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Constitutional Law: Drug Courier Profile and Reasonable Articulable Suspicion - Does Conformity with the Former Give Rise to the Latter - State v. Cohen

Kathleen M. V. Oakey

CONSTITUTIONAL LAW: Drug Courier Profile and Reasonable Articulable Suspicion—Does conformity with the former give rise to the latter? *State v. Cohen*.

I. INTRODUCTION

Within the past decade, developments in constitutional law have complicated and eroded fourth amendment protections.[1] A significant number of United States Supreme Court decisions have weakened the strength of the amendment and, to date, both state and federal courts have diminished its scope and, hence, its effectiveness.[2] The 1986 New Mexico Supreme Court decision in *State v. Cohen* exemplifies this trend.[3]

Cohen presented two closely related, but distinct, issues of first impression: (1) whether a suspect's conformity with the elements of a drug courier profile coupled with his "unusual" nervousness give rise to reasonable articulable suspicion justifying an investigatory stop and (2) whether

1. Adopted in 1789, the fourth amendment states in part that "the right of the people to be secure in their persons, papers and effects, against unreasonable searches and seizures shall not be violated. . . ." U.S. CONST. amend. IV. The basic purpose of the fourth amendment is to impose a standard of reasonableness on government officials in order to safeguard the privacy and security of individuals against arbitrary invasion, Delaware v. Prouse, 440 U.S. 648, 654 (1979), and to protect the sanctity of the individuals home and privacy, Boyd v. United States, 116 U.S. 616 (1886). In Katz v. United States, 389 U.S. 347, 351-52 (1967), the Supreme Court noted: "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *See* State v. Chort, 91 N.M. 584, 585, 577 P.2d 892, 893 (Ct. App. 1978).

As early as 1891, the United States Supreme Court acknowledged that the right of an individual to be free from all government restraint was paramount. In Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891), the United States Supreme Court recognized that "[n]o 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."

2. *See generally* Oliver v. United States, 466 U.S. 170 (1984) (The Court held that "open fields" located beyond the curtilage of defendant's property were not protected by the fourth amendment regardless of the privacy expectations defendant had in the field.); New York v. Belton, 453 U.S. 454 (1981) (The Court held that when the police have made a lawful "custodial arrest" of the occupant of an automobile, they may, incident to that arrest, search the vehicle's entire passenger compartment including containers found therein.); United States v. Robinson, 414 U.S. 218 (1973) (The Court allowed the incident-to-arrest exception to apply to the search of the person of a driver who was initally stopped on suspicion of a minor offense—driving with a revoked license.).

3. 103 N.M. 558, 711 P.2d 3 (1985). Fourth amendment restrictions on search and seizure are applicable to the states through the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643, (1961); State v. Garcia, 76 N.M. 171, 413 P.2d 210 (1966).

the detention in *Cohen*, if pursuant to a legitimate investigatory stop, was reasonable in both manner and duration.[4]

Under generally recognized principles, an individual may be briefly detained absent probable cause[5], if the officer, prior to the stop, had reasonable articulable suspicion[6] to believe the individual was involved in criminal activity.[7] In upholding the constitutionality of investigatory stops, the United States Supreme Court has recognized that such stops provide a reasonable compromise between the privacy interests of the individual and the crime prevention and law enforcement interests of the State.[8] Further, the United States Supreme Court has noted that if police officers are expected to successfully investigate suspected criminal activity they must, in some instances, be able to detain the suspect for a brief period of time absent probable cause.[9]

In *Cohen*, the New Mexico Supreme Court upheld the constitutionality of an investigatory stop based on the conformity of the suspects with the characteristics of a drug courier profile coupled with their nervous behav-

4. 103 N.M. at 560, 711 P.2d at 5. A drug courier profile is "an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs." United States v. Mendenhall, 446 U.S. 544, 547, n.1 (1980).

5. Probable cause exists when the facts and circumstances available to the officer, which are based on reasonably trustworthy information, are sufficent to warrant a person of reasonable caution in the belief that a crime has been or is being committed. State v. Snedeker, 99 N.M. 286, 290, 657 P.2d 613, 617 (1982) (citing State v. James, 91 N.M. 690, 694, 579 P.2d 1257, 1261), *cert. denied*, 91 N.M. 751, 580 P.2d 972 (1978)). The probable cause requirement is derived from the second prong of the fourth amendment which provides that ". . . no warrant shall issue, but upon probable cause." U.S. CONST. amend. IV.

6. Terry v. Ohio, 392 U.S. 1 (1968). In *Terry*, reasonable articulable suspicion was defined as specific articulable facts taken together with the rational inferences therefrom. *Id.* at 21. In short, all available facts and all reasonable inferences which are available to the officer must convince a person of reasonable caution in the belief that the investigatory stop is appropriate. *Id.* at 21-22. The facts relied on in justifying a "seizure" of the person must be determined objectively: Would the facts available to the officer at the point of seizure warrant a man of reasonable caution in the belief that the action taken was appropriate? *Id;* State v. Hilliard, 81 N.M. 407, 467 P.2d 733 (Ct. App. 1970); State v. Slicker, 79 N.M. 677, 448 P.2d 478 (Ct. App. 1968). It is undisputed that an officer's unsupported intuition or "hunch" will not give rise to reasonable articulable suspicion. *Terry*, 392 U.S. at 22; United States v. Price, 599 F.2d 494 (2d Cir. 1979); United States v. Montgomery, 561 F.2d 875 (D.C. Cir. 1977); United States v. Mallides, 473 F.2d 859 (9th Cir. 1973); Brown v. State, 481 S.W.2d 106 (Tex.Crim.App. 1972). In *Montgomery*, the court noted:

> The inarticulate hunch, the awareness of something unusual, is reason enough for officers to look sharp. Their knowledge and experience identify many incidents in the course of a day that an untrained eye might pass without any suspicion whatever. But awareness of the unusual, and a proper resolve to keep a sharp eye, is not the same as an articulated suspicion of criminal conduct.

Id. at. 879.

7. *See Terry*, 392 U.S. 1; *see also supra* note 6.

8. *Terry*, 392 U.S. at 21.

9. *See* Michigan v. Summers, 452 U.S. 692 (1981) (The Court held that when police officers, pursuant to a valid search warrant, are searching a residence for evidence, they may detain the occupants and the owner of the house, absent an arrest warrant, while the search is performed.); State v. Valdez, 91 N.M. 567, 577 P.2d 465 (Ct. App. 1978).

ior.[10] Furthermore, the court held Cohen and Atava's subsequent detention to be reasonable in both manner and duration and therefore valid under the fourth amendment.[11]

This Note will discuss the doctrines and policies justifying the legality of investigatory stops in general, the New Mexico Supreme Court's rationale for validating the stop and subsequent detention in *Cohen*, and the implications of *Cohen* in New Mexico.[12] Further, this Note will suggest that the supreme court's approach in *Cohen* was analytically clumsy and that, although *Cohen* has unequivocally sanctioned the use of drug courier profiles in establishing reasonable articulable suspicion in New Mexico, the supreme court's opinion lacked adequate substance, analysis and direction.

II. STATEMENT OF THE CASE

In late 1983, Officer Summers of the New Mexico State Police attended a state police course concerning the common profile factors in narcotics trafficking on I-40.[13] In January 1984, Summers stopped an automobile on I-40 near Albuquerque for speeding sixty-one miles per hour in a fifty-five mile per hour zone.[14] The vehicle was driven by Mier Cohen and occupied a passenger, Erez Atava.[15] Upon stopping the vehicle, Summers noticed that the automobile was an out-of-state rental car; it had been rented with cash; it was a one-way rental from Florida to California and it contained very little luggage for a cross-country trip.[16] Additionally, Summers noticed that both Cohen and Atava appeared to be foreigners and to be unusually anxious and nervous about the traffic stop.[17] Cohen, Atava and the vehicle closely matched the factors in the I-40 drug courier profile.[18]

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10. *Cohen*, 103 N.M. at 558, 711 P.2d at 3.

11. *Id.*

12. This Note will not address the issue of the validity of Cohen's consent to search. The consent was attacked, however, not on the basis that it was coerced or uninformed, but rather as being voluntarily given but tainted by virtue of the illegal detention. *Cohen*, 103 N.M. at 560, n.5, 711 P.2d at 5, n.5. New Mexico, however, follows the rule that a voluntary consent can validate what might otherwise be an illegal search and seizure. State v. Herring, 77 N.M. 232, 421 P.2d 767 (1966); State v. Ruud, 90 N.M. 647, 567 P.2d 496 (Ct. App. 1977); *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

13. *Cohen*, 103 N.M. at 565, 711 P.2d at 10. The factors in the I-40 profile were: (1) two persons appearing to be foreigners, (2) driving a one-way rental car with Florida license plates, (3) across the country, (4) with a small amount of luggage, and (5) with the car being paid for in cash. *Id.* at 559-60, 711 P.2d at 4-5.

14. *Id.* at 559, 711 P.2d at 4.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 559-60, 711 P.2d at 4-5. *See supra* note 13.

Summers obtained identification from Cohen and Atava as well as the rental contract on the car and informed Cohen that he would be cited for speeding.[19] Summers returned to his police car to run a check on the documents, placed a call to the National Crime Information Computer (NCIC)[20] and wrote a speeding ticket for Cohen.[21] During this time, Summers noticed Cohen and Atava speaking to each other and looking back at him.[22] Within five minutes, Cohen exited his car and approached Summers' vehicle.[23] Summers exited his automobile and met Cohen half way.[24] Cohen told Summers that he was in a hurry and would like Summers to issue the ticket so he could leave.[25] Summers later testified that Cohen appeared very nervous and because it was cold and windy he thought it "very unusual" that Cohen would exit the shelter of his car to speak with him.[26]

Upon returning to his vehicle, Summers considered Cohen's nervous behavior in conjunction with the factors provided in the I-40 drug courier profile and decided to investigate further.[27] Summers called for back-up assistance and, while awaiting its arrival, filled out a consent to search form in anticipation of requesting permission from Cohen to search the automobile.[28] During this time, Summers received a negative reply from the NCIC indicating that Cohen had no outstanding warrants and that the vehicle had not been reported stolen.[29] Officer Marino and Sergeant Velarde, the officers in charge of narcotics, arrived soon after Summers requested assistance but after Summers received the NCIC reply and, after a short briefing, the three officers approached the Cohen vehicle.[30]

Cohen and Atava were asked to get out of the car and Velarde took

19. *Cohen*, 103 N.M. at 565, 711 P.2d at 10.

20. *Id.* at 559, 711 P.2d at 4. The standard procedure upon stopping an individual for a traffic violation is to make a request to the National Crime Information Computer to determine whether the driver has any outstanding warrants or the vehicle is stolen. *Id.* at 559, n.1, 711 P.2d at 4, n.1. The NCIC check in *Cohen* revealed that there were no warrants for Cohen and the rental vehicle had not been reported stolen. *Id.* at 560, 711 P.2d at 5.

21. *Id.* at 559, 711 P.2d at 4.

22. *Id.* at 565, 711 P.2d at 10.

23. *Id.* at 560, 711 P.2d at 5.

24. *Id.* at 559, 711 P.2d at 4.

25. *Id.*

26. *Id.* Summers testified that the temperature outside at that time was approximately 25 degrees. *Id.*

27. *Id.* at 560, 711 P.2d at 5. Summers testified that at this point approximately 10-15 minutes had passed since the initial stop of Cohen. *Id.* The appellate court in *Cohen* pointed out that nervousness is an element of some drug courier profiles. *Id.* at 566, 711 P.2d at 11 (citing Florida v. Royer, 460 U.S. 491 (1983)).

28. *Cohen*, 103 N.M. at 560, 711 P.2d at 5.

29. *Id.*

30. *Id.*

Atava back to the police car with him.[31] Cohen was advised of his *Miranda* rights[32] and Marino informed him that they would like to search his car for weapons and narcotics.[33] After being advised that he did not have to consent to the search,[34] Cohen was presented with the consent form which he read and then signed.[35] After a brief examination of the vehicle, the officers decided, for safety reasons, to drive the car to the closest, warmest, well-lit area.[36] The car was driven three miles to a gas station where

31. *Id.* at 565, 711 P.2d at 10.

32. *Id.* at 560, 711 P.2d at 5. It is not a prerequisite to uphold the validity of a consent to search without a warrant that a suspect first be given those rights set forth in Miranda v. Arizona, 384 U.S. 436 (1966). *See* State v. Ruud, 90 N.M. 647, 567 P.2d 496 (Ct. App. 1977); State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App. 1972). In *Miranda*, the United States Supreme Court recognized that incommunicado interrogation is inherently intimidating and undermines the suspect's fifth amendment privilege against self-incrimination and hence certain procedures must be followed by law enforcement officials in order to protect the suspects constitutional privilege. 384 U.S. at 445-58. Thus, absent effective alternative measures, the United States Supreme Court held that, prior to custodial interrogation, a suspect must be clearly warned that he has the right to remain silent, and that anything he says may be used against him in court; that he has the right to consult with an attorney and to have the lawyer present during interrogation; and that if he cannot afford an attorney, one will be appointed to represent him. *Id.* at 467-73.

It was not argued in *Cohen* whether Summers' reading of *Miranda* indicated an arrest had occurred which, absent probable cause, would be unconstitutional. Likewise, other cases involving the reading of *Miranda* pursuant to an investigatory stop have failed to address the issue. In United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977) three individuals were stopped at an airport, escorted to a small office then mirandized. In reversing defendant's convictions, the appellate court did not consider the fact that *Miranda* was read to defendants but instead held that the police lacked reasonable suspicion to stop defendants initially. *Id.; see also* United States v. Post, 607 F.2d 847 (9th Cir. 1979). In *Post*, drug enforcement agents stopped individuals suspected of trafficking drugs and asked if they would accompany the agent to an interview room in the airport for questioning. Both suspects agreed. Upon entering the interview room, defendant Post was read *Miranda*. Pursuant to a search of defendant's person, two bags of cocaine were discovered. In affirming Post's conviction, the appellate court did not address the issue of whether the reading of *Miranda* to the defendants indicated an arrest absent probable cause.

33. *Cohen*, 103 N.M. at 560, 711 P.2d at 5. An officer does not need probable cause to ask for consent to search. State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975). The New Mexico Supreme Court noted, however, that (for the sake of discussion) an officer needs, at least, reasonable articulable suspicion to request permission to search. Thus, an officer may not randomly ask for consent to search because it's a slow day. An officer, however, does not need probable cause to ask for consent to search. *Id.*

34. *Cohen*, 103 N.M. at 565, 711 P.2d at 10. The Supreme Court in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), held that police requesting permission to search need not inform the suspect that he has a right to refuse. The Court held that it would be thoroughly impractical to impose on the normal consent search the detailed requirement of an effective warning because of the informality of most searches and the suddenness with which the need to conduct such searches arises. *Id.* at 231-32; *see* United States v. Shields, 573 F.2d 18 (10th Cir. 1978) (The court held that a search is not considered involuntary simply because the police failed to advise the accused that he had the right to refuse to grant consent.); United States v. Agapito, 620 F.2d 324 (2d Cir. 1980) (Knowledge of the right to refuse to grant consent to search is but one factor to be considered in determining the voluntariness of consent.).

35. *Cohen*, 103 N.M. at 560, 711 P.2d at 5. No threats were made to obtain the consent to search. *Id.*

36. *Id.* It was cold, dark and there was heavy traffic on I-40.

a search was conducted.[37] The search revealed eleven pounds of cocaine in a spare tire in the trunk.[38]

Cohen and Atava were subsequently indicted for possession of cocaine and trafficking in a controlled substance.[39] After a hearing on a motion to suppress[40] the contraband as evidence obtained subsequent to an illegal seizure, the trial court found the initial stop of the defendants' vehicle for speeding to be proper and the consent to search, voluntary.[41] The court held, however, that the detention of Cohen and Atava after the NCIC report was received, but before consent to search was obtained, was not based on reasonable articulable suspicion and therefore constituted an "illegal seizure" which tainted the consent.[42] Accordingly, the

37. *Id.* Cohen followed one police car while the other (which contained Atava as a passenger) followed behind. *Id.*

38. *Id.* During the search the officers noticed an extra tire in the trunk whose bolt was different than that of the rental car spare. *Id.* The extra tire was flat and when officer Marino lifted it he noticed something "loose" inside which was subsequently identified as cocaine. *Id.*

39. *Id.* at 559, 711 P.2d at 4. Cohen and Atava were charged pursuant to N.M. STAT. ANN. § 30-31-20 (1978). To add insult to injury, Cohen was also charged with speeding. *Id.* at 559, 711 P.2d at 4.

40. A motion to suppress is the proper procedure to be followed when evidence illegally obtained is used in a criminal proceeding against the defendant. The exclusionary rule was a judicially created means of effectuating those rights guaranteed by the fourth amendment. Stone v. Powell, 428 U.S. 465 (1976). Thus, pursuant to the exclusionary rule, such evidence is excluded from being introduced at trial. Wong Sun v. United States, 371 U.S. 471 (1963). The prohibition extends to indirect as well as direct products of such invasions. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383 (1914). "[T]he exclusionary sanction applies to any 'fruits' of a constitutional violation—whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention." United States v. Crews, 445 U.S. 463, 470 (1980).

In *Weeks*, the Supreme Court first recognized the exclusionary rule and in Mapp v. Ohio, 367 U.S. 643 (1961), the rule was held applicable to the states. *See* State v. Lucero, 70 N.M. 268, 372 P.2d 837 (1962) (The court acknowledged that any and all evidence obtained pursuant to an illegal search and seizure would be inadmissible in a New Mexico court.). The Supreme Court believed that the exclusion of illegally obtained evidence from trial would deter law enforcement authorities from unlawful conduct in violation of the suspect's fourth amendment rights and would encourage judiciary integrity. United States v. Calandra, 414 U.S. 338 (1974); Elkins v. United States, 364 U.S. 206 (1960). The rule has been a source of great controversy and criticism and has been heralded as a "senseless obstacle to arriving at the truth in many criminal trials." Stone v. Powell, 428 U.S. 465, 501 (1976) (Burger, C.J. concurring).

In United States v. Leon, 468 U.S. 897 (1984), however, the Supreme Court recognized the "good faith" exception to the exclusionary rule. Pursuant to this exception, the exclusionary rule will not apply to evidence obtained by officers acting in reasonable reliance (good faith) on a search warrant issued by a detached and neutral magistrate which is later found to be invalid. *Id.* at 905-25. Hence, *Leon* has diminished the effectiveness of the rule.

41. *Cohen*, 103 N.M. at 559, 711 P.2d at 4.

42. *Id.* In determining the constitutionality of a *Terry* "stop", the Supreme Court noted that while an investigatory stop of a pedestrian was not a "technical arrest", it constituted a restraint on the suspect's freedom of movement which constituted a "seizure" of the individual under the fourth amendment. *Terry*, 392 U.S. at 19. In *Terry*, the Court recognized that when an officer, by means of physical force or a show of authority, in some way restrains the liberty of a citizen, a seizure has

trial court suppressed the cocaine; the court of appeals affirmed.[43]

The New Mexico Supreme Court reversed, holding that the initial stop of the defendants for speeding was proper, the subsequent investigatory stop was based on reasonable articulable suspicion and was reasonable in duration, and the consent to search was voluntary.[44] The United States Supreme Court denied certiorari and the case was subsequently reinstated on the state trial docket.[45]

III. ANALYSIS AND DISCUSSION

A. Constitutional Seizures

Pursuant to probable cause, a police officer may stop, seize and arrest an individual suspected of criminal activity.[46] Furthermore, in appropriate circumstances, a police officer may approach, stop, and temporarily detain an individual for purposes of investigating possible criminal activity even though there exists no probable cause to make an arrest.[47] Such an inves-

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occurred. *Id.* at 19, n.16. A seizure has also occurred if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554 (1980).

In *Mendenhall*, the Supreme Court recognized that certain circumstances are cognizant of a "seizure": (1) the presence of several officers; (2) the display of a weapon by an officer; (3) a physical touching of the person by an officer; or (4) the use of certain language or a tone of voice of an officer. *Id.* at 554; *see* State v. Frazier, 88 N.M. 103, 105, 537 P.2d 711, 713 (Ct.App. 1975). In *Frazier*, the court held that a person is seized when his freedom of action is restricted by a police officer and he is subjected to the control of that officer. *Id.* Similarly, an investigatory stop of a motor vehicle constitutes a seizure for fourth amendment purposes. United States v. Cortez, 449 U.S. 411 (1981); United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

43. *Cohen*, 103 N.M. at 559, 711 P.2d at 4. At the appellate level, Cohen and Atava raised the claim that the traffic stop was pretextual. *Id.* at 564, 711 P.2d at 9. In affirming the district court decision to suppress the evidence, however, the appellate court did not address the issue. *Id.*

44. *Id.* at 558, 711 P.2d at 3. The consent was not attacked as being coerced or uninformed, but rather as being voluntary but illegally obtained pursuant to the illegal detention. Thus it was argued that the illegal detention worked to taint the consent. *Id.* at 563, 711 P.2d at 8. In testing the validity of a consent to search, the court must judge the "consent" against the totality of the circumstances and the question is whether the consent was a voluntary, free and unconstrained choice or was the result of express or implied threat, duress, coercion, or force. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); State v. Rudd, 90 N.M. 647, 567 P.2d 496 (Ct. App. 1977).

45. *Cohen*, 103 N.M. at 564, 711 P.2d at 9, *cert. denied*, 106 S.Ct. 2276 (1986).

46. Michigan v. Summers, 452 U.S. 692 (1981).

47. *Terry*, 392 U.S. 1; United States v. Brignoni-Ponce, 422 U.S. 873 (1975); State v. Galvan, 90 N.M. 129, 560 P.2d 550 (Ct. App. 1977). The fourth amendment applies to all seizures of the person including investigatory stops regardless of duration. United States v. Cortez, 449 U.S. 411 (1981). In determining the limits of a lawful investigatory stop, the Supreme Court has acknowledged that occupants of a vehicle may be detained while an officer investigates a reasonable suspicion that they are involved in criminal activity. *Id.* at 417; Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976). In *Brignoni-Ponce*, the Supreme Court held that the government interest in preventing the entry of illegal aliens into the United States permits an investigatory stop based on reasonable articulable suspicion that a specific vehicle contains illegal aliens. 422 U.S. at 884-85. The Court did acknowledge, however, that the "Mexican appearance" of the vehicle's occupants is not, alone, sufficient to allow even a brief stop for questioning. *Id.* at 885-87.

tigatory stop, however, is considered lawful only if the officer, prior to the stop, had reasonable articulable suspicion to believe that a crime had been,[48] was being, or was about to be committed.[49] Such a stop is commonly referred to as a *Terry* investigatory stop.[50]

Both federal and state courts have justified such intrusions upon the individual's freedom on the belief that the government's interest in investigating an officer's reasonable suspicion of criminal activity overrides the individual's fourth amendment privacy right in remaining secure from such invasions.[51] Further, it has been argued that a "stop" as opposed to an "arrest" constitutes a minimal intrusion upon the individual's freedom and thus poses only a "petty indignity."[52] In essence, courts have employed

48. United States v. Hensley, 469 U.S. 221 (1985). In *Hensley*, the police received a "wanted" flyer from another police department stating that Hensley was wanted for questioning concerning a robbery. *Id.* at 223. The flyer did not state whether an arrest warrant had been issued for Hensley. *Id.* Twelve days later a police officer who knew Hensley saw him driving a vehicle. *Id.* at 223-24. The officer pulled him over and during the stop noticed a gun in the car. *Id.* at 224. The Supreme Court held that Hensley could be charged with possession of a gun because the flyer furnished reasonable articulable suspicion to believe that Hensley was wanted in connection with the prior robbery. *Id.* at 229. Thus, if a police officer has reasonable suspicion to believe that an individual was involved in or is wanted in connection with a completed felony, a *Terry* stop is valid.

49. *Terry*, 392 U.S. 1; Brown v. Texas, 443 U.S. 47, 51 (1979); Delaware v. Prouse, 440 U.S. 648, 661 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Adams v. Williams, 407 U.S. 143, 146-49 (1972).

50. *Terry*, 392 U.S. 1. *See infra* note 53 and accompanying text.

51. *See Hensley*, 469 U.S. 221; United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976). In *Martinez-Fuerte*, the Court held that the need to make routine checkpoint stops at U.S. borders was great and the consequent fourth amendment intrusion was "quite limited". *Id.* at 557. Thus, the Court upheld the constitutionality of vehicle stops at border checkpoints absent reasonable articulable suspicion. *Id.* The Supreme Court recognized that law enforcement officials have plenary power in determining who and what will enter United States borders. *Id.* at 564; *see* United States v. Montoya De Hernandez, 473 U.S. 531 (1985) ("[D]etention of a traveler at the border beyond the scope of a routine customs search and inspection is justified at its inception if customs agents, considering all facts and circumstances surrounding the travel and trip, reasonably suspect the traveler is smuggling contraband in her alimentary canal." *Id.* at 311); *see also* Delaware v. Prouse, 440 U.S. 648, 653-55 (1979). In *Prouse*, the Supreme Court noted that police may generally stop a vehicle at designated checkpoints to make sure that licensing and registration requirements are being followed. *Id.* at 663. The Court held, however, that randomly stopping an automobile constituted a seizure and must be accompanied by, at least, reasonable articulable suspicion. *Id.* The Court held that a random stop constituted a substantial intrusion which shows "an unsettled show of authority, interferes with the individuals' freedom of movement, causes inconvenience, wastes time and may cause the occupants substantial anxiety." *Id.* at 657.

52. People v. Rivera, 14 N.Y.2d 441, 447, 201 N.E.2d 32, 34, 252 N.Y.S.2d 458, 464 (1964), *cert. denied*, 379 U.S. 978 (1965). The court in *Rivera* noted:

> the evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed.

Id.

In *Terry*, however, the Court emphatically rejected the view that a stop and frisk performed by an officer "while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty

a balance between the individual's right to be secure from ureasonable searches and seizures, as guaranteed by the fourth amendment, and the importance of effective law enforcement protection and criminal detection.

In the landmark case of *Terry v. Ohio*, the United States Supreme Court first recognized the constitutionality of an investigatory stop.[53] The *Terry* court emphasized that the fourth amendment prohibits only unreasonable searches and seizures and an investigatory stop based on reasonable articulable suspicion constitutes a reasonable seizure not violative of the constitution.[54] In determining the constitutionality of an investigatory stop, however, the initial stop must be based on an officer's reasonable articulable suspicion that the suspect was involved in criminal activity and the subsequent detention must be reasonable in both manner and duration.[55] An investigatory stop, though initially justified upon reason-

indignity'." *Terry*, 392 U.S. at 17. In *Terry*, the Court considered the following description of a "frisk": "The officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet." *Id.* at 17, n.13 (quoting Priar & Martin, *Searching and Disarming Criminals*, 45 J.CRIM.L. C. & P. S. 481 (1954)). Thus, the *Terry* court noted that a frisk "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." *Id.* at 17.

53. 392 U.S. 1 (1968). In *Terry*, an experienced police officer approached two men he suspected of preparing to rob a store. *Id.* at 6. He identified himself and asked the men their names. *Id.* at 6-7. When one of the men mumbled something in response, the officer grabbed one of the men, spun him around so he was between himself and the other suspect and proceeded to pat down his outer clothing where a gun was discovered. *Id.* at 7. Though the Supreme Court recognized such a "stop and frisk" fell within the ambit of the fourth amendment, the Court nonetheless held the officer's actions to be justified upon reasonable articulable suspicion and therefore constitutional. *Id.* at 30-31. Prior to *Terry*, an officer could not lawfully stop and detain an individual suspected of criminal activity absent probable cause.

54. *See Terry*, 392 U.S. 1. The *Terry* Court was quick to point out, however, that not all contacts between citizens and the police, during an investigation, is subject to fourth amendment protection because the fourth amendment does not mandate that all communication between private individuals and law enforcement officials be adversarial. *Id.* Additionally, the Supreme Court in *Schneckloth*, noted that given the common interests of the police and the general public in safety and effective law enforcement, police must, at times, be able to question individuals without fourth amendment restrictions for "[w]ithout such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished." 412 U.S. at 225. (citing Haynes v. Washington, 373 U.S. 503, 515 (1963)). *See also* United States v. Berry, 670 F.2d 583, 591 (5th Cir. 1982) where the Supreme Court determined that there exist three levels of encounters between citizens and the police: communications between the police and citizens involving no detention and therefore outside the ambit of the fourth amendment; "brief" seizures which must be supported by reasonable articulable suspicion and; full arrests that must be supported by probable cause.

It is interesting to note that the *Terry* court specifically stated that their decision in no way determined the constitutional validity of an investigatory "seizure" upon less than probable cause for the purpose of "detention", 392 U.S. at 19, n.16, but subsequent cases have extended the *Terry* analysis to include such detentions. *See* United States v. Mendenhall, 446 U.S. 544 (1980); Adams v. Williams, 407 U.S. 143 (1972); *see also supra* note 42.

55. *Cohen*, 103 N.M. at 561, 711 P.2d at 6.

able articulable suspicion, becomes a *de facto* arrest if too lengthy. Absent probable cause, the seizure violates the fourth amendment.[56] Further, an investigatory stop which is not based on reasonable suspicion or which is unreasonable in manner or duration is unconstitutional and any evidence, confession, or statement obtained as a result of the illegal detention is suppressed.[57]

B. Constitutional Test For Terry Stop

In determining the constitutional validity of a *Terry* stop, it must be shown that not only was the investigatory stop based on reasonable articulable suspicion, but that the subsequent detention was reasonable in both manner and duration.

1. Reasonable Suspicion For "Stop"

A suspect's conformity with the elements of a drug courier profile will not establish probable cause for a lawful arrest.[58] Further, a suspect's conformity with a drug courier profile, alone, will not provide reasonable articulable suspicion to justify an investigatory stop.[59] Such profiles fail to provide the "individualized suspicion" necessary to establish reasonable articulable suspicion but instead "describe a large number of innocent

56. Sharpe v. United States, 660 F.2d 967 (4th Cir. 1981).

57. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914); *see supra* note 40.

58. *Cohen*, 103 N.M. at 566, 711 P.2d at 11. *See* United States v. Berry, 670 F.2d 583 (5th Cir. 1982); United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977). In *Berry*, the court questioned the "mechanistic" use of drug courier profiles by courts who fail, instead, to consider the totality of the circumstances of each case. 670 F.2d at 599. The court feared that the use of drug courier profiles, alone, could result in "blanket approval of police seizures of innocent citizens." *Id.*

59. *See* Berry, 670 F.2d 583; United States v. Berd, 634 F.2d 979 (5th Cir. 1981); McCaleb, 552 F.2d 717. In *Berry*, the court determined that the presence or absence of a particular characteristic on a particular drug courier profile is not legally significant in determining whether reasonable suspicion exists. 670 F.2d at 601. The court held, however, that although a match between a suspect and the characteristics of a drug courier profile does not necessarily provide reasonable suspicion, a "stop" based on a specific profile might be upheld depending on all the facts and circumstances surrounding the particular stop. *Id.* at 600. The *Berry* court recognized, however, that individualized objective suspicion must be found to believe that *this* particular suspect is engaged in criminal activity. *Id.* The court concluded that drug courier profiles usually do not focus on the specific facts and circumstances surrounding a particular suspect and thus individualized and reasonable suspicion usually do not arise. *Id.* Though not citing directly to United States v. Cortez, 449 U.S. 411 (1981), the *Berry* court seemed to be elaborating on the holding there. In *Cortez*, the United States Supreme Court held that in determining the existence of reasonable articulable suspicion the "totality of the circumstances—the whole picture—must be taken into account." 449 U.S. at 417. Further, the *Cortez* court determined that in assessing all the factors of a particular stop, probabilities rather than hard certainties are the proper applicable standard. *Id.* at 418. Particularly revealing was the Court's recognition that in determining the existence of reasonable suspicion, the officer's training and experience should be considered in that objective facts which are meaningless to the ordinary citizen may prove particularly insightful to the trained police officer. *Id.* at 418-21.

travellers."[60] Drug courier profiles, however, vary in character from place to place and whether a specific profile will aid in providing reasonable articulable suspicion depends on other independent non-profile elements surrounding the stop.[61]

In determining whether the investigatory stop in *Cohen* was based on reasonable suspicion, the New Mexico Supreme Court adopted the following *Terry* two prong test: (1) whether the officer's action in stopping the suspect was justified at its inception and (2) whether the detention of the suspect was reasonably related in scope to the circumstances which justified the interference in the first place.[62] In determining whether Summers' action was justified at its inception, the *Cohen* court held that the law enforcement purposes being served, pursuant to the investigatory stop, and the time reasonably needed to effectuate those purposes are factors which must be considered.[63]

In *Cohen*, the trial court, court of appeals and the New Mexico Supreme Court all agreed that the initial traffic stop of Cohen and Atava for speeding was proper.[64] The subsequent investigation into their identities, record and the vehicle, pursuant to the traffic stop, were likewise deemed valid.[65] Thus, if Summers' suspicion had not been aroused, Cohen would have been free to leave immediately upon receiving the speeding ticket. Once Summers received the negative NCIC reply, however, the traffic stop became an investigatory stop and constitutional only if based on probable cause or reasonable articulable suspicion to believe that Cohen and Atava had engaged in, were engaged in, or were about to engage in criminal activity other than the traffic violation.[66] At this point, Summers had no probable cause to arrest Cohen and Atava and, thus, the investigatory stop,

60. *Cohen*, 103 N.M. at 566, 711 P.2d at 11 (citing Reid v. Georgia, 448 U.S. 438 (1980)). In State v. Graciano, 134 Ariz. 35, 37, 653 P.2d 683, 685 (1982), the court noted that the facts sufficient to justify an investigatory stop differ from case to case but courts generally agree that an investigatory stop must be based upon "particularized" or "founded" suspicion by the officer, who must be able to state an "articulable reason" for the stop. *See also Cortez*, 449 U.S. at 418; Reid v. Georgia, 448 U.S. 438 (1980); United States v. Carrizoza-Gaxiola, 523 F.2d 239, 241 (9th Cir. 1975). *But see* United States v. Sanford, 658 F.2d 342, 346 (5th Cir. 1981) where the court held that the drug enforcement agent's observation of the drug courier profile characteristics coupled with the suspect's unusual behavior gave rise to reasonable articulable suspicion.

61. *Cohen*, 103 N.M. at 566, 711 P.2d at 11. *See* Reid v. Georgia, 448 U.S. 438, 441 (1980) (The suspect's conformity with the elements of a drug courier profile were "too slender a reed to support the seizure. . . .").

62. *Terry*, 392 U.S. at 20-22.

63. *Cohen*, 103 N.M. at 561, 711 P.2d at 6 (citing United States v. Hensley, 469 U.S. 221 (1985)).

64. *Cohen*, 103 N.M. at 559, 711 P.2d at 4.

65. *Id.* at 568, 711 P.2d at 13 (Donnelly, J. dissenting).

66. *Id.* at 561, 711 P.2d at 6. The *Cohen* court stated: "In discussing the reasonableness of a stop, (which is analogous to a detention once the reason for a valid stop expires, as [it] did here when the NCIC report came back negative). . . ." *Id.*

if valid, must have been based on reasonable articulable suspicion. Since the investigatory stop in *Cohen* began when Summers received the negative NCIC reply and Cohen and Atava were not allowed to leave, the *Terry* test must be applied at this point.[67]

In applying the first prong introduced in *Terry* to *Cohen*, the supreme court acknowledged that Summers'decision to detain Cohen and Atava occurred only after Summers noticed that they and the rental vehicle closely matched the I-40 drug courier profile elements and that both Cohen and Atava appeared "unusually" nervous and anxious about the traffic stop.[68] Moreover, Summers' decision to investigate further was not made immediately upon noticing the profile match but only after he noticed Cohen and Atava speaking to each other and looking back at him and after Cohen approached the police vehicle to inquire when they would be allowed to leave.[69] Additionally, in the special area of narcotics trafficking, the United States Supreme Court has recognized that both the public and government have a compelling interest in detecting those individuals who traffic deadly drugs for personal profit.[70]

Summers' action in stopping the vehicle pursuant to the traffic violation was valid. Summers' decision to detain Cohen and Atava was made only after he noticed that they and the vehicle closely matched the I-40 drug courier profile and they appeared unusually nervous for a traffic stop. Thus, the supreme court reasoned, Summers' action in detaining Cohen and Atava based upon their match with the drug courier profile, their unusual nervousness, and the government's compelling interest in detecting drug trafficking, justified the investigatory stop at its inception.[71]

The law enforcement purpose being served, pursuant to the investigatory stop, was not only the government's general interest in crime prevention and detection, but its compelling interest in detecting drug trafficking specifically.[72] Further, the time reasonably needed to effectuate the purpose of the stop was that amount of time Summers necessarily required to investigate his suspicions.

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67. *Id.*

68. *Id.* at 559-60, 711 P.2d at 4-5.

69. *Id.* at 565, 711 P.2d at 10.

70. *Mendenhall*, 446 U.S. at 544. The *Mendenhall* Court acknowledged that:

> Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. . . . As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.

Id. at 561-62. Furthermore, both the government and the public have a substantial and compelling interest in detecting and terminating drug smuggling. "The toll on our society in lives made wretched, in costs to citizens, and in profits of gross size funnelled to the most odious criminals, is staggering." *Berry*, 670 F.2d at 594-95.

71. *Cohen*, 103 N.M. at 564, 711 P.2d at 9. The New Mexico Supreme Court noted that Summers was acting on more than "gut instinct" in detaining Cohen and Atava after the NCIC check came back negative. *Id.* at 562, 711 P.2d at 7.

72. *See supra* note 70.

The court of appeals determined that once Summers received the negative reply from NCIC, all he had left were "the elements of the drug courier profile and nothing else."[73] In essence, the appellate court did not consider Cohen and Atava's nervousness to be an element separate and distinct fom the drug courier profile.[74] Thus, the court determined that Summers did not have reasonable suspicion to detain Cohen and Atava even a moment past the time he received the NCIC report and presented Cohen with the speeding ticket.[75] Therefore, the appellate court reasoned, without reasonable suspicion, the prolonged detention of Cohen and Atava violated their fourth amendment right against unreasonable seizure and the cocaine was properly suppressed.[76]

In contrast, however, the supreme court determined that Summers' reliance on a drug courier profile, plus the fact that Cohen and Atava appeared "unusually" nervous and appeared to want to get away from the officer, gave rise to reasonable suspicion, thereby legitimizing the investigatory stop.[77] Thus, contrary to the court of appeals, which noted that "nervousness" is an element of some drug courier profiles, the supreme court considered Cohen and Atava's nervousness to be an additional non-profile element.

In summation, the supreme court acknowledged that the traffic stop was valid pursuant to a traffic violation, and further determined that Summers' subsequent suspicion that Cohen and Atava might be smuggling drugs was based on reasonable articulable suspicion. Therefore, the prolonged detention of Cohen and Atava, after Summers received the NCIC reply, was justified. Thus, without explicitly stating so, the supreme court apparently determined that the subsequent detention of Cohen and Atava was, in fact, reasonably related in scope to the circumstances which justified the interference in the first place. The next step in the court's analysis was the determination of whether the detention, though initially justified, was reasonable in both manner and duration.[78]

2. Reasonableness of "Detention"

In determining the "reasonableness" of the *Cohen* detention, the supreme court adopted the following test: whether the officers, during the deten-

73. *Cohen*, 103 N.M. at 566, 711 P.2d at 11.

74. *Id.* at 566-67, 711 P.2d at 11-12. The court of appeals pointed out that nervousness is an element of some drug courier profiles. *Id.* at 566, 711 P.2d at 11.

75. *Id.* The court held that the detention after the NCIC clearance was illegal. *Id.* at 567, 711 P.2d at 12.

76. *Id.*

77. *Id.* at 559-60, 711 P.2d at 4-5. Although the supreme court did not specifically hold that they considered Cohen and Atavas' nervousness to be an element separate from the drug courier profile, it must be inferred or the court's decision would be contrary to the United States Supreme Court's decision in Reid v. Georgia, 448 U.S. 438 (1980).

78. *Cohen*, 103 N.M. at 560, 711 P.2d at 5.

tion, pursued a means of investigation which was likely to confirm or dispel their suspicion quickly during which time it was necessary to detain the suspect.[79] Additionally, the court recognized that the time necessary to confirm or dispel the officers' suspicion must be reasonable.[80] Thus, in deciding whether the *Cohen* detention was constitutional, the supreme court considered the officer's investigatory actions during the detention and the length of the detention to be salient factors.[81]

a. Manner of "Detention"

In determining the reasonableness of the manner of the *Cohen* detention, the supreme court noted that Summers' immediate call for additional law enforcement assistance, pursuant to his aroused suspicions, and his preparation of a consent form while awaiting the officers' arrival constituted a diligent effort on Summers' part to confirm or dispel his suspicions.[82] The court noted that Summers' short "briefing" of the officers upon their arrival constituted a necessary procedural and precautionary measure and thus indicated further diligence. Moreover, the court considered the removal of the car for safety purposes to be a reasonable precaution.[83]

b. Length of "Detention"

In determining whether the length of the *Cohen* detention was reasonable, the supreme court noted that the United States Supreme Court has held that a twenty minute investigatory stop detention is not *per se* unrea-

79. *Id.* at 561, 711 P.2d at 6; *see* United States v. Sharpe, 470 U.S. 675 (1985).

80. *Cohen*, 103 N.M. at 561, 711 P.2d at 6 (citing United States v. Hensley, 469 U.S. 221 (1985)). Though the *Hensley* Court determined that the time necessary to investigate the officer's suspicion must be reasonable, the Court failed, as had each case before it, to define what length of detention would constitute a reasonable and, therefore acceptable seizure. Although no court has designated a specific investigatory stop time limit, it is apparent from all case law that a *Terry* stop must not be lengthy. *See* Florida v. Royer, 460 U.S. 491 (1983); Brignoni-Ponce, 422 U.S. 873; Adams v. Williams, 470 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1. In *Terry* and *Adams*, the Supreme Court described the investigatory stops as "brief". Likewise, in *Brignoni-Ponce*, the Court upheld a "modest" stop that "usually consumed no more than one minute", 422 U.S. at 880, and the Court in *Royer* described a legitimate *Terry* stop as "temporary", 460 U.S. at 500. The United States Supreme Court has held, however, that a valid investigatory stop could, under some circumstances, last longer "than the brief time period involved in *Terry* and *Adams*." Michigan v. Summers, 452 U.S. 692, 700, n.12 (1981).

81. *Cohen*, 103 N.M. at 561, 711 P.2d at 6.

82. *Id.* at 563, 711 P.2d at 8. Cohen and Atava argued that the consent to search would have been proper if obtained prior to the NCIC check reply but that the few minutes they were detained between the time the NCIC reply was received and the additional officers arrived constituted an illegal seizure. *Id.* Citing to *Sharpe*, the *Cohen* court noted that "common sense and ordinary human experience must govern over rigid criteria." *Id.* "Creative judges engaged in *post hoc* evaluations of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *Id.* "We do not believe the fourth amendment as interpreted by the United States Supreme Court requires such absurd results." *Id.*

83. *Id.* at 563-64, 711 P.2d at 8-9.

sonable as long as the officers diligently investigated their suspicions during that period.[84] The United States Supreme Court was quick to point out, however, that regardless of the officers' diligence in their investigation, an investigatory stop must be temporary and a stop which continues indefinitely will, at some point, no longer be justified as an investigatory stop.[85]

In conclusion, the New Mexico Supreme Court determined that Summers detained Cohen and Atava only three to thirteen minutes between the time the NCIC reply was received and the consent to search was granted and, therefore, the detention was reasonable in duration.[86] Further, the court held that Summers' means of investigation during the detention was appropriate and diligent and, therefore, the detention was also reasonable in manner.[87] In essence, the *Cohen* court adopted a balancing test in determining that New Mexico's governmental interest in detecting, preventing, and halting drug trafficking was justified in light of the short amount of time that Cohen and Atava were detained prior to consenting to the search of their vehicle.[88]

IV. IMPLICATIONS

In reversing the court of appeals, the New Mexico Supreme Court

84. United States v. Sharpe, 470 U.S. 675 (1985). In *Sharpe*, the United States Court of Appeals reversed the convictions of defendants Sharpe and Savage holding that although the initial "stop" of defendants was based on reasonable articulable suspicion, the subsequent 30-40 minute detention failed to meet the requirement of brevity. 660 F.2d at 970. The court held that the length of the detention transformed the valid investigatory stop into a *de facto* arrest absent probable cause which constituted an unreasonable seizure under the fourth amendment. *Id.* Thus, the reversal was based solely on the duration of the detention. *Id.*

In reversing the appellate court, the Supreme Court determined that the time of detention was not the 30-40 minutes the police detained Sharpe but the 20 minutes Savage was detained. 470 U.S. at 677. More importantly, the Court held that the lower court failed to consider the investigatory conduct of the officers during the stop in determining its reasonableness. *Id.* at 685. Thus, the court shifted the focus from the duration of the detention to the investigatory conduct of the officers during the stop. The Court held that since the officers pursued their investigation diligently during the detention, 20 minutes was not unreasonable. *Id.* at 687.

The fact that the *Sharpe* Court reconsidered the time of detention is insightful in that it indicates the unwillingness of the Court to find an investigatory stop reasonable the longer the duration of the detention, regardless of the officer's actions during that time. It also, arguably, established a quasi-maximum time limit of 20 minutes. The *Sharpe* court did not indicate, however, whether it's decision would have differed had the stop, in fact, been 30-40 minutes as initially determined by the trial court.

85. *Id.* at 685. Although the *Sharpe* court realized the advantage a "bright line" would provide for law enforcement authorities, the court questioned the wisdom of a rigid time limitation. *Id.* The Court stressed that the guidance offered officers through a time limitation would simultaneously undermine the equally important need to allow authorities to "graduate their responses to the demands of any particular situation." *Id.* at 686 (citing United States v. Place, 462 U.S. 696, 709, n.10 (1983)). *See supra* note 80.

86. *Cohen*, 103 N.M. at 561, 711 P.2d at 6.

87. *Id.* at 563, 711 P.2d at 8.

88. *Id.*

failed to adequately address those questions raised by the appellate court. The court of appeals noted that most cases dealing with the validity of an investigatory stop based on the suspect's conformity with a drug courier profile involve the existence of an additional factor which is not a part of the profile, but which aids in establishing reasonable articulable suspicion.[89] The court of appeals also noted that nervousness is an element of many such profiles, though not of the I-40 profile, and thus does not constitute an additional element.[90] The supreme court, however, simply determined that the presence of the profile elements and the fact that Cohen and Atava appeared more nervous than the average person stopped for speeding, together, gave rise to reasonable articulable suspicion.[91] Thus, without explicitly stating so, the supreme court determined that "nervousness", if an element separate from a drug courier profile, constitutes an "additional factor" sufficient to validate an investigatory stop in New Mexico.

Further, the supreme court failed to recognize that Cohen and Atava were initially stopped for a traffic violation and, thus, the investigatory stop began only after the reasons for the traffic stop had ended and Cohen and Atava were not allowed to leave. The distinction is important because the facts and circumstances which justified the traffic stop would not justify the prolonged subsequent detention absent additional relevant factors giving rise to reasonable articulable suspicion. This distinction must be clearly drawn because the analysis and application of constitutionally established tests, to determine the existence of reasonable suspicion, must be applied not to the traffic stop, but to the point at which reasonable articulable suspicion arguably occurred.

The supreme court's analysis on the constitutionality of the *Cohen* "investigatory stop" may be divided into two distinct issues. First, whether there existed reasonable articulable suspicion to justify the investigatory stop and second, whether the subsequent detention was reasonable in both manner and duration. The supreme court's analysis of the first issue was weak at best. Though the court held that the traffic stop was valid, the court then introduced, but failed to apply, certain established tests to determine whether the "stop" for the suspected drug trafficking was valid. Thus, the court's opinion on this issue lacked the rationale and analysis necessary to make *Cohen* understandable in subsequent New Mexico cases involving the same issue.

The court's rationale and analysis of the second issue, however, was clear. The supreme court unequivocally established the general role of

89. *Id.* at 566, 711 P.2d at 11.
90. *Id.*
91. *Id.* at 561-62, 711 P.2d at 6-7.

the New Mexico officer pursuant to an investigatory stop and introduced an acceptable time range in determining the reasonableness of the detention. Although the court did not explicitly state what the officers' duties during the stop must be, it is apparent from *Cohen* and other cases that the constitutionality of the detention depends on the particular facts and circumstances of each case. The court did, however, determine that those actions taken in *Cohen* were legitimate. Thus, New Mexico police officers investigating possible criminal activity pursuant to an investigatory stop in a manner similar to those actions taken by Summers in *Cohen* will be deemed valid.

Further, in reconsidering the duration of the detention in *Cohen*, the court indicated its unwillingness to consider a detention valid the longer the time of the detention. Thus, arguably, the New Mexico Supreme Court has established a twenty minute maximum time limit for an investigatory stop.

V. CONCLUSION

In *Cohen*, the New Mexico Supreme Court adopted the view that a suspect's conformity with the elements of a drug courier profile coupled with his "unusual" nervous behavior will give rise to reasonable articulable suspicion to believe the suspect is involved in narcotics trafficking. Hence, an investigatory stop based on these facts would be constitutional. Although the court recognized that the use of a drug courier profile alone will not justify an investigatory stop, the court simultaneously indicated its willingness to consider any additional non-profile factor in determining the existence of reasonable suspicion.

The *Cohen* court also indicated that in determining the reasonableness of an investigatory detention, the court's primary focus will be directed to the activities of the officers during the detention as opposed to the length of the stop. Although the court has recognized that a stop which is too lengthy in duration will at some point no longer constitute an investigatory stop, the *Cohen* court has employed a balance between the constitutional rights of the suspect and the importance of law enforcement protection and criminal detection, especially in the area of drug trafficking, in favor of the state.

KATHLEEN M. V. OAKEY