

IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

Petitioner,

v.

PAUL CLIVE JOHNSON,

Respondent .

_____ /

PETITIONER'S REPLY BRIEF ON THE MERITS

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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?

Respondent argues that a drug courier profile cannot provide reasonable suspicion because each of the factors, taken separately, could apply to innocent travellers equally well as guilty drug dealers. This does not mean an experienced officer has no cause for reasonable suspicion, however. In U.S. v. Ruano, 647 F.2d 577 (11th Cir. 1981), for example, customs officials observed three boats travelling at a high speed at 8:15 a.m., with one person in each boat. To the unfamiliar observer, these facts are not individually suspicious. However, the customs officers, familiar with the area, knew the boats' speed was unusual, as was the hour: the fact that there was one person in each boat militated against people going out fishing. Also, the officials were aware of a local custom (of slowing at a certain point), which was not followed by the boats. If the same activity occurred outside Florida, officers would not suspect anything. In Florida, however, drug smuggling is one of the most common explanations for this type of activity.

Trooper Vogel's suspicions are based on similar "factors." Vogel has spent years observing traffic on this same stretch of I95. When Vogel testifies that a 55 mph rate of speed is

unusual, he has ample experience supporting his opinion. Like the fishing boats, the fact that a vehicle is occupied by a single individual travelling at 4:00 a.m. in a large, late-model car "militates against" tourists on vacation. Casual attire "militates against" a businessman. Young, casually dressed persons do not usually rent a large, late-model Lincoln when cheaper vehicles are available. As anyone casually observes traffic on the interstate Northbound, he can mentally speculate about the vehicle: it looks like a tourist family returning home (luggage, children); it looks like local people going to work (e.g., local tags, 7:30 a.m., dressed in suit and tie). After observing traffic on the same stretch of road for literally years, Trooper Vogel (and other troopers like him) can undoubtedly pick out immediately those automobiles with no regular definition. Keeping in mind that this case only deals with I95 northbound from Miami, there is another fairly common category of automobiles: those carrying drugs.

Vogel does not premise his stops on the fact that there is no other reasonable purpose for a particular vehicle, although the state would suggest this is a permissible consideration. Rather, in addition to observing that certain vehicles are not otherwise explainable, Vogel has, in the course of his traffic stops, observed particular factors common to drug carriers. This "profile" was composed of completely random traffic stops, which ended up in drug discoveries (these commonalities are listed in appellant's initial statement of facts). Anyone travelling Florida highways can readily draft a "tourist profile" which

could provide "reasonable suspicion" that a vehicle is transporting tourists: out-of-state tags: two adults and a child or children: luggage piled on the top of the car travelling toward Disney World. The car may or may not be transporting tourists, but there is certainly reasonable suspicion to at least stop and investigate.

Likewise, there are certain factors which make a knowledgeable officer suspicious that a particular vehicle (or vessel) is carrying drugs. The factors making the officers suspicious in Ruano are virtually identical to Vogel's "profile" factors, and constituted reasonable suspicion. ~~See also,~~ U.S. v. Erwin, 803 F.2d 1505 (9th Cir. 1986); U.S. v. Palleres-Palleres, 784 F.2d 1231 (5th Cir. 1986); U.S. v. Reeh, 780 F.2d 1541 (11th Cir. 1986); U.S. v. Henke, 775 F.2d 641 (5th Cir. 1985); but c.f., U.S. v. Sokolow, 831 F.2d 1413 (9th Cir. 1987).

Amicus argue that various factors differ from place to place, "profile" to "profile." Aside from the fact that the circumstances may be, in fact, different in different locations, the list of factors Vogel compiled here are documented in the record. It is quite possible that certain factors do no more than discount any other explanation. For example, it is not probative of anything if a tourist is driving northbound at 4:15 a.m.. However, tourist vehicles usually have more than one person. It is not particularly noteworthy that a businessman would rent a late-model Lincoln, but a young man less well dressed would generally choose a cheaper or racier vehicle. On the other hand, Trooper Vogel has observed, in his experience,

that a large, late model vehicle rented by a person less well dressed frequently is carrying narcotics when it is northbound on this interstate highway. It seems to appellant that one can hardly dispute the probative value of Vogel's profile factors, when Vogel correctly identifies a major drug haul between one-third and one-half of the time. Ordinary investigatory Terry stops cannot make the same claim of success.

A second amicus contests the legality of profile stops asserting that suspicion is not particularized to any individual car. Amicus correctly refers to U.S. v. Cortez, 449 U.S. 441, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981), as delineating two elements for a legal stop: (1) an assessment of suspicion must be based upon all the circumstances, and (2) suspicion must be particularized to the individual stopped. Amicus apparently agrees that considerable suspicion can be based upon a "mode of operation" profile, but denies that this suspicion can be particularized to any individual vehicle.

Appellant contends that amicus makes his argument by failing to distinguish between general profile factors and individual characteristic factors. The profile contains both. As discussed in the state's initial brief, tons of narcotics travel northbound through Florida daily. One particularly significant "modus operandi" of drug traffickers seeking their supply of marijuana and cocaine is to deliver the drugs from South America to South Florida, and, from there, divide up and transport the hauls north on 195. Since some 80% of the narcotics entering the country follow this route, it is a virtual certainty that on any

particular evening, a considerable amount of drugs passes by an officer stationed on I95 northbound. This is a "general" profile factor. No particular vehicle is suspected, but we know some vehicles are transporting drugs.

Some vehicles call attention to themselves, however. They act intending to avoid the attention of officers: drivers steadfastly avoid eye contact: the vehicle scrupulously maintains the speed limit although it is 4:00 a.m. The automobile is a large car, which is particularly suitable for transporting marijuana. It is a large rental car, notable because a rental allows the boss trafficker to avoid using his own vehicle, and no vehicle can be forfeited. Additional factors such as lack of luggage, the car being rented to someone other than the driver, and nervousness on the part of the driver, all serve to particularize suspicion to this vehicle. In the instant case, for example, the odor of fabric softener could be smelled.* Trooper Vogel had knowledge that smugglers often used fabric softener sheets to mask the smell of marijuana. The fact that use of fabric softener is a "mode of operation" in general does not deny that this particular vehicle is therefore suspicious. The patent fact is that Trooper Vogel only stops particular vehicles, not any vehicles at random. These vehicles distinguish themselves for particular reasons. In considering U.S. v. Cortez, it should be kept in mind that the case deals with officers' attempts to locate one single smuggler ("Chevron"). The profile here

*

This was after the stop.

identifies many automobiles because there are many automobiles smuggling drugs.

Amicus also accuses the state of wasting time establishing a "straw man" proposition, to-wit: that vehicles can be stopped based upon reasonable suspicion. Perhaps petitioner could have been clearer in stating the point, which is that the quantum of suspicion deemed "reasonable" varies according to the legitimate government need for the stop, and the resultant intrusion. It is reasonable to effect a simple traffic stop in **195**, with no further intrusion whatever, where the need to quell the flow of narcotics is great. Petitioner notes that neither respondent nor any amicus suggests that a five minute traffic stop on **I95** is intrusive or burdensome. While respondent express his fears of police stopping anyone, anywhere, his arguments are irrelevant to the facts of this case. Interstate **95** is a specific drug corridor; the profile involved was pre-approved; the stretch of highway where stops are effected was pre-approved; there is no authority for any officer to stop any vehicle except under tightly controlled conditions. The State of Florida respectfully urges this court that the balancing test discussed in Delaware v. Prouse, **440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)**, should be tipped in favor of profile stops in this state if we are to have any chance of combatting the drug gangs, corruption, and death that traffic in narcotics is causing here and throughout the country.

CONCLUSION

The State of Florida prays the decision of the District Court of Appeal, Fifth District, be reversed, and that proper use of drug courier profiles be approved as an effective and legal law enforcement tool.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Reply Brief has been furnished by mail to Carl H. Lida, Esquire, 2000 So. Dixie Highway, Suite 217, Miami, FL 33133, this 29th day of April, 1988.

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