TOURO LAW
Touro College Jacob D. Fuchsberg Law Center

Touro Law Review

Volume 28
Number 3 *Annual New York State Constitutional Law Issue*

Article 19

August 2012

Roving Border Patrols In New York – Sometimes the Drug Smuggler Does Not Get Convicted: The Legal Limitations Regarding Vehicle Stops and Consent Searches Based Upon Reasonable Suspicion - People v. Banisadr

Robert Mitchell
Touro Law Center

Roving Border Patrols In New York – Sometimes the Drug Smuggler Does Not Get Convicted: The Legal Limitations Regarding Vehicle Stops and Consent Searches Based Upon Reasonable Suspicion - People v. Banisadr

Cover Page Footnote
28-3

ROVING BORDER PATROLS IN NEW YORK - SOMETIMES THE DRUG SMUGGLER DOES NOT GET CONVICTED: THE LEGAL LIMITATIONS REGARDING VEHICLE STOPS AND CONSENT SEARCHES BASED UPON REASONABLE SUSPICION

COUNTY COURT, ST. LAWRENCE COUNTY NEW YORK

People v. Banisadr[1]
(decided May 23, 2011)

I. THE MATTER OF *PEOPLE V. BANISADR*

The defendant in this action requested a suppression hearing regarding a search and seizure of marijuana discovered in his motor vehicle during a roving patrol traffic stop by the Border Patrol in upstate New York.[2] The defendant also sought suppression of incriminating statements he made to the State Police after his arrest.[3] The hearing focused on two main issues: (1) whether reasonable suspicion was established by the Border Patrol in order to pull over the defendant's automobile[4] and (2) whether "voluntary consent" was given to the Border Patrol agent to search the vehicle.[5] Factors to "support a finding of reasonable suspicion" were evaluated and the court held that reasonable suspicion was established.[6] However, the People failed "to meet their heavy burden of showing voluntary consent by

[1] No. 2010-079, 2011 WL 2022735 (St. Lawrence Cnty. Ct. May 23, 2011).
[2] *Id.* at *1.
[3] *Id.*
[4] *Id.* at *4.
[5] *Id.* at *5.
[6] *Banisadr*, 2011 WL 2022735, at *5.

clear and convincing evidence" primarily due to a lack of detail regarding the occurrence.[7] Therefore, the defendant's motion to suppress was granted.[8]

In this case, a Border Patrol agent was on a roving border patrol in upstate New York within two miles of the Canadian border.[9] The area had unguarded roads known for smuggling and the Border Patrol agent noticed two out-of-state vehicles traveling together.[10] The Border Patrol agent testified the vehicles were traveling at 45 miles per hour in a 55 miles per hour zone.[11] The agent stated the occupants all looked straight ahead and never acknowledged the marked Border Patrol car traveling alongside them.[12] The defendant was pulled over in a rental car with New Jersey license plates.[13] The agent asked the defendant about his citizenship and whether he knew the occupants in the other vehicle.[14] The Border Patrol agent testified the defendant claimed he did not know the people in the other vehicle, but that he changed his story when the defendant was told the other car was registered under his name.[15] The agent stated consent was then obtained to search a suitcase in the trunk.[16] The defendant was arrested after marijuana was discovered in the suitcase.[17] The defendant testified he was a naturalized U.S. citizen with no previous criminal record.[18] He stated he did not break any traffic laws prior to the traffic stop.[19] More importantly, the defendant testified he never gave consent to search the vehicle.[20] Instead, he claimed the keys to the car were simply grabbed from the dashboard and the trunk was

[7] *Id.* at *6.
[8] *Id.*
[9] *Id.* at *1-2.
[10] *Id.*
[11] *Banisadr*, 2011 WL 2022735, at *2.
[12] *Id.*
[13] *Id.*
[14] *Id.* at *2-3.
[15] *Id.* at *3.
[16] *Banisadr*, 2011 WL 2022735, at *3 (stating the Border Patrol agent testified he "asked if he could have consent to look in the trunk and the suitcase" and the agent "said defendant said that he could look there, and handed [the Agent] the keys").
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

opened by the agent.[21] The defendant testified he was never asked if the suitcase in the trunk could be searched.[22]

The reasoning of the County Court first concentrated on whether reasonable suspicion was established in order to support legally pulling over the defendant's car.[23] In *United States v. Brignoni-Ponce*,[24] certain factors were established and must be taken into account in order to decide if reasonable suspicion exists to legally stop a motor vehicle in a border patrol area.[25] Based upon the testimony of the Border Patrol agent, the County Court found factors that supported a conclusion that reasonable suspicion existed in that the defendant "might be involved in transporting contraband" and, therefore, the stop was justified to make further inquiries.[26] The court stated that while these factors may appear "innocent in and of themselves, they must be evaluated collectively."[27] The "totality of the circumstances" must be considered in making reasonable suspicion determinations which "tilt[ ] in favor of a standard less than probable cause" in "brief investigatory stops of persons and vehicles."[28]

The court stated that Border Patrol agents have "many, but not all, of the powers of a peace officer under New York State law to make a warrantless arrest."[29] In New York, prior to such an arrest or

[21] *Banisadr*, 2011 WL 2022735, at *3.

[22] *Id.*

[23] *Id.* at *4.

[24] 422 U.S. 873 (1975).

[25] *Id.* at 884-85 (stating the Supreme Court determined that the factors necessary to establish reasonable suspicion in border areas may include the following: "characteristics of the area;" "proximity to the border;" "usual patterns of traffic;" "previous experience;" "information about recent illegal border crossings;" "driver's behavior;" "aspects of the vehicle itself;" "characteristic appearance of persons").

[26] *Banisadr*, 2011 WL 2022735, at *5; *id.* at *1-2 (stating that the testimony the Border Patrol agent provided revealed factors which established reasonable suspicion: the agent's special training in drug detection, the agent's six years patrol experience, the unguarded roads in area were used for smuggling, the defendant was driving less than two miles from the border, the agent noticed the defendant in one of two out-of-state automobiles traveling together, the occupants in the out-of-state vehicles avoided eye contact with the agent who was in a marked Border Patrol vehicle traveling alongside them).

[27] *Id.* at *5; *see also* United States v. Arvizu, 534 U.S. 266, 273 (2002) (stating the Supreme Court held that "[w]hen discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of the circumstances' ").

[28] *Arvizu*, 543 U.S. at 273.

[29] *Banisadr*, 2011 WL 2022735, at *4; (*see also* N.Y. CRIM. PROC. LAW § 2.15 (7) (McKinney 2007); N.Y. CRIM. PROC. LAW § 2.20 (1)(a) and (c) (McKinney 2005); People v. Boyea, 844 N.Y.S.2d 156, 157 (App. Div. 3d Dep't 2007) (stating "Border Patrol agents[ ]

search, the agent must have reasonable suspicion.[30] However, the Border Patrol agent can always make inquiries about the citizenship of occupants in a motor vehicle.[31] Furthermore, the "court reviewing whether there was reasonable suspicion to support the legality of th[e] stop is required to credit the officer with drawing on his stated experience and specialized training that may lead him or her to make inferences and deductions about the situation."[32] Similar to federal precedent, factors used to analyze reasonable suspicion must be evaluated *collectively*.[33] The County Court held the Border Patrol agent here had reasonable suspicion regarding the defendant's vehicle in that it might be transporting contraband.[34] Therefore, the stop was authorized and further inquires could be made.[35]

The second issue the court analyzed was whether voluntary consent was given to the Border Patrol agent in order to search the defendant's vehicle.[36] The agent and the defendant had vastly different accounts of what occurred during the traffic stop.[37] The focus during the suppression hearing was whether the burden of proof was met by the prosecutor.[38] It is "[t]he People [who] bear a heavy burden of establishing consent to a voluntary search of a vehicle or its

are granted the powers accorded to peace officers in New York" and can perform "warrantless searches when constitutional permissible and effected pursuant to the agent's duties")).

[30] *Banisadr*, 2011 WL 2022735, at *4; *see also* People v. Cantor, 324 N.E.2d 872, 877 (N.Y. 1975) (stating before a vehicle is "stopped in a public place . . . officer must have reasonable suspicion" and "reasonable suspicion is the quantum of knowledge sufficient to induce an ordinary prudent and cautious man under the circumstances to believe criminal activity is at hand").

[31] *Banisadr*, 2011 WL 2022735, at *4; *see Brignoni-Ponce*, 422 U.S. at 881-82 (stating Border Patrol "may question the driver and passengers about their citizenship and immigration status."); *see also Boyea*, 844 N.Y.S.2d at 157-58 (confirming Border Patrol "reasonably stopped the vehicle to question the occupant concerning his citizenship").

[32] *Banisadr*, 2011 WL 2022735, at *4; s*ee also* People v. Mothersell, 926 N.E.2d 1219, 1226 (N.Y. 2010).

[33] People v. LaRose, 782 N.Y.S.2d 633, 637 (St. Lawrence Cnty. Ct. 2004) (stating "the border patrol agent must have a particularized and objective basis for suspecting legal wrongdoing something more than a 'mere hunch' "); *see also Arvizu*, 534 U.S. at 277 (holding courts must consider reasonable suspicion is established by looking at "the totality of the circumstances and given due weight to the factual inferences drawn by the law enforcement officer").

[34] *Banisadr*, 2011 WL 2022735, at *5.

[35] *Id.*

[36] *Id.*

[37] *Id.* at *6.

[38] *Id.* at *5.

contents."[39] If voluntary consent was not established, the Supreme Court has held "evidence seized during an unlawful search [can] not constitute proof against the victim of the search."[40] In New York, a peace officer need not inform a suspect that he or she may refuse consent to a search request.[41] However, failure to advise of the right to refuse "may be considered in assessing the voluntariness of the consent."[42] The court here ascertained that if the defendant actually consented to the search, the warrantless search of the suitcase and the "seizure of the marijuana [would be] proper" because a "driver's consent to search the vehicle is a valid substitute for probable cause."[43] The critical issue in this matter was "whether the defendant consented to the search and if so, the scope of the consent."[44] The court reasoned the Border Patrol agent could have established " 'unequivocally that consent to search was obtained by getting a signed consent to search form or, at the very least [the agent could have] made a complete and accurate record of how consent was given.' "[45] Clear and convincing evidence was not established due to the lack of detail provided and the testimony articulated "wildly different versions of what occurred" during the traffic stop.[46] The Border Patrol agent claimed he received consent and was handed the keys to search both the trunk and the suitcase in the trunk.[47] The defendant testified he was told to put the keys on the dashboard.[48] He claimed the agent simply grabbed the keys and without consent opened the trunk.[49] The defendant stated the agent also never asked for his consent "to search the suitcase in the trunk."[50] Lastly, the "[d]efendant said that [the

[39] *Banisadr*, 2011 WL 2022735, at *5; *see also* Bumper v. North Carolina, 391 U.S. 543, 548 (1968) ("When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.").

[40] Wong Sun v. United States, 371 U.S. 471, 484 (1963).

[41] People v. Gonzalez, 347 N.E.2d 575, 581 (N.Y. 1976).

[42] *Banisadr*, 2011 WL 2022735, at *5.

[43] *Id.*; *see Gonzalez*, 347 N.E.2d at 579 ("[L]imited exception[ ] to the warrant requirement and, indeed, to the requirement of probable cause, is voluntary consent to the search.").

[44] *Banisadr*, 2011 WL 2022735, at *6.

[45] *Id.* (quoting People v. Hall, No. 01560-2005, WL 1341016, at *4 (Erie Cnty. Ct. May 5, 2006)).

[46] *Id.*

[47] *Id.* at *3.

[48] *Id.*

[49] *Banisadr*, 2011 WL 2022735, at *3.

[50] *Id.* (stating the suitcase is where the marijuana was allegedly found).

agent] came back to the driver's side window, pointing his gun at the defendant's head and said, '[d]on't move or I will blow your f-ing head off.' "[51] The court held the People failed to meet the burden of voluntary consent.[52] As a product of an unauthorized warrantless search, the subsequent statements made by the defendant after his arrest to the State Police were also suppressed.[53]

II. ROVING BORDER PATROLS: THE FOURTH AMENDMENT AND THE LIMITATIONS OF CONDUCTING WARRANTLESS SEARCHES BASED UPON REASONABLE SUSPICION

The right to have control and possession of your own person is held to the highest regard in the United States.[54] The Fourth Amendment protects "the right of the people to be secure . . . against unreasonable searches and seizures."[55] Therefore, evidence obtained in violation of the Fourth Amendment is excluded in order to deter police from conducting impermissible searches.[56] In *Katz v. United States*,[57] the Supreme Court stated that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[58] A "search" occurs in an area where a person has a "reasonable expectation of privacy."[59] Anytime law enforcement "restrains [a person's] freedom to walk away," law enforcement has seized that person.[60] Searches and seizures are controlled by the Fourth Amendment and probable cause is considered

[51] *Id.*

[52] *Id.* at *6.

[53] *Id.*; *see* People v. Hall, 828 N.Y.S.2d 740, 741 (App. Div 4th Dep't 2006) ("[T]he court properly suppressed the subsequent statements made by defendant to police and the evidence thereafter seized from the vehicle" (*see generally Wong Sun*, 371 U.S. at 487-88)); *Banisadr*, 2011 WL 2022735, at *1. The defendant made incriminating statements after his arrest to the State Police regarding that he was a "small player" who was paid $2,000 to transport the ten pounds of marijuana in his car.

[54] *See* Terry v. Ohio, 392 U.S. 1, 9 (1968); *see also* Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891).

[55] *See Terry*, 392 U.S. at 8; *see also* U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.").

[56] *Terry*, 392 U.S. at 12.

[57] 389 U.S. 347 (1967).

[58] *Katz*, 389 U.S. at 351.

[59] *Id.* at 360-61 (Harlan, J., concurring).

[60] *Terry*, 392 U.S. at 16.

essential.[61] An objective standard must be utilized to ascertain the specific facts and rational inferences used by law enforcement to reasonably warrant an intrusion.[62]

It is imperative to note exigencies are needed to justify the initiation of a search "in the absence of probable cause to arrest."[63] The police rely on their law enforcement experiences and specialized training. To lawfully take limited intrusive action based upon reasonable suspicion, a police officer must objectively surmise from the "totality of the circumstances" in a given situation that criminal wrongdoing may be in play.[64] Reasonable suspicion is a lower standard than probable cause to conduct warrantless searches.[65] Such suspicion has been held constitutionally permissible in order to conduct certain activities such as "brief investigatory stops of persons and vehicles."[66]

Border Patrol agents have authority to search for any aliens in any vessel of transportation "within 100 miles of the border."[67] Border Patrol agents have no absolute "authority to search cars, but only to question the occupants about their citizenship and immigration status."[68] Border Patrol agents must have a "founded suspicion" to stop a vehicle and that suspicion cannot be based solely on the occupants' ancestry.[69] The suspicion must be reasonable in order to stop a car briefly to "investigate the circumstances that provoke[d] suspicion," to inquire about citizenship, and for occupants "to explain suspicious

[61] *Id.* at 17; *see also* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 272 (MATTHEW BENDER & CO. INC. 5TH ED. 2010) ("[T]he Supreme Court has never quantified the concept of 'probable cause' . . . 'probable cause' involves a 'substantial basis' for concluding—a 'fair probability' but less than a preponderance of the evidence—that a search will turn up criminal evidence or that the person seized is guilty of an offense.").

[62] *Terry*, 392 U.S. at 21.

[63] *Id.* at 25-26 ("[A]n officer may lawfully arrest a person . . . when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime.").

[64] *Arvizu*, 534 U.S. at 273.

[65] *Id.*; *see also Terry*, 392 U.S. at 27 (describing reasonable suspicion as when a "prudent man in the circumstances would be warranted in the belief his safety or that of others was in danger" and then "in determining whether an officer acted reasonably in such circumstances, due weight must be given . . . to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience").

[66] *Arvizu*, 534 U.S. at 273.

[67] *Brignoni-Ponce*, 422 U.S. at 877; s*ee also* 8 C.F.R. § 287.1(a)(2) (2003).

[68] *Brignoni-Ponce*, 422 U.S. at 874.

[69] *Id*. at 876.

circumstances."[70] It is unconstitutional to simply stop automobiles at random because it would lead to arbitrary law enforcement.[71] Roving border patrols must consider a number of "factors" in determining whether reasonable suspicion exists to stop an automobile near any border area.[72] The factors must not be considered individually, but instead, they "must turn on the totality of the particular circumstances" where everything is taken into account collectively.[73] This is because the "concept of reasonable suspicion is somewhat abstract" and cannot simply be reduced to a particular or fine set of rules.[74] Factors or acts may be innocent if each is analyzed separately; however, based upon all the patrol agent's factual inferences, reasonable suspicion and further investigation could arise or be warranted only if the series of acts or factors are taken together in a proper analysis.[75] To establish reasonable suspicion, a Border Patrol agent may consider such factors as: "recent illegal border crossings," "driver's behavior . . . or obvious attempts to evade officers," "proximity to the border," "characteristics of the area," "previous experience," "usual traffic patterns on a particular road," "aspects of the vehicle itself," and "characteristic appearance of persons."[76]

Regarding reasonable suspicion determinations, the Supreme Court has held the federal courts must adhere to a particular standard of review. In federal courts, "a *de novo* standard of review [is applied] to determinations of . . . reasonable suspicion."[77] "[T]he legal rules for . . . reasonable suspicion acquire content only through appli-

[70] *Id.* at 881-82.

[71] *Id.* at 884 ("[T]he Fourth Amendment forbids stopping vehicles at random.").

[72] *Id.* at 884-85. Factors an agent may consider to establish reasonable suspicion include: "aspects of the vehicle itself" (for example, heavily loaded, high number of passengers); "characteristic appearance of persons" (for example, haircut, mode of dress); "characteristics of the area;" "proximity to the border;" "usual traffic patterns on a particular road;" "previous experience;" "recent illegal border crossings;" "driver's behavior . . . or obvious attempts to evade officers;" *see also Brignoni-Ponce*, 422 U.S. at 885 ("In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling.").

[73] *Brignoni-Ponce*, 422 U.S. at 885 n.10.

[74] *Arvizu*, 543 U.S. at 274 (stating "divide-and-conquer analysis" of factors is precluded and reasonable suspicion can only be established by looking at all the factors, not in isolation, but in the totality of the circumstances involved).

[75] *Id.* at 273-75.

[76] *Brignoni-Ponce*, 422 U.S. at 884-85.

[77] Ornelas v. United States, 517 U.S. 690, 695 (1996).

cation."[78] Therefore, independent review is necessary for federal courts to clarify and "maintain control of" these legal principals through the utilization of *de novo* review.[79] *De novo* review also establishes greater uniformity.[80]

At border stop checkpoints, reasonable suspicion is not required to search persons and effects because "[t]he [g]overnment's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border."[81] It has been long recognized that automobiles seeking entry into the country can be searched because the government has a paramount interest in the protection of its territorial integrity.[82] Therefore, the Supreme Court has held that it is reasonable for "suspicionless inspections at the border [to] include[ ] the authority to remove, disassemble, and reassemble a vehicle's fuel tank."[83] The typical reasonable person understands "the expectation of privacy is less at the border than in the interior."[84] Therefore, the government can "conduct suspicionless inspections at the border" where any privacy expectation is much less than in the interior of the country.[85] In *United States v. Singh*,[86] the Second Circuit held "[r]outine searches at the border, or at the functional equivalent of the border (such as an inland airport, where an international flight first lands), [has] long been viewed as reasonable *per se*."[87] However, this "*per se* reasonableness" does not apply to roving border patrols near the border as they are "held to a higher standard."[88] This is because "[t]he Supreme Court has recognized that lesser intrusions by inland roving patrols need be supported . . . by reasonable suspicion."[89]

The New York Court of Appeals has held that "reasonable suspicion is the quantum of knowledge sufficient to induce an ordina-

[78] *Id.* at 697.
[79] *Id.*
[80] *Id.*
[81] United States v. Flores-Montano, 541 U.S. 149, 152 (2004).
[82] *Id.* at 153, 155.
[83] *Id.* at 155.
[84] *Id.* at 154.
[85] *Id.* at 154-55.
[86] 415 F.3d 288 (2d Cir. 2005).
[87] *Id.* at 293.
[88] *Id.* at 294.
[89] *Id.* ("By that, the Supreme Court means the officer must have a 'particularized and objective basis for suspecting legal wrongdoing' given the 'totality of the circumstances.' " (quoting *Arvizu*, 543 U.S. at 273)).

rily prudent and cautious man under the circumstances to believe criminal activity is at hand."[90] In other words, a mere "gut reaction" or a "hunch" is not enough to establish reasonable suspicion because the requisite knowledge must have some demonstrable roots and "be more than subjective" in nature.[91] New York precedent is abundantly clear that, at the very least, reasonable suspicion is needed that a motorist and "[any] occupants had been, are then, or are about to be, engaged in conduct in violation of the law" in order for the police to conduct a traffic stop.[92] The absence of the minimum requisite of reasonable suspicion would constitute the stopping of an automobile by law enforcement as an impermissible seizure.[93] Therefore, the minimum requirement for law enforcement to pull over a motorist is a "reasonable suspicion of criminal activity" because "any other rule would permit police seizures solely if the circumstances existed [that presented] a potential for danger."[94]

In New York, Border Patrol agents on roving patrols may stop vehicles near the border if they are aware of specific facts together with rational inferences that can reasonably warrant suspicion.[95] "The existence of reasonable suspicion justifying an investigatory stop is dependent upon both the content of the information possessed by the [patrol agent] and its degree of reliability, both of which should be considered with the totality of the circumstances."[96] Border Patrol agents may question the car occupants about citizenship and ask them "to explain suspicious circumstances;" however, "any further detention must be based upon . . . consent or probable cause."[97] The issues surrounding further detention were highlighted in *People v. LaRose*.[98] In *LaRose*, a Border Patrol agent claimed he made a reasonable suspicion motor vehicle stop near the border based upon the driver making questionable turns and "the fact something

[90] *Cantor*, 324 N.E.2d at 877.

[91] People v. Sobotker, 373 N.E.2d 1218, 1220 (N.Y. 1978).

[92] *Id.*

[93] *Id.*

[94] People v. May, 609 N.E.2d 113, 115 (N.Y. 1992).

[95] People v. Carillo, 686 N.Y.S.2d 114, 117 (App. Div. 3d Dep't 1999); *see also Brignoni-Ponce*, 422 U.S. at 884.

[96] *Hall*, 2006 WL 1341016, at *2; *see* United States v. Colon, 250 F.3d 130, 134 (2d Cir. 2001).

[97] *Carillo*, 686 N.Y.S.2d at 117; *see also Brignoni-Ponce*, 422 U.S. at 881-82.

[98] 782 N.Y.S.2d 633 (St. Lawrence Cnty. Ct. 2004).

just didn't seem right."[99] During the incident, the agent inquired if any weapons were in the vehicle and discovered a loaded 9 millimeter handgun in the center console.[100] The County Court found that the Border Patrol agent on a roving patrol received assurances from the occupants concerning their citizenship and, therefore, the "basis for further detention ended."[101] If however, the stop was preceded by a traffic violation, then the patrol agent was free to call local law enforcement to assist him if he was not trained in the enforcement of New York traffic laws.[102] The court held the evidence in the case suppressed because once the patrol agent had no other concerns about smuggling or aliens he "lacked authority to ask further investigatory questions."[103] The case demonstrates the seriousness of New York courts in enforcing the limited authority granted to Border Patrol agents on roving patrols conducting traffic stops based upon reasonable suspicion.

III. NEW YORK OFFERS MORE PROTECTION: A CANINE SNIFF DURING A TRAFFIC STOP CONSTITUTES A SEARCH

The Supreme Court has held a canine sniff is not a search.[104] In *Illinois v. Caballes*,[105] the Supreme Court stated a dog sniff during a routine traffic stop did not constitute a search because it "reveal[ed] no information other than the location of a substance that no individual has any right to possess."[106] This is because "[o]fficial conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment . . . [and] any interest in possessing contraband cannot be deemed 'legitimate.' "[107]

The New York Court of Appeals established precedent that police must have at least a reasonable suspicion to use a "canine

[99] *Id.* at 637.

[100] *Id.* at 635.

[101] *Id.* at 637.

[102] *Id.* at 638.

[103] *LaRose*, 782 N.Y.S.2d at 638.

[104] United States v. Place, 462 U.S. 696, 707 (1983) (stating a dog sniff "discloses only the presence or absence of narcotics" which "did not constitute a 'search' within the meaning of the Fourth Amendment").

[105] 543 U.S. 405 (2005).

[106] *Id.* at 410. The routine traffic stop was an individual being pulled over for speeding on an Illinois interstate highway.

[107] *Id.* at 408 (quoting United States v. Jacobsen, 466 U.S. 109, 123 (1984)).

sniff" to detect drugs around a residence as it constitutes a "search within the meaning of article I, § 12 of our State Constitution."[108] In *People v. Devone*,[109] the Court of Appeals held "a canine sniff of the exterior of an automobile constitutes a search" and a founded suspicion by law enforcement is required.[110] In New York, the "graduated four-level test for evaluating street encounters initiated by the police" sets founded suspicion as a lower standard to meet than reasonable suspicion.[111] In *Devone*, law enforcement officers pulled over an automobile because the driver was using his cell phone.[112] The driver was unable to identify the owner of the car and could not produce his driver's license and registration.[113] The Court of Appeals stated the police therefore had "founded suspicion that criminal activity was afoot, justifying [a] canine sniff."[114] A police dog was then utilized, which "alerted" the police officer that drugs were in the car, and crack cocaine was lawfully discovered in the center console.[115] New York disagrees with the Supreme Court that a canine sniff is not a search. The New York Constitution sets a higher standard for reasonable searches than the federal precedent.

---

[108] People v. Dunn, 564 N.E.2d 1054, 1058 (N.Y. 1990); *see also* N.Y. CONST. art. 1, § 12.

[109] 931 N.E.2d 70 (N.Y. 2010).

[110] *Id.* at 74 (stating a reasonable suspicion standard is required for a canine sniff at a residence and a lower expectation of privacy exists in relation to automobiles, therefore, "law enforcement need only meet a lesser standard before conducting a canine sniff of the exterior of a lawfully stopped vehicle . . . [g]iven [the] diminished expectation of privacy . . . [the] application of [a] founded suspicion standard in these cases is appropriate").

[111] *See* People v. Moore, 847 N.E.2d 1141, 1142 (N.Y. 2006) (explaining the levels of the scaled test and standards to justify the initiation of different street encounters by law enforcement indicating founded suspicion at level two and reasonable suspicion at level three);

> [W]e set forth a graduated four-level test for evaluating street encounters initiated by the police: level one permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; level two, the common-law right of inquiry, permits a somewhat greater intrusion and requires a founded suspicion that criminal activity is afoot; level three authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor; level four, arrest, requires probable cause to believe that the person to be arrested has committed a crime.

Id.; *see also* People v. DeBour, 352 N.E.2d 562, 571-72 (N.Y. 1976).

[112] *Devone*, 931 N.E.2d at 71-72.

[113] *Id.* at 72.

[114] *Id.* at 74.

[115] *Id.* at 72.

IV. ROVING BORDER PATROLS: VOLUNTARY CONSENT AND THE SCOPE OF VEHICLE SEARCHES ABSENT PROBABLE CAUSE

The Supreme Court has held that valid consent to conduct a warrantless search is established by (1) voluntary consent[116] and (2) obtained from a person with apparent[117] or real authority.[118] Additionally, the actual search must not exceed the scope for which the consent was granted.[119] A "consent search" is "constitutionally permissible" as an important law enforcement activity and sometimes provides "the only means in obtaining important reliable evidence."[120] The allowance of properly obtained "consent search" evidence is crucial in the pursuit of justice, for as the Court so eloquently stated, "the protections of the Fourth Amendment . . . have nothing whatsoever to do with promoting the fair ascertainment of truth at a criminal trial." [121] In the absence of probable cause, consent searches provide an invaluable option to law enforcement officers especially during suspect late night traffic stops.

Border Patrol agents may question occupants of a motor vehicle about their immigration status or citizenship and seek an explanation about suspicious circumstances, "but any further detention or search must be based upon consent or probable cause."[122] The burden of proving that consent to search a vehicle was voluntarily and freely given rests on the shoulders of the government.[123] Reasona-

[116] Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973) (explaining consent cannot be established as "the result of duress or coercion, express or implied"); *see Bumper*, 391 U.S. at 548, 550 (stating consent must be "freely and voluntarily given" and "[w]here there is coercion there cannot be consent.").

[117] Illinois v. Rodriguez, 497 U.S. 177, 188-89 (1990) (describing the valid use of an objective standard to be utilized to reasonably ascertain from the given facts that a consenting party has the apparent authority to consent).

[118] United States v. Matlock, 415 U.S. 164, 170 (1974). The Court held that those individuals with common authority over a home can individually volunteer consent to a search.

[119] Florida v. Jimeno, 500 U.S. 248, 251 (1991) ("The scope of a search is generally defined by its expressed object.").

[120] *Schneckloth*, 412 U.S. at 227-28.

[121] *Id.* at 242-43; *see also* Arizona v. Hicks, 480 U.S. 321, 329 (1987) ("[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.").

[122] *Brignoni-Ponce*, 422 U.S. at 881-82.

[123] *Bumper*, 391 U.S. at 548 (stating "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given").

bleness is the cornerstone of the Fourth Amendment.[124] The Fourth Amendment merely proscribes state-initiated searches which are unreasonable.[125] While it is reasonable for Border Patrol agents to search a vehicle once proper permission is granted, "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness – what would the typical reasonable person have understood by the exchange between the [patrol agent] and the suspect?"[126] For example, in *Florida v. Jimeno*,[127] the Supreme Court held it is reasonable for law enforcement officers, when granted consent to search a vehicle, to search containers in the vehicle without express consent for each container, but it is "unreasonable to think that a suspect, by consenting to the search in his trunk, has agreed to breaking open a locked briefcase within the trunk."[128] Alternatively, a driver, when voluntarily granting consent to search, may specify limits to law enforcement and set the boundaries regarding the scope of any consent search.[129] Limiting instructions restrict what is objectively reasonable when interpreting the consent granted as duly tailored to narrow the measure of scope.

In New York, voluntary consent to a search is a limited exception to the warrant and probable cause requirements, as long as it is an unconstrained and free choice by the suspect.[130] It must be determined if voluntary consent was actually given or if the suspect was simply "yielding to overbearing official pressure" because submission to authority is not consent.[131] The People have "the heavy burden of proving the voluntariness of the purported consent[ ]."[132] Factors used to determine whether consent was voluntarily given include whether the suspect was in custody, the background of the consenter, whether the suspect at the time was uncooperative or evasive with the peace officer, and whether the suspect was informed he or she could refuse to consent.[133] Voluntary consent has been determined to be a

[124] United States v. Knights, 534 U.S. 112, 118 (2001).
[125] *Jimeno*, 500 U.S. at 250.
[126] *Id.* at 251.
[127] 500 U.S. 248 (1991).
[128] *Id.* at 251-52.
[129] *Id.* at 252.
[130] *See Gonzalez*, 347 N.E.2d at 579-80.
[131] *Id.* at 580.
[132] *Id*.
[133] *Id*. at 581.

valid substitute for probable cause.[134] If the initial motor vehicle stop is determined to have been unlawful, then any evidence acquired through consent and absent probable cause must be suppressed.[135] The scope of consent is measured by objective reasonableness between what was understood between the Border Patrol and the driver of a vehicle.[136] It should be noted that, in New York, law enforcement officers cannot use general consent to perform a destructive search of an automobile.[137]

Voluntary consent was the central focus in *People v. Hall*,[138] where during a traffic stop, law enforcement initially asked the driver, "[a]nything we should know about?"[139] After a pause, the driver was asked if any weapons were in the car.[140] The record revealed the driver was never asked to identify himself, who owned the vehicle, or where he was going.[141] Instead, the police simply asked for the car keys and searched the trunk only to discover a gun.[142] The court suppressed the handgun holding the police request for the keys was more like a "command," which meant the defendant's consent was not a voluntary waiver of a constitutional right, because intimidation did not make a choice free and voluntary.[143] On appeal, in *People v. Hall II*,[144] the Fourth Department affirmed the lower court's decision stating "[t]he People failed to prove the substance of the conversation between defendant and police" by an objective reasonableness standard and that asking the defendant for consent to look in the vehicle is "not consent to search it."[145]

Border Patrol agents must have authority to request voluntary

[134] *Id.* at 579; *see also* People v. Barclay, 607 N.Y.S.2d 531, 531 (App. Div. 4th Dep't 1994).

[135] *See Cantor*, 324 N.E.2d at 878.

[136] *See* People v. Gomez, 838 N.E.2d 1271, 1273-74 (N.Y. 2005). An example of scope of consent includes easily opened containers in an automobile that could be opened by a Border Patrol agent granted consent to search a vehicle.

[137] *Id.* at 1274 (explaining the use of a crowbar to pry automobile parts open to locate drugs is beyond general consent and impermissible).

[138] No. 01560-2005, 2006 WL 1341016 (Erie Cnty. Ct. May 5, 2006).

[139] *Id.* at *1.

[140] *Id.*

[141] *Id.* at *3.

[142] *Id*. at *1-2.

[143] *Hall*, 2006 WL 1341016, at *4.

[144] 828 N.Y.S.2d 740 (App. Div. 4th Dep't 2006).

[145] *Id.* at 741.

consent to search a vehicle in order for the People to meet the heavy burden in establishing that consent was granted.[146] A "roving patrol is not the functional equivalent of the border," therefore, searches and "questions at the border without probable cause have no bearing on the roving patrol stop."[147] In *People v. LaRose*, the court suppressed handgun evidence found in the trunk and center console of a vehicle.[148] A Border Patrol agent was performing a roving patrol and stopped a car that did not violate any traffic laws.[149] The court held that when the agent had no further concerns about smuggling or aliens he simply "lacked the authority to ask further investigatory questions" which led to a the search of the trunk and the vehicle.[150] However, in *People v. Carillo*,[151] the court denied a motion to suppress cocaine evidence found in a car.[152] While on a roving patrol, the Border Patrol agent pulled the defendant over for a traffic violation.[153] The occupant was discovered to be an illegal alien.[154] An agent is authorized to inquire about citizenship and any reasonably suspicious circumstances which may lead to the discovery that an automobile occupant is an illegal alien.[155] Based upon these circumstances, the court held the agent had authority to obtain voluntary consent and perform a search.[156]

In New York, Border Patrol agents can enforce state law "by making warrantless arrests for offenses committed in the agent's presence and carrying out warrantless searches when constitutionally permissible."[157] In *People v. Boyea*,[158] a Border Patrol agent on a roving patrol pulled a car over and smelled marijuana the driver admitted to have smoked.[159] This admission provided probable cause to

146 *Bumper*, 391 U.S. at 548.
147 *LaRose*, 782 N.Y.S.2d at 638.
148 *Id.*
149 *Id.*
150 *Id*.
151 686 N.Y.S.2d 114 (App. Div. 3d Dep't 1999).
152 *Id.* at 116.
153 *Id.*
154 *Id.*
155 *Id.* at 117.
156 *Carillo*, 686 N.Y.S.2d at 117.
157 *Boyea*, 844 N.Y.S.2d at 157.
158 844 N.Y.S.2d 156 (App. Div. 3d Dep't 2007).
159 *Id.* at 158.

search the trunk so consent was not necessary.[160]

Border Patrol agents have the freedom to patrol and conduct all necessary job functions within the scope of their limited authority. However, once a conscious or unconscious attempt is made to go beyond their authority, the tendency of New York courts seems to shift sharply in favor of defendants. It appears the state courts are highly inflexible regarding improperly substantiated action taken by Border Patrol employees against road travelers in New York.

V. CONCLUSION

In *People v. Banisadr*,[161] the court determined reasonable suspicion was established in a matter concerning a roving border patrol vehicle stop, in which the defendant had broken no traffic laws and made no attempt to evade a Border Patrol agent.[162] This determination seems to be incorrect. The facts of the case may provide some factors necessary to establish reasonable suspicion such as: proximity to the border, known smuggling in the area, defendant's posture or stiffness, defendant's failure to acknowledge the sighted agent driving alongside his vehicle, and the appearance of the defendant.[163] The defendant was driving in a new Ford Focus rental car and was traveling alongside others driving in the defendant's Ford Explorer truck.[164] Both vehicles had out-of-state license plates.[165] However, it seems a highly ambitious and arduous feat to ascertain how a person safely driving near an international border in a rented out-of-state vehicle, with no occupants, would initiate the determination of an objectively suspicious activity rather than a simple commonplace occurrence.

The curious issue the court seemed to ignore was that the Border Patrol agent pulled over the smaller car.[166] Drug smugglers logically would not be inclined to travel in a subcompact vehicle. Mathematically, more cargo space usually equates to a higher payload. Further, the Border Patrol agent testified that, prior to the ve-

[160] *Id.* (stating the consent granted simply "provided an additional basis for the search").
[161] No. 2010-079, 2011 WL 2022735 (St. Lawrence Cnty. Ct. May 23, 2011).
[162] *Id.* at *3, 5.
[163] *Id.* at *1-2.
[164] *Id.* at *2-3.
[165] *Id.* at *2.
[166] *Banisadr*, 2011 WL 2022735, at *2.

hicle stop, he received information over the radio regarding registration on both vehicles.[167] While he stated the "lighter skinned male" driving the Ford Explorer did not match the description he received regarding the actual registered owner, it seemed more than a little odd that the "middle-eastern looking" defendant in a rental subcompact car was whom he decided to stop instead.[168] It is more plausible that with all his training, the Border Patrol agent would have assessed a higher level of reasonable suspicion about an out-of-state truck in a known smuggling area being driven by someone whose description did not match the actual owner. Given these facts, there is a strong possibility the Border Patrol agent here was working off a hunch or a bias, which is not a factor in establishing reasonable suspicion to initiate a roving border patrol traffic stop.[169] Even assessing the totality of the circumstances, the vehicle stopped by the Border Patrol agent was an illogical choice. The court should have raised this issue to consider whether reasonable suspicion was truly established or if prejudice played a role in the arrest of Mr. Banisadr.

The court should have assessed whether the traffic stop inquiry was too expansive. The defendant allegedly verified his citizenship to the Border Patrol agent and explained he had traveled from Maryland and was simply on his way back.[170] Because no traffic violations occurred,[171] the Border Patrol agent should have stopped his inquiry at this point.[172] If he wanted the investigation to go any further, local law enforcement officers should have been notified due to the Border Patrol agent's limited authority and the fact no crime or traffic violation was committed in his presence.[173] It strong-

[167] *Id.*

[168] *Id.* Moments before the traffic stop in an area known for drug smuggling, the driver of the Ford Explorer was verified by the patrol agent as not matching the description of the person the truck was registered to and this blatant and more suspicious discrepancy appears to have been simply ignored. *Id.* The rental car did not and could not have a similar driver discrepancy issue. *See id.*

[169] *See LaRose*, 782 N.Y.S.2d at 637 (stating a hunch is not enough to establish reasonable suspicion).

[170] *Banisadr*, 2011 WL 2022735, at *2.

[171] *Id.* at *3.

[172] *See Carillo*, 686 N.Y.S.2d at 117; *see also Brignoni-Ponce*, 422 U.S. at 881-82 (stating that without probable cause or consent a Border Patrol agent is limited to questioning about citizenship and suspicious circumstances).

[173] *See LaRose*, 782 N.Y.S.2d at 638. On roving patrols, Border Patrol agents not trained on New York laws must ask for local police assistance; *see also* N.Y. CRIM. PROC. LAW § 2.15 (7) (McKinney 2007); N.Y. CRIM. PROC. LAW § 2.20 (1)(a) and (c) (McKinney 2005).

ly appears that reasonable suspicion was improperly ascertained. The court seemed to allow extraordinarily low criteria to be met when it held that reasonable suspicion was established. The Fourth Amendment forbids law enforcement to stop cars at random.[174] The problem with setting such a low threshold in ascertaining the totality of the circumstances is it could lead to increased arbitrary actions by Border Patrol agents on roving patrols.

The court was correct in holding the search of the vehicle was improper.[175] As the court pointed out, if the defendant did grant consent to search the vehicle, this did not authorize the opening of the suitcase in the trunk.[176] Besides, one can only imagine how many drug smugglers would actually consent to the opening of a suitcase containing pounds of marijuana. The key issue was that the Border Patrol agent did not present enough credible testimony on how consent was obtained to open the suitcase.[177] The court was simply faced with "wildly different versions" of what occurred at the traffic stop in question.[178]

The fact that the passenger in the patrol car at the time of the incident was the brother of the Patrol Agent's ex-girlfriend seemed to add more credibility to the defendant's testimony.[179] One could easily assume that after improperly seizing the marijuana in the car, the Border Patrol agent drew his gun and screamed at the defendant possibly to impress his friend sitting in the patrol car.[180] Additionally, the Border Patrol agent took no additional measures to validate his testimony such as obtaining a signed "consent to search form" from the defendant.[181]

The court correctly held the People failed to meet their heavy burden of showing that voluntary consent was obtained through clear and convincing evidence.[182] Therefore, the marijuana evidence and

[174] Delaware v. Prouse, 440 U.S. 648, 663 (1979); *see also Brignoni-Ponce*, 422 U.S. at 883 (stating random automobile stops are impermissible under the Fourth Amendment).

[175] *Banisadr*, 2011 WL 2022735, at *6.

[176] *Id.* at *5.

[177] *Id.* at *6.

[178] *Id.*

[179] *Id.* at *3.

[180] *Banisadr*, 2011 WL 2022735, at *3.

[181] *See Hall*, 2006 WL 1341016, at *4. The court indicated a consent form to search the vehicle could have been utilized, but was not, which weakened the prosecutor's case. *Id.*

[182] *Banisadr*, 2011 WL 2022735, at *6.

the subsequent conversations the defendant had with the State Police were properly suppressed.[183]

Robert Mitchell[*]

[183] *Id.* at *6; *see also Terry*, 392 U.S. at 12 (explaining evidence seized in violation of the Fourth Amendment cannot be utilized).

[*] Associate Editor, *Touro Law Review*. J.D. Candidate, Touro Law Center, May 2013; B.S. Marketing, St. John's University. I would like to express my deepest gratitude to my family and friends for their devotion and support during my law school years, with particular thanks to my wonderful children. It was the loss of my parents combined with the love of my children that awoke in me the courage to enroll and undertake a legal education. Their constant inspiration is my guiding strength. Special thanks to Professor Douglas Scherer, and to all the talented members of the *Touro Law Review*, especially and most importantly, Andrew Koster, for their excellent advice and assistance. I dedicate this article to my devoted parents; thank you both for all the gifts I can never repay.