

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NOS. 2008-039 & 2008-206

NOVEMBER TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Orleans Circuit
	}	
Steven Gerber	}	DOCKET NOS. 40-10-07 OsCs &
	}	657-10-07 OsCr

Trial Judge: Robert R. Bent

In the above-entitled causes, the Clerk will enter:

Defendant appeals the suspension of his driver's license and his conviction for driving while intoxicated (DWI), arguing that the district court erred by denying his motion to suppress evidence obtained following his assertedly unlawful detention. We affirm.

The facts are undisputed. On the evening of October 14, 2007, a veteran border patrol agent was engaged in a roving patrol around the towns of Newport and Derby Line near the Canadian border. In particular, the agent was checking out motels because operational intelligence predicted attempts that weekend to smuggle Colombian nationals into Canada through Derby Line. The intelligence indicated that the smugglers would be using local motels as a staging ground. In response to this intelligence, American border patrol agents were working with agents of the Royal Canadian Mounted Police to identify vehicles that would be attempting to bring illegal aliens into Canada. Shortly after midnight, the agent involved in this case observed a car with Connecticut plates pull into a motel in Newport, approximately six miles from the Canadian border. A passenger got out of the car at the motel, and the car proceeded to a restaurant parking lot at a nearby shopping center. After following the car to the shopping center, the agent drove off. The agent returned a few minutes later, however, upon learning that the restaurant had closed at midnight. When the agent returned, the car was still there. The agent observed in the car the driver and a passenger who was slumped down in the rear seat as if to avoid detection. When the car started to leave, the agent stopped it to perform an immigration inspection. As it turned out, neither occupant of the vehicle was an illegal alien, but the agent observed indicia of intoxication, which resulted in investigation by local police and defendant's eventual arrest for DWI.

At the civil suspension hearing, defendant filed a motion to suppress, arguing that there was no legal justification for the stop. The district court denied the motion, ruling that the stop was justified by the agent's reasonable suspicion that defendant was engaged in transporting illegal aliens, in light of the following facts: (1) the activity took place within six miles of the Canadian border; (2) the agent had received operational intelligence indicating that smugglers were suspected of using local motels as a staging ground to bring Columbian nationals into Canada; (3) the agent observed defendant, who was operating a vehicle with out-of-state plates, drop a passenger off at a local motel late at night and then proceed to the parking lot of a closed restaurant, where he remained for some period of time; and (4) a passenger in the rear of the car was slumped down as if trying to avoid detection. After the court denied his motion to suppress, defendant pled guilty to the criminal DWI charge, conditioned upon his being allowed to challenge the court's ruling on the motion. On appeal, defendant argues that the facts relied upon by the court were insufficient to support the agent's detention of his vehicle.

As the trial court noted, there is well-settled governing federal law in this area. When the observations of a border patrol agent engaging in a roving patrol lead him "to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion." United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975). Thus, agents "on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." Id. at 884. Courts must examine the "totality of the circumstances" in each case to determine whether the agent had a particularized and objective basis for suspecting wrongdoing. United States v. Arvizu, 534 U.S. 266, 273 (2002). Moreover, courts must keep in mind that agents may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them." Id.

In Brignoni-Ponce, the Court noted a non-exhaustive list of factors that may be taken into account in determining whether there was reasonable suspicion to stop a vehicle in a border area: (1) the characteristics of the area in which the vehicle is encountered; (2) the proximity of the vehicle to the border; (3) the usual patterns of traffic on the road; (4) the agent's previous experience with alien traffic; (5) available information about recent illegal border crossings; and (6) the behavior or appearance of the vehicle's operator or passengers. 422 U.S. at 884-85. "A determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." Arvizu, 534 U.S. at 277. In many cases, each of the above factors examined in isolation is susceptible of innocent explanation, but all the facts taken together suffice to form a particularized and objective basis for a stop. Id. at 277-78.

As the superior court suggested, this is a close case. Certainly, none of the factors relied upon by the trial court in denying defendant's motion to suppress, when viewed individually, support the conclusion that the agent had a particularized and objective basis for the stop. As defendant points out, the operational intelligence available to the agent was not particularly specific, in the sense that it did not indicate the type or make of vehicle or the particular persons involved. On the other hand, the information did indicate that the smugglers would be using local motels as a staging ground for the movement of Colombian nationals in the near future, and that the illegal aliens would be smuggled north into Canada. We agree with defendant that, viewed in isolation, there is nothing particularly suspicious about a car with out-of-state plates

pulling into a motel at the height of foliage season and dropping off a passenger, or even about that same car proceeding to the parking lot of a closed restaurant late at night and remaining at the parking lot for some minutes with a passenger slumped down in the rear seat of the car. But, when considering these facts together in conjunction with the operational intelligence available to the agent, the trial court did not err in concluding that they could arouse reasonable suspicion in an experienced agent, thereby allowing the agent to briefly detain the vehicle to ensure that it was not involved in the smuggling operations expected at that time. See State v. Lawrence, 2003 VT 68, ¶ 8, 175 Vt. 600 (mem.) (noting that this Court applies de novo review to trial court's ultimate ruling on motion to suppress, but that more deferential review is applied to trial court's findings of fact). Defendant makes much of the fact that there was no evidence that his car had crossed the border recently, but this fact did not necessarily suggest that the vehicle was not involved in transporting illegal aliens north into Canada or that it would not so in the near future.

Affirmed.

BY THE COURT:

---

Paul L. Reiber, Chief Justice

---

John A. Dooley, Associate Justice

---

Marilyn S. Skoglund, Associate Justice