

SUPREME COURT

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE

Plaintiff and Appellant,

v.

BOUNH MAIKHIO,

Defendant and Respondent.

S180289

Ct.App. 4/1 D055068

Super. Ct. App. Div. No.
CA211304

Super. Ct. No. M032897



ANSWER TO PETITION FOR REVIEW

SUPREME COURT
FILED

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Bounh Maikhio respectfully submits his answer to the People's petition for review.

INTRODUCTION

Bounh Maikhio, his wife and infant child, left the Ocean Beach fishing pier around 11:00 o'clock at night, got into their car, and drove through the town of Ocean Beach on their way home. They were stopped by an officer of the Department of Fish and Game (DFG) about three blocks away. The officer stopped them because he had observed Mr. Maikhio fishing from the pier with a hand line, and catch something which he put into a bag. The officer did not have a reasonable suspicion that Mr.

Maikhio had violated any law, rather he relied exclusively on Fish and Game Code sections 1006 and 2012 as authority to detain the Maikhios and then search their car.

The Court of Appeal, in a split decision, affirmed the trial court's order suppressing the undersized, out-of-season, lobster seized from Maikhio's car, holding that the detention and search of the car was not authorized by either the plain language of Fish and Game Code sections 1006 or 2012, or by fair implication therefrom, and was not reasonable under the Fourth Amendment. The People seek review from in this court

WHY REVIEW SHOULD BE DENIED

The People offer four reasons why the Court should review this case. None of their reasons are persuasive; they will be addressed in the order the People presented them in their petition for review.

Protection of Fish and Wildlife

First, the People claim that the Court of Appeal's decisions "seriously imperils the state's ability to protect fish and wildlife." Nothing supports this claim other than the claim itself. No evidence appears in the record supporting the claim. This is a scare tactic and should be disregarded. If DFG takes it's mission as seriously as asserted, it can certainly figure out effective ways to accomplish its mission consistent with the governing

statutes and the Constitution. While some statutes, and especially the Constitution, are constant thorns in the side of law enforcement, that is the price of liberty and DFG will just have to learn to live with it.

Additionally, as the Court of Appeal found, “[i]n the circumstances of this case, . . . Fleet’s stop of Maikhio’s vehicle was indisputably made for normal law enforcement needs and to uncover evidence of ordinary criminal wrongdoing (i.e., a misdemeanor fishing offense) by a specific individual (i.e., Maikhio).” (Slip Opn, pp. 13-14; *People v. Maikhio* (2010) 180 Cal.App.4th 1178, 1190.) The Court of Appeal came to this conclusion based both on the DFG officer’s conduct, and, equally important, comparing the effectiveness of the targeted single vehicle stop used in this case, with other available, and far more effective, methods of furthering the core mission of DFG, the protection of fish and wildlife. The chosen method is clearly aimed at the issuance of criminal citations, perhaps motivated by their revenue generation, and not the education of fisherman or the efficient preservation of fish. Walking up and down the pier would have furthered the core mission far more than stopping one vehicle three blocks from the pier. But, as officer Fleet testified at the suppression motion, the targeted single vehicle stop was chosen over other, more visible methods, so that his “cover” wasn’t blown and everybody else on the pier

knew that Fish & Game was present and “all the evidence gets thrown.”
(Trans. p. 8.) That way, possession and the intent of not releasing an illegal
catch was solidified. (Trans. p. 9.)

In light of the evidence actually presented in this case, it is clear that
DFG *can* do its core job consistent with the governing statutes and
constitutional provisions, but it choose to pursue its general law
enforcement function and issue citations over pursuing its “warden”
function and having illegal catch returned to the ocean. Therefore, the
People’s claim that the holding of the Court of Appeal undermines the
ability of DFG to do its job is a red herring.

Specific Vehicle Stops on the Highway for Inspection

The People spend one page on a spurious argument that the 1944
opinion of the Attorney General (4 Ops.Cal.Atty Gen. 405, 407-410) that
the Fourth Amendment did not prohibit vehicle stops and searches under
California’s inspections statutes based solely on a reasonable suspicion that
someone in the vehicle had recently been engaged in DFG regulated
activities had somehow been adopted by the Legislature and was, if not
binding on the court, at least more persuasive than the court found it. The
Court of Appeal disposed of this contention in footnote 6 of its opinion,
noting that the Attorney General’s opinion pre-dated *Terry v. Ohio* (1968)

392 U.S.1, and does not reflect current Fourth Amendment principles. And the Court was right.

Implied Consent

Apparently spurred by the dissenting opinion in the Court of Appeal, the People argue for the first time that the warrantless, suspicionless, specific vehicle stop in this case is justified by an implied consent inherent in engaging in regulated activities. The term “implied consent” does not appear in any of the People’s briefs filed in this case in either the Appellate Division of the Superior Court or the Court of Appeal. The DFG officer relied on Fish and Game Code sections 1006 and 2012 for his stop and search of Maikhio’s car, not on implied consent. To the extent that there is any implied consent to an inspection, the scope of that inspection is limited by those statutes, and the Fourth Amendment. There is no implied consent to unconstitutional conduct by DFG officials or any other government entity.

The Special Needs Doctrine

This is a Fourth Amendment, special needs doctrine case. The People argue that the Court of Appeal was wrong in concluding that the specific vehicle stop was for the primary purpose of general law enforcement, and that the Court’s balancing of the competing interests was

skewed.

The evidence presented at the suppression hearing overwhelmingly support the Court of Appeal's conclusion that the method of enforcement chosen by the DFG officer was primarily aimed at *enforcement* of law, not the *protection* of sea life. The DFG officer expressed that his chosen method of enforcement was designed so that his "cover" wasn't blown and everybody else on the pier knew that Fish & Game was present and "all the evidence gets thrown." (Trans. p. 8.) That way, possession and the intent of not releasing an illegal catch was solidified. (Trans. p. 9.) Based on that evidence, the Court of Appeal's conclusion that the primary purpose of the targeted vehicle stop was general law enforcement, not the protection of fish and wildlife, was not only reasonable, it was inescapable. This, the per se rule of unconstitutionality announced in *Indianapolis v. Edmond* (2000) 531 U.S. 32 was properly invoked.

Although finding that the stop of Maikhio's vehicle was per se unconstitutional based on *Edmond*, the Court of Appeal also performed a traditional special needs doctrine balancing test. The People quibble with that, too.

The People argue that in balancing the degree to which the seizure advances the public interest against the severity of the interference with

individual liberty, that the method of stopping an individual vehicle is “an especially effective means of promoting the state’s interest in protecting fish and wildlife resources.” Yet they offer no evidence of this claim, and common sense suggests the opposite. While the DFG officer is spending 30 or 45 minutes on a traffic stop of one fisherman, how many others are leaving the fishing area with illegal catches? How is it more effective to contact one person than 100? Absent specific evidence to the contrary, the conclusion has to be that this method of enforcement may generate more revenue, but at the cost of inefficiency in protecting fish and wildlife and educating fishermen.

The People assert, with out discussion, that the vehicle stop in this case was a minimal intrusion. The evidence and the law belie that claim.

In *Delaware v. Prouse* (1979) 440 U.S. 648 [99 S.Ct. 1391; 59 L.Ed.2d 660 [*Prouse*], a police officer stopped the car to check the driver’s license and the registration. (*Id.*, at p. 650.) He had observed neither traffic or equipment violations nor any suspicious activity. (*Ibid.*)

In determining whether the stop was permissible under the Fourth Amendment, the Court balanced the stop’s intrusion on the individual’s Fourth Amendment interest against its promotion of legitimate governmental interests. As for the intrusion, the Court stated:

We cannot assume that the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol. Both of these stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety. For Fourth Amendment purposes, we also see insufficient resemblance between sporadic and random stops of individual vehicles making their way through city traffic and those stops occasioned by roadblocks where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community. “At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers’ authority, and he is much less likely to be frightened or annoyed by the intrusion.”

[Citations.]

(*Prouse, supra*, 440 U.S. at p. 657.)

In this case, the vehicle stop was made at 11:00 at night. Not only was Mr. Maikhio detained, but so was his wife and infant child. After the DFG seized the lobster from the passenger compartment near the woman’s feet, he then extracted Mr. Maikhio from the car, handcuffed him, sat him on the curb, and performed a more thorough search of the car, apparently in

retaliation for Mr. Maikhio having initially denied having any sea life in his car. The suggestion that this was a minimal intrusion is disingenuous.

The People's real claim is that DFG officials may, consistent with the Fourth Amendment, stop any vehicle whose occupants they reasonably believe have recently been engaged in fishing. They do not point to one case supporting that assertion., and a simple review of *Prouse, supra*, 440 U.S. 648, put the claim to rest.

In *Prouse*, the court the court stated,

We agree that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed. Automobile licenses are issued periodically to evidence that the drivers holding them are sufficiently familiar with the rules of the road and are physically qualified to operate a motor vehicle. The registration requirement and, more pointedly, the related annual inspection requirement in Delaware are designed to keep dangerous automobiles off the road. Unquestionably, these provisions, properly administered, are essential elements in a highway

safety program. Furthermore, we note that the State of Delaware requires a minimum amount of insurance coverage as a condition to automobile registration, implementing its legitimate interest in seeing to it that its citizens have protection when involved in a motor vehicle accident.

(*Id.*, at pp. 658-659.)

In *Prouse*, there was no doubt that the individual stopped had been engaging in the highly regulated activity of driving. Nonetheless, the Court held “that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.” (*Id.* at p. 663.) Likewise, unless there is at least articulable and reasonable suspicion that a fisherman is unlicensed or is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his fishing license and catch are unreasonable under the Fourth Amendment.

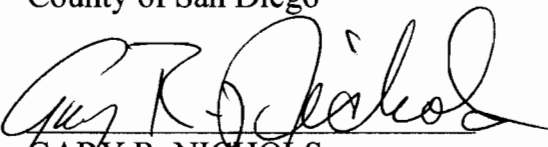
CONCLUSION

Both the trial court and the Court of Appeal correctly found that the vehicle stop in this case violated the Fourth Amendment. Review should be denied.

Dated: March 10, 2010

Respectfully submitted,

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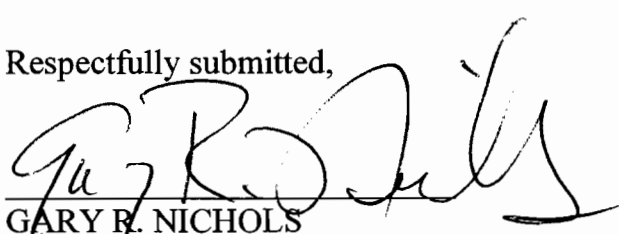
CERTIFICATE OF WORD COUNT

I, Matthew Braner, hereby certify that based on the software in the word processor program, the word count for this document is 2,149 words.

Dated: March 10, 2010

Respectfully submitted,

By:


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PROOF OF SERVICE

CASE NAME: BOUNH MAIKHIO
Supreme Ct. No.: S180289
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I, the undersigned, say: I am a citizen of the United States and a resident of the County of San Diego, State of California. I am over the age of 18 years and not a party to the within action. My office address is 233 "A" Street, Suite 500, San Diego, California 92101.

On the date of February 17, 2009, I personally served a true and correct copy of the *ANSWER TO PETITION FOR REVIEW*, to the following:

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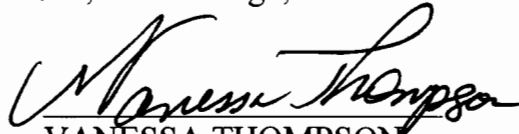
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Mr. Bounh Maikhio
(by mail)

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of March 2010, at San Diego, California.


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Paralegal I