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In The
Supreme Court of the United States

—◆—
TERRILL BERNARD WEATHERSPOON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—◆—
**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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Dated: October 13, 2020

QUESTION PRESENTED

MUST AN OFFICER HAVE A REASONABLE SUSPICION THAT A COMPANION OF AN ARRESTEE IS ARMED AND DANGEROUS, INDEPENDENTLY OF A REASONABLE SUSPICION THAT THE ARRESTEE IS ARMED AND DANGEROUS, TO CONDUCT A PAT DOWN SEARCH OF THE COMPANION FOR WEAPONS?

STATEMENT OF RELATED CASES

Counsel is unaware of any proceedings directly related to the case in this Court.

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**In The
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TERRILL BERNARD WEATHERSPOON,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

**Petition for a Writ of Certiorari
To the United States Court of Appeals for the Fourth Circuit**

Petitioner, Terrill Bernard Weatherspoon, in the Middle District of North Carolina, after the denial of his motion to suppress evidence, entered a conditional plea of guilty to, and was found guilty of, and was sentenced for one count of possession of a firearm in commerce by a felon. The petitioner filed a timely notice of appeal to the United States Court of Appeals for the Fourth Circuit. The United States Court of Appeals for the Fourth Circuit affirmed the decision of trial court. [Appendix 1a- 7a]. Petitioner respectfully asks this Court to issue a writ of certiorari to review the opinion of the Fourth Circuit Court of Appeals.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in this case is unpublished. The opinion is appended to this petition. [Appendix 1a-7a]

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was filed on August 7, 2020. This important question justifies review by this Court whose jurisdiction is invoked under 28 U.S.C § 1254(1).

Subject matter jurisdiction was conferred upon the United States District Court pursuant to, and in accordance with, Title 18 U.S.C. § 3231.

Subject matter jurisdiction was conferred upon the Fourth Circuit Court of Appeals pursuant to, and in accordance with, 18 U.S.C § 3742(a), Title 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISION INVOLVED

“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.” United States Constitution, Amendment IV.

INTRODUCTION

In the daylight morning of July 18, 2018 the petitioner, Terrill Weatherspoon, walked from a motel room toward the motel’s parking lot.

There was nothing unusual about Weatherspoon’s behavior.

He was in the company of two other men one of whom, Joshua Espinoza, the police had an arrest warrant for driving while impaired and who was believed to be dangerous.

Police searched Weatherspoon and a gun was revealed.

The error complained of is that the district court relied on, and the Fourth Circuit Court of Appeals affirmed, a totality of circumstances test which was not particularized as to Weatherspoon but which relied on circumstances peculiar only to Weatherspoon's companion, Espinoza.

STATEMENT OF THE CASE

A. Facts.

Joshua Espinoza was a suspect in a jewelry store robbery. He was also a suspect in a shootout in downtown Durham, North Carolina.

Espinoza was under surveillance. Cell phone tracking indicated that Espinoza was at the back side of the Days Inn Motel in Durham, North Carolina on the morning of July 18, 2018.

Officers had an arrest warrant for Espinoza for driving while impaired. (JA 35).

Six to eight law enforcement officers were present at the Days Inn at this time.

Terrill Weatherspoon, the Petitioner, was with Joshua Espinoza and Nigel Hemby at the Days Inn Motel in Durham, North Carolina on the morning of July 18, 2018.

In mid morning the three men walked from a motel room down an exterior stairwell toward the parking lot.

The officers effected the arrest of Espinoza as he walked down the exterior stairwell to the parking lot. Each member of the law enforcement team had visible lettering on their persons indicating police or FBI. (JA 36).

Espinoza fled on foot, dropped a bag in his hands, ran behind the motel in the woods. (JA 26).

One officer pushed Hemby to the ground and commanded Weatherspoon and Hemby to sit on the ground and raise their hands. (JA 26).

FBI Special Agent Jocys approached Weatherspoon and Hemby, told them both to get on the ground, sit on the ground, and put their hands up. (JA 26).

Weatherspoon immediately complied with law enforcement's command that he sit down and raise his hands. (JA 38).

The officers gave pursuit of Espinoza while Agent Jocys remained with Weatherspoon and Hemby. (JA 26).

Agent Jocys had her gun drawn at Weatherspoon and Hemby. (JA 39).

Agent Jocys had information that Espinoza was a violent gange member, that he had a violent criminal history, including arrest for assault with deadly weapon with intent to kill, discharging a firearm into occupied property, a number of arrests for felon in possession of a firearm, and an arrest for robbery with a dangerous weapon. (JA 23).

Agent Jocys knew Espinoza was a suspect in the jewelry store burglary and was a suspect in the downtown Durham shootout. (JA 23,24).

Based on data based search, Agent Jocys knew that Espinoza was known to carry a gun. (JA 24).

There was nothing unusual about Terrill Weatherspoon's behavior as he walked toward the car. (JA 35).

Law enforcement did not know who Terrill Weatherspoon was as he walked down the stairwell toward the parking lot.

Agent Jocys commanded Weatherspoon and Hemby to keep their hands up. Agent Jocys asked "Who had a gun?" (JA 27).

Weatherspoon responded "I do". He was later handcuffed and frisked. A handgun was taken from Weatherspoons left hip which had been concealed by his shirt. (JA 28).

Weatherspoon and Agent Jocys were not in the vicinity of Espinoza at the time of Espinoza's arrest. (JA 39). Espinoza was taken into custody several minutes later. (JA 42).

B. Procedural History.

Terrill Weatherspoon was charged in the Middle District of North Carolina in a Superseding Indictment filed on September 24, 2018 with possession of a firearm in commerce by a felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (JA 7).

Weatherspoon filed a motion to suppress evidence on October 30, 2018. (JA 13)

A hearing was held on Weatherspoon's motion to suppress before the district court on November 13, 2018. (JA 19).

The district court made an oral ruling in court on November 16, 2018 denying the petitioner's motion to suppress. (JA 58).

Immediately following the denial his motion to suppress evidence, Weatherspoon on November 16, 2018 pursuant to a written plea agreement entered a conditional plea of guilty to possession of a firearm by a felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) preserving his right to appeal the denial of the motion to suppress. (JA 94).

Weatherspoon was sentenced on April 17, 2019 to a term of ninety four (94) months imprisonment, three (3) years of supervised release, and a special assessment of \$100.00. (JA 124).

Judgment in a Criminal Case was entered on May 2, 2019. (JA 124).

Weatherspoon filed Notice of Appeal on May 7, 2019. (JA 132).

The Fourth Circuit Court of Appeals affirmed the order of the district on the motion to suppress in an opinion and a judgment filed on August 7, 2020.

MANNER IN WHICH QUESTION PRESENTED

The premise of Weatherspoon's motion to suppress, appeal, and petition is that when Special Agent Jocys pointed a gun at Weatherspoon and Hemby while they were seated on the ground with their hands raised and Agent Jocys commanded "Who has a gun?" that the command with gun drawn was a search which implicated the Fourth Amendment.

"18. The demand by S.A. Jessup "who had a gun" and the seizure by S.A. Jessup of a handgun from Terrill Weatherspoon was a search and seizure, protected

by the United States Constitution, Fourth Amendment.” Defendant’s Motion to Suppress Evidence Seized During Police Detention. (JA 16).

“Jocy’s demand of Weatherspoon and Hemby ‘who has a gun’ with her gun drawn on them was the same as a pat down frisk. (JA 43).” Appellant’s Br. at 12.

Weatherspoon argued to the district court and to the Fourth Circuit Court of Appeals that the command, “Who has a gun?”, the functional equivalent of a pat down search, cannot be justified under Terry v. Ohio and relevant Supreme Court opinions because the special agent did not have a reasonable suspicion based on articulable facts that Weatherspoon was armed and dangerous.

The district court made the finding in its Order denying Weatherspoon’s motion to suppress that “She [Special Agent Jocys] told them to put their hands up. She noticed that Mr. Weatherspoon began to move a little bit to his left, so she asked whether either of the two men, that is, Hemby or Weatherspoon, had a gun. The Defendant said, ‘I do.’” (JA 62).

The district court made three conclusions of law in denying Weatherspoon’s motion to suppress.

The district court held the officer had a reasonable objection basis to have searched Weatherspoon and made the inquiry. (JA 67).

The district court held that this case is within a narrow public safety exception of United States v. Mobley, 40 F.3d 688 (4th Cir. 1994) relying on New York v. Quarles, 467 U.S. 649 (1984 (JA 69)).

The district court agreed with the government that this case is covered by United States v. Poms, 484 F.2d 919 (4th Cir. 1973), which approved the automatic companion rule. (JA 64).

The district court did not apply the automatic companion rule in denying Weatherspoon's motion to suppress instead relying on a reasonable objective basis and a narrow public safety exception. (JA 67, 69).

The Fourth Circuit Court of Appeals affirmed the district court's judgment.

The Fourth Circuit Court of Appeals based its opinion that the totality of circumstances of Weatherspoon's search was objectively reasonable under Terry v. Ohio, United States v. Weatherspoon, No. 19 - 4324, p.6, 2020. [Appendix p. 6a].

The Fourth Circuit stated “ To proceed from a stop to a frisk, or patdown for weapons, the officer must reasonably suspect that the person ‘may be armed and presently dangerous’” citing Terry v. Ohio, 392 U.S. at 30. United States v. Weatherspoon, No. 19-4324, p.6, 2020 [Appendix p. 6a].

The Fourth Circuit stated “We look to the ‘totality of the circumstances- the whole picture.’” citing United States v. Cortez, 449 U.S. 411, 417 (1981). United States v. Weatherspoon, No. 19-4324, p.6, 2020 [Appendix p. 6a].

The Fourth Circuit, contrary to relevant Supreme Court opinions, allowed the totality of circumstances to include the facts supporting reasonable suspicion that Espinoza, Weatherspoon's companion, was armed and dangerous in its determination that there was reasonable suspicion that Weatherspoon was armed and dangerous.

Apart from the facts supporting reasonable suspicion that Espinoza was armed and dangerous there were not any circumstances supporting reasonable suspicion that Weatherspoon was armed and dangerous other than the fact Weatherspoon moved to his left. United States v. Weatherspoon, No. 19-4324, p.6, 2020. [Appendix p. 6a].

The Fourth Circuit characterized this movement to his left as a “furtive movement to his left...” Id.

The district court found “She [Jocys] noticed that Mr. Weatherspoon began to move a little to his left...” (JA 62). The district court did not find that Weatherspoon made a furtive movement.

The movement of Weatherspoon to his left while seated with hands raised is an innocuous circumstance of the type the Fourth Circuit has criticized as excuse by law enforcement furnishing reasonable suspicion. United States v. Powell, 666 F.3d 180 (4th Cir. 2011), United States v. Massenburg, 654 F.3d 480 (4th Cir. 2011), United States v. Black, 707 F.3d 531 (4th Cir. 2013).

REASONS FOR GRANTING THE WRIT

- A. THE SUPREME COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO CLARIFY THAT THE TOTALITY OF CIRCUMSTANCES ON WHICH REASONABLE SUSPICION IS BASED MUST BE CONFINED TO THOSE CIRCUMSTANCES PARTICULARIZED TO THE INDIVIDUAL TO BE SEARCHED. THE FOURTH CIRCUIT COURT OF APPEALS EXTENDS TERRY V. OHIO TO ALLOW SEARCHES OF INDIVIDUALS BASED ON ASSOCIATION CONTRARY TO RELEVANT SUPREME COURT OPINIONS.

The Fourth Circuit Court of Appeals affirmed the district court's denial of Weatherspoon's motion to suppress on the authority of Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The holding in Terry v. Ohio addressed persons - plural.

Terry v. Ohio held "that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and other in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." Id. at 30.

The Supreme Court held in Terry v. Ohio that when a law enforcement officer confronts individuals who may be engaged in criminal activity that the officer may

pat down for weapons those individuals who the officer believes to be armed and dangerous.

The Supreme Court in Terry v. Ohio did not hold that when a police officer observes that criminal activity maybe afoot and in the course of investigating this activity he reasonably believes that a person encountered is armed and dangerous the officer may conduct a carefully limited pat down search of the outer clothing of all persons present in order to discover weapons which might be used to assault him

The Supreme Court's holding in Ybarra v. Illinois clarifies that Terry v. Ohio pat down search for weapons is not allowed on mere association. Ybarra v. Illinois, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979).

The holding of Ybarra is that "The narrow scope of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place". Id. at 94.

The Supreme Court held in a routine traffic stop that police may perform a pat down of any vehicle occupant upon reasonable suspicion that the vehicle occupant is armed and dangerous. It is unnecessary in the routine traffic stop for police to also have a reasonable suspicion that there is criminal activity afoot. Arizona v. Johnson, 555 U.S. 323, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009).

The Supreme Court in Arizona v. Johnson limited pat down searches of weapons to the vehicle occupants who are reasonably believed to be armed and dangerous.

The Supreme Court did not state in Arizona v. Johnson that in a routine vehicle stop that when a patrol officer confronts an individual reasonably believed to be armed and dangerous, then the patrol officer may search all other occupants of the vehicle for weapons.

There is not right to search associates of persons reasonably believed to be armed and dangerous under relevant Supreme Court opinions unless the associates are also reasonably believed to be armed and dangerous.

- B. THE SUPREME COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO ESTABLISH THAT THERE IS NO AUTOMATIC COMPANION RULE TO ALLOW SEARCHES BASED ON ASSOCIATION. THERE IS A SPLIT AMONG THE CIRCUIT COURTS OF APPEALS AS TO WHETHER THERE IS AN AUTOMATIC COMPANION RULE ALLOWING A PAT DOWN SEARCH FOR WEAPONS OF COMPANIONS OF AN ARRESTEE.

The automatic companion rule was enunciated by the Ninth Circuit in United States v. Berryhill, 445 F.2d 1189, 1193 (9th Cir. 1971).

The automatic companion rule is “[all] companions of the arrestee within the immediate vicinity... are constitutionally subject to the cursory ‘pat-down’ reasonably necessary to give assurance that they are unarmed.” Id.

The Fourth Circuit approved the automatic companion rule in United States v. Poms, 484 F.2d 919, 922 (1973).

The Seventh Circuit has also adopted the automatic companion rule. United States v. Simmons, 567 F.2d 314 (7th Cir. 1977).

The Sixth, and Eight Circuits have not adopted the automatic companion rule. These circuits have approved a totality of circumstances test. United States v. Bell, 762 F.2d 495 (6th Cir. 1985). United States v. Flett, 806 F.2d 823 (8th Cir. 1986).

The Fourth Circuit did not address the automatic companion rule in Weatherspoon's case. The Fourth Circuit in Weatherspoon's case rested its opinion on the totality of circumstances test.

The automatic companion rule is contrary to Terry v. Ohio, Ybarra v. Illinois, and Arizona v. Johnson, *supra*.

An opinion by the Supreme Court that a law enforcement officer must have a reasonable suspicion, particularized to the individual to be searched, that a companion of an arrestee is armed and dangerous in order to conduct a pat down search of the companion for weapons would establish that there is no automatic companion rule.

C. THE SUPREME COURT SHOULD GRANT THE WRIT OF CERTIORARI IN ORDER TO CLARIFY THAT RELEVANT SUPREME COURT OPINIONS DO NOT ALLOW PAT DOWN SEARCHES OF DETAINEES FOR WEAPONS FOR OFFICERS' SAFETY UNLESS THE OFFICERS HAVE A REASONABLE SUSPICION THAT THE DETAINEES ARE ARMED AND DANGEROUS.

The government argued to the district court at the motion to suppress hearing "From the government's perspective, this is a straight safety analysis." (JA 45).

There were seven to eight officers including Agent Jocys who were present when the arrest of Espinoza for driving while impaired was initiated.

Agent Jocys had her gun drawn on Weatherspoon and Hemby while they were seated on the ground with their hands raised.

The officers safety was not an issue in Weatherspoon's case.

The Supreme Court has extended or affirmed since Terry v. Ohio the right of law enforcement to detain individuals while performing valid law enforcement with respect to other individuals. Michigan v. Summers, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 276 (1981); Arizona v. Johnson, 555 U.S. 323, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009).

Weatherspoon acknowledges that law enforcement had the right to briefly detain him while law enforcement was effecting the arrest of Espinoza.

The Supreme Court should issue a writ of certiorari to clarify to law enforcement that the right to detain an individual does not include the right to conduct a limited pat down search for weapons unless the officer has a reasonable suspicion that the detainee is armed and dangerous.

Agent Jocys had the right to draw her firearm at Weatherspoon and Hemby for her safety without the necessity of a reasonable suspicion that Weatherspoon and Hemby were armed and dangerous.

Agent Jocys did not have the right to pat down search Weatherspoon by demanding whith her gun drawn "Who has a gun?" because she did not have a reasonable suspicion based on articulable facts that Weatherspoon was armed and dangerous.

SUMMARY

An automatic companion rule or a totality of circumstances test that allows circumstances peculiar to one individual to be applied to a companion grants law enforcement unprecedented authority to search individuals without any particularized basis of suspicion.

CONCLUSION

Terrill Bernard Weatherspoon seeks that the United States Supreme Court issue a Writ of Certiorari to the Fourth Circuit Court of Appeals in order to address the question whether reasonable suspicion to search a companion of an arrestee must be made independently of a reasonable suspicion to search the arrestee.

Respectfully submitted.

This the 13th day of October, 2020.

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