

IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA,
Appellant,

vs.

PAUL CLIVE JOHNSON,
Appellee.

FD
AUG 10 1988
CLIVE JOHNSON
Deputy Clerk

CASE NO.: E71,631

BRIEF OF AMICUS CURIAE

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PRELIMINARY STATEMENT

In this Brief, Amicus Curiae, Department of Highway Safety and Motor Vehicles will be referred to as the Department. Petitioner, State of Florida will be referred to as the State. Paul Clive Johnson will be referred to as Respondent. The record will be denoted by the letter "R" followed by the appropriate page number.

SUMMARY OF ARGUMENT

The instant case presents an issue of first impression to the Florida Supreme Court: whether an officer may lawfully detain a vehicle and its occupants based solely upon facts consistent with a drug courier profile developed by the officer based upon his training and experience. The Department, as amicus curiae, contends that the Fourth Amendment balancing test applied by the United States Supreme Court and this Court in other decisions which affect Fourth Amendment rights, resolves this case in favor of the validity of the stop.

In weighing the gravity of public concern, the degree to which the detention of the vehicle advances the public interest, and the intrusion to the motorist, an investigatory detention pursuant to a profile is analogous to a sobriety checkpoint which has been reviewed by this Court. As in the case of a checkpoint, the detention of the vehicle serves the public interest by investigating the officer's suspicions that the vehicle is transporting controlled substances. Similar to the checkpoint, the officer's discretion in conducting the stop can be limited. A drug interdiction program utilizing profile stops can be approved in advance by agency supervisors to avoid arbitrary and capricious detentions. Furthermore, an investigatory detention pursuant to a profile stop involves less intrusion to the motorist than a checkpoint.

The facts observed by Trooper Vogel which gave rise to the stop of Respondent's vehicle were consistent with prior felony arrests made by the trooper. Although the trooper's profile may

be broad enough to include the behavior of innocent citizens, the trooper's experience and the minimal intrusion to the motorist support the stop on the basis of the trooper's reasonable suspicion of criminal activity.

When properly conducted, the drug courier profile is an effective tool to intercept the flow of drugs on the state highways. A brief investigatory detention to satisfy a trooper's concerns of criminal activity is not an unreasonable seizure in light of the record in this case. The certified question of the appellate court should be answered in the affirmative and its decision reversed.

ISSUE

MAY A PROFILE OF SIMILARITIES OF DRUG COURIERS, WHICH IS DEVELOPED BY A LAW ENFORCEMENT OFFICER AND WHICH, IN LIGHT OF HIS EXPERIENCE, SUGGESTS THE LIKELIHOOD OF DRUG TRAFFICKING, BE RELIED UPON BY HIM TO FORM AN ARTICULABLE OR FOUNDED SUSPICION WHICH WILL JUSTIFY A BRIEF INVESTIGATORY TRAFFIC STOP ON HIGHWAYS KNOWN TO THE OFFICER TO BE FREQUENTLY USED FOR THE TRANSPORT OF DRUGS?

ARGUMENT

Interdicting the flow of illegal drugs on the state's highways is a major concern of the Department. The legislature specifically directed the Florida Highway Patrol to seize contraband transported on the highways, and this duty remains a top priority with the Patrol. See section 321.05(1), Florida Statutes (1987).

The amount of drugs being transported on Florida highways staggers the imagination. During the time period of July, 1986 through June, 1987, troopers of the Florida Highway Patrol seized a total estimated value of \$67,513,512.82 in illegal drugs. Included in this amount were 1941 pounds of cocaine and 10,781 pounds of marijuana.¹ State roads and the Florida Turnpike are lifelines for drug couriers. In most cases, only a trooper of the Florida Highway Patrol stands between the courier and fulfillment of his illegal activity.

Without the commission of a traffic offense, these cases would never have materialized. The success of the Patrol's drug interdiction program currently rests on the possibility that a

¹Source: Department of Highway Safety and Motor Vehicles, Division of Florida Highway Patrol, Office of Records & Information.

drug courier may commit a traffic violation which would support a lawful detention. See for example State v. Irvin, 483 So.2d 461 (Fla. 5th DCA 1986); State v. Oqburn, 483 So.2d 500 (Fla. 3rd DCA 1986).

As the present case illustrates, however, drug couriers are known for their cautious driving behavior to avoid any encounter with a law enforcement officer. (R 20) These couriers have no fear of apprehension if the decision of the Fifth District Court of Appeal in the present case is allowed to stand. The Department contends that experienced drug enforcement officers should be permitted to conduct brief investigatory detentions of such drivers who fit a drug courier profile on the basis of their reasonable suspicion of criminal activity, notwithstanding the absence of any traffic offense. The gravity of the drug problem, the effectiveness of the drug courier profile, the limited discretion of the officer conducting a profile stop, and the minimal intrusion to the motorist support the Department's argument.

Investigatory detentions pursuant to a profile stop can be effectively implemented within the constitutional parameters established by the United States Supreme Court. Certainly, a stop by an experienced trooper who observes facts consistent with the drug courier profile is a far cry from the roving patrol outlawed by the Court in Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Prouse has been frequently cited as the underlying authority in support of DUI roadblocks.

State v. Jones, 483 So.2d 433 (Fla. 1986). However, the Court's dicta in Prouse has broader implications than just the validity of checkpoints:

This holding does not preclude the State of Delaware or other states from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock stops is one possible alternative. (Emphasis supplied) Id. at 63, 99 S.Ct. at 1401.

Obviously, the Court's concern in Prouse is the arbitrary and unlimited discretion that may be exercised by an officer in detaining a motorist. Conversely, an investigatory stop that involves minimal intrusion to the motorist and limited discretion of the officer would not be offensive to the Court.

The Florida Supreme Court has previously recognized that a checkpoint may be constitutionally administered. State v. Jones, supra. This Court determined the constitutionality of the roadblock by balancing the legitimate government interests involved against the degree of intrusion on the individual's fourth amendment rights. Id. at 435. Citing Brown v. Texas,² the Court explained that in every warrantless search and seizure that the balancing test involves three considerations: 1) the gravity of the public concern that the seizure serves; 2) the degree to which the seizure advances the public interest; and 3) the severity of the interference with individual liberty. 483 So.2d at 435.

²443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

The Jones decision is significant because this Court held that with proper guidelines which restrain the officer's discretion, a DUI roadblock may be constitutionally administered. In particular, the Court noted the state's compelling interest in protecting the public from drunk drivers and the minimal intrusion that results from a proper roadblock procedure. With regard to the gravity of the public concern served by the seizure and the degree to which the seizure advanced the public interest, the court remarked that

The public, however, must keep in mind that the privilege of driving an automobile over a public highway does not amount to an absolute organic right. (citation omitted) Our government provides the roadways of Florida as a benefit to the public at large. Accordingly, this state retains extensive authority to safeguard the driving public via its police power. (citations omitted) Id. at 439.

The considerations by this Court in Jones apply to the present case. If a sobriety roadblock can satisfy the Fourth Amendment balancing test, surely a brief investigatory stop pursuant to established guidelines which limit a trooper's discretion also passes constitutional muster. Certainly, the gravity of the problem presented by drug trafficking is at least commensurate with the threat posed by drunk drivers. In his concurring opinion in United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), Justice Powell recognized the compelling interest of the public to interdict the flow of drugs on the nation's highways:

Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin, may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement." 446 U.S. at 561, 562.

A brief investigatory stop of a vehicle that fits an established drug courier profile would obviously advance the public interest by allowing the officer to investigate his concerns that the vehicle was in fact transporting controlled substances. Any intrusion to the motorist would be less than that occasioned by a roadblock. In the present case, unless additional grounds developed to continue the detention of the motorist, Trooper Vogel released the vehicle within a few minutes. (R 29, 32) In contrast, a checkpoint on a well traveled road inherently involves some delay to the motorist which a fortiori results in a greater intrusion to the motorist.

In a drug interdiction roadblock conducted by the Department on January 12, 1984, the Highway Patrol stopped 278 of 554 vehicles which passed through the roadblock. Cardwell v. State, 482 So.2d 512 (Fla. 1st DCA 1986). When traffic backed up, the officers waived the traffic through. Id. at 13. Cardwell complained of the length of delay at the roadblock, although this issue was resolved in favor of the state. Id. If Cardwell had been stopped pursuant to an investigatory detention, the length of his detention would not have presented a similar concern.

Also, from an operational standpoint, the drug interdiction checkpoint which resulted in the arrest of Cardwell was not very productive. Of the 278 vehicles stopped at the roadblock, Cardwell was the only person arrested. 482 So.2d at 514. In contrast, one-third to one-half of the fifteen-to-twenty stops made by Trooper Vogel pursuant to his profile resulted in a drug arrest. Although the District Court of Appeal correctly reasoned that the reasonableness of the intrusion is determined by all the relevant circumstances rather than on the basis of any statistical analysis,³ it is clear to the Florida Highway Patrol that profile stops are significantly more effective than a drug interdiction checkpoint. If Trooper Vogel made two narcotics arrests in a given evening, he was twice as productive as the checkpoint which produced Cardwell's arrest.

It should also be apparent to this Court that with a profile stop, only one trooper is involved, although he may request a back-up officer for his protection. While the trooper is on patrol, he is free to assist a disabled motorist, respond to an accident if necessary, make criminal arrests, and otherwise attend to any needs that may arise during the course of his patrol. However, at a checkpoint, many officers are present in one location during the operation. These officers are precluded from performing other essential law enforcement duties and they are not in a position to detect and seize controlled substances which may be transported elsewhere.

³Id.

Moreover, as in the case of a checkpoint the officer's discretion in conducting a vehicle stop can be limited by a definitive profile, such as the profile employed by Trooper Vogel. If a list of relevant factors may be considered by Border Patrol Officers in conducting investigatory vehicle stops to detect the smuggling of illegal aliens,⁴ factors relevant to drug smuggling may be similarly developed. Experienced troopers should be able to consider the characteristics of the area in which they encounter a vehicle (whether the highway is known for illegal drug activity), in addition to the driving behavior, the appearance of the vehicle, the appearance of the driver and occupants, and the time of day. These factors, present in Trooper Vogel's profile, are consistent with the profile characteristics approved by the United States Supreme Court⁵.

Two other points must be considered that would limit the application of the profile and the discretion exercised by the officer: the experience of the trooper and appropriate supervision of the officer. The drug enforcement experience of Trooper Vogel weighs heavily in favor of the validity of his investigatory detention because the facts observed by this trooper were consistent with his prior felony arrests. This pattern of criminal activity observed by Trooper Vogel gave him a reasonable suspicion of criminal activity to support a detention

⁴United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

⁵422 U.S. at 884, 885; see also United States v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985).

of the Respondent. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Even though a profile may be broad enough to include innocent citizens, the United States Supreme Court has consistently looked to the training and experience of the officer to determine if the facts observed by the officer gave rise to a reasonable suspicion of criminal activity. See United States v. Cortez, 449 U.S. 441, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). This Court should take into consideration Trooper Vogel's extensive experience in drug enforcement, and an opinion upholding the validity of his detention of the Respondent should emphasize that experience.

If the Florida Supreme Court approves the use of Trooper Vogel's drug courier profile to support the brief investigatory detention of the Appellee's vehicle, the Court will not have sanctioned the use of such a profile by any officer and every law enforcement agency in the State of Florida. In view of Trooper Vogel's experience, the profile that he developed, and the particular facts that he observed, it would be unreasonable for a law enforcement agency such as the Florida Highway Patrol to advise its officers to take a list of facts which comprise a drug courier profile and initiate vehicle stops based solely upon that profile for the purpose of drug investigation. By allowing officers without the necessary background in drug enforcement to conduct such detentions, the agency would face not only

suppression of evidence in the criminal case but also civil liability for violation of Fourth Amendment rights pursuant to the federal Civil Rights Act.⁶

As a practical matter, a law enforcement agency initiating a program of profile stops would also be sensitive to public and media criticism if the agency overreaches by conducting improper detentions. In view of the fact that the motorist would be stopped without a traffic violation being committed, the agency must be cognizant of the reaction from the public and the press. For this reason alone, an agency such as the Florida Highway Patrol must be cautious in implementing an approved program of profile stops.

It should be pointed out that Trooper Vogel's profile was reviewed by the Department's Office of General Counsel for legal sufficiency, and approved in advance by his supervisors. Any future operation of the Florida Highway Patrol would follow suit. It is possible for written guidelines to be established by supervisory personnel which would limit the discretion of the officer and the intrusion to the motorist. As previously discussed, relevant profile factors could be delineated. The agency could authorize certain troopers to conduct profile stops based upon their experience and training.

The Florida Highway Patrol's felony officer program, which emphasizes drug interdiction, would be well suited for conducting such investigatory detentions on the basis of profile stops. These troopers who participate in the program have been selected

⁶42 U.S.C. §1983.

because of their service record and interest in drug enforcement. The felony officers report directly to a captain who is particularly concerned with their enforcement activities.

The Florida Highway Patrol is not unique in having a unit which is particularly designated for narcotics enforcement; other agencies employ officers who are well versed in drug enforcement. Such agencies, by adopting a similar plan, may very well meet the concerns expressed by this Court in State v. Jones, supra, with regard to limiting the discretion of officers in conducting vehicle stops.

The present case, therefore, offers this Court an opportunity to provide law enforcement agencies such as the Florida Highway Patrol with an effective tool to combat the flow of drugs on the state's highways. The investigatory stop of a vehicle which involves a minimal intrusion to the motorist and appropriate constraints on the discretion of the officer is not an unreasonable seizure. Such a brief investigatory detention is a reasonable means of intercepting the drug couriers who use the highways of this state for their illicit purposes.

In Terry v. Ohio, supra, the Supreme Court remarked that it would have been poor police work for an officer with 30 years experience in the detection of theft from stores in the same neighborhood to have failed to investigate the suspicious activity that he observed. 392 U.S. at 23, 88 S.Ct. at 1881. The Department respectfully requests this Court to recognize that experienced troopers of the Florida Highway Patrol who observe specific facts which are consistent with a drug courier profile

of which they have personal knowledge should be permitted to similarly conduct a brief investigatory detention to investigate their suspicions. This Court, therefore, should answer the certified question from the District Court of Appeal in the affirmative.

CONCLUSION

A brief investigatory stop conducted by an experienced drug enforcement of the Florida Highway Patrol is not an unreasonable seizure. In view of the gravity of the public concern, the degree to which the vehicle stop advances the public interest, and the minimal intrusion to the motorist, the investigatory detention of the Respondent did not offend his Fourth Amendment rights. The Department suggests that a drug enforcement program utilizing similar profile stops may be constitutionally employed. The Department respectfully requests this Court to reverse the opinion of the District Court of Appeal.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular United States mail to Ellen D. Phillips, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, and Lane S. Abraham, 300 South Dixie Highway, Suite 217, Miami, Florida 33133, this 22d day of February, 1988.



R. W. EVANS