No. 12-10958

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2012

WILLIAM WESLEY SELLARS, JR.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE NORTH CAROLINA COURT OF APPEALS ERRED IN DETERMINING THE DE MINIMIS PRINCIPLE PREVIOUSLY SET FORTH BY THIS COURT AND ADOPTED BY THE FEDERAL CIRCUIT COURTS APPLIED TO THE CIRCUMSTANCES IN THE INSTANT CASE.

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CITATION TO OPINION BELOW

The opinion of the North Carolina Court of Appeals is reported at State v. Sellars, 730 S.E.2d 208 (2012), and is reproduced in the appendix to the petition.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a) to review the opinion of the North Carolina Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. IV, and XIV.

STATEMENT OF THE CASE

A. Procedural History

On 16 September 2010, petitioner was charged with possession with intent to sell or deliver cocaine, trafficking in cocaine by possession, trafficking in cocaine by transportation, and felony maintaining a vehicle in Forsyth County, North Carolina. Petitioner was subsequently indicted, on 29 November 2010 and 7 March 2011 respectively, for possession with intent to sell or deliver cocaine, and for trafficking 200 grams or more but less than 400 grams of cocaine by both possession and transportation.

On 11 April 2011, petitioner filed a pretrial motion to suppress with the trial court. In an order, issued orally on 17 May 2011 and reduced to writing and filed 13 June 2011, the trial court granted petitioner's motion on the basis that any further extension of the traffic stop was not supported by reasonable suspicion or consent. The State gave notice of appeal.

On 7 August 2012, the North Carolina Court of Appeals reversed the trial court's order, and held that any prolonged detention was *de minimis*, and therefore did not violate petitioner's constitutional rights. State v. Sellars, 730 S.E.2d 208, 212-13 (2012). On 11 September 2012, petitioner filed a notice of appeal and petition for discretionary review with the Supreme Court of North Carolina. In an order, filed 24 January 2013, the Supreme Court of North Carolina dismissed petitioner's notice of appeal, and denied his petition. State v. Sellars, 736 S.E.2d 489 (2013).

B. Evidence in the Trial Court

The facts of this case are adequately summarized at the outset of the opinion of the North Carolina Court of Appeals. Sellars, 730 S.E.2d at 208-09.

It must be noted, however, that the issue petitioner wishes to present to this Court was not resolved by the trial court, and a number of the facts petitioner alleges were further not resolved by the trial court in its order. See Sellars, 730 S.E.2d at 209 (acknowledging the same). Those facts are therefore incompetent for review, and there is significant disagreement between petitioner's characterizations to the amount of time that passed between various events (see Pet. p. 8), and the State's characterization of that evidence. And, even the opinion of the North Carolina Court of Appeals is incorrect as to the amount of time that should be considered as a further prolongation of time prior to first alert of the canine, which gave probable cause to search.

Any further facts relevant to the instant argument will be included below.

REASONS WHY WRIT SHOULD NOT BE GRANTED

THE NORTH CAROLINA COURT OF APPEALS DID NOT ERR IN DETERMINING THE DE MINIMIS PRINCIPLE PREVIOUSLY SET FORTH BY THIS COURT AND ADOPTED BY THE FEDERAL CIRCUIT COURTS APPLIED TO THE CIRCUMSTANCES IN THE INSTANT CASE.

The North Carolina Court of Appeals did not err in its decision. Even assuming it did, this is not an appropriate case for this Court's review.

A. There was no error in the opinion of the North Carolina Court of Appeals, and the Court properly concluded that any prolonged detention was *de minimis.*

Petitioner conceded the validity of the initial stop of the vehicle, and it was supported by reasonable suspicion.

Petitioner further did not challenge the legality of, or basis for, the canine sniff, but simply challenged any further duration of the stop awaiting the alert from the canine. And, as previously held by this Court, a shift in purpose from a lawful traffic stop into a drug investigation by a canine sniff does not need to be supported by any additional reasonable suspicion during an otherwise justified, legitimate traffic stop. Illinois v. Caballes, 543 U.S. 405, 409 (2005); see also City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000); United States v. Place, 462 U.S. 696, 707 (1983); State v. Branch, 627 S.E.2d 506, 508-09 (applying these principles to a North Carolina case), cert. denied, 634 S.E.2d 220 (2006).

This Court echoed this principle in Muehler v. Mena, 544 U.S. 93 (2005), where it also applied this – as interpreted by the lower courts – *de minimis* principle to

unrelated questioning, and other discreet events that would have traditionally required additional reasonable suspicion otherwise. There, this Court addressed a defendant's argument that was "premised on the assumption that the officer[] [was] required to have independent reasonable suspicion in order to question [him and to request, and conduct the subsequent consent search]... because the questioning constituted a discrete Fourth Amendment event." Muehler v. Mena, 544 U.S. 93, 100-01 (2005). This Court rejected that argument, holding that "mere police questioning" – unrelated to the purpose for the stop, just like the dog sniff in Caballes – "does not constitute a[n additional] seizure" unless such questioning unreasonably prolongs the detention of the defendant. Id. at 101; see also Caballes, 543 U.S. at 407; United States v. Alexander, 448 F.3d 1014, 1016-17 (8th Cir. 2006), cert. denied, 549 U.S. 1118 (2007).

This Court reaffirmed this premise in the context of traffic stops in Johnson, stating:

> A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop.... An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.

Arizona v. Johnson, 555 U.S. 323, 333 (2009) (emphasis added); see also United States v. Everett, 601 F.3d 484, 488-96 (6th Cir. 2010) (explaining that the *de minimis* principle first set forth in Muehler is well-recognized as applicable in the traffic stop context). It must be noted that Johnson concerned an officer ordering a passenger out of a vehicle where she conducted a suspicionless frisk, without the passenger's consent.

This Court's holding concerned only whether the patdown frisk constituted an unlawful search, and did not concern whether suspicion or consent was needed to support any additional or prolonged detention of the defendant.

Here, to the extent there was any further prolongation of the stop due to the canine sniff search, it was less than a minute of time. After handing back petitioner's license, Detective McKaughan asked petitioner if he could ask him a question. Petitioner responded, "Yes, sir." Det. McKaughan informed petitioner that "[he] had an alert in [the computer] from Burlington...," and proceeded to ask petitioner a series of control questions about whether narcotics or weapons were present in his vehicle. Det. McKaughan ultimately asked for, and was denied, consent to search his vehicle. This exchange with petitioner took nearly a minute, before petitioner ultimately responded, "Nuh, no."

At that time, Det. McKaughan informed petitioner that he was deploying a K-9 narcotics detector around his vehicle. Det. McKaughan explained how that worked, and during the course of the exchange that followed in response to petitioner's own questions, another two minutes passed. Det. McKaughan then deployed K-9 Basco, and Basco immediately alerted to the presence of narcotics even as they were walking towards the car. K-9 Basco also subsequently alerted both at the open passenger side window, and also at the driver's door.

Petitioner in his petition – and the Court of Appeals for that matter – misstates the amount of time regarding any *de minimis* intrusion, and further attributes it all to police action rather than the lengthy exchange petitioner had with the officer. From

the time of the stop, until the time of the third and final alert, at the conclusion of the canine sniff, a total of approximately fifteen minutes had passed. From the time consent was denied, to the time of the first alert, just under three minutes had passed. And, most importantly, nearly two minutes of that three minute duration concerned an exchange with petitioner explaining the sniff itself and responding to petitioner's own voiced concerns. If one were to subtract the time attributable to petitioner's questions, concerns, and delay in responding to the officer, from the moment petitioner was informed Basco would be employed to the first alert, giving the officer probable cause, only a minute of time passed. As argued by the State at the hearing, and found by the North Carolina Court of Appeals, there was nothing unreasonable in this *de minimis* duration.

And, in its opinion, the North Carolina Court of Appeals relied on a prior case from its own jurisdiction previously applying these principles in similar circumstances, see Sellars, 730 S.E.2d at 211 (citing State v. Brimmer, 653 S.E.2d 196 (2007)), as well as the Eighth Circuit Court of Appeals' decision in United States v. Alexander, 448 F.3d 1014 (8th Cir. 2006), cert. denied, 549 U.S. 1118 (2007). In addressing nearly identical facts – albeit here the prolonged extension was less than a minute rather than four minutes – the Court in Alexander,

> expanded upon the reasoning in Caballes and embraced the *de minimis* approach to traffic stops. Defendant, Alexander, was stopped due to his car having only one of the required two California license plates. After the officer indicated that he was only going to issue him a warning, the officer then asked for permission to search the vehicle. Alexander declined. The officer then told Alexander that he would be conducting a dog sniff test on the car and if nothing was detected he would be free to

> leave. The drug dog alerted to the car and a subsequent search revealed drugs in the vehicle. The drug sniff test was completed approximately four minutes after Alexander was told he would be receiving a warning ticket. The court held that this four-minute detention was *de minimis*....
>
> The court went on to hold that the artificial line marking the end of a traffic stop does not foreclose the momentary extension of the detention for the purpose of conducting a canine sniff of the vehicle's exterior.

Sellars, 730 S.E.2d at 212 (citing Alexander, 448 F.3d at 1016-17).

While it is true that this Court has not addressed these precise facts, the decision in Alexander did. The defendant in Alexander subsequently sought review from this Court. And, this Court declined to review the case. Alexander v. United States, 549 U.S. 1118 (2007). If Alexander was inappropriate for this Court's review, review of this case is also unwarranted.

B. The conflicting cases offered by petitioner are overstated.

The lower courts have repeatedly upheld the *de minimis* principle set forth in Muehler, and subsequently applied to the traffic stop context by this Court in Johnson. See United States v. Mason, 628 F.3d 123, 131-32 (4th Cir. 2010), cert. denied, 132 S. Ct. 329, (2011); United States v. Harrison, 606 F.3d 42, 45 (2nd Cir. 2010) (*per curiam*); United States v. Taylor, 596 F.3d 373, 376 (7th Cir. 2010), cert. denied, 130 S. Ct. 3485 (2010); United States v. Canipe, 569 F.3d 597, 602 (6th Cir. 2009); United States v. Turvin, 517 F.3d 1097, 1101-04 (9th Cir. 2008); United States v. Stewart, 473 F.3d 1265, 1269 (10th Cir. 2007); United States v. Olivera-Mendez, 484 F.3d 505, 511 (8th Cir. 2007); United States v. Wallace, 429 F.3d 969, 974 (10th Cir. 2005); United States v. Martin, 422 F.3d 597, 601-02 (7th Cir. 2005); United States v. Burton, 334 F.3d 514,

518-19 (6th Cir. 2003); United States v. Childs, 277 F.3d 947, 949 (7th Cir. 2002) (*en banc*); see also United States v. Brigham, 382 F.3d 500, 508 (5th Cir. 2004) (*en banc)*; State v. Leyva, 250 P.3d 861, 872 (N.M. 2011); State v. Griffin, 949 So. 2d 309, 315 (Fla. Dist. Ct. App.), disc. review denied, 958 So. 2d 920 (2007); Johnson v. Commonwealth, 179 S.W.3d 882, 885-86 (Ky. App. 2005), rev. denied, 2005 Ky. LEXIS 381 (Ky., Dec. 14, 2005). And, this Court has previously denied review of several of these earlier cases. See, e.g., Mason v. United States, 132 S. Ct. 329 (2011); Taylor v. United States, 130 S. Ct. 3485 (2010); Alexander v. United States, 549 U.S. 1118 (2007).

Petitioner cites to numerous cases from various jurisdictions to support that there exists some conflict in the lower courts. (See Pet. pp. 11-12) What he ignores, however, is that all but two of the cases he cites predated this Court's decision in Johnson, which made it clear that the *de minimis* principle applied to the traffic stop context. As discussed at length by the Sixth Circuit Court of Appeals, prior to Johnson, and in similar context, these "conflicting" courts believed that a license and registration must be handed back, and the stop terminated in its entirety – spurring a line of cases that relied on these set factors as creating an "artificial line" – before it could be extended by consent. See United States v. Everett, 601 F.3d 484, 488-96 (6th Cir. 2010) (explaining that the *de minimis* principle first set forth in Muehler is now well-recognized as applicable in the traffic stop context, and has been adopted by all sister circuits to have considered it). This position was not correct, and is not the law today. Everett, 601 F.3d at 492-96; State v. Jenkins, 3 A.3d 806, 823-49 (Ct. 2010) (the

Connecticut Supreme Court discussing at length the evolution of this issue). And, many of the cases relied upon by petitioner appear to have been decided under similar misconceptions. Given that these concerns have since been resolved by this Court, any viability of the cases relied upon by petitioner is called into question.

Moreover, the "artificial line" or the bright-line "no prolongation" rule that petitioner wishes to impose on the North Carolina Court of Appeals both swallows itself, and makes little sense. Indeed, the New Mexico Supreme Court has found a similar argument by a defendant "nonsensical." There, recognizing that this Court had since permitted *de minimis* questioning regarding drugs and weapons, as well as a request to search on that basis, the New Mexico Court addressed whether the defendant's rights were violated because a request to search came after the investigation was completed, and a citation given, but before the driver was considered by the Court to be free to leave. See State v. Leyva, 250 P.3d 861, 872 (N.M. 2011) The Court discussed, and noted, the following:

> Approximately ten minutes passed between the time Leyva came to a stop and Officer Hash returned to Leyva his documents. Posing the subsequent question, "Before I turn this vehicle over to anyone else is there anything in it that I need to know about? . . . [Are there] any knives, needles, guns, or drugs[?]," could not have taken more than ten seconds. It would be nonsensical if we were to hold Officer Hash violated Leyva's Fourth Amendment rights by asking the question immediately after handing him the citation, when the questions undoubtedly would have been permitted if Officer Hash had asked while he was writing the citation or running the records check.

Id. at 873 (citations omitted). On this basis, the New Mexico Supreme Court found such a "bright-line, temporal cut-off point," id. at 869, the same as demanded by

petitioner here, to be unsupported.

Likewise, in Everett, the Sixth Circuit Court of Appeals addressed the viability of the artificial line petitioner wishes to impose here. The Court "note[d] that each of our sister circuits to confront this question... has refused to adopt a bright-line 'no prolongation' rule." Everett, 601 F.3d at 492. This was so, because such a rule

> would provide little actual protection against police abuses. Muehler and Johnson make clear (and Everett does not dispute) that an officer may ask unrelated questions to his heart's content, provided he does so during the supposedly dead time while he or another officer is completing a task related to the traffic violation. Thus, a police officer intent on asking extraneous questions could easily evade Everett's proposed rule – by delegating the standard traffic-stop routine to a backup officer, leaving himself free to conduct unrelated questioning all the while, or simply by learning to write and ask questions at the same time.
>
> Because the vast weight of authority is against a bright-line rule, and because such a rule would not even serve its intended purpose as a bulwark against pretextual police activity, we join our sister circuits in declining to construe Muehler and Johnson as imposing a categorical ban on suspicionless unrelated questioning that may minimally prolong a traffic stop.

Id.

And, indeed, the proper application of this Court's prior jurisprudence mandates no such bright-line rule. Rather, much as the totality of the circumstances test for reasonable suspicion is to be applied, this Court's holding concerning what constitutes a "measurabl[e] exten[sion]," Johnson, 555 U.S. at 333, to a stop is simply to be applied on a case-to-case basis. This Court has so far left it up to the lower courts to determine what meets that test, and what constitutes an unreasonable extension under individual circumstances. And, to this end, while it may be true that some courts have

applied the *de minimis* principle differently to separate factual circumstances, because the test is properly one of case-by-case application, petitioner overstates any conflict that actually exists between the lower courts.

The mere fact that this "test" has been or may be applied differently to various factual scenarios does not warrant this Court's intervention or review. If so, certiorari would be appropriate every time a well-adopted premise were applied to slightly differing fact patterns. At best for petitioner, the North Carolina Court of Appeals simply misapplied a properly stated rule of law to the specific facts of that case. The decision of the Court of Appeals did not change the law, or raise any issue of substantial constitutional magnitude. Petitioner has further failed to show any substantial conflict in the lower courts which warrants this Court's review.

C. This is not the appropriate case to resolve or develop this issue further.

Even assuming petitioner were correct, this is neither an ideal nor the appropriate case to resolve or develop this issue further.

1. The trial court did not rule upon this issue or resolve facts necessary to its determination.

This Court should only address issues that are squarely before it. Although the *de minimis* issue was presented to the trial court as an argument in the alternative, the trial court's order did not rule upon the issue. More importantly, as alleged above, the trial court also failed to resolve a number of facts that would be pertinent to this Court's consideration or resolution of this issue.

The trial court found only that petitioner continued to be seized, and that the stop had not ended insofar as the officer was concerned. (See Order, findings of fact nos. 15, 17) As acknowledged by the North Carolina Court of Appeals in its decision, "[t]he trial court did not make findings of fact regarding where Basco was located throughout the traffic stop and how much time transpired after the police returned defendant's license before Basco alerted." Sellars, 730 S.E.2d at 209. The trial court also did not resolve when the "artificial line" petitioner wishes to impose first occurred, where it should be drawn, whether that line was extended by any possible cooperation or discussion by petitioner, how long the officer's explanations took, whether that duration was attributable to petitioner or the State, when and where Basco first alerted, in addition to when Basco's second and third alerts occurred, or how much time would be considered the "additional" detention of petitioner. The State during argument at the hearing, characterized the canine sniff as taking less than a minute, and that the canine actually alerted "very quickly." And, it would be the State's contention that even the videotape evidence, left unresolved by the trial court, would be insufficient without such findings that resolved these issues or any possible conflict between the videotape and the officer's testimony.

Without these specific findings, this Court's review of this issue would be inappropriate.

2. This is also not an appropriate case for review because the outcome was correct in any event.

The sole basis for the trial court's ruling was that there was not reasonable

suspicion to support any further detention of petitioner. The trial court wrongly decided this issue, and reasonable suspicion was presented to the North Carolina Court of Appeals as the primary issue. While the Court of Appeals declined to address whether reasonable suspicion existed, turning instead to the issue presented in the alternative, this further demonstrates that this case is not appropriate for review because the outcome was correct in any event.

When an intrusion is not considered *de minimis*, and a suspect is considered further detained, "there must be 'reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot.'" State v. Euceda-Valle, 641 S.E.2d 858, 863 (2007) (quoting State v. McClendon, 517 S.E.2d 128, 132 (1999)). The North Carolina courts have repeatedly held that such facts include nervousness and conflicting statements, McClendon, 517 S.E.2d at 131-32; State v. Hernandez, 612 S.E.2d 420, 426 (2005), as well as odd movements or jestures. A suspect's criminal history can also add to reasonable suspicion. While a prior conviction standing alone does not suffice, "it is proper for an officer's prior knowledge of a defendant, combined with present observations and not taken alone, to constitute a reasonable suspicion justifying further investigation." State v. Branch, 591 S.E.2d 923, 926 (2004) (citing State v. Briggs, 536 S.E.2d 858, 863-64 (2000)); see also United States v. Holmes, 376 F.3d 270, 278 (4th Cir. 2004).

Here, after Det. McKaughan activated his blue lights, petitioner delayed briefly before stopping at the roadside. Petitioner gave an odd response to McKaughan's initial questions, telling McKaughan that he had been driving a long way, but then

stated that he had come from Burlington, which was not far from where the stop took place. Petitioner first pulled out, and presented, a credit card as his driver's license before ultimately handing over his license. Petitioner also was very nervous, his right hand visibly shaking when presenting the card, and also shaking later while in the patrol vehicle. Both petitioner and the passenger were visibly nervous throughout, and petitioner's nervousness never subsided, even when informed he would not be receiving a ticket. In fact, petitioner's nervousness appeared to increase throughout the course of the fifteen minute traffic stop. Det. McKaughan further received an alert from the Burlington Police Department that said, "Mr. Sellars's record, drug dealer, known felon."

Even were the lower court incorrect as to the application of this Court's *de minimis* principle to the instant facts, under the totality of the circumstances, there was reasonable suspicion to support any additional one to three minute detention of petitioner during the canine sniff. The North Carolina Court of Appeals was correct in its outcome, and therefore this case is further not an appropriate case for this Court's review.

CONCLUSION

The petition should be denied.

Respectfully submitted, this the 6th day of September, 2013.

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CERTIFICATE OF SERVICE

I, Robert C. Montgomery, Special Deputy Attorney General for the State of North Carolina and a member of the bar of this Court, hereby certify that on the ** day of September, 2013, one copy of the State of North Carolina's RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA, was served on the Petitioner's counsel of record, Benjamin Dowling-Sendor, Assistant Appellate Defender, Office of the Appellate Defender, 123 West Main Street - Suite 500, Durham, NC 27701, by first class mail, postage prepaid. I further certify that all parties required to be served have been served.

This the 6th day of September, 2013.

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