

ISSUE

Did a U.S. Border Patrol agent have reasonable suspicion to detain the defendant?

FACTS

At about 2:15 P.M., a sensor alarm was received at a Border Patrol station at the US-Mexico border near Douglas, Arizona. The alarm indicated that a vehicle was traveling on Leslie Canyon Road, an unpaved road that is “very rarely traveled” except by local ranchers, forest service personnel, and drug smugglers. The smugglers use it mainly because it allows them to circumvent Border Patrol checkpoints. This particular alarm indicated the vehicle was traveling northbound; i.e., from the direction of Mexico.

In addition to these circumstances, the timing of the alarm was somewhat suspicious. According to the Border Patrol agent who responded to the alarm, it was activated just before shift change when agents start driving back to the checkpoint, leaving the area “unpatrolled.” The agent explained that “alien smugglers did extensive scouting and seemed to be most active when agents were en route back to the checkpoint.”

One other thing: several weeks earlier, an agent responding to the same sensor alarm spotted a minivan traveling northbound; when the occupants spotted the agent, they started “throwing bundles of marijuana out the door.”

As the agent arrived in the area, he spotted the dust trail of an approaching vehicle about a half mile away. Based on a second sensor alarm, it appeared this was the vehicle that had triggered the initial alarm. The agent pulled to the side of a road so he could get a good look at the vehicle as it went by.

It was a minivan, a type of vehicle that, according to the agent, is commonly used by smugglers. At this point, a series of things occurred that caused the agent to become even more suspicious.

- ☛ As the van approached the patrol vehicle, the driver “slowed dramatically,” from about 50-55 to 25-30 miles per hour.

- ☛ As the van passed the patrol vehicle, the driver “appeared stiff and his posture very rigid. He did not look at [the agent] and seemed to be trying to pretend that [the agent] was not there.” This was suspicious because, as the agent testified, “most persons look over and see what is going on, and in that area most drivers give border patrol agents a friendly wave.”

- ☛ It appeared that two of the three children sitting in the rear seat were “propped up on some cargo on the floor.”

- ☛ As the agent started following the van, it appeared the three children were being instructed to wave at the agent; i.e., “all of the children, though still facing forward, put their hands up at the same time and began to wave at [the agent] in an abnormal pattern. . . . Their odd waving continued on and off for about four to five minutes.”

- ☛ The driver made a sudden right turn onto the last road that would have allowed him to avoid the checkpoint. There were no picnic grounds or

sightseeing destinations along this road. In fact, it is a very rough road that is usually used by four-wheel-drive vehicles.

☛ The van was registered to an address in Douglas “that was four blocks north of the border in an area notorious for alien and narcotics smuggling.”

Based on these circumstances, the agent stopped the van and obtained consent to search from the driver, Arvizu. The search netted 128 pounds of marijuana worth about \$100,000.

DISCUSSION

Although the District Court ruled the detention was lawful, the Court of Appeals for the Ninth Circuit ruled the circumstances known to the Border Patrol agent did not constitute reasonable suspicion to stop the van. Consequently, it ruled the consent was invalid and the marijuana must be suppressed. The United States Supreme Court disagreed and reversed.

Two of the most basic principles that are applied in determining the existence of reasonable suspicion and probable cause are, (1) officers and courts must consider the totality of circumstances, and (2) they must evaluate the circumstances in light of common sense and the officers’ training and experience.

These principles were formulated to stop the practice of some courts to isolate each fact relied upon by officers, belittle its importance or explain it away, then conclude that because none of the facts was very suspicious or incriminating, probable cause did not exist.¹ Now the courts must consider the totality of circumstances—the “total atmosphere of the case.”²

For example, in one case in which a defendant attempted to fractionalize the facts upon which probable cause was based, the court responded: “Defendant would apply the axiom that a chain is no stronger than its weakest link. Here, however, there are strands which have been spun into rope. Although each alone may have insufficient strength, and some strands may be slightly frayed, the test is whether when spun together they will serve to carry the load of upholding the action of the magistrate in issuing the warrant.”³

This type of fractionalizing was precisely what the Ninth Circuit did in justifying its ruling. As the U.S. Supreme Court observed:

¹ See, for example, *People v. Huntsman* (1984) 152 Cal.App.3d 1073; *People v. Loewen* (1983) 35 Cal.3d 117.

² See *Illinois v. Gates* (1983) 462 US 213, 230-1; *United States v. Sokolow* (1989) 490 US 1, 8; *Massachusetts v. Upton* (1984) 466 US 727, 732 [“[The trial court] insisted on judging bits and pieces of information in isolation”]; *People v. Soun* (1995) 34 Cal.App.4th 1499, 1524; *People v. Ramirez* (1996) 41 Cal.App.4th 1608, 1614; *People v. Romero* (1996) 43 Cal.App.4th 440, 444; *People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1742.

³ *People v. McFadin* (1982) 127 Cal.App.3d 751, 767. ALSO SEE *People v. Superior Court (Price)* (1982) 137 Cal.App.3d 90, 97 [“Even if no single fact met the test for reasonable cause, the totality of information available to the officer from a number of sources was sufficient In adopting a [totality of circumstances] approach in this area, courts are not being innovative; they are merely accepting the fact that straight line measurements (i.e. weighing each individual factor separately) may not always provide the proper answers. Both the psychologist who studies human behavior, and the policeman who deals with problems on his beat, have learned that the ultimate configuration or structure that evolves from total experience is not necessarily the simple total of its constituent parts.”].

“After characterizing the District Court’s analysis as relying on a list of 10 factors, the Court of Appeals proceeded to examine each in turn. It held that 7 of the factors, including respondent’s slowing down, his failure to acknowledge [the agent], the raised position of the children’s knees, and their odd waving carried little or no weight in the reasonable-suspicion calculus. The remaining factors—the road’s use by smugglers, the temporal proximity between respondent’s trip and the agents’ shift change, and the use of minivans by smugglers—were not enough to render the stop permissible.”

In other words, said the Court, the Ninth Circuit’s “methodology was contrary to our prior decisions,” and as the result, it was wrong when it concluded that the various circumstance did not add up to reasonable suspicion. Said the Court, “Undoubtedly, each of these factors alone is susceptible to innocent explanation, and some factors are more probative than others. Taken together, we believe they sufficed to form a particularized and objective basis for [the car stop].”