Suspicious Reasoning: How the Tenth Circuit's Reasonable Suspicion Analysis Went Wrong [Vasquez v. Lewis, 834 F.3d 1132 (10th Cir. 2016)]

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Summary*: The Tenth Circuit Court of Appeals held that two law enforcement officers did not have reasonable suspicion to detain and search an individual's vehicle for drugs. The court erred in using the "divide-and-conquer" approach to determine whether reasonable suspicion existed, and because it never properly answered that threshold question, it also erred by finding the officers were not entitled to qualified immunity.*

I. INTRODUCTION

Since the United States Supreme Court first used the "totality of the circumstances" test in the 1937 case *First National Bank & Trust Co. v. Beach*,[1] the phrase has grown into a linchpin of American jurisprudence. The concept is used in conjunction with many legal standards, including reasonable suspicion and probable cause. In *Vasquez v. Lewis*,[2] the Tenth Circuit Court of Appeals made the unfortunate mistake of applying a totality of the circumstances analysis incorrectly. Rather than follow the Supreme Court instructions and truly look at the big picture during a reasonable suspicion analysis, the majority in *Vasquez* attacked the facts one at a time, in a "divide-and-conquer" fashion. As a result, it is difficult to tell whether justice truly was served.

II. BACKGROUND

A. Case Description

On December 16, 2011, Peter Vasquez drove eastbound on Interstate Seventy through Wabaunsee County, in northeast Kansas.[3] Officers

1. 301 U.S. 435 (1937). In *Beach*, the Court dealt with a bankruptcy rather than a criminal case, and held that a totality test should be used to determine whether an individual qualifies as a "farmer" under United States bankruptcy law. *Id.* at 439.
2. 834 F.3d 1132 (10th Cir. 2016).
3. *Id.* at 1135.

Jimerson and Lewis stopped Vasquez because they could not read the temporary tag in the tinted rear window of Vasquez's 1992 BMW sedan.[4] Upon approaching the car, Officer Jimerson noted that Vasquez was the only occupant and the car was relatively empty other than some lumped-up blankets and pillows in the backseat.[5] Officer Jimerson first thought the lumped-up blankets could hide someone, and he asked Vasquez if anyone else was in the car, but Vasquez responded that he was alone.[6]

The officers learned Vasquez was traveling cross-country to move from Colorado to Maryland.[7] Vasquez also presented insurance to the officers, and Officer Jimerson observed that Vasquez had two vehicles newer than the BMW sedan.[8] Because Officer Jimerson noted that Vasquez seemed very nervous, he requested that Officer Lewis also try to gauge Vasquez's nervousness.[9] Officer Lewis reported to Officer Jimerson that Vasquez seemed very nervous, and "look[ed] all scared to death."[10]

At this point, Officer Jimerson suspected Vasquez of involvement in drug trafficking and radioed for a drug dog.[11] When Officer Lewis returned to the vehicle, he asked why Vasquez was not driving one of the newer vehicles; Vasquez responded that he recently purchased the BMW for his girlfriend.[12] Officer Lewis also asked why the car was relatively empty, and Vasquez responded that he had already moved most of his things to Maryland.[13]

Officer Lewis issued Vasquez a warning for the tag violation, and then requested to ask Vasquez a few more questions.[14] When Vasquez agreed, Officer Lewis asked if there were any drugs in the vehicle.[15] Vasquez said there were not.[16] Officer Lewis then asked if he could search Vasquez's vehicle, which Vasquez refused.[17] Officer Lewis

4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Vasquez*, 834 F.3d at 1135.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Vasquez*, 834 F.3d at 1135.
15. *Id.*
16. *Id.*
17. *Id.* The Supreme Court has ruled that refusal to give consent to search, on its own, is not sufficient to create probable cause. *See* Florida v. Bostick, 501 U.S. 429, 437 (1991) ("[A]n individual may decline an officer's request without fearing prosecution. We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.") (citation omitted); *see also* Florida v. Royer, 460 U.S. 491, 498 (1983) ("[A person] may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds."). *But see* United States v. Edmonds, 948 F. Supp. 562, 567 (E.D. Va. 1996) ("[W]hile the Supreme Court has ruled that a citizen's refusal to consent to a search can never furnish the sole basis for a brief detention and investigation, it has not yet addressed the question whether a refusal can be part of the basis for a

believed Vasquez was "'probably involved in a little criminal activity here' and detained him."[18] The drug dog arrived approximately fifteen minutes later, and the subsequent search of Vasquez's vehicle found nothing illegal.[19]

Vasquez filed a lawsuit against Officers Jimerson and Lewis under 42 U.S.C. § 1983, claiming the officers violated his Fourth Amendment rights by detaining him and searching his car without reasonable suspicion.[20] The district court initially denied the officers' motion to dismiss, but eventually granted the officers' motion for summary judgment on the basis of qualified immunity.[21] Vasquez appealed to the Tenth Circuit.[22]

B. Legal Background

A law enforcement officer must meet the threshold of reasonable suspicion before detaining an individual.[23] Reasonable suspicion is not, nor is it meant to be, a burdensome standard.[24] An officer need only have "a particularized and objective basis for suspecting criminal conduct under a totality of the circumstances."[25] The totality of the circumstances test states that there is no single deciding factor for a decision.[26] The court must consider all the facts and their context to conclude from the whole picture: whether there is probable cause, whether an alleged detention is in fact a detention, or whether a citizen acted lawfully.[27] Although the Supreme Court has not given one specific instruction on how to employ a totality of the circumstances test, it has provided instruction on how *not* to employ the test.[28]

In *United States v. Arvizu*,[29] the Supreme Court reversed the Ninth Circuit's decision that a border patrol agent had no reasonable suspicion to

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Terry stop.").

18. *Vasquez*, 834 F.3d at 1135.

19. *Id.*

20. *Id.* Section 1983 was enacted on April 20, 1871, as part of the Civil Rights Act of 1871, and is also known as the "Ku Klux Klan Act" because one of its main purposes was to provide a civil remedy against the abuses committed by groups like the KKK and law enforcement. CONG. GLOBE, 42d Cong. 1st Sess., 374–76 (1871) (remarks of Rep. Lowe). While the existing laws protected all citizens in theory, their protection in practice was unavailable to some because those persons tasked with the enforcement of the laws were unable or unwilling to do so. *Id.* Section 1983 claims were intended to provide a private remedy for such violations of federal law, and have since been interpreted to create a specific type of tort liability. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305–06 (1986).

21. *Vasquez*, 834 F.3d at 1135.

22. *Id.*

23. *See* Terry v. Ohio, 392 U.S. 1, 21 (1968) ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

24. United States v. Pettit, 785 F.3d 1374, 1379 (10th Cir. 2015).

25. *Id.* (internal quotations omitted).

26. *Terry*, 392 U.S. at 21.

27. *See id.* at 21–22.

28. United States v. Arvizu, 534 U.S. 266, 274 (2002).

29. 534 U.S. 266 (2002).

detain a minivan.[30] The Ninth Circuit separately inspected ten factors supporting reasonable suspicion, and decided that seven of the factors should not be given significant weight because each was easily susceptible to innocent explanation.[31] In denying this method, the Supreme Court held that even if each factor is consistent with an innocent explanation, individually innocent factors considered together can merit further investigation.[32]

Finally, the doctrine of qualified immunity protects government officials from liability for civil damages, "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[33] The generally accepted purpose of qualified immunity is to allow government officials to carry out their assigned duties without the fear of being harassed, particularly via lawsuits.[34] To overcome a claim of qualified immunity, a plaintiff must show: (1) a defendant violated his constitutional rights; and (2) it was clearly established at the time of the violation that such actions violated that right.[35] When dealing with the second prong of qualified immunity for law enforcement, the Tenth Circuit holds, "[a] right is clearly established if 'it would be clear to a reasonable officer that his conduct was unlawful in the situation.'"[36]

III. COURT'S DECISION

A three judge panel of the Tenth Circuit granted a review of the summary judgment ruling *de novo*.[37] The court ultimately decided that Officers Jimerson and Lewis did not have reasonable suspicion to detain Vasquez, and that the officers were not entitled to qualified immunity.[38] When conducting its reasonable suspicion analysis, the majority divided and individually examined the factors used by the officers to justify their belief of reasonable suspicion.[39]

With regards to qualified immunity, the majority pointed to *United States v. Wood*[40] as clear evidence that the officers should have known they did not have reasonable suspicion, and thus should not have detained

30. *Id.* at 277–78.
31. *Id.* at 272, 274.
32. *Id.* at 274.
33. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
34. *See* Richard G. Schott, *Qualified Immunity: How It Protects Law Enforcement Officers*, LAW ENFORCEMENT BULLETIN (Sept. 1, 2012), https://leb.fbi.gov/articles/legal-digest/legal-digest-qualified-immunity-how-it-protects-law-enforcement-officers [https://perma.cc/J52G-PP9N].
35. Foote v. Spiegel, 118 F.3d 1416, 1424 (10th Cir. 1997).
36. Maresca v. Bernalillo Cty., 804 F.3d 1301, 1308 (10th Cir. 2015) (citing *Cortez v. McCauley*, 478 F.3d 1108, 1114 (10th Cir.2007)).
37. Vasquez v. Lewis, 834 F.3d 1132, 1135 (10th Cir. 2016).
38. *Id.* at 1139.
39. *See id.* at 1136–38.
40. 106 F.3d 942 (10th Cir. 1997).

Vasquez.[41] In *Wood*, an officer detained Wood's car and contents to search it for narcotics, under circumstances similar (but certainly not identical) to those seen in this case, and the court found no reasonable suspicion existed.[42]

IV. COMMENTARY

A. The Majority Incorrectly Applied a "Divide-and-Conquer" Analysis when Examining the Reasonable Suspicion Factors

Throughout its opinion, the majority gave lip service to reviewing the facts under a valid totality of the circumstances argument. For example, one line alluded to a lawful totality of the circumstances test: "[t]hough we analyze these facts under the totality of the circumstances, we first note which factors have less weight in our analysis."[43] In the very next sentence, however, the majority isolated that Vasquez was a resident of Colorado.[44] It attempted to justify this analysis by saying it found the factor not compelling in isolation or in combination with other factors, which it did not repeat in its analysis of other individual factors.[45]

The majority followed by claiming that Vasquez's nervousness weighs lightly in the totality of the circumstances analysis.[46] It stated that the Tenth Circuit consistently holds that nervousness should weigh little in totality of the circumstances analyses, and that the factor should be treated with caution.[47]

Even if the majority did not give significant weight to Vasquez's nervousness alone, it failed to discuss how nervousness potentially interacts with other more weighty factors and simply continued the "divide-and-conquer" strategy. The majority treated other facts in isolation, including that Vasquez was travelling on a known drug corridor in Interstate Seventy and that the vehicle was uncharacteristically empty for someone travelling cross-country.[48] The majority failed to make any more than a passing mention of another factor the officers considered: that

41. *Vasquez*, 834 F.3d at 1139 (citing United States v. Wood, 106 F.3d 942, 944 (10th Cir. 1997)).

42. *Wood*, 106 F.3d at 948. In *Wood*, Officer Jimerson approached the car and "noticed trash on the floor, including sacks from fast-food restaurants, and open maps in the passenger compartment. He also determined that Mr. Wood was 'extremely nervous'; his breathing was rapid, his hands trembled as he handed over his driver's license, and he cleared his throat several times." *Id.* at 944. The officer at issue in *Wood* was the same Officer Jimerson as in *Vasquez*. *Wood*, 106 F.3d at 948.

43. *Vasquez*, 834 F.3d at 1137.

44. *Id.*

45. *Id.*

46. *Id.* at 1138.

47. *Id. But see* State v. Adan, 886 N.W.2d 841, 845 (N.D. 2016) ("An individual's nervousness during a traffic stop is a pertinent factor in determining reasonable suspicion.") (internal quotations omitted).

48. NAT'L DRUG INTELLIGENCE CTR., *Drug Transportation Corridors*, (Jan. 2006), https://www.justice.gov/archive/ndic/pubs11/18862/transport.htm [https://perma.cc/5NJW-HVLY].

Vasquez was driving his oldest vehicle on a cross-country trip, when he had two much newer, and likely more reliable cars he could be using.[49]

The issue here is not that the majority failed to make a correct finding on whether reasonable suspicion existed.[50] Rather, the issue is that the court came to its conclusion using an analytic method that has been explicitly invalidated by the Supreme Court. As the dissent emphasized:

The majority, in effect, takes the district court finding and concludes that 0 + 0 + 0 cannot = reasonable suspicion. Of course, a series of completely innocent conduct does not create reasonable suspicion. But the Supreme Court instructs us not to employ a "divide-and-conquer analysis" and requires us to consider the "totality of the circumstances."[51]

In denying this "divide-and-conquer" method, the Supreme Court held that even if each factor is consistent with innocent travel, individually innocent factors, when considered together, can merit further investigation.[52] Here, the majority failed to consider the factors together. According to the Supreme Court, that method is unacceptable, and the court may have reached a different result if it correctly applied the totality of the circumstances test.[53]

The majority's "divide-and-conquer" analysis also changes the essence of reasonable suspicion. The standard was never intended to be difficult for law enforcement and prosecutors to satisfy; the Supreme Court intended it to serve as a low threshold, which the Tenth Circuit acknowledged.[54] However, if the Tenth Circuit continues to use isolated analysis, reasonable suspicion quickly will become an arduous standard. Under the majority's analytic framework, law enforcement could attain valid reasonable suspicion only by discovering some major evidentiary piece. Law enforcement no longer may piece together bits of evidence that on their own may be innocent, but when taken together paint a picture of particularized illegal activity. Unfortunately for officers, not all drug traffickers drive around with their cocaine on the front seat.[55]

B. Even if the Officers Lacked Reasonable Suspicion, This Case Presents

49. *Vasquez*, 834 F.3d at 1142 (Tymkovich, C.J., dissenting) ("Vasquez was driving a newly-purchased twenty-year-old car, despite owning a new car, and had a flimsy, even implausible, explanation as to why.").

50. There is no doubt that the facts of this case present a close call on reasonable suspicion, but when considering all of the evidence (i.e. drug corridor, nervousness, older vehicle on a cross country trip when a new one was available, claim of moving but little in the car, etc.) and that "reasonable suspicion is not, and is not meant to be, an onerous standard," the officers may have had reasonable suspicion. United States v. Pettit, 785 F.3d 1374, 1379 (10th Cir. 2015).

51. *Vasquez*, 834 F.3d at 1140 (Tymkovich, C.J., dissenting).

52. United States v. Arvizu, 534 U.S. 266, 274 (2002).

53. *See id.*

54. *See Pettit*, 785 F.3d at 1379.

55. *See Stash Spotted! The 10 Weirdest Places Drugs Have Been Found*, COMPLEX (Jan. 15, 2010), http://www.complex.com/pop-culture/2010/01/stash-spotted-the-10-weirdest-places-drugs-have-been-found [https://perma.cc/VH58-VHJU].

a Close Enough Call that the Officers Should Be Entitled to Qualified Immunity

The absence of reasonable suspicion still does not guarantee that the officers are not entitled to qualified immunity. As the dissent pointed out, "[t]his case presents a close call on reasonable suspicion. But the essence of qualified immunity is to give government officials protection in resolving close calls in reasonable ways."[56]

Just because a court ultimately decides that reasonable suspicion does not exist in a particular scenario does not mean that it was "clearly established" for the officers at the time of the encounter. Nor does it mean a reasonable officer would automatically agree that no reasonable suspicion existed at the time of the incident. The majority pointed to *Wood* to say that the officers should have been aware that reasonable suspicion did not exist, but the facts from *Wood* are readily distinguishable from those in *Vasquez*.[57] Outside of the fact that altogether different factors were considered in the cases, in *Wood* the officer placed a greater deal of emphasis on the nervousness factor, while in *Vasquez* the nervousness factor was still considered, but not in as great of detail as in *Wood*.[58]

Officers are trained to investigate and have been instructed by the Supreme Court that reasonable suspicion is an amorphous, but relatively easily attained, standard.[59] In this case, Officers Jimerson and Lewis were presented with a close call, and it is easy to see why they erred on the side of the existence of reasonable suspicion. They did not believe their conduct was unlawful, and simply tried to do their jobs. This is precisely the kind of case for which qualified immunity exists.

V. CONCLUSION

The majority's incorrect application of the totality of the circumstances test violates clearly established Supreme Court instruction. Under the majority's "divide-and-conquer" application, reasonable suspicion becomes a much more onerous burden than intended. Had the Tenth Circuit applied the correct analysis, the question of qualified immunity could be moot, but even if reasonable suspicion did not exist,

56. *Vasquez*, 834 F.3d at 1140 (Tymkovich, C.J., dissenting).

57. *See id.* at 1138–39 (citing United States v. Wood, 106 F.3d 942, 944, 948 (10th Cir. 1997)).

58. *Wood*, 106 F.3d at 948 ("Mr. Wood was 'extremely nervous'; his breathing was rapid, his hands trembled as he handed over his driver's license, and he cleared his throat several times.").

59. *See* Ornelas v. United States, 517 U.S. 690, 695 (1996) ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.") (internal quotations omitted); Alabama v. White, 496 U.S. 325, 330 (1990) ("Reasonable suspicion . . . can be established with information that is different in quantity or content than that required to establish probable cause . . . [and] can arise from information that is less reliable than that required to show probable cause.").

the officers should be protected by qualified immunity. If the court continues applying this unconstitutional "divide-and-conquer" analysis to its totality of the circumstances questions, reasonable suspicion in the Tenth Circuit will not be reasonable at all.