

No.
IN THE
SUPREME COURT OF THE UNITED STATES

STEVEN SPAIN, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari
To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In the wake of *McDonald v. City of Chicago*, 561 U.S. 742 (2010), jurisdictions throughout the nation have recognized the breadth and importance of the Second Amendment right to bear arms. Many states now allow some form of public carry of firearms, sometimes in conjunction with a license and registration requirement. The Fourth Amendment requires reasonable suspicion or probable cause that a person is involved in criminal activity before they can be detained by police. *Terry v. Ohio*, 392 U.S. 1 (1968). The question presented is:

In a state that allows residents to carry a firearm in public, is it reasonable under the Fourth Amendment to stop and arrest someone for carrying a firearm without first asking or otherwise investigating whether they have a license to carry the firearm?

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The petitioner, Steven Spain, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The decision of the Illinois Appellate Court with dissent (Appendix A) is reported at 2019 IL App (1st) 163184, and is published. The order of the Illinois Supreme Court denying leave to appeal (Appendix B) is reported at 147 N.E.3d 682 (Table).

JURISDICTION

On December 27, 2019, the Illinois Appellate Court issued its decision. No petition for rehearing was filed. A petition for leave to appeal was timely filed after an extension and denied on May 27, 2020. The time for filing in this Court was extended to October 26, 2020, by the order extending deadlines in light of COVID-19. Misc. Order, 589 U.S. __ (March 19, 2020), *available at* <https://tinyurl.com/y9q2gnoc>. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides, in relevant part:

The right of the people to be secure in their persons * * * against unreasonable searches and seizures, shall not be violated. * * *

The Illinois Firearm Concealed Carry Act (430 ILCS 66/1 *et seq.*) is set out in its entirety in Appendix C.

STATEMENT OF THE CASE

Brief Overview

This case arises from a felony conviction for possessing a concealed and loaded firearm without a concealed carry permit. *People v. Spain*, 2019 IL App (1st) 163184, ¶ 1, *appeal denied*, 147 N.E.3d 682 (Ill. 2020). In Illinois, it was legal to carry a fully or partially concealed firearm with a proper permit at the time of Mr. Spain's arrest. 430 ILCS 66/10(a) & (c)(1). The statute also required license holders who are stopped by the police to provide their license upon the request of officers. 430 ILCS 66/10(h). Mr. Spain was detained and ultimately arrested based on an officer's observation of him with a gun in his waistband prior to any questioning as to whether he was licensed to carry a firearm. *Spain*, 2019 IL App (1st) 163184, ¶¶ 33-35, 38-39.

The Fourth Amendment protects "the right of the people to be secure in their persons *** against unreasonable searches and seizures." U.S. Const. amend. IV. Law enforcement may briefly stop and question someone based on an objectively reasonable suspicion that the person is engaged in criminal activity, and an arrest must be supported by probable cause. *Terry v. Ohio*, 392 U.S. 1, 16-27 (1968). Mr. Spain contested his initial stop and ultimate arrest on Fourth Amendment grounds in both pretrial and posttrial motions, as well as on appeal.

I. Factual Background

Steven Spain caught the attention of police when he adjusted what appeared to be a black gun handle in his waistband at around 1:00 p.m. on a January day. From an unmarked car, Officer O'Connor saw a group of five Hispanic men and one white man—later identified as Mr. Spain—standing in front of an apparently abandoned

house. When O'Connor's car was within 14 feet of Mr. Spain, he saw Mr. Spain turn toward a fence and "try to stuff" a black object that appeared to be a gun handled "down his pants." O'Connor exited his car, approached Mr. Spain, and ordered him to put his hands up. He was within a foot or two of Mr. Spain during the ensuing exchange.

Mr. Spain initially complied with O'Connor's order to put his hands up, but started to lower them, so O'Connor again ordered him to put his hands up and directed him to put his hands on the nearest parked car. According to O'Connor, Mr. Spain seemed nervous but complied. As instructed, Mr. Spain leaned his hands against the car, while O'Connor patted him down. A gun was recovered. Mr. Spain was arrested on the spot. At the time, officers did not know or ask whether he had a Firearm Owner's Identification card or a concealed carry permit.

Multiple police officers, including O'Connor, were in the area because they had received a call that a "male Hispanic with tattoos on his face" had a gun. No one matching this description was found. There was also an "officer safety" alert for the area based on a threat of gang violence which warned of a possible shoot-out at a neighboring house. The appellate court agreed that there was no information provided as to who provided the tip leading this alert. *Spain*, 2019 IL App (1st) 163184, ¶ 33.

II. Procedural Background

Mr. Spain was charged with aggravated unlawful use of a weapon for carrying a loaded, concealed firearm without a proper permit. In the trial court, he filed a motion to quash arrest and suppress evidence premised on the Fourth Amendment and the fact that concealed carry could no longer be presumed illegal in Illinois. He argued

that the police had neither reasonable suspicion nor probable cause to stop and arrest him. Initially, the trial court granted the defense motion after finding that the arrest was not based on probable cause.

The State filed a motion to reconsider. The trial court reversed its earlier decision and denied the motion to quash arrest and suppress evidence. The court reasoned that anyone who went through the licensing process would proactively offer their license-status to law enforcement without being asked.

The parties proceeded to a stipulated bench trial where Mr. Spain was found guilty. He filed a post-trial motion arguing again that his stop and arrest violated the Fourth Amendment. It was denied. Since it was his first felony, Mr. Spain received the minimum sentence.

On appeal, Mr. Spain again argued that the police lacked reasonable suspicion to stop him and probable cause to arrest him. *Spain*, 2019 IL App (1st) 163184, ¶ 1. In a divided opinion, the appellate court affirmed Mr. Spain's conviction. *Id.*

The appellate court determined that law enforcement could properly stop Mr. Spain because he was seen with a gun in his waistband near an address which was the subject of an "officer safety alert." *Spain*, 2019 IL App (1st) 163184, ¶¶ 33-35, 51. The majority further reasoned that Mr. Spain's failure to volunteer whether or not he had a permit was sufficient to provide probable cause for an arrest. *Id.* at ¶ 41.

The dissent would have found probable cause was lacking. *Spain*, 2019 IL App (1st) 163184, ¶ 48 (Walker, J., dissenting). Justice Walker reasoned, "Gun possession alone is not enough to create probable cause to arrest, and silence in the face of multiple approaching officers is not unreasonable or inherently suspicious. " *Id.* at ¶

49. He further noted that the Concealed Carry Act in Illinois specifically requires legal owners to provide their license upon an officer's request at a lawful stop. *Id.* at ¶ 52. Thus, Mr. Spain should never have been arrested without anyone so much as asking whether he had a permit to carry a gun. *Id.* at ¶ 54.

REASONS FOR GRANTING CERTIORARI

Resolving this case can provide guideposts to alleviate the tension growing between lawful gun owners and law enforcement. Currently, federal courts of appeals and state courts are divided over whether and when police officers can stop or arrest someone seen carrying a firearm in states where public possession is not *per se* illegal. U.S. Const., amends IV, XIV; *Terry v. Ohio*, 392 U.S. 1 (1968) (providing that investigative stops in addition to arrests are governed by the Fourth Amendment). In the decade since *McDonald v. City of Chicago*, 561 U.S. 742 (2010), this country has seen a renewed appreciation for the historical and constitutional importance of the right to bear arms. See also U.S. Const., amends II, XIV (providing the federal constitutional right to “keep and bear arms” which is enforceable against the states). As legal gun possession increases, it is vital that law enforcement and citizens alike have guidance on how the police can safely fulfill their duties without trammeling the rights of lawful gun owners.

This case provides a clean example of the issues at play as Mr. Spain was the subject of an investigative stop which quickly became an arrest for gun possession. The investigative stop was premised on seeing Mr. Spain in possession of an apparent gun in an area subject to an “officer safety alert,” while the arrest was based on confirming that he possessed a gun without any inquiry into the legality of that possession. In short, the way that Mr. Spain was stopped and arrested exposes the limits on Fourth Amendment protections for anyone carrying a gun in a sketchy neighborhood.

I. Federal and state courts are divided over how to apply the Fourth Amendment in a world of legal gun possession.

Courts are sharply divided over what the Fourth Amendment requires to stop and arrest someone for gun possession in states where such possession is legal with a license.

On one side of the divide, multiple courts have held that public gun possession is presumed illegal for purposes of the Fourth Amendment, unless and until the citizen proves otherwise. *United States v. Gatlin*, 613 F.3d 374, 378 (3d Cir. 2010); *United States v. Pope*, 910 F.3d 413, 415-16 (8th Cir. 2018), *cert. denied*, 140 S. Ct. 160 (2019); *United States v. Rodriguez*, 739 F.3d 481, 491 (10th Cir. 2013); *State v. Timberlake*, 744 N.W.2d 390, 394-97 (Minn. 2008). As explained by the Third Circuit, the rationale is that public gun possession can be presumed illegal if the jurisdiction treats having a permit as an affirmative defense. Compare *Gatlin*, 613 F.3d at 378, with *United States v. Ubiles*, 224 F.3d 213, 217 (3d Cir. 2000). Thus, whether there can be a stop depends on how each jurisdiction drafts and implements the laws permitting gun possession.

On the other side of the divide, courts have said that the gun possession cannot be presumed illegal for purposes of the Fourth Amendment unless accompanied by other indicia of illegality. *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1132-33 (6th Cir. 2015); *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013); *Stoedter v. Gates*, 704 F. App’x 748, 753-56 (10th Cir. 2017); *United States v. Lewis*, 672 F.3d 232, 240 (3d Cir. 2012); *United States v. Ubiles*, 224 F.3d 213, 217 (3d Cir. 2000); *Duffie v. City of Lincoln*, 834 F.3d 877, 883 (8th Cir. 2016); *Commonwealth v. Hicks*, 208 A.3d 916, 936-37 (Pa. 2019), *cert. denied sub nom. Pennsylvania v. Hicks*, 140 S. Ct. 645 (2019); *Pinner v. State*, 74 N.E.3d 226, 232-34 (Ind. 2017); *Kilburn v. State*, 297 So. 3d 671, 672-76 (Fla. Dist. Ct. App. 2020). Thus, the question becomes what extra is

required beyond gun possession before law enforcement can seize or arrest someone who may be lawfully armed.

In reaching this conclusion, the Sixth Circuit noted that this Court already rejected a firearm exception to the Fourth Amendment requirement of individualized suspicion in 2000. *Northrup*, 785 F.3d at 1132 (citing *Florida v. J.L.*, 529 U.S. 266 (2000)). The Pennsylvania Supreme Court also explained that permitting stops based on gun possession alone would mean that lawful gun owners would lose much of their Fourth Amendment right to be free from governmental intrusion. *Hicks*, 208 A.3d at 941-45. Further, both Pennsylvania and Florida courts have compared stopping a citizen to check for a gun permit to stopping a driver to check for a driver's license—a practice that would clearly violate the Fourth Amendment absent additional protections. *Hicks*, 208 A.3d at 941-45; *Kilburn*, 297 So. 3d at 676.

In short, courts are sensitive to the needs of law enforcement and the importance of protecting Fourth Amendment rights. Yet, they are currently reaching both extremes when asked whether officers are entitled to stop citizens possessing firearms in jurisdictions where such possession may be legal.

II. Resolving this question is important to private citizens, law enforcement, and to the communities they share.

Recent years have shown all too clearly the importance of having guideposts of what is expected of both citizens and law enforcement during interactions in which private citizens may be legally armed. See, e.g., Lou Raguse, *Jurors in Philando Castile Case May Not Hear He Had Gun Permit*, USA Today, May 30, 2017, available at <https://tinyurl.com/y57rg2vg> (describing how, during a traffic stop, an officer shot and

killed a lawful gun owner who informed them of his gun possession and license). Millions of Americans practice their lawful right to carry firearms outside the home. *Kilburn v. State*, 297 So. 3d 671, 676 (Fla. Dist. Ct. App. 2020) (in Florida alone more than 2 million people are licensed to concealed carry); NRA-ILA, Gun Right to Carry Laws, <https://www.nraila.org/gun-laws> (last visited September 28, 2020)(showing that nearly every state allows concealed carry). As legal gun possession rises, it is vital that officers and citizens alike know the constitutional limits on their interactions. Christopher Ingraham, *After San Bernardino, Everyone Wants To Be a 'Good Guy With a Gun'*, Wash. Post (Dec. 10, 2015), <http://tinyurl.com/l6n9d8f> (estimating that permits for concealed carry rose from 4.6 million in 2007 to 12.8 million in 2015).

The reality is that officers need flexibility, but also guidance in order to do their jobs effectively without forcing everyday citizens to choose between their Second and Fourth Amendment rights. The Fourth Amendment promises the necessary flexibility. Under *Terry*, the Fourth Amendment permits brief investigatory stops based on reasonable suspicion in addition to arrests based on probable cause. *Terry v. Ohio*, 392 U.S. 1, 21-27 (1968). But even brief stops can be humiliating and involve an officer's sensitive fingers tracing the outlines of one's body in public. *Id.* at 17 n. 13, 25. Thus, citizens should know ahead of time whether lawfully carrying a sidearm for protection means agreeing to indiscriminate stops and searches by law enforcement.

The current confusion of Fourth Amendment law provides no resolution for the growing tension between lawful gun owners and law enforcement. The differing decisions will serve to make the job of law enforcement more difficult and to impede their ability to respectfully serve their communities.

III. The present case is a good vehicle for clarifying the issue.

This case is a beneficial presentation of the Fourth Amendment issue, because it includes a *Terry* stop which turned into a full arrest with clear indications of the factors relied on in finding reasonable suspicion and probable cause. The court found that reasonable suspicion was supported by the observation of a partially concealed gun and an officer safety alert based on an unknown tipster's assertion of gang violence at a specific location. *People v. Spain*, 2019 IL App (1st) 163184, ¶¶ 33-35, *appeal denied* (Ill. 2020). A majority of the court then found probable cause based on Mr. Spain's nervousness and silence during his pat-down and arrest for gun possession. *Id.* at ¶¶ 40-41. In dissent, Justice Walker noted that Illinoisans are not required to volunteer information to law enforcement or risk arrest. *Id.* at ¶¶ 52-54.

The facts and legal issues were well-developed where the Fourth Amendment issue was fully litigated before trial and the parties proceeded via stipulated bench trial. The issues were also fully developed on appeal and the appellate court opinion has a clean analysis of the tensions at play. Thus, this case presents an excellent opportunity for this Court to analyze both reasonable suspicion and probable cause for illegal gun possession in states where gun possession may be legal outside the home.

IV. The Illinois Appellate Court's majority opinion shows how Fourth Amendment principles may erode without guidance on the limits of government intervention due to the possibility of gun possession.

Terry v. Ohio was the first step in recognizing the Fourth Amendment's ability to balance the interests of law enforcement in investigating crime against the interests of private citizens in avoiding government intrusions. *Terry v. Ohio*, 392 U.S. 1, 20-27

(1968). This Court elucidated that the touchstone is reasonable suspicion of criminal behavior. *Id.*; *Florida v. J.L.*, 529 U.S. 266, 270-72 (2000). In setting the standard of reasonableness, this Court recognized that a forced interaction with the police can be both terrifying and humiliating. *Terry*, 392 U.S. at 24-25. Thus, there must be some objective sign that a citizen was involved in criminal behavior before they should be forced to suffer such a government intrusion. *J.L.*, 529 U.S. at 270-72.

Notably, this Court has considered whether to lessen the burden on police to stop someone suspected of having a firearm due to the deadliness of the instrument. In *Florida v. J.L.*, this Court specifically eschewed a firearm exception to the requirement of reasonable suspicion. *Id.* at 272-73. In doing so, this Court held that the Fourth Amendment was violated when the police stopped someone based on his matching an anonymous tip that someone in a plaid shirt at a certain bus stop had an illegal gun. *Id.* The court reasoned that a *Terry* stop requires that the police have reason to believe a tipster is giving reliable information on the *criminal* aspect of their tip. *Id.*

Here, reasonable suspicion was found based on an officer safety alert that there would be a gang shoot-up at a particular address. *People v. Spain*, 2019 IL App (1st) 163184, ¶¶ 33-35, *appeal denied*, 147 N.E.3d 682 (Ill. 2020). The appellate court recognized that there was no information given about the person that provided the information leading to the alert. *Id.* at ¶ 33. Nonetheless, the court determined that the tip was adequately corroborated when officers saw a group of people—including one with a partially concealed firearm—near the location identified in the alert. *Id.* at ¶¶33-34. Where having a firearm was not itself illegal, this reasonable suspicion analysis effectively lowered the standard set out in *Florida v. J.L.*

But the Fourth Amendment analysis does not end there. Mr. Spain was then arrested based solely on his gun possession without any inquiry into whether he was licensed to have the gun in question. The majority relied entirely on Mr. Spain's failure to volunteer whether he had a permit during his pat-down to justify an arrest requiring probable cause. *Spain*, 2019 IL App (1st) 163184, ¶ 41. As Justice Walker noted in dissent, citizens are not required to speak with the police upon pain of arrest. *Id.* at ¶ 53. Further, it would require little effort for officers to simply ask about a permit prior to the arrest itself. *Id.* at ¶ 54. Illinois law even requires permit-holders to produce their license upon request during investigative stops. 430 ILCS 66/10(h). Indeed, if this had unfolded with a legal gun owner, it would have been a waste of everyone's time and aggravation to handcuff and transport someone to the police station only to learn the citizen was just a legal gun owner talking with some friends.

This case shows how a fear of firearms and a desire for decisive action may lead courts to erode Fourth Amendment rights when there is a tip about possible gun violence. As legal gun ownership rises in the wake of a renewed Second Amendment, it is a perfect time to clarify how the Fourth Amendment applies when officers wish to speak with an armed citizen. This case presents an opportunity to examine an intrusion based on gun possession that moved from a stop to an arrest without any consideration that the possession could be legal. Thus, it presents a good opportunity to assess each step of the Fourth Amendment analysis.

CONCLUSION

For the foregoing reasons, petitioner, Steven Spain, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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APPENDIX A

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NOTICE AND PROOF OF SERVICE

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The undersigned, a member of the Bar of this Court, in compliance with Rules 29 and 33.2, on October 15, 2020, mailed the original and ten copies of the Motion for Leave to Proceed *In Forma Pauperis* and Petition for Writ of Certiorari to the Clerk of the above Court and submitted an electronic copy using the Court's electronic filing system. On that same date, the undersigned personally served the same documents on opposing counsel by delivering one copy of the Motion and Petition to an employee authorized to accept service at each office, and mailed one copy to the petitioner by depositing it in the United States mail, postage prepaid and addressed as above. An electronic version was also served by email to opposing counsel. All parties required to be served have been served.

//s// Douglas R. Hoff
DOUGLAS R. HOFF
Counsel of Record

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner requests leave to proceed *in forma pauperis*. The Petitioner has previously been granted leave to proceed *in forma pauperis* in the court below. Counsel was appointed to represent petitioner in the court below pursuant to 725 ILCS 105/10(a).

Respectfully submitted,

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