Recent Decisions of the Supreme Court of North Carolina

By Bradley Lingo, Adam Conrad, Robert T. Numbers II, & Wm. Grayson Lambert

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Introduction

The Supreme Court of North Carolina hears and decides cases on legal issues that are critical to individuals and businesses—from criminal law to contract law, and from freedom of speech to voting rights. Those decisions are binding within the state and, once established as precedent, are difficult to overturn. North Carolinians will head to the polls this year to elect four of the seven justices on the Supreme Court of North Carolina, and each will serve an eight year term. As a result, the 2014 election will shape the state's judiciary for the foreseeable future. The outcome could have a deep and lasting impact on a number of areas of the law.

This paper aims to inform North Carolinians about some of the important cases decided in recent years by the state's supreme court. It discusses eight recent cases separated into four categories: constitutional law, election law, business law, and criminal law. Some of these cases highlight differences in judicial philosophy among members of the court. In keeping with the mission of the Federalist Society, we hope this paper will foster public discussion regarding the role of courts, and particularly the Supreme Court of North Carolina, in our system of government.

I. Constitutional Law

The Supreme Court of North Carolina decides cases that resolve disputes over the meaning of the foundational documents that govern our society, and often address the scope of individual rights and governmental authority. In two recent decisions, the supreme court addressed key limitations on governmental authority in the areas of taxation and religious liberty.

A. IMT, Inc. v. City of Lumberton, *366 N.C. 456, 738 S.E.2d 156 (2013). Vote Count: 6-0*

The Supreme Court of North Carolina recently addressed a constitutional question regarding the ability of towns to raise taxes on businesses. The power to tax is granted in both the federal and state constitutions, but the North Carolina Constitution comes with a caveat: "The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away." Prior to 2013, the Supreme Court of North Carolina had never interpreted the Just and Equitable Tax Clause of this provision or used it to strike down a government action. In *IMT v. Lumberton*, it did both.

IMT, Inc. and three other companies challenged the City of Lumberton's decision to increase its privilege license tax. Before 2010, Lumberton charged a flat tax of $12.50 per year on any business that used any electronic machine to conduct a game of chance, including a sweepstakes. Then, in 2010, Lumberton increased that tax to $5,000 per business location, plus $2,500 per computer terminal, meaning that a business running a sweepstakes would pay a minimum tax of $7,500—600 times greater than the previous tax of $12.50. For the four businesses that challenged Lumberton's new tax, their privilege license taxes were 6,000 to 11,000 times greater than they would have owed under the previous tax.

Writing for a unanimous court, Justice Mark Martin struck down Lumberton's tax increase as violating the Just and Equitable Tax Clause. The court held that the "just and equitable" language of the clause was not "precatory language"—that is, not merely aspirational words—that prefaced the language about public purpose or not contracting away the power to tax. Instead, the "just and equitable" language provided an independent limitation on the legislature's power to tax.

In deciding the nature and scope of that limitation, the court noted the "constitutional tension between the affirmative statement of the government's taxing authority and the limitation of the Just and Equitable Tax Clause." This tension, according to Justice Martin's opinion, "must be resolved in a manner that protects the citizenry from unjust and inequitable taxes while

preserving legislative authority to enact taxes without exposing the State or its subdivisions to frivolous litigation." This balance requires that government exercise its taxing power with "equality and fair play," so that the public is protected "from abusive tax policies." Providing guidance for lower courts, the Supreme Court of North Carolina instructed that, in cases challenging a tax under this clause, courts should consider "size of the city, sales volume, and exemptions from alternative taxes," as well as any other factors that may be relevant to that particular case, such as the change in taxes from one year to the next.

Although recognizing that applying these principles may be difficult in some cases, the court concluded that this case was not a close call. Lumberton's 59,900 percent tax increase was "wholly detached from the moorings of anything reasonably resembling a just and equitable tax." Thus, the Just and Equitable Tax Clause "surely render[ed]" Lumberton's tax unconstitutional.

B. State v. Yencer*, 365 N.C. 292, 718 S.E.2d 615 (2011). Vote: 7-0*

The First Amendment to the United States Constitution enshrines individuals' right to free exercise of religion while also prohibiting laws that would constitute an establishment of religion.

In *State v. Yencer*, the Supreme Court of North Carolina addressed whether the Campus Police Act violates the Federal Establishment Clause. That Act allows private colleges and universities to create police departments to protect students and faculty on campus. Davidson College exercised that authority to create a police department. Then, in 2006, one of its police officers arrested Julie Yencer for driving while impaired. Yencer sought to suppress the evidence of her arrest on the ground that Davidson was a religious institution and that North Carolina's delegating Davidson the authority to create a police force ran afoul of the Federal Establishment Clause.

Writing for a unanimous court, Justice Mark Martin found no constitutional violation. The court applied the *Lemon* test, a standard that the United States Supreme Court has occasionally used to determine whether a law violates the Establishment Clause.[1] This test has three parts: (1) whether the law has a secular purpose; (2) whether the law has a secular effect; and (3) whether the law fosters an excessive entanglement between government and religion. In this case, the parties agreed that the Campus Police Act had a secular purpose, so the court's analysis focused on the other two parts of the *Lemon* test, analyzing the issue through the lens of the government's giving aid to a religious organization and delegating authority to a religious organization.

As for the effect of the Campus Police Act, Justice Martin wrote that the Act benefits Davidson by offering it "a state-certified police agency to enforce federal and state laws, not religious rules." In other words, Davidson's police force played no role in promulgating any religious doctrines. In fact, the Campus Police Act constrained campus police officers to enforcing "secular law, not campus policies or religious rules." Thus, the court concluded that the Act had a secular purpose.

Finally, the court found no excessive entanglement. Based on the court's review of Davidson's characteristics—its faculty, students, curriculum, and management—Davidson's religious ties to the Presbyterian Church in the United States of America were not "so pervasive that a substantial portion of its functions are subsumed in the religious mission." Combined with the limits imposed on campus police by the Act, the court saw "little danger that the governmental benefit will accrue to religious rather than secular activities." Because the Campus Police Act was not likely to entangle the state with a religious organization, the court held the Act was constitutional.

II. Election Law

In addition to constitutional cases, the Supreme Court of North Carolina recently decided two significant cases relating to how North Carolinians select those who will represent them in government. These decisions affected how candidates appear on the ballot on election day and whether legislators must disclose communications with attorneys made during the process of drawing voting districts.

1 *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

A. Libertarian Party of North Carolina v. State*, 365 N.C. 41, 707 S.E.2d 199 (2011). Vote: 5-1*

North Carolina has a law—General Statute § 163-96—that defines when a political party will be recognized and allowed to have its candidates appear on a ballot. Under this law, a political party must obtain the signatures from registered voters totaling 2 percent of the number of votes cast in the last gubernatorial election. For the 2008 election, this requirement meant that a party had to submit 69,734 signatures from registered voters to gain recognition as a political party and have a candidate on the ballot. The Libertarian Party challenged this requirement as violating the North Carolina Constitution's protections for the rights of freedom and petition, of speech and the press, and of equal protection of the law.

Justice Patricia Timmons-Goodson authored the majority opinion, in which the court upheld § 163-96's requirement. She looked to the United States Supreme Court's decision in *Timmons v. Twin Cities Area New Party*[2] for the framework that the Supreme Court of North Carolina would use to analyze the issue. Under this framework, a court first considers whether a law limiting some voting right imposes a severe burden on that right. If so, the law must be narrowly tailored and must advance a compelling state interest. If not, a state's interest must only be "sufficiently weighty to justify the limitation." The Supreme Court of North Carolina recognized that while associational rights are an important part of elections, those rights are not absolute, and the *Twin Cities* framework offered a balance between citizens' associational rights and a state's need to manage elections.

The court decided that § 163-96 "may burden minor political parties somewhat, but it does not impose a severe burden." It supported that conclusion with several reasons. First, minor political parties have three-and-a-half years to collect the necessary signatures. Second, § 163-96 placed few limitations on whose signature could count toward the necessary total. Third, history demonstrated that a few people could collect the majority of signatures; for example, for the 2008 election, five people collected over 85,000 signatures for the Libertarian Party. Fourth, history also demonstrated that the requirement was not hard to meet—in the previous five elections, eight minor political parties had obtained the necessary signatures. And finally, the court observed that the United States Supreme Court had upheld more burdensome requirements imposed by Georgia.

Once the court determined that the restrictions of § 163-96 were not severely burdensome, it next considered whether the State had a sufficiently weighty interest to justify those restrictions. In this case, North Carolina's restrictions were politically neutral and reasonable methods of preventing voter confusion and ballot overcrowding by frivolous candidates. Thus, the State's interests were sufficiently important to justify the signature requirements of § 163-96, so that the statute did not violate the North Carolina Constitution.

Justice Paul Newby dissented. Calling this case an invitation "to return to these fundamental democratic principles, specifically, the right of open access to the election ballot," he argued that § 163-96 "unduly" burdens that right. He took exception to the majority's decision to adopt the *Twin Cities* framework because, as a fundamental right, the right to ballot access should, in his view, receive strict scrutiny—the most exacting test that a court can apply when determining whether a law is constitutional, requiring a law to be narrowly tailored to further a compelling state interest. Moreover, Justice Newby claimed that the *Twin Cities* test is "entirely too subjective" because it invites judges to "assess the degree of burden, rather than relying upon the nature of the protected right." Such a subjective test would "be an inadequate safeguard of this fundamental democratic principle."

Having determined that strict scrutiny should apply to § 163-96 because the right to ballot access implicates freedom of association and the right to vote, he concluded that the court below had erred by placing the burden on the plaintiff to show why the statute was unconstitutional, rather than on the State to prove that the statute was constitutional. Therefore, Justice Newby would have sent the case back to the trial court for the court to apply the strict scrutiny test properly.

2 520 U.S. 351 (1997).

B. Dickson v. Rucho*, 366 N.C. 332, 737 S.E.2d 362 (2013). Vote: 5-1*

Every ten years, the General Assembly redraws the legislative districts in North Carolina based on the most recent census. When the constitutionality of the new districts was challenged after the 2010 census, a dispute arose over whether the communications between the legislators and their attorneys who advised them during the redistricting process were protected by attorney-client privilege.

In 2011, the General Assembly enacted new redistricting plans for the North Carolina Senate, North Carolina House of Representatives, and United States House of Representatives. Various plaintiffs, including individual voters and the NAACP, then challenged the constitutionality of these districts, suing the State of North Carolina and individual legislators. As part of that litigation, the plaintiffs sought emails between those legislators and lawyers who advised them during the redistricting. The legislators objected, claiming that those communications were protected by attorney-client privilege. The plaintiffs argued that any privilege had been waived by statute.

Thus, the Supreme Court of North Carolina faced the question whether North Carolina General Statute § 120-133 waived attorney-client privilege for legislators who worked with attorneys during the redistricting process. That statute provides:

> Notwithstanding any other provision of law, all drafting and information requests to legislative employees and documents prepared by legislative employees for legislators concerning redistricting the North Carolina General Assembly or the Congressional Districts are no longer confidential and become public records upon the act establishing the relevant district plan becoming law.

The court, in an opinion by Justice Barbara Jackson, held that § 120-133 did not waive attorney-client privilege. The court's analysis begin with the rule the attorney-client privilege is waived only by a clear and unambiguous statement because the privilege is "one of the oldest recognized privileges" and "is intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." In other statutes, the General Assembly expressed its intent to waive attorney-client privilege by explicitly stating that the statute "shall be deemed to waive the attorney-client privilege." But § 120-133 "includes no such clear and unambiguous waiver of the attorney-client privilege."

The court relied on several different rationales to support this conclusion. First, the statute does not mention the attorney-client privilege, so it could not expressly waive that privilege. Second, the phrase "[n]otwithstanding any other provision of law" referred to statutory provisions, not the traditional common law of attorney-client privilege developed by courts. Third, examining the statutory framework in which § 120-133 is located makes clear that that statute is designed to operate as "a narrow exception" to the protections given to other documents related to legislative communications. And fourth, in view of the separation of powers, the court refused to "lightly assume such a waiver by" a co-equal branch of government. Therefore, the court held that § 120-133 did not waive the attorney-client privilege that protected the communications between the legislators and their lawyers during the redistricting process.

Justice Robin Hudson dissented from the majority opinion. She claimed that attorney-client privilege protects only confidential communications—meaning that confidentiality is a "*prerequisite* to application of the attorney-client privilege." Justice Hudson contended § 120-133 made documents "no longer confidential" and that the emails between the legislators and their lawyers were "documents" under the relevant definition of that term. Therefore, these non-confidential documents could not be withheld under the attorney-client privilege because the rationale for the privilege should not apply.

III. Business Law

Beyond these cases touching on more political issues, the Supreme Court of North Carolina also decides cases that affect businesses across North Carolina. Relatively speaking, the Supreme Court of North Carolina decides fewer cases that clarify laws applicable to businesses than, for example, criminal

law cases. Accordingly, when the court does issue decisions in this area, those decisions are likely to have a disproportionate impact.

A. Bumpers v. Community Bank of Northern Virginia, *747 S.E.2d 220 (N.C. 2013). Vote: 5-2*

North Carolina's Unfair and Deceptive Trade Practices Act is one of the most commonly litigated statutes in business cases. That statute, General Statute § 75-1.1 states, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." Modeled on the Federal Trade Commission Act, the North Carolina statute is designed to ensure fair play in commercial activity.

Travis Bumpers obtained a loan from Community Bank of Northern Virginia for $28,450 at 16.99 percent interest to pay off a credit card with a higher interest rate and to perform home improvements. He paid fees of $4,827.88, including a $1,820.25 loan discount fee. Troy Elliot obtained a similar loan with similar fees. Bumpers and Elliot sued Community Bank for violating § 75-1.1, alleging that (1) although they paid the loan discount fee, they did not actually receive a discounted loan and (2) the fees charged for the loan closings were excessive. In support of their first claim, they noted that (even though they paid the fees), the HUD-1A form box for "Buydown" was checked "no." In support of their second claim, they noted that although they each paid over $1,000 in fees, the upper limit for any reasonable fees would have been $400.

Community Bank appealed the trial court's decision that Bumpers and Elliot should prevail on their claims. The Supreme Court of North Carolina, in an opinion by Justice Newby, agreed. A claim under § 75-1.1 requires a plaintiff to show three things: (1) that the defendant committed an unfair or deceptive act or practice; (2) the act or practice was in or affecting commerce; and (3) the act proximately caused the plaintiff's injury. This case focused on what a plaintiff had to show to prove causation: first, the plaintiff must show actual reliance on the defendant's actions; and second, the plaintiff must show that the reliance on the defendant's actions was reasonable. Thus, Bumpers and Elliot had to show that they reasonably relied on misrepresentations by Community Bank to prevail on their first claim. The supreme court held that the trial court erred by failing to consider whether the plaintiffs could show this reliance. (The lower court had focused on an alleged pattern of overcharging by Community Bank, rather than on the reliance by Bumpers and Elliot.)

As for the second claim, Justice Newby noted that "there is nothing unfair or deceptive about freely entering a transaction on the open market." Although in some instances, "an unreasonably excessive price" could violate § 75-1.1, this case was not such an instance. Bumpers and Elliot "entered into their loan transactions freely and without any compulsion." Therefore, the fees charged for the loan closings did not violate § 75-1.1. Based on these conclusions, the supreme court sent the case back to the trial court for further proceedings.

Justice Hudson dissented from the majority opinion. She wrote that § 75-1.1 "does not require reliance." On the plaintiffs' second claim, she wrote that allowing an excessive pricing claim under § 75-1.1 would not create "judicially unmanageable standards" but would simply put "the ultimate decision to the discretion of the trial court." Justice Cheri Beasley separately dissented. She also argued that this case was one based on overcharging and that the plaintiffs did not need to show actual reliance.

B. Tillman v. Commercial Credit Loans, Inc., *362 N.C. 93, 655 S.E.2d 362 (2008). Vote: 3-2-2*

In recent decades, arbitration has become a popular alternative to litigation because arbitration is widely viewed as more efficient and less expensive. Arbitration is a creature of contract, meaning that parties can agree in a contract to arbitrate any disputes they may have. Once parties have agreed to arbitrate, one party can demand that the other party go to arbitration even if the first party files a lawsuit in court. But without an enforceable agreement to arbitrate, a party cannot be compelled to submit a dispute to arbitration. It is increasingly common both for contracts to contain arbitration clauses and for one party to argue that the arbitration clause is unenforceable as a means to avoid arbitration. *Tillman* is such a case.

Fannie Lee Tillman, who had relatively little wealth, obtained a loan from Commercial Credit Loans. Along with this loan, she purchased credit life insurance and disability insurance for the loan. Shirley Richardson also obtained a loan from Commercial Credit Loans, as well as credit life, disability, and unemployment insurance. The insurance premiums were financed and included in the loan amounts. The loan agreements that both women signed included an arbitration clause agreeing to arbitrate any disputes, except those involving foreclosure and those involving monetary damages less than $15,000. The arbitration clauses also prohibited any arbitration that included claims belonging to anyone other than the individual involved in a particular dispute and required that the losing party would pay the costs of most arbitration proceedings.

Tillman and Richardson sued Commercial Credit Loans for, among other things, violating § 75-1.1 because they did not want or need the credit life insurance but were never told that it was optional. Commercial Credit Loans moved to compel arbitration based on the loan agreements. Tillman and Richardson opposed being forced into arbitration, claiming that the arbitration clauses were unconscionable and therefore unenforceable.

Justice Timmons-Goodson wrote the court's plurality opinion holding that the arbitration clauses were unenforceable under a two-part framework for unconscionability: procedural and substantive. Procedural unconscionability involves the process by which the parties reached their agreement, while substantive unconscionability involves the actual provisions of that agreement.

Justice Timmons-Goodson first held that Tillman and Richardson had shown procedural unconscionability. Tillman and Richardson were "rushed through the loan closings . . . [without any] mention of credit insurance or the arbitration clause." Coupled with the fact that Tillman and Richardson had no opportunity to negotiate any terms of the loan agreements, Justice Timmons-Goodson concluded that they had shown procedural unconscionability.

Turning to substantive unconscionability, Justice Timmons-Goodson noted that the potential cost of losing an arbitration would effectively prevent Tillman or Richardson from being able to pursue their claims; they lacked the financial resources to pay an arbitrator and, given the size of the potential recovery, an attorney was unlikely to take the case on a contingency-fee basis. Next, she observed that, because of the exception to arbitration for cases involving less than $15,000, Commercial Credit Loans had avoided ever having to go to arbitration in any of the 2,000 collection actions that it had filed in North Carolina since 1996. Finally, she decided that the prohibition of joinder of claims and class actions in arbitrations contributed to the unconscionability of the arbitration clauses because it made arbitration financially unfeasible for borrowers and benefitted only the lender.

Justice Robert Edmunds, joined by Justice Martin, authored an opinion concurring in the result reached by Justice Timmons-Goodson's decision but not in the reasoning. He believed that the court should have applied the totality of the circumstances test that the court established in *Brenner v. Little Red School House, Ltd.*[3] In that case, the Supreme Court of North Carolina stated that a "court must consider all the facts and circumstances of a particular case" when determining whether a clause is unconscionable. If the court "determines that the inequality of the bargain is so manifest as to shock the judgment of a person of common sense and that the terms are so oppressive that no reasonable person would make them on the one hand or accept them on the other," then the court should refuse to enforce the contract as unconscionable. Applying this test, Justice Edmunds concluded that the arbitration clauses were unconscionable.

Justice Newby, joined by Chief Justice Sarah Parker, dissented from the conclusion that the arbitration clauses were unconscionable. He wrote that the case "implicates bedrock principles of contract law which should not be disturbed in response to policy concerns" over subprime lenders. First, Justice Newby asserted that the court's majority treated this arbitration provision differently than other contractual provisions. Under the Federal Arbitration Act, a contract involving substantial interstate activity that includes an arbitration clause is unenforceable only if it would be unenforceable

3 302 N.C. 207, 274 S.E.2d 206 (1981).

under "common law principles" of contract. But the majority, according to Justice Newby, focused on provisions of the loan agreement that could appear only in an arbitration clause to hold that the clause was unenforceable—in other words, "the majority concludes this arbitration is unconscionable because it contains provisions common to many arbitration agreements."

Justice Newby also focused on the role of contracts in a free-market economy, noting that the right to enter into a contract is protected by the federal and state constitutions. This right comes with the corresponding responsibility to fulfill a contract's obligations. And the courts have the responsibility to enforce the agreements into which parties enter and "to exercise caution in undertaking any judicial inquiry into the wisdom of a contract's terms."

Turning to procedural unconscionability, Justice Newby observed that the same alleged unconscionability issues were present in *Brenner* but did not make that contract unconscionable. Additionally, the arbitration clause was not hidden but instead "was bolded, capitalized, and underlined" in the contract.

As for substantive unconscionability, Justice Newby first agreed that Commercial Credit Loans received a higher interest rate and some favorable terms but noted that it was lending money to people with "impaired credit." Justice Newby disputed the plurality's calculation of arbitration costs as mere "speculation" and cited a likely maximum cost of $375 under normal arbitration rules. He further observed that attorneys would be more likely to take these cases than the plurality opinion acknowledged because of the possibility of treble damages and attorney's fees. Justice Newby thus believed that the arbitration clauses were not unconscionable.

IV. Criminal Law

Much of the Supreme Court of North Carolina's docket consists of criminal cases, which are also among the most interesting cases that the court decides, often because the factual backgrounds are captivating. Yet these cases are about far more than compelling stories. They are about interpreting the laws that govern when the State can take away or limit a person's freedom.

A. State v. Bowditch*, 364 N.C. 335, 700 S.E.2d 1 (2010). Vote: 4-3*

In 2006, the North Carolina General Assembly passed a law that directed the Department of Corrections to create a continuous satellite-based monitoring (SBM) program to monitor sex offenders. A person enrolled in the monitoring program would have to wear an ankle bracelet with a GPS receiver that the Department of Corrections could use to monitor that person's location. After the Department of Corrections created this program, it notified multiple individuals of its intent to enroll them in the program. Three of these individuals, including Kenney Bowditch, challenged the Department's intent to enroll them in the monitoring program, arguing that doing so would run afoul of constitutional prohibitions against *ex post facto* laws—laws that impose greater or different punishments than what was authorized when the crime was committed.

The court rejected this challenge. Whether a statute constitutes an *ex post facto* law is a two-part analysis. First, a court must consider whether the General Assembly's intent in passing the law was to impose punishment. If the intent was to punish, then the law violates the ban on *ex post facto* laws. Second, the court must consider whether, even if the intent was not to punish, the law has such a punitive effect that it negates the non-punitive intent.

As for the first part of this test, Justice Brady noted that the General Assembly "did not enact a separate purpose section" to state whether the monitoring program was intended to be civil or criminal. But the name of the act that established the program—"An Act To Protect North Carolina's Children/Sex Offender Law Changes"—indicated that the act was about protecting children, not punishing sex offenders. Also, the act was located in the article of the North Carolina General Statutes dealing with the Sex Offender Registration Program, and courts had viewed these registration programs as non-punitive civil regulations.

Turning to the second part of the test, Justice Brady held that the civil, non-punitive intent of the program was not negated by its effects. He observed that SBM surveillance is fundamentally different from holding people in prison or on parole because people in

the monitoring program have more freedom. He also noted that it was a relatively passive form of monitoring. Moreover, he wrote that the program was not about punishing past wrongdoing but rather for "protecting the public against recidivist tendencies of convicted sex offenders." Justice Brady further concluded that the monitoring program had a rational connection to "the nonpunitive purpose of protecting the public" and determined that the monitoring program was a reasonable option for achieving the State's objective for protecting children from sex offenders.

Justice Hudson, joined by Chief Justice Parker and Justice Timmons-Goodson, dissented. She acknowledged that "[s]exual offenses are among the most disturbing and damaging of all crimes," but she believed that the monitoring program, because of the way it was implemented, "ha[d] marginal, if any, efficacy" in protecting children while imposing "substantial interferences into the daily lives" of people in the program. Although she agreed with the majority that the program was not intended to be punitive, she argued that it had no real connection to protecting children and instead was "only . . . retributive and deterrent in purpose and effect."

B. State v. Heien*, 366 N.C. 271, 737 S.E.2d 351 (2012). Vote: 4-3*

The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures." When determining whether a particular search or seizure is constitutionally reasonable, courts take into account the fact that police officers have dangerous jobs, often facing uncertain situations with imperfect information. Unsurprisingly, police officers occasionally make a mistake about the facts of a situation. As long as a factual mistake was reasonable, however, courts will not second-guess the police officer's actions—such as an arrest or discovery of evidence. Sometimes, police officers may make a mistake about the law. The question thus arises: under what circumstances, if any, will a court uphold a search or seizure when the officer's actions rest on a misunderstanding of the law? The Supreme Court of North Carolina answered that question in *Heien*.

A sheriff's deputy stopped a car on Interstate 77 because it had a broken brake light. During the stop, conflicting stories about where the vehicle was heading aroused the deputy's suspicion. He then asked permission to search the vehicle. After being granted permission, the deputy found a bag of cocaine. At his trial, Mr. Heien argued that the cocaine found in the car should be suppressed because the stop was illegal.

The trial court denied that motion, but the court of appeals reversed, deciding that the statute requiring a working brake light did not require that all brake lights work, just one light. The court of appeals therefore decided that the stop was unconstitutional and the cocaine should not have been shown to the jury.

When the case reached the Supreme Court of North Carolina, the only issue before the court was "whether an officer's mistake of law may nonetheless give rise to reasonable suspicion to conduct a routine traffic stop." Assuming that the court of appeals correctly interpreted the statute about brake lights, the majority (in an opinion by Justice Newby) held that the deputy's mistake about what the brake-light statute required did not negate the reasonable suspicion he had for searching the vehicle. He noted that other courts, in both the federal system and in other states, were divided over whether an officer's mistaken belief that a law is being violated can support reasonable suspicion and make a vehicle-stop constitutional.

Although noting "persuasive justifications" on both sides of the issue, Justice Newby held that allowing an objectively reasonable mistake of law to support reasonable suspicion was the better approach. Reasoning that "the primary command of the Fourth Amendment" is for officers to act reasonably, Justice Newby noted that permitting the traffic stop in this case was consistent with other aspects of criminal law that do not punish an officer for an objectively reasonable mistake. This view also avoided "discourag[ing] our police officers from conducting stops for perceived traffic violations." Moreover, a "*post hoc* determination" of a statute's meaning by a court should not affect the reasonableness of a traffic stop.

Justice Hudson dissented in an opinion joined by Chief Justice Parker and Justice Timmons-Goodson. She agreed that the officer had "acted upon a reasonable belief" but warned that the court's decision would

justify future mistakes by police officers about a "less innocuous statute" than the brake-light statute. She also emphasized that most courts had reached the opposite conclusion of the majority. The courts interpret the laws, and the police must enforce those laws as courts have interpreted them. This division of responsibility asks "that our police be diligent in studying the law and remaining current on changes in the law." Accordingly, Justice Hudson would have required the trial court to have prevented the jury from seeing the cocaine during Mr. Heien's trial because, in her view, the stop was unconstitutional.

The United States Supreme Court has recently agreed to hear Mr. Heien's appeal of the decision of the Supreme Court of North Carolina.

Conclusion

The Supreme Court of North Carolina has the ability to dramatically impact the economic and individual liberty of the state's citizens. The justices that sit on the supreme court will determine how our state and federal constitutions are interpreted, the rules that apply to those doing business in North Carolina, and the government's ability to tax, protect, and incarcerate North Carolinians. We hope that this paper will spark debate about what kind of judges are best suited for that role.

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