The Burger Court Opinion Writing Database

United States v. Hensley

469 U.S. 221 (1985)

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

(12)

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

CHAMBERS OF
THE CHIEF JUSTICE

December 21, 1984

Re: No. 83-1330 - United States v. Thomas J. Hensley

Dear Sandra,

I join.

Regards,

Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 6, 1984

No. 83-1330

United States v. Hensley

OK

Dear Thurgood,

Sandra's opinion in this case seems to me largely to obviate the concerns that led me to vote to dissent at Conference. I therefore propose to send the attached letter and concurrence to Sandra and to the Conference. However, I won't do that yet, if you intend to write. Do you?

Sincerely,

Bill

Justice Marshall

No. 83-1330

United States v. Hensley

JUSTICE BRENNAN, concurring.

I join the opinion of the Court. With respect to its effect on respondent's "right to be secure ... in his person" guaranteed by the Fourth Amendment, the stop in this case -- although it no doubt was a serious intrusion on respondent's privacy -- lasted a mere matter of moments, see ante, p. ___, before the discovery of the gun ripened what had been merely reasonable suspicion into the full-scale probable cause necessary for an arrest. For circumstances like these, Terry v. Ohio, 392 U.S. 1 (1968) "defined a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test." Dunaway v. New York, 442 U.S. 200, 210 (1979). See ante, p. 6. Such a balancing test is appropriate as long as it is conducted, as here, with full regard for the serious privacy interests implicated even by such a relatively nonintrusive stop. See Terry v. Ohio, 392 U.S. 1, 24-25 (1968). Of course, in the case of intrusions properly classifiable as full-scale arrests for Fourth Amendment purposes, no such balancing test is needed. Such arrests are governed by the probable cause standard provided by the text of the Fourth Amendment itself.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 6, 1984

No. 83-1330

United States v. Hensley

Dear Sandra,

I had originally intended to dissent in this case. However, your persuasive opinion has largely convinced me otherwise. Like John, I believe that the Covington Police Department's actions are valid only if the St. Bernard Police Department could have performed the same actions. Like Harry and John, I too could join your opinion if you make that change. I shall also file the enclosed.

Sincerely,

Justice O'Connor

Copies to the Conference

Enclosure

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 10, 1984

Re: United States v. Hensley, No. 83-1330

Dear Sandra:

I had originally intended to dissent in this case, but your persuasive opinion has largely convinced me otherwise. However, I am troubled by two relatively minor points on page 11 of the draft. First, I wonder about the advisability of including the two sentences on page 11 beginning with "If the flyer has been issued in the absence ..." Neither the parties nor the lower court in this case addressed the issue of civil damage actions arising from stops like that conducted here. If any modification of ordinary immunity law is required to take account of our decision in this case (and I do not take your opinion to be intending such a modification), should we not address that issue in a case where it is squarely presented? Second, in the last sentence of the same paragraph the draft speaks of stops as legitimate if "not significantly more intrusive than would have been permitted the issuing department." I am uncomfortable with the idea that the second police department has any greater authority in these circumstances than the first police department and would therefore prefer that the word "significantly" be removed from this sentence.

If you could make these modifications, I would be pleased to join and would file only the enclosed concurrence.

Sincerely,

W.J.B.,Jr.

Justice O'Connor
Copies to the Conference

84 DEC 10 61:42

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: 12/10/84

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1330

UNITED STATES, PETITIONER *v.*
THOMAS J. HENSLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[December ——, 1984]

JUSTICE BRENNAN, concurring.

I join the opinion of the Court. With respect to its effect on respondent's "right to be secure . . . in his person" guaranteed by the Fourth Amendment, the stop in this case—although it no doubt seriously infringed upon respondent's privacy—lasted a mere matter of moments, see *ante*, at 3, before the discovery of the gun ripened what had been merely reasonable suspicion into the full-scale probable cause necessary for an arrest. For circumstances like these, *Terry* v. *Ohio*, 392 U. S. 1 (1968), "defined a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test." *Dunaway* v. *New York*, 442 U. S. 200, 210 (1979). See *ante*, at 6. Such a balancing test is appropriate as long as it is conducted with full regard for the serious privacy interests implicated even by such a relatively nonintrusive stop. See *Terry* v. *Ohio*, *supra*. Of course, in the case of intrusions properly classifiable as full-scale arrests for Fourth Amendment purposes, no such balancing test is needed. Such arrests are governed by the probable cause standard provided by the text of the Fourth Amendment itself.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 12, 1984

Re: United States v. Hensley, No.83-1330

Dear Sandra:

Thank you so much for trying to accomodate me. Your suggested changes on immunity are wholly agreeable, but I'm afraid your substitution for "significantly" causes me even greater worry than the original language. I think that I'd prefer that you leave unchanged the "not significantly more intrusive" sentence. I would then be pleased to join your opinion.

Sincerely,

W.J.B.,Jr.

Justice O'Connor
Copies to the Conference

'84 DEC 13 AM 11:28

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 13, 1984

No. 83-1330

United States v. Hensley

Dear Sandra,

I do appreciate all you have done to accommodate my suggestions and I am happy to join your third draft. I shall, of course, file the concurrence that I have already circulated.

Sincerely,

Bill

Justice O'Connor

Copies to the Conference

84 DEC 13 AM 11:55

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 29, 1984

83-1330 - United States v. Hensley

Dear Sandra,

Please join me.

Sincerely yours,

Byrm

Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 18, 1984

Re: No. 83-1330-U.S. v. Hensley

Dear Sandra:

Please join me.

Sincerely,

T.M.

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 4, 1984

Re: No. 83-1330, United States v. Hensley

Dear Sandra:

I am sympathetic to the modification suggested by John. If you could see you way clear to adopt his suggestion, I, too, would be prepared to join.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 13, 1984

Re: No. 83-1330, United States v. Hensley

Dear Sandra:

Please join me.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

84 DEC 13 P1:30

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 6, 1984

83-1330 United States v. Hensley

Dear Sandra:

Please join me.

Sincerely,

Lewis

Justice O'Connor

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 30, 1984

Re: No. 83-1330 United States v. Hensley

Dear Sandra,

Please join me.

Sincerely,

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 29, 1984

Re: 83-1330 - United States v. Hensley

Dear Sandra:

Although I have had a good deal of difficulty with this case, when I read your draft opinion I found that I was persuaded until I came to the bottom of page 10. You conclude that the justification for a Terry stop based on another police department's flyer or bulletin depends on what the flyer or bulletin says, rather than the information in the originating police department that gave rise to the flyer. It would seem to me that the validity of the stop, like the validity of the arrest in Whiteley, should depend on the information that was available to the entire police establishment. I would therefore propose that the concluding paragraph on page 10 be revised to read something like this:

> "We conclude that, if a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification."

Subsequent portions of the opinion would, of course, have to be changed to conform to this reading.

It seems to me most unwise for the Court to endorse stops that are based on totally unsupported flyers or bulletins simply because they appear to be facially valid. I would agree, of course, that an officer making such a stop would have a good faith defense to any suit based on the incorrect stop, but I simply cannot understand why we should conclude that such a stop is legitimate. Indeed, the Government's

brief seemed to endorse "the proposition that an officer who receives a police bulletin has 'the same right' to make a stop or an arrest as the officer who issued the bulletin." Brief, at 19.

In all events, if you could see your way clear to recasting this part of the opinion, I would be prepared to join you.

Respectfully,

Justice O'Connor

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

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

December 12, 1984

Re: 83-1330 - United States v. Hensley

Dear Sandra:

Please join me.

Respectfully,

J.P.S.

Justice O'Connor

Copies to the Conference

84 DEC 15 P5:18

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: NOV 29 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1330

UNITED STATES, PETITIONER *v.*
THOMAS J. HENSLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[November ——, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari in this case, —— U. S. —— (1984), to determine whether police officers may stop and briefly detain a person who is the subject of a "wanted flyer" while they attempt to find out whether an arrest warrant has been issued. We conclude that such stops are consistent with the Fourth Amendment under appropriate circumstances.

I

On December 4, 1981, two armed men robbed a tavern in the Cincinnati suburb of St. Bernard, Ohio. Six days later, a St. Bernard police officer, Kenneth Davis, interviewed an informant who passed along information that respondent Thomas Hensley had driven the getaway car during the armed robbery. Officer Davis obtained a written statement from the informant and immediately issued a "wanted flyer" to other police departments in the Cincinnati metropolitan area.

The flyer twice stated that Hensley was wanted for investigation of an aggravated robbery. It described both Hensley and the date and location of the alleged robbery, and asked other departments to pick up and hold Hensley for the St. Bernard police in the event he were located. The flyer also warned other departments to use caution and to consider Hensley armed and dangerous.

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 30, 1984

No. 83-1330 United States v. Hensley

Dear John,

Thank you for your letter. What is at issue here is the admissibility of the evidence obtained on making the Terry stop. Under either your view or my view, it is admissible if the officers issuing the flyer had specific articulable facts giving them reasonable suspicion justifying the stop. The evidence is inadmissible if they did not. Under either your view or mine, the officers acting in good faith reliance on an objective reading of the flyer from another department would not be liable in civil damages for so acting. The only practical difference in our views is whether a civil damage action can be dismissed outright or whether it is subject to proof by the officers of their good faith reliance.

If those who have joined the circulating opinion or who plan to join it agree with you, I will make the appropriate changes. Should we circulate our exchange of letters to the Conference?

Sincerely,

Sandra

Justice Stevens

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 8, 1984

No. 83-1330 United States v. Hensley

Dear John,

Since our correspondence has been circulated to the Conference I have heard no objection from others to accommodating your suggestion. I have made the suggested changes in the new draft circulated herewith as noted on pages 10, 11, and 13.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference

10-11, 13

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: DEC 8 1984

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1330

UNITED STATES, PETITIONER *v.*
THOMAS J. HENSLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[November ——, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari in this case, —— U. S. —— (1984), to determine whether police officers may stop and briefly detain a person who is the subject of a "wanted flyer" while they attempt to find out whether an arrest warrant has been issued. We conclude that such stops are consistent with the Fourth Amendment under appropriate circumstances.

I

On December 4, 1981, two armed men robbed a tavern in the Cincinnati suburb of St. Bernard, Ohio. Six days later, a St. Bernard police officer, Kenneth Davis, interviewed an informant who passed along information that respondent Thomas Hensley had driven the getaway car during the armed robbery. Officer Davis obtained a written statement from the informant and immediately issued a "wanted flyer" to other police departments in the Cincinnati metropolitan area.

The flyer twice stated that Hensley was wanted for investigation of an aggravated robbery. It described both Hensley and the date and location of the alleged robbery, and asked other departments to pick up and hold Hensley for the St. Bernard police in the event he were located. The flyer also warned other departments to use caution and to consider Hensley armed and dangerous.

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 11, 1984

No. 83-1330 United States v. Hensley

Dear Bill,

Thanks for your letter and suggestions. Naturally, I would be delighted to have your concurrence in the circulating opinion. The new language on page 11 was the result of my correspondence with John and I am reluctant to make additional major changes.

I included the word "significantly" in the last sentence of Part II because it appeared likely that, when a police officer makes an investigatory stop based on a flyer or bulletin from another police department, the duration of the stop might be somewhat longer than if the stop were made by the department issuing the flyer. This is because the department receiving the flyer may require sufficient time to contact the issuing department to obtain any requested information. I would prefer to leave the language intact, although if it would meet your concerns I would be willing to delete the word "significantly" and substitute something along the following lines:

"Of course, a stop made by officers in reliance on a wanted flyer might need to last somewhat longer than a stop made by the officers who issued the flyer. This is because the officers who rely on a flyer may need to communicate with the issuing department, and efforts to identify and contact the issuing department may require more time than it takes an officer in the issuing department to call his own headquarters."

With respect to the language about civil liability of the officers making the stop, I think it is important to indicate in some way that officers acting in reasonable reliance on a flyer or bulletin from another department are not civilly liable for doing so. As the Solicitor General's brief in this case notes, police departments in the Cincinnati area have begun to refuse to act on flyers from other departments. Brief at 10, n. 8. Ambiguity about civil liability could cause this trend to continue, despite the other language in the opinion. It is well established that officers who act in good faith reliance on a warrant

have a defense to civil suits should the warrant turn out to be invalid. See, e.g., Turner v. Raynes, 611 F.2d 92, 93 (CA5), cert. denied, 449 U.S. 900 (1980). The opinion already analogizes to Whiteley, where police acted on a report that a warrant had been issued, to conclude that police can act on a flyer requesting an investigatory stop just as they can act on a flyer requesting execution of an arrest warrant. I do not think it is a modification of existing immunity law, or a particularly great leap of reasoning, to say that officers who act in good faith reliance on a flyer enjoy protection similar to that possessed by officers who act in good faith reliance on a warrant. I would prefer to expressly so indicate. Would it alleviate your concerns if the sentences were amended to read:

"If the flyer has been issued in the absence of a reasonable suspicion, then a stop in objective reliance upon it violates the Fourth Amendment. In such a situation, of course, the officers making the stop may have a good faith defense to any civil suit. See Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967); Turner v. Raynes, 611 F.2d 92, 93 (CA5), cert. denied, 449 U.S. 900 (1980)(officer relying in good faith on an invalid arrest warrant has defense to civil suit). It is the objective reading of the flyer or bulletin that determines whether other police officers can defensibly act in reliance on it. ..."?

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

p11

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: DEC 13 1984

SDO
Please join me
JWJ

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1330

UNITED STATES, PETITIONER *v.*
THOMAS J. HENSLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[December ——, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari in this case, —— U. S. —— (1984), to determine whether police officers may stop and briefly detain a person who is the subject of a "wanted flyer" while they attempt to find out whether an arrest warrant has been issued. We conclude that such stops are consistent with the Fourth Amendment under appropriate circumstances.

I

On December 4, 1981, two armed men robbed a tavern in the Cincinnati suburb of St. Bernard, Ohio. Six days later, a St. Bernard police officer, Kenneth Davis, interviewed an informant who passed along information that respondent Thomas Hensley had driven the getaway car during the armed robbery. Officer Davis obtained a written statement from the informant and immediately issued a "wanted flyer" to other police departments in the Cincinnati metropolitan area.

The flyer twice stated that Hensley was wanted for investigation of an aggravated robbery. It described both Hensley and the date and location of the alleged robbery, and asked other departments to pick up and hold Hensley for the St. Bernard police in the event he were located. The flyer also warned other departments to use caution and to consider Hensley armed and dangerous.

Stylistic Changes Throughout

pp. 8

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: DEC 20 1984

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1330

UNITED STATES, PETITIONER *v.*
THOMAS J. HENSLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[December ——, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari in this case, 467 U. S. —— (1984), to determine whether police officers may stop and briefly detain a person who is the subject of a "wanted flyer" while they attempt to find out whether an arrest warrant has been issued. We conclude that such stops are consistent with the Fourth Amendment under appropriate circumstances.

I

On December 4, 1981, two armed men robbed a tavern in the Cincinnati suburb of St. Bernard, Ohio. Six days later, a St. Bernard police officer, Kenneth Davis, interviewed an informant who passed along information that respondent Thomas Hensley had driven the getaway car during the armed robbery. Officer Davis obtained a written statement from the informant and immediately issued a "wanted flyer" to other police departments in the Cincinnati metropolitan area.

The flyer twice stated that Hensley was wanted for investigation of an aggravated robbery. It described both Hensley and the date and location of the alleged robbery, and asked other departments to pick up and hold Hensley for the St. Bernard police in the event he were located. The flyer also warned other departments to use caution and to consider Hensley armed and dangerous.

Stylistic Change at pp. 8

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: JAN 2 1985

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1330

UNITED STATES, PETITIONER *v.*
THOMAS J. HENSLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1985]

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari in this case, 467 U. S. —— (1984), to determine whether police officers may stop and briefly detain a person who is the subject of a "wanted flyer" while they attempt to find out whether an arrest warrant has been issued. We conclude that such stops are consistent with the Fourth Amendment under appropriate circumstances.

I

On December 4, 1981, two armed men robbed a tavern in the Cincinnati suburb of St. Bernard, Ohio. Six days later, a St. Bernard police officer, Kenneth Davis, interviewed an informant who passed along information that respondent Thomas Hensley had driven the getaway car during the armed robbery. Officer Davis obtained a written statement from the informant and immediately issued a "wanted flyer" to other police departments in the Cincinnati metropolitan area.

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