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INVESTIGATIVE STOPS IN HIGH CRIME AREAS

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Officer Saverio Alesi, a New York City patrolman, was in uniform and on duty on Eighth Avenue between 42nd and 43rd Streets, when he saw a white man, Vincent Magda, and a black man conversing on the other side of the street. He saw the men exchange something, after which the black man looked across the street in the officer's direction. The black man turned, according to the officer, "in a rapid motion" and then walked away. Magda crossed the street toward the officer and began walking down Eighth Avenue. As he passed Alesi, the officer tapped him on the shoulder and asked him to stop. Magda turned to face the officer, slowed down, but continued, walking backwards. The officer followed him for several steps and Magda stopped. Officer Alesi asked him what had occurred between him and the other man. Magda at first denied that anything had occurred, but in response to a second question from the officer, Magda told him he had bought a marijuana cigarette for a dollar. He then handed the cigarette to Officer Alesi.

Officer Alesi placed Magda under arrest for possession of marijuana and then frisked him completely. The search produced an unloaded handgun and a demand note which began, "This is a robbery. Keep your hands where I can see them. . . ." The evidence linked Magda to a series of unsolved bank robberies in New York, Washington, Miami, and New Orleans. Magda was indicted in federal district court for the New York bank robbery. He was also charged in state court with possession of marijuana and the handgun.

What constitutes reasonable suspicion of criminal activity?

Magda moved in both the state and federal proceedings to suppress the evidence found pursuant to the search on the grounds that the initial stop by Officer Alesi was not justified, as required by *Terry v. Ohio,* 392 U.S. 1 (1968), by a reasonable suspicion that criminal activity was afoot.

Hearings were conducted in both state and federal courts. Officer Alesi testified for the prosecution in both instances, giving substantially the same testimony. He recounted his experience with the police department—11 years, although he had been on foot patrol in the Eighth Avenue-42nd Street vicinity for only six months. He said that, although he had not made any street arrests for narcotics in that area, he had observed two such arrests. He said that the area was known to police as a "narcotics prone location." And finally, he said, his suspicion of criminal activity was aroused when "the male black exchanged something and he seen me, he turned in a rapid motion and proceeded westbound." Neither the black man nor Magda was previously known to Officer Alesi.

The state court granted the motion to suppress the seized evidence pursuant to *People v. Cantor,* 36 N.Y.2d 106, 365 N.Y.S.2d 509, 324 N.E.2d 872 (1975), which requires a patrolman to have a reasonable suspicion that criminal activity has occurred in order to stop a person in a public place. Judge Kleiman ruled that denial of the motion would mean that a mere exchange of hands in a high narcotics

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area would justify the stop of a person, and that such facts were insufficient to support a reasonable suspicion of criminal activity.

The federal district court also granted Magda's motion on the basis of New York law, although Judge Carter acknowledged that the same result was compelled under federal law. *U.S. v. Magda,* 409 F. Supp. 734, 740 (S.D. N.Y. 1976).

A "rather lenient" standard

The government appealed the federal suppression order and the court of appeals reversed. *U.S. v. Magda,* 547 F.2d 756 (2d Cir. 1976), *cert. denied,* 434 U.S. 878 (1977). Judge Van Graafeiland, writing for the majority, acknowledged the test for an investigative stop as set forth in *Terry v. Ohio,* 392 U.S. 1 (1968): the stop is constitutionally permissible only if the police officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. Under such circumstances, the Second Circuit ruled, the conditions precedent to a stop are "rather lenient." *U.S. v. Magda,* 409 F. Supp. at 759.

The *Magda* court placed heavy emphasis upon the officer's belief that the area was "narcotics prone." Moreover, the police officer's 11 years' experience, albeit in other neighborhoods, was "not to be lightly brushed aside." *Id.* at 758. Finally, the court observed that the reasonableness of the police officer's conduct may be determined by the nature of the stop. Since the officer did not attempt to harass, intimidate, humiliate, or physically restrain Magda, the scope of the intrusion was minimal and "reasonably related to the observations which caused Alesi to become suspicious." *Id.* at 759.

District Judge Motley, sitting by designation, dissented. She argued that the decision permits a police officer to "make an investigatory stop based on a combination of entirely innocent factors," thereby setting "a new minimum standard for the 'reasonable suspicion' necessary to justify such a stop." *Id.* (Motley, J., dissenting). Moreover, the application of the "narcotics prone location" factor is improper in order to justify a stop. Judge Motley explained:

"Even when it can be shown that criminal activity is more likely in one geographical area than another, courts are extremely hesitant to acknowledge this as a strong factor in satisfying the standards required for an interrogatory stop. . . . The fact that the area is notorious for criminal activity can only be considered when other less ambiguous facts are present which would lead one to suspect that criminal activity is afoot." [Citations omitted.] *Id.* at 764. On remand, Magda was convicted.

Magda has been perceived by some as a significant departure from the standards countenanced by the Supreme Court in *Terry* and its progeny to justify a police officer's investigatory stop of a person. *See, e.g.,* "Investigative Stops in Urban Centers: Upholding the Constable's Whim," 44 Brooklyn L. Rev. 963 (1978). The facts observed by Officer Alesi, had they occurred in a neighborhood not characterized by its crime rate, may well have been insufficient to justify a stop. Indeed, the *Terry* companion case, *Sibron v. New York,* 392 U.S. 40 (1968), although focusing upon the illegality of a search rather than an initial stop, specifically held that a person's mere conversation with known narcotics addicts was not the sort of articulable fact required to support a police intrusion.

Officer Alesi, of course, had no information that the man with whom Magda made the exchange was either a narcotics addict or a dealer. The operative difference in *Magda* is clearly the high crime area factor. Thus, *Magda* seems to suggest that, although certain activities may be insufficient to justify a stop in one neighborhood, they may be sufficient in another.

The border stop parallel

A more recent case, *U.S. v. Brignoni-Ponce,* 422 U.S. 873 (1975), affords an even more striking similarity to the facts in *Magda.* In that case, Mr. Justice Powell ruled that Border Patrol officers may not stop an automobile near the Mexican border to question the occupants about their citizenship on the ground that the occupants appeared to be of Mexican descent.

The government sought to justify a border stop as a minimal intrusion outweighed by the public interest. The Supreme Court agreed that 85 percent of all undocumented aliens in the United States are from Mexico; it agreed that the Border Patrol's resources are inadequate to prevent illegal crossings along a 2,000 mile border; it agreed that the influx of illegal aliens creates significant economic and social problems for the United States; it agreed that the intrusion was a modest one. *Id.* at 878–80. Nevertheless, the Supreme Court held, this acknowledged "valid public interest" does not justify an interference with individual liberty resulting from a stop. The Supreme Court expressed particular concern for the rights of hundreds of thousands of innocent persons who travel lawfully near the Mexican border and who would be subjected "to potentially unlimited interference with their use of the high-

ways," *id.* at 882, if physical appearance were the sole criterion for reasonable suspicion.

The parallels between the facts in *Magda* and *Brignoni-Ponce* are difficult to ignore: both involved innocent behavior by the suspects (exchanging something on a street corner vs. appearing to be of Mexican descent); both stops took place in areas characterized by law enforcement officers as high crime locations (narcotics prone area vs. proximity to the Mexican border); both involved arguably experienced officers; and both involved brief investigative stops for questioning.

The *Magda* majority does not suggest that the nature of the intrusion by Officer Alesi was different from that of the Border Patrol in *Brignoni-Ponce.* Instead, the Second Circuit, in balancing the "gravity of the intrusion" against the "need for the stop," 547 F.2d at 758, seems to imply that the magnitude of the public interest was greater in *Magda* than in *Brignoni-Ponce,* although the court does not say so. Indeed, *Magda* relies on *Brignoni-Ponce* as "authorizing brief investigative stops, of the type at issue here, based on reasonable suspicion." *Id.* The *Magda* opinion, however, makes no atempt to compare the facts in the two cases and simply fails to mention the *Brignoni-Ponce* holding: that a person's appearance of Mexican descent near the Mexican border will *not* justify an investigative stop.

Nevertheless, a number of courts have relied on *Magda* in determining whether otherwise innocent behavior which occurs in a high crime context can form the basis for a stop by a police officer. The drug courier cases serve as apt illustrations.

The drug courier cases

A familiar technique employed by both federal and state drug enforcement officials is to compare the activities of travelers—usually in airports—with a "profile" which the agency has identified as typical of a drug carrier. Such typical factors might include: use of small denomination currency to buy an airplane ticket; travel to or from drug import centers; absence of luggage or use of an empty suitcase; nervousness; and the use of an alias, among other things. *See, e.g., U.S. v. McCaleb,* 552 F.2d 717, 719–20 (6th Cir. 1977). Passengers matching such a profile are stopped, and, occasionally, contraband is discovered. A number of courts have had opportunities to assess the propriety of evidence seized in this manner.

In *U.S. v. Westerbann-Martinez,* 435 F. Supp. 690 (E.D. N.Y. 1977), the defendant passenger was stopped because he matched a "drug courier profile" used to screen airport arrivals. The profile included such factors as: traveling from a "source city"; being Hispanic (especially Mexican); traveling long distances with little luggage; failing to acknowledge an apparent companion; and acting nervous. Drug Enforcement Administration agents accosted *Westerbann-Martinez* and, when he failed to produce identification, asked to look in his luggage. He assented and drugs were found.

On the defendant's motion to suppress the evidence seized by the agents, the court noted that the factors making up the drug courier profile were neutral—consistent with non-criminal activity—and could not, therefore, support the agent's suspicion that criminal activity was in progress. The court said that *Magda* "probably represents the minimum interplay of elements needed to establish reasonable suspicion under Terry." 435 F. Supp. at 697. In granting the defendant's motion to suppress, the court declined to hold that a combination of otherwise innocent circumstances constitutes articulable facts sufficient to justify the agents' suspicions.

More recent federal drug courier cases, however, seem to have adopted the "rather lenient" standard recognized in *Magda.* In *U.S. v. Flores,* 462 F. Supp. 702 (E.D. N.Y. 1978), for example, an apparent companion of certain suspects, who matched several neutral factors on a drug courier profile (including, *inter alia,* being the last to deplane, having padlocks but no luggage tags on suitcases, and arriving from a "source city") was overheard by DEA agents correcting the suspects as to their next destination. The apparent companion, until that point, had been ignored.

Those facts, the court held, were sufficient to support the agents' suspicion that they were transporting illegal drugs, and drugs seized following the stop of the suspects were admissible. The government had not, said the court, relied on "any single fact which is 'perhaps innocent in itself' [quoting *Terry*] but in the . . . set of circumstances 'which taken together warranted further investigation' [quoting *Terry*]." Moreover, the court stressed the *need* for the investigative stop, referring at length to *U.S. v. Oates,* 560 F.2d 45, 49 (2d Cir. 1977):

"A significant portion of that need is supplied by the inherent odiousness and gravity of the offense, the societal costs of which, in terms of ruined and wasted lives, are staggering. We further believe that the need for the stop was supported by the fact that quick and decisive action may be required when suspected large-scale dope peddlers are about to board a jet aircraft [footnote omitted] with narcotics which, as is commonly known, are a "readily disposable commodity." *U.S. v. Flores, supra,* at 707.

Thus, the court relied to a significant extent on the nature of the suspected offense—large-scale trafficking in heroin—in striking the balance in the government's favor. Similar results involving drug couriers have been reached by the Second Circuit in *U.S. v. Rico,* 594 F.2d 320 (2d Cir. 1979), and *U.S. v. Price,* 599 F.2d 494 (2d Cir. 1979). *Magda* was cited as a principal authority in both cases. *Accord, U.S. v. Hernandez-Rojas,* 470 F. Supp. 1212 (E.D. N.Y. 1979). *See also U.S. v. Chamblis,* 425 F. Supp. 1330 (E.D. Mich. 1977), where the court upheld the initial stop of the defendant at an airport but granted his motion to suppress evidence seized after he was taken to an officer for further, more extensive questioning; this further interrogation was held to constitute an unreasonable extension of the scope of the stop. *Id.* at 1335.

The scales tip in the government's favor not only in the large-scale drug trafficking cases, however. On occasion, where law enforcement personnel have relied on a matrix of neutral factors to support their suspicions, investigative stops have been upheld. For example, the Fourth Circuit, in *U.S. v. Constantine,* 567 F.2d 266 (4th Cir. 1977), *cert. denied,* 435 U.S. 926 (1978), upheld the stop of a suspect and the subsequent seizure of cocaine where the only articulable facts relied upon by the officer were that he had never seen the defendant in the area before, the defendant had gotten out of his car and spoken to the dirver of a van parked nearby, and the area had a high incidence of vandalism. "An area's disposition toward criminal activity . . . [t]he mood of the precinct and the circumambient activities" observed by the officer are proper bases for a stop, opined the court in a *per curiam* decision citing *Magda. U.S. v. Constantine,* 567 F.2d at 267. *Cf. U.S. v. Bull,* 565 F.2d 869 (4th Cir. 1977), *cert. denied,* 435 U.S. 946 (1978).

Acceptance and rejection of Magda's "lenient" standard

Although a few federal courts have relied on *Magda* to uphold investigative stops where a number of otherwise neutral factors, taken together, prompted a police officer's suspicions, those cases do not necessarily describe a trend toward authorizing all stops in high crime areas as might have been feared. The facts in *Magda* itself were scanty, and it is doubtful that, had *Magda* consummated his exchange in a peaceful, residential neighborhood, his actions would have aroused Officer Alesi's curiosity, much less his suspicion.

But *Magda* does not seem to have gained widespread acceptance in any appellate court based on similar facts, with the possible exception of *Constantine.* Those cases in which *Magda* furnishes the authority for upholding investigative stops involve far more extensive concrete observations by the officers. Indeed, there appears to be no acceptance among state courts for the proposition that nonsuspicious or marginally suspicious behavior becomes sufficiently suggestive of criminal conduct when it occurs in a high crime neighborhood.

At least two state courts have considered and disapproved investigative stops quite similar to the one in *Magda.* In *State v. Smith,* 347 So. 2d 1127 (La. 1977), police officers in a high crime area observed the defendant walking across a housing project courtyard wearing a heavy coat on a sunny winter day. Since the officers did not recognize him, they stopped him and found cocaine. The Louisiana Supreme Court ruled that "[p]olice officers are not entitled to stop at will any person in a high crime area just because that person is unknown to them, nor because he is wearing a leather jacket on a warm December day." *Id.* at 1129. Two judges, emphasizing the high crime area and the defendant's inappropriate dress, dissented, citing *Magda.*

In a similar case, the California Supreme Court recently refused to sanction the "high crime area" factor as sufficient to uphold an investigative stop by a police officer. In *People v. Bower,* 24 Cal. 3d 638, 156 Cal. Rptr. 856, 597 P.2d 115 (1979), the defendant, a white man, was observed by police officers with a group of black men near a predominantly black, low-income housing project in a high crime neighborhood. When the men saw the officers they attempted to return to the building they had just left, but the elevator had closed so they "huddled" together. An officer got out of the patrol car and walked toward the group. The defendant began walking away quickly. One of the officers told him to stop and he complied. A pat search revealed a concealed firearm. The court held that the initial detention was not supported by sufficient articulable facts:

"[T]he officer's assertion that the location lay in a 'high crime' area does not elevate these facts into a reasonable suspicion of criminality. The 'high crime area' factor is not an 'activity' of an individual. Many citizens of this state are forced to live in areas that have 'high crime' rates or they come to these areas to shop, work, play, transact business, or visit relatives or friends. The spectrum of legitimate human behavior occurs every day in so-called high crime areas. As a result, this court has appraised this factor with caution and has been reluctant to conclude that a location's crime rate transforms otherwise innocent-

appearing circumstances justifying the seizure of an individual." 597 P.2d at 119.

Thus, the California Supreme Court holds directly that neither an area's disposition to criminal activity nor the "mood" of the precinct, nor the "circumambient activities" of the neighborhood countenanced by *Constantine* can transform innocent behavior into the basis for suspecting that a crime has been or is about to be committed. While the court does not go so far as to say that the character of the neighborhood can never be a *factor* in arousing the officer's suspicion, the suspect himself, by his conduct, must do something to suggest that he is up to no good.

The "high crime area" factor taken alone

The extent to which a police officer may rely on the high crime character of a neighborhood to support his suspicion of illicit activity has recently been rather sharply defined by the U.S. Supreme Court. In *Brown v. Texas,* — U.S. — (No. 77-6673, decided 6/25/79), Mr. Chief Justice Burger, writing for a unanimous court, held: "The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct."

In that case, police officers in El Paso observed Brown and another man walking away from each other in an alley. They had never seen Brown in the area before, but they testified that the neighborhood had a high incidence of drug traffic. Brown was stopped. No contraband was found, but he was charged and later convicted of failing to identify himself to a police officer.

In reversing the conviction, the Supreme Court appears to have adopted the view previously taken by the Supreme Courts of Louisiana and California in *Smith* and *Bower*: that the high crime propensity of an area is insufficient to tip the scale in the government's favor. Police officers are justified in stopping a person for questioning only where his behavior itself suggests criminal activity. *Brown,* however, does not purport to disturb rulings in those cases in which furtive or otherwise suspicious behavior by the suspect prompts the officer's attention.

Although *Magda* may be distinguishable from *Brown* on the ground that Officer Alesi saw Magda exchange something with the other man, and that the other man looked around quickly, *Brown* makes it clear that, absent those suspicious facts, a person's mere presence in a high crime neighborhood does not elevate otherwise innocent behavior to a level justifying an investigative stop.

RECENT CASES

Minnesota Court Bars Use of Warrant to Search Lawyers' Offices

After the Supreme Court held that premises of innocent third parties may be the target of search warants, *Zurcher v. Stanford Daily,* 436 U.S. 547 (1978), a growing trend developed around the country to apply that ruling to the search of lawyers' offices. In the first important judicial ruling on the use of search warrants to look through the files of attorneys, the Minnesota Supreme Court has held that searches pursuant to warrant are unreasonable in the absence of proof that the lawyer himself is involved in the commission of crime or that the document might be destroyed if a warrant is not used. *O'Connor v. Johnson,* — N.W.2d — (Minn. 1979). The court ruled that the examination of lawyers' files may only be accomplished by the use of a subpoena providing advance notice and the right to contest the examination.

While the Supreme Court rejected the necessity of proceeding by means of a subpoena in searching an innocent party's premises, the Minnesota court cited added considerations that make this course of action necessary when lawyers' offices are the target of the search. The court noted that "even the most particular warrant cannot adequately safeguard client confidentiality, the attorney-client privilege, the attorney's work product, and the criminal defendant's constitutional right to counsel of all of the attorney's clients." In order to avoid exposure of documents which might compromise any of these judicially-recognized interests, the court concluded that a subpoena must be obtained for production of the documents.

Absent Owner of Occupied Vehicle Lacks Standing to Challenge Its Search, First Circuit Holds

The First Circuit has held that the owner of a vehicle who is not present at the time of its search does not have a legitimate expectation of privacy in the vehicle sufficient to give him standing to challenge the search. *U.S. v. Dall,* — F.2d — (1st Cir. 1979).

The court relied on the Supreme Court decision in *Rakas v. Illinois,* 439 U.S. 128 (1978), from which it derived the principle that ownership of a searched vehicle does not automatically indicate a sufficient privacy interest to give the owner standing. While the Court in *Rakas* stated that a proprietary interest in property is highly significant in determining legitimate expectations of privacy for standing purposes, the First Circuit found that, under the cir-

cumstances present in *Dall,* the defendant had failed to show a privacy interest.

The vehicle was in the possession of three persons given permission to use it by the defendant. Those persons, when stopped by the police, disclaimed any knowledge of the contents of the compartment searched by the police, in which stolen property was found. However, the court found it important that the defendant, upon being contacted after the search, disclaimed knowledge of the stolen property and contended that the compartment in question was empty. Under these circumstances, the court held that the defendant had not met his burden of showing a privacy interest in the vehicle.

Eighth Circuit Bars Use of Collateral Estoppel to Preclude § 1983 Plaintiff's Fourth Amendment Claim

The Eighth Circuit has held that a civil rights plaintiff alleging a Fourth Amendment violation under 42 U.S.C. § 1983 cannot be precluded from litigating his claim because the issue was decided against him in a state criminal prosecution. *McCurry v. Allen,* — F.2d — (8th Cir. 1979).

While some courts have applied the doctrine of collateral estoppel to the § 1983 setting, those courts have specifically noted that alternative avenues of relief were available to the plaintiff, such as direct litigation of the propriety of the state court ruling through federal habeas corpus review. However, under the Supreme Court ruling in *Stone v. Powell,* 428 U.S. 465 (1976), Fourth Amendment claims are precluded in federal habeas proceedings if the claim was susceptible to full review in state courts. Therefore, a § 1983 action is likely to be the only type of federal review open to a state defendant whose Fourth Amendment claim has been adversely decided in state court.

Since the civil rights statute has an explicit policy of providing a federal forum for constitutional claims otherwise precluded from review, the Eighth Circuit held that application of collateral estoppel to Fourth Amendment claims under § 1983 would defeat the congressional intent in enacting that statute.

Oregon Court Discusses "Exigent Circumstances" Sufficient to Justify Warrantless Entry of House

The Oregon Supreme Court has held that the warrantless entry and securing of premises pending arrival of a search warrant were not justified by exigent circumstances when the police had ample information to obtain a search warrant for at least five days prior to the entry. *State v. Matsen,* 601 P.2d 784 (Or. 1979).

The police had put defendants' house under surveillance after receiving a tip that it was the center of extensive narcotics dealing. After a week of surveillance, the police had developed sufficient information to justify issuance of a warrant to search the premises. Rather than obtain a warrant, however, the police kept the house under surveillance until the alleged supplier entered the premises, a period of five additional days. At that point, the police entered the premises, claiming exigent circumstances, and secured it for four hours or more until a warrant was obtained.

The court found that the prior opportunity to obtain a warrant precluded the police contention that exigent circumstances existed for the entry. The court noted that a police officer "cannot create exigent circumstances by his own inaction." Further, the court refused to find that merely indicating the readily destructible nature of drugs and the possibility that the suspects might escape is a sufficient showing of exigency without further concrete information that these possibilities are in fact likely to occur. Finally, the court held that securing of premises pending arrival of a search warrant is itself a major intrusion requiring exigent circumstances in order to justify it. No such exigencies existed here.

Montana High Court Bans All Electronic Surveillance Until Statutory Safeguards Adopted

The Montana Supreme Court has moved to bar any further use of electronic surveillance in that state until the state legislature adopts a statutory scheme to implement the provisions of the federal wiretap statute, 18 U.S.C. §§ 2510–2520, commonly known as Title III. *State v. Hanley,* — P.2d — (Mont. 1979).

The court held that it was the intent of Congress in adopting Title III that a state adopt specific authorization and set procedural guidelines prior to permitting electronic surveillance. In reviewing the state's statutes regarding electronic surveillance, the Montana court found them inadequate to meet the requirements of Title III. The court therefore imposed its ban.

New Binder for 1980–81 Issues Available

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