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No. 03-5554

IN THE
SUPREME COURT OF THE UNITED STATES

LARRY D. HIIBEL
Petitioner,

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF, HUMBOLDT AND THE HONORABLE RICHARD A. WAGNER
Respondent,

and

THE STATE OF NEVADA,
Real Party in Interest.

On Petition For Writ of Certiorari
To The Supreme Court of Nevada

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER UNDER THE PROTECTIONS OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION NRS 171.123(3) VIOLATES AN INDIVIDUAL'S RIGHT OF PRIVACY.

2. WHETHER NRS 171.123(3) COMPELS AN INDIVIDUAL TO BE A WITNESS AGAINST HIMSELF IN VIOLATION OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

OPINIONS AND JUDGMENTS BELOW

Larry D. Hiibel v. Sixth Judicial District Court, 118 Nev. Ad. Op. 88, 59 P.3d 1201 (2002).

JURISDICTION

Pursuant to United States Supreme Court Rules 15.3 and 24.2 Respondent adopts Petitioner's statement regarding jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV

United States Constitution, Amendment V

NRS 171.123

OPPOSITION TO WRIT OF CERTIORARI

I

FACTUAL AND PROCEDURAL BACKGROUND

On May 21, 2000 Humboldt County Deputy Lee Dove (hereinafter referred to as Dove) responded to a call from the Humboldt County Dispatch that an individual had observed a fight between two people who were traveling in a red and silver GMC pickup truck on Grass Valley Road in Humboldt County, Nevada. Deputy Dove drove his patrol vehicle south on Grass Valley Road and stopped his vehicle near Lynx Road. He had a brief conversation with an apparent witness to the fight. This individual's name was Mr. Riddley. (Petitioner's App. C and D)

After obtaining some additional information from Mr. Riddley, Dove continued to drive south on Grass Valley Road. While driving south on Grass Valley Road Dove saw a truck that matched the description given to him by the Humboldt County dispatcher. This truck was pulled off to the side of the road and petitioner, Larry D. Hiibel, (hereinafter referred to as Hiibel) was standing next to the truck. Dove got out of his vehicle and started walking toward Hiibel. As he walked toward Hiibel he noticed a female was sitting inside the cab of the truck. Dove asked Hiibel for identification but Hiibel refused to provide it. Dove continued to ask Hiibel for his identification but each time Hiibel refused to comply. According to the record Dove asked Hiibel to produce his identification eleven (11) times. On one occasion Hiibel asked Dove why he needed to provide his identification. Dove explained that he needed Hiibel's identification because of the reported fight. During this encounter Hiibel even placed his hands behind his back and told Dove to take him to jail. In light of Hiibel's refusal to

provide identification, Dove placed him under arrest for the crime of resisting an officer pursuant to NRS 199.280[1]. (Petitioner's App. C and D)

On December 13, 2001 a misdemeanor trial was held in the Union Township Justice Court in Winnemucca, Nevada. Based on the evidence presented to the court, Hiibel was found guilty of violating NRS 199.280, resisting a police office. Hiibel was fined $250.00 and assessed an administrative fee of $70.00. (Petitioner's App. G) Hiibel appealed this conviction to the Sixth Judicial District Court, State of Nevada. That appeal was denied and Hiibel's conviction was affirmed. Hiibel then filed a Writ of Certiorari with the Nevada Supreme Court. (Petitioner's App. G) On December 20, 2002 the Nevada Supreme Court denied Hiibel's writ of Certiorari. (Petitioner's App. A) On January 7, 2003 Hiibel filed a petition for rehearing. (Petitioner's App. I) On April 25, 2003 the Nevada Supreme Court denied the petition for rehearing. (Petitioner's App. F)

Hiibel filed his Writ of Certiorari with this court on or about July 22, 2003. On August 8, 2003 the State of Nevada through its counsel, Conrad Hafen, submitted a waiver to this court stating that it did not intend to file a response but asked the court to grant Hiibel's Writ of Certiorari because of the jurisdictional conflict between the Ninth Circuit Court of Appeals and the Nevada Supreme Court. However, on August 28, 2003 this Court, through the Office of the Clerk, sent a letter to Mr. Hafen requesting that the State of Nevada file a response to Hiibel's Petition for a Writ of Certiorari on or before September 29, 2003. The court further instructed Mr. Hafen to submit ten (10) typewritten reproduced copies of the response together with proof of service.

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[1] A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished:
(2) Where no dangerous weapon is used in the course of such resistance, obstruction or delay, for a misdemeanor.

II

LEGAL ARGUMENT

1. NRS 171.123(3) DOES NOT VIOLATE AN INDIVIDUAL'S FOURTH AMENDMENT RIGHT OF PRIVACY BECAUSE CITIZENS DO NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN THEIR NAME

The Nevada State statute at issue in this case is NRS 171.123(3). This statute states in pertinent part:

> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself but may not be compelled to answer any other inquiry of any peace officer.

NRS 171.123 is the State of Nevada's statutory codification of this court's opinion in Terry v. Ohio, 392 U.S. 1 (1968). *See* State v. Lisenbee, 116 Nev. 1124, 13 P.3d 947 (2000). A prerequisite to detaining an individual pursuant to NRS 171.123(3) is that the officer must first have reasonable suspicion. If an officer believes he has reasonable suspicion that the person has committed, is committing or is about to commit a crime, the officer may detain that person for up to sixty (60) minutes. *See* NRS 171.123(1)(4). Once a person is detained on reasonable suspicion they are considered to be seized under the Fourth Amendment. Davis v. Mississippi, 394 U.S. 721 (1969); Terry v. Ohio, 392 U.S. 1 (1968). This court has recognized that there is a special category for police investigations that require an initial seizure of the person. In Terry v. Ohio, 392 U.S. 1 (1968) this court determined that as a "rubric of police conduct" an officer could seize an individual on less than probable case. *Id.* at 20. This court has also applied a balancing test between the public interest in preventing crime and the individual's right to personal security free from arbitrary interference by law officers.

See United States v. Brignoni-Ponce, 422 U.S. 873, 878-883 (1975); *See Also* Dunaway v. New York, 442 U.S. 200 (1979).

One of the questions put before this court is whether the right of privacy found in the Fourth Amendment of the United States Constitution protects a person from being compelled to provide identification after he is lawfully detained by an officer. The state contends that compelling a lawfully detained person to identify himself is reasonable when balancing the interests of law officers and a person's right of privacy and/or right to be free from arbitrary interference with law officers. Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977). In Katz v. United States, 389 U.S. 347 (1967) Justice Harlan's concurring opinion set forth a two part test when determining if a person has a right of privacy under the Fourth Amendment. Justice Harlan believed that a court should ask first, whether the person has exhibited an actual (subjective) expectation of privacy and second, whether that expectation is one that society is prepared to recognize as reasonable. *Id.* at 361. This court seems to have adopted this test in many subsequent cases dealing with this "right of privacy." Bond v. United States, 529 U.S. 334 (2000).

The first prong of this test asks whether the individual has engaged in any affirmative conduct to ensure that his privacy interests are protected. The record in this case fails to provide an abundance of evidence regarding Hiibel's subjective intentions as it relates to keeping his name private. However, the record does indicate that Hiibel was driving a vehicle at the time he committed the alleged crime of battery/domestic battery. There is nothing in the record to suggest he did not have a valid driver's license. (See Petitioner's App. G) In order to have a driver's license, Hiibel had to provide his true and correct name to the Nevada Department of Motor Vehicles. This was an affirmative act on Hiibel's part to reveal his name

to a governmental agency and not maintain his right of privacy. As a result, it appears that Hiibel engaged in conduct that is contrary to his assertion that his name should be given privacy protection under the Fourth Amendment.

Perhaps the most compelling argument against Hiibel's claim is found in part two of Justice Harlan's test. The state submits that society is not prepared to recognize that a person has a reasonable expectation of privacy in their name when being lawfully detained by an officer. In order to function in our society it is necessary that a person provide their name under a variety of governmental imposed requirements. A person can not obtain a job without first providing identification to their potential employer. This is required because the employer needs to complete paperwork required by the state and federal government as it relates to wage withholding and benefits. Lending institutions governed by governmental rules and regulations require a person to provide identification before a loan can be approved. Individuals can not attend schools, travel the airlines or obtain a credit card without revealing their identification. In addition, individuals who are stopped for traffic violations provide identification to the officer. These are just some examples that illustrate how pervasive the requirement to provide identification has become in our society.

Furthermore, in today's society people recognize and understand how important it is that law enforcement investigate and charge the right person. There is a continuous debate in our criminal justice system over wrongful arrests and convictions and how best to prevent them. One of the best tools law officers have to avoid arresting the wrong person is to obtain the suspected individual's identification. Most people in our society recognize that by providing identification to an officer at the early stages of a legal detention quickens the process of correctly identifying whether the officer is detaining the right person. As a result,

the state submits that society is not prepared to recognize that withholding identification after being lawfully detained by an officer is a reasonable expectation of privacy.

In Wyoming v. Houghton, 526 U.S. 295 (1999) this court stated:

> The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search and seizure under the common law when the amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree in which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. *Id.* at 299-300 (emphasis added).

It is difficult to determine if, under the common law, requiring an individual to identify himself would be considered a violation of the Fourth Amendment. Clearly the framers of the United States Constitution wanted to protect individuals from unreasonable intrusions into their homes, persons, papers and effects. But query whether giving your name to an officer falls under any of these protected areas. As previously stated, NRS 171.123(3) only requires a lawfully detained person to identify himself. It does not require that he produce a paper or other form of identification. The state suggests that the framers intent in drafting the Fourth Amendment was to protect citizens from the government engaging in intrusive searches of their person or home and seizing their papers and effects without first establishing probable cause to do so. However, identifying yourself is different because it does not involve the searching of a home, the person or seizing the person's papers or effects. As a result, traditional standards of reasonableness should be applied in this case.

The state submits that when you apply traditional standards of reasonableness to the legitimate governmental interest in preventing crime against a person's right of privacy not

reveal his name to an officer, the governmental interest outweighs this de minimis intrusion. Requiring an individual to identify himself is not unreasonable because the state has a compelling interest in preventing crime. By obtaining a lawfully detained person's identification law officers can determine the person's name. This will assist them in matching information from an outstanding warrant or flyers issued from other agencies. They will also be able to determine if the person they are confronting has a violent criminal history and take increased precautionary measures to protect themselves as well as other officers. Again, if we place barriers to an officer's ability to identify the individual they are confronting the investigation may lead to erroneous information. Without a proper investigation those who are innocent might be falsely accused. Those who were guilty might wholly escape prosecution and many crimes would go unsolved. As a result, the security of all would be diminished. Haynes v. Washington, 373 U.S. 503 (1963).

Since it is reasonable to require an individual to identify himself in furtherance of a legitimate governmental interest, Hiibel had no clearly established constitutional right to refuse Dove's lawful request to provide identification. As a result, Hiibel was in violation of NRS 199.280 and could be lawfully arrested. In Oliver v. Woods, 209 F.3d 1179 (2000) the Tenth Circuit Court of Appeals reached the same conclusion. Oliver, a criminal defense attorney, was taking his car to an auto repair shop. In the process of driving his car into the shop he triggered a silent alarm. Law enforcement officers installed the silent alarm to catch individuals who had been dumping illegal oil near the auto shop. An officer approached Oliver and asked for his name and identification. Oliver refused and quoted the Utah statute regarding when an officer can ask for identification. The officer asked for identification again and told Oliver he was not free to leave. Oliver ignored the officer and left in another vehicle

that was there to pick him up. The officer followed Oliver and upon receiving backup stopped Oliver's car. Oliver was told to get out of his car but he refused. After a brief scuffle he was arrested for failing to provide identification.

The prosecutor reviewed the case and determined that no penalty was imposed for violating this statute. The charge was amended to failing to display motor vehicle registration. The justice of the peace dismissed the charge because he determined the officers did not have reasonable suspicion to detain Oliver. Oliver filed a civil lawsuit under 42 U.S.C.A. Section 1983 alleging the officers violated his constitutional rights. The United States District Court for the District of Utah denied the officers' motion for summary judgment on qualified immunity grounds and granted Oliver's motion for summary judgment as to liability.

On appeal, the Tenth Circuit Court of Appeals noted that the Utah statute Oliver was arrested under codified the requirements for an investigative or *Terry* detention. The court reviewed the facts leading up to Oliver's arrest and determined that the officer did have reasonable suspicion to detain him. *Id.* at 1187-8. The court then addressed the issue of whether the officer had probable cause to arrest Oliver when he refused to produce identification. The court cited Adams v. Williams, 407 U.S. 143 (1972) and stated "when an officer is conducting a lawful investigative detention based on reasonable suspicion of criminal activity, the officer may ask for identification and an explanation of the suspect's presence in the area." *Id.* at 1189.

The court ruled that the officer gave Oliver a lawful order when he told him to present identification and remain in the parking lot while he conducted an investigation. When Oliver refused to present identification he refused to perform an act required by a lawful order that was necessary to affect the detention. *Id.* The Tenth Circuit concluded its opinion by holding

that Oliver had no clearly established constitutional right to violate Utah code 76-8-305 which makes it a misdemeanor to interfere with an officer when he is seeking to affect a lawful detention. *Id.* at 1190. *See* United States v. Trimble, 986 F.2d 394 (10th Cir. 1993).

In the case at bar, Deputy Dove was effectuating a detention based on reasonable suspicion. NRS 199.280 prohibits an individual from delaying or obstructing an officer while he is discharging any legal duty. Deputy Dove had reasonable suspicion to investigate a reported crime and therefore was engaged in a legal duty. When petitioner refused to produce identification during the course of the lawful detention he delayed and obstructed Deputy Dove as he discharged his legal duty. As in Oliver, Hiibel has no clearly established constitutional right to violate NRS 171.123(3). Therefore, arresting petitioner for failing to produce identification and other acts amounting to resisting a public officer under NRS 199.280 does not make NRS 171.123(3) unconstitutional under the Fourth Amendment.

Permitting an individual to refuse to identify himself once an officer has reasonable suspicion to detain and investigate a crime carves out a much broader protection than the Fourth Amendment envisions. It tips the scale and forces an officer to make more difficult decisions because he no longer has the ability to gather needed information. NRS 171.123(3) does not give an officer unfettered discretion in stopping individuals and compelling them to produce identification. Delaware v. Prouse, 440 U.S. 648 (1979). The statute requires an officer to have reasonable suspicion before detaining a person for investigative purposes. This protects the person from arbitrary interference of a law officer. However, once an officer establishes reasonable suspicion he should be allowed to fully confirm or dispel those suspicions as quickly as possible. Requiring the detained person to identify himself is a

reasonable means in achieving this goal. As a result, the public interest in crime prevention and effective police work outweighs Hiibel's claimed right of privacy.

2. COMPELLING AN INDIVIDUAL TO PROVIDE IDENTIFICATION AFTER BEING LAWFULLY DETAINED BY AN OFFICER DOES NOT VIOLATE THE PROTECTION SET FORTH IN THE FIFTH AMENDMENT THAT NO PERSON SHALL BE COMPELLED TO BE A WITNESS AGAINST HIMSELF.

The Fifth Amendment of the United States Constitution protects a person from being "compelled in any criminal case to be a witness against himself." The word "witness" in the constitutional text only applies to the category of compelling incriminating communications to those that are "testimonial" in nature. The history and policies underlying the self-incrimination clause support the proposition that this privilege may only be asserted to resist compelled explicit or implicit disclosures of incriminating information. This privilege was created to prevent the type of inquisitorial methods used by ecclesiastical courts and the Star Chamber wherein an individual would be compelled under oath to answer questions designed to uncover uncharged offenses without evidence from another source. *See* Andresen v. Maryland, 427 U.S. 463, 470-471 (1976); 8 Wigmore sec. 2250; *See Also* Doe v. United States, 487 U.S. 201, 212 (1988).

Based on this historical backdrop the state submits to this court that compelling an individual to produce identification after an officer establishes reasonable suspicion does not constitute a violation of the Fifth Amendment. The state contends that Hiibel's name does not have "testimonial" significance. In United States v. Wade, 388 U. S. 218 (1967) defendant was indicted for robbery. Without notice to his attorney, defendant was placed in a lineup and made to wear strips of tape on his face as the robber allegedly had done. Further, defendant was required to repeat the words used by the robber. Defendant was subsequently convicted of robbery and filed a Writ of Certiorari with the United States Supreme Court. This court

granted Certiorari and determined that defendant's Fifth Amendment privilege against self-incrimination was not violated when he was required to speak the same words the robber spoke during the robbery. This court stated that these spoken words did not have any "testimonial significance" because he was not being asked to disclose any knowledge he had about the robbery itself. *Id.* at 222-223.

Applying this court's interpretation of the Fifth Amendment privilege against self-incrimination in Wade to this case it seems clear that stating one's name carries with it no "testimonial significance." When comparing both cases there are some very important distinctions that this court should consider. First, unlike Wade, Hiibel was never formally charged with a crime prior to being asked for identification. Deputy Dove made this request while conducting a temporary detention to investigate a possible crime relating to battery or domestic battery. The state submits that once a person has been charged and is considered to be the only person who committed the crime, the protections provided by the privilege against self-incrimination become much more important. There is a greater interest in making sure the government does not use compulsive means to extract a confession or information that can be used at time of trial. Second, unlike Wade, requiring Hiibel to provide identification did not give the prosecution any material information about the crime itself. Wade was compelled to speak the same words as the robber while eye witnesses listened. This seems to be a greater infringement on the privilege against self-incrimination because it gave the prosecution an important piece of evidence that placed Wade at the scene of the crime. If the witnesses harbored any doubts as to the identity of the perpetrator, hearing the same words and comparing the voices erased these doubts.

In light of United States v. Wade, 388 U.S. 218 (1967), if this court finds that requiring a person who is detained based on reasonable suspicion to provide identification is a violation of the Fifth Amendment privilege against self-incrimination, the court would be engaging in what Justice Holmes stated as "an extravagant extension of the Fifth Amendment." Holt v. United States, 218 U.S. 245 (1910) (compelling a defendant to put on a blouse did not violate the privilege against self-incrimination). It would be unreasonable to label a person's name as "testimonial" when this court has held that other more incriminating evidence does not merit that distinction. For instance, this court has ruled that compelling a person to provide a blood sample does not violated the Fifth Amendment. Schmerber v. California, 384 U.S. 757 (1966). This court has affirmed the compulsion of a handwriting exemplar, recording of a voice or putting on a shirt. Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 91967); Holt v. United States, 218 U.S. 245 (1910). All more intrusive requirements than simply providing a name while being detained for investigative purposes. In addition, these other compulsive means provide information that has far more evidentiary value at time of trial than a name. This court has further held that unless the compulsion brings about a communication that relates either express or implied assertions of fact or belief the Fifth Amendment privilege against self-incrimination will not apply. Pennsylvania v. Muniz, 496 U.S. 582 (1990); United Sates v. Dionisio, 410 U.S. 1 (1973). Applying this standard to the facts in this case, it is clear there is not a violation of the Fifth Amendment.

In Byers v. California, 402 U.S. 424 (1971) this court recognized that when there is a question of a compelled disclosure that has an incriminating potential the judicial scrutiny is invariably a close one. *Id.* at 427. This court also noted that in an organized society many burdens are placed upon it citizens to provide information that may result in some future

prosecution and that the "mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure..." *Id.* at 427-28. The state contends that NRS 171.123(3) and the need for law officers to identify the individual they are lawfully detaining constitutes a "strong policy in favor of disclosure." Providing identification is "essentially a neutral act." *Id.* at 432. Giving it any other greater significance amounts to what Justice Holmes reiterated in United States v. Sullivan, 274 U.S. 259 (1927) as "an extreme if not extravagant application of the Fifth Amendment.

Perhaps the most compelling state court decision on this issue is State v. Flynn, 285 N.W. 2d 710 (1979). In Flynn an officer was investigating a crime and developed reasonable suspicion to detain the defendant. During the detention the officer asked defendant for identification. Defendant refused to provide his identification so the officer took it from him. On appeal the Wisconsin Supreme Court upheld the officer's conduct. The court stated that unless an officer is entitled to at least ascertain the identity of the suspect the right to stop serves no useful purpose at all. The court determined that to allow a suspect to refuse to provide identification would reduce the officers authority granted in Adams v. Williams, 407 U.S. 143 (1972) to a mere fiction. *See* W. LaFave 9.4(g).

The state finds it difficult to understand how the giving of one's name results in "self-incrimination." The request does not require the suspect to "speak to his guilt" and the answer to such a request does not give law enforcement "substantive information." United States v. Wade, 388 U.S. 221 (1967). NRS 171.123(3) did not require Hiibel to explain his whereabouts at a particular time or his conduct prior to being detained by Deputy Dove. This information can only be described as neutral and non-substantive in nature. If a lawfully detained person can not be compelled to provide identification to an officer, then as the court stated in Flynn,

the right to stop a person on reasonable suspicion serves no useful purpose and the officer's authority is a mere fiction.

CONCLUSION

The state submits that this court should grant Hiibel's Petition for Writ of Certiorari. However, after full briefs have been submitted on the Writ of Certiorari, this court should find that NRS 171.123(3) does not violate a person's rights under the Fourth and Fifth Amendments to the United States Constitution.

Dated this 19 day of September, 2003.

Conrad Hafen
Senior Deputy Attorney General