The Burger Court Opinion Writing Database

United States v. Brignoni-Ponce

422 U.S. 873 (1975)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1975

Re: 74-114 - United States v. Brignoni-Ponce
73-2050 - United States v. Ortiz
73-6848 - Bowen v. United States

Dear Lewis:

To keep you informed, my present view is that 73-6848, Bowen v. United States, should be affirmed.

As to 74-114, United States v. Brignoni-Ponce, and 73-2050, United States v. Ortiz, I am not yet persuaded to affirm.

I am glad you now avoid the "area search warrant" approach but I fear we may not have found the key I need to resolve this problem.

As of now, in the latter two cases, I am close to where I was at Conference.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 12, 1975

Re: No. 74-114 - United States v. Brignoni-Ponce

Dear Bill:

Your June 10 memorandum appeals to me. My sense of survival leads me toward "parts" when I can't get "loaves." If the other "losers" go with you, I'll join to make a united front. Is there any way to exploit an opening here for a selective suppression doctrine?

Regards,

WEB

Mr. Justice Rehnquist

cc: Mr. Justice White
Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 23, 1975

Re: No. 74-114 - United States v. Brignoni-Ponce

Dear Bill:

Please show me as joining your concurrence but I may join only the judgment, thereby limiting my concurrence.

I will act as soon as Lewis' "whole package" is clear to me.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 25, 1975

Re: No. 74-114 - United States v. Brignoni-Ponce

Dear Bill:

I am writing separately in the above and I think it better to have that stand alone, so please withdraw my "join" of June 23.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 5, 1975

Dear Lewis:

RE: United States v. Brignoni-Ponce, 74-114

If your memorandum in this case becomes an opinion of the Court I shall file the enclosed statement concurring in the judgment.

WILLIAM O. DOUGLAS

Mr. Justice Powell

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-114

United States, Petitioner, *v.* Felix Humberto Brignoni-Ponce. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1975]

MR. JUSTICE DOUGLAS, concurring in the judgment.

I join in the affirmance of the judgment. The stopping of respondent's automobile solely because its occupants appeared to be of Mexican ancestry was a patent violation of the Fourth Amendment. I cannot agree, however, with the standard the Court adopts to measure the lawfulness of the officers' action. The Court extends the "suspicion" test of *Terry* v. *Ohio*, 392 U. S. 56, to the stop of a moving automobile. I dissented from the adoption of the suspicion test in *Terry*, believing it an unjustified weakening of the Fourth Amendment's protection of citizens from arbitrary interference by the police. I remarked then that

> "The infringement of any 'seizure' of the person can only be 'reasonable' under the Fourth Amendment if we require the police to possess 'probable cause' before they seize him. Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge that the person seized has committed, is committing, or is about to commit a crime." *Terry* v. *Ohio, supra*, at 38.

The fears I voiced in *Terry* about the weakening of the Fourth Amendment have regrettably been borne out

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 28, 1975

RE: No. 74-114 United States v. Brignoni-Ponce

Dear Lewis:

After our discussion please note me as joining you in full your opinion in the above.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 28, 1975

No. 74-114, U. S. v. Brignoni-Ponce

Dear Lewis,

I agree with your memorandum in this case and would join it as an opinion of the Court.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JSTICE THURGOOD MARSHALL

May 28, 1975

Re: No. 74-114, U.S. v. Brignoni-Ponce

Dear Lewis:

I agree with your memorandum in this case and would join it as an opinion of the Court.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

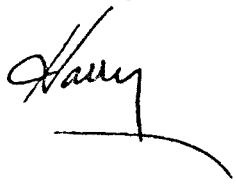
June 11, 1975

Re: No. 74-114 - United States v. Brignoni-Ponce

Dear Bill:

This is in response to your letter of June 10. I am sympathetic to the approach.

Sincerely,



Mr. Justice Rehnquist

cc: The Chief Justice
Mr. Justice White

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

2nd DRAFT

From: Powell, J.

Circulated: May 24, 1975

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 74-114

United States, Petitioner, v. Felix Humberto Brignoni-Ponce. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1975]

Memorandum of MR. JUSTICE POWELL.

This case raises questions as to the United States Border Patrol's authority to stop automobiles in areas near the Mexican border. It differs from our decision in *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973), in that the Border Patrol does not claim authority to search cars, but only to question the occupants about their citizenship and immigration status.

I

As a part of its regular traffic checking operations in southern California, the Border Patrol operates a fixed checkpoint on Interstate Highway 5 south of San Clemente. On the evening of March 11, 1973, the checkpoint was closed because of inclement weather, but two officers were observing northbound traffic from a patrol car parked at the side of the highway. The road was dark, and they were using the patrol car's headlights to illuminate passing cars. They pursued respondent's car and stopped it, saying later that their only reason for doing so was that its three occupants appeared to be of Mexican descent. The officers questioned respondent and his two passengers about their citizenship and

pp 4, 11

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: _____

Recirculated: JUN 10 1975

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-114

United States, Petitioner, v. Felix Humberto Brignoni-Ponce. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1975]

Memorandum of MR. JUSTICE POWELL.

This case raises questions as to the United States Border Patrol's authority to stop automobiles in areas near the Mexican border. It differs from our decision in *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973), in that the Border Patrol does not claim authority to search cars, but only to question the occupants about their citizenship and immigration status.

I

As a part of its regular traffic checking operations in southern California, the Border Patrol operates a fixed checkpoint on Interstate Highway 5 south of San Clemente. On the evening of March 11, 1973, the checkpoint was closed because of inclement weather, but two officers were observing northbound traffic from a patrol car parked at the side of the highway. The road was dark, and they were using the patrol car's headlights to illuminate passing cars. They pursued respondent's car and stopped it, saying later that their only reason for doing so was that its three occupants appeared to be of Mexican descent. The officers questioned respondent and his two passengers about their citizenship and

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 19, 1975

Cases Held for No. 74-114 U.S. v. Brignoni-Ponce

MEMORANDUM TO THE CONFERENCE:

No. 74-993 Janney v. United States
No. 74-6150 Coffey and Sparks v. United States

These two cases are exactly like No. 74-6016, Arnold v. United States, and the petition of Bylund and Dixon in No. 74-6014, discussed in the memo of cases held for United States v. Ortiz. In each case the petitioner was stopped at the Sierra Blanca checkpoint and, in the course of questioning, Border Patrol officers discovered evidence that provided probable cause for a search. In each case CA5 relied on its decision in Hart. If the Court wants to review the functional equivalency issue, in hopes of reaching the stop question, these cases should be held. If the Court vacates and remands in the other cases, I think these petitioners should receive the same treatment. I might add that these Sierra Blanca cases are the only petitions presently before us that potentially present the issue of stops for questioning at checkpoints. I was in error in my memorandum of May 23, in suggesting that several pending petitions presented this issue. Our options, if we want to settle this remaining issue, are to grant one of these petitions despite the "functional-equivalency" hurdle, or to wait for a petition that presents the issue cleanly. My current inclination is to vacate and remand these petitions and wait.

No. 74-5062 Quiroz-Reyna v. United States
No. 74-5307 Baca v. United States

These petitions involve stops conducted prior to the date of decision in Almeida-Sanchez. None of the present

Citechecking changes throughout.
1, 8, 9, 10, 12

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Powell, J.

Circulated: JUN 25 1975

Recirculated: _____

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-114

United States, Petitioner, v. Felix Humberto Brignoni-Ponce. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case raises questions as to the United States Border Patrol's authority to stop automobiles in areas near the Mexican border. It differs from our decision in *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973), in that the Border Patrol does not claim authority to search cars, but only to question the occupants about their citizenship and immigration status.

I

As a part of its regular traffic checking operations in southern California, the Border Patrol operates a fixed checkpoint on Interstate Highway 5 south of San Clemente. On the evening of March 11, 1973, the checkpoint was closed because of inclement weather, but two officers were observing northbound traffic from a patrol car parked at the side of the highway. The road was dark, and they were using the patrol car's headlights to illuminate passing cars. They pursued respondent's car and stopped it, saying later that their only reason for doing so was that its three occupants appeared to be of Mexican descent. The officers questioned respondent and his two passengers about their citizenship and

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 10, 1975

Re: No. 74-114 - United States v. Brignoni-Ponce

Dear Fellow Losers:

At this stage of the Term, it seems to be the common understanding that we have two choices in this case and in Ortiz, both of which represent extensions of Almeida-Sanchez in which we dissented. The first choice is to continue our votes to reverse the Court of Appeals, and thereby under Conference practice during the past few months to require the cases to go over for reargument next fall. The other choice is to try to persuade Lewis to make some modifications in his draft opinion in exchange for the four of us concurring either in the opinion or in the result.

I think the second choice has much to be said for it for at least two reasons. First is that if we follow the first option we are apt in the long run to find that it will become a Court opinion in spite of our disagreement with it, and as presently drafted it has a good deal of potential for spill-over into areas quite different from Border Patrol searches. The basic conception of the opinion, as I now read it, is that even though the governmental interest is significant, and the intrusion produced by a stop is minor, the interest of innocent citizens in using the highway is such that even this

minor intrusion will not be permitted under the Fourth Amendment. I am hopeful that Lewis may be amenable to changing some of the language in his opinion so as to shift its emphasis in a way that would confine the result more to the particular situation of the Border Patrol, and leave open not merely in form but in substance the question of the propriety of stops where the stop is related to inquiring as to whether conditions imposed by law for operating a vehicle on a public highway have been met.

The second reason why I think it wise to pursue the second alternative is that it does seem to me that we all have institutional responsibility for getting these cases decided this Term. I don't think any of those who have voted to join Lewis are about to change, and so the changes will have to come from us. If it were a case of a numerically evenly divided Court, it could well be argued that there is no more reason for us to alter our views than for those on the other side to alter theirs, but here there is a five man majority in support of Lewis' present position.

Feeling as I do, I want to take this opportunity to sound out each of the three of you on the proposed changes in the draft opinion which are attached to this memorandum. I include a partial rewrite of pages 8 and 9 of the May 24th circulation, together with a typed footnote "7a" following revised page 9, and an insertion on page 11 of the phrase "give rise" to the present word "add" in the eighth line on that page.

I have no idea whether these changes would be satisfactory to Lewis, and I am quite sure they might produce some objections on the part of others who have joined his present draft. But here we do have some bargaining strength. Lewis has proposed to me a somewhat pro forma footnote which would go on page 9 of the present draft and read as follows:

> "Our decision is based on an assessment of the Border Patrol's function, its statutory authority for stopping vehicles, and the character of stops for questioning in the border areas. We imply no view as to issues that may arise with respect to state and local law enforcement practices of stopping vehicles for such purposes as checking driver's licenses and auto registration, weighing trucks, or enforcing agricultural quarantines."

While this adequately reserves these issues in form, I do not regard it as being nearly as satisfactory as the proposed changes in language which I have incorporated in the attachments to this memorandum. I have heard enough discussions in three and a half years of Conference to realize that a simple footnote in a case saying, "We do not decide this question," is not always thought by everybody who joins the opinion to mean exactly what it says, and I would like to make sure that the opinion itself is structured in such a way as to genuinely reserve these issues.

If that is done, I would propose something very generally along the following as a concurring statement for as many of the four of us as agree with it, probably to be issued in the name of the Chief Justice, as our senior and mentor, or in Byron's name, if he were willing, since he authored the dissent in Almeida-Sanchez:

> "We dissented from the Court's decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), and we are of the view that the Court's decision in this case represents a still further extension of departures taken in that case. Nonetheless, because a majority of the Court adheres

to Almeida, and believes that this case should be similarly resolved, we [join in the Court's opinion] [concur in the result].

"We think it quite important to point out, however, that the Court's opinion and reasoning deal only with the type of stop involved in this case. We think that just as travelers entering the country may be stopped and searched without probable cause and without founded suspicion because of 'national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in,' Carroll v. United States, 267 U.S. 132, 154 (1925), a strong case may be made for those charged with the enforcement of laws conditioning the right of vehicular use of a highway to likewise stop motorists using highways in order to determine whether they have met the qualifications prescribed by applicable law for such use. See Cady v. Dombrowski, 413 U.S. 433, 440-441 (1973); United States v. Biswell, 406 U.S. 311 (1972). We regard these and similar situations, such as agricultural inspections and highway roadblocks to apprehend known fugitives, as not in any way constitutionally suspect by reason of today's decision."

I would appreciate receiving your reaction to this very rough and tentative proposal.

Sincerely,

The Chief Justice
Mr. Justice White
Mr. Justice Blackmun

identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.*, at 145–146.

These cases together establish that in appropriate circumstances the Fourth Amendment allows a properly limited "search" or "seizure" on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime. In both *Terry* and *Adams* v. *Williams* the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous. The limited searches and seizures in those cases were a valid method of protecting the public and preventing crime. In this case as well, because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion. As in *Terry*, the stop and inquiry must be "reasonably related in scope to the justification for their initiation." 392 U. S., at 29. The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops.[7] We conclude that in the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the government. Roads near the border carry not only

[7] Because the stop in this case was made without a warrant and the officers made no effort to obtain one, we have no occasion to decide whether a warrant could be issued to stop cars in a designated

aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.3 million, is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that a large majority of traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to interference with their use of the highways, solely at the discretion of Border Patrol officers who seek to enforce laws having nothing to do with the regulation of highway use.[7a] The only formal limitation on that discretion appears to be the administrative regulation defining the term "reasonable distance" in § 287 (a)(3) to mean within 100 air miles from the border. 8 CFR § 287.1 (1974). That, however, is not enough, at least in these circumstances. If we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law. Yet the cases in which border area stops have been considered establish that bases for reasonable suspicion are available to Border Patrol officers. As we discuss in Part IV, infra, the nature of the violations which are here involved naturally generate articulable grounds for differentiating between violators and nonviolators. Even though the intrusion involved in Border Patrol stops is admittedly modest, we do not think it "reasonable" under the Fourth Amendment to make such stops on a random basis when means are available to protect law-abiding residents from indiscriminate official interference.

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area on the basis of conditions in the area as a whole and in the absence of reason to suspect that any particular car is carrying aliens. See *Almeida-Sanchez, supra,* at 275 (MR. JUSTICE POWELL, concurring); *Camara* v. *Municipal Court,* 387 U. S. 523 (1967).

Footnote 7a/

Our decision in this case is based on an assessment of the Border Patrol's function, theimportance of the governmental interests served by its stops, the character of its stops, and, as discussed below, the availability of alternatives to indiscriminate stops unsupported by reasonable suspicion. The decision is also one which concerns stops having nothing to do with an inquiry whether highway users and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local law enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding driver's licenses, vehicle registration, truck weights, agricultural quarantines and similar matters.

6/23/75

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

From: Rehnquist, J.

Circulated: 6/23/75

Recirculated: _____

No. 74-114, United States v. Brignoni-Ponce

MR. JUSTICE REHNQUIST, concurring:

I join in the opinion of the Court. I think it quite important to point out, however, that that opinion, which is joined by a somewhat different majority than that which comprised the Almeida court, is both by its terms and by its reasoning concerned only with the type of stop involved in this case. I think that just as travelers entering the country may be stopped and searched without probable cause and without founded suspicion, because