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The Fishing Gets Easier

Police gain more latitude in traffic stops, and other powers could be on way

BY KATHRYN R. URBONYA

As many a criminal defendant is quick to argue, traffic stops can amount to fishing expeditions for police officers in search of drugs and other contraband.

Fishing expeditions, as any angler knows, do not always produce a catch. In the case of traffic stops, however, legal difficulties arise



Cops' motivations for a stop are irrelevant, Court says.

when police do find something in the course of searching a vehicle. Defendants often seek to keep the evidence out of court by invoking the prohibition against unreasonable searches and seizures under the Fourth Amendment to the U.S. Constitution.

Ever since the Supreme Court's 1925 ruling in *Carroll v. United States*, 267 U.S. 132, that police may search automobiles without warrants, vehicles have become targets for police seeking contraband.

In recent years, vehicles have become easier targets for police searches, especially under decisions of the Rehnquist Court. In two recent decisions, the justices issued rulings that continue to trend toward letting police fish pretty much where they want. Now the question is whether the Court will hook a third decision later this term to its line of reasoning and let police throw an even larger net over traffic stops.

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In *Whren v. United States*, 116 S. Ct. 1769 (1996), issued last term, the Court upheld a police practice of using a traffic violation to justify a stop, even if the only purpose of the stop was to search a vehicle for drugs.

And in one of its first opinions issued this term, the Court ruled in *Ohio v. Robinette*, No. 95-891 (Nov. 18, 1996), that the Fourth Amendment does not compel police officers to expressly inform motorists stopped for traffic violations that they are free to leave before asking for consent to search them or their vehicles.

Later this term, the justices will have a chance to further broaden the powers of police in traffic stops when they consider, in *Maryland v. Wilson*, No. 95-1268, whether police officers may automatically order passengers out of a vehicle during a traffic stop.

In *Whren*, undercover police officers stopped a vehicle for minor traffic violations. During the stop, one of the officers looked inside and saw Michael Whren, a passenger in the front seat, holding a bag that contained what turned out to be a form of cocaine.

After Whren and the driver were arrested on federal drug law charges, they moved to suppress the cocaine as evidence on grounds that the traffic stop was pretextual; in other words, the officer wanted to find drugs, not enforce traffic laws.

The defendants contended that the test for whether the stop was valid should be whether a "reasonable officer would have made the stop" under the circumstances, absent a motivation to find drugs.

Rejecting that argument, the Supreme Court, in a unanimous opinion written by Justice Antonin Scalia, held that the relevant Fourth Amendment question was whether the police officers "could" have lawfully stopped the suspects for traffic violations.

An officer's subjective motivations for the stop are irrelevant, according to the Court. Because traffic laws were violated, the Court determined, the stop was lawful and the drugs observed during it were properly admissible at trial.

In *Robinette*, a police officer on drug interdiction patrol stopped Robert Robinette for driving 24 mph over the speed limit. Following the procedures of the interdiction program, the officer asked Robinette to step out of his car, then videotaped the ensuing exchange.

Finally, the officer asked Robinette point-blank whether he was carrying any drugs, guns or other contraband. Robinette said he was not. The officer then asked whether he could search the vehicle, and Robinette consented. During his search, the officer found a small amount of marijuana and one capsule of an illegal drug with the street name "ecstasy."

Constitutional Questions

The Ohio Supreme Court suppressed the evidence on grounds that the driver's consent to a search was the fruit of a detention conducted in violation of the Ohio Constitution and the Fourth Amendment of the U.S. Constitution.

Lawful detention requires that police officers first inform drivers that they are free to leave before asking for consent to search their vehicles, according to the state court.

In an 8-1 decision, the U.S. Supreme Court reversed and remanded on the ground that this bright-line rule is not constitutionally necessary to determine the validity of a vehicle search or a driver's consent to it.

But in an opinion written by Chief Justice William H. Rehnquist, the Court did not explicitly determine whether Robinette had been lawfully "seized" when the officer asked for his consent to a search. Only Justice John Paul Stevens, the lone dissenter, argued that an unlawful seizure had occurred.

Under the Fourth Amendment, a seizure has occurred if a reasonable person would not feel free to leave. So when the officer stopped Robinette for a traffic violation, he

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was lawfully seized within the meaning of the Fourth Amendment.

At issue in *Robinette* was whether this initial lawful seizure for the traffic stop allowed the officer to continue to detain Robinette in order to seek consent to search his car.

The Court held that the answer to that question must be determined by considering the totality of circumstances, not the single question of whether the officer had told Robinette he was free to leave.

Having opened the door to wider police searches of vehicles in *Whren* and *Robinette*, the Supreme Court will address another common issue during traffic stops: whether police officers, without any reason to suspect passengers of wrongdoing, may automatically order them out of a vehicle during a lawful traffic stop.

Although the authority of police to order a driver out of a vehicle during a lawful stop was recognized by the Court in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), the Maryland Court of Special Appeals held that the power does not apply to passengers because they do not present the same level of risks as drivers.

Consider the Risks

Maryland Attorney General Joseph Curran, who was to argue *Wilson* before the Supreme Court on Dec. 11, contends that the state court interpreted *Mimms* too narrowly. "*Mimms* stands for the proposition that police officers need not take unreasonable risks during traffic stops," Curran says.

To be safe, Curran maintains, police must be able "to control the stop," which includes ordering passengers out of a vehicle. If the Court approves this practice, he believes passengers would not have the right to walk out of the sight line of officers.

Whren and *Robinette* significantly expand police powers during traffic stops. Now *Wilson* may be the next step in giving officers even more latitude in one of the most common forms of interaction between the police and the public.

Professor Yale Kamisar of the University of Michigan Law School in Ann Arbor predicts that the Supreme Court in *Wilson* is likely to interpret the Fourth Amendment to give police officers authority to automatically order passengers out of



The Court will decide whether officers may order passengers out of a vehicle.

lawfully stopped vehicles, even in the absence of reasonable suspicion to believe that a particular passenger presents a danger to them.

The Court's justification for this increase in police power will be the inherent danger that all traffic stops raise for police, Kamisar suggests.

The effect of *Whren* is clear. According to Professor William J. Stuntz of the University of Virginia School of Law in Charlottesville, after *Whren*, "Anyone can be stopped anytime."

Whren also could foster some increase in racial friction because these types of police fishing expeditions on the roads frequently are directed at black drivers and passengers.

Although the Supreme Court stated in *Whren* that the equal protection clause prohibits selective prosecution, the Court's decision last term in *United States v. Armstrong*, 116 U.S. 1480 (1996), shows that proving such a violation could be difficult.

In *Armstrong*, decided a month before *Whren*, the Court held that, to prove a selective prosecution claim, a defendant must show that a prosecutorial policy had "a discriminatory effect and was motivated by a discriminatory purpose." To prove discriminatory effect, the de-

fendant must show that similarly situated people of another race were not prosecuted.

Meeting this standard in the context of racially motivated traffic stops is a "herculean feat," according to Kamisar.

Professor Sheri Lynn Johnson of Cornell Law School in Ithaca, N.Y., however, reads both *Whren* and *Armstrong* somewhat more optimistically. She contends that black drivers do not lose their right to equal protection when officers conduct racially motivated stops. If an officer admits that the stop was racially based—which police often do in connection with "profile" stops—the driver can establish an equal protection violation, Johnson says.

Yet both Kamisar and Johnson doubt that the Supreme Court would adopt an "equal protection exclusionary rule."

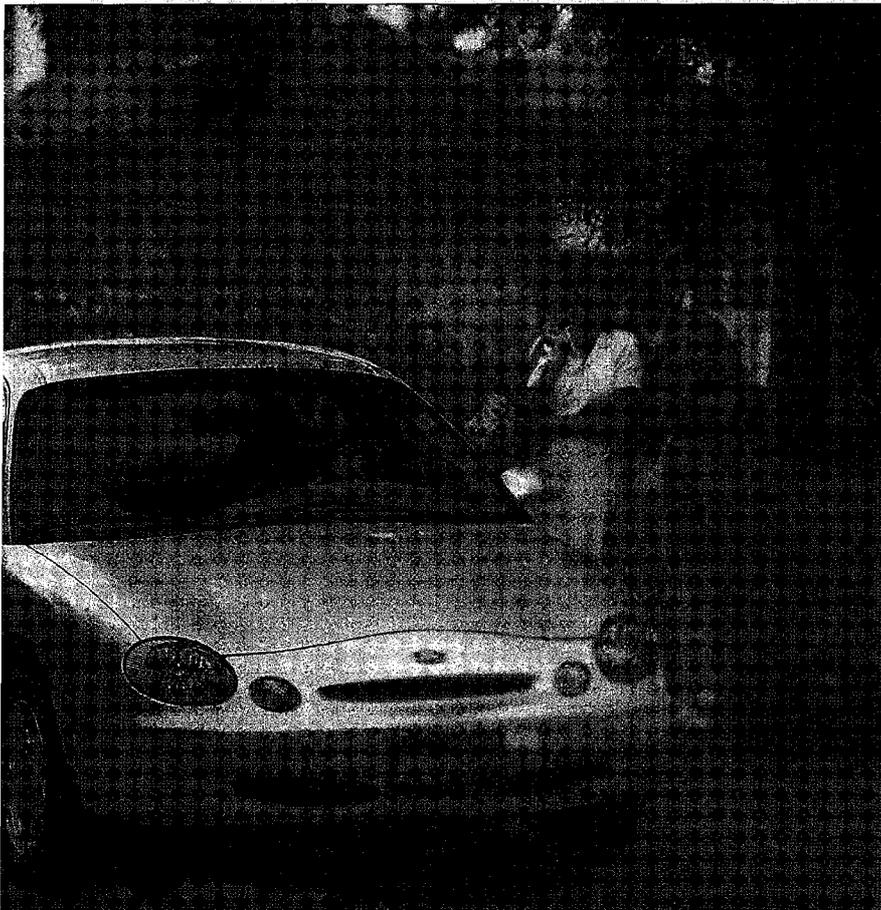
Another reason for concern is that, even though police officers already had broad discretion in stopping drivers, the Supreme Court in *Robinette* refused to "allow a moderate restraint on police power" by rejecting a bright-line rule that would require police to inform drivers that they are free to leave before asking for consent to search their vehicles, according to Tracey Maclin, a professor at Boston University School of Law who wrote a brief to the Court in the case on behalf of the American Civil Liberties Union.

In *Robinette*, the Court stated that it has "consistently eschewed bright-line rules" in determining reasonableness. Kamisar, for one, questions this statement, pointing to bright-line rules adopted by the Court regarding police powers during lawful traffic stops in several decisions, including *Mimms*.

But Jeffrey S. Sutton, state solicitor for the Ohio attorney general, contends that the Court wisely rejected a bright-line rule on the question of whether a person has been seized in the course of a traffic stop. To do otherwise would, he says, "create a *Miranda* requirement in the Fourth Amendment."

Drivers and their passengers rarely exercise the right to say "no" to police search requests during traffic stops. But to law enforcement authorities, at least, that may be a worthwhile trade-off for being able to brag about more "big ones" that did not get away. ■

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