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'Neighborhood profiling' starts to raise several judicial eyebrows

Everyone has heard of "racial profiling." But have you ever heard of "neighborhood profiling"?

The 7th U.S. Circuit Court of Appeals recently handed down a 5-3 en banc decision in *U.S. v. Johnson*, No. 15-1366, (decided Oct. 27) in which dissenting Judge David F. Hamilton perhaps suggests that this is what the case is all about.

Police in Milwaukee saw a car stopped within 15 feet of a crosswalk. This is unlawful in Wisconsin unless the vehicle is engaged in loading or unloading passengers. Not one, but two police cars pulled up to deal with this situation by issuing a ticket.

Police properly asked the passenger Randy Johnson to exit the car. They then saw a weapon and Johnson was eventually charged and convicted of being a felon in possession.

The majority made short shrift of the case. It held that police had probable cause to believe the car was violating the parking statute. That fact alone permitted them to make a brief seizure and to issue a ticket. The lawful seizure properly resulted in discovery of the fact that Johnson was a felon in possession of a weapon.

Finally, it relied on *Whren v. U.S.* for the proposition that any ulterior motive the police may have had in using two police cars to deal with this trivial offense is irrelevant to any Fourth Amendment analysis. 517 U.S. 806 (1996).

Hamilton in dissent conceded that *Whren* held that, with regards to the Fourth Amendment, subjective bias is irrelevant to the issue of police enforcement of moving traffic violations. And he conceded that the majority's extension of *Whren* to parking violations was "arguably defensible." But, Hamilton contended, "[D]efensible does not mean correct."

Hamilton complained that the majority was wrong to ignore the context in which this stop oc-

curred. The Milwaukee police who made this stop were not on parking patrol. They were part of the Milwaukee Police Department's Neighborhood Task Force Street Crimes Unit assigned to crime "hot spots." One officer admitted that "part of our initiative is to look for smaller infractions and hope that possibly they may lead to bigger and better things."

Hamilton then reviewed just what the police may constitutionally accomplish based on probable cause for even the most trivial traffic stop: Police may automatically make the driver and passengers exit the car (*Maryland v. Wilson*, 519 U.S. (1997)); conduct a frisk of any occupant if there is reasonable suspicion concerning safety (*Arizona v. Johnson*, 555 U.S. 323 (2009)); ask questions about any subject (*Illinois v. Caballes*, 543 U.S. 405 (2005)); visually inspect the interior of the car (*Colorado v. Bannister*, 449 U.S. 1 (1980)); under some circumstances, pursuant to an arrest, search the car's interior without probable cause to search (*Arizona v. Gant*, 556 U.S. 332 (2009)); and do a drug-dog inspection if it takes place within a reasonable time for the stop (*Caballes*).

For these reasons, Hamilton contended that the parking violation being investigated by not one, but two police cars of the Street Crimes Unit, cannot be

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looked at as an isolated occurrence. He urged the court to "consider the cumulative effects of the doctrine."

And the place to begin looking is the neighborhood in which the stop occurred. The dissent bluntly noted that "The police tactics here would never be tolerated in more affluent neighborhoods." If "the police tried these tactics in

CRIMINAL PROCEDURE

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Milwaukee's affluent east side ... [c]itizens would be up in arms, and rightly so."

Johnson never contended that the police considered the race of the car's occupants in making their decision to conduct the stop. But could concentrating enforcement efforts in certain "high-crime neighborhoods" constitute a proxy for race?

This concept of "neighborhood profiling" may be gathering momentum. Consider *U.S. v. Gross*, 784 F.3d 784 (2015). A few years ago the Washington, D.C., Metropolitan Police operated a Gun Recovery Unit. This unit cruised high-crime neighborhoods in unmarked cars looking for guns.

One evening an officer driving one of the unit's car encountered

in possession of a weapon. The D.C. Circuit affirmed, finding that none of the questioning amounted to a seizure.

But Judge Janice Rogers Brown, an African-American woman, castigated the majority for finding that this encounter devoid of any grounds for suspicion could possibly be "consensual." She characterized it as a "rolling roadblock" being conducted in those Washington neighborhoods without political clout.

She asked the reader to "[T]ry to imagine this scene in Georgetown ... Would residents of that neighborhood maintain there was no pressure to comply if the district's officers patrolled Prospect Street in tactical gear, questioning each person they encountered about whether they were carrying an illegal firearm?"

Interestingly, Brown had confronted an analogous problem when she was on the California Supreme Court in 2002. Conrad McKay was stopped for the offense of riding his bicycle the wrong way on a residential street. When he could not produce identification, he was arrested. A subsequent search turned up contraband drugs. The California Supreme Court affirmed.

In her opinion concurring and dissenting, then-justice Brown pointedly noted "I do not know Mr. McKay's ethnic background. One thing I would bet on: [H]e was not riding his bike a few doors down from his home in Bel Air or Brentwood or Rancho Palos Verdes, places where no resident would be arrested for riding the 'wrong way' on a bicycle." *People v. McKay*, 27 Cal.4th 603, 641-642 (2002).

The concept of "neighborhood profiling" may be an idea whose time has finally come. (See, e.g., "Neighborhood Profiling at Center of Case Before Arizona Supreme Court," kjzz.org/content/427027/neighborhood-profiling-center-case-arizona-supreme-court.)

It is definitely worth the serious attention of the criminal justice system.