



**THE THIRD CIRCUIT AGREES WITH THE DISTRICT COURT'S FINDING THAT THE LAWENFORCEMENT OFFICIALS HAD A REASONABLE, ARTICULABLE SUSPICION TO CONDUCT A TERRY STOP AND AFFIRMED THE DISTRICT COURT'S DENIAL OF THE DEFENDANT'S MOTION TO SUPPRESS**



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In *United States v. Rosales*, 2017 WL 14007460 (3d Cir. Apr. 19, 2017), the United States Court of Appeals for the Third Circuit was asked to determine whether law enforcement officers possessed a reasonable, articulable suspicion to justify a Terry stop of Defendant Raul Osvaldo Rosales after he made a trip via a small engine airplane from Los Angeles, California, to Philadelphia, Pennsylvania. The District Court determined that a reasonable, articulable suspicion existed to justify the Terry stop, and Rosales appealed. The relevant facts are as follows.

On February 3, 2015, pilot Warren Nichols departed Los Angeles, California, in a small airplane and made a series of stops along the way. Defendant Raul Osvaldo Rosales accompanied Nichols as the sole passenger starting in at least Albuquerque, New Mexico. The next morning at 2:00 a.m., the two men landed at Wings Air Field, a small, rural airport outside Philadelphia, Pennsylvania.

While in the air, the flight was monitored by the Air and Marine Operations Center (AMOC), a division of the Department of Homeland Security. AMOC began monitoring Nichols's plane because it was leaving Los Angeles, a common "source city" for drugs, and because it was heading towards Philadelphia, a common "destination city" for drugs. AMOC observed that the plane followed an unusual flight path, stopping multiple times to refuel and changing course headings and altitude frequently—actions that increased both the cost of the flight and the wear-and-tear on the plane. AMOC deemed the flight suspicious and alerted the Homeland Security Investigations Unit (HSI) which also began to monitor the flight. HSI, then, contacted local law enforcement authorities in Pennsylvania.

During one refueling stop in Albuquerque, New Mexico, an AMOC informant observed a Hispanic male (presumably Rosales) accompanying Nichols as the sole passenger. The informant noted a large duffel bag in the plane and observed that Nichols locked the plane during the brief stop. At a later refueling stop in Oklahoma, an AMOC informant observed the plane taxi backwards down the runway, leading the informant to conclude that the pilot was inexperienced. In addition, AMOC informed HSI that, as the plane flew over Kentucky, the plane's transponder was turned off for three minutes, indicating an attempt to avoid detection. After receiving this information from AMOC, HSI

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determined that Nichols had previously been arrested in Philadelphia for drug possession and for carrying a concealed weapon.

After the plane landed in Pennsylvania, Rosales and Nichols disembarked and left the airport on foot. The two men began walking together down the dark, quiet road outside the airfield when they were approached by law enforcement authorities. Initially, one local police officer approached them and, very shortly thereafter, two additional officers arrived.

During the conversation with the police officers, Nichols reached inside his bag, and the law enforcement authorities observed a white plastic bag containing what appeared to them to be marijuana. When asked about the plastic bag, both men fled. However, authorities intercepted and arrested the men and recovered four bricks of cocaine from their bags. After receiving a Miranda warning, Rosales provided a statement in which he admitted that he had assisted Nichols in transporting cocaine from California to Pennsylvania. Rosales and Nichols were later indicted for possession and conspiracy to possess with intent to distribute 500 grams or more of cocaine.

Thereafter, Rosales moved to suppress both the physical evidence and his statement, arguing that the law enforcement authorities lacked reasonable suspicion to make the initial investigatory (i.e., Terry) stop after the plane landed. The District Court held an evidentiary hearing and denied Rosales' motion to suppress. Rosales pleaded guilty but preserved his right to appeal the suppression ruling. The District Court later sentenced Rosales to 60 months of imprisonment. Nichols also pleaded guilty and was sentenced to 36 months of imprisonment, but he did not appeal.

The Third Circuit began its Opinion by explaining that, when law enforcement authorities conduct a brief investigatory stop without a warrant, the seizure is permissible under the Fourth Amendment if the officers acted with "reasonable, articulable suspicion that criminal activity is afoot." Illinois Wardlow, 528 U.S. 119, 123 (2000)(citing Terry v. Ohio, 392 U.S. 1, 30 (1968)). Reasonable suspicion is a less demanding standard than probable cause, but it requires at least a minimal level of objective justification. The officer "must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity." Id. at 123-24. Because the concept of reasonable suspicion cannot be reduced to a neat set of legal rules, the Third Circuit stated that, in reviewing whether a reasonable, articulable suspicion existed to warrant an investigatory stop, courts must consider the totality of the circumstances. United States v. Sokolow, 492 U.S. 1, 7-8 (1989). Even where each fact being considered may not itself be inconsistent with innocent travel, a set of facts taken together may give rise to reasonable suspicion. Id. at 9. The inquiry is not whether the conduct is innocent or guilty but the degree of suspicion that attaches to particular types of non-criminal acts. Id. at 10.

In this case, the District Court determined that, for Fourth Amendment purposes, the men were stopped when the first police officer approached Rosales and Nichols on the road outside the airfield. Rosales did not dispute the District Court's determination. Instead, Rosales argued that the District Court erroneously concluded that the circumstances gave rise to a reasonable suspicion for the stop. Rosales asserted that the flight activities observed by AMOC and HSI were not inherently suspicious and could have been viewed as activities of a hobbyist or an inexperienced small-plane pilot. According to Rosales, the stop was based on no more than mere speculation that criminal activity was afoot and was not justified by reasonable, articulable facts indicating that he was engaged in any type of criminal activity.

The Third Circuit disagreed. The Third Circuit held that the facts presented at the evidentiary hearing, when taken together, were sufficient to give rise to objectively justifiable suspicion. The Third Circuit agreed with the District Court that the law enforcement officers had far more than a mere hunch of criminal activity for a number of reasons. First, the officers who stopped Nichols and Rosales had the benefit of AMOC's input in deeming the small plane's flight suspicious. The Third Circuit stated that it Court had previously held that officers may draw on their specialized training to make inferences about the information available to them. *United States v. Thompson*, 772 F.3d 752, 758 (3d Cir. 2014). Here, AMOC flagged the flight based on a number of articulated facts, including knowledge of "source" and "destination" cities for drugs, an uncommon flight pattern (frequent stops and changes in course headings and altitude), and unusual behavior reported by on-the-ground AMOC informants (locking the plane during a brief refueling, taxiing backward down a runway).

Second, the Third Circuit explained that unusual means of travel and strange behavior while travelling (even if legal) may give rise to a reasonable suspicion. Likewise, an unusual time and location of a stop and the stopped individual's criminal history may give rise to reasonable suspicion sufficient to justify a Terry stop. In this case, the Third Circuit agreed with the District Court that Nichols and Rosales engaged in unusual means of travel (an overnight cross-country flight in a small plane that made frequent stops and altitude changes), engaged in apparent efforts to attempt evasion (turning off the plane's transponder and departing the airport on foot), arrived at an unusual time and location (in a pre-dawn hour at a deserted rural airport), and Nichols had a criminal history (including a drug arrest). The Third Circuit concluded that these facts justified the officers' Terry stop of Rosales.

Third, the Third Circuit stated that a reasonable suspicion as to one individual may "taint" his associate where the criminal activity is contemporaneous with the association or where the nature of the activity is such that it could not normally be carried out without the knowledge of all present. Here, Rosales was Nichols's sole passenger for a lengthy overnight cross-country flight in a small airplane; he was present for the plane's numerous stops, including the stop during which Nichols locked the plane for a brief refueling; and he accompanied Nichols by departing a deserted airport on foot down a desolate rural road.

Accordingly, the Third Circuit held that these circumstances, considered together, were sufficient to give rise to a reasonable suspicion that criminal activity was afoot and that Rosales was involved in it. Although the Third Circuit agreed that the flight could have been that of a hobbyist and that some of the details observed by AMOC and HSI could be attributed to inexperience rather than criminal activity, the Court stated that the alternative, innocent explanation did not undermine its conclusion. Therefore, the Court held that, when viewing the sum of the circumstances, it was apparent that the law enforcement authorities relied upon articulable, objective facts giving rise to a reasonable suspicion of criminal activity sufficient to stop Rosales, and the Third Circuit affirmed the District Court's denial of Rosales' motion to suppress.

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**Note:** *Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*