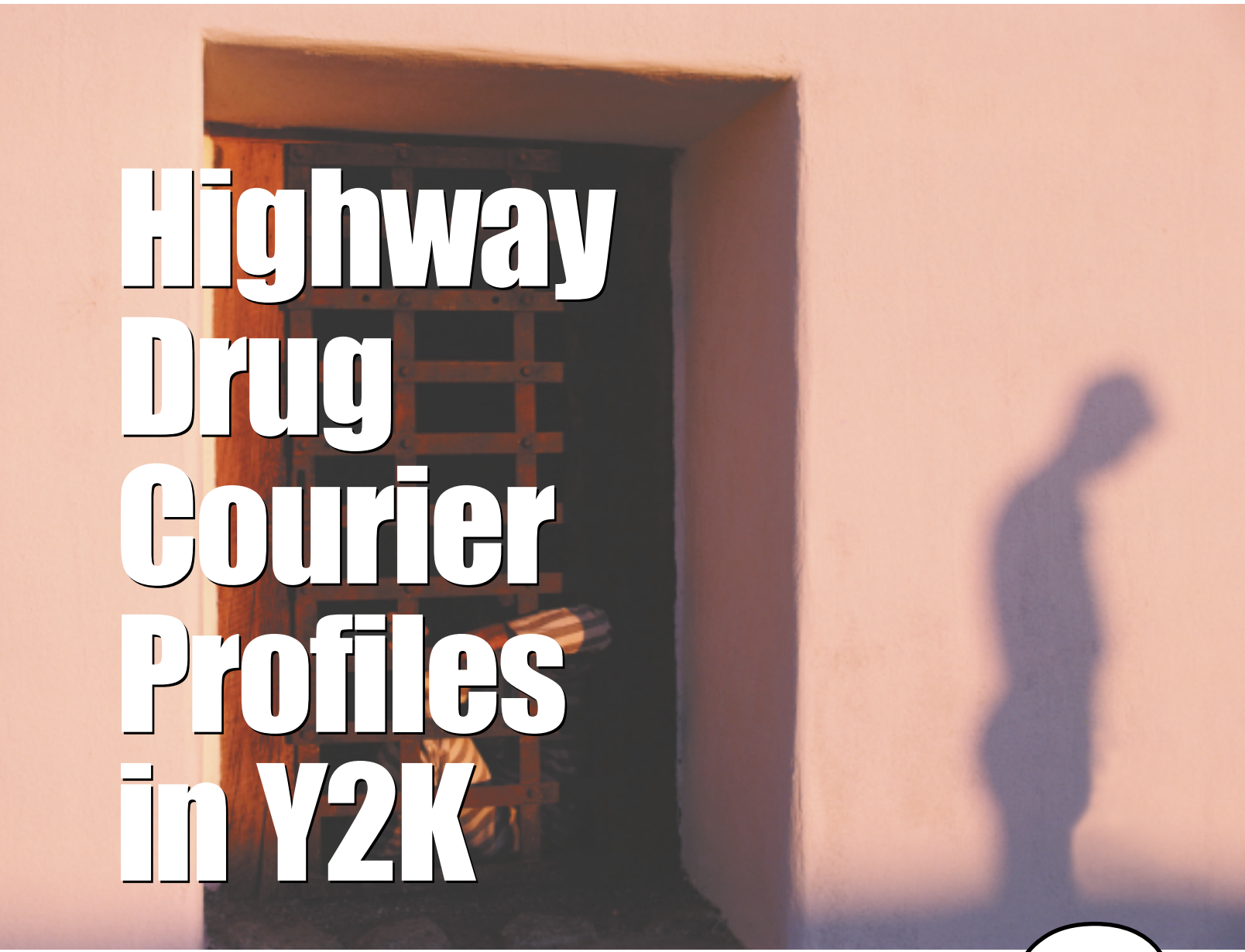
Another Nail in the Coffin of the Fourth Amendment?



Highway Drug Courier Profiles in Y2K

by Diana Patton

DESPITE A GROWING FEAR that the war on drugs is lost, many U.S. citizens seem willing to accept governmental erosion of their right to be free from unreasonable search and seizure—gambling or hoping that relinquishing some freedoms will help win the war. The damage done to the fourth amendment in the name of stemming drug trafficking[1] has been even more serious than that visited upon it by the motor vehicle[2] cases in the 1970s. Thus, it stands to reason that when drug trafficking and motor vehicles are joined as a single search and seizure issue, the fourth amendment will suffer accordingly. But, at least for now, it is still possible to challenge detentions of motorists based on profiling of what a drug courier is supposed to "look like."

The Subjectivity of Drug Courier Profiles

The highway "drug courier profile" is a "rather loosely formulated list of characteristics" used by law enforcement to distinguish those who are carrying narcotics from the innocent traveling public.[3] It was derived from the DEA's airport drug courier profiles of the 1970s and 1980s, which in turn were based upon the FAA's skyjacker profile devised in the 1960s and 1970s.[4] The skyjacker profile was based on information compiled according to the scientific method; drug courier profiles, by contrast, are based on collective experiences of law enforcement agencies. This makes drug courier profiles a fertile area for due process and privacy violations, because a profile, even applied by a scrupulous officer, can consist of almost anything he wants it to,[5] not the least evil of which can be racial profiling.

There are many highway drug courier profile characteristics: appearing to be a foreigner[6]; driving a one-way rental car[7]; paying for the rental car with cash[8] or with someone else's credit card[9]; traveling across country[10]; carrying a small amount of luggage[11]; appearing to be nervous and in a hurry when stopped by police[12]; driving below the speed limit[13]; driving above the speed limit[14]; looking at the police vehicle[15]; not looking at the police vehicle[16]; traveling on a route known to be used by drug couriers[17]; driving a late-model car[18] or large luxury car[19]; traveling late at night or early in the morning[20]; appearing to be a husband and wife team of Spanish descent[21]; driving a car while wearing jeans with a tie, being nervous, not making eye contact, coming from a "source" city and placing the car's registration on the passenger seat[22]; driving a dirty car[23]; and driving a clean car.[24]

How Have Profiles Fared in the Courts?

Courts usually hold that a match between the suspect's appearance and profile factors can be considered reasonable suspicion to detain the person briefly and investigate further, but all are in agreement that the profile cannot amount to probable cause to search the car.[25] One court dismissed the drug courier profile as a "classic example of those 'inarticulate hunches' that are insufficient to justify a seizure under the fourth amendment."[26] Courts seem to have two main objections to the drug courier profile: (1) many factors also resemble innocent, lawful behavior,[27] and (2) the "drug courier profile has a chameleon-like quality; it seems to change itself to fit the facts of each case."[28]

The most recent Arizona cases are *State v. Magner*,[29] in which the detention was held illegal, and *State v. Omeara*,[30] in which the detention and search were upheld, both by the Arizona Court of Appeals and the Arizona Supreme Court.

In *Magner*, the defendant was pulled over on Interstate 40 outside Flagstaff for driving 71 mph in a 65 mph zone. During the stop and preparation of a written warning, the officer observed the following: (1) Mr. Magner avoided eye contact, (2) he flinched the one time that he did make eye contact ("nervous"), (3) he was unusually upset about the stop, (4) he wore sneakers and jeans with a tie ("attempting to present as a businessman to any passing patrolman"), (5) the car's registration was on the seat, not in the glove compartment (causing the officer to "wonder whether defendant had a gun in the glove box"), (6) Mr. Magner was traveling from Tucson ("a known source for illegal drugs"), (7) the car was dirty ("travel from Point A to Point B as fast as they can without cleaning their cars"), and (8) an overnight bag was on the seat ("to keep the contents of the trunk hidden").[31]

The court of appeals, while acknowledging the totality of the circumstances approach, also said "that in looking at the totality, it had to examine each factor individually,"[32] and offered innocent explanations for each individual factor—for example, nearly everyone is nervous while being stopped by a police officer, and avoiding eye contact did not fall into the category of "dramatic nervousness."[33] The court also observed that the registration on the front seat should not have prompted suspicion, because the officer never asked the defendant why it was there as opposed to somewhere else—it could have been removed from its usual place in preparation for the traffic stop itself. Because the officer did not ask, his assumption that there might be a gun in the glove compartment was unreasonable. Regarding defendant's choice of apparel, the court was willing only to say that wearing a tie on a cross-country trip seemed "unusual," but again, without the officer inquiring, it could not be considered "suspicious." That the officer believed Tucson was a "source city" for drugs was discarded with little discussion, as the defendant had given an adequate and unprovoking explanation of his presence there. The court also declined to find a dirty car suspicious in the middle of a long trip, as it would make more sense to clean the car at the end of the trip.[34] Finally, although the court found the officer's inference reasonable that the overnight bag was on the seat because drugs occupied the trunk, they found it equally reasonable that the bag was there for "easy access to items such as a shaving kit or toothbrush."[35]

The court concluded that the traffic stop for speeding was legitimate, but further detention was unjustified:

> [The officer] would have been authorized to continue defendant's detention for a brief period to ask further questions about the circumstances [the officer] deemed suspicious. … However, [the officer] asked further questions only with respect to defendant's visit in Tucson, which produced nothing to enhance the suspicion of criminal activity. … The end result, when evaluating all of [the officer's] observations, together with the unclarified inferences from those observations, is that *[the officer] had no more than a "hunch" that defendant was involved in transporting drugs. This is not enough under the Fourth Amendment to justify defendant's detention.*[36]

However, this factor-by-factor approach was scrutinized and to a certain extent discredited by the Supreme Court a year later.[37] The court held that a "totality of the circumstances" approach and not a separate examination of each factor was the correct analytical vehicle: "While we certainly agree with the result in *Magner*, we do not approve of the approach taken. As the dissent in *Magner* noted, 'When addressed individually, almost any factor short of a 10 pound bale of marijuana on the front seat of the vehicle may have an innocent explanation.'"[38]

The *Omeara* case presented a different fact pattern and different "factors." In *Omeara*, the officer observed behavior that was suspicious on its face, not explainable as "innocent" behavior. He saw several men talking, getting in and out of two cars and switching cars. When the officer followed one of the cars, it made two illegal U-turns in heavy traffic, and the officer lost track of the car temporarily. When he located the car, the other car joined it and they began traveling together.

During the traffic stop for the U-turns, the officer issued a written warning. The officer asked for consent to search, which was refused. The officer sniffed the outside of the trunk lid and detected the heavy odor of fabric softener, which he knew from his experience was used to mask the odor of marijuana. He continued to detain defendant for 45 to 50 minutes while a drug-sniffing dog was brought to the scene; when the dog alerted, the officer had probable cause to obtain a telephonic search warrant, and 349 pounds of marijuana were seized.[39]

In upholding the detention and search, the court of appeals quoted the dissent in *Magner* approvingly,[40] and this may be why some construe it as contrary to *Magner*. But *Omeara* does not compromise the holding in *Magner*; they merely say the same thing in different ways. Even employing a totality of the circumstances approach in *Omeara*, the Supreme Court easily distinguished the "suspicious factors" in *Magner* from those in *Omeara*:

> The [lower court in *Omeara*] should have looked at the whole picture to evaluate the totality of the circumstances. *It then could have concluded that, collectively, these factors simply failed to show reasonable suspicion of criminal activity.* … One cannot parse out each individual factor, categorize it as potentially innocent, and reject it. … There is a gestalt to the totality of the circumstances test.[41]

Profiling and Probable Cause

The key seems to be that Supreme Court in *Omeara* correctly observed that the car-switching actions, U-turns and heavy odor of fabric softener were patently suspicious on their face for articulable reasons, whereas presumably the officer's observations in *Magner* were not. If one defines any sort of "profiling" as using an observable factor to reach a conclusion that unseeable activity is afoot, the Arizona Supreme Court's reasoning is sound: The car-switching, fabric softener, illegal turns and so forth were patent clues that criminal activity was occurring, whereas wearing a tie with jeans may be a fashion faux pas in some places but is an overt condition that does not on its face lead to a reasonable suspicion that a crime is taking place. Individually or collectively, the factors observed in *Magner* did not add up to reasonable suspicion, let alone probable cause to arrest.

In addition, law enforcement officers are adept at suppression hearings to remedy, in hindsight, any defect in the traffic stop. Search and seizure fact patterns are so fact-intensive that officers routinely seek to preserve the state's case on the witness stand. Two things help here: First, it should be made clear before your prehearing interview that the officer had better review her departmental report and come prepared to make any changes or additions at the interview—not on the witness stand. An interview must be planned carefully, and the officer should be locked into the facts and observations that indicate that she made the stop based on the drug courier profile. A defense attorney should not put words in her mouth and give her every opportunity to amend her report.

Finally, the officer on the witness stand will be conversant, in a black-letter way, with the latest drug courier profile cases. Just as police invoke terms such as "plain view" and "exigent circumstances" without fully knowing what they mean, the officer will know that she must somehow transform her inarticulate hunch into reasonable suspicion. Thus, the officer will borrow facts from recent case law and plug them into a defendant's traffic stop, whether it existed or not. This is why you should involve your client in the suppression hearing preparation; he may not even recognize himself in the police report—the circumstances may be that altered! For example, the officer might testify that your client did not make eye contact (a major drug courier factor); you may learn from your client that there was no eye contact because the client was wearing his only pair of prescription glasses—sunglasses—and you verify those are the only glasses impounded in his jail property.

Conclusion

Contrary to how it sometimes seems from the defense perspective, there is still something left to work with in motions to suppress drug evidence when the investigatory detention is based on the drug courier profile.

A motion to suppress always should point out that although the drug courier profile can add up to reasonable suspicion, once the officer decides to investigate further, he'd better investigate further,[42] not merely scrutinize the motorist for more drug courier factors, or the detention may be illegal. Remember, the drug courier profile never supports probable cause to search.[43]

The recent cases, *Magner* and *Omeara*, are distinguishable from one another and completely compatible, and the newer case, particularly the Supreme Court's holding, should not be construed to further erode the right to be free of unreasonable search and seizure.

***Diana Patton** is a trial lawyer with the Maricopa County Office of the Legal Defender.*

Endnotes

1. *See generally, Miles of White Lines: Use of the Drug Courier Profile by State Law Enforcement Agencies on the Highway as Reasonable Suspicion to Detain Motorists*, 30 Ariz. L. Rev. 949 (1988).
2. "Our treatment of automobiles has been based in part on their inherent mobility, which often makes obtaining a judicial warrant impracticable." *United States v. Chadwick*, 433 U.S.1 (1977), citing *Cady v. Dombrowski*, 413 U.S. 433, 441–442 (1973), *Texas v. White*, 423 U.S. 67 (1975). "The answer lies in the diminished expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." *Id., citing Cardwell v. Lewis*, 417 U.S. 583, 590 (1974).
3. *United States v. Johnson*, 516 So.2d 1015 (Fla. Ct. App. 1987)

(upholding suppression of evidence seized pursuant to a drug courier profile stop).

4. *See Miles of White Lines, supra* note 1.
5. In *State v. Calvin Morrell*, CR 99-14784, the Department of Public Safety officer testified at the preliminary hearing and the suppression hearing that the defendant's "clean, unwrinkled shirt," hanging in the back seat, was suspicious because drug couriers displayed a shirt or jacket to seem more like "businessmen," or other members of the traveling public.
6. *State v. Cohen*, 711 P.2d 3, 5 (N.M. 1985).
7. *Valcarcel v. State*, 718 S.W. 2d 359, 361 (Tex. 1986).
8. *Cohen*, 711 P.2d at 5.
9. *Valcarcel*, 718 S.W.2d at 362.
10. *Id.*
11. *Cohen*, 711 P.2d at 5.
12. *Id.*
13. *Johnson*, 516 So.2d at 1018.
14. *State v. Magner*, 956 P.2d 519 (Ariz. Ct. App. 1998). The officer did not cite speeding as a drug courier factor but opined that drug couriers' cars are dirty because they "drive from Point A to Point B as fast as they can" without stopping to wash their cars.
15. *Valcarcel*, 718 S.W.2d at 362.
16. *Department of Highway Safety and Motor Vehicles v. Coleman*, 505 So.2d 668, 670 (Fla. Ct. App. 1987).
17. *Id.*
18. *Id.*
19. *Johnson*, 516 So.2d at 1018.
20. *United States v. Smith*, 799 F.2d 704, 706 (11th Cir. 1986).
21. *Valcarcel*, 718 S.W.2d at 362.
22. *State v. Magner*, 392, 956 P.2d 519 (1998) (detention and search suppressed).
23. *Id.*
24. *United States v. Baron*, 94 F.3d 1312, 1319 (9th Cir.), *cert. denied*, 117 S. Ct. 624 (1996).
25. *E.g.*, the outcome of *State v. Omeara*, 297 Ariz. Adv. Rep. 3 (Div. 2, April 27, 1999), would have been quite different if the officer had proceeded directly to a warrantless search on the basis of the odor of fabric softener.
26. *United States v. Smith*, 799 F.2d 704, 707 (11th Cir. 1986). *But see State v. Cohen*, 711 P.2d 3 (N.M. 1985), in which a match of seven profile characteristics did amount to reasonable suspicion to detain the suspects after the lawful reason for the initial stop had expired.
27. *United States v. Westerbann-Martinez*, 435 F. Supp. 690, 698 (E.D.N.Y. 1977).
28. *Id.*
29. 956 P.2d 519 (Ariz. Ct. App. 1998).
30. 956 P.2d 519, 330 Ariz. Adv. Rep. 3 (Ct. App. 2000).
31. 956 P.2d at 523.
32. 330 Ariz. Adv. Rep. 3, quoting the lower court opinion, 956 P.2d 519, 523–524 (Ct. App. 1999).
33. *Id.* at 524.
34. *Id.* at 525. In an almost tongue-in-cheek aside, the court observed that cars that appeared "too clean" also were associated with drug couriers. *United States v. Baron*, 94 F.3d 1312, 1319 (9th Cir.), *cert. denied*, 117 S. Ct. 624 (1996).
35. 956 P.2d at 525.
36. 956 P.2d at 527 [emphasis added].
37. 330 Ariz. Adv. Rep. 3 (August 31, 2000).
38. 330 Ariz. Adv. Rep. 3, *quoting* 956 P.2d at 528 (Voss, J., dissenting).
39. 297 Ariz. Adv. Rep. at 3.
40. "We agree with the following observations by the dissent in *Magner*:

    When addressed individually, almost any factor short of a 10 pound bale of marijuana on the front seat of the vehicle may have an innocent explanation. … The relevant inquiry is not whether the particular behavior is innocent or guilty, but rather the degree of suspicion that attaches to the particular types of non-criminal acts."

    Omeara 297 Ariz. Adv. Rep. at 4, *quoting Magner*, 956 P.2d at 528–529 (Voss, J., dissenting).
41. 330 Ariz. Adv. Rep. 3–4 (2000) [emphasis added].
42. The *Omeara* court said that the holding in *Magner* does not "mandate questioning by the officer during investigatory stop; rather, it simply permits or authorizes questioning." 297 Ariz. Adv. Rep. at 4. However, this reasoning fails because it is circular: The officer is permitted to question, and if he does not question, there is no basis for the continued detention.
43. In fact, as a caveat, it should be said here that a motion to suppress probably should not live or die on that issue. You still must pay attention to issues such as whether the length of the detention exceeded the scope. Did the officer claim that the duration of the stop was to issue a traffic ticket and then continue to detain the motorist to extract consent to search? Did he make the stop in the first place for weaving within the traffic lane when that's not even illegal?