No. 21-5176

IN THE SUPREME COURT OF THE UNITED STATES

DE'UNDRE RASHAD ROBERT TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to suppression of evidence that he possessed a firearm, based on his Fourth Amendment challenge to a police officer's directive that a passenger exit petitioner's parked car, when the car was parked in a neighborhood known for drug violence, the car was near a residence where numerous drug sales had taken place, and the police saw the passenger carrying a different firearm.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted at 827 Fed. Appx. 996.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2020. A petition for rehearing was denied on February 10, 2021. The petition for a writ of certiorari was filed on July 5, 2021. 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 Southern District of Florida, petitioner was convicted of possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 24 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-2a.

1. In March 2019, police officers executed a search warrant in Miami, Florida, in a neighborhood "known for gun and drug activity," at a multi-unit residence where "a number of drug sales" had recently taken place. D. Ct. Doc. 41, at 1-2 (Aug. 20, 2019). During the search, the officers recovered drugs and a gun. Pet. App. 1a.

In April 2019, police officers returned to the address to execute a second search warrant. D. Ct. Doc. 41, at 2. As they approached, they saw a car parked in the multi-unit residence's parking lot. Pet. App. 2a. Petitioner was sitting in the driver's seat; a passenger was in the other front seat; another passenger was in the rear. Ibid. One of the officers, Detective Angel Delgado, saw movement within the car, but he could not see its occupants through the tinted rear windows. Id. at 1a-2a. "Concerned that he might encounter the resident named in the warrant," Detective Delgado walked to the passenger's side of the

car. Id. at 2a. Through the passenger-side windows, which were rolled down, Detective Delgado saw the three men in the car and recognized that none of them was the subject of the second search warrant. Ibid.; D. Ct. Doc. 41, at 2-3. Detective Delgado also noticed, however, that the front passenger had a gun tucked in the waistband of his pants. Pet. App. 1a; D. Ct. Doc. 41, at 1.

Detective Delgado asked the men whether any guns were in the vehicle; the front passenger answered that there were and claimed that he had a permit for the firearm. Pet. App. 2a. As the front passenger "fumbl[ed] around with * * * his pockets," Detective Delgado asked him to step out of the car, and the front passenger emerged with a gun permit in his hand. 8/16/19 Tr. (Tr.) 9. Detective Delgado, who had previously encountered "people with fake permits," sought to confirm that the permit was valid. Tr. 15. The front passenger then informed Detective Delgado about a second gun underneath the passenger seat. Pet. App. 2a. "That statement immediately placed the officers on notice that [petitioner] and [the] rear passenger could be possessing at least that firearm." D. Ct. Doc. 41, at 4. At that point, another officer asked the rear passenger to exit the car. Pet. App. 2a. A records check revealed that the rear passenger had a prior felony conviction. D. Ct. Doc. 41, at 3.

Meanwhile, petitioner was sitting in the driver's seat with his hands on the steering wheel, and one of the police officers at

the scene, Officer Ti'Andre Bellinger, asked him for his driver's license. Pet. App. 1a-2a. Officer Bellinger observed that petitioner appeared to be nervous and was shaking when he removed his wallet from his pants to produce his license. Id. at 2a.

After the officers found the second gun under the passenger seat, they directed petitioner to exit the car, and Officer Bellinger asked petitioner whether he was armed. Pet. App. 2a; D. Ct. Doc. 41, at 3. Petitioner denied having a weapon, but Officer Bellinger began to pat him down. Pet. App. 2a. Petitioner became visibly upset, asked Officer Bellinger why he was patting him down, but then admitted to Officer Bellinger, "I have a gun." Ibid. In response, Officer Bellinger wrapped his arms around petitioner to secure him and yelled "gun, gun." Ibid. Another officer retrieved a gun (the third gun found at the scene) from petitioner's pants. Ibid. Petitioner was a convicted felon. Ibid.

2. A grand jury in the Southern District of Florida indicted petitioner for possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g). Petitioner moved to suppress the gun found on his person, arguing that the officers had found it because of an unconstitutional detention and search. D. Ct. Doc. 41, at 1. Following an evidentiary hearing, the district court denied the motion. Id. at 1-5. The court found that the police "did not stop or detain the vehicle," which "was parked in the

driveway" without any "indication the vehicle was readying to leave." Id. at 4. It also found that the officers had acted reasonably in asking the front passenger to exit the vehicle while they investigated whether he had a valid permit for the first gun. Ibid. It further found that the officers had acted reasonably when, after the front passenger disclosed the presence of another gun, they asked petitioner and the rear passenger to exit the car. Id. at 4-5. Finally, the court found that the officers were justified in patting petitioner down for weapons. Id. at 5.

Following that decision, petitioner pleaded guilty, reserving his right to appeal the denial of his suppression motion. Pet. App. 1a; D. Ct. Doc. 45, at 2-3 (Aug. 23, 2019). The district court sentenced petitioner to 24 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-2a. The court explained that the police officers needed no level of suspicion simply to approach the car in the first place. Id. at 2a. The court then determined that, upon seeing a gun in plain view in the front passenger's waistband, the officers acted reasonably in removing the front passenger from the car to determine whether he possessed a valid permit to carry a concealed weapon. Ibid. The court further determined that, "[a]fter the front passenger volunteered that there was a second gun concealed under his seat, safety concerns allowed officers to remove

[petitioner] from the driver's seat." Ibid. Finally, the court found that petitioner's "nervous behavior" justified the officers' decision to pat petitioner down for weapons, and that petitioner's admission that he was armed justified the seizure that led to the discovery of the gun in petitioner's waistband. Ibid.

ARGUMENT

Petitioner contends (Pet. 8-18) that Detective Delgado violated the Fourth Amendment when he directed the front passenger to exit petitioner's parked car while Detective Delgado determined whether the front passenger had a valid permit for the firearm he was carrying. But petitioner cannot challenge that seizure, which was directed at the front passenger rather than petitioner himself. In any event, the court of appeals correctly rejected petitioner's contention, and its decision does not conflict with any decision of this Court, any other court of appeals, or any state court of last resort. Petitioner's contrary view rests on a misinterpretation of the court's decision. This Court has recently and repeatedly denied certiorari petitions raising similar issues. See, e.g., Pope v. United States, 140 S. Ct. 160 (2019) (No. 18-8785); Sykes v. United States, 140 S. Ct. 136 (2019) (No.18-8988); Robinson v. United States, 138 S. Ct. 379 (2017) (No. 16-1532). It should follow the same course here.

1. The court of appeals and district court discussed and analyzed a variety of actions taken by the police during their

interaction with petitioner and his passengers: approaching the car and questioning its occupants, ordering the front passenger out of the car after observing a gun in his waistband, ordering petitioner and the rear passenger out of the car after learning of the second gun, patting petitioner down for weapons, and restraining petitioner after he admitted to having a gun. See Pet. App. 2a; D. Ct. Doc. 41, at 4-5. In this Court, petitioner focuses on one of those actions: ordering the front passenger to exit the car. See, e.g., Pet. 8 (challenging the court of appeals' "holding" that police officers "'had reasonable suspicion to remove the [front] passenger from the car to determine whether he possessed a valid permit to carry a concealed weapon'") (citation omitted); Pet. 9 ("[t]he front passenger was lawfully carrying a concealed firearm"); Pet. 10 ("he had no authority to seize the front passenger"). Petitioner does not discuss his own removal from the car or his subsequent frisk; indeed, the petition does not even mention those events. See Pet. 5.

Petitioner's Fourth Amendment challenge to the officers' actions with respect to the passenger contravenes the longstanding rule that "Fourth Amendment rights are personal rights which * * * may not be vicariously asserted." Rakas v. Illinois, 439 U.S. 128, 133-134 (1978) (citation omitted); see, e.g., United States v. Padilla, 508 U.S. 77, 81 (1993) (per curiam); Alderman v. United States, 394 U.S. 165, 173 (1969); Jones v. United States, 362 U.S.

257, 261 (1960). A person may challenge a search or seizure if he is the "victim of [the] search or seizure," but not if the search or seizure was "directed at someone else." Jones, 362 U.S. at 261; see, e.g., Rakas, 439 U.S. at 134 (explaining that a person may not challenge "the introduction of damaging evidence secured by a search of a third person's premises or property"). The order directing the front passenger to leave the car may have amounted to a seizure of the front passenger, but it did not amount to a seizure of petitioner himself. Petitioner therefore cannot challenge that order.

Petitioner suggests (Pet. 8) that, "[a]t th[e] moment" Detective Delgado ordered the front passenger to leave the car, "all passengers in the vehicle -- including Petitioner -- were seized." But petitioner neither provides any argument nor cites any authority to support the proposition that the police seize someone by ordering someone else to leave a car. And although this Court has held that a "traffic stop" of a "car" amounts to a seizure of both the driver and the passengers, Brendlin v. California, 551 U.S. 249, 251 (2007), the district court here found that the police "did not stop or detain the vehicle," which was "parked in the driveway" with "no indication the vehicle was readying to leave," D. Ct. Doc. 41, at 4 (emphasis added). Petitioner may have been seized later, when he was ordered to exit

the car, but noted above, petitioner has not challenged that separate order. See p. 7, supra.

2. In any event, the court of appeals correctly determined that the police did not violate the Fourth Amendment by ordering the front passenger out of the car. The Fourth Amendment allows police officers to stop and briefly detain a suspect for investigation if they have reasonable suspicion that criminal activity is afoot. See Terry v. Ohio, 392 U.S. 1, 21-22, 30 (1968). That standard is "less demanding" than probable cause and "considerably less" than proof by a preponderance of the evidence. United States v. Sokolow, 490 U.S. 1, 7 (1989). Courts applying that standard "must permit officers to make 'commonsense judgments and inferences about human behavior'" in light of the totality of the circumstances before them. Kansas v. Glover, 140 S. Ct. 1183, 1188 (2020) (citation omitted).

Applying those principles, the court of appeals correctly found that Detective Delgado had reasonable suspicion that criminal activity was afoot when he directed the front passenger to step out of petitioner's parked car. Pet. App. 2a. The car was "in a high crime area known for violence and drugs." D. Ct. Doc. 41, at 5. It was parked near a residence where numerous drug sales had taken place, where a previous search had found a firearm and drugs, and where the police were about to execute a second search warrant. Ibid. After approaching the car, Detective

Delgado saw that the front passenger had a gun protruding from under his shirt. Pet. App. 2a. Although the front passenger claimed to have a valid permit, he began "fumbling around with * * * his pockets," and the detective had previously encountered "people with fake permits." Tr. 9, 15. On those facts, as the court correctly found, "the detective had reasonable suspicion to remove the [front] passenger from the car to determine whether he possessed a valid permit." Pet. App. 2a.

The court of appeals' fact-bound determination does not warrant further review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). That is especially so given that the district court agreed that "it was reasonable to briefly detain [the front passenger] to verify the validity of the permit." D. Ct. Doc. 41, at 4; see Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in Johnston] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)).

3. Contrary to petitioner's contention (Pet. 8-12), the court of appeals did not address the first question presented by the petition for a writ of certiorari: "whether a seizure can be initiated upon reasonable suspicion of a noncriminal violation." Pet. 8 (emphasis altered; capitalization omitted). In Florida, it is a felony to carry a concealed firearm without a license, see Fla. Stat. § 790.01(2) (2019), but a civil infraction for a person who has a concealed-carry license to fail to display the license upon demand by a police officer, see id. § 790.06(1). In upholding the search here, the court found that Detective Delgado had reasonable suspicion that the front passenger was carrying a concealed weapon without "a valid permit" -- a felony. Pet. App. 2a. Petitioner stresses (Pet. 8) that the court cited "Fla. Stat. § 790.06(1)," Pet. App. 2a, the statutory provision concerning the civil infraction of failure to display a permit. But the court also cited United States v. Lewis, 674 F.3d 1298 (11th Cir. 2012), see Pet. App. 2a, a case concerning the crime of carrying a concealed weapon without a permit. In any event, the citations cannot override the text of the opinion, which does not suggest that the court viewed the officer to have reasonable suspicion of only a civil infraction, let alone expressly hold that such suspicion would be sufficient to justify the seizure.

Even accepting petitioner's interpretation of the court of appeals' decision, moreover, petitioner errs in contending (Pet.

10-12) that the decision conflicts with Commonwealth v. Rodriguez, 37 N.E.3d 611 (Mass. 2015), Commonwealth v. Cruz, 945 N.E.2d 899 (Mass. 2011), and State v. Duncan, 43 P.3d 513 (Wash. 2002) (en banc). This case involved only the Fourth Amendment, but the three decisions on which petitioner relies involved state constitutional provisions that imposed greater restrictions on police than did the Fourth Amendment. See Rodriguez, 37 N.E.3d at 619-620 ("In balancing these factors, we keep in mind that '[Mass. Const.] art. 14 may provide greater protection than the Fourth Amendment against searches and seizures.' * * * * [T]he stop in this case violated art. 14.") (citations omitted); Cruz, 945 N.E.2d at 906 n.10 ("Article 14 of the Massachusetts Declaration of Rights may, in some circumstances, provide more protection than the Fourth Amendment to the United States Constitution. * * * Although officers may issue an exit order to passengers in a stopped vehicle as routine practice in the Fourth Amendment context, * * * they may not do so in this Commonwealth.") (citations omitted); Duncan, 43 P.3d at 518 ("The Washington constitution affords greater privacy protection than the Fourth Amendment."). Further, the Washington Supreme Court in Duncan concluded that a stop based on reasonable suspicion of a civil infraction was impermissible where "the violation did not occur in [the officers'] presence." 43 P.3d at 521. Any offense in this case, by contrast, did occur in the officers' presence.

4. Petitioner similarly errs in arguing (Pet. 13) that the court of appeals found reasonable suspicion based on the front passenger's "mere possession of a concealed firearm, without more." The court discussed a variety of facts beyond the front passenger's possession of the firearm. For example, it noted that the car was parked in a neighborhood known for drug-related violence, that the car was parked near a residence where numerous drug sales had taken place, and that drugs and a firearm had been found in a recent search of the residence. Pet. App. 1a-2a. The court was not required to expressly repeat all those facts in the specific sentence finding reasonable suspicion, and that finding was consistent with this Court's decisions explaining that the reasonable-suspicion standard must account for the totality of the circumstances. See, e.g., Glover, 140 S. Ct. at 1188.

Petitioner errs in suggesting (Pet. 15-16) that the Third, Fourth, Sixth, Seventh, and Eighth Circuits would disagree with the court of appeals' finding of reasonable suspicion on these facts. The Third, Sixth, and Eighth Circuit decisions that petitioner cites addressed whether officers could initiate a stop based on nothing more than the presence of a firearm. See United States v. Lewis, 672 F.3d 232, 240 (3d Cir. 2012) ("[T]he possession of a firearm in the Virgin Islands, in and of itself, does not provide officers with reasonable suspicion to conduct a Terry stop."); United States v. Ubiles, 224 F.3d 213, 218 (3d Cir.

2000) (concluding that officers lacked reasonable suspicion to stop the defendant based on his possession of a gun at a crowded festival); Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1131 (6th Cir. 2015) (affirming denial of summary judgment for officer who claimed that clearly established law entitled him to stop a person for "open possession of a firearm"); Duffie v. City of Lincoln, 834 F.3d 877, 883 (8th Cir. 2016) ("[T]he mere report of a person with a handgun is insufficient to create reasonable suspicion."). And the Fourth Circuit, which concluded in the case that petitioner cites that a person's "lawful display of his lawfully possessed firearm" could not justify his detention, United States v. Black, 707 F.3d 531, 540 (2013), has clarified that the possession of a firearm "plus something 'more' may 'justify an investigatory detention,'" Walker v. Donahoe, 3 F.4th 676, 683 (4th Cir. 2021). This case, as discussed above, involved circumstances beyond the mere possession of a gun.

The Seventh Circuit's decision in United States v. Leo, 792 F.3d 742 (2015), is similarly inapposite. In that case, the police seized the defendant on suspicion of attempted burglary with a gun, frisked him without finding a weapon, cuffed his hands behind his back, and then opened and emptied a backpack that was no longer in his reach, finding a firearm. Id. at 744-745. The defendant did not dispute that the police could lawfully stop him and "pat[] down the backpack to search for weapons." Id. at 749. The

defendant instead raised, and prevailed on, the argument that officer-safety concerns did not justify opening and emptying the backpack, which was outside the defendant's reach at the time it was searched. Id. at 749-752. That decision does not conflict with the decision below, which involves reasonable suspicion for a stop in the first instance, rather than any subsequent opening and emptying of an inaccessible backpack based on concerns about officer safety.

Petitioner also errs in contending (Pet. 17-18) that the decision below conflicts with the decisions of state courts in Commonwealth v. Hicks, 208 A.3d 916 (Pa.), cert. denied, 140 S. Ct. 645 (2019), and Kilburn v. State, 297 So. 3d 671 (Fla. Dist. Ct. App. 2020). In Hicks, the Pennsylvania Supreme Court found "no justification for the conclusion that the mere possession of a firearm, where it lawfully may be carried, is alone suggestive of criminal activity," but then recognized that the possession of a firearm "certainly can be" suspicious depending on other "[r]elevant contextual considerations." 208 A.3d at 937-938. Similarly, in Kilbourn, a Florida state intermediate court concluded that "a law enforcement officer may not use the presence of a concealed weapon as the sole basis for seizing an individual." 297 So. 3d at 675 (emphasis added). Hicks and Kilburn thus do not establish that any state court of last resort would disagree with the decision below. Moreover, because Kilburn was decided by a

state intermediate court, rather than a state court of last resort, any tension between Kilburn and the decision below would not warrant this Court's review. See Sup. Ct. R. 10(a) (stating that, in deciding whether to grant a writ of certiorari, the Court considers whether a court of appeals "has decided an important federal question in a way that conflicts with a decision by a state court of last resort").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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