

DOCKET NO.
05-4312-cr

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

-v-

JEREMY HARDY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX ON APPEAL FOR DEFENDANT-APPELLANT
JEREMY HARDY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION PURSUANT TO F.R.A.P. 28 (a) (2) 1

STATEMENT OF ISSUE PRESENTED 2

Whether the Border Patrol Agents seized Mr. Hardy in violation of his Fourth Amendment rights by conducting a *Terry* stop that was unsupported by reasonable suspicion.

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS 4

SUMMARY OF THE ARGUMENT 11

POINT I 12

MR. HARDY WAS SEIZED IN VIOLATION OF HIS FOURTH AMENDMENT RIGHTS AND THE FRUITS OF THAT ILLEGAL SEIZURE SHOULD HAVE BEEN SUPPRESSED BY THE DISTRICT COURT.

A. Standard Of Review 12

B. The Border Patrol Officers Initiated A *Terry* Stop When They Approached Mr. Hardy in the Hannaford Parking Lot At The St. Lawrence Center Mall After They Followed His Vehicle For 23 Miles. 12

C. Mr. Hardy Was Seized After His Vehicle Was Blocked In By Agent Gonzales And Trooper Dillon. 15

D. The Agents Were Not Able To Articulate Anything More Than An Inchoate And Unparticularized Suspicion Or Hunch To Justify The *Terry* Stop. 16

 1. Reasonable suspicion during the 23 mile pursuit. 18

 2. Reasonable Suspicion at the St. Lawrence Center Mall. 20

CONCLUSION 24

CERTIFICATE OF COMPLIANCE 25

CERTIFICATE OF SERVICE 26

TABLE OF AUTHORITIES

<u>CASES</u>	Page
<u>Brown v. Illinois</u> , 422 U.S. 590 (1975)	23
<u>Dunaway v. New York</u> , 442 U.S. 200 (1979)	13,23
<u>Florida v. Bostick</u> , 501 U.S. 429 (1991)	23
<u>Florida v. Royer</u> , 460 U.S. 491 (1983)	13
<u>Hiibel v. Sixth Judicial District of Nevada</u> , 124 S.Ct. 2451 (2004)	17
<u>Terry v. Ohio</u> , 392 U.S. 1 (1968)	13,15, 16-17
<u>Union Pac.R.Co. v. Botsford</u> , 141 U.S. 250 (1891)	13
<u>United States v. Arvizu</u> , 534 U.S. 266 (2002)	17
<u>United States v. Brignoni-Ponce</u> , 422 U.S. 873 (1975)	19-20
<u>United States v. Casado</u> , 303 F.3d 440 (2d Cir. 2002)	12
<u>United States v. Jiminez-Medina</u> , 173 F.3d 752 (9 th Cir. 1999)	18
<u>United States v. Lawes</u> , 292 F.3d 123 (2d Cir. 2002)	12
<u>United States v. Mendenhall</u> , 446 U.S. 544 (1980)	15-16
<u>Wong Sun v. United States</u> , 371 U.S. 471 (1963)	23

STATUTES

18 U.S.C. § 2 3

18 U.S.C. § 3231 1

18 U.S.C. § 3742 (a) 1

21 U.S.C. § 841 3

21 U.S.C. § 846 1,3

28 U.S.C. § 1291 1

F.R.A.P. 28(a)(2) 1

USCA Const. Amend. 4 12

STATEMENT OF JURISDICTION PURSUANT TO F.R.A.P. 28(a)(2)

1. This appeal is taken from a Judgment of Conviction entered against the Defendant-Appellant, Jeremy Hardy, in the United States District Court for the Northern District of New York, by the Hon. Norman A. Mordue, United States District Court Judge, on July 29, 2005.

2. The District Court had subject matter jurisdiction, pursuant to 18 U.S.C. § 3231, because this was a criminal case alleging violations of 21 U.S.C. § 846.

3. Jurisdiction in this appeal is invoked in this Court pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

4. A Notice of Appeal was timely filed on August 9, 2005, pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure.

STATEMENT THE ISSUE

Whether the Border Patrol Agents seized Mr. Hardy in violation of his Fourth Amendment rights by conducting a *Terry* stop that was unsupported by reasonable suspicion.

STATEMENT OF THE CASE

On April 7, 2004, Mr. Hardy, and his co-defendant, Christopher LaPierre, were charged by Indictment with conspiring to possess with intent to distribute marijuana, in violation of 21 U.S.C. §§ 841, 846, and 18 U.S.C. § 2. (A 10-11). Mr. Hardy's initial appearance was held on April 8, 2004. (A 4). Mr. Hardy entered a plea of not guilty to the Indictment and was released on personal recognizance and a bond of \$1500.00. (A 4).

On May 5, 2005, Mr. Hardy moved to suppress evidence that resulted from the stop and seizure of Mr. Hardy's vehicle on November 21, 2003 at the St. Lawrence Center Mall in Massena, New York. (A 4). A Suppression Hearing was held on August 11, 2004. (A 5). On January 14, 2005, the district court issued a Memorandum, Decision and Order denying Mr. Hardy's Motion to Suppress. (A 6, 98-111).

Mr. Hardy entered a plea of guilty to the Indictment pursuant to a conditional plea agreement on March 21, 2005. (A 7, 111). Mr. Hardy reserved his right to appeal the district court's denial of his Motion to Suppress. (A 111).

On July 27, 2005, Mr. Hardy was sentenced to 12 months and 1 day in prison, to be followed by 24 months of supervised release. (A 113-114). Mr. Hardy timely filed a Notice of Appeal on August 9, 2005. (A 122).

STATEMENT OF THE FACTS

On November 21, 2003, at approximately 11:00 a.m., Jeremy Hardy was driving a 1999 Ford Escort eastbound on State Route 37 in the Village of Waddington, New York. (A 12, 14, 33, 84). Mr. Hardy's friend, Christopher LaPierre, was riding in the front passenger seat. (H 12, 53). Mr. Hardy and Mr. LaPierre attended college together in Cortland, New York. It was the Friday before Thanksgiving (A 33) and they were traveling from Cortland to Mr. Hardy's home in Malone, New York (A 15) and Mr. LaPierre's home in Saranac Lake, New York (A 22-23). Mr. Hardy had planned to spend Thanksgiving with his girlfriend's family in Long Island but had to first drop his dog off at his parent's house in Malone. (A 24,61, 86).

United States Border Patrol Agents Gilbert Gonzales and Michael Chase were located in separate vehicles that were parked on the side of Route 37. (A 12). The windows of the vehicles were open so that they could talk to each other. (A 12). Agent Chase was in a blue unmarked service vehicle, a Ford Crown Victoria. (A 12-13). Agent Gonzales was in a marked Border Patrol Chevy Tahoe. (A 13).

According to Agent Chase, when the vehicle passed the agents, neither Mr. Hardy, nor Mr. LaPierre, looked toward the agents. (A 46). Although the vehicle was driving toward the Canadian border, which was a half mile away, Agent Chase

became suspicious that they were alien smugglers because they failed to acknowledge the Agents. Agent Chase testified, “If they look forward, especially alien smugglers, they figure if they don’t look at you, you don’t exist.” (A 46). If they had acknowledged him, he also would have been suspicious. (A 47).

In contrast, Agent Gonzales who was parked right next to Agent Chase, became suspicious that the men were alien smugglers because they looked at the Agents three or four times when they drove by and appeared real concerned as to what the Agents were doing. (A 57, 75). Agent Gonzales emphasized that they were more focused on the Agents than on the road. (A 77).

Agent Chase told Agent Gonzales that they should follow them because “they look like potential—somebody that’s going to come up and possibly smuggle into the area.” (A 13). Agent Chase was suspicious because they were two young white males driving a Ford Escort. (A 44-45). He was suspicious that they were traveling eastbound toward the Canadian border. (A 44). Had they been traveling westbound, he also would have been suspicious. (A 45).

Agent Chase pulled out onto Route 37, directly behind the Ford Escort. (A 34). Agent Gonzales pulled out behind Agent Chase. (A 35). Agent Chase conducted a registration check on the license plate and learned that the car was registered to Dana Taylor of Williamsville, New York. (A 14, 54). Both Agents agreed that it was not

unusual for a person to be driving a car registered to another person, especially during the holidays. (A 38-39, 72). They continued to follow the vehicle because they “weren’t satisfied” and wanted to see where Mr. Hardy and Mr. LaPierre were going. (A 78).

They followed the vehicle for 23 miles through the village of Massena. (A 18). The vehicle turned onto alternate Route 37B, a local access route familiar to local residents. (A 36, 48-49). Agent Chase agreed that there is nothing suspicious about local residents using Route 37B. (A 49). No other heads were observed in the vehicle and the vehicle was not riding low. (A 37-38). During the 23 mile pursuit, Jeremy Hardy was simply “just driving.” (A 18).

Mr. Hardy drove into the St. Lawrence Center Mall and the agents followed him. (A 15-16). Mr. Hardy parked the vehicle in the Hannaford Grocery Store Parking Lot. (A 16-17). The Agents testified that the Hannaford parking lot is a staging area for smuggling activity. (A 16-17, 52, 55).¹

Mr. Hardy exited the vehicle with his dog and walked over to a median with his dog. (A 56). Agent Gonzales testified that Mr. Hardy turned around, saw Agent Gonzales, and kept walking. (A 81). Agent Gonzales yelled, “hey, hold up, guy, I

¹ Defense counsel attempted to verify this testimony through a Subpoena Duces Tecum to the United States Border Patrol in Massena, New York. The district court granted the Government’s motion to quash the Subpoena.

want to talk to you.” (A 80). Agent Gonzales approached Mr. Hardy and asked him if he was a United States Citizen and asked him for his identification. (A 56, 79). Mr. Hardy replied that he was a United States Citizen and did not have identification. (A 56). Agent Gonzales asked Mr. Hardy for the vehicle registration and walked Mr. Hardy back to the vehicle to retrieve it. (A 58). Agent Gonzales asked Mr. Hardy where he was going and Mr. Hardy replied that he was going to Long Island. (A 61). Agent Gonzales asked him, “aren’t you going the long way around?” Mr. Hardy explained that he was leaving his dog at his parents’ house in Malone. (A 61).

Agent Chase got out of his car and approached the passenger side of the vehicle. (A 19). He knocked on the window to get Christopher LaPierre’s attention. (A 19). Agent Chase identified himself as a Border Patrol Agent, asked Mr. LaPierre what country he was a citizen of, and requested his identification. (A 19). Christopher LaPierre replied that he was a United States Citizen, born in Saranac Lake, and that he did not have any identification. (A 19). Mr. LaPierre told Agent Chase the car belonged to a friend of his and provided her name to Agent Chase. (A 21-22). Mr. LaPierre told Agent Chase that they were possibly going to the casino, but that they were going to Jeremy’s parents’ house in Malone and then to his parents’ house in Saranac Lake. (A 22-23). Agent Gonzales was not aware of what Mr. LaPierre told Agent Chase regarding their destination. (A 62).

Both Agents testified that it is common for alien smugglers not to carry identification with them in order to avoid being identified or detected by law enforcement. (A 21-22, 65). However, Jeremy Hardy and Christopher LaPierre provided the Agents with their correct names and date of births. In addition, Mr. LaPierre told Agent Chase that his brother-in-law was Sergeant Michael Trimboli in the New York State Police Department. (A 21, 51). Further, Mr. LaPierre was identified at the scene by his sister-in-law, Judy Paduano, a New York State Police Investigator. (A 30-31, 82). With respect to Mr. Hardy, Agent Chase knew his family, specifically Mr. Hardy's brother. (A 32, 50). Agent Chase testified that he did not realize this until after Mr. Hardy was handcuffed and placed in the patrol vehicle. (A 32). Agent Gonzales testified otherwise. He stated that Agent Chase told him he knew Mr. Hardy's family prior to Mr. Hardy being handcuffed and placed in the patrol vehicle. (A 72, 85).

The Agents ran their names through a "wants and warrants" check. The search revealed no outstanding warrants for either man. (A 20, 42, 60). Jeremy Hardy and Christopher LaPierre did not speak with accents, the car did not smell of narcotics and there were no deodorizers in the car to mask the smell of narcotics. (A 40, 66). Although Agent Gonzales did not see any evidence of narcotics or alien smuggling (A 71), he contacted the K-9 Unit to conduct an exterior sniff of the vehicle. (A 25-

26, 28, 41). Agent Chase ordered Mr. Hardy and Mr. LaPierre out of the Ford Escort and told them that the K-9 Unit would be arriving soon. (A 28).

After contacting the K-9 Unit, Agent Gonzales requested a New York State Trooper to come to the scene to determine whether Mr. Hardy had a New York State Driver's license. (A 26, 28). Despite the fact that Mr. Hardy was driving toward the Canadian border, Agent Gonzales asked him if there was anyone in the trunk of the vehicle and requested consent to search the trunk. (A 27, 41, 62). Mr. Hardy agreed, the trunk was searched, and no people or contraband were found inside the trunk. (A 27). Mr. Hardy never gave consent to search the interior of the vehicle.

New York State Trooper Bridget Dillon arrived at the scene within 5 minutes after being called. (A 28). This was approximately 8 minutes after they entered the parking lot. (A 66-67). Prior to her arrival, Agent Gonzales moved his vehicle beside Jeremy Hardy's vehicle. (A 70). Trooper Dillon parked directly behind Mr. Hardy's vehicle blocking him in. (A 28-29, 68, 70). Trooper Dillon verified that Mr. Hardy had a valid New York State driver's license. (A 29, 42). No traffic tickets were issued. (A 43). Agent Gonzales stated that Jeremy Hardy was not free to leave the scene after the Agents learned that he was a licensed New York State driver. (A 74). Agent Chase continued to secure Mr. Hardy and Mr. LaPierre outside of the vehicle. (A 30).

The K-9 Unit arrived after Trooper Dillon at approximately 11:45 a.m. (A 30, 63, 91). The K-9 Unit conducted an exterior sniff of the vehicle and the dog alerted to the right side of the vehicle. (A 30, 63). The officers opened the car and discovered a white plastic bag that contained \$43,900. (A 63-64). Agent Gonzales held up a bag of money and Agent Chase immediately handcuffed Mr. Hardy and Mr. LaPierre. (A 32, 43). Mr. Hardy and Mr. LaPierre were transported to the New York State Police station for questioning. (A 31-32). Agent Chase testified that from the time they first approached Mr. LaPierre and Mr. Hardy in the Hannaford parking lot until the conclusion of the dog sniff, approximately 45 minutes to an hour had passed. (A 42). At the police station, Mr. Hardy and Mr. LaPierre informed officers that they were delivering proceeds from a marijuana transaction to Native Americans on the Akwesasne Reservation.

SUMMARY OF THE ARGUMENT

The district court erroneously concluded that no stop occurred because Mr. Hardy drove into the St. Lawrence Center Mall on his own accord. Regardless of that fact, the Agents immediately initiated a *Terry* stop in the Hannaford Grocery Store parking lot after following Mr. Hardy for 23 miles. Mr. Hardy was walking away from Agent Gonzales, when Agent Gonzales yelled out to him to “hey, hold up guy, I want to talk to you.” Mr. Hardy complied. In any event, Mr. Hardy was seized within 8 minutes of his arrival in the parking lot after his vehicle was blocked in by Agent Gonzales and New York State Trooper Dillon.

Once Trooper Dillon arrived at the scene, she verified that Mr. Hardy was a licensed New York State driver. Prior to her arrival, the Agents had no reasonable suspicion to believe that Mr. Hardy was involved in criminal activity. He was simply “just driving” a Ford Escort on Route 37 that ultimately drove into the St. Lawrence Center Mall. By the Agents’ own admissions, there was no evidence of alien or narcotics smuggling. Despite this, Agent Chase ordered Mr. Hardy and Mr. LaPierre out of the vehicle prior to the arrival of both Trooper Dillon and the K-9 Unit. After Trooper Dillon confirmed that Mr. Hardy was a licensed driver, Agent Gonzales said he was not free to leave the scene. The continued detention of Mr. Hardy prior to the arrival of the K-9 unit was without legal basis.

ARGUMENT

POINT I

MR. HARDY WAS SEIZED IN VIOLATION OF HIS FOURTH AMENDMENT RIGHTS AND THE FRUITS OF THAT ILLEGAL SEIZURE SHOULD HAVE BEEN SUPPRESSED BY THE DISTRICT COURT.

A. Standard Of Review

The legal issues presented by a motion to suppress are reviewed de novo. United States v. Casado, 303 F.3d 440, 443 (2d Cir. 2002). The issue of whether a suspicion leading to a search is reasonable is a question of mixed fact and law, which is also reviewed de novo. United States v. Lawes, 292 F.3d 123, 127 (2d Cir. 2002). The district court's factual findings are accepted unless clearly erroneous. Casado, 303 F.3d at 443.

B. The Border Patrol Officers Initiated A *Terry* Stop When They Approached Mr. Hardy in the Hannaford Parking Lot At The St. Lawrence Center Mall After They Followed His Vehicle For 23 Miles.

The Fourth Amendment to the United States Constitution guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” by the Government. U.S.C.A. Const. Amend. 4. “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free

from all restraint or interference of others, unless by clear and unquestionable authority of law.” Terry v. Ohio, 392 U.S. 1,9 (1968)(quoting Union Pac.R.Co. v. Botsford, 141 U.S. 250, 251 (1891)).

Prior to the United States Supreme Court’s decision in Terry v. Ohio, 392 U.S. 1 (1968), any restraint on the person amounting to a seizure for Fourth Amendment purposes was invalid unless obtained by a warrant supported by probable cause. Florida v. Royer, 460 U.S. 491, 498 (1983)(citing Dunaway v. New York, 442 U.S. 200, 207-209 (1979)). *Terry* created a narrow exception to the warrant requirement holding that a law enforcement officer may stop and detain a person if they have some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. Terry 392 U.S. at 30.

The district court erroneously concluded that no stop occurred because Mr. Hardy drove into the St. Lawrence Center Mall on his own accord. (A 104). The district court’s reliance on this fact is misplaced. The Agents suspected Mr. Hardy and Mr. LaPierre of being alien smugglers from the moment they first observed them on Route 37. (A 13, 46, 57, 75, 77).

For example, the Government specifically asked Agent Gonzales, “Why was it that you followed these defendants that day to this location?” (A 57). Agent Gonzales replied, “By their actions when they drove by us, they were real concerned

as to what we were doing. They looked at us like 3 or 4 different times, both passenger and driver. They were real concerned as to what we were doing there, and they kept on looking toward our direction.” (A 57). Agent Chase wanted to follow them because they looked like “somebody that’s going to come up and possibly smuggle into the area.” (A 13). Agent Chase believed they were smugglers because they didn’t acknowledge the Agents on the side of Route 37 when they passed them. (A 46). Agent Chase testified, “If they look forward, especially alien smugglers, they figure if they don’t look at you, you don’t exist.” (A 46).

Agent Chase pulled out directly behind Mr. Hardy and Agent Gonzales pulled out behind Agent Chase. (A 34-35). The Agents then followed the vehicle for 23 miles. (A 18). If Agent Gonzales’s version of events are true, then Mr. Hardy must have known that the Agents were following him when he drove into the St. Lawrence Center Mall.

After Mr. Hardy parked his vehicle in the Hannaford parking lot, he exited his vehicle with his dog. Mr. Hardy saw Agent Gonzales, turned around, looked at him, and kept on walking. (A 81). Agent Gonzales yelled to Mr. Hardy from his patrol vehicle, “hey, hold up guy, I want to talk to you.” (A 80-81). Agent Gonzales further testified that “[Mr. Hardy] knew that I was approaching him and he knew that I wanted to well, I’m not saying he knew but he saw me and I was there for a purpose.

I'm sure he knew that I wanted to speak to him.” (A 81). Agent Gonzales asked Mr. Hardy for his identification, vehicle registration, date of birth, citizenship, point of origin and destination.

The fact that the Agents did not use their sirens to pull the vehicle over is of no moment. Once all parties reached the parking lot, the Agents immediately initiated a *Terry* stop because they believed that Mr. Hardy and Mr. LaPierre were involved in smuggling activities. Agent Chase testified that they followed the vehicle for 23 miles because they “weren’t satisfied” and they wanted to see where they were going. (A 78). Agent Chase further admitted that they did not have reasonable suspicion to pull the vehicle over. It was simply fortuitous for the Agents that Mr. Hardy pulled into the St. Lawrence Center Mall.

C. Mr. Hardy Was Seized After His Vehicle Was Blocked In By Agent Gonzales And Trooper Dillon.

A seizure within the meaning of the Fourth Amendment occurs “[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” Terry 392 U.S. at 19 n. 16. The test for determining whether an individual has been restrained by coercive police conduct was set forth in United States v. Mendenhall, 446 U.S. 544 (1980):

[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. Id. at 554.

Factors for the court to consider in reaching this determination include:

the threatening presence of several officers; the display of a weapon; physical touching of the person by the officer; language or tone indicating that compliance with the officer was compulsory; prolonged retention of a person's personal effects, such as airplane tickets or identification; and a request by the officer to accompany him to the police station or a police room." Id.

In this case, the Agents followed Mr. Hardy for 23 miles on Route 37 and followed him into the St. Lawrence Center Mall. Agent Gonzales was in a marked border patrol vehicle and Agent Chase was in an unmarked Ford Crown Victoria. Within 8 minutes of his arrival in the parking lot, and after being questioned extensively by Agent Gonzales, his vehicle was blocked in by New York State Trooper Bridget Dillon and Agent Gonzales. (A 66-67, 70). No reasonable person in Mr. Hardy's position would have believed he was free to leave the scene. (A 66-67).

D. The Agents Were Not Able To Articulate Anything More Than An Inchoate And Unparticularized Suspicion Or Hunch To Justify The *Terry* Stop.

A police officer may stop and briefly detain a person if the officer has reasonable suspicion that the person may be involved in criminal activity. Terry 392 U.S. at 20. The officer must be able to "point to specific and articulable facts which

taken together with rational inferences from those facts, reasonably warrant that intrusion.” Id. at 20-21. “The facts must be judged against an objective standard: would the facts available to the officer at the moment of the seizure ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?” Id. at 21-22. A police officer “must be able to articulate something more than an “inchoate and unparticularized suspicion or ‘hunch’.” Id. at 27. When a police officer stops and detains a citizen without having a reasonable suspicion that a crime is afoot, the officer seizes that person in violation of the Fourth Amendment. Id. at 16.

To ensure that a seizure resulting from a *Terry* stop is constitutionally reasonable, it must be limited. Hiibel v. Sixth Judicial District of Nevada, 124 S.Ct. 2451, 2458 (2004). The officer’s action must be “ ‘justified at its inception, and ...reasonably related in scope to the circumstances which justified the interference in the first place.’” Id. (citations omitted). Reviewing courts must look at the “totality of the circumstances” of each case to see whether the detaining officer had a “particularized and objective basis” to suspect legal wrongdoing. United States v. Arvizu, 534 U.S. 266, 273 (2002)(citations omitted).

1. Reasonable suspicion during the 23 mile pursuit.

The Agents’ testimony during the Suppression Hearing confirms that the Agents were acting on a mere hunch from the moment they first observed Mr. Hardy

driving on Route 37. Reasonable suspicion cannot be based on broad profiles which cast suspicion on entire categories of people. See United States v. Jiminez-Medina, 173 F.3d 752, 756 (9th Cir. 1999). Yet, the Agents decided that Mr. Hardy and Mr. LaPierre fit the profile of alien smugglers because they were two young white males driving a Ford Escort on Route 37. (A 44-45).

Incredibly, the Agents, who were parked right next to each other on the side of Route 37, provided completely different accounts of what occurred when the vehicle passed them. Agent Gonzales emphasized in his testimony that Mr. Hardy and Mr. LaPierre looked at the Agents several times and “were real concerned” as to what the Agents were doing. (A 57). In fact, Agent Gonzales said that they focused their attention on the Agents, rather than on the road. (A 77). This is why Agent Gonzales wanted to follow the vehicle. Agent Chase testified to just the opposite. Agent Chase believed they were alien smugglers because they did not acknowledge the Agents in any way. (A 46). Agent Chase found it suspicious that they were driving toward the Canadian border. (A 44). If they were driving in the opposite direction, he also would have been suspicious. (A 44).

After following the vehicle for approximately 5 miles, the Agents learned that the car was registered to Dana Taylor of Williamsville, New York. (A 14, 54). Both Agents agreed that it is not unusual for a person to be driving a car registered to

another person, especially during the holidays. (A 38-39, 72). Although nothing suspicious occurred during this time period, they decided to follow the vehicle because they “weren’t satisfied” and wanted to see where Mr. Hardy was going. (A 78). During the 23 mile pursuit, Mr. Hardy was simply “just driving.” (A 18). The vehicle was not riding low and no other heads were observed in the vehicle. The Agents found it suspicious that Mr. Hardy turned onto Route 37B, a local access route familiar to local residents. (A 36, 48-49). However, the Agents agreed that there is nothing suspicious about local residents, such as Mr. Hardy, using that Route. (A 49).

The Agents claimed that their suspicions were heightened because Mr. Hardy was driving on Route 37, a common route taken by alien smugglers. (A 13, 55). Additionally, the Agents averred that the St. Lawrence Center Mall, specifically the Hannaford Grocery store parking lot, is a staging area for smuggling activity. (A 16-17, 52, 55). The district court would not permit this allegation to be verified through a Subpoena Duces Tecum. In United States v. Brignoni-Ponce, 422 U.S. 873 (1975), the Supreme Court specifically addressed roving border patrol stops and their conformity with the Fourth Amendment. The Supreme Court was unwilling to presumptively permit searches that fail to comply with the constitutional requirement that officers must have a reasonable suspicion justifying roving patrol stops because

“[r]oads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well.” Brignoni-Ponce 422 U.S. at 882. The Court wanted to prevent “the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers.” Id. It should be noted that the Hannaford Grocery store is a market open to the public. There is nothing suspicious about an individual driving into that parking lot on a Friday morning.

2. Reasonable Suspicion at the St. Lawrence Center Mall.

Although Mr. Hardy did not have identification on him, New York State Trooper Bridget Dillon arrived at the scene and confirmed that he had a valid New York State driver’s license. This occurred prior to the arrival of the K-9 Unit.

Both Agents testified that it is common for alien smugglers not to carry identification with them in order to avoid being identified or detected by law enforcement. (A 21-22, 65). However, Mr. Hardy and Mr. LaPierre did not try to avoid being detected, they provided the Agents with their correct names and date of births. The Agents used this information to check for “wants and warrants” which came back with negative results. (A 20, 42, 60). In addition, Mr. LaPierre told Agent Chase that his brother-in-law was Sergeant Michael Trimboli in the New York State Police Department. (A 21, 51). Further, Mr. LaPierre was identified at the scene by

his sister-in-law, Judy Paduano, a New York State Police Investigator. (A 30-31, 82). With respect to Mr. Hardy, Agent Chase knew his family, specifically Mr. Hardy's brother. (A 32, 50).

Agent Chase alleged that Mr. Hardy and Mr. LaPierre gave different stories regarding their travel plans. This simply was not the case. Both Mr. Hardy and Mr. LaPierre told the Agents that they were on their way to Mr. Hardy's home in Malone and Mr. LaPierre's home in Saranac Lake. Mr. Hardy told Agent Gonzales that he was going to Long Island to spend Thanksgiving with his girlfriend's family, but first had to leave his dog at his parent's house. Mr. LaPierre told Agent Chase that they might *possibly* stop at the Casino. Agent Chase claimed that these "different" stories caused Agent Gonzalez to contact the K-9 Unit. (A 24-25). However, Agent Gonzales clearly testified that he was unaware of what Mr. LaPierre told Agent Chase regarding their destination. (A 61-62).

Despite the fact that Agent Gonzales did not see any evidence of narcotics or alien smuggling, he requested a K-9 Unit to the scene to conduct an exterior sniff of the car. (A 25-26, 28, 41). Both Agents admitted that Mr. Hardy and Mr. LaPierre did not speak with accents, the car did not smell of narcotics and there were no deodorizers to mask the smell of narcotics. (A 40, 66). Agent Chase ordered Mr. Hardy and Mr. LaPierre out of the vehicle and told them the K-9 Unit would be

arriving soon. (A 28). Agent Chase secured Mr. Hardy and Mr. LaPierre outside of the vehicle. (A 30).

After contacting the K-9 Unit, Agent Gonzales requested a New York State Trooper to the scene to determine whether Mr. Hardy had a New York State Driver's license. (A 26, 28). Even though Mr. Hardy was observed driving toward the Canadian border, Agent Gonzales asked Mr. Hardy if anyone was in the trunk of the vehicle and sought permission to look inside. (A 27, 41, 62). Mr. Hardy consented, the trunk was searched, and no people or contraband were found inside the trunk. (A 27).

New York State Trooper Bridget Dillon arrived at the scene five minutes after being called and verified that Mr. Hardy had a valid New York State Driver's license. (A 29, 42). No traffic tickets were issued. The Agents had no legal basis to hold Mr. Hardy at the scene as there was no evidence of narcotics or alien smuggling and it was determined that Mr. Hardy had a valid license. Yet, Agent Gonzales testified that Mr. Hardy was not free to leave the scene after Trooper Dillon confirmed that he was a licensed driver. (A 74). Agent Chase continued to secure Mr. Hardy and Mr. LaPierre outside the vehicle while waiting for the K-9 Unit, which did not arrive at the scene until 11:45 a.m. (A 30, 91).

Based on the Agents' testimony, it is clear that they had nothing more than

“unparticularized suspicion” and a “hunch” that Mr. Hardy was involved in criminal activity. In fact, their testimony fails to demonstrate any objective basis to believe that criminal activity was afoot. Instead, their testimony displays that their suspicions were continuously dispelled, yet they continued on a fishing expedition.

Because the Agents conducted a *Terry* stop that was not supported by reasonable suspicion and therefore detained Mr. Hardy in violation of his Fourth Amendment rights, the search of his vehicle cannot be sustained and the seizure of all physical evidence and any statements obtained from Mr. Hardy should have been suppressed by the district court. Florida v. Bostick, 501 U.S. 429 (1991); Brown v. Illinois, 422 U.S. 590, 602 (1975); Wong Sun v. United States, 371 U.S. 471 (1963); Dunaway v. New York, 442 U.S. 200 (1979).

CONCLUSION

For the reasons advanced above, the district court erroneously denied Mr. Hardy's Motion to Suppress and Mr. Hardy's conviction must therefore be reversed.

DATED: October 5, 2005

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(B)

This brief complies with the type-volume limitation of Fed.R.App.P.32(a)(7)(B) because this brief contains 5417 words, excluding the parts of the brief exempted by Fed.R.App.P.32(a)(7)(B)(iii).

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

Docket No.: 05-4312-CR

V.

JEREMY HARDY,

Defendant-Appellant.

CERTIFICATE OF SERVICE

I, Valarie Bruni, the Legal Secretary for the Federal Public Defender's Office, do hereby state under penalty of perjury that on October 5, 2005, I served a copy of the Brief on Appeal and Appendix of the Defendant-Appellant, Jeremy Hardy, on the following:

Elizabeth S. Riker, Esq., AUSA, James M. Hanley Federal Building, 100 South Clinton Street, 9th Floor, Syracuse, NY 13261 (*Via Hand Delivery*)

Jeremy Hardy, Reg. # 12582-052, Fort Dix FCI, Federal Correctional Institution, Fort Dix, NJ08640 (*Via First Class Mail*)

DATED: October 5, 2005

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