
IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Respondent on Review

v.

MARIO ARREOLA-BOTELLO,

Defendant-Appellant,
Petitioner on Review

Washington County Circuit Court
Case No. C151713CR

CA A161566

S066119

BRIEF ON THE MERITS OF *AMICI CURIAE*
OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION
OREGON JUSTICE RESOURCE CENTER

Review from the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Washington County
Honorable D. Charles Bailey, Jr., Judge

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I. INTRODUCTION

Oregon Criminal Defense Lawyers Association (OCDLA) is non-profit organization based in Eugene, Oregon. OCDLA's 1,291 members are lawyers, investigators and related professionals dedicated to defending individuals who are accused of crimes. OCDLA serves the defense community by providing continuing legal education, public education and networking. OCDLA is concerned with legal issues presenting a substantial statewide impact to defendants in criminal cases.

Oregon Justice Resource Center (OJRC) is a non-profit organization founded in 2011. OJRC works to "promote civil rights and improve legal representation for communities that have often been underserved in the past: people living in poverty and people of color among them." OJRC, *About Us*, <http://ojrc.info/about-us/> (last visited December 8, 2018). The OJRC *Amicus* Committee is comprised of Oregon attorneys from multiple disciplines.

Amici wish to be heard by this court because *amici* agree with defendant that the court should affirm the reasonable relationship test articulated by this court to reduce racial disparities in searches conducted during traffic stops.

II. SUMMARY OF ARGUMENT

Studies spanning the past two decades illustrate that black and hispanic drivers are more likely to be stopped and, during that stop, searched by police. Requiring police to justify all activities during the ongoing seizure of a traffic stop can help reduce unequal treatment of drivers based on race.

II. ARGUMENT

Racial bias comes in two forms, explicit and implicit. We observe explicit bias in the actions and statements of individuals and organizations who believe that people of color are inferior, and that disparate treatment of people of color is justified. Implicit bias is a theory that explains why people make decisions based on racial stereotypes even when people consider themselves to be not racist. Baumgartner, Christiani, Epp, et al. *Race or Place? The Persistence of Race Effects in Police Behavior Following Traffic Stops* (2018) at 6 available at <http://fbaum.unc.edu/TrafficStops/Baumgartner-et-al-MeasuringDisparities-20May2018.pdf> (last visited December 5, 2018) [hereinafter Baumgartner 2018.] Implicit biases “are thought to emerge on a cultural level through repeated exposure to movies, television, news coverage,

and popular culture that present blacks and other minority racial groups in an unflattering or stereotypical light.” *Id.* (citations omitted.)

Amici first present data illustrating disparate treatment of black and hispanic motorists during traffic stops. Then *amici* argue that this disparate treatment, whether caused by explicit or implicit bias, could be mitigated by requiring officers to have a specific reason for questioning drivers about matters outside of the scope of the traffic stop, rather than allowing officers free reign to ask any question during an unavoidable lull during a traffic stop.

a. **People of color are more likely to be searched during traffic stops than their white counterparts.**

- i. Robust statistical analysis of millions of traffic stops confirms persistent racial disparities when police search black and hispanic drivers.

Analysis of tens of millions of traffic stops across the United States demonstrates that black and hispanic drivers are searched during traffic stops at significantly higher rates than white drivers. *See* Baumgartner, Christiani, Epp et al, *Racial Disparities in Traffic Stop Outcomes*, Duke Forum for Law and Social Change Vol 9:21 at 33 (2017) [hereinafter “Baumgartner 2017.”]; *see also* Pierson, Simoin, Overgoor, et al. *A Large Scale Analysis of Racial Disparities in Police Stops in the United States*, Stanford University Open

Policing Project (2017) available at <https://5harad.com/papers/traffic-stops.pdf> (last visited December 2, 2018) [hereinafter “Stanford Study 2017.”]

Researchers from the University of North Carolina at Chapel Hill reviewed over 55 million traffic stops conducted by 132 different law enforcement agencies in 16 states, including the Portland Police Bureau (PPB). Baumgartner 2017 at 24. The study included data from 1999 to 2017. *Id.* at 28.

Researchers found that in general drivers were searched 3.37% of the time. *Id.* at 30. In contrast, black drivers were searched 7.62% of the time, and hispanic drivers were searched 8.69% of the time. *Id.* at 33, 35. This disparity means that black drivers and hispanic drivers are 2.51 and 3.14 times more likely to be searched during a traffic stop than white drivers, respectively. *Id.* at 37, 39.

In this study, the PPB data included stops occurring between 2004 and 2010.¹ *Id.* at 29. The authors of the study noted that in 2006 PPB conducted 45,008 stops of white drivers, and conducted a search 13.78% of the time. *Id.* at 33. Also in 2006, PPB stopped 9,427 black drivers, and conducted a search

¹ Portland Police Bureau makes stop data publicly available. See Portland Police Bureau, *Stops Data Collection* available at <https://www.portlandoregon.gov/police/65520> (last visited December 2, 2018) That data is discussed separately below.

26.52% of the time. *Id.* at 36. Finally, in 2006, PBB stopped 6,253 hispanic drivers and conducted searches 26.88% of the time. *Id.* at 37.

The Stanford University Open Policing Project analyzed more than 60 million state patrol stops from 20 states occurring between 2011 and 2015. Stanford Study 2017 at 1. Researchers at Stanford requested information from all 50 states, but only 20 states provided information detailed enough to be included in the study.²

Stanford researchers found that black and hispanic drivers are twice as likely to be searched after a traffic stop even when controlling for factors such as stop location, date and time and driver gender. *Id.* at 6.

Racial disparities in police searches during traffic stops persist even when including variables such as race, gender, driver age, stop purpose, hour of the day, day of the week, out of state drivers, vehicle age and “high disparity officers.” Baumgartner 2018 at 12.

² Although Oregon responded to the request for information from Stanford, the data provided was insufficiently detailed to be included in the study. A list of the extensive shortcomings of the data from Oregon can be found at <https://github.com/5harad/openpolicing/blob/master/DATA-README.md> (last visited December 2, 2018).

High disparity officers were defined by the authors as officers who have at least 50 stops of white drivers; at least 50 stops of black or hispanic drivers depending on the analysis; a search rate for all drivers that is higher than the average for their agency; and a search rate of black or hispanic drivers at least two times that of white drivers. *Id.* The purpose of controlling for high disparity officers was to identify whether racial disparities in searches could be explained by a few “bad apples” in a particular police department. *Id.* at 5, 12-13. Researchers found that after controlling for the above factors, black and hispanic drivers are still more than twice as likely to be searched during a traffic stop than white drivers, and that the disparities are, “large, widespread, and race appears to be a statistically robust factor in a police officer’s decision to search a car.” *Id.* at 16.

In addition to analyzing their data controlling for non-racial factors, the authors of the Stanford Study conducted a threshold test. The threshold test is considered a more robust way of detecting discrimination. *Id.* at 9. The threshold test takes into account the race of the driver, the stop location, whether the stop resulted in a search and whether the search resulted in finding contraband. *Id.* The threshold analysis illustrated that “black and hispanic drivers are searched on the basis of less evidence than white drivers, suggestive of bias in search decisions.” *Id.* at 15.

These large studies of millions of traffic stops nationwide provide strong evidence that racial bias is a cause of the disparities in search rates among black and hispanic drivers. These disparities appear in data collected and made publicly available by PBB.

An overview of the data reflects that PBB searched black drivers more often than whites. Portland Police Bureau Strategic Services Division, *Stops Data Collection: 2016 Annual Report* 13 (2018) available at <https://www.portlandoregon.gov/police/article/689285> (last visited December 2, 2018) [hereinafter PBB 2016]. Data for years 2012-2016 show a steep decline in searches overall, but racial disparities strongly persist. *Id.* Finally, in 2016 PBB reported that searches based on probable cause are significantly more likely to result in finding contraband than consent searches. *Id.* at 14.

In Portland, black drivers “are significantly more likely to be the subject of a consent search and significantly less likely to be the result of a probable cause search.” *Id.* at 4. In other words, black drivers in Portland are more likely to be subjected to a search that is less likely to produce contraband.

The reasonable inference from the above PBB data and the Stanford threshold analysis is that racial bias causes officers to search black and hispanic drivers disproportionately more often than white drivers, even when there is no

criminogenic basis for a search. It is bias, whether intentional or implicit, that causes these disparities.

Outside of Portland, Oregon does not have publicly available data to analyze in the manner of the Baumgartner and Stanford studies. It is no surprise that Oregon has so little relevant data. Although other states around the country have laws requiring police to collect and report such data,³ it was not until July of this year that police departments in Oregon were required to do so. ORS 131.395.

- ii. Even though data from Oregon is limited, there is no reason to believe that Oregon is immune from racial disparities in searches from traffic stops.

Oregon has a sinister history of violence and discrimination against Oregonians who are not white. In 1844 the provisional legislature passed a law that required people who owned slaves to remove their slaves within three years, or the slaves would be freed. *Black in Oregon: 1840-1870*, Oregon Secretary of State.

<https://sos.oregon.gov/archives/exhibits/black-history/Pages/context/slavery.aspx> (last visited December 6, 2018). That statute

³ A list of states that require data collection regarding police stops can be found in Baumgartner 2017 at 28-29.

also required “freed blacks” over the age of 18 to leave the state or be subject to trial. *Id.* After the trial where the accused was likely convicted of the obvious—that he or she was black while present in Oregon—the person would then be subject to 20 to 35 lashes, presumably with a whip. *Id.* That punishment would continue every six months until the person left the state. *Id.* Eventually, the “lash law” was replaced with a provision that required a person convicted of living in Oregon while black to perform forced labor and then leave the state. *Id.*

Oregon’s ignominious *de jure* discrimination of black Oregonians echoes throughout Oregon today. For example, not until 2015 were police agencies in Oregon required to prohibit racial profiling in policing. ORS 131.920. In addition, black Oregonians are disproportionally sent to prison more often than white Oregonians. Maxine Bernstein, *blacks Overrepresented in Every Part of Multnomah County’s Criminal Justice System, Report Finds*, The Oregonian, available at

https://www.oregonlive.com/portland/index.ssf/2016/02/blacks_overrepresented_in_every.html (last visited December 6, 2018).

Finally, there is no reason to believe that Oregonians are immune from implicit biases. Just because police practices reflect racial bias in policing, does not mean that all law enforcement officers avowed racists. Police officers are

human, and are just as vulnerable to negative messages about people of color that pervade popular culture—whether through movies, television or social media—than anyone else.

Racial disparity in searches in traffic stops can be addressed and mitigated. Allowing officers to expand questioning during a traffic stop only when the officer has reasonable suspicion of a crime or to ensure officer safety can do just that.

- b. Subject matter limits on questioning drivers during traffic stops, as required by this court, encourage decision-making based on legitimate law enforcement concerns rather than on improper and illegal race-based grounds.

During traffic stops, police officers may take action outside of the scope of the investigation of the traffic violation when the officer has safety concerns or develops suspicion of criminal activity. ORS 810.410(3)(d), (c). In interpreting this statute, this court has consistently held that any “conduct by the police, beyond that reasonably related to the traffic violation must be justified on some basis other than the traffic violation. *State v. Rogers/Kirkeby*, 347 Or 610, 227 P3d 695 (2010); *State v. Jimenez*, 357 Or 417, 357 P3d 1227 (2015).

In contrast to this court’s decisions requiring a reasonable relationship between questions posed by the officer and the traffic stop, the Court of Appeals allows any questioning during the “unavoidable lull” in a traffic stop.

State v. Hall, 238 Or App 75, 82, 241 P3d 757 (2010) This rule provides an opportunity for unlawful and improper race-based decisions during a traffic stop whether based on implicit bias or intentional racism.

Questions asked during an unavoidable lull are subject to no judicial scrutiny under *Hall*, because the court found that those questions have no constitutional significance. *Id.* at 83 citing *State v. Amaya*, 176 Or App 35, 29 P3d 1177 (2001). As a result, an officer has no obligation to think about why he or she is asking a particular question. Instead, any biases harbored by the officer, explicit or implicit, remain unchecked during the unavoidable lull in a traffic stop.

Furthermore, allowing officers unfettered discretion to question a driver about criminal conduct or requesting consent to search during an unavoidable lull subjects the driver to an indignity that, according to the data discussed in section I(A), *supra*, occurs disproportionately more often to black and hispanic drivers. This unjustified government intrusion, which violates both article 1 section 9 of the Oregon Constitution and the Fourth Amendment to the United States Constitution, should not be tolerated.

There are racial disparities in searches conducted during traffic stops. People of color are searched more frequently with less evidence. Black drivers are asked for consent to search more often than white drivers, even though

consent searches are less effective in finding contraband. There is a strong public interest in remedying these disparities. Adopting the rule of law offered by petitioner is one step towards that goal.

III. CONCLUSION

For the foregoing reasons, *amici* respectfully request that this court adopt the rule of law proposed by petitioner, and reverse the decision of the Court of Appeals and remand the case to the trial court.

Respectfully submitted,

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/s/ Rosalind M. Lee

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Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 3,038 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

/s/ Rosalind M. Lee

ROSALIND M. LEE, OSB 055566

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 9, 2018, I filed Brief of Amicus Curiae to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing system.

I further certify that counsel for the petitioner, Joshua Crowther and respondent, David Thompson, will be served via the efilng system.

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