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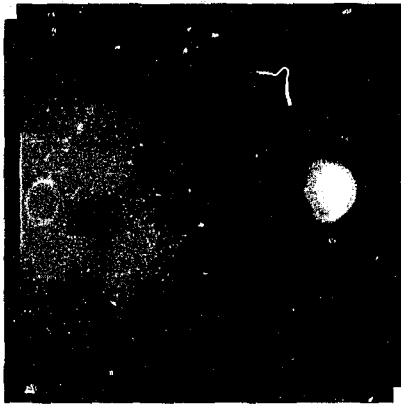
FBI Law Enforcement Bulletin

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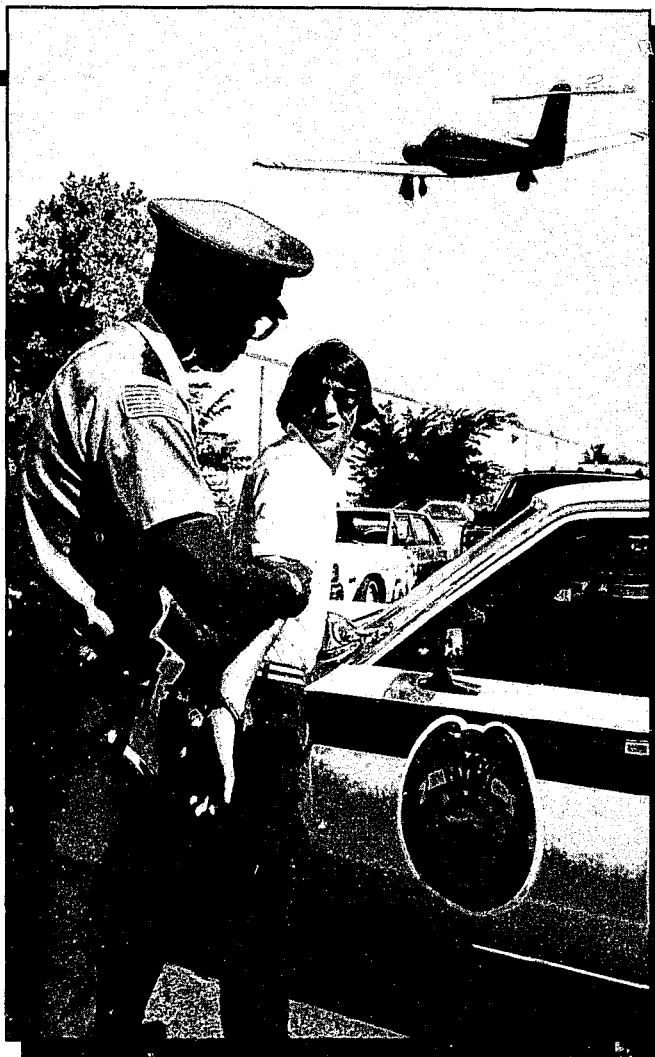
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Detaining Suspected Drug Couriers *Recent Court Decisions*

By
WILLIAM U. McCORMACK



Since 1968, the U.S. Supreme Court has recognized the constitutional authority of law enforcement officers to temporarily detain an individual on less than probable cause.¹ Temporary detentions have become an important tool of law enforcement in stopping the flow of illegal drugs into and around the United States. A temporary detention based on reasonable suspicion gives officers an opportunity to develop probable cause through the use of a trained drug-sniffing dog, further questioning of a suspect, and other investigative efforts that

may quickly confirm or dispel an officer's suspicion that the individual detained is a drug smuggler or courier.

In the course of drug interdiction efforts, some law enforcement agencies have developed lists of factors and so-called drug courier profiles² to assist officers in deciding whether to detain a suspect. Some of these factors and profiles have been challenged on constitutional grounds when a law enforcement officer employs them in detaining or stopping travelers in bus and train stations, airport terminals, and on the highways.

The purpose of this article is to alert law enforcement officers to the constitutional requirement for reasonable suspicion and to assist them in deciding whether reasonable suspicion exists to detain a suspected drug courier. It examines recent court decisions addressing whether police had established reasonable suspicion to detain suspected drug couriers and the extent to which drug courier profiles can be used by police to establish reasonable suspicion. This article then offers law enforcement officers some specific recommendations regarding the types of facts and

observed behavior that can constitutionally be used to establish reasonable suspicion for a temporary detention.

USEFULNESS OF PROFILES

In 1989, the U.S. Supreme Court decided *United States v. Sokolow*,³ a case involving the use of a drug courier profile to detain an individual in an airport. In *Sokolow*, the Court held that reasonable suspicion

to detain a person must be based on a totality of the circumstances and that the concept of reasonable suspicion is not readily or even usefully reduced to a neat set of legal rules. The Court reviewed the use of a drug courier profile in *Sokolow*, but did not find that the use of a profile either added to or detracted from the significance of the factors relied upon to detain a suspected drug courier. Rather, the Court found that based on a totality of the circumstances, all of the factors taken together amounted to reasonable suspicion to detain the defendant.

Factual Background of *Sokolow*

In *Sokolow*, a young man (the suspect) approached a ticket agent at the Honolulu International Airport and requested two round-trip tickets to Miami for a flight leaving later that day. He was dressed in a black jumpsuit and was wearing gold jewelry. The suspect, appearing nervous, told the ticket agent that the tickets were for Andrew Kray and Janet Norian and paid for them with \$20 bills taken from a large roll of twenties. He and his female companion did not check their four pieces of luggage when they later boarded their flight.

After the ticket agent informed police about the cash purchase of the tickets, an officer checked the phone number given by the suspect and determined that it was not listed in the name Andrew Kray. The officer then determined that the suspect and his companion had reservations to return from Miami to Honolulu just 3 days from the date of their departure.

Drug Enforcement Administration (DEA) Agents observed that the

suspect appeared nervous during his return flight to Honolulu. Again, he had not checked any luggage and was dressed exactly as when he left Honolulu. After getting off the plane, the couple was detained by DEA Agents, who asked the suspect for his ticket and identification. They were told that he did not have them and that his name was Sokolow. Sokolow and his companion were then escorted to the DEA office at the airport, and shortly thereafter, a drug-sniffing dog alerted on Sokolow's brown shoulder bag, which was then searched pursuant to a search warrant. After a second search warrant was later obtained, 1,063 grams of cocaine were found in a different bag.

The U.S. Court of Appeals for the Ninth Circuit reversed Sokolow's subsequent conviction on the grounds that there was insufficient reasonable suspicion to detain him at the airport and that this illegal detention tainted the subsequent search of the bag. The U.S. Supreme Court reversed the Ninth Circuit and held that under a totality of the circumstances, there were sufficient facts known by the DEA Agents to justify Sokolow's detention.

Reasonable Suspicion Based on Totality of Circumstances

In analyzing the facts needed to detain a suspected drug courier, the Supreme Court stated in *Sokolow* that an officer must be able to articulate something more than an unparticularized suspicion or hunch. The Court added that the level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence and obviously less than that needed for

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...each decision to detain an individual must be judged on the individual facts available...at the time of the stop, viewed in light of the officer's training and experience.”



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probable cause.⁴ In finding that reasonable suspicion existed based on a totality of the circumstances, the Court stated that the primary facts the DEA Agents relied upon to justify their stop were:

- 1) Sokolow paid \$2,100 for two airplane tickets from a roll of \$20 bills;
- 2) He traveled under a name that did not match the name under which his telephone number was listed;
- 3) His original destination was Miami, a source city for illicit drugs;
- 4) He stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours;
- 5) He appeared nervous during his trip; and
- 6) He checked none of his luggage.⁵

Judicial Disagreement— Probative Value of Profiles

The probative value of drug courier profiles was raised in *Sokolow* because a DEA Agent testified during the suppression hearing that Sokolow's behavior "had all the classic aspects of a drug courier."⁶ In response, Sokolow argued that the DEA Agent's belief that his behavior was consistent with one of the DEA's drug courier profiles should detract from the probative or evidentiary significance of some of the profile factors the Agent observed. The Court disagreed as follows:

"A court sitting to determine the existence of reasonable

suspicion must require the Agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent."⁷

“
...the legal basis for a
temporary detention
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suspicion based on a
totality of the
circumstances....
”

Illustrative of the judicial disagreement regarding the probative value of profiles, the dissent in *Sokolow* analyzed the use of drug courier profiles at greater length. They concluded that a law enforcement officer's mechanistic application of a drug courier profile in deciding whom to detain can only dull the officer's ability and determination to make sensitive and fact-specific decisions based on experience, particularly in ambiguous or borderline cases.⁸

Sokolow suggests that drug courier profiles should not be considered by officers as a panacea for establishing reasonable suspicion to detain an individual. However, courts appear to allow officers to use profiles as an investigative aid

in establishing reasonable suspicion to detain.

PROFILES AS INVESTIGATIVE AIDS

Sokolow makes it clear that law enforcement officers should not rely exclusively on drug courier profiles or a magical number of matching factors to establish reasonable suspicion to detain a suspected drug courier. Nonetheless, profiles can be particularly useful for a law enforcement officer who is recently hired or transferred from a different assignment.

Officers who have extensive experience conducting drug interdiction efforts in a particular airport or other public facility or area are likely to gain valuable knowledge about drug trafficking in that location. Putting that experience into the format of a profile can be a useful way for experienced officers to pass that knowledge and experience to another officer. A profile based on such knowledge and prior experience was viewed by one court as having the following investigative and factual significance:

"Indeed, the use of a profile is simply a means by which the law enforcement team communicates its collective expertise and empirical experience to the officer in the field and by which the officer, in turn, explains the special significance of his observations to the court.⁹

Profiles can aid courtroom testimony by helping officers to articulate the special significance of their observations. They can give officers a structured means to articulate reasonable suspicion based

on personal experiences and a means to organize knowledge received from other officers involved in previous drug investigations. Moreover, officers who identify the typical characteristics of drug couriers and then include those factors in a profile may be able to make more informed decisions regarding the existence of reasonable suspicion, since a profile can serve as a written list of factors that officers can use in making the decision whether to detain.

Probative Value of Observed Behavior

Since the legal basis for a temporary detention is simply the presence or absence of reasonable suspicion based on a totality of the circumstances, officers involved in such stops should be aware of court decisions involving reasonable suspicion decided in their jurisdiction. While each fact pattern is different, there are common patterns in these court decisions that can provide guidance to officers who must decide whether reasonable suspicion exists to detain a suspected drug courier temporarily.

Courts tend to divide facts officers may attempt to use to establish reasonable suspicion into two general categories. The first category includes facts that describe a large number of innocent citizens, such as nervousness, destination or arrival at a "drug source" or "drug reception" city, manner of attire, time of travel, position among disembarking passengers, no checked luggage, and extreme confidence, such as looking straight ahead and walking fast.

The second category consists of facts indicative of illegal activity,

such as use of an alias or false name in travel, furtive or evasive behavior after seeing law enforcement officers, the unusual purchase of a ticket with cash, and the receipt by police of information or an anonymous tip that a particular person or type of person is a drug courier. Most lower courts applying *Sokolow's* totality of circumstances test require police to have some facts indicative of illegal activity before a temporary detention is deemed lawful.

Innocent citizens

Most courts hold that reasonable suspicion requires police to have more than merely facts and circumstances that describe a very large

“...reasonable suspicion to detain requires factors or facts indicative or probative of illegal drug trafficking....”

category of innocent citizens, such as no checked luggage, last or first off an airplane, nervousness or extreme confidence, early or late travel, flashy or grungy clothing, and travel to or from a drug-source city.¹⁰ In the context of vehicle stops, facts in this category could include a young person driving a late model sports car or a person driving extremely cautiously on an interstate highway.¹¹ Such otherwise innocent conduct is generally not sufficient to estab-

lish reasonable suspicion to detain an individual.¹²

For example, the U.S. Court of Appeals for the Sixth Circuit found insufficient facts to justify a temporary detention in *United States v. Taylor*.¹³ In that case, the defendant arrived in Memphis on a plane from Miami, Florida. His detention was based on the following factors:

- 1) Arrival from a drug-source city;
- 2) Walking away from the gate nervously and hurriedly moving faster than the other passengers;
- 3) Constantly looking backwards while walking;
- 4) Carrying a tote bag held tightly to his body; and
- 5) Leaving the terminal walking very fast.¹⁴

The court also disapproved of the stop on the grounds that the officers involved in the detention had little experience in identifying drug couriers. Also, testimony at the suppression hearing indicated that the defendant's race and grungy clothing may have been impermissibly considered by the officers in their decision to detain.¹⁵

Facts indicative of illegal activity

Most courts hold that reasonable suspicion to detain requires factors or facts indicative or probative of illegal drug trafficking, such as the use of a false name,¹⁶ the unusual purchase of a ticket with cash,¹⁷ and furtive or unusual behavior after seeing law enforcement officers.¹⁸ In the context of vehicle stops, courts have found reasonable

suspicion where officers observed evidence associated with drug trafficking, such as seeing a beeper and papers with telephone numbers in a car or seeing a car with a large trunk with the items normally kept in the trunk on the back seat.¹⁹

Information that Tips the Scale

Highly probative in determining reasonable suspicion is the receipt by law enforcement of information or a tip that a particular person or type of person is a drug courier.²⁰ For example, in *United States v. Condolee*,²¹ the U.S. Court of Appeals for the Eighth Circuit upheld a temporary detention of a stylishly dressed black woman at the Kansas City International Airport based on the following factors:

- 1) The DEA Agent involved in the stop had 17 years' experience with substantial experience in drug trafficking investigations;
- 2) The defendant arrived early in the morning from Los Angeles, a source city especially for early courier dispatch;
- 3) The Agent involved had received a tip that two Los Angeles street gangs were using "sharply dressed black female couriers" to smuggle drugs through the Kansas City airport;
- 4) The defendant was traveling only with carry-on luggage and walked quickly and directly, while looking straight ahead; and
- 5) Prior to the actual temporary detention when

the defendant was talking to DEA Agents, she appeared nervous and attempted to conceal the contents of her purse, which made a loud thud when placed on a trash can.²²

"Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or

“ In analyzing the facts needed to detain a suspected drug courier...an officer must be able to articulate something more than an unparticularized suspicion or hunch. ”

Anonymous Tips and Corroboration

The U.S. Supreme Court recently held in *Alabama v. White*²³ that an anonymous tip when sufficiently corroborated can provide reasonable suspicion to detain an individual. In that case, police received an anonymous tip that the defendant would be leaving a particular apartment at a particular time in a brown Plymouth station wagon with the right taillight lens broken; that she would be going to a certain motel; and that she would be in possession of about an ounce of cocaine inside a brown attache case. Police went to the apartment, saw the defendant leave and enter the station wagon, and stopped her just short of the motel to which the tipster had predicted she would drive.

In approving the stop, the Court described the reasonable suspicion standard as follows:

content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause."²⁴

Thus, informant information or anonymous tips not reliable enough to provide probable cause may provide the justification for a temporary detention, especially when corroborated by observed behavior that has probative value in determining reasonable suspicion.²⁵

SUMMARY

In order to stop and detain someone under the fourth amendment, the U.S. Constitution requires that a law enforcement officer justify the stop on something more than a mere suspicion or hunch. The stop must be based on an articulable and reasonable suspicion that criminal activity is afoot.

In developing and articulating reasonable suspicion, a profile can be a useful tool in categorizing and attaching particular significance to otherwise innocent behavior. However, each decision to detain an individual must be judged on the individual facts available to an officer at the time of the stop, viewed in light of the officer's training and experience.

Officers are encouraged to gather and evaluate as many facts as possible because the validity of a detention is determined by a totality of the circumstances test. Under this test, most courts attach particular significance to certain factors, such as the use of a false name, the unusual purchase of a ticket with cash, unusual furtive or evasive behavior, and the existence of informant information or a tip that a particular person or particular type of person is likely to be a drug courier.

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Court found these facts insufficient to justify a temporary detention.

¹¹ See, e.g., *State v. Johnson*, 561 So.2d 1139 (Fla. 1990) (late model car being driven cautiously at 4:15 a.m. by 30-year-old male on I-95 not sufficient reasonable suspicion to justify stop of car on suspicion of drug trafficking); *Snow v. State*, 578 A.2d 816 (Md. App. 1990) (avoidance of eye contact by nervous driver stopped on I-95, the presence of several air fresheners, and driver's refusal to consent to search did not give reasonable suspicion to detain for drug trafficking); *United States v. Hernandez-Alvarado*, 891 F.2d 1414 (9th Cir. 1989) (no reasonable suspicion to stop when agent observed car bought from dealership associated with drug dealers, two-way antenna protruding from large trunk, driver

“Profiles can aid courtroom testimony by helping officers to articulate the special significance of their observations.”

driving cautiously, and car registered in a neighborhood known as a high drug smuggling area); and *United States v. Tapia*, 912 F.2d 1367 (11th Cir. 1990) (no reasonable suspicion to detain a motorist for drug smuggling when officer observed nervous Hispanic individual in car with out-of-State license allegedly traveling out of State to look for work with no visible signs of luggage. Court stated that these characteristics could plausibly describe the behavior of a large portion of the motorists engaged in travel on interstate highways). See also, John Sauls, "Traffic Stops: Police Powers Under the Fourth Amendment," *FBI Law Enforcement Bulletin*, October 1989.

¹² See, e.g., *United States v. Millan*, 912 F.2d 1014 (8th Cir. 1990) (reasonable suspicion to detain traveler in an airport not present when DEA Agents knew defendant had arrived on an early flight from San Francisco to Kansas City, was one of the first passengers to deplane, carried a garment bag and had not checked luggage, dressed casually, wore a gold chain and had long hair, had purchased a one-way ticket costing \$179 with cash, was not traveling under an assumed name, could not remember the address or telephone number of the person allegedly visited, and had something evenly shaped in the pockets of his jacket).

¹³ 917 F.2d 1402 (6th Cir. 1990).

¹⁴ *Id.* at 1408.

¹⁵ *Id.* at 1409.

¹⁶ *Florida v. Royer*, 460 U.S. 491 (1983) and *United States v. Tavalacci*, 895 F.2d 1423 (D.C. Cir., 1990).

¹⁷ *United States v. Colyer*, 878 F.2d 469 (D.C. Cir. 1989) and *United States v. Sterling*, 909 F.2d 1078 (7th Cir. 1990).

¹⁸ See, e.g., *Florida v. Rodriguez*, 469 U.S. 1 (1984) (suspects glancing over shoulders and overheard saying, "Let's get out of here."); *United States v. Sullivan*, 903 F.2d 1093 (7th Cir. 1990) (detention of train traveler's luggage upheld based on travel from Los Angeles, a source city, one-way ticket purchased with cash on date of departure, defendant only carrying one small bag and appeared to divert eyes from police officers when followed by them, and appeared to pretend to make a telephone call without actually placing any money in a public phone); *United States v. Hayes*, 825 F.2d 32 (4th Cir. 1987) (the fact that defendants were traveling from a source city and appeared nervous not sufficient for reasonable suspicion, but when the defendants took flight after police identified themselves, detention based on reasonable suspicion then justified).

¹⁹ See, *Derricot v. State*, 578 A.2d 791 (Md. App. 1990) (flashy vehicle and dress of young driver, as well as possession of paging device and papers bearing telephone numbers, gave reasonable suspicion to detain for drug trafficking); *Cresswell v. State*, 564 So.2d 480 (Fla. 1990) (nervous driver on I-95 in car with large trunk driving car registered to someone else, CB in car, ignition key separate from other keys, and items normally kept in trunk on back seat provided reasonable suspicion to justify detention of driver for drug trafficking).

²⁰ See, e.g., *United States v. Malone*, 886 F.2d 1162 (9th Cir. 1989) (stop in airport justified, in part, on defendant fitting a "gang member" profile based on knowledge of DEA Agents concerning Los Angeles street gang members transporting drugs into Seattle. Also, defendant glanced around terminal furtively, carried only a plastic shoe bag for a 3-day stay, had no identification, could not name anyone in Seattle to verify identity, and could not explain presence in the city).

²¹ 915 F.2d 1206 (8th Cir. 1990).

²² *Id.* at 1210.

²³ 110 S.Ct. 2412 (1990).

²⁴ *Id.* at 2416.

²⁵ See, e.g., *United States v. Lane*, 909 F.2d 895 (6th Cir. 1990) (informant's tip added to the totality of the circumstances justifying detention of defendant for drug possession).

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Footnotes

¹ *Terry v. Ohio*, 392 U.S. 1 (1968). See also, John C. Hall, "Investigative Detention: An Intermediate Response," *FBI Law Enforcement Bulletin*, November and December 1985 and January 1986; Jerome O. Campana, "Investigative Detention and the Drug Courier: Recent Supreme Court Decisions," *FBI Law Enforcement Bulletin*, November 1983.

² Drug courier profiles are typically developed by law enforcement officers who work in a particular area. Because the factors in one area may vary significantly from other areas, it may be difficult to determine significant factors nationwide.

³ 109 S.Ct. 1581 (1989).

⁴ *Id.* at 1585.

⁵ *Id.* at 1583.

⁶ *Id.* at 1587, n. 6.

⁷ *Id.* at 1587.

⁸ *Id.* at 1588.

⁹ *Derricot v. State*, 578 A.2d 791 (Md. App. 1990).

¹⁰ In *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam), the petitioner arrived from Fort Lauderdale early in the morning, appeared to conceal the fact that he was traveling with a companion and had not checked luggage. The