



**A full but divided United States Court of Appeals for the Seventh Circuit holds that police officers had reasonable suspicion to stop a car that was parked within fifteen feet of a crosswalk, an area in which stopping was not permitted unless the car was actually engaged in loading or unloading or receiving or discharging passengers, even though the police officers did not observe the car long enough to know that it was not within the scope of that exception before stopping it**



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In *United States v. Johnson*, 874 F.3d 571 (7th Cir. 2017), the United States Court of Appeals for the Seventh Circuit, sitting as a full panel, had to decide whether police officers had a reasonable suspicion to stop and issue a motorist a ticket for violating Wisconsin law or whether the police officers first must ensure that an exception to the Wisconsin law did not apply before stopping the car and issuing the ticket. The resolution of this issue was important because the alleged violation of Wisconsin law gave the police officers a reasonable suspicion to stop the car, and the stop led the police officers to discover a firearm in the vehicle that, in turn, led to Defendant Randy Johnson's indictment for being a felon in possession of a firearm. The relevant facts are as follows.

On the night in question, police officers in Milwaukee, Wisconsin, saw a car stopped within fifteen feet of a crosswalk. Stopping a car within fifteen feet of a crosswalk is unlawful under Wisconsin law unless the car is engaged in loading or unloading or in receiving or discharging passengers. Upon seeing the car stopped near the crosswalk, one police car drew up parallel to the stopped car, and another police car drew up behind it. Shining lights through the stopped car's windows, the police officers saw a passenger in the back seat try to hide a firearm. Defendant Randy Johnson was that passenger, and he was eventually prosecuted for being a felon in possession of a firearm in violation of 28 U.S.C. § 922(g)(1).

Thereafter, Johnson moved to suppress the evidence of the gun arguing that the police officers lacked a reasonable suspicion to stop the car in which he was a passenger and in which the officers found the gun, and therefore, the gun was obtained in violation of his Fourth Amendment rights. The District Court denied Johnson's motion to suppress, and so, Johnson entered a conditional guilty plea and was sentenced to 46 months' imprisonment. On appeal, a three-judge panel of the United States Court of Appeals for the Seventh Circuit affirmed Johnson's conviction and sentence. However, the Seventh Circuit's decision was subsequently vacated when the full Seventh Circuit decided to hear the appeal.

Before the full Seventh Circuit, Johnson conceded (as he did before the District Court) that the car was stopped seven or eight feet from a crosswalk. The District Court held that this factual admission gave the police officers probable cause to issue a ticket, a process that entails a brief seizure of the car and its occupants. As Officer Conway approached, he saw Johnson make movements that led him to infer that Johnson was hiding something such as alcohol, drugs, or a gun. Concerned for his safety, Officer Conway ordered Johnson to get out of the car. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (holding that officers

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making a traffic stop on probable cause may require a car's occupants to get out). Once the car's door was open, Officer Conway saw a gun on the floor, and Officer Conway's observation led to Johnson's arrest.

Johnson argued that the District Court should have suppressed the evidence of the gun because the statutory exception for receiving or discharging passengers meant that the police did not have adequate reason to issue a ticket or even to approach the car until they had sufficiently observed the car long enough to know that the car was not within the scope of that exception. The District Court rejected Johnson's argument, and so did the full Seventh Circuit for three reasons.

First, the Seventh Circuit held that the exception was inapplicable under the facts of this case. The District Court found that, when the police officers approached the car, all four doors were shut, and no one was standing nearby. Therefore, there was no evidence of loading or unloading of any passengers. The Seventh Circuit held that the District Court's finding was not clearly erroneous on this point. Indeed, Johnson did not contest the District Court's factual finding on appeal.

Second, the Seventh Circuit declined Johnson's invitation to interpret Wisconsin law in such a manner as to make the stop of the vehicle unconstitutional. Johnson argued that Wisconsin's judiciary would treat a driver's stop to buy something from a nearby store as within the "loading or unloading or . . . receiving or discharging passengers" exception. Johnson claimed that the car's driver had gone inside a nearby liquor store to buy something, thereby making the exception applicable.

However, the Seventh Circuit held that officers who have probable cause are entitled to approach a car before resolving any statutory exceptions. Here, the police officers possessed probable cause, could hand out a ticket (or make arrests), and could leave to the judicial process the question whether a defense, exception, proviso, or other limitation applied. The Fourth Amendment requires searches and seizures to be reasonable; it does not demand that police and other public officials resolve all possible exceptions before approaching a stopped car and asking the first question.

The Seventh Circuit acknowledged that the police did more than just "stroll up." Two squad cars bathed the parked car in bright light, thereby implying that the occupants were not free to drive away. The District Court treated this stop as a seizure, and so did the Seventh Circuit. Nevertheless, the Seventh Circuit opined that issuing a ticket always entails a brief seizure, and Johnson conceded that the driver of a car approached by the police who are armed with probable cause to investigate a parking offense is not entitled to leave. Moreover, when the officers approached this parked car, no one was in the driver's seat. So, both as a matter of the suspects' legal entitlements and as a matter of brute fact, the Seventh Circuit held that it did not make any difference whether the police approached with two cars rather than one or whether the cars' spotlights were on.

Third, the Seventh Circuit stated that it was worth noting that Johnson never contended that the police officers considered the race of the car's occupants when deciding to approach it or when deciding to use two cruisers rather than one. Indeed, Johnson did not contend that the police officers even observed the race of the car's occupants until after they approached it. Again, Johnson's principal argument was that the police officers had the car in view for only a few minutes before deciding to approach it and, thus, did not have sufficient time to determine whether the statutory exception of loading and unloading applied. As a result, the Seventh Circuit did not consider whether, and if so when, using racial criteria to select among potential targets of investigation would require the suppression of evidence. Accordingly, the Seventh Circuit affirmed the District Court's denial of Johnson's motion to suppress and affirmed Johnson's conviction and sentence.

As noted above, the full panel of the Seventh Circuit was divided in its opinion in this case. Three judges issued a dissenting opinion in which they stated that the District Court's decision should be reversed and that

the Seventh Circuit find a Fourth Amendment violation in this seizure of the passengers in the car idling outside a store.

The dissent stated that the majority erred by extending United States Supreme Court precedent to allow the pretextual seizure in this case based on the suspected parking violation. The dissent believed that this extension was not supported by existing law, and it also was contrary to the core Fourth Amendment standard of reasonableness. The dissent noted that no other appellate court has tolerated such police tactics to address a suspected parking violation, and the dissent stated that the Seventh Circuit should not do so either, at least absent extraordinary circumstances that were not present in this case. The dissent concluded that the seizure in this case was not reasonable, and therefore, Johnson's conviction should be vacated as being obtained in violation of his Fourth Amendment rights.