

## Review of Recent Juvenile Cases (2007)

by  
The Honorable Pat Garza  
Associate Judge  
386th District Court  
San Antonio, Texas

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### **A passenger of a car stopped by police has standing to challenge the legality of the stop.[Brendlin v. California](07-4-7)**

**On June 18, 2007, the United States Supreme Court held that when police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and as a result may challenge the constitutionality of the stop.**

¶ 07-4-7. **Brendlin v. California**, 127 S. Ct. 2400, 168 L. Ed. 2d 132, 2007 U.S. Lexis 7897 (U.S. Sup. Ct., 6/18/07).

**Note:** While this is not a "per se" juvenile case, it is a Supreme Court holding, and its ramifications will extend to stops made of juveniles in similar situations. As a result, I have elected to include it as part of our cases at this time.

**Facts:** After officers stopped a car to check its registration without reason to believe it was being operated unlawfully, one of them recognized defendant, a passenger in the car. Upon verifying that defendant was a parole violator, the officers formally arrested him and searched him, the driver, and the car, finding, among other things, methamphetamine paraphernalia. The State conceded that the police had no adequate justification to pull the car over. Defendant was charged with various methamphetamine offenses and moved to suppress the evidence obtained in searches of his person and the car in which he was a passenger as fruits of an unconstitutional seizure. The trial court denied the motion to suppress.

The California Court of Appeal reversed the denial of the suppression motion, holding that Brendlin was seized by the traffic stop, which they held unlawful. By a narrow majority, the Supreme Court of California reversed. The State Supreme Court noted California's concession that the officers had no reasonable basis to suspect unlawful operation of the car, but still held suppression unwarranted because a passenger "is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer's investigation or show of authority," The court reasoned that Brendlin was not seized by the traffic stop because Simeroth was its exclusive target, that a passenger cannot submit to an officer's show of authority while the driver controls the car, and that once a car has been pulled off the road, a passenger "would feel free to depart or otherwise to conduct his or her affairs as though the police were not present,"

**Held:** Vacated and Remanded

**Opinion:** The State concedes that the police had no adequate justification to pull the car over, see n. 2 *supra*, but argues that the passenger was not seized and thus cannot claim that the evidence was tainted by an unconstitutional stop. We resolve this question by asking whether a reasonable person in Brendlin's position when the car stopped would have believed himself free to "terminate the encounter" between the police and

himself. *Bostick, supra*, at 436, 111 S. Ct. 2382, 115 L. Ed. 2d 389. We think that in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.

A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on "privacy and personal security" does not normally (and did not here) distinguish between passenger and driver. *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976). An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place. Cf. *Drayton, supra*, at 197-199, 203-204, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (finding no seizure when police officers boarded a stationary bus and asked passengers for permission to search for drugs).<sup>3</sup>

3 Of course, police may also stop a car solely to investigate a passenger's conduct. See, e.g., *United States v. Rodriguez-Diaz*, 161 F. Supp. 2d 627, 629, n. 1 (Md. 2001) (passenger's violation of local seatbelt law); *People v. Roth*, 85 P. 3d 571, 573 (Colo. App. 2003) (passenger's violation of littering ordinance). Accordingly, a passenger cannot assume, merely from the fact of a traffic stop, that the driver's conduct is the cause of the stop.

It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety. In *Maryland v. Wilson*, 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997), we held that during a lawful traffic stop an officer may order a passenger out of the car as a precautionary measure, without reasonable suspicion that the passenger poses a safety risk. *Id.*, at 414-415, 117 S. Ct. 882, 137 L. Ed. 2d 41; cf. *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) (*per curiam*) (driver may be ordered out of the car as a matter of course). In fashioning this rule, we invoked our earlier statement that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Wilson, supra*, at 414, 117 S. Ct. 882, 137 L. Ed. 2d 41 (quoting *Michigan v. Summers*, 452 U.S. 692, 702-703, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981)). What we have said in these opinions probably reflects a societal expectation of "unquestioned [police] command" at odds with any notion that a passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission. *Wilson, supra*, at 414, 117 S. Ct. 882, 137 L. Ed. 2d 41.<sup>4</sup>

4 Although the State Supreme Court inferred from Brendlin's decision to open and close the passenger door during the traffic stop that he was "awar[e] of the available options," 38 Cal. 4th 1107, 1120, 45 Cal. Rptr. 3d 50, 136 P. 3d 845, 852 (2006), this conduct could equally be taken to indicate that Brendlin felt compelled to remain inside the car. In any event, the test is not what Brendlin felt but what a reasonable passenger would have understood.

Our conclusion comports with the views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on the question. See *United States v. Kimball*, 25 F.3d 1, 5 (CA1 1994); *United States v. Mosley*, 454 F.3d 249, 253 (CA3 2006); *United States v. Rusher*, 966 F.2d 868, 874, n. 4 (CA4 1992); *United States v. Grant*, 349 F.3d 192, 196 (CA5 2003); *United States v. Perez*, 440 F.3d 363, 369 (CA6 2006); *United States v. Powell*, 929 F.2d 1190, 1195 (CA7 1991); *United States v. Ameling*, 328 F.3d 443, 446-447, n. 3 (CA8 2003); *United States v. Twilley*, 222 F.3d 1092, 1095 (CA9 2000); *United States v. Elycio-Montoya*, 70 F.3d 1158, 1163-1164

(CA10 1995); *State v. Bowers*, 334 Ark. 447, 451-452, 976 S.W.2d 379, 381-382 (1998); *State v. Haworth*, 106 Idaho 405, 405-406, 679 P.2d 1123, 1123-1124 (1984); *People v. Bunch*, 207 Ill. 2d 7, 13, 796 N.E.2d 1024, 1029, 277 Ill. Dec. 658 (2003); *State v. Eis*, 348 N.W.2d 224, 226 (Iowa 1984); *State v. Hodges*, 252 Kan. 989, 1002-1005, 851 P.2d 352, 361-362 (1993); *State v. Carter*, 69 Ohio St. 3d 57, 63, 1994 Ohio 343, 630 N.E.2d 355, 360 (1994) (*per curiam*); *State v. Harris*, 206 Wis. 2d 243, 253-258, 557 N.W.2d 245, 249-251 (1996). And the treatise writers share this prevailing judicial view that a passenger may bring a Fourth Amendment challenge to the legality of a traffic stop. See, e.g., 6 W. LaFare, Search and Seizure § 11.3(e), pp. 194, 195, and n. 277 (4th ed. 2004 and Supp. 2007) ("If either the stopping of the car, the length of the passenger's detention thereafter, or the passenger's removal from it are unreasonable in a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car which is their fruit" (footnote omitted)); 1 W. Ringel, Searches & Seizures, Arrests and Confessions § 11:20, p. 11-98 (2d ed. 2007) ("[A] law enforcement officer's stop of an automobile results in a seizure of both the driver and the passenger").<sup>5</sup>

5 Only two State Supreme Courts, other than California's, have stood against this tide of authority. See *People v. Jackson*, 39 P. 3d 1174, 1184-1186 (Colo. 2002) (en banc); *State v. Mendez*, 137 Wn. 2d 208, 222-223, 970 P.2d 722, 729 (1999) (en banc).

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The contrary conclusion drawn by the Supreme Court of California, that seizure came only with formal arrest, reflects three premises as to which we respectfully disagree. First, the State Supreme Court reasoned that Brendlin was not seized by the stop because Deputy Sheriff Brokenbrough only intended to investigate Simeroth and did not direct a show of authority toward Brendlin. The court saw Brokenbrough's "flashing lights [as] directed at the driver," and pointed to the lack of record evidence that Brokenbrough "was even aware [Brendlin] was in the car prior to the vehicle stop." 38 Cal. 4th, at 1118, 136 P. 3d, at 851. But that view of the facts ignores the objective *Mendenhall* test of what a reasonable passenger would understand. To the extent that there is anything ambiguous in the show of force (was it fairly seen as directed only at the driver or at the car and its occupants?), the test resolves the ambiguity, and here it leads to the intuitive conclusion that all the occupants were subject to like control by the successful display of authority. The State Supreme Court's approach, on the contrary, shifts the issue from the intent of the police as objectively manifested to the motive of the police for taking the intentional action to stop the car, and we have repeatedly rejected attempts to introduce this kind of subjectivity into Fourth Amendment analysis. See, e.g., *Whren*, 517 U.S., at 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"); *Chesternut*, 486 U.S., at 575, n. 7, 108 S. Ct. 1975, 100 L. Ed. 2d 565 ("[T]he subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted"); *Mendenhall*, 446 U.S., at 554, n. 6, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (principal opinion) (disregarding a Government agent's subjective intent to detain *Mendenhall*); cf. *Rakas*, 439 U.S., at 132-135, 99 S. Ct. 421, 58 L. Ed. 2d 387 (rejecting the "target theory" of Fourth Amendment standing, which would have allowed "any criminal defendant at whom a search was directed" to challenge the legality of the search (internal quotation marks omitted)).

California defends the State Supreme Court's ruling on this point by citing our cases holding that seizure requires a purposeful, deliberate act of detention. See Brief for Respondent 9-14. But *Chesternut*, *supra* 486 U.S. 567, 108 S. Ct. 1975, 100 L. Ed. 2d 565, answers that argument. The intent that counts under the Fourth Amendment is the "intent [that] has been conveyed to the person confronted," *id.*, at 575, n. 7, 108 S. Ct. 1975, 100 L. Ed. 2d 565, and the criterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized. Our most recent cases are in accord on this point. In *Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043, we considered whether a seizure occurred when an officer accidentally ran over a passenger who had fallen off a motorcycle during a high-speed chase, and in

holding that no seizure took place, we stressed that the officer stopped Lewis's movement by accidentally crashing into him, not "through means intentionally applied." *Id.*, at 844, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (emphasis deleted). We did not even consider, let alone emphasize, the possibility that the officer had meant to detain the driver only and not the passenger. Nor is *Brower*, 489 U.S. 593, 109 S. Ct. 1378, 103 L. Ed. 2d 628, to the contrary, where it was dispositive that "Brower was meant to be stopped by the physical obstacle of the roadblock--and that he was so stopped." *Id.*, at 599, 109 S. Ct. 1378, 103 L. Ed. 2d 628. California reads this language to suggest that for a specific occupant of the car to be seized he must be the motivating target of an officer's show of authority, see Brief for Respondent 12, as if the thrust of our observation were that Brower, and not someone else, was "meant to be stopped." But our point was not that Brower alone was the target but that officers detained him "through means intentionally applied"; if the car had had another occupant, it would have made sense to hold that he too had been seized when the car collided with the roadblock. Neither case, then, is at odds with our holding that the issue is whether a reasonable passenger would have perceived that the show of authority was at least partly directed at him, and that he was thus not free to ignore the police presence and go about his business.

Second, the Supreme Court of California assumed that Brendlin, "as the passenger, had no ability to submit to the deputy's show of authority" because only the driver was in control of the moving vehicle. 38 Cal. 4th, at 1118, 1119, 136 P. 3d, at 852. But what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away. Here, Brendlin had no effective way to signal submission while the car was still moving on the roadway, but once it came to a stop he could, and apparently did, submit by staying inside.

Third, the State Supreme Court shied away from the rule we apply today for fear that it "would encompass even those motorists following the vehicle subject to the traffic stop who, by virtue of the original detention, are forced to slow down and perhaps even come to a halt in order to accommodate that vehicle's submission to police authority." *Id.*, at 1120, 136 P. 3d, at 853. But an occupant of a car who knows that he is stuck in traffic because another car has been pulled over (like the motorist who can't even make out why the road is suddenly clogged) would not perceive a show of authority as directed at him or his car. Such incidental restrictions on freedom of movement would not tend to affect an individual's "sense of security and privacy in traveling in an automobile." *Prouse*, 440 U.S., at 662, 99 S. Ct. 1391, 59 L. Ed. 2d 660. Nor would the consequential blockage call for a precautionary rule to avoid the kind of "arbitrary and oppressive interference by [law] enforcement officials with the privacy and personal security of individuals" that the Fourth Amendment was intended to limit. *Martinez-Fuerte*, 428 U.S., at 554, 96 S. Ct. 3074, 49 L. Ed. 2d 1116. <sup>6</sup>

6 California claims that, under today's rule, "all taxi cab and bus passengers would be 'seized' under the Fourth Amendment when the cab or bus driver is pulled over by the police for running a red light." Brief for Respondent 23. But the relationship between driver and passenger is not the same in a common carrier as it is in a private vehicle, and the expectations of police officers and passengers differ accordingly. In those cases, as here, the crucial question would be whether a reasonable person in the passenger's position would feel free to take steps to terminate the encounter.

Indeed, the consequence to worry about would not flow from our conclusion, but from the rule that almost all courts have rejected. Holding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal. <sup>7</sup> The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passengers would be a powerful incentive to run the kind of "roving patrols" that would still violate the driver's Fourth Amendment right. See, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266, 273, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (1973) (stop and search by Border Patrol agents without a warrant or

probable cause violated the Fourth Amendment); *Prouse, supra*, at 663, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (police spot check of driver's license and registration without reasonable suspicion violated the Fourth Amendment).

7 Compare *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979) (requiring "at least articulable and reasonable suspicion" to support random, investigative traffic stops), and *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-884, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975) (same), with *Whren v. United States*, 517 U.S. 806, 810, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996) ("[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred"), and *Atwater v. Lago Vista*, 532 U.S. 318, 354, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender").

Brendlin was seized from the moment Simeroth's car came to a halt on the side of the road, and it was error to deny his suppression motion on the ground that seizure occurred only at the formal arrest. It will be for the state courts to consider in the first instance whether suppression turns on any other issue. The judgment of the Supreme Court of California is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.