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VASQUEZ V. LEWIS: ELIMINATING COLORADO RESIDENCY IN DETERMINATIONS OF REASONABLE SUSPICION

Although the state of Kansas seeking to control the flow of marijuana entering its boarders from Colorado, the Tenth Circuit Court of Appeals recently held that Colorado residence cannot serve as a consideration in a finding of reasonable suspicion to conduct a search of a vehicle by law enforcement. In Vasquez v. Lewis, a Colorado motorist brought a claim under 42 U.S.C. § 1983, asserting that two Kansas police officers violated his Fourth Amendment right against unreasonable searches and seizures by detaining him and searching his automobile without reasonable suspicion. Based upon Plaintiff Vasquez’s residency of Colorado, among other factors, the officers conducted a search of Vasquez’s vehicle under suspicion of drug trafficking. The district court held that Vasquez’s asserted constitutional right was not established and, therefore, the officers were entitled to qualified immunity. The Tenth Circuit Court of Appeals disagreed, and reversed and remanded for further proceedings. Of particular importance in Vasquez was the Court’s decision to formally eliminate state residency as a consideration (absent extraordinary circumstances) in the context of determinations of reasonable suspicion in vehicle searches and seizures.

The Fourth Amendment protects against unreasonable searches and seizures by the government. This protection extends to brief stops of persons or vehicles, including those that do not result in an arrest. In the context of traffic stops, detention and search is permissible when the officer has an “objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring.” Such a determination is assessed based upon the totality of the circumstances. However, law enforcement officers are granted qualified immunity in the context of searches and seizures. To conquer qualified immunity, which is awarded to police officers in actions brought under section 1983, the claimant must show 1.) that the officer violated a statutory or constitutional right; and 2.) that the right was clearly established at the time of the challenged conduct.

1. Id.
2. Id.
3. Id.
4. Id. at 1.
5. Id. at 2.
6. Id.
7. Id. at 5 (quoting United States v. Gonzalez–Lerma, 14 F.3d 1478, 1483 (10th Cir. 1994)).
8. Id. at 6.
9. Id. at 1.
On December 11, 2016, Plaintiff Vasquez was driving west on I-70 through Wabaunsee County, Kansas when officer’s Lewis and Jimerson stopped him because they could not read his temporary license tag. Vasquez, a resident Aurora, Colorado, was in the process of moving to Maryland from Colorado at the time. Vasquez was detained and his car searched, as the officers were suspicious that he was transporting drugs. Vasquez was not transporting drugs or otherwise engaging in illegal activity. He filed suit, asserting that the officers did not have reasonable suspicion sufficient to give rise to his detention and search. Among the factors that the officers found to give rise to a reasonable suspicion of illegal conduct were that Vasquez was driving alone late at night, he had a blanket and pillow in the back seat of his car, he was driving on I-70 (which is “a known drug corridor”), he appeared nervous, and that he was a resident of Colorado. On Appeal, the officers argued that under the totality of the circumstances, these factors were sufficient to give rise to a reasonable suspicion of criminal activity.

The Tenth Circuit Court of Appeals did not find the officers’ basis for reasonable suspicion compelling. Without the detainee’s consent, the court noted, an officer must have a “particularized and objective basis for suspecting” that a person was engaged in criminal activity in order to conduct a search that expands the initial scope of the stop. The Court did not believe that the factors cited by the officers gave rise to a particularized and objective basis for a reasonable suspicion that Vasquez was engaging in illegal activity. The Court took care to address the factor that they found “most troubling”; that the Plaintiff was a resident of Colorado.

Specifically, the officers asserted that Colorado residency contributes to a reasonable suspicion because Colorado is home to legal recreational and medicinal marijuana. The Court disagreed. In support, the Court cited a number of cases in which the Court attributed little weight to searches of vehicles traveling from known drug source states or cites. The Court went on to note that twenty-five states currently permit the use of marijuana for medical purposes and note that it would be improper to assume that an individual is more likely to be involved in criminal activity solely because of his state of residence. In conclusion, the Court noted, “it is time to abandon the pretense that state citizenship is a permissi-

10. Id.
11. Id. at 2.
12. Id. at 3.
13. Id. at 3.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id. at 3.
19. Id.
ble basis upon which to justify the detention and search of out-of-state motorists . . . .”20 This decision thus requires that, absent clear extraordinary evidence, “use of state residency as a justification for fact of or continuation of a traffic stop is impermissible under the Fourth Amendment.”21

The Vasquez decision brings forth a number of practical considerations for automobile searches in the Tenth Circuit. First, Vasquez seemingly runs contrary to the accepted principle that, in establishing reasonable suspicion, a police officer may give consideration the fact that a vehicle is traveling from a drug-supply location to a drug-demand location. This principle was acknowledged in Arvizu, in which the Supreme Court noted that the origin of a driver is a relevant consideration in a determination of reasonable suspicion.22 In Arvizu, a driver was traveling from Douglas, Arizona, a known departure point for drug smugglers.23 Due to this fact, the Court gave increased weight to the driver’s strange behavior. The Court stated, “[w]e think it quite reasonable that a driver’s slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural Southeastern Arizona).”24 Put simply, because the determination of reasonable suspicion is considered by the totality of the circumstances, an individual’s origin and direction of travel is a relevant consideration. In Arvizu, otherwise insipid behavior was given increased relative weight due to the driver traveling a known drug route.25 Vasquez is notably different from the Arvizu holding in this regard. The I-70 corridor thorough Kansas is a known drug smuggling route, yet this consideration (at least insofar as the driver’s residence in Colorado) cannot be a consideration in a reasonable suspicion determination.

Second, it is uncertain whether Vasquez will evoke any noticeable change in out-of-state police officers conducting searches of Colorado residents. Prior to the decision, the act of traveling a known drug route carried little weight in a determination of reasonable suspicion.26 In Vasquez, the Court cited its previous decision in Gurrero, which noted, “that the defendant was traveling from a drug source city—or . . . a drug source state—does little to add to the overall calculus of suspicion.”27 Therefore, even prior to Vasquez, the fact that an individual was a Colorado resident could not itself give rise to reasonable suspicion in the ab-

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20. Id.
21. Id.
22. Id. at 274.
23. Id.
24. Id.
25. Id.
27. Id. at 3 (quoting United States v. Gurrero, 472 F.3d 787–778 (10th Cir. 2007)).
sence of other factors under a totality of the circumstances analysis. As such, the holding seems to do little in the sense that an individual could not be searched solely by virtue of his or her Colorado residency prior to the decision.

Finally, the elimination of state residence as a factor in a determination reasonable suspicion does little to prevent out-of-state police officers from targeting Colorado residents in routine traffic stops. Although a determination of reasonable suspicion is treated as an objective threshold, much of its practical application is subjective. Because no two traffic stops are the same, the police officer must make case-by-case decisions as to whether reasonable suspicion exists. In a footnote of his dissent in the Vasquez decision, Judge Tymkovich noted cited Arvizu while noting that “[a]lthough here I would not find travel from a state that had legal-ized marijuana suspicious, we should recognize, especially near where borders where smuggling is common, law enforcement can discern patterns in drug trafficking.” 28. It is possible, much like Tymkovich’s description of law enforcement near borders, that Kansas police officers hold Colorado license plates as characteristic of drug trafficking. If so, state residence may remain a strong factor in their subjective suspicion, even if it is not articulated as a factor in their objective calculation of reasonable suspicion.

Through its holding in Vasquez, the Tenth Circuit Court of Appeals articulated its distaste for law enforcement being suspicious of Colorado citizens solely on the basis of their residency. The Court raised compelling points, noting that twenty-five states currently have legalized marijuana use for various purposes. 29. Thus, the Court reasoned, reasonable suspicion based upon citizenship would give rise to a suspicion of all residence in half of the U.S. states. Because justification for searches and seizures are based upon the totality of the circumstances, however, it remains to be seen whether the Vasquez holding will lead to any noticeable change in law enforcement.

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28. Id. at 8 (Tymkovich, C.J., Dissenting).
29. Id. at 3.

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