

October 31, 2005.

No. 39,820-KA

**DISSENT FROM THE DENIAL OF REHEARING
RENDERED ON OCTOBER 20, 2005**

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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STATE OF LOUISIANA

Appellee

versus

ROBERT PAUL GARRISON

Appellant

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Originally appealed from the
Third Judicial District Court for the
Parish of Lincoln, Louisiana
Trial Court No. 50776

Honorable Jay Bowen McCallum, Judge

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GOFF and GOFF
By: Addison K. Goff, IV

Counsel for
Appellant

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Appellee

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Before BROWN, STEWART, GASKINS, CARAWAY and DREW, JJ.

STEWART, J., dissents to the denial of application for rehearing and assigns reasons.

DREW, J., dissents to the denial of application for rehearing and assigns reasons.

STEWART, J., dissents to the denial of application for rehearing and assigns reasons.

I would grant the rehearing. The majority's decision impermissibly expands the parameters of police authority in contravention of the Fourth Amendment protection against unreasonable searches and seizure.

I will acknowledge that an officer may perform an investigatory stop with *reasonable* cause. He may also stop a suspect based on *probable* cause. However, the majority decision allows an officer to stop a person just "*because*"- as in "*because I want to.*" The majority is correct in its conclusion that an officer may seek a citizen's "voluntary cooperation" in furtherance of an investigation. However, the law does not permit an officer to stop and seize a citizen and demand "voluntary cooperation" with an investigation without meeting basic standards of reasonableness. According to the majority's skewed reasoning, all any officer has to do anytime he stops a person illegally is to utter the talismanic words, "I was seeking voluntary cooperation" to cloak his behavior under an air of legality. What makes this legal fiction even more absurd in this case is the fact that the officer had no jurisdiction.

The majority decision is disturbing and frightening as it essentially erases the guarantees afforded to our citizenry by the Fourth Amendment. The "ends justifies the means" concept has never been the appropriate standard of appellate review. Its application in this case is errant and will have unfortunate consequences for citizens who decline to voluntarily cooperate with an illegal search or seizure. Consequently, I must respectfully dissent.

DREW, J., dissents to the denial of application for rehearing and assigns reasons.

I agree with Judge Stewart that a rehearing should have been granted.

An individual law officer may make an investigative detention predicated upon the officer developing *reasonable suspicion of criminal activity*. The officer must be able to articulate the specific factors upon which the stop was made, and the factors must be particularized as to the specific defendant stopped.

This well-meaning Louisiana Tech University Police Officer may well have saved Mr. Garrison's life, or the life of an innocent motorist.

Just because it turned out that Mr. Garrison was impaired, however, does not change the fact that this particular stop was unsupported by reasonable suspicion of criminal activity, which is the legal requirement for any detention, whether a traffic infraction or a crime proscribed in Titles 14, 40, or 56.¹ A much higher burden, probable cause, is required for arrest, or in the case of a traffic matter, for the issuance of a citation (which is normally the case, in lieu of arrest, for most Title 32 violations).

The speculation that someone's tires were spinning somewhere near campus while the Louisiana Tech Police Officer was on his way to campus, is too remote to justify this particular vehicular stop. Without doubt this is a close case, but as we're charged with examining *de novo* the learned trial court's determination of reasonable suspicion, I cannot quite get this one past the sniff test.

¹ See *Terry v. Ohio*, 88 S.Ct. 1868 (1968), and La. C. Cr. P. art. 215.1.A.

The initial stop (at U.S. Hwy. 80) was illegal.² Consequently, nothing flowing from this detention can be used against the defendant, absent proof of sufficient attenuation from the illegal stop. *See United States v. Jaquez*, 421 F. 3d 338 (5th Cir. 8/15/05), where a report of a generic red car being involved in a drive-by shooting led an officer to stop a generic red car in the same general area 15 minutes later. The Fifth Circuit found that the red car was stopped without sufficiently particularized reasonable suspicion of criminal activity.

I find unpersuasive the defendant's reliance on *State v. Hawsey*, 377 So. 2d 338 (La. 11/20/79), a case decided more than a quarter of a century ago by the Louisiana Supreme Court. Nonetheless, in *Hawsey*, the trooper at least knew which car was spinning its wheels. Here, there was only rank speculation that this was, in fact, the vehicle in question. Had the officer **known** this was the offending vehicle, and had the vehicle been **on a public street on or immediately contiguous to campus**, I believe the stop would have been good as gold, as spinning the tires would at least have amounted to reasonable suspicion, if not probable cause, that the vehicle was committing the offense of careless operation, La. R.S. 32:58.

Even less persuasive is the majority's reliance upon and extensive quoting from *Illinois v. Lidster*, 124 S. Ct. 885 (2004), which is irrelevant to our present inquiry. *Lidster* concerned an **informational checkpoint**³ set

² In fact, this illegal stop is constitutionally insupportable, without necessity of even visiting the jurisdictional issue of the Louisiana Tech Officer's authority to make off-campus stops.

³ The purpose of the *Lidster* roadblock was to find any possible *witnesses* to the fatal hit-and-run of the previous week.

up in the exact area of a fatal hit and run incident, **precisely one week** after the accident. By definition, a checkpoint allows stops with no suspicion of criminal activity by the driver. Likewise, there is a laundry list of tasks which must be completed in order to effectuate a valid D.W.I. checkpoint in Louisiana (advance warning to approaching motorists via signs, flares, and other indications; use of a systematic, non-random criteria for stopping motorists; guidance by supervisory personnel, preferably by written guidelines; minimal intrusion upon motorists, etc.). *See State v. Jackson*, 2000-0015 (La. 7/6/00), 764 So. 2d 64.

To follow and extend the majority's logic, any stop of any vehicle at any time for the vaguest of reasons would be legal. To apply these facts to a checkpoint/road block template is comparing apples and kumquats.

The stop in question here is simply **not** a check point situation. Both *Lidster* and *Jackson* are inapplicable to this inquiry, which involves the intrusion of the state, represented by Officer Sasser, into the affairs of Mr. Garrison, an individual driver – one officer, one defendant. This traffic stop was made, with only the vaguest of suspicions that Garrison **may** have recently spun his tires in the area of the stop. After following the motorist a short distance, the officer *still* observed no infraction by *this* motorist. Yet the stop was made. This is a long way short of reasonable suspicion of criminal activity.

The lurking jurisdictional problem could be avoided in the future if all P.O.S.T.-certified⁴ Louisiana Tech P.D. officers were commissioned by

⁴ This term refers to the Louisiana Peace Officers Standards and Training Council.

the Ruston Chief of Police or by the Lincoln Parish Sheriff, or both. The downside of this, of course, would be the understandable fear by the City of Ruston and the Lincoln Parish S.O. of additional civil liability stemming from the actions of these additional officers, which is a very real concern in today's world. The upside would be that more officers would be able to protect and serve in Ruston, without splitting hairs over which street adjoins which property near what road.

Under these limited facts, this excellent officer could have called the Ruston P.D. or Lincoln S.O. to follow this car in order to observe the operation of the vehicle. Had these other officers then observed the commission of a minor traffic offense or a crime, a valid stop could have been made. *U.S. v. Santiago*, 310 F. 3d 336 (5th Cir. 2002); *State v. Waters*, 780 So. 2d 1053 (La. 2000); and *State v. McVan*, 744 So. 2d 641 (La. App. 2d Cir. 1999). Even if pretextual, the stop would have then been good. *See Whren v. U.S.*, 116 S. Ct. 1769 (1996); *U.S. v. Castro*, 166 F. 3d 728 (5th Cir. 1999), *cert. denied*.

This would have given the police officer or deputy sheriff a brief window of time,⁵ while processing the ticket, to make a point about the need for careful driving, and to observe the driver for any indicia of impairment, thereby keeping the roads safer for those law-abiding citizens who, unlike Mr. Garrison, choose not to drink and drive. As it is, under these facts, this inconsiderate and dangerous driver should have walked out of the

⁵ At least one court has said (not binding in Louisiana) that a valid traffic stop, lasting no more than 17 minutes, can never be unconstitutional. *U.S. v. Hernandez*, 418 F. 3d 1206 (11th Cir. 2005).

courtroom a free man, because there was no indicia of criminality extant to support the stop.

The transcript reflects excellent courtroom work by both the lawyer for Mr. Garrison and the lawyer for the state. However, this case should have been doomed at inception. The jurisdictional question is razor-close, but a decision on that issue should not be necessary to decide this case. The officer simply made an illegal stop.

Considering the thin pre-stop observations by the officer, the initial detention (traffic stop) itself was clearly illegal, regardless of:

- where the conduct arose, or
- where the stop was made, or
- what agency's officer initiated the detention, or
- exactly where were the geographical limits of the officer's jurisdiction within which he was empowered to act.

The motion to suppress should have been granted. Accordingly, I respectfully dissent from the majority's denial of the defendant's application for rehearing.