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SPEAKERS

Rob Johnson, Will Aronin, Anthony Sanders

A Anthony Sanders 00:24

North Philly, May 4, 2001. Officer Sean Devlin, Narcotics Strike Force, was working the morning shift. Undercover surveillance. The neighborhood? Tough as a \$3 steak. Devlin knew. Five years on the beat, nine months with the Strike Force. He'd made fifteen, twenty drug busts in the neighborhood. Devlin spotted him: a lone man on the corner. Another approached. Quick exchange of words. Cash handed over; small objects handed back. Each man then quickly on his own way. Devlin knew the guy wasn't buying bus tokens. He radioed a description and Officer Stein picked up the buyer. Sure enough: three bags of crack in the guy's pocket. Head downtown and book him. Just another day at the office. Well, that was not a recent case from the Federal Circuits of Appeal. But that was a denial, a dissent, from a denial of certiorari by none other than Chief Justice John Roberts issued back in 2008. I was reminded of that description of the case that Judge Roberts was talking about there from a case we'll be talking about this week here on Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. Today, I have two powerhouse IJ attorneys with me to talk about these two cases, one of them from the Sixth Circuit were Judge Sutton went in a different direction than it seemed like Justice Roberts meant to do in that case, if the case had been taken, although different facts and different doctrine involved, but the cop on the beat aspect of it remind me of that earlier case. And talking about that Sixth Circuit case later in the show will be Will Aronin. So Will, welcome back to Short Circuit.

W Will Aronin 02:36

Thanks so much for having me. And I really love your cop voice.

A Anthony Sanders 02:41

Well, I never read any, still haven't; Mickey Spillane. But except for that take on, I'm pretty sure it was a take on Mickey Spillane by Justice Roberts. And I always, I try to use that voice whenever I can. And Rob Johnson is joining us too. Now Rob is going to talk about a very

different issue. We're not talking about cops on the beat, but in a sense, judges on the beat, and when you can sue them. Usually you can't. But every now and then, a judge does something so outrageous that you actually can pierce that veil. So Rob was involved in this case, IJ was an amicus in the case, and it was actually argued by our former colleague, Tori Clark, at oral argument as an amicus. The decision came out a few weeks ago, and we at IJ were very happy with the result. So it's from the Eighth Circuit written by Judge Stras. And so Rob, can you tell us a story of *Rockett v. Eighmy*, is that right?

R Rob Johnson 03:53

I think so. Yes.

A Anthony Sanders 03:55

Not the normal girl's name, my wife's name, Amy. But I think it is pronounced Amy.

R Rob Johnson 04:02

Yeah, it's spelled E-I-G-H-M-Y, which, you know, I think if I recall correctly at argument everyone was saying Amy, so we'll go with that. Yeah. So you know, as you said, this is a case about judicial immunity, which, you know, everybody I'm sure, who listens is familiar with the concept of qualified immunity. And judicial immunity is like the, it's basically like qualified immunity on steroids.

A Anthony Sanders 04:32

The really, really good kinds of steroids.

R Rob Johnson 04:34

Yeah, very.

A Anthony Sanders 04:35

Like way above Barry Bonds.

R Rob Johnson 04:37

This is like Lance Armstrong steroids. You're definitely winning the Tour de France on these steroids. So, basic rule, you cannot sue judges for anything. But, as you said, sometimes there are things that are so bad that you can, and this is in fact one of those cases. It's a custody dispute between two parents. And the parents were initially married in the state of Missouri. Then they got divorced. And they actually moved together after they got divorced to the state

of California, so that they could pursue their children's career in the entertainment industry. And it actually turns out that the children were successful, unlike most people who moved to California. They actually were successful in pursuing their dreams of success in the entertainment business. They became magicians, and they rose to national prominence appearing on the show, America's Got Talent. And this matters, it's not just sort of an interesting aside, although it is that. It matters because the judge who is assigned to this custody dispute in Missouri after the mother sues for custody of the children in Missouri; the judge who's assigned to the case doesn't like that these children are living what he believes to be the Hollywood lifestyle. And he actually thinks they should come home to Missouri and be good little Missouri children, not doing California type things. So, this all comes to a head. There is a custody hearing where the judge assigns custody for the following month to the mother, and then tells the children after the month is up, they're going to have to go back to their father. And the children react negatively to this decision, they want to stay with the Father. And in the hallway, they are heard loudly complaining about the judge's decision. And at this point, to be clear, nobody has asked the judge to do anything. The children aren't in the courtroom. They're just in the hallway. There's no motion pending in front of the judge, and in fact, the judge has taken off his robes, he's come down from the bench. He's just an ordinary guy, effectively. But he walks into the hallway, and he decides he is going to deal with this situation. So he takes the kids into a conference room, where he tells them that they have to give up the Hollywood Life and come back to Missouri and be normal kids. And they continue to protest his decisions and they want to stay with their dad, they don't want to go with the mother. And so he tells them, I'm going to show you what I can do. And then he personally takes them down to the jail cells in the courtroom, or the courthouse. And there he has them take off their shoes, he books them into the cell, and he holds them there for over an hour until finally they agreed to go off with their mother. And that's the first time that the judge has these children jailed, it is not the last time. The next time he has them jailed, we fast forward to the year 2020, in the midst of the pandemic. And the mother again, has filed a motion seeking custody of the children, and the judge orders a hearing. And, at the advice of their lawyers, the father and the kids don't show up. They do send the lawyer, but the lawyer tells them you don't need to come because you don't live in Missouri anymore. You have no connection to Missouri at this point. And so there's no reason that you need to travel to Missouri in the midst of the pandemic to be there in person for this hearing. But the judge doesn't like that, and he issues what is called a pickup order for the children, which is basically an order telling the police to arrest these children. And again, nobody's asked him to do this. There's no motion pending. Nobody has said "Please arrest my children." The judge just takes it on himself to order this to happen. The order then gets forwarded to the police in Louisiana, who execute the order, and they arrest these two children and hold them in jail for over two days in the midst of the COVID pandemic in Louisiana. Finally, the dad is able to get them out, and he turns around and he sues this judge for twice arresting his children without any legal basis. This thing comes up to the Eighth Circuit on the issue of judicial immunity, and the court issues a decision saying that at least, in part, this judge is not immune. Now the court begins by giving a sort of interesting discussion of the history of judicial immunity, a lot of it drawn from the Institute for Justice amicus brief, and what the judge essentially explains is, or the Court essentially explains is well, the whole origins of this doctrine were that back in the twilight of history, if you didn't like a judge's decision, there was no way to appeal. The whole idea of appeals hadn't been invented yet. So instead, what you would do, is you would challenge the judge to a duel. And if you won the duel, not only would the decision be overturned, but the judge would no longer be a judge. They would lose their ability to be a judge forever. So this was how things were settled in the olden days. But they decided that that was not a good system. So instead, they invented the whole idea of appeals. And the idea of judicial immunity was, you know, you can't challenge judges to duels anymore. Instead, you have to appeal which, you know, that makes sense. But that doesn't mean that judges should

be immune for literally everything that they do. Instead, there are two important exceptions to this idea of judicial immunity. Now, the first is that judges are not immune for "non-judicial acts". So you know, if a judge robs a bank, you don't get to say, "Well, sure, I robbed a bank, but I'm also a judge, you can't get me." No, that doesn't work, you can be liable for that. And then the other is things that, where the judge is doing something judicial, but there's a complete absence of jurisdiction. So, you know, judges have to have jurisdiction over the case in front of them. If they just clearly obviously lacked jurisdiction, they can be held liable for that as well. So having laid that groundwork, the Eighth Circuit then turns to this facts of this particular case. And it draws a line between the two arrests. And it says, as to the first arrest, the judge was not acting as a judge. You know, there was no motion to arrest these kids. The kids weren't even in the courtroom. The judge arrested them personally. He didn't order someone to arrest them. He just walked, walked in, arrested the kids, put them in jail. And in the words of the Court, judges are not jailers, right? So the court says no immunity for that. So far, so good. But then an interesting thing does happen: the court says, well, as to the second arrest, there the judge was acting as a judge. The court says that, you know, basically, the judge issued an order. He sort of wrapped it up in the formalities of what judges do. And so that looks enough like what judges do that it is a judicial act. And the court says, well, he did have jurisdiction because Missouri courts are courts of general jurisdiction, and basically have jurisdiction over everything, so he's immune. And, you know, I think, I think you're right. You said that we we like this decision, and we do, right? I think judicial immunity is so broad that even the first part of this is, is great. It's a major victory. But at the same time, there's also something a little weird about the decision where you have a judge, you know, he arrests these children both times without any request from the parents, and without any legal authority to actually have them arrested. But if he does it, himself, he is liable. But if he just issues this completely illegal order, and asked the Louisiana police to do it instead, well, now he's off the hook. You know, is that the right result? I'm not sure. And actually, you know, it's interesting. The judge, the Eighth Circuit gives a few examples of cases where you might not have judicial immunity, and some of these look a lot like the sort of second instance here. So the court gives us an example where you wouldn't have immunity. They say, you know, a judge can order lawyers and the case brought before them by the bailiffs, but a judge can't order the lawyers to be beaten with nightsticks along the way. The Eighth Circuit says, a judge can order a search warrant, but a judge can't spontaneously order a search warrant for the house of their neighbor. And the Eighth Circuit also gives an example of a case where a judge was held liable for having a coffee vendor arrested by the courtroom bailiffs because the courtroom vendor, the coffee vendor sold the judge putrid coffee. Real case, real case.

W

Will Aronin 14:15

Have you ever had putrid coffee? It really is a horrible offense.

R

Rob Johnson 14:18

I mean, it is a terrible thing. It is a terrible thing. But, you know, to me, this case is not that different from the putrid coffee case, right? Like he had these kids arrested in Louisiana without any motion from anybody asking him to do this, without any legal authority for it. And especially in the context of the first arrest, I think the second arrest really is not that different from the putrid coffee case. So you know, it is a good decision, but at the same time, it's a split decision. The second part, I think, is highly debatable and very troubling, right? Like, if a judge

can just have you arrested so long as they dress it up in an order, even if that order is totally illegal, I'm not sure that, you know, we want to have in that world. It's a world where you better not piss off a judge, but that is the world we live in. And at least at least the judge is not totally immune.

A

Anthony Sanders 15:08

Will, have you ever been sent to jail by a judge who wasn't wearing robes?

W

Will Aronin 15:14

Were they wearing robes? I have I have never been sent to jail by a judge. I have had a judge in the middle of a homicide trial threaten to hold me in contempt. But afterwards, we all laughed about it. So I have never actually had it done.

A

Anthony Sanders 15:31

But if you had gone to jail for contempt, I'm guessing there would be no remedy, even if it was absolutely outrageous what the judge was doing to you.

W

Will Aronin 15:40

I didn't say it was outrageous. He may have been warranted. No, there would not have been, there would not have been any remedy. I agree with Rob. It is clearly a split decision. I was a little surprised. The idea of this judge just disliking the father and these children that much that he sent them to jail for two days? The fact pattern is so outrageous that after reading it, I don't know how much more legal analysis I did as much as just Googling, finding out is this judge on the bench, and it appears that he still is. The judicial ethics counts haven't really gone through, if there are any. It's just amazing. The degree with which this judge was able to hurt this family, and just commit heinous acts, and the consequences, thankfully, are beginning to come, but too slow.

R

Rob Johnson 16:26

People sort of put that out there as the justification for absolute immunity. They say, oh, well, you'll be held accountable in some other way. Like you'll be, you know, if you're elected, you won't be reelected. If you're appointed, you'll be impeached. Or there'll be some sort of ethics complaint. But it turns out, in practice, none of that is meaningful, right? Like often, you know, you're not going to get impeached for political reasons or because it's just too hard. You're not going to get unelected, because turns out, sometimes voters like judges who do ridiculous things, just like they like politicians who do ridiculous things. And ethics, you know, you're basically asking other judges to hold their peers accountable, and that's not always going to happen.

A

Anthony Sanders 17:07

I mean, that's definitely true with prosecutorial immunity, who get absolute immunity when they are acting as prosecutors, and it's a little bit more of a hazy line there, but it's similar. And, and I know a lot of work has been done on, you know, the worst that almost ever happens to a prosecutor is some kind of informal, or formal, but not meaningful slap on the wrist. And judges, I would imagine, it's even worse. The rare judge who who, you know, doesn't win election because of because of some reelection because of some scandal. Yeah, I am similarly torn as you guys on the good and the bad in this case. I mean, so the, you know, the arrest warrant, the second one, where the, the only actual arrest warrant. That, you know, that would obviously be a candidate for mandamus review, which is very hard to get, but I can't see how it wouldn't be granted in this case where no one's even asked for the arrest warrant, and it's out of state and, you know, pandemic, all the other reasons you give. I guess, you know, to get to play a little bit of devil's advocate, I guess the reason for the doctrine as it is in this case, is that it, it is so, it can be so gray, what the difference is between, you know, a judge just acting in a way that would be reversed on appeal, or even by mandamus. And then a judge acting outside of the lines. It's just so gray that it's like, you put the robe on, you take the robe off. That's how we're gonna look at it. Is that a fair way to summarize it, Rob? Because I, I mean, of course, there are hypotheticals you can come up with where the judge has a robe on and is doing, you know, is acting outside of the box, but I guess they just they they're going to err on the side of immunity.

R

Rob Johnson 17:47

Yeah, well, so I think that's the problem, right? You can't possibly just come down to the robe. And that's like, the coffee example is such a good one, right? Like if the judge, the judge in the coffee example, he's wearing his robes then he actually, I mean, the the facts are just incredible. The judge actually orders the bailiffs to go out on the street, arrest this hot dog vendor, and he specifically says, "You have to bring him into my courtroom in handcuffs." So the deputies handcuffed the vendor. The vendor is like, "Please could you not handcuff me?" And they're like, "No, no, we got to handcuff you." So they walk into the courtroom. All the people in the courthouse are like, yelling to each other, "They arrested the hot dog man!" And they bring him into the courtroom. They have a court reporter and the judge proceeds to basically interrogate the guy about his coffee. And you know, it's saying that the coffee is putrid, vendor's like, "No, it's not." He then lets him go. But then when the coffee vendor comes back that afternoon, the judge has him arrested again, and brought into his courtroom a second time. But like, you know, he's wearing robes, there's a court reporter, there's, like all of the formalities are being observed. And yet, it's just completely illegitimate and not a legitimate exercise of judicial power. You have to draw that line somewhere, right? And I think with the second arrest, the things that to me kind of put it on the other side of that line are first off, I think you have to view the two together, right? Like you have a pattern here. Second, there's no motion to arrest the kids. I think that's a very important fact, right? Like, it's not like the mom said, "Hey, please arrest my kids." And the judge was like, "Okay, fine, I'll arrest your kids." Like, there's no motion, he just decides to do this by himself. And then the other thing is, there's actually just no legal authority to do this. Like there's a statute that says when you can issue pickup orders, there has to be like a petition for juvenile delinquency. There is no petition for juvenile delinquency. The judge just like decides to do this, even though it's just legally not allowed. And sure yeah, like there's, you don't want every bad judicial decision to turn into a lawsuit against the judge. Like, that's why we have appeals instead. But in this case, like there

was a mandamus petition, it was granted. But that takes time. And like in the two intervening days, these two kids are sitting in jail in Louisiana, in the middle of a pandemic, and there has to be some recourse for that.

W

Will Aronin 21:39

It's just amazing to, the mindset of the how, these kids being in Hollywood is so bad for them that I'd rather throw them in jail for days against the parents wishes for the crime of not wanting to live life the way the judge wants to. Like this is some of the worst, like fact pattern I think I've read in a while.

A

Anthony Sanders 22:00

I got a closing question, which is, you talk Rob about the history of having a duel with a judge, and then they invented appeals. And I get that that, there's this fascinating footnote, footnote one in the opinion, where Judge Stras recounts some of this stuff. And, you know, cites the history books, and it talks about the law at the time of Henry II, which was in the the mid 1100s. But, you know, it's not like appeals didn't exist before that. I think there were in some ways, you know, courts of appeals and the court of Constantinople and, and elsewhere. So it doesn't seem like a very self-sustainable practice. Do you know anything more than about that history? This is really a different podcast, I guess, but I would, I would love to dig into a little bit. I mean, I know about duels when it came to litigation, or when it came to criminal law. But I actually didn't really know about duels when it came to appeal.

R

Rob Johnson 23:08

I, you know, I wish I knew more. I but I don't know a ton. I do know that in England, a lot of this also was there. You know, if you're familiar with the history, there was the different types of courts in England. So you had the king's bench, obviously, but then you also had the ecclesiastical courts. You had the common law courts, which are like sort of the same as the king's bench, but maybe sort of different. And then you have like, the local lord, can be a court. Yeah.

A

Anthony Sanders 23:36

Yeah, well, I think there were the county courts.

R

Rob Johnson 23:39

Yeah.

A

Anthony Sanders 23:39

And at some point, the county courts were kind of developed, that the king's bench was

developed as a kind of appeal of the county courts for cases that came from the countryside, not from that were filed in London. And I'm guessing maybe this was early on. Maybe after the Norman Conquest, when things were kind of all over the place, the county courts would just kind of have this duel thing.

R Rob Johnson 23:39

So I think in addition to the duels, though, a lot of this was judicial immunity. A lot of it was basically they were establishing the hierarchy of the different judges. And so actually, in England, like they didn't, not every judge had judicial immunity. And so basically, if you had judicial immunity, that made you like an appellate court, but if you didn't have it, then like you could be appealed by filing a lawsuit challenging your decision.

A Anthony Sanders 24:03

I see. Yeah. Okay, that makes sense. More sense.

W Will Aronin 24:06

I just love, I love how you two can talk about the history of the different level of courts off top your head and I am literally sitting here thinking about the duels and just imagining the Mountain from Game of Thrones being the greatest judge ever, because no one could ever appeal his battles. Like, just our minds work very, very differently.

R Rob Johnson 24:47

Well, they do mention in the decision you didn't have to do the duel yourself. You could have a champion.

A Anthony Sanders 24:53

Yeah, champion.

R Rob Johnson 24:54

So this actually is like Game of Thrones adjacent, right? So like, because in Game of Thrones, right, the mountain is not, he's like someone's champion, I think, in in the duel. So very similar actually.

W Will Aronin 25:04

Prince Oberyn Martell. That's who I'm taking on that one.

A Anthony Sanders 25:08
Well, if I had a champion, I'm sure it would be one of you two.

R Rob Johnson 25:12
I think you could probably choose better.

A Anthony Sanders 25:16
Oh, that's all I got right now. So we're gonna move on to another champion. And this is this is a beat cop in in Lansing. So not not a huge town, but a town -

W Will Aronin 25:34
Home of the greatest point guard ever.

A Anthony Sanders 25:37
We don't, we don't need to get into that. But where there's a cop who was on the beat, who noticed something suspicious. I have to say I would be a little suspicious of this too, and then what led from it. So, Will, what was going on for this man, Jaron Morgan, and why was he sleeping in his car?

W Will Aronin 26:05
So the case is U.S. v. Morgan, and it's a case authored by Judge Sutton out of the Sixth Circuit. Why he is sleeping in his car is a question that the Court, the officer, and the defendant all have very, very different answers to. But I really like this case, because it touches on two issues that are sort of near and dear to my heart, both suppression in criminal cases and just the Fourth Amendment's Community Caretaking doctrine. It's also just an interesting decision because although I do like the general holding, I have some mixed feelings about the factual analysis. So here's largely what happened. So just an officer is responding to just a completely unrelated non-emergency call at 5am on a residential street. Someone is snowed in. Their car is snowed in, I'm not actually sure why that's a police issue, but the police went out, I guess helped the guy. On the way to this like residential street, the officer sees someone asleep in a running car at 5am on sort of an isolated street. So the cop sees that and sort of considers it suspicious, but he goes, he helps the snowed in civilian. Takes about 10, I think the decision said 11 minutes. And as he is, as the officer is leaving the street, he still sees that the person is asleep at the wheel at this running car. So basically the officers thinking to himself, or according to the Community Care doctrine, Caretaking doctrine is saying, well, this, the person could be intoxicated, they could have been in the middle of a DUI, they could be asleep, they could also just need help. So the cop goes up to the car, and generally, nobody really thinks that this is inappropriate. The cop saw something suspicious, or in this doctrine there, something that that

the officer thought he needed to look into and help. That's all fine. So typically, what you imagine is what the cop is going to do is knock on the window, shine in the flashlight. That's not exactly what the officer does. So the officer, rather than knocking on the door, he actually just opens the car door and asks Morgan, "are you okay?" And this is where the facts become, they're not overly contested. The decision specifically notes that the the officer turned on his body cam. So it seems to suggest that the fact pattern is pretty supported by the camera footage. So the defendant, Morgan, responded to "Are you okay?" pretty groggily. He would seem maybe intoxicated. The officer asked him to get out of the car. There is a scuffle, like some disagreement. The decision said Morgan hits his own head on the steering wheel, which seems a little weird. In any event, the officer says he sees the defendant reaching for a cardboard box on the passenger seat, on the passenger side. The cop says he thought it was a gun, grabs him, there's a fight, other officers are brought in. The person, Morgan, is arrested. Incident to the arrest, they searched the car and they find, I actually went back to the briefs for the detailed facts, but it was about somewhere between 25 to 30 grams of meth, fentanyl, cocaine and heroin. And I think maybe most tellingly, there actually was a gun specifically in that cardboard box on the on the passenger side. Now I will tell you, my background is criminal defense. So I always look at these facts somewhat skeptically. But going back to the briefs and the fact that they talked about the body cam, and the fact that everything was found, probably went down mostly the way the cop is saying it did. But then it goes to a suppression motion, and Morgan moves to suppress basically saying that the search was unreasonable. Now that, basically the argument was it was unreasonable because it was a Community Caretaking Doctrine. Now community caretaking is designed instead of for criminal investigations, the idea that police are allowed to do non-investigatory steps. They can deal with public safety, they can look into dangerous situations, they can deal with illegally parked cars, things like that. And if it happens to be that while they're doing it, they see evidence of a crime, that that is an exception to the to the warrant requirement. So, Morgan says that while they may have been able to look into it, it was entirely unreasonable to simply open the car door and not just do the less invasive steps, of knocking on the door or shining a flashlight, what have you. The officer says that in his experience, startled people, if you knock on the door when they're intoxicated, might just push the gas and slam on the gas and drive through. And he had just, and he mentioned that he had just helped a civilian basically on the same street, and that he was afraid that the driver might actually hurt someone. Fair enough. The off the -

R

Rob Johnson 30:51

Is it though?

W

Will Aronin 30:53

That's sort of the second takeaway. The best question is why are you startled when someone like knocks on the window but not opens the door? It's sort of questionable.

R

Rob Johnson 31:03

Is it like presumed that he's like sleeping with the car in gear, but his foot on the brake, so that it's not moving?

W

Will Aronin 31:12

That's why I kind of like the general holding. So let's talk about what the holding is really quick.

A

Anthony Sanders 31:17

Wait, I hadn't even thought of that. Was it an automatic or manual? Does it even say?

W

Will Aronin 31:21

Oh, I think I saw. My guess is it's automatic, just from the stats, but that would be really funny if it wasn't.

R

Rob Johnson 31:28

Even if it's an automatic like this presumes the car is in drive. Right?

A

Anthony Sanders 31:33

Yeah, the car wouldn't be in drive if it's an automatic, there's no way.

W

Will Aronin 31:37

No, it completely right. And that's why ultimately, we're skipping ahead a little bit. Because the court does suppress the evidence. And he talks about the Community Caretaking Doctrine, what it was for. Sutton goes into quite a bit of history of the doctrine going back talking about the the non-criminal investigatory, non-criminal aspects that police have done throughout history. And ultimately, the the court says that community caretaking would have allowed the officer to investigate, but they have to, any actions have to be reasonable. And essentially that because there were less invasive ways for the cops to investigate, knocking on the door essentially, opening it was, opening the door was unreasonable, and therefore it was suppressed. And I will say, interestingly enough, the Morgan pled guilty and actually took 17 years, but preserved his right to appeal the suppression issue, making this decision essentially an all-or-nothing. So he either was going to get 17 years for this or zero, which is actually pretty typical and criminal cases. It's just, it's an interesting, interesting like gamble type of thing. There are sort of two takeaways that I find really fascinating about this case. The first is just it's nice to see the continuing narrowing of the Community Caretaking Doctrine in general, and especially in the context of cars. Rob and I are actually co-counsel on a case in Delaware involving the way town sees impound and tow and ultimately scrapped cars. And the court largely justifies it or rather, the city largely justifies their actions based on the Community Caretaking Doctrine, and largely what some cases have said, is anything dealing with cars allows cops to do, to investigate because they are mobile, and they can be moved, they can be seized, etc. So it's nice to see some sort of narrowing, because listeners here probably remember that in 2021, Supreme Court, in a case called Caniglia, actually cast doubt on the

doctrine, especially when it comes to people's houses. And it's just nice to see it's expanding. I will say the other second thing that caught my eye, though, was discussed when Rob, when you and Anthony were joking about "is it reasonable to think that startled people just drive off?" What the Court talks about is that the officer just made this assertion that it's entirely, that like, that, in their experience startled people might push the gas. And the Court noted that there was no support for that. That the police, the officers, the prosecutor didn't introduce any evidence, didn't introduce any expert evidence, any empirical data, anything whatsoever to say that this assertion or this training is real. And if what this case means is that, at suppression hearings, cops can't just go in and say like, "in my experience, criminal defendants or suspects are suspicious for one of 1000 different reasons" and if courts actually hold them to a level of proof and say, "There has to be some basis. Show me the training, show me the data, where are you getting that?", this decision connect should have a pretty important impact of slowing down just officers kind of like later on, post hoc rationale for why they basically grabbed someone and searched them. That's that could be the biggest takeaway, at least to me.

R

Rob Johnson 35:15

Yeah, so my reaction to this case, you know, it, I've always sort of felt like in the area of the Fourth Amendment, like we have these doctrines that just if police officers come on the stand, and they say the right things like, "Oh, I was just trying to help," or "I was just worried for my safety", or "I was worried for someone else's safety", that we have these doctrines that it's like magic word doctrines that just then let officers off the hook. And the weird incentive that that creates is that it creates an incentive for officers to lie, to get evidence on into court. And basically, it's like, if you just lie and say that you were worried about someone's safety, or you were there to do one thing, when you were really there to do another that courts will just accept that. And it's very pernicious for, obviously, the judicial system to have, you know, to just sort of like, accept lies and not critically examine them. But it's also I think, been really bad for the whole profession of policing, where you have like a generation of police officers, and not to disparage anyone, right? But like, it creates this idea that like part of your job as a police officer is to lie on the stand. And that's not good for the profession of policing. It's certainly not good for the courts. And it is nice to see judges push back against that.

A

Anthony Sanders 36:34

Yeah, I completely agree with what both of your takes on that. The interesting thing to me was, well, one of the interesting things was that if the cop had, you know, given a different justification, I could see this going different ways, such as this guy is passed out in the morning with the car running, and so there's a really good chance he's intoxicated. And so I'm going to use that as a excuse for a search. I don't want to, I don't need to do the analysis of that's going to work, but it seems like it would go in a different direction maybe than the the community caretaking direction. I was really fascinated by the history that Judge Sutton gave about community caretaking. One thought, and this is a very different angle, but one thought I had about that. Will I'd be curious if you have a thought, and this is really leaving it for another day is, right, we've been talking a lot the last few years about how cops to do too many things. And I'm very sympathetic to that argument, right? So cops do all these welfare checks, they do all these things that you don't need a guy with a gun to do, and that can escalate situations, and you know, this was a huge conversation after the George Floyd murder and in all kinds of other ways. But this also shows, like this fact pattern shows that it, it would be a little hard in some

ways to extricate cops from that role, because cops just kind of land up doing a lot of that stuff in their normal crime fighting. So what this then demonstrates is that if the police are going to do less community caretaking type things, which I think they should do, I'm very sympathetic as I said to that, sometimes it's going to be hard for that to happen, because this officer was doing, you know, a call that was within his purview as like, you know, patrolling. And then he sees this, he sees a guy in a car. He's calling it, you know, kind of his community caretaker hat, he's checking on the guy, but what is he supposed to do? Call a social worker to come down to check on the guy when he's already there on the street? You know, that's not going to be very efficient, and so he goes and does that. But then at the same time, he of course, has his cop hat on, and things escalate very quickly, and he goes back into being a cop. So it would be, it's complicated to try to remove police from this other role. And of course, this is a very controversial issue, but it just shows how there's not a lot of, there's often not a lot of bright lines in having, you know, what police do as crime fighters and then what police do and other ways that we think maybe other agents of the state should or even of civil society should be involved with.

W

Will Aronin 39:53

Yeah, I'm here for that argument. I'm really sympathetic to the idea that there are, police are doing too many things and just, welfare checks can escalate and have escalated in a way that maybe we don't want to involve law enforcement. That there may be better solutions to that. It actually, I feel like it ties, what you just said ties in a lot of the themes from this decision, and what Rob said. And it's funny that Caniglia is the case that sort of cast out on the Community Caretaking Doctrine as a whole, and then Caniglia sort of ends, or maybe it was a concurrence by Roberts I want to say, talks about how there wasn't. It was specifically because the government decided to rely exclusively on the Community Caretaking Doctrine that it just didn't work in that there really were other excuses or other rationales rather, for why the police could have acted. And going back to the way you open this, the way you open this podcast about like the narrator from the film noir, like, honestly, what the cop did was pretty good policing. He saw something that was really suspicious in a neighborhood, and it was either, realistically, either a drunk driver, or he probably had some suspicion that there was drug dealing involved. And suppression always has to be decided, absent, like while ignoring what you actually find. But let's be honest, this guy had a gun, was probably reaching for it, and had 30 grams of drugs on him. So the cop did a good job. And if he didn't have to rely on like the Community Caretaking Doctrine as a whole, and sort of getting like, bury himself into this weird cul de sac of legal arguments, he could have really said, "Look, this was super suspicious, I'm very concerned about it" and actually investigate the criminal activity and not have to talk about how it was really, how everything really fit within the Community Caretaking Doctrine. So hopefully, like casting doubt on that doctrine as a whole might eliminate some of the problems we keep seeing.

A

Anthony Sanders 41:53

Sure.

R

Rob Johnson 41:55

I gotta jump in though, I don't agree. I really disagree. So like the judge, the officer made a

couple big mistakes, right? Like sure, yeah, this looks suspicious, maybe. But first off, I don't agree that it's either drunk driving, or drug dealing, because like, there are just people who sleep in their cars like, that is a thing that happens. Like sometimes people don't have a place to stay because they're homeless, or like, they were kicked out of the house by their spouse, or like, who knows, but they sleep in their cars. Like that doesn't necessarily, it's not necessarily suspicious. Or maybe there was a big blizzard. He was driving home, and he just like, didn't want to drive in the snow, so he slept in his car. I don't know. But I don't think that like, is itself inherently suspicious. Second off, and this to me is like the main thing, he didn't have to open the door of the car. He could have just knocked on the window, and that's why the whole discussion we had earlier about whether the, like this, this idea that this officer gives on the stand of like, "Oh yeah, like I was worried that the car was going to accelerate off if I woke him up by tapping on the window." It's just ludicrous. And the police officer definitely did not have to open the door, right? And that's what made it too intrusive. That was where he went wrong. He should have just knocked on the window.

A

Anthony Sanders 43:21

I completely agree with that. I think it's the, the fact we're even using this community caretaker, like it's a thing, right, that allows this argument to be made, kind of just unnecessarily muddies the waters. I think my point is more, whether you have this doctrine or not, cops do this kind of, you know, non-crimefighting thing, which he probably wasn't doing here, but they do do in other cases. And so that's unfortunately, there's some gray areas on what is and what, what isn't. I think the doctrine doesn't help because then the doctrine allows for these searches that aren't crime fighting searches, that aren't under the Fourth Amendment, and therefore cops want to be community caretakers, and not crime fighters, when they're actually really crime fighters.

W

Will Aronin 44:15

Yeah, and this goes back to what you were saying, Rob, about just like the testa-lying. Going on the stand and just making things up. If he didn't have to fit what the officer did into the Community Caretaking Doctrine, I'd actually, taking off my criminal defense hat, I'd actually be really interested to have the officer just explain very, like, detailed why he was really suspicious of this car in particular, and not fit it into the doctrine. Because again, like outside, I'm not defending the guy, he had a gun and 30 grams of individually wrapped drugs, so like there probably was something more than just "he's sleeping in his car". And I would much rather have the officer get on the stand, subject to cross examination, and actually explain the thought process, go through some of the training, go through what it was that he observed at that specific time, and then, again, subject to cross examination, learn it. But because there's this loophole of, I don't know if I want to call the whole Community Caretaking Doctrine a loophole, but like there is this very broad doctrine that sort of swallows up the entirety of the probable cause or the warrant exception, or requirement. Like, I just don't want to keep hearing officers get on the stand and explain how they were really just trying to help when honestly, what they saw was someone they believed to be a criminal, and probably had probable cause to believe it. And now let's actually question the probable cause on subject cross examination. That's what a suppression hearing is supposed to look like, and it often doesn't. And that would be a huge thing to come out of this case, if we could get, if we could go back to what the hearing is supposed to be.

A

Anthony Sanders 45:44

Well, thank you both. I'm gonna go back to thinking about the last time I slept in a car, and how I would have, I didn't think I had the, the engine running, luckily, and how I might respond to something like that. And in the meantime, I hope our listeners think it through, too, and I hope they've enjoyed our two guests here today. Thank you both for coming on. That was, that was excellent. These were two really fun cases. We'll look forward to our listeners coming back next time, where we're going to be having a special guest. I hope you will enjoy our next show. Don't want to give too much away at the moment, but we'll have a special guest next week. But in the meantime, I hope that all of you enjoyed our Independence Day a couple days ago from when we recorded this. But in the meantime in the future, I hope that all of you get engaged.