No. 19-8594

IN THE SUPREME COURT OF THE UNITED STATES

JUSTIN HARRINGTON DARRELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record

BRIAN C. RABBITT
Acting Assistant Attorney General

KELLEY BROOKE HOSTETLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that officers had reasonable suspicion to stop petitioner, when the officers arrived in marked squad cars at a known drug house to execute an arrest warrant and saw petitioner immediately walk away from them, toward an area out of the officers' sight where he could potentially warn the target of the impending arrest.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Miss.):

United States v. Darrell, No. 18-cr-3 (Jan. 25, 2019)

United States Court of Appeals (5th Cir.):

United States v. Darrell, No. 19-60087 (Dec. 23, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 945 F.3d 929. The order of the district court (Pet. App. B1-B3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 2019. A petition for rehearing was denied on February 7, 2020 (Pet. App. C1-C3). The petition for a writ of certiorari was filed on May 28, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Mississippi, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 36 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A12.

1. On September 3, 2017, two local law-enforcement officers drove to a residence in Corinth, Mississippi, to execute an arrest warrant for a woman named Brandy Smith. Pet. App. A1. The residence was "a known drug house" at which multiple arrests and disturbances, and one shooting, had previously occurred. Ibid. The uniformed officers arrived in two marked squad cars and parked in the driveway behind a black Chevrolet Camaro that was already there. Ibid. "Almost instantaneously" after the officers' arrival, they observed petitioner get out of the Camaro and begin walking toward the back of the house, toward an area that would have been outside the officers' field of vision. Ibid.; 8/23/18 Hearing Tr. (Tr.) 12. The officers "didn't know * * * who all was at the house," and feared that petitioner "could be telling somebody else, if he went around back, that we was there and * * * hindering prosecution." Tr. 13; see Pet. App. A1.

The officers ordered petitioner to stop, but he only walked more quickly toward the back of the house. Pet. App. A1. The officers ordered petitioner to stop a second time, and petitioner then turned around and walked back toward the officers. Ibid. Petitioner was carrying a bottle of whiskey inside a brown paper bag, which is illegal in dry Alcorn County, Mississippi, and the officers took it. Ibid.

One officer then went to the front door in order to execute the arrest warrant, while the other officer remained with petitioner. Pet. App. A1; Tr. 17-19. At that point, the officer standing next to petitioner noticed two knives on petitioner's belt. Pet. App. A1. The officer told petitioner that he was going to remove the knives for "both of our safeties," and did so. Tr. 19. The officer then asked if petitioner had any other weapons, and petitioner said no. Pet. App. A1. The officer told petitioner, "I'm going to pat you down real quick since I got these two knives off of you just for our safety," Tr. 20, and he did so. Pet. App. A1. During the patdown, the officer discovered in petitioner's pocket a loaded semi-automatic firearm with an obliterated serial number. Id. at A2. The entire encounter took approximately "less than a minute." Ibid. Petitioner, who was a convicted felon, was arrested. Ibid.

2. A federal grand jury in the Northern District of Mississippi charged petitioner with possessing a firearm as a

felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1. Petitioner moved to suppress the gun on the theory that the officers violated the Fourth Amendment by detaining him without reasonable suspicion. Pet. App. A2; see D. Ct. Doc. 18, at 1 (Aug. 7, 2018).

Following an evidentiary hearing, the district court denied petitioner's motion to suppress. Pet. App. B3. The district court determined that the officers "had reasonable suspicion to believe that criminal activity was afoot -- namely that [petitioner] may have been attempting to warn the female resident of the house of the impending execution of the arrest warrant against her, which would be a violation of Miss. Code. § 97-9-103." Id. at B2-B3. The district court also found that the subsequent "protective search" of petitioner was justified by reasonable suspicion that he was armed and dangerous. Id. at B3.

Petitioner entered a conditional guilty plea, in which he preserved his right to appeal the denial of his motion to suppress. See Pet. App. A2; Judgement 1. The district court sentenced him to 36 months of imprisonment. Judgment 2.

3. The court of appeals affirmed. Pet. App. A1-A12. The court explained that because petitioner did not challenge the patdown, but only the initial seizure, the relevant question was "only whether, under the totality of the circumstances, the officers had reasonable suspicion" to stop petitioner as he

approached the house. Id. at A2. And the court found that, "under the totality of the circumstances * * * reasonable suspicion supported the brief investigatory stop." Id. at A6.

The court took note of "three key facts to support the stop": petitioner's exit from his car as soon as the police arrived; his apparent goal of going behind the house where he could potentially warn occupants or take out a firearm; and the stop's occurrence at a known drug house that had been the scene of prior arrests and a shooting. Pet. App. A2-A3. The court compared the events in this case to those in Illinois v. Wardlow, 528 U.S. 119 (2000), in which this Court found reasonable suspicion to support a stop when a suspect in a high-crime area "took off in an 'unprovoked flight' as soon as he saw * * * approaching police cars." Pet. App. A3 (quoting Wardlow, 528 U.S. at 124). And the court determined that Wardlow "shares several salient factual similarities" with this case: "Just like Wardlow, [petitioner] responded to the arrival of police by making a sudden attempt to get out of the officers' sight, and in both cases the stops took place in 'area[s] of expected criminal activity.'" Ibid. (citation omitted).

The court of appeals did not, however, view Wardlow as an "exact" match for this case, because petitioner "walked away from the police" rather than running. Pet. App. A4. The court determined that the case law on flight -- and particularly on the issue of walking rather than running -- is "not clear-cut." Ibid.

The court surveyed circuit precedents in which walking away from the police, in addition to "other contextual factors," supported a stop. Ibid. The court also discussed precedents on which petitioner relied -- one involving a passenger in the defendant's car walking away from police while the defendant remained, and the other involving a defendant who was already walking when he saw the police and continued to do so -- in which the court had found no reasonable suspicion. Id. at A4-A6; see United States v. Hill, 752 F.3d 1029 (5th Cir. 2014); United States v. Monsivais, 848 F.3d 353 (5th Cir. 2017).

After discussing those precedents, and examining the totality of the circumstances here, the court found that petitioner's behavior was a "prototypical case of suspicious activity: flight from police in a high-crime area." Pet. App. A6. The court observed that the officers "reasonably feared" petitioner might "draw a weapon or warn the target of their arrest warrant if he were permitted to withdraw from view." Ibid. And the court explained that the officers could lawfully stop petitioner without "certainty that a crime is in fact being committed," because Terry v. Ohio, 392 U.S. 1 (1968), requires only "reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" Pet. App. A6 (citations omitted).

Judge Dennis dissented. Pet. App. A6-A9. In his view, the circumstances did not support reasonable suspicion of criminal

activity and any "practical necessity of detaining [petitioner]" in order to facilitate the execution of the arrest warrant was "irrelevant." Id. at A8 n.2; see id. at A6-A9.

ARGUMENT

Petitioner contends (Pet. 9-23) that he was seized in violation of the Fourth Amendment when he complied with the officers' second order to stop, as he moved toward an unobservable area behind the drug house where they were executing an arrest warrant. The court of appeals' factbound decision is correct and does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. As this Court explained in Terry v. Ohio, 392 U.S. 1 (1968), "the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." Id. at 19; see Birchfield v. North Dakota, 136 S. Ct. 2160, 2186 (2016) ("[R]easonableness is always the touchstone of Fourth Amendment analysis."). Accordingly, in Terry, this Court held that a police officer may make an investigatory stop of a suspect based upon a reasonable and articulable suspicion that he is engaged in potential criminal activity. 392 U.S. at 21, 30-31. To establish reasonable suspicion, "the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence

standard." United States v. Arvizu, 534 U.S. 266, 274 (2002). A reviewing court "must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." Id. at 273 (internal quotation marks omitted).

In Illinois v. Wardlow, 528 U.S. 119 (2000), this Court emphasized two types of facts that are "among the relevant contextual considerations in a Terry analysis": "that [a] stop occurred in a 'high crime area,'" and that a suspect engaged in "nervous, evasive behavior," such as "unprovoked flight." Id. at 124 (citation omitted). Together, those factors can support reasonable suspicion to conduct a brief investigatory stop, as they did in Wardlow itself. Ibid. The Court acknowledged that there are innocent reasons for flight from the police and that, therefore, "flight is not necessarily indicative of ongoing criminal activity." Id. at 125. But it emphasized that "[e]ven in Terry, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation," and explained that such ambiguity does not "establish a violation of the Fourth Amendment," which "accepts the risk that officers may stop innocent people" as long as they are permitted to go on their way once it becomes clear that officers lack probable cause to arrest. Id. at 125-126.

2. Applying those principles, the court of appeals correctly determined that, "under the totality of the

circumstances" in this case, the stop did not violate the Fourth Amendment. Pet. App. A6. As the court explained, this case "shares several salient factual similarities with Wardlow," in that officers saw petitioner engage in evasive behavior -- walking away from police and toward an area outside their line of sight -- immediately after the officers' arrival at a known drug house. Id. at A3. The court of appeals acknowledged that the evasive behavior in this case was less pronounced than in Wardlow, as petitioner walked rather than ran away from police. Id. at A4. But the locational nexus to criminal activity -- a known drug house as opposed to simply a high crime "area" -- was stronger in this case than in Wardlow. Wardlow, 528 U.S. at 124. And the police in this case had an additional reason for suspicion that was absent in Wardlow, namely that they were on the scene to execute an arrest warrant, supporting reasonable suspicion that petitioner "may have been attempting to warn the female resident of the house of the impending execution of the arrest warrant against her, which would be a violation of Miss. Code. § 97-9-103." Pet. App. at B2-B3.

On these facts, it was reasonable for police to briefly detain petitioner in order to "resolve the ambiguity" in his behavior. Wardlow, 528 U.S. at 125. Indeed, even apart from Terry, this Court has found it constitutionally reasonable in similar circumstances for officers to temporarily detain a person in furtherance of the execution or obtainment of a judicially

authorized warrant. See Michigan v. Summers, 452 U.S. 692 (1981) (reasonable for police to detain the occupants of a residence while executing a search warrant there); Illinois v. McArthur, 531 U.S. 326 (2001) (reasonable for police to prevent defendant from entering his residence when police had probable cause to believe defendant had drugs in the residence and would destroy them before police could obtain a warrant). No sound reason exists to find that the officers acted unreasonably in stopping petitioner here.

3. Petitioner errs in contending (Pet. 9-18) that this case presents the question whether officer safety can justify a Terry stop when police lack reasonable suspicion of criminal activity. Neither the court of appeals nor the district court found the stop lawful based on a public-safety rationale. Instead, the court of appeals recognized that the "reasonable suspicion" test requires "'a particularized and objective basis for suspecting the person stopped of criminal activity.'" Pet. App. A2 (citations omitted). The court found that test satisfied here, in part because the officers "reasonably feared that [petitioner] might draw a weapon or warn the target of their arrest warrant if he were permitted to withdraw from view," id. at A6, and petitioner acknowledges that those actions would be crimes. Pet. 14 ("it would certainly have been a crime for [petitioner] to retrieve a weapon and harm the officers or to warn the target of the warrant in order to help her evade arrest"). Petitioner's dispute is thus not with the legal

test employed by the court of appeals, but with the court's application of that test to the facts of this case. No reason exists to review that factbound determination.

Petitioner also errs in contending (Pet. 18-23) that this case presents the question whether "walking away in a high crime area, without more, [can] sustain a Terry seizure." Id. at 18. As explained above, p.9, supra, that is an incomplete description of the salient facts here. Petitioner was not simply walking away from police in a high crime area; he was walking to the rear of a known drug house where police had just arrived to execute an arrest warrant. Pet. App. A1. And for similar reasons, petitioner errs in contending (Pet. 21) that the court of appeals' decision conflicts with decisions of other circuits. Neither of the cases he cites, United States v. Kitchen, 11 Fed. Appx. 844 (9th Cir. 2001), and United States v. Navedo, 694 F.3d 463 (3d Cir. 2012), indicates that another court of appeals would have reached a different outcome from the decision below on the distinct facts of this case.

In Kitchen -- an unpublished and non-precedential decision -- the Ninth Circuit found no reasonable suspicion when police observed two men walking away from each other after making hand-to-hand contact in the parking lot of a gas station/deli. 11 Fed. Appx. at 845-846. The gas station/deli was not known as a drug-trafficking location, and the officers testified that they had

never before seen a hand-to-hand drug transaction. Id. at 846. Those facts bear little resemblance to the facts of this case. And in Navedo, the Third Circuit found that police lacked reasonable suspicion to stop a suspect after officers observed the suspect looking at another man's gun, in an area not known for its high crime rates. 694 F.3d at 468. The suspect fled upon the officers' approach, and the officers then arrested him. Id. at 466. The Third Circuit took the view that even if reasonable suspicion had existed to detain the suspect before his flight, the flight alone, "without more, can not elevate reasonable suspicion to detain and investigate into the probable cause required for an arrest." Id. at 474. Navedo thus arose on very different facts and considered legal issues not presented by this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

BRIAN C. RABBIT
Acting Assistant Attorney General

KELLEY BROOKE HOSTETLER
Attorney

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