

The Laughable Drug Courier Profile

The following is a dissent in United States v. Hooper, 935 F.2d 484, 499 (2d Cir. 1991).

GEORGE C. PRATT, Circuit Judge, dissenting:

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean -- neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master -- that's all." L. Carroll, *Alice Through the Looking-Glass* (1872).

This case presents another example of the erosion of our constitutional protections resulting from this country's wasteful, ineffective, self-destructive efforts to stop drug trafficking. Because I believe that the majority's holding now allows government agents to seize virtually any air traveller's luggage while they make an investigation, I dissent.

To justify their seizure of Hooper's bag the agents testified he had come from a "source city" and fit the DEA's "drug courier profile." Yet the government conceded at oral argument that a "source city" for drug traffic was virtually any city with a major airport, a concession that was met with deserved laughter in the courtroom. The "drug courier profile" is similarly laughable, because it is so fluid that it can be used to justify designating anyone a potential drug courier if the DEA agents so choose. "The [DEA] has not committed the profile to writing" and "the combination of factors looked for varies among agents." *United States v. Taylor*, 917 F.2d 1402, 1407 n. 8 (6th Cir. 1990), *vacated*, 925 F.2d 990 (6th Cir. 1991). Moreover, a canvass of numerous cases reveals the drug courier profile's "chameleon-like way of adapting to any particular set of observations." *United States v. Sokolow*, 831 F.2d 1413, 1418 (9th Cir.1987), *rev'd*, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989):

Arrived late at night *United States v. Nurse*, 916 F.2d 20, 24 (D.C.Cir.1990).

Arrived early in the morning *United States v. Reid*, 448 U.S. 438, 441, 100 S.Ct. 2752, 2754, 65 L.Ed.2d 890 (1980); *United States v. Millan*, 912 F.2d 1014, 1017 (8th Cir.1990).

One of first to deplane *United States v. Millan*, 912 F.2d at 1015, *United States v. Moore*, 675 F.2d 802, 803 (6th Cir. 1982), *cert. denied*, 460 U.S. 1068, 103 S.Ct. 1521, 76 L.Ed.2d 945 (1983).

One of last to deplane *United States v. Mendenhall*, 446 U.S. 544, 547 n. 1, 100 S.Ct. 1870, 1873 n. 1, 64 L.Ed.2d 497 (1980); *United States v. Sterling*, 909 F.2d 1078, 1079 (7th Cir.1990); *United States v. White*, 890 F.2d 1413, 1414 (8th Cir.1989), *cert. denied*, 498 U.S. 825, 111 S.Ct. 77, 112 L.Ed.2d 50 (1990).

Deplaned in the middle *United States v. Buenaventura-Ariza*, 615 F.2d 29, 31 (2d Cir.1980).

Used a one-way ticket *United States v. Johnson*, 910 F.2d 1506 (7th Cir.1990), *cert. denied*, 498 U.S. 1051, 111 S.Ct. 764, 112 L.Ed.2d 783 (1991); *United States v. Colyer*, 878 F.2d 469, 471 (D.C. Cir. 1989); *United States v. Sullivan*, 625 F.2d 9, 12 (4th Cir. 1980).

Used a round-trip ticket *United States v. Craemer*, 555 F.2d 594, 595 (6th Cir. 1977).

Carried brand-new luggage *United States v. Taylor*, 917 F.2d at 1403; *United States v. Sullivan*, 625 F.2d at 12.

Carried a small gym bag *United States v. Sanford*, 658 F.2d 342, 343 (5th Cir.1981), *cert. denied*, 455 U.S. 991 (1982).

Travelled alone *United States v. White*, 890 F.2d at 1415; *United States v. Smith*, 574 F.2d 882, 883 (6th Cir.1978).

Travelled with a companion *United States v. Garcia*, 905 F.2d 557, 559 (1st Cir.), cert. denied, 498 U.S. 986, 111 S.Ct. 522, 112 L.Ed.2d 533 (1990); *United States v. Fry*, 622 F.2d 1218, 1219 (5th Cir.1980).

Acted too nervous *United States v. Montilla*, 928 F.2d 583, 58a (2d Cir.1991); *United States v. Cooke*, 915 F.2d 250, 251 (6th Cir.1990).

Acted too calm *United States v. McKines*, 933 F.2d 1412 (8th Cir.1991); *United States v. Himmelwright*, 551 F.2d 991, 992 (5th Cir.), cert. denied, 434 U.S. 902, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977).

Wore expensive clothing and gold jewelry *United States v. Chambers*, 918 F.2d 1455, 1462 (9th Cir. 1990).

Dressed in black corduroys, white pull-over shirt, loafers without socks *United States v. McKines*, supra.

Dressed in dark slacks, work shirt, and hat *United States v. Taylor*, 917 F.2d at 1403.

Dressed in brown leather aviator jacket, gold chain, hair down to shoulders *United States v. Millan*, 912 F.2d at 1015.

Dressed in loose-fitting sweatshirt and denim jacket *United States v. Flowers*, 909 F.2d 145, 146 (6th Cir.1990).

Walked rapidly through airport *United States v. Millan*, 912 F.2d at 1017; *United States v. Rose*, 889 F.2d 1490, 1491 (6th Cir.1989).

Walked aimlessly through airport *United States v. Gomez-Norena*, 908 F.2d 497, 497 (9th Cir.1990), cert. denied, 498 U.S. 947, 111 S.Ct 363, 112 L.Ed.2d 326 (1991).

Flew in to Washngton National Airport on the LaGuardia Shuttle *United States v. Powell*, 886 F.2d 81, 82 (4th Cir.1989), cert. denied, 493 U.S. 1084, 110 S.Ct. 1144, 107 L.Ed.2d 1049 (1990).

Had a white handkerchief in his hand *United States v. Garcia*, 848 F.2d 58, 59 (4th Cir.), cert. denied, 488 U.S. 957, 109 S.Ct. 395, 102 L.Ed.2d 384 (1988).

In our "Looking-Glass" world of drug enforcement, the DEA apparently seeks "to be master" by having "drug courier profile" mean, like a word means to Humpty Dumpty, "just what I choose it to mean -- neither more nor less."

But even assuming that the "source city" and "drug courier profile" elements gave the agents some level of suspicion, the facts of this case do not permit the conclusion that the DEA agents had a reasonable suspicion, let alone probable cause, to detain Hooper's suitcase. Neither *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), nor *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), countenance the extensive intrusion on privacy rights that occurred here. In *Terry* the Court approved a pat-down investigation based on less than probable cause, because they were dealing with the need for "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat." *Terry*, 392 U.S. at 20, 88 S.Ct. at 1879. The *Place* Court said a canine sniff could be based on less than probable cause because the sniff--"sui generis" according to the Court -- "is much less intrusive than a typical search." *Place*, 462 U.S. at 707, 103 S.Ct. at 2544.

The point of *Place* is that *Terry* may be extended to allow something specific and quick, like a sniffing dog, that will either confirm or dispel the "reasonable suspicion"; it was surely not meant to allow government agents to "buy time" in order to develop probable cause. Here, the only reason advanced by the agents for detaining the luggage was that they needed time to obtain a search warrant, even though they admittedly lacked probable cause at that point to do so. There is no evidence of any plan to undertake "swift action or to adopt a "less intrusive" means of satisfying their curiosity. I fear the majority's extension of *Terry* and *Place* now allows government agents to make seizures based on "reasonable suspicion" so that they can, indeed, buy time to develop probable cause later.

This is yet another example of the aggressive tactics recently employed by federal law enforcement officials in the Buffalo area, which are well chronicled in our cases. See, e.g., *United States v. Montilla*, 928 F.2d 583 (2d Cir.1991); *United States v. \$37,780 in Currency*, 920 F.2d 159 (2d Cir.1990); *United*

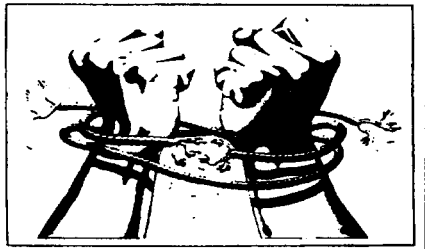
States v. Lee, 916 F.2d 814 (2d Cir.1990); *United States v. \$359 500 in Currency*, 828 F.2d 930 (2d Cir.1987). Sadly, no improvement yet appears on the horizon, and this decision, like those cited above, may simply encourage even more intrusive governmental conduct there and elsewhere.

During the suppression hearing, agents Gerace and Allman testified that they spend their days approaching potential drug suspects at the Greater Buffalo International Airport. Accord-

ing to their own testimony, they detained 600 suspects in 1989, yet their hunches that year resulted in only ten arrests. It appears that they have sacrificed the fourth amendment by detaining 590 innocent people in order to arrest ten who are not -- all in the name of the "war on drugs." When, pray tell, will it end? Where are we going?



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