2002

State of Utah v. Eric Jarvis Warren : Reply Brief of Petitioner

Utah Supreme Court

Catherinw E. Lilly; Heather Johnson; Salt Lake Legal Defender Association; Attorneys for Respondent.
Marian Decker; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Matthew G. Nielsen; Serena Wissler; Deputy Salt Lake Legal County Attorneys; Attorneys for Petitioner.

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Petitioner,	:	Case No. 20020002-SC
v.	:	
ERIC JARVIS WARREN,	:	
Defendant/Respondent.	:	

REPLY BRIEF OF PETITIONER

ON WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

MARIAN DECKER
Assistant Attorney General
MARK L. SHURTLEFF
Utah Attorney General
Heber M. Wells Building
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, Utah 84114-0854

MATTHEW G. NIELSEN
SERENA WISSLER
Deputy Salt Lake County Attorneys

Attorneys for Petitioner

CATHERINE E. LILLY
HEATHER JOHNSON
SALT LAKE LEGAL DEFENDER
ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Respondent

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CATHERINE E. LILLY
HEATHER JOHNSON
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Respondent

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REPLY BRIEF OF PETITIONER

THE ISSUE ON CERTIORARI IS NOT WHETHER A WEAPONS FRISK IS AUTOMATICALLY JUSTIFIED PURSUANT TO A TRAFFIC STOP, BUT WHETHER THE COURT OF APPEALS IMPROPERLY REFUSED TO ACKNOWLEDGE THAT ALL TRAFFIC STOPS ARE INHERENTLY DANGEROUS

Defendant repeatedly asserts that "it would be patently unreasonable to adopt a rule that all traffic stops are inherently dangerous *and therefore a frisk is always justified in those situations*." *See* Resp. Br. at 7, 14-15, 18 (emphasis added). The State does not ask for such a rule, nor is that the issue before the Court. The issue framed in the State's Petition for Certiorari was as follows:

> In determining whether the officer who stopped defendant's car for minor traffic violations had reasonable suspicion to frisk defendant, did the court of appeals properly ignore this Court's recognition that traffic stops are inherently dangerous?

Cert. Pet. at 1.

The State has not and does not now argue that a weapons frisk is automatically justified by virtue of the dangers inherent in all traffic stops, but rather that reviewing courts cannot dismiss this critical and relevant factor in reviewing the totality of the circumstances confronting an officer conducting a traffic stop. As set out in the Brief of Petitioner, pp. 8-13, the court of appeals' refusal to consider the circumstances surrounding the instant traffic stop in their totality, including the inherent dangerousness of traffic stops was the basis for the court's erroneous determination that the instant frisk was unjustified. *See* Pet. Br. at 7-14. *See United States v. Arvizu*, 534 U.S. 266, 122 S.Ct. 744, 750 (2002) (reaffirming that *Terry v. Ohio*, 392 U.S. 1 (1968) "precludes" a "divide-and-conquer analysis" in evaluating reasonable suspicion).

DEFENDANT'S OBSERVATION THAT ANY GIVEN TRAFFIC STOP MAY AS LIKELY INVOLVE A NON-VIOLENT AS A VIOLENT OFFENDER IS IRRELEVANT

Defendant urges this Court to affirm because he believes the court of appeals "properly noted that 'lesser traffic offenses' are not suggestive of weapons.'" Resp. Br. at 11, 21 (quoting *State v. Warren*, 2001 UT App 346, ¶ 16 n.4, 37 P.3d 270). As set out in the State's Brief of Petitioner, pp. 7-8, defendant's—and the court of appeals' view—is at odds with this Court's recognition that "concerns relating to officer safety" during traffic stops are "inherent." *State v. James*, 2000 UT 80, ¶ 10 n.3, 13 P.3d 576 (citing *Knowles v. Iowa*, 525 U.S. 113, 117-118 (1998) and *Pennsylvania v. Mimms*, 434 U.S. 106, 108-110 (1977)). *See also Maryland v. Wilson*, 519 U.S. 408, 414 (1997) (recognizing "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"). Indeed, as this Court recognized, "the safety concerns guiding the Supreme Court's decision in *Mimms* do not depend on any particular showing that an officer was at heightened risk due to the unique circumstances of a given automobile stop[.]" *James*, 2000 UT 80, ¶ 10 n.3. *See also Knowles*, 525 U.S. at 117 (recognizing that the concern for officer safety does not abate "in the case of a routine traffic stop"). Defendant's suggestion that any given traffic stop may as likely involve a non-violent as a violent offender is thus irrelevant. Resp. Br. at 11.

Moreover, contrary to defendant's further suggestion, the traffic stops in *Mimms*, *Wilson* and *James* are not meaningfully distinguished on the ground that they involved lesser intrusions than a protective frisk, i.e., ordering and assisting drivers and passengers from stopped vehicles. *See Mimms*, 434 U.S. at 107; *Wilson*, 519 U.S. at 411; *James*, 2001 UT 364, ¶¶ 3, 11. Resp. Br. at 16-18. This distinction may have significance if the State was equating the danger inherent in traffic stops with automatic justification to frisk, but it is of no consequence in the absence of such an argument. Rather, the real importance of *Mimms*, *Wilson*, and *James* is that they recognize the inherent danger in traffic stops regardless of whether the traffic stop involves a minor or a major violation. *James*, 2000 UT 80, ¶ 10 n.3. *See Mimms*, 434 U.S. at 107 (Mimms was stopped for "an expired license plate"); *Wilson*, 519 U.S. at 410 (Wilson was stopped for traveling 64 m.p.h. in a 55 m.p.h. zone and "no regular license tag"); *James*, 2000 UT 80, ¶ 11 (James was detained for reckless driving). Defendant essentially acknowledges as much. Resp.

Br. at 19. ("At most, [*Mimms*, *Wilson* and *James*] set forth the proposition that safety concerns inhere in traffic stops, and for that reason the limited intrusions discussed in those cases are appropriate."). The problem here is that the court of appeals refused to recognize that the potential for danger inheres in the fact of the traffic stop itself, regardless of the egregiousness of the specific violation. *See Warren*, 2001 UT 346, ¶¶ 15-16 n.4. *See* Pet. Br. at 11.

The Tenth Circuit recently emphasized the morbid reality confronting police conducting a routine traffic stop:

> The terrifying truth is that officers face a very real risk of being assaulted with a dangerous weapon each time they stop a vehicle. The officer typically has to leave his vehicle, thereby exposing himself to potential assault by a motorist. The officer approaches the vehicle not knowing who the motorist is or what the motorists's intentions might be. It is precisely during such an exposed stop that the courts have been willing to give the officers 'wide latitude,' to discern the threat the motorist may pose to officer safety.
>
> An officer in today's reality has an objective, reasonable basis to fear for his or her life every time a motorist is stopped. Every traffic stop, after all, is a confrontation. The motorist must suspend his plans and anticipates receiving a fine and perhaps even a jail term. That expectation becomes even more real when the motorist or a passenger knows there are outstanding warrants or current criminal activity that may be discovered during the course of the stop. Resort to a loaded weapon is an increasingly plausible option for many such motorists to escape those consequences, and the officer, when stopping a car on a routine traffic stop never knows in advance which motorists have that option by virtue of possession of a loaded weapon in the car.

United States v. Holt, 264 F.3d 1215, 1223 (10th Cir. 2001) (citation omitted).

Here, in addition to the inherent danger in the fact of the traffic stop itself, Officer Swensen observed conduct immediately prior to the traffic violations which in his experience reasonably suggested defendant was involved in a drug or prostitution offense with another individual. Following the traffic stop, defendant lied about the invalidity of his license (R84). Given these circumstances and the other objective factors emphasized by the trial court including, at that unusually early hour—the isolated downtown location, the fact that Officer Swensen was alone, and that he needed to impound defendant's Cadillac, attempting to perform a protective frisk before proceeding with the impound was eminently reasonable (*id.*). *See* Pet. Br. at 10-11.

In sum, the State is not asking that the well-established rule that police may order drivers and passengers from their vehicles be extended to encompass an automatic protective frisk. Rather, the State is asking this Court to instruct lower courts that the danger inherent in all traffic stops must be considered as part of the totality of the circumstances test in any evaluation of the reasonableness of an officer's decision to frisk incident to a traffic stop.

THE FOURTH AMENDMENT DOES NOT REQUIRE THAT AN OFFICER SUBJECTIVELY FEAR A SUSPECT BEFORE A PROTECTIVE FRISK IS JUSTIFIED

Defendant also asserts that the court of appeals decision should be affirmed on certiorari "because Officer Swensen himself testified that he did not think that [defendant] was armed and dangerous and that he only frisks as a matter of routine." Resp. Br. at 10. Defendant claims that "if Officer Swensen himself did not believe that [defendant] was

armed and dangerous, then the reasonable particularized suspicion requirement which lies at the heart of *Terry* and the Fourth Amendment is not present." Resp. Br. at 10. Contrary to defendant's suggestion, neither *Terry* nor the Fourth Amendment require that police subjectively fear a suspect before a protective frisk is warranted.

Rather, in assessing the reasonableness of a weapons frisk, "it is imperative that the facts be judged against an *objective* standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Terry*, 392 U.S. at 24 (emphasis added). *See also State v. Carter*, 707 P.2d 656, 659 (Utah 1985) ("It is not essential that an officer actually have been in fear."). Under this objective standard, "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27. "[D]ue weight must also be given[] . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id. See also Arvizu*, 122 S.Ct. at 751 (2002) (recognizing that totality of circumstances review "allows officers to draw on their experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person'") (quotation omitted). "That one officer is braver (or more foolhardy) than another, and therefore not subjectively concerned for his or safety, should not deprive that particular officer of a

right to protect his or her safety. Even the brave officer should be allowed to minimize the ever-present risk of being attacked or killed." *Holt*, 264 F.3d at 1225-1226.

While Officer Swensen expressed no subjective fear of defendant, he did articulate an objective officer safety concern (*see* R129:9). As noted previously, the trial court also identified several objective factors justifying the frisk, including the unusually early hour, the downtown location (no residences or open business), defendant's and his companion's suspicious behavior prior to the stop (suggesting a possible drug or prostitution offense), the fact that Officer Swensen was alone, defendant's lie about the status of his license, and the need to impound defendant's vehicle (*See* R84). *See* Pet. Br. at 10-11.

In evaluating the reasonableness of the frisk, the court of appeals' purported to recognize that "'[i]t is not essential that an officer actually have been in fear' to perform a *Terry* frisk." That recognition amounted to mere lip service when the court of appeals summarily concluded that "[t]he fact that Officer Swensen candidly admitted at the suppression hearing that he did not believe Warren was armed at the time he decided to frisk him clearly takes Officer Swensen's actions outside of *Terry's* limited justification for warrantless searches." *Warren*, 2001 UT App 346, ¶¶ 14, 16. Essentially ignoring the trial court's findings, the court of appeals reversed on the ground that Officer Swensen's subjective impression was alone determinative. *Id.* Applying the court of appeals' reasoning, officers who have no subjective fear of a suspect, but who do have objective safety concerns will never be able to justify a protective frisk. *Warren*, 2001 UT App 346, ¶ 16. Such a result is contrary to *Terry*, and to *James* in particular (where the officer

similarly expressed no subjective safety concern), and thus presents no compelling ground for affirming the court of appeals' flawed analysis. *Id.* at ¶ 10 n.3.

CONCLUSION

The court of appeals' conflicting and inadequate analysis should be reversed and remanded.[1]

RESPECTFULLY SUBMITTED on 30th October 2002.

MARK L. SHURTLEFF
Utah Attorney General

Marian Decker
MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF DELIVERY

I certify that two copies of the foregoing *REPLY BRIEF OF PETITIONER* were hand-delivered on 30th October 2002, to the following:

CATHERINE E. LILLY
HEATHER JOHNSON
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Ste. 300
Salt Lake City, Utah 84111

Attorneys for Respondent

Marian Decker

[1]As set out in Pet. Br. at 14 n.3, remand is necessary because the court of appeals did not address the issue of whether the officer's brief questioning unduly prolonged the traffic stop prior to the frisk. *See Warren*, 2001 UT App 346, ¶ 16 n.5.