1/8/19

No. 18-915

In the
Supreme Court of the United States

GREGORY T. CHRISTIAN,
Petitioner,
v.

GREENVILLE POLICE OFFICER
K.A. PAYNE,
GREENVILLE POLICE OFFICER
ANDREW LEAGUE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 8, 2019

QUESTIONS PRESENTED

Petitioner was searched twice by Respondent police at a yard sale. The first search was ostensibly for weapons, and the second search was for a ring which the operator of the yard sale claimed Petitioner had stolen from her. Both searches were fruitless. Petitioner filed suit under 42 U.S.C. §1983 for violation of 4th Amendment guarantee against warrantless search. The district court granted summary judgment on grounds the weapon search was generally justified and Respondents deserved qualified immunity for second search based on belief Petitioner voluntarily consented. The appeals court held the weapon search justified on grounds of unrequested production of identification, and concurred in the district court finding of qualified immunity.

The questions presented are:

1) whether producing identification without being requested to justifies search for weapons several minutes later;

2) whether overt submission to and facilitation of search establishes police belief that submission was not a result of immediately preceding fraud and coercion engaged in explicitly for such purpose;

3) whether systemic suppression of audio evidence is sufficiently improper to warrant remand.

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PETITION FOR WRIT OF CERTIORARI

This matter began with a single act of deceit, a woman telling Petitioner she saw him steal a ring, which single act of deceit produced a steadily widening stream of deceit which now reaches the Supreme Court, where it will at least end. Petitioner was searched twice by Respondent police officers in full view of his neighbors and without justification, probable cause, or valid consent. Petitioner's accuser lied, Respondent police lied in pursuit of her lies, and the courts have continued the pattern, the district court advancing a novel theory of equivalent falsehood by which deceit is not deceit, and holding that the threat of being imprisoned was not coercive, while the appeals court in its turn weaves a justification for weapon search out of whole cloth, and police deceit and coercion are simply sent down the memory hole. Truth is absent. Petitioner reluctantly sees the matter through.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in Appendix A. Summary Judgment of the District Court is reproduced in Appendix B.

JURISDICTION

The Court of Appeals issued its opinion on October 11, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Statutory Background

This action arises under 42 U.S.C. § 1983, which provides a cause of action for deprivation of rights guaranteed by the US Constitution, in this case the 4th Amendment prohibition against warrantless and unreasonable search.

B. Facts and Procedural History

Petitioner is an aerospace engineer. Petitioner has

no criminal record, save for being listed as a suspected thief in the police report of the incident related herein.

As Petitioner was leaving a yard sale approximately one mile from his home, Petitioner was stopped by the operator of the yard sale, who claimed to have seen Petitioner put a ring in his pocket. Petitioner responded "what?". Petitioner's accuser then asked Petitioner if he had stolen a ring. Petitioner said "no". Petitioner's accuser then sought to search Petitioner. Petitioner told his accuser "no", and that if she felt a crime had been committed she should call the police, and Petitioner would wait for them to arrive. Petitioner's accuser walked away and called 911. Petitioner's accuser told the 911 operator she believed Petitioner had stolen a ring from her. No basis for her claim was asked or given.

Respondent Police Officer K.A. Payne of the Greenville, South Carolina Police Department promptly arrived at the yard sale. Petitioner approached Respondent Payne, introduced himself, and told him what had happened. Respondent Police Officer Andrew League and a third police officer, James Shelton, arrived while Petitioner and Respondent Payne were speaking. Petitioner provided officers with identification in the form of a South Carolina drivers license. Respondent Payne told Petitioner to wait behind the police car while police spoke to Petitioner's accuser.

While waiting behind the police car, Petitioner was grabbed by Officer Shelton, who claimed Petitioner was standing too close to him. Officer Shelton subsequently stated at a hearing he grabbed Petitioner because he believed Petitioner was planning to flee.

Respondent Payne conversed with Petitioner's accuser for some minutes. This conversation was documented by Respondent League in the police report by the single entry "Anna Brennan Healy advising that a subject had taken a ring from the (sic) her yard sale".

Respondent Payne returned to where Petitioner was standing behind the police car. A police audio recording begins at this point. Petitioner was searched by police, ostensibly for weapons. Petitioner asked if the search was consensual and was threatened by Officer Shelton with being "put on the ground" (audio 00:49). Immediately following the first search, Officer Shelton screamed at Petitioner to keep away from him (audio 01:57). Petitioner was approximately 15 feet away from the officer and standing where he had been told.

Following the first search, Respondent League pressured Petitioner for several minutes to submit to a second search. Petitioner resisted being searched again. Respondent League falsely told Petitioner several people claimed to have seen Petitioner put a ring in his pocket (audio 02:31). Petitioner believed this because it was coming from a police officer. Respondent League later claimed his words were taken out of context. No. Respondent League told Petitioner "We have several witnesses to say that they saw you put the ring in your pocket". Respondent League also told Petitioner he would be "taken downtown and locked up" if he did not submit to another search (audio 04:06). Petitioner adjudged his position legally untenable, which in conjunction with repeated violent outbursts by Officer Shelton compelled Petitioner to sign a consent form and

submit to search. The apparent legal reality appeared hopeless, and the physical risk was ongoing and quite real.

As the search was commencing, Petitioner explicitly told Respondents he was acting under duress, telling them he was not cooperating, but was trying to not be taken "downtown" (audio 10:21). The search was fruitless and Petitioner was released with a trespass warning.

Petitioner registered a complaint with the Greenville police department, without effect. Petitioner eventually filed suit against the City of Greenville, South Carolina under 42 U.S.C. § 1983, and in due course added Respondents Payne and League as Defendants by amendment. The City of Greenville was dismissed early on motion for summary judgment, and Respondent police officers were awarded summary judgment afterwards on grounds of qualified immunity. Discovery was suspended on motion prior to judgment. Petitioner filed appeal of summary judgment. The appeals court upheld the district court ruling, and Petitioner petitions for writ of certiorari.

REASONS FOR GRANTING CERTIORARI

This case presents a compelling public interest. Petitioner, at 53 years of age and with no criminal record, at a yard sale near his home suddenly found himself outside the sphere of the law, an unsettling place to be, and the law has yet to be brought to bear in the matter. The Court need not weigh the details of the law only to have it dismissed by police and courts below.

The appeals court ruling weaves a de novo justification for weapon search out of whole cloth, holding that Respondents searched Petitioner for weapons because Petitioner reached into his pocket to retrieve identification. No such claim was made by Respondents, and the weapon search in fact occurred several minutes after Petitioner produced identification.

The ruling below directly conflicts with settled law and Fourth Circuit precedent in that valid consent to search is inferred solely from facilitative conduct despite clear, immediately preceding, and egregious fraud and coercion used to gain consent, and clear claim of duress. A new standard is created whereby police may claim belief in consent solely on the basis of submission itself.

A number of technical anomalies and other irregularities indicate with reasonable confidence approximately the first half of a police audio file of the incident at issue was removed, with the concurrence of the courts.

I. The court of appeals weaves a justification for weapon search out of whole and demonstrably false cloth.

Police search for weapons must be justified by "specific and articulable facts" to be Constitutionally permissible (*Terry v. Ohio,* 392 US 1 (1968), 88 S. Ct. 1868). The appeals court held that a weapon search of Petitioner was justified because Petitioner reached into his pocket to retrieve his drivers license without being cleared to by police. This is not true. No party has made such claim, the district court made no such finding, and it is generally contradicted by accounts submitted by all parties. Setting aside the question of whether wanton production of a drivers license at a yard sale could be construed a threatening act, it did not in fact happen. The appellate court ruling resting upon such claim, found nowhere but in the ruling itself, is not based in truth.

Additionally, production of identification occurred several minutes before the search for weapons, and thus could not be connected as claimed by the lower court. Petitioner has maintained throughout, and a police audio substantiates, Petitioner produced identification several minutes before the weapon search, and before Respondent Payne spoke with the yard sale operator. It was only after Respondent Payne spoke with the yard sale operator that Petitioner was searched. Petitioner's production of identification several minutes earlier had no bearing on the ostensible weapon search, and Respondent police officers have not claimed it did.

Respondents in fact claimed the weapon search was justified because Petitioner was "agitated and erratic" and Petitioner refused to keep his hands out of his pockets despite being repeatedly told to remove

them. The first claim contains no "specific and articulable facts" capable of review per *Terry*, and the second claim has been denied and is not credible. The appeals court contrives a straw to grasp at, rather than hold Respondents accountable for their actions. Respondents certainly had a reason to search Petitioner for weapons, as all actions have a cause, but what that reason was has yet to be discovered and its legal sufficiently tested in a court of law, as clear precedent and the Constitution require.

II. The courts below erroneously find Respondent police officers validly concluded Petitioner's submission to second search was voluntary because Petitioner assumed the position for search and removed his jacket and shoes without being ordered. This sets a dangerous precedent.

The appeals court concurred in the district court ruling which held Respondents were properly granted qualified immunity on basis of belief Petitioner voluntarily consented to search because he assumed the position for search and removed his jacket and shoes without being ordered to do so. The ruling runs directly counter to the law, fact, and precedent, in that it ignores clear and immediately preceding fraud and coercion used to acquire consent, and clear communication of duress.

It is a long settled matter of law that voluntary consent to search cannot be obtained by coercion or fraud; "Where consent to search is obtained through a misrepresentation by government, or under inherently coercive pressure and the color of the badge, consent is

not voluntary." (*U.S. v. Rothman*, C.A.9 (Cal.) 1973, 492 F.2d 1260) (see also: *US v. Lattimore*, 87 F. 3d 647 - Court of Appeals, 4th Circuit 1996). Petitioner averred in Complaint and it remains uncontested that, among other falsehoods, Respondents falsely told Petitioner immediately prior to acquiring consent to the second search that several people claimed to have seen him steal a ring (audio 02:31), and that he would be "taken downtown and locked up" if he did not consent to search (audio 04:06). There can be no doubt Petitioner was taken in by the deceit. Petitioner's baffled consternation is apparent in the police audio, though Petitioner avers skepticism was not otherwise an advisable option. It also cannot be denied Petitioner strenuously resisted a second search for several minutes, indeed that is why Respondents had to lie to Petitioner to gain consent, and Petitioner plainly communicated to Respondents as the search began that he was submitting in fear of being "taken downtown" (audio 10:21). Petitioner's consent to search was certainly and deliberately obtained by fraud and coercion. How did Respondents believe that Petitioner facilitating the search to which they fraudulently and coercively acquired his consent removed the taint of fraud and coercion used? Did Petitioner's action in putting his hands on the police car and once again spreading his legs as he had previously been ordered to do, with profanity in fact (audio 00:40), indicate he no longer believed several people were claiming to have seen him steal a ring, and that he would be "taken downtown and locked up" if he refused another search? What did Respondents expect Petitioner to do after he signed the form? Had the procedure for

search changed? When Petitioner removed his jacket and shoes, did that indicate to Respondents that Petitioner was no longer duped? How did Petitioner overtly submitting to Respondents' second search convince Respondents their deliberate fraud, perpetrated immediately before the search for the explicit purpose of gaining consent thereto, and without which they would not have acquired such consent, was thereby rendered something other than fraudulent? Respondents offer no explanation, but do the courts below contemplate a mechanism by which this could happen? When Petitioner bent over the police car and spread his legs apart in resignation to another public body search, did the Fraud Fairy sprinkle truth dust on the scene? Did Respondents deceits turn into butterflies? When Petitioner removed his jacket, did a truth rainbow appear? How could resounding success render conscious and egregious fraud and coercion anything other than exactly that, and how did Respondent police believe it so did? Respondents claim belief in voluntary consent but have offered no reason to believe Petitioner's conduct was motivated by anything other than the manifest deceit and coercion they used to facilitate their search, and Petitioner's haste to end it. The rulings below are a sham.

If police are allowed to use fraud and fear to procure submission to search, the 4th Amendment is essentially dead. Freed from the restraint of truth, there is no limit to the fear police can create, particularly among the law abiding. The immediate fear of being "taken downtown and locked up", coupled with the

fraudulently created certainty this is imminent, in an atmosphere of relentless hostility, will induce the average person to sign essentially anything. The courts permit such depredation to their shame.

III. A number of technical anomalies and other irregularities indicate with reasonable confidence approximately the first half of a police audio file of the incident at issue was removed, with the concurrence of the courts.

Petitioner notes the significance opposing counsel and courts below attach to Petitioner being an aerospace engineer and working on the Space Shuttle and Space Station programs.

Some months after filing the Complaint, Petitioner learned of a police audio recording of the incident at issue. Petitioner acquired a copy of the audio file through the Freedom of Information Act, and subsequently acquired a different copy through discovery. The audio validated and provided details to a number of claims in the Complaint. However, as noted in appeal, a number of anomalies indicate with reasonable confidence the approximate front half of the original audio file was removed and this portion suppressed with the concurrence of the courts. There seems no other explanation. Petitioner pursued the matter in discovery, but the district court did not grant a single motion to compel nor motion for subpoena, and suspended discovery on motion prior to granting summary judgment. Petitioner notes the following:

1) Federal discovery rules require recordings be provided in original "as recorded" format. However, the

audio file given Petitioner by Respondents was of lower resolution than the audio file previously received under FOIA. An original file cannot be lower resolution than a copy. Respondents refused to provide an original format audio file, and the district court refused to compel.

2) The audio is .76 seconds short of exactly 10 minutes long, while the incident itself is recorded as 35 minutes. Opposing counsel speculated the reason for the miscompare was a dead microphone battery. However, the apparently missing portion is prior to audio start.

3) Respondents refused to reveal the location of the sound source.

4) The district court refused to issue a subpoena for technical information concerning the recording equipment on grounds Petitioner could not afford the cost of mailing, which cost would have amounted to less than 1% of the filing fee.

5) The portion of the audio made available appears to have been intended to establish Petitioner's voluntary consent to search, without realizing the audio also documented Respondents deceiving Petitioner to acquire consent. The missing portion of the audio would further corroborate Petitioner's account of the incident and more comprehensively establish Respondents' account was substantially fabricated.

CONCLUSION

Respondent police officers were taken in by a malicious, deceitful woman. In a different time, circumstance, and skin color, who knows but that she could perhaps have had Petitioner dangling from a rope,

and indeed the last lynching in America happened five miles distant, not so long ago. Had Respondent police officers simply limited their conduct within the proper scope of the law, they would have limited the woman's mischief as well. Instead, once Petitioner's accuser determined his guilt, Respondent police officers made the further determination Petitioner was not someone to whom they need extend Constitutional protections in establishing that guilt. Their determination has thus far proven correct. The courts have no more seen fit to compel Respondents to adhere to the law than Respondents saw fit to do so, which is to say not at all. This Petition is submitted to either gain this Court's intercession or establish its acquiescence.

In such measure as the courts refuse to compel order, they give rein to anarchy. In refusing to hold police accountable before the law, the judiciary encourages the good police to be bad, the bad police to be worse, and ultimately, the public fringe to start shooting. Refusing to restrain police excess is bad for the victims, bad for society, and perhaps worst for the police themselves.

For the reasons set forth above, this Court should grant the petition for certiorari.

respectfully submitted,

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January 8, 2019