ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY DUDLEY HIIBEL,
Petitioner,
vs.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, AND THE HONORABLE RICHARD A. WAGNER, DISTRICT JUDGE,
Respondents,

and
THE STATE OF NEVADA,
Real Party in Interest.
_____/

Case No. 38876

FILED

JAN 7 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY _____
DEPUTY CLERK

PETITION FOR REHEARING

Petitioner LARRY DUDLEY HIIBEL, by and through his attorneys, STEVEN G. MCGUIRE, Nevada State Public Defender, and JAMES P. LOGAN, Chief Appellate Deputy, petitions this Court for rehearing of its opinion entered in this proceeding on December 20, 2002.

This petition is made pursuant to NRAP 40 on the grounds that the court has overlooked or misapprehended material points of law or fact requiring rehearing. This petition is supported by the following points and authorities and based upon all pleadings, documents and exhibits on file herein as well as the record on appeal.

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03-00363

Stay of the remittitur is requested pursuant to NRAP 41(a) (timely petition for rehearing stays remittitur).

DATED this 7 day of January, 2003.

STEVEN G. McGUIRE
Nevada State Public Defender

By: _____
JAMES P. LOGAN
Chief Appellate Deputy
Bar I.D. No.1791
511 E. Robinson St., Suite 1
Carson City, NV 89701
(775) 687-4880

POINTS AND AUTHORITIES

The issue before this Court, in this case, is whether NRS 171.123(3), which requires persons stopped under reasonable suspicion by a police officer to identify themselves, violates the United States Constitution. Not just the Fourth Amendment! In his petition, Mr. Hiibel cites to not only the Fourth Amendment but also to both the Fourteenth and Fifth Amendments. Petition, pp. 1, 7. This court's discussion in its decision utilizes only a Fourth Amendment analysis. Therefore, the court has overlooked or misapprehended the Fifth Amendment implications of the issue.

The Fourth Amendment protects a person from unreasonable searches and seizures. Fifth Amendment jurisprudence defines when a person may be compelled to give information to governmental authorities.

Perhaps a more precise wording of the issue in this case is better defined as follows: During a valid Fourth Amendment detention, upon less than probable cause, is someone required to identify themselves to a police officer?

It appears that the United States Supreme Court case which is closest to the issue at hand is California v. Byers, 402 U.S. 424 (1971). The case analyzed the constitutionality, under the Fifth Amendment, of a California "hit and run" statute which required motorists involved in a property damage accident to stop and give their name and address. In that case the court stated the general rule as follows:

> Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.

California v. Byers, 402 U.S. at 427.

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Although the United States Supreme Court engages in a balancing analysis, that analysis takes into account factors far different than those analyzed by this Court in the instant case.

In Byers, the United States Supreme Court discussed three factors that determine whether a self-reporting requirement violates the Fifth Amendment privilege against self-incrimination: Whether the notice requirement (1) applies to an area of activity that is "permeated with criminal statutes," (2) is directed at a "highly selective" group of persons "inherently suspect of criminal activities," and (3) poses a "substantial hazard" or "direct likelihood" or self-incrimination. *See* Byers, 402 U.S. at 430 (citing Albertson v. SACB, 382 U.S. 70 (1965), Marchetti v. United States, 390 U.S. 39 (1968), Grosso v. United States, 390 U.S. 62 (1968) and Haynes v. United States, 390 U.S. 85 (1968)). Also in these cases, Albertson, Marchetti, Grosso, and Haynes, the court found that compliance with the statutory disclosure requirements would confront the petitioner with "substantial hazards of self-incrimination. . . ." Also in these cases the disclosures condemned were only those extracted from a "highly selective group inherently suspect of criminal activities" and the privilege was applied only in "an area permeated with criminal statutes" - not in "an essentially noncriminal and regulatory area of inquiry."

In Byers, the United States Supreme Court upheld the California reporting statute. However, the plurality opinion of Chief Justice Burger found it significant that the law "was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities" and was not aimed at a "highly selective group inherently suspect of criminal activities." California v. Byers, 402 U.S. at 430.

By contrast, the Nevada statute, NRS 171.123(3), is entirely different. The request for identification takes place during a valid Fourth Amendment seizures when there is an "articulable suspicion" that criminal activity is afoot. *See* Terry v. Ohio, 392 U.S. 1 (1968). The only time the request for identification takes place is during an actual criminal investigation! Obviously, this is an area of activity

"permeated with criminal statutes" and is directed at a "highly selective" group of persons "inherently suspect of criminal activities." Also this type of encounter poses a "substantial hazard" or "direct likelihood" of self-incrimination.

In this case the officer was investigating a possible domestic battery. In addition, the officer noticed the smell of an alcohol on Mr. Hiibel's breath. (The encounter took place along the side of a highway by Mr. Hiibel's vehicle.) The same last name can be evidence of a relationship which triggers the domestic battery laws. Domestic battery differs from simple battery in a number of ways. Police officers must arrest a suspect in a domestic battery case as opposed to using their discretion in a battery case. NRS 171.137. Once arrested, a domestic battery suspect can not be bailed out of jail for a minimum of twelve (12) hours and then only at exorbitant amounts of bail unless he/she appears before a magistrate, which can take at least as long as forty eight (48) hours. NRS 178.484(5); Riverside County, Calif. v. McLaughlin, 500 U.S. 44 (1991). Finally, domestic battery, like driving under the influence, subjects offenders to increased punishment for those having prior offenses, ultimately constituting a felony. Compare NRS 200.481, NRS 200.485 and NRS 484.3792. The prior record of the offender is discovered through data bases indexed by name among other ways. It is clear that at this time in our criminal justice, a person's name can be used to enforce a harsher penalty. While the police can find this information out through other sources, the Fifth Amendment protects individuals from being compelled to provide information which tends to incriminate.

This case should be reconsidered because this Court analyzed the issues under the Fourth Amendment instead of the Fifth Amendment. Because of this error, this Court failed to consider very relevant factors in the balancing analysis. Factors which weigh heavily in favor of Mr. Hiibel. Finally, the issue in this case strikes at the basic freedoms upon which this country was founded and involves passionate response as evidenced by the split of opinion within this Court itself, the passionate dissent of the dissenting justices, and the spirited response of the press

regarding this case. See Exhibit A, attached hereto. While this nation is currently involved in a war on terrorism, the majority has understandably been swayed by a desire to enhance public safety. However, by doing so, the majority may have overlooked a warning by one of our forefathers. "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." Letter from Benjamin Franklin to Josiah Quincy (Sept. 11, 1773).

The decision in this case should be reconsidered and Mr. Hiibel's conviction reversed.

RESPECTFULLY SUBMITTED this 7 day of January, 2003.

STEVEN G. McGUIRE
Nevada State Public Defender

By: _____
JAMES P. LOGAN
Chief Appellate Deputy
Bar I.D. No.1791
511 E. Robinson St., Suite 1
Carson City, NV 89701
(775) 687-4880

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Tuesday, December 24, 2002

EDITORIAL: Your papers, please

Four Nevada high court justices endorse police state

About the only good thing about Friday's state Supreme Court decision that Nevada police can demand of any citizen, anywhere, that he present proof of identification is that it was a close vote.

Three stalwart justices set their jaws and stood firm in a desperate rear-guard defense of our remaining, fast-eroding freedoms, insisting we are not yet -- or shouldn't be -- living out a scene from one of those old black-and-white war movies in which the Gestapo officers in the wide-brimmed hats strut through the train full of terrified escapees, demanding that everyone show their "travel papers, please."

The case began in May of 2000, when Humboldt County Deputy Sheriff Lee Dove was sent by dispatchers to a site where a caller had reported seeing a man strike a girl inside a truck.

Arriving at the scene, Deputy Dove found a man who later turned out to be Larry Hiibel standing outside a truck. Mr. Dove later testified that he believed Hiibel to be intoxicated and that his daughter was sitting inside his truck. Mr. Dove demanded to see the man's identification 11 times. Eleven times the man refused, because he did not believe he had done anything wrong.

Under a law which pretends to require Nevadans to identify themselves to police upon demand, Mr. Hiibel was later convicted of resisting and obstructing a police officer in the performance of his duties. He appealed to the state Supreme Court, where a slim, four-member majority Friday abandoned the cause of privacy and freedom, delivering us instead into the hands of police-state tyranny.

EXHIBIT A

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To be forced to reveal one's identity to a cop, even if you're simply standing by the roadside -- Justice Cliff Young wrote for the majority -- is not an invasion of privacy because people give each other their names every day "without much consideration" -- this is merely part of "polite manners," Justice Young explains.

Then, Justice Young goes on to offer the rationale which has justified every police state from the dawn of tyranny -- that any minor "intrusion on privacy" is "outweighed by the benefits to officers and community safety."

"Knowing the identity of a suspect allows officers to more accurately evaluate and predict potential dangers that may arise during an investigative stop," Justice Young wrote for himself, Chief Justice Bill Maupin, and fellow Justices Myron Leavitt and Nancy Becker.

Can Justice Young still recall anyone who might once have said, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety"?

With the growing threat to our constitutional liberties in this post-Sept. 11 atmosphere, "Now is precisely the time when our duty to vigilantly guard the rights enumerated in the Constitution becomes most important," wrote Justice Deborah Agosti, in a brave and ringing dissent joined by Justices Bob Rose and Miriam Shearing.

The "true test of our national courage" is "our necessary and steadfast resolve to protect and safeguard the rights and principles upon which our nation was founded, our constitutional and our personal liberties," Justice Agosti concludes.

Amen to that.

Yes, a policeman's lot can be slightly less safe and convenient in a free country. But ask anyone who survived Russia in the 1930s, Germany in the 1940s, China in the 1950s, or Cambodia or Chile in the 1970s, how much "safer" it felt to live in a nation where everyone was tracked, numbered, and required to show their "papers, please," on demand.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Nevada State Public Defender and on this 7th day of January, 2003, I served the foregoing PETITION FOR REHEARING by mailing a copy thereof to:

ATTORNEY GENERAL
100 N CARSON ST
CARSON CITY NV 89701

HUMBOLDT COUNTY DISTRICT ATTORNEY
P O BOX 909
WINNEMUCCA NV 89446

THE HON. RICHARD A WAGNER
DISTRICT COURT JUDGE
P O BOX H
LOVELOCK NV 89419

LARRY D HIIBEL
P O BOX 1323
WINNEMUCCA NV 89446

Jane Bolin