

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

THE STATE,

RECEIVED

PETITIONER
FEB 27 2020

S.C. SUPREME COURT

V.

ERIC TERRELL SPEARS,

RESPONDENT

APPELLATE CASE NO. 2017-001933

Certiorari to the Court of Appeals

Honorable Robert E. Hood, Circuit Court Judge

Opinion No. 27945

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Eric Terrell Spears petitions this Court for rehearing and respectfully submits that this Court misapprehended the facts in the totality of the circumstances analysis such that it should have held Respondent was improperly seized in this case. Additionally, this Court should have considered race in its analysis of the totality of the circumstances to support that holding.

In this case Respondent was improperly seized as understood by the Fourth Amendment of the United States Constitution when he was stopped and questioned by multiple officers about possessing illegal items as he walked away from a bus terminal. Furthermore, regardless of whether

Respondent's race was *specifically* argued as a factor in the totality of circumstances test by trial counsel or whether it was briefed before this Court, this Court should adopt the dissent's position that race should always be considered in the totality of circumstances test as a practical recognition that race inherently impacts encounters with law enforcement. See United States v. Brown, 925 F.3d 1150 (9th Cir. 2019) (quoting Washington v. Lambert, 98 F.3d 1181, 1187–88 (9th Cir. 1996) (“[T]he burden of aggressive and intrusive police action [that] falls disproportionately on African-American, and sometimes Latino, males...[shows] as a practical matter neither society nor our enforcement of the laws is yet color-blind.”)); see United States v. Mendenhall, 446 U.S. 544, 558 (1980) (holding that race is “not irrelevant” in the totality of circumstances.)

In this case, the state conceded that the officers did not have reasonable suspicion to stop Respondent. R. 65, ll. 7 – 18. Instead, the state argued that Spears was not seized by the arresting officers because he consented to the encounter with police that led to his arrest. Id. However, Spears did not voluntarily choose to speak with police and only did so because the circumstances of the stop were such that a reasonable person would not feel free to terminate the encounter. R. 55, ll. 1 – 60, ll. 1; See U.S. v. Smith, 794 F.3d 681, 684 – 685 (7th Cir. 2015) (explaining that the presence of multiple officers makes a stop threatening in and of itself and that the officers waiting for a suspect to move to an isolated location before springing the encounter on him has the same threatening effect as the officers proactively isolating him.)

To determine when a suspect has been seized under the Fourth Amendment the Court uses the totality of the circumstances test put forth in United States v. Mendenhall. That test states that a person has been seized when, under the totality of circumstances, a reasonable person in the suspect's position would not have felt free to decline the officers' requests or to otherwise terminate the encounter. Id. at 554 – 555.

An examination of the commonly enumerated factors in the totality of circumstances test showed that they weighed in favor of Respondent in this case.¹ The most crucial factor here was that Spears and Jenkins were not informed of their right to terminate the encounter. This was especially true in this case because the state's argument was that Respondent consented to the encounter with police.

Since Respondent was never informed of his right to terminate the encounter, he could not consent to the encounter with police. As Justice Marshall explained in his dissent in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), "I have difficulty in comprehending how a decision made without knowledge of available alternatives can be treated as a choice at all." Schneckloth, at 284 – 285. Moreover, "If consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search, it follows that his consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police." Id. Since Respondent was never informed of his right to terminate the encounter, this most important factor weighed in favor of holding that Respondent was wrongfully seized.

If this Court believed that Spears implicitly consented to the stop by answering the officers' initial questions, the scope of that consent was limited to the general questions about his identity and recent bus trip. Florida v. Bostick, 501 U.S. 429, 437 (1991) ("As we have explained, no seizure occurs when police ask... to examine the individual's identification, and request consent to search his or her luggage.") The moment the officers asked Spears if he possessed "illegal items" they exceeded the limited scope of Spears' implied consent to answer non-incriminating questions. R.

¹ The usual factors include: the time and place of the encounter; the number of officers present; the length of the detention; whether the detainee was isolated at the time of the encounter; whether the detainee was informed of his right to terminate the encounter; whether the detainee was told they were the suspect of a crime; whether the detainee's documents were retained; and whether the officer(s) exhibited threatening behavior. U.S. v. Smith, 794 F.3d 681, 684 (citing Mendenhall, 446 U.S. at 554).

71, ll. 22 – 24; R. 69, l. 14 – 70, l. 9; See Smith, 794 F.3d at 686 (“The line between a consensual conversation and a seizure is crossed when police convey to an individual that he or she is suspected of a crime... While the government posits that in order to convey such a message, police must say, ‘you are a suspect,’ such magic words are not required.”) (internal citations omitted) Furthermore, during the stop, but before the frisk, the officers repeatedly ordered Respondent to not make movements with his hands. R. 41, ll. 1 – 20. No reasonable person would have believed they could terminate the encounter and walk away once the multiple officers who stopped him asked incriminating questions and issued orders that controlled his movements. R. 61, l. 20 – 62, l. 9.

Had Respondent continued to walk away, the agents could have used that against him as behavior that created a reasonable suspicion for stopping him. See State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013) (finding reasonable suspicion existed where the defendant attempted to avoid officers by riding away on his bicycle). Respondent was then stuck in the situation where he had to either stop and talk to the police, thereby “consenting” to the stop, or keep walking away and risk giving police enough “reasonable suspicion” to stop him. The protections of the Fourth Amendment cannot be so limited that they allow the state to put citizens in this Catch-22 position.

Respondent also disagrees with this Court’s determination that the length of the encounter weighed in favor of the state. The length of the actual face to face encounter was not exactly determined but it was estimated it took about twenty minutes. R. 56, ll. 18 – 24. A twenty-minute conversation on the street with strangers was exceedingly long and would not have reached that length had the officers been anyone other than the police. Thus, the length of the conversation indicated that it was solely Respondent’s reasonable belief that he was not free to terminate the encounter that kept the conversation going for twenty minutes. Accordingly, this factor weighed in favor of Respondent.

While there are the factors commonly enumerated in the “totality of the circumstances” test, they are not exhaustive. It was undeniable that race was a factor in the totality of circumstances in this case such that this Court should have considered it in its evaluation. Race is a pivotal characteristic in society today such that people are treated differently because of their race and *people expect to be treated differently because of their race*. Since there is no denying race’s impact in the minds of Americans, it should always be included in the totality of circumstances test.²

This Court cited United States v. Mendenhall, 446 U.S. 544 (1980) in support of the decision that Respondent was not seized in this case but overlooked crucial differences between Mendenhall and the present case. Mendenhall was standing in the concourse of an airport when two DEA agents questioned her about her trip. Id. at 547 – 548. After Mendenhall gave inconsistent answers, the agents asked her if she consented to coming to the DEA airport office for further questioning, and Mendenhall agreed to go with them. Id. at 548. In the DEA office an agent asked her if she consented to having her bag searched and *informed her of her right to decline the search*. Id. Mendenhall again consented to be searched after being notified of her right to decline. Id.

² There is a split among the circuits between two lines of cases on the issue of race being considered in the totality of circumstances test for whether a reasonable person would believe they were seized. The first line recognized race as a factor. See U.S. v. Brown, 925 F.3d 1150 (9th Cir. 2019); U.S. v. Smith, 794 F.3d 681, 687 (7th Cir. 2015). The second is U.S. v. Easley, 911 F.3d 1074, 1081-82 (10th Cir. 2018) that refused to recognize race as a factor. Respondent respectfully recommends that this Court follow the Brown and Smith line because Easley was wrongfully decided. The United States Supreme Court held in Mendenhall that race was “not irrelevant” in evaluating the totality of circumstances regarding whether a reasonable person would believe they were seized. Mendenhall, at 548. Accordingly, by differentiating the analyses of seizure and consent, the Tenth Circuit separated two legal concepts that are inextricably intertwined. As such, the Easley decision contradicted United States Supreme Court precedent and should not be followed.

Accordingly, the reason the Court in Mendenhall determined the stop was consensual, despite the impact Mendenhall's race had on the encounter, was because the officers informed Mendenhall of her right to terminate the encounter. Id. at 558 – 559. (“It is *especially significant* that respondent was twice expressly told that she was free to decline consent to search, and only thereafter explicitly consented to it.”) (emphasis added) While race was not dispositive in the totality of circumstances test, the Supreme Court stated race was “not irrelevant,” meaning it was included in the totality of circumstances. Id. at 558.

The factors in Mendenhall that outweighed the consideration of race were not present in Respondent's case. Here, the officers never asked for Spears' consent to search him nor *did they inform Spears of his right to terminate the encounter*. R. 118, l. 12 – 119, l. 18. Spears was also leaving the bus terminal and was hailed by police, such a show of force was not necessary in Mendenhall because she was stationary when her encounter started. Id.; R. 61, ll. 20 – 25. Lastly, Spears' answers to the questions about his identity and trip were not inconsistent like Mendenhall's and the agents should not have persisted in their questioning beyond those innocuous topics. R. 118, l. 12 – 119, l. 18.

Although at trial the issue of race was never expressly argued at trial, the fact that Spears was a black male was put before the trial court. R. 17, ll. 15 – 17; R. 169, ll. 15 – 17. The issue of race's impact on the totality of circumstances was apparent enough that during oral argument this Court posed the question if race played a part in whether Spears felt free to terminate the encounter with police.

Under State v. Tindal, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010), this Court can conduct its own review of the facts under the deferential standard of review for Fourth Amendment cases. If this Court felt that Respondent's race should have been considered by the lower court as

part of the totality of circumstances it was able to reach a conclusion on that issue on appeal as part of its own review of the facts.

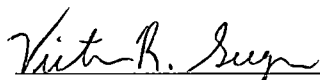
It is not required for trial attorneys to foresee and argue every potential angle or detail of the encounter to preserve that factor for consideration on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (quoting State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001)). Such a requirement would constrain an appellate court from conducting its own review of the facts involved in the totality of circumstances to evaluating the rote arguments of trial counsel.

Here, the dissent cited the Ninth Circuit Court of Appeals decision in United States v. Brown, 925 F.3d 1150 (9th Cir. 2019) for the proposition that race is a factor included in the totality of circumstances test. There was nothing in the Brown opinion that indicated that the issue of race was ever brought up by the trial attorneys or ever argued on appeal. However, the Brown Court addressed the issue because it was a practical recognition that “neither society nor our enforcement of the laws is yet color-blind.” Brown, 925 F.3d at 1156 (quoting Washington v. Lambert, 98 F.3d 1191, 1197-99 (9th Cir. 1996)).

Respondent does not argue that the consideration of race on its own necessitated holding that a reasonable person would not feel free to terminate Respondent’s encounter with police. It is Respondent’s position that race was a factor to be considered as part of the totality of circumstances in his case, and had this Court considered race in its decision it would have held that Respondent was seized at least at the time that the officers asked if he possessed any illegal items. See U.S. v. Smith, 794 F.3d at 686.

Accordingly, Respondent respectfully requests that this Court reconsider its decision, grant rehearing, hold that Respondent was seized at least at the time the officers questioned him on illegal activity, and affirm the Court of Appeals' decision as modified.

Respectfully Submitted,



VICTOR R SEEGER
Appellate Defender

This 27th day of February, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

PETITIONER,

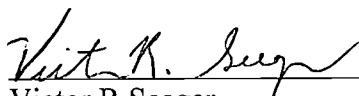
V.

ERIC TERRELL SPEARS,

RESPONDENT

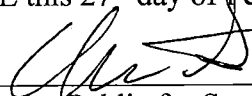
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Eric T. Spears, #363100, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 27th day of February, 2020.



Victor R Seeger
Appellate Defender
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO BEFORE
ME this 27th day of February, 2020.

 (L.S)

Notary Public for South Carolina
My Commission Expires: September 30, 2029