

No. 17-7277

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL TERRAYE WINDOM, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, on the totality of the circumstances in this case, petitioner's Fourth Amendment rights were violated by the traffic stop of his car based on reasonable suspicion that he had recently committed a disorderly conduct misdemeanor by flashing a gun at patrons in a restaurant.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 863 F.3d 1322.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2017. On October 17, 2017, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including December 21, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Colorado, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The district court sentenced petitioner to 46 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. A1-A10.

1. On April 1, 2015, an employee of Challengers Sports Bar and Restaurant (Challengers) in Aurora, Colorado, called the Aurora Police Department (APD) to report a man who had flashed a gun at other patrons and informed them that he was a Crips gang member. Pet. App. A1. The employee described the individual as a 33-year-old black man, who was 6'2" or 6'3", with braided hair, and wearing jeans and a black jacket. Ibid. At the start of the call, the employee informed APD dispatch that the man had left Challengers and was in the parking lot. Ibid. As the call progressed, the employee updated dispatch that she observed the man getting into one of two vehicles -- a Nissan Murano or a light blue Cadillac sedan -- and watched the car drive westbound out of the parking lot. Ibid.

APD dispatch put out a "weapons call" to several local officers, informed them as to the nature of the alleged conduct, and provided the description of the man and the two cars. Pet.

App. A2 (citation omitted). Shortly thereafter, the officers refocused their search on the Cadillac after an officer arrived at the Challengers parking lot and observed a parked Nissan Murano. Ibid.

APD Officer Jeremy McElroy observed a Cadillac matching the caller's description about two miles away from Challengers. Pet. App. A2. Officer McElroy made a U-turn to follow the vehicle, called for backup, and initiated a "high-risk traffic stop," meaning that he drew his weapon, pointed it at the stationary Cadillac, wedged himself behind the door jam of his police vehicle and shined a spotlight on the Cadillac. Ibid. (citation omitted). At least two other APD officers also "had their guns drawn and pointed at the Cadillac." Ibid. (citation omitted). Officer McElroy ordered the vehicle's occupants to put their hands up; turn the car off; throw the keys out the driver's side window; exit the vehicle; and lie face down with legs crossed. Pet. App. A2. When the front-seat passenger, later identified as petitioner, emerged, Officer McElroy observed that he matched the description provided by dispatch -- a black man, around 6'2", with braided hair and wearing jeans and a black jacket. Ibid. During a patdown, officers positively identified the front-seat passenger as petitioner, and found a Smith & Wesson revolver in his pocket during the course of the patdown. Ibid. (citation omitted).

Petitioner was subsequently arrested for the crime of disorderly conduct based on his actions at Challengers. Ibid.

2. A federal grand jury in the District of Colorado charged petitioner with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Pet. App. A2. Petitioner filed a motion to suppress the firearm as the fruit of an illegal seizure. He contended that "the conduct of the law enforcement officers following the traffic stop constituted an arrest of the occupants of the vehicle." Ibid. (citation omitted). According to petitioner, the officers' use of "high-risk" traffic stop techniques was unreasonable under the circumstances and converted the investigative detention into an arrest without probable cause, in violation of the Fourth Amendment. Ibid.

Following an evidentiary hearing, the district court denied the motion. 9/10/15 Tr. 1-21. The court concluded that the officers had "reasonable and articulable suspicion" that, upon stopping the Cadillac, they would find an "armed and dangerous" individual who had "identified himself as a gang member, [had] show[n] a gun to patrons at a restaurant" and had "cause[d] enough concern for a private citizen to call and report the matter to police." Id. at 13, 18.

Petitioner entered a conditional guilty plea, in which he reserved the right to appeal the denial of his suppression motion. Pet. App. A2. The district court sentenced petitioner to 46 months

of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. A1-A10. The court explained that "[t]he only issue in this appeal is whether the force used by the officers in seizing [petitioner] was reasonable in the context of an investigative detention." Id. at A3. The court noted that to evaluate the reasonableness of a traffic stop conducted pursuant to Terry v. Ohio, 392 U.S. 1 (1968), it asks whether the stop was justified at its inception, and whether the officers' actions were reasonably related in scope to the circumstances that justified the stop. Pet. App. A4. Here, petitioner "acknowledge[ed] that the officers had reasonable suspicion to stop the vehicle," but argued that the officers' use of "high-risk" procedures in executing the stop was unreasonable and elevated the stop from an investigative detention to an unlawful arrest. Ibid. The court therefore "focus[ed] on Terry's second inquiry," ibid., and determined that, under the totality of the specific circumstances presented in this case, "the degree of force used by the officers was reasonable and justified." Id. at A6.

Applying an objective balancing test, the court of appeals explained that "[o]nce the officers * * * stopped the vehicle, the government's interest in officer safety took on heightened salience." Pet. App. A7. The court reasoned that the information

available to the officers provided an objective basis to believe that petitioner was armed and dangerous, so the officers had reason to protect their personal safety during the course of the lawful stop. Ibid. The court noted that the officers "conducted the Terry stop in a high-crime area at around midnight, after receiving a tip that would have led a reasonable officer to believe that one of the occupants of the vehicle they had just stopped had flashed a firearm in public, and had also proclaimed membership in the Crips, a notoriously dangerous street gang." Ibid. (emphasis omitted).

The court of appeals determined that, "given the particular facts of this case, * * * the precautionary measures of force that the officers employed in seizing [petitioner] were reasonable, and did not cause his seizure to rise to the level of a de facto arrest, which would have required a showing of probable cause." Pet. App. A8. The court noted that "when an officer has a reasonable belief that a suspect he is investigating at close range is armed, 'it would appear clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.'" Id. at A6 (quoting Michigan v. Long, 463 U.S. 1032, 1047 (1983)).

The court of appeals rejected petitioner's argument that the officers' use of "high-risk stop" techniques was unreasonable

because the officers only had reasonable suspicion that petitioner was guilty of a completed misdemeanor. Pet. App. A6-A8. The court explained that petitioner's "arguments based on the misdemeanor nature of his conduct" pertained solely to the reasonableness of the initial stop, which was "undisputedly * * * not at issue here." Id. at A8. Further, the court stated, "[t]he information known to the officers at the time of the seizure was not simply that the suspect they were pursuing had committed a garden-variety misdemeanor"; the officers "had a reasonable belief that the suspect was armed and dangerous." Ibid.

ARGUMENT

Petitioner contends (Pet. 6-9) that this Court should adopt a categorical rule that police may not conduct a stop pursuant to Terry v. Ohio, 392 U.S. 1 (1968), to investigate a completed misdemeanor. Further review of that question is not warranted. In the court of appeals, petitioner's argument was limited to whether it was reasonable for officers to use "high-risk" stop procedures to investigate a completed misdemeanor, not whether it is ever permissible to conduct a Terry stop to investigate a completed misdemeanor. Accordingly, the question presented in the petition was not pressed or passed upon by the court of appeals. In any event, petitioner has not identified any conflict with another court of appeals or a state court of last resort that warrants this Court's review.

1. Petitioner seeks review (Pet. i, 6-9) of whether it can ever be reasonable under the Fourth Amendment for officers to conduct a Terry stop to investigate a completed misdemeanor. Petitioner, however, did not raise any argument on that issue in the court of appeals. See Pet. C.A. Br. 6-19 (noting that court applies a balancing test to determine the constitutionality of an investigatory stop for a completed misdemeanor and arguing that the intrusion into petitioner's personal security during the high-risk stop procedures outweighed the government's interest in investigating petitioner's completed misdemeanor). Accordingly, the court did not address the question presented in the petition.

The court of appeals instead based its decision on the understanding that the "reasonableness about the initial stop" was "undisputedly * * * not at issue here." Pet. App. A8. This Court's usual practice is to "refrain from addressing issues not raised in the [c]ourt of [a]ppeals," EEOC v. Federal Labor Relations Auth., 476 U.S. 19, 24 (1986) (per curiam), and petitioner identifies no reason to depart from that practice here. See United States v. Williams, 504 U.S. 36, 41 (1992) ("Our traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" (citation omitted)).

2. In any event, the question presented in the petition does not warrant this Court's review.

a. In United States v. Hensley, 469 U.S. 221 (1985), this Court unanimously rejected "an inflexible rule that [would] preclude[] police from stopping persons they suspect of past criminal activity unless they have probable cause for arrest." Id. at 227. The Court explained that "[t]he proper way to identify the limits" on stops to investigate past crimes "is to apply the same test already used to identify the proper bounds of intrusions that further investigations of imminent or ongoing crimes," which involves "balanc[ing] the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." Id. at 228. The Court observed that "[t]he factors in the balance may be somewhat different when a stop to investigate past criminal activity is involved," ibid., but it stated that, "[p]articularly in the context of felonies or crimes involving a threat to public safety, it is in the public interest that the crime be solved and the suspect detained as promptly as possible," id. at 229. Because the crime at issue in Hensley was a felony, see id. at 223, the Court stated that it "need not and d[id] not decide * * * whether Terry stops to investigate all past crimes, however serious, are permitted," id. at 229. Rather, the Court determined that "[i]t [wa]s enough to say that, if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a

completed felony, then a Terry stop may be made to investigate that suspicion." Ibid.

b. The stop of petitioner's vehicle was fully consistent with Hensley and lawful under the Fourth Amendment. As the court explained, this case involved "a threat to public safety," Hensley, 469 U.S. at 229, because, as the court of appeals observed, the officers had reason to believe that petitioner was armed, belonged to a "notoriously dangerous street gang," and had just flashed his weapon at patrons in a restaurant. Pet. App. A7.

The timing and location of the stop further underscore its reasonableness. The Court noted in Hensley that a "stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly as a stop to investigate suspected ongoing criminal activity," that "the exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards," and that "officers making a stop to investigate past crimes may have a wider range of opportunity to choose the time and circumstances of the stop." Hensley, 469 U.S. at 228-229. But those potential attenuating factors are largely absent in this particular situation, given the immediacy of the operative crime. This case involves a type of criminal activity (flashing a gun) that is inherently unlikely to occur in the presence of a law enforcement officer, and the report the officers

had received suggested that the suspect was still armed and out in the community. Pet. App. A1. Officers proceeded to the scene immediately after receiving the employee's phone call, and they stopped petitioner shortly after he had departed from the restaurant, as soon as they were able to locate him and ascertain backup. As a consequence, at the time he was stopped, petitioner more nearly represented an individual in the process of violating the law or a suspect fleeing from the scene of a crime than "a suspect in a past crime who now appears to be going about his lawful business." Hensley, 469 U.S. at 228. Because the officers had already located petitioner and had no way to know where he was going when they saw the Cadillac, it was reasonable for them to initiate a stop.

Whether it is permissible per se for police officers to make a brief investigatory stop of any person they have reasonable suspicion to believe may have committed a criminal offense may warrant this Court's review in an appropriate case. Such a rule would provide "clear and simple" guidance to law enforcement officers who must act "on the spur (or in the heat) of the moment." Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001). But because the court of appeals' judgment in this case is also easily justified under a context-specific balancing approach -- the outcome of which petitioner does not directly challenge -- this case would not be an appropriate vehicle in which to do so. In

contending that the Court should adopt a rule under which the Fourth Amendment would categorically forbid police officers from conducting Terry stops to investigate completed misdemeanors -- petitioner does not explain how the government's interest in effective crime prevention, law enforcement, and the protection of public safety are categorically insufficient to justify a decision "to briefly stop [a] person, ask questions, or check identification in the absence of probable cause" (Hensley, 469 U.S. at 229) whenever the underlying offense is classified as a misdemeanor and the suspect is able to complete the crime by the time officers arrive on the scene.

2. Petitioner contends (Pet. 7-9) that the court of appeals' decision conflicts with decisions of the Sixth Circuit and state courts in Minnesota, Florida, and Kentucky. But the court of appeals' decision in this case does not conflict with the settled holdings of any other court of appeals or state court of last resort.

a. In United States v. Hughes, 606 F.3d 311 (6th Cir. 2010), the only federal decision on which petitioner relies (Pet. 7), a police officer stopped the defendant's car in a deserted, high-crime neighborhood after radioing in his belief that the defendant was casing a business, and a subsequent search of the car produced marijuana, cocaine, and a gun. Id. at 312-313. The district court suppressed evidence found in the car after concluding that no

reasonable suspicion existed for the stop. Id. at 314. On the government's appeal, the court of appeals held that the district court had impermissibly based its decision on the officer's subjective intent, and it remanded for consideration of whether the officer had probable cause to believe that the defendant had violated a traffic law prior to the stop. Id. at 313, 320.

In determining the appropriate standard to be applied on remand, the court of appeals noted "a degree of confusion in this circuit over the legal standard governing traffic stops, and in particular over whether police officers must have reasonable suspicion or probable cause in order to make a valid stop." Hughes, 606 F.3d at 316 n.8. Citing United States v. Sanford, 476 F.3d 391, 394 (6th Cir. 2007), and United States v. Simpson, 520 F.3d 531, 541 (6th Cir. 2008), the court stated that officers must have probable cause to conduct a traffic stop for the completed misdemeanor or the civil traffic infractions at issue in that case. Ibid.

The Sixth Circuit precedent cited in Hughes does not clearly establish a settled per se rule regarding investigatory stops following completed non-traffic-related misdemeanors. In Simpson, the court did not hold that a stop for a completed misdemeanor requires probable cause, questioned the soundness of such a requirement, noting that prior statements in circuit decisions suggesting that requirement was dicta. 520 F.3d at 540-541. The

court in Simpson went on to express "grave doubts" about how "the original 'bedrock rule that reasonable suspicion of a crime justifies a brief stop' had potentially gone awry," observing that intervening Supreme Court and circuit precedent may have "repudiated the implication * * * that only probable cause would suffice" and that "virtually every other circuit court of appeals has held that reasonable suspicion suffices to justify an investigatory stop for a traffic violation." Id. at 539, 540 (citation omitted). The court, however, did not decide the legal standard for completed misdemeanors or for non-traffic offenses, as the case before the court involved an ongoing misdemeanor traffic violation. Ibid.

Sanford likewise involved an ongoing misdemeanor traffic violation and did not reach the issue of investigatory stops and completed or non-traffic-related misdemeanors. 476 F.3d at 392-393. And since the decision in Hughes, the Sixth Circuit has again noted the "confusion" in circuit law, reiterating that "the dividing line between when probable cause is required for a traffic stop and when reasonable suspicion is sufficient is in need of greater clarity in this circuit." United States v. Collazo, 818 F.3d 247, 254, cert. denied, 137 S. Ct. 169 (2016).

Where other courts of appeals have addressed the issue, they have consistently declined to create a categorical rule requiring a heightened legal standard for stops to investigate completed

misdemeanors, and instead conduct a Terry balancing for reasonableness. See United States v. Grigg, 498 F.3d 1070, 1081 (9th Cir. 2007) (declining “to adopt a per se standard that police may not conduct a Terry stop to investigate a person in connection with a past completed misdemeanor simply because of the formal classification of the offense” and instead concluding that the permissibility of such a stop “depends on the nature of the misdemeanor,” including “the potential for ongoing or repeated danger,” “any risk of escalation,” as well as “the possibility that the police may have alternative means to identify the suspect or achieve the investigative purpose of the stop”); see also United States v. Hughes, 517 F.3d 1013, 1017 (8th Cir. 2008) (declining “to adopt a per se rule that police may never stop an individual to investigate a completed misdemeanor”); United States v. Moran, 503 F.3d 1135, 1139, 1146 (10th Cir. 2007) (upholding a Terry stop following a completed misdemeanor by balancing “the nature and quality of the intrusion on personal security against the importance of governmental interests alleged to justify the intrusion,” an interest which is “particularly strong when the criminal activity involves a threat to public safety,” such as trespassing with a firearm), cert. denied, 553 U.S. 1035 (2008). Given the uniform view of other circuits that have addressed this claim and the indication that some members of the Sixth Circuit view the issue as unsettled, any asserted tension with the Sixth

Circuit's decision in Hughes does not justify this Court's review in this case. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

b. Petitioner likewise fails to demonstrate any conflict between the court of appeals' decision and "a decision by a state court of last resort." Sup. Ct. R. 10(a). Indeed, petitioner does not cite any decision by a state court of last resort. See Pet. 7.

In Blaisdell v. Commissioner of Pub. Safety, 375 N.W.2d 880 (Minn. Ct. App. 1985), the Minnesota Court of Appeals expressed the view that a "vehicle stop[] to investigate completed misdemeanors violate[s] the [F]ourth [A]mendment." Id. at 884. The Terry stop in that case, however, occurred two months after the commission of the misdemeanor, and the court emphasized that it did "not decide the difficult question of when an offense becomes a 'completed' crime, since the [misdemeanor] in question occur[ed] two months before the stop was certainly 'completed,'" and it cautioned that "courts should be hesitant to declare criminal conduct which occurred in the very recent past (such as the same day of the stop) to be 'completed.'" Id. at 882 n.2. The crime in Blaisdell (a "no-pay gas theft" where the subject car had left a gas station without paying) also presented no threat to public safety; in this case, in contrast, petitioner had flashed

a gun at patrons in a restaurant and claimed to be a gang member. Id. at 881. In any event, the Minnesota Supreme Court affirmed the court of appeals' decision in Blaisdell on other grounds, noting that it was "unnecessary for the Court of Appeals to decide * * * whether all stops to investigate completed misdemeanors are impermissible" and "express[ing] no opinion as to the correctness of the Court of Appeals' holding." Blaisdell v. Commissioner of Pub. Safety, 381 N.W.2d 849, 849-850 (Minn. 1986).

Petitioner also relies upon State v. Bennett, 520 So. 2d 635 (Fla. Dist. Ct. App. 1998) (per curiam), and Taylor v. Commonwealth, No. 2007-CA-2026, 2009 WL 2192290 (Ky. Ct. App. July 24, 2009). Those intermediate state appellate decisions, however, cannot create a conflict that warrants this Court's review. Indeed, Bennett was a per curiam affirmance without an opinion, 520 So. 2d at 635; petitioner relies on the concurring opinion of a single judge. And petitioner's claim is factually distinct from the crime in Taylor (an unpublished, non-precedential opinion) in both the nature of the underlying misdemeanor and the basis for the reasonable suspicion. In Taylor, an officer heard squealing tires two blocks away before seeing the defendant drive past him, and he stopped the car based on a "'hunch or suspicion' that it was the vehicle he had heard squealing its tires a few moments earlier." 2009 WL 2192290, at *1. In contrast, the officers who stopped petitioner had a detailed description of his physical

appearance, plus his mode of transportation, the direction he was heading, and information that he was armed, all minutes after he had flashed his gun at restaurant patrons.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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