No. ____ - _____

IN THE

SUPREME COURT OF THE UNITED STATES

ABDUL MAJID,
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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QUESTIONS PRESENTED

I. Whether, in reversing the District Court's grant of a motion to suppress drug evidence, the Court of Appeals can override the lower court's findings of fact and expand the scope of the search beyond limits set by this Court?

II. Whether officers can presume probable cause for an automobile search exists based on the smell of marijuana in a jurisdiction where its use has been legalized?

LIST OF PARTIES

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

RELATED CASES

Majid believes his co-defendant Haseeb Malik intends to file his own petition for writ of certiorari.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Abdul Majid respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit appears at pages 1a to 6a to the petition and is published at 963 F.3d 1014.

The judgment of the United States District Court for the District of Nevada appears at pages 7a to 28a and is unpublished.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit decided this case on July 6, 2020. A petition for rehearing was denied on October 15, 2020.

The district court in the District of Nevada had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3732. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment 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.

Constitution of the United States, Amendment XIV:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Fourth Amendment generally prohibits police from searching an individual absent a warrant or probable cause. As relevant here, Majid and Malik were traveling on a highway in Nevada when they were stopped by local law enforcement for speeding. They were traveling in a semi-trailer style vehicle, with Malik driving and Majid located in a living quarters offset behind the cab of the vehicle.

The officer claimed to smell a slight odor of marijuana, to which Malik admitted he had smoked a "joint" some six or seven hours earlier, which he finished and discarded. The officer called for backup, and the backup officer directed the on-scene officer to "hang on" to the vehicle so that an administrative search could be executed when he arrived.

When the other officer arrived, he immediately interrogated Malik and Majid about the smell of marijuana. Malik responded that he had smoked a joint, but this time stated it was three to four hours ago. A warrantless search of the vehicle was then conducted, which according to the court of appeals, was pursuant to this Court's automobile exception. United States v. Ross, 456 U.S. 798 (1982). While no marijuana was found, substantial amounts of other drugs were located in the living quarters of the semi-trailer.

The district court granted a motion to suppress, finding that the officers lacked probable cause to conduct a warrantless search. After a full evidentiary hearing, the district court found the admission of smoking marijuana, along with the smell of it, "within the permissible possession of an ounce or less of marijuana under Nevada law." App. at 24a. The district court also found that even if there was probable cause to search the cab of the vehicle, officers exceeded the permissible scope of the search when they searched not just the cab but also the vehicle's living quarters. App. at 27a.

The government appealed and in a three-judge panel decision issued July 6, 2020, the Ninth Circuit held that the district court erred, and reversal as opposed to remand was the only appropriate remedy. The panel held that the district court erred by failing to consider Malik's changing statements of how long ago he smoked the marijuana. The panel also faulted the district court for focusing on the officers' "subjective motivations" for the search. App. at 4a. The decision does not differentiate between Malik's admission to smoking marijuana or the officer's

purported detection of it, but finds the motion to suppress was erroneously granted due to "Malik's admission and shifting story." App. at 6a.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Disregarded This Court's Precedents About Warrantless Searches and Further Erred by Overriding Without Explanation the District Court's Factual Findings.

The court of appeals chiefly criticized the district court for allegedly failing to analyze the totality of the circumstances that led to the search. App. at 2a. The court of appeals glossed over the officers' stated reason for searching the vehicle, which was state administrative law governing commercial vehicles. App. at 19a. Instead, the court of appeals focused solely on the officers' ability to conduct a warrantless automobile search as part of a "criminal investigation supported by reasonable suspicion." App. at 2a.

While the court of appeals did not define which criminal investigation justified the warrantless search, certainly an investigation for mere speeding would not have done so. Knowles v. Iowa, 525 U.S. 113 (1998). That would only leave the investigation of a smell of marijuana as a basis for the automobile search. As to the smell of marijuana then, the court of appeals found the officers' subjective intentions irrelevant.

But this Court has held that a "police officer may draw inferences based on his own experience in deciding whether probable cause exists." Ornelas v. United States, 517 U.S. 690, 700 (1996). The "facts" used to support the probable cause

analysis are interpreted in light of a trained officer's experience. United States v. Hernandez-Alvarado, 891 F.2d 1414, 1416 (9th Cir. 1989), citing United States v. Cortez, 449 U.S. 411, 418 (1981). The district court properly considered those facts, to include the on-scene officer's complete lack of knowledge about whether a search was justified under any basis, as reasons for suppressing the fruits of the search. App. at 16a.

At the evidentiary hearing, the on-scene officer testified to no signs of impaired driving, and testified he had no idea how long it would take the smell of marijuana to dissipate. The officer never explained what crime would have been committed by Malik smoking marijuana in light of it being legal in the amount at issue in both California and Nevada.

The district court's probable cause analysis was correct as much as it considered the officer's knowledge and training as part of the probable cause analysis. The court of appeals erred by completely excluding consideration of those factors. If the officer's knowledge and training are considered part of the objective probable cause inquiry, it is apparent the officer lacked probable cause to search the truck, detain the occupants, or further interrogate them because he knew nothing about administrative searches, and had no objective basis to conclude how long it takes the smell of marijuana to dissipate.

The court of appeals erred yet another way when it disregarded the district court's reasons for focusing on what the officers knew at the time they made the

decision to search – which occurred prior to any change in Malik's timeframe for having smoked marijuana.

Although the district court did not completely exclude consideration of the changed timeframe, it likewise did not detail its basis for focusing on the decision to search prior to the conflicting statements. Two lines of analysis support the district court's decision, and neither was addressed by the court of appeals.

First, the second officer's further questioning of the defendants at a time when they were no longer free to leave the scene (if they ever could) violated the defendants' collective rights under Miranda v. Arizona, 384 U.S. 436 (1966). A defendant handcuffed at a traffic stop is no longer free to leave and is in-custody for custodial interrogation purposes. United States v. Henley, 984 F.2d 1040, 1042 (9th Cir. 1993). There is also little doubt the second officer's questioning of the defendants after they were unable to leave the scene was "interrogation." The first question he asked was, "So who's smoking? Who smoked the marijuana?" Consideration of these responses would have violated Miranda and been unconstitutional.

Even if the district court limited its probable cause inquiry to exclude Malik's timeline shift, its reasons for doing so were because (1) the officers did not testify credibly and the weight of the evidence supported the district court's finding that the decision to search depended exclusively on both administrative law and evidence obtained before the second officer's arrival at the scene and (2)

consideration of un-Mirandized admissions after that officer arrived would have been unconstitutional.

Second, this Court's precedents generally permit a warrantless vehicle search based on probable cause that the vehicle contains evidence of criminal activity. United States v. Ross, 456 U.S. 798 (1982). But this search is not without limits. The search is limited to any areas of the vehicle in which there is a "genuine" evidentiary concern. Arizona v. Gant, 556 U.S. 332, 347 (2009). The limits of a search under Ross are "defined by the object of the search and the places in which there is probable cause to believe that it may be found." Ross, 456 U.S. at 824, United States v. Chavez, 2018 U.S. Dist. LEXIS 107695, *17 (N.D. Cal. 2018), citing Illinois v. Gates, 462 U.S. 213 (1983).

There is no genuine concern, and the officers never testified to one, that the remnants of an alleged recently smoked joint would be found in a sealed package in the living quarters of a semitrailer. This is especially the case here where, at best, the initial officer smelled a "little" smell of smoked marijuana in the driver area of the cab of the truck. This limited evidence, if it even arose to the level of probable cause, did not give the officers genuine license to search sealed packages in the living quarters of the truck. Chavez, 2018 U.S. Dist. LEXIS at 17.

The Tenth Circuit has echoed this concern, holding that the smell of burnt marijuana alone coming from the passenger compartment of a vehicle provides no probable cause to search the vehicle's trunk. United States v. Parker, 72 F.3d 1444, 1450 (10th Cir. 1995) (collecting cases). In that case, numerous items of actual

contraband were found before the trunk was searched. But here, however, the slight smell of burnt marijuana from the cab of the vehicle would likewise have provided probable cause for a warrantless search, if at all, of only the cab of the truck.

On any of these bases, the court of appeals erred by overriding the district court's factual findings and misapplying this Court's precedents. The petition for writ of certiorari should be granted.

II. The Court Of Appeals Disregarded Nevada's Legalization of Marijuana by Finding the Smell of Marijuana Provided Probable Cause for a Vehicle Search.

The court of appeals also erred by finding the smell of marijuana provided probable cause for the vehicle search in the first instance. While the decision noted Nevada's legalization laws, it hypothesized that the initial officer "had probable cause to search for evidence of Nevada state law..." App. at 3a. The court of appeals noted Nevada laws it felt could apply, such as those which prohibited consuming marijuana in a moving vehicle or in a public place, or driving under the influence of marijuana. App. at 5a.

The problem here is that it is already well-accepted that "we must not accept what has come to appear to be a prefabricated or recycled profile of suspicious behavior very likely to sweep many ordinary citizens into a generality of suspicious appearance merely on hunch." United States v. Rodriguez, 976 F.2d 592, 595-96 (9th Cir. 1992).

The court of appeal's decision ignores the practical reality which is that every day, police officers are likely to encounter persons who possess small amounts of marijuana. One in five American adults say they use marijuana and one in seven say they use it regularly. *Weed & the American Family*, MaristPoll (Apr. 17, 2017), https://bit.ly/35ihKN2.

The Ninth Circuit's decision ignores the pronounced shift in states' attitudes toward possession of marijuana. Just about every State in the Ninth Circuit has some form of marijuana legalization law. *Map of Marijuana Legality By State*, DISA Global Solutions, https://disa.com/map-of-marijuana-legality-by-state. Possession of a legal, user amount of marijuana can no longer form the basis for probable cause under the Fourth Amendment, because its legalization is just as likely to ensnare law-abiding citizens and criminals alike

The decision below attempts to bolster its rationale by citing additional Nevada state laws. But the evidentiary hearing already confirmed that officers could not identify even a single sign of impairment, did not even investigate a potential charge of impairment, performed no field sobriety tests, and never sought charges relating to driving under the influence of marijuana or any other substance. Further, Malik's statements were always that the marijuana was smoked some hours ago – with no admission of having done so in a public place or a moving vehicle.

This Court should not permit the Ninth Circuit to establish by way of a published decision affecting tens of millions of Americans a rule that is so totally

divorced from modern reality. The "smell of marijuana" is no longer evidence of criminal activity, but rather, is equally or more so associated with what is now lawful activity under State law.

CONCLUSION

The Court should grant this petition and review the Ninth Circuit's reversal of the district court order of suppression, or should summarily reverse the Ninth Circuit's decision based on its disregard for this Court's precedents.

Respectfully submitted,

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