Privacy Questions In Heien V. NC May Have To Wait

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On Oct. 6, the U.S. Supreme Court heard oral argument in Heien v. North Carolina, which posed the question of whether a police officer may acquire the reasonable suspicion necessary to justify a car stop based on a mistake of law.

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More particularly, in Heien, police began to follow a car whose driver appeared "stiff and nervous," and then stopped the car upon observing that the right rear brake light failed to illuminate. Forty minutes later, after a full-blown search of the car, police discovered a baggie of cocaine. While such "pretext stops" of cars for minor traffic infractions are constitutional pursuant to the Supreme Court's decision in Whren v. United States, the problem here was that, contrary to the officer's belief, under North Carolina's Vehicle and Traffic Code, there is simply no infraction as long as one brake light is working — and, here, the left light was working just fine.

Heien argued, as the majority of state and federal courts have held, that a stop based on a mistake of law is illegal at its inception and violates the Fourth Amendment; the state argued that just as a mistake of fact can furnish reasonable suspicion, so too can a mistake of law — as long as that mistake is a reasonable one.

If adopted, the state's position would effect a significant change in the law for a majority of jurisdictions, including New York. It would lead to the facially unfair and logically irreconcilable position that while a private citizen is presumed to know the law and cannot rely upon even a reasonable mistake of law to defend against criminal charges, the police can rely upon a mistaken understanding of the law — which they are uniquely entrusted with enforcing — to justify their intrusion into the privacy of a citizen who is engaged in wholly legal conduct.

Worse, in combination with Whren, the effect of a decision adopting the state's position would be to allow police to stop and detain a person who has broken no laws whatsoever, based on an officer's articulation of a pretextual reason that is not even legally valid. Such a rule would stray far from the accepted view of "reasonableness" as based on the realities rapidly unfolding before a trained officer in the field. Instead, it would substitute both factual and legal fictions for the reality of a stop, like this one, that was actually motivated by a constitutionally impermissible hunch, was subsequently justified as being based upon the observation of a traffic infraction that never actually occurred, and was ultimately upheld because the officer charged with knowing and enforcing the laws was deemed "reasonable" in his mistake about what the law actually prohibits. The Constitution should not be interpreted to ever justify as "reasonable" a search or seizure based entirely on a fiction rather than reality.

During oral argument, these concerns were expressed by Justices Elena Kagan and Sonia Sotomayor, who reminded the government that the stop here was not based on observation of criminality, as the attorney had stated, but, rather, on what the officer thought was a "lawful pretext," which turned out to be wrong. And the irony in the rule proposed by the state was not lost on Justice John Roberts, who highlighted that if the situation were flipped, ignorance of the law would not save a motorist who believed that the law required only one functioning headlight if the statute actually required two. These justices' questions explored whether the rule proposed by the state would lead police to take advantage of ambiguities in the law to search citizens engaged in perfectly legal conduct.

But the bulk of the oral argument focused on a question not briefed by the parties: whether the case presented any actual case or controversy in view of the Supreme Court's recognition of a "good faith exception" to the exclusionary rule — an exception not recognized by many states, including North Carolina.

Justice Antonin Scalia led the charge on this issue, sharply questioning Heien's attorney about why it mattered whether a constitutional violation had occurred in view of Heien's failure to demonstrate that North Carolina's highest court had erred in denying suppression under federal law. In other words, according to Justice Scalia, whose concerns were echoed at times by Justices Kagan, Sotomayor, Anthony Kennedy and Samuel Alito, even if Heien were right that a constitutional violation had occurred, and the state court had erred in holding otherwise, the Supreme Court would have no occasion or ability to set aside the

judgment if, under federal law, the remedy of suppression still would not lie.

This issue was ultimately unresolved, with Heien unconvincingly arguing for a decision ruling on the constitutional issue and remanding on the good-faith-exception question, which Justice Scalia quickly dismissed as a futile remedy for a question that the North Carolina court could never reach under its own state law; and with the government's attorneys conceding that they had put all of their eggs in the constitutional basket, although the good-faith-exception basket clearly held the best hope for their victory under federal law.

While the result is far from certain, the lack of a remedy, and thus, any justiciable case or controversy, might mean lights out for this case — as well as for Heien's car — and the dismissal of the writ of certiorari as improvidently granted. Justice Kennedy seemed to intimate as much, remarking that he was "not so sure it makes good prudential sense to allow the North Carolina Supreme Court to put to us what is basically an abstract question." And Justice Scalia outright stated that he was "sorry to waste so much of our time." Thus, in the end, the important substantive questions raised by Heien v. North Carolina may have to wait for another day to be resolved.

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