Supreme Court Rules in Long-Running Racial Profiling Case

Assessing the path forward in selective enforcement claims after State v. Johnson

On September 1, 2023, the Supreme Court of North Carolina issued its ruling in *State v. Jeremy Johnson*, a case which considered the proper framework for analyzing allegations by a criminal defendant that a police officer's decision to investigate or take enforcement action against them was improperly motivated by race. *Johnson* involved a Black man convicted of drug possession, who was investigated on suspicion of trespassing after a Raleigh police officer observed him sitting parked in his car at an apartment complex. Although Emancipate NC did not represent Mr. Johnson, our organization has a long history with this case and litigated it as *amicus* counsel in support of his claim. Emancipate NC attorney Ian Mance testified as a defense witness in pre-trial suppression hearings in 2018, developing and introducing the statistics that were later at issue on appeal. These statistics showed that 82% of all traffic stops made by Johnson's arresting officer, B.A. Kuchen of Raleigh PD, involved Black motorists in a city that was then 28% Black. Emancipate NC attorney Elizabeth Simpson briefed the case at the Court of Appeals, which issued two opinions in April and December of 2020, and again at the Supreme Court. Elizabeth's most recent brief can be found here.

Johnson is the first appellate case in North Carolina to consider a criminal defendant's use of data generated by G.S. § 143B-903, the state's first-in-the-nation (but much duplicated) traffic stop data collection statute. This law was passed in 1999 in response to concerns about racial profiling and since 2002 has required every agency serving a jurisdiction of more than 10,000 people to report. Over time, it has generated detailed data on nearly 30 million traffic stops made by thousands of NC police officers, including information about the race of persons stopped, searches conducted, and uses of force. The law has long served as a source of intrigue to criminal defense and civil rights attorneys for its potential to identify and demonstrate discriminatory practices that occur in the context of traffic stops. Yet it was not until late 2015 that this data, which today is available online at NCCopWatch.org, first became available in a format that made it accessible to attorneys and members of the public.

In the intervening years, trial courts around the state regularly found this data admissible, but until *Johnson*, no appellate court had considered it. Partly because of this, some attorneys have expressed concerns about the practicality of admitting the data in a criminal case, particularly given the statute's language that the "correlation between the identification numbers and the names of the officers shall not be a public record, and shall not be disclosed by the agency except when required by order of a court[.]" G.S. § 143B-903(d). However, no such court order proved necessary in *Johnson*. Instead, technology enabled attorneys to discern the arresting officer's data-reporting ID number through the examination of public databases. With this ID in hand, it was

determined that 82% of Officer Kuchen's career traffic stops involved Black motorists. Johnson's public defender called Ian Mance to testify to this data and how it was identified. (Ian remains available to assist any NC defense attorney who wishes to introduce similar data in their case and recently testified for the defense in a federal criminal case.) The defender then moved under the federal and state constitutions to suppress evidence recovered in the case, on the basis that the racial disparities reflected in the officer's data, in combination with the suspicious circumstances of the stop, supported a reasonable inference that his encounter with Mr. Johnson had been motivated by race.

Until recently, *Johnson* seemed poised to answer directly whether statistics showing racial enforcement disparities under § 143B-903 can be so "stark" as to constitute prima facie evidence of selective enforcement in violation of equal protection guarantees. The Supreme Court took the unusual step of remanding the case back to the Court of Appeals for reconsideration after the first opinion, and it granted certiorari in the case after the Court of Appeals again affirmed the trial court. For the first half of 2022, it appeared the Court was preparing to grapple, head on, with statistical evidence of racial profiling and perhaps even take steps towards giving a remedy to those victimized by the practice.

These hopes faded with Justice Newby's ascension to the role of Chief Justice, after which time a number of cases involving race, including *Johnson*, were held off the docket. Worries began to mount among advocates that the Court's calendaring practices appeared calculated to hold these cases over for argument until after the November 2022 election, in seeming anticipation of the impending change in the Court's majority bloc. Although Appellate Rule 29(b) provides that a case should typically be scheduled "in the order [in] which [it was] docketed," these cases, which were properly before the Court and its then 5-2 Democratic majority, sat uncalendared for months. Attempts by litigants to have the cases heard by the group of Justices who agreed to hear them were largely rebuffed. Instead, cases that had seemed poised to make progress for civil rights were set for the first week of argument before the new Republican majority.

Ultimately, that new majority voted to affirm the Court of Appeals' second opinion in *Johnson*. Curiously, however, it did so without issuing an opinion. Instead, the only opinion came in the form of a 22-page dissent from Justices Earls and Morgan, the Court's two Black Justices, who wrote that "an opinion that clarifies the correct standard for selective enforcement cases in North Carolina is warranted." (Shortly after *Johnson* was published, Justice Morgan announced his resignation from the Court.) According to Earls, in choosing to resolve the case as it had, "the Court abdicated the responsibility it took on when deciding to hear the case: to clarify 'legal principles of major significance to the jurisprudence of the State.'" She and Morgan dissented, she wrote, because they "would clarify the correct framework."

Given this outcome, ambiguity remains as to what it takes to establish a selective enforcement claim in the context of a criminal case. Whatever the answer, however, it would be a mistake to read *Johnson* to suggest that traffic stop data cannot be leveraged effectively in the defense context. Defenders armed with similar data have used and will continue to use the data at the trial court level to get charges dismissed, to obtain better outcomes in plea bargaining and sentencing, and even to change police policies. While *Johnson* undoubtedly represents a missed opportunity for civil rights, the summary affirmance does help to clarify several issues moving forward. We discuss some of these issues below.

The state constitution prohibits racial profiling. By affirming the Court of Appeals without opinion, the Court recognized for the first time that article I, § 19 of the North Carolina Constitution "prohibits selective enforcement of the law based on considerations such as race." *See Johnson*, slip op., at 9 (Earls, J. dissenting) ("[H]ere the majority affirms the Court of Appeals decision finding such a right, and I agree."). This recognition of an independent source of authority in the state constitution for challenging law enforcement's consideration of race, although doing little work here, may have significance with future courts. Article I, § 19 contains both an equal protection clause, similar in language to that found in the Fourteenth Amendment to the U.S. Constitution, as well as a Non-Discrimination Clause without a federal constitutional analogue. Historically, claims of racial profiling have been litigated solely under the Fourteenth Amendment. The Supreme Court of North Carolina has long recognized the authority of state courts "to construe [the N.C.] constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision." State v. Carter, 370 S.E.2d 553, 555 (N.C. 1988).

Online platforms enable the accurate identification of officer data. The case lends credibility to the web-based technology used by Johnson's defense to identify the racial demographics of the people who were stopped or searched by the arresting officer over the course of his career. Officer Kuchen testified shortly after Ian at the suppression hearing and heard his testimony. Kuchen did not dispute the assertion that 82% of his career stops involved Black motorists. In the years since the case has been on appeal, Justice Earls observed, the "State [did] not argue that Mance's identification of Officer Kuchen [as the officer who generated the statistics in question] was incorrect." *Id.* at 7. Earls noted that the legislature's rationale for passing G.S. § 143B-903 was to provide evidence of selective enforcement where it may occur. Here, the courts' treatment of the evidence affirms the idea that the statute is working as designed. It created statewide standards for reporting and a public database that can now be reliably queried to identify an individual officer's stop and enforcement history.

Trial courts continue to have discretion to consider and interpret police data. The Supreme Court determined the trial court did not commit prejudicial error when it concluded that the statistics, as presented, were insufficient to establish a racially selective enforcement claim in this case. However, like the Court of Appeals, it declined to "clarify the correct framework" for assessing such evidence. *Id.* at 14. Consequently, judges will continue to have latitude to decide how to weigh the type of data introduced in this case. Justice Earls, for example, wrote that she would find the statistical enforcement disparities "permit but do not compel an inference that Officer Kuchen discriminated on the basis of race in conducting his police duties, including when he approached Mr. Johnson." *Johnson* does not preclude a trial court judge from concluding that an officer targeted a person based on unlawful racial considerations if presented with similar statistical evidence in the future.

North Carolina's *driving* population is whiter than its population. Justice Earls' opinion memorializes the important and often overlooked fact that white people are "overrepresented" in North Carolina's driving population. In other words, as bad as the racial enforcement disparities against Black people appear, the actual disparities are *worse*. This observation about driving populations is based on more than a decade of research by professors at the University of North Carolina at Chapel Hill, including Dr. Mike Dolan Fliss, who prepared a report on the subject for the Court, which Emancipate NC submitted as an appendix to its brief. For years, trial lawyers

have been forced to respond to the erroneous assertions of prosecutors that Black people might be overrepresented among those stopped by police because they make up a disproportionate share of the driving population. The inclusion of Dr. Fliss's report in Justice Earls' opinion, which refutes this idea, should help to bolster the case of defense attorneys who are attempting to establish to a trial court that disparities present in a particular case warrant closer scrutiny.

There is no "same behavior" standard in selective enforcement claims. The Supreme Court affirmed the N.C. Court of Appeals decision to reject the use of the "exacting 'same behavior'" standard applied by the trial court, which purported to require Johnson to show that "similarly situated" individuals of a different race were observed by the same officer, engaged in the same behavior, and were not investigated. State v. Johnson, 852 S.E.2d 733, at *6 n.3 (N.C. App. 2020), aff'd, No. 197PA20-2, 2023 WL 5658849 (N.C. Sept. 1, 2023). Helpfully, the Court of Appeals concluded there were "forceful arguments against [the] adoption" of such a standard, noting that "selective enforcement claims present unique concerns that might make the gathering of [the necessary] evidence difficult, if not impossible, in some cases." *Id.* Justice Earls highlighted various approaches that different courts around the country have taken in lieu of adopting this kind of standard. *Johnson*, slip op. at 12–13 (Earls, J., dissenting). Each of these approaches remains a possibility for North Carolina unless and until the Court decides the issue. *Id.* at 13–14.

Additional evidence may be necessary in cities with multiple patrol districts. Although the Court's majority did not agree with Justices Earls and Morgan that Officer Kuchen's statistics were "a textbook example of prima facie evidence" of racial discrimination, *Johnson* does not extinguish the promise of successfully leveraging traffic stop data in future suppression hearings. The Court of Appeals agreed with Jeremy Johnson that Officer Kuchen's data appeared to show a "stark" pattern of stops of Black motorists. *Johnson*, 852 S.E.2d 733, at *8. The officer's percentage of stops involving Black people far exceeded their representation in the Raleigh residential population and the population of people stopped for traffic offenses by Raleigh PD. However, the Court of Appeals determined the statistics did not compel the conclusion that the trial court should have granted Johnson's motion to suppress: "Without knowing the demographics of southeast Raleigh—the district Officer Kuchen was assigned and where this stop occurred—there is no adequate population benchmark from which we can assess the racial composition of individuals and motorists 'faced by' Officer Kuchen." *Id.*

Johnson thus illustrates the challenges litigants in larger cities with multiple patrol districts may face in benchmarking an officer's enforcement data. For smaller jurisdictions—including many, perhaps most, towns in North Carolina—the decision will have little relevance, because officers regularly patrol their entire jurisdiction. Criminal defendants who are arrested in cities may face greater evidentiary challenges, but they are not insurmountable. Justice Earls expressed concern that it was "not clear that demographic statistics for the districts [an individual officer] patrolled can be produced." Fortunately, however, this information is available, even if it can be somewhat cumbersome to come by. According to Dr. Fliss, who consulted with our organization on this case, multiple methods exist to reliably estimate the demographics of a given patrol district. Attorneys who are interested in developing such evidence in future cases are invited to contact Emancipate NC's Senior Counsel, Ian Mance, for assistance: ian [at] emancipatenc.org