

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-8395
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROBIN SHURLEEN ROLLER,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

P 92 CR 41 2

May 27, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Around 8:00 p.m. on April 3, 1992, United States Border Patrol Agent Danny Burns noticed about six or eight familiar vehicles in the parking lots located near the Boquillas Boat Crossing in the

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Big Bend National Park area. After patrolling the Boquillas Canyon road, Agent Burns noticed an unfamiliar white Chevrolet sedan which contained two passengers as it pulled in front of him onto Route 12. Finding it unusual for an unfamiliar vehicle to have arrived after his initial patrol of the area at such a late hour and to be leaving within 20 minutes of its arrival, Burns signalled for the car to pull over. At trial, Burns also stated that he suspected that the persons in the vehicle had either picked up someone or something because of the brief visit in the area.

Upon inquiry, the female driver indicated to Burns that they were coming from Boquillas. The female passenger, whom Burns later recognized, indicated that she was being picked up and that they were on their way to Alpine. Burns requested that the driver present her driver's license and also asked her to open the trunk of the vehicle. The driver, Robin Shurleen Roller, voluntarily complied, and Burns discovered that the trunk of the vehicle contained two large nylon sacks of marijuana. Both parties, Robin Shurleen Roller and Molly Jean Grinkavitch (the passenger), were indicted for conspiring to possess and for possession of marijuana with the intent to distribute.

Prior to trial, Roller filed a motion to suppress all of the seized items and the laboratory test results on the basis that Burns lacked a reasonable suspicion to stop the vehicle or probable cause to conduct the search. The district court conducted a hearing on the motion to suppress and ruled that the stop and search of the vehicle were justified. Based on the "roving patrol"

doctrine, the district court concluded that Burns was justified in his stop and search of the vehicle because he reasonably suspected, based on articulable facts and rational inferences from those facts, that the vehicle was engaged in illegal activity.

Following waiver of a trial by jury, the district court found Roller and Grinkavitch guilty of both counts.

OPINION

Roller argues that the trial court erred in failing to grant her motion to suppress because the arrest and search of her vehicle occurred without reasonable suspicion or probable cause in violation of the Fourth Amendment. She asserts that the officer stopped the vehicle merely because he did not recognize it and, at the time of the stop, the Border Patrol officer had not observed any illegal activity; further, Roller contends the officer searched the vehicle because he recognized the passenger and had heard that she had been involved in drugs.

In ruling on the motion to suppress, the district court specifically found that Burns had a reasonable suspicion to stop the vehicle for the following reasons: 1) the hour of the day, 2) the proximity of the area to the border crossing, 3) the car was not recognized as one belonging to a local resident and had not been in the parking lot twenty minutes earlier when Agent Burns patrolled it, 4) the boat crossing had been closed for a few hours, 5) the area is one frequented by smugglers of both illegal aliens and narcotics, 6) a vehicle had been seen twenty minutes earlier on the Mexican side of the river at the boat crossing, and 7) there is

generally no traffic in the area after dark. The court noted that the subsequent search of the vehicle was justified by those same reasons, in addition to the fact that Grinkavitch stated that she had just crossed the border from Boquillas.

A vehicle and its occupants may be briefly detained for investigation based not upon probable cause but upon reasonable suspicion of criminal activity. The question whether an officer had reasonable suspicion to stop a person is one of law. See United States v. Casteneda, 951 F.2d 44, 47 (5th Cir. 1992).

A Border Patrol agent conducting a roving patrol in a border area may make a temporary, investigative stop of a vehicle if specific, articulable facts and the rational inferences drawn from those facts reasonably warrant suspicion that the vehicle is engaged in illegal activities. United States v. Brignoni-Ponce, 422 U.S. 873, 884, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975). Factors to be considered include known characteristics of a particular area; the proximity of the area to the border; the usual traffic patterns on a particular road; the agent's previous experience with criminal traffic; information about recent illegal trafficking; characteristics of the vehicle stopped, including its type and appearance and the behavior of the driver. Id. at 884. Roller challenges the application of the district court's factual findings to the factors enumerated in Brignoni-Ponce as satisfying a reasonable suspicion. Roller contends the only factor warranting a reasonable suspicion in this case is the proximity of the area to the border.

Reasonable suspicion of illegal activities can be found in this case when considering the Brignoni-Ponce factors. The facts justifying the stop which were noted by Border Patrol Agent Danny Burns and accepted by the district court satisfy the factors which are properly considered for an investigative stop under the "roving patrol" doctrine. See Brignoni-Ponce, 422 U.S. at 884.

Roller cites Casteneda to argue that Burns did not have reasonable suspicion to stop her vehicle.¹ Casteneda was a case in which the propriety of the stop centered on the agent's testimony that he could detect the odor of marijuana trailing the truck he was investigating. 951 F.2d at 46-47. In Casteneda, this Court concluded that without the agent's testimony that he smelled marijuana, the Brignoni-Ponce factors were suspicion-neutral. Id. This Court also noted that many roads near the Texas-Mexico border share characteristics similar to those of the road in Casteneda and that use of these roads does not in itself create reasonable suspicion to warrant a stop. Id., n.4.

Unlike the facts of Casteneda, Burns testified to the many reasons for his reasonable suspicion that the car was probably engaged in illegal activities. He maintained that it was the car's brief venture into the tourist area; the fact that he did not recognize the vehicle; the less-than-one mile proximity of the location to the Mexican border; the fact that he noticed a car

¹ In Casteneda, an agent with five years of experience stopped a truck on a gravel road approximately 35 miles from the border. The road was known for narcotics trafficking and as a bypass between the two border checkpoints in the area. Id. at 45-46.

coming from the Mexican side of the border while he was proceeding down Boquillas Canyon Road; the fact there were no checkpoints at that area; and the probability that the parties picked up something or someone as providing the basis of his reasonable suspicion to make the stop. Burns is an experienced agent who was hired in 1972. Therefore, the Brignoni-Ponce factors were satisfied.

Roller's theory that the district court erred in denying her motion to suppress because Burns did not have probable cause to search the vehicle is also without merit.

The Supreme Court in Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), held:

[T]he true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.

Id. at 153. See also United States v. Ervin, 907 F.2d 1534, 1537 (5th Cir. 1990). The question of the legality of the search is a question of law and is subject to de novo review. United States v. Cooper, 949 F.2d 737, 744 (5th Cir. 1991), cert. denied, 112 S. Ct. 2945 (1992).

Warrantless searches of vehicles are permitted if the search is supported by probable cause. United States v. Kelly, 961 F.2d 524, 527 (5th Cir. 1992). The Supreme Court in Brinegar v. United States, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949), defined probable cause as "a reasonable ground for belief of guilt." See id. at 175. The existence of probable cause is

determined by reviewing the totality of the circumstances. United States v. Reed, 882 F.2d 147, 149 (5th Cir. 1989). "A succession of otherwise `innocent' circumstances or events . . . may constitute probable cause when viewed as a whole." United States v. Muniz-Melchor, 894 F.2d 1430, 1438 (5th Cir.), cert. denied, 495 U.S. 923 (1990). This Court noted in Kelly that the factors relevant to probable cause are not technical ones but instead they are "factual and practical ones of everyday life on which reasonable and prudent persons, not legal technicians, act." Kelly, 961 F.2d at 527 (internal citations and quotations omitted).

The district court validated Burns's search based on the driver's indication that they had crossed the border from Boquillas. The district court also upheld the reasons given for the stop as justifying the search of the trunk. Viewing the totality of the following factors: the lack of checkpoints at the border crossing, the irregularity of late-night traffic in the area, the fact that the driver and the passenger gave conflicting stories about their purpose in the area as well as the indication that they had come from Boquillas, the time of day, and the fact that Burns was familiar with the passenger, probable cause to search the vehicle existed. See United States v. Espinoza-Seanez, 862 F.2d 526, 531 (5th Cir. 1988) (the proximity to the border, the time of day, the normal patterns of traffic in the area, and the fact that the driver lied about where he was coming from justified the search); United States v. Gordon, 712 F.2d 110, 113 (5th Cir. 1983) (the proximity of the location to the border, the fact that

the Border Patrol agent of 15 years did not recognize the truck although he was familiar with the area and its traffic patterns along with the fact that local traffic had stopped for the evening justified the stop and search).

Roller's arguments that reasonable suspicion and probable cause to stop and search the vehicle did not exist are not persuasive. The district court's denial of the motion to suppress is affirmed.