

Drug Couriers — Pretext and Profile Highway Stops: A Nuts and Bolts Approach To a Creative Defense

by J. Gary Trichter

I. Introduction

Use of the **Drug Courier Profile (DCP)** came to life in 1974 at Detroit International Airport. Its creator, United States Drug Enforcement Administration Agent Paul Markonni, utilized the profile as a tool for identification of persons who were thought by him to be in possession of controlled substances. Since its inception, the drug courier profile has been sold to the judiciary by law enforcement as a substitute for both the constitutional requirements of proof for "a reasonable and articulate suspicion" and "probable cause." The DCP is now used by law enforcement officials in airports, train and bus stations and on the interstate highways.

II. The Drug Courier Profile Defined

A. Prosecution Definition

The DCP is a loose compilation of innocent physical characteristics, which when viewed as a whole, equates to proof that justifies a detention, search or arrest of the profiled person and/or those items associated with him. The primary and usual justification for use of the DCP is premised upon the training and experience of the particular law enforcement officer utilizing it. In this latter regard, the fact that the DCP is made up of characteristics that may by themselves be innocent is not of import because the compilation of the innocent characteristics amounts to proof of guilt when viewed by a trained and experienced law enforcement officer.

B. Defendant Definition

The DCP is at best an educated guess, unfounded suspicion or gut feeling even if had by a trained and experienced law enforcement officer that the profiled person is in possession of controlled substances. The DCP, by itself, falls short of a reasonable and articulate suspicion and/or probable cause. DCP use by law enforcement has resulted in an escalation of sham, pretext and unconsensual seizures, searches and arrests. Moreover, and certainly more damaging, DCP use has generated a

substantial increase in the incidence of both perjured testimony by law enforcement officers and the deprivation of the privacy and due process rights of both innocent and guilty persons.

C. Conservative Judicial Application Definition

The DCP has a mystical hallucinogenic drug-like effect that causes most judges to go blind to the truth in any case where controlled substances are found. This mystical drug like effect also causes many (how many?) judges to automatically believe law enforcement officers where the officers are known by them to be less than credible. It also causes the same judges to disbelieve drug defendants when they appear to be telling the truth. Finally, this DCP effect produces a type of amnesia in a trial judge which causes a total loss of memory that law enforcement is now and always has been a highly competitive enterprise.

III. The Usual Courtroom Situation

Generally speaking, in most highway drug prosecutions where a motion to suppress hearing occurs, the arresting officer will testify to two facts: first, that he saw the Defendant commit a traffic violation and that was the reason for the stop; and second, that the Defendant voluntarily consented to the search of his vehicle. Thereafter, the Defendant either fails to testify or if he does, testifies that he neither committed a traffic violation or gave consent. These are usually the only two witnesses the court hears. Of course, having heard the conflicting testimony, the court almost always believes the officer, disbelieves the Defendant, and overrules the motion to suppress.

IV. How to Create the Unusual Courtroom Situation and Maybe Win the Motion.

A. The Defendant Must Testify and the Defense Must Put On Evidence

It doesn't matter whether your name is Racehorse, your body is possessed by the spirit of the late Percy Foreman, or otherwise; because just like in 99% of

your cross-examinations, the officer is not going to admit, either negligently or intentionally, to violating the Defendant's rights. Absent your client's testimony, there generally is nothing to put in issue the questions concerning the unreasonableness of the stop or the involuntariness of the consent. Further, absent your client's testimony, there is usually no other evidence to rebut the officer's testimony. Accordingly, as a general rule your client should testify at the motion hearing. Further, remember that other passengers or scene witnesses ought also be considered to bolster your defense at the hearing. Moreover, the defense should always try to find and produce "other defendant" witnesses and "other drivers and their passengers" so the officer's habit, routine and character in regard to sham, pretext, profile arrests and nonconsensual searches can be properly evaluated by the trial court.

B. Prepare Your Client and Witnesses Well for Cross-Examination

Make sure he understands the concepts of an "investigative detention" on "a reasonable and articulate suspicion," "probable cause" to search and arrest, what a "furtive gesture" is, and what is "voluntary consent." Understanding these concepts will help him in his testimony on both direct and cross-examination. These same concepts are equally important for other defense witnesses to know too, i.e., other passengers, scene witnesses, other drivers and their passengers and other defendants.

C. Do Informal and Formal Discovery For Witnesses and Documentary Evidence — Going Outside Your Case Facts for Evidence of the Arresting Officers Habit and Routine of Making Pretext/Profile Stops and Nonconsensual Searches — Look for Character Evidence Too!

More than anything else, discovery of other nonparticipating witnesses, documentary evidence, and statistics concerning the arresting officer's habit

and routine in making pretext/profile stops and nonconsensual searches can often lead to your motion to suppress being granted as opposed to being denied. Accordingly, to properly defend the pretext/profile case counsel must investigate and develop evidence outside of it. Clearly, the very nature of the "habit and routine" concept necessitates going beyond the singular event in issue. Therefore, intertwining your case facts with evidence in others the officer has made, is the key to defending it. Places to look for this type of evidence include:

1) Jail Booking Log: At the jail to learn who else the officer has arrested. Such logs might also provide the defense with its first clues that the officer's profile includes or leans toward minorities and/or is gender based, i.e., most persons who were arrested had Hispanic surnames and were male;

2) Forfeiture Pleadings: Review forfeiture pleadings in the district clerk's files to learn who the officer arrested and the type vehicles that were seized, i.e., private vs. rental, car vs. van, new vs. old, state plates, registration to an Hispanic surname owner vs. non-minority name, etc. In addition, it must be noted that forfeiture proceedings, being civil in nature, also allow for depositions and are fertile ground for discovery. Indeed, it is possible to win a motion to suppress at the civil hearing which would collaterally estop the Government from relitigating the seizure and search in the criminal case. *Cf. Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189 (1970).

3) Past Newspaper Articles: Often you can use the officer's name as a key to the paper's computer files. These articles generally tell your Defendant names, where the arrest occurred, state registration of the vehicle stopped, and, sometimes contain a statement of the officer;

4) Newspapers and/or Media Ads: Newspapers and/or media ads for your witnesses. This is a good method of discovering nondefendant witnesses who were illegally stopped and thereafter had their cars illegally searched by your arresting officer and/or his fellow officers. These are the witnesses whose names were not recorded by the officer and are usually quite irate about having been intimidated into airing their laundry on the roadside. Absent an ad for them to respond so they would simply be

undiscoverable. This loss would be a real travesty because these are the witnesses who have no real ill motive to burn the officer and do bring credibility to the defense claims of profile/pretext and nonconsent;

5) Subpoenas: Issue a subpoena duces tecum to the officer, his agency, or to the sheriff's office. For example, it might be fruitful to subpoena all booking photographs of persons arrested by the officer and profile training films, i.e., the photographs may show the profile of age, gender, race, facial hair, long hair and the films may actually show a profile. In regard to training films, please note the following are in existence;

a. Operation Pipeline, in possession of and produced by the DEA and the New Mexico State Police;

b. The Drug Courier, in possession of and produced by the Louisiana State Police;

c. Operation Alliance, in possession of and produced by the Federal Law Enforcement Training Center;

d. Profile of the Interstate Cocaine Smuggler, in possession and produced by the Texas Department of Public Safety; and,

e. An unknown titled DCP tape is also in possession of and produced by the Illinois State Police.

Note that this film list is not exhaustive and that State police often borrow other agency training tapes, e.g., Texas had the Louisiana tape.

6) Formal Motions For Discovery;

7) Formal Open Records Requests: Here is an area to really explore! Using these requests, you can learn about bonus pay received by the officer for making drug cases, i.e., a bounty for making drug cases, written consent forms to search other persons' vehicles, law enforcement agency drug courier profile reports, (i.e., DPS Drug Courier

Arrest Notification Drug/Currency Incident Report); and, employment form application information about the officer;

8) Reverse Stings: This is where you can get real creative and crazy at the same time. The goal here is to recreate a profile vehicle and to get stopped, absent probable cause, to have your vehicle searched absent consent, by the same officer who arrested your client — all, of course, while making multiple surreptitious audio/video recordings of the incident;

9) Defense Attorney Pooling of Information: Talking to your brother and sister lawyers at the courthouse about the arresting officer and/or checking the court docket to determine who also has a client that was arrested by your client's arresting officer and share and compare notes;

10) Traffic Citations: Where your client was lucky enough to receive a traffic citation from the officer, counsel should litigate it at all costs as it is a no lose situation. For example, a trial record from a traffic ticket case is a wonderful discovery and impeachment device and is very similar to that which could be discerned and used from a deposition. Moreover, it might be possible to have a motion to suppress granted by either the judge or the jury (under Article 38.23, Tex.Cr.Pro.) which would collaterally estop the state from relitigating the seizure and search issues in the criminal case. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189 (1970) and *Ex Parte Tarver*, 695 S.W.2d 344, 347 (Tex.App — Houston [1st] 1986), *aff'd* 725 S.W.2d 195 (Tex.Cr.App. 1986).

11) Westlaw/Lexis Computer Searches: Westlaw or Lexis searches of an officer's name can help establish that his statements concerning probable cause are less than candid, and may

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