10-1978

Brown v. Texas

Lewis F. Powell Jr.

MR. CABALLERO:

We plead not guilty to the charge.

THE COURT:

Okay, the State may call its first witness.

MR. PATTON:

Officer Venegas.

ENRIQUE VENEGAS, JR.

having been duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. PATTON:

Q. Okay Officer, would you please state your full name to the Court?

A. Enrique Venegas, Jr.

Q. And how are you employed Officer?

A. I'm a Police Officer for the City of El Paso.

Q. In what capacity are you employed by the City?

A. Patrolman.

Q. And were you so employed in that capacity on or about December 9, 1977?

A. I was.

Q. Now on that date in question, you came into contact with one Zackary Brown, is that correct?

A. That's correct.

Q. And you were driving down Magoffin Street by the 3000 block of Alameda?

A. Yes sir.

Q. And that was at approximately 12:45 P.M. on December 9, 1977?

A. Yes it was.

Q. And on that date and time in question, while you were driving down Magoffin, you had occasion to notice one Zackary Brown, is that correct?

A. That's correct.

Q. Okay, will you please explain to the Court what led you to first notice Zackary Brown?

A. Okay, we were patroling the area and we noticed the subject walking down the alley behind Alameda.

Q. Behind Alameda, and you were driving on Magoffin, is that correct?

A. Right, Magoffin.

Q. And you had a view of the alley from the position of yourself on Magoffin Street?

A. That's correct.

Q. Now, were you in a vehicle or were you on foot?

A. We were in a vehicle.

Q. Is there any particular reason, what led you to first notice Zackary Brown in that alley?

A. Well because we noticed him walking and that's a very high drug...

MR. CABALLERO:

Judge, I object to the characterization of the neighborhood in one way or the other as high crime area, one of these terminologies. The man hasn't been charged with anything but failure to give his name. What people may do in the neighborhood is totally irrelevant to the case.

THE COURT:

Okay, overruled.

MR. PATTON:

Q. Was there anyone else in that alley?

A. Yes sir, there was another subject wearing an overcoat.

Q. What did you notice about him, was there anything unusual?

A. He was limping, and as we approached them, they seemed to separate, or....

Q. Had they been speaking to one another?

A. We were unable to tell that, if that had occurred.

Q. But they were together, is that correct?

A. They were either together or they were going to be together.

Q. Were they walking toward one another?

A. We couldn't tell, we just know that as soon as we drove up, they just separated, and if they were going towards each other, they went their separate ways, or if they had been together, they just separated.

Q. Did they walk past one another?

A. I was unable to see that.

Q. Let me ask you this. You saw Mr. Brown in the alley along with this other subject, why then did you stop Zackary Brown?

A. Because it looked suspicious and we had never seen that subject in that area before.

Q. Why was it so suspicious for him to be in that area?

A. Because of...

MR. CABALLERO:

Judge, here again I have an objection to any characterization calling for some sort of conclusion that people standing in an alley talking to one another, if that's what they were doing, there's not even evidence that they were doing that. That being someplace with anybody is suspicious, there's no evidence of any crime. I object to any characterization as that activity being suspicious when it's not.

THE COURT:

Okay, overruled, go ahead.

MR. PATTON:

Q. Okay, you stopped Zackary Brown, is that correct?

A. That's correct.

Q. Is Mr. Brown in this courtroom today?

A. Yes he is.

Q. Would you please identify him for the Court?

A. It's that gentleman sitting over there.

Q. What color jacket is he wearing?

A. Navy Blue.

Q. Your honor, at this time I'd like the record to reflect that the witness has identified the defendant in this cause, Zackary Brown.

THE COURT: The record will so reflect.

MR. PATTON:

Q. Now you were in your patrol car at the time, is that correct, when you first noticed Mr. Brown?

A. Yes, I was.

Q. And did you get out of your patrol car and walk up to the alley to where Mr. Brown was?

A. No, we drove up.

Q. And you got out of the patrol car?

A. When we approached, yes.

Q. And what did you ask Mr. Brown?

A. We asked him what his name was and what he was doing in the alley?

Q. Are these the only questions you asked him at that time?

A. At that time, yes.

Q. And did he tell you his name at that time?

A. No he did not.

Q. Did he give any reason why he wasn't going to tell you his name?

A. At the beginning he did not. When he had his hands in his pocket we also asked him if he would please take his hands out of his pocket, and he did not the first time. The second time he did, and that's when my partner patted him down.

Q. Well, did he give you any reason why he didn't want to tell you what his name was?

A. No he did not.

Q. He just refused to tell you his name and left it at that?

A. The first couple of times we asked him, he refused.

Q. You asked him for his name more than once?

A. Yes.

Q. And on those occasions which you asked him for his name while there in the alley, he refused on all occasions to to give you his name?

A. Correct.

Q. Now, did you identify yourself as a police officer?

A. We were in uniform and we were in a patrol car, it was obvious that we were police officers.

Q. So you presumed that the defendant would realize from your uniform and also the vehicle you were driving, that you were police officers?

A. Correct.

Q. What was the Defendant's attitude during this time that

you confronted him in the alley?

A. He was very discourteous, he was yelling at us saying that we had no right, no reason to stop him.

Q. At all times were you polite and courteous towards him?

A. Yes we were.

Q. And you did give him ample opportunity to identify himself at the scene, is that correct?

A. That's correct.

Q. And what did you eventually do when he still refused to identify himself?

A. We put him under arrest, brought him to Central Station and booked him.

Q. I have no further questions.

CROSS EXAMINATION

BY MR. CABALLERO:

Q. Mr. Venegas, going back to the scene, this was daylight, was it not?

A. Yes sir.

Q. In fact, I think you said it was 12:45 P.M.?

A. Yes.

Q. And what were the weather conditions like?

A. Sunny and bright.

Q. Now that part of town were you were, was the alley paved or unpaved?

A. The alley was unpaved.

Q. And it has a clear view. In other words, if you're going down Magoffin Street, you can just go right into the alley, can you not?

A. Yes.

Q. You say you saw two individuals at first when you and the other officer drove up to the scene, there were two individuals in the alley, is that correct?

A. Correct.

Q. This was on December 9th?

A. Yes.

Q. And one of the individual's was wearing a coat?

A. An overcoat.

Q. Is that rare in El Paso?

A. In sunny weather it is.

Q. In sunny weather it was, and did you ever stop that individual?

A. No.

Q. You never did, and when my client, Mr. Brown and the other individual were in the alley, when you first saw them, how far apart were they?

A. Couple of feet.

Q. Couple of feet, and were they facing each other or were their backs against each other?

A. They were walking away from each other.

Q. They were walking away from each other. At that point,

if that's the first thing you saw, you don't know if two people were just crossing each other in the alley or not, do you?

A. No.

Q. And you never did find out, did you?

A. No.

Q. Was the other individual, can you describe him by race?

A. It was a black man.

Q. And could you describe Zackary Brown for me?

A. He's a black male.

Q. How old is Zackary?

A. Mid twenties, approximately mid twenties.

Q. That part of town, is it rare to see black people in that part of town?

A. No, it's not.

Q. As a matter of fact, would I be correct in saying that it's an area of town probably where more blacks congregate than any other area?

A. I don't know if that's a fair statement.

Q. You don't know whether or not the area on Alameda Street right between Piedras and three or four blocks east is an area known to be frequented by blacks, officer?

A. It's frequented by blacks, but you said that it's the most highly populated area by blacks.

Q. No, I said frequented by blacks. Do you know of any

other area in town where blacks hang out, you see more blacks than you do on Alameda Street between Piedras and three blocks east officer?

A. Yes.

Q. What other area?

A. Dyer Street.

Q. Dyer Street, lot of military people up there?

A. Yes.

Q. So it would be fair to say that those two areas are ones where you see more blacks than any other?

A. Yes.

Q. Okay, so you see a black person in that part of town is not unusual, is it?

A. No, it's not.

Q. Have you seen, do you know every black that frequents the Alameda area?

A. Most of them.

Q. You know most of them, my question was, do you know every one of them?

A. No.

Q. And every time you meet a new one, do you stop him to ask his name?

A. No.

Q. Did you, was there any action by my client that he was armed or committed a crime at that time?

A. No.

Q. The only thing you wanted to do was stop him and ask him his name?

A. Correct.

Q. That's all?

A. That's all.

Q. And that's what you did?

A. Yes.

Q. And when you did stop him and he told you, he asked you why did you stop me, isn't that true?

A. No.

Q. Or words to that effect, did he say you have no reason to stop me?

A. Correct.

Q. And did you tell him you had a reason?

A. Just told him that he was walking in the alley and that was a high drug problem area.

Q. And you asked him for his name?

A. Correct.

Q. And did he, aside from what he may have said officer, did he kick you or become disorderly or push you or anything like that?

A. No.

Q. And you didn't pat him down?

A. My partner patted him down.

Q. Did he find any weapons on him?
A. No.
Q. Did you find any drugs on him?
A. No.
Q. And once you found out he hadn't been committing a crime, and you asked him for his name again, did he give it to you?
A. No.
Q. And what did you do then?
A. We arrested him.
Q. And for what?
A. For failure to identify.
Q. How many people have you arrested for those things before officer?
A. That was my first.
Q. That was your first. Is it, how long have you been on the force now?
A. Since October.
Q. In other words, you'd been on the force a little more than a month or so, and you made your first arrest for failure to identify?
A. Correct.
Q. Have you made any since?
A. Make any since?
Q. Have you arrested anybody since then for failure to

identify themselves?

A. No.

Q. Is it a rare thing for someone in the Police Department to arrest somebody for failure to identify?

A. I can only speak from my experience.

Q. Well, from your experience?

A. Yes.

Q. All right, when you go to Police School, were you advised that it was a crime to refuse to give an officer a person's name and address?

A. Yes.

Q. You were told that?

A. Yes, it's in the Penal Code.

Q. All right, but when you go to school they tell you, there are a lot of things in the Penal Code that you may not know about, but they told you though that was one of the things in the Penal Code?

A. Correct.

Q. And did they tell you that if someone, for absolutely whatever reason they had, refused to give you, a police officer, his name or her name, that you can then proceed to arrest him and book him?

A. Correct.

Q. And that's what you did with Mr. Brown?

A. Right.

Q. And were you ever told since then that you shouldn't have done that or make sure that someone committed a crime, or you had reason to believe they did, or anything like that?

A. No, I have not.

Q. They've never told you otherwise?

A. No.

Q. The only reason you arrested him is because a person refused to provide his name, is that correct?

A. Right.

Q. Where did you book my client, Mr. Brown?

A. Where did I book him?

Q. Yes sir?

A. County Jail.

Q. El Paso County Jail, and he was placed in there the same as any other prisoner that you may have picked up for committing a violation of some sort, is that correct?

A. Correct.

Q. And was there a bond placed on him?

A. I believe so.

Q. Do you recall the amount?

A. No.

Q. Did you have any more involvement with the case after that officer?

A. No, I did not.

Q. Now when my client was booked at the County Jail, aside from patting him which your partner had already conducted, they searched him more thoroughly there, did they not, while being processed in the jail?

A. Yes.

Q. And do you participate in that process or is that something done by the Sheriff of El Paso County?

A. We give him another search before we take him to jail.

Q. All right, did you give my client, Mr. Brown, another search?

A. I believe he was taken to jail by my partner.

Q. By your partner?

A. I don't quite recall.

Q. Anyway he was searched again according to procedures?

A. Right.

Q. Was anything found of an illegal nature?

A. No.

Q. Officer, after you made the arrest, because my client refused to give you his name, when you were on the way downtown to book him in the jail, he finally did tell you what his name was, didn't he?

A. Yes.

Q. But he had already committed the violation, is that correct?

A. Correct.

Q. So once you had his name, it didn't help you any one way or the other, did it?

A. No.

Q. But in your opinion, the way this law is written, the crime had already been committed?

A. Correct.

Q. Pass the witness.

THE COURT:

Q. Did you ever ask him what his residence address was?

A. Yes, we did.

Q. Did he refuse to tell you that?

A. Before we placed him under arrest, before we arrested him, yeh, he refused.

Q. Including his address?

A. Yes, including his address.

MR. CABALLERO:

That's all we have, your honor.

THE COURT:

Q. Didn't you go to Corporation Court to testify?

A. My partner went to Municipal Court I believe.

THE COURT:

Okay, does the State have anything further?

MR. PATTON:

The State rests, your honor.

MR. CABALLERO:

Judge, we have a motion for acquittal, and also we want to reurge our motion, which we filed earlier, for dismissal, and we just don't think the evidence is sufficient for a conviction.

THE COURT:

Those motions are overruled.

MR. CABALLERO:

Judge, we have no evidence to present.

THE COURT:

Then the State rests and the Defense rests, both your motions are denied.

MR. CABALLERO:

That's all I have, your honor.

THE COURT:

Okay, then the Defense rests?

MR. CABALLERO:

Yes sir.

THE COURT:

And do both sides close?

MR. PATTON:

Yes sir.

MR. CABALLERO:

Yes sir.

THE COURT:

Any argument.

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MR. PATTON:

No argument, your honor.

MR. CABALLERO:

We have none, Judge, we've already stated our position.

THE COURT:

Then I'll find the Defendant guilty. Is there any evidence on the punishment that either side wishes to present?

MR. CABALLERO:

No Judge, we have no further evidence.

THE COURT:

Does the State have any?

MR. PATTON:

No evidence, your honor.

THE COURT:

Any argument about the punishment?

MR. CABALLERO:

None Judge.

MR. PATTON:

No, your honor.

THE COURT:

Does the Defendant wish to say anything?

MR. BROWN:

No, your honor.

THE COURT:

Okay then, the punishment is a $45.00 fine and court

costs. Now, since I do so few of these, I'm not sure whether I impose sentence or whether the Defendant has ten days to accept sentence. In case he does, does he want to wait ten days or does he want to waive the ten days?

MR. CABALLERO:

Judge, we will waive.

THE COURT:

The Defendant so waives?

MR. BROWN:

Yes sir.

THE COURT:

Okay then, in case it's necessary, you're sentenced to a fine of $45000 and court costs. Now we'll have to call the Clerk up here. Now, once you have this commitment you either have to pay it or go to jail, or make some other arrangements.

MR. CABALLERO:

Judge, my intention is to file timely notice of appeal and to ask this Court for a stay of the execution of the sentence pending the appeal.

THE COURT:

Where are you going to appeal, you can't appeal to the Court of Criminal Appeals?

MR. CABALLERO:

Judge, we're going to file a notice of appeal to this Court, and the Court of Criminal Appeals has no jurisdiction

and I assume it's going to be to the Supreme Court of the United States.

THE COURT:

Then we'll consider that the Judgment, the Court will stay the Judgment, the execution of the fine pending your perfection of the appeal to the United States Supreme Court. Please prepare an order for the Court to sign on the stay.

MR. CABALLERO:

Yes sir.

THE COURT:

Now if this were an ordinary appeal, all that would be stayed when you give your notice of appeal, but I don't know what the status is since it's under $100 fine. In case one is needed, it's granted. Now, we're here on the, there's some question now on the notice of appeal that would bring this case to this Court from the Municipal Court, and there was some delay in the filing in this Court. And the Court Reporter and the Court Secretary were all looking for this appeal, and we were notified by the Municipal Court that they had lost the appeal bond in this matter. And I think perhaps we should have some testimony that there was an appeal bond. Do you want your client to testify?

MR. CABALLERO:

Yes, for those purposes Judge.

ZACKARY BROWN

C.F.R. Dissent

Attack on Texas statute making it criminal offense not to give name & address upon request by an officer.

PRELIMINARY MEMORANDUM

June 15, 1978, Conference
List 2, Sheet 1

No. 77-6673

Now insubstantial - I'd like to CFR. JA

BROWN — Appeal from El Paso County Court (no opinion)

v.

TEXAS — State/Criminal — Timely

1. SUMMARY: In this unusual appeal, an individual challenges the constitutionality of a Texas statute which makes it a criminal offense to refuse to give one's name and address to a police officer upon request.

2. FACTS: Because there are no opinions in this case and, as yet, no response, I must rely entirely on the jurisdictional statement for the relevant facts. Two El Paso police officers saw appellant and another pedestrian walking down an alley shortly after noon. The officers drove into the alley, stopped appellant and asked him his name and what he was doing in the alley. When he refused to give his name, appellant was arrested for violation of Section 38.02 of the Texas Penal Code, which provides:

> A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.

Appellant was patted down but no weapons or contraband was found. On the way to the jail, appellant did tell the officers his name, but the officers told him that the violation was already complete.

Prior to trial, appellant moved in writing that the statute was unconstitutional as overbroad and violative of his Fifth, Fourth and First Amendment rights. The County Court at law denied this motion. At trial the arresting officer apparently testified that he had noted that appellant was a black male and that he stopped appellant because he had not seen him in the area before. The officer admitted that many blacks are found in that area of town. The officer

apparently stated that he suspected no crime and just wanted to stop appellant to ask his name.

Appellant was convicted and fined 45 dollars. Because it appeared that no review could be obtained in the Texas Court of Criminal Appeals for a case involving less than $100,[1/] appellant appealed directly to this Court.

3. CONTENTIONS: First, with respect to jurisdiction, appellant states that the Texas Court of Criminal Appeals has previously held that where one is fined less than $100 in a County Court at Law, there is no appeal to the Texas Court of Criminal Appeals. Coates v. Texas, 398 S.W.2d 869 (Tex. Ct. Crim. App. 1957). Hence, the decree in this case has been rendered "by the highest court of a State in which a decision could be had" within the meaning of 28 U.S.C. §1257(2). See Williams v. Florida, 399 U.S. 78, 79 n. 5 (1970).

On the merits, appellant argues, first, that the statute violates the First Amendment because it is vague and overbroad and unreasonably infringes on a protected form of expression - silen Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). The vagueness of the statute is also viewed as violative of the Due Process Clause of the Fifth Amendment.

1/ Article 4.03 of the Texas Code of Criminal Procedure provides:

> The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases. This Article shall not be so construed as

Second, appellant contends that the statute authorizes an unwarranted invasion of the right of privacy and is therefore violative of the Fourth Amendment. Fourth Amendment benefits are not secure if one can be punished for refusing to give one's name or address where there was no probable cause or even suspicion that one had committed a crime.

Finally, the Texas statute punishes silence and is therefore violative of the right to remain silent granted by the Fifth Amendment.

4. DISCUSSION: The questions presented by this case seem substantial. In its leading decision on street encounters, Terry v. Ohio, 392 U.S. 1 (1968), this Court held that the police could stop and, if necessary, frisk where they possessed an articulable suspicion that a person had committed or would commit a crime. To the extent that appellant here was detained by the police, the "stop" would not appear to have been permissible under Terry. 2/ Moreover, although Terry did not deal with the right of the police to compel answers to their

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1/ (continued)

> to embrace any case which has been appealed from any inferior court to the county court, the county criminal court, or county court at law, in which the fine imposed by the county court, the county criminal court or county court at law shall not exceed one hundred dollars.

2/ If the stop here was not lawful, then it may be unnecessary to reach the constitutionality of the statute, for the statute only applies where a person is "lawfully stopped".

questions, Mr. Justice White, concurring, stated:

> There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him, Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnished no basis for an arrest, although it may alert the officer to the need for continued observation." 392 U.S. at 34.

Mr. Justice Harlan, concurring, also seemed to recognize an individual's "right to ignore his interrogator." 392 U.S. at 33.

This appeal would thus appear to raise serious Fifth as well as Fourth Amendment issues. In California v. Byers, 402 U.S. 424 (1971), the Court upheld a conviction based on a statute which required a driver involved in an accident to leave his name and address at the scene. The Chief Justice's plurality opinion reasoned that the statute did not violate the Fifth Amendment privilege because it was directed at the public at large and because the information obtained was nontestimonial in character. Cf. Schmerber v. California, 384 U.S. 757 (1966). Justice Harlan, in a separate opinion necessary to form the majority, reasoned that California statute was constitutional because of the strength of its noncriminal regulatory purpose. Although the information which the statute compels here seems similar to that obtained in Byers, the State's regulatory interest and the assurances that the statute

will be broadly applied would appear to be much weaker.

Appellant's First Amendment claim does not seem substantial. If the First Amendment is implicated by a police officer's question, then every Government question or questionnaire would seem to implicate a First Amendment "right to silence". Nor does the statute seem unduly vague in the traditional sense that it fails to give notice of the prohibited behavior. Appellant may have an argument, however, that the statute permits the police to arrest otherwise innocent citizens almost at will, and therefore is subject to the arbitrary and capricious misuse of vagrancy statutes discussed in Papachistou v. City of Jacksonville, 405 U.S. 156 (1972).

In sum, I think that appellant mounts a serious constitutional challenge to the Texas statute. Whether this Court has jurisdiction over this appeal will depend upon whether appellant has accurately stated Texas procedural law. In addition, appellant's summary of the record - in particular, his assertion that the police did not suspect him of a crime - may be challenged by the State. In order to examine the quality and contents of the record, I would call for the record as well as a response.

CFR.

There is no response.

June 8, 1978 Cole No Ops.

Pet. was convicted of a misdemeanor under Tex. statute [illegible] persons lawfully stopped by police to give name & address.

Response by Texas states need lawfully stopped means reasonable suspicion [illegible] e.g. a Terry stop or a Brignoni-Ponce stop.

Here - no presumptions - [illegible] But [illegible] not [illegible]

SUPPLEMENTAL MEMORANDUM

No. 77-6673

BROWN

v.

TEXAS

Appeal from El Paso County Ct.
(No opinion)

State/Criminal

Timely

The response requested in this case has now been received, along with the record and a reply from the appellant. It appears that there may be substantial questions involved under the Fourth and Fifth Amendments.

With respect to the issues of substance, the response (in the form of a motion to dismiss or affirm) makes two main arguments: (1) The phrase "lawfully stopped" in the statute under which appt was prosecuted requires at least the existence of the objectively-based suspicion necessary for a Terry v. Ohio stop,[1] and that suspicion was present in this case; (2) there is no Fifth Amendment problem with a statute requiring a person subject to a Terry stop to give his name and address because this information is not incriminating, but simply involves the taking of non-testimonial evidence such as blood samples, finger prints, or handwriting exemplars. The state also argues that the case is insubstantial because appt was subject only to a $45.00 fine and a class C misdemeanor conviction.

The reply to the motion to dismiss or affirm is not particularly helpful; it primarily reargues the points made in the petition.

THE FOURTH AMENDMENT ISSUE.

If the statute is construed as allowing a policeman to stop a person and demand his name and address without any cause whatsoever, then obvious Fourth Amendment problems exist. The

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1. Terry, of course, focused on the suspicions needed to justify a pat-down; it reserved the question whether a stop solely for purposes of interrogation was proper. That question was answered in the affirmative in your opinion for the Court in Brignoni-Ponce, cited in the following text. People still refer to the kind of detention that occured here as Terry stops, however, probably because it would be so awkward to say "Brignoni-Ponce stop."

state denies that the statute has this meaning, although it points to no state court cases construing it one way or the other. My brief research reveals none. The record suggests that the parties and the court were assuming that at least Terry suspicions are required under the statute, and the words "lawfully stopped" make that the most plausible reading.

Even if the statute requires the proper level of suspicion before the initial stop can be made, however, there would still be a Fourth Amendment problem if the officers in this case did not have such a suspicion. The state asserts that during trial, appt's lawyer "indicated that he assumed the officers 'had some reason to make an initial stop and ask a question or so.'" The record suggests that this comment, taken in context, may have been made simply for argumentative purposes. The reply doesn't comment on this allegation one way or the other.

Whether the police actually had cause to stop appt is a fact-specific question not warranting plenary review. I believe, however, that rather than simply declining to decide this question, the Court should at least consider a summary reversal. The portion of the transcript attached represents the sum total of the evidence against appt. To me it is patent that the officers were "not aware of specific, articulable facts, together with rational inferences from those facts, that reasonably warrant[ed] suspicion" that criminal activity was afoot. United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975). The Court

might wish to dispose of the case on that basis rather than having to face what I believe is the more difficult Fifth Amendment issue that follows. A possible obstacle to such a disposition, however, is that appt's counsel does not appear to have argued the factual validity of the initial stop very vigorously, if at all.

THE FIFTH AMENDMENT ISSUE.

Even if the initial stop of appt was fully justified, there remains a troubling Fifth Amendment question in allowing him to be criminally punished for simply refusing to give his name and address when asked. Certainly the officers are entitled to put the question, but does a suspect have to answer it on pain of a criminal conviction? The trial court pushed the prosecutor rather hard on this question and got no good answers. But in the end the judge seemed to shrink from so bold a move as declaring a state statute unconstitutional.

The Court's decisions on what kinds of communications fall within the scope of the Fifth Amendment are confusing at best. I agree with the preliminary memo that Beyers is probably distinguishable. There the requirement of giving one's name after being involved in an auto accident was justified on the ground that it was for a regulatory purpose not necessarily linked to criminal investigation. The plurality distinguished compelled communications "directed at a highly selective group inherently suspected of criminal activities." A strong argument could be made that those subject to a Terry stop fall within this category.

If a suspect is arrested, given his Miranda warnings, then asked his name and address, my understanding of the law is that he is not required to answer. Even though the questions are routine and the answers are usually discoverable in other ways, the information sought is still potentially incriminating (as when the suspect is wanted on other charges, is a fugitive, etc.), and, when demanded orally, it is testimonial. If an arrestee is not required to divulge his name and address, neither should the subject of a Terry stop be required to do so.

It is significant that what is at stake in this case is not the exclusion of evidence for whatever crime appt may have been suspected of committing, but a criminal conviction for the act of refusing to answer.

Perhaps I am missing something obvious or approaching this case incorrectly, but this case strikes me as an important one. A similar statute is involved in No. 77-1680, Michigan v. DeFillippo, Summer List 7, Sheet 3, although the precise issue there is apparently focused on the exclusion of evidence gained in a good faith arrest pursuant to a statute later declared unconstitutional by a state court.

I think the case should be discussed.

Argued ....., 19... *Assigned* ....., 19... No. 77-6673

Submitted ....., 19... *Announced* ....., 19...

BROWN

vs.

TEXAS

Also motion to dismiss or affirm.

WJB thinks the Jurisdictional "can fully stopped" cases should be relisted

DFWSFQ

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.						✓							
Brennan, J.						✓							
Stewart, J.						✓							
White, J.						✓							
Marshall, J.				✓									
Blackmun, J.						✓							
Powell, J.						✓							
Rehnquist, J.						✓							
Stevens, J.						✓							
.....													

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: 29 SEP 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

ZACKARY C. BROWN *v.* STATE OF TEXAS

ON APPEAL FROM THE COUNTY COURT AT LAW NUMBER TWO, EL PASO COUNTY

No. 77-6673. Decided October —, 1978

MR. JUSTICE MARSHALL, dissenting.

Appellant was convicted by the County Court of El Paso, Tex., of violating § 38.02 of the Texas Penal Code, which prohibits an individual from "intentionally refus[ing] to report or giv[ing] a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information." The court imposed a fine of $45. Under Art. 4.03 of the Texas Code of Criminal Procedure, review in state court was foreclosed because appellant's fine was less than $100.

The circumstances leading to appellant's arrest are not in dispute. Shortly after noon on December 9, 1977, two El Paso policemen on patrol saw appellant and another person walking away from each other in an alley. The officers drove into the alley, stopped appellant, and asked him for his name and an explanation of what he was doing in the alley. When appellant refused to identify himself, he was arrested, searched, and taken to the station for booking. The search revealed no weapons or contraband.

According to the officer who testified at trial, appellant was stopped because he was a black male in his mid-twenties whom the officers had not recognized and whose presence in the alley therefore seemed "suspicious." The officer acknowledged that there had been no reports of crime in the area, that he had been unable to tell whether appellant and the other pedestrian had met or spoken to each other in the alley, and that there was nothing in appellant's conduct to suggest that he was armed or had committed a crime. Nor was it unusual, the

officer conceded on cross-examination, for blacks to frequent the area of El Paso in which appellant had been apprehended.

This Court recognized in *Terry* v. *Ohio*, 392 U. S. 1, 16 (1968), that an individual's reasonable expectation of privacy under the Fourth Amendment is implicated "whenever a police officer accosts [him] and restrains his freedom to walk away." To justify such an intrusion, the officer must point to "specific and articulable facts which, taken together with rational inferences," would "'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Id.*, at 21–22. Appellant here was stopped for no apparent or articulable reason other than his age, race, and proximity to an unidentified pedestrian. There was simply nothing incongruous in appellant's appearance or presence in the area to arouse suspicion. Under such circumstances, appellant's stop evinces the same quality of random intrusiveness which this Court has previously refused to countenance except at the border or its functional equivalent. Compare *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975), *United States* v. *Ortiz*, 422 U. S. 891 (1975), and *Almeida Sanchez* v. *United States*, 413 U. S. 266 (1973) with *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976).

Since § 38.02 proscribes silence only in the face of inquiries made pursuant to a lawful stop, the burden was on the State to establish that the questioning was within the constitutional limits established by *Terry*. I see nothing in the papers before me to suggest that the State in fact made such a showing. To convict on a record wholly devoid of evidentiary support for an essential element of the offense violates the most fundamental tenets of due process. See *Thompson* v. *Louisville*, 362 U. S. 199 (1960), *Garner* v. *Louisiana*, 368 U. S. 157 (1961).

Accordingly, I would treat this appeal as a petition for certiorari and set the case down for argument.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

September 29, 1978

RE: No. 77-6673 Brown v. Texas

Dear Thurgood:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

September 29, 1978

Re: No. 77-6673 - Zackary C. Brown v. Texas

Dear Chief:

Would you please relist this case for me.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

TO: Mr. Justice Powell

FROM: Eric

DATE: 9/29/78

RE: Brown v. TEXAS, No. 77-6673

I think there is a 5th Amend Q that we probably will want to take in a better case. May not reach it here.

According to the attached papers, although Mr. Justice Marshall was the only one in favor of noting jurisdiction in this case at conference, his proposed dissent has persuaded Mr. Justice Brennan to join him, and TM has now asked that the case be relisted.

As I mentioned in my supplemental memorandum, I think the Court should accept the state's reading of the statute that it requires at least "Terry suspicions" to justify the initial stop. Thus, there is probably no facial Fourth Amendment problem here. Although I have serious doubts that the officer actually had such suspicions when he stopped Brown, whether the statute was constitutionally applied with respect to the Fourth Amendment is a fact specific question not worthy of plenary review. Yes

The Fifth Amendment question is more substantial. It seems highly questionable that the state constitutionally may criminalize the failure to speak to an officer who is investigating one for suspected illegal activities. Yes

TM seems not to get past the Fourth Amendment issue in his dissent. For the reasons noted above, I do not recommend that you join him on that basis. Although I do think the Fifth Amendment question may be worth review, I assume from your vote at conference that you disagree. Unless you have second thoughts or wish to bring the Fifth Amendment problem to the attention of TM or the Conference, I think you should therefore adhere to your original vote.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

September 29, 1978

RE: No. 77-6673 Brown v. Texas

Dear Thurgood:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

September 29, 1978

Re: No. 77-6673 - Zackary C. Brown v. Texas

Dear Chief:

Would you please relist this case for me.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Linda
attach to Docket Sheet + Memo

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: 29 SEP 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

ZACKARY C. BROWN *v.* STATE OF TEXAS

ON APPEAL FROM THE COUNTY COURT AT LAW NUMBER TWO, EL PASO COUNTY

No. 77-6073. Decided October —, 1978

MR. JUSTICE MARSHALL, dissenting.

Appellant was convicted by the County Court of El Paso, Tex., of violating § 38.02 of the Texas Penal Code, which prohibits an individual from "intentionally refus[ing] to report or giv[ing] a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information." The court imposed a fine of $45. Under Art. 4.03 of the Texas Code of Criminal Procedure, review in state court was foreclosed because appellant's fine was less than $100.

The circumstances leading to appellant's arrest are not in dispute. Shortly after noon on December 9, 1977, two El Paso policemen on patrol saw appellant and another person walking away from each other in an alley. The officers drove into the alley, stopped appellant, and asked him for his name and an explanation of what he was doing in the alley. When appellant refused to identify himself, he was arrested, searched, and taken to the station for booking. The search revealed no weapons or contraband.

According to the officer who testified at trial, appellant was stopped because he was a black male in his mid-twenties whom the officers had not recognized and whose presence in the alley therefore seemed "suspicious." The officer acknowledged that there had been no reports of crime in the area, that he had been unable to tell whether appellant and the other pedestrian had met or spoken to each other in the alley, and that there was nothing in appellant's conduct to suggest that he was armed or had committed a crime. Nor was it unusual, the

officer conceded on cross-examination, for blacks to frequent the area of El Paso in which appellant had been apprehended.

This Court recognized in *Terry* v. *Ohio*, 392 U. S. 1, 16 (1968), that an individual's reasonable expectation of privacy under the Fourth Amendment is implicated "whenever a police officer accosts [him] and restrains his freedom to walk away." To justify such an intrusion, the officer must point to "specific and articulable facts which, taken together with rational inferences," would "'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Id.*, at 21–22. Appellant here was stopped for no apparent or articulable reason other than his age, race, and proximity to an unidentified pedestrian. There was simply nothing incongruous in appellant's appearance or presence in the area to arouse suspicion. Under such circumstances, appellant's stop evinces the same quality of random intrusiveness which this Court has previously refused to countenance except at the border or its functional equivalent. Compare *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975), *United States* v. *Ortiz*, 422 U. S. 891 (1975), and *Almeida Sanchez* v. *United States*, 413 U. S. 266 (1973) with *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976).

Since § 38.02 proscribes silence only in the face of inquiries made pursuant to a lawful stop, the burden was on the State to establish that the questioning was within the constitutional limits established by *Terry*. I see nothing in the papers before me to suggest that the State in fact made such a showing. To convict on a record wholly devoid of evidentiary support for an essential element of the offense violates the most fundamental tenets of due process. See *Thompson* v. *Louisville*, 362 U. S. 199 (1960), *Garner* v. *Louisiana*, 368 U. S. 157 (1961).

Accordingly, I would treat this appeal as a petition for certiorari and set the case down for argument.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: ~~11 OCT 1978~~

Recirculated: 11 OCT 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

ZACKARY C. BROWN *v.* STATE OF TEXAS

ON APPEAL FROM THE COUNTY COURT AT LAW NUMBER TWO, EL PASO COUNTY

No. 77-6873. Decided October —, 1978

MR. JUSTICE MARSHALL, dissenting.

Appellant was convicted by the County Court of El Paso, Tex., of violating § 38.02 of the Texas Penal Code, which prohibits an individual from "intentionally refus[ing] to report or giv[ing] a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information." The court imposed a fine of $45. Under Art. 4.03 of the Texas Code of Criminal Procedure, review in state court was foreclosed because appellant's fine was less than $100.

The circumstances leading to appellant's arrest are not in dispute. Shortly after noon on December 9, 1977, two El Paso policemen on patrol saw appellant and another person walking away from each other in an alley. The officers drove into the alley, stopped appellant, and asked him for his name and an explanation of what he was doing in the alley. When appellant refused to identify himself, he was arrested, searched, and taken to the station for booking. The search revealed no weapons or contraband.

According to the officer who testified at trial, appellant was stopped because he was a black male in his mid-twenties whom the officers had not recognized and whose presence in the alley therefore seemed "suspicious." The officer acknowledged that there had been no reports of crime in the area, that he had been unable to tell whether appellant and the other pedestrian had met or spoken to each other in the alley, and that there was nothing in appellant's conduct to suggest that he was armed or had committed a crime. Nor was it unusual, the

officer conceded on cross-examination, for blacks to frequent the area of El Paso in which appellant had been apprehended.

This Court recognized in *Terry* v. *Ohio*, 392 U. S. 1, 16 (1968), that an individual's reasonable expectation of privacy under the Fourth Amendment is implicated "whenever a police officer accosts [him] and restrains his freedom to walk away." To justify such an intrusion, the officer must point to "specific and articulable facts which, taken together with rational inferences," would " 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Id.*, at 21–22. Appellant here was stopped for no apparent or articulable reason other than his age, race, and proximity to an unidentified pedestrian. There was simply nothing incongruous in appellant's appearance or presence in the area to arouse suspicion. Under such circumstances, appellant's stop evinces the same quality of random intrusiveness which this Court has previously refused to countenance except at the border or its functional equivalent. Compare *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975), *United States* v. *Ortiz*, 422 U. S. 891 (1975), and *Almeida Sanchez* v. *United States*, 413 U. S. 266 (1973) with *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976).

Since § 38.02 proscribes silence only in the face of inquiries made pursuant to a lawful stop, the burden was on the State to establish that the questioning was within the constitutional limits established by *Terry*. I see nothing in the papers before me to suggest that the State in fact made such a showing.

Accordingly, I would treat this appeal as a petition for certiorari and set the case down for argument.

Linda

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

From: Mr. Justice Stevens

Circulated: _____

Recirculated: OCT 11 1978

1st DRAFT

SUPREME COURT OF THE UNITED STATES

ZACKARY C. BROWN *v.* STATE OF TEXAS

ON APPEAL FROM THE COUNTY COURT AT LAW NUMBER TWO, EL PASO COUNTY

No. 77-6673. Decided October —, 1978

Rewritten

I'll not join

MR. JUSTICE STEVENS, dissenting.

The questions presented by the jurisdictional statement and record in this case all relate to the constitutionality of § 38.02 of the Texas Penal Code. Because the Court has not previously considered the constitutionality of such a statute, I would note probable jurisdiction and set the case for argument instead of deciding the merits summarily. However, I cannot join MR. JUSTICE MARSHALL's dissenting opinion. Appellant has not contended in this Court that his conviction is unconstitutional under the holding in *Thompson* v. *Louisville*, 362 U. S. 199. In fact, that case is inapplicable here because the record is not "wholly devoid of evidentiary support" for the reasonable suspicion element of the offense.* *Supra*, at —.

*As is clear from the evidence described in MR. JUSTICE MARSHALL's opinion, the conduct witnessed by the police officer in the alley was characteristic of a just-completed narcotics transaction. Whether or not that evidence was sufficient to justify a finding that the officer's suspicion was reasonable, it plainly satisfies the constitutional requirement articulated in *Thompson* v. *Louisville*, *supra*, that a judgment must have some evidentiary support.

Linda

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 12, 1978

I could Hold - but not
Reverse or Note

Re: No. 77-6673 - Brown v. Texas

Dear Thurgood:

I could give sympathetic consideration to a summary reversal in this case. If there are insufficient votes for this, I would hold it for 77-1680, Michigan v. DeFillippo. My third preference would be to note and have the case argued with DeFillippo.

Sincerely,

Harry

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

October 12, 1978

Re: 77-6673 - Brown v. Texas

Dear Thurgood,

I doubt that I would vote to dismiss this appeal since, like Brother Stevens, I am interested in the question of the validity of the underlying statute. That issue is somewhat similar to the question we may reach in Michigan v. De Fillippo, No. 77-1680, in which certiorari was granted on October 2. I would at least hold this case for De Fillippo, although I could note and have the two argued together.

If the appeal is dismissed, I would not grant certiorari to review the facts underlying the stop.

Sincerely yours,

Mr. Justice Marshall

Copies to the Conference

Argued ....., 19... *Assigned* ....., 19... No. 77-6673

Submitted ....., 19... *Announced* ....., 19...

BROWN

VS.

TEXAS

Relisted for Mr. Justice Stevens. Also motion to dismiss or affirm.

Harry would like this set for argument with Michigan v. DeFillippo 77-1680 (But that case is different)

Noted

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.						✓							
Brennan, J.				✓									
Stewart, J.						✓							
White, J.				✓									
Marshall, J.				✓									
Blackmun, J.				✓		Could reverse Summarily							
Powell, J.					✓	✓							
Rehnquist, J.						✓							
Stevens, J.				✓									
.....													

LFP/lab 1/29/79 No. 77-6673 Brown v. Texas

To: Eric Date: January 29, 1979

From: L.F.P., Jr.

I discussed this at home after reading briefs. I did not have file with prior memos.

Appellant was convicted and fined for violating Section 3802 of the Texas Penal Code that makes it an offense for refusing to give one's name and residence upon being "lawfully stopped" by the police.

The prosecuting attorney at the beginning of the de novo trial in a court of record, conceded that the "stop and request for name" could be made only if there was a "lawful stop". App. 15. The evidence in the Appendix makes it clear that there was no reason for the police to stop appellant other than his presence in a "high drug problem area". The officer conceded he had no reason to think appellant had committed a crime or carried a weapon. App. 28-31.

In light of the foregoing, I am not at all sure that this case presents the issue which prompted us to grant it. If there was no reason to stop appellant, and the prosecuting attorney concedes that the statute applies only where there has been a "lawful stop", possibly this is a DIG.

Apparently there has been no interpretation by a Texas appellate court of the statute or of the phrase

"lawful stop".

In any event, I will not need a bench memorandum in this case.

I will want to be briefed by my clerk.

L.F.P., Jr.

In effect the State conceded at trial there was no "lawful stop" — hence there was a 4th amend violation.

We took care (I suppose) to reach the 5th amend issue: Whether ~~abs~~absent lawful grounds for a "stop", an officer may assert for failure to give name.

77-6673 BROWN v. TEXAS Argued 2/20/79

See my memo of 1/29, & Eric's of 9/29

Caballero (Appellant)

Sole reason for stop was observing D in alley.

This case is "sig. different" from DeFillippo (Detroit case).

The word "lawful" in Tex statute but this is vague — no standard.

~~Only~~

This case involves only a conviction for failing to identify. This is unlike DeFillippo which was not a prosecution under the identification statute; rather, it was a prosecution for possession of drugs.

Challenges the lawfulness of stop.

Argue we should assume stop was lawful & reach Const. issue. (I don't accept this)

See Thompson v. Louisville 362 U.S. 199

This statute has never been construed by a Texas ~~appellate~~ appellate court. Prosecutions under this statute are rarely ever brought.

Hicks (Asst AG of Texas)

4th Amend issue not raised on appeal.

Agrees that stop must be "lawful" & this means a Terry type stop.

P.S. noted that Tex. Ct. held the stop here was lawful.

Recognizes that under Thompson v. Louisville we can & reverse.

(John asked Qs supportive of my view that there was no lawful stop – Terry or otherwise).

Concession | Concedes that my view may be right – i.e. there was no lawful stop. "This Ct. may very well hold there was no Terry stop & thus no "lawful stop".

Byron & P.S. suggested that Tex Ct in this case, holding stop was "lawful"; has construed statute as not requiring even the reasonable suspicion required in Terry.

Reverse 9-0 (Different reasons)

77-6673 Brown v. Texas Conf. 2/23/79

The Chief Justice Reverse (tentative)

Statute not vague. It penalizes silence but we penalize silence in many ways - e.g. tax returns, failure to comply with SEC Regs etc

Beyer not relevant.

Statute is close to validating a law compelling ~~identity~~ identity card. This is open question

Statute requires at least a Terry type stop.

Mr. Justice Brennan Reverse (absent

See letter

Mr. Justice Stewart Reverse

No opinion but we do have a conviction which is necessarily a construction of statute. On facts, there was no justification for even a Terry stop.

Thus, as applied the statute is invalid under 4th Amend.

If there were at least grounds for Terry stop, probably OK to ask for name + but ~~it~~ need not reach this.

Mr. Justice White Reverse

In Prouse, we held can't stop auto w/out cause. It controls here

If there were grounds for a Terry stop, statute OK

No 5th Amend issue. Giving name is not incriminating.

#Statute not bad on face

Mr. Justice Marshall Reverse

This is like Detroit ordinance.

Mr. Justice Blackmun Reverse

Police had no ground for stop.

Nothing to 5th Amend issue. Name & address are neutral facts.

Failure to identify should not be a crime. Even if there were grounds

Mr. Justice Powell Reverse

I could decide case simply on ground of failure of proof of an element of the crime.

But I'd join a decision on grounds stated by P.S & Byron.

Under Miranda, once in custody can't take name?

Mr. Justice Rehnquist Reverse

agree with P.S. & Byron

Mr. Justice Stevens Reverse

& echo the theories Powell can be distinguished, agree with P.S + Byron.

Sally - Would a Join note

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 29 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6673

Zackary C. Brown, Appellant, v. State of Texas. | On Appeal from the County Court at Law Number Two, El Paso County, Texas.

[June —, 1979]

Justice Powell
I would join.
Paul

Agree
Easy case

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This appeal presents the question whether appellant was validly convicted for refusing to comply with a policeman's demand that he identify himself pursuant to a provision of the Texas Penal Code which makes it a crime to refuse such identification on request.

I

At 12:45 on the afternoon of December 9, 1977, officers Venegas and Sotelo of the El Paso Police Department were cruising in a patrol car. They observed appellant and another man walking in opposite directions away from one another in an alley. Although the two men were a few feet apart when they first were seen, officer Venegas later testified that both officers believed the two had been together or were about to meet until the patrol car appeared.

The car entered the alley, and officer Venegas got out and asked appellant to identify himself and explain what he was doing there. The other man was not questioned or detained. The officer testified that he stopped appellant because the situation "looked suspicious and we had never seen that subject in that area before." The area of El Paso where appellant was stopped has a high incidence of drug traffic. However, the officers did not claim to suspect appellant of any

specific misconduct, nor did they have any reason to believe that he was armed.

Appellant refused to identify himself and angrily asserted that the officers had no right to stop him. Officer Venegas replied that he was in a "high drug problem area"; officer Sotelo then "frisked" appellant, but found nothing.

When appellant continued to refuse to identify himself, he was arrested for violation of Texas Penal Code Ann. § 38.02 (a), which makes it a criminal act for a person to refuse to give his name and address to an officer "who has lawfully stopped him and requested the information." [1] Following the arrest the officers searched appellant; nothing untoward was found.

While being taken to the El Paso County Jail appellant identified himself. Nonetheless, he was held in custody and charged with violating § 38.02 (a). When he was booked he was routinely searched a third time. Appellant was convicted in the El Paso Municipal Court and fined $20 plus court costs for violation of § 38.02. He then exercised his right under Texas law to a trial *de novo* in the El Paso County Court. There, he moved to set aside the information on the ground that § 38.02 (a) of the Texas Penal Code violated the First, Fourth, and Fifth Amendments and was unconstitutionally vague in violation of the Fourteenth Amendment. The motion was denied. Appellant waived jury, and the court convicted him and imposed a fine of $45 plus court costs.

Under Texas law an appeal from an inferior court to a county court is subject to further review only if a fine exceeding $100 is imposed. Texas Code Crim. Proc. Ann., Art. 4.03 (Vernon). Accordingly, the County Court's rejection of

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[1] The entire section reads as follows:

"§ 38.02. FAILURE TO IDENTIFY AS WITNESS

"(a) person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information."

appellant's constitutional claims was a decision "by the highest court of a State in which a decision could be had." 28 U. S. C. § 1257 (2). On appeal here we noted probable jurisdiction. — U. S. — (1978). We reverse.

II

When the officers detained appellant for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment. In convicting appellant, the County Court necessarily found as a matter of fact that the officers "lawfully stopped" appellant. See Texas Penal Code Ann. § 38.02. The Fourth Amendment, of course, "applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *Davis* v. *Mississippi*, 394 U. S. 721 (1969); *Terry* v. *Ohio*, 392 U. S. 1, 16–19 (1968). '[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person,' *id.*, at 16, and the Fourth Amendment requires that the seizure be 'reasonable.'" *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975).

Reasonableness depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Pennsylvania* v. *Mimms*, 434 U. S. 106, 109 (1977); *United States* v. *Brignoni-Ponce*, *supra*, at 878. Consideration of the constitutionality of a seizure involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. See, *e. g.*, *id.*, at 878–883.

A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. See *Delaware* v. *Prouse*, 440 U. S. —, — (1979); *United States* v. *Brignoni-Ponce*, *supra*, at 882.

To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require that arrest of the particular individual, or that the arrest must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. *Delaware* v. *Prouse*, *supra*, at ——. See *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 558–562 (1976).

The State does not contend that appellant was stopped pursuant to a practice embodying neutral criteria, but rather maintains that the officers were justified in stopping appellant because they had a "reasonable, articulable suspicion that a crime had just been, was being, or was about to be committed." We have recognized that an officer may detain a suspect briefly for questioning although he does not have "probable cause" to believe that the suspect is involved in criminal activity, as is required for a traditional arrest. *United States* v. *Brignoni-Ponce*, *supra*, at 880–881. See *Terry* v. *Ohio*, 392 U. S. 1, 25–26 (1968). However, we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. *Delaware* v. *Prouse*, *supra*, at ——; *United States* v. *Brignoni-Ponce*, *supra*, at 882–883; see also *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1938).

None of the circumstances preceding the officers' detention of appellant justified a reasonable suspicion that he was involved in criminal conduct. Officer Venegas testified at appellant's trial that the situation in the alley "looked suspicious," but he was unable to point to any facts supporting that conclusion. There is no indication in the record that it was unusual for people to be in the alley. The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct. In short, the ap-

pellant's activity was no different from the activity of other pedestrians in that neighborhood. When pressed, officer Venegas acknowledged that the only reason he stopped appellant was to ascertain his identity. The record suggests a desire, not wholly unreasonable in itself, to assert a police presence.

In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference. The Texas statute under which appellant was stopped and required to identify himself is designed to advance a weighty social objective in large metropolitan centers: prevention of crime. But even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits. See *Delaware* v. *Prouse*, *supra*, at —— (slip op., at 12–13).

The application of Texas Penal Code Ann. § 38.02 to detain appellant and require him to identify himself violated the Fourth Amendment because the officers lacked any reasonable suspicion to believe appellant was engaged or was about to engage in criminal conduct.[2] Accordingly, appellant may not be punished for refusing to identify himself, and the conviction is reversed.

Reversed.

---

[2] We need not decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements. See *Terry* v. *Ohio*, 392 U. S. 1, 34 (1968) (WHITE, J., concurring). The County Court judge who convicted appellant was troubled by this question, as shown by the colloquy set out in the Appendix.

APPENDIX

"THE COURT: . . . What do you think about if you stop a person lawfully, and then if he doesn't want to talk to you, you put him in jail for committing a crime.

"MR. PATTON [Prosecutor]: Well first of all, I would question the Defendant's statement in his motion that the First Amendment gives an individual the right to silence.

"THE COURT: . . . I'm asking you why should the State put you in jail because you don't want to say anything.

"MR. PATTON: Well, I think there's certain interests that have to be viewed.

"THE COURT: Okay, I'd like you to tell me what those are.

"MR. PATTON: Well, the Governmental interest to maintain the safety and security of the society and the citizens to live in the society, and there are certainly strong Governmental interests in that direction and because of that, these interests outweigh the interests of an individual for a certain amount of intrusion upon his personal liberty. I think these Governmental interests outweigh the individual's interests in this respect, as far as simply asking an individual for his name and address under the proper circumstances.

"THE COURT: But why should it be a crime not to answer?

"MR. PATTON: Again, I can only contend that if an answer is not given, it tends to disrupt.

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sumed that perhaps this individual is up to something, and the officer is doing his duty simply to find out the individual's name and address, and to determine what exactly is going on.

"THE COURT: I'm not questioning, I'm not asking whether the officer shouldn't ask questions. I'm sure they should ask everything they possibly could find out. *What I'm asking is what's the State's interest in putting a man in jail because he doesn't want to answer something.* I realize lots of times an officer will give a defendant a Miranda warning which means a defendant doesn't have to make a statement. Lots of defendants go ahead and confess, which is fine if they want to do that. But if they don't confess, you can't put them in jail, can you, for refusing to confess to a crime?" App. 15–17 (emphasis added).

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 29 1979

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

Received
5/30

No. 77-6673

Zackary C. Brown, Appellant, v. State of Texas. | On Appeal from the County Court at Law Number Two, El Paso County, Texas.

[June —, 1979]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This appeal presents the question whether appellant was validly convicted for refusing to comply with a policeman's demand that he identify himself pursuant to a provision of the Texas Penal Code which makes it a crime to refuse such identification on request.

I

At 12:45 on the afternoon of December 9, 1977, officers Venegas and Sotelo of the El Paso Police Department were cruising in a patrol car. They observed appellant and another man walking in opposite directions away from one another in an alley. Although the two men were a few feet apart when they first were seen, officer Venegas later testified that both officers believed the two had been together or were about to meet until the patrol car appeared.

The car entered the alley, and officer Venegas got out and asked appellant to identify himself and explain what he was doing there. The other man was not questioned or detained. The officer testified that he stopped appellant because the situation "looked suspicious and we had never seen that subject in that area before." The area of El Paso where appellant was stopped has a high incidence of drug traffic. However, the officers did not claim to suspect appellant of any

specific misconduct, nor did they have any reason to believe that he was armed.

Appellant refused to identify himself and angrily asserted that the officers had no right to stop him. Officer Venegas replied that he was in a "high drug problem area"; officer Sotelo then "frisked" appellant, but found nothing.

When appellant continued to refuse to identify himself, he was arrested for violation of Texas Penal Code Ann. § 38.02 (a), which makes it a criminal act for a person to refuse to give his name and address to an officer "who has lawfully stopped him and requested the information." [1] Following the arrest the officers searched appellant; nothing untoward was found.

While being taken to the El Paso County Jail appellant identified himself. Nonetheless, he was held in custody and charged with violating § 38.02 (a). When he was booked he was routinely searched a third time. Appellant was convicted in the El Paso Municipal Court and fined $20 plus court costs for violation of § 38.02. He then exercised his right under Texas law to a trial *de novo* in the El Paso County Court. There, he moved to set aside the information on the ground that § 38.02 (a) of the Texas Penal Code violated the First, Fourth, and Fifth Amendments and was unconstitutionally vague in violation of the Fourteenth Amendment. The motion was denied. Appellant waived jury, and the court convicted him and imposed a fine of $45 plus court costs.

Under Texas law an appeal from an inferior court to a county court is subject to further review only if a fine exceeding $100 is imposed. Texas Code Crim. Proc. Ann., Art. 4.03 (Vernon). Accordingly, the County Court's rejection of

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[1] The entire section reads as follows:

"§ 38.02. FAILURE TO IDENTIFY AS WITNESS

"(a) person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information."

appellant's constitutional claims was a decision "by the highest court of a State in which a decision could be had." 28 U. S. C. § 1257 (2). On appeal here we noted probable jurisdiction. — U. S. — (1978). We reverse.

II

When the officers detained appellant for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment. In convicting appellant, the County Court necessarily found as a matter of fact that the officers "lawfully stopped" appellant. See Texas Penal Code Ann. § 38.02. The Fourth Amendment, of course, "applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *Davis* v. *Mississippi*, 394 U. S. 721 (1969); *Terry* v. *Ohio*, 392 U. S. 1, 16–19 (1968). '[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person,' *id.*, at 16, and the Fourth Amendment requires that the seizure be 'reasonable.'" *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975).

Reasonableness depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Pennsylvania* v. *Mimms*, 434 U. S. 106, 109 (1977); *United States* v. *Brignoni-Ponce*, *supra*, at 878. Consideration of the constitutionality of a seizure involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. See, *e. g.*, *id.*, at 878–883.

A central concern in balancing of these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. See *Delaware* v. *Prouse*, 440 U. S. —, — (1979); *United States* v. *Brignoni-Ponce*, *supra*, at 882.

To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require ~~that~~ the arrest of the particular individual, or that the arrest must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. *Delaware* v. *Prouse*, *supra*, at —. See *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 558–562 (1976).

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 30, 1979

Re: No. 77-6673 - Brown v. State of Texas

Dear Chief,

Please join me.

Sincerely yours,

Byron

The Chief Justice

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 30, 1979

Re: 77-6673 - Brown v. State of Texas

Dear Chief:

Please join me.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

May 31, 1979

77-6673 Brown v. Texas

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 31, 1979

Re: No. 77-6673 - Brown v. Texas

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 13, 1979

RE: No. 77-6673 Brown v. Texas

Dear Chief:

Please join me in the above as revised in your Memorandum of June 13.

Sincerely,

Bill

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 19, 1979

Re: No. 77-6673 - Brown v. Texas

Dear Chief:

Please join me.

Sincerely,

T.M.

T.M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 20, 1979

Re: 77-6673 - Brown v. Texas

Dear Chief:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
3/5/79								
1st draft 5/29/79	join cj 6/13/79	join cj 6/20/79	join cj 5/30/79	join cj 6/19/79	join cj 6/14/79	join cj 5/31/79	join cj 5/31/79	join cj 5/30/79
2nd draft 6/20/79								
				77-6673 Brown v. Texas				