
CRIMINAL LAW — FOURTH AMENDMENT — NINTH CIRCUIT CONSIDERS COMMUNITY'S RACIAL TENSION WITH POLICE IN FINDING ILLEGAL SEIZURE AND LACK OF VOLUNTARY CONSENT. — *United States v. Washington*, 490 F.3d 765 (9th Cir. 2007).

The traditional story of Fourth Amendment search and seizure doctrine involves a complex compromise between public safety and the constitutional right to personal liberty.¹ Although the choice of viewpoint is often left out of the story, much also depends on whose perspective — police officers' or civilians' — a judge employs for search and seizure determinations.² The chosen perspective circumscribes the types of facts that a judge considers in these evaluations.³ Recently, in *United States v. Washington*,⁴ the Ninth Circuit held that the district court should have suppressed evidence obtained through a vehicle search because the consent was not voluntary, or, even if it were voluntary, because the evidence was the fruit of an illegal seizure.⁵ In its search and seizure analyses, the panel considered the tension that earlier police shootings had caused between police and the local black community. By including racialized community-police tension in its reasoning, the Ninth Circuit took a subtle but significant step toward aligning its Fourth Amendment analysis with the underlying principles of search and seizure standards, while also furthering the privacy and dignity interests⁶ the Amendment seeks to protect.

In 2003 and 2004, white Portland police officers shot and killed two unarmed black citizens during routine traffic stops.⁷ In response, the Portland Police Bureau, along with black community organizations,

¹ See *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973).

² See Devon W. Carbado, (*E*)*Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 968 & n.107, 969–70 (2002); see also Janice Nadler, *No Need To Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 162–63.

³ See, e.g., Nadler, *supra* note 2, at 162–63, 199–200.

⁴ 490 F.3d 765 (9th Cir. 2007).

⁵ *Id.* at 767.

⁶ JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 55 (4th ed. 2006) (describing an interpretation of the Amendment as protecting “legitimate expectations of privacy”); *id.* at 56 (discussing Professor William Stuntz’s proposition that the Amendment protects dignity interests).

⁷ See *Washington*, 490 F.3d at 768 & n.1. The court in *Washington* incorrectly characterized only the first shooting as fatal; in fact, both shootings were. See Maxine Bernstein, *Man Killed by Police Unarmed*, OREGONIAN (Portland), Mar. 30, 2004, at A1; Andrew Kramer, *Man Fatally Shot by Police in Portland Was Unarmed*, COLUMBIAN (Vancouver, WA), Mar. 30, 2004, at C2; Michelle Roberts & Maxine Bernstein, *Deadly Force When Firing Guns at Moving Vehicles*, OREGONIAN (Portland), May 18, 2003, at A1. Kendra James was a passenger in a car when it was pulled over by the police because the driver failed to stop completely at a stop sign. After police took the driver into custody, Kendra got into the driver’s seat, began to drive away, and was shot to death by police. *Id.* Similarly, James Jahar Perez was shot to death after police pulled him over for not signaling a turn correctly. Bernstein, *supra*; Kramer, *supra*.

developed pamphlets describing how civilians should interact with police and targeted distribution to black communities.⁸ One of the pamphlets advised readers to “follow [a police] officer’s directions” and to “comply with the procedures for a search.”⁹ Defendant Bennie Washington, a black member of the Portland community,¹⁰ knew of one of these pamphlets and was aware of the shootings.¹¹ At approximately 11:30 p.m. on November 23, 2004, Washington was sitting in his lawfully parked car on a public street, waiting to give his friends a ride home.¹² Portland police officer Daryl Shaw, a white man, parked his squad car behind Washington’s vehicle in order to “initiate investigatory contact,” despite his lack of reasonable suspicion.¹³ Officer Shaw approached Washington’s car and asked him whether he could search Washington’s person, to which Washington consented. At Officer Shaw’s request, Washington exited the vehicle and moved to the squad car where he was searched.¹⁴ Officer Troy Pahlke (who is also white) arrived at the scene while Washington was exiting his car and positioned himself such that Washington could not reenter the vehicle.¹⁵ Officer Shaw completed the personal search and received Washington’s consent to search the car.¹⁶ Neither officer told Washington he could decline to consent to either the search of his car or of his person.¹⁷ Officer Pahlke discovered a firearm in the car, and Officer Shaw arrested Washington for driving with a concealed weapon.¹⁸

After Washington was indicted for being a felon in possession of a firearm,¹⁹ he filed a motion to suppress the gun, claiming that the officers had violated the Fourth Amendment.²⁰ District Court Judge Haggerty denied the motion, finding that the police officers had not

⁸ *Washington*, 490 F.3d at 768, 773.

⁹ *Id.* at 769 (internal quotation marks omitted). According to the defense’s expert witness, this pamphlet encouraged black people “to not try to advance any rights other than to stay alive” and to “let [other rights] be adjudicated in court.” Transcript of Motion Hearing at 71–72, 75–76, *Washington*, (No. 06-30386) (testimony of Bishop Adolph A. Wells, member of the African-American Police Advisory Committee and a commission on racial profiling).

¹⁰ *Washington*, 490 F.3d at 767.

¹¹ *Id.* at 769; Appellant’s Reply Brief at 9, *Washington*, (No. 06-30386), 2006 WL 4030077.

¹² Transcript of Motion Hearing, *supra* note 9, at 47–48 (testimony of Bennie Washington).

¹³ *Washington*, 490 F.3d at 767–68; Transcript of Motion Hearing, *supra* note 9, at 4–5 (testimony of Daryl Shaw).

¹⁴ *Washington*, 490 F.3d at 768.

¹⁵ *Id.*

¹⁶ *Id.* Washington denied that he was asked to consent to the car search. Transcript of Motion Hearing, *supra* note 9, at 54–55 (testimony of Bennie Washington); Appellant’s Opening Brief at 10–11, *Washington*, (No. 06-30386), 2006 WL 3368594.

¹⁷ *Washington*, 490 F.3d at 768.

¹⁸ *Id.*; Transcript of Motion Hearing, *supra* note 9, at 34–35; Brief of the Plaintiff-Appellee at 5–6, *Washington*, (No. 06-30386) 2006 WL 3937894.

¹⁹ Washington’s gun possession violated 18 U.S.C. § 922(g)(1) (2000).

²⁰ Appellant’s Opening Brief, *supra* note 16, at 2–3.

seized Washington and that he had voluntarily consented to the car search.²¹ Washington conditionally pled guilty to the charge, and the district court sentenced him to seventy months in prison.²²

On appeal, a Ninth Circuit panel vacated and remanded. Writing for the panel, Judge Gould²³ began the review of the suppression ruling by determining whether there had been an impermissible seizure.²⁴ Using the standard articulated in *United States v. Mendenhall*²⁵ and *Florida v. Bostick*²⁶ — whether “a reasonable person would have believed that he was not free to leave”²⁷ — the panel held that, under the *initial* circumstances of the encounter, there was no seizure.²⁸ To determine whether the encounter later escalated into a seizure, Judge Gould applied the factors articulated in *Orhorhaghe v. INS*²⁹ and considered the “publicized shootings by white Portland police officers of African-Americans” and the “widely distributed pamphlet.”³⁰ Judge Gould concluded that the encounter escalated into a seizure during the search of Washington’s person, but before he consented to the car search, because a reasonable person “in Washington’s shoes” would not have felt free to leave.³¹ Because neither officer had reasonable suspicion or probable cause, the seizure was unconstitutional.³² To determine the voluntariness of consent for the car search, the panel considered the five factors set forth in *United States v. Soriano*³³ and the

²¹ *Id.* Judge Haggerty stated that the law left the court “no alternative” in this “very close” case because there had been no show of force by the officers. *Id.* at 3, 16. He found that Washington had not been seized because the officers did not use lights or sirens, did not use force or threat of force, did not have guns out, and used cordial tones. *Id.* at 16–17. The judge did not consider the community tension resulting from the police shootings or the pamphlets. *Id.*

²² *Washington*, 490 F.3d at 769. Washington reserved his right to appeal the suppression denial. *Id.*

²³ Judge Gould was joined by Judges Paez and Rawlinson.

²⁴ *Washington*, 490 F.3d at 769.

²⁵ 446 U.S. 544 (1980).

²⁶ 501 U.S. 429 (1991).

²⁷ *Mendenhall*, 446 U.S. at 554; *see also Bostick*, 501 U.S. at 437.

²⁸ *Washington*, 490 F.3d at 770. The panel’s reasons were similar to those of the district court. *Compare Washington*, 490 F.3d at 770, with discussion *supra* note 21.

²⁹ 38 F.3d 488 (9th Cir. 1994). The panel considered: “(1) the number of officers; (2) whether weapons were displayed; (3) whether the encounter occurred in a public or non-public setting; (4) whether the officer’s tone or manner was authoritative, so as to imply that compliance would be compelled; and (5) whether the officers informed the person of his right to terminate the encounter.” *Washington*, 490 F.3d at 771–72.

³⁰ *Washington*, 490 F.3d at 773.

³¹ *Id.* at 772.

³² *Id.* at 774.

³³ 361 F.3d 494 (9th Cir. 2004). The five factors the court considered were: “(1) whether defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether Miranda warnings were given; (4) whether the defendant was notified that [he] had a right not to consent; and (5) whether the defendant had been told a search warrant could be obtained.” *Washington*, 490 F.3d at 775 (alteration in original) (quoting *Soriano*, 361 F.3d at 502) (internal quotation marks omitted).

context in which Washington made his decision.³⁴ The panel held that the district court “clearly erred” in finding that Washington’s consent was voluntary.³⁵ The court held that even if his consent to the car search were voluntary, the gun was barred as fruit of the poisonous tree because Washington had been unconstitutionally seized.³⁶

The *Washington* search and seizure determinations were more reflective of the totality of the circumstances than the traditional Ninth Circuit analyses have been, and this increased contextualization realigned those determinations with Fourth Amendment goals and the principles underlying the reasonableness and voluntariness standards.³⁷ By focusing on the viewpoint of a reasonable civilian *in that neighborhood* and considering community history, the court took a significant step toward grounding the analysis in reality. Other courts should follow suit, making a subtle shift or — better yet — a more explicit move to approach search and seizure determinations from a civilian perspective and to consider community context.

The viewpoint and type of facts that the *Washington* court considered differed significantly from traditional Ninth Circuit reasonable person and voluntariness evaluations. In pre-*Washington* practice, Ninth Circuit factors included only the specific details of the encounter and not background circumstances.³⁸ In addition, the *Orhorhaghe* and

³⁴ *Washington*, 490 F.3d at 775. The context included the “unique situation” in the community after the two fatal shootings. *Id.* Judge Gould placed discussion of the context of Washington’s consent decision ambiguously; he could have been including it in the first *Soriano* factor, custody, or it could have been an additional factor, separate from those outlined in *Soriano*. Moreover, Judge Gould did not specify what was “unique” about the community situation.

³⁵ *Id.* at 775–76.

³⁶ *Id.* at 777.

³⁷ Because of the nature of the facts and the analyses in *Washington*, the discussion below does not address the voluntariness of confessions.

³⁸ See, e.g., *Soriano*, 361 F.3d at 502; *Orhorhaghe v. INS*, 38 F.3d 488, 494–96 (9th Cir. 1994). Although the *Orhorhaghe* and *Soriano* factors are “non-exhaustive,” *Washington*, 490 F.3d at 771, neither includes elements of the broader community context. Cf. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 213 (2001) (stating that “the subjective views of the suspect are almost invariably ignored by the courts” in consent law). Some landmark Supreme Court seizure cases also include language that reveals a preference for details of the encounter. See, e.g., *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (stating that “the crucial test is whether . . . the police conduct would ‘have communicated to a reasonable person that he was not at liberty to [leave]’” (emphasis added) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988))); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (giving examples of circumstances that might indicate seizure, including the “threatening presence of several officers,” an officer displaying a weapon, an officer physically touching the citizen, and the officer’s language or tone). In addition to the articulated factors, the Ninth Circuit has general standards for search and seizure that focus on the conduct of police officers during the encounter. See *United States v. Washington*, 387 F.3d 1060, 1068 (9th Cir. 2004).

The listed factors may be limited to the details of the encounter because such egregious background circumstances less frequently exist, but, as the *Washington* circumstances (the earlier shootings and the pamphlets) show, such events *when existent* would likely affect the voluntariness of a reasonable person’s consent.

Soriano factors focus on police conduct, a choice that orients courts to approach the encounter from the police perspective (the viewpoint of an officer who may have violated the Constitution) instead of from a civilian perspective (the viewpoint of a civilian whose constitutional rights may have been violated).³⁹ Yet the traditional tests for seizure and voluntariness are, at least in theory, not in tension with approaching the analyses from a civilian's perspective or considering background circumstances. Although the court did not narrow the reasonable person analysis to the subjective views of Washington individually, the court situated the reasonable person and voluntariness evaluations within a particular community.

Including background circumstances and the civilian perspective in search and seizure analyses brings the reasonable person and voluntariness standards closer to their underlying purposes and to people's lived experiences. One purpose of the Fourth Amendment is to prevent, and to protect people from, unreasonable searches and seizures.⁴⁰ To administer seizure and voluntariness tests in a thorough manner requires knowing more than mere details about the location and the interactions during the encounter.⁴¹ In combination, community

³⁹ Professor Devon Carbado uses the term "perpetrator perspective" to describe the "Court's active construction of an imaginary, race-less arena in which law enforcement and minorities interact[, in which the] focus on racist actors serves to blur the experiences of race victims." Carbado, *supra* note 2, at 968 n.107. Professor Carbado argues that the Supreme Court should move away from the "perpetrator perspective" in favor of the "victim perspective," which is expressly race-conscious and thus "more concerned with the coercive and disciplinary ways in which race structures the interaction between police officers and nonwhite persons." *Id.* at 970; see also Nadler, *supra* note 2, at 162–63 (discussing the differences in approaching search and seizure questions from a "citizen perspective" and a "police perspective").

The consideration of background circumstances and the perspective from which the court approaches the analyses are related but distinct. Although a court employing a civilian perspective would be more likely to consider background circumstances than a court employing a police perspective, as a civilian is more likely to be aware of the significance of those circumstances, a court could also consider background circumstances from a police perspective. The police perspective would likely cause a court to underestimate the influence of background circumstances on a reasonable person and on voluntariness. For example, a police officer might think that earlier encounters involving different actors would not influence a civilian in the present encounter, but a civilian might have the images of those earlier shootings at the forefront of his mind out of fear for his own safety. Conversely, a court could approach the analyses from a civilian perspective and still exclude relevant background: the court would consider the specific details of the encounter — such as police behavior — through the eyes of a civilian, but would not include other circumstances that a civilian might consider relevant.

⁴⁰ See U.S. CONST. amend. IV; DRESSLER & MICHAELS, *supra* note 6, at 55.

⁴¹ See *Chesternut*, 486 U.S. at 573 (explaining that what constitutes a seizure "will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs"). Psychology studies have shown that the power of authority can act upon participants in a scenario to an extent nearly incomprehensible to an outside observer. See Nadler, *supra* note 2, at 155–56, 172–85; Strauss, *supra* note 38, at 236–44.

Judges making search and seizure determinations are not likely to consider background circumstances despite the influential role that the community situation can play. See Nadler, *supra*

events such as the shootings in *Washington* and individuals' innate tendencies to comply with authority — as demonstrated by Leonard Bickman's and Stanley Milgram's psychological experiments⁴² — could have significant effects on police-civilian encounters. In some cases, background circumstances might be even more significant for evaluating seizure and voluntariness than the typical factors: a circumstance that provokes a fear of being killed by police would likely have a stronger impact than the time of day or the number of officers present on whether a person feels free to leave or to decline the search. *Washington* realigned the analyses with the Fourth Amendment reasonableness requirement by expanding the police conduct inquiry to include the recent egregious actions of other local police officers.⁴³ Including community context in the constitutional analyses also furthers the purposes of the Amendment: it discourages illegal searches and seizures by threatening suppression of evidence in future cases, and it preserves the integrity of courts by keeping judges' hands unsoiled by evidence gathered in a police-created climate of fear.⁴⁴

Despite these benefits, courts may be reluctant to assume the civilian perspective and to consider community context in their analyses because doing so might undermine the quasi-fiction of individual free will in police-citizen interaction⁴⁵ and lead to political backlash. Courts have resisted acknowledging the lack of free will in Fourth Amendment police encounters⁴⁶ because traditional search and seizure evaluations would collapse if courts accepted that the reasonable per-

note 2, at 169 (stating that "behavior that looks voluntary from the outside can feel constrained by the situation from the perspective of the actor" and that "people are strongly inclined toward explaining another person's behavior in terms of . . . intentions and dispositions . . . while ignoring aspects of the situation").

⁴² In Milgram's experiments, over 65% of participants obeyed an experimenter and delivered what they were told were "severe shocks" to an actor playing a fellow test subject. Nadler, *supra* note 2, at 172–79. In Bickman's compliance studies, 82% of participants obeyed the directions of a man wearing a guard's uniform, and 56% of subjects obeyed an "unreasonable demand." Strauss, *supra* note 38, at 236–40.

⁴³ As likely unreasonable state action, the earlier shootings and pamphlets are relevant to the later search and seizure determinations. When police action is as egregious as it was in the shootings, that action is likely to make an impression on the community beyond that specific event.

⁴⁴ See DRESSLER & MICHAELS, *supra* note 6, at 369–70.

⁴⁵ See Nadler, *supra* note 2, at 155–56, 172–85; Strauss, *supra* note 38, at 236–44.

⁴⁶ Study after study shows that people generally do not feel free to walk away from police or to decline an officer's request to search. See Nadler, *supra* note 2, at 155–56, 172–79; Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 233 (asserting that the concept of voluntary consent ignores psychological findings that "most people mechanically obey legitimate authority"). Black individuals, and black men in particular, may have "racial survival strateg[ies]" or internalized "rules of the game" that require obedience to police requests. Carbado, *supra* note 2, 953–54; see also Tracey Maclin, "Black and Blue Encounters" — *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243 (1991).

son generally does not feel free to leave or to decline an officer's request.⁴⁷ Furthermore, a judge who overtly includes community context in his or her analysis and who approaches the Fourth Amendment from the civilian perspective is vulnerable to harsh public attack.⁴⁸

To overcome these impediments, courts could employ the civilian perspective and consider background circumstances in a subtle fashion, as the *Washington* panel did.⁴⁹ The holding may have turned more on racial tension than the panel admitted: racialized community tension is the only major fact the panel considered that the district court did not, and the panel, after considering it, found that the district court clearly erred. The Ninth Circuit's consideration of community context was a compromise: it admitted that some events outside of the specific police encounter could be so extreme that they impact a reasonable person, yet it maintained the judicial administrability of Fourth Amendment doctrine by not expressly advocating for the consideration of background circumstances in all cases. Finally, the *Washington* panel avoided political backlash by emphasizing that the holding could have been the same under more traditional analyses: even without considering the community-police tension, the defendant still could have been found illegally seized,⁵⁰ consent still could have been

⁴⁷ See Nadler, *supra* note 2, at 155–56 (claiming that “the Court’s Fourth Amendment consent jurisprudence is either based on serious errors about human behavior and judgment, or else has devolved into a fiction of the crudest sort”). If a court recognizes that people generally do not feel free to decline consent or to terminate an encounter, then the resulting search and seizure standards either would make unconstitutional almost all police-civilian encounters or would return to ignoring the general lack of free will and consider only more extreme situations.

⁴⁸ See Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts To Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 310–12 (1997); Jon O. Newman, *The Judge Baer Controversy*, 80 JUDICATURE 156 (1997). The experience of Judge Baer is a testament to this possibility. In *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), Judge Baer granted a motion to suppress both physical evidence found in a car search and post-arrest statements because he found that the investigatory stop at issue was invalid due to a lack of reasonable suspicion. *Id.* at 243. Although the judge explicitly stated that he was conducting an analysis “from the officer’s perspective,” he repeatedly doubted the validity of the police officer’s account, looked at the situation leading to the encounter from the civilian perspective, and pointed to community context — past police corruption in the neighborhood — to claim that it would have been “unusual” if the defendant’s acquaintances had “not run when the cops began to stare at them.” *Id.* at 239, 240, 242. In response to the controversial opinion, more than 200 members of Congress demanded that President Clinton call for Judge Baer’s resignation, and the Clinton administration effectively put Judge Baer on notice by announcing that it would decide whether to call for Judge Baer’s resignation after the judge decided the then-pending motion for reconsideration of the case. Newman, *supra*, at 156–57.

⁴⁹ There is evidence that the *Washington* panel minimized the importance of racialized community tension. Judge Gould included a description of the shootings and the community-police situation in the background section of the opinion, omitted these details from his three-page analysis of the seizure, and then included the facts in the summary of the seizure determination. *Washington*, 490 F.3d at 768–73.

⁵⁰ See *id.* at 775.

involuntary,⁵¹ and even if consent had been voluntary, the gun would still have been excluded as fruit of the poisonous tree.⁵²

While *Washington*'s subtle approach is a step in the right direction, a more overt approach is better for notice and precedential reasons: it would provide police and other courts with an enhanced understanding of what is unreasonable in police-civilian interactions. Other courts should articulate what the *Washington* panel did not: when should a court consider background circumstances and what are the reasons for adopting a civilian perspective?⁵³ Even though the *Washington* panel did not specify what made Portland's racialized community tension significant enough to be considered in the court's evaluations, a court could derive principles for the inclusion of background circumstances from the facts of *Washington*. Such principles might include the circumstances' temporal proximity to the encounter at issue, geographical proximity to the encounter, notoriety, egregiousness, and analogousness of actors.⁵⁴ To ensure that community context is considered only when it has influenced the encounter, courts should require the defendant's specific knowledge of a background event.

Unlike other cases analyzing aggressive police behavior, *Washington* is unique because the panel considered search and seizure *in light of* the earlier police brutality. By approaching the question from a civilian perspective and including background circumstances in its analyses, the Ninth Circuit made significant progress toward establishing Fourth Amendment standards that are more reflective of reality and hew closer to its privacy and dignity goals. Now other courts should pick up where *Washington* left off.

⁵¹ Even though the court admitted that some factors had significant impacts, the court emphasized that none of the factors — this would include racialized community tension — was a necessary factor to find that Washington's consent was involuntary. *Id.* at 775.

⁵² *Id.* at 776–77.

⁵³ The *Washington* panel did not suggest that evidence of tension as strong as the pamphlet is necessary, nor did the court set some type of threshold requirement for consideration. The races of the police officers and defendant involved in *Washington* mirrored those of the police officers and victims in the prior shootings, but it is unclear whether that would be required for tension to be considered in a future case.

⁵⁴ These factors should be weighed in an interdependent manner. For instance, in a situation like *Washington* where recent police killings have occurred, racial analogousness of the actors might be less important.