SUPREME COURT BROADENS LAW ENFORCEMENT INVESTIGATORY POWERS

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In an historical decision rendered on January 26, 2009, the United States Supreme Court in *Arizona v. Johnson*, 555 U.S. ____ (2009), unanimously upheld the authority of the police to "stop and frisk" a passenger detained pursuant to a valid traffic stop, when the officer reasonably suspects that the person is armed and dangerous but does not suspect criminal activity. This decision effectively broadens law enforcement investigatory powers, particularly in the fight against criminal gang activity.

In *Johnson*, a police gang task force was patrolling a Tucson neighborhood known for gang activity. They pulled over a vehicle after running a license registration check and learning that the registration had been revoked for an insurance-related violation. There were three occupants in the vehicle – the driver, front seat passenger and back seat passenger. At the time of the stop, the police did not suspect anyone of criminal activity. The defendant was seated in the back seat. One of the officers noticed that the defendant looked back and kept his eyes on the officer as she approached. The defendant was wearing a blue bandana consistent with the Crips gang membership, and he had a police scanner in his jacket pocket. He had no identification, but he stated that he lived in Elroy Arizona which the officer knew was a home to the Crips gang. He also told the officer that he had served time for burglary and had been out for one year. The officer asked defendant to exit the car in order to gain information about the Crips gang. Based on her observations and what he told her, the officer suspected that he might have a gun on him, so she searched him and felt the butt of a gun near his waist. When he began to struggle, the officer handcuffed him.

The defendant was charged with unlawful gun possession. The trial court denied his motion to suppress the evidence, and a jury convicted him of the charge. An Arizona Court of Appeals reversed concluding that the police had no right to conduct the pat down search even if she suspected that he might be armed and dangerous. The Arizona Supreme Court denied review of the case.

The U.S. Supreme Court reversed the state appellate court. The Court held that the pat down search was lawful under *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, the Court held that a limited search of outer clothing for weapons pursuant to a valid investigatory stop was reasonable under the Fourth Amendment in order to protect the safety of the officer and the public. The Court analogized a traffic stop to a *Terry* stop and recognized that traffic stops in particular are "fraught with danger to police officers." The Court reasoned that the risk of harm to the officers is minimized only if the officers have command of the situation. Following its precedent in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (holding that police may conduct pat down driver upon valid traffic stop), *Maryland v. Wilson*, 519 U.S. 408 (1997) (applying *Mimms* to passengers), and *Brendlin v. California*, 551 U.S. 249 (2007) (holding that passengers have standing to challenge validity of traffic stop), the Court in *Johnson* held that the police may perform a pat down search of a passenger upon reasonable suspicion that the passenger may be armed and dangerous.

In reaching its decision, the Court rejected the argument that the officer's authority to conduct the pat down ceased once the officer began to question the defendant about matters unrelated to the traffic stop, i.e., his gang activity. The Court concluded that: "An officer's inquiries into matters unrelated to the justification for the traffic stop .

. . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."

Interestingly, the Illinois Supreme Court had come to a different conclusion five years ago in *People v. Gonzales*, 204 Ill. 2d 220, 789 N.E.2d 260 (2003). In *Gonzales,* the Court compared a traffic stop to a *Terry* stop and held that the allowable scope of the stop could be exceeded by *either* impermissibly prolonging the detention *or* by fundamentally altering the nature of the stop. However, just last year the Court overruled *Gonzales* and held in *People v. Harris*, 228 Ill.2d 222, 886 N.E.2d 947 (2008), that the second part of the *Gonzales* test - whether the fundamental nature of the stop can be altered by the police – did not comport with U.S. Supreme Court's decision in *Illinois v. Caballes*, 543 U.S. 405 (2005) (upholding canine sniff for drugs in routine traffic stops), and *Muehler v. Mena*, 544 U.S. 93 (2005) (upholding questioning occupants of a residence about their immigration status while being detained pursuant to the execution of a search warrant on an unrelated matter). Thus, the Court in *Harris* held that the police may ask for the identification of a passenger who is detained pursuant to a valid traffic stop without an independent reasonable suspicion of criminal activity, so long as the duration of the stop is not unreasonably prolonged.