

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL THOMAS GAUSSIRAN,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Appointed Under the Criminal Justice Act of 1964

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Amendment's Right To Be Free From Unreasonable Searches And Seizures Requires Reversal When There Is No Evidence To Support Reasonable Suspicion To Stop A Person And Probable Cause To Search His Car?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

None.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael Thomas Gaussiran, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 19, 2020.

OPINIONS BELOW

On December 13, 2019, the United States Court of Appeals for the Ninth Circuit issued an unpublished decision affirming petitioner's convictions and sentence for four counts: Possession of Fifteen or More Unauthorized Access Devices (18 U.S.C. § 1029(a)(3)), Aggravated Identity Theft (18 U.S.C. § 1028A(a)(1)), Possession with Intent to Use or Transfer Unlawfully at Least Five Identification Documents (18 U.S.C. § 1028(a)(3)), and Possession of Stolen Mail (18 U.S.C. § 1708). Appendix A. On February 19, 2020, the United States Court of Appeals for the Ninth Circuit denied petitioner's Petition for Panel Rehearing and Rehearing En Banc. Appendix B.

JURISDICTION

On February 19, 2020, the Court of Appeals entered its decision affirming the convictions and sentence of the petitioner for violations of Title 18 U.S.C. § 1029(a)(3), § 1028A(a)(1), § 1028(a)(3), § 1708. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourth Amendment to the United States Constitution:

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.

18 U.S.C. § 1029(a)(3), § 1028A(a)(1), § 1028(a)(3), § 1708

STATEMENT OF THE CASE

Petitioner Appellant Gaussiran was convicted in the Central District of California of four counts following a jury trial: Possession of Fifteen or More Unauthorized Access Devices (18 U.S.C. § 1029(a)(3)), Aggravated Identity Theft (18 U.S.C. § 1028A(a)(1)), Possession with Intent to Use or Transfer Unlawfully at Least Five Identification Documents (18 U.S.C. § 1028(a)(3)), and Possession of Stolen Mail (18 U.S.C. § 1708). The indictment was based on alleged unauthorized access devices, identification documents and stolen mail found after the police officer's seizure of Mr. Gaussiran and search of his car. Excerpt of Record ("ER") 86-89. Mr. Gaussiran was sentenced to 58 months in prison followed by three years of supervised release. ER 1, CR 156.

Ventura Police Officer Rogelio Nunez testified that an unidentified woman walking in the park flagged him down and told him, "[t]here is narcotic activity in the area." ER 140. The woman did not provide a description of the person or people, the type of activity, whether the activity was in a car or not. ER 140-141. "She simply

stated there was narcotics activity in the area and kept walking the opposite direction in which I was driving," Officer Nunez said. ER 141. Officer Nunez saw a parked silver Toyota Corolla. ER 144. As he drove past, he saw two individuals in the car: a man, later identified as Gaussiran, and a female passenger. ER 145. Officer Nunez claimed that upon seeing Officer Nunez in his patrol car, Gaussiran looked "to his left, noticed me, and immediately looks back down, what I will say, between his legs." ER 146, 194. The district court found that Gaussiran was not manipulating anything between his legs. ER 194.

Officer Nunez ran a DMV records check on the car's license plate number and discovered that the registration had expired. ER 145; ER 82, 101.

Officer Nunez then later turned his patrol car around and saw the Toyota Corolla drive past him. ER 147. The district court – and the Ninth Circuit -- incorrectly found that Officer Nunez followed the Corolla. Eventually, Officer Nunez turned on Twin Rivers Road and came upon Gaussiran walking on Twin Rivers Road. ER 151. Officer Nunez never said that the Corolla drove away from him.

Officer Nunez gave three differing accounts as to what happened when he saw Gaussiran on Twin Rivers Road. He first said that Gaussiran was walking towards him. ER 151. Then Officer Nunez stated that Gaussiran was actually walking to the door of one of the homes in the housing complex on Twin Rivers Road. ER 152. Later, Officer Nunez stated that when Gaussiran saw him, he "immediately changed directions and went toward the back gate of the residence." ER 169.

According to Officer Nunez, Gaussiran was “fidgeting” and anxious – although the videos from the body camera did not show such reactions by Gaussiran. *Cf.* ER 180 with CR 29, Ex. C. (body camera video recordings of Gaussiran).

Officer Nunez claimed that as he spoke to Gaussiran, he could see Gaussiran’s car parked in a stall around the corner of the building behind Gaussiran. ER 153-155. Officer Nunez testified that he purportedly saw the female “reaching into the center console area of the vehicle.” ER 155. However, such testimony was not credible as it conflicted with the body camera recordings that showed that Officer Nunez could not have seen Gaussiran’s car during his interaction with Gaussiran while on the private road. *See* CR 29, Ex. C (ER 152-153); Def. Trial Exs. 200-202 (still photos from same body camera video 867 in Exhibit C).

At trial, Officer Nunez admitted that he could not see the car when he first began speaking with Gaussiran in the road as depicted in the photographs, ER 91-92. Officer Nunez also admitted that the body camera would depict accurately what was in front of him, at his side if he looked to that side or if he leaned to one side. ER 91.

Throughout the video recordings of the seizure, Gaussiran was calm, not offensive or exhibiting signs of drug use in any way. Gaussiran asserted his rights, asked why the officer was detaining him, why the officer was searching him, and why the officers were searching his car. Officer Nunez never mentioned running his plate nor expired registration or violation of any traffic laws. ER 90.

After Officer Nunez called Gaussiran's name into dispatch, the dispatcher informed him that Gaussiran was a "PROS" offender, meaning he was purportedly on Probation Release on Supervision. ER 160-162. However, that information from dispatch was not true; Appellant was not a PROS offender. The PROS notation on his "rap sheet" made clear that his PROS status had to first be verified with Ventura County Probation. This caveat to verify his status was due to the obviously erroneous expiration date of 99/99/9999. Officer Nunez made clear he detained Gaussiran and conducted the search only based on his purported PROS status. ER 163.

Officer Nunez testified that after the search was completed, Corporal Snow told Officer Nunez that Gaussiran was in fact not on PROS. ER 96.

In addition, Officer Nunez claimed that he observed a fresh puncture mark inside of Gaussiran's elbow, consistent with a recent narcotics injection. ER 180. However, in no part of the body camera video recordings did Gaussiran ever state that he had used methamphetamine or any other drugs the day before. Nor do any of the videos show any puncture marks or signs of drug use.

Officer Nunez then conducted a search of Gaussiran's person and found a piece of mail and a credit card in the names of individuals other than Gaussiran. Dispatch informed Officer Nunez that the female passenger was on probation, subject to search terms for narcotics. ER 156, 158. When asked if she had any contraband, the female passenger told Officer Nunez that she had marijuana in her purse, which was located inside of the car. ER 158. Officer Nunez retrieved the purse and found the marijuana inside. ER 158. While in the car, retrieving the purse, Officer Nunez saw two syringes

in the center console of the vehicle. ER 172-173.

Afterwards, Officer Nunez searched the rest of Gaussiran's car and found in the back seat and trunk several garbage bags filled with mail, checks, and cards. ER 86-89. In total, officers recovered 1,105 pieces of mail, 69 credit and debit cards, two U.S. passports and three California driver's licenses, addressed to or belonged to others. ER 115-116, 118. Gaussiran was not cited for any traffic violation or invalid registration. ER 165.

On appeal, Mr. Gaussiran argued, among other issues, that his convictions should be reversed because there was no reasonable suspicion to stop him and no probable cause to search his car.

The Ninth Circuit Court of Appeals upheld Mr. Gaussiran's convictions and sentence.

REASON FOR GRANTING THE PETITION

I. THE FOURTH AMENDMENT'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES REQUIRES REVERSAL BECAUSE THERE WAS NO EVIDENCE TO SUPPORT REASONABLE SUSPICION TO STOP GAUSSIRAN AND PROBABLE CAUSE TO SEARCH HIS CAR

The Court of Appeals for the Ninth Circuit affirmed the district court's denial of the motion to suppress evidence from the unlawful seizure and search of Mr. Gaussiran that violated the Fourth Amendment of the United States Constitution.

The Ninth Circuit's decision as to this important Fourth Amendment question conflicts with relevant decisions of this Court.

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.

Amendment IV, U.S. Constitution.

The Court of Appeals for the Ninth Circuit found that the “district court’s factual findings were not clearly erroneous as to the officer’s reasonable suspicion to stop Gaussiran and speak with him, based on (1) the anonymous tip that there was narcotics activity in the area, (2) Gaussiran’s vehicle registration being expired, (3) Gaussiran attempting to avoid eye contact with the officer, (4) Gaussiran driving away from the officer, and (5) Gaussiran walking away from the officer in a residential neighborhood.” Appendix A, p. 2. However, the Ninth Circuit’s conclusion in finding against Fourth Amendment violation was wrong.

An investigatory stop of a person requires that officers must have reasonable suspicion that the person is engaging in illegal activity. *Terry v. Ohio*, 392 U.S. 1 (1968). A seizure of the person includes not only a full-fledged arrest, but also “investigatory detentions,” *see Davis v. Mississippi*, 394 U.S. 721, 726 (1969), and any other “detention of [a person] against his will,” *see Cupp v. Murphy*, 412 U.S. 291, 294 (1973). To form reasonable suspicion, “detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.”

United States v. Cortez, 449 U.S. 411, 417-18 (1981). Reasonable suspicion cannot be

based on an officer's "unparticularized suspicion or 'hunch'." *Terry*, 392 U.S. at 27.

Here, the anonymous tip did not provide any description of whether the activity was in a car, the type of car or people involved. The woman did not provide a description of the person or people, the type of activity, whether the activity was in a car or not. ER 140-141. "She simply stated there was narcotics activity in the area and kept walking the opposite direction in which I was driving." ER 141.

Second, Gaussiran did not attempt to avoid eye contact. Officer Nunez testified that upon seeing Officer Nunez in his patrol car, Gaussiran looked "to his left, noticed me, and immediately looks back down, what I will say, between his legs." ER 146, 194. The district court found that Gaussiran was not manipulating anything between his legs. ER 194. It was the district court that incorrectly added that Gaussiran "appeared both surprised and nervous" when he saw Officer Nunez. ER 43. However, Officer Nunez never said that in court subject to examination. ER 43.

Third, Officer Nunez never followed the Toyota Corolla in the first place for there to be a finding that Gaussiran "drove away from the officer." After Officer Nunez drove past the Toyota Corolla, he turned his patrol car around and saw the Toyota Corolla drive past him. ER 147. Thus, it is not factually the case that the Corolla "drove away from the officer."

Fourth, Officer Nunez gave three differing accounts as to what happened when he saw Gaussiran on Twin Rivers Road. Officer Nunez first said that Gaussiran was walking towards him. ER 151. Then Officer Nunez stated that Gaussiran was actually walking to the door of one of the homes in the housing complex on Twin

Rivers Road. ER 152. Later, Officer Nunez stated that when Gaussiran saw him, he “immediately changed directions and went toward the back gate of the residence.” ER 169. Thus, the finding that Gaussiran walked away from the officer was not supported by the differing accounts from the officer as to what happened when he saw Gaussiran walking in the neighborhood.

As to the purported probable cause to search Gaussiran’s car, Officer Nunez did not have reason to approach and search the car.

The Fourth Amendment explicitly states a preference for searches to be conducted pursuant to a search warrant; therefore, the Supreme Court has held warrantless searches and seizures to be *per se* unreasonable unless they fall within a “few specifically established and well delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357 (1967); *Thompson v. Louisiana*, 469 U.S. 17, 19-20 (1984); *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993). When a law enforcement officer searches a car without probable cause, the occupant’s Fourth Amendment rights have been violated. *See Florida v. Royer*, 460 U.S. 491, 497-99 (1983).

Probable cause to conduct a warrantless search depends upon the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). This requires the court to determine the facts leading up to the search and whether from the standpoint of an objectively reasonable police officer those facts amount to probable cause. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). In cases where the existence of probable cause is doubtful, the Supreme Court has held that district courts should favor the issuance of warrants. *Massachusetts v. Upton*, 466 U.S. 727, 734 (1984) (per curiam).

If the government cannot show that a particular exception applies, evidence seized because of an illegal warrantless search, and the fruits thereof, must be suppressed.

See Wong Sun v. United States, 371 U.S. 471, 485-86 (1963).

Officer Nunez testified that he purportedly saw the female “reaching into the center console area of the vehicle.” ER 155. However, Officer Nunez’s body camera recordings showed that Officer Nunez could not have seen Gaussiran’s car during his interaction with Gaussiran while on the private road. *See* CR 29, Ex. C (ER 152-153 and submitted to the court); Def. Trial Exs. 200-202 (still photos from same body camera video 867 in Exhibit C). Indeed, at trial, Officer Nunez admitted that he could not see the car when he first began speaking with Gaussiran in the road. ER 91-92.

Officer Nunez also admitted at trial that the body camera would depict accurately what was in front of him, at his side if he looked to that side or if he leaned to one side. ER 91.

Further, the officer did not find the syringes while lawfully present in the car. Instead, the video makes clear that Officer Nunez retrieved the purse and charger, closed the door to the vehicle then walked away. *See* CR 29, Ex. C, video 867 at 14:00. Thus, Officer Nunez did not find syringes or any other contraband in plain sight while retrieving the purse.

“To fall within the plain view exception, two requirements must be met: the officers must be lawfully searching the area where the evidence is found and the incriminatory nature of the evidence must be immediately apparent.” *United States v. Stafford*, 416 F.3d 1068, 1076 (9th Cir. 2005).

The videos from Officer Nunez's body camera did not show Gaussiran fidgeting or nervous at any time. *Cf.* ER 180 with CR 29, Ex. C. (body camera video recordings numbered 867 through 888).

Regardless, as to the passenger's possession of drugs or Gaussiran's purported drug use, evidence of mere possession of drugs and a suspicion that someone is under the influence of drugs does not establish probable cause to search a vehicle. *See United States v. Wanless*, 882 F.2d 1459, 1466 (9th Cir. 1989); *see also United States v. Vasey*, 834 F.2d 782, 788 (9th Cir. 1987) (mere suspicion of drug-related activity does not rise to the level of probable cause). Officer Nunez did not have probable cause to search Gaussiran's vehicle.

Officer Nunez did not have reasonable suspicion that criminal activity was afoot and did not describe specific articulable facts suggesting that Gaussiran was involved in criminal activity. No description from the unidentified pedestrian about "narcotics activity in the area" pointed to Gaussiran or his car.

The Petition should be granted and the decision of the Court of Appeals for the Ninth Circuit should be reversed.

CONCLUSION

Based on the foregoing, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Date: April 6, 2020

s/ Shaun Khojayan

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