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NO. 99730-6

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

PALLA SUM,

Petitioner.

STATE RESPONSE TO AMICI

MARY E. ROBNETT
Pierce County Prosecuting Attorney

ANNE EGELER
WSBA No. 20258 / OID #91121
BRITTA ANN HALVERSON
WSBA No. 44108
Deputy Prosecuting Attorneys
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-7400

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I. INTRODUCTION

The Amici are in agreement with the State and Petitioner Palla Sum that when the evidence demonstrates that race is relevant to an encounter with law enforcement, existing case law permits consideration of race as a factor in the totality of the circumstances test. *E.g.*, Amicus Br. at 5; Pet. Supp. Br. at 11; State’s Supp. Br. at 1. In undertaking such an analysis, state and federal courts have consistently emphasized that the totality of the circumstances test requires the court to examine the record as a whole, rather than basing the decision on any single factor.

In this case, the only information in the record regarding race is that Sum is “Asian/Pacific Islander.” There is nothing in the record indicating that race was relevant to Sum’s encounter with law enforcement. The Court should uphold the Court of Appeals’ decision that a seizure had not occurred when Sum gave false information to Deputy Rickerson.

II. ARGUMENT

A. Race Is a Factor that May Be Considered under the Totality of the Circumstances Test—Not in Isolation

As Amici correctly indicate, the totality of the circumstances test has always allowed a “meaningful, reality-based determination” of when an individual is seized. Amicus Br. at 5. However, application of a totality of the circumstances test involves more than simply looking at national data regarding disproportionate use of force against Black persons and assuming that all persons of color have the same experiences. The test requires a cumulative examination of the facts in the record, not a “divide-and-conquer” analysis. *See United States v. Arvizu*, 534 U.S. 266, 274, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). As a result, courts employ a totality of the circumstances test by making a full examination of the record, including the individual’s race, any data indicating whether force is disproportionately used against persons of that race in the community at issue, and other facts regarding the specific interaction between the officer and the individual.

Indeed, if the test involved nothing more than a bare application of statistics, the data in the Korematsu Report cited by the Amici would foreclose consideration of race for anyone labeled Asian or Asian/Pacific Islander, because they are statistically *less* likely to experience a disproportionate use of force than a white person. *See* Amicus Br. at n. 22; *Race & Washington's Crim. Justice Sys.: 2021 Report to the Washington Supreme Court*, Task Force 2.0, Fred T. Korematsu Center for Law & Equity (2021) (Korematsu Report) at 12-13 and n. 32.¹ The term “Asian/Pacific Islander” compounds the problem, because the category is overbroad and encompasses widely

¹ The Korematsu Report is available at: http://digitalcommons.law.seattleu.edu/korematsu_center/116/; *see also* Pierce County Criminal Justice Work Group, *Use of Force Analysis*, Pierce County Sheriff's Dep't (Nov. 8, 2021) (Pierce County Report), <http://www.piercecountywa.gov/useofforce>; Frank Edwards, Edward Esposito & Hedwig Lee, Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex, Proceedings of the National Academy of Sciences of the United States of America, (August 20, 2019), <https://www.pnas.org/content/116/34/16793>.

varying populations. *See* Korematsu Report, Appendix J. But the record here contains nothing more than the bare indication that Sum is Asian/Pacific Islander.

Rather than relying solely on statistics, the case law indicates that when race is relevant, it is appropriate to consider it as one of the factors applied in the totality of the circumstances test. In applying the test, courts have consistently emphasized that no single factor is determinative and that race may alter the impact of other evidence in the record. For example, in *Dozier v. United States*, 220 A.3d 933, 941-43 (D.C. App. 2019), the D.C. Court of Appeals considered a Black man's race in conjunction with other evidence in the record, including data regarding police encounters with Black individuals in that community, the fact that two armed officers engaged the man in "repeated and escalating requests," the man was alone at night in a secluded alley, his path to leave the alley was partially blocked by a police car, and there were two additional officers standing by. *Id.* at 941-43. In concluding that a reasonable person would not have

felt free to leave, the Court emphasized the importance of considering all of the facts “as a whole under the totality of the circumstances, rather than in isolation” and that “no single circumstance” was sufficient to amount to a seizure. *Id.* at 947 (quoting *Jackson v. United States*, 805 A.2d 979 (D.C. App. 2002)).

The Ninth Circuit also has indicated that the totality of the circumstances test requires examination of the trial record. *United States v. Washington*, 490 F.3d 765 (2007). In *Washington*, the Ninth Circuit examined all of the evidence in the trial record, including the time of night, the presence of multiple officers, the authoritative direction that the man exit his car and walk toward the squad car, the fact that one of the officers blocked the man’s path back to his car, and the publication of information regarding white Portland police officers shooting Black persons. The Court held that after the man was directed to walk away from his car, the totality of the circumstances were such that a reasonable person would not have felt free to end the

encounter. *Id.* at 771, 774. *Washington* illustrates that considering the impact of race in the context of the full record enhances the court’s understanding of each aspect of the encounter.

As in *Dozier* and *Washington*, our state courts have examined seizure issues raised under article I, section 7 of the state constitution by fully examining “the interaction between the person and the officer.” *E.g.*, *State v. O’Neill*, 148 Wn.2d 564, 574-75, 62 P.3d 489 (2003); *State v. Young*, 135 Wn.2d 498, 514, 957 P.2d 681 (1998) (rejecting argument that the single factor of shining a spotlight amounts to a *per se* violation of article I, section 7); *State v. Armenta*, 134 Wn.2d 1, 948 P.2d 1280 (1997) (asking for identification is not singularly determinative).

In analogous contexts, state and federal courts also have considered known, objective characteristics—such as age, sex, and race—in applying a totality of the circumstances test to the trial record in other legal contexts. For example, the tests for seizure and consent “turn on very similar facts” and “the question

of voluntariness pervades both . . . inquiries.” *United States v. Drayton*, 536 U.S. 194, 206, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002). The United States Supreme Court has indicated that when a court performs a *Miranda*² custody analysis to determine whether a reasonable person in the suspect’s position would have felt free to leave, it is appropriate to consider all of the relevant circumstances surrounding the interrogation, including the age of the suspect. *J.D.B. v. North Carolina*, 564 U.S. 261, 272, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). Similarly, the Supreme Court acknowledged that it would be appropriate for a totality of the circumstances analysis to include consideration of whether the questioning would objectively appear to be “unusually threatening” to a Black woman questioned by white, male officers. *United States v. Mendenhall*, 446 U.S. 544, 558, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Consistent with the United States Supreme Court, this Court has held that for purposes of *Miranda*, the relevant circumstances may include the surroundings, the extent of police control of the surroundings, degree of physical restraint, and the duration and character of questioning. *State v. Escalante*, 195 Wn.2d 526, 534, 461 P.3d 1183 (2020); *State v. Ruem*, 179 Wn.2d 195, 207, 313 P.3d 1156 (2013) (holding that “no single factor is dispositive” when employing a totality of the circumstances test to determine consent to search); *State v. Johnson*, 8 Wn. App. 2d 728, 745 n. 5, 440 P.3d 1032 (2019) (recognizing that race is a factor that may be considered by the totality of the circumstances test, if the record indicates that it was relevant).

The entirety of the record is also considered in determining whether the trial record demonstrates a reasonable, race-neutral reason to strike a juror. *Batson v. Kentucky*, 476 U.S. 79, 99-100, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Rather than imposing a blanket ban on any peremptory challenge to a juror who is Black,

Indigenous, or a Person of Color, *Batson* requires the trial court to examine the circumstances in full. *Id.* at 97-98. This Court and GR 37 have modified the *Batson* test, but an examination of the record remains essential. This was made clear in *State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018), which holds that when an appellate court decides whether an objective observer could view race as a factor in the use of a peremptory challenge, it must “stand in the same position as does the trial court, and . . . review the record”. *Id.* at 250. Similarly, GR 37 requires that after an objection is made at trial, the court must consider a non-exhaustive list of circumstances. GR 37(g). Thus, even where elimination of racism is the focus of the inquiry, the court examines the record in full.

In short, whether a totality of the circumstances test is employed in the context of a seizure issue, or in applying GR 37, it is critical that race be considered in the context of the entirety of the record on appeal—not as a singularly dispositive factor.

B. The Record Contains No Indication that Race Was Relevant to Sum's Encounter with the Officer

In Sum's case, there is nothing in the record to support his newly raised allegation that race impacted his encounter with the deputy and raised it to the level of a seizure. Sum's motion to suppress did not mention race or argue that it was relevant to the encounter. CP 7-12. At the suppression hearing, Deputy Rickerson was the only witness who testified and he did not provide any further information regarding his own race or Sum's. 2RP 9-44. After the case was appealed, Sum did not raise any arguments regarding race to the Court of Appeals. Nor did he contend that there had been any change in the law that would permit him to raise the new issue on direct appeal.

The only information in the record that pertains to race are the form notations that Sum is "Asian/Pacific Island[er]" CP 4, 23, 65. The basis for the notation is unknown. This leaves the Court with nothing to consider other than statistical data regarding use of force against Asian/Pacific Islanders. Applying the totality of the circumstances test to this limited information

would lead to an objective inference that as an individual who is Asian/Pacific Islander, Sum objectively had *less* reason to believe that he was not free to leave than a white person in the same situation. *See supra* note 1.

This is certainly not a foregone conclusion for every defendant who is Asian/Pacific Islander and contends that a seizure occurred, because the totality of the circumstances test requires full consideration of the facts unique to each case. When considered in conjunction with the totality of the circumstances in another case, an Asian/Pacific Islander's race may well be a factor that would lead a reasonable person to conclude that they were not free to leave. For example, race would be relevant if an officer used racial slurs, or mocked an Asian/Pacific Islander's speech, appearance, or immigration status. The totality of the circumstances test provides courts the flexibility to analyze the facts unique to each case and community.

Here, however, the totality of the circumstances provides absolutely no support for Sum's newly raised contention that race was a factor in his encounter with the deputy.

III. CONCLUSION

The parties and Amici are in agreement that race is a factor which may be considered within the totality of the circumstances test. In Sum's case, the newly raised issue finds no support in the record. The Court should decline to rule on an issue not properly before it.

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RESPECTFULLY SUBMITTED this 22nd day of
February, 2022

MARY E. ROBNETT
Pierce County Prosecuting Attorney

s/ Anne Egeler

ANNE EGELER
WSBA No. 20258 / OID #91121
Deputy Prosecuting Attorney
Pierce County Prosecutor's Office
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-7400
Anne.egeler@piercecounitywa.gov

s/ Britta Ann Halverson

BRITTA ANN HALVERSON
WSBA No. 44108
Deputy Prosecuting Attorney
Pierce County Prosecutor's Office
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-2912
Britta.halverson@piercecounitywa.gov

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