L.Ed.2d 930 (1967). The Court fails clearly to articulate the reasons for its reconciliation of these interests in this case, but it is at least clear to me that the considerations ***386** alluded to by the Court, and further discussed by Mr. Justice POWELL, are insufficient to justify the Court's result in this case.

To begin with, the Court appears to suggest by reference to a "diminished" expectation of privacy, *ante*, at 3096, that a person's constitutional interest in protecting the integrity of closed compartments of his locked automobile may routinely be sacrificed to governmental interests requiring interference with that privacy that are less compelling than would be necessary to justify a search of similar scope of the person's home or office. This has never been the law. The Court correctly observes that some prior cases have drawn distinctions between automobiles and homes or offices in Fourth Amendment cases; but even as the Court's discussion makes clear, the reasons for distinction in those cases are not present here. Thus, *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), and *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), permitted certain probable-cause searches to be carried out without warrants in view of the exigencies created by the mobility of automobiles, but both decisions reaffirmed that the standard of probable cause necessary to authorize such a search was no less ****3106** than the standard applicable to

  

search of a home or office. *Chambers*, *supra*, 399 U.S., at 51, 90 S.Ct., at 1981; *Carroll, supra*, 267 U.S., at 155-156, 45 S.Ct., at 286.[3] In other contexts the Court has recognized that automobile travel sacrifices some privacy interests to the publicity of plain view, *e. g.*, *Cardwell v. Lewis*, 417 U.S. 583, 590, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325 (1974) (plurality opinion); cf. *Harris v. United States*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968). But this recognition, too, is inapposite here, for there is no question of plain view in ***387** this case.[4] Nor does this case concern intrusions of the scope that the Court apparently assumes would ordinarily be permissible in order insure the running safety of a car. While it may be that privacy expectations associated with automobile travel are in some regards less than those associated with a home or office, see *United States v. Martinez-Fuerte*, 428 U.S. 543, at 561-562, 96 S.Ct. 3074, at 3084, 49 L.Ed.2d 1116, it is equally clear that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away . . .," ***388** *Coolidge v. New Hampshire*, 403 U.S. 443, 461, 91 S.Ct. 2022, 2035, 29 L.Ed.2d 564 (1971).[5] Thus, we have recognized that "[a] *search*, even of an automobile, is a substantial invasion of privacy," *United States v. Ortiz*, 422 U.S. 891, 896, 95 S.Ct. 2585, 2588, 45 L.Ed.2d 623 (1975) (emphasis added), and accordingly our cases have consistently recognized that the nature and substantiality of interest required to justify a *search* of private areas of an automobile is no less than that necessary to justify an intrusion of similar scope into a home or office. See, *e. g.*, *United States v. Ortiz*, *supra*; *Almeida-Sanchez v. United States*, 413 U.S. 266, 269-270, 93 S.Ct. 2535, 2538, 37 L.Ed.2d 596 (1973); *Coolidge, supra*; *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221-222, 88 S.Ct. 1472, 1475, 20 L.Ed.2d 538 (1968); *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964).[6]

***389** The Court's opinion appears to suggest that its result may in any event be justified ****3107** because the inventory search procedure is a "reasonable" response to
"three distinct needs: the protection of the owner's property while it remains in police custody . . .; the protection of the police against claims or disputes over lost or stolen property . . .; and the protection of the police from potential danger." *Ante*, at 3096.[7]

This suggestion is flagrantly misleading, however, because the record of this case explicitly belies any relevance of the last two concerns. In any event it is my view that none of these "needs," separately or together, can suffice to justify the inventory search procedure approved by the Court.

First, this search cannot be justified in any way as a safety measure, for— though the Court ignores it—the sole purpose given by the State for the Vermillion police's inventory procedure was to secure Valuables, Record 75, 98. Nor is there any indication that the officer's search in this case was tailored in any way to safety concerns, or that ordinarily it is so circumscribed. Even aside from the actual basis for the police practice in this case, however, I do not believe that any blanket safety argument could justify a program of routine ***390** searches of the scope permitted here. As Mr. Justice POWELL recognizes, ordinarily "there is little danger associated with impounding unsearched automobiles," *ante,* at 3101.[8] ****3108** Thus, while the safety rationale may not be entirely discounted when it is actually relied upon, it surely cannot justify the search of every car upothe basis of undifferentiated possibility of harm; on the contrary, such an intrusion could ordinarily be justified only in those individual cases where the officer's inspection was prompted by specific circumstances indicating the possibility ***391** of a particular danger. See *Terry v. Ohio*, 392 U.S., at 21, 27, 88 S.Ct. at 1879; cf. *Cady v. Dombrowski*, 413 U.S. 433, 448, 93 S.Ct. 2523, 2531, 37 L.Ed.2d 706 (1973).

Second, the Court suggests that the search for valuables in the closed glove compartment might be justified as a measure to protect the police against lost property claims. Again, this suggestion is belied by the record, since—although the Court declines to discuss it—the South Dakota Supreme Court's interpretation of state law explicitly absolves the police, as "gratuitous depositors," from any obligation beyond inventorying objects in plain view and locking the car. 228 N.W.2d 152, 159 (1975),[9] Moreover, as Mr. Justice POWELL notes, Ante, at 3101, it may well be doubted that an inventory procedure would in any event work significantly to minimize the frustrations of false claims.[10]

Finally, the Court suggests that the public interest in protecting valuables that may be found inside a closed compartment of an impounded car may justify the inventory procedure. I recognize the genuineness of this governmental interest in protecting property from pilferage. But even if I assume that the posting of a guard would be fiscally impossible as an alternative means to ***392** the same protective end,[11] I cannot agree with the Court's conclusion. The Court's result authorizes—indeed it appears to require

  

—the routine search of nearly every[12] car impounded.[13] In my view, the Constitution does not permit such searches as a matter of routine; absent specific consent, such a search is permissible only in exceptional circumstances of particular necsity.

It is at least clear that any owner might prohibit the police from executing a protective search of his impounded car, since by hypothesis the inventory is conducted for the owner's benefit. Moreover, it is obvious that not everyone whose car is impounded ****3109** would want it to be searched. Respondent himself proves this; but ***393** one need not carry contraband to prefer that the police not examine one's private possessions. Indeed, that preference is the premise of the Fourth Amendment. Nevertheless, according to the Court's result the law may presume that each owner in respondent's position consents to the search. I cannot agree. In my view, the Court's approach is squarely contrary to the law of consent;[14] it ignores the duty, in the absence of consent, to analyze in each individual case whether there is a need to search a particular car for the protection of its owner which is sufficient to outweigh the particular invasion. It is clear to me under established principles that in order to override the absence of explicit consent, such a search must at least be conditioned upon the fulfillment of two requirements.[15] First, there must be specific cause to believe that a search of the scope to be undertaken is necessary in order to preserve the integrity of particular valuable property threatened by the impoundment: "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which . . . reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S., at 21, 88 S.Ct. at 1880.

Such a requirement of "specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence," *id.*, at 21 n. 18, 88 S.Ct., at 1880, for "[t]he basic purpose of this ***394** Amendment, as recognized in countless decisions of this Court, is safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S., at 528, 87 S.Ct. at 1730. Cf. *United States v. Brignoni-Ponce*, 422 U.S. 873, 883-884, 95 S.Ct. 2574, 2588, 45 L.Ed.2d 607 (1975); *Cady v. Dombrowski*, 413 U.S., at 448, 93 S.Ct. at 2531; *Terry v. Ohio*, *supra*, 392 U.S., at 27, 88 S.Ct. at 1883. Second, even where a search might be appropriate, such an intrusion may only follow the exhaustion and failure of reasonable efforts under the circumstances to identify and reach the owner of the property in order to facilitate alternative means of security or to obtain his consent to the search, for in this context the right to refuse the search remains with the owner. Cf. *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).[16]

Because the record in this case shows that the procedures followed by the Vermillion police in searching respondent's car fall far short of these standards, in my view the search was impermissible and its fruits must be suppressed. First, so far as the record shows, the police in this case had no reason to believe that the glove compartment of the impounded car contained particular property of any substantial value. Moreover, the owner had apparently thought it adequate to protect whatever he left in the car overnight on the street in a business area simply to lock the car, and there is nothing in the record to show that the impoundment ***395** lot would prove a less secure location against pilferage,[17] cf. *Mozzetti* ****3110** *v. Superior Court,* 4 Cal.3d 699, 707, 94 Cal.Rptr. 412, 484 P.2d 84, 89 (1971), particularly when it would seem likely that the owner would claim his car and its contents promptly, at least if it contained valuables worth protecting.[18] Even if the police had cause to believe that the impounded car's glove compartment contained particular valuables, however, they made no effort to secure the owner's consent to the search. Although the Court relies, as it must, upon the fact that respondent was not present to make other arrangements for the re of his belongings, *ante*, at 3099, in my view that is not the end of the inquiry. Here the police readily ascertained the ownership of the vehicle, Record 98-99, yet they searched it immediately without taking any steps to locate respondent and procure his consent to the inventory or advise him to make alternative arrangements to safeguard his property, *id*., at 32, 72, 73, 79. Such a failure is inconsistent with the rationale that the inventory procedure is carried out for the benefit of the owner.

The Court's result in this case elevates the conservation of property interests—indeed mere possibilities of property interests—above the privacy and security interests ***396** protected by the Fourth Amendment. For this reason I dissent. On the remand it should be clear in any event that this Court's holding does not preclude a corary resolution of this case or others involving the same issues under any applicable state law. See *Oregon v. Hass*, 420 U.S. 714, 726, 95 S.Ct. 1215, 1223, 43 L.Ed.2d 570 (1975) (Marshall, J., dissenting).

Statement of Mr. Justice WHITE.

Although I do not subscribe to all of my Brother MARSHALL's dissenting opinion, particularly some aspects

of his discussion concerning the necessity for obtaining the consent of the car owner, I agree with most of his analysis and conclusions and consequently dissent from the judgment of the Court.

**All Citations**

428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 At respondent's trial, the officer who conducted the inventory testified as follows:

"Q. And why did you inventory this car?

"A. Mainly for safekeeping, because we have had a lot of trouble in the past of people getting into the impound lot and breaking into cars and stealing stuff out of them.

"Q. Do you know whether the vehicles that were broken into . . . were locked or unlocked?

"A. Both of them were locked, they would be locked." Record 74.

In describing the impound lot, the officer stated:

"A. It's the old county highway yard. It has a wooden fence partially around part of it, and kind of a dilapidated wire fence, a makeshift fence." *Id*., at 73.

2 In *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), and *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967), the Court held that a warrant was required to effect an unconsented administrative entry into and inspection of private dwellings or commercial premises to ascertain health or safety conditions. In contrast, this procedure has never been held applicable to automobile inspections for safety purposes.

3 The New York Court of Appeals has noted that in New York City alone, 108,332 cars were towed away for traffic violations during 1969. *People v. Sullivan*, 29 N.Y.2d 69, 71, 323 N.Y.S.2d 945, 946, 272 N.E.2d 464, 465 (1971).

4 In contrast to state officials engaged in everyday caretaking functions:

"The contact with vehicles by federal law enforcement officers usually, if not always, involves the detection or investigation of crimes unrelated to the operation of a vehicle." *Cady v. Dombrowski*, *supra*, 413 U.S. 433, 440, 93 S.Ct. 2523, 2527 (1973).

5 In analyzing the issue of reasonableness *vel non* the courts have not sought to determine whether a protective inventory was justified by "probable cause." The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures. See generally Note, Warrantless Searches and Seizures of Automobiles, 87 Harv.L.Rev. 835, 850-851 (1974). The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations.

In view of the noncriminal context of inventory searches, and the inapplicability in such a setting of the requirement of probable cause, courts have held—and quite correctly—that search warrants are not required, linked as the warrant requirement textually is to the probable-cause concept. We have frequently observed that the warrant requirement assures that legal inferences and conclusions as to probable cause will be drawn by a neutral magistrate unrelated to the criminal investigative-enforcement process. With respect to noninvestigative police inventories of automobiles lawfully within governmental custody, however, the policies underlying the warrant requirement, to which Mr. Justice POWELL refers, are inapplicable.

  

6 Given the benign noncriminal context of the intrusion, see *Wyman v. James*, 400 U.S. 309, 317, 91 S.Ct. 381, 385, 27 L.Ed.2d 408 (1971), some courts have concluded that an inventory does not constitute a search for Fourth Amendment purposes. See *e. g.*, *People v. Sullivan*, *supra*, 29 N.Y.2d, at 77, 323 N.Y.S.2d, at 952, 272 N.E.2d, at 469; *People v. Willis*, 46 Mich.App. 436, 208 N.W.2d 204 (1973); *State v. Wallen*, 185 Neb. 44, 49-50, 173 N.W.2d 372, 376, cert. denied, 399 U.S. 912, 90 S.Ct. 2211, 26 L.Ed.2d 568 (1970). Other courts have expressed doubts as to whether the intrusion is classifiable as a search. *State v. All*, 17 N.C.App. 284, 286, 193 S.E.2d 770, 772, cert. denied, 414 U.S. 866, 94 S.Ct. 51, 38 L.Ed.2d 85 (1973). Petitioner, however, has expressly abandoned the contention that the inventory in this case is exempt from the Fourth Amendment standard of reasonableness. Tr. of Oral Arg. 5.

7 In *Cooper*, the owner had been arrested on narcotics charges, and the car was taken into custody pursuant to the state forfeiture statute. The search was conducted several months before the forfeiture proceedings were actually instituted.

8 There was, of course, no certainty at the time of the search that forfeiture proceedings would ever be held. Accordingly, there was no reason for the police to assume automatically that the the automobile would eventually be forfeited to the State. Indeed, as the California Court of Appeal stated, "[T]he instant record nowhere discloses that forfeiture proceedings were instituted in respect to defendant's car . . . ." *People v. Cooper*, 234 Cal.App.2d 587, 596, 44 Cal.Rptr. 483, 489 (1965). No reason would therefore appear to limit *Cooper* to an impoundment pursuant to a forfeiture statute.

9 The Court expressly noted that the legality of the inventory was not presented, since the evidence was discovered at the point when the officer was taking protective measures to secure the automobile from the elements. But the Court clearly held that the officer acted properly in opening the car for protective reasons.

10 The inventory was not unreasonable in scope. Respondent's motion to suppress in state court challenged the inventory only as to items inside the car not in plain view. But once the policeman was lawfully inside the car to secure the personal property in plain view, it was not unreasonable to open the unlocked glove compartment, to which vandals would have had ready and unobstructed access once inside the car.

The "consent" theory advanced by the dissent rests on the assumption that the inventory is exclusively for the protection of the car owner. It is not. The protection of the municipality and public officers from claims of lost or stolen property and the protection of the public from vandals who might find a firearm, *Cady v. Dombrowski*, or as here, contraband drugs, are also crucial.

1 Routine inventories of automobiles intrude upon an area in which the private citizen has a "reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). Thus, despite their benign purpose, when conducted by government officials they constitute "searches" for purposes of the Fourth Amendment. See *Terry v. Ohio*, 392 U.S. 1, 18 n. 15, 88 S.Ct. 1868, 1878, 20 L.Ed.2d 889 (1968); *United States v. Lawson*, 487 F.2d 468 (CA8 1973); *Mozzetti v. Superior Court*, 4 Cal.3d 699, 709-710, 94 Cal.Rptr. 412, 484 P.2d 84, 90-91 (1971) (en banc). Cf. *Cardwell v. Lewis*, 417 U.S. 583, 591, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325 (1974) (plurality opinion).

2 The principal decisions relied on by the State to justify the inventory search in this case, *Harris v. United States*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968); *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967); and *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), each relied in part on significant factors not found here. *Harris* only involved an application of the "plain view" doctrine. In *Cooper* the Court validated an automobile search that took place one week after the vehicle was impounded on the theory that the police had a possessory interest in the car based on a state forfeiture statute requiring them to retain it some four months until the forfeiture sale. See 386 U.S., at 61-62, 87 S.Ct. at 791. Finally, in *Cady* the Court held that the search of an automobile trunk "which the officer reasonably believed to contain a gun" was not unreasonable within the meaning of the Fourth and Fourteenth Amendments. 413 U.S., at 448, 93 S.Ct. at 2531. See also *id.*, at 436-437, 93 S.Ct. at 2526. The police in a typical inventory search case, however, will have no reasonable belief as to the particular automobile's contents. And, although the police in this case knew with certainty that there were items of personal property within the exposed interior of the car—*i. e.*, the watch on the dashboard—see *ante*, at 3095, this information alone did not, in the circumstances of this case, provide additional justification for the search of the closed console glove compartment in which the contraband was discovered.

  

3 The interest in protecting the police from liability for lost or stolen property is not relvant in this case. Respondent's motion to suppress was limited to items inside the autombile not in plain view. And, the Supreme Court of South Dakota here held that the removal of objects in plain view, and the closing of windows and locking of doors, satisfied any duty the police department owed the automobile's owner to protect property in police possession. S.D., 228 N.W.2d 152, 159 (1975).

4 See *Mozzetti v. Superior Court, supra,* 4 Cal3d, at 709–710, 94 Cal.Rptr. 412, 484 P.2d, at 90–91.

5 See Note, Warrantless Searches and Seizures of Automobiles, 87 Harv.L.Rev. 835, 853 (1974).

6 A complete "inventory report" is required of all vehicles impounded by the Vermillion Police Department. The standard inventory consists of a survey of the vehicle's exterior—windows, fenders, trunk, and hood—apparently for damage, and its interior, to locate "valuables" for storage. As part of each inventory a standard report form is completed. The report in this case listed the items discovered in both the automobile's interior and the unlocked glove compartment. The only notation regarding the trunk was that it was locked. A police officer testified that all impounded vehicles are searched, that the search always includes the glove compartment, and that the trunk had not been searched in this case because it was locked. See Record 33–34, 73–79.

7 As part of their inventory search the police may discover materials such as letters or checkbooks that "touch upon intimate areas of an individual's personal affairs," and "reveal much about a person's activities, associations, and beliefs." *California Bankers Assn. v. Shultz*, 416 U.S. 21, 78–79, 94 S.Ct. 1494, 1525, 39 L.Ed.2d 812 (1974) (Powell, J., concurring). See also *Fisher v. United States*, 425 U.S. 391, 401 n. 7, 96 S.Ct. 1569, 1576, 48 L.Ed.2d 39 (1976). In this case the police found, *inter alia*, "miscellaneous papers," a checkbook, an installment loan book, and a social security status card. Record 77. There is, however, no evidence in the record that in carrying out their established inventory duties the Vermillion police do other than search for and remove for storage such property without examining its contents.

8 The Amendment provides that

"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 Warrants 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."

9 This difference turns primarily on the mobility of the automobile and the impracticability of obtaining a warrant in many circumstances, *e. g.*, *Carroll v. United States*, 267 U.S. 132, 153-154, 45 S.Ct. 280, 294, 69 L.Ed. 543 (1925). The lesser expectation of privacy in an automobile also is important. See *United States v. Ortiz*, 422 U.S. 891, 896 n. 2, 95 S.Ct. 2585, 2588, 45 L.Ed.2d 623 (1975); *Cardwell v. Lewis*, 417 U.S., at 590, 94 S.Ct. at 2469; *Almeida-Sanchez v. United States*, 413 U.S. 266, 279, 93 S.Ct. 2535, 2542, 37 L.Ed.2d 596 (1973) (Powell, J., concurring). See *Cady v. Dombrowski*, 413 U.S. at 441-442, 93 S.Ct. at 2528.

10 See, *e. g.*, *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Warden v. Hayden*, 387 U.S. 294, 298-300, 87 S.Ct. 1642, 1645, 18 L.Ed.2d 782 (1967); *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967); *Brinegar v. United States*, 338 U.S. 160, 174-177, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949); *Carroll v. United States*, *supra*, 267 U.S., at 153, 156, 45 S.Ct. at 283. See also *McDonald v. United States*, 335 U.S. 451, 454-456, 69 S.Ct. 191, 192, 93 L.Ed. 153 (1948); *United States v. Mapp*, 476 F.2d 67, 76 (CA2 1973) (listing then-recognized exceptions to warrant requirement: (i) hot pursuit; (ii) plain-view doctrine; (iii) emergency situation; (iv) automobile search; (v) consent; and (vi) incident to arrest).

11 In this case, for example, the officer who conducted the search testified that the offending automobile was towed to the city impound lot after a second ticket had been issued for a parking violation. The officer further testified that all vehicles taken to the lot are searched in accordance with a "standard inventory sheet" and "all items [discovered in the vehicles] are removed for safekeeping." Record 74. See n. 6, *supra*.

1 The Court does not consider, however, whether the police might open and search the glove compartment if it is locked, or whether the police might search a locked trunk or other compartment.

2 I agree with Mr. Justice POWELL's conclusion, ante, at 3100 n. 1, that, as petitioner conceded, Tr. of Oral Arg. 5, the examination of the closed glove compartment in this case is a "search." See *Camara v. Municipal Court*, 387 U.S. 523,

  

530, 87 S.Ct. 1727, 1732, 18 L.Ed.2d 930 (1967): "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." See also *Cooper v. California*, 386 U.S. 58, 61, 87 S.Ct. 788, 790, 17 L.Ed.2d 730 (1967), quoted in n. 5, *infra*. Indeed, the Court recognized in *Harris v. United States*, 390 U.S. 234, 236, 88 S.Ct. 992, 993, 19 L.Ed.2d 1067 (1968), that the procedure invoked here would constitute a search for Fourth Amendment purposes.

3 This is, of course, "probable cause in the sense of specific knowledge about a particular automobile." *Almeida-Sanchez v. United States*, 413 U.S. 266, 281, 93 S.Ct. 2535, 2544, 37 L.Ed.2d 596 (1973) (Powell, J., concurring).

4 In its opinion below, the Supreme Court of South Dakota stated that in its view the police were constitutionally justified in entering the car to remove, list, and secure objects in plain view from the outside of the car. 228 N.W.2d 152, 158-159 (1975). This issue is not presented on certiorari here.

Contrary to the Court's assertion, however, *ante*, at 3099-3100, the search of respondent's car was not in any way "prompted by the presence in plain view of a number of valuables inside the car." In fact, the record plainly states that every vehicle taken to the city impound lot was inventoried, Record 33, 74, 75, and that as a matter of "standard procedure," "every inventory search" would involve entry into the car's closed glove compartment. *Id.*, at 43, 44. See also Tr. of Oral Arg. 7. In any case, as Mr. Justice POWELL recognizes, *ante*, at 3100 n. 2, entry to remove plain-view articles from the car could not justify a further search into the car's closed areas. Cf. *Chimel v. California*, 395 U.S. 752, 763, 764-768, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969). Despite the Court's confusion on this point—further reflected by its discussion of *Mozzetti v. Superior Court*, 4 Cal.3d 699, 94 Cal.Rptr. 412, 484 P.2d 84 (1971), *ante* at 3097, and its reliance on state and lower federal-court cases approving nothing more than inventorying of plain-view items, *e. g.*, *Barker v. Johnson*, 484 F.2d 941 (CA6 1973); United States v. Mitchell, 458 F.2d 960 (CA9 1972); *United States v. Fuller*, 277 F.Supp. 97 (DC 1967), conviction aff'd, 139 U.S.App.D.C. 375, 433 F.2d 533 (1970); *State v. Tully*, 166 Conn. 126, 348 A.2d 603 (1974); *State v. Achter*, 512 S.W.2d 894 (Mo.Ct.App.1974); *State v. All*, 17 N.C.App. 284, 193 S.E.2d 770, cert. denied, 414 U.S. 866, 94 S.Ct. 51, 38 L.Ed.2d 85 (1973)—I must conclude that the Court's holding also permits the intrusion into a car and its console even in the absence of articles in plain view.

5 Moreover, as the Court observed in *Cooper v. California*, *supra*, 386 U.S., at 61, 87 S.Ct. at 791: " '[L]awful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it.' "

6 It would be wholly unrealistic to say that there is no reasonable and actual expectation in maintaining the privacy of closed compartments of a locked automobile, when it is customary for people in this day to carry their most personal and private papers and effects in their automobiles from time to time. Cf. *Katz v. United States*, 389 U.S. 347, 352, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (opinion of the Court; *id.*, at 361, 88 S.Ct., at 516 (Harlan, J., concurring)). Indeed, this fact is implicit in the very basis of the Court's holding—that such compartments may contain valuables in need of safeguarding.

Mr. Justice POWELL observes, *ante*, at 3101-3102, and n. 7, that the police would not be justified in sifting through papers secured under the procedure employed here. I agree with this, and I note that the Court's opinion does not authorize the inspection of suitcases, boxes, or other containers which might themselves be sealed, removed, and secured without further intrusion. See, *e. g.*, *United States v. Lawson*, 487 F.2d 468 (CA8 1973); *State v. McDougal*, 68 Wis.2d 399, 228 N.W.2d 671 (1975); *Mozzetti v. Superior Court, supra*. But this limitation does not remedy the Fourth Amendment intrusion when the simple inventorying of closed areas discloses tokens, literature, medicines, or other things which on their face may "reveal much about a person's activities, associations, and beliefs," *California Bankers Assn. v. Shultz*, 416 U.S. 21, 78-79, 94 S.Ct. 1494, 1526, 39 L.Ed.2d 812 (1974) (Powell, J., concurring).

7 The Court also observes that "[i]n addition, police frequently attempt to determine whether a vehicle has been stolen and thereafter abandoned." *Ante*, at 3097. The Court places no reliance on this concern in this case, however, nor could it. There is no suggestion that the police suspected that respondent's car was stolen, or that their search was directed at, or stopped with, a determination of the car's ownership. Indeed, although the police readily identified the car as respondent's Record 98-99, the record does not show that they ever sought to contact him.

8 The very premise of the State's chief argument, that the cars must be searched in order to protect valuables because no guard is posted around the vehicles, itself belies the argument that they must be searched at the city lot in order to

  

protect the police there. These circumstances alone suffice to distinguish the dicta from *Cooper v. California*, 386 U.S., at 61-62, 87 S.Ct. at 791, recited by the Court, *ante*, at 3098.

The Court suggests a further "crucial" justification for the search in this case: "protection of the Public from vandals who might find a firearm, *Cady v. Dombrowski*, [413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973)], or as here, contraband drugs" (emphasis added). *Ante*, at 3100 n. 10. This rationale, too, is absolutely without support in this record. There is simply no indication the police were looking for dangerous items. Indeed, even though the police found shotgun shells in the interior of the car, they never opened the trunk to determine whether it might contain a shotgun. Cf. *Cady, supra*. Aside from this, the suggestion is simply untenable as a matter of law. If this asserted rationale justifies search of all impounded automobiles, it must logically also justify the search of *all* automobiles, whether impounded or not, located in a similar area, for the argument is not based upon the custodial role of the police. See also *Cooper v. California, supra*, 386 U.S., at 61, 87 S.Ct. at 790, quoted in n. 5, *supra*. But this Court has never permitted the search of any car or home on the mere undifferentiated assumption that it might be vandalized and the vandals might find dangerous weapons or substances. Certainly *Cady v. Dombrowski*, permitting a limited search of a wrecked automobile where, *inter alia*, the police had a reasonable belief that the car contained a specific firearm, 413 U.S., at 448, 93 S.Ct. at 2531, does not so hold.

9 Even were the State to impose a higher standard of custodial responsibility upon the police, however, it is equally clear that such a requirement must be read in light of the Fourth Amendment's pre-eminence to require protective measures other than interior examination of closed areas.

10 Indeed, if such claims can be deterred at all, they might more effectively be deterred by sealing the doors and trunk of the car so that an unbroken seal would certify that the car had not been opened during custody. See *Cabbler v. Superintendent*, 374 F.Supp. 690, 700 (ED Va.1974), rev'd, 528 F.2d 1142 (CA4 1975), cert. pending, No. 75-1463.

11 I do not believe, however, that the Court is entitled to make this assumption, there being no such indication in the record. Cf. *Cady v. Dombrowski*, *supra*, 413 U.S., at 447, 93 S.Ct., at 2531.

12 The Court makes clear, *ante*, at 3099, that the police may not proceed to search an impounded car if the owner is able to make other arrangements for the safekeeping of his belongings. Additionally, while the Court does not require consent before a search, it does not hold that the police may proceed with such a search in the face of the owner's denial of permission. In my view, if the owner of the vehicle is in police custody or otherwise in communication with the police, his consent to the inventory is prerequisite to an inventory search. See *Cabbler v. Superintendent*, *supra*, 374 F.Supp., at 700; cf. *State v. McDougal*, 68 Wis.2d, at 413, 228 N.W.2d, at 678; *Mozzetti v. Superior Court*, 4 Cal.3d, at 708, 94 Cal.Rptr. 412, 484 P.2d, at 89.

13 In so requiring, the Court appears to recognize that a search of some, but not all, cars which there is no specific cause to believe contain valuables would itself belie any asserted property-securing purpose.

The Court makes much of the fact that the search here was a routine procedure, and attempts to analogize *Cady v. Dombrowski*. But it is quite clear that the routine in *Cady* was only to search where there was a reasonable belief that the car contained a dangerous weapon, 413 U.S., at 443, 93 S.Ct. at 2529; see *Dombrowski v. Cady*, 319 F.Supp. 530, 532 (ED Wis.1970), not, as here, to search every car in custody without particular cause.

14 Even if it may be true that many persons would ordinarily consent to a protective inventory of their car upon its impoundment, this fact is not dispositive since even a majority lacks authority to consent to the search of *all* cars in order to assure the search of theirs. Cf. *United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974); *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964).

15 I need not consider here whether a warrant would be required in such a case.

16 Additionally, although not relevant on this record, since the inventory procedure is premised upon benefit to the owner, it cannot be executed in any case in which there is reason to believe the owner would prefer to forgo it. This principle, which is fully consistent with the Court's result today, requires, for example, that when the police harbor suspicions (amounting to less than probable cause) that evidence or contraband may be found inside the automobile, they may not inventory it, for they must presume that the owner would refuse to permit the search.

  

17 While evidence at the suppression hearing suggested that the inventory procedures were prompted by past thefts at the impound lot, the testimony refers to only two such thefts, see *ante*, at 3095 n. 1, over an undisclosed period of time. There is no reason on this record to believe that the likelihood of pilferage at the lot was higher or lower than that on the street where respondent left his car with valuables in plain view inside. Moreover, the failure of the police to secure such frequently stolen items as the car's battery, suggests that the risk of loss from the impoundment was not in fact thought severe.

18 In fact respondent claimed his possessions about five hours after his car was removed from the street. Record 39, 93.

147 Wash.App. 490
Court of Appeals of Washington,
Division 1.

STATE of Washington, Respondent,

v.

Steven K. CHANG, Appellant.

No. 60743–0–I.
|
Nov. 17, 2008.

**Synopsis**

**Background:** Defendant was convicted in the Superior Court, King County, Richard McDermott, J., of three counts of possession of stolen property in the second degree, unlawful possession of a firearm in the second degree, and two counts of drug possession. Defendant appealed.

**Holdings:** The Court of Appeals, Becker, J., held that:

officers could search car without a warrant to protect their safety, and

defendant's convictions for possession of a stolen access device were supported by his possession of stolen checking account numbers.

Affirmed.

**Attorneys and Law Firms**

****1009** Eric Nielsen, Nielsen Broman Koch, Seattle, WA, for Appellant.

Heidi J. Jacobsen-Watts, King County Prosecuting Attorney, Seattle, WA, for Respondent.

**Opinion**

BECKER, J.

***493** ¶ 1 The convictions appealed by Steven Chang arose from a search of his car. Because the officers had information there was a gun in the car, the warrantless search was appropriate to protect their safety. And Chang's convictions for possession of a stolen access device were supported by his possession of checking account numbers. Because checking account numbers can be used to access accounts in nontraditional ways not involving paper checks, they do not fall within the statutory exclusion for devices that can be used to initiate a transfer of funds "solely by paper instrument."

FACTS

¶ 2 Police responded to a report of a suspected forgery at a bank. Inside the bank, the suspect told them he had arrived at the bank in a white Subaru driven by Steven ****1010** Chang. Some of the officers found Steven Chang in a white Subaru in the parking lot and detained him. Meanwhile, asked whether there were any weapons on Chang or in the ***494** Subaru, the suspect inside the bank told police that Chang had a handgun. This information was relayed via radio to the officers outside, who had already removed Chang from the Subaru. One of the officers patted Chang down and handcuffed him, then looked inside the car and saw a bulge under the driver's side floor mat. Reaching in, he pulled back the floor mat and immediately saw a handgun on the floorboard. Chang denied ownership of the gun. He was placed under arrest for carrying a concealed weapon.

¶ 3 The police searched the interior of Chang's car incident to arrest. They found a backpack in the rear seat. Inside were several bank checks with different names on them, a small quantity of drugs, and several documents bearing Chang's name and personal information. Police also found a small quantity of marijuana and a methamphetamine pipe in the center console.

¶ 4 The State charged Chang with three counts of possession of stolen property in the second degree for the checking account numbers in his possession, unlawful possession of a firearm in the second degree, and two counts of drug possession.

¶ 5 Chang moved to suppress the checks, the handgun, and the drugs. The court denied the motion, concluding that the warrantless search was justified by officer safety concerns.

¶ 6 After the State rested, Chang moved to dismiss the counts of possession of stolen property, arguing that the checks were not access devices under RCW 9A.56.010(1) because they were paper instruments. The trial court denied the motion. The jury convicted Chang as charged. He appeals.

  

SEARCH OF VEHICLE

¶ 7 Chang assigns error to the denial of his motion to suppress. He correctly notes that the trial court did not enter CrR 3.5 and 3.6 findings until after he filed his ***495** appellate brief. When findings and conclusions are not entered until after the appellant files his brief, his opportunity to assign an error to a finding of fact is foreclosed. But there is no error if the trial court's oral findings are sufficient to permit appellate review, and the defendant does not demonstrate any prejudice arising from the belated findings. *State v. Glenn,* 140 Wash.App. 627, 639–40, 166 P.3d 1235 (2007). That is the case here.

¶ 8 The trial court's ruling on a motion to suppress evidence must be affirmed if substantial evidence supports the court's findings of fact, and those findings support the court's conclusions of law. *State v. Ross,* 106 Wash.App. 876, 880, 26 P.3d 298 (2001). Here, Chang does not challenge the findings of fact. The trial court's conclusion of law is reviewed de novo. *Ross,* 106 Wash.App. at 880, 26 P.3d 298.

¶ 9 The court found that when Chang was detained, he was standing at the rear driver's side bumper area of his car and about two strides from the driver's side door. Upon receiving the information that Chang had a gun, an officer patted Chang down and handcuffed him, then looked inside the car and found the gun under the floor mat. The gun was loaded, and the officer removed and secured it.

¶ 10 The protective search exception to the warrant requirement applies when a valid *Terry* stop includes a vehicle search to ensure officer safety. *State v. Kennedy,* 107 Wash.2d 1, 12, 726 P.2d 445 (1986) citing *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Larson,* 88 Wash.App. 849, 853, 946 P.2d 1212 (1997). If a police officer has a reasonable belief that the suspect in a *Terry* stop might be able to obtain weapons from a vehicle, the officer may search the vehicle without a warrant to secure his own safety, limited to those areas in which a weapon may be placed or hidden. *State v. Holbrook,* 33 Wash.App. 692, 696, 657 P.2d 797, *rev. denied,* 99 Wash.2d 1023 (1983) (protective search was valid when another officer informed the searching officer of an informant's "hot-sheet" information about a hidden gun).

****1011** ***496** ¶ 11 In determining whether the search was reasonably based on officer safety concerns, a court should evaluate "the entire circumstances" surrounding the *Terry* stop. *State v. Glossbrener,* 146 Wash.2d 670, 679, 49 P.3d 128 (2002). For example, if a suspect made a furtive movement appearing to be concealing a weapon or contraband in the passenger compartment, a protective search is generally allowed. *Kennedy,* 107 Wash.2d at 12, 726 P.2d 445 (a valid protective search was made when the officer witnessed the driver lean forward in a way that looked like he was hiding something in the front seat of the car); *Larson,* 88 Wash.App. at 857, 946 P.2d 1212 (when an officer following a speeding driver saw him leaning toward the floorboard, the officer properly searched inside in the area of the furtive movement); *Glossbrener,* 146 Wash.2d at 679, 49 P.3d 128 (the officer's safety concern based on the driver's furtive movement seen before stopping the car was no longer objectively reasonable at the time of the search because the officer had completed his investigation and the search was an afterthought).

¶ 12 When an officer reasonably believes that a suspect's vehicle contains a weapon, the ability to search is limited to the area "within the investigatee's immediate control." *Kennedy,* 107 Wash.2d at 12, 726 P.2d 445. In *Kennedy,* the court applied this reasoning to approve a search where a passenger still remained in the car after the police had removed the driver who made a furtive movement. Chang attempts to distinguish *Kennedy* by pointing out that he was standing handcuffed outside the car, there was no one inside the car, and therefore no one had immediate access to any gun that might be inside. However, *Kennedy* "did not limit an officer's ability to search the passenger compartment of a vehicle based on officer safety concerns only to situations in which either the driver or passenger remain in the vehicle." *Glossbrener,* 146 Wash.2d at 679, 49 P.3d 128. For example, where a lone driver is outside the automobile and has no immediate access to the car, police may conduct a protective search if the suspect will have a later opportunity to return to his vehicle. *Larson,* 88 Wash.App. at 857, 946 P.2d 1212; ***497** *Glenn,* 140 Wash.App. at 636, 166 P.3d 1235. In *Larson,* once the suspect was pulled over, the driver was ordered to get out of his truck. In order to obtain his registration, the driver would need to return to his truck. Because of the driver's initial furtive movement raising suspicion that a weapon might be inside the vehicle, the court recognized sufficient grounds for safety concerns to justify the warrantless search by the police. *Larson,* 88 Wash.App. at 857, 946 P.2d 1212.

¶ 13 Similarly, the court held there was a reasonable officer safety concern in *Glenn* because the police knew they would have to return Glenn to his car if they found no weapon on

  

his person. *Glenn,* 140 Wash.App. at 636, 166 P.3d 1235. There, a child told his mother that a man in a passing car had pointed a gun at him from the car window. Based on this report, the police identified Glenn as a suspect and conducted a protective search of his car. This court ruled that a legitimate citizen's report about the gun was sufficient to justify concern about the safety of the officers. *Glenn,* 140 Wash.App. at 635, 166 P.3d 1235. If the officers had returned Glenn to his car without making sure that the weapon seen by the boy was not inside, "they would not have been ensuring their own safety or that of the surrounding community." *Glenn,* 140 Wash.App. at 636, 166 P.3d 1235.

¶ 14 Here, as established by the trial court's undisputed findings of fact, the officers were informed that Chang might be connected to the forgery attempt and that he reportedly had a handgun with him. Like Glenn, Chang was handcuffed and standing outside the car, but the police did not necessarily intend to arrest him without further investigation. Without a formal arrest, the police could not detain Chang in handcuffs longer than necessary to investigate his possible connection to the forgery attempt. Securing the scene required ensuring that the reported weapon would not be available to Chang if the police eventually released him to get back in his car. *See Glenn,* 140 Wash.App. at 636, 166 P.3d 1235.

¶ 15 Because the police had information that Chang had a gun in his car, their safety ****1012** concern was reasonable, and ***498** the trial court did not err in concluding that the warrantless search was valid. The order denying the motion to suppress is affirmed.

STOLEN ACCESS DEVICE

¶ 16 Chang claims the evidence was insufficient to support his convictions on the charges of possessing a stolen access device. When reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hosier,* 157 Wash.2d 1, 8, 133 P.3d 936 (2006).

¶ 17 Possession of stolen property means "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1). A person who possesses a "stolen access device" is guilty of possessing stolen property in the second degree. RCW 9A.56.160(1)(c). Chang claims the evidence of the checks he possessed was insufficient to support a conviction because the statutory definition of "access device" contains an exclusion for paper instruments.

¶ 18 At trial, the State presented the testimony of three witnesses whose checking account numbers were found in Chang's backpack during the search incident to his arrest. The first witness was shown two checks admitted as one of the State's exhibits. He said they had been in a checkbook that disappeared when someone broke into his vehicle while it was parked at a trailhead. He testified that the account number on the checks was the account number for his investment account. The second witness was shown two checks that he testified bore the account number of his credit union checking account. He said they were printed on different stationery, without the credit union watermark. He recalled that he had once written a check to pay his ***499** water bill, but the water company did not receive it. He later learned that a check with the same number but in a larger amount had cleared through the credit union. The third witness was shown a check that she identified as having the same account number as one of her current accounts. All three witnesses testified that Chang did not have permission to possess the checks.

¶ 19 Chang claims the evidence of the checks he possessed was insufficient to support a conviction because the statutory definition of "access device" contains an exclusion for paper instruments such as checks. The State responds that Chang was convicted of possession of the account numbers on the checks, not the checks themselves. The State charged Chang with possessing stolen account numbers, not stolen checks, and the State elicited testimony from the victims that they recognized the account numbers that were on the checks. Contrary to Chang's argument, it was not the checks but rather the account numbers on the checks that the State relied on as proof of the charge.[1] The question, then, is whether account numbers on checks satisfy the definition of "access device."

¶ 20 The statute defines access device as:

> any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, *other than a transfer originated solely by paper instrument.*

  

RCW 9A.56.010(1) (emphasis added).

¶ 21 Questions of statutory interpretation are reviewed de novo. *Western Telepage v. City of Tacoma,* 140 Wash.2d 599, 607, 998 P.2d 884 (2000). A court's objective ***500** in construing a statute is to determine the legislature's intent. If a statute's meaning is plain on its face, the court must give effect to ****1013** that plain meaning as an expression of legislative intent. Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *State v. Elmore,* 143 Wash.App. 185, 188, 177 P.3d 172 (2008).

¶ 22 As originally enacted in 1975, RCW 9A.56.010 was focused on credit cards. Laws of 1975, 1st Ex.Sess., ch. 260, § 9A.56.010, effective July 1, 1976. The Washington legislature amended the statute in 1987, substituting the phrase "access device" for "credit card." *State v. Standifer,* 110 Wash.2d 90, 94, 750 P.2d 258 (1988). *Standifer* quoted a bill report that explained that the amendment was intended to keep up with changes in technology:

> Technology has significantly changed banking practices. The term "credit card" does not adequately define many of the mechanisms that allow people to obtain access to credit and checking accounts. Changing the definition will make it easier for prosecutor's [sic] to establish certain types of fraudulent transactions.

*State v. Standifer,* 110 Wash.2d at 94, 750 P.2d 258, (quoting H.B. Rep. on Substitute H.B. 508, at 2, 50th Leg., Reg. Sess. (1987)). In the same enactment, the legislature added the phrase "other than a transfer originated solely by paper instrument" to the end of the definition of access device. Laws of 1987, ch. 140, § 1(3).

¶ 23 On its face, the statute includes account numbers among the items defined as access devices. This court has had no difficulty concluding that a credit card number is, by itself, an access device. *See e.g., State v. Askham,* 120 Wash.App. 872, 885, 86 P.3d 1224, *rev. denied,* 152 Wash.2d 1032, 103 P.3d 201 (2004). But here the question is complicated by the "paper instrument" exclusion at the end of the definition. Washington courts have not addressed the meaning of this exclusion, but it has been a topic of discussion in federal cases, and we look to them for insight into its meaning.

***501** ¶ 24 The legislative history of an analogous federal statute strongly suggests that our legislature was attempting to be consistent with the federal scheme. A federal criminal statute enacted in 1984 has an analogous definition of "access device" and the same "paper instrument" exclusion:

> any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (*other than a transfer originated solely by paper instrument* ).

18 U.S.C. § 1029(e)(1) (emphasis added).

¶ 25 Subject to the above definition of access device under subsection (e)(1), 18 U.S.C. § 1029 criminalizes the use of counterfeit access devices, the use of unauthorized access devices where during a one-year period anything of value aggregating $1,000 or more is obtained, the knowing possession of 15 or more counterfeit or unauthorized access devices, and the knowing possession or use of device-making equipment. 18 U.S.C. § 1029(a)(1)-(4).

¶ 26 In the 1984 legislation, Congress attempted to expand the scope of access device broadly enough to encompass future technological changes just as the Washington legislature did in the 1987 amendment to RCW 9A.56.010. Congressional hearings documented the intent:

> [T]here are indications of a growing problem in counterfeit credit cards and unauthorized use of account numbers or access codes to banking system accounts called debit instruments.... There are also indications that thieves are becoming increasingly sophisticated and in fact are stealing account numbers and using them without even getting physical control of the cards themselves.

H.R.Rep. No. 98-894, at 4 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3689, 3689-90. As to the definition of "access device", the congressional report states that the definition ***502** "is broad enough to encompass future technological changes." 1984 U.S.C.C.A.N., *supra,* at 3705. According to ****1014** the report, the only limitation—*i.e.,* the one relating to paper instruments—"excludes activities such as passing forged checks." 1984 U.S.C.C.A.N., *supra,* at 3705.

¶ 27 Considering this history of the federal statute, a federal circuit court has concluded that Congress wished to zero in on major counterfeiting and trafficking activities without supplanting state and local regulation of less sophisticated

  

schemes of forgery and fraud. *United States v. Hughey,* 147 F.3d 423, 434 (5th Cir.1998).

¶ 28 In *Hughey,* the defendant was charged under the federal statute with *use* (not possession) of an unauthorized access device. The conduct for which he was charged consisted of completing, presenting and cashing counterfeit checks. His conviction on this count was reversed, the court holding that his conduct concerned only transfers "originated solely by paper instrument", which was "not within the ambit of the conduct that Congress sought to prohibit." *Hughey,* 147 F.3d at 435. The government argued that Hughey's conviction on this count should nonetheless be affirmed on the basis that he was in possession of the checking account numbers which had the "inherent potential for use with other devices." *Hughey,* 147 F.3d at 435. The court rejected this argument, stating that it ignored the plain text of the exclusion. "Hughey used the account numbers to originate a transfer solely by paper instrument. Hughey did not use the subject account numbers independently to gain account access." *Hughey,* 147 F.3d at 435.

¶ 29 The "paper instrument" exception was also at issue in *United States v. Tatum,* 518 F.3d 769 (10th Cir.2008). In *Tatum,* the defendant was convicted of uttering a counterfeit check with the intent to deceive an organization in violation of 18 U.S.C. § 513(a). The trial court imposed a sentencing enhancement because it concluded that the defendant's conduct involved "production or trafficking of any access device," which requires sentencing enhancement ***503** under the federal sentencing guidelines. *Tatum,* 518 F.3d at 771. The Tenth Circuit reversed, following *Hughey:*

> We agree with the Fifth Circuit's reasoning. The statutory definition of access devices unambiguously excludes "transfer[s] originated solely by paper instrument," which is precisely the conduct involved in Defendant's offense. The government introduced no evidence that Defendant used, possessed, produced, or trafficked in bank account numbers in any way except as part of his scheme to pass counterfeit checks. We therefore conclude that both the counterfeit checks and the account numbers printed on those checks fall outside the statutory definition of an access device.

*Tatum,* 518 F.3d at 772 (alteration in original).

¶ 30 The federal cases persuasively show that the statute is not intended for use in cases where a defendant is charged with actually using a paper check to attempt or achieve a transfer of funds. We agree with that interpretation. But *Hughey* at least suggests that mere possession of checking account numbers is also outside the scope of the statute. *Hughey,* 147 F.3d at 435–36 ("We are not persuaded that Hughey's mere possession of the numbers, at least without additional evidence demonstrating the possibility of an additional use, is sufficient to overcome the express statutory provision excluding his conduct from the ambit of § 1029"). We regard this statement as dicta not compelled by the plain meaning of the statute. Unlike in *Hughey,* Chang was charged and convicted solely for his conduct of possessing stolen account numbers. There was no charge, no proof and no argument that he had passed bad checks or that his conduct was part of a scheme to pass bad checks.

¶ 31 Where the State seeks only to prove that a defendant possesses stolen checking account numbers, we conclude—considering the ordinary meaning of the language of the exclusion and the statutory scheme as a whole—that the State is not precluded from obtaining a conviction under RCW 9A.56.010(1). While the use of paper checks has long been known as a method of gaining access to bank accounts, today there is also widespread use of devices such as ***504** telephones and computers to initiate paperless ****1015** banking transactions using account numbers only. The statute permits the State to prosecute those who possess stolen checking account numbers without waiting to see whether there will be an actual attempt at passing bad checks. Where a defendant has actually used or attempted to use a paper instrument to initiate a transfer of funds, the more traditional charges like forgery or fraud remain available as charging options.

¶ 32 Affirmed.

WE CONCUR: AGID and LEACH, JJ.

**All Citations**

147 Wash.App. 490, 195 P.3d 1008

Footnotes

1 At oral argument, Chang asserted that evidence is insufficient to support a finding that the account numbers on checks are access devices unless there is testimony explaining how money can be obtained from a checking account without

  

paper. We are inclined to agree with the State that the matter is within the common knowledge of jurors. However, the argument was not made in Chang's appellate brief and we will not resolve it here.

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151 Vt. 225
Supreme Court of Vermont.

STATE of Vermont
v.
Kenny K. GREENSLIT.

No. 87-175.
|
March 3, 1989.

**Synopsis**
Defendant was convicted of possession of marijuana by the District Court, Unit No. 1, Windsor Circuit, and defendant appealed. The Supreme Court, Gibson, J., held that warrantless search of defendant was valid and fell within exception for search incident to a lawful arrest, as probable cause existed for the arrest where officer smelled burning marijuana and contemporaneously saw smoke coming out of car in which defendant had been a passenger.

Affirmed.

**Attorneys and Law Firms**

****672** ***225** Mark T. Cameron, Windsor County Deputy State's Atty., and Robert B. Fiske III, Law Clerk (on the brief), White River Junction, for plaintiff-appellee.

***226** Claude T. Buttrey of Hershenson, Carter, Scott and McGee, Norwich, and Martin and Paolini, Barre, for defendant-appellant.

Before ALLEN, C.J., and PECK, GIBSON, DOOLEY and MORSE, JJ.

**Opinion**

GIBSON, Justice.

Defendant appeals his conviction of possession of marijuana in violation of 18 V.S.A. § 4224(a), claiming that probable cause was lacking for the warrantless search and seizure of evidence which led to his conviction. We disagree and affirm.

The facts were stipulated at trial. Defendant was one of four occupants of a car parked at a swimming hole off Route 100 in Rochester, Vermont. The local constable spotted the car while on patrol, parked behind it, and ran a check on the license plate. The check revealed that the owner was under suspension for an insurance violation. Deciding to investigate, the officer approached the vehicle. As he did so, the person sitting behind the wheel got out and walked towards him. The officer could see smoke coming from within the vehicle, and as he got closer, he smelled burning marijuana.

The officer ordered the three passengers, including the defendant, out of the car, and ****673** advised all four of their Miranda rights. Telling them that he smelled marijuana, he ordered them to turn over any drugs or he would search them. Defendant removed a small amount of the drug from his person and handed it to the officer, who then issued him a citation to appear in court.[1]

Defendant moved to suppress the evidence obtained by the officer on the ground that probable cause was lacking to support the warrantless search and seizure of the marijuana. The trial court denied the motion, and an adjudication of guilt was subsequently entered on the facts as stipulated by the parties.

Defendant raises two issues on appeal. First, he states that as a matter of law, the smell of burning marijuana together with the sight of smoke within the automobile does not give rise to probable cause to search the vehicle. Second, assuming for argument's ***227** sake that probable cause existed to believe that marijuana was present in the car, defendant argues that the warrantless search of his person was impermissible as lacking in particularized probable cause.

A review of the stipulated facts, however, indicates that no search of the vehicle took place; rather, the police officer ordered defendant to turn over any drugs he possessed, threatening to search *him* if he failed to do so. Our inquiry, then, focuses on the constitutional propriety of the officer's alleged search of the defendant, not the car.

We note that defendant assumes for purposes of his argument that the police officer's order that he "hand over" any drugs constitutes a search, relying on *United States v. DiGiacomo,* 579 F.2d 1211, 1215 (10th Cir.1978), and *United States v. Gay,* 774 F.2d 368, 378 (10th Cir.1985) (reiterating the holding in *DiGiacomo* ).[2] This point was neither briefed nor argued by either party and is not decided here. Instead, we too will assume solely for purposes of this opinion that this

  

set of events constituted a "search" for Fourth Amendment purposes.

Because we conclude that the search was incident to a lawful arrest, we affirm defendant's conviction.

I.

It is axiomatic that a search incident to a lawful arrest is constitutional. See *Chimel v. California,* 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969), and its progeny. The proper inquiry, then, is not (as defendant articulated it) whether probable cause existed to search the vehicle, but whether probable cause existed to support an arrest of defendant and a search incident thereto.

Defendant contends that the smell of burning marijuana together with smoke does not rise to the level of probable cause. The two cases cited by defendant in support of his argument are, however, distinguishable from the facts of this case. In *State v. Schoendaller,* 176 Mont. 376, 382, 578 P.2d 730, 734 (1978), the court found that the odor of marijuana alone did not constitute probable cause for a warrantless search, stating that "to hold that an odor alone, absent evidence of visible contents, is deemed equivalent to plain view might very easily mislead officers into ***228** fruitless invasions of privacy where there is no contraband." In *People v. Hilber,* 403 Mich. 312, 321, 269 N.W.2d 159, 162 (1978), the court found that the odor of previously burned marijuana did not, under the circumstances of that case, constitute probable cause to search for the drug, but the court noted that it "share[d] the view that the odor of burned marijuana, in some circumstances, may provide reason to believe ****674** that a particular person smoked it (probable cause for arrest) or that there is a quantity of unsmoked marijuana (probable cause to search for it)." (Parentheticals in original.)

Here, the constable's actions were based not on the smell of burning marijuana alone, but on the contemporaneous presence of smoke coming out of the car. It was reasonable, under the circumstances, for the officer to infer that the smell and smoke were related and together more likely than not indicated a criminal transaction. *State v. Murray,* 134 Vt. 115, 119, 353 A.2d 351, 355 (1976).

Since probable cause for arrest exists where the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a person of reasonable caution to believe that a crime is being committed, *State v. Meunier,* 137 Vt. 586, 589, 409 A.2d 583, 585 (1979) (relying on *Carroll v. United States,* 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543 (1925)), we conclude that there was probable cause to arrest defendant in the instant case. See, e.g., *Adams v. Arkansas,* 26 Ark.App. 15, 19, 758 S.W.2d 709, 712 (1988) (smell of marijuana emanating from car constituted "reasonable suspicion" that crime had occurred or was about to occur; when officer then observed defendant stuffing a package down the front of his pants, there was a "logical progression of events" resulting in probable cause for arrest and right to search for and seize drugs), *petition for cert. filed,* 489 U.S. 1018, 109 S.Ct. 1136, 103 L.Ed.2d 197 (1988).

Inasmuch as there was probable cause for defendant's arrest, a search of defendant's person incidental thereto was constitutional under the doctrine enunciated in *Chimel v. California,* which allows such a search in order to prevent the destruction or concealment of evidence. 395 U.S. at 763, 89 S.Ct. at 2040.

The argument that defendant was not formally taken into custody and transported to the police station is of no avail, since it is the existence of probable cause for the arrest which brings the search within constitutional limits, not merely the act of taking an individual into custody. See, e.g., ***229** *Sibron v. New York,* 392 U.S. 40, 77, 88 S.Ct. 1889, 1909, 20 L.Ed.2d 917 (1968) (Harlan, J., concurring) ("If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden."); *United States v. Gay,* 774 F.2d at 378 (prearrest search was constitutional where arrest "followed quickly on the heels of the challenged search"); *United States v. Ilazi,* 730 F.2d 1120, 1126 (8th Cir.1984) (prearrest search constitutional where arrest and search are "substantially contemporaneous" and probable cause existed prior to search).

II.

Defendant's second argument on appeal is that the warrantless search of his person was impermissible as lacking in particularized probable cause. Given our conclusion that the alleged search was constitutional as incident to a lawful arrest, this point is governed by our holding on the first issue.

*Affirmed.*

  

**All Citations**

151 Vt. 225, 559 A.2d 672

Footnotes

1 Although it is not stated in the record, it is clear from the facts that this citation was issued pursuant to V.R.Cr.P. 3(c) in lieu of a continuing detention of defendant. While under Rule 3(c)(2)(B) a person may be arrested in order to obtain nontestimonial evidence upon or within the reach of the person, once such evidence has been obtained and continued detention is no longer necessary to preserve the evidence, a citation must be issued instead. See Reporter's Notes, V.R.Cr.P. 3 ("Even where there has been an arrest under [a Rule 3(c)(2) ] exception [ ], a citation must be issued subsequently if the grounds for the exception cease to exist.").

2 This position was recently adopted in the case of *Burnham v. West,* 681 F.Supp. 1160, 1164 (E.D.Va.1987).

162 Idaho 642
Supreme Court of Idaho,
Boise, August 2017 Term.

STATE of Idaho, Plaintiff-Respondent,

v.

Trevor Glenn LEE, Defendant-Appellant.

Docket No. 44932
|
Filed: September 22, 2017

**Synopsis**

**Background:** After his motion to suppress was denied, defendant entered a conditional guilty plea in the District Court, Payette County, Third Judicial District, Susan E. Wiebe, J., to possession of methamphetamine. Defendant appealed. The Court of Appeals, 2017 WL 361148, affirmed. Defendant appealed.

**Holdings:** The Supreme Court, Burdick, C.J., held that:

law enforcement officer was justified in his suspicion that defendant was armed and dangerous, and thus officer's *Terry* frisk of defendant was justified;

officer exceeded the permissible scope of his justified *Terry* frisk when he opened containers that he removed from defendant's pocket during frisk; and

search incident to arrest exception to search warrant requirement did not justify officer's search of containers, in which officer discovered controlled substances, and thus search of containers was unlawful.

Conviction vacated; denial of motion to suppress reversed and remanded.

****1098** Appeal from the District Court of the Third Judicial District, State of Idaho, Payette County. Hon. Susan E. Wiebe, District Judge.

District court order denying motion to suppress, reversed.

**Attorneys and Law Firms**

Eric D. Fredericksen, State Appellate Public Defender, Boise, for appellant. Andrea W. Reynolds, Depute State Appellate Public Defender argued.

Hon. Lawrence G. Wasden, Idaho Attorney General, Boise, for respondent. Jessica M. Lorello, Deputy Attorney General argued.

**Opinion**

BURDICK, Chief Justice.

***645** Trevor Glenn Lee appeals the Payette County district court's denial of his motion to suppress. As part of his plea agreement, Lee reserved the right to challenge the denial of his suppression motion on appeal. The district court concluded the pat-down frisk was reasonable under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), but the officer exceeded the scope of the frisk by opening the containers found in Lee's pocket. However, the district court concluded the search of the containers was permissible as a search incident to Lee's arrest because, prior to the search, the officer had probable cause to arrest Lee for driving without privileges and the search was substantially contemporaneous with the arrest. The court of appeals agreed and affirmed the district court's denial of Lee's motion to suppress. We reverse.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On May 16, 2015, Officer Laurenson of the Fruitland Police Department observed Trevor Lee driving a pickup. Officer Laurenson suspected that Lee might be driving without a valid license due to a prior encounter and confirmed through dispatch that Lee's license was indeed suspended. Officer Laurenson then observed Lee park in a Maverik parking lot and enter the store. He later observed Lee exit the store and start to walk on the highway instead of getting back into his pickup. Officer Laurenson pulled in behind Lee, activated his patrol lights, and made contact with Lee.

During the initial contact, Officer Laurenson asked Lee why he left his truck back at the Maverik store. Lee responded that he ****1099** ***646** wanted to walk. Officer Laurenson then asked Lee for his driver's license. Lee said that he did not have his license on him while patting his pockets. Officer Laurenson told Lee not to touch his pockets and asked if he had any weapons. Once again, Lee began patting his pockets,

  

mumbling some words. Officer Laurenson immediately told Lee not to touch his pockets and to go to the front of his patrol car. Lee did not move, asking "What did I do?" Officer Laurenson, once again, told Lee that he saw him driving with a suspended license. Officer Laurenson told Lee another three times to go to the patrol car, but Lee did not comply, arguing that he "was not driving." Finally, on the fifth request, Lee began to walk towards the patrol car. Once Lee made it to the patrol car, Officer Laurenson began a pat-down frisk for weapons. During the frisk, Officer Laurenson felt a large bulge in Lee's front pocket. Officer Laurenson felt that the bulge consisted of several cylindrical items, but one item felt longer, like a pocketknife. Officer Laurenson asked Lee for his consent to search his pocket; Lee denied his request, but Officer Laurenson, not knowing whether the item he felt was indeed a knife, told Lee that he was going to anyway. Officer Laurenson pulled each item out one at a time until he reached and pulled out the last object, a pocketknife. Officer Laurenson handcuffed Lee and told him that he was being "detained right now." Officer Laurenson advised Lee that he was "going to get a citation for driving without privileges" and in the meantime, that he was "going to sit in the back of [the] car."

Once Lee was detained, Officer Laurenson examined the containers because, based on his experience and training, he believed the containers contained evidence of drug activity. Officer Laurenson opened the container that he found to be the "most worn" and discovered a green leafy substance. He then opened the other container and discovered a powdery residue. Officer Laurenson arrested Lee and charged him with Possession of a Controlled Substance, Possession of Paraphernalia, and Driving without Privileges.

Lee moved to suppress the evidence found during the search. The district court denied Lee's motion to suppress. The court concluded Officer Laurenson was justified in conducting a frisk under *Terry*. However, the court concluded that Officer Laurenson exceeded the scope of a *Terry* frisk when he opened the containers because he did not believe the containers contained weapons. Nonetheless, the court held that the search of the containers was permissible as a search incident to Lee's arrest because Officer Laurenson had probable cause to arrest Lee based on the driving offense, and the search was substantially contemporaneous with the arrest.

The parties entered into a plea agreement, pursuant to which Lee pled guilty to felony possession of a controlled substance and the State dismissed the misdemeanor charges. The court imposed a unified sentence of four years, with eighteen months determinate. The court then suspended the sentence and placed Lee on probation for three years. The court of appeals affirmed the district court's denial of the motion to suppress and judgment of conviction. Lee timely petitioned for review to this Court.

## II. ISSUES ON APPEAL

1. Regarding the *Terry* frisk, was the district court correct in holding that the frisk was reasonable, but that the officer exceeded the permissible scope under *Terry*?

2. Under the search incident to arrest exception, was the district court correct in holding that the search of the containers was permissible because the officer had probable cause to arrest Lee for driving without privileges prior to the search regardless of whether the officer intended to arrest Lee before finding the drug paraphernalia?

## III. STANDARD OF REVIEW

When addressing a petition for review, this Court will give "serious consideration to the views of the Court of Appeals, but directly reviews the decision of the lower court." *State v. Schall*, 157 Idaho 488, 491, 337 P.3d 647, 650 (2014). In reviewing an order denying a motion to suppress evidence, this Court applies a bifurcated standard of ****1100 *647** review. *State v. Purdum*, 147 Idaho 206, 207, 207 P.3d 182, 183 (2009). This Court will accept the trial court's findings of fact unless they are clearly erroneous but will freely review the trial court's application of constitutional principles to the facts found. *Id.* Findings of fact are not clearly erroneous if they are supported by substantial and competent evidence. *State v. Bishop*, 146 Idaho 804, 810, 203 P.3d 1203, 1209 (2009).

## IV. ANALYSIS

Lee's constitutional challenges arise exclusively under the United States Constitution, as Lee makes no argument under the Idaho Constitution.[1] Lee contends the district court erred in denying his motion to suppress for two main reasons. First, Officer Laurenson's frisk of Lee was not a permissible frisk under *Terry*. Second, Officer Laurenson's search of Lee's containers was not permitted under the search incident to

  

arrest exception. For the reasons discussed below, we reverse the district court's denial of Lee's motion to suppress.

**A. The district court correctly concluded that the frisk was justified under *Terry* but that Officer Laurenson exceeded the scope of a permissible frisk when he opened the containers found on Lee.**

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures." U.S. Const. amend IV. Evidence obtained in violation of the Fourth Amendment is subject to the exclusionary rule, which requires unlawfully seized evidence to be excluded.[2] *E.g.*, *Wong Sun v. United States*, 371 U.S. 471, 484–85, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Page*, 140 Idaho 841, 846, 103 P.3d 454, 459 (2004). The exclusionary rule requires the suppression of both "primary evidence obtained as a direct result of an illegal search or seizure, ... but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.' " *Segura v. United States*, 468 U.S. 796, 804, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984) (quoting *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939)); *accord, e.g.*, *Bishop*, 146 Idaho at 811–12, 203 P.3d at 1210–11. "Searches conducted without a warrant are considered *per se* unreasonable unless they fall into one of the 'specifically established and well-delineated exceptions' to this general rule." *Bishop*, 146 Idaho at 815, 203 P.3d at 1214; (quoting *State v. Henderson*, 114 Idaho 293, 295, 756 P.2d 1057, 1059 (1988)).

One such exception is the *Terry* frisk, which permits a pat-down search for weapons acknowledged by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Under *Terry*, an officer may conduct a limited pat-down search, or frisk, "of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons." *Bishop*, 146 Idaho at 818, 203 P.3d at 1217 (quoting *Terry*, 392 U.S. at 16, 30, 88 S.Ct. 1868). "Such a frisk is only justified when, at the moment of the frisk, the officer has reason to believe that the individual he or she is investigating is 'armed and presently dangerous to the officer or to others' and nothing in the initial ****1101** ***648** stages of the encounter dispels the officer's belief." *Id.* (quoting *Terry*, 392 U.S. at 24, 30, 88 S.Ct. 1868). "The test is an objective one that asks whether, under the totality of the circumstances, a reasonably prudent person would be justified in concluding that the individual posed a risk of danger." *Id.* (citing *State v. Henage*, 143 Idaho 655, 660–61, 152 P.3d 16, 21–22 (2007)); *see also Terry*, 392 U.S. at 27, 88 S.Ct. 1868. The officer must indicate "specific and articulable facts which, taken together with rational inferences from those facts," and in light of the officer's experiences, justify the officer's suspicion that the individual is armed and presently dangerous. *Henage*, 143 Idaho at 660, 152 P.3d at 21 (quoting *Terry*, 392 U.S. at 21, 88 S.Ct. 1868).

This Court has identified several factors that influence whether a reasonable person in the officer's position would conclude that a particular individual was armed and dangerous, including:

> [W]hether there were any bulges in the suspect's clothing that resembled a weapon; whether the encounter took place late at night or in a high crime area; and whether the individual made threatening or furtive movements, indicated that he or she possessed a weapon, appeared nervous or agitated, appeared to be under the influence of alcohol or illegal drugs, was unwilling to cooperate, or had a reputation for being dangerous.

*Bishop*, 146 Idaho at 819, 203 P.3d at 1218.

The district court concluded that the frisk was reasonable based on Lee's reluctant attitude and noncompliance with Officer Laurenson's requests, as well as Lee's previous encounter with Officer Laurenson, where Lee ran when told he would be searched for drugs.[3] Here, although Lee was not violent with Officer Laurenson, he was uncooperative. Lee did not initially comply with Officer Laurenson's several requests to go to the front of the patrol car. Further, although Officer Laurenson may not have noticed the bulge until after he conducted the frisk, when he asked Lee whether he had any weapons, Lee moved his hand towards his pocket before stating whether he did or did not. Therefore, although an officer's "inchoate and unparticularized suspicion or 'hunch,' " for safety is not enough to justify a frisk, *id.*, (quoting *Terry*, 392 U.S. at 27, 88 S.Ct. 1868), the specific and articulable facts in this case, taken together with rational inferences from those facts, and in light of Officer Laurenson's experiences, justified Officer Laurenson's suspicion that Lee was armed and dangerous.

However, Officer Laurenson exceeded the permissible scope of the *Terry* frisk when he opened the containers, believing they contained drugs, not weapons.

> [T]he permissible scope of a pat-down search for weapons is limited to the minimum intrusion necessary to reasonably

  

> assure the officer that the suspect does not have a weapon. If the officer is unable to make an objectively reasonable determination that an object causing a bulge under a person's clothing is not a weapon by feeling its size and density, the officer is entitled to further invade the person's privacy only to the extent necessary that such a determination can be made.

*State v. Watson*, 143 Idaho 840, 845, 153 P.3d 1186, 1191 (Ct. App. 2007).

Once an officer is satisfied that an object found on the individual's person does not contain a weapon, the officer no longer has a valid reason to further invade the object. In *State v. Faith*, the officers performed a *Terry* frisk on the defendant, found an Altoids tin on his person, and then opened the tin to find drug residue and paraphernalia. ****1102 *649** 141 Idaho 728, 729, 117 P.3d 142, 143 (Ct. App. 2005). The Court of Appeals concluded that the removal of the tin violated the defendant's Fourth Amendment rights because "[a]fter satisfying themselves that the item was a container and not a weapon ... the officers had no valid reason to further invade [the defendant's] right to be free of police intrusion absent reasonable cause to arrest him." *Id.* at 730, 117 P.3d at 144. The court further explained that "even if the officers were justified in removing the tin for their own protection ... once the container was in the officers' possession, the officers no longer had reason to believe that it posed a threat to them in either respect." *Id.*

Similarly, in this case, Officer Laurenson exceeded the permissible scope of the *Terry* frisk when he opened the containers, because he did not believe the containers posed a threat. Officer Laurenson testified that based on his drug training, he immediately recognized that the items might contain contraband. Although Officer Laurenson was permitted to conduct a pat-down frisk of Lee's outer clothing for weapons, once Officer Laurenson opened the containers, he exceeded the scope of the permissible *Terry* frisk. Thus, the warrantless opening of the containers violated Lee's right against unreasonable searches, unless an exception to the warrant requirement applies. The district court found that the search incident to arrest exception justified the search.

**B. The district court erred in concluding that the search of Lee's person was a permissible search incident to arrest.**

The second well-recognized exception to the warrant requirement applicable in this case is the search incident to arrest. Pursuant to the search incident to arrest exception, law enforcement officers may search an arrestee incident to a lawful custodial arrest. *Virginia v. Moore*, 553 U.S. 164, 176–77, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008); *United States v. Robinson*, 414 U.S. 218, 235–36, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); *see also State v. Baxter*, 144 Idaho 672, 680, 168 P.3d 1019, 1027 (Ct. App. 2007). Further, "so long as the search and arrest are substantially contemporaneous, and the fruits of the search are not required to establish probable cause for the arrest, the search need not precisely follow the arrest in order to be incident to that arrest." *State v. Johnson*, 137 Idaho 656, 662, 51 P.3d 1112, 1118 (Ct. App. 2002) (quoting *State v. Crabb*, 107 Idaho 298, 304, 688 P.2d 1203, 1209 (Ct. App. 1984)).

Lee contends that the search of the containers found in Lee's pocket was not permitted as a search incident to arrest for two reasons. First, the probable cause for the arrest was provided by the fruits of the search because Officer Laurenson did not arrest Lee for driving without privileges either prior to or after the search and Lee was not, and could not, have been arrested for possession of a controlled substance prior to the search of the containers found in his pockets. Second, the search of the containers did not implicate either of the historical rationales underlying the search incident to arrest exception—officer safety and evidence preservation—because (1) Officer Laurenson stated that he would issue Lee a citation for the driving offense; and (2) due to the *de minimis* nature of the offense, Officer Laurenson knew no further evidence of driving without privileges would be found on Lee's person or in the containers.

The State, on the other hand, contends that for a search to fall within the search incident to arrest exception all that is required is that probable cause for *any* arrestable offense exists prior to the search and that the search be substantially contemporaneous to the arrest—regardless of the offense for which one is arrested, and even if the officer is neither making nor contemplating an actual arrest.

The threshold question involves probable cause. An officer may perform a warrantless search only incident to an arrest that is lawful. "In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable [and lawful] under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford*, 543 U.S. 146, 152, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004).

****1103 *650** In this case, Officer Laurenson initially had probable cause to arrest Lee for driving without privileges

  

before he searched the containers, because he saw Lee drive and confirmed Lee was without driving privileges. Thus, the marijuana and methamphetamine discovered during the search were not used to establish probable cause to arrest Lee.

However, the question still remains: When Officer Laurenson established that he was not going to arrest Lee, and rather was only going to issue a citation, could the officer still search Lee's person "incident to arrest" because he *could have* arrested him for driving without privileges, but chose not to?

The United States Supreme Court has repeatedly reaffirmed that warrantless searches incident to a lawful arrest are justified by two historical rationales: "(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles v. Iowa*, 525 U.S. 113, 116, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) (citing *Robinson*, 414 U.S. at 234, 94 S.Ct. 467).

The United States Supreme Court laid down the "proper extent" of a search incident to a lawful, custodial arrest in *Chimel v. California*, 395 U.S. 752, 762, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). The Court stated that, due to officer safety interests, "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape." *Id.* at 762–63, 89 S.Ct. 2034. The Court similarly recognized that "it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Id.* at 763, 89 S.Ct. 2034. The Court clarified that the area of such search includes the area " 'within [the arrestee's] immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.*

Though *Chimel* failed to address the issue of whether the bare fact of probable cause and an arrest justified the search, the Court later answered this question by announcing that all officers are entitled to search incident to a "full custodial arrest" regardless of the likelihood that the search will reveal a dangerous weapon or evidence material to the prosecution of the offense. *Robinson*, 414 U.S. at 236, 94 S.Ct. 467; *Gustafson v. Florida*, 414 U.S. 260, 265, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973).

More recently, in *Knowles*, the United States Supreme Court clarified that a warrantless search of a vehicle pursuant to a citation, rather than an arrest, violated the Fourth Amendment. 525 U.S. at 119, 119 S.Ct. 484. In *Knowles*, defendant Knowles was stopped for speeding. *Id.* at 114, 119 S.Ct. 484. Under Iowa law, if an officer observes an individual committing a traffic violation, the officer is authorized to either arrest the individual or issue a citation. *Id.* at 115, 119 S.Ct. 484. The officer chose to issue Knowles a citation—and did in fact issue him a citation—in lieu of an arrest. *Id.* at 114, 119 S.Ct. 484. The officer then conducted a full search of Knowles' car with neither consent nor probable cause for a different offense. *Id.* at 114–15, 119 S.Ct. 484. The officer found drugs and then arrested Knowles. *Id.* In upholding the search, the Iowa Supreme Court relied upon an Iowa statute specifying that "the issuance of a citation in lieu of an arrest 'does not affect the officer's authority to conduct an otherwise lawful search,' "[4] interpreting this statute to allow a search incident to citation. *Id.* at 115, 119 S.Ct. 484.

The Court reversed, reasoning that the two primary historical justifications for incident searches set out in *Chimel*—disarming an arrestee and preserving evidence—did not justify the search of Knowles once the citation was issued. *Id.* at 118, 119 S.Ct. 484.

> We have recognized that the first rationale—officer safety—is " 'both legitimate and weighty,' " *Maryland v. Wilson*, 519 U.S. 408, 412, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 110, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) *(per curiam)*). The threat to officer safety from issuing a traffic ****1104 *651** citation, however, is a good deal less than in the case of a custodial arrest. In *Robinson*, we stated that a custodial arrest involves "danger to an officer" because of "the extended exposure which follows the taking of a suspect into custody and transporting him to the police station." 414 U.S. at 234–235, 94 S.Ct. 467. We recognized that "[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest." *Id.*, at 234 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427. A routine traffic stop, on the other hand, is a relatively brief encounter and "is more analogous to a so-called '*Terry* stop' ... than to a formal arrest." *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

*Id.* at 117, 98 S.Ct. 330. Similarly, with respect to evidence preservation, *Knowles* reasoned that "[o]nce Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. *Id.* at 118, 98 S.Ct. 330. No further evidence of excessive speed

  

was going to be found on the person of the offender or in the passenger compartment of the car." *Id.*

Here, the State seeks to distinguish *Knowles* from this case because the search in *Knowles* took place *after* the officer had issued a citation. However, *Knowles* makes it clear that the search incident to arrest is not so absolute that it extends to every traffic stop for which there is probable cause. While it is true that no citation was issued in this case, the facts of the *Knowles* case and of this case are almost indistinguishable. Here, like *Knowles*, Lee was temporarily stopped for a traffic offense—driving without privileges in this case and speeding in *Knowles*. Like *Knowles*, the officer determined that Lee would not be arrested, but would instead be issued a citation. Like *Knowles*, the stop of Lee offered no additional probable cause to give the detaining officer reason to search Lee. The only difference between *Knowles* and this case is that Knowles was issued a citation before the search. However, the distinction that Knowles was issued a citation before the search, but Lee was not, is meaningless when considering the historical rationales underlying the search incident to arrest exception because Officer Laurenson already said that he would issue Lee a citation for the traffic offense.

Therefore, Lee correctly contends that the distinction between actually issuing a citation and stating that a citation will be issued is a distinction without a difference because the historical rationales explained in *Chimel* are not present in both situations—when a citation is actually issued and when an officer states that he is going to issue a citation. Regarding evidence preservation, all the evidence that was needed to issue Lee a citation for driving without privileges had already been obtained before the search. Thus, no further evidence of driving without privileges would be found in Lee's containers. Regarding officer safety, Officer Laurenson had already frisked Lee for weapons, and Officer Laurenson knew no other weapons would be found in the containers because, based on his experience and training, he immediately recognized that the containers might contain contraband.

In sum, Officer Laurenson had probable cause to arrest Lee for driving without privileges prior to the search. However, Officer Laurenson told Lee that he would issue him a citation for that offense instead. Yet, instead of actually writing the citation, Officer Laurenson searched the containers found on Lee's person, finding drug paraphernalia. Officer Laurenson then decided to arrest Lee instead of issuing him the citation. Lee was arrested and charged with driving without privileges as well as several drug possession charges. Although the arrest was substantially contemporaneous to the search, once it was clear that an arrest was not going to take place, the historical rationales justifying the search were no longer present.

Decisions from other jurisdictions support the rationale that the search incident to arrest exception should not apply when no arrest is to take place. "A search incident to arrest need not necessarily occur after formal arrest to be valid, but the argument that the search was incident to arrest becomes more strained when the facts show that a defendant would not have been arrested but ****1105 *652** for the fact that the search produced evidence of a crime...." *United States v. Davis*, 111 F.Supp.3d 323, 334 (E.D.N.Y. 2015).

In *People v. Reid*, an officer pulled over a vehicle for driving erratically, and subsequently developed probable cause to arrest the driver for driving while intoxicated. 24 N.Y.3d 615, 2 N.Y.S.3d 409, 26 N.E.3d 237, 238 (2014). The officer subsequently performed a pat-down of the driver, found a switch-blade knife, and then arrested the driver. *Id.* At the driver's suppression hearing, the officer testified that he was not going to arrest the driver for driving while intoxicated; rather he only made the decision to arrest after finding the knife in the pat-down search. *Id.* The court found that the search could not be justified as incident to arrest stating, "[i]t is irrelevant that, because probable cause existed, there *could* have been an arrest without a search. A search must be incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not." *Id.*, 2 N.Y.S.3d 409, 26 N.E.3d 237 at 239. The court went on to say that "If a search could be justified by an arrest that, but for the search, would never have taken place, the Supreme Court would not have decided *Knowles* in the way it did." *Id.*, 2 N.Y.S.3d 409, 26 N.E.3d 237 at 240.

Similarly, in *State v. Taylor*, officers approached a man drinking in a park, intending to issue a citation for that offense. 167 Ariz. 439, 808 P.2d 324, 324 (Ariz. Ct. App. 1990). One officer searched the defendant and found hashish, and subsequently arrested the defendant. *Id.* Both officers agreed that if the hashish had not been found during the search, the defendant would have been free to leave. *Id.* On appeal, the court addressed "whether officers are free to search anyone they might arrest but have no intention of arresting under a search incident to arrest theory." *Id.* The court held "they may not." *Id.* The court went on to say,

> [i]t would be obviously destructive of the privacy of many if police could justify searches on the basis of charges they

  

> never intended to pursue in the hope that the search would turn up something they could pursue. That would invite pretextual arrests and incident searches, with a custodial arrest to follow if something was found and release to follow otherwise.

*Id.* at 325.

Recently, the California Supreme Court held in *People v. Macabeo*, that "... *Rawlings [v. Kentucky,* 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) ] does not stand for the broad proposition that probable cause to arrest will always justify a search incident as long as an arrest follows. Otherwise, *Knowles* would have been decided differently." 211 Cal.Rptr.3d 34, 384 P.3d 1189, 1197 (2016). The court explained that the "[p]eople's expansive understanding of *Rawlings* ... is inconsistent with *Chimel*" and "in tension with the reasoning in *Knowles*[—officer safety and evidence preservation]." *Id.*, 211 Cal.Rptr.3d 34, 384 P.3d at 1195–96. The court concluded, "Once it [is] clear that an arrest [is] *not* going to take place, the justification for a search incident to arrest is no longer operative." *Id.*, 211 Cal.Rptr.3d 34, 384 P.3d at 1197.

We agree with the rationale adopted by the courts in *Reid*, *Taylor*, and *Macabeo*. The reasonableness of a search is determined by the totality of the circumstances, and a search incident to arrest is not reasonable when an arrest is not going to occur. We determine if an arrest is going to occur based on the totality of the circumstances, including the officer's statements. While the subjective intent of an officer is usually not relevant in Fourth Amendment analysis, statements made by the officer of his intentions along with other objective facts are relevant in the totality of circumstances as to whether an arrest is to occur. If an arrest does not occur, and objectively the totality of the circumstances show an arrest is not going to occur, an officer cannot justify a warrantless search based on the search incident to arrest exception.

Here, Officer Laurenson told Lee he would get a citation for driving without privileges. It was only after Officer Laurenson searched Lee and subsequently the containers that Officer Laurenson decided to arrest Lee. Because the totality of the circumstances, including Officer Laurenson's statement that Lee was to get a citation, show that no arrest ****1106** ***653** was to occur prior to finding marijuana and methamphetamine during the search, the search that occurred was a search incident only to an intended citation. Therefore, the search incident to arrest exception to the warrant requirement cannot justify the search. Thus, the search was unlawful, and therefore the fruits of the search must be suppressed. Accordingly, the district court's denial of Lee's motion to suppress must be reversed.

## V. CONCLUSION

We vacate the conviction, reverse the district court's denial of Lee's motion to suppress, and remand for further proceedings consistent with this opinion.

Justices EISMANN, JONES, HORTON and BRODY concur.

**All Citations**

162 Idaho 642, 402 P.3d 1095

Footnotes

1 "The Idaho Constitution offers protection for unlawful search and seizure as well. Idaho Const. art. I, § 17. However, [Lee] does not argue that Idaho's Constitution provides greater protection than the U.S. Constitution; thus, our analysis is limited to the Fourth Amendment to the U.S. Constitution." *State v. Cohagan*, No. 44800, 162 Idaho 717, 720, 404 P.3d 659, 662, 2017 WL 3623658 *2 (Idaho July 18, 2017) (citing *In re Doe*, 155 Idaho 36, 39 n.2, 304 P.3d 1202, 1205 n.2 (2013)).

2 Deterrence of police misconduct is not the only purpose of the exclusionary rule under Idaho's Constitution, rather the exclusionary rule serves to: "1) provide an effective remedy to persons who have been subjected to an unreasonable government search and/or seizure; 2) deter the police from acting unlawfully in obtaining evidence; 3) encourage thoroughness in the warrant issuing process; 4) avoid having the judiciary commit an additional constitutional violation by considering evidence which has been obtained through illegal means; and 5) preserve judicial integrity." *Cohagan*, No. 44800, 162 Idaho at 221-23, 404 P.3d at 663-65, 2017 WL 3623658 at *4–5 n.3 (citing *State v. Guzman*, 122 Idaho 981, 993, 842 P.2d 660, 672 (1992)). However, Lee makes no argument concerning the Idaho Constitution.

3 Lee supports his argument, that Officer Laurenson's frisk was unreasonable, by arguing that the district court clearly erred in two of its factual findings that are relevant to this analysis: First, the district court found that Lee did not verbally

  

respond when Officer Laurenson asked if he was carrying any weapons; and second, the district court found that Officer Laurenson observed a bulge in Lee's front pocket before he began the frisk. However, according to Lee, Lee *did* respond to Officer Laurenson's question, and Officer Laurenson did not observe the bulge in Lee's pocket until *after* he began the frisk. Our conclusion that the frisk exceeded the scope of *Terry* obviates the need to address Lee's assertions that the district court erred in its factual finding.

4 Iowa Code Ann. § 805.1(4).

129 N.J.Super. 430
Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,

v.

Paul B. SMITH, Defendant-Appellant.

Argued June 17, 1974.
|
Decided Aug. 2, 1974.

**Synopsis**

A motion to suppress evidence was denied by the Union County Court, and defendant appealed. The Superior Court, Appellate Division, held that where informant had in the past supplied information leading to arrests, and where added credence was given by an anonymous phone call, defendant's known narcotics record, his recent presence in areas being investigated for narcotics activity, his presence at a particular address for a period just long enough to make a narcotics purchase and his furtive glances after exiting, such circumstances warranted an experienced police officer's believing that defendant had probably made a purchase of narcotics, and where he was thereafter in a vehicle being followed by police, exigent circumstances warranted search without written warrant.

Affirmed.

**Attorneys and Law Firms**

****63 *432** Michael Suffness, Asst. Deputy Public Defender, for defendant-appellant (Stanley C. Van Ness, Public Defender, attorney).

Thomas P. Simon, Asst. Prosecutor, for plaintiff-respondent (Karl Asch, Union County Prosecutor, attorney).

Before Judges HANDLER, MEANOR and KOLE.

**Opinion**

PER CURIAM.

From two sources the Elizabeth, New Jersey police received information that narcotics were being dispensed from an apartment occupied by one Robert Jackson located at 1065 Magnolia Street. One source of information was an anonymous telephone call; the other was an informer whose information had in the past led to arrests. Detective Arne Highsmith began a surveillance of the premises in an effort to garner sufficient factual data for a search warrant. While waiting in an unmarked car parked one the same side of the street as the building being watched, Highsmith saw a vehicle stop and double park on the opposite side of the street. While his two companions waited in the car defendant exited therefrom and entered the building which consisted of a store on the first floor and apartments on the two floors above. Highsmith recognized defendant and knew that he had an arrest record for narcotics violations. The detective also had information that Smith was currently a narcotics user and that he had been seen recently in areas under surveillance in connection with narcotics investigations.

When defendant entered the building Highsmith drove past the building in an effort to see which apartment Smith entered. He was unable to ascertain this, made a U-turn and stopped opposite the building at a point behind the double- ***433** parked car which was awaiting defendant's return. Smith remained in the building 10 to 15 minutes and then reentered the double-parked car. While occupying the rear seat Smith glanced around furtively. Since he was of the opinion that Smith had made a purchase of narcotics, Highsmith radioed for help while he followed the vehicle in which defendant, still looking about suspiciously, was a passenger. The vehicle was stopped, defendant was ordered out of it and a nonconsensual search revealed heroin concealed in one of his shoes.

Defendant's motion to suppress was denied and the propriety of that ruling is the only issue raised on this appeal.

The forceful search of defendant undertaken here cannot be justified as a search incident to an arrest, for Highsmith conceded that defendant was not under arrest at the time of the search. The arrest of defendant was subsequent to and dependent upon the search. Thus, this warrantless search can only be justified if it was made on probable cause under exigent circumstances that, as a practical matter, prevented expenditure of the time necessarily consumed in obtaining a warrant. State v. Hannah, 125 N.J.Super. 290, 310 A.2d 512 (App.Div.1973).

We deal first with the matter of exigent circumstances, for we have no doubt that such existed here. If there was probable cause to search Smith, promptness in acting thereon was essential, for the time expended to obtain a warrant would probably have permitted Smith to escape or consume the

  

heroin or both. See State v. Hannah, Supra, which finds an exigent circumstance present because of the mobility of the automobile. See also, State v. Williams, 117 N.J.Super. 372, 285 A.2d 23 (App.Div.1971), aff'd o.b. 59 N.J. 535, 284 A.2d 531 (1971).

There is no mathematical precision to the concept of probable cause. The shorthand test is whether under the circumstances a prudent man would be warranted in the belief that a crime probably is being committed. While that belief may not rest on raw suspicion, it may rest on hearsay which has the aura of trustworthiness. Too, in determining ***434** whether probable cause exists, the specialized experience of the police may be taken into account. ****64** Here, Detective Highsmith had participated in over 1,000 narcotics arrests. Valuable discussions of probable cause from which the above principles are drawn may be found in State v. Kasabucki, 52 N.J. 110, 116-117, 244 A.2d 101 (1968); State v. Ebron, 61 N.J. 207, 294 A.2d 1 (1972); Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) and Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

Here we believe that Detective Highsmith had probable cause to believe that Smith had made a purchase of narcotics and was illegally in possession of them at the time of his exit from the premises under surveillance. Had there been no exigent circumstance, Highsmith could have obtained a warrant to search Smith based on the information in his possession. Since there was no realistic possibility of obtaining a search warrant without risking a probability of the disappearance of defendant and destruction of the object of the search, Highsmith was justified in proceeding to search without a warrant and to arrest on the basis of the search.

The combination of factors known to Highsmith, none of which alone would have provided a proper foundation for a finding of probable cause, when considered In toto, justify his search. The informant's information had an added manifestation of reliability since this person had in the past supplied information leading to arests. State v. Perry, 59 N.J. 383, 283 A.2d 330 (1971). See also State v. Ebron, 61 N.J. 207, 294 A.2d 1 (1972). The anonymous phone call, while not entitled to great weight, gives added credence to the idea that narcotics were being dispensed from 1065 Magnolia Avenue. Defendant's known narcotics record; his recent presence in areas being investigated for narcotics activity; his presence at 1065 Magnolia Avenue for a period just long enough to make a narcotics purchase and his furtive glances after exiting under the circumstances would warrant an experienced police officer to believe that Smith had probably made a purchase of narcotics. ***435** State v. McNair, 60 N.J. 8, 285 A.2d 583 (1972); State v. Gray, 59 N.J. 563 (1971). With probable cause to search, Highsmith was justified in doing so without a warrant under these exigent circumstances. We believe that this result is supported by the following cases from other jurisdictions, all of which uphold searches under exigent circumstances prior to arrest. State v. Gerke, 6 Wash.App. 137, 491 P.2d 1316 (Ct.App.1971); State v. Goings, 184 Neb. 81, 165 N.W.2d 366 (Sup.Ct.1969); State v. Hazelwood, 209 Kan. 649, 498 P.2d 607 (Sup.Ct.1972); State v. Dixon, 5 Or.App. 113, 481 P.2d 629 (Ct.App.1971), cert. den. 404 U.S. 1024, 92 S.Ct. 690, 30 L.Ed.2d 674 (1972); State v. Diaz, 3 Or.App. 498, 473 P.2d 675 (Ct.App.1970); State v. Murphy, 3 Or.App. 82, 471 P.2d 863 (Ct.App.1970); Holt v. Simpson, 340 F.2d 853 (7 Cir. 1965); Lavato v. People, 159 Colo. 223, 411 P.2d 328 (Sup.Ct.1966) and Cf. People v. Simon, 45 Cal.2d 645, 290 P.2d 531 (Sup.Ct.1955).

Some of the above cases proceed on the rationale that where the arrest and search occur close together in point of time and in reality constitute a single transaction, it does not matter if technically the search preceded the arrest. See State v. Doyle, 42 N.J. 334, 343, 200 A.2d 606 (1964). However, the fact remains that these cases are authority for the validation of a search made under exigent circumstances upon probable cause prior to arrest. We think that this is a more appropriate analysis and hold that a search without a warrant may be made if probable cause exists therefor and exigent circumstances are present which, as a practical matter, preclude expenditure of the time necessary to obtain a warrant because of a probability that the suspect or the object of the search will disappear, or both. The exigent circumstances theory better fits this type of case than does an analysis that attempts to fit a pre-arrest search into the category of a search incidental to an arrest. The latter approach seems to us to carry a built-in logical inconsistency.

****65** ***436** Our holding here is not contrary to State v. Scharfstein, 79 N.J.Super. 236, 191 A.2d 205 (App.Div.1963), aff'd 42 N.J. 354, 200 A.2d 777 (1964) or In re State in Interest of D.S., 63 N.J. 541, 310 A.2d 460 (1973) adopting dissenting opinion 125 N.J.Super. 278, 283, 310 A.2d 506 (App.Div.1973). In Scharfstein a search was made on nothing more than an anonymous tip. In In re State in Interest of D.S. the search was made on no greater a foundation than that young males were congregating on a corner in an area noted for narcotics activity. As the facts here show, Detective Highsmith was possessed of information that

  

provided a basis for probable cause to believe that defendant was in possession of narcotics.

Affirmed.

**All Citations**

129 N.J.Super. 430, 324 A.2d 62

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372 Md. 137
Court of Appeals of Maryland.

No. 29, Sept. Term, 2002.
STATE of Maryland
v.
Earmon Alvin WALLACE, Sr.

Dec. 11, 2002.
|
Reconsideration Denied Feb. 11, 2003.

**Synopsis**

Defendant was convicted after bench trial in the Circuit Court, Anne Arundel County, Joseph P. Manck, J., of possession with intent to distribute cocaine. Defendant appealed. The Court of Special Appeals reversed, 142 Md.App. 673, 791 A.2d 968. Granting state's petition for writ of certiorari, the Court of Appeals, Cathell, J., held that a positive canine scan to contraband in a vehicle does not, without more, establish probable cause to search all passengers of that vehicle.

Judgment of Court of Special Appeals affirmed.

Harrell, J., filed a dissenting opinion in which Battaglia, J., joined.

**Attorneys and Law Firms**

****293** ***140** Gary E. Bair, Solicitor General (J. Joseph Curran, Jr., Attorney General of Maryland, on brief), Baltimore, for petitioner.

Bradford C. Peabody, Assistant Public Defender (Stephen E. Harris, Public Defender, on brief), Baltimore, for respondent.

Argued before BELL, C.J., ELDRIDGE, RAKER, WILNER, CATHELL, HARRELL and BATTAGLIA, JJ.

**Opinion**

CATHELL, Judge.

On July 26, 1999, respondent was charged in a three-count indictment with various narcotics violations arising from his arrest on July 9, 1999. On February 1, 2000, the Circuit Court for Anne Arundel County held a hearing on a pre-trial motion to suppress evidence during which respondent argued that his search was not based upon probable cause and as a result the contraband seized from him on the night of his arrest should not be permitted into evidence at trial. On February 3, 2000, the motions court filed a written opinion denying respondent's motion to suppress. On September 28, 2000, following a bench trial, respondent was convicted on an agreed statement of facts and was found guilty of possession with intent to distribute cocaine. On November 29, 2000, that court sentenced respondent to 20 years' incarceration, with all but five years suspended. On December 14, 2000, respondent noted a timely appeal to the Court of Special Appeals. On ***141** February 27, 2002, in a reported opinion, the intermediate appellate court reversed the judgment of the circuit court. *Wallace v. State,* 142 Md.App. 673, 791 A.2d 968 (2002). On June 10, 2002, we granted the State's Petition for Writ of Certiorari. *State v. Wallace,* 369 Md. 301, 799 A.2d 1262 (2002). Petitioner presents one question for our review:

> "Did the Court of Special Appeals incorrectly hold that a passenger in a vehicle could not be searched after a drug dog has alerted an officer to the presence of illegal drugs in the vehicle, notwithstanding that the alert provided probable cause to believe drugs were present in the vehicle and/or on the person of one or more of the occupants of the vehicle?"

We affirm the judgment of the Court of Special Appeals, answer no to petitioner's question, and hold that the police did not have probable cause to search respondent, a passenger in the vehicle. Further, we hold that the Court of Special Appeals properly held that a positive canine alert to contraband in a vehicle, without more, ****294** does not establish probable cause to search all of the passengers in a vehicle.

**I. Facts**

On July 9, 2000, at approximately 3:00 a.m., Officer Jessica Hertik was driving her marked police car eastbound on Forest Drive in Annapolis, Maryland. As she approached Hilltop Lane, a forty mile per hour road, she observed a four-door Buick driving at a high rate of speed in the opposite direction. She made a U-turn and accelerated to 90 m.p.h. to catch up to the Buick. In addition to speeding, Officer Hertik saw the vehicle run a red light. Officer Hertik then activated her emergency equipment and the Buick pulled over.

Officer Hertik stopped behind the vehicle, exited her car and approached the driver's side of the Buick. Sitting inside of the vehicle was the male driver, a male front seat

  

passenger, and three back seat passengers-respondent and two women. Officer Hertik recognized respondent and two of the other passengers from a previous encounter, although in her testimony at the suppression hearing she did not describe that ***142** encounter. She informed the driver that she had stopped the vehicle for speeding and for not stopping at a traffic light. The driver of the car complied when Officer Hertik requested to see his driver's license and car registration.

When Officer Hertik walked back to her car, she met another officer who had arrived at the scene. She was Officer Elizabeth Nelson who was on duty with Bosco, her drug detection dog.[1] Officer Hertik explained what had occurred and then proceeded to run a license check and write two tickets. In the meantime, other police units had arrived on the scene and these additional officers watched the Buick while Bosco scanned the vehicle. Bosco made two positive alerts to the presence of drugs at the front and rear seam of the driver's side front door. Officer Nelson testified that, because of various factors, *i.e.,* air currents in the vehicle, there is little correlation between where a canine alerts and where drugs are found in the vehicle; rather it is just a general alert to the whole of the passenger compartment of the car itself.

Officer Nelson advised Officer Hertik, who was still in the process of writing tickets, that Bosco had made a positive alert on the vehicle. While Officer Nelson returned Bosco to her patrol car, Officer Hertik approached the Buick to speak with the driver. She informed the driver that she suspected that the vehicle contained drugs and asked the occupants to exit the vehicle so the police could search them.

The occupants were taken out of the car one at a time and searched while the others remained in the car. The other officers watched the occupants of the car while the searches were being conducted. Officer Jonathan Supko, one of the officers who had arrived at the scene, searched the three males. Officer Supko testified that his actions were not a ***143** mere "frisk" or "pat down" but were intended to discover anything suspicious, for "anything apparent ... [w]eapons and what not." Officer Supko first searched the driver and then he searched the front seat passenger.

Officer Supko next searched respondent, who was sitting behind the front passenger seat. During the search Officer Supko felt a hard object near respondent's groin, which he said he knew was not a gun, ****295** knife, or other weapon. Officer Supko handcuffed respondent with his hands behind his back, told him he was "not under arrest at th[at] time" and walked him to a grassy area away from the road to complete the search. Officer Supko stated that he had handcuffed respondent "just for my safety and his safety."

As they walked over to the grassy area, respondent moved his hips in an apparent attempt to shake the object loose. When the officer searched respondent's groin area again, the object was gone. Officer Supko saw, however, something protruding from respondent's left pants leg, which turned out to be a clear plastic baggie containing several pieces of suspected cocaine. Respondent was placed under arrest.

The two females were searched after respondent. Officer Hertik searched one of them herself. Officer Hertik searched the vehicle only after each of the occupants of the car was searched. She found $1,155 in cash in someone's shorts in the front passenger seat and a knife in a purse in the backseat. No drugs were found in the car.

Respondent alleged at a suppression hearing that there was not probable cause for his search and, as a result, the cocaine seized from him at the time of his search should be suppressed as evidence to be used at trial. The trial court denied his suppression motion and respondent was, as indicated *supra,* ultimately convicted of possession with intent to distribute cocaine. On appeal, the Court of Special Appeals reversed the judgment of the circuit court and that court's denial of respondent's motion to suppress.

***144 II. Standard of Review**

Our review of a circuit court's denial of a motion to suppress evidence under the Fourth Amendment, ordinarily, is limited to the information contained in the record of the suppression hearing and not the record of the trial. *Carter v. State,* 367 Md. 447, 788 A.2d 646 (2002); *Ferris v. State,* 355 Md. 356, 368, 735 A.2d 491, 497 (1999); *In re Tariq A-R-Y,* 347 Md. 484, 488, 701 A.2d 691, 693 (1997), *cert. denied,* 522 U.S. 1140, 118 S.Ct. 1105, 140 L.Ed.2d 158 (1998); *Simpler v. State,* 318 Md. 311, 312, 568 A.2d 22, 22 (1990); *Trusty v. State,* 308 Md. 658, 670, 521 A.2d 749, 755 (1987). When there is a denial of a motion to suppress, we are further limited to considering facts in the light most favorable to the State as the prevailing party on the motion. *See Scott v. State,* 366 Md. 121, 143, 782 A.2d 862, 875 (2001); *Riddick v. State,* 319 Md. 180, 183, 571 A.2d 1239, 1240 (1990); *Simpler,* 318 Md. at 312, 568 A.2d at 22. Even so, we review legal questions *de novo,* and where, as here, a party has raised a constitutional

  

challenge to a search or seizure, we must make an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case. *See Stokes v. State,* 362 Md. 407, 414, 765 A.2d 612, 615 (2001) (quoting *Jones v. State,* 343 Md. 448, 457-58, 682 A.2d 248, 253 (1996)); *Wilkes v. State,* 364 Md. 554, 569, 774 A.2d 420 (2001); *In re Tariq A-R-Y,* 347 Md. at 489, 701 A.2d at 693. We will not disturb the trial court's factual findings unless they are clearly erroneous. *See Wengert v. State,* 364 Md. 76, 84, 771 A.2d 389, 394 (2001).

**III. Discussion**

Petitioner contends that a positive canine alert in and of itself provides the police with probable cause to search all passengers in an automobile and that the Court of Special Appeals improperly held that the positive canine alert in this case did not give the police probable cause to search respondent on the night in question. ****296** As indicated *supra,* we disagree with petitioner's contention and affirm the decision of the Court of Special Appeals.

***145** The Fourth Amendment to the United States Constitution states:

> "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants 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."

There are certain well-defined exceptions to the Fourth Amendment's requirement that searches be based upon probable cause and conducted pursuant to a valid warrant, but for purposes of this opinion we need not note or discuss them all. *See generally, United States v. Robinson,* 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427(1973) (permitting a search of a person incident to a full custody arrest supported by probable cause to effectuate the arrest-the "search incident to arrest" exception) and *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) (permitting the warrantless search of a passenger compartment of a vehicle incident to a lawful custodial arrest).[2]

There is no argument made in this case that the warrantless search of the four-door Buick did not meet the constitutional requirements of the Fourth Amendment and that the search of the car was based upon probable cause. Nor, is there any argument that the actions taken by the officers up to and including the canine sniff of the Buick were anything but proper and, thus, provided the police officers with probable cause to search the car. Accordingly, we do not directly ***146** address these events except as necessary to address the issue presented.

In *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the Supreme Court first recognized an "automobile exception" to the Fourth Amendment's warrant requirements, an exception such as the search incident to a lawful arrest exception set forth many years later in *Robinson,* referenced *supra.* Presently known as the "Carroll Doctrine," the exception allows vehicles to be searched without a warrant provided that the officer has probable cause to believe that a crime-connected item is within the car. Following *Carroll,* the Supreme Court has held that during a lawful traffic stop officers can compel the driver of a vehicle to exit the car. *See Pennsylvania v. Mimms,* 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). The *Mimms* holding was extended to passengers as well. *See Maryland v. Wilson,* 519 U.S. 408, 410-11, 117 S.Ct. 882, 884-85, 137 L.Ed.2d 41, 45-46 (1997). Since *Wilson,* with the case of *Wyoming v. Houghton,* 526 U.S. 295, 307, 119 S.Ct. 1297, 1303-04, 143 L.Ed.2d 408, 419 (1999), the Supreme Court has gone on to hold that a passenger's property left within a vehicle, when occupants are ordered out of a car, falls within the permissible scope of a "Carroll Doctrine" warrantless search.

****297** Further, the law is settled that when a properly trained canine alerts to a vehicle indicating the likelihood of contraband, sufficient probable cause exists to conduct a warrantless "*Carroll* " search of the vehicle. *See Gadson v. State,* 341 Md. 1, 668 A.2d 22 (1995), *cert. denied,* 517 U.S. 1203, 116 S.Ct. 1704, 134 L.Ed.2d 803 (1996); *Accord United States v. Dovali-Avila,* 895 F.2d 206, 207 (5th Cir.1990); *In re Montrail M.,* 87 Md.App. 420, 437, 589 A.2d 1318, 1327 (1991).

In this opinion we focus solely on the narrow question of whether the police officers had probable cause to search respondent, who was not the owner or driver but a mere passenger of the automobile, based only upon a positive canine alert that drugs were somewhere in the interior of the automobile.

  

***147 a. Probable Cause**

In order for a warrantless search or arrest to be legal it must be based upon probable cause.[3] Regarding arrests we have held that a police officer can arrest an accused without a warrant if the officer has probable cause to believe that a crime has been or is being committed by an alleged offender in the officer's presence, the general standard for probable cause. *Woods v. State,* 315 Md. 591, 611-12, 556 A.2d 236, 246 (1989); *Nilson v. State,* 272 Md. 179, 184, 321 A.2d 301, 304 (1974).[4]

We have gone on to state that:

> ***148** "Probable cause, we have frequently stated, is a nontechnical conception of a reasonable ground for belief of guilt. ****298** *Doering v. State,* 313 Md. 384, 403, 545 A.2d 1281 (1988); *Edwardsen v. State,* 243 Md. 131, 136, 220 A.2d 547 (1966). A finding of probable cause requires less evidence than is necessary to sustain a conviction, but more evidence than would merely arouse suspicion. *Woods, supra,* 315 Md. at 611, 556 A.2d 236; *Sterling v. State,* 248 Md. 240, 245, 235 A.2d 711 (1967); *Edwardsen, supra,* 243 Md. at 136, 220 A.2d 547. Our determination of whether probable cause exists requires a nontechnical, common sense evaluation of the totality of the circumstances in a given situation in light of the facts found to be credible by the trial judge. *State v. Lemmon,* 318 Md. 365, 379, 568 A.2d 48 (1990); *Doering, supra,* 313 Md. at 403-04, 545 A.2d 1281. Probable cause exists where the facts and circumstances taken as a whole would lead a reasonably cautious person to believe that a felony had been or is being committed by the person arrested. *Woods, supra,* 315 Md. at 611, 556 A.2d 236; *Stevenson v. State,* 287 Md. 504, 521, 413 A.2d 1340 (1980); *Duffy v. State,* 243 Md. 425, 432, 221 A.2d 653 (1966). Therefore, to justify a warrantless arrest the police must point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted the intrusion. *Lemmon, supra,* 318 Md. at 380, 568 A.2d 48." *Collins v. State,* 322 Md. 675, 680, 589 A.2d 479, 481 (1991).

To determine whether an officer had probable cause in a specific case, here probable cause to search, "the reviewing court necessarily must relate the information known to the ***149** officer to the elements of the offense that the officer believed was being or had been committed." *DiPino v. Davis,* 354 Md. 18, 32, 729 A.2d 354, 361 (1999).

In the case *sub judice,* in order for respondent's warrantless search to be valid, the officer must have had probable cause at the time of the search to believe that respondent was in possession of a controlled dangerous substance. Possession is defined in the Maryland Code (2001), section 5-101(u) of the Criminal Law Article as "exercis[ing] actual or constructive dominion or control over a thing by one or more persons." This statute recognizes, as we have held, that possession may be constructive or actual, exclusive or joint. *State v. Leach,* 296 Md. 591, 596, 463 A.2d 872, 874 (1983).

**b. Case Law**

This Court has had the occasion to apply the elements of possession to cases involving a Fourth Amendment challenge, like the constitutional challenge which initiated the issue in the case *sub judice.* We had the occasion to do so very recently in *Pringle v. State,* 370 Md. 525, 805 A.2d 1016 (2002), where the defendant challenged his warrantless arrest for possession. In that case, Joseph Jermaine Pringle was a front seat passenger in a car being driven by its owner and there was another backseat passenger. The vehicle was pulled over for a routine traffic stop. During a search of the vehicle, a sum of rolled up money was found inside the closed glove compartment located in front of Pringle and drugs were found hidden behind a rear armrest. The officer who conducted the traffic stop only saw the money in the closed glove box when the driver/owner of the vehicle opened the glove compartment for the vehicle registration. The officer at the scene then asked the owner/driver of the car if he could search the vehicle and the owner/driver consented to the search. After the three occupants of the car were taken out of the vehicle, the officer searched the car and found five glassine baggies containing suspected cocaine hidden inside or behind an armrest in the backseat. The officer on the scene questioned all three ****299** men ***150** about the ownership of the drugs and money and told the three men that, if no one admitted to ownership of the drugs he was going to arrest them all. Because none of the three men offered any information regarding the ownership of the drugs and/or money, all three men were placed under arrest and transported to the police station.

Later, at the station house, Pringle acknowledged that the cocaine belonged to him. Subsequently, his friends, the owner/driver of the automobile and the other passenger, were released.

  

During a pre-trial suppression hearing, Pringle argued that the confession should be suppressed as the unlawful fruit of an illegal arrest because there was no probable cause for his arrest at the time of the traffic stop. The trial court denied his motion. Pringle made the same claim on appeal to the Court of Special Appeals. While we noted that the evidence might have constituted probable cause to arrest the owner or the driver of the vehicle, we held that Pringle's mere presence as a front seat passenger in an automobile in which contraband was found in a concealed place in the rear seat and where money was found in a closed glove compartment did not constitute probable cause to arrest Pringle. In her concurring opinion in *Pringle,* Judge Raker stated:

> "Apparently, proximity to concealed drugs is sufficient for the dissent to find probable cause to arrest.... Although it may be sufficient under certain circumstances, the discovery of three men riding in a car in the early morning hours, with some rolled money in a closed glove box and drugs hidden from view in a back arm rest, without more, hardly constitutes probable cause to arrest a front seat passenger who has no possessory interest in the automobile.
>
> "I cannot improve on Judge Sonner's analysis ... below:
>
> > '... I believe the majority has stopped far short of considering whether Pringle, in any way, knowingly exercised dominion or control over the secreted contraband, and has resorted instead to "speculation or conjecture." ***151** Although Pringle ... may have been within an arm's reach of the drugs, in fact, to expose the drugs, he would have had to stretch his body, maneuver around the back of his seat, and pull down the arm rest. And ... Pringle was not sitting in a closed car that emanated the pungent, easily detectable smell of marijuana, which were critical facts in Judge Moylan's analysis sustaining Folk's conviction thirty years ago. Although the majority [of the Court of Special Appeals] attaches some significance to the large roll of currency found in the glove compartment, located in front of Pringle's seat, cash, in and of itself, is innocuous and certainly less suspicious than the scales and cutting tools discounted by the Court of Appeals in *Leach.* Further, there was no showing whatsoever that Pringle, as a passenger in the car, had any connection to, or knowledge of, the money found within the glove compartment of someone else's car.' "

In *Collins, supra,* we also addressed a situation involving a warrantless arrest and a subsequent challenge to probable cause for that arrest. On September 20, 1988, at 3:00 a.m., Officer Holmes of the Salisbury Police Department noticed five men standing about five feet from a Mustang that was parked in the entrance to a car dealership. Officer Holmes approached the men and asked what they were doing. The driver of the Mustang, Steven Lewis, stated that they were looking at the BMW's. Officer Ewing arrived ****300** on the scene to assist Officer Holmes. Officer Ewing saw a 35mm film canister on the rear seat of the Mustang and he asked one of the men to retrieve the canister for him. Inside the canister, Officer Ewing found over twenty cellophane wrapped packets containing cocaine and proceeded to arrest all of the men, including Collins. Collins alleged at a suppression hearing that there was not probable cause for his arrest. The trial court denied his suppression motion and Collins was convicted of possession of cocaine.

Collins appealed and, before this Court, asserted that there ***152** was not probable cause for his arrest.[5] He claimed that his mere proximity to the incriminating evidence, or to an offender, was not enough for finding of probable cause for arrest. Collins also asserted that there was no further factual basis to connect him to the drugs or to having committed any crime. In addressing Collin's claims, we discussed the United States Supreme Court case of *United States v. Di Re,* 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948) and our *Livingston* case and ultimately held in favor of Collins that there was not probable cause for his arrest.

*Di Re* is not a canine alert case, but it has influenced the discussion in cases such as the one at bar. Di Re was seated in the front passenger seat of a vehicle from which an informant had purchased counterfeit gasoline ration coupons from the driver and the backseat passenger was seen holding the gasoline ration coupons. The police arrested and searched all three men. The Supreme Court held that Di Re's mere presence in a vehicle involved in criminal activity, without more, did not cause him to lose his right to be free from a search of his person. The Supreme Court explained:

> "There is no evidence that it is a fact or that the officers had any information indicating that Di Re was in the car when Reed obtained ration coupons from Buttitta, and none that he heard or took part in any conversation on the subject....
>
> "An inference of participation in conspiracy does not seem to be sustained by the facts particular to this case. The argument that one who 'accompanies a criminal to a crime

  

> rendevous' cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passers-by, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. ***153** If Di Re had witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons, and if he saw that they were ration coupons, it would not follow that he would know them to be counterfeit. Indeed it appeared at the trial to require an expert to establish that fact. Presumptions of guilt are not lightly to be indulged form mere meetings." *Di Re,* 332 U.S. at 593, 68 S.Ct. at 228, 92 L.Ed. at 219-20.

Essentially, in *Di Re,* the Supreme Court held that "we are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." *Id.* at 587, 68 S.Ct. at 225, 92 L.Ed. at 216.

In *Livingston v. State,* 317 Md. 408, 564 A.2d 414 (1989), Wesley Livingston was ****301** one of three people in a vehicle that was stopped for speeding. Livingston, who was not the owner of the vehicle, was sitting in the backseat. During the stop, the state trooper saw two marijuana seeds on the floor of the front passenger's side. The state trooper arrested all three occupants of the car and upon searching Livingston pursuant to the arrest, the state trooper discovered cocaine and marijuana in Livingston's pocket. Livingston was charged with possession of cocaine with intent to distribute, possession of cocaine and possession of marijuana. We held that the two seeds on the floor in the front of the vehicle did not provide the state trooper with probable cause to arrest Livingston and then conduct a search incident to that arrest. Or, in the alternative, that the mere proximity to incriminating evidence or to an offender is not enough for a finding of probable cause for arrest generally.

In *People v. Fondia,* 317 Ill.App.3d 966, 251 Ill.Dec. 553, 740 N.E.2d 839 (2000), the Illinois Appellate Court considered a case with facts similar to the case *sub judice.* There, after a lawful traffic stop, an officer requested a police canine unit while he was conducting computer inquires and a warrants check. The driver and two passengers remained in the car while the canine gave a positive alert to drugs in the car, specifically near the rear seam of the driver's door. The ***154** police then had the driver exit the automobile and told the driver that the canine had given a positive alert to drugs in the car. The police officer then searched the occupants of the vehicle and the vehicle itself. The defendant, Fondia, a backseat passenger, was removed from the car and told "that the dog had alerted and that [Officer] Gallagher was going to search him." *Fondia,* 251 Ill.Dec. 553, 740 N.E.2d at 841 (alteration added). The officer then put his hand into Fondia's pocket when he felt a metal tube that he recognized to be a crack pipe. The officer then removed the tube, handcuffed Fondia and completed the search. The tube field-tested positive for cocaine and Fondia was arrested for possession of drug paraphernalia.

In *Fondia,* it was also stipulated to that the traffic stop was lawful and that the dog was properly trained. The trial court, in that case, ruled that the positive canine alert gave the police "probable cause to search the vehicle ..., ... and all of the occupants.' " *Id.* at 841. On appeal, the Illinois Appellate Court agreed that the alert by a dog trained to detect contraband gave the police "probable cause to believe that controlled substances were somewhere *either* within the car *or* on the person of one or more of its occupants.... However, before [Officer] Gallagher searched defendant's person, he could have-and should have-had the dog sniff defendant to see if the dog would again alert." *Id.* at 842 (alteration added) (emphasis added). The Illinois Appellate Court went on to note that it has been held that a canine sniff is not a search for purposes of the Fourth Amendment, pursuant to *United States v. Place,* 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), and opined:

> "If a dog sniff ... had occurred and the dog alerted, then probable cause would have existed to search defendant's person. If, on the other hand, the dog did not alert after sniffing defendant but did alert as to one of the car's other occupants or as to the now-unoccupied car interior, then no basis would have existed to search defendant's person. By not conducting additional dog sniffs of defendant or the car's other occupants (which the officers had it entirely in ***155** their power to do), the officers willfully denied themselves this additional, critical information that would have sharpened ****302** their focus on whom to search, leaving themselves in a position of 'willful ignorance.'
>
> "This posture of 'willful ignorance' dissipates the reasonableness of the police conduct in this case, given the nature of that conduct, which was a search of defendant's person, not merely a container within the car. In *Houghton* ... the Supreme Court wrote of the 'unique, significantly heightened protection afforded against searches of one's person and quoted the following from *Terry v. Ohio,* 392 U.S. 1, 24-25, 88 S.Ct. 1868,

  

1881-82, 20 L.Ed.2d 889, 908 (1968): ' "Even a limited search of the outer clothing ... constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." ' "

*Fondia,* 251 Ill.Dec. 553, 740 N.E.2d at 842-43. *See also State v. Kelly,* 2001 WL 1561543 (Ohio App.2001) (ruling that a canine alert to the presence of drugs in a car gave police probable cause to search the interior of the car, but not to search the occupants of the car, one of which was the defendant, because the general canine alert was not specific to indicate that the defendant had drugs on his person).

**c. Consideration of Probable Cause to Search Respondent**

In the case *sub judice* and relying on our holdings in *Pringle, Collins, Livingston,* the Supreme Court's holding in *Di Re,* the Illinois case of *Fondia,* we hold that there was not probable cause to search respondent. This case is similar to the situation in *Fondia,* where the defendant was in a car that had had a positive drug alert by a drug detection dog and the officer then removed the defendant from the car, searched him, found drug paraphernalia and arrested him. We emphasize, just as the Illinois court in *Fondia* emphasized, that while the alert by a drug dog trained to detect contraband, undisputedly, gave the police probable cause to believe there was contraband somewhere in the car or on the person of someone ***156** in the car, the canine sniff of the vehicle alone did not amount to probable cause to then search each of the passengers.

Without additional facts that would tend to establish respondent's knowledge and dominion or control over the contraband before his search, the K-9 sniff of the car was insufficient to establish probable cause for a search of a non-owner, non-driver for possession. Merely sitting in the backseat of a car did not amount, in this case, to probable cause specific to respondent to search and subsequently arrest him. If the K-9 had sniffed respondent, and specifically alerted to respondent, before the officer searched him, probable cause for the search might have existed. If the officers simply had Bosco sniff each of the passengers of the car prior to searching them, then probable cause might have existed to search any of the passengers who positively re-alerted the canine to contraband. This did not happen here.[6]

****303** Moreover, as the Court of Special Appeals in this case opined, some link between the passenger and the crime must exist or probable cause generally will not be found. That was the case here. Respondent was searched merely based upon the fact that probable cause existed to search the vehicle based upon a general canine scan of the car, nothing more. ***157** Without any other indicia of possession of contraband, specifically relating to respondent, there was no probable cause for the officer, at that point in time on the night in question, to have sufficient probable cause to search respondent. There simply was no link or further factual basis to connect respondent to drugs or to having committed any crime solely upon Bosco's positive scan of the vehicle owned and driven by another person.

In contrast with the cases previously discussed, petitioner asserts that the *dicta* intimated by this Court and the Court of Special Appeals in the cases of *Wilkes v. State,* 364 Md. 554, 587 n. 24, 774 A.2d 420, 439 n. 24 and *State v. Funkhouser,* 140 Md.App. 696, 782 A.2d 387 (2001) support a finding of probable cause to search not only the vehicle itself *but also* the passengers of a vehicle when there has been a positive alert by a drug detection dog to contraband somewhere in a vehicle. In *Wilkes,* in a footnote, this Court recognized that the cases from some jurisdictions have taken the position that a positive alert to contraband by a drug dog amounted to probable cause to effectuate a warrantless arrest. In *Funkhouser,* the Court of Special Appeals held that when a qualified drug dog signals to its handler that narcotics are in a vehicle there is *ipso facto* probable cause to justify a warrantless *Carroll* doctrine search of the vehicle. But, petitioner fails to recognize that searches of vehicles pursuant to a positive canine alert and probable cause to do so is well-settled and is distinguishable from the issue raised in this case.[7]

Additionally, both *Wilkes* and *Funkhouser* are factually distinguishable because in both of those cases the person searched and arrested was the sole occupant of the car and the owner/driver of the car. In neither case was the person searched a mere passenger. In *Funkhouser,* the Court of Special Appeals stated "The police not only had probable cause [after a positive canine scan] to search the Jeep wrangler; they also had probable cause to arrest Funkhouser as its ***158** driver and lone occupant." *Funkhouser*, 140 Md.App. 721, 782 A.2d 402 (2001). (alteration added). Admittedly, we stated in *Wilkes* "that once a drug dog has alerted the trooper to the presence of illegal drugs in a vehicle, sufficient probable cause existed to support a warrantless arrest." 364 Md. at 554 n. 24, 774 A.2d at 439 n. 24. However, as in *Funkhouser,* Wilkes was the driver and the only person in the vehicle. Petitioner also asserts that the case of *United States v. Klinginsmith,* 25 F.3d 1507 (10th

  

Cir.1994), *cert. denied,* 513 U.S. 1059, 115 S.Ct. 669, 130 L.Ed.2d 602 (1994), cited in *Wilkes,* supports the extension of probable cause to include passengers. Klinginsmith was a passenger in a car driven by another person. The police had placed a sign near the highway that ****304** read "Narcotic Check Lane Ahead," but the sign was a ruse hoping to get narcotics traffickers who saw the sign to exit the highway on a particular exit. When the driver of the car exited the highway, the police pursued the car and stopped it at a gas station. The troopers began asking questions of both of the occupants, including Klinginsmith, and both men consented when the troopers asked to search the car. In the meantime, a canine unit had arrived on the scene and gave a positive alert for narcotics in the car. The Tenth Circuit held that "when the dog 'alerted,' there was probable cause to arrest [the driver and passenger]." *Klinginsmith,* 25 F.3d at 1510. We also recognize that the U.S. District Court for the District of Kansas recently reaffirmed the holding in *Klinginsmith* in *United States v. Garcia,* 52 F.Supp.2d 1239 (D.Kan.1999). Despite the holdings in *Klinginsmith* and *Garcia,* we hold that those cases are not controlling as to the issue currently for our review. Rather, we hold in line with the body of case law discussed *supra,* especially our very recent holding in *Pringle,* and affirm that a positive canine scan to a vehicle's interior compartment generally, without more, does not rise to probable cause to search all passengers of that vehicle.

A passenger in an automobile is generally not perceived to have the kind of control over the contents of the vehicle as does a driver and cases from this State have noted the distinction between drivers and owners and passengers of ***159** vehicles. Therefore, some additional substantive nexus between the passenger and the criminal conduct must appear to exist in order for an officer to have probable cause to either search or arrest a passenger.

Pursuant to the facts of the case *sub judice,* there was no link, beyond the positive canine alert to drugs in the car somewhere, between respondent and the drug scan by Bosco of the passenger compartment as a whole. At the time of the search of respondent, there was no evidence, other than Bosco's alert to the car in which respondent and four others had been sitting, to establish respondent's possible possession of drugs. There were no circumstances in this case indicating that there were drugs or drug paraphernalia visible to either the occupants of the car or the officers looking into the vehicle, there was no evidence of any odor of drugs emanating from the vehicle that would have been detectable to a passerby or even to a passenger, nor is there any evidence that any of the occupants prior to the search exhibited any suspicious behavior to the officers. We recognize that if, in a particular case, the facts justify it, there may be a constitutionally acceptable basis for searching the passengers, but that is not so under the facts of the case *sub judice.*

**IV. Conclusion**

As we have indicated we do not dispute that Bosco's positive alert provided evidence of a commission of a crime and that Bosco's alert, alone, provided adequate probable cause for the officers to search the automobile without a warrant. However, without anything more than the positive canine alert to drugs in the automobile somewhere, *i.e.,* something more particular linking any one passenger in the car, including respondent, to the drugs sniffed by Bosco, there was insufficient probable cause to search the passengers of the automobile in question in this case. A canine alert on the exterior of a vehicle does not support the proposition that the drugs potentially in the car are concealed on a *particular* occupant of that vehicle. When the police get all of the occupants out of the vehicle and find no drugs in the vehicle, they cannot use a ***160** positive general canine scan of the car as authority to go ****305** further and search a non-owner/non-driver passenger. In the case *sub judice,* the search of respondent on these facts was unlawful. The motion to suppress should have been granted.

**JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.**

Dissenting Opinion follows.

HARRELL and BATTAGLIA, JJ. dissent.

Dissenting Opinion by HARRELL, J., in which BATTAGLIA, J., joins

Consonant with my association with the dissent in *Pringle v. State,* 370 Md. 525, 556-66, 805 A.2d 1016, 1033-40 (2002), I respectfully dissent in the present case. Although *Pringle* presaged the result in this case, I cling to a view that both it and this case are decided wrongly. In this case, I would adopt the reasoning of *United States v. Klinginsmith,* 25 F.3d 1507 (10th Circ.1994), *cert. denied,* 513 U.S. 1059, 115 S.Ct. 669, 130 L.Ed.2d 602 (1994) and *United States v. Garcia,* 52 F.Supp.2d 1239 (D.Kan.1999) and reverse the Court of Special Appeals.

  

Judge BATTAGLIA authorizes me to state that she joins this dissent.

**All Citations**

372 Md. 137, 812 A.2d 291

Footnotes

1 Officer Nelson had been with the Annapolis City Police Department for seven years and had been a certified K-9 officer for four of those years. Testimony at the suppression hearing revealed that both Officer Nelson and Bosco have undergone extensive training and updating of their skills each year.

2 We note that the night respondent was arrested he was first asked to exit the vehicle and a police officer began to search him not as a "frisk" or "pat down" but to find anything "suspicious." During this search, the officer felt something hard, which he admitted was not a gun, a knife or a weapon, but put handcuffs on respondent for safety and told respondent he was "not under arrest at the time." Petitioner did not contend, prior to this appeal, that respondent was "arrested" at the time of his "search" potentially making his search lawful as a search incident to an arrest. *See Klauenberg v. State,* 355 Md. 528, 552, 735 A.2d 1061, 1074 (1999) ( "[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal.").

3 We note that our discussion of probable cause includes cases where probable cause to arrest was at issue. Nonetheless, our discussion of probable cause generally and whether there was probable cause to search respondent in this case is based upon the same standard for probable cause to arrest, because, "In terms of quantifiable probability, moreover, the probable cause for a ... search is the same as the probable cause for a warrantless arrest. Whatever the possible occurrence or circumstance, the likelihood of which we are assessing, probable cause itself is a constant. It does not take more probable cause to support a warrantless arrest than it does to support a warrantless ... search. The classic *Brinegar v. United States,* 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949), definition of probable cause is used for both situations, with no distinction made between the predicate for a[ ] ... search and the predicate for a lawful arrest.... The measure of likelihood is the same." *State v. Funkhouser,* 140 Md.App. 696, 721, 782 A.2d 387, 402 (2001). Further, the United States Supreme Court stated in *Ybarra v. Illinois,* 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238, 245 (1979), that "[w]here the standard is probable cause, a search *or* seizure of a person must be supported by *probable cause particularized with respect to that person.*" (emphasis added).

4 Maryland Code (2001), section 2-202 of the Criminal Procedure Article states:

> " **§ 2-202. Warrantless arrests-In general.**
>
> (a) *Crime committed in presence of police officer.*-A police officer may arrest without a warrant a person who commits or attempts to commit a felony or misdemeanor in the presence or within the view of a police officer.
>
> (b) *Probable cause to believe crime committed in the presence of officer.*-A police officer who has probable cause to believe that a felony or misdemeanor is being committed in the presence or within the view of the police officer may arrest without a warrant any person whom the police officer reasonably believes to have committed the crime.
>
> (c) *Probable cause to believe felony committed.*-A police officer without a warrant may arrest a person if the police officer has probable cause to believe that a felony has been committed or attempted and the person has committed or attempted to commit the felony whether or not in the presence or within the view of the police officer."
>
> This provision of the Criminal Procedure Article in respect to arrest generally is language derived without substantive change from former Article 27, section 594B(a), (b) and (c) of the Maryland Code.

5 Collins specifically relied upon the case of *Livingston v. State,* 317 Md. 408, 564 A.2d 414 (1989), discussed *infra,* when he asserted lack of probable cause for his arrest at his motion to suppress hearing.

  

6 A certified drug detection dog is very accurate and minimally intrusive, much less so than a search because "Even a limited search of the outer clothing ... constitutes a severe, though brief, intrusion upon cherished personal security." *Terry v. Ohio,* 392 U.S. 1, 24-25, 88 S.Ct. 1868, 1881-82, 20 L.Ed.2d 889, 908 (1968). Also, a canine sniff, in and of itself, is not a search for purposes of the Fourth Amendment. *See United States v. Place,* 462 U.S. 696, 707, 103 S.Ct. 2637, 2644-45, 77 L.Ed.2d 110, 121 (1983). Therefore, a dog sniff of the passengers might have been appropriate after the K-9 alerting had established probable cause existed to search the vehicle. Under petitioner's reasoning, if contraband were found in a twelve-passenger van, or perhaps a bus, trolley, or taxi that you share with someone for means of public transportation, the police would be permitted to search everyone in that vehicle simply because a drug detection dog gave a positive general alert to contraband in that vehicle somewhere. Simply stated, a policy of permitting officers to search on this basis alone until contraband is found on someone, without other indications of particularized suspicion of contraband on that person, is, in our view, constitutionally unacceptable. *See Pringle, supra.*

7 *See* discussion in text *supra* regarding the *Carroll* doctrine.

913 F.3d 862
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Alfredo Enos LANDEROS, Defendant-Appellant.

No. 17-10217
|
Argued and Submitted September 12, 2018 San Francisco, California
|
Filed January 11, 2019

**Synopsis**

**Background:** Defendant was convicted, on guilty plea that preserved his right to appeal the denial of earlier motion to suppress, and that was entered in the United States District Court for the District of Arizona, No. 4:16-cr-00855-RCC-BGM-1, Raner C. Collins, J., of being felon in possession of ammunition, and he appealed from suppression ruling.

**Holdings:** The Court of Appeals, Berzon, Circuit Judge, held that:

officer could not prolong traffic stop for several minutes by repeatedly demanding that front seat passenger provide him with identification absent reasonable suspicion that passenger was guilty of some criminal misconduct;

officer did not have requisite reasonable suspicion of criminal activity to prolong stop; and

evidence that a police officer discovered after lawfully stopping a motor vehicle for speeding only when he ordered passenger out of vehicle had to be suppressed, regardless of validity of exit order.

Reversed.

**Attorneys and Law Firms**

***864** Lee Tucker (argued), Assistant Federal Defender; Jon M. Sands, Federal Defender; Federal Public Defender's Office, Tucson, Arizona; for Defendant-Appellant.

Charisse Arce (argued) and Angela W. Woolridge, Assistant United States Attorneys; Elizabeth A. Strange, First Assistant United States Attorney; Robert L. Miskell, Appellate Chief; United States Attorney's Office, Tucson, Arizona; for Plaintiff-Appellee.

Appeal from the United States District Court for the District of Arizona, Raner C. Collins, District Judge, Presiding, D.C. No. 4:16-cr-00855-RCC-BGM-1

Before: Marsha S. Berzon, Johnnie B. Rawlinson, and Paul J. Watford, Circuit Judges.

## OPINION

BERZON, Circuit Judge:

Our question is whether law enforcement officers may extend a lawfully initiated vehicle stop because a passenger refuses to identify himself, absent reasonable suspicion that the individual has committed a criminal offense. We conclude that they may not do so. As a result, we reverse.[1]

## I.

Early in the morning of February 9, 2016, police officer Clinton Baker pulled over a car driving 11 miles over the speed limit. The stop occurred on a road near the Pascua Yaqui Indian reservation. Alfredo Landeros sat in the front passenger seat next to the driver. Two young women were in the back seat. The driver apologized to Officer Baker for speeding and provided identification.

Officer Baker wrote in his incident report and testified that he smelled alcohol in the car. The two women in the backseat appeared to him to be minors, and therefore subject to both the underage drinking laws and the 10:00 p.m. Pascua Yaqui curfew.[2] According to the two women's testimony, Officer Baker requested their identification and explained that he was asking because they looked younger than 18 years old "and

  

it was past a curfew." The two women—who were 21 and 19 years old—complied.

***865** As he stated at the suppression hearing, Officer Baker did not believe that Landeros was underage, and he was not. Nonetheless, Officer Baker, in his own words, "commanded" Landeros to provide identification. Later, Officer Baker explained it was "standard for [law enforcement] to identify everybody in the vehicle." Landeros refused to identify himself, and informed Officer Baker—correctly, as we shall explain—that he was not required to do so. Officer Baker then repeated his "demand[ ] to see [Landeros's] ID." Landeros again refused. As a result, Officer Baker called for back-up, prolonging the stop. Officer Frank Romero then arrived, and he too asked for Landeros's identification. The two officers also repeatedly "commanded" Landeros to exit the car because he was not being "compliant."

Landeros eventually did leave the car. At least several minutes passed between Officer Baker's initial request for Landeros's identification and his exit from the car, although the record does not reflect the exact length of time.

Officer Baker testified that, as Landeros exited the car, he saw for the first time pocketknives, a machete, and two open beer bottles on the floorboards by the front passenger seat. Arizona prohibits open containers of alcohol in cars on public highways, Ariz. Rev. Stat. Ann. § 4-251. Officer Baker then placed Landeros under arrest. Consistent with Officer Baker's testimony, the government represented in its district court briefing that Landeros was arrested both for possessing an open container[3] and for "failure to provide his true full name and refusal to comply with directions of police officers." *See* Ariz. Rev. Stat. Ann. § 13-2412(A) ("It is unlawful for a person, after being advised that the person's refusal to answer is unlawful, to fail or refuse to state the person's true full name on request of a peace officer who has lawfully detained the person based on reasonable suspicion that the person has committed, is committing or is about to commit a crime."); *id.* § 28-622(A) ("A person shall not willfully fail or refuse to comply with any lawful order or direction of a police officer invested by law with authority to direct, control or regulate traffic.").

The officers handcuffed Landeros as soon as he exited the car. Officer Romero asked Landeros if he had any weapons; Landeros confirmed that he had a knife in a pocket. Officer Romero requested consent to search Landeros's pockets, and Landeros agreed. During that search, Officer Romero found a smoking pipe and six bullets in Landeros's pockets.

Two and a half months later, Landeros was indicted for possession of ammunition by a convicted felon, 18 U.S.C. §§ 922(g)(1), 924(a)(2). He moved to suppress the evidence based on the circumstances of the stop, and also to dismiss the indictment based on alleged abuse by the police officers after the search. The magistrate judge recommended the district court deny both motions, and it did so in a single sentence order. Landeros then entered into a plea agreement that preserved his right to appeal the denials of the two motions. The district court accepted the agreement and sentenced Landeros to 405 days in prison and three years of supervised release.

## II.

This case implicates two doctrines, one concerning the circumstances under which ***866** law enforcement can prolong a stop, and the other governing when law enforcement can require a person to identify himself.

### A.

*Rodriguez v. United States* held that "[a]n officer ... may conduct certain unrelated checks during an otherwise lawful traffic stop. But ... he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." —— U.S. ——, 135 S.Ct. 1609, 1615, 191 L.Ed.2d 492 (2015). In that case, a police officer stopped Rodriguez for a minor traffic violation. *Id.* at 1612. The officer collected Rodriguez's license, registration, and proof of insurance, ran a records check on both Rodriguez and a passenger, and questioned the passenger about "where [they] were coming from and where they were going." *Id.* at 1613. He then returned to the vehicle "to issue [a] written warning" to Rodriguez for the traffic violation. *Id.*

Although the reasons for the traffic stop were, at this point, "out of the way," the officer continued the stop, asking Rodriguez for permission to walk a dog around the vehicle. *Id.* When Rodriguez refused, the officer ordered Rodriguez out of the car and called for back-up. *Id.* Several minutes later, after a deputy sheriff arrived, the officer conducted a dog sniff test, which resulted in the discovery of methamphetamines within the car. *Id.*

  

Based on the fruits of that search, Rodriguez was indicted for possession with intent to distribute. *Id.* He moved to suppress the evidence on the ground that there was no reasonable suspicion of any offense other than the traffic violation, so the stop was unlawfully prolonged by the dog sniff. *Id.* The district court agreed with Rodriguez that the officer lacked reasonable suspicion to extend the stop after the written warning, but determined that the extension was nonetheless permissible because of its brevity. *Id.* at 1613–14. The Eighth Circuit affirmed. *See United States v. Rodriguez*, 741 F.3d 905, 907–08 (8th Cir. 2014), *vacated and remanded*, 135 S.Ct. 1609.

The Supreme Court vacated the judgment on the basis that law enforcement may not extend a traffic stop with tasks unrelated to the traffic mission, absent independent reasonable suspicion. *Rodriguez*, 135 S.Ct. at 1616–17. In reaching this conclusion, the Court made clear that it would not have mattered if the police officer conducted the dog sniff test before, rather than after, he issued the warning. What mattered was the added time, not at what point, in the chronology of the stop, that time was added. *Id.*

This court so emphasized in *United States v. Evans*, published a month after *Rodriguez*. 786 F.3d 779, 786 (9th Cir. 2015). There, we held that law enforcement impermissibly extended a traffic stop by running an ex-felon registration check unrelated to traffic safety and unsupported by separate reasonable suspicion. *Id.* "That the ex-felon registration check occurred before ... the officer issued a ticket [stemming from the initial traffic violation] is immaterial," we explained. *Id.* (brackets, citation, and internal quotation marks omitted). "[R]ather, the critical question is whether the check prolongs —*i.e.,* adds time to—the stop." *Id.* (brackets, citation, and internal quotation marks omitted).

We recognize here, for the first time, that *Rodriguez* at least partially abrogated this circuit's previous precedent, *United States v. Turvin*, 517 F.3d 1097 (9th Cir. 2008), upon which the magistrate judge relied and to which the government now cites for support. *Turvin* held that a police officer did not transform a lawful traffic ***867** stop into an unlawful one when, without reasonable suspicion, he took a break from writing a traffic citation to ask the driver about a methamphetamine laboratory and obtain the driver's consent to search his truck. *Id.* at 1098. *Turvin* concluded that because "the circumstances surrounding the brief pause here were reasonable," the extension was permissible despite the absence of reasonable suspicion. *Id.* at 1101–02.

*Rodriguez* squarely rejected such a reasonableness standard for determining whether prolonging a traffic stop for reasons not justified by the initial purpose of the stop is lawful. 135 S.Ct. at 1616. Instead, *Rodriguez* requires that a traffic stop may be extended to conduct an investigation into matters other than the original traffic violation only if the officers have reasonable suspicion of an independent offense. *Id.*

Dissenting in *Turvin*, Judge Paez wrote, "Because I do not believe that reasonable suspicion supported [the officer's] decision to prolong his traffic stop of Turvin, I would affirm the district court's order granting Turvin's motion to suppress." 517 F.3d at 1104 (Paez, J., dissenting). Judge Paez's dissent aligns with the majority in *Rodriguez*, and so highlights the "tension between *Turvin*, which permits slight prolongations to ask unrelated questions, and *Rodriguez*, which requires independent, reasonable suspicion if [the additional investigation] adds any time to a traffic stop." *United States v. Cornejo*, 196 F.Supp.3d 1137, 1151 (E.D. Cal. 2016). As *Turvin*'s reasonableness standard cannot be reconciled with the holding of *Rodriguez*, *Turvin* is no longer binding precedent. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) ("[W]here the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled.").

Here, the magistrate judge concluded that the extended stop was permissible because it was "reasonable," looking to *Turvin* rather than *Rodriguez* to guide the inquiry. The magistrate wrote, in relevant part:

> "[W]hether questioning unrelated to the purpose of the traffic stop and separate from the ticket-writing process that prolongs the duration of the stop may nonetheless be reasonable ... [upon] examin[ation] [of] the totality of the circumstances surrounding the stop, and [a] determin[ation] whether [Officer Baker's] conduct was reasonable." *United States v. Turvin*, 517 F.3d 1097, 1101 (9th Cir. 2008) (internal quotations and citations omitted).

The district court adopted the magistrate judge's recommendation, and therefore his analysis, without comment or explanation. Because it was based on *Turvin* and disregarded *Rodriguez*, the district court's approval of the duration of the stop was premised on legal error.

  

**B.**

Applying *Rodriguez*, we shall assume that Officer Baker was permitted to prolong the initially lawful stop to ask the two women for identification, because he had reasonable suspicion they were underage.[4] But the several minutes of additional questioning to ascertain Landeros's identity ***868** was permissible only if it was (1) part of the stop's "mission" or (2) supported by independent reasonable suspicion. 135 S.Ct. at 1615.

A demand for a passenger's identification is not part of the mission of a traffic stop. "When stopping an individual for a minor traffic violation, 'an officer's mission includes ordinary inquiries incident to the traffic stop.' " *Evans*, 786 F.3d at 786 (quoting *Rodriguez*, 135 S.Ct. at 1615). These involve "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance," and each shares "the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Rodriguez*, 135 S.Ct. at 1615. The identity of a passenger, however, will ordinarily have no relation to a driver's safe operation of a vehicle.

*Rodriguez* also "recognized that 'an officer *may* need to take certain negligibly burdensome precautions in order to complete his mission safely.' " *Evans*, 786 F.3d at 787 (quoting *Rodriguez*, 135 S.Ct. at 1616 (emphasis added by *Evans* court).) But knowing Landeros's name would not have made the officers any safer. Extending the stop, and thereby prolonging the officers' exposure to Landeros, was, if anything, "inversely related to officer safety." *Evans*, 786 F.3d at 787.

**C.**

The officers' extension of the stop therefore violated the Fourth Amendment unless supported by independent reasonable suspicion. Reasonable suspicion "exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for *particularized* suspicion." *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc); *see also Evans*, 786 F.3d at 788. The government argues that Officer Baker had reasonable suspicion of "underage drinking and curfew violations" based on "the smell of alcohol and belief that the back seat passengers were younger than eighteen." An extension of the traffic stop was necessary, the government contends, because Landeros's "own conduct prevented the officers from being able to determine whether he had committed the offenses of underage drinking or curfew violation." But, on cross-examination, Officer Baker stated that Landeros did not look "underage" to him at the time of the stop. Further, Officer Baker's testimony and reports indicate he asked Landeros for identification because it was "standard" procedure, not because he was concerned about Landeros's age. Indeed, the reports specifically mention that Officer Baker believed the two women were underage, but make no mention of Landeros's age. As a result, the record does not demonstrate that Officer Baker had a reasonable suspicion that Landeros was out past his curfew or drinking underage. Any extension of the traffic stop to investigate those matters was an unlawful seizure.

The government also contends that Landeros's refusal to identify himself "provided reasonable suspicion of the additional offenses of failure to provide identification and failure to comply with law enforcement orders." Arizona law provides:

> It is unlawful for a person, after being advised that the person's refusal to answer is unlawful, to fail or refuse to state the person's true full name on request of a peace officer who has lawfully detained the person based on reasonable suspicion that the person has committed, is committing or is about to commit a crime.

***869** Ariz. Rev. Stat. Ann. § 13-2412(A). By the plain text of the statute, Landeros could not have violated Section 13-2412 because, as already explained, the officers lacked reasonable suspicion, at the time they initially insisted he identify himself, that Landeros had committed, was committing, or was about to commit any crimes, including violating curfew or drinking underage.

Additionally, Arizona Law provides that "[a] person shall not willfully fail or refuse to comply with any lawful order or direction of a police officer invested by law with authority to direct, control or regulate traffic." Ariz. Rev. Stat. Ann. § 28-622(A). The question that remains, then, is whether law enforcement could *lawfully* order Landeros to identify himself, absent reasonable suspicion that he had committed an offense.

In some circumstances, a suspect may be required to respond to an officer's request to identify herself, and may be

  

arrested if she does not. *Hiibel v. Sixth Judicial District Court* upheld a Nevada "stop and identify" statute, similar to Arizona's, that permitted law enforcement to detain "any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime" so as to ascertain that person's identity. 542 U.S. 177, 181–82, 185, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004) (quoting Nev. Rev. Stat. § 171.123 (2003) ). As authoritatively interpreted by the Nevada Supreme Court, the statute required only that a suspect disclose her name—not produce a driver's license or any other document. *Id.* at 185, 124 S.Ct. 2451.

The challenge to Nevada's law arose out of Hiibel's arrest for failing to identify himself to law enforcement. *Id*. at 181, 124 S.Ct. 2451. Earlier on the day of the arrest, the local sheriff's department received a report of a man assaulting a woman in a truck on a particular road. *Id*. at 180, 124 S.Ct. 2451. When an officer arrived at that road to investigate, he found a truck matching the reported description, with a man—later identified as Hiibel—standing outside, and a young woman sitting inside. *Id*. at 180–81, 124 S.Ct. 2451. The officer explained to the man that he was investigating a reported fight and repeatedly asked him for identification. *Id*. The officer warned Hiibel that if he did not provide identification, he would be arrested for refusing to identify himself. *Id*. at 181, 124 S.Ct. 2451. Hiibel did not comply, so he was arrested. *Id*. The Court determined this application of the Nevada law permissible, because the request was " 'reasonably related in scope to the circumstances which justified' the stop." *Id.* at 189, 124 S.Ct. 2451 (quoting *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) ). (The Court did not mention that the officer's request for "identification," which it understood as "a request to produce a driver's license or some other form of written identification," *id.* at 181, 124 S.Ct. 2451, demanded more than state law required Hiibel to provide.)

In its opinion, the Court distinguished the circumstances of Hiibel's arrest from those of an earlier case, *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). *Brown* overturned a conviction under a Texas "stop and identify" law similar to that at issue in *Hiibel*. *Id*. at 49–50, 99 S.Ct. 2637. Unlike Hiibel, Brown was stopped, detained, and interrogated about his identity even though there was no reasonable suspicion that he had committed any offense. *Id*. at 51–52, 99 S.Ct. 2637; *see also Hiibel*, 542 U.S. at 184, 124 S.Ct. 2451 (discussing *Brown*). *Brown* held squarely that law enforcement may not require a person to furnish identification if not reasonably suspected of any criminal conduct. *Brown*, 443 U.S. at 52–53, 99 S.Ct. 2637.

***870** In short, *Brown* holds that an officer may not lawfully order a person to identify herself absent particularized suspicion that she has engaged, is engaging, or is about to engage in criminal activity, and *Hiibel* does not hold to the contrary.

As explained above, the officers insisted several times that Landeros identify himself after he initially refused, and detained him while making those demands. At the time they did so, the officers had no reasonable suspicion that Landeros had committed an offense. Accordingly, the police could not lawfully order him to identify himself. His repeated refusal to do so thus did not, as the government claims, constitute a failure to comply with an officer's lawful order, Ariz. Rev. Stat. Ann. § 28-622(A). There was therefore no justification for the extension of the detention to allow the officers to press Landeros further for his identity.

Evidence obtained as the result of an unconstitutional seizure "is ordinarily tainted by the prior illegality and thus inadmissible, subject to a few recognized exceptions," none of which the government contends apply in this case. *United States v. Gorman*, 859 F.3d 706, 716 (9th Cir. 2017) (internal quotation marks omitted.) Here, " 'the challenged evidence ... is unquestionably the product of the illegal governmental activity—*i.e.,* the wrongful detention.' " *New York v. Harris*, 495 U.S. 14, 19, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990) (internal quotation marks and brackets omitted). The officers discovered the bullets Landeros was convicted of possessing only because he was ordered from the car as part of the unlawfully extended seizure and subsequently consented to a search of his pockets. As a result, the evidence cannot be introduced at trial.

The government repeatedly notes that this court's precedent permits police to "*ask* people [including passengers in cars] who have legitimately been stopped for identification without conducting a Fourth Amendment search or seizure." *United States v. Diaz-Castaneda*, 494 F.3d 1146, 1152 (9th Cir. 2007) (emphasis added). But we need not resolve whether that precedent remains valid after *Rodriguez*. Regardless of whether the *first* request for Landeros's identification was lawful, law enforcement's refusal to take "no" for an answer was not. *Diaz-Castaneda* does not suggest otherwise.

  

Landeros also refused to comply with the officers' commands to leave the car. Police officers may order a suspect out of a car during a traffic stop. *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). The Supreme Court has extended that rule to passengers detained during a lawful stop. *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997). But here, the stop was no longer lawful by the time the officers ordered Landeros to leave the car, as it had extended longer than justified by either the suspected traffic violation or any offense as to which there was independent reasonable suspicion. *See Rodriguez*, 135 S.Ct. at 1616. As Officer Baker had, before Landeros was ordered from the car, impermissibly extended the stop based on Landeros's refusal to identify himself, the validity or not of the exit order standing alone does not matter.

**III.**

For the foregoing reasons, we **REVERSE** the district court's denial of Landeros's motion to suppress.

**All Citations**

913 F.3d 862, 19 Cal. Daily Op. Serv. 496, 2019 Daily Journal D.A.R. 289

Footnotes

1 Appellant also challenges the district court's denial of his motion to dismiss the indictment based on alleged police abuses after his arrest. We address that challenge in a concurrently filed memorandum disposition.

2 Officer Baker is a police officer with the Pascua Yaqui Police Department who has authority to enforce both the Pascua Yaqui tribal code and Arizona state laws.

3 We do not reach the question whether, if the seizure were otherwise lawful, law enforcement could have lawfully detained and arrested Landeros based on the open container of alcohol seen where he had been sitting. He was never charged with that offense.

4 We really cannot tell whether the suspicion was reasonable as we do not know what the two women looked like.

68 S.Ct. 222
Supreme Court of the United States

UNITED STATES
v.
DI RE.

No. 61.
|
Argued
|
Oct. 17, 1947.
|
Decided Jan. 5, 1948.

**Synopsis**

Michael Di Re was convicted on a charge of knowingly possessing counterfeit gasoline ration coupons in violation of the Second War Powers Act of 1942, s 301, 50 U.S.C.A.Appendix, s 633. Judgment was reversed by the Circuit Court of Appeals, 159 F.2d 818, and the United States brings certiorari.

Affirmed.

Mr. Chief Justice VINSON and Mr. Justice BLACK dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

**Attorneys and Law Firms**

****223** Mr. ***582** Frederick Bernays Wiener, of Providence, R.I., for petitioner.

Mr. Charles J. McDonough, of New York City, for respondent.

**Opinion**

Mr. Justice JACKSON delivered the opinion of the Court.

Michael Di Re was convicted on a charge of knowingly possessing counterfeit gasoline ration coupons in violation of s 301 of the Second War Powers Act, 1942.[1] The decisive evidence was that obtained by search of his person, after he was arrested without a warrant of any kind. The Circuit Court of Appeals, Second Circuit, 159 F.2d 818, considered that any question as to the timeliness of his objection to this evidence was eliminated by its disposition on its merits by the District Court, and, one judge dissenting, it held both his search and arrest to have been illegal. ***583** The Government was granted certiorari,[2] raising no question other than the correctness of the holding by the Court of Appeals that the evidence was the fruit of an illegal arrest and search.

An investigator of the Office of Price Administration was informed by one Reed that he was to buy counterfeit gasoline ration coupons from a certain Buttitta at a named place in the City of Buffalo, New York. The investigator and a detective from the Buffalo Police Department trailed Buttitta's car and finally came upon it parked at the appointed place. They went to the car and found the informer Reed, the only occupant of the rear seat, holding in his hand two gasoline ration coupons which later proved to be counterfeit. Reed, on being asked, said he obtained them from Buttitta, who was sitting in the driver's seat. Beside Buttitta sat Di Re. All three were taken into custody, 'frisked' to make sure they had no weapons and were then taken to the police station. Here Di Re complied with a direction to put the contents of his pockets on a table. Two gasoline and several fuel oil ration coupons were laid out. He said he had found them in the street. About two hours later, after questioning, he was 'booked' and thoroughly searched. One hundred inventory gasoline ration coupons were found in an envelope concealed between his shirt and underwear. These, as well as the gasoline coupons earlier disclosed, proved to be counterfeit. Their introduction as evidence, over the objection of the defendant, was held by the court below to require reversal of the conviction.[3]

I.

The Government now defends the search upon alternative grounds: 1, that search of Di Re was justified as ***584** incident to a lawful arrest; 2, that search of his person was justified as incident to search of a vehicle reasonably believed to be carrying contraband. We consider the second ground first.

The claim is that officers have the rights, without a warrant, to search any car which they have reasonable cause to believe carries contraband, and incidentally may search any occupant of such car when the contraband sought is of a character that might be concealed on the person. This contention calls, first, for a determination as to whether the circumstances gave a right to search this car.

  

The belief that an automobile is more vulnerable to search without warrant than is other property has its source in the decision of Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790. That search was made and its validity was upheld under the search and seizure provisions enacted for enforcement of the National Prohibition Act and of that Act alone. Transportation of liquor in violation of that Act subjected first the liquor, and then the vehicle in which it was found, to seizure and confiscation, and the person 'in charge thereof' to arrest.[4] ****224** The Court reviewed ***585** the legislative history of enforcement legislation and concluded (267 U.S. at page 147, 45 S.Ct. at page 283), 'The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles in[5] the enforcement of the Prohibition Act is thus clearly established by the legislative history of the Stanley Amendment. Is such a distinction consistent with the Fourth Amendment? We think that it is. The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.' The progeny of the Carroll case likewise dealt with searches and seizures under this Act. Husty v. United States, 282 U.S. 694, 51 S.Ct. 240, 75 L.Ed. 629, 74 A.L.R. 1407.

Obviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional. In view of the strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable,' the Carroll decision falls short of establishing a doctrine that, without such legislation, automobiles nonetheless are subject to search without warrant in enforcement of all federal statutes. This Court has never yet said so. The most that can be said is that some of the language by which the Court justified the search and seizure legislation in the Carroll case might be used to make a distinction between what is a reasonable search as applied to an automobile and as applied to a residence or fixed premises, even in the absence of legislation.

We need not decide whether, without such Congressional authorization as was found controlling in the ***586** Carroll case, any automobile is subject to search without warrant on reasonable cause to believe it contains contraband. In the case before us there appears to have been no search of the car itself. No one on the spot seems to have thought there was cause for searching it, or that it was subject to forfeiture. The nature of ration tickets, the contraband involved, was not such that a car would be necessary or advantageous in carrying them except as an incident of carrying the person. When the question of admissibility of this evidence arose in the trial court, counsel for the Government made no claim that there had been search or cause for search of the car. No question of fact concerning such a claim has been resolved by the trial court or the jury.

Assuming, however, without deciding, that there was reasonable cause for searching the car, did it confer an incidental right to search Di Re? It is admitted by the Government that there is no authority to that effect, either in the statute or in precedent decision of this Court, but we are asked to extend the assumed right of car search to include the person of occupants because 'common sense demands that such rights exist in a case such as this where the contraband sought is a small article which could easily be concealed on the person.'

****225** This argument points up the different relation of the automobile to the crime in the Carroll case than in the one before us. An automobile, as was there pointed out, was an almost indispensable instrumentality in large-scale violation of the National Prohibition Act, and the car itself therefore was treated somewhat as an offender and became contraband. But even the National Prohibition Act did not direct the arrest of all occupants but only of the person in charge of the offending vehicle, though there is better reason to assume that no passenger in a car loaded with liquor would remain innocent of knowledge ***587** of the car's cargo than to assume that a passenger must know what pieces of paper are carried in the pockets of the driver.

The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued. By a parity of reasoning with that on which the Government disclaims the right to search occupants of a house, we suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?

We see no ground for expanding the ruling in the Carroll case to justify this arrest and search as incident to the search of a car. We are not convinced that a person, by mere presence in

  

a suspected car, loses immunities from search of his person to which he would otherwise be entitled.

II.

The other ground on which the Government defended the search of Di Re, and the only one on which it relied at the trial, is that the officers justifiably arrested him and that this conferred a right to search his person. If he was lawfully arrested, it is not questioned that the ensuing search was permissible. Hence we must examine the circumstances and the law of arrest.

***588** Some members of this Court rest their conclusion that the arrest was invalid on s 180 of the New York Code of Criminal Procedure which requires an officer making an arrest without a warrant to inform the suspect of the cause of arrest, except when it is made during commission of the crime or when in pursuit after an escape.[6] This question was first raised from the Bench during argument in this Court. Di Re did not assert this ground of invalidity at the trial. Had he done so the Government might have met it with proof of circumstances which in themselves would show that Di Re had been effectively informed, even if the circumstances fell short of establishing the statutory exception. The proceedings below did not develop the facts concerning Di Re's arrest in connection with this requirement. Inasmuch as the issue would lead to exploration of the law as to waiver when the defense was not raised in either court below, or indeed by the petition here, and as to applicability of the statute if, as the Government contends, lack of express declaration was unnecessary because circumstances supplied the required information, we do not undertake to determine on this record whether Di Re's arrest satisfied this provision of the New York law.

****226** The arrest was challenged in the courts below on the ground that it violated another provision of New York law which was considered to be controlling on the subject. The court below assumed that the arresting officer, a state officer, derived his authority to arrest Buttitta and Reed, although it was for a federal crime, from ***589** s 177 of the New York Code of Criminal Procedure, and also considered the legality of the arrest of Di Re under paragraph 3 thereof.[7] In this Court the Covernment originally argued that the arrest was authorized under both paragraphs 2 and 3 of the State law, but in a supplemental brief the Government withdraws the suggestion 'that the arrest of respondent can be justified under subsection 2 of section 177 of the New York Code of Criminal Procedure.' Instead, it now urges that 'the validity of an arrest without a warrant for a federal crime is an matter of federal law to be determined by a uniform rule applicable in all federal courts.'

We believe, however, that in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity. By one of the earliest acts of Congress, the principle of which is still retained, the arrest by judicial process for a federal offense must be 'agreeably to the usual mode of process against offenders in such State.'[8] There is no reason to ***590** believe that state law is not an equally appropriate standard by which to test arrests without warrant, except in those cases where Congress has enacted a federal rule. Indeed the enactment of a federal rule in some specific cases seems to imply the absence of any general federal law of arrest.

Turning to the Acts of Congress to find a rule for arrest without warrant, we find none which controls such a case as we have here and none that purports to create a general rule on the subject. If we were to try to find or fashion a federal rule for arrest without warrant, it appears that the federal legislative materials are meager, inconsistent and inconclusive. Federal Bureau of Investigation officers are authorized only 'to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer.'[9] However, marshals and their deputies 'shall have the power to make arrests without warrant for any offense against the laws of the United States committed in their presence or for any felony cognizable under the laws of the United States in cases where such felony has in fact been or is being committed and they have reasonable grounds to believe that the person to be arrested has committed or is committing it,'[10] and they are also given the same powers as sheriffs in the same state ****227** may have, by law, in executing the laws thereof.[11]

In denouncing unlawful search by federal officers as a misdemeanor, Congress provided that it should not ***591** apply to one 'arresting or attempting to arrest any person committing or attempting to commit an offense in the presence of such officer, agent or employee, or who has committed, or who is suspected on reasonable grounds of

  

having committed, a felony.'[12] Thus the legislative sources, while yielding some common provisions, also contain many inconsistencies. No act of Congress lays down a general federal rule for arrest without warrant for federal offenses. None purports to supersede state law. And none applies to this arrest which, while for a federal offense, was made by a state officer accompanied by federal officers who had no power of arrest. Therefore the New York statute provides the standard by which this arrest must stand or fall.

Since, under that law, any valid arrest of Di Re, if for a misdemeanor must be for one committed in the arresting officer's presence, and if for a felony must be for one which the officer had reasonable grounds to believe the suspect had committed, we seek to learn for what offense this man was taken into custody. The arresting officer testified that he did not tell Di Re what he was being arrested for. After he was taken to the station he was 'booked,' but the record does not show upon what charge. He was later indicted for the misdemeanor of knowingly possessing counterfeit gasoline ration coupons in violation of Ration Order No. 5(c) of the Office of Price Administrator. But on appeal the Government suggested the arrest may be defended as one for a felony because probable grounds existed for believing him guilty of the felony of conspiracy under s 37 of the Criminal Code,[13] and in this Court for the first time it suggests that there were grounds for arrest on a charge of possessing a known counterfeit writing with intent to utter it as true for the ***592** purpose of defrauding the United States, a felony under s 28 of the Criminal Code.[14]

Assuming, without deciding, that an arrest without a warrant on a charge not communicated at the time may later be justified if the arresting officer's knowledge gave probable grounds to believe any felony found in the statute books had been committed, we are brought to the inquiry whether the circumstances at that time afforded such grounds.

The Government now concedes that the only person who committed a possible misdemeanor in the open presence of the officer was Reed, the Government informer who was found visibly possessing the coupons. Of course, as to Buttitta they had previous information that he was to sell such coupons to Reed, and Reed gave information that he had done so. But the officer had no such information as to Di Re. All they had was his presence, and if his presence was not enough to make a case for arrest for a misdemeanor, it is hard to see how it was enough for the felony of violating s 28 of the Criminal Code.

The relevant difference between Ration Order 5(c) and s 28 of the Criminal Code is that the former declares mere possession of a counterfeit coupon an offense, while the latter defines a felony which consists not merely of possession but also of knowledge of the instrument's counterfeit character, and also of intent to utter it as true. It is admitted that at the time of the arrest the officers had no information implicating Di Re and no information pointing to possession of any coupons, unless his presence in the car warranted that inference. Of course they had no information hinting further at the knowledge and intent required as elements of the felony under the statute.

***593** III.

The Government's defense of the arrest relies most heavily on the conspiracy ****228** ground. In view of Reed's character as an informer, it is questionable whether a conspiracy is shown. But if the presence of Di Re in the car did not authorize an inference of participation in the Buttitta-Reed sale, it fails to support the inference of any felony at all.

There is no evidence that it is a fact or that the officers had any information indicating that Di Re was in the car when Reed obtained ration coupons from Buttitta, and none that he heard or took part in any conversation on the subject. Reed, the informer, certainly knew it if any part of his transaction was in Di Re's presence. But he was not called as a witness by the Government, nor shown to be unavailable, and we must assume that his testimony would not have been helpful in bringing guilty knowledge home to Di Re.

An inference of participation in conspiracy does not seem to be sustained by the facts peculiar to this case. The argument that one who 'accompanies a criminal to a crime rendezvous' cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passersby, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If Di Re had witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons, and if he saw that they were ration coupons, it would not follow that he would know them to be counterfeit. Indeed it appeared at the trial to require an expert to establish that fact. Presumptions of guilt are not lightly to be indulged from mere meetings.

  

***594** Moreover, whatever suspicion might result from Di Re's mere presence seems diminished, if not destroyed, when Reed, present as the informer, pointed out Buttitta, and Buttitta only, as a guilty party. No reason appears to doubt that Reed willingly would involve Di Re if the nature of the transaction permitted. Yet he did not incriminate Di Re. Any inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person.

IV.

The Government also makes, and several times repeats, an argument to the effect that the officers could infer probable cause from the fact that Di Re did not protest his arrest, did not at once assert his innocence, and silently accepted the command to go along to the police station. One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases. But courts will hardly penalize failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law. A layman may not find it expedient to hazard resistance on his own judgment of the law at a time when he cannot know what information, correct or incorrect, the officers may be acting upon. It is likely to end in fruitless and unseemly controversy in a public street, if not in an additional charge of resisting an officer. If the officers believed they had probable cause for his arrest on a felony charge, it is not to be supposed that they would have been dissuaded by his profession of innocence.

It is the right of one placed under arrest to submit to custody and to reserve his defenses for the neutral tribunals erected by the law for the purpose of judging his case. An inference of probable cause from a failure to engage in discussion of the merits of the charge with arresting ***595** officers is unwarranted. Probable cause cannot be found from submissiveness, and the presumption of innocence is not lost or impaired by neglect to argue with a policeman. It is the officer's responsibility to know what he is arresting for, and why, and one in the unhappy plight of being taken into custody is not required to test the legality of the arrest before the officer who is making it.

The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officer's knowledge at the time gave ****229** them grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up.[15] In law it is good or bad when it starts and does not change character from its success.

V.

We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand.

Affirmed.

The CHIEF JUSTICE and Mr. Justice BLACK dissent.

**All Citations**

332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210

Footnotes

1 50 U.S.C.App. Supp. V, s 633, 50 U.S.C.A.Appendix, s 633.

2 331 U.S. 800, 67 S.Ct. 1348.

3 2 Cir., 159 F.2d 818.

4 Section 26, Title II of the National Prohibition Act provided in part as follows: 'When * * * any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall

  

take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. * * *' 27 U.S.C.A. s 40. In the Carroll case it was said 267 U.S. at page 155, 45 S.Ct. at page 286, that this section was intended 'to reach and destroy the forbidden liquor in transportation and the provisions for forfeiture of the vehicle and the arrest of the transporter were incidental'; and 267 U.S. at page 158, 45 S.Ct. at page 287, 'the right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. The seizure in such a proceeding comes before the arrest as section 26 indicates. * * *'

5 This word 'in' is erroneously printed 'is' in the case as reported in 267 U.S.

6 Section 180 provides:

'When arresting a person without a warrant the officer must inform him of the authority of the officer and the cause of the arrest, except when the person arrested is in the actual commission of a crime, or is pursued immediately after an escape.'

See also People v. Marendi, 213 N.Y. 600, 610, 107 N.E. 1058, 1061. Cf. John Bad Elk v. United States, 177 U.S. 529, 20 S.Ct. 729, 44 L.Ed. 874; Christie v. Leachinsky (1947) 1 All Eng. 567.

7 Section 177 of the New York Code of Criminal Procedure provides: 'A peace officer may, without a warrant, arrest a person,

'1. For a crime, committed or attempted in his presence;

'2. When the person arrested has committed a felony, although not in his presence;

'3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it.'

8 The Act of September 24, 1789 (Ch. 20, s 33, 1 Stat. 91), concerning arrest with warrant, provided: 'That for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned or bailed, as the cae may be, for trial before such court of the United States as by this act has cognizance of the offence.' This provision has remained substantially similar to this day. 18 U.S.C. s 591, 18 U.S.C.A. s 591. See also 1 Ops.Atty.Gen. 85, 86.

9 48 Stat. 1008, 49 Stat. 77, 5 U.S.C. s 300a, 5 U.S.C.A. s 300a.

10 49 Stat. 378, 28 U.S.C. s 504a, 28 U.S.C.A. s 504a.

11 1 Stat. 425, 12 Stat. 282, 28 U.S.C. s 504, 28 U.S.C.A. s 504.

12 49 Stat. 877, 18 U.S.C. s 53a, 18 U.S.C.A. s 53a.

13 18 U.S.C. s 88, 18 U.S.C.A. s 88.

14 18 U.S.C. s 72, 18 U.S.C.A. s 72.

15 See, for example, Byars v. United States, 273 U.S. 28, 29, 47 S.Ct. 248, 71 L.Ed. 520.

16 F.3d 582
United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Joseph GASTIABURO, a/k/a Joe Gastiaburo, a/k/a Joseph Gastiburo, a/k/a Joseph Menendez, a/k/a Joseph Gastibury, a/k/a Robert Julio Gastiaburo, a/k/a Joseph Mendez, a/k/a Joseph Rodriguez, Defendant–Appellant.

No. 92–5513.
|
Argued Oct. 28, 1993.
|
Decided Feb. 8, 1994.

**Synopsis**
Defendant was convicted of possession of drugs with intent to distribute, carrying firearm during and in relation to drug trafficking crime, and possession of firearm by convicted felon after jury trial in the United States District Court for the Eastern District of Virginia, Thomas Selby Ellis III, J. Defendant appealed. The Court of Appeals, Murnaghan, Circuit Judge, held that: (1) warrantless search of defendant's automobile after it had been impounded and he had been arrested came within automobile exception to warrant requirement; (2) opinion testimony of police sergeant as to defendant's intent to distribute drugs found in his car was not plain error; (3) police sergeant's testimony as to attributes of persons involved in distribution of drugs and "tools of trade" was proper expert opinion testimony; and (4) district judge's questioning of sole defense witness as to whether he had ever been convicted of felony, although inappropriate, was not so prejudicial as to deny fair trial and to permit review on appeal absent objection at trial.

Affirmed.

**Attorneys and Law Firms**

***584 ARGUED:** Fred Warren Bennett, Baltimore, Maryland, for Appellant. Russel N. Jacobson, Special Assistant United States Attorney, Alexandria, Virginia, for Appellee.

**ON BRIEF:** Kenneth E. Melson, United States Attorney, Marcus J. Davis, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Before MURNAGHAN and NIEMEYER, Circuit Judges, and YOUNG, Senior U.S. District Judge for the District of Maryland, sitting by designation.

**OPINION**

MURNAGHAN, Circuit Judge:

After pulling over defendant-appellant, Joseph Gastiaburo, for a routine traffic stop, a Virginia State Trooper conducted a warrantless consent search of Gastiaburo's car. The search produced $10,000 cash, drug paraphernalia, and several grams of cocaine base ("crack cocaine"). The state police arrested Gastiaburo and impounded his car.

Five weeks later, after receiving a tip from an acquaintance of Gastiaburo, the police conducted a warrantless search of a hidden compartment in the car's dashboard and seized a loaded semiautomatic pistol and a much larger quantity of crack cocaine. The district court denied Gastiaburo's motion to suppress the evidence seized during the latter search.

At trial under an indictment charging (a) possession of drugs with intent to distribute, (b) carrying a firearm during and in relation to a drug trafficking crime, and (c) possession of a firearm by a convicted felon, the government put a law enforcement officer on the stand as an expert on drug trafficking practices and techniques. Over and beyond direct and cross-examination, the district judge asked the government's expert several questions; later, he asked the defense's sole witness several questions, as well. The jury convicted Gastiaburo on all counts, and the district judge sentenced him to 322 months imprisonment. He has appealed.

*I. The Facts*

At midday on October 8, 1991, Joseph Gastiaburo and a passenger, Dina Viola, were heading southbound on Interstate 95. Virginia State Police Trooper Mark Cosslett pulled Gastiaburo over for reckless driving. Adhering to state police procedures for a routine traffic stop, Cosslett asked

  

Gastiaburo for his license and registration and also asked if he was transporting any drugs or weapons. Gastiaburo replied that he was not, and asked Cosslett whether he would like to take a look in the vehicle. Cosslett replied, "You don't mind if I take a look through your vehicle?" Gastiaburo answered, "No, go ahead." Cosslett reiterated his request and explicitly confirmed that Gastiaburo had no objections to a search of both the vehicle and any containers therein.

Following those repeated consents to a search, Cosslett placed Gastiaburo in the police cruiser, wrote out a traffic citation, and waited for a backup officer. After the backup arrived, Gastiaburo was again asked for permission to search the vehicle, including any containers, and he again consented. With Gastiaburo sitting on the interstate guardrail adjacent to the car, Cosslett commenced his search. The search produced, among other things, a set of hand scales, rolling papers, razor blades, a knife with a retractable blade, a large number of small plastic baggies, an address book with various names and financial notations, a paging device or "beeper," $10,000 in cash (folded into $100 increments), a box of .25 caliber ammunition, and a black leather zippered pouch containing twenty-one small zip-locked plastic baggies, each containing about one-fifth of a gram of a rock-like substance that was subsequently determined to be crack cocaine.

The backup officer arrested Gastiaburo and drove him to a nearby detention center. His car was seized for forfeiture by the Commonwealth of Virginia and removed to an impoundment lot at the regional State Police headquarters, where it was secured by parking state vehicles around it. The next morning an inventory search of the impounded car produced no additional contraband.

On November 15, 1991, Cosslett and Viola, Gastiaburo's passenger at the time of arrest, ***585** met at the Prince William County Courthouse. Viola inquired whether he had found the gun. When Cosslett said that he had not, Viola told him that there was a hidden compartment located behind the radio in the console of Gastiaburo's car, and that the compartment contained drugs, money, and a handgun.

Cosslett promptly went to the impound lot and, without obtaining a warrant, searched for and located the hidden compartment. He found and seized a loaded, .25 caliber semiautomatic pistol and, wrapped in aluminum foil and then in brown paper lunch bags, a lump of rock-like substance that was subsequently determined to be a 24–gram "rock" of crack cocaine.

A grand jury of the United States District Court for the Eastern District of Virginia returned the above-mentioned three-count indictment against Gastiaburo. On April 3, 1992, a suppression hearing took place. After listening to conflicting testimony from Gastiaburo and Cosslett, the district judge resolved the credibility conflicts in Cosslett's favor and denied all of Gastiaburo's motions, including a motion to suppress the gun and the crack cocaine that Cosslett had seized during his warrantless search of the impounded car on November 15, 1991.

On April 22, 1992, Gastiaburo was tried before a jury in Judge Ellis's courtroom. The government called Cosslett, who gave testimony substantially similar to his earlier testimony at the suppression hearing. The government also called Sergeant Floyd Johnston of the U.S. Park Police as an expert in the field of drug trafficking practices and techniques. Among other things, Johnston examined the various government exhibits that had been seized from Gastiaburo's car and testified that they were generally consistent with crack cocaine distribution, rather than with mere personal use of the drug. In response to questions from the bench, Johnston also testified about the quantities of crack cocaine consumed by typical addicts.

Gastiaburo called only one witness, Charles J. Pucci, his brother-in-law. Pucci testified that Gastiaburo had visited him in New York City shortly before the arrest, and that he had given Gastiaburo $10,000 in loose cash to pay a debt to a family member in Florida. The court asked Pucci several questions about the cash, and also inquired about Pucci's occupation. Judge Ellis then asked whether Pucci had ever been convicted of a felony. Pucci responded, "I have not."

The jury returned guilty verdicts on all three counts. The district court imposed a sentence of 322 months imprisonment plus five years of supervised release, $10,000 forfeiture, and $150 in special assessments. Gastiaburo's appeal followed.

*II. The Gun and Cocaine Seized on November 15, 1991*

Gastiaburo has contended that the gun and the 24–gram rock of crack cocaine that the police seized from his car on November 15, 1991 should have been suppressed because they were obtained without a warrant, in violation of his Fourth Amendment rights. In response the government has argued that the district court's denial of Gastiaburo's motion

  

to suppress should be affirmed on any of four grounds: (1) the evidence was seized during a valid consent search; (2) the evidence was seized during a valid inventory search; (3) the police had probable cause to believe the search would uncover contraband (*i.e.,* the so-called "automobile exception" to the warrant requirement); or (4) the evidence was seized during a valid search of a vehicle subject to forfeiture. The third argument, based on the "automobile exception" to the warrant requirement, is clearly correct. Because we review such a mixed question of law and fact *de novo, see, e.g., United States v. Moore,* 817 F.2d 1105, 1106–08 (4th Cir.), *cert. denied,* 484 U.S. 965, 108 S.Ct. 456, 98 L.Ed.2d 396 (1987), the district court's decision not to suppress the evidence seized on November 15, 1991 should be affirmed.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV. Searches conducted without a warrant issued by a judge or magistrate upon probable cause "are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and ***586** well-delineated exceptions." *California v. Acevedo,* 500 U.S. 565, ——, ——, 111 S.Ct. 1982, 1991, 114 L.Ed.2d 619 (1991) (citations and internal quotation marks omitted); *see also United States v. Turner,* 933 F.2d 240, 244 (4th Cir.1991). At least since 1925, when the Supreme Court handed down its decision in *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the federal judiciary has recognized an "automobile exception" to the warrant requirement: it may be reasonable and therefore constitutional to search a movable vehicle without a warrant, even though it would be unreasonable and unconstitutional to conduct a similar search of a home, store, or other fixed piece of property. *See id.* at 153, 158–59, 45 S.Ct. at 285, 287.

The Supreme Court delivered its most recent exposition on the "automobile exception" in *California v. Acevedo, supra.* The *Acevedo* Court held that "[t]he police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." 111 S.Ct. at 1991. "[T]he scope of a warrantless search of an automobile is 'no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause.' " *United States v. $29,000—U.S. Currency,* 745 F.2d 853, 855 (4th Cir.1984) (quoting *United States v. Ross,* 456 U.S. 798, 823, 102 S.Ct. 2157, 2172, 72 L.Ed.2d 572 (1982)). With or without warrant, the scope of the search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found. For example, probable cause to believe that a container placed in the trunk of an automobile contains contraband does not justify a search of the entire car. *See Acevedo,* 500 U.S. at ——, 111 S.Ct. at 1991 (citing *Ross,* 456 U.S. at 824, 102 S.Ct. at 2172).

In the present case, as of November 15, 1991, the police had probable cause to believe that one particular area within Gastiaburo's car contained as-yet undiscovered contraband. On that date, Dina Viola, Gastiaburo's passenger at the time of his arrest, met Cosslett at the Prince William County Courthouse and told him that there was a hidden compartment behind the radio in the console of Gastiaburo's car and that the compartment contained additional drugs and money, as well as a handgun. Those facts are uncontroverted, and they would have more than sufficed to justify the issuance of a warrant by a magistrate. Therefore, they also sufficed to justify a warrantless search of the area behind the radio.

Furthermore, the facts in the record indicate no overreaching by the police. As of November 15, 1991, the police apparently had probable cause to believe that contraband remained hidden only where Viola had told Cosslett to look. Appropriately, Cosslett confined his search to that area. And Gastiaburo does not claim that the search of November 15, 1991 covered a broader scope than that contained in the tip that gave Cosslett probable cause. Therefore, the November 15, 1991 search complied with the requirements of the Fourth Amendment.

Gastiaburo has made two responses to the government's "automobile exception" argument. First, he has contended that impoundment effectively transformed his car from a movable vehicle into a "fixed piece of property," thus making the automobile exception to the warrant requirement inapplicable. However, the justification to conduct a warrantless search under the automobile exception does not disappear merely because the car has been immobilized and impounded. *See United States v. Johns,* 469 U.S. 478, 484, 105 S.Ct. 881, 885, 83 L.Ed.2d 890 (1985); *Florida v. Meyers,* 466 U.S. 380, 382, 104 S.Ct. 1852, 1853, 80 L.Ed.2d 381 (1984) (per curiam); *Michigan v. Thomas,* 458 U.S. 259, 261, 102 S.Ct. 3079–3080–81, 73 L.Ed.2d 750 (1982) (per curiam); *see also Turner,* 933 F.2d at 244; *$29,000—U.S. Currency,* 745 F.2d at 855. Under the Supreme Court's precedents, the fact that impoundment may have made it virtually impossible for anyone to drive the car away or to tamper with its contents is irrelevant to the constitutionality

  

of a warrantless search under the circumstances of the present case. *See, e.g., Thomas,* 458 U.S. at 261, 102 S.Ct. at 3081.

Second, Gastiaburo has noted that thirty-eight days transpired between the seizure ***587** of his car on October 8, 1991 and the warrantless search in question, and has argued that the delay violated the "temporal limit on the automobile exception" and that "it was a *per se* unreasonable delay." Gastiaburo's "delay" argument also lacks merit. Not a single published federal case speaks of a "temporal limit" to the automobile exception. The Supreme Court has repeatedly stated that a warrantless search of a car (1) need not occur contemporaneously with the car's lawful seizure and (2) need not be justified by the existence of exigent circumstances that might have made it impractical to secure a warrant prior to the search. *See Acevedo,* 500 U.S. at ——, 111 S.Ct. at 1986 (explaining that the police can search later whenever they could have searched earlier, had they so chosen) (describing the Court's reasoning in *Chambers v. Maroney,* 399 U.S. 42, 51–52, 90 S.Ct. 1975, 1981–82, 26 L.Ed.2d 419 (1970)); *Johns,* 469 U.S. at 484–85, 105 S.Ct. at 885–86; *Thomas,* 458 U.S. at 261–62, 102 S.Ct. at 3080–81. Therefore, the passage of time between the seizure and the search of Gastiaburo's car is legally irrelevant.

Moreover, Cosslett's actual "delay" here was minimal: he conducted the search on the very same day that he first had probable cause to believe contraband could be found behind the dashboard of Gastiaburo's car. Cosslett testified at the suppression hearing that, upon learning of the hidden compartment in Gastiaburo's dashboard, he proceeded "to the headquarters, obtained the keys from the evidence custodian, removed the vehicles [that were blocking in Gastiaburo's car], and checked the hidden compartment." Such an expeditious search cannot be deemed "*per se* unreasonable." Rather, it falls squarely within the specifically established and well-delineated "automobile exception" to the Fourth Amendment's warrant requirement.

*III. Expert Testimony*

Gastiaburo next has contended that the district court erred in admitting expert testimony from Sergeant Johnston that included (1) an opinion as to Gastiaburo's intent, allegedly in violation of Rule 704(b) of the Federal Rules of Evidence; and (2) matters within the common understanding of the jurors, allegedly in violation of Rule 702.

*A. Johnston's testimony on "intent to distribute."* The prosecutor had asked Johnston: "Would you have an opinion based on your training and experience what that crack cocaine [that the police had seized from the hidden compartment in Gastiaburo's car and the twenty-one zip-locked plastic baggies, each containing a "hit" of crack cocaine], ... were possessed for, taking all the elements into consideration?" Johnston replied: "Clearly, based on my opinion, my training and experience, it was certainly possessed with the intent to distribute." Gastiaburo's trial attorney did not object. On appeal, Gastiaburo has claimed that Johnston's answer provided expert opinion testimony on Gastiaburo's intent in a specific-intent crime, a violation of Federal Rule of Evidence 704(b).

Because Gastiaburo did not object at trial, we review the admission of Johnston's expert testimony for plain error. Rule 52(b) of the Federal Rules of Criminal Procedure provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed.R.Crim.P. 52(b). The Supreme Court recently interpreted Rule 52(b) to require not only the existence of an "error" (*i.e.,* a "[d]eviation from a legal rule" that the defendant has not waived), but also that the error be "plain" (*i.e.,* "clear" or, equivalently, "obvious" under the current applicable law). *United States v. Olano,* 507 U.S. 725, ——, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993) (citations and internal quotation marks omitted).

Rule 704(b) of the Federal Rules of Evidence provides:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

***588** Fed.R.Evid. 704(b). Rule 704(b) was enacted in the wake of the attempted assassination of President Reagan and the murder of John Lennon, and was an attempt to constrain psychiatric testimony on behalf of defendants asserting the insanity defense. *See generally* Anne Lawson Braswell, Note, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense,* 72 Cornell L.Rev. 620 (1987). The application of the same rule in an entirely different context—a law enforcement officer's expert opinion testimony on behalf of the government at the trial of an alleged drug dealer—is murky at best.

  

Was Johnston in fact "testifying with respect to the mental state or condition of a defendant in a criminal case"? Did he actually "state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element" of the crime of possession of cocaine with intent to distribute? The testimony lends itself to the interpretation that possession of the quantity of crack cocaine seized from Gastiaburo's car—with the individual "hits" packaged in twenty-one small zip-locked baggies, and the larger "rock" in foil and paper bags—was consistent with the distribution of cocaine, rather than with mere personal use of the drug.

In any event, Gastiaburo's failure to object at the trial made the relevant inquiry for us whether Judge Ellis committed a "plain error" under Rule 52(b). The error, if any, was not "plain" (or "clear" or "obvious"). *Cf. Olano,* 507 U.S. at ——, 113 S.Ct. at 1777. Most appellate panels have refused to find error in the admission of expert testimony on intent to distribute controlled substances. *See, e.g., United States v. Valentine,* 984 F.2d 906, 910 (8th Cir.), *cert. denied,* 510 U.S. 828, 114 S.Ct. 93, 126 L.Ed.2d 60 (1993); *United States v. Chin,* 981 F.2d 1275, 1279 (D.C.Cir.1992), *cert. denied,* 508 U.S. 923, 113 S.Ct. 2377, 124 L.Ed.2d 281 (1993); *United States v. Williams,* 980 F.2d 1463, 1465–66 (D.C.Cir.1992); *United States v. Wilson,* 964 F.2d 807, 810 (8th Cir.1992); *United States v. Gomez–Norena,* 908 F.2d 497, 502 (9th Cir.), *cert. denied,* 498 U.S. 947, 111 S.Ct. 363, 112 L.Ed.2d 326 (1990); *United States v. Alvarez,* 837 F.2d 1024, 1030–31 (11th Cir.), *cert. denied,* 486 U.S. 1026, 108 S.Ct. 2003, 2004, 100 L.Ed.2d 234, 235 (1988).[*] One recent D.C. Circuit decision did find that the admission of expert testimony on the defendant's intent to distribute violated Rule 704(b), but went on to hold that the error was not "plain" under the settled law of the Supreme Court or the D.C. Circuit, as it stood at the time of the trial. *See United States v. Mitchell,* 996 F.2d 419, 421–23 (D.C.Cir.1993).

*B. Johnston's other testimony.* Gastiaburo also has contended that the district court should have rejected various parts of Johnston's testimony as insufficiently helpful for the trier of fact under Federal Rule of Evidence 702. On direct examination, Johnston testified, over defense counsel's objection, that it is not uncommon for people transporting controlled substances to grant consent to law enforcement officers to search their possessions or their persons. He also testified about the attributes of persons involved in the distribution of drugs and the "tools of the trade"—*e.g.,* beepers, address books, the quantities of drugs possessed by dealers, and so on. During defense counsel's cross-examination, Judge Ellis interjected, asking Johnston about half-a-dozen questions. In response, Johnston testified about addicts' typical levels of crack consumption, typical patterns of addiction, and typical quantities of crack that a user will purchase and hold at any given moment. Although Gastiaburo did not object at trial to the colloquy between Judge Ellis and Johnston, he has complained on appeal that the judge's questions violated Rule 614 of the Federal Rules of Evidence, *see infra* Part IV, and that the Johnston's answers violated Rule 702.

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a ***589** fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The trial judge has broad discretion under Rule 702. *See Hamling v. United States,* 418 U.S. 87, 108, 94 S.Ct. 2887, 2903, 41 L.Ed.2d 590 (1974) ( "[T]he District Court has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony.") (citations omitted); *cf. United States v. Ham,* 998 F.2d 1247, 1252 (4th Cir.1993).

As then-Judge Ruth Bader Ginsburg has explained: "In accord with the commodious standard of Federal Rule of Evidence 702, expert testimony on the *modus operandi* of criminals 'is commonly admitted,' particularly regarding the methods of drug dealers." *Chin,* 981 F.2d at 1279 (quoting *United States v. Dunn,* 846 F.2d 761, 763 (D.C.Cir.1988)); *see also Mitchell,* 996 F.2d at 423 ("Federal courts often allow expert testimony on narcotics operations to familiarize jurors with the variety of methods by which drug dealers attempt to pursue and conceal their activities....") (citing *Dunn,* 846 F.2d at 763).

We have repeatedly upheld the admission of law enforcement officers' expert opinion testimony in drug trafficking cases. *See, e.g., United States v. Safari,* 849 F.2d 891, 895 (4th Cir.) (upholding the admission of expert testimony on the size of an average dose of heroin, because, "[w]hile not usurping the function of the jury, this testimony aided the jury during its deliberations, for most laymen are not familiar with the quantity, purity, and dosage units of heroin"), *cert. denied,* 488 U.S. 945, 109 S.Ct. 374, 102 L.Ed.2d 363 (1988); *United States v. Monu,* 782 F.2d 1209, 1210–11 (4th Cir.1986) (upholding the admission of two investigative agents' expert

opinion testimony regarding the purity of heroin and heroin distributors' use of triple-beam balance scales). Similarly, in *United States v. Wilson,* 964 F.2d at 809–10, the Eighth Circuit upheld a conviction for possession with intent to distribute and affirmed the admission of a drug enforcement agent's testimony that, based upon his experience and training, 130 grams of methamphetamine (the amount seized from the defendant) was more than generally possessed by mere users of the drug. The Eighth Circuit found no abuse of discretion in admitting the agent's testimony: "Such testimony aids the jury by putting the drug dealer in context with the drug world. It is a reasonable assumption that a jury is not well versed in the behavior and average consumption of drug users." *Id.* at 810 (citation omitted); *see also United States v. Foster,* 939 F.2d 445, 452 (7th Cir.1991) (noting that "jurors are not well versed in the behavior of drug dealers"). Here, too, the district court properly admitted Johnston's expert testimony.

*IV. The District Judge's Questioning of Witnesses*

Gastiaburo has further contended that he was denied a fair trial because the district judge violated Rule 614 of the Federal Rules of Evidence by improperly questioning witnesses at trial. Gastiaburo has claimed that there was error in the judge's questioning of Charles Pucci, Gastiaburo's brother-in-law and the only witness whom Gastiaburo called at trial. At the end of the government's cross-examination of Pucci, the judge asked him whether he typically sent $10,000 payments in cash via his brother-in-law (Gastiaburo), where he got the cash, what his occupation was, and whether he had ever been convicted of a felony. Gastiaburo did not object to those questions at trial.

Gastiaburo's argument appears to come too late. The plain language of Rule 614(c) of the Federal Rules of Evidence requires objections to the trial judge's interrogation of witnesses "[to] be made at the time or at the next available opportunity when the jury is not present." Fed.R.Evid. 614(c). We, interpreting that rule, have held that "the failure of ... counsel to object to any of [the district judge's] questioning at trial precludes our review of this issue on appeal." *Stillman v. Norfolk & W. Ry. Co.,* 811 F.2d 834, 839 (4th Cir.1987).

*Stillman* recognized a "limited exception" to the general rule against appellate review " '[w]here a trial judge's comments were so prejudicial as to deny a party an opportunity for a fair and impartial trial.' " ***590** *Id.* (quoting *Miley v. Delta Marine Drilling Co.,* 473 F.2d 856, 857–58 (5th Cir.), *cert. denied,* 414 U.S. 871, 94 S.Ct. 93, 38 L.Ed.2d 89 (1973)). In sketching the contours of that "limited exception," we cited a case in which the judge interrupted the witness to answer the counsel's question himself, referred to the question as one that "any five-year-old idiot" could answer, and then instructed counsel, "Don't waste my time and the jury's on that." *Id.* (internal quotation marks omitted). Even those inflammatory and insulting comments were deemed *not* "sufficiently biased or notorious" to permit appellate review absent any objection at trial. *Id.*

Clearly, none of the questions that Judge Ellis asked of Johnston (a topic dealt with above) even began to approach the level of "bias" or "notoriety" found in the above-cited example. The same can be said of Judge Ellis's questioning of Pucci, with one qualification. Judge Ellis may appear to have overstepped the bounds of proper judicial interrogation when he asked the criminal defendant's sole witness whether he had ever been convicted of a felony. Seen in the printed record, the absence of any particularized, good-faith basis made the question inappropriate.

However, while Judge Ellis's final question of Pucci may have been improvident, it was not so prejudicial as to deny Gastiaburo the opportunity for a fair and impartial trial. Judge Ellis was not requested to retract the question. The answer to it, promptly given, was in the negative. Thus, Gastiaburo's failure to object to Judge Ellis's interrogation during the trial is fatal to his argument on appeal.

*V. Ineffective Assistance of Counsel at Sentencing*

Finally, Gastiaburo has contended that he was denied the effective assistance of counsel at sentencing when, after he claimed on the record that his trial counsel had been ineffective, his counsel failed to allocute on his behalf.

A claim of ineffective assistance of counsel should be raised by motion under 28 U.S.C. § 2255 in the district court and not on direct appeal, unless it "conclusively appears" from the record that defense counsel did not provide effective representation. *United States v. Fisher,* 477 F.2d 300, 302 (4th Cir.1973) (citing *United States v. Mandello,* 426 F.2d 1021, 1023 (4th Cir.1970)); *see also United States v. DeFusco,* 949 F.2d 114, 120–21 (4th Cir.1991), *cert. denied,* 503 U.S. 997, 112 S.Ct. 1703, 118 L.Ed.2d 412 (1992); *United States v. Percy,* 765 F.2d 1199, 1205 (4th Cir.1985).

  

In the present case, the record on appeal does not conclusively demonstrate ineffective assistance of counsel. Therefore, we do not now address the issue on direct appeal. Gastiaburo may assert the claim in a § 2255 *habeas* motion, if he so chooses.

*VI. Conclusion*

Accordingly, the judgment is

*AFFIRMED.*

**All Citations**

16 F.3d 582

Footnotes

* The question presented here has only recently been discussed. At the time of Gastiaburo's trial, the cases cited here had not yet been decided and published, with the exceptions of *Gomez–Norena* and *Alvarez*.

195 F.3d 258
United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

John Jay HILL and Malcolm Scott Hill, Defendants–Appellants.

No. 98–6047.
|
Argued Aug. 11, 1999.
|
Decided Oct. 4, 1999.

**Synopsis**
Defendants were convicted pursuant to conditional guilty pleas in the United States District Court for the Western District of Tennessee, Julia S. Gibbons, Chief District Judge, of possession with intent to distribute cocaine. Defendant appealed denial of their motion to suppress evidence seized from their rental truck pursuant to traffic stop. The Court of Appeals, Clay, Circuit Judge, held that: (1) officer had probable cause to make initial traffic stop; (2) traffic stop did not exceed its original scope; (3) officer had reasonable suspicion to detain defendants beyond scope of stop so as to allow drug detection dog to conduct sniff search; and (4) evidence supported finding that drug detection dog was properly trained and reliable.

Affirmed.

Boggs, Circuit Judge, concurred in result only.

**Attorneys and Law Firms**

***261** Paul M. O'Brien (argued and briefed), Asst. U.S. Attorney, Memphis, TN, for Plaintiff–Appellee.

W. Thomas Dillard (briefed), Richard L. Gaines (argued), Ritchie, Fels & Dillard, Knoxville, TN, for Defendants–Appellants.

Before: KRUPANSKY, BOGGS, and CLAY, Circuit Judges.

CLAY, J., delivered the opinion of the court, in which KRUPANSKY, J., joined. BOGGS, J., concurred in the result only.

**OPINION**

CLAY, Circuit Judge.

Defendants, John J. Hill and Malcolm Scott Hill, appeal from the judgment of conviction entered by the United States District Court for the Western District of Tennessee, following Defendants' conditional guilty plea to one count of possession with intent to distribute cocaine, in violation of 18 U.S.C. § 841(a)(1), wherein Defendants reserved the right under Federal Rule of Criminal Procedure 11(a)(2) to appeal the district court's order denying their motion to suppress the evidence seized from Defendants' U–Haul Rental Truck on February 23, 1996, pursuant to a traffic stop. For the reasons set forth below, the district court's order denying Defendants' motion to suppress is AFFIRMED.

**BACKGROUND**

On the evening of February 23, 1996, Deputy Steve Whitlock of the Shelby County, Tennessee, Sheriff's Department Interstate Interdiction Unit was on routine patrol on I–40 in Shelby County. Deputy Whitlock had his patrol car positioned where I–40 and I–240 merge, when he noticed a 1996 Ford U–Haul traveling eastbound on I–40 while in the process of navigating a large curve in the interstate. According to Deputy Whitlock, the U–Haul was not speeding at the time. Nonetheless, Deputy Whitlock pulled out behind the U–Haul after it made the turn, to determine whether the driver of the U–Haul engaged in a traffic violation because, as an experienced interdiction officer, Deputy Whitlock was aware that U–Haul trucks were often used to used to transport narcotics. In Deputy Whitlock's words, he pulled out after the vehicle because it was a U–Haul, and because it had been his experience that U–Hauls carry narcotics.

Traveling in his patrol car, Deputy Whitlock then caught up to the U–Haul which was now traveling northbound on I–40. Deputy Whitlock paced himself behind the U–Haul by traveling four to five car lengths behind it for about three-fourths of a mile. When the speed of Deputy Whitlock's vehicle and the speed of the U–Haul were the same, Deputy

  

Whitlock checked his certified speedometer, which showed a reading of sixty-two miles per hour. Although Deputy Whitlock's vehicle was equipped with radar, he was unable to clock the speed of the U–Haul using the radar equipment inasmuch as the two vehicles were traveling in the same direction. Because the speed limit on I–40 in that area is fifty-five miles per hour, Deputy Whitlock stopped the driver of the U–Haul at the Watkins Road exit for speeding.

The driver of the U–Haul was Defendant John Hill. Deputy Whitlock exited his patrol car, approached the driver's side of the U–Haul, and asked John for his driver's license. John produced a Florida driver's license; Deputy Whitlock informed him of the reason for the stop; and asked John to exit the U–Haul and step to the back of the vehicle so that Deputy Whitlock would be clear from the heavy traffic flow. Deputy Whitlock noticed that John's hands were shaking "uncontrollably" at the time John handed his license to Deputy Whitlock. John's brother, and co-defendant in this case, Malcolm Scott ***262** Hill ("Scott"), remained seated in the passenger seat of the U–Haul.

Once out of the vehicle, Deputy Whitlock questioned John about his travel plans, to which John replied that his sister was in the military and had been transferred to Pennsylvania, so he and Scott were moving their sister's belongings from Irvine, California to Scranton, Pennsylvania. Deputy Whitlock, who had been in the military himself, found it unusual that John and Scott would be moving their sister's belongings, inasmuch as it had been Deputy Whitlock's experience that people in the military who were transferred to another location usually had their moving arrangements handled by the military. Deputy Whitlock asked John about his sister's whereabouts at the time, and John replied that she had flown to Scranton about one month earlier. Deputy Whitlock described John's statements made during this colloquy as "very deliberate as if it was rehearsed on what he was supposed to be telling me as to the destination and the reason for their trip." Deputy Whitlock then asked John where he and Scott were from, to which John replied that they were from Florida, and that the two had flown to California to assist their sister.

Deputy Whitlock asked John to be seated in the patrol car so that Deputy Whitlock "could write the ticket, check [John's] driver's license, and also [because] it was kind of windy that night, and it was hard to hear due to all the traffic." Once inside the vehicle, Deputy Whitlock continued to question John about his travel plans as Deputy Whitlock completed John's "courtesy" citation. John informed Deputy Whitlock that he was not sure how long he and Scott were going to remain in Scranton, inasmuch as their sister was married and they just needed to help her "offload," and then they could leave.

Deputy Whitlock then returned to the U–Haul to obtain the rental agreement for the truck from Scott. When asked by Deputy Whitlock about his travel plans, Scott stated that he and John were moving their sister to Scranton, Pennsylvania, and that once they got there they were going to stay approximately three or four days to help her unload and to get settled before they flew back to Florida. Scott produced the rental agreement for Deputy Whitlock; the agreement was in Scott's name; it indicated that the truck had been rented on February 19, 1996; and next to the amount tendered on the rental receipt were the initials "CA," which Deputy Whitlock interpreted to mean that Scott had paid for the rental in cash. According to Deputy Whitlock, the significance of the "CA" notation is that it had been his experience that drug dealers commonly pay for everything in cash. Deputy Whitlock later testified that the fact that the truck had been rented on February 19, just four days before the night in question, aroused his suspicion inasmuch as John had told Deputy Whitlock that his sister had moved to Pennsylvania a month beforehand. As Deputy Whitlock spoke with Scott, he noticed a large amount of used Kleenex on the floorboard of the truck. This also aroused Deputy Whitlock's suspicion inasmuch as it had been his experience that people who "snort" cocaine constantly have a "runny" nose which requires constant wiping.

Deputy Whitlock returned to the patrol car and, while waiting for verification of John's driver's license, asked John to sign the "courtesy" citation. Deputy Whitlock then asked John if he and Scott had helped their sister load the U–Haul, to which John answered in the affirmative. Then, when Deputy Whitlock "confronted [John] with the fact that [his sister] had been gone a month, ... he became somewhat confused and stuttered for a minute and changed his story, saying that she had just laid it out on how they were supposed to load the truck." Deputy Whitlock asked John if he could search the U–Haul, but John refused. The verification of John's license came back and indicated that John's license was valid with no restrictions. At that point, Deputy Whitlock decided ***263** to run a canine search using his certified narcotics dog, "Spanky," who was present in Deputy Whitlock's vehicle, and who travels with Deputy Whitlock at all times. Deputy Whitlock later testified that he decided to run the canine search because he had "reasonable suspicion that the

  

possibility of a narcotics transfer was being made due to the fact [of] the inconsistent stories, the nervousness and the demeanor of both subjects." Deputy Whitlock then placed Scott in the patrol car with John, and ran the canine search, which took about one minute to complete. Up until this point, about twelve minutes had passed from the time Deputy Whitlock pulled over the U–Haul.

Spanky gave a "positive" indication for the presence of narcotics by scratching and biting at the part of the U–Haul where the cab meets the box part of the truck. Because of Spanky's response, and Deputy Whitlock's experience with Spanky on other occasions when the canine elicited the same response to the presence of narcotics, Deputy Whitlock believed that narcotics were present in the U–Haul.

At this point, Deputy Kellerhall arrived on the scene and Defendants were placed in Deputy Kellerhall's vehicle. The Deputies searched the cab of the U–Haul, and no narcotics were found; however, the search did turn up a large number of keys in a bag behind the rear seat. The Deputies assumed that one of the keys would unlock the lock on the rear door of the truck; however, none of the keys worked, so the Deputies cut the lock with bolt cutters. In the meantime, Deputy Segerson arrived on the scene with his certified narcotics canine, "Oz;" the canine did a search of the U–Haul and reacted positively to the same area to which Spanky had reacted positively.

Once the lock was cut from the rear door of the U–Haul, the Deputies began their search of the rear of the truck and found, among other things, five large wardrobe boxes located against the back wall nearest the cab. Inside the wardrobe boxes were what appeared to be tractor tire inner tubes. Deputy Whitlock punctured the tube with his pocketknife, and when he pulled his knife out of the tube, a white substance was on the blade. Deputy Whitlock tested the powder and determined that it was cocaine. Deputy Whitlock then placed Defendants under arrest. The U–Haul was taken into the interstate office; a thorough search of the truck was conducted; and 502 kilograms of cocaine were recovered.

On February 27, 1996, a federal grand jury for the Western District of Tennessee returned a one count indictment against Defendants. The indictment alleged that on February 23, 1996, Defendants possessed with the intent to distribute approximately 502 kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

Thereafter, on April 25, 1996, Defendants filed a joint motion to suppress the evidence—502 kilograms of cocaine. A suppression hearing was held on the motion and, following the hearing, both the government and Defendants filed post-hearing briefs. The district court entered an order denying Defendants' motion to suppress the evidence on July 16, 1997. Defendants pleaded guilty to the one count indictment on December 16, 1997, and pursuant to the plea agreements, Defendants reserved the right to appeal the district court's denial of the motion to suppress the evidence.

Defendants were each sentenced on 135 months' imprisonment to be followed by three years of supervised release. This appeal ensued.

## ANALYSIS

The Supreme Court has held that "stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth and Fourteenth] Amendments, even though the purpose of the stop is limited and the resulting detention is quite brief." *Delaware v.* ***264** *Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). An ordinary traffic stop, however, is more akin to an investigative detention rather than a custodial arrest, and the principles announced in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), apply to define the scope of reasonable police conduct. *United States v. Palomino*, 100 F.3d 446, 449 (6th Cir.1996). Reasonable police conduct under such circumstances is such that any subsequent detention after the initial stop must not be excessively intrusive in that the officer's actions must be reasonably related in scope to circumstances justifying the initial interference. *Palomino*, 100 F.3d at 449 (citing *Terry*, 392 U.S. at 20, 88 S.Ct. 1868). Once the purpose of the traffic stop is completed, a motorist cannot be further detained unless something that occurred during the stop caused the officer to have a reasonable and articulable suspicion that criminal activity was afoot. *United States v. Erwin*, 155 F.3d 818, 822 (6th Cir.1998) (*en banc*), *cert. denied*,525 U.S. 1123, 119 S.Ct. 906, 142 L.Ed.2d 904 (1999); *United States v. Mesa*, 62 F.3d 159, 162 (6th Cir.1995).

Recently, in *Knowles v. Iowa*, 525 U.S. 113, 119 S.Ct. 484, 488, 142 L.Ed.2d 492 (1998), a unanimous Supreme Court held that a full-blown search of an automobile and its driver, after an officer had elected to issue the driver a traffic citation rather than arresting the driver, violated the

  

Fourth Amendment. Because neither the officer's safety nor the need to preserve evidence was implicated by the routine traffic stop, the Court held that once the driver was stopped for speeding and was issued a citation, all of the evidence necessary to prosecute him had been obtained and, without a reasonable suspicion that other criminal activity was afoot, the stop of the vehicle and issuance of a traffic citation did not justify a full search of the vehicle. *Id*. However, the *Knowles* decision does not change the fact that an officer may detain an individual after a routine traffic stop is completed if the officer has a reasonable suspicion that the individual is engaged in criminal activity. *See Erwin*, 155 F.3d at 822. Furthermore, *Knowles* does nothing to the state of the well-settled law that the legality of the traffic stop is not dependent upon an officer's motivations. *See Whren v. United States*, 517 U.S. 806, 812–13, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *United States v. Ferguson*, 8 F.3d 385, 391 (6th Cir.1993) (*en banc*), *cert. denied*, 513 U.S. 828, 115 S.Ct. 97, 130 L.Ed.2d 47 (1994). That is to say, an officer may stop a vehicle for a traffic violation when his true motivation is to search for contraband, as long as the officer had probable cause to initially stop the vehicle. *Whren*, 517 U.S. at 812–13, 116 S.Ct. 1769. If the initial traffic stop is illegal or the detention exceeds its proper investigative scope, the seized items must be excluded under the "fruits of the poisonous tree doctrine." *See Wong Sun v. United States*, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The touchstone of the Fourth Amendment is "reasonableness" based upon the totality of the circumstances. *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996) (citing *Florida v. Jimeno*, 500 U.S. 248, 250, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991)).

This Court reviews a district court's decision on a motion to suppress the evidence under " 'two complimentary standards. First, the district court's findings of fact are upheld unless clearly erroneous. Second, the court's legal conclusion as to the existence of probable cause is reviewed *de novo*.' " *United States v. Diaz*, 25 F.3d 392, 394 (6th Cir.1994) (quoting *United States v. Leake*, 998 F.2d 1359, 1362 (6th Cir.1993)) (citations omitted). In reviewing the district court's findings of fact, we consider evidence in the light most favorable to the government. *United States v. Buchanon*, 72 F.3d 1217, 1223 (6th Cir.1995). In addition, we must give deference to the district court's assessment of credibility inasmuch as the court was in the best position to make such a ***265** determination. *See United States v. Bradshaw*, 102 F.3d 204, 210 (6th Cir.1996).

**1. The Initial Traffic Stop**

In the case at hand, it is questionable as to whether Defendants challenge the district court's finding that Deputy Whitlock had probable cause to make the initial traffic stop of Defendants' U–Haul. Defendants acknowledge in a footnote to their brief that they do not dispute the legality of a pretextual stop after the *Whren* and *Ferguson* decisions; yet, they appear to challenge the district court's finding of probable cause on the basis of Deputy Whitlock's motivation in pursuing their vehicle. Defendants argue that because Deputy Whitlock pursued their vehicle on the basis that it had been his experience that U–Haul trucks carry drugs, his deep-rooted bias colored his thinking. We disagree with Defendants' claim where it is clear that regardless of Deputy Whitlock's motivation in stopping the U–Haul, the stop was valid as long as he had probable cause to make the traffic stop. *See Whren*, 517 U.S. at 812–13, 116 S.Ct. 1769 (holding that the constitutional reasonableness of a traffic stop does not depend upon the officer's actual motivation).[1]

Deputy Whitlock pulled Defendants over for traveling in excess of the speed limit, in that Defendants were traveling sixty-two miles per hour and the posted speed limit in that area is fifty-five miles per hour. As noted by the district court, the Tennessee Code prohibits speeding, *see* Tenn.Code Ann. § 55–8–152, and Defendants do not dispute the fact that they were traveling in excess of the posted speed limit. Therefore, the district court properly concluded that Officer Whitlock had probable cause to make the initial traffic stop. *See United States v. Akram*, 165 F.3d 452, 455 (6th Cir.1999) (finding that where the officer observed a U–Haul failing to signal before changing lanes in violation of Ohio law, the officer had probable cause to stop the U–Haul irrespective of his subjective motivation for doing so); *Palomino*, 100 F.3d at 449 (finding that where the officer observed the defendant speeding and changing lanes without signaling, "even if [the officer] was motivated by a suspicion that the defendant fit into a drug courier profile, the stop was not unreasonable because probable cause existed").

Notably, in *Akram*, this Court recently had occasion to decide whether a police officer had probable cause to stop a U–Haul truck, where the record indicated that although the officer claimed to have stopped the truck for failing to change lanes without signaling in violation of Ohio law, his "true" motivation for stopping the U–Haul was to look for contraband. 165 F.3d at 455. There, the facts indicate that police officers pulled the U–Haul over two days in a row; that the legal reason for pulling the vehicle over on the first day was questionable (going two miles over the posted speed

  

limit); and that the police officers found illegal videotapes when they searched the vehicle on that day, but that the officers did not arrest the defendants because they did not receive word that they had a legal basis for doing so (i.e., they were not aware of the illegal nature of the tapes) until the defendants had been detained for forty-five minutes and released. *Id.* at 454, 459–60. The facts further indicate that the legal reason for pulling the vehicle over the next day—failure to signal when changing lanes—was not documented on paper anywhere, but brought out near the end of the officer's testimony in a response to a question from the court; and that upon search of the U–Haul, illegal videotapes were found. *Id.* at 454–55, 460.

***266** The two-judge majority in *Akram* reluctantly agreed with the district court's finding that the officer had probable cause to stop the vehicle:

> The dissent makes a strong case for disbelieving [the police officer's] explanation for the February 27 stop. We agree that this case is an example of the very questionable police conduct that is permitted by *Whren* and *Ferguson*. Were the author of this opinion writing on a clean slate, she would hold that the police may not use a trivial traffic violation as a pretext for stopping a vehicle, when their real purpose would not justify a stop. We are, however, bound by the opposite holding. While the dissent demonstrates that the officers were uninterested in the traffic violation and were really looking for drugs, the point of *Whren* and *Ferguson* is that the motives of police are irrelevant.

*Akram*, 165 F.3d at 455. However, the dissent found that the district court was clearly erroneous in crediting the police officer's version of what occurred, and in therefore concluding that there was probable cause to stop the vehicle. The dissent focused on the fact that rental trucks such as "U–Hauls" have become "profile" or "target" vehicles, and that "[i]t is clear from the number of cases reaching our court that the police within the Sixth Circuit make full use of the technique of stopping vehicles for minor traffic infractions with the hope that circumstances will develop which ultimately will allow them to make a legal search of the vehicle." *Id.* at 457 (Guy, J., dissenting).

The dissent further opined as follows:

> All of the officers involved in this case were part of a highway drug interdiction unit. Although they could, and I assume would, stop vehicles committing egregious traffic offenses, traffic patrol was not their primary mission. Nor do they rely on just "getting lucky" when making truly legitimate traffic stops. This would be a non-productive waste of manpower. It is clear to me from the cases that reach our court—including this one—that the officers are looking for "profile" or "target" vehicles and occupants.
>
> A rental truck is a profile or target vehicle. That this was not admitted by the police officers is not controlling in my view. Credibility is the issue here and, in making credibility determinations, a court can utilize what is specifically part of the record, what has been learned from other similar cases, and all reasonable inferences that can be drawn therefrom. We routinely tell jurors that although they have to decide the case before them on the basis of the testimony and exhibits, they do not have to leave their common sense at the courthouse door. Surely judges, who are more experienced and sophisticated than the average juror about legal matters and court proceedings, are entitled to factor common sense into the credibility equation.
>
> Rental vehicles are profile vehicles because the police know they have become popular with persons transporting contraband. There are several reasons for the popularity. First, they can be obtained at a relatively low cost. Second, when the plates and registrations are checked, they reveal nothing about the vehicle's occupants. Third, they are little more than a large box on wheels and are completely windowless, thus affording privacy to those carrying contraband. Finally, if the vehicle is stopped and contraband is found, there is no worry about forfeiting the vehicle since it does not belong to the wrongdoer.
>
> * * * * * *
>
> Legally, the police can now stop a vehicle for any alleged traffic violation and, while the vehicle is stopped, subject it to a canine sniff or hold the vehicle until a dog arrives on the scene. They also can have a profile and stop target vehicles if they find them committing a traffic offense, but —they still must have a legitimate traffic offense as the basis ***267** for the stop. I do not believe the officers did here—but, more importantly, I do not believe the district judge could properly conclude they did on the basis of this record. The courts have given the police this extraordinary power to make pretextual stops and searches of vehicles, but it is also the responsibility of the courts to make sure the testimony of police officers is given the same critical scrutiny given to a defendant's testimony.

*Akram*, 165 F.3d at 458, 460 (Guy, J., dissenting) (footnotes omitted).

  

We share in the concern that police officers are using the state of the law in this Circuit as carte blanche permission to stop and search "target" or "profile" vehicles for drugs. Of course, the Supreme Court in *Whren* confirmed that a police officer is legally allowed to stop a vehicle for a traffic violation when there is probable cause for the traffic stop, without regard for the officer's subjective motivation. *See* 517 U.S. at 812–13, 116 S.Ct. 1769. However, we agree that it is the responsibility of the courts to make sure that police officers act appropriately and not abuse the power legally afforded to them by, among other things, carefully scrutinizing a police officer's testimony as to the purpose of the initial traffic stop. Although U–Hauls may in fact be used to carry illegal contraband, the potential for police officers to abuse the *Whren* principle is apparent, and when applied to "target" vehicles such as U–Hauls—which are typically used by lower income people to move who do not have many personal belongings and cannot afford the expense of a professional moving company, or typically used by young college students making their first move from home—the abuse becomes particularly distasteful.

In the case at hand, the facts related to the purpose of the stop are essentially not in dispute and, as stated, it is questionable whether Defendants even challenge the propriety of the stop. Although Deputy Whitlock testified that he began following Defendants because they were traveling in a U–Haul and it has been his experience that U–Hauls carry contraband, his legal reason for initially stopping the vehicle—speeding—is not challenged here to the extent that Defendants do not claim that they were traveling at the posted speed limit. Furthermore, by speeding Defendants were in fact committing a traffic infraction under Tennessee law. Therefore, under *Whren*, *Ferguson* and their progeny, the district court's conclusion that Deputy Whitlock had probable cause to stop the U–Haul must be upheld.

This, however, is not the end of the relevant inquiry, and leads to another check on the authority provided to police officers under *Whren* —the fact that the officer must conduct the stop with the least intrusive means reasonably available and not detain the individual longer than necessary to effectuate the purpose of the stop, unless the officer has an articulable reasonable suspicion that the individual is engaged in criminal activity. *See Mesa*, 62 F.3d at 162–63. As with the concern that the courts must be particularly careful in scrutinizing a police officer's purpose for initially stopping a "target" vehicle, we believe that the courts must also carefully scrutinize a police officer's conduct during the course of such a stop to insure that it is limited to effectuating the purpose of the stop. Likewise, the courts must carefully scrutinize an officer's stated reasons for detaining the individual beyond the purpose of the stop to insure that the reasons rise to the level of reasonable suspicion, so that the officer does not abuse his authority under *Whren*.[2]

**2. Detention**

Defendants focus their argument on appeal on the reasonableness of their detention ***268** by Deputy Whitlock. Defendants argue that Deputy Whitlock 1) unreasonably questioned them beyond the scope of the traffic stop, 2) deliberately conducted the stop in such a fashion so as to prolong the time necessary to complete the purpose of the traffic stop, and 3) did so without an articulable reasonable suspicion. We disagree.

**a. Questioning by Deputy Whitlock and His Method of Conducting the Initial Stop (Defendants' First and Second Arguments)**

Defendants argue that Deputy Whitlock improperly engaged in a series of questions unrelated to the stop. The questions to which Defendants take issue related to whether Defendants were "moving" and, if so, where they were moving to and from. Defendants contend that such questions were improper because they did not relate to the purpose of the stop—speeding—and because Deputy Whitlock could not have had a reasonable suspicion to question Defendants outside the scope of the stop inasmuch as Deputy Whitlock began asking John these questions immediately after the stop.

In *Erwin*, an *en banc* panel of this Court held as follows:

> [I]rrespective of whether the deputies were justified in detaining [the defendant] after he showed no signs of intoxication, and even if they had not, after approaching [the defendant], observed conditions raising reasonable and articulable suspicion that criminal activity was "afoot," they were entitled to ask [the defendant] for permission to search his vehicle. A law enforcement officer does not violate the Fourth Amendment merely by approaching an individual, even when there is no reasonable suspicion that a crime has been committed, and asking him whether he is willing to answer some questions.

155 F.3d at 822–23 (citing *Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)). Although it is true that the Supreme Court stated in *Royer* that "an

investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop, [while] the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time," *see* 460 U.S. at 500, 103 S.Ct. 1319, Deputy Whitlock's questioning of John as to his moving plans at the outset of the stop was reasonable in that the questions related to John's purpose for traveling. *See Erwin*, 155 F.3d at 822–23; *see also United States v. Potts*, No. 97–6000, 1999 WL 96756, at *3 (6th Cir.1999), *cert. denied*, 528 U.S. 822, 120 S.Ct. 66, 145 L.Ed. 2d 57 (1999) (finding that "an officer is free to ask traffic-related questions, and questions about a driver's identity, business and travel plans during the course of a traffic stop").

Defendants also contend that Deputy Whitlock consciously tailored the stop to draw out its duration so as to allow time to investigate his "hunch" that Defendants were using the U–Haul to transport drugs. Specifically, Defendants argue that Deputy Whitlock ran a check on John's driver's license late in the stop, separated Defendants, and did not request the rental agreement from John when he initially asked for John's driver's license. Defendants note that four minutes and seventeen seconds transpired from the time Deputy Whitlock called John's driver's license into dispatch for verification until the time Deputy Whitlock received the results. Defendants argue that if Deputy Whitlock had performed the driver's license check at the beginning of the stop, instead of after he had already questioned John, the purpose of the stop would have been over when Deputy Whitlock handed John the courtesy citation (i.e., the verification of the license would have been received). Defendants conclude that this factor is significant inasmuch as the government includes events which occurred after John was handed the citation as ***269** grounds for Deputy Whitlock's reasonable suspicion that criminal activity was afoot. We disagree with Defendants' contention, where the record shows that Deputy Whitlock did not purposefully extend the purpose of the traffic stop and, as discussed *infra*, during the course of the stop Deputy Whitlock was developing reasonable suspicion that criminal activity was afoot.

The stop occurred at approximately 20:41:35; after a brief conversation with Deputy Whitlock, John was asked to have a seat in the patrol car at approximately 20:43:27; less than seven minutes later, Deputy Whitlock ran the license check; and the driver's license verification came back four minutes and seventeen seconds after it was requested. The record indicates that during the period of time from which Deputy Whitlock asked John to have a seat in the patrol car until the time that he ran the check on John's driver's license, Deputy Whitlock wrote out the courtesy citation, retrieved the rental agreement from the U–Haul, spoke with Scott, and returned to the patrol car. Upon returning to the patrol car, Deputy Whitlock ran the check on John's driver's license and while waiting for the results, questioned John about his travel plans once again inasmuch as Scott's description of the travel plans was inconsistent with John's description. Upon receiving the notification that John's license was valid in the state of Florida, Deputy Whitlock then placed Scott in the patrol car with John and proceeded to allow Spanky to do a canine sniff of the U–Haul.

Based upon the above factual scenario, the district court's findings of fact on this issue were not clearly erroneous. The district court specifically found as follows regarding Defendants' detention:

> In the present case, defendants cannot successfully claim that the detention, from its inception through the return of the diver's license check, exceeded its original scope. It is uncontested that in a valid traffic stop, an officer can request a driver's license, registration or rental papers, run a computer check thereon, and issue a citation. In this case, Whitlock asked John Hill to produce his driver's license and to exit the vehicle. He then requested that John Hill sit in the front of the police car while Whitlock filled in the courtesy citation. Whitlock then left the vehicle to obtain rental papers. When he returned, Whitlock called for a computer check of the license. While waiting for verification of John Hill's license, Whitlock gave the courtesy citation to John Hill for his signature.
>
> The questioning occurred while Whitlock performed these tasks and waited for the results of the computer check. Therefore, the questioning did nothing to extend the duration of the initial, valid stop. Furthermore, the entire traffic stop, up to the return of the computer check, lasted little more than twelve minutes. Contrary to defendants' contentions, there is simply no indication that Whitlock intentionally prolonged the stop by delaying the license check, separating the defendants, or requesting the rental papers. Whitlock was entitled to perform these tasks and did so in a sufficiently efficient manner, as was his standard procedure.

(J.A. at 45–46) (footnotes omitted).

  

When viewing the course of events which took place at the time of the stop under a totality of the circumstances and in the light most favorable to the government, the district court properly found and concluded that the detention, from its inception through the return of the driver's license check, did not exceed its original scope. As noted *supra*, the touchstone of the Fourth Amendment is reasonableness based upon the totality of the circumstances. *See Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996). To accept Defendants' position that Deputy Whitlock purposefully tailored the stop to draw out its duration would require the Court to view the stop not under the totality of the circumstances but, ***270** rather, in an unreasonable piecemeal fashion so as to draw a bright line limitation as to an officer's course and conduct during a stop. *See United States v. Place*, 462 U.S. 696, 709, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) ("declin[ing] to adopt an outside time limitation for a permissible *Terry* stop"). Of course, one must be mindful of the police officer's duty to conduct the stop with the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time, *see Royer*, 460 U.S. at 500, 103 S.Ct. 1319; however, nothing in the record suggests that Deputy Whitlock's actions were unreasonable. *See United States v. Bradshaw*, 102 F.3d 204, 212 & n. 18 (6th Cir.1996) (finding that the police officer lawfully detained the "nervous" and "jittery" defendant in the patrol car after the initial stop until the officer performed the radio checks and issuance of the citation, and noting that "*Mesa* does not require that reasonable suspicion be present 'up-front' for an officer to detain a motorist in his squad car while conducting a records search that is related to the traffic violation for which the motorist was stopped").

Furthermore, even if Deputy Whitlock had run the driver's license check at the outset of the stop—i.e., when he initially placed John inside the patrol car—that still would have provided Deputy Whitlock four minutes and seventeen seconds to ask Scott about the travel plans and to determine that Scott's answers were inconsistent with John's answers about the plans, such that Deputy Whitlock would have determined it necessary to have Spanky do a canine sniff of the U–Haul. In short, accepting Defendants' argument does nothing to change the fact that Deputy Whitlock still would have had time to further develop his reasonable suspicion that Defendants were in engaged in criminal activity.

**b. Whether Deputy Whitlock had Reasonable Suspicion of Criminal Activity (Defendants' Third Argument)**

Defendants argue that the district court erred when it found that Deputy Whitlock had reasonable suspicion to detain Defendants after the completion of the traffic stop. Specifically, Defendants note that verification of John's valid Florida driver's license was received by Deputy Whitlock before he ran the canine search of the U–Haul, and conclude that because they were detained without reasonable suspicion while Deputy Whitlock conducted the canine search, the positive results of the canine search should have been suppressed. Defendants contend that the district court's findings as to why Deputy Whitlock held a reasonable suspicion are clearly erroneous when taken individually as well as when considered in total, inasmuch as Deputy Whitlock lacked credibility. We disagree.

When addressing whether Deputy Whitlock had a reasonable suspicion that Defendants were engaged in criminal activity so as to detain them beyond the purpose of the traffic stop—i.e., so as to allow Deputy Whitlock to detain Defendants for the approximately one or two minutes it took Spanky to run the search of the vehicle, the district court found as follows:

> In forming his suspicions, Whitlock was entitled to assess the circumstances and defendant's [sic] in light of his experience as a police officer and his knowledge of drug courier activity. *See United States v. Cortez*, 449 U.S. 411, 416, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981) ("[E]vidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."); *United States v. Finke*, 85 F.3d 1275, 1280 (7th Cir.1996).
>
> Whitlock testified that his suspicions were aroused by a number of factors: 1) the unusual explanation of the defendants' cross-country trip, 2) the deliberate, or rehearsed, manner in which John Hill answered Whitlock's questions, 3) the apparent cash rental of the U–Haul truck, 4) John Hill's uncontrollably ***271** shaky hands and apparent nervousness, 5) the sweating and apparent nervousness of the passenger Malcolm [Scott] Hill, 6) the inordinate number of used Kleenex littering the U–Haul's floorboard, 7) John Hill's confusion in explaining how and when his sister's furniture had been loaded, and 8) the defendants' inconsistent responses regarding their itinerary.

  

> When questioned by Whitlock about their purpose and destination, defendants indicated that they had flown cross-country from Florida to California to help their sister make a military transfer to Scranton, Pennsylvania. Defendants also explained that their sister had already moved and had been in Pennsylvania for a month. Whitlock found it unusual that the defendants' sister would have her brothers fly cross-country to help her move when the military normally paid for military moves and took care of such arrangements. Whitlock's skepticism of defendant's [sic] explanation was confirmed, as previously noted by the court, through Dabney's testimony. Whitlock's suspicion was justifiably aroused and contributed to a reasonable suspicion of illegal activity.

* * * * * *

> The defendants' nervous behavior, Scott Hill's profuse perspiration, and John Hill's deliberate responses also caught Whitlock's attention....
>
> Within the course of the traffic stop, Whitlock also noticed that the U–Haul rental agreement contained the notation "CA" across from the amount tendered. Whitlock reasonably assumed "CA" to indicate that the U–Haul had been paid for in cash. In Whitlock's experience on the Interstate Interdiction Unit, U–Haul vehicles had been used to transport illegal drugs on numerous occasions. Furthermore, Whitlock testified that it was common for drug couriers to pay for such rentals in cash to maintain anonymity....
>
> Inside the U–Haul, Whitlock noticed an inordinate number of Kleenex on the floorboard, which he believed to be a possible indication of cocaine use....
>
> Whitlock's suspicions were also aroused by inconsistent statements by defendants regarding their travel plans.... Although the inconsistency between the two stories is slight, when viewed in light of the many other suspicious factors surrounding the stop, it was not unreasonable for Whitlock to focus on these discrepancies.
>
> Taken individually, some of the factors establishing reasonable suspicion in this case would be susceptible to innocent explanations. The totality of the circumstances, however, plainly supported a reasonable suspicion of illegal activity. Therefore, the detention to allow for a dog sniff was permissible.

(J.A. at 48–51) (footnote and citations omitted). In short, the district court found that Deputy Whitlock possessed a reasonable suspicion that Defendants were engaged in the transportation of illegal drugs so as to detain Defendants for an additional minute or so beyond the purpose of the stop based upon 1) Defendants' implausible explanation for their cross-country trip; 2) Defendants' inconsistent statements regarding their travel itinerary; 3) the possibility that at least of one of the Defendants were using cocaine; and 4) the Defendants' nervous demeanor during the stop.

In *United States v. Cortez*, the Supreme Court set forth parameters to determine an articulable suspicion as follows:

> Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized ***272** and objective basis for suspecting the particular person stopped of criminal activity.
>
> The [assessment of the whole picture] does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

449 U.S. 411, 417–18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981) (citations omitted). Applying these principles to the facts of the instant case, the district court properly concluded that Deputy Whitlock detained Defendants beyond the duration of the traffic stop based upon a reasonable suspicion that Defendants were engaged in the transportation of drugs, where the district court's findings of fact were not clearly erroneous.

It is reasonable to conclude that one of the factors contributing to Deputy Whitlock's suspicion that Defendants were engaged in criminal activity was Deputy Whitlock's belief that Defendants provided an implausible explanation for their trip —moving their sister who was in the military from California to Pennsylvania because she had been relocated. This explanation aroused Deputy Whitlock's suspicions inasmuch as it had been his experience that people in the military did

  

not have to move their belongings themselves when relocated; the military moved the belongings for them. Defendants argue that because they presented testimony from Dawn Dabney, a civilian employee at the Millington Naval Reserve Center, stating that military personnel are given the option of moving themselves (a "Do–It–Yourself" or "DITY" move), and about twenty-five percent of the military moves are done in such a fashion, the district court's finding was clearly erroneous. We disagree where Dabney's testimony also indicates that seventy-five percent of military moves are handled in the fashion in which Deputy Whitlock believed they are handled.

Furthermore, it is also reasonable to conclude that Defendants' inconsistent stories regarding their travel itinerary—i.e., John claiming that he and Scott were just going to drop off their sister's belongings and then leave; Scott claiming that the two were going to stay about three or four days and then leave; John claiming that their sister had flown out to Pennsylvania about a month beforehand, then claiming that she had assisted them in loading the truck, then claiming that she laid the belongings out for the men to load before she left—also contributed to Deputy Whitlock's suspicion that Defendants were engaged in criminal activity. Finally, it was reasonable to conclude that Deputy Whitlock's observance of the large amount of used Kleenex on the floorboard of the truck, indicating that one or both of Defendants were using cocaine based upon his experience as an interdiction officer that cocaine users have to wipe their noses often, as well as Defendants' nervous demeanor contributed to his suspicion that criminal activity was afoot. *See* *Palomino*, 100 F.3d at 450 (finding that the defendant's inconsistent stories about the ownership of the car and purpose of the trip, his nervousness, and the odor that the police officer smelled when the defendant rolled down his window aroused a reasonable suspicion of criminal activity justifying the officer's inquiry into whether the defendant was carrying contraband).

Accordingly, when viewing the evidence in the light most favorable to the government and under a totality of the circumstances using a common-sense approach, the district court did not err in finding that Deputy Whitlock had formed a reasonable suspicion that Defendants were carrying contraband sufficient to justify extending the purpose of the traffic stop to allow Spanky to do a canine sniff of the U–Haul. ***273** We are not persuaded otherwise by Defendants' attack on Deputy Whitlock's credibility, where the district court credited Deputy Whitlock as being a credible witness and where nothing in the record supports Defendants' contention to the contrary. *See* *Bradshaw*, 102 F.3d at 210 (finding that because the district court was in the best position to judge credibility, and because the court plausibly resolved the discrepancies in the testimony, its findings of fact should not be disturbed); *compare* *Akram*, 165 F.3d at 457–60 (Guy, J., dissenting) (finding the district court's findings of fact clearly erroneous based upon the incredible nature of the officer's testimony).

**3. Search**

Defendants challenge the district court's conclusion that Deputy Whitlock had probable cause to search their U–Haul as a result of a positive indication by Spanky, only to the extent that Defendants challenge Spanky's training and reliability. Defendants do not challenge the fact that a positive indication by a properly trained narcotics detecting dog is sufficient to establish probable cause to search for the presence of a controlled substance. We believe that Defendant's argument is without merit.

One of the exceptions to the requirement that the government obtain a warrant before searching private property is the "automobile exception," which excuses the police from obtaining a warrant when they have probable cause to believe that a vehicle they have stopped contains evidence of a crime. *See* *United States v. Pasquarille*, 20 F.3d 682, 690 (6th Cir.1994) (citing *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925)). It is well-established in this Circuit that an alert by a properly-trained and reliable dog establishes probable cause sufficient to justify a warrantless search of a stopped vehicle. *See* *United States v. Diaz*, 25 F.3d 392, 394 (6th Cir.1994).

Defendants contend that the district court's finding that Spanky was a properly trained and reliable drug detection dog was clearly erroneous because Deputy Whitlock testified that he did not know exactly what training he was actually required to perform with Spanky as his handler, and because Deputy Whitlock failed to keep records of the number of times Spanky indicated a "false alert." Essentially, Defendants challenge the government's failure to produce records to establish Spanky's training and reliability.

In *Diaz*, this Court rejected a similar argument on the basis that despite the lack of the production of records, the credible testimony established the dog's ("Dingo's") proper training and reliability. *See* 25 F.3d at 395. Specifically, in *Diaz*, "[the defendant] argue[d] that the government could not establish Dingo's reliability because [the officer] failed to bring the dog's training and performance records to court and so was

  

unable to answer precisely how many searches Dingo had done and how many times drugs were not discovered when Dingo indicated, [and because] ... [the officer] and Dingo were improperly trained." *Id*. In rejecting the defendant's claim and finding that the district court's finding of fact as to Dingo's reliability was not clearly erroneous, the Court stated that "[the officer] testified as to her and Dingo's training, certification, and experience. The district judge heard the testimony and made a credibility determination: [the officer] was believable. [The officer's] testimony supports a finding that Dingo was trained and reliable. After reviewing the record, we are not left with a definite and firm conviction that a mistake has been made." *Id*.

Likewise, in the instant case, after reviewing the record we are not left with a firm and definite conviction that a mistake has been made regarding the district court's finding that Spanky was trained and reliable. Testimony from Lieutenant Mark Robinson indicated that he had been the supervisor of the canine unit for the ***274** past eight years and was a certified canine trainer. Lieutenant Robinson testified that he trained both Deputy Whitlock to be a canine handler and Spanky to be a drug detection dog. Lieutenant Robinson described the extensive procedures under which Spanky was trained, and stated that Spanky passed each level of the extensive training such that Spanky was a certified drug detection dog. In addition, Lieutenant Robinson testified that Spanky passed post-certification training as well. Finally, Lieutenant Robinson stated that he had reviewed the training and performance records kept by the Shelby County Sheriff's Department on Spanky and other drug detection dogs, and in his professional opinion, Spanky was reliable.

Accordingly, as in *Diaz*, Defendants' challenge to the district court's finding that Spanky was a properly trained and reliable drug detection dog must fail. Deputy Whitlock therefore had probable cause to search the U–Haul inasmuch as Spanky gave a positive alert to the presence of drugs when Deputy Whitlock ran the canine search. *See Diaz*, 25 F.3d at 394–95.

## CONCLUSION

In summary, the district court properly found that Deputy Whitlock had probable cause to stop Defendants for speeding; properly found that Deputy Whitlock had a reasonable suspicion to detain Defendants beyond the purpose of the stop; and properly found that Deputy Whitlock had probable cause to search the U–Haul based upon Spanky's alert. Accordingly, we conclude that the district court did not err in denying Defendants' motion to suppress the 502 kilograms of cocaine found in the U–Haul. We therefore **AFFIRM** the district court's order denying Defendants' motion to suppress the evidence.

### All Citations

195 F.3d 258, 1999 Fed.App. 0351P

Footnotes

1 We hasten to note that although the Supreme Court has held that an officer's subjective motivations play no role in ordinary, probable cause Fourth Amendment analysis, the Court has held that an officer's actual motivation is considered when a claim is brought under the Equal Protection Clause for selective enforcement of the law based on considerations such as race. *See Whren*, 517 U.S. at 813, 116 S.Ct. 1769.

2 Notably, the defendant in *Akram* did not challenge whether the officers had a reasonable suspicion to detain him for forty-five minutes beyond the scope of the initial stop. 165 F.3d at 456 n. 4.

16 F.3d 714
United States Court of Appeals,
Seventh Circuit.

UNITED STATES of
America, Plaintiff–Appellee,
v.
Ismael ORNELAS–LEDESMA and
Saul Ornelas, Defendants–Appellants.

Nos. 93–2356, 93–2405.
|
Argued Dec. 10, 1993.
|
Decided Feb. 10, 1994.

**Synopsis**

Defendants were convicted in the United States District Court for the Eastern District of Wisconsin, Rudolph T. Randa, J., of illegal possession of a controlled substance with intent to distribute, and they appealed. The Court of Appeals, Posner, Chief Judge, held that: (1) police officers had reasonable suspicion of criminal activity necessary for investigatory stop of defendants' vehicle, but (2) remand was required to determine whether police officer had probable cause to remove door panel of vehicle and search for drugs.

Vacated and remanded.

**Attorneys and Law Firms**

***715** Penelope C. Fleming (argued), Office of U.S. Atty., Milwaukee, WI, for plaintiff-appellee U.S.

Brian W. Gleason (argued), Milwaukee, WI, for defendant-appellant Ismael Ornelas–Ledesma.

Robert G. LeBell (argued), Styler, Kostich, LeBell & Dobroski, Milwaukee, WI, for defendant-appellant Saul Ornelas.

Before POSNER, Chief Judge, and FLAUM and MANION, Circuit Judges.

**Opinion**

POSNER, Chief Judge.

Ismael Ornelas–Ledesma and Saul Ornelas were convicted of illegal possession of a controlled substance with intent to distribute it and were sentenced to 60 and 63 months in prison, respectively. The appeal challenges the denial of their motion to exclude from evidence the cocaine seized from "their" 1981 Oldsmobile. We say "their" Oldsmobile, although it was registered to someone else, because the government does not question their right, akin to that of a tenant, bailee, borrower, or other lawful occupier or possessor, to object to the seizure. The cases are quicker to draw the analogy in the case of the driver of a vehicle, *United States v. Garcia,* 897 F.2d 1413, 1418–19 (7th Cir.1990); *United States v. Soto,* 988 F.2d 1548, 1553 (10th Cir.1993); *United States v. Miller,* 821 F.2d 546, 548–49 (11th Cir.1987), than in the case of a passenger, *Rakas v. Illinois,* 439 U.S. 128, 148–49, 99 S.Ct. 421, 433, 58 L.Ed.2d 387 (1978); *United States v. Lechuga,* 925 F.2d 1035, 1037, 1041 n. 3 (7th Cir.1991); *United States v. Roberson,* 6 F.3d 1088, 1091 (5th Cir.1993), but the government does not ask us to make that distinction here.

The defendants argue that the stop which led to their consenting to the search of the car violated the Fourth Amendment, invalidating the consent and hence the search; and that independently of this the seizure of the drugs, which was from the inside of the door of the car, violated the Fourth Amendment because, even if a superficial search of the car was proper as an incident of the stop, the officers needed and lacked probable cause to open the compartment and seize its contents.

Police officers in Milwaukee keep a regular watch on motels, looking for drug runners. Cruising through a motel parking lot one day in 1992, a detective named Pautz, a two-year veteran of the Milwaukee County Sheriff's Drug Enforcement Unit, spotted a 1981 two-door Oldsmobile with a California license plate. Pautz was interested. Two-door General Motors cars of that vintage are believed by law enforcement authorities to be drug traffickers' favorites (though not their only favorites, *United States v. Sharpe,* 470 U.S. 675, 682 n. 3, 105 S.Ct. 1568, 1573 n. 3, 84 L.Ed.2d 605 (1985); *United States v. Ocampo,* 890 F.2d 1363, 1366 (7th Cir.1989)) because it is easy to conceal drugs in them. And California, like other states on the eastern, western, and southern borders of the United States, is a state from which drugs are shipped to other states, a "source" state. So Pautz called up his dispatcher on his car radio and asked him to find out whom the car was registered to. Now in fact it was registered to "Ornelas, Miguel Ledesma," of San Jose, California, who may or may not be related to one of the defendants. But we do not know

  

what exactly the dispatcher told Pautz or what exactly Pautz understood—whether it was "Miguel Ledesma Ornelas" or "Miguel Ornelas Ledesma." Confusion on this score is understandable, though not justifiable. Spanish naming conventions are confusing to non-Hispanic Americans. When a Hispanic has two surnames, such as Ornelas Ledesma or Ledesma Ornelas, the first is his father's last name and the second his mother's maiden name. The first is primary, and the second subordinate—exactly the reverse of the middle and last names of non-Hispanics. To a Hispanic, therefore, "Ornelas, Miguel Ledesma," would denote Miguel Ornelas Ledesma rather than, as a non-Hispanic would expect, Miguel Ledesma Ornelas. But if the motor vehicle authorities, the dispatcher, or Pautz were unfamiliar with Spanish naming conventions (and Pautz testified that he *was* unfamiliar with them), "Ledesma" ***716** and "Ornelas" could easily get reversed.

Pautz, believing that he had the name of the car's registered owner, entered the motel and checked the registry, which showed that an Ismael (not Miguel) Ornelas had registered at 4:00 a.m. and had been accompanied by another man. Pautz then called his partner, Detective Hurrle, to join him. When Hurrle arrived, the two officers called the Milwaukee office of the Drug Enforcement Administration and asked it to run a NADDIS check on Miguel Ledesma Ornelas from San Jose and on Ismael Ornelas. NADDIS (Narcotic and Dangerous Drug Information System) is a computerized compilation of the federal Drug Enforcement Administration's information on known and suspected drug traffickers. NADDIS reported two "hits." One was on Miguel Ledesma Ornelas, also known as Miguel Lemus–Ledesma, identified by NADDIS as a heroin dealer in El Centro, California, which is hundreds of miles from San Jose, the residence of the registered owner of the car. The other "hit" was on Ismael Ornelas, Jr., of Tucson, Arizona, reported by the computer to be a 1000–kilogram-per-month cocaine dealer, although no "wants" or warrants were outstanding against him. The officers did not attempt to obtain descriptions of the two suspected dealers, neither of whom in fact is one of or, as far as we know, related to the defendants.

Because the car was an older GM two-door, because its occupants had checked in at the motel at 4:00 a.m. without having made reservations in advance, because there were two persons rather than just one and at least one of them was Hispanic, and because they apparently had come from a "source state"—and of course because of the "hits" on similar or identical names—the officers decided to stop and question the men when they left the motel. At this point a third officer arrived, Luedke, bringing with him a drug-sniffing dog; and Pautz left. After a time, two men emerged from the motel and entered the Oldsmobile. The officers parked their cars on either side of it. Hurrle tapped the window on the driver's side, identified himself as a police officer, and asked both men for identification. Saul Ornelas, who was in the driver's seat, produced a driver's license in that name; Ismael Ornelas–Ledesma, who was in the front passenger's seat, produced a driver's license in the name of Ismael Ornelas, residing in Martinez, California. Hurrle asked whether there were any drugs in the car. The occupants said "no." Hurrle asked them for permission to search the car, and they gave their permission. The two men were not placed under arrest but the government concedes that a reasonable person in their position would not have felt free to leave. So the encounter was a so-called "*Terry* stop" (after *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)), *Michigan v. Chesternut,* 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988); *INS v. Delgado,* 466 U.S. 210, 216, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984); *United States v. Adebayo,* 985 F.2d 1333, 1338–39 (7th Cir.1993), a semi-arrest that is lawful under the Fourth Amendment if but only if the officers had a "reasonable suspicion supported by articulable facts" that the persons stopped were engaged in criminal activity. *United States v. Sokolow,* 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989).

Officer Luedke inspected the interior without canine assistance and noticed a loose panel on the passenger's door. One of the screws by which the panel was fastened to the door was—Luedke testified—rusty. To him this meant that it had been removed recently. He didn't explain why, but maybe the idea is that the removal of the screw would have scraped off its chrome coating, which protected it from rusting. Suspecting that drugs were concealed behind the panel, Luedke pried it open. His hunch was correct; there was a package containing two kilograms of cocaine wrapped in aluminum foil and paper. Ornelas and Ornelas–Ledesma were then arrested.

Clearly, were it not for the NADDIS hits, the officers would not have had grounds for *reasonable* suspicion that the defendants were drug traffickers. Not only is every circumstance on which the officers relied other than the hits innocent taken by itself—many Americans (approximately one in eight) are Californians, many Californians are Hispanic, many Americans drive two-door General ***717** Motors cars, many people check into motels very late at night (or early in the morning), many travel in pairs rather than

  

alone, and many do not make advance reservations—but the confluence of these circumstances is pretty innocuous as well, especially since many of the circumstances are correlated rather than independent. Hispanics are disproportionately concentrated in California, and having on average lower incomes than non-Hispanic Americans are doubtless more likely than other Americans to drive two-door rather than four-door cars, older rather than newer cars, and American rather than foreign cars. They are more likely to drive than to fly and, we imagine, less likely to make reservations in advance at motels, since cheap motels don't advertise much or have 800 numbers. Nothing is more common than for people taking long trips to drive until they're tired and then—often at very odd hours—to check in at the nearest motel, of course without a reservation. And people who drive long distances late at night prefer to have someone with them. Because the "suspicious" circumstances (other than the NADDIS hits) are so strongly correlated with each other, were they considered sufficient by themselves to justify a stop the practical consequence would be that a very large proportion of all Hispanic Americans would be vulnerable to being stopped on suspicion of drug trafficking. Hispanics would be second-class citizens in the eyes of the police. Although a brief investigatory stop is less intrusive than an arrest, it is sufficiently redolent of police-state tactics for courts to insist in the name of the Fourth Amendment that its use be circumscribed.

So we must ask what the NADDIS hits added to a "drug courier profile" that seems only a little better than a dragnet for Hispanics. It would be nice to *know* something about NADDIS, but the government successfully opposed the defendants' efforts to obtain discovery aimed at determining the character and reliability of the information in the NADDIS data base, and as a result the record is bare of evidence about it. At argument the government's lawyer, while saying that she has used NADDIS herself, disclaimed any knowledge about the system except how to access it. We do not know how many names are in it currently, where exactly the names come from, whether any of the information inputted into the system is screened for reliability before being entered, whether anyone checks to make sure that errors are not made in inputting information, whether information is updated systematically, and (a closely related question) whether information discovered to be stale or inaccurate is removed from the system. Although a number of judicial opinions mention NADDIS in passing—obviously it is widely used in drug enforcement—we have found no considered judicial assessment of its reliability, although we have found occasional judicial expressions of concern about that reliability. *United States v. $7,850 United States Currency,* 7 F.3d 1355, 1358 (8th Cir.1993); *United States v. $215,300 United States Currency,* 882 F.2d 417, 419 and n. 2 (9th Cir.1989) (per curiam); *United States v. Saperstein,* 723 F.2d 1221, 1232 (6th Cir.1983).

Maybe NADDIS is no better than a vast compendium of rumors, errors, and libels: garbage in, garbage out. That seems unlikely. It would not be heavily used by drug enforcement authorities if it were merely a random sample of the American population. Which is not to say, however, that it is *highly* reliable; concern that it may not be is heightened by the (scanty) secondary literature, which depicts NADDIS as an unselective, unweeded repository of unsubstantiated allegations, often dated. See UPI Release, "VIP Names in Drug Agency's Computer Files," July 3, 1984; Vanessa Jo Grimm, "Behemoth DEA Database Tracks Drug Smugglers," *Government Computer News,* July 8, 1991, p. 85. According to the UPI Release, as of 1984 NADDIS contained 1.5 million names, obtained from debriefings of informants and suspects and from surveillance and intelligence reports of various law enforcement agencies.

As an example of NADDIS's possible unreliability, we note that according to it Ismael Ornelas, Jr., of Tucson, a 1000 kilogram a month dealer—a *large* dealer—is not wanted by any law enforcement authority in the country. Maybe *that* Ornelas (who is neither Saul Ornelas nor Ismael Ornelas–Ledesma nor the registered owner of the ***718** Olds) died years ago or is some practical joker's or desperate informant's fictional creation or is an honest man falsely accused by an enemy. Because the reliability of information stored in NADDIS is unknown, that information must, on the record before us, be reckoned no more reliable than that of an informant not known to be reliable. Therefore, since an uncorroborated tip from such an informant cannot by itself furnish probable cause for an arrest or search, *Illinois v. Gates,* 462 U.S. 213, 227, 103 S.Ct. 2317, 2326, 76 L.Ed.2d 527 (1983), an unverified, uncorroborated entry in NADDIS cannot do so either. *United States v. $7,850 United States Currency, supra,* 7 F.3d at 1358; *United States v. $215,300 United States Currency, supra,* 882 F.2d at 419 and n. 2; *United States v. Saperstein, supra,* 723 F.2d at 1232. The issue here, it is true, is not probable cause, but reasonable suspicion, because we are dealing with a stop rather than an arrest. But the Supreme Court has held that an uncorroborated anonymous tip, even when it comes from law enforcement authorities, does not by itself justify a stop. *United States v.*

  

*Hensley,* 469 U.S. 221, 232, 105 S.Ct. 675, 682, 83 L.Ed.2d 604 (1985). The statement in *United States v. Troka,* 987 F.2d 472, 474 (7th Cir.1993), that "the police department was a reliable source," must be understood in context (the police department was a reliable source *in the circumstances of that case* ), rather than as a quixotic effort to overrule the Supreme Court.

That cannot be the end of our analysis, however. NADDIS furnished two tips, not one. "Ismael Ornelas," the name on the motel registry, was very similar to "Ismael Ornelas, Jr.," the name in NADDIS. And while the names Miguel Ornelas Ledesma and Miguel Ledesma Ornelas are as different from each other as Francis Scott Key and Francis Key Scott, the names could easily have been reversed in entering them in the computer, just as "Jr." could easily have been left off a motel registry. So there was some reason to believe that the registered owner of the Olds was the Miguel Ornelas Ledesma, or Miguel Ledesma Ornelas, identified by NADDIS as a suspected drug dealer. Even if NADDIS is not terribly reliable, some or for that matter many entries in it may be accurate or at least approximately so. And the fact that *both* the registered owner of the car *and* the name on the motel registry corresponded more or less to names of suspected drug dealers in the NADDIS database was impressive. One "hit" might well be coincidence; it was much less likely that two—one corresponding to the name in the hotel registry, presumably that of either the driver or the passenger; the other to the name of the registered owner, who might or might not be one of the two men in the motel—were, though this depends in part on how common the names "Ornelas" and "Ledesma" are. Paradoxically, the very unreliability of NADDIS (if it is unreliable) might strengthen the inference that the two men in the Olds were involved in the drug trade; inverting last and middle names is just the kind of mistake that one would expect in a carelessly maintained database. A mistaken premise can furnish grounds for a *Terry* stop, if the officers do not know that it is mistaken and are reasonable in acting upon it. *Illinois v. Rodriguez,* 497 U.S. 177, 184–86, 110 S.Ct. 2793, 2799–2800, 111 L.Ed.2d 148 (1990); *United States v. De Leon–Reyna,* 930 F.2d 396, 399 (5th Cir.1991) (en banc) (per curiam); *United States v. Walraven,* 892 F.2d 972, 974–75 (10th Cir.1989).

The tips were mutually corroborating; and the other circumstances on which the officers relied (the make and type of the car, the state it came from, etc), insufficient as they were by themselves to create a suspicion reasonable enough, substantial enough, to justify the infringement of personal liberty that is brought about by an investigative stop, may, when taken together with the NADDIS "tips," have tipped the balance in favor of a finding of reasonable suspicion. *United States v. Esieke,* 940 F.2d 29, 34 (2d Cir.1991), and *United States v. Morin,* 665 F.2d 765 (5th Cir.1982), factually similar cases although stronger for the government, so suggest. And the Supreme Court held in *Alabama v. White,* 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), that an anonymous tip can create reasonable suspicion if corroborated. The form the corroboration took in that case was verification of a prediction made by the informer, but there is no ***719** magic in a particular form of corroboration. The circumstances that first aroused Pautz's suspicions were corroborative of the "anonymous tips" furnished by NADDIS in the sense that they made it likelier than otherwise that NADDIS was, in this instance anyway, accurate. Standing alone, the drug courier profile that first aroused Pautz's suspicions was very little. Standing alone, one NADDIS "hit" could not, in the absence of any evaluation of NADDIS's reliability, be thought much either. The second "hit," however, added to the credibility of the first; and together the profile and the "hits," though still not enough evidence of crime to furnish probable cause to search the car, could satisfy the lesser showing required for a *Terry* stop.

Although the question is close, we conclude that the district court did not commit clear error in holding that there was a lawful stop. And clear error is the test; the proposition that review of a district court's determination of reasonable suspicion (if it is a *Terry* stop) or probable cause (if it is an arrest, search, or seizure) is plenary, embraced in such cases as *United States v. Jaramillo,* 891 F.2d 620, 626 (7th Cir.1989), is no longer tenable after *United States v. Spears,* 965 F.2d 262 (7th Cir.1992), where, overruling inconsistent precedents, this court held that the standard for judicial review of determinations of probable cause was clear error. There is no basis for distinguishing in this regard between probable cause and reasonable suspicion. They are adjacent points on a continuum.

Since the stop was lawful, we need not decide whether, had it been unlawful, the defendants' consent to search would nevertheless have been valid even though (a relevant factor, though not a decisive one, *Schneckloth v. Bustamonte,* 412 U.S. 218, 231–33, 249, 93 S.Ct. 2041, 2049–51, 2059, 36 L.Ed.2d 854 (1973)) the officers failed to advise the defendants of their right not to consent. *United States v. Valdez,* 931 F.2d 1448, 1451 (11th Cir.1991); *United States v. Valencia,* 913 F.2d 378, 381 (7th Cir.1990). But we do not

  

think the denial of the motion to suppress the drugs seized from the door of the Olds can be upheld on the basis of the record compiled in the district court. The government does not argue that a *Terry* stop justifies so intrusive a search. The only lawful purpose of a search incident to a *Terry* stop is to protect the officers from the danger that the persons they have stopped will reach for a weapon, *Minnesota v. Dickerson,* 508 U.S. 366, ——, 113 S.Ct. 2130, 2136, 124 L.Ed.2d 334 (1993); *Michigan v. Long,* 463 U.S. 1032, 1049–51, 103 S.Ct. 3469, 3481–82, 77 L.Ed.2d 1201 (1983), and ordinarily and here the officers do not have to dismantle a car to satisfy themselves on that score. Nor does the government argue that the consent to search that Ornelas and Ornelas–Ledesma gave the officers was consent to dismantle the car. *United States v. Garcia, supra,* 897 F.2d at 1419–20; but cf. *United States v. Pena,* 920 F.2d 1509, 1515 (10th Cir.1990). The seizure was lawful, therefore, only if the search yielded information that gave Officer Luedke probable cause to believe that contraband was secreted behind the loose panel. If so, no search warrant was required, even for a search that would require taking the car apart. *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

In arguing that there was probable cause for the search that discovered the drugs secreted in the car door, the government places great weight on the loose panel and the rusty screw. But the screw was not rusty. The magistrate judge to whom the motion to suppress was referred for a recommended ruling looked at the screw and found no indication of rust. The screw is in the appellate record and we have looked at it ourselves. There is not the slightest trace of rust or of anything that looks like rust. It is a Phillips screw and the head contains scratches that suggest it might have been removed and reinserted, but Luedke was adamant that it was signs of rust that caused him to believe that the panel had been removed recently and then put back in place. Having inspected the screw, the magistrate judge naturally disbelieved Luedke's testimony that the screw had looked rusty. Without discussing the bearing of Luedke's testimony about the loose panel on the issue of probable cause, the magistrate judge concluded that the seizure of the drugs had not been supported ***720** by probable cause. But noting the presence of the drug-sniffing dog, he found that the drugs would have been discovered anyway and therefore upheld the seizure on the ground of inevitable discovery. *Nix v. Williams,* 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

The district judge upheld the seizure, too, but not on the magistrate judge's ground but rather on the ground that the allegedly loose panel alone, which the magistrate judge had not discussed, furnished probable cause. The government defends Luedke's testimony about the rust by arguing that it was dark inside the car (though it was broad daylight) and maybe the screw looked rusty though it wasn't; we are more accustomed to being told of the remarkable eyesight of the police that enables them to see tiny objects at great distances in the dark. *United States v. Sophie,* 900 F.2d 1064, 1073 (7th Cir.1990); *United States v. Gilliard,* 847 F.2d 21, 24 (1st Cir.1988); cf. *United States v. Pinto–Mejia,* 720 F.2d 248, 262 (2d Cir.1983). In any event, the magistrate judge was not required to believe Luedke or recast his testimony in a believable form.

The magistrate judge concluded that Luedke did not have probable cause to seize the drugs; the district judge concluded that he did. Can we uphold the district judge's determination, in view of this disagreement? The standard for judicial review of a determination of probable cause is, as we have noted already, clear error; and this is so whether the determination is made by a magistrate judge or by a district judge. *United States v. Spears, supra; United States v. Adebayo,* 985 F.2d 1333, 1337 n. 2 (7th Cir.1993). A qualification is necessary, however, for the case in which the magistrate judge, rather than determining probable cause en route to issuing a warrant later challenged by a motion to suppress evidence seized pursuant to it, is merely recommending the disposition of a motion referred to him by a district judge to suppress evidence obtained as a result of a search, or an arrest, made without a warrant. In the first case, the relation between district judge and magistrate judge is that of reviewing court to court of first instance, and the usual standard of appellate review of findings of fact and of the application of a legal standard to such findings applies. In the second case—which is our case—not only may the district judge (with inapplicable exceptions) "accept, reject, or modify, in whole or in part, the [magistrate judge's] findings or recommendations," 28 U.S.C. § 636(b)(1); he is required "to make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made." *Id.*

The question whether the district judge's power of de novo determination authorizes him to reject a magistrate judge's finding of credibility, without the district judge's hearing the witness himself, was left open in *United States v. Raddatz,* 447 U.S. 667, 681 n. 7, 100 S.Ct. 2406, 2415, 65 L.Ed.2d 424 (1980), though with a broad hint, picked up in *Proffitt v. Wainwright,* 685 F.2d 1227, 1237, 1241 (11th Cir.1982),

  

that the answer is "no." See also *Grassia v. Scully,* 892 F.2d 16, 19–20 (2d Cir.1989); but cf. *LoConte v. Dugger,* 847 F.2d 745, 750 (11th Cir.1988). We need not answer the question here. Rather than reject the magistrate judge's finding that Luedke's testimony about the rusty screw should not be believed, the district judge found probable cause for the seizure in a part of Luedke's testimony that the magistrate judge had not relied upon—the testimony that the panel was loose. A number of cases, illustrated by *United States v. Lugo,* 978 F.2d 631, 637 (10th Cir.1992), treat a loose door panel as a telltale sign of drug running—but not as sufficient in itself to constitute probable cause. (In *United States v. Garcia, supra,* 897 F.2d at 1416, the officers saw packages peeping out from behind the loose panel.) The facts of this case show why. The car was eleven years old when Officer Luedke conducted the search. We mean no disrespect to Detroit in observing that the interior of a 1981 Olds unlike that of a Rolls Royce is apt to be rather worn and battered after eleven years. The fact that a door panel is loose does not by itself create a reasonable likelihood that the panel conceals a secret compartment containing contraband. *State v. Swanson,* 172 Ariz. 579, 838 P.2d 1340, 1345–48 (App.1992). Here as in most cases there was more, but not much more: ***721** mainly the NADDIS "hits" of unproven reliability.

We need not decide, however, whether the NADDIS hits (remember that there were two, and that this enhances their reliability), plus the fact that the defendants fit the drug courier profile, plus a loose door panel add up to probable cause—whether in other words the loose panel could turn reasonable suspicion into probable cause. For we do not know whether Luedke's testimony about the door panel should be believed. The only judicial officer who heard him testify was the magistrate judge, who failed to indicate whether he believed the testimony. Since the magistrate judge disbelieved a closely related part of Luedke's testimony, and the district judge did not overturn *that* credibility finding, it can hardly be *assumed* that the magistrate judge would surely have believed Luedke's testimony about the door panel, or that if he had disbelieved it would surely have been reversed by the district judge. Nor did the latter base his determination on a viewing of the car; there was no viewing. Even if, contrary to *Proffitt,* and to decisions involving the parallel case of administrative review of administrative law judges' credibility determinations, e.g., *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 495–97, 71 S.Ct. 456, 468–469, 95 L.Ed. 456 (1951); *NLRB v. Augusta Bakery Corp.,* 957 F.2d 1467, 1475–76 (7th Cir.1992); *Ortiz–Salas v. INS,* 992 F.2d 105, 108 (7th Cir.1993), a district judge can reject a magistrate judge's determinations of credibility without hearing the witnesses' testimony himself, we do not think that he can be permitted to ignore the issue of credibility altogether. We do not think that he can accept challenged testimony given before another judicial officer without giving a reason for resolving the issue himself rather than referring the matter for initial determination by the other officer.

This oversight would be academic if the magistrate judge's alternative ground for upholding the seizure—inevitable discovery by Luedke's dog—was so clearly correct that we could uphold it without the benefit of the district judge's views, as in *United States v. Lewis,* 621 F.2d 1382, 1387 (5th Cir.1980). We cannot. No evidence was presented concerning the dog's capabilities. For all we know he is an infallible sniffer of two kilograms of cocaine wrapped and hidden behind the door panel of a car; but we cannot take judicial notice of this fact. We don't know and have not been told anything about this dog except his name (Merlin), although our own research reveals that a Milwaukee drug-sniffing dog named Merlin, presumably the same beast, has on at least one occasion detected drugs in a piece of luggage when there weren't any. *Schaefer v. United States,* 656 F.Supp. 631, 632 (E.D.Wis.1987). If Merlin is *that* good, no doubt he could sniff the cocaine in the door of the defendants' car, but the government has not had the audacity to argue that a dog who can detect nonexistent drugs is an infallible inevitable discoverer of existent drugs. We may be too hard on Merlin; maybe he sniffed the residue of drugs in the luggage in the *Schaefer* case; maybe it was a different dog with the same name. But the government in its brief, without going so far to confess error on the magistrate judge's alternative ground (that is, inevitable discovery), does not defend it, even though defendant Ornelas had attacked it at some length in his opening brief. The government does not, for example, respond to Ornelas's damaging quotation from the testimony of Detective Hurrle: "I don't know if he [the dog] necessarily would have hit on this particular cocaine." (To which it can be added that we don't know whether the dog would have been directed to sniff in or about the car if Luedke's search had disclosed no suspicious circumstances.) We cannot affirm on a ground that has been waived, *Crane v. Indiana High School Athletic Ass'n,* 975 F.2d 1315, 1319 (7th Cir.1992); *Frederick v. Marquette Nat'l Bank,* 911 F.2d 1, 2 (7th Cir.1990), and the government has waived the defense of inevitable discovery by failing to defend the magistrate judge's determination. Perhaps it did this because it believed that the determination could not be defended. It put all its eggs in the probable-cause basket, and the eggs are broken.

  

The motion to suppress should not have been denied, though it is open to the government on remand to ask the district judge ***722** either to hear Luedke's testimony on the loose panel himself (or at least view the car's interior) or refer the matter to the magistrate judge for a determination of the credibility of that testimony. If Luedke's testimony is disbelieved, the motion to suppress should be granted. If it is believed, the district court must decide whether the loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first aroused Officer Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the panel. The court may wish to consider the evidence of the loose panel (if that evidence is believed) in conjunction with the Philips screw. For while it is plain that it is not rusty, it does look as if it had been scratched in just the way one would expect if it had been removed and reinserted, though its appearance could we suppose reflect its removal by Officer Luedke or other handling since. The test for probable cause is objective. It is not what the officer in question actually believed but what a reasonable officer in his position would have believed. *Scott v. United States,* 436 U.S. 128, 138, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978); *Mahoney v. Kesery,* 976 F.2d 1054, 1057–58 (7th Cir.1992). A reasonable officer would not have believed the screw rusty but might have believed it showed (other) evidence of having been removed and reinserted. That is a matter to be explored on remand.

The judgments of conviction are vacated and the case is remanded for further proceedings consistent with this opinion. The other grounds raised by the appellants have too little merit to warrant discussion.

Vacated and Remanded.

**All Citations**

16 F.3d 714

provided for no discountability.[6] *Id.* at 72-73. Western argues that, in view of the marked differences between Rate Schedule T-53 service and Rate Schedule PT service, the Commission erred in upholding equivalent rates for the T-53 forward haul.

Moreover, Western argues, because of the seasonal limitations imposed on Western's service, the contract conferred appreciable advantages on the Panhandle system and failed to exact certain costs associated with peak-period transportation. First and foremost, the winter backhaul service afforded the pipeline more capacity to transport gas between the upstream point, at which gas was removed, and the downstream point, at which gas was reinserted. In fact, the Commission recognized the possibility of just these benefits in the context of mandating a lower backhaul rate, discussed *infra.* Second, the summer forward-haul service allegedly enabled the pipeline to recover costs during the period in which the pipeline was used least. The forward-haul rate for off-peak service, maintains Western, properly should recognize the fact that few customers would otherwise seek out the pipeline's services during this period. Other things being equal, Western asserts, the pipeline benefitted tangibly from the increased throughput stimulated by the erstwhile favorable Rate Schedule T-53. Finally, as a summer forward-haul customer, Western faced no competition for scarce pipeline capacity. During the winter, when customers abound, higher rates both offset the costs of greater burdens on the system and serve as a rationing mechanism. Paradoxically, Western suggests, the Commission took seasonal factors into account in decreasing the backhaul rate, but ***1574 **15** refused to take cognizance of them in its consideration of the forward-haul rate.

Western bolsters its argument by several of the Commission's regulations that touch upon seasonal rates. At 18 C.F.R. § 284.7(c)(2), the Commission sets forth objectives for rate-setting during off-peak periods, stating that:

Rates for firm service during off-peak periods and for interruptible service during all periods should maximize throughput.

Moreover, 18 C.F.R. § 284.7(d)(3) provides that:

Any rate filed for service subject to this section must reasonably reflect any material variation in the cost of providing the service due to:

(i) Whether the service is provided during a peak or an off-peak period.

Finally, as Western notes, 18 C.F.R. § 284.7(d)(4)(i) provides that:

Any maximum rate filed under this section must be designed to recover on a unit basis, solely those costs which are properly allocated to the service to which the rate applies.

Although these regulations appear to leave considerable discretion to the rate-setter, they nevertheless clearly contemplate that different costs may be attributable to different services in different seasons. Western urges this court to find that the Commission violated these regulations by approving an off-peak forward-haul rate that, like the PT rate, included a full allocation of capacity costs, when the T-53 service imposed no such capacity costs on the system.

Western's arguments are not insubstantial.[7] We begin by recognizing that, because it was the source of the proposed change, Panhandle bore the burden of persuasion under § 4 of the NGA to justify a departure from the presumptively just and reasonable preexisting rate structure, under which the forward-haul rate for T-53 service was significantly lower than that for Rate Schedule PT service. *See* 15 U.S.C. § 717c(e) (1988); *East Tennessee Natural Gas Co. v. FERC,* 863 F.2d 932, 937 (D.C.Cir.1988). Section 4 limits the Commission to two courses of action, "acceptance (in whole or in part) or rejection of the pipeline's proposed rates." *Sea Robin Pipeline Co. v. FERC,* 795 F.2d 182, 183 (D.C.Cir.1986). Under its § 4 authority, the Commission need only articulate the bases for its determination that the proposed rate is just and reasonable, demonstrating a sound and rational nexus between the facts and its conclusions.[8]

Even under such a relaxed standard, we find that the Commission's opinion falls short in making manifest the requisite connection. Somewhat perplexingly, the Commission appeared to accept (or at least, not to reject) many of Western's substantive arguments even as it approved the increased forward-haul rate over Western's protest. In its Order on Rehearing, the Commission conceded that seasonal rate differences might be necessary in order to ration rights to winter capacity, but observed that "no party, including [Western], has provided evidence which would help the Commission determine with any certainty what those [adjusted rates] should be." 59 F.E.R.C. at ¶ 61,874. The Commission acknowledged that Rate Schedule T-53 service lacked the flexibility of PT service, but determined that this factor suggested that Rate Schedule T-53 service should be adjusted for more flexibility, not priced more cheaply.[9] The Commission ***1575 **16** concluded, "[i]n any event,

[Western] has not shown what value should be attached to this feature of Rate Schedule PT service so that the Commission could determine an appropriate rate adjustment." *Id.* at ¶ 61,875. Although the Commission apparently found some measure of logic to Western's arguments, it declined the opportunity to interpose its own rate under § 5 of the NGA. In approving the new rate notwithstanding these lingering questions, the Commission implicitly found the proposed increase just and reasonable.

To be sure, we approach this finding with the deference befitting a reviewing court's inquiry into rate-setting. The Commission, possessed as it is of considerable expertise, is entitled to hold sway provided that its conclusion "is supported by substantial evidence and reached by reasoned decisionmaking-that is, a process demonstrating the connection between the facts found and the choice made." *ANR Pipeline Co. v. FERC,* 771 F.2d 507, 516 (D.C.Cir.1985) (citing *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 167-68, 83 S.Ct. 239, 245-46, 9 L.Ed.2d 207 (1962)). Taking these principles firmly in hand, we nonetheless conclude that the Commission's rationale fails to dispel certain vexing questions about the propriety of assessing equivalent rates for two very different services, the off-peak forward haul and the unlimited, open access transportation. Particularly given the Commission's apparent concession that seasonal disparity in rates might be warranted in this case and the Commission's rate objectives embraced in regulations, we are unpersuaded that the Commission's decision approving the increased forward-haul rate comports with reason and logic.

In its brief, the Commission makes several arguments that intensify our discomfort. The Commission argues for the first time that it viewed the forward- and backhaul rates "as parts of a closely interrelated service," and that it "attempted to give recognition to the capacity advantages that the T-53 service provides overall to Panhandle by requiring that the backhaul rate be halved...." Brief for Respondent at 39. Despite this concession on brief, the orders below gave no indication that the Commission intended the adjusted backhaul rate to reflect supposed benefits of the off-peak *forward-haul* service. Instead, the Commission repeatedly lamented that Western had provided it no means of quantifying any possible benefits of the off-peak forward haul, and that it therefore had to accept Panhandle's proposed rate hike at face value. *See* 59 F.E.R.C. at ¶ 61,874. Obviously, a new gambit undertaken by the Commission in its brief at this stage cannot be used to rationalize the Commission's action below, due to our longstanding rule that "courts may not accept appellate counsel's post hoc rationalizations for agency action." *Algonquin Gas Transmission Co. v. FERC,* 948 F.2d 1305, 1316 (D.C.Cir.1991) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 50, 103 S.Ct. 2856, 2870, 77 L.Ed.2d 443 (1983)). By the same token, we also refrain from drawing the negative inference from new arguments at this stage that the Commission intends to abandon or undercut rationales employed below. Nonetheless, we do observe that this new argument seems *further* to underscore concerns already discussed about the Commission's apparent *agreement* with Western's underlying premise that off-peak forward-haul service differs from Rate Schedule PT service in ways that might justly and reasonably be reflected in lower rates-whether in the forward-haul rate itself, as Western urges, or in the backhaul rate, which the Commission's counsel now asserts for the first time motivated the Commission's 50% cut. Yet the fact remains that the Commission's forward-haul decision itself indicates outright rejection of seasonal considerations.

The Commission also contends in its brief that Rate Schedule T-53 incorporated certain benefits lacking in PT service that compensated for its other limitations. Specifically, the Commission now argues that Western's service "could not be abandoned without the exercise of the Commission's express abandonment authority under section 7(b) of the ***1576 **17** NGA, ... whereas open-access transportation under Rate Schedule PT was subject to 'pre-granted abandonment.' " Brief for Respondent at 40. The Commission urges now-although it did not so conclude below-that because of the abandonment factor, PT service is not necessarily superior to T-53 service. Although the issue of abandonment might cast the rate-setting issue in a different light, we are unwilling to deviate from the time-honored rule that a reviewing court "must judge the propriety of [agency] action solely by the grounds invoked by the agency." *SEC v. Chenery Corp.,* 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947). Accordingly, we take no stock in the Commission's *post hoc* justification. We observe, however, that again, by offering a new factor at this late stage, the Commission reinforces nagging doubts that, without more, seasonal limitations should have translated into lower rates.

We remand to the Commission for reconsideration of the T-53 forward-haul rate in light of regulations that appear to endorse seasonal distinctions, the Commission's apparent recognition below (repeated in its brief) that the off-peak forward-haul rate differs materially from the PT rate, and our belief that

  

the Commission cannot adequately justify at 224% increase in the off-peak forward-haul rate structure merely by asserting that the affected customer provided no substitute. Even when the Commission does not itself bear the burden of proof, the Commission's responsibility to ensure that all approved rates are just and reasonable requires more explanation than it gave here for a remarkable deviation from the presumptively just and reasonable status quo.

2. *Parity With Sales Rates*

Western also argues that Panhandle's forward-haul rate hike discriminates against nonsales customers, who pay only a modest administrative fee for off-peak forward hauls made in conjunction with the sale of gas. In approving the rate increase, Western maintains, the Commission countenanced discrimination between the two services in violation of its regulations and the parties' original agreement. Without ruling on the substance of Western's arguments, the Commission concluded that the comparison of sales and transportation rates was beyond the purview of the reserved settlement issue. As a threshold matter, therefore, we must determine whether the Commission reasonably interpreted the settlement agreement to preclude examination of Western's claims. We conclude that the Commission acted reasonably in light of the terms of the settlement and the circumstances surrounding the litigation. Accordingly, we do not venture beyond the threshold to consider the merits of Western's argument.

In *National Fuel Gas Supply Corp. v. FERC,* 811 F.2d 1563 (D.C.Cir.1987), this court determined that the Commission's reading of a settlement agreement is entitled to deference even when the issue involves the proper construction of the agreement's terms.[10] The inquiry, the court reasoned, should proceed along the lines of the now-familiar *Chevron* analysis: "if the intent of the parties on the particular issue is clearly expressed in the document, 'that is the end of the matter.' " *Id.* at 1572 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984)). If the parties' agreement does not speak directly to the problem, however, we are bound to uphold a reasonable agency interpretation of the agreement. To be sure, we need not accept "an agency interpretation that black means white. However, if the choice lies between dark grey and light grey, the conclusion of the agency, unmistakably possessed as it is of special expertise, in favor of one or the other will have great weight." *Id.* (citing *Consolidated Gas Supply Corp. v. FERC,* 745 F.2d 281, 291 (4th Cir.1984) (citation omitted)).

Article III of the settlement agreement specifically reserves for the Commission the issue "[w]hether the rates for service to ****18** ***1577** [Western] under Rate Schedule T-53[,] which is performed pursuant to section 7 authorization[,] which predate the issuance of Order 436 shall be equivalent to the maximum rates for services provided under Rate Schedule PT." 57 F.E.R.C. at ¶ 61,858. The reserved issue does not address sales rates, which seem to present altogether different issues. The Commission interpreted the reserved question to focus only on the comparison between Rate Schedule PT and Rate Schedule T-53, not to extend to consideration of sales rates. As the Commission observed, Western and Panhandle could revisit the issue of Rate Schedule TS-4 sales rates and their effect on Rate Schedule T-53 in Panhandle's more recent rate case in Docket No. RP91-229-000. In light of the language of the settlement issue, which makes no reference to sales rates, we conclude that the Commission was well within its discretion in determining that consideration of sales rates was beyond the scope of the agreement. Accordingly, we decline to second-guess the Commission's decision to pass on that issue.

C. *The Backhaul Rate*

In its decision below, the Commission accepted Western's argument that winter backhaul service allowed Panhandle to transport more gas during periods of strained capacity between the upstream point and the downstream point. The Commission agreed that these benefits should translate into lower rates, concluding that "the appropriate Rate Schedule T-53 backhaul rate is one half the Rate Schedule T-53 forward haul rate...." 59 F.E.R.C. at ¶ 61,873. The Commission determined that this figure, proposed by Western, "gives a reasonable approximation of the benefits conferred and is appropriate until a better method can be established." *Id.*

Panhandle challenges this conclusion on several grounds. First, Panhandle claims that the separate issue of backhaul rates was not properly before the Commission, because the parties' settlement agreement restricted FERC to consideration of whether T-53 rates could be set equal to PT rates, not whether backhaul rates and forward-haul rates should be set differently. Second, Panhandle argues that the backhaul rate ultimately approved by the Commission was the Commission's own creation, a new figure falling under the Commission's § 5 authority under the NGA. Consequently, Panhandle contends, the Commission was required, but

  

failed, to bear the burden of proof on the basis of substantial evidence that its proffered new rate was "just and reasonable." Finally, Panhandle claims that under § 5, FERC was not authorized to grant refunds. We consider these issues in turn.

1. *Scope of the Reserved Question*

The settlement agreement reserved the single question whether T-53 rates should be set equal to rates under Rate Schedule PT. Panhandle contends that this issue is narrow, entailing a literal comparison of T-53 and PT rates without distinction between forward-haul and backhaul charges. The Commission rejoins that its decision answers the question affirmatively for forward-haul rates and negatively for backhaul rates, and is entirely consistent with the reserved question. To evaluate this claim, we hearken back to *National Fuel Gas Supply Corp. v. FERC,* 811 F.2d 1563, 1569 (D.C.Cir.1987), in which this court underscored the principle of deference to the agency's construction of settlement agreements. Although it is true that the reserved question is not parsed into forward-haul and backhaul components, we agree with the Commission that the issue is ambiguous. Forward-haul and backhaul rates were historically set much differently by the parties, and proper resolution of the reserved question seemingly requires consideration of the two components separately. In light of these factors, we find the Commission's conclusion reasonable and worthy of deference. As the Commission notes, the difference between the forward-haul and backhaul rates was at the core of the parties' disagreement.

2. *The Commission's Authority under the NGA*

The remaining two issues raised by Panhandle-whether the Commission sustained its burden of proof and whether the Commission was authorized to apply the adjusted ***1578 **19** back-haul rate retroactively-require characterization of FERC's action in approving a backhaul rate equal to one-half of the approved forward-haul rate. Under the NGA, the allocation of the burden of proof and the propriety of ordering refunds depend on the source of the proposed rate change. *See East Tennessee Natural Gas Co. v. FERC,* 863 F.2d 932, 937 (D.C.Cir.1988); *Tennessee Gas Pipeline Co. v. FERC,* 860 F.2d 446, 449 (D.C.Cir.1988). Section 4, which governs the approval or rejection of rates proposed by the pipeline, mandates that the pipeline bear the burden of proof that its proposed rate is just and reasonable and permits refunds in certain narrowly drawn circumstances.[11] *See* 15 U.S.C. § 717c(e) (1988). Section 5 governs situations in which the Commission imposes rates of its own creation or at the behest of a third party. This section requires FERC to bear the burden of proof that its proffered rate is just and reasonable and bars retroactivity altogether. *See* 15 U.S.C. § 717d(a) (1988). Panhandle argues that the Commission's determination of the backhaul rate in the proceedings below ventured beyond the exercise of its § 4 authority and into the realm of § 5. As a result, Panhandle argues, the Commission was required by statute to bear a burden that it did not meet in this instance.

The Commission responds by contending that its action fell squarely within the ambit of its § 4 powers. The Commission characterizes its action as a partial acceptance of the pipeline's proposed rate hike. Under § 4, the pipeline was required to convince the Commission that its proposed rate was just and reasonable. FERC maintains that it found that the pipeline had sustained this burden, but *only* to the extent that the new backhaul rate did not exceed one-half of the forward-haul rate. Because § 4 contemplates acceptance in whole *or in part* of pipeline proposals, *see Sea Robin Pipeline Co. v. FERC,* 795 F.2d 182, 183 (D.C.Cir.1986), the Commission urges us to find that the pipeline-and the pipeline only-bore the full burden of proof in connection with the new rate, and that it sustained that burden only by half.

This court "has consistently disallowed attempts to blur the line between §§ 4 and 5." *Public Serv. Comm'n v. FERC,* 866 F.2d 487, 491 (D.C.Cir.1989). As we complained four years ago, "[o]n four occasions in the last three years this court has reviewed Commission efforts to compromise § 5's limits on its power to revise rates. On each the court has repelled the Commission's gambit. This is number five." *Id.* at 488-89. We now make it an even six. The approved backhaul rate at issue here is methodologically distinct from the one proposed by the pipeline. Panhandle had proposed uniform forward-haul and backhaul rates that would recover a full allocation of its fixed costs each way. *See* J.A. at 399. Panhandle argued that, because backhaul service presupposed working forward-haul service, the services should be priced identically. The Commission responded by differentiating between forward-haul and backhaul rates on the grounds that the seasonal backhaul service conferred cognizable benefits on Panhandle's system that necessitated alteration of the rate structure. The Commission set the backhaul rate at one-half the forward-haul rate, and in so doing reached beyond approval or rejection of the pipeline's proposal to adoption of an entirely different rate design.

The Commission attempts to distinguish other cases in which we insisted upon compliance with § 5 when the Commission

  

imposed a new rate on the grounds that in those cases, the Commission reached out to alter aspects of the rate structure that the pipeline had not proposed to change. Although there ***1579** ****20** are differences, these cases provide ample support for the conclusion that FERC should bear the burden under § 5 whenever it moves beyond rejection of a proposed rate to the task of redesigning it. *See, e.g., Tennessee Gas Pipeline Co. v. FERC,* 860 F.2d 446, 454 (D.C.Cir.1988) (quoting with approval an ALJ's statement to this effect); *Sea Robin Pipeline Co. v. FERC,* 795 F.2d 182, 187 (D.C.Cir.1986) (reasoning that Commission moves out of § 4 range when approved rate methodology deviates from that proposed by the pipeline).

Although we find controlling the methodological distinctions between the proposed and imposed rates so as to mandate compliance with § 5's strictures, we must also examine the Commission's principal contention that our precedents allow it to accept proposals "in part." The Commission argues that under § 4, it may not only approve one prong of a rate proposal and reject another; it may also approve part, but not all, of a single proposed rate. In *Sea Robin,* we stated that "[s]ection 4 limits the Commission's authority to acceptance (*in whole or in part* ) or rejection of the pipeline's proposed rates...." 795 F.2d at 183 (emphasis added). Moreover, § 4(e) of the NGA allows for refunds of "the *portion* of such increased rates or charges by [the Commission's] decision found not justified." 15 U.S.C. § 717c(e) (1988) (emphasis added). Some support for the Commission's proposition thus may be fashioned from snippets of statute and precedent. Of course, our responsibility for construing the NGA requires us to go beyond consideration of mere individual strands, to determine how the various provisions of the Act are interwoven to achieve Congress' purpose.

After careful consideration of the statutory framework, we cannot accept the Commission's argument that § 4 permits it to approve any rate, no matter how materially different from that proposed by the pipeline, so long as it can be viewed as a "part" of the original request. We appreciate that minor deviations from the pipeline's proposed rate based, for example, upon differences as to the extent of specific cost items, may be handled in a § 4 proceeding, but the imposition by the Commission of only half of a proposed rate surely requires more. When the rate imposed by the Commission differs significantly from that proposed by the pipeline, it can no longer be attributed to the pipeline-at least without the pipeline's consent-so as to qualify for § 4 treatment. Accordingly, we find the Commission's argument that the 50% backhaul rate was justified as a "partial approval" of the pipeline's request is precluded by the statutory design, as well as by our own precedent. *See, e.g., Sea Robin,* 795 F.2d at 187 ("The rate methodology FERC imposed on Sea Robin was not proposed by the pipeline; thus, the order cannot represent an approval, in whole or part, of changes suggested by Sea Robin."); *ANR Pipeline,* 771 F.2d at 513.

In sum, we hold that § 4 cannot accommodate the Commission's action below, in which the pipeline proposed a rate that differed substantially from its old rates,[12] and the Commission responded by setting backhaul rates at half of forward-haul rates in order to recognize benefits winter backhauls conferred on the system. Not only did the Commission set a rate different from that proposed by the pipeline, it also employed a completely different strategy in quantifying distinctions between the two kinds of service. If the Commission wished to impose its own rate, the Commission was required to bear the burden of proving that it was just and reasonable in a § 5 proceeding.

3. *Application of the § 5 Burden Scheme*

Under the NGA, an action may originate as a § 4 proceeding only to be transformed later into a § 5 proceeding. In imposing its own rate under these circumstances, the Commission must make three findings: first, it must conclude under § 4 that the pipeline failed to carry its burden of proof that the proposed rate was just and reasonable; second, it must itself demonstrate that the default position, the prior rate, is no longer just and reasonable; and third, it must establish that its substitute rate is just and reasonable. *See Tennessee Gas Pipeline Co. v. FERC,* 860 F.2d 446, 456 (D.C.Cir.1988) (FERC ***1580** ****21** must first determine "that the *presumptively* just and reasonable *existing* rate is no longer just and reasonable") (emphasis in original); *Sea Robin Pipeline Co. v. FERC,* 795 F.2d 182, 184 (D.C.Cir.1986) (FERC must find "that the existing rate is unjust or unreasonable and the proposed new rate is both just and reasonable"); *ANR Pipeline Co. v. FERC,* 771 F.2d 507, 514 (D.C.Cir.1985) (same). In monitoring whether the Commission has satisfied its burden when it imposes a new rate under § 5, this court has assumed an active stance, requiring that the Commission's conclusion be "supported by substantial evidence and reached by reasoned decisionmaking." *Id.* at 516.

The Commission's order with respect to the backhaul issue in this case is terse, referring for full discussion to companion

  

opinions numbered 369 and 369-A, which pertain to the 1988 rate period. *See* 57 F.E.R.C. ¶ 61,264, ¶ 61,839-40 (1991); 59 F.E.R.C. ¶ 61,244. The companion opinions, the first issued contemporaneously with the initial order and the second an order on rehearing issued contemporaneously with the Commission's order on rehearing in this case, reject Panhandle's proposed increase to a backhaul rate and impose an adjusted rate at Western's suggestion. The Commission found that peak backhauls confer a substantial benefit on the pipeline by reducing seasonal capacity constraints and saving costs of compression. The Commission concluded that, although Panhandle's system was not so overburdened as to require capacity rationing, capacity constraints did encumber the system significantly. In the decision below, the Commission accepted the same adjusted backhaul rate elaborated in the companion opinions, set at one-half of the forward-haul rate, which it termed a "reasonable approximation of the benefits conferred[,] ... appropriate until a better method can be established." 59 F.E.R.C. at ¶ 61,873.

In drawing this conclusion, the Commission made no effort to demonstrate that the preexisting backhaul rate, which it had previously approved, had somehow become unjust or unreasonable. As stated above, pursuant to § 5, the Commission "must first find that the existing provision is unjust or unreasonable." *ANR Pipeline,* 771 F.2d at 514; *accord Tennessee Gas Pipeline,* 860 F.2d at 456; *Sea Robin,* 795 F.2d at 187. The Commission's action setting the backhaul rate lower than the forward-haul rate is more consistent with the preexisting rate structure than with the pipeline's proposal. Without any findings demonstrating why a departure is warranted, the Commission cannot set out on uncharted territory to impose its own rate.

Panhandle also argues that the Commission failed to establish how the facts warranted the new backhaul rate it actually imposed. The Commission explains its failure to impose a more precise backhaul rate by the fact that neither party offered any means of quantifying the precise benefits involved. We reject this argument, because the Commission, not the other two parties, bore the burden of establishing that its rate was just and reasonable. The Commission's explanation suggests that the burden lay elsewhere, and that it set this rate as an interim measure until another party bore *its* burden and recommended a better rate. Because we find that the Commission misperceives its own responsibility in imposing the new backhaul rate, we remand so that the Commission may rechart its course.

The Commission imposed the backhaul rate below while laboring under a misconception about the breadth of its § 4 authority. It is impossible, in the context of § 4, to justify the Commission's action setting the backhaul rate at one-half of the forward-haul rate. Neither can the Commission justify its action under § 5 on this record; it failed to make the requisite showing below that the preexisting rate had become unjust and unreasonable and that its own rate was just and reasonable. The Commission has therefore acted inconsistently with both § 4 and § 5 of the NGA. We remand so that the Commission can reconsider its two options and strike out on a path that adheres faithfully to the statutory scheme.

4. *The Commission's Refund Order*

The Commission ordered Panhandle to refund to Western any money paid under the proposed backhaul rate during the ***1581 **22** locked-in period in excess of one-half of the forward-haul rate. In so doing, the Commission purported to act under its § 4 power. In a § 5 proceeding, of course, the Commission is without authority to order refunds. *See* 15 U.S.C. § 717d(a) (section 5 allows FERC to "determine the just and reasonable rate ... to be *thereafter* observed and in force") (emphasis added); *see also Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571, 578, 101 S.Ct. 2925, 2930-31, 69 L.Ed.2d 856 (1981); *Tennessee Gas Pipeline Co. v. FERC,* 860 F.2d 446, 454 n. 10 (D.C.Cir.1988); *Sea Robin Co. v. FERC,* 795 F.2d 182, 189 n. 7 (D.C.Cir.1986).

We are aware that the Commission's order of refunds under § 4 is discretionary. *See Belco Petroleum v. FERC,* 589 F.2d 680, 686 (D.C.Cir.1978). "In granting the Commission that discretion, Congress did not specify how the refunds should be computed; this, too, was left to the discretion of the agency." *Id.* Pursuant to this discretion, however, the Commission's longstanding policy has been to grant full refunds of rates found unjustified at the conclusion of § 4 proceedings, in the absence of equitable considerations to the contrary. *See Towns of Concord, Norwood & Wellesley v. FERC,* 955 F.2d 67, 76 (D.C.Cir.1992) (citing *Illinois Power Co.,* 52 F.E.R.C. ¶ 61,162, ¶ 61,625 (1990)); *see also Estate of French v. FERC,* 603 F.2d 1158, 1163 (5th Cir.1979) (enumerating countervailing equitable considerations such as passage of time, size of producer, magnitude of amounts owed, public interest). Presuming no countervailing equitable concerns in this case, we would expect that the Commission should order refunds of rates collected in excess of the preexisting filed rate, rather than in excess of the 50% backhaul rate it imposed. Because, however, we hold that the

  

Commission's action is presently supportable under neither § 4 nor § 5, we remand to the Commission for reexamination of the refund issue in light of its reconsideration of the forward-haul and backhaul rates themselves. At this juncture we note only that if the Commission proceeds to impose a new rate under § 5, after rejecting a § 4 rate proposal as unjust and unreasonable, we see no statutory impediment to the Commission's exercise of § 4 refund authority to prevent the pipeline from benefitting from an unjust or unreasonable rate in the interim before remedial action is taken.

## III. Conclusion

For the foregoing reasons, we remand to the Commission so that it may more adequately explain its conclusion approving the proposed forward-haul rate increase and revisit its actions with respect to the backhaul rate.

*It is so ordered.*

**All Citations**

9 F.3d 1568, 304 U.S.App.D.C. 9, Util. L. Rep. P 13,959

## Footnotes

1 The agency proceedings refer to Western as the Kansas Power & Light Company, its official name until May 1992. For the sake of clarity, we refer to the company throughout as “Western.”

2 The contract between Western and Panhandle has expired since the issuance of the Commission's decision.

3 As we noted in *ANR Pipeline Co. v. FERC,* 771 F.2d 507 (D.C.Cir.1985), a “[b]ackhaul is accomplished not by actually transporting gas back west (which would require a separate pipeline) but rather by performing a swap. When ANR wishes to ‘move’ gas from east to west, gas is removed from the eastward flowing stream at the western destination point. ANR then ‘pays back’ the pipeline by restoring the appropriate quantity of gas to the gas stream at the eastern origination point.” *Id.* at 511-12.

4 The contract defines the term “Mcf” as one thousand cubic feet of gas. Joint Appendix (“J.A.”) at 66.

5 According to Western, rates under Rate Schedule T-53 increased from $907,220 to $2,935,651, at 224% leap. *See* J.A. at 43.

6 This lack of price-flexibility is not surprising. As we noted in *Columbia Gas Transmission Corp. v. FERC,* 848 F.2d 250 (D.C.Cir.1988), “FERC typically has refused to authorize selective discounting under individual section 7(c) certificates.” *Id.* at 254.

7 Like the airline passenger who purchases a nonrefundable airline ticket months in advance-for an off-peak, nonblackout period, no less-Western expects that the significant limitations on its service should be reflected in the price it pays. Its contention at this juncture, that the off-peak limitation should translate into less costly service, has inherent appeal.

8 As we have mentioned previously, although 15 U.S.C. § 717r(b) requires that “[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive,” this is merely a recitation of the “arbitrary and capricious” standard for factual findings. *See Tennessee Gas Pipeline Co. v. FERC,* 860 F.2d 446, 452 n. 7 (D.C.Cir.1988); *Maryland People's Counsel v. FERC,* 761 F.2d 768, 774 (D.C.Cir.1985).

9 In this respect, the Commission seems to have verged precipitously close to begging the question. The issue reserved for the Commission's determination was whether, given the distinctions between these two services, it was appropriate to price them equally. It is a far cry from responding, surely, to conclude that the distinctions themselves should not exist. Moreover, it strains Western's argument somewhat to depict it as an attempt to procure a less-constrained T-53 service.

10 We carved exceptions, inapplicable here, for situations in which Congress specified that courts should play an independent role and situations in which the agency itself is an interested party to the agreement. The latter exception

  

seems to contemplate only the extreme case in which FERC itself is a party to the original contract. *See National Fuel,* 811 F.2d at 1571.

11 Specifically, the statute provides an exception to the rule prohibiting retroactive rate changes "in order to accommodate the realities of administrative delay." *East Tennessee,* 863 F.2d at 942. If a FERC proceeding extends over five months, the statute permits the pipeline to collect the proposed rates on a temporary basis. If the Commission ultimately concludes that the proposed rates are not just and reasonable, it may require the pipeline to pay refunds. We recognized a further exception to the general rule against refunds in *Cities of Batavia v. FERC,* 672 F.2d 64 (D.C.Cir.1982). This exception subjects a pipeline to refunds if the interaction between proposed and existing rates will create results that are unjust or unreasonable under existing FERC policy as it applies to the pipeline at the time of filing. *See East Tennessee,* 863 F.2d at 943.

12 In which, it should be recalled, the forward-haul rate was higher by a factor of twenty.

# Blue to Gold

## LAW ENFORCEMENT TRAINING