NO. _____

October Term, 2019

IN THE SUPREME COURT OF THE UNITED STATES

_____

TOMMY DEAN BULLCOMING, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

_____

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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(a) <u>The Question Presented for Review Expressed in the Terms and Circumstances of the Case</u>.

As recognized in *Scott v. Harris*, 550 U.S. 372 (2007), should a video recording of the actual events that clearly contradicts the sworn testimony of an officer support de novo review of the district court's credibility determination.

(b) List of all Parties to the Proceeding

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) Table of Contents and Table of Authorities

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(d) Reference to the Official and Unofficial Reports of any Opinions

The order and judgment of the United States Court of Appeals for the Tenth Circuit is unpublished. *United States v. Bullcoming*, No.18-6083, 764 Fed.Appx. 804 (10th Cir. March 11, 2019) (unpublished).

(e) Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked.

(i) Date of judgment sought to be reviewed.

The unpublished Order and Judgment of the Tenth Circuit of which review is sought was filed March 11, 2019;

(ii) Date of any order respecting rehearing.

Not applicable;

(iii) Cross Petition.

Not applicable;

(iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant Title 28, United States Code, Section 1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

(v) The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

(f) The Constitutional Provisions, Statutes and Rules which the Case Involves.

(1) Constitutional Provisions:

U.S. CONSTITUTION, amend. IV:

> 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) Statutes Involved:

None.

(3) Rules Involved:

None.

(4) Other: None.

(g) <u>Concise Statement of the Case</u>.

Basis of Jurisdiction in Court of First Instance

This Petition seeks review of an order entered by a United States Court of Appeals, affirming the denial of relief from a motion to suppress evidence discovered during a warrantless search. The jurisdiction of the district court was invoked pursuant Title 18, United States Code, Section 3231. Review in the Court of Appeals was sought under Title 28, United States Code, Section 1291. The Court of Appeals denied Mr. Bullcoming's appeal on March 11, 2019. Review in this Court is sought

under Title 28, United States Code, Section 1254. This petition is timely filed pursuant to Supreme Court Rule 13.1.

Facts Material to Consideration of Question Presented

Procedural Posture

On September 8, 2017, Mr. Bullcoming was charged by complaint with a single count of possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1). A United States Magistrate Judge held a combined preliminary and detention hearing on September 12, 2017. Mr. Bullcoming was bound over and detained.

On October 3, 2017, a federal grand jury returned an indictment, again charging Mr. Bullcoming with possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1). Mr. Bullcoming subsequently filed a motion to suppress, challenging the warrantless search of the vehicle in which he was a passenger. The district court denied Mr. Bullcoming's motion after hearing evidence and argument.

Mr. Bullcoming entered into a conditional plea agreement that preserved his right to appeal the denial of his motion to suppress and entered a plea of guilty. The district court sentenced Mr. Bullcoming to ten (10) months incarceration, which was an upward variance from the advisory guideline range of 0-6 months. Mr. Bullcoming appealed to the United States Court of Appeals for the Tenth Circuit. The Tenth

Circuit Court of Appeals affirmed the conviction and sentence in an unpublished order and judgment. *United States v. Bullcoming*, No.18-6083, 764 Fed.Appx. 804 (10th Cir. March 11, 2019) (unpublished).

Facts

The facts surrounding the search and seizure of Mr. Bullcoming were derived from the testimony of Bureau of Indian Affairs Police Chief Bryan Stark. Although the casino parking lot in which the events occurred was subject to extensive video surveillance, the contemporaneous record of the events was lost when the casino failed to preserve the recording. A partial record of the events, which documents the opening and search of Mr. Bullcoming's closed bag, was preserved by the camera worn by Custer County Deputy Sheriff Mach.

At approximately 10:00 p.m. on June 19, 2017, Bureau of Indian Affairs Police Chief Bryan Stark received a call from dispatch indicating a white vehicle in the parking lot of the Lucky Star Casino in Hammon, Oklahoma was believed to contain marijuana. (*Tr. Supp. Hr.* Vol. 4 at 12). The suspicion derived from the observations of Samantha Candy, a security officer employed by the casino. No additional details were communicated in the call. Ms. Candy did not testify at the suppression hearing.

Chief Stark testified he arrived at the casino parking lot approximately fifteen minutes after receiving the call from dispatch. Chief Stark spoke briefly with Ms.

Candy inside the casino. (*Tr. Supp. Hr.* Vol. 4 at 13). Ms. Candy pointed to the vehicle she said contained marijuana. (*Tr. Supp. Hr.* Vol. 4 at 13). At about the time Ms. Candy pointed out the vehicle, its lights turned on and it began to exit the parking lot. (*Id*. at 14). Neither the call from dispatch, nor the conversation with Ms. Candy revealed any factual basis to support the suspicion marijuana was inside the vehicle.

Relying entirely on Ms. Candy's identification of the vehicle, Chief Stark performed a traffic stop on a white SUV while it was still in the parking lot of the casino. (*Tr. Supp. Hr.* Vol. 4 at 14-15). The vehicle traveled about 50 to 75 yards inside the parking lot before Chief Stark pulled it over. (*Tr. Supp. Hr.* Vol. 4 at 15). Chief Stark made contact with the driver. Mr. Bullcoming was in the front passenger seat. (*Tr. Supp. Hr.* Vol. 4 at 16). Chief Stark testified that when the driver's side window was rolled down, he "notice[d] the odor of marijuana coming from the vehicle." (*Tr. Supp. Hr.* Vol. 4 at 16). The smell was that of "raw marijuana." (*Id*. at 17). At about that time, Custer County Deputy Sheriff Mach arrived on scene and approached the passenger side of the vehicle. (*Tr. Supp. Hr.* Vol. 4 at 17). After a short conversation with the driver, Chief Stark ordered the occupants to exit the vehicle. (*Tr. Supp. Hr.* Vol. 4 at 17). At this point in the sequence of events, Chief Stark's accounts were contradictory.

At the preliminary hearing, Chief Stark testified he approached the passenger side of the vehicle and shined a flashlight to discover loose marijuana laying on the passenger floorboard of the vehicle alongside a black bag. (*Tr. Prelim. Hr.* Vol. 3 at 18-19). Chief Stark testified he opened the black bag to discovery the brick of marijuana. (*Tr. Prelim. Hr.* Vol. 3 at 19). In fact, Chief Stark testified Deputy Mach did not "do anything with respect to the bag or the marijuana or the individuals that were inside the car." (*Tr. Prelim. Hr.* Vol. 3 at 21).

At the hearing on Mr. Bullcoming's motion to suppress, Chief Stark abandoned his account of the events and testified Deputy Mach discovered a bag with approximately a half pound brick of marijuana. (*Tr. Supp. Hr.* Vol. 4 at 18-19). In fact, Deputy Mach's body camera documented his search of the vehicle, including his opening of the zipped black bag and his search of the contents. (*Tr. Supp. Hr*. Vol. 4 at 31). This directly contradicted Chief Stark's prior sworn testimony. A video of the encounter was admitted into evidence.

Ruling of the district court

The district court concluded the search and seizure did not violate the Fourth Amendment:

> [B]ased on the evidence that I have heard, that the officer has supplied the evidence that it seems to me supports the idea that the stop of the vehicle was justified in the first instance. He's testified that that was the -- that he had a report of a car with drugs in it. When he responded, he's

indicated that was confirmed by the security officer at the point he got there.

It seemed to me -- it seems to me that that is plainly sufficient to at least create a reasonable suspicion sufficient to warrant some further contact with the people in the vehicle. It perhaps arises to the status of probable cause flat out, but at least it is -- provides a reasonable basis for initiating the further stop and having the contact with the folks in the car.

I see no reason -- I found the officer's testimony generally credible with respect to what happened. I have -- *I see no reason to discount his testimony that at the time when he approached the car he smelled marijuana. In addition to that, it would seem to me that the smell of marijuana, coupled with the prior reports he had, was sufficient at that point to give him probable cause to -- to arrest for possession of marijuana and -- and to proceed with the search that happened here*. And once the search occurred, as I understand, I guess, essentially the automobile exception to the warrant requirement and how that plays out in a context like this, the -- assuming the presence of probable cause, then they're entitled to search the contents of the vehicle, as happened here.

So it seems to me that there was probable cause, or at least, as I said, reasonable suspicion to initiate the stop at the outset. And as a result, I think the search was appropriate and so I don't see any basis for suppressing anything here.

(*Tr. Supp. Hr.* Vol. 4 at 53-54) (emphasis added).

Ruling of the Court of Appeals

The Tenth Circuit reviewed the district court findings under the clear error standard. Based upon evidence most favorable to the lower court's decision, the Circuit ruled the district court correctly determined there was reasonable suspicion to

stop the vehicle. For purposes of this petition, the Tenth Circuit held the district court's finding that Chief Stark smelled marijuana was not clear error.

(h) <u>Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.</u>

This case presents an example where objective evidence in the form of a video recording erodes the credibility of an officer's testimony such that the underlying facts supporting probable cause to search are suspect. In this case, a police officer's sworn testimony that flatly contradicts the video recording from a body worn camera should cause any reviewing court pause. While review in the United States Supreme Court is rarely granted for error correction, the Court should grant review because this case presents the opportunity to recast the level of appellate scrutiny when video evidence is available. This Court has previously used videotape testimony to reverse a district court's legal determination based on a factual dispute. *Scott v. Harris*, 550 U.S. 372 (2007).

I. The application of clear error should yield when a reviewing court has objective evidence in the form of videotape recordings.

The Tenth Circuit affirmed the district court's legal conclusion that probable cause supported the search of the vehicle. *Bullcoming*, slip. op. at 6-7. It rejected Mr. Bullcoming's challenge to the officer's testimony, holding that "Defendant fail[ed]

to show clear error in the court's finding that Chief Stark's testimony regarding the marijuana smell emanating from the vehicle was credible." *Id*. at 6.

Yet, clear and uncontroverted evidence conclusively demonstrated Chief Stark testified falsely at Mr. Bullcoming's preliminary hearing. Chief Stark testified at the preliminary hearing that he opened a black bag on the passenger side floor board and he observed a brick of marijuana inside. (*Tr. Prelim. Hrg.* Vol. 3 at 19). Chief Stark was specifically asked whether the other officer that arrived, Deputy Mach, did anything with respect to the bag or the marijuana. (*Id*. at 21). Chief Stark testified "No . . . [n]ot that I'm aware of." (*Tr. Prelim. Hrg.* Vol. 3 at 21). Indeed, his testimony was that the marijuana was already located by the time Deputy Mach reached the scene. (*Id*.).

However, at the suppression hearing (and after review of the video), Chief Stark offered a different version of events. Now, Chief Stark testified Deputy Mach was the officer that discovered the black bag. (*Tr. Supp. Hrg.* Vol. 4 at 18). He also testified at he observed loose marijuana after discovery of the bag. (*Id*.). On cross examination, he attempted to explain the clear contradiction:

> Q: [D]o you remember your testimony that . . . [Deputy] Mach didn't have anything to do with it, right?
>
> A: Well, basically on your question there, I mean, he didn't have anything as far as the defendants – as, you know, the video shows he did open the bag and look inside at the marijuana, but he did

> not seize the bag or he didn't make an arrest. So to me that – in my opinion, that is he didn't have anything really to do with the defendants.

Id. at 49. He also did not testify at the suppression hearing that he shined a flashlight onto the passenger floor board to reveal loose marijuana, as he did at the preliminary hearing. (*Tr. Prelim. Hrg.* Vol. 3 at 18). Indeed, review of the body camera demonstrates no such loose marijuana is to be seen.

Only when confronted with the indisputable evidence in the form of Deputy Mach's camera does Chief Stark admit he was not the one who discovered and opened the black bag. This inconsistent statement calls his credibility as to the underlying odor of marijuana, a characteristic unable to be caught on camera. Accordingly, his testimony as to the probable cause to search the vehicle is inherently suspect.

Ordinarily, such credibility determinations are left to the trial court. *See, e.g.*, *Miller v. Fenton*, 474 U.S. 104, 114 (1985) ("When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight."); *United States v. Hernandez*, 847 F.3d 1257, 1263 (10th Cir. 2017) "[I]t is the province of the trial court to assess the credibility of witnesses at the suppression hearing and

to determine the weight to be given to the evidence presented, and we must give such determinations due deference.") (internal quotation omitted).

However, review of clear, uncontroverted video evidence obviates the need for trial court expertise. Stephen E. Baumann, II and L. Michael Brooks, Jr., *Defer no More, Appellate Review in the iPhone Era*, 9 No. 2 IN-HOUSE DEF. Q. 54 (Spring 2014) ("A witness's rendition of an event is arguably unnecessary if a video fully and accurately depicts the same event. Stated another way, a court need not determine if a witness is telling the truth: the video cannot lie.").

In *Scott v. Harris*, 550 U.S. 372, 378 (2007), this Court addressed the interplay between appellate review of factual questions when there is a "videotape capturing the events in question." *Scott* involved the denial of qualified immunity in a claim of excessive force under the Fourth Amendment when law enforcement purposefully caused Harris's vehicle to crash during a pursuit. *Id*. at 375-76. At issue was whether Harris was driving in such a manner as to endanger human life. *Id*. at 380. The lower courts concluded there was an issue of material fact. This Court, however, reviewed the videotape and held that Harris's version was "so utterly discredited by the record that no reasonable jury could have believed him." *Id*. In this way, a reviewing Court watched the videotape and inserted its own assessment of the conduct at issue. This

decision is an acknowledgment that appellate courts are capable of reviewing factual issues de novo.

To be sure, the majority of published decisions on the appropriate standard of review involving video recordings adhere to clear error, *see e.g.*, *United States v. Santos*, 403 F.3d 1120, 1128 (10th Cir. 2005) (rejecting request to review factual finding under less deferential standard due to video recording); *Muniz v. Rovira-Martino*, 453 F.3d 10, 13 (1st Cir. 2006) ("[W]e may not exercise de novo review over the district court' account of the video evidence in this case.").

Some lower courts, however, have reviewed video recordings under a seemingly less deferential standard of review. *See, e.g.*, *Ramirez v. Martinez*, 716 F.3d 369, 374 (5th Cir. 2013) (in appeal from denial of summary judgment, applying *Scott* and reviewing video tape to determine whether it "blatantly contradict[ed]" the version of events told by witness). *See also United States v. Foreman*, 369 F.3d 776, 789 (4th Cir. 2004) (J., Gregory, concurring in part, and dissenting in part) (noting the appellate court reversed grant of suppression motion despite trial court's apparent adverse credibility determination).

Historical deference to trial court factual determinations is becoming obsolete as proceedings are driven by objective accounts in video tape form. One commentator

questioned whether traditional fact-finding deference should continue in light of technological advances:

> In the case of jury trials, appellate deference is further justified by the special role of the jury as the community's fact-finding representative. That justification does not apply to bench trials. Accordingly, simple logic suggests that if technology permits us to replicate for the appellate court what the trial judge observed, we ought not to persist in such deference.

Fredric I. Lederer, *The Effect of Courtroom Technologies on and in Appellate Proceedings and Courtrooms*, 2 J. APP. PRAC. & PROCESS 251, 259-60 (2000).

A more appropriate standard of review in light of video evidence supporting a factual finding should be less deferential than clear error. Mr. Bullcoming submits de novo review is appropriate when objective evidence in the form of video recordings is available. De novo review in this case would result in a reversal of the trial court's factual determination that Chief Stark was generally credible. The entire sequence of events prior to the activation of the body worn camera is questionable in light of Chief Stark's false, sworn testimony. Notably, it was during this time he allegedly smelled the odor of raw marijuana, the crucial fact establishing probable cause to search the vehicle.

Simply put, Chief Stark's testimony was incredible. Only when confronted with video evidence did he revise his prior sworn testimony. His willingness to

provide inaccurate testimony at the preliminary hearing called his credibility into sufficient question such that the trial court's credibility determination was error.

Cases such as Mr. Bullcoming's, in which there is an objective video recording contradicting sworn testimony, call for a revisit of the appellate deference due to factual determinations.

(i) <u>Appendix</u>.

(i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

United States v. Bullcoming, No.18-6083, 764 Fed.Appx.804 (10th Cir. March 11, 2019) (unpublished).

(ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None;

(iii) Any order on rehearing:

None;

(iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

None;

(v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

(vi) Other appended materials:

Oral Ruling Denying Motion to Suppress made during Suppression Hearing.

Conclusion

The petition should be granted.

Respectfully submitted,

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