

ARIZONA SUPREME COURT

STATE OF ARIZONA,) No. CR-18-0565-PR
)
Appellee,) Court of Appeals No.
) 2 CA-CR 2017-0265
v.)
) Pima County Superior Court No.
JUAN MAURICIO LERMA,) CR-20033881
)
Appellant.)
_____)

**BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR
CRIMINAL JUSTICE (AACJ) IN SUPPORT OF APPELLANT**

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INTRODUCTION

For more than a generation, when considering whether a seizure has occurred, the U.S. Supreme Court has continuously rejected a subjective test in favor of an objective test. *E.g.*, *United States v. Mendenhall*, 446 U.S. 544 (1980); *Florida v. Bostick*, 501 U.S. 429 (1991). This Court has consistently adhered to that view. *E.g.*, *State v. Winegar*, 147 Ariz. 440 (1985). Although the Supreme Court carved out a narrow exception in *California v. Hodari D.*, 499 U.S. 621 (1991), for situations where the suspect flees, such exceptions do not swallow the rule.

Yet in *State v. Gonzalez*, 235 Ariz. 212 (App. 2014), the court of appeals altered the standard entirely and held that a defendant's subjective belief that he is being seized is the linchpin for determining whether a seizure actually occurred. In that case, the court created a false equivalency between the active flight in *Hodari D.* and what is best described as passive submission to a claim of lawful authority. While this Court has explained that “[o]ur society expects, and unquestionably demands, that people follow directives issued by law enforcement officers,” *State v. Valenzuela*, 239 Ariz. 299, 306 ¶ 23 (2016), the court of appeals has again instead interpreted a seized person's submission to such a show of authority as insufficient to prove a seizure has occurred. In *State v. Lerma*, 2018 WL 5309877 (Ariz. Ct. App. 2018) (“*Decision*”), the court of appeals pushed the *Gonzalez* doctrine past its breaking point and held that a defendant must prove that he was aware of the seizure

and submitted to the seizure.¹ This Court must step in to reject this new doctrine.

Furthermore, this case is an excellent vehicle for the Court to reach the issue of whether the private affairs clause of article 2, section 8 of the Arizona Constitution should afford broader protection for automobile travelers than the Fourth Amendment to the federal constitution provides. Arizona courts have heretofore interpreted the two provisions in lockstep except in the context of home searches. *Amicus curiae* Arizona Attorneys for Criminal Justice (AACJ) continues to ask this Court to address this question, as it has in other recent cases.² The plain language of the state constitution, markedly different from that of the federal counterpart, requires that drivers and passengers in vehicles should not be disturbed by law enforcement without authority of law.³

INTERESTS OF *AMICUS CURIAE*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally

¹ As Lerma correctly points out, among the court's errors in *Lerma* is the shifting of the burden onto the defendant to prove the unlawfulness of the seizure. Petition at 10-11 (citing Ariz. R. Crim. P. 16.2).

² *E.g.*, *State v. Adair*, 241 Ariz. 58 (2016); *State v. Jean*, 243 Ariz. 331 (2018); *State v. Weakland*, CR-17-0615-PR, *review pending*.

³ AACJ's decision to brief only the issue of the suspicionless seizure should not be interpreted as implicitly suggesting that Lerma's other issues are not worthy of this Court's review.

accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Amicus offers this brief in support of Appellant Lerma because the right of all Arizonans to travel freely, unmolested by overzealous law enforcement officers, touches the core of AACJ's mission. The decision in this case would allow any officer to seize a traveler that is not currently in motion, unless that driver could prove to the satisfaction of the court that he was submitting to the officer's demand. The reasoning that allowed the lower court to reach this result is contrary to forty years of law from this Court and the United States Supreme Court, which has consistently held that the test for determining whether a seizure has occurred is objective, based on whether a reasonable person under the circumstances would feel that he is not free to leave. This is the only standard that is comprehensible, enforceable, and logical. The subjective standard created by the court of appeals in *Gonzalez* and reinforced in *Lerma* endangers the rule of law.

ARGUMENTS

- I. Both this Court and the United States Supreme Court have consistently held that the standard for determining whether a seizure has occurred is objective and not subjective. The court of appeals has created a contrary doctrine and this Court's review is necessary to end that erroneous doctrine.**

The United States Supreme Court has consistently construed Fourth Amendment challenges based upon a “reasonable person” standard. In *Mendenhall*, the U.S. Supreme Court set forth an objective test that a seizure occurs if “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” 446 U.S. at 554. The Court elaborated:

We conclude that a person has been “seized” within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Id. at 554-55 (internal citations omitted).

In *INS v. Delgado*, 466 U.S. 210, 215 (1984), the Court stated that “a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *See also Michigan v. Chesternut*, 486 U.S.

567, 569 (1988) (seizure does not occur where “the police conduct would not have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business”). The “reasonable person” test presupposes an innocent person. *Bostick*, 501 U.S. at 438; *Winegar*, 147 Ariz. at 448.

In *Hodari D.*, the Court held that a seizure cannot occur unless the suspect actually submits to the officer. The defendant relied on *Delgado* for the reasonable-person test, but the Court pointed out that *Delgado* used the phrase “only if,” not “whether,” and that the seizure requires the reasonable-person test as a precondition to a seizure but that the inquiry does not end at that. *Hodari D.*, 499 U.S. at 627-28. Because Hodari did not yield but fled and threw cocaine on the ground during his flight, the cocaine was not the fruit of an unlawful seizure. *Id.* at 629.

Hodari D. is a classic example of clear-cut facts that result in an opinion that is challenging to apply when the facts are grayer. The Court recognized this point in *Brendlin v. California*, 551 U.S. 249, 255 (2007), when it acknowledged the need for a test when “an individual’s submission to a show of governmental authority takes the form of passive acquiescence.” Vehicle passengers lack the necessary autonomy to make the decision to submit to a police seizure, yet they are no less free to leave, and for this reason the Court adopted the *Mendenhall* test for such circumstances. *Id.*

In *Lerma*, the court of appeals turned this jurisprudence on its head by holding that a defendant's lack of articulable response to the officer's act of blocking his vehicle precludes a challenge of the seizure under the Fourth Amendment because he failed to prove his submission to the show of authority. In doing so, it relied upon the holding of *Gonzalez*, 235 Ariz. at 215 ¶ 16, that the defendant must have manifested an articulable subjective reaction to the show of authority in order to trigger the protections of the Fourth Amendment. The Supreme Court specifically rejected a defendant's attempt to interject a subjective inquiry into the test for determining whether a seizure occurred in *Bostick*, 501 U.S. at 437-38.

Despite forty years of law clearly establishing an objective standard to determine whether a "seizure" has taken place, the court of appeals, through its decisions in *Lerma* and *Gonzalez*, has disregarded the Supreme Court's unambiguous reasonable-person analysis in favor of its own mixed subjective/objective test. It has shifted the burden to a defendant to take specific articulable actions to alert law enforcement to his submission to the officer's show of authority. Absent this subjective articulable action, the court of appeals has held that a defendant cannot be "seized" under the Fourth Amendment. In *Gonzalez*, the court relied upon the officer's testimony that "none of the suspects reacted or did 'anything that indicated that they even saw [him] coming.'" 235 Ariz. at 215 ¶ 14. Likewise, in *Lerma*, the court determined that the trial court "could implicitly infer

that because his seat was deeply reclined as the officers approached from behind, Lerma did not see them and was unaware of their presence outside his vehicle...”

Decision ¶ 11. In neither case did the court look objectively at whether a reasonable person in a similar situation would feel they were free to leave.

Gonzalez and *Lerma* find support from a single case, *G.M. v. State*, 19 So.3d 973 (Fla. 2009). In *G.M.*, officers observed people surrounding a Lexus in a park at night and suspected them of dealing drugs. Without reasonable suspicion, they activated emergency lights and parked three feet behind the Lexus. *Id.* at 974. The officers admitted at the suppression hearing that they made their presence known, and G.M. testified that he was aware of the officers prior to their approach. *Id.* at 975. The Florida Supreme Court resoundingly rejected the lower court’s finding that the encounter was consensual, but it affirmed the denial of suppression because G.M. was unaware of his seizure, however, was equally unsupported. *Id.* at 980-81. The court’s own facts do not support its reasoning or holding, and its reliance on *Hodari D.* and failure to acknowledge *Brendlin* explains its faulty conclusion.

Other courts confronting this question have ruled against the position stated in *G.M.* and *Gonzalez*. In *People v. Brown*, 353 P.3d 305, 311 (Cal. 2015), the California Supreme Court held that the *Hodari D.* exception applies when the show of authority is clear but a suspect’s refusal to yield prevents the seizure from taking place. Under those circumstances, the “seizure” does not take place until the use of

force stops the defendant or he submits to the assertion of authority. *Id.* The court rejected a requirement of particularized evidence of defendant's submission and held the defendant submitted to a deputy's show of authority by simply staying in his car at the scene. In doing so, it condemned the subjective approach as "impractical and unnecessary" because the objective test for passive acquiescence already existed based upon a reasonable person standard. *Id.* at 312. *See also Smith v. State*, 87 So.3d 84, 88 (Fla. App. 2012) (reasonable person would not feel free to leave when officer parked "catty corner" to defendant's vehicle, activated his emergency lights, and used his spotlight to illuminate car); *State v. Williams*, 185 S.W.3d 311, 318 (Tenn. 2006) ("While the officer may have subjectively intended to activate his blue lights solely for his safety and the safety of others on the road, the litmus test is the objective belief of a reasonable person in the position of the defendant, not that of the officer.").

The *Lerma* court failed to consider whether a reasonable person in defendant's position would feel free to leave after being blocked into a parking spot by two officers who were approaching with weapons drawn (albeit kept to their sides) and who activated emergency lights on their police vehicle. Its holding is dependent on whether Lerma, individually, knew the officers had blocked him in and were approaching his vehicle. It is also based on an assumption—devoid of evidence—that Lerma did not know he was blocked in. The court's requirement of subjective

knowledge of a defendant, together with reliance on the officer's subjective beliefs of what defendant knows are concerning for many reasons. First, it puts the burden on a defendant to articulate his knowledge of law enforcement's presence. Second, it requires an affirmative act by defendant that is articulable to prove submission. Finally, it requires a court to consider an officer's subjective interpretation of a suspect's actions to determine if submission occurred. For example, contrary to the reasoning of *Gonzalez*, it is impossible for an officer to know that a person in the driver's seat did not use "side-eye" to look in the mirrors and see the officer approaching. Permitting this type of subjective test that permits great deference to law enforcement's subjective interpretation of defendant's subjective actions is a dangerous path. What articulable actions are required by a defendant to meet this subjective standard? How does a court determine whether an officer's subjective belief comports with the defendant's subjective knowledge? Issues in interpretation of subjective elements is precisely why the courts have consistently applied objective "reasonable person" standards to constitutional analysis. Instead, the court of appeals has endorsed a standard by which officers are allowed to read minds and have superhuman powers of observation.

This Court should accept review and reinforce that the Fourth Amendment requires a strictly objective test. Injecting subjective inquiries into the analysis will back the wheels of time and present a standard that is difficult to apply. It would

necessarily require a defendant to forego his Fifth Amendment rights to ensure his subjective knowledge is in the record. It would require law enforcement to not only pay attention to and note isolated actions by a suspect (such as whether the defendant looked in the rear view mirror). In the absence of law enforcement's willingness to observe minute actions and then properly note those actions, a defendant's silence and choice to remain still in the presence of law enforcement would deprive him of the ability to vindicate his Fourth Amendment rights.

II. This Court should grant review to decide whether article 2, section 8 of the Arizona Constitution affords greater protection than the Fourth Amendment.

AACJ joins Lerma in requesting this Court to grant review to decide that article 2, section 8 of the Arizona Constitution affords greater protection than the Fourth Amendment.⁴ Despite the fact that the Arizona Constitution uses the language of the Washington Constitution rather than the corresponding federal provisions, this Court has only expressly stated independent state grounds for suppression in a handful of cases involving home searches and a recent case involving a cell phone search. *State v. Bolt*, 142 Ariz. 260, 264-65 (1984); *State v. Ault*, 150 Ariz. 459, 466 (1986); *State v. Wilson*, 237 Ariz. 296, 301 ¶ 23 (2015);

⁴ The court of appeals did not consider Lerma's state constitutional claim because it was not raised until the reply brief. *Decision* at 5 n.2. But given that court's body of law as discussed *infra*, it would not have considered it anyway. *E.g.*, *State v. Hernandez*, 242 Ariz. 568, 576 n.12 (App. 2017), *vacated*, 244 Ariz. 1 (2018) ("For the same reasons, we find no violation of article II, § 8 of the Arizona Constitution.").

State v. Peoples, 240 Ariz. 244, 250 ¶ 25 (2016). Moreover, this Court has explicitly disclaimed a broader interpretation of the exclusionary rule. *Bolt*, 142 Ariz. at 268-69; *State v. Hummons*, 227 Ariz. 78, 82 ¶ 16 (2011). The court of appeals has rejected attempts to extend the state constitution’s reach in cases involving vehicles. *State v. Johnson*, 220 Ariz. 551, 557 ¶ 13 (App. 2009); *State v. Juarez*, 203 Ariz. 441, 444-45 ¶¶ 14-16 (App. 2002).

The failure to extend the state constitution is erroneous for two reasons. First, it fails to recognize that “Americans enjoy the protections of not one constitution but fifty-one. Our federalist system allows us to interpret our state constitution differently than the U.S. Supreme Court interprets the national Constitution, so long as we do not diminish federal constitutional protections or transgress federal laws enacted pursuant to the U.S. Constitution.” *State v. Jean*, 243 Ariz. 331, 353 ¶ 92 (Bolick, J., concurring in part and dissenting in part). Second, the state constitutional provision uses markedly different law “[o]n its face, article 2, section 8 provides a categorical bar against the state disturbing individuals in their private affairs without authority of law.” *Id.* at 354 ¶ 94. In both *Bolt* and *Ault*, the rationale for deciding the cases under the state constitution was both concern that the U.S. Supreme Court was scaling back the historical protections of the Fourth Amendment, as shown in *Segura v. United States*, 468 U.S. 796 (1984), and recognition of the different

language used in article 2, section 8. *Bolt*, 142 Ariz. at 264; *Ault*, 150 Ariz. at 466.

As to the latter,

Arizona is one of just ten states to explicitly recognize a right to privacy in its constitution. As this Court observed long ago:

It is true that we have held . . . that section 8 of article 2 of the Constitution of Arizona is of the same general effect and purpose as the Fourth Amendment to the Constitution of the United States. We have the right, however, to give such construction to our own constitutional provisions as we think logical and proper, notwithstanding their analogy to the Federal Constitution and the federal decisions based on that Constitution.

Turley v. State, 48 Ariz. 61, 70-71 (1936). Yet the private affairs clause has essentially become dead letter, as recognized in *Juarez*, 203 Ariz. at 445 ¶ 16. Focusing on the protection of the home at the expense of private affairs, however, violates the canon of statutory construction that each clause and word should be given meaning to avoid rendering anything superfluous, void, contradictory, or insignificant. *State v. Garza Rodriguez*, 164 Ariz. 107, 112 (1990). The time has come to breathe life into this provision.

Lerma has cited cases from sixteen jurisdictions that have rejected *Hodari D.* on state constitutional grounds. Petition at 12 n.1. *Amicus* submits that the thorough analysis of the Connecticut Supreme Court in *State v. Oquendo*, 613 A.2d 1300 (Conn. 1992), should guide this Court. In *Oquendo*, the defendant admitted that his interaction would not constitute a seizure under the recently decided *Hodari D.*

because he did not submit when the officers attempted to seize him, and for that reason the defendant argued the unlawfulness of the police action under the Connecticut Constitution. *Id.* at 1307. The court began with its agreement with the principles stated in *Mendenhall* that a seizure occurs when a reasonable person would not feel free to leave. *Id.* at 1307-08 (quoting *State v. Ostroski*, 440 A.2d 984 (Conn. 1982)). The court then held that it was the U.S. Supreme Court that “abandon[ed] these well established standards” in *Hodari D.* when it distinguished a seizure from an “attempted seizure,” regardless of the fact that the attempt was no less unlawful at common law. *Id.* at 1308-09. “We are persuaded that the distinction made by the United States Supreme Court between an arrest and an attempted arrest at common law does not guide our determination of what constitutes a seizure under article first, §§ 7 and 9 of our state constitution.” *Id.* at 1310.

Furthermore, this Court should reject *Hodari D.* as bad policy. An officer who knows he has no reasonable suspicion to justify a seizure might frighten suspects unnecessarily (for example, pointing a gun at a suspect and being especially forceful in issuing commands) with the hope that one will flee. Then, not only will the fleeing suspect will lose all Fourth Amendment protection, but police can use that person’s flight to justify detaining (but not frisk) his associates who stayed behind. *State v. Primous*, 242 Ariz. 221 (2017). Juveniles such as the child in *Hodari D.* are more likely to react to such a show of force by fleeing. This is in part due to

“incompetencies associated with youth” including “inability to deal with police officers.” *Miller v. Alabama*, 567 U.S. 460, 477-78 (2012) (citing *Graham v. Florida*, 560 U.S. 48, 78 (2010); *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011)).

CONCLUSION

For these reasons, AACJ requests that this Court grant review so that it can clarify that the test for determining whether a person is seized is purely objective and hold that the Arizona Constitution affords greater protection than the Fourth Amendment.

RESPECTFULLY SUBMITTED this 24th day of January, 2019

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