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Summary of Cortes v. State, 127 Nev. Adv. Op. No. 44

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Cortes v. State, 127 Nev. Adv. Op. No. 44 (July 21, 2011)¹
CRIMINAL LAW AND PROCEDURE—UNREASONABLE SEARCHES AND SEIZURES

Summary

Appeal from conviction of possession of a controlled substance with intent to sell.

Disposition/Outcome

A unanimous three-judge panel affirmed because, if the finding of reasonable suspicion is sound, no Fourth Amendment violation occurred. Furthermore, the Court does not interpret Nevada's constitutional guarantee against unreasonable searches and seizures more strictly than the United States Supreme Court interprets the Fourth Amendment.

Factual and Procedural History

Arturo Torres Cortes (“Cortes”) was a passenger in a car stopped by a patrol officer at night for not having a license plate or temporary tag. A backup officer arrived shortly thereafter. When asked for identification, Cortes gave conflicting answers as to whether he had ID. During the stop, one officer noticed a tool-knife on Cortes's lap, which she asked Cortes to place on the floor. Officers also testified the driver and Cortes were unusually agitated during the stop.

Later, after failing to obey commands to keep his hands in his lap, an officer ordered Cortes from the vehicle. Cortes exited the vehicle furtively. Cortes then resisted the officer's attempt to conduct a patdown search, so the officer handcuffed him. During the search, officers discovered a methamphetamine pipe. Cortes continued to struggle, and was then arrested for obstructing an officer. During the search incident to arrest that followed, the officers also discovered 3.3 grams of methamphetamine.

Before trial, Cortes filed a motion to suppress the pipe and drug evidence as the fruits of an illegal search and seizure. The district court denied the motion under *Arizona v. Johnson*.² The jury subsequently convicted Cortes of possession of a controlled substance with intent to sell. This appeal followed.

Discussion

Standard of Review; Evidentiary Hearings

The Court reviews de novo the district court's legal determination of the constitutionality of a frisk but review its findings of fact for clear error.³ Cortes faulted the district court for not *sua sponte* ordering an evidentiary hearing. However, because Cortes did not contest the evidence below, the Court declined to find the district court's findings clearly erroneous or plainly wrong.

¹ By Sean W. McDonald.

² *Arizona v. Johnson*, 129 S. Ct. 781 (2009).

³ *Somee v. State*, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008).

Fourth Amendment Analysis

The Court found the district court correctly applied *Arizona v. Johnson* as the controlling case. *Johnson* applies the two-pronged stop and frisk test in *Terry v. Ohio*.⁴ The first prong requires a lawful traffic stop.⁵ *Johnson/Terry* applies to a passenger with equal force because a passenger's motivation "to employ violence to prevent apprehension' of [a more serious] crime . . . is every bit as great as that of the driver."⁶ Because passengers are already stopped, the passenger is deemed seized for *Terry* purposes "just as the driver is, 'from the moment [a car stopped by the police comes] to a halt on the side of the road.'"⁷ Cortes did not contest the lawfulness of the traffic stop. Thus, the district court properly held the first prong of *Johnson/Terry* was met.

The second prong of *Johnson/Terry* focuses on the justification for the frisk. It asks whether an officer has a reasonable suspicion that the driver and any passengers may be armed and dangerous, which "is a fact-specific inquiry that looks at the totality of the circumstances in light of common sense and practicality."⁸ Reasonable suspicion is measured by an objective standard.⁹

The Court found the totality of the circumstances in this case justified frisking Cortes to protect the officers from the threat they reasonably suspected he posed to their safety. When officers arrived, Cortes had a knife in his lap; the presence of a knife in plain view in a lawfully stopped car contributes to reasonable suspicion that other weapons may be present, making the person armed and dangerous even if the knife is moved out of reach.¹⁰ Cortes also refused to keep his hands in plain view, despite repeated requests.¹¹ Cortes gave contradictory answers about whether he had identification; "evasive responses to police questions can help support reasonable suspicion," as can "contradictory answers to simple questions."¹² Nervousness and agitation also support reasonable suspicion.¹³ Finally, when Cortes exited the vehicle, he did so strangely, trying to conceal his hands and back from officers.¹⁴ Given all of this, the Court found common sense indicated a reasonable officer confronting Cortes at night during a traffic stop could reasonably suspect Cortes was armed and that a frisk was necessary to protect himself and his partner.

Seatbelt Law's Alleged Unconstitutional Vagueness as Basis for Exclusion of Evidence

Cortes further argued that Nevada's seatbelt statute, NRS 484D.495, is unconstitutionally vague and overbroad if it allows an officer to cite a passenger for a violation after the car is

⁴ *Terry v. Ohio*, 392 U.S. 1, 9, 22-23 (1968).

⁵ *See Johnson*, 129 S. Ct. at 784.

⁶ *Id.* at 787 (quoting *Maryland v. Wilson*, 519 U.S. 408, 414 (1997)).

⁷ *Id.* (quoting *Brendlin v. California*, 551 U.S. 249, 263 (2007) (alteration in original)).

⁸ *United States v. Tinnie*, 629 F.3d 749, 751 (7th Cir. 2011) (internal quotation omitted) (discussing *Johnson*).

⁹ *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011).

¹⁰ *United States v. Vinton*, 594 F.4d 14, 20-21 (D.C. Cir.), *cert. denied*, 131 S. Ct. 93 (2010).

¹¹ *See United States v. Soares*, 521 F.3d 117, 121 (1st Cir. 2008) (passenger's refusal to obey officer's request cited as part of the totality of circumstances justifying a patdown search).

¹² *Tinnie*, 629 F.3d at 752.

¹³ *See id.*

¹⁴ *See United States v. Burkett*, 612 F.3d 1103, 1107 (9th Cir. 2010) (upholding passenger frisk under *Johnson* based partly on furtive movements and the guarded way the passenger exited the car).

stopped when the officer did not observe the violation while the vehicle was moving. According to Cortes, if NRS 484D.495 is unconstitutional in that respect, then the officer's request for identification pursuant to NRS 484A.730(1) constituted an illegal search, making everything that followed the fruit of that poisonous tree. The Court rejected that argument for several reasons. First, the Court was not troubled with the constitutionality of the seatbelt statute as applied to Cortes. Second, evidence seized in reliance on a statute later held unconstitutionally vague does not violate the Fourth Amendment or require suppression of the evidence.¹⁵ Finally, a request for identification does not constitute an additional seizure under the Fourth Amendment.¹⁶

Nevada's Equivalent to the Fourth Amendment

Article I, section 18 of the Nevada Constitution uses almost the same words as the Fourth Amendment does to prohibit unreasonable searches and seizures.¹⁷ Cortes argued the Court should, as a matter of policy, read the Nevada Constitution as imposing a stricter test for traffic-stop frisks than *Arizona v. Johnson* does. Although federal Fourth Amendment jurisprudence does not dictate how a state supreme court interprets cognate provisions of its state constitution,¹⁸ and the Court has in two instances imposed stricter standards under article I, section 18 of the Nevada Constitution than the Fourth Amendment demands,¹⁹ the Court found no reason to adopt that divergent approach in the *Arizona v. Johnson* context.

The Court has already held—albeit in a Fourth Amendment context rather than under the Nevada Constitution—that the need for officer safety in a traffic stop outweighs any intrusion, especially where reasonable suspicion develops during the stop that the passenger may be armed and dangerous.²⁰ The Court then cited to several cases where the Court has applied *Terry* to search and seizure challenges.²¹ The Court also rejected reliance on *Harnisch* and *Bayard* as justification to adopt a stricter standard in this case, noting “[n]either case involved the emergency police-safety concerns that underlie *Terry*.” The Court dismissed Cortes's remaining claims of testimonial, evidentiary, and instructional errors, finding either that the district court did not abuse its discretion or that the objections were not properly preserved for appeal.

Conclusion

Arizona v. Johnson's two-pronged approach to traffic stop frisks applies in Nevada. In such cases, the article I, section 18 of the Nevada Constitution does not afford stricter protection against unreasonable searches and seizures than the Fourth Amendment does.

¹⁵ See *Michigan v. DeFillippo*, 443 U.S. 31, 39-40 (1979); see also *Davis v. United States*, 131 S. Ct. 2419, 2423-24 (2011) (holding that evidence obtained in search conducted in objectively reasonable reliance on binding appellate precedent is not subject to exclusionary rule).

¹⁶ Compare *Arizona v. Johnson*, 129 S. Ct. 781, 788 (2009) with *Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt Cty.*, 542 U.S. 177, 185 (2004) (both finding request for identification not inconsistent with the Fourth Amendment).

¹⁷ The Court found slight variations in word order and usage of both singular and plural nouns are without substantive significance.

¹⁸ *Virginia v. Moore*, 553 U.S. 164, 171 (2008); *Osborn v. State*, 118 Nev. 323, 326, 44 P.3d 523, 525 (2002).

¹⁹ *State v. Harnisch*, 114 Nev. 225, 228-229, 954 P.2d 1180, 1183 (1998) (warrant clause); *State v. Bayard*, 119 Nev. 241, 247, 71 P.3d 498, 502 (2003) (custodial arrest for a non-jailable offense).

²⁰ See *Scott v. State*, 110 Nev. 622, 630-31, 877 P.2d 503, 509 (1994) (upholding patdown search under *Terry v. Ohio* following a traffic stop for a license plate violation that turned up a weapon).

²¹ See *Cortes v. State*, 127 Nev. Adv. Op. No. 44, at 14 n. 7 (July 21, 2011).