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United States Supreme Court

DEPUTY HAD REASONABLE SUSPICION TO INITIATE TRAFFIC STOP

On April 28, 2016, Deputy Mehrer with the Douglas County Kansas Sheriff's Office was on patrol and ran a license plate check through the Kansas Department of Revenue's database. The vehicle came back as a 1995 Chevrolet pickup truck owned by Charles Glover Jr. The check also showed that Glover's Kansas driver's license was revoked.

Deputy Mehrer, who assumed that Glover was the person driving the pickup, initiated a traffic stop on the 1995 pickup truck. Deputy Mehrer did not observe any traffic violations prior to initiating the stop, and had not otherwise verified that the driver was, indeed, Glover. **As it turned out, Glover was driving the pickup and was charged with driving as a habitual violator.**

Glover filed a motion to suppress all evidence from the traffic stop, arguing that Deputy Mehrer lacked the reasonable suspicion required to conduct the stop. The case worked its way through the Kansas courts as follows: (1) the District Court granted Glover's motion; (2) the Court of Appeals reversed the District Court's decision; and (3) the Kansas Supreme Court then reversed the Court of Appeals' holding, finding that the deputy "did not have reasonable suspicion because his inference that Glover was behind the wheel amounted to 'only a hunch' that Glover was engaging in criminal activity."

The State of Kansas filed a petition with the United States Supreme Court ("Supreme Court" or "Court") for a writ of certiorari, the primary method by which a party petitions the Supreme Court to hear a case. (According to the Supreme Court's website, it receives between 7,000 and 8,000 petitions for certiorari each term but only grants about 80 per term.) The Supreme Court granted the State of Kansas's petition.

The question the Supreme Court considered in this case was "whether a police officer violates the Fourth Amendment by initiating an investigative traffic stop after running a vehicle's license plate and learning that the registered owner has a revoked driver's license." In its review of applicable precedent, the Supreme Court considered that an officer may make "a brief investigative traffic stop when he has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'"

The Supreme Court also considered its precedent recognizing "that States have a 'vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles [and] that licensing, registration, and vehicle inspection requirements are being observed.'" The Court then examined the facts known to Deputy Mehrer upon stopping Glover's car: (1) someone was operating a 1995 Chevrolet pickup truck with Kansas tag number 295ATJ; (2) the pickup's registered owner had a revoked license; and (3) the model of the pickup matched the vehicle he saw.

Based on its review of these facts, the Court found that Deputy Mehrer had reasonable suspicion to conduct the stop. The Court determined that the deputy's "commonsense inference" that Glover was likely the driver of the vehicle gave rise to "more than reasonable suspicion to initiate the stop." The Court concluded that "[t]he fact that the registered

owner of a vehicle is not ***always*** the driver of the vehicle does not negate the reasonableness of Deputy Mehrer's inference. Such is the case with all reasonable inferences." (Emphasis added).

The Court was unpersuaded by the dissenting Justice's argument that Deputy Mehrer's inference was unreasonable "because it was not grounded in his law enforcement training or experience. Nothing in our Fourth Amendment precedent supports the notion that, in determining whether reasonable suspicion exists, an officer can draw inferences based on knowledge gained only through law enforcement training and experience. We have repeatedly recognized the opposite."

The Court called upon its decision in a prior case in support of its conclusion that reasonable inferences can be drawn without the benefit of any specialized training: "In *Navarette*, we noted a number of behaviors—including driving in the median, crossing the center line on a highway, and swerving—that as a matter of common sense provide "sound indicia of drunk driving."

The Court emphasized the "narrow scope" of its conclusion that Deputy Mehrer had reasonable suspicion to stop Mr. Glover. As the Court pointed out, there are instances in which "the presence of additional facts might dispel reasonable suspicion: For example, if an officer knows that the registered owner of the vehicle is in his mid-sixties but observes that the driver is in her mid-twenties, then the totality of the circumstances would not 'raise a suspicion that the particular individual being stopped is engaged in wrongdoing.'"

However, the Court pointed out that, in Deputy Mehrer's case, by contrast, there was "no exculpatory information—let alone sufficient information to rebut the reasonable inference that Glover was driving his own truck—and thus the stop was justified." *Kansas v. Glover,* No. 18-556, 2020 WL 1668283 (U.S., April 6, 2020).

11th Circuit Court of Appeals

INITIAL TRAFFIC STOP LAWFUL; SUBSEQUENT WARRANTLESS SEARCHES WERE NOT

Joshua West, who was operating a pickup truck around 4:30 PM on a Thursday afternoon, was stopped by Officer Williams for running a red light. The officer did not observe any erratic driving but did observe that the vehicle had a dealership "drive off tag" as opposed to a valid Alabama tag. Upon stopping his vehicle, West opened the driver's door and started to exit. In his hand, West had an envelope that contained papers. Officer Williams ordered West to stay in his truck and West complied. Officer Sorrell arrived as back-up and stood by West's passenger truck door.

Officer Williams requested West's identification, proof of insurance, and asked when the truck was purchased and if he had proof of ownership. West said he had recently purchased the truck and that he was on his way to the tag office to get a new tag. West searched his 8 ½ x 11-inch envelope for the documents as well as looking in his truck. West provided his driver's license, insurance card, and mistakenly the title for his motorcycle. Upon immediately recognizing his mistake, he looked for the correct title but was told by Officer Williams that he did not need to provide the truck title.

Officer Williams returned to his vehicle to check West's license and determined that his license was valid and that he had no outstanding warrants. He then began to write West a citation for the red-light violation. Officer Sorrell continued to observe West while Officer Williams was in his patrol car. Officer Sorrell observed West "look repeatedly in the rear-view and driver-side mirrors to look back at Officer Williams." He further observed West flipping through the envelope of papers and that he "placed his right hand by his side, brought his hand back up with his fist closed, and then opened fully his hand over the envelope."

Based on his observations of West's hand movement, Officer Sorrell thought "West had dropped something into his lap, around his lap, or into the envelope itself." Although Officer Sorrell did not see any item in or drop from his hand, he opened West's passenger door and questioned him regarding what he was doing.

Officer Williams returned to West's vehicle, told him to exit the vehicle, and West complied. He was holding the envelope of documents and upon Officer Williams instructing him to drop the envelope, he dropped the envelope in the driver's seat. **Officer Williams handcuffed West and did a pat-down search of his person in which no weapons or contraband were found. West consented to a search of his pockets but did not give consent to a search of his truck.**

Officer Sorrell conducted **an initial search** of West's truck, beginning with the driver's seat and envelope. A small clear plastic bag suspected to be methamphetamine was located in the envelope within approximately 40 seconds of the initial search. **West was arrested for the drugs and then a full warrantless search of the vehicle incident to the arrest occurred.** The **second search** revealed "a scale, a burned marijuana cigarette, and several plastic bags containing various controlled substances and prescription pills."

West filed a motion to suppress the evidence seized during the initial warrantless search of his vehicle. The government contended "that the initial search was justified under two separate theories: (1) as a protective search because the officers had reasonable suspicion to believe that West was armed and dangerous; and (2) under the automobile exception to the warrant requirement because the officers had probable cause to believe that contraband would be found in the truck."

The magistrate judge concluded that there was no Fourth Amendment violation as a result of the initial search and recommended that the motion to suppress be denied by the district court. The magistrate judge determined that the protective search of the truck for weapons was justified by the totality of the circumstances. In determining that reasonable suspicion existed to believe that West had a concealed weapon in the vehicle, the court considered such things as West's hand movements in the area of his lap and envelope, and his repeatedly looking in the mirrors. Regarding the governments second argument, the court rejected that argument and "concluded that – at the time of the initial search – no probable cause existed to believe that contraband or evidence of a crime would be discovered in West's truck."

The district court agreed and denied West's motion to suppress. However, the district court did not agree with all the findings and conclusions of the magistrate judge. The district court determined that reasonable suspicion did not exist for a protective search; however, there was probable cause to search the envelope for contraband.

West entered a conditional guilty plea and reserved the right to appeal the court's denial of his motion to suppress. "The sole issue on appeal is whether Officer Sorrell's initial search of the envelope inside West's truck was constitutional under the Fourth Amendment. 'A search without a warrant based on probable cause is illegal, unless the government can show that it falls into one of those limited exceptions recognized by law.'"

On appeal, the court held that the initial search of the vehicle did not fall under any exception to the warrant requirement, so the search was unlawful under the Fourth Amendment. The court reviewed the protective search and automobile exception arguments in reaching this conclusion.

The court reviewed the totality of the circumstances in West's case and determined that "no reasonably prudent man could have concluded that West posed a danger to the safety of the officers or to others." The circumstances considered by the court included the following: (1) the incident occurred during the day and in a populated area, (2) no evidence of erratic driving or behavior by West, (3) no evidence of intoxication,

(4) no aggressive behavior by West towards the officers, (5) West was calm, cooperative and complied with the officers, and (6) no weapons were observed in the vehicle in plain view. In addition, a protective search is "limited to areas that could contain a weapon."

Considering the totality of the circumstances, the court held that "no reasonable suspicion could exist that would support Officer Sorrell's initial search of West's truck or the envelope for weapons." Therefore, the initial warrantless search of the vehicle was outside the protective search exception.

The court further considered the automobile exception to the Fourth Amendment's warrant requirement. "[I]f probable cause exists to believe the vehicle contains contraband or evidence of criminal activity," then police can search a vehicle without a warrant under the automobile exception. Once probable cause is established, a container within the vehicle may be searched "if probable cause exists to believe the container holds contraband or evidence of criminal activity."

The court considered the totality of the circumstances and concluded that probable cause did not exist to justify the initial search of West's truck by Officer Sorrell. The circumstances reviewed by the court included: (1) West did not drive erratically or attempt to flee, (2) neither officer had any prior knowledge of West, (3) officers did not see or smell marijuana or other drugs in the vehicle, (4) West complied with Officer Williams's orders and provided requested documents, (5) West was calm and cooperative, and (6) had a valid license and no outstanding warrants. The court concluded that these factors did not give the officers any reason to believe West was engaged in criminal activity beyond a red-light violation.

Based on the facts in West's case and circumstances that have previously been held to support probable cause, "no reasonable and prudent officer on the scene could have concluded that a fair probability existed…that contraband or evidence of a crime would be found in West's truck or in the envelope." The fact that West repeatedly looked in the mirror and opened his fist over the envelope, "is not enough to give rise to probable cause supporting a warrantless search of West's truck."

The court held that the initial search of West's vehicle did not fall under any exception to the warrant requirement and was therefore, unlawful under the Fourth Amendment. The denial of West's motion to suppress evidence obtained as a result of the initial warrantless search was reversed. West's conviction was vacated, and the case remanded for further proceedings. *U.S. v. West*, No. 19-12170, 2020 WL 1656172 (11th Cir., April 3, 2020).

Georgia Court of Appeals

TRIAL COURT CORRECTLY CHARGED JURY REGARDING DUI BLOOD TEST REFUSAL

A Georgia State Patrol trooper conducted a traffic stop of David Hinton on May 24, 2018. Hinton was driving without headlights and wasn't wearing a seatbelt. The trooper smelled an odor of marijuana coming from Hinton's car as he approached the driver's side window. Hinton, who had bloodshot eyes and constricted pupils, "admitted to eating a marijuana stem approximately two hours before the stop."

The trooper gave Hinton three field sobriety tests at the scene: the horizontal gaze nystagmus (HGN), the walk-and-turn, and the one-leg stand. The trooper testified to observing zero out of six clues on the HGN, which, he explained, "[is] to be expected when someone is using marijuana." The trooper observed seven of eight clues on the walk-and-turn and two of four clues on the one-leg stand. Per the trooper, Hinton's "eyelid and body tremors" during the Romberg balance test were "consistent with marijuana use."

Hinton was arrested for DUI, at which time the trooper read him the Georgia implied consent

warning for suspects age 21 or over (that was in effect at that time). The warning reads, in part:

> Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs.... Your refusal to submit to the required testing may be offered into evidence against you at trial.

Hinton refused to submit to a state administered blood test. At his jury trial on the DUI and related traffic offenses, the judge charged the jury as follows regarding Georgia's implied consent law:

> A person accused of driving under the influence to the extent that he was less safe has the right to refuse to submit to chemical tests of his blood requested by the law enforcement officer. Should you find that the defendant refused to take the requested test, you may infer that the test would have shown the presence of drugs, though not that the drugs impaired his driving. Whether or not you draw such an inference is for you to determine. The inference may be rebutted. The inference alone is not sufficient to convict the defendant.

Hinton was convicted of driving under the influence (less safe), not wearing a seatbelt, and driving without headlights. He subsequently appealed the trial court's denial of his motion for a new trial. "Citing to *Elliott v. State*, 305 Ga. 179, 824 S.E.2d 265 (2019), Hinton urges that the charge instructing that the jury could infer by his refusal to submit to a blood test that such test would have shown the presence of drugs violated his right against self-incrimination."

The Georgia Court of Appeals held that the trial court's implied consent jury instruction was not in error. In the *Elliott* case, the Georgia Supreme Court found that "the Georgia Constitution's right against compelled self-incrimination prevents the State from forcing someone to submit to a chemical ***breath* test**." (Emphasis added). Therefore, the Supreme Court held that the refusal to submit to the breath test was an exercise of the defendant's constitutional right and could not be admitted in evidence at trial.

The Court of Appeals contrasted the *Elliott* case with its March 12, 2020, decision in *State v. Johnson*. In this case, the Court of Appeals held "that the admission of a refusal to consent to ***blood* testing** did not implicate the right against self-incrimination." (Emphasis added). In its *Johnson* decision, the Court of Appeals cited a special concurrence in the *Elliott* case, in which Justice Boggs stated that "the holdings of *Olevik* and *Elliott* are limited to chemical tests of a driver's *breath*, not tests of a driver's blood." (Emphasis in original.) In *Johnson*, the Court of Appeals found that although

> *Olevik* and *Elliott* make clear that evidence of a defendant's invocation of the right against self-incrimination by refusing to consent to a State-administered breath test is inadmissible, ... neither the United States nor Georgia Supreme Courts have found admission of a refusal to consent to blood testing to implicate the right against self-incrimination. Accordingly, such evidence is not constitutionally inadmissible.

In Hinton's case, the Court of Appeals affirmed the trial court's denial of the motion for new trial. The Court held that "the trial court's jury instruction correctly charged that Hinton's failure to submit to a blood test could be used as evidence against him at trial." *Hinton v. State,* No. A20A0736, 2020 WL 1808368 (Ga. Ct. App. April 9, 2020).

ALS REMINDER

OSAH has canceled all **in-person** ALS Hearings in all hearing locations for the month of **May.** OSAH has also updated their website (www.osah.ga.gov) with the cancellation information. Prehearing Orders have been issued in some ALS cases instructing the parties to confer regarding resolving the ALS case. Telephone ALS Hearings may be scheduled in some cases and you will receive a notice from OSAH with that information. If you have any questions or need any assistance with an ALS case, please contact Dee.

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