
INTRODUCTION

In 1974, the Department of Justice Drug Enforcement Administration (DEA) instituted training programs for its narcotics agents wherein instruction was given on the use of a “drug courier profile.” Developed as a method of identifying potential narcotics violators in the nation’s airports, the “profile” is, in effect, the collective experience of narcotics investigators concerning characteristics repeatedly seen in persons transporting illegal drugs. Among the factors incorporated into the profile are: use of a large number of small denomination currency for ticket purchases; travel to or from cities which are major sources of drugs; excessive nervousness; loose fitting, casual clothing; inadequate luggage; and evasive or contradictory answers.

The validity of the procedures used by narcotics agents in stopping domestic airline passengers who exhibit behavior consistent with the characteristics of the profile has been examined in a number of lower court decisions and recently was addressed by

2. See generally United States v. Buenaventura-Ariza, 615 F.2d 29, 36 (2d Cir. 1980) (investigatory stop of individuals suspected of involvement in drug trafficking must be based on other objective facts besides arrival from a source city and apparent nervous behavior); United States v. Ballard, 573 F.2d 913, 916 (5th Cir. 1978) (stop of airline passenger could not be justified as investigatory stop where suspect’s pace and supposed nervousness were the only substantial factors offered to justify search); United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977) (drug courier profile, by itself, provides no probable cause to arrest suspect).
3. 103 S. Ct. at 1339 n.6. One DEA agent explained: Basically, it’s a number of characteristics which we attribute or which we believe can be used to pick out drug couriers. And these characteristics are basically things that normal travelers do not do . . . . Essentially, when we started this detail at the airport, we didn’t really know what we were looking for. The majority of our cases, when we first started, involved cases we made based on information from law enforcement agencies or from airline personnel. And as these cases were made, certain characteristics were noted among the defendants. At a later time we began to see a pattern in these characteristics and began using them to pick out individuals we suspected as narcotic couriers without any prior information.
the Supreme Court of the United States in Florida v. Royer. In this case, a plurality of the Court concluded that although the narcotics agents had adequate grounds for temporarily detaining the suspect, the confinement to which he was subjected was a more serious intrusion on his personal liberty than was allowable on a mere suspicion of criminal activity. The suspect's consent to the search of his luggage was tainted by the illegal detention and was ineffective to justify the search.

This note will examine the Supreme Court's holding and rationale in Royer. Specifically, the propriety of stopping airline passengers based upon the correspondence of an individual's appearance and behavior with the traits listed in a drug courier profile will be analyzed in light of fourth amendment requirements and the standards which have been developed in the area of stop-and-frisk.

FACTS AND LOWER COURT HOLDINGS

On January 3, 1978, Mark Royer entered the Miami International Airport and purchased a one-way ticket to New York City. Two state narcotics agents observed Royer's appearance, mannerisms, and actions and believed them to be consistent with several


7. Id. at 1326. Justice White joined by Justices Marshall, Powell, and Stevens, announcing the Court. Id. at 1321. Justice Brennan concurred, expressing the view that the suspect's consent to the search of his luggage was tainted by an illegal arrest and that the initial stop of the suspect was also illegal. Id. at 1330-31. Justice Blackmun dissented, expressing the view that the agents' conduct was minimally intrusive and reasonable and that such conduct should not be subjected to a requirement of probable cause. Id. at 1332. Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor, dissented and asserted the view that the agents' conduct was reasonable in light of fourth amendment requirements. Id. at 1336.

8. Id. at 1329.

9. See generally Beck v. Ohio, 379 U.S. 89, 91 (1964) (constitutionality of arrest depends upon existence of probable cause—whether the facts and circumstances within the officers' knowledge were sufficient to warrant a prudent person in believing that an offense was committed by the suspect); Brinegar v. United States, 338 U.S. 160, 175-78 (1949) (probable cause exists when facts and circumstances within an officer's knowledge are sufficient to warrant a person of reasonable caution in believing that an offense has been committed).

10. See generally Terry v. Ohio, 392 U.S. 1, 20-22, 30 (1968) (governmental interest which allegedly justifies the official intrusion must be balanced against the constitutionally protected interests of the private citizen); Sibron v. New York, 392 U.S. 40, 60-63 (1968) (police conduct, where probable cause to arrest is lacking, must be judged under the reasonable search and seizure clause of the fourth amendment).

11. 103 S. Ct. at 1321-22.
elements of the "drug courier profile." As Royer made his way to the airport concourse, the agents approached him, identified themselves as police officers, and asked if Royer had a moment to speak with them, to which he affirmatively replied. The agents then asked Royer to produce his driver's license and airline ticket; Royer gave the items to the agents without orally consenting. Upon inspection, the agents noted that the airline ticket and the luggage tags bore a name different from the name appearing on the driver's license. When questioned about the discrepancy, Royer explained that a friend had made the reservation under the name on the airline ticket. According to the testimony of the detectives, Royer became "all the more obviously nervous." Thereupon, the agents identified themselves as narcotics investigators and informed Royer that they had reason to suspect him of transporting narcotics.

Retaining the airline ticket and the driver's license, the agents asked Royer to accompany them to a private room, approximately forty feet away, adjacent to the concourse area. Royer said nothing in response but accompanied the detectives as he had been asked. Using Royer's baggage check stubs, one of the detectives retrieved Royer's luggage from the airline and brought it into the room. Without orally responding to the detectives' request of consent to a search of the luggage, Royer produced a key and unlocked one of the suitcases, which a detective then opened without further assent from Royer. After finding drugs in the first suit-

12. Id. The detectives' attention was attracted by the following characteristics which were considered to be within the profile: (a) Royer was carrying American Tourister luggage of a type commonly used for marijuana smuggling; (b) Royer appeared pale and nervous, looking around at other people as though he might be looking for police officers; (c) Royer paid for his ticket in cash with a large number of small denomination bills; and (d) rather than completing the airline identification tag to be attached to checked baggage, which had a space for a name, address, and telephone number, Royer wrote only a name and the destination. Royer v. State, 389 So. 2d 1007, 1016 (Fla. Dist. Ct. App. 1980).
13. 103 S. Ct. at 1322.
14. Id.
15. 389 So. 2d at 1016. The airline ticket, like the baggage identification tags, bore the name "Holt," while the driver's license bore the correct name of "Royer."
16. 103 S. Ct. at 1322.
17. 389 So. 2d at 1017.
18. Id.
19. Id. The room was later described by one of the narcotics agents as a "large storage closet," located in the stewardesses' lounge and containing shelves, a small desk and two chairs.
20. 103 S. Ct. at 1322.
21. Id. The baggage stubs were used to retrieve Royer's luggage without his consent or agreement.
22. Id.
case, the agents asked if Royer objected to the opening of the second suitcase. Royer replied in the negative but stated that he did not know the combination to the lock on the suitcase. The agents pried the second suitcase open and more marijuana was found. Royer was placed under arrest.

Prior to his trial for felony possession of marijuana, Royer made a motion to suppress the evidence obtained in the search of his luggage. A Florida trial court denied the motion and concluded that Royer's consent to the search was "freely and voluntarily given." Moreover, because Royer fit the profile of a drug courier, the officers had probable cause to believe his luggage contained contraband, justifying a search.

The Florida District Court of Appeal for the Third District, sitting en banc, reversed, holding that the motion to suppress should have been granted. The court's decision was based upon the following three-step legal analysis:

1. Royer was involuntarily confined without probable cause;
2. the involuntary confinement exceeded the limited investigatory stop permitted by Terry v. Ohio, and

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23. Id.
24. Id.
25. Id.
26. Id.
27. Id. Royer was charged with felony possession of marijuana in violation of FLA. STAT. ANN. § 893.13(1)(a)(2) (West 1975), which provides in pertinent part:

1. (a) It is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance. Any person who violates this provision with respect to:
   1.1 A controlled substance named or described in § 893.03(1)(a), (1)(b), (2)(a), or (2)(b) is guilty of a felony of the second degree, punishable as provided in § 775.082, § 775.083 and § 775.084.
   1.2 A controlled substance named or described in § 893.03(1)(c), (2)(c), (3), or (4) is guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.
28. 103 S. Ct. at 1322.
29. Id. at 1322-23. See also note 34 infra. Additionally, the trial judge denied the motion to suppress on the alternate ground that "in the airport-search context, 'the officer doesn't have the time to run out and get a search warrant because the plane is going to take off. If there is going to be anything occurring, it's going to occur long before they can take any type of action.'" Royer v. State, 389 So. 2d at 1018.
29. 389 So. 2d at 1008.
31. Id. at 1015. On appeal, a panel of the district court of appeal found that viewing the totality of the circumstances, the finding of consent by the trial court was supported by clear and convincing evidence. Id. at 1009. The panel decision was vacated and rehearing en banc granted. Id. at 1015.
32. Id. at 1018-19. See notes 42-48 and accompanying text infra.
33. 389 So. 2d at 1019. See Terry v. Ohio, 392 U.S. 1, 30-31 (1968), and notes 49-78 and accompanying text infra.
(3) the consent to the search was invalid because tainted by the involuntary confinement.34

In concluding that Royer's confinement was tantamount to arrest, the Florida Court of Appeal analyzed several factors.35 When Royer gave his silent consent to the search of his suitcases, he "found himself in a small enclosed area being confronted by two police officers—a situation which presents an almost classic definition of imprisonment."36 The conclusion that Royer had been taken into custody was also supported by the fact that the officers had previously informed him that he was suspected of transporting narcotics.37 In addition, the detectives' possession and retention of Royer's airplane ticket and luggage precluded any doubt, in the district court's view, that Royer was not free to leave.38

The Florida Court of Appeal was also of the opinion that the conduct involved was as consistent with innocence as with guilt.39

34. 389 So. 2d at 1019-20. Searches that are not conducted pursuant to a valid warrant "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Mincey v. Arizona, 437 U.S. 385, 390 (1978) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). One exception to the fourth amendment requirement of both a warrant and probable cause for a search is a search conducted pursuant to a valid grant of consent thereto. C. WHITMORE, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS, § 4.03(c), at 108 (1980). Whether voluntary consent to search has been given is a fact question for the court, and in making that decision the court must examine the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). See, e.g., United States v. Lopez, 581 F.2d 1338, 1343 (9th Cir. 1978); United States v. Shields, 573 F.2d 18, 22-23 (10th Cir. 1978); United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977). The State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority. Bumper v. North Carolina, 391 U.S. 543, 549-550 (1968).

In the leading case of Schneckloth v. Bustamonte, the Supreme Court identified factors relevant in the assessment of the voluntariness of consent under the totality-of-circumstances test. Relevant factors include the age of the person allegedly consenting, his education and intelligence, his mental and physical condition at the time of consent, whether he is under arrest, the length and nature of the interrogation, and whether he has been advised of his right to refuse to consent. 412 U.S. at 226. However, no single factor will determine the voluntariness of consent, and failure to inform the person of his right to refuse consent does not necessarily make consent involuntary. Id. at 226-27.

35. 103 S. Ct. at 1323.
36. 389 So. 2d at 1018.
37. Id. The district court found it "obvious that Royer, as he himself testified, was 'under [the] reasonable impression that he [was] not free to leave the officer's presence.'" (citation omitted). The court stated:

Of course, this apprehension was much more than a well-justified subjective belief. As common sense tells us, and as the state conceded at the oral argument, the officers would not have permitted Royer to leave the room even if he had erroneously thought he could.

Id.
38. Id.
39. Id. at 1019.
Consequently, a mere similarity with the characteristics enumerated in the drug courier profile was held to be insufficient even to constitute the "articulable suspicion" required to justify a limited investigatory stop. The court went on to hold that even if the rule were otherwise, the facts in this case were "not 'sufficient in themselves to warrant a man of reasonable caution in the belief that a [felony] has been or is being committed,' and thus to constitute probable cause." The Supreme Court of the United States granted Florida's petition for certiorari.

BACKGROUND

The Fourth Amendment and Terry v. Ohio

The fourth amendment to the United States Constitution provides that

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The fourth amendment guarantees that no arrest will be made without probable cause. Probable cause to arrest exists at the moment when the facts and circumstance within an officer's knowledge, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed. The standard of probable cause is not technical in nature; rather, it takes form after an analysis of the underlying circumstances of each particular case.

Traditionally, while warrants were not required in all circum-

40. Id. See notes 60-67 and accompanying text infra.
41. 389 So. 2d at 1019 (citations omitted). See notes 43-48 and accompanying text infra.
42. 103 S. Ct. at 1323.
43. U.S. Const. amend. IV.
46. See Beck v. Ohio, 379 U.S. 89, 91 (1964) (probable cause to arrest depends upon whether, at the moment the arrest was made, the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the suspect had committed an offense); Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (probable cause implies dealing with possibilities; they are the factual and practical consideration of everyday life on which reasonable and prudent men, not legal technicians, act).
stances, the requirement of probable cause was treated as absolute. The "long-prevailing standards" of probable cause were thought to embody "the best compromise that has been found for accommodating [the] opposing interests" in "safeguard[ing] citizens from rash and unreasonable interferences with privacy" and in "seek[ing] to give fair leeway for enforcing the law in the community's protection." The standard of probable cause thus represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest reasonable under the fourth amendment.

Over the last several years, six exceptions to the fourth amendment requirement of a warrant based upon probable cause have been propounded by the United States Supreme Court. One such exception lies in the common, everyday encounter between the police and the public, known as the "stop and frisk." These encounters were held subject to the sanctions of the fourth amendment in the 1968 decision of Terry v. Ohio, the classic formulation of their constitutionality.

In Terry, a detective of long experience observed two men loitering on a street corner and became suspicious. As he watched, each man alternatively walked up the street, peered into the same store and then walked back down the street to confer with his companion. This action was repeated approximately twelve times. Subsequently, a third man joined the previous two, conferred with them briefly, and walked up the street toward the store. A few

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48. See Gerstein v. Pugh, 420 U.S. 103, 111-12 (1975). (Value of probable cause, as standard for arrest under the fourth amendment, is a necessary accommodation between individual's right to privacy and state's duty to control crime).
50. C. WHrrEBREAD, CRIMINAL PROCEDURE, AN ANALYSIS OF CONSTITUTIIONAL CASES AND CONCEPTS, § 4.03, at 108 (1980). The six exceptions to the requirement of a warrant are as follows: (1) searches incident to a lawful arrest; (2) automobile searches; (3) "hot pursuit," evanescent evidence and other emergency searches; (4) consent searches; (5) stop and frisk searches; and (6) plain view searches.
51. Id.
52. 392 U.S. 1 (1968). In Terry, the court explained that "[t]he distinctions of classical 'stop-and-frisk' theory thus serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." Id. at 19. Thus, the Court rejected the notion that the fourth amendment did not come into play as a limitation upon police conduct if the officers stop short of a technical arrest. Id.
53. Id. at 5.
54. Id. at 5-6.
55. Id. at 6.
56. Id.
minutes later, the two men followed him. The officer thought the previous activities indicated that an armed robbery was about to occur; he thus accosted the men, identified himself, and asked for their names. When the men mumbled in response, the officer grabbed one of them and proceeded to pat down the outside of his clothing. The officer discovered a gun and arrested the suspect.

On certiorari, the United States Supreme Court held that a police officer may stop and question a person upon less than probable cause. Moreover, the Court noted that when an officer has reason to believe that criminal activity is afoot and that a person suspected of such activity is armed and dangerous, the officer may act to ensure his and others' safety by patting down the suspect for weapons after he has identified himself and made reasonable inquiries. The scope of an intrusion is permissible if it is limited to verification of the reasonable suspicion which rendered the stop justifiable. In order to assess the reasonableness of an officer's conduct, the Court stated:

[I]t is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. . . . [I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?

Simply stated, the police officer may justify his actions by pointing to his observation of unusual conduct which, in light of his experience, manifests specific and articulable facts (as distinguished

57. Id.
58. Id. at 6-7.
59. Id. at 7.
60. Id.
61. Id. at 24-25.
62. Id. at 30.
63. Id. at 28-30. "The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible," Id. at 19.
64. Id. at 21-22 (citations omitted).
65. Id. at 30.
from an inchoate, unparticularized suspicion or hunch) which would lead a reasonably prudent man to conclude that criminal activity might be afoot.

*Terry* departed from traditional fourth amendment analysis in two respects. First, it defined a special category of fourth amendment seizures so substantially less intrusive than arrests that the general rule requiring probable cause was replaced by a balancing test. Second, the application of this balancing test led the Court to approve this less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons.

Because *Terry* involved an exception to the general rule requiring probable cause, the Supreme Court has been careful to maintain its narrow scope. Indeed, recent decisions involving law enforcement intrusion upon privacy reject any notion that even the most minimal stop may be judged by anything short of specific, articulable facts. To illustrate, roving border patrols and random automobile stops have been held to violate the fourth amendment, notwithstanding important governmental interests, where policy conduct is not based upon articulable suspicion.

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66. *Id.* at 27.
67. *Id.*
68. *Id.* at 30.
69. See generally *Id.* at 20-30. In *Terry*, the Court held that even "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat" constituted a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment," and therefore "must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Id.* at 17, 20. To determine the justification necessary to make this limited intrusion "reasonable" under the fourth amendment, the Court balanced the limited violation of individual privacy involved against the opposing interests in crime prevention and the police officer's safety. *Id.* at 22-27.
70. See notes 60-67 and accompanying text supra.
71. See *Dunaway v. New York*, 442 U.S. 200, 209-10 (1979). The Court observed that *Terry* established a narrowly drawn authority to permit a reasonable search where the police officer has reason to believe the suspect is armed and dangerous, regardless of whether the officer has probable cause to arrest.
73. In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the officers' practice of conducting roving patrols in areas near the border was held to violate the fourth amendment. *Id.* at 885-86. The Court analogized the roving stop to a *Terry* stop and found that vehicles could be detained only if the officers were aware of specific articulable facts. *Id.* at 880-81. Accord *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-60 (1976) (border patrol checkpoint operation sanctioned because of the lesser intrusion upon the motorists' fourth amendment interests involved).

In *Delaware v. Prouse*, 440 U.S. 648 (1979), the constitutionality of investigatory stops of automobiles was at issue. *Id.* at 650. The Court found that, except where
The courts have emphasized that the lack of an appropriate factual basis for suspecting an individual invites intrusion upon constitutionally guaranteed rights. Moreover, investigative detentions must be temporary and last no longer than is necessary to effectuate the purposes of the stop. The investigative methods employed should be the least intrusive means reasonable available to verify or dispel the officer's suspicion in a short period of time. Once the permissible limits of a stop have been reached, further detention or searches must be justified by probable cause.

The Fourth Amendment and the Airport Stop

The circumstances justifying policy activity in the absence of

there is at least an articulable suspicion that a motorist is unlicensed, stopping an automobile in order to check the driver's license is unreasonable under the fourth amendment. In Adams, a police officer acted solely on information that the respondent possessed narcotics and a gun. Alternatively, the respondent was seated in a car parked in a high crime area late at night. Id. The officer approached the car and asked the respondent to open the car door. Id. at 145. Instead, the respondent rolled down his window. Id. Thereupon, the officer reached into the car and found the gun where the informant said it was hidden. Id. The officer had not personally observed any suspicious conduct, nor did he identify himself or make inquiry prior to frisking the respondent. Id. at 155. The Supreme Court held that the tip carried enough "indicia of reliability" to justify a stop. Id. at 147.

See generally Davis v. Mississippi, 394 U.S. 721, 726 (1969) (the purpose of the fourth amendment is to prevent wholesale intrusions upon the personal security of individuals); Beck v. Ohio, 379 U.S. 81, 91 (1964) (standard of probable cause is the best compromise for accommodating law enforcement interests and constitutionally guaranteed rights).

Adams v. Williams, 407 U.S. at 146. "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." Id. See United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975) (the investigations of roving border patrols stopping automobiles to check for illegal immigrants usually consumed less than a minute and involved a brief question or two).

See, e.g., United States v. Brignoni-Ponce, 422 U.S. at 881-82 (reasonable suspicion of criminal activity warrants a temporary seizure for purpose of verifying suspicion that immigration laws were violated).

Id. at 881-82. See also Adams v. Williams, 407 U.S. at 146-49.

There are several investigative techniques which may be utilized effectively in the course of a Terry-type stop. 2 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 9.2, at 36 (1978). The most common is interrogation, which consists of a request for identification and inquiry concerning the suspicious conduct of the individual detained. Id. Alternatively, the suspect may be detained while it is determined if in fact a crime has occurred in the area, a process involving checking of certain premises, locating of objects abandoned by the suspect, or talking with other people. Id. at 37. There is no reason to conclude that any investigative methods of the type previously mentioned are inherently objectionable; they might cast doubt upon the reasonableness of the detention, however, if their use makes the period of detention unduly long or involves moving the suspect to another locale.

United States v. Brignoni-Ponce, 422 U.S. at 881-82.
facts to support a finding of probable cause were examined by the United States Supreme Court in the context of investigatory stops of domestic airline passengers in *United States v. Mendenhall*. In *Mendenhall*, the respondent was walking along an airport concourse when she was approached by two federal DEA officers who, believing the woman's behavior fit a drug courier profile, identified themselves as federal agents. The officers asked for Mendenhall's airline ticket and some identification; the names on the ticket and identification did not match.

After returning the ticket and identification, one of the agents asked Mendenhall if she would accompany him to the DEA airport office, approximately fifty feet away, for further questioning. Once in the office, Mendenhall was asked to consent to a search of her person and her handbag; she was advised of her right to decline. Mendenhall responded affirmatively to the request and handed her purse to the agent. In a private room, following further assurance from Mendenhall that she consented to the search, a policewoman began the search of Mendenhall's person by requesting that Mendenhall disrobe. As she began to undress, Mendenhall removed two concealed packages, one of which appeared to contain heroin, and handed them to the policewoman. Subsequently, Mendenhall was arrested and indicted for possession of heroin.

The United States Supreme Court upheld the agent's conduct

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81. *Id.* at 547. Mendenhall arrived on a flight from Los Angeles, a drug source city, she was the last person to deplane; she appeared very nervous, scanning the entire area; she proceeded past the baggage area without claiming any luggage; and she changed airlines for her flight out of Detroit. *Id.* at 547 n.1.
82. *Id.* at 548.
83. *Id.* at 547-48.
84. *Id.* at 548.
85. *Id.*
86. *Id.*
87. *Id.* at 548-49.
88. *Id.* at 549.
89. *Id.* Prior to trial, Mendenhall moved to suppress the introduction into evidence of the illegal drugs which had been seized during the personal search. *Id.* The district court denied Mendenhall's motion to suppress and concluded that the agents' conduct in initially approaching her and asking to see her ticket and identification was a permissible investigatory stop under *Terry*. *Id.* Moreover, the court found that Mendenhall had not been placed under arrest when she was asked to accompany the agents to the DEA office. *Id.*

The United States Court of Appeals for the Sixth Circuit reversed, determining that the initial stop of Mendenhall was unlawful because it was not based upon a reasonable suspicion of criminal activity. *Id.* at 549-50. In the alternative, the court found that even if the initial stop was permissible, the officer's request that Mendenhall accompany him to the DEA office constituted an arrest without probable cause. *Id.* at 550.
in initially approaching Mendenhall, asking to see her ticket and identification, and requesting her to accompany them to the DEA office for questioning and a strip search. The Court adhered to the view that constitutional safeguards are to be invoked only if an intrusion amounts to a "seizure," that is, when by means of physical force or a show of authority, freedom of movement is restrained. In concluding that the agents' conduct did not amount to an arrest or a Terry stop, the Court stated as follows:

[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

On the facts of this case, no 'seizure' of the respondent occurred. The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct without more, did not amount to an intrusion upon any constitutionally protected interest.

Justice Powell, joined by Chief Justice Burger and Justice Blackmun, offered a second perspective in the concurring opinion. They expressed the view that the agents who had observed Mendenhall engaging in conduct that they reasonably associated with criminal activity in an airport known to be frequented by drug couriers, possessed "a reasonable and articulable suspicion of criminal activity" when they stopped the woman and asked her for identification. In analyzing the reasonableness of the stop, the concurring Justices took three factors into account: the public interest in preventing drug traffic; the minimal intrusion upon

90. Id. at 557-58.
91. Id. at 553.
92. Id. at 554-55 (citations omitted).
93. Id. at 560.
94. Id. at 560, 565.
95. Id. at 561. The Court observed that the "public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit."
Mendenhall's privacy; and the objective facts upon which the officers relied.

Justice White, joined by Justices Brennan, Marshall, and Stevens, dissented. Assuming that Mendenhall was seized within the meaning of the fourth amendment when she was stopped by the agents, Justice White concluded that such seizure was illegal, since there was no reasonable ground for suspecting Mendenhall of criminal activity at the time of the stop. Mendenhall's conduct was the "kind of behavior that could reasonably be expected of anyone changing planes in an airport terminal."

Subsequently, the continued validity of the Mendenhall analysis was placed in doubt by the United States Supreme Court in Reid v. Georgia. In this case, the petitioner arrived on a commercial airline flight from Florida in the early morning hours. The passengers left the plane in single file; although a man carrying luggage identical to the petitioner's remained separate from him, the petitioner occasionally looked back at the second man as they proceeded through the concourse area. When they reached

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96. Id. at 565. The Court noted that the intrusion involved was "quite modest." Id. at 562-63. The plainclothes agents approached Mendenhall in a public area without the display of weapons. Id. at 563. Moreover, the questioning was brief. Id.

97. Id. at 563-65. In reviewing the factors that led the agents to stop and question Mendenhall, the Court noted that a "trained law enforcement agent may be 'able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer.'" Id. at 563 (citing Brown v. Texas, 443 U.S. 47, 52 n.2 (1979)). The agents observed an individual who appeared very nervous, scanned the gate area, walked very slowly toward the baggage area, claimed no baggage, and changed flights en route to Pittsburgh. Id. at 564.

However, the concurring Justices' conclusion that the agents possessed specific and articulable suspicion in light of the above observations indicates a reliance on behavior which does no more than conform to the characteristics typically found in drug courier profiles; such reliance has been criticized. Constantino, Drug Courier Profiles and Airport Stops: Is the Sky the Limit?, 3 W. New Eng. L. Rev. 175, 190 (1980).

98. 446 U.S. at 566.
99. Id. at 571.
100. Id. at 572. Justice White noted that at the time Mendenhall was stopped, the agents' suspicion that she was involved in criminal activity was based solely on their observations of her conduct at the airport. Id. at 571. The agents did not observe unusual conduct on the part of Mendenhall which would lead an experienced officer reasonable to conclude that criminal activity was afoot. Id. at 572. In Justice White's view, the agents' observations that Mendenhall was the last person to deplane from a flight originating in a "major source city," that Mendenhall claimed no luggage and changed airlines, were insufficient to provide reasonable suspicion.

Id. at 572-73.
101. Id. at 572.
102. 448 U.S. 438, 440-41 (1980) (agent could not reasonably have suspected the petitioner of criminal activity on the basis of the drug courier profile).

103. Id. at 439.
104. Id.
the lobby of the airport terminal, the second man caught up with the petitioner and spoke briefly to him. The two men then left the airport terminal together. A DEA agent approached the two men outside the terminal, identified himself as a narcotics agent, and asked if the men would agree to return to the terminal and to consent to a search of their persons and luggage. Although both men responded affirmatively, the petitioner attempted to flee as he entered the terminal, abandoning his luggage. When recovered, the petitioner's bag was found to contain cocaine.

Prior to trial in state court on charges of illegal drug possession, the petitioner moved to suppress the introduction of the drugs on the ground that the federal agent had seized the drugs in violation of the fourth and fourteenth amendments. The trial court granted the motion to suppress, concluding that the drugs had been obtained as the result of a seizure of the petitioner by the agent without an articulable suspicion that the petitioner was transporting narcotics. The Georgia Court of Appeals reversed, holding that the stop of the petitioner was permissible since the petitioner possessed a number of characteristics found in a drug courier profile.

Granting certiorari, the United States Supreme Court vacated the judgment of the court of appeals insofar as it rested on the determination that the agent had lawfully seized the petitioner outside the airport terminal. In a per curiam opinion, it was held that the DEA agent, as a matter of law, could not have reasonably suspected the petitioner of criminal activity. The Court observed:

The appellate court's conclusion in this case that the DEA agent reasonably suspected the petitioner of wrongdoing rested on the fact that the petitioner appeared to the agent to fit the so-called "drug courier profile". Of the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward

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105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 439-40.
111. *Id.* at 439.
112. *Id.* at 439-40. The Georgia Court of Appeals also concluded that the petitioner had consented to return to the airport terminal for a search of his person. *Id.* at 440. After the petitioner had attempted to flee, abandoning his bag, there existed probable cause to search the bag. *Id.*
113. *Id.* at 441-42.
114. *Id.* at 441.
at him as they proceeded through the concourse relates to their particular conduct. The other circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure.\textsuperscript{115}

Further, the Court recognized that while an individual may be detained briefly without probable cause to arrest him, \textit{any} curtailment of an individual's liberty must be supported at least by a reasonable and articulate suspicion that the individual detained is engaged in criminal activity.\textsuperscript{116}

\section*{Analysis}

In \textit{Florida v. Royer},\textsuperscript{117} the Court, in a plurality opinion,\textsuperscript{118} determined that, although adequate grounds for temporarily detaining Royer and his luggage existed, the detention to which Royer was subjected when consent to a search of his suitcases was given was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity.\textsuperscript{119} Consequently, the plurality found that Royer's consent was tainted by the illegal detention and was ineffective to justify the search.\textsuperscript{120}

Justice White, writing for the plurality, addressed three reasons proffered by the State for holding that Royer was not being illegally detained when he consented to the search of his luggage.\textsuperscript{121} First, the State argued that the entire encounter was consensual.\textsuperscript{122} Finding this submission "untenable," the plurality concluded that Royer was seized for fourth amendment purposes when the officers identified themselves, told Royer he was suspected of transporting narcotics, and asked him to accompany them to the DEA office.\textsuperscript{123} Especially noteworthy was the fact that the officers retained Royer's driver's license and airline ticket.\textsuperscript{124} The plurality found that the existence of the above circumstances surely amounted to a "show of official authority such that 'a rea-

\textsuperscript{115} Id. at 440-41.
\textsuperscript{116} Id. at 440.
\textsuperscript{117} 103 S. Ct. 1319 (1983).
\textsuperscript{118} Justice White delivered the opinion of the Court in which Justices Marshall, Powell, and Stevens joined. Id. at 1321. Justice Blackmun filed a dissenting opinion. Id. at 1332. Justice Rehnquist filed a separate dissenting opinion in which Chief Justice Burger and Justice O'Connor joined. Id. at 1336.
\textsuperscript{119} Id. at 1326.
\textsuperscript{120} Id. at 1329.
\textsuperscript{121} Id. at 1326.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
sonable person would have believed he was not free to leave.'

Second, the State contended that if Royer had been "seized," there existed reasonable, articulable suspicion to justify a Terry investigatory stop. The plurality agreed with the State that adequate grounds for suspecting Royer of transporting narcotics existed. Specifically, the Court found that "paying cash for a one-way ticket, the mode of checking the two bags, and Royer's appearance and conduct in general" were adequate grounds for suspecting Royer of transporting narcotics and for temporarily detaining him. Further, the temporary detention to which Royer was subjected while the agents attempted to verify or dispel their suspicions did not exceed the limits of an investigative detention. The plurality concluded, however, that at the time Royer consented to the search of his suitcases, "the detention to which he was then subjected was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity."

What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions. The officers had Royer's ticket, they had his identification, and they had seized his luggage. Royer was never informed that he was free to board his plane if he so chose, and he reasonably believed that he was being detained. At least as of that moment, any consensual aspects of the encounter had evaporated, and we cannot fault the Florida Court of Appeal for concluding that Terry v. Ohio and the cases following it did not justify the restraint to which Royer was then subjected. As a practical matter, Royer was under arrest.

Finally, the State argued that Royer was not being illegally detained when he gave his consent to the search of his suitcases because there was probable cause to arrest him at that time. The plurality, however, found to the contrary. The plurality reasoned that to agree with the State's position would be to agree that "every nervous young man paying cash for a ticket to New York

125. Id. (citing United States v. Mendenhall, 446 U.S. 544, 544 (1980)).
126. Id.
127. Id.
128. Id.
129. Id.
130. Id.
131. Id. at 1327.
132. Id. at 1329.
133. Id.
City under an assumed name and carrying two heavy American Tourister bags may be arrested and held to answer for a serious felony charge.\textsuperscript{134} Because Royer was being illegally detained when he consented, the consensus was tainted by the illegality and was ineffective to justify the search.\textsuperscript{135}

Justice Powell concurred in finding a valid \textit{Terry} airport stop despite the paucity of objective facts, stressing the compelling interest of the public in identifying those who transport illegal drugs for personal profit.\textsuperscript{136} Justice Powell stated:

I write briefly to repeat that the public has a compelling interest in identifying by all lawful means those who traffic in illicit drugs for personal profit. As the plurality opinion emphasizes, . . . the facts and circumstances of investigative stops necessarily vary. In view of the extent to which air transportation is used in the drug traffic, the fact that the stop at issue is made by trained officers in an airport warrant special consideration.\textsuperscript{137}

Justice Brennan also concurred in the result, finding that Royer's consent to the search of his suitcases was tainted by an illegal arrest.\textsuperscript{138} However, Justice Brennan dissented from the plurality's determination that the initial stop of Royer was legal, expressing the view that Royer was "seized" for fourth amendment purposes when the agents asked him to produce his driver's license and airline ticket.\textsuperscript{139} Justice Brennan observed that while the fourth amendment allows a limited search or seizure on facts insufficient to constitute probable cause, such a seizure must be justified by reasonable suspicion of criminal activity based on specific and articulable facts.\textsuperscript{140} Justice Brennan concluded:

In this case, the officers decided to approach Royer because he was carrying American Tourister luggage, which appeared to be heavy; he was young; he was casually dressed; he appeared to be pale and nervous and was looking around at other people; he paid for his airline ticket in cash with a large number of bills; and he did not completely fill out the identification tags for his luggage, which was checked to New York. These facts clearly are not sufficient to provide the reasonable suspicion of criminal activity necessary to justify the officer's subsequent seizure

\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 1329-30.
\textsuperscript{138} Id. at 1330.
\textsuperscript{139} Id. at 1331.
\textsuperscript{140} Id. at 1332.
of Royer. Indeed, considered individually or collectively, they are perfectly consistent with innocent behavior and cannot possibly give rise to any inference supporting a reasonable suspicion of criminal activity. The officers' seizure of Royer, therefore, was illegal.\textsuperscript{141}

The plurality's holding that a lawful \textit{Terry} stop had been effected—in the absence of objective facts, other than those traits listed in a drug courier profile—raises the question of the continued vitality of \textit{Terry}, at least in the context of airport stops. The central inquiry under the fourth amendment, when limited stops are involved, is the reasonableness of the particular governmental intrusion upon an individual's personal security in light of all facts and circumstances.\textsuperscript{142} Indeed, the essence of the holding in \textit{Terry} is that the reasonableness of an investigatory stop should be determined on the facts of each case.\textsuperscript{143} Consequently, an examination of the totality of circumstances is essential to a determination of the reasonableness of a particular governmental intrusion under the fourth amendment.\textsuperscript{144}

In addition, \textit{Terry} and its progeny provide that some reasonable ground must be demonstrated for focusing on the individual stopped as one who was involved in, or about to become involved in, criminal activity.\textsuperscript{145} Even intrusions justified by a compelling public interest must be based on specific and articulable facts and the rational inferences that can be drawn therefrom.\textsuperscript{146}

The \textit{Royer} plurality, however, in its determination that there existed reasonable, articulable suspicion to justify a \textit{Terry} stop, relied solely upon facts resembling the characteristics typically enumerated in a drug courier profile.\textsuperscript{147} Sole dependence on such a checklist serves as a substitute for an officer's determination that a crime has been, or is about to be, committed. The characteristics listed in the profile are not sufficient to provide the reasonable suspicion of criminal activity necessary to justify a \textit{Terry} investigatory stop. Moreover, the reasonableness of the particular governmental intrusion in \textit{Royer} was not determined in light of all facts and circumstances but was measured against an agency's predetermined compilation of characteristics.\textsuperscript{148} The reasonableness test of

\textsuperscript{141} \textit{Id.} (citations omitted).
\textsuperscript{142} See notes 63-67 and accompanying text \textit{supra}.
\textsuperscript{143} 392 U.S. at 19-20.
\textsuperscript{145} 392 U.S. at 21-22. See also notes 63-67, 70-73 and accompanying text \textit{supra}.
\textsuperscript{146} 392 U.S. at 21.
\textsuperscript{147} 103 S. Ct. at 1326. See also notes 3-4, 12, 125-127, 140 and accompanying text \textit{supra}.
\textsuperscript{148} 103 S. Ct. at 1326.
Royer, based upon a profile system of law enforcement, thus leaves the *Terry* analysis behind.\textsuperscript{149} The proposition emerges that airport investigatory stops based upon the observance of predetermined characteristics enumerated in the drug courier profile fall outside the reasonableness requirements of the fourth amendment.\textsuperscript{150}

**CONCLUSION**

While the drug courier profile is recognized as a useful tool for law enforcement, the notion that the profile alone constitutes a sufficient basis for instituting a *Terry* investigatory stop should be rejected. The drug courier profile in a particular case may not provide the specific and articulable facts that are required under the fourth amendment standard of reasonableness. Consequently, a court should not automatically accept as reasonable the suspicions enumerated by an agency when they are based solely upon that agency's collective experience. Courts should view the totality of suspicious factors, including those which make up a drug courier profile. When the government is unable to articulate the specific facts which point to an individual's involvement in criminal activity, the investigatory stop-and-frisk must be unlawful.

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\textsuperscript{149} See 392 U.S. at 21. The need for the stop is balanced against the gravity of the intrusion to determine the reasonableness of the particular investigatory stop. *Id.* Such a balance is examined in light of specific, objective facts presented to the court to show that the particular individual is engaged in criminal activity. *Id.* at 21-22.

\textsuperscript{150} See, e.g., United States v. Mendenhall, 446 U.S. 544 (1980), and notes 89-91 and accompanying text *supra*. 