10-1982

Kolender v. Lawson

Lewis F. Powell Jr.

Note

CA 9 invalidated a Calif "loitering" statute that had been upheld three times by Calif courts.

Statute required a person to identify himself or stopped by a police officer who reasonably believed the person may threaten public safety. Cf Terry v Ohio

PRELIMINARY MEMORANDUM

March 5, 1982 Conference
List 1, Sheet 1

No. 81-1320

KOLLENDER (San Diego Police Chief), et al.

v.

LAWSON (Loiterer)

Appeal from CA9 (Ferguson, Boochever, Redden [DJ])

Federal/Civil

Timely

SUMMARY: The State of California and several state and San Diego officials appeal from a CA9 holding that a California loitering law is unconstitutional.

FACTS AND HOLDING BELOW: Appellee was stopped by San Diego police approximately 15 time between March, 1975 and January, 1977. Each time he was detained or arrested under the California loitering law, Cal. Penal Code §647(e).[1] Appellee was actually

Note? The state ct. interpretation of §647(e) (to read in the probable cause element from Terry) makes the CA 9 result quite suspect. I think the issue is substantial. jv

[1] Footnote(s) 1 will appear on following pages.

prosecuted only twice, the first time leading to a dismissal, the second to a conviction. Appellee then filed this complaint seeking a declaratory judgment that §647(e) is unconstitutional, a mandatory injunction barring enforcement of the section, and compensatory and punitive damages. The DC denied appellee's request for a jury trial, holding that he had waived his right to a jury by failing to timely file a list of proposed jury instructions. The DC found the statute overbroad and enjoined enforcement, but held that the police officers acted in good faith and appellee therefore could not obtain damages.

CA9 affirmed the finding that the law was unconstitutional, but reversed the DC holding that appellee had waived his right to a jury trial. The court noted that in Powell v. Stone, 507 F.2d 93 (CA9 1974), rev'd on other grounds, 428 U.S. 495 (1976), CA9 held invalid a similar Nevada municipal ordinance. That ordinance was void because it failed to give adequate notice of the illegal conduct and it permitted arrest without probable cause. Unless California courts have interpreted §647(e) to avoid the probelms encountered with the Powell ordinance, the California law must also be held invalid.

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[1]Section 647(e) provides:

> Every person who commits any of the following acts is guilty of disorderly conduct, misdemeanor: . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

State courts have upheld §647(e) several times. The statute includes three elements: 1) loitering or wandering on the streets; 2) refusal to give identification; 3) circumstances involving public safety. The state courts have read "loitering" to mean "lingering . . . for the purpose of committing a crime as opportunity may be discovered." Wandering means "movement for evil purposes." The identification provision has been held to require production of some verifiable form of identification which provides a means to later get in touch with the individual. The requirement of circumstances involving criminal activity impose the standards required for a brief detention and pat down search under Terry v. Ohio, 392 U.S. 1 (1968).

The statute, in effect, requires a person to supply reasonable identification when an officer has the degree of suspicion discussed in Terry. The question whether Terry suspicion justifies punishment for refusing to supply demanded identification was left open by the Supreme Court in Brown v. Texas, 443 U.S. 47, 53n.3 (1979). We now decide that issue, and conclude that §647(e) violates the Fourth Amendment for two reasons: 1) the demand for identification grants police officer the authority to arrest on less than probable cause; and 2) the individual's interest in personal security outweighs the mere possibility that the identification may lead to an arrest. The first reason was relied upon in two previous cases holding invalid similar laws. Powell v. Stone, supra, and United States ex rel. Newsome v. Malcolm, 492 F.2d 1166 (CA2 1974), aff'd sub nom. Lefkowitz v. Newsome, 420 U.S. 283 (1975).

The individual "freedom of locomotion" outweighs the state's law enforcement interests. The demand for identification is a more substantial intrusion than the pat down in Terry. Although its instantaneous effect is less intrusive, the demand for identification give police "unfettered discretion to initiate or continue investigation of the person long after the detention has ended." This case is not analogous to cases in which border searches have been upheld. It is also unlike cases in which stops subsequent to traffic violations have been held valid; here, there is no prior unlawful conduct. "Moreover, a license to operate a vehicle is a privilege . . . not a constitutionally protected right like the freedom to go where one pleases."

In addition to holding that it violates the Fourth Amendment, CA9 held that the law also violates the due process clause because it is so vague and indefinite as to encourage arbitrary and discriminatory enforcement. Section 647(e) gives the police unfettered discretion by providing no standards. It could be used to facilitate arbitrary arrests and police harrassment. The statute also fails to give fair and adequate notice that the covered conduct is illegal. We do not decide whether the law violates the Fifth Amendment protection against self-incrimination, but note that two state courts have held invalid similar laws for that reason.

The CA concluded by holding that the DC erred in holding that appellee had waived his right to a jury trial. Local rules do not provide for automatic waiver by failure to submit jury instructions. Absent an express rule, the DC ruling was too

harsh. On remand, the jury will decide whether the police officers acted in good faith.

CONTENTIONS: Appellants contend that the CA improperly failed to consider state court interpretations of §647(e). In order to ask for identification, a police officer must have sufficient suspicion to justify a Terry pat down. If a police officer can conduct a pat down search, he certainly should be able to ask for identification. The statute provides no more of a "bootstrap" arrest opportunity that Terry; the request for identification is not made to facilitate an arrest for refusal any more than the request to submit to a pat down search is made to generate a refusal and an arrest for obstructing justice. The CA is also incorrect in asserting that the request for identification is more intrusive than a Terry search.

Appellants also assert that the law gives fair and adequate notice of what is required. A person of ordinary intelligence will know what a police officer means when he asks for identification. The law enforcement interests served outweigh the minimal intrusion permitted by §647(e). "[T]he freedom of citizens to move about or wander has decreased in direct proportion to the increase in crime." This kind of balancing should be left to the legislatures.

Appellee maintains that appellants' attack does not match up with the CA9 decision. The statute des not require articulable facts to support a suspicion that criminal activity is afoot and that the detainee has some connection to that activity. The Fourth Amendment speaks of probable cause, not articulable suspicion. The issue is not whether a police officer may ask for

identification, it is whether an officer can require identification and arrest solely for failure to produce that identification.

The fair notice inquiry should look not to whether the citizen knows what the police officer requires when he requests identification, but to whether the law provides sufficient standards to ascertain when a police officer has the right to ask for identification. The CA did not err in its balancing of interests, and that was not crucial to its outcome.

DISCUSSION: I recommend NPJ. In Brown v. Texas, supra, the Court held unconstitutional a Texas law which made it a crime to refuse to honor a police officer's demand for identification. However that law required no articulable suspicion on the part of the officer. The Court expressly declined to reach the issue of whether a person may be punished for refusing to give identification in the course of a Terry search. That issue is presented in this case. The CA held that the California law allowed the police officer to demand identification only if he had the level of suspicion that would justify a pat down under Terry. Nevertheless, the court held that the identification requirement violated the Fourth Amendment. The result seems questionable and worthy of review.

I recommend NPJ.

There is a response.

February 26, 1982 Holzhauer Opn in appendix

March 5, 1982

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 81-1320

KOLENDER

vs.

LAWSON

C J says like "Terry" search. This was left open in Brown v Texas

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.							✓						
White, J.				✓									
Marshall, J.							✓						
Blackmun, J.								Join 3					
Powell, J.				✓									
Rehnquist, J.				✓									
Stevens, J.				✓									
O'Connor, J.				✓									

GRANT
Schlueter

Deny

April 30, 1982
List 1, Sheet 5

No. 81-1320

KOLENDER. et al.

v.

LAWSON

Motion to Dispense with
Printing the Joint Appendix

SUMMARY: This case addresses the constitutionality of a California loitering statute which in effect requires production of identification on demand by police officers conducting Terry v. Ohio, 392 U.S. 1 (1968) stops. Apps, with the concurrence of the appees, move to dispense with printing the joint appendix.

FACTS AND CONTENTIONS: This Court noted probable jurisdiction on March 8, 1982. App argues that the essential materials required by Rule 30.1 for the joint appendix are already included in the Jurisdictional Statement. Any other matters which might be referred to by the parties can be gleaned from the record on file with the court. See Rule 30.2. Apps therefore

OK

DL

request that this Court relieve them from printing a joint appendix. In the alternative, apps move for deferral of the appendix.

DISCUSSION: Apps' summary arguments do not shed light on the degree to which the parties might rely on materials not already in the Jurisdictional Statement. However, because the issue presented appears to be a narrow legal question, the matters already on file will presumably be sufficient.

Should the Court be of the view that a joint appendix is required, it would seem appropriate to defer its printing.

There is no response.

4/27/82 Schlueter

PJC

April 30, 1982

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 81-1320

KOLENDER

vs.

LAWSON

Motion to dispense with printing the joint appendix.

Defer until Briefs of Parties are received

	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.										✓			
White, J.										✓			
Marshall, J.											✓		
Blackmun, J.										✓			
Powell, J.										✓	✓		
Rehnquist, J.											✓		
Stevens, J.											✓		
O'Connor, J.													

Reviewed 10/30

Frk

mfs 10/29/82

Mike would aff w. on 4th Amend analysis: stopping & requiring identification (crime if one refuses to give reliable identification - name & address) without probable cause is more intrusive than Terry pat-down stop. Identity is private.

No violation of 5th Amend as identification is not inherently incriminating.

Not void for vagueness, as record doesn't support (except in this case) arbitrary enforcement. The reasonableness of stop is reviewable by a court - as is true of many statutes.

The Calif. statute (5647) requires one to give name & address only if the surrounding circumstances are such as to indicate to a reasonable person that the public safety demands identification (p2). In Solomon, Calif Ct/Appr described this as requiring an officer to have a "reasonable belief" in existence of a "threat to public safety" (Juris St- A60). This construction comes close to my view as to airport stops: Mendenhall.

BENCH MEMORANDUM

No. 81-1320

Kolender v. Lawson

Michael F. Sturley October 29, 1982

Question Presented

May a state make it a crime for an individual to refuse to identify himself to a peace officer who has "articulable suspicion" sufficient to justify a Terry stop?

See Calif. v. Byers 402 U.S. 427-428 (quoting Holmes) upheld ... auto accident to give name & address

Outline of Memorandum page

I. Background

A. The Statute

The California loitering statute essentially requires a person to identify himself when requested to do so by a peace officer. Failure to do so is a misdemeanor. The statute provides:

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:
>
> * * *
>
> (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable person that the public safety demands such identification.

Cal. Penal Code §647. This provision has been construed by the California courts to require an officer demanding identification to have "articulable suspicion" justifying an investigative stop under the standards of Terry v. Ohio, 392 U.S. 1 (1968).

B. Facts

Ap'ee is a 36-year old black "business consultant" — a jest? (He was in Court.) from San Francisco. His dress and appearance are unconventional: his hair is braided, and he typically dresses in sports coat, slacks, and sneakers. Between March 1975 and January 1977 he was detained fifteen times pursuant to §647(e) while on trips to the San Diego-Chula Vista area of Southern California. Each time he was in a predominantly white area.

Most of the detentions lasted between five and twenty minutes while the detaining officer ran a "warrant check" on

ap'ee. On occassions when ap'ee declined to identify himself, he was arrested pursuant to §647(e) and taken to the police station. Once he was held 30-40 minutes, then released. Another time he was held over a day before being released. A third time he was held over a day before being arraigned; charges were dismissed at the arraignment. Once he was held for two days; charges were eventually dismissed at trial. And on one occassion he was convicted of violating §647(e).

C. Decisions Below

Ap'ee, wishing to forestall further detentions, filed a complaint in DC (SD Cal; Nielsen) seeking a declaration that §647(e) is unconstitutional and an injunction prohibiting its enforcement. (Ap'ee also sought damages from the ap'ants who had detained him. That issue is not before the Court.) Initially the DC upheld §647(e). On reconsideration it reversed itself and held the statute unconstitutional.

On appeal, CA9 (Ferguson, Boochever, Redden [DJ]) affirmed, holding that §647(e) was unconstitutionally vague, that it violated the "Fourth Amendment", and that it encouraged arbitrary and discriminatory enforcement in violation of the Due Process Clause. CA9 suggested that §647(e) might violate the Fifth Amendment as well, but declined to reach the issue.

CA9

(1)

(2)

5th Amend issue not reached

II. Discussion

I think this is an easy case, at least under the Fourth Amendment. In view of our discussions in Florida v. Royer, No. 80-2146, I assume you will agree with me, for I see the powers claimed by the police here as inconsistent with the limitations assumed to exist in Royer. Accordingly I have not discussed all of the issues in detail. In Part II.A, I highlight what I think are the most important Fourth Amendment issues. In the remaining parts, I discuss the other claims, essentially concluding that the Court should not reach them. As usual, I would be happy to discuss any of these issues in greater detail if you would find it helpful.

A. The Fourth Amendment

In Terry, JUSTICE WHITE explained the relevant Fourth Amendment principles in language that has frequently been quoted since then:

> 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 furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.

Terry v. Ohio, 392 U.S. 1, 34 (1968) (WHITE, J., concurring). The Court described this as "settled principle" the following year. Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969) ("[W]hile the police have the right to request citizens to answer

voluntarily questions concerning unsolved crimes they have no right to compel them to answer."). And JUSTICE WHITE's statement above was quoted in full in Dunaway v. New York, 442 U.S. 200, 210 n.12 (1979). The disclaimer of Brown v. Texas, 443 U.S. 47, 53 n.3 (1979) ("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."), represents an abundance of caution. If the police may not constitutionally compel a suspect to answer the question, "What is your name?", the state should not be able to make it a crime to refuse to produce identification under the same circumstances.

Left open

why?

Yes, but is identification per se unreasonable

(1) The Expectation of Privacy. The state's arguments fail both in underestimating the suspect's reasonable expectation of privacy and in overestimating the state's interest in compelling disclosure. The former error is probably the greater, for I think the state is clearly wrong to contend that a demand[1] for identification is less intrusive than a pat-down search. As the

2

[1]Throughout its brief, the state attempts to characterize this case as involving a "request" for identification. (Some of the amicii make the same mistake.) If that characterization were correct, there would be no problem here. As JUSTICE WHITE noted in Terry, there is nothing in the Constitution to prevent a policeman (or any other citizen) from asking questions. The problem, of course, is that §647(e) does not simply authorize a request for identification, it requires a suspect to comply with that request. To the extent that the peace officer relies on §647(e), therefore, he is not requesting but demanding identification. The fact that a simple request creates a minimal intrusion is irrelevant.

Under Terry, & my view of airport searches, a limited "seizure" is justified by reasonable suspicion. In latter circumstances identification is unrelated

Court made clear in Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979), Terry does not allow "a generalized 'cursory search for weapons' or, indeed, any search whatever for anything but weapons." Although a pat-down might be unpleasant and embarrassing, it is limited to a search for weapons that can be felt through a person's clothing. The police learn nothing about a suspect through the pat-down except that he does not constitute an immediate threat to their safety.

A person's identity, on the other hand, is highly personal--as personal as anything he possesses. In Brown v. Texas, 443 U.S. 47 (1979), the Court recognized that an individual has a reasonable privacy expectation that he will not be required to disclose his identity, but the Court did not have to decide how far that expectation extended. (Since there was almost nothing in the way of state interest in Brown, there was little balancing to be done.)

Looking beyond strictly legal matters, society has recognized the strong interest that a person has in keeping his identity private since ancient Greek times, at least. The story of Odysseus's encounter with Polyphemus, the Cyclops, is a perfect example. When Polyphemus demanded to know Odysseus's name, Odysseus replied "Nobody," effectively asserting his right not to reveal his identity. Similarly, when King Arthur first encountered Lancelot, neither would reveal his identity to the other without a fight. Both incidents demonstrate the same point: a person's expectation that he may keep his identity

to himself is strongly established in our cultural and literary tradition.

Despite my inability to cite any clear authority for the proposition, I believe that most people continue to respect this well-established tradition. It is considered rude to ask someone who he is without first identifying yourself. A random request on the street for a person's name is as likely to get "none of your business" as the true answer for its response. In analogous areas, people are concerned with preventing their names from appearing on mailing lists, or their telephone numbers from being published, and society accepts these concerns as legitimate. There is a strong tradition of anonymity in the political process. The Privacy Act pervades the federal bureaucracy, requiring notices on millions of government documents. In the end, of course, this becomes a judgment call. I think that a person has a strong reasonable expectation of privacy in not being required to divulge his identity.

(2) The State's Interest in Disclosure. Probable cause is the general requirement under the Fourth Amendment. The lower "articulable suspicion" standard of Terry applies only in the narrow category of cases where not only is the intrusion minimal, but the state interest in permitting the police action is strong. In Terry there was an immediate and compelling concern--protecting the police from armed attack--that goes far beyond the supposed state interest here. The state can point only to a generalized "state interest in detecting and preventing crime."

Ap'ants' Brief 18. Cf. Amicus Brief filed by Appellate Committee of the California District Attorneys Association 36-37. The claim appears to be that the identification may turn out to be helpful if a crime eventually is discovered in the area. Since the California courts do not require the police to be aware of any specific criminal incident, or to suspect the person of any specific type of criminal activity, the state interest is much less immediate than in Terry. Furthermore, the state suggests (in its attempt to show that the demand for identification is not very intrusive) that it has insufficient time, manpower, and funding to keep track of the names of people contacted under §647(e). See Juris Stmt 17-18. To the extent the state's claim is true,[2] it has a much lower interest in obtaining the information initially, for it is unable to put it to any proper use.

The state hints that it has a strong interest in making Terry stops effective. This argument fails for two reasons. First, it is not clear that the police will be significantly less effective without the authority of §647(e). They will still have the right to request identification--or any other information they think relevant. Most people will cooperate. Ap'ee, who has demonstrated an unusual desire to assert his constitutional rights, complied with the ID requests at least two-thirds of the times he was detained. The guiltiest drug courier is almost in-

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[2]To the extent the state's claim is false, of course, the intrusion is that much greater. The state is caught on a dilemna here: either the contact is intrusive, or the information is of limited use.

variably willing to produce identification to a DEA agent in an airport. Even if a few suspects do not cooperate, there seems to be little value to the police in actually knowing a suspect's name. The true value of a §647(e) request is in making the police presence felt, and in letting the suspect know that the police have an eye on him. This deterrent force is as strong when the police can ask the questions as when they can demand the answers. If anything, a person who has just made a point of not cooperating with the police would be particulary careful about committing a crime in the vicinity.

Second, the state's argument misses the entire point of the Fourth Amendment's protections. The Fourth Amendment makes probable cause the general standard to determine whether the police may seize something--including a suspect's identification. Terry only creates a narrow exception to the probable cause requirement. The purpose of the Fourth Amendment is still to ensure that a citizen's reasonable expectation of privacy is observed except when the police have probable cause to act differently. Terry is not designed to ensure that questionable police tactics are effective.

what case says that?

B. The Fifth Amendment – no self-incrimination by simply providing identification.

I see ap'ee's Fifth Amendment contention essentially as a make-weight, at least to the extent that a suspect is required only to provide identification. The cases ap'ee cites are all distinguishable. His argument falls on the fact that the Fifth Amendment is independent of probable cause. If a suspect has a

Fifth Amendment right not to reveal his identity, he retains this right not only when he is detained under Terry, but also when he is arrested with probable cause. I do not think that the Fifth Amendment compels such a result.

C. Vagueness

There are two vagueness arguments here. The first, on which CA9 relied to a considerable degree, does not seem that important to me. While it is true that a suspect who is detained will not know if the peace officer has satisfied the requirements of §647(e), that should not affect the suspect's actions. Assuming that the statute is otherwise valid, a suspect required to produce identification pursuant to §647(e) should know that he must comply, even if the demand is later found to be improper. The case seems little different from an invalid arrest. If a policeman attempts to arrest a suspect, the suspect is not entitled to resist simply because a court may later find that the officer acted without probable cause.

More troublesome is the vagueness about the identification requirement itself. It is not entirely clear that §647(e) requires a person to carry identification, although that seems to be the logical result of the statute. It certainly seems unwise for anyone to travel to California without acceptable identification, in case he does arouse a peace officer's suspicions. Even worse (from the perspective of vagueness analyis, at least) is the fact that there is no indication of what identification is acceptable under §647(e). The California courts have said simply

that it must be "genuine identification ... carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." People v. Solomon, 33 Cal. App.3d 429, 438 (1973), Juris stmt app A-69. It appears from this case that the police will accept a passport and a driver's license. Many of the people most likely to be stopped, however, are too poor to drive or to travel abroad. What identification are they required to produce, and to carry in case production is demanded? Without this information, they will be unable to order their lives to comply with the statute.

Despite these real constitutional problems, I do not think the Court should base its decision on the vagueness issue. That would dispose of the present case, but it might suggest that §647(e) could be saved by an amendment specifying certain types of identification that would be acceptable. Such an amendment should still fail under the Fourth Amendment. If the Court affirms on Fourth Amendment grounds, there is little point in addressing the vagueness issue. It would add little to vagueness doctrine (which is itself already vague) to explain how an otherwise unconstitutional statute could be narrowly drawn.

D. Arbitrary and Discriminatory Enforcement

Realistically, I think there are problems here with arbitrary and discriminatory enforcement. As has been the case with similar statutes of this type, I am confident that §647(e) is disproportionately directed against minorities in white areas.

What about facts of this case

Nevertheless, I do not think the Court should reach this issue, either. There is nothing in the record to prove that the statute generally has been enforced arbitrarily and discriminatorily. Although the police conduct with respect to ap'ee is questionable, he is only one suspect representing fifteen detentions--and even then, there are apparently no judicial findings to support his charges. The Court would be forced to rely on the fact that the statute is capable of improper enforcement, but this is true of many statutes. Terry stops are themselves capable of being arbitrary and discriminatory, since they are based on the same criteria as §647(e) demands. The Court has recognized that they may be valid. In the end, ap'ee's complaint on this point is valid to the extent that there is police bad faith. While it is true that police bad faith exists, there is little that this Court directly can do to prevent it. In the context of this case, the Court would be much better off to rely on the much clearer Fourth Amendment violation.

III. Conclusion

The key issue in this case is the extent of the Terry exception to the Fourth Amendment's probable cause requirement. Thus far the Court has always been very careful to confine that exception to narrow limits. The California statute, as construed, would permit a greater intrusion for a less compelling state interest than anything this Court has yet recognized.

* What about Airport search cases. Also Summers

81-1320 KOLENDER v. LAWSON Argued 11/8/82

Calif. vagrancy statute

Peterson (~~State~~ (Deputy A/G - Calif)

Facts in this case are immaterial. Case has not been tried.

Relies on Terry

Statute doesn't require one to carry identification.

No Miranda type warnings are required (but the person is not in custody).

Only required "reliable identification" - it has to be "reliable". (A 69)

The "account for presence" language has been interpreted as meaning only "reliable identification". This is ~~a~~ construction by Calif Ct in Solomon

Rosenbaum (Rapp)

Both "vagueness" & 4th Amend are compelling arguments.

Statute has no objective core.

Qs may be ~~not~~ asked & person may be detained ~~until he is~~ by officer until he asks ~~to~~ for identification.

Statute is a "probable cause" mfg. machine. (But same can be said of Terry)

(DAs referred to Mich v. DeFillippo as an answer to the claim of a probable ~~cause~~ cause" mfg machine

Can these be a 4th violation

Rosenbaum (cont.)

Gen. interest ~~is~~ in crime prevention & detection doesn't justify their personal intrusions.

(John emphasizes that person stopped doesn't know it is a crime not to identify himself)

mfs 11/09/82

To: JUSTICE POWELL

From: Michael

Re: No. 81-1320 Kolender v. Lawson

I have taken another look at People v. Solomon, 33 Cal. App.3d 429 (1973) (construing Cal. Penal Code §647(e)) (reprinted juris stmt app A-45). For the most part, the court simply tracks the statutory language ("the public safety demands such identification") without explaining the extent to which the public safety must be involved. See juris stmt app, at A-58 (paraphrasing statute); id., at A-60 (quoting statute); id., at A-67 to A-68 ("circumstances involve the public safety); id., at A-68 (paraphrasing statute); id., at A-70 ("circumstances that infringe upon the public safety"); id., at A-71 (paraphrasing statute). At three points the court goes beyond the mere statutory language, but only to note a generalized interest in the prevention of crime. See id., at A-49 ("the governmental interest in effective crime prevention and detection"); id., at A-61 ("prevention and detection of crime"); id., at A-64 ("protection of society against crime"). At no point does the court limit the statute to circumstances when an officer reasonably suspects that a crime has just been committed, or that a crime is about to be committed, or that a violent crime is involved. If anything, the court seems to suggest that an officer's reasonable suspicion of any criminal activity--specific or general, violent or nonviolent--is sufficient to trigger a §647(e) demand.

No. 81-1320, Kolender v. Lawson — Aff'm 8-1 — Conf. 11/10/82

The Chief Justice — Aff'm

The rigid language of 647(e) is troublesome. as was 15 arrests of Reds indicated:

C J read from her op. in Brown v. Texas

Justice Brennan — Aff'm

Police may ask but not compel answer to any questions. Davis v. Mississippi; Brown v. Ill

This statute is an attempt to evade the "probable cause" requirement of 4th amend.

Terry did not allow right to compel answers.

Statute doesn't give suspect reasonable notice as to purport of Qs.

Justice White — Aff'm

But on WJB's second ground.

A Terry stop would justify detaining one to enable asking Qs — but can't make it a crime not to answer questions.

Justice Marshall ~~Reverse~~ Affirm

Justice Blackmun Affirm
Statute does not have legitimate purpose.
Statute is vague - officer has full discretion & statute has no standard
Not prepared to say a properly drawn statute allowing ~~doctor~~ officer to identify would be invalid

Justice Powell Inclined to Affirm on vagueness grounds.
We are not reviewing Reik's conviction.
The statute on its face does not make clear that ~~[illegible]~~ there is an imminent (sp?) risk to public safety. Solomon ~~[illegible]~~ compared this to Terry that did require imminent threat. But Solomon did not ~~[illegible]~~ eliminate the vagueness problems.

Justice Rehnquist

Rev.

Not vague as construed in Solomon.

No violation of 4th Amend.

Terry is highly relevant.

Justice Stevens

Affirm

Very difficult case - but

the way Atty. Gen. described

the type of questions ~~asked~~ asked

you too far.

Not in vagueness - but in 4th Amend

Justice O'Connor

Affirm

On ~~the~~ vagueness - Solomon

doesn't clear this up.

Would not agree that 4th

Amend denies police right

to question under ~~proper~~

some circumstances.

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

L.7.P

From: **Justice O'Connor**

Circulated: FEB 9 1983

Recirculated: _____

Reviewed

Join

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1320

WILLIAM KOLENDER, ET AL., PETITIONER *v.*
EDWARD LAWSON

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February ——, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

This appeal presents a facial challenge to a criminal statute that requires persons who are loitering on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry* v. *Ohio*, 392 U. S. 1 (1968).[1] We conclude that the statute as it has been construed is unconstitutionally vague within the meaning of the due process clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a "credible and reliable" identification. Accordingly, we affirm the judgment of the court below.

I

Appellee Edward Lawson was detained or arrested on ap-

[1] Cal. Penal Code § 647(e) provides:

"Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

Join. The conference vote produced a majority to decide this case on Fourth Amendment grounds, but SOC has written a very narrow vagueness opinion to conform with your views. Mike (Yes)

proximately 15 occasions between March 1975 and January 1977 pursuant to Cal. Penal Code § 647(e).[2] Lawson was prosecuted only twice, and was convicted once. The second charge was dismissed.

Lawson then brought a civil action in the District Court for the Southern District of California seeking a declaratory judgment that § 647(e) is unconstitutional, a mandatory injunction seeking to restrain enforcement of the statute, and compensatory and punitive damages against the various officers who arrested him. The District Court found that § 647(e) was overbroad because "a person who is stopped on less than probable cause cannot be punished for failing to identify himself." Juris. Statement, at A–78. The District Court enjoined enforcement of the statute, but held that Lawson could not recover damages because the officers involved acted in the good faith belief that each detention or arrest was lawful.

Appellant H.A. Porazzo, Deputy Chief Commander of the California Highway Patrol, appealed the District Court decision to the Court of Appeals for the Ninth Circuit. Lawson cross-appealed, arguing that he was entitled to a jury trial on the issue of damages against the officers. The Court of Appeals affirmed the District Court determination as to the un-

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[2] The District Court failed to find facts concerning the particular occasions on which Lawson was detained or arrested under § 647(e). However, the trial transcript contains numerous descriptions of the stops given both by Lawson and by the police officers who detained him. For example, one police officer testified that he stopped Lawson while walking on an otherwise vacant street because it was late at night, the area was isolated, and the area was located close to a high crime area. Tr. 266–267. Another officer testified that he detained Lawson, who was walking at a late hour in a business area where some businesses were still open, and asked for identification because burglaries had been committed by unknown persons in the general area. Tr. 207. The appellee states that he has never been stopped by police for any reason apart from his detentions under § 647(e).

constitutionality of § 647(e). The appellate court determined that the statute was unconstitutional in that it violates the Fourth Amendment's proscription against unreasonable searches and seizures, it contains a vague enforcement standard that is susceptible to arbitrary enforcement, and it fails to give fair and adequate notice of the type of conduct prohibited. Finally, the Court of Appeals reversed the District Court as to its holding that Lawson was not entitled to a jury trial to determine the good faith of the officers in his damages action against them, and remanded the case to the District Court for trial.

The officers appealed to this Court from that portion of the judgment of the Court of Appeals which declared § 647(e) unconstitutional and which enjoined its enforcement. We noted probable jurisdiction pursuant to 28 U. S. C. § 1254(2). 455 U. S. 999 (1982).

II

In the courts below, Lawson mounted an attack on the facial validity of § 647(e).[3] "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has profferred." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U. S. 489, 494 (1982). As construed by the California Court of Appeal,[4] § 647(e) requires that an

[3] The appellants have apparently never challenged the propriety of declaratory and injunctive relief in this case. See *Steffel* v. *Thompson*, 415 U. S. 452 (1974). Nor have appellants ever challenged Lawson's standing to seek such relief. We note that Lawson has been stopped on approximately 15 occasions pursuant to § 647(e), and that these 15 stops occurred in a period of less than two years. Thus, there is a "credible threat" that Lawson might be detained again under § 647(e). See *Ellis* v. *Dyson*, 421 U. S. 426, 434 (1975).

[4] In *Wainwright* v. *Stone*, 414 U. S. 21, 22–23 (1973), we held that "[f]or the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.' *Minne-*

individual provide "credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a *Terry* detention.[5] *People* v. *Solomon*, 33 Cal. App. 3d 429 (1973). "Credible and reliable" identification is defined by the state Court of Appeal as identification "carrying reasonable assurance that

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sota ex rel. Pearson v. *Probate Court*, 309 U. S. 270, 273 (1940)." The Court of Appeals for the Ninth Circuit noted in its decision that the state intermediate appellate court has construed the statute in *People* v. *Solomon*, 33 Cal. App. 3d 429 (1973), that the state supreme court has refused review, and that *Solomon* has been the law of California for nine years. In these circumstances, we agree with the Ninth Circuit that the *Solomon* opinion is authoritative for purposes of defining the meaning of § 647(e). See 658 F. 2d 1362, 1364–1365 n. 3 (1981)

[5] The *Solomon* court apparently read *Terry* to hold that the test for a *Terry* detention was whether the officer had information that would lead a reasonable man to believe that the intrusion was appropriate. The Ninth Circuit noted that according to *Terry*, the applicable test under the Fourth Amendment requires that the police officer making a detention "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U. S., at 21. The Ninth Circuit then held that although what *Solomon* articulated as the *Terry* standard differed from what *Terry* actually held, "[w]e believe that the *Solomon* court meant to incorporate in principle the standards enunciated in *Terry*." 658 F. 2d 1366, n. 8. We agree with that interpretation of *Solomon*. Of course, if the *Solomon* court misread *Terry* and interpreted § 647(e) to permit investigative detentions in situations where the officers lack a reasonable suspicion of criminal activity based on objective facts, Fourth Amendment concerns would be implicated. See *Brown* v. *Texas*, 443 U. S. 47 (1979).

In addition, the *Solomon* court appeared to believe that both the *Terry* detention *and* frisk were proper under the standard for *Terry* detentions, and since the frisk was more intrusive than the request for identification, the request for identification *must* be proper under *Terry*. See 33 Cal. App. 3d, at 435. The Ninth Circuit observed that the *Solomon* analysis was "slightly askew." 658 F. 2d, at 1366, n. 9. The court reasoned that under *Terry*, the frisk, as opposed to the detention, is proper only if the detaining officer reasonably believes that the suspect may be armed and dangerous, in addition to having an articulable suspicion that criminal activity is afoot.

the identification is authentic and providing means for later getting in touch with the person who has identified himself." *Id.*, at 438. In addition, a suspect may be required to "*account for his presence* . . . to the extent that it assists in producing credible and reliable identification . . . ." *Ibid.* Under the terms of the statute, failure of the individual to provide "credible and reliable" identification permits the arrest.[6]

III

Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression. See generally M. Bassiouni, Substantive Criminal Law 53 (1978).

As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Village of Hoffman Estates* v. *Flipside*, 455 U. S. 489 (1982); *Smith* v. *Goguen*, 415 U. S. 566 (1974); *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972); *Papachristou* v. *City of Jacksonville*, 405 U. S. 156 (1972); *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926). Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a

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[6] In *People* v. *Caylor*, 6 Cal. App. 3d 51, 56 (1970), the court suggested that the State must prove that a suspect detained under § 647(e) was loitering or wandering for "evil purposes." However, in *Solomon*, which the court below and the parties concede is "authoritative" in the absence of a California Supreme Court decision on the issue, there is no discussion of any requirement that the State prove "evil purposes."

legislature establish minimal guidelines to govern law enforcement." *Smith*, *supra*, at 574. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.*, at 575.[7]

Section 647(e), as presently drafted and construed by the state courts, contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. An individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets "only at the whim of any police officer" who happens to stop that individual under § 647(e). *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87, 90 (1965). Our concern here is based upon the "potential for arbitrarily suppressing First Amendment liberties . . . ." *Id.*, at 91. In addition, § 647(e) implicates consideration of the constitutional right to freedom of movement. See *Kent* v. *Dulles*, 357 U. S. 116, 126 (1958); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 505–506 (1964).

Section 647(e) is not simply a "stop-and-identify" statute. Rather, the statute requires that the individual provide a "credible and reliable" identification that carries a "reason-

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[7] Our concern for minimal guidelines finds its roots as far back as our decision in *United States* v. *Reese*, 92 U. S. 214, 221 (1875):

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government."

able assurance" of its authenticity, and that provides "means for later getting in touch with the person who has identified himself." *Solomon*, *supra*, at 438. In addition, the suspect may also have to account for his presence "to the extent it assists in producing credible and reliable identification." *Ibid.*

At oral argument, the appellants confirmed that a suspect violates § 647(e) unless "the officer [is] satisfied that the identification is reliable." Tr. of Oral Arg. 6. In giving examples of how suspects would satisfy the requirement, appellants explained that a jogger, who was not carrying identification, could, depending on the particular officer, be required to answer a series of questions concerning the route that he followed to arrive at the place where the officers detained him,[8] or could satisfy the identification requirement simply by reciting his name and address. See *id.*, at 6–10.

It is clear that the full discretion accorded to the police to determine whether the suspect has provided a "credible and reliable" identification necessarily "entrusts[s] lawmaking 'to the moment-to-moment judgment of the policeman on his beat.'" *Smith*, *supra*, at 575 (quoting *Gregory* v. *City of Chicago*, 394 U. S. 111, 120 (1969) (Black, J., concurring)). Section 647(e) "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,'" *Papachristou*, *supra*, at 170 (quoting *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940)), and "confers on police a virtually unrestrained power to arrest and charge persons with a violation." *Lewis* v. *City of New Orleans*, 415 U. S.

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[8] To the extent that § 647(e) criminalizes a suspect's failure to answer such questions put to him by police officers, Fifth Amendment concerns are implicated. It is a "settled principle that while police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Davis* v. *Mississippi*, 394 U. S. 721, 727, n. 6 (1969).

130, 135 (1974) (POWELL, J., concurring). In providing that a detention under § 647(e) may occur only where there is the level of suspicion sufficient to justify a *Terry* stop, the State ensures the existence of "neutral limitations on the conduct of individual officers." *Brown* v. *Texas*, 443 U. S. 47, 51 (1979). Although the initial detention is justified, the State fails to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement.

Appellants stress the need for strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation. The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity. See *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939). Section 647(e), as presently construed, requires that "suspicious" persons satisfy some undefined identification requirement, or face criminal punishment. Although due process does not require "impossible standards" of clarity, see *United States* v. *Petrillo*, 332 U. S. 1, 7–8 (1947), this is not a case where further precision in the statutory language is either impossible or impractical.

IV

We conclude § 647(e) is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute.[9] Accordingly, the decision of

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[9] Because we affirm the judgment of the court below on this ground, we find it unnecessary to decide the other questions raised by the parties where our resolution of these other issues would decide constitutional questions in advance of the necessity of doing so. See *Burton* v. *United States*, 196 U. S. 283, 295 (1905); *Liverpool, N.Y. & P.S.S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). See also *Ashwander* v.

the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Tennessee Valley Authority, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring). The remaining issues raised by the parties include whether § 647(e) implicates Fourth Amendment concerns, whether the individual has a legitimate expectation of privacy in his identity when he is detained lawfully under *Terry*, whether the requirement that an individual identify himself during a *Terry* stop violates the Fifth Amendment protection against compelled testimony, and whether inclusion of the *Terry* standard as part of a criminal statute creates other vagueness problems. The appellee also argues that § 647(e) permits arrests on less than probable cause. See *Michigan* v. *DeFillippo*, 443 U. S. 31, 36 (1979).

February 10, 1983

81-1320 KOLENDER v. LAWSON

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

Copies to the Conference

LFP/vde

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 10, 1983

Re: No. 81-1320 - Kolender v. Lawson

Dear Sandra:

Please join me.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 15, 1983

Re: 81-1320 - Kolender v. Lawson

Dear Sandra,

I do not agree with your suggested holding that the statute involved here is facially void for vagueness and will dissent from a judgment of affirmance on that basis. Much of what I said about facial declarations on vagueness grounds in Smith v. Goguen in 415 U.S. is applicable here. As I see it, this statute has obvious non-vague applications; that is, there is a range of conduct that any reasonable person or law enforcement offical would know is forbidden by the statute. If this is the case, there is no basis for a facial declaration of unconstitutional vagueness. I shall write briefly to this effect.

Sincerely,

Justice O'Connor

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 16, 1983

Re: 81-1320 - Kolender v. Lawson

Dear Sandra:

Please join me.

Respectfully,

Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 14, 1983

Re: No. 81-1320 - Kolender v. Lawson

Dear Sandra:

Please join me.

Sincerely,

T.M.

T.M.

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

April 13, 1983

Re: No. 81-1320, Kolender v. Lawson

Dear Sandra:

This will confirm my "join."

Regards,

WEB

Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 14, 1983

No. 81-1320 Kolender v. Lawson

Dear Sandra:

Please join me in your opinion. I am also writing briefly in concurrence. I hope to have my statement around shortly, perhaps before tomorrow's conference.

Sincerely,

WJB, Jr.

Justice O'Connor

Copies to the Conference

Reasonable belief in existence of "threat to public safety."

Then could be read reasonably as implying an imminent threat.

THE C. J.	W. J. B.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.	S. D. O'C.
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Join SOC 4/13/83	Join SOC 4/14/83	dissent 1st draft 4/11/83	Join SOC 3/14/83	Join SOC 2/10/83	~~Join SOC~~ 2/10/83	~~Join SOC~~ 4/10/83	Join SOC 2/16/83	1st draft 2/9/83 2nd draft 4/13/83 3rd draft 4/28/83
	1st draft Concurring opinion 4/20/83	2nd draft 4/22/83				Join BRW 4/13/83		
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