Order Code RL30680

An Overview of Supreme Court Search and Seizure Decisions from the October 1999 Term

September 15, 2000

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Summary

In the October 1999 Term, the Supreme Court placed limits on the extent to which intrusions into reasonable privacy interests in a number of situations may withstand constitutional muster. Drawing upon *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny, the Court in *Florida v. J. L.*, ___ U.S. ___, 120 S. Ct. 1375 (2000), held that a stop and frisk may not be justified by an anonymous tip, without more, that a person in a given location and wearing specific clothes was carrying a gun. Such a tip merely provided identifying information about the subject, but lacked sufficient indicia of reliability as to the allegations of criminal activity. In *Illinois v. Wardlow*, ___ U.S. ___, 120 S. Ct. 673 (2000), the Court found that the headlong flight of a subject in a high crime area upon seeing police was sufficient to support a stop and frisk.

In *Flippo v. West Virginia*, ___ U.S. ___, 120 S. Ct. 7 (1999), the Court relied upon *Mincey v. Arizona*, 437 U.S. 385 (1978), in rejecting a "homicide crime scene exception" to the warrant requirement of the Fourth Amendment. Finally, in *Bond v. United States*, ___ U.S. ___, 120 S. Ct.1462 (2000), the Court found that a bus passenger had a reasonable expectation of privacy in regard to opaque carry-on luggage stored above the passenger's seat in an overhead compartment. Physical manipulation of that luggage by a Border Patrol agent exceeded constitutionally permissible grounds.

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The October 1999 Term afforded the United States Supreme Court an opportunity to address four search and seizure cases. These cases were *Florida v. J. L.*, ___ U.S. ___, 120 S. Ct. 1375 (2000); *Illinois v. Wardlow*, ___ U.S. ___, 120 S. Ct. 673 (2000); *Flippo v. West Virginia*, ___ U.S. ___, 120 S. Ct. 7 (1999); and *Bond v. United States*, ___ U.S. ___, 120 S. Ct. 1462 (2000). Two of these decisions involved investigative stops, one dealt with a proposed exception to the Fourth Amendment warrant requirement, and one dealt with the constitutionality of a luggage search on a bus. This report will examine these Fourth Amendment[1] decisions.

Investigative Stops

The case that set the cornerstone in the area of investigative stops is the Supreme Court's 1968 decision in *Terry v. Ohio*, 392 U.S. 1 (1968), a case involving a stop and frisk. In that case, a police officer observed three individuals conducting themselves in a manner which, based upon the officer's experience, appeared to indicate that the individuals were "casing" a store as a possible armed robbery target. The officer stopped the individuals and identified himself, but did not receive prompt identification from the men he addressed. He then seized one of the men and patted down the exterior of his clothes in search of weapons. In doing so, the officer found a gun. The Court found Fourth Amendment rights implicated in this situation, where "a police officer accosts an individual and restrains his freedom to walk away."[2] The Court applied a reasonableness test, looking to whether the officer could point to "specific and articulable facts which, taken together with rational inferences from those facts," that a neutral magistrate would conclude would lead a man of reasonable caution to believe that possible criminal conduct was involved and that an investigative stop and frisk were warranted.[3] This case and its progeny have given rise to the requirement that an investigative stop be supported by a reasonable suspicion of criminal activity. The Court's analysis in this area has been very fact specific, examining the totality of the circumstances, and requiring the officer to have

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[1] The Fourth Amendment to the United States Constitution provides:

> 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.

[2] 392 U.S. at 16.

[3] 392 U.S. at 20-21.

articulable reasons or founded suspicion upon which to base his reasonable suspicion of criminal activity.[4] Two cases from the Court's past term addressed investigative stops.

Florida v. J. L.

In *Florida v. J. L.*, *supra*, the Court considered the question "whether an anonymous tip that a person is carrying a gun is, without more, sufficient to justify a police officer's stop and frisk of that person."[5] The Court held that it was not. The police had received a telephone tip from an anonymous caller that a young black male wearing a plaid shirt at a specific bus stop was carrying a gun. The call was apparently not recorded, and no information was available regarding the informant. After an unknown period of time, two officers were sent to the bus stop in response to the call. There they found three young black men, one of whom, J. L., was wearing a plaid shirt. The officers did not observe a firearm. Nor did J. L. make any threatening or suspicious moves. One of the officers told J. L. to put his hands on the bus stop, frisked him, and seized a gun from J. L.'s pocket. Although the police had received no information about the other two young men, they were frisked by the second officer. Nothing was found.

At the time of the stop and frisk, J. L. was almost 16. He was charged under state law with possessing a firearm under the age of 18, and with carrying a concealed firearm without a license. The defendant filed a motion to suppress the gun as the fruit of an illegal search, and the trial court granted his motion. This decision was reversed by an intermediate appellate court. The Supreme Court of Florida then reversed the intermediate appellate court's decision and held that the search violated the Fourth Amendment. The Florida Supreme Court found no indicia of reliability in the facts before it to give rise to a reasonable suspicion of criminal activity. Two of the justices of the Supreme Court of Florida dissented on the theory that the safety of the public and the police warranted a "firearm exception" to the general rule foreclosing stop and frisks based upon an unsupported anonymous tip. The decision of the Florida Supreme Court was in conflict with decisions in the U.S. Courts of Appeals for the Seventh Circuit and the District of Columbia Circuit which found that such investigative stops satisfied the Fourth Amendment's requirements. The U.S. Supreme Court granted certiorari and affirmed the Supreme Court of Florida's decision.

The U.S. Supreme Court noted that here the officers' suspicion of criminal activity stemmed solely from an uncorroborated anonymous tip from an unknown location. The officers had no personal observations to support the suspicion that J. L. was carrying a firearm. The Court distinguished this situation from that of a tip from a known informant, "whose reputation can be assessed and who can be held

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[4] *See, e.g., Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412 (1990) (anonymous tip corroborated by independent police work has indicia of reliability to provide reasonable suspicion for an investigative stop); *United States v. Sokolow*, 490 U. S. 1, 109 S. Ct. 1581 (1989) (drug courier profile); *United States v. Cortez*, 449 U.S. 411 (1981); *United States v. Mendenhall*, 446 U.S. 544 (1980).

[5] 120 S. Ct. 1375, 1377 (2000).

responsible if her allegations turn out to be fabricated, *see Adams v. Williams*, 407 U.S. 143, 146-147 . . . (1972)."[6] The Court noted, however, that while "'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity,' *Alabama v. White*, 496 U.S. at 329 . . ., there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.' 496 U.S. at 327."[7]

In the case before it, the Court found no such indicia of reliability. The call did not afford the police any predictive information that would give the police a means of testing the informant's knowledge or credibility. Nor was this deficiency remedied by the fact that the search produced a gun. The Court emphasized that:

> The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J. L. If *White* was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line.[8]

In *J. L.*, the Court outlined the degree of reliability of an anonymous tip sufficient to support a *Terry* stop. The accuracy of a description of a subject's "readily observable location and appearance" is reliable in the limited sense that it will help the police identify the subject. In supporting an investigative stop, however, it is the reliability of the tipster's assertion of criminal activity that is critical.[9]

The Court in *J. L.* rejected an argument by the State of Florida and by the United States as amicus that a "firearm exception" be created to the general standards for pre-search reliability necessary to justify a stop and frisk. In so doing, the Court noted that the reliance on "reasonable suspicion" to support a *Terry* stop instead of the usual "probable cause" necessary to support other searches was responsive to the concern over the danger to public safety posed by armed criminals. However, the Court declined to go further, observing that an automatic "firearms exception" would make it possible for a person to harass and embarrass another by calling in an anonymous tip falsely stating that that person was carrying a firearm. The *J. L.* Court also noted that once such an exception was in place, it would be difficult to limit it just to firearms. Nor did J. L.'s age justify the search, for the gun tip was no more reliable where it involved a person under the age of 21 than it would have been had it involved an adult.

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[6] 120 S. Ct. at 1378.

[7] *Id.*

[8] *Id* at 1379. *White* involved an anonymous tip that a woman was carrying cocaine and predicting that she would leave a particular apartment building at a particular time, get into a car matching a specific description, and drive to a specified motel. The woman did so. Only after observing this behavior, did the police have a reasonable basis for believing that the person providing the tip had some knowledge of the woman's affairs. However, the Court noted that that knowledge did not necessarily imply credibility with respect to the information that she was carrying cocaine. The Court regarded *White* as a close case.

[9] *Id.*

The Court refused to speculate about circumstances in which an alleged danger might be so great as to justify a search even without a showing of reliability. A report of a person carrying a bomb may not require the same indicia of reliability to support a search that a report of a firearm may require. The Court also noted that its holding did not foreclose protective searches, in settings such as airports or schools where there is a diminished expectation of privacy, based on information which would not justify searches elsewhere. The Court emphasized that "the requirement that an anonymous tip bear standard indicia of reliability in order to justify a stop in no way diminished a police officer's prerogative, in accord with *Terry*, to conduct a protective search of a person who has already been legitimately stopped.

Justice Kennedy concurred, observing that there were many possible indicia of reliability in the context of anonymous tips that have not yet been addressed by the Court.

Illinois v. Wardlow

The other *Terry* stop case considered by the Court during the past term was *Illinois v. Wardlow, supra*. In this case, the Court addressed the question of whether Wardlow's unprovoked flight from officers in a heavy narcotics trafficking area supported a reasonable suspicion that the person fleeing was involved in criminal activity, thereby justifying an investigative stop. The officers who stopped Wardlow, Officers Nolan and Harvey, were driving the last of four police cars converging on the area to investigate illegal drug transactions. The eight officers in the four cars anticipated encountering a large number of people in the area including drug customers and lookouts. Officers Nolan and Harvey observed Wardlow standing next to a building holding an opaque bag. When he saw the officers, Wardlow turned and fled. When the officers caught up with Wardlow, Officer Nolan did a protective pat down for weapons, since, in his experience, it was common for weapons to be near the vicinity of drug transactions. During the frisk, the officer squeezed the opaque bag Wardlow was carrying and encountered a hard gun-shaped object. Upon opening the bag, Officer Nolan discovered a .38 handgun and five rounds of live ammunition. Wardlow was arrested.

He moved to suppress the gun at trial. The trial court denied his motion, finding the stop and frisk lawful. Wardlow was convicted of unlawful use of a weapon by a felon. The Illinois Appellate Court reversed, finding that the gun should have been suppressed, because the officer lacked reasonable suspicion to justify a *Terry* stop. The Illinois Supreme Court affirmed the Illinois Appellate Court's decision, finding that flight may simply be "an exercise of [a person's right] to 'go on one's way,' and . . . could not constitute reasonable suspicion justifying a *Terry* stop.'"[10] The United States Supreme Court reversed, holding that the stop and frisk in this case did not violate the Fourth Amendment.[11]

The Court reviewed the facts above, noting the context in which Officer Nolan decided to investigate Wardlow after seeing him flee. The Court emphasized that

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[10] 120 S. Ct. 673, 675 (2000).

[11] 120 S. Ct. at 674.

"[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime," but the officers may consider the "relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."[12] Among those contextual circumstances which may be considered is the fact that the stop occurred in a "high crime area." "Nervous, evasive behavior" is another pertinent factor to be considered. The Court characterized "headlong flight" as "the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."[13] In the Court's view, unprovoked flight is neither a mere refusal to cooperate with police nor "going about one's business."[14] A determination of reasonable suspicion is based on "commonsense judgments and inferences about human behavior."[15] In context, Officer Nolan suspicion that Wardlow was engaged in criminal activity was reasonable and sufficient to support an investigative stop. While the Court acknowledged that there may be innocent reasons for flight, in context it was suggestive of criminal activity, and officers may detain fleeing individuals to resolve such an ambiguity. If, in investigating further, the officer does not learn facts giving rise to probable cause that the individual stopped was involved in criminal activity, then that individual must be allowed to go on his way. Here, the investigative stop revealed evidence of criminal wrongdoing.

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, concurred in part and dissented in part. They concurred in the majority's unwillingness to adopt either a bright line rule authorizing the temporary detention of anyone who flees at the sight of a police officer or one holding that flight upon seeing the police can never, by itself, be sufficient to authorize a *Terry* stop. However, they differed with the majority in that those dissenting would not have found the circumstances in the case before them sufficient to support an investigative stop. Justice Stevens noted a wide range of possible explanations for a person to flee after seeing a police car. Some were innocent while others were consistent with criminal wrongdoing. Further, he noted that some of the innocent circumstances that could precipitate flight were particularly prevalent in high crime areas. The dissenting justices found both the fact of unprovoked flight and Wardlow's presence in a high crime are "too generic and susceptible of innocent explanation to satisfy the reasonable suspicion inquiry."[16] Justice Stevens emphasized that the burden to articulate facts sufficient to support reasonable suspicions fell upon the State, and found that the State had failed to carry its burden.

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[12] 120 S. Ct. at 676.

[13] 120 S. Ct. at 676.

[14] 120 S. Ct. at 676.

[15] 120 S. Ct. at 676.

[16] 120 S. Ct. at 684 (Justice Stevens concurring in part and dissenting in part, joined by Justices Souter, Ginsburg, and Breyer).

Warrant Requirement–Homicide Crime Scene Search

Flippo v. West Virginia

In *Flippo v. West Virginia, supra,* the Court considered the question of whether evidence found during a warrantless search of a homicide crime scene should be suppressed. One night while Flippo and his wife were vacationing in a cabin in a state park, Flippo called 911 to report that he and his wife had been attacked. Police responding to the scene found Flippo standing outside the cabin with head and leg injuries. After questioning him, an officer entered the cabin and found the body of Flippo's wife. She had received fatal head wounds. The police closed off the scene, took Flippo to the hospital, and searched the exterior and the environs of the cabin for footprints or signs of forced entry. A police photographer arrived at 5:30 the next morning. The officers then reentered the building and "process[ed] the crime scene," spending 16 hours taking photographs, searching the cabin, and collecting evidence. Among the things found was a closed but unlocked briefcase which, "in the ordinary course of investigating a homicide," they opened, finding and seizing a number of photographs and negatives in an envelope.

Flippo was indicted for his wife's murder. He moved to suppress the photographs and negatives, arguing that the police had obtained no warrant, and that no exception to the warrant requirement applied. The trial court denied his motion to suppress, approving the search as one of a "homicide crime scene," stating:

> "The Court also concludes that investigating officers, having secured, for investigative purposes, the homicide crime scene, were clearly within the law to conduct a thorough investigation and examination of anything and everything found within the crime scene area. The examination of [the] briefcase found on the table near the body of a homicide victim in this case is clearly something an investigating officer could lawfully examine." . . . .[17]

Although both the defendant and the prosecutors cited the U.S. Supreme Court's decision in *Mincey v. Arizona*, 437 U.S. 385 (1978), to the trial court, and the State also placed reliance on the plain view exception to the warrant requirement,[18] the trial court, in denying the motion to suppress, appears to have relied solely on the premise that after a murder crime scene is secured for investigation, anything and everything within the crime scene could be searched. The Supreme Court of Appeals of West Virginia denied discretionary review.

The United States Supreme Court granted certiorari. In a *per curiam* opinion, the Court reversed and remanded the lower court decision, finding it in conflict with the Court's decision in *Mincey v. Arizona*, 437 U.S. 385 (1978). A warrant is

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[17] 120 S. Ct. 7, 8 (1999).

[18] The plain view doctrine provides, in pertinent part, that objects within the "plain view" of an officer who has a right to be in the position to see those objects may be seized without a warrant. *See, e.g., Horton v. California*, 496 U.S. 128 (1990); *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Washington v. Chrisman*, 455 U.S. 1 (1982); *United States v. Santana*, 427 U.S. 38 (1976); *Collidge v. New Hampshire*, 403 U.S. 443 (1971).

required for a search or seizure under the Fourth Amendment, unless one of the exceptions to the warrant requirement applies.[19] In *Mincey*, the Court rejected the position that there was a "murder scene exception" to the warrant requirement under the Fourth Amendment. As the *Flippo* Court stated:

> We noted that police may make warrantless entries onto premises if they reasonably believe a person is in need of immediate aid and may make prompt warrantless searches of a homicide scene for possible other victims or a killer on the premises, [437 U.S.] at 392 . . ., but we rejected any general "murder scene exception" as "inconsistent with the Fourth and Fourteenth Amendments– . . . the warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there." [437 U.S.] at 395. . . . *Mincey* controls here.[20]

The Court did not express an opinion as to whether the search of the cabin might be justified as consensual, an argument raised by the State, because this factual issue was not suitable for consideration in the first instance by the U.S. Supreme Court. Nor did the Court express any opinion as to whether any other exception to the warrant rule might be applicable or as to whether the admission of the evidence might be harmless error. Such matters, if properly raised, were to be resolved on remand. The case was reversed and remanded for further proceedings not inconsistent with the Court's opinion.

Luggage Search

Bond v. United States

The final Fourth Amendment case decided by the Court in the October 1999 term was *Bond v. United States*, *supra*. In *Bond*, the Court examined the issue of whether a law enforcement officer's physical manipulation of a bus passenger's carry-on luggage violated the Fourth Amendment."[21] The Court held that a Fourth Amendment violation had occurred.

Bond was a passenger on a Greyhound bus en route from California to Little Rock, Arkansas. The bus stopped at the permanent Border Patrol checkpoint at Sierra Blanca, Texas. A Border Patrol agent entered the bus to check the immigration status of the passengers. The agent, having reached the back of the bus and having determined that the passengers were lawfully in the United States, then began walking to the front of the bus. As he proceeded forward, the agent squeezed the soft carry-on luggage that the passengers had placed in the overhead storage space above their seats. When he squeezed a green canvas bag in the compartment above Bond's seat, the agent encountered a "brick-like" object. Bond admitted the bag was his and permitted the agent to open it. The agent found a "brick" of methamphetamine wrapped in duct tape and rolled in a pair of pants.

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[19] 120 S. Ct. at 8, *citing Katz v. United States*, 389 U.S. 347, 357 (1967).

[20] 120 S. Ct. at 8.

[21] 120 S. Ct. 1462, 1463 (2000).

Bond was indicted for conspiracy to possess and possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1). He moved to suppress the drugs as fruits of an illegal search. The district court denied his motion. He was convicted and sentenced. On appeal, Bond conceded that other passengers on the bus had access to his bag. However, he argued that the agent had manipulated the bag in a way that the passengers would not have. The Court of Appeals rejected his argument, finding the fact that the agent's manipulation of the bag was calculated to detect contraband irrelevant for Fourth Amendment purposes, citing the Supreme Court's 1986 decision in *California v. Ciraolo*, 476 U.S. 207 (1986).[22]

The United States Supreme Court granted certiorari and reversed, distinguishing the visual observation in *Ciraolo, supra*, and in *Florida v. Riley*, 488 U.S. 445 (1989), from tactile inspection in the case before it. The Court deemed the latter more intrusive than the former. The Court noted that travelers use their carry-on luggage to transport personal items that they prefer to keep close at hand. The Court found two questions to be central to its Fourth Amendment analysis: Whether the defendant has shown that he sought to preserve something private, and whether the individual's expectation of privacy was one that society is prepared to recognize as reasonable.[23] In answering the first of these questions, the Court noted that Bond had attempted to preserve privacy by use of an opaque bag placed in the overhead compartment above his bus seat. As to the second, the Court observed that a bus passenger placing a bag in the overhead bin expects that other passengers or bus company employees may move it around, but not that they will, as a matter of course, feel the bag in an exploratory manner. The Court held the agent's physical manipulation of the bag unconstitutional under Fourth Amendment precepts.

Justice Breyer dissented, joined by Justice Scalia, finding that the degree of physical manipulation of his carry-on luggage by the agent in the case before the Court was no more intrusive than that which a bus passenger might expect from fellow passengers or bus employees. The dissent noted further that, in determining what expectation of privacy is reasonable in a given situation, the purpose of the intrusion is irrelevant; rather the critical factor is the effect of that intrusion. Justice Breyer regarded the majority opinion in *Bond* as a departure from established Fourth Amendment jurisprudence, and as a decision which would have a detrimental effect on law enforcement efforts to detect drugs in border searches while doing little to further legitimate privacy interests.

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[22] In *Ciraolo*, the Court held that police observation of a backyard from a plane flying at 1,000 feet did not violate a reasonable expectation of privacy. Similarly, the Court in *Florida v. Riley*, 488 U.S. 445 (1989), relied on *Ciraolo* in holding that police observation from a helicopter flying at 400 feet of a greenhouse in a home's curtilage was not violative of the Fourth Amendment. The Court based these decisions on the theory that the property was "not necessarily protected from inspection that involves no physical invasion," and that, in each case, the defendant's expectation of privacy was neither reasonable nor one that society was prepared to honor. 488 U.S. at 449.

[23] 120 S. Ct. at 1465.

Conclusion

In the October 1999 Term, the Supreme Court placed limits upon the extent to which intrusions into reasonable privacy interests may withstand constitutional muster in a number of areas. Drawing upon *Terry v. Ohio, supra,* and its progeny, the Court in *Florida v. J. L., supra,* held that a stop and frisk may not be justified by an anonymous tip, without more, that a person in a given location and wearing specific clothes was carrying a gun. Such a tip merely provided identifying information about the subject, but lacked sufficient indicia of reliability as to the allegations of criminal activity. In *Illinois v. Wardlow, supra,* the Court found that the headlong flight of a subject in a high crime area upon seeing police was sufficient to support a stop and frisk.

In *Flippo v. West Virginia, supra,* the Court, relying upon its 1978 decision in *Mincey v. Arizona, supra,* rejected a "homicide crime scene exception" to the warrant requirement of the Fourth Amendment. Finally, in *Bond v. United States, supra,* the Court found that a bus passenger had a reasonable expectation of privacy in regard to opaque carry-on luggage stored above the passenger's seat in an overhead compartment. Physical manipulation of that luggage by a Border Patrol agent exceeded constitutionally permissible grounds.