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'Parking while black' case awaits Supreme Court's possible review

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Now that the briefs requesting review are in, the decision on whether to hear a "parking while black" case belongs to nine justices on the U.S. Supreme Court.

Parking while what?

Readers read it right — parking while black.

Although the defendant in this case — Randy Johnson of Milwaukee — is a black man, it's not really exclusively about race. But the monicker lends itself easily to "Johnson vs. U.S." because Johnson was seated in a parked car with some acquaintances in 2014 when Milwaukee police rushed the car to determine in what nefarious activities they were engaged.

Was what the probable cause justifying police action? The car in which Johnson was a passenger was parked illegally within 15 feet of a crosswalk.

Police found what they were looking for: Johnson was carrying a gun. He entered a conditional plea of guilty and was sentenced to 46 months in prison. But the conditional aspect of his guilty plea allowed him to challenge the authority of police to use a parking violation as a pretext to conduct an aggressive search looking for evidence of more serious crimes.

To hear the opposing lawyers characterize the legal dispute, it represents either the end of civil liberties as people know them or unremarkable business as usual in the real world of law enforcement.

"The fundamental question ... is there any infraction so trivial that the government cannot make a pretextual seizure, despite the existence of probable cause," wrote Northwestern University law Professor David Shapiro on Johnson's behalf.

U.S. Solicitor General Noel Francisco framed the issue in a more favorable light, asserting that the court is being asked to suppress the gun as evidence because "officers temporarily detained" an illegally parked car "in which (Johnson) was a passenger" while looking for evidence of a serious crime.

The nation's highest court hears very few of the cases it's asked to review. But this one is sufficiently unique to draw more than a passing glance.

Johnson's bid to have the stop and search declared illegal was rejected at the trial court in Milwaukee. He lost by a 2-1 vote at the federal appeals court in Chicago. After the original three-judge appeals panel ruled, the court decided to conduct an en banc review with eight judges presiding.

Johnson lost again; the vote was 5-3.

Writing the dissenting opinion in both appellate reviews was Justice David Hamilton. He argued that allowing police office to swarm cars parked illegally "loses sight of reasonableness and proportion" and invites "intolerable intrusions on people just going about their business."

"The correlation with race is obvious," Hamilton wrote.

While outrageous to Hamilton, the appeals court majority found the situation unremarkable. Pretext stops are permitted with moving cars, they noted, so why should they not be permitted with parked cars?

"Pretext stops"?

The phrase may be unfamiliar with ordinary people, but it's well known in law enforcement.

Pretext stops are those made by police office for a hidden motive. They may stop a car for having a burned-out taillight, but they're really looking for evidence of serious criminal activities.

The legality of the practice was enshrined in the 1996 case of *Whren vs. U.S.*, in which a unanimous court ruled "that any traffic offense committed by a driver was a legitimate legal basis for a stop" and that an officer's motives are not a factor in deciding whether the stop is legal.

Just three justices of the nine justices on the court in the *Whren* case are still there — Clarence Thomas, Ruth Ginsburg and Stephen Breyer.

Ginsburg has since had second thoughts about *Whren's* reach. She's called for it to be pared back.

A case involving probable cause involving a parking violation would be a perfect vehicle for her to try to do so.

The Cato Institute, the Fourth Amendment Scholars Association and the Howard University School of Law have filed briefs on Johnson's behalf.

The government's position is that stopping parked cars is no different that moving cars.

"If anything, approaching a stopped car ... is less intrusive than stopping a moving car for a traffic violation, for the simple reason that a parked car is already stopped," Francisco wrote.

He also dismissed the police decision to aggressively swarm the parked car, asserting the "unusual manner of the seizure is not the proper subject of this particular suppression motion."

"Further review is unwarranted," Francisco concluded.

Writing on Johnson's behalf, The Cato Institute's Jay Schweikert said extending the Whren pretext stop rule to parked cars "will effectively subject every individual to the whims of any law enforcement office at any time."

"...as broad as such liability already is, upholding (the appeal court) — and extending Whren to any and all of even the more trivial 'criminal' violations — would be more concerning," he wrote.

The Supreme Court is expected to consider granting review at its Sept. 24 conference. If it grants review, the court will hear the case during its 2018-19 session that begins in October.