

**DOCKET NO.**  
02-1207

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In The  
**UNITED STATES COURT OF APPEALS**  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,  
Appellee,

-v-

FRANCINE LA MAY,  
Defendant-Appellant.

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

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**BRIEF AND APPENDIX ON APPEAL FOR DEFENDANT-APPELLANT,**  
**FRANCINE LA MAY**

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

1. This appeal is taken from a Judgment of Conviction entered against Defendant-Appellant, Francine La May in the Northern District of New York by the Honorable Frederick J. Scullin, Jr., Chief United States District Court Judge, on March 26, 2002.

2. The District Court had subject matter jurisdiction, pursuant to 18 U.S.C. § 3231, because this was a criminal case alleging violations of the laws of the United States under 8 U.S.C. § 1324(a)(1)(A)(ii).

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 March 22, 2002, pursuant to Rule 4 (b) of the Federal Rules of Appellate Procedure.

**STATEMENT OF ISSUE PRESENTED**

1. WAS THE ROVING-BORDER PATROL STOP OF THE DEFENDANT'S VEHICLE SUPPORTED BY REASONABLE SUSPICION THAT THE VEHICLE WAS CARRYING UNDOCUMENTED PERSONS?

## **STATEMENT OF THE CASE AND STATEMENT OF FACTS**

On July 19, 2001, a Federal Grand Jury for the Northern District of New York returned an Indictment against the Defendant-Appellant Francine La May, charging her with four counts of Unlawful Transportation of Aliens Within the United States, in violation of 8 U.S.C. § 1324(a)(1)(A)(ii). (A11).

The above charges stem from a roving-border patrol stop, conducted by Senior United States Border Patrol Agent, Andrew Fair, of Ms. La May's vehicle on Interstate 81 South on May 23, 2001. (A27). A report was prepared by Senior Agent Fair regarding the stop. (A27-28).

According to the report, at approximately 1:45 a.m., Senior Agent Fair was conducting a roving patrol when he observed a mid-sized sedan proceeding southbound on Interstate 81, near Watertown, New York. (A27). The vehicle was later identified as a 1983 Buick Regal 4-door sedan. (A27). The vehicle appeared to be riding low in the rear and he noticed several heads silhouetted through the vehicle's windows. (A27).

Subsequent registration and TECS lane crossing checks showed the vehicle to be registered to Francine La May, a resident of Massena, New York, and that the vehicle had not crossed the United States-Canadian border. (A27). The report

does not indicate any outstanding traffic infractions, a license suspension, a registration suspension, or any summons or warrants pertaining to Francine La May or the vehicle. (A27).

Senior Agent Fair followed the vehicle for thirteen miles. (A27). During this time, his report does not state that he observed any violations of the New York State Vehicle and Traffic law, erratic driving or evasive behavior. (A27). He initiated a stop of the vehicle in order to perform an immigration inspection of the vehicle and its occupants. (A27). After pulling the vehicle over, Senior Agent Fair activated his spotlights and counted five occupants in the vehicle. (A27).

Senior Agent Fair's report states that he stopped the vehicle "[b]ased on the route of travel, time of day, number of occupants, point of origin, type/condition of vehicle, and my previous experience/encounters with smuggling methods in border areas." (A27). According to Senior Agent Fair, I-81 South is commonly used smuggling route from the United States-Canadian border. (A27).

Upon approaching the vehicle, he discovered that the driver was a white female, Francine La May, and four adult black males were passengers. (A27). Senior Agent Fair subsequently learned that the four men had illegally entered the United States and were picked up by Francine La May near Massena, New York. (A27-28).

On August 15, 2001, the Defendant filed a Motion to Suppress any and all evidence that was obtained subsequent to, or as a result of, the seizure by Senior Agent Fair on May 23, 2001. (A6). The Government filed its opposition on October 12, 2001. (A6).

A Motion Hearing was held before the Hon. Frederick J. Scullin, Jr., Chief United States District Court Judge for the Northern District of New York, on October 26, 2001. (A7, A13). An evidentiary hearing was not conducted. After hearing oral arguments from the Defendant and the Government, Judge Scullin denied the Defendant's Motion to Suppress from the bench on the ground that 8 U.S.C. § 1357(a)(3) "provides that within a reasonable distance, that means within 100 miles of the border, from any external border of the United States, there is an authority to search without a warrant by the border patrol." (A20-21).

On October 31, 2001, the district court issued a Memorandum-Decision and Order denying the Defendant's Motion to Suppress, which recognized that 8 U.S.C. § 1357(a)(3) does not override the Fourth Amendment. (A22). The district court then held that "Senior Agent Fair's prior experience with illegal alien trafficking along the U.S.-Canadian border, specifically along Interstate 81, coupled with the facts in the present case: the time of night (1:45 a.m.), the likely origin (Massena, New York- a known smuggling area), the route (Interstate 81- a

known smuggling route), and the observations made on the scene (five individuals in a weighed-down late model vehicle), were enough to justify the investigatory stop.” (A25).

Following the denial of the Defendant’s Motion to Suppress, the Defendant entered a Conditional Guilty Plea to the four-count indictment, via a written plea agreement, reserving her right to appeal the denial of the Motion to Suppress. (A7).

Ms. La May was subsequently sentenced on March 21, 2002 to a term of probation for thirty-six (36) months on each count to run concurrently. (A29-30).

A Notice of Appeal was timely filed on Ms. La May’s behalf with the Clerk of the District Court for the Northern District of New York on March 22, 2002. (A36).

This appeal is from the district court’s denial of the defendant’s motion to suppress.

## **ARGUMENT**

The Defendant-Appellant, Francine La May, was stopped by Senior United States Border Patrol Agent Andrew Fair while driving on Interstate Route 81 South, a major interstate. The factors relied upon by Agent Fair to conduct a stop of the vehicle did not amount to reasonable suspicion to believe that the vehicle was carrying undocumented persons. Hence, the subsequent search of the vehicle, which revealed that four passengers in the vehicle had illegally entered the country, violated the Fourth Amendment. As a result, the district court should have suppressed the evidence discovered as a result of the unlawful stop.

### ***Standard of Review***

A district court's conclusion that there was reasonable suspicion to conduct an investigatory stop is subject to de novo review. Ornelas v. United States, 517 U.S. 690, 699 (1996); United States v. Patrick, 899 F.2d 169 (2<sup>nd</sup> Cir. 1990). A district court's factual findings are reviewed for clear error. Ornelas 517 U.S. at 700.

## POINT I

### **THE ROVING-BORDER PATROL STOP OF THE DEFENDANT’S VEHICLE VIOLATED THE FOURTH AMENDMENT BECAUSE IT WAS NOT SUPPORTED BY REASONABLE SUSPICION THAT THE VEHICLE WAS CARRYING UNDOCUMENTED PERSONS.**

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. In the present case, when Senior Agent Fair caused Ms. La May to pull her vehicle over and come to a stop, she was seized within the meaning of the Fourth Amendment. See, Whren v. United States, 517 U.S. 806, 809 (1996)(holding temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a “seizure” of persons within the meaning of the 4<sup>th</sup> Amendment); Terry v. Ohio, 392 U.S. 1, 16 (1968)(“whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”).

Prior to the United States Supreme Court’s decision in Terry v. Ohio, 392 U.S. 1, 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 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.

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, 122 S.Ct. 744, 749 (2002)(citing United States v. Cortez, 449 U.S. 411, 417 (1981)). An officer’s reliance on a mere “hunch” is insufficient to justify the intrusion. Terry 392 U.S. at 27.

After hearing oral argument in Ms. La May’s case, the district court held that the stop was justified because 8 U.S.C. § 1357(a)(3) “provides that within a reasonable distance, that means within 100 miles of the border, from any external border of the United States, there is an authority to search without a warrant by the border patrol.” (A20-21). Ms. La May’s vehicle was stopped in Adams, New York, approximately forty (40) miles south of the United States-Canadian border. (A24).

After recognizing that its initial decision could not exclusively be premised on the statutory provisions of 8 U.S.C. § 1357, because “no Act of Congress can authorize a violation of the Constitution,” Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973), the district court supplemented its initial ruling by holding that,

“Senior Agent Fair’s prior experience with illegal alien trafficking along the U.S.-Canadian border, specifically along Interstate 81, coupled with the facts in the present case: the time of night (1:45 a.m.), the likely origin (Massena, New York -a known smuggling area), the route (Interstate 81-a known smuggling route), and the observations made on the scene, (five individuals in a weighed-down late model vehicle), were enough to justify the investigatory stop.” (A25).

The historical facts found by the district court do not support a conclusion that the Government met its burden of proving that the roving-border patrol stop was justified under the Fourth Amendment. United States v. Ceballos, 812 F.2d 42, 49 (2d Cir. 1987); United States v. Mapp, 476 F.2d 67 (2d Cir. 1973)(holding Government has burden of persuasion that at least one of the narrow exceptions to the Fourth Amendment warrant requirement applies to the case).

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.

Brignoni-Ponce provided a non-exhaustive list of several factors to be considered as part of the totality of circumstances in determining the existence of reasonable suspicion in border patrol cases. For example, officers may consider the characteristics of the area in which they encounter a vehicle, its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic. Id. at 884-885. Upon application of these factors to Ms. La May’s case, it is clear that the stop was not supported by reasonable suspicion.

Ms. La May was observed by Senior Agent Fair on I-81 South near Watertown, New York, more than twenty miles from the Canadian border. (A27).

Although Senior Agent Fair's report states that I-81 South is commonly used smuggling route from the United States Canadian border, it is also a major interstate that runs from the Canadian border to the state of Tennessee.

After conducting a vehicle registration check, Senior Agent Fair learned that the car was lawfully registered to Ms. La May in Massena, New York, which is located near the Canadian border in Saint Lawrence County; a county that has a population of over 100,000 people. (A16).

The district court found that the point of origin, Ms. La May's residence in Massena, New York, was a known smuggling area. In support of this conclusion, the court cited a Northern District of New York case, United States v. Lariviere, 1998 WL 809002, \*2 (NDNY Nov. 16, 1998), asserting that Lariviere specifically identified "the Massena border area and Interstate 81 as 'notorious' smuggling locations and routes." (A25). Lariviere, states that "New York State Route 37 is a direct route from the Canadian border area to Interstate 81, a major interstate, and also from the Saint Regis Mohawk Indian Reservation, which is adjacent to the United States and Canadian border and the situs of previous, recent illegal entries." Id. The fact that the defendant in Lariviere was observed driving on Route 37 was vital to the district court's decision in upholding the border patrol

stop. In contrast, Ms. La May, was observed driving solely on I-81 South, near Watertown, New York.

An additional factor supporting a roving border patrol stop emerges when officers observe suspicious driver behavior, such as erratic driving or obvious attempts to evade officers. Brignoni-Ponce 422 U.S. at 885. Senior Agent Fair followed Ms. La May's vehicle for thirteen miles. (A27). His report does not state that he observed any erratic driving behavior or attempts to evade him, nor does it indicate that Ms. La May violated any section of the New York State Vehicle and Traffic Law. (A27).

Aspects of the vehicle may also be considered by the officer, such as station wagons, with large compartments for fold-down seats or spare tires, since they are frequently used for transporting concealed aliens. Id. The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide. Id. (*citing* United States v. Larios-Montes, 500 F.2d 941, 944 (9<sup>th</sup> Cir. 1974)(car was heavily loaded, with passengers in the back seat who appeared to be trying to hide)).

These factors apply to situations where an officer observes a vehicle riding low and there are no passengers in plain view. See, United States v. Bugarin-Casas, 484 F.2d 853, 855 (9<sup>th</sup> Cir. 1973)(border patrol agents saw one man driving

station wagon which was riding low in the rear; agent knew vehicle model had compartment in rear into which back seats could be folded and aliens had been found hidden in such compartments before.).

Here, Ms. La May was driving a 1983 4-door Buick Regal that was riding low, but her passengers were in plain view and the vehicle was not overloaded. Senior Agent Fair only observed several heads silhouetted through the vehicle's windows and his report does not indicate that any of the passengers ever attempted to hide while he followed the vehicle for thirteen miles. (A27).

The district court's factual finding, that five individuals in the car, was a permissible factor to justify the investigatory stop is clearly erroneous. (A25). Senior Agent Fair's report reveals that he did not know how many individuals were in the vehicle until he had initiated the stop. Specifically, the report states, "[a]fter notifying my radio operator of the vehicle stop and location, I activated my spotlights and was able to count five occupants in the vehicle." (A27). Five people traveling in a five-seated vehicle is appropriate rather than extraordinary.

Under the totality of the circumstances, the factors asserted by Senior Agent Fair in support of the roving-border patrol stop do not justify stopping Ms. La May's vehicle. She was a resident of Massena, New York, traveling on a major

interstate with passengers in her vehicle. The circumstances in this case are strikingly dissimilar to the circumstances which justified such a stop in a recent Supreme Court case, United States v. Arvizu, 122 S.Ct. 744 (2002). In Arvizu, the roving border patrol stop of the defendant's vehicle was justified by the discovery of the defendant's vehicle on an unpaved road which is frequently used by drug smugglers at a time when agents are usually unavailable because they are heading back to a checkpoint; the use of a minivan which is not suitable for such an unpaved road and is instead commonly employed by alien or drug smugglers; the dramatic slowing down of the vehicle when it approached the agent's car and the stiff and very rigid posture of the driver who did not look at the officer; the knees of the children sitting in the back seat were unusually high as if their feet were propped up on some cargo on the floor; when the agent began following the vehicle, the children all waved at the agent in an abnormal pattern as if they were being instructed and continued waving for five minutes; the minivan made a right turn on a road which was the last place that would have allowed the minivan to avoid a checkpoint and continued on a road which was usually only utilized by a four-wheel drive vehicle and was not leading to a picnic ground or other destination which might be a suitable place for a family outing; and the agent

discovered that the vehicle was registered to an address that was four blocks north of the border in an area notorious for alien and narcotics smuggling. Id.

Accepting the factors relied upon by Senior Agent Fair would subject all residents of Massena, New York traveling on I-81 South with passengers in their vehicle to be stopped at random by border patrol agents. Ms. La May was not committing any traffic violations and Senior Agent Fair learned through computer checks that her New York State vehicle registration and driver's license were untarnished. The stop in this case was the result of Senior Agent Fair's unbridled discretion, a result the Supreme Court specifically denounced in Brignoni-Ponce.

Because the stop of Ms. La May's vehicle violated the Fourth Amendment, the search of her vehicle cannot be sustained and the seizure of all physical evidence and any post-arrest statements obtained from the Defendant 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 the Defendant's Motion to Suppress and the Defendant's conviction must therefore be reversed.

DATED: June 29, 2006

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