IN THE COURT OF APPEALS OF MARYLAND

NO. 18

SEPTEMBER TERM, 1995

BRUCE LAMONT DENNIS

V.

STATE OF MARYLAND

Bell, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Raker
Wilner,
JJ.

OPINION BY BELL, C.J.
RAKER, J., DISSENTS.

FILED: May 19, 1997

In Dennis v. State, 342 Md. 196, 647 A.2d 928 (1996), we were presented with "the issue of whether a passenger in a vehicle whose driver has been stopped by police for a traffic violation may be convicted of disorderly conduct and battery when, rather than heeding the police command to remain in the vehicle, he walks away from the scene, and subsequently resists police attempts at detention." Id. at 198, 647 A.2d at 929. We held "that to justify detaining the passenger, the officer must have a reasonable suspicion that the passenger engaged in criminal behavior and must have intended to conduct further investigation based on that suspicion." Id. at 211-12, 674 A.2d at 935. In that regard, we observed:

> In the case sub judice, the record reflects that once the driver stopped the fleeing vehicle, the petitioner got out and began walking away from the scene, disregarding Officer Foskey's command to stop. Officer Foskey could have concluded from that conduct that the petitioner was fleeing the scene. While fleeing from a police officer or disregarding a police officer's command to stop, in and of itself, does not give rise to probable cause or even a reasonable suspicion sufficient to justify the use of force to detain the person fleeing, ... where that person is a passenger in the automobile as the driver attempts to flee from and elude the police, a police officer reasonably and objectively could entertain a suspicion that he was an active and willing participant with the driver in that attempt. In the instant case, however, that suspicion was not what prompted the officer to detain the petitioner. It was solely because the officer felt he would be safer if the petitioner were detained.

Id. at 210, 674 A.2d at 935 (citing Watkins v. State, 288 Md. 597, 604, 420 A.2d 270, 274 (1980)).

We made clear, however, that

> [t]he prosecutor, rather than the officer, articulating a reasonable suspicion, justified by the record, on which the officer may have acted, may not be sufficient for a Terry [v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968)] stop. It clearly is not sufficient in the instant case, where a stop for the officers' safety, rather than a Terry investigative stop, was intended. There is no articulated reason why the officers would be safer by detaining the petitioner, rather than simply allowing him to walk away from the scene.

Id. at 211, 674 A.2d at 935. Moreover, we also pointed out that "we [were] not holding ... that a passenger in an automobile whose driver has fled from and eluded the police has an unfettered right to ignore a police officer's commands to stop." Id. at 211-12, 674 A.2d at 935.

The State of Maryland filed a petition for a writ of certiorari, asking the United States Supreme Court to review this Court's judgment. That Court granted the State's petition, vacated this Court's judgment, and remanded the case to this Court for further consideration in light of Whren v. United States, 517 U.S. ___, 116 S. Ct. 1769, 135 L.Ed.2d 89(1996). Maryland v. Dennis, 517 U.S. ___, 117 S.Ct. 40, 136 L.Ed 2d 4 (1996).

In Whren, the issue, as articulated by Justice Scalia, who authored the opinion for a unanimous Court, was "whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment’s prohibition against unreasonable seizures unless a reasonable officer would have been

motivated to stop the car by a desire to enforce the traffic laws." Id. at ___, 116 S. Ct. at 1772, 135 L. Ed.2d at 94. In that case, accepting that there was probable cause to make the traffic stop, the petitioners argued, instead, that, "`in the unique context of civil traffic regulations' probable cause is not enough." Id. at ___, 116 S. Ct. at 1773, 135 L. Ed.2d at 96. Their concerns, as interpreted by the Court, were:

> Since ... the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists.

Id. at ___, 116 S. Ct. 1773, 135 L. Ed.2d at 96. Stated differently, the petitioners' focus was on determining what the arresting officer may have been thinking but did not articulate, rather than on what he or she, in fact, did articulate. The solution proposed by the petitioners was to substitute for the established Fourth Amendment test of whether there was probable cause for the stop, a new test of "whether a police officer, acting reasonably, would have made the stop for the reason given." Id. at ___, 116 S. Ct. at 1773, 135 L. Ed.2d at 96.

The Court recognized that the petitioners' proposed test was motivated by their concern that the police action not be a pretext. Rejecting the petitioners' argument and proposed test,

the Court pointed out that its cases[1] "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." Id. at ___, 116 S. Ct. at 1774, 135 L. Ed.2d at 98. See also Ohio v. Robinette, 519 U.S. ___, 117 S. Ct. 417, 136 L. Ed.2d 347 (1996). Moreover, the Court expressed concern over the fact that such a test "is plainly and indisputably driven by subjective considerations," id. at ___, 116 S. Ct. at 1774, 135 L. Ed.2d at 98, and asks more of the Court than would be the case had the focus been confined to the actions of the individual officer. Id. As the Court put it:

> [I]t seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a "reasonable officer" would have been moved to act upon the traffic violation. While police manuals and standard procedures may sometimes provide objective assistance, ordinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable -- an exercise that might be called virtual subjectivity.

Id. at __, 116 S.Ct. at 1775, 135 L. Ed. 2d at 99.

The issue in this case is different from the issue presented and resolved by the Court in Whren, and, thus, Whren is not

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[1]The cases to which the Court referred were: United States v. Villamonte-Marquez, 462 U.S. 579, 584, n.3, 103 S. Ct. 2573, n.3, 77 L.Ed.2d 22, 28, n.3 (1983); United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467, 38 L.Ed.2d 427 (1973); Gustafson v. Florida, 414 U.S. 260, 266, 94 S. Ct. 488, 492, 38 L.Ed.2d 456, 461 (1973); Scott v. United States, 436 U.S. 128, 138, 98 S. Ct. 1717, 1723, 56 L.Ed.2d 168, 178 (1978).

dispositive. In the instant case, what Dennis challenged was his detention without probable cause when the police did not wish to make an investigative stop but, instead, stated they wished to detain him "for the officer's safety." It is noteworthy that subsequent to its decision in Whren, the Supreme Court indicated that the question resolved in the instant case, whether "an officer may forcibly detain a passenger for the entire duration of [a traffic] stop," remains open. Maryland v. Wilson, 519 U.S. ___, 117 S.Ct. 882, 137 L.Ed. 2d 41 (1997). In Wilson, the Supreme Court held that a police officer may order passengers to get out of a car during a traffic stop. The Court noted, however, that it was expressing no opinion on the validity of the forcible detention of passengers. Id. at __, n.3, 117 S.Ct. at 886, n.3, 137 L. Ed. 2d at 48, n.3. The issue decided in the instant case was not addressed by the Supreme Court in Whren, and was left expressly undecided in Wilson.

What we clearly concluded in the instant case is that there was no reason articulated or indicated as to why it was necessary to detain Dennis "for the officer's safety," and the detention could not be justified on any other basis. First, there was no probable cause to arrest Dennis. Second, although the officer might have had a reasonable suspicion adequate to make an investigative stop pursuant to Terry v. Ohio, the officer did not intend to question Dennis, and a Terry investigative stop was not the basis for Dennis's detention. Without some explanation, we

were unable to determine why it was safer for the officer to detain Dennis rather than allow him to walk away from the scene. Our holding resulted from the officer's indication that he did not make an investigative stop and was not motivated by any suspicion that Dennis was involved in illegal activity. We recognized that the officer might have had a basis for a Terry stop, but noted that the officer's stop was made only because of his unexplained belief that detaining Dennis was safer for the officer than letting Dennis leave the scene. There was no intent to interrogate Dennis as might have been permitted by Terry and no indication why Dennis should be stopped for the officer's safety. This analysis is perfectly consistent with the Whren analysis.

Having reconsidered this case in light of the principles enunciated in Whren and finding them inapposite, we reaffirm our prior holding and opinion.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH DIRECTIONS TO VACATE THE JUDGMENT OF THE CIRCUIT COURT FOR SOMERSET COUNTY. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY SOMERSET COUNTY.

Bruce Lamont Dennis v. State of Maryland
No. 18, September Term, 1995

[CRIMINAL LAW - ARREST SEARCH AND SEIZURE - ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES TO RECONSIDER CASE IN LIGHT OF Whren v. United States, 517 U.S. ____, 116 S. Ct. 1769, 135 L.Ed.2d 89 (1996).]