ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

STATE OF ARIZONA v. JOHNATHON BERNARD SERNA
CR-13-0306-PR

PARTIES:

Petitioner: Johnathon Bernard Serna

Respondent: State of Arizona

FACTS:

Phoenix Police Officers Richey and Nunley, patrolling at about 10 p.m., noticed Johnathon Serna standing with a woman in the middle of the street. As the officers turned onto the street, Serna and the woman separated and walked in opposite directions. The officers knew the area as "high crime," a "gang neighborhood" where "violence takes place." They thought the behavior of Serna and the woman was "a common stratagem in the area, as persons disperse to avoid contact with law enforcement inquiries into potential criminality." The officers got out of the car and called to Serna loudly enough to get his attention. Serna turned around and walked toward the officers, acting "very cooperative and polite." Officer Richey asked Serna if he lived in the house nearby. Serna responded that it belonged to a friend. The officer then noticed a bulge on Serna's waistband and asked him if he had any firearms or illegal drugs. Serna said he had a gun. Officer Richey then ordered Serna to place his hands on top of his head and removed a gun from a holster on Serna's waistband. Officer Nunley asked Serna if he had ever been incarcerated or had any felony convictions. Serna said he had been convicted of a felony, so the officers arrested him (possession of a gun by a felon is a crime). Upon admitting the prior conviction, he was handcuffed and given *Miranda* warnings.

Serna was charged with and convicted of misconduct involving weapons. Before trial, he moved to suppress the gun, asserting it was the fruit of an investigatory stop that violated his fourth amendment rights. The trial court denied the suppression motion, reasoning:

> Given the totality of the circumstances, the encounter above was not so intimidating that a reasonable person would feel he was not free to leave. *State v. Wyman*, 197 Ariz. 10 (App.2000). The officers did not draw their guns, give commands or use other intimidating behaviors to get the Defendant to respond to their questions. Further, Defendant gave no indication that he was unwilling to answer questions. Once the officers became aware Defendant had a gun, they were allowed to remove the gun and conduct a pat down for safety purposes. *State v. Caraveo*, 222 Ariz. 228 (App. 2010), citing *United States v. Orman*, 486 F. 3d 1170 (9th Cir. 2007).

The court of appeals affirmed in a split decision. It described three types of encounters possible between police and individuals: (1) consensual encounters (individual willingly agrees to speak to officers without any objective level of suspicion); (2) stops allowed under *Terry v.*

Ohio, 392 U.S. 1 1968) (either a *Terry* stop – a brief detention of a person for investigative purposes based on reasonable suspicion of criminal activity, or a *Terry* frisk – a limited protective patdown search of a person, who officers reasonably believe may be armed and dangerous, for weapons); and (3) an arrest (that must be based on probable cause). The majority then recognized that, in *In re Ilono H.*, 210 Ariz. 473, 113 P.3d 696 (App. 2005), Division Two of the court of appeals held that a police officer was not entitled to conduct a protective search as part of a consensual encounter, even if the officer believed the suspect was armed and dangerous, in the absence of any reason to believe the target had committed or was committing a crime. But the majority did not follow *Ilono*. It noted that another panel of Division One had expressed reservations about *Ilono* in *State v. Caraveo*, 222 Ariz. 228, 213 P.3d 377 (App. 2007). It said the *Caraveo* court acknowledged that the Ninth Circuit court in *Orman* upheld a patdown for "officer safety purposes" during a consensual encounter because "reasonable suspicion that the suspect is armed is all that is required for a protective *Terry* search." The majority found its holding gives police enough flexibility to react reasonably in situations they encounter, while safeguarding the constitutional protections of lawfully armed citizens. The majority also noted that, even if it agreed with *Ilono*, differences in this case would justify a different result: here the officer retrieved a gun volunteered by Serna to be on his person, Serna acceded to its retrieval, and there was no evidence that officers even touched Serna's person in the course of retrieving the weapon; but, in *Ilono*, the subject (a minor) concealed on his person evidence of crime (a beer bottle) that officers actively seized from him without asking him any questions.

Judge Norris dissented based on her understanding that what began as a consensual encounter transformed into an unreasonable search and seizure when police "commanded" Serna to place his hands on his head and took a gun from him. She said to be constitutional, *Terry* requires a lawful investigatory stop (based on reasonable suspicion), and to proceed from a stop to a frisk police must reasonably suspect that the person stopped is armed and dangerous. This is exactly what the Arizona appellate court recognized in 2005 in *Ilono* – that a police officer's right to conduct a frisk must be based on the officer's right to initiate the investigatory stop in the first place. She concluded the majority's decision is not supported by public policy (that is, the legislature did not find that "armed equals dangerous" when it dealt with concealed carry laws) or the totality of the circumstances.

ISSUE:

Under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), an officer may conduct a patdown of an individual if the officer has 1) reasonable suspicion that criminal activity is afoot, and 2) reason to believe the individual is armed and dangerous. Here, officers engaged in a consensual encounter with Serna and then, without reason to believe that criminal activity was afoot or that Serna was dangerous, escalated the encounter to a patdown when officers ordered Serna to place his hands upon his head and retrieved a gun. The Court of Appeals held that there was no need for reasonable suspicion that criminal activity was afoot or reason to believe than an armed individual was also dangerous. Did the lower court err?