

January 2004

Criminal Law - The Fourth Amendment Dilemma

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Recommended Citation

Craig, Jenny Lynn (2004) "Criminal Law - The Fourth Amendment Dilemma," *Wyoming Law Review*. Vol. 4: No. 2, Article 8.

Available at: <https://scholarship.law.uwyo.edu/wlr/vol4/iss2/8>

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CASE NOTES

CRIMINAL LAW – The Fourth Amendment Dilemma: *Damato v. State*, 64 P.3d 700 (Wyo. 2003).

INTRODUCTION

On April 16, 2000, Wyoming Highway Patrolman David Rettinger pulled a vehicle over on eastbound Interstate 80 in Albany County for traveling eighty-two (82) miles-per-hour in a seventy-five (75) mile-per-hour zone.¹ Patrolman Rettinger became suspicious of the driver, Nicholas Damato, because he seemed unusually nervous, there was a large amount of fast food wrappers on the floorboard of the vehicle, and his luggage was in the back seat of the car instead of the trunk.² There were also discrepancies in Damato's answers regarding where he had rented the car and where he was to drop it off.³ According to Damato, he had rented the car in San Francisco and was heading to his home in Illinois.⁴ However, the rental agreement showed that he had rented the car in San Diego and was to drop it off in Omaha.⁵ Based on his suspicion from these facts, Patrolman Rettinger requested to search the vehicle and Damato refused.⁶ Patrolman Rettinger did not believe that he could detain Damato any longer and allowed him to leave without issuing a speeding citation.⁷

After telling Damato he could leave, Patrolman Rettinger radioed the highway patrol dispatch to inform the other officers on duty of the incident.⁸ He requested they keep an eye out for the vehicle because of Damato's suspicious behavior, which included Damato not consenting to a search of the vehicle.⁹ One of the officers to hear the call was Patrolman Bauer, who proceeded to drive eastbound on Interstate 80 to "get probable cause to stop him."¹⁰ When Patrolman Bauer saw the vehicle he believed to

1. *Damato v. State*, 64 P.3d 700, 702 (Wyo. 2003).

2. *Id.* The large amount of fast food wrappers on the floorboard of the car suggests that Damato was on a "hard run." *Id.* at 708. A "hard run" is a phrase used to describe drug traffickers who are in a hurry to get to the drop off destination. The fast food wrappers are an indication of this because the trafficker does not have time, nor want to stop to eat food, so they tend to eat drive-thru fast food the whole way to the destination. Telephone Interview with E. Stormy Appgar, Professor, Department of Criminal Justice, University of Wyoming (Sept. 14, 2003).

3. *Damato*, 64 P.3d at 702.

4. *Id.*

5. *Id.* Patrolman Rettinger indicated that the significance of this discrepancy was great because he was aware that both San Diego and Omaha were "known drug hubs." *Id.* at 709.

6. *Id.* at 702.

7. *Id.*

8. *Id.* at 702-03.

9. *Id.* When Patrolman Rettinger told the other officers that Damato did not consent to a vehicle search, he was inferring he was looking for drugs. *Id.* at 703.

10. *Id.* at 703.

be Damato's, he passed the car and then turned around and followed the vehicle.¹¹ Patrolman Bauer was still looking for probable cause when he clocked Damato with the radar traveling seventy-seven (77) miles-per-hour in a seventy-five (75) mile-per-hour zone.¹² Patrolman Bauer then moved closer to Damato, who, without using a turn signal, moved into the right lane to get out of the way.¹³ Patrolman Bauer then turned on his lights and pulled over Damato.¹⁴

Before proceeding to Damato's vehicle, Patrolman Bauer called for the canine unit.¹⁵ After approaching the vehicle, Patrolman Bauer asked to see Damato's license, registration, and proof of insurance.¹⁶ Damato asked Patrolman Bauer why he had been stopped and explained that he did not think he was speeding since he had just been pulled over by Patrolman Rettinger.¹⁷ During this initial encounter with Damato, Patrolman Bauer observed the fast food wrappers on the floor, the luggage in the backseat, and Damato's nervousness.¹⁸ Patrolman Bauer also noticed a bottle of Visine on the console.¹⁹ He then noticed that Damato appeared to have pink "dope" eyes.²⁰ Damato also made a comment about the documents Patrolman Bauer asked for as being in the trunk, then immediately corrected himself.²¹

Patrolman Bauer directed Damato to get out of the vehicle so he could look at the radar in the patrol car.²² Damato did as Patrolman Bauer said, and as he reached the back of the vehicle Patrolman Bauer did a pat-down search.²³ Patrolman Bauer stated that it was for his own safety since Damato was going to be getting into the patrol car.²⁴ During the pat-down

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* Patrolman Bauer later testified that at the time he told Damato to look at the radar, Damato was not free to leave because Patrolman Bauer was still in possession of his drivers license, registration, and proof of insurance. *Id.* In a footnote, it was added that the district court found that Patrolman Bauer directed Damato to exit the vehicle so he could view the radar showing the seventy-seven (77) miles-per-hour. *Id.* at 703 n.1. Patrolman Bauer testified that this action was justified because Damato "requested [to see the] radar." *Id.* at 703. However, the Highway Patrol videotape of the stop does not show this request. *Id.* The district court judge explained that the videotape was reviewed several times and did not show Damato arguing with Patrolman Bauer or requesting to see the radar. *Id.* The district court judge believed that Damato reacted the same as any other driver would by not resisting Patrolman Bauer's questions and was fully cooperative. *Id.*

23. *Id.*

24. *Id.*

search, Patrolman Bauer found two small pocketknives, and felt what he believed to be a cellophane bag of marijuana in Damato's back right pocket.²⁵ Patrolman Bauer asked Damato what was in his pocket and after being asked again, Damato pulled out a bag containing approximately three grams of marijuana.²⁶

Patrolman Bauer placed Damato under arrest for possession of marijuana.²⁷ Patrolman Bauer then put in another call to the canine unit and also called the Division of Criminal Investigation.²⁸ While waiting for the canine unit, Patrolman Bauer read Damato his *Miranda* warnings, which Damato acknowledged he understood.²⁹ However, Damato did not appear to agree to answer any questions at that time.³⁰ Patrolman Bauer told Damato that he could help himself by telling him what was in the car and that he would find out anyway when the car was inventoried.³¹ Damato kept refusing to answer, but after several repeated questions he finally told Patrolman Bauer that there was a marijuana cigarette in the console of the vehicle, and that the trunk was full of marijuana.³² Patrolman Bauer opened the trunk and discovered more than 300 pounds of marijuana.³³ Damato was subsequently charged with possession of marijuana with intent to deliver.³⁴

The District Court of Laramie County determined the bottle of Visine and the trash on the floor were not enough to justify an articulable suspicion.³⁵ But when the false information about the place of rental and final destination were included, it could be evidence of criminal activity.³⁶ The district court said that Patrolman Bauer would have been justified in detaining Damato until the canine unit arrived, but he did not wait for the dogs and told Damato to exit the vehicle to view the radar.³⁷ After reviewing the facts of the case, the district court determined that Patrolman Bauer improperly ordered Damato from the car, which led to the suppression of the evidence obtained from the subsequent pat-down search, and everything thereafter.³⁸ The state then filed for reconsideration arguing the marijuana in the trunk would have been inevitably discovered by the canine unit.³⁹ Based on this

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 714 (Hill, J., dissenting).

34. *Id.* at 703. No citations were issued to Damato concerning the traffic violations or the misdemeanor possession of marijuana. *Id.*

35. *Id.* at 704.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

argument, the district court then denied the motion to suppress the evidence obtained in the pat-down search.⁴⁰

The defense then appealed the district court's decision to the Wyoming Supreme Court.⁴¹ The Wyoming Supreme Court concluded Patrolman Bauer did not have a reasonable suspicion of criminal activity to detain Damato.⁴² Due to the lack of suspicion, Damato was unlawfully seized when he was asked to exit his car and was frisked.⁴³

This case note will look at relevant cases decided by the United States Supreme Court, the United States Court of Appeals for the Tenth Circuit, and the Wyoming Supreme Court in search and seizure law based on a citizen's Fourth Amendment rights under the United States Constitution. It will also explore the Wyoming Supreme Court's analysis in *Damato*, and why it could be inconsistent with some recent precedent by the United States Supreme Court, although the correct result was eventually reached. Finally, this case note will speculate that the Wyoming Supreme Court is willing to depart from federal constitutional law concerning pretext stops when dealing with the stops on a state constitutional level.

BACKGROUND

The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁴⁴

Evidence that has been obtained in violation of this amendment will be excluded, and this exclusion has been recognized as the main way to discourage lawless police conduct.⁴⁵ While this protection is something most people hold very sacred, the United States Supreme Court has clarified that some searches are reasonable without warrants or probable cause.⁴⁶

40. *Id.* When the district court denied the motion to suppress, Damato entered a conditional plea of guilty and was sentenced to four and one-half to nine years in prison and fined \$10,000.00. *Id.*

41. *Id.*

42. *Id.* at 710.

43. *Id.* at 706.

44. U.S. CONST. amend. IV.

45. *Terry v. Ohio*, 392 U.S. 1, 12 (1968).

46. *See generally Terry v. Ohio*, 392 U.S. 1 (1968).

United States Supreme Court Fourth Amendment Precedent

The Court first recognized a lesser standard than probable cause for the intrusion upon constitutionally guaranteed rights in *Terry v. Ohio*.⁴⁷ In *Terry*, a Cleveland detective observed two men, John Terry and Richard Chilton, walking back and forth alternately along an identical route.⁴⁸ As the men did this, they always stopped and stared in the same store window.⁴⁹ While the two men were standing together on the street corner, a third man, Carl Katz, started a conversation with them.⁵⁰ The third man then left and approximately ten minutes later Terry and Chilton followed.⁵¹ The detective's observations of this behavior led him to suspect that the two men were "casing a job" and he believed they may have had a gun.⁵² The detective then approached the two men as they met to converse with the third man again.⁵³ The detective identified himself as a police officer and asked the three men to identify themselves.⁵⁴ The men responded to the questions by "mumbling something," at which point the detective grabbed Terry and patted down the outside of his clothing.⁵⁵ The detective felt a pistol inside Terry's overcoat, but he could not remove the gun.⁵⁶ He ordered the three men inside one of the stores, and took Terry's overcoat off to retrieve the pistol.⁵⁷

The Court held that a two-part inquiry must be used to determine whether the search and seizure was "unreasonable."⁵⁸ First, it must be determined if the officer's actions were justified at the inception of the seizure.⁵⁹ Second, it must be determined if the search was reasonably related in scope to the circumstances which justified the interference in the beginning.⁶⁰ In *Terry*, the detective had a reasonable suspicion the men were about to commit a daytime robbery and it would be reasonable to assume the robbery would include the use of weapons.⁶¹ The Court held when a police officer observes unusual conduct he is entitled, for the protection of himself

47. *Terry v. Ohio*, 392 U.S. 1 (1968).

48. *Id.* at 5-6.

49. *Id.* at 6. Officer McFadden observed the men walk this identical route about five to six times a piece; a total of approximately twelve trips. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 7.

55. *Id.*

56. *Id.*

57. *Id.* At this point the detective also patted the other two men down for weapons. *Id.* A revolver was found in Chilton's overcoat pocket, but no weapons were found on the third man. *Id.*

58. *Id.* at 19-20.

59. *Id.* at 20.

60. *Id.*

61. *Id.* at 28.

and others, to conduct a limited search of the outer clothing of the person to discover weapons that may be used to assault him.⁶² The officer may do this if he can reasonably conclude criminal activity may be occurring and the person being dealt with may be armed and dangerous.⁶³

The United States Supreme Court relied greatly on the decision in *Terry* to decide *Minnesota v. Dickerson*.⁶⁴ While using *Terry* as a foundation, the Court established the "plain-feel" doctrine.⁶⁵ The plain-feel exception states that if an officer is lawfully patting down a suspect's outer clothing, within the bounds of *Terry*, and feels an object whose shape or mass makes its identity immediately apparent, the warrantless seizure is justified.⁶⁶ However, the search is unconstitutional if the officer must conduct a search outside the bounds of *Terry* to determine if the object is contraband.⁶⁷

In *Pennsylvania v. Mimms*, the Court had to decide if it would extend the limits of seizure that were set by *Terry*.⁶⁸ The issue in *Mimms* was whether a police officer could ask the driver of a vehicle, who was stopped for a traffic violation, to step outside of the vehicle to produce his/her license if the officer did not have a reasonable suspicion that a criminal activity, other than the traffic offense, was occurring.⁶⁹ The Court held that the intrusion to the driver of having to get out of the car was "de minimis," and that the officer has already lawfully decided that the driver may be briefly detained.⁷⁰ The only question was whether the driver would be detained in the

62. *Id.* at 30.

63. *Id.*

64. *Minnesota v. Dickerson*, 508 U.S. 366, 374 (1993). In *Dickerson*, two police officers approached the respondent after observing him leaving a "crack house" and acting suspiciously. *Id.* at 368. The officers conducted a pat-down search but found no weapons. *Id.* at 369. However, the officers did notice a small lump in the respondent's jacket. *Id.* The officer retrieved a plastic bag containing one fifth of one gram of crack cocaine out of the jacket. *Id.* The respondent was arrested and charged with possession of a controlled substance. *Id.*

65. *Id.* at 375.

66. *Id.*

67. *Id.* at 379. The bounds of *Terry* allow the officer to conduct a limited search of the outer clothing of the person to discover weapons that may be used to assault him. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

68. *Pennsylvania v. Mimms*, 434 U.S. 106, 106 (1977).

69. *Id.* at 109. When *Mimms* exited the vehicle at the officer's request, the officer noticed a bulge in *Mimms*' clothing, which he believed to be a weapon. *Id.* at 107. The officer then proceeded to frisk *Mimms* for weapons and found a .38-caliber revolver loaded with five rounds of ammunition. *Id.* The actual frisk is not a real issue in *Mimms* because as outlined in *Terry*, once the officer reasonably concluded *Mimms* might be armed he was entitled to conduct a limited search for weapons. *Id.* at 111.

70. *Id.*

car or standing next to the car.⁷¹ The Court said this minor intrusion was justified when balanced against the safety of the officer.⁷²

In *Whren v. United States*, the Court was asked to decide on the validity of a pretext stop.⁷³ The Court held this question was answered in *United States v. Robinson*, when the court decided that a traffic-violation arrest would not be invalidated by the fact that it was “a mere pretext for a narcotics search.”⁷⁴ The Court stated that if the officer was justified in making the initial stop, the legal justification would not be invalidated because the officer’s actual motive was not the legal justification for the initial stop.⁷⁵

The United States Supreme Court was asked to revisit the validity of pretext stops in *Arkansas v. Sullivan*.⁷⁶ In *Sullivan*, the Court confirmed the position taken in *Whren* that an arrest based on a traffic violation would not be invalidated just because it was a pretext for a narcotics search.⁷⁷ The Arkansas Supreme Court made the decision that it could interpret the United

71. *Id.*

72. *Id.* The state justified the removal of the driver of the car for safety reasons. *Id.* at 109-10. The state argued that it was ordinary practice to order all drivers out of the car whenever there was a traffic violation because establishing face-to-face confrontation diminishes an otherwise substantial possibility that there will be an assault on the officer. *Id.* at 110. The state offered into evidence a study that shows “30% of police shootings occurred when a police officer approached a suspect seated in an automobile.” *Id.* (citing *Adams v. Williams*, 407 U.S. 143, 148 n. 3 (1972)).

73. *Whren v. United States*, 517 U.S. 806, 812 (1996). In *Whren*, plainclothes policemen were patrolling a “high drug area” in an unmarked vehicle. *Id.* at 808. The officers observed a vehicle, with youthful occupants, stopped at a stop sign for an unusual amount of time. *Id.* The vehicle suddenly turned right, without signaling, and drove off at an “unreasonable speed.” *Id.* The officers decided to approach the vehicle and immediately observed two large bags of what appeared to be crack cocaine in *Whren*’s hands. *Id.* at 808-09. The petitioners argued that to avoid the danger of officers stopping people for impermissible reasons, such as race, the Fourth Amendment test for traffic stops should not be whether *probable cause exists* to justify the stop, but whether a reasonable police officer *would* have made the stop for the reason given. *Id.* at 810. For further discussion of this argument, *see infra* note 277.

74. *Id.* at 812-13 (quoting *United States v. Robinson*, 414 U.S. 218, 221 n.1 (1973)). In *Robinson*, an officer pulled over the respondent and subsequently arrested him for driving with a revoked license. *Robinson*, 414 U.S. at 220. After placing *Robinson* under arrest, the officer conducted a search of *Robinson*. *Id.* at 221. While the officer was conducting the pat-down search, he recovered a crumpled up cigarette package, which contained heroin. *Id.* at 222-23. The United States Supreme Court ruled that when an officer has probable cause for an arrest, a more extensive search of the suspect is authorized. *Id.* at 236.

75. *Whren*, 517 U.S. at 813 (quoting *Scott v. United States*, 436 U.S. 128, 136, 138 (1978)).

76. *Arkansas v. Sullivan*, 532 U.S. 769 (2001).

77. *Id.* at 771-72. In *Sullivan*, an officer pulled over a driver for having improperly tinted windows. *Id.* at 769. When the officer looked at the driver’s license, he realized he had information that the driver was involved in narcotics. *Id.* at 770. The officer then arrested the driver for speeding, driving without his registration and proof of insurance, carrying a weapon (a roofing hatchet found on the floor), and improper window tinting. *Id.* The officer conducted an inventory of the vehicle and discovered a bag containing what appeared to be methamphetamine and drug paraphernalia. *Id.*

States Constitution to give greater protections than what the United States Supreme Court provided.⁷⁸ The United States Supreme Court addressed this issue by stating that while a state can impose greater restrictions on police activity in regards to state law, the state may not impose greater restrictions regarding federal constitutional law when the United States Supreme Court has specifically decided not to impose those greater restrictions.⁷⁹ In other words, “had the Arkansas Supreme Court decided that it could not apply *Whren* under its own state constitution, the [United States Supreme] Court would not interfere.”⁸⁰

Another aspect of search and seizure law is the “totality of the circumstances” test used to determine whether reasonable suspicion exists. The United States Supreme Court recently encountered a case in which the “totality of the circumstances” test was evaluated.⁸¹ In *United States v. Arvizu*, the defendant was stopped by a border patrol agent on a road rarely traveled, except by smugglers trying to avoid the border patrol checkpoint.⁸² The border patrol agent found Arvizu to be suspicious for several reasons.⁸³ First, the agent was suspicious simply because of the road being traveled.⁸⁴ The agent had characterized this road as being a way for smugglers to avoid the border patrol checkpoint, and the timing of the incident coincided with the point when agents began heading back to the checkpoint for a shift change, leaving the area unpatrolled.⁸⁵ When the agent actually saw the ve-

78. *Id.* at 772.

79. *Id.* In the concurring opinion, Justice Ginsburg expressed similar concerns as the Arkansas Supreme Court regarding the issue of a pretext stop as a way to intrude on an individual’s liberty and privacy. *Id.* at 772-73 (Ginsburg, J., concurring). She described, along with the Arkansas Supreme Court, an unwillingness to sanction conduct when an officer waits for a driver suspected of criminal conduct to exceed the speed limit by one mile per hour, in order to arrest the driver for speeding, and conduct an inventory search of the vehicle. *Id.* at 773 (Ginsburg, J., concurring). While she was concerned about this, she stated that the Court has held that this type of official discretion is unlimited by the Fourth Amendment as she joined the Court’s opinion based on the current case law. *Id.* (Ginsburg, J., concurring). The primary case Justice Ginsburg cited was *Atwater v. Lago Vista*, in which she was part of the dissenting opinion. *Id.* (Ginsburg, J., concurring) (citing *Atwater v. Lago Vista*, 532 U.S. 318 (2001)). Justice Ginsburg also stated that she hoped the Court would reconsider its recent precedent in the case that the Court’s decision in *Atwater* did not prove to be correct. *Id.* (Ginsburg, J., concurring). She directed the Court to consider *Vasquez v. Hillery*, which observed the Court has departed from *stare decisis* when necessary. *Id.* (Ginsburg, J., concurring) (citing *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986)).

80. *Damato v. State*, 64 P.3d 700, 705 (Wyo. 2003).

81. *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

82. *Id.* at 268.

83. *Id.* at 269-72.

84. *Id.* at 269.

85. *Id.* The agent was aware that alien smugglers were most active when the agents were on their way back to the checkpoint. *Id.* The agent was also aware that a fellow agent had apprehended a minivan using the same route and saw the occupants of the vehicle throwing bundles of marijuana out the door. *Id.* at 269-70.

hicle he noticed it was a minivan with five occupants inside.⁸⁶ A few minutes later, the children in the minivan started waving at the agent in a very awkward fashion.⁸⁷ The agent also found the driver of the van to be suspicious because he appeared to be very stiff and rigid.⁸⁸ It appeared that the driver was trying to pretend the agent was not there.⁸⁹ The agent also noticed that the knees of two of the children in the back seat appeared to be propped up on something on the floor.⁹⁰

The agent then radioed for a registration check and learned that the minivan was registered in an area notorious for alien and narcotics smuggling.⁹¹ The agent proceeded to pull the vehicle over.⁹² When the agent approached Arvizu, he asked permission to search the vehicle, and Arvizu consented.⁹³ The agent found a duffle bag full of marijuana under the children's feet, and another bag of marijuana in the very rear of the vehicle.⁹⁴

The Court of Appeals for the Ninth Circuit analyzed each factor individually and held that the factors present were not enough to render the stop permissible.⁹⁵ The United States Supreme Court disagreed with the Court of Appeals and unanimously reversed its decision.⁹⁶ The Court held that by allowing the officer to use the "totality of the circumstances" he may draw from his own experience and specialized training to make inferences about all of the information available.⁹⁷ The United States Supreme Court stated the Court of Appeals erred by evaluating and rejecting the factors in isolation from each other because it did not view the factors in light of the

86. *Id.* at 270. The minivan is significant because the agent knew that this was one type of vehicle smugglers use when making deliveries. *Id.* The occupants of the minivan consisted of a man, a woman, and three children. *Id.*

87. *Id.* at 270-71. The agent believed the children were being instructed to wave. *Id.* at 271. The odd waving continued for about four to five minutes. *Id.*

88. *Id.* at 270.

89. *Id.* The agent stated this type of behavior is suspicious because most drivers look to see what is going on, and most drivers wave to border patrol agents. *Id.*

90. *Id.*

91. *Id.* at 271.

92. *Id.*

93. *Id.* at 271-72.

94. *Id.* at 272. The United States Court of Appeals for the Ninth Circuit looked at each factor individually, and ruled that many of the factors in this situation carried no weight in a Fourth Amendment analysis. *Id.* These factors include the defendant's slowing down of the vehicle, the defendant's failure to acknowledge the agent, the raised position of the children's knees, and their odd waving. *Id.* The court concluded that the road's use by smugglers, the proximity between the defendant's trip and the agents' shift change, and the use of the minivan were the only factors that could be used to find reasonable suspicion. *Id.* at 273.

95. *Id.*

96. *Id.* at 278.

97. *Id.* at 273.

totality of the circumstances.⁹⁸ The Court found when the factors are weighed together the agent did have reasonable suspicion to detain Arvizu.⁹⁹

United States Court of Appeals for the Tenth Circuit Fourth Amendment Precedent

In *United States v. Wood*, the United States Court of Appeals for the Tenth Circuit decided whether reasonable suspicion was present in order for an officer to search a car during a routine traffic stop.¹⁰⁰ The court reiterated the two-part inquiry that was established in *Terry*.¹⁰¹ First, it must be determined if the stop was justified.¹⁰² The second question is whether the officer's actions during the stop reasonably related in scope to the reason why the stop occurred in the first place.¹⁰³ The court held that during traffic stops for speeding the officer may ask questions, examine the documentation, and run computer verifications to make sure the driver has a valid driver's license and is entitled to drive the vehicle.¹⁰⁴ When the driver has shown a valid driver's license and can show that he is entitled to drive the vehicle, the officer must let the driver proceed on his way without further delay.¹⁰⁵ The officer may expand the detention beyond what is reasonably necessary as long as the person stopped consents to the expansion.¹⁰⁶ The officer may only expand the detention beyond its initial purpose without consent if he has a reasonable suspicion that the person is engaged in criminal activity other than the traffic violation.¹⁰⁷ If the person stopped will not consent to a search, the officer cannot use the refusal to aid in forming reasonable suspicion.¹⁰⁸

The court also reiterated that a reasonable suspicion of illegal activity does not depend on one factor, but on the "totality of the circum-

98. *Id.*

99. *Id.* at 277.

100. *United States v. Wood*, 106 F.3d 942, 945-46 (10th Cir. 1997).

101. *Id.* at 945 (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

102. *Id.* (citing *Terry*, 392 U.S. at 20). In *Terry*, the Court explained that there is no test to determine the reasonableness of an intrusion upon a private person other than to balance the need of the search against the invasion of the search. *Terry*, 392 U.S. at 20-21 (citing *Camara v. Municipal Court*, 387 U.S. 523, 534-35, 536-37 (1967)). "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21.

103. *Wood*, 106 F.3d at 945 (citing *Terry*, 392 U.S. at 20).

104. *Wood*, 106 F.3d at 945 (citing *United States v. Miller*, 84 F.3d 1244, 1250 (10th Cir. 1996)).

105. *Wood*, 106 F.3d at 945 (citing *United States v. Lee*, 73 F.3d 1034, 1039 (10th Cir. 1996)).

106. *Id.* at 946.

107. *Id.* (citing *United States v. Lambert*, 46 F.3d 1064, 1069 (10th Cir. 1995)).

108. *Wood*, 106 F.3d at 946 (citing *United States v. Manuel*, 992 F.2d 272, 274 (10th Cir. 1993)).

stances.”¹⁰⁹ When determining the “totality of the circumstances” the court must examine the factors both individually and in the aggregate, use common sense and ordinary human experience, and give deference to a law enforcement officer’s ability to separate innocent and suspicious behavior.¹¹⁰ The court emphasized that although reasonable suspicion may be found based on factors that could be present in innocent travel, “some facts must be outrightly dismissed as so innocent or susceptible to varying interpretations as to be innocuous.”¹¹¹

In *United States v. Williams*, the Tenth Circuit addressed similar issues as those in *Wood*.¹¹² In *Williams*, the court again used the “totality of the circumstances” test.¹¹³ The court emphasized that when evaluating the totality of the circumstances, it is appropriate to take into consideration common sense and ordinary human experience, and the officer’s ability to distinguish between innocent and suspicious behavior.¹¹⁴ The court did point out that although these are relevant considerations, an officer cannot base reasonable suspicion on inchoate suspicions and unparticularized hunches.¹¹⁵

109. *Wood*, 106 F.3d at 946 (citing *United States v. Bloom*, 975 F.2d 1447, 1456 (10th Cir. 1992)).

110. *Wood*, 106 F.3d at 946.

111. *Id.* (citing *United States v. Sokolow*, 490 U.S. 1, 9-10 (1989); *United States v. Lee*, 73 F.3d 1034, 1039 (10th Cir. 1996)). In *Wood*, the first factor that was taken into account by the district court for the reasonable suspicion of the officer was Wood’s unusual travel plans. *Wood*, 106 F.3d at 946. Mr. Wood told the officer that he was only traveling in the car one way because he had originally flown to Sacramento, California, where the car was rented, but wanted to drive back to Kansas to enjoy the scenery. *Id.* The officer and the district court also found it suspicious that Mr. Wood could afford to take a vacation because he was an unemployed painter. *Id.* at 946-47. The district court also found that the officer could have established reasonable suspicion from the presence of fast food wrappers and open maps in the passenger compartment. *Id.* at 947. The Tenth Circuit did not agree with this reasoning and believed that open maps and fast food wrappers are consistent with cross-country travel and that it cannot reasonably give rise to a suspicion of criminal activity. *Id.* Another factor that weighed heavily in the district court’s decision was the extreme nervousness of Mr. Wood during the traffic stop. *Id.* at 948. The Court of Appeals once again disagreed and stated that it is not uncommon for most people to become nervous when confronted by a law enforcement officer, whether they are guilty or innocent. *Id.* The court noted that nervousness is of limited significance and that when relying on nervousness as a basis for reasonable suspicion it should be treated with caution. *Id.* at 948 (citing *United States v. Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994)). The final factor the district court relied on in finding reasonable suspicion was that Mr. Wood had a prior narcotics conviction. *Wood*, 106 F.3d at 948. The court again cautioned that prior criminal involvement alone is not enough to create a reasonable suspicion to change a traffic stop to a narcotics or weapons investigation. *Id.*

112. *United States v. Williams*, 271 F.3d 1262 (10th Cir. 2001).

113. *Id.* at 1268.

114. *Id.*

115. *Id.* The court had to take into consideration five different factors under the “totality of the circumstances” test. *Id.* at 1267-70. The first factor, which the court promptly refused to consider, was Williams’ refusal to allow the officer to search his car. *Id.* at 1268. Next, the court had to consider Williams’ “uncommon and extreme” nervousness. *Id.* The court held that while nervousness is of limited significance in gathering reasonable suspicion, ex-

Wyoming Supreme Court Fourth Amendment Precedent

In *State v. Welch*, the Wyoming Supreme Court decided the issue of what constitutes reasonable suspicion, and how much time can pass before a stop is considered unreasonable under the standards of the United States Constitution and the Wyoming Constitution.¹¹⁶ In *Welch*, a highway patrol officer stopped a pickup truck with a topper on Interstate 80 for failing to properly signal a lane change.¹¹⁷ As the officer approached the truck, he noticed someone in the back of the truck who appeared to be sleeping, and a plastic liner, which was quite clean.¹¹⁸ Once the officer got to the front of the truck, he noticed a large clove of garlic, and a radar detector.¹¹⁹ The officer looked through the window of the topper and noticed that the ceiling of the topper was sagging down approximately two inches in the center.¹²⁰ When the officer asked the driver who owned the vehicle, the driver pronounced the name on the registration differently from how it was spelled.¹²¹ The driver told the officer that he was coming from San Diego, which made the officer suspicious because San Diego "or practically anywhere in Southern California is a major drug source for narcotics coming into our country."¹²² The officer returned to the patrol car to issue a warning and he requested that the dispatcher send the canine unit.¹²³ While waiting for the canine unit, the officer began asking the driver questions about his trip, who the man in the back was, and if he had any weapons in the cab.¹²⁴ The officer stated that as the stop went on the driver became more nervous, and he thought it was strange that the man in the back remained sleeping for so long.¹²⁵ The canine unit arrived about thirty-five minutes after they were called, and the dog alerted the officer that there was something in the left front of the topper.¹²⁶ The officer found a block of marijuana, and after a full search of the vehicle found approximately 347 pounds of marijuana.¹²⁷

tre and continued nervousness is entitled to somewhat more weight. *Id.* The court distinguished the nervousness in this case with the nervousness in *Wood*. *Id.* at 1268-69. In *Wood*, there appeared to be the more common situation; a citizen first exhibits signs of nervousness but then tends to "settle down" as the traffic stop continues. *Id.* at 1268-69. In *Williams*, the officer testified that the defendant's nervousness did not dissipate throughout the entire stop. *Id.* at 1269.

116. *State v. Welch*, 873 P.2d 601 (Wyo. 1994).

117. *Id.* at 602. See WYO. STAT. ANN. § 31-5-217(b) (LexisNexis 1989).

118. *Welch*, 873 P.2d at 602.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 603.

123. *Id.*

124. *Id.*

125. *Id.* The officer testified that when you make a traffic stop, usually the people who are sleeping wake up and look around. *Id.*

126. *Id.*

127. *Id.*

The defense asked for a motion to suppress the evidence, and the District Court of Albany County granted the motion, stating that the search was in violation of the Fourth Amendment to the United States Constitution and Article 1, Section 4 of the Wyoming Constitution.¹²⁸ The district court concluded that while the officer made a lawful stop, the detention after what was necessary to conduct the stop was unlawful because the officer lacked a reasonable articulable suspicion of criminal behavior.¹²⁹

The Wyoming Supreme Court agreed with the district court that the officer made a lawful stop, but the Wyoming Supreme Court believed that the officer had reasonable articulable suspicions to justify detaining the driver.¹³⁰ The court discussed that conduct which may seem innocent can form the basis for reasonable suspicion that criminal activity may be in progress.¹³¹ The court believed the officer was correct in taking all of the observations he had made and putting them together as a “totality of the circumstances” to form a reasonable articulable suspicion.¹³²

The Wyoming Supreme Court also concluded fifty minutes was not an unreasonable amount of time to detain the driver while waiting for the narcotics dog to arrive.¹³³ The court backed this decision by comparing it to *United States v. Hardy*, which stated that a fifty-minute detention was sufficiently short given the rural nature of the area.¹³⁴

PRINCIPAL CASE

The District Court of Laramie County originally held that all of the evidence found by Patrolman Bauer must be suppressed.¹³⁵ After the state filed for reconsideration, the court changed its ruling and denied the motion to suppress based on the theory that the evidence would have been inevitably discovered by the canine unit.¹³⁶ On appeal, the Wyoming Supreme Court was asked to determine whether the continued detention of Mr. Damato was justified by a reasonable articulable suspicion.¹³⁷

128. *Id.* at 603-04.

129. *Id.* at 604.

130. *Id.*

131. *Id.* (citing *United States v. Sokolow*, 490 U.S. 1 (1989); *United States v. Glover*, 957 F.2d 1004, 1013 (2d Cir. 1992)).

132. *Welch*, 873 P.2d at 604-05.

133. *Id.* at 605.

134. *Id.* (citing *United States v. Hardy*, 855 F.2d 753, 760 (11th Cir. 1998)). In *Hardy*, the court stated that a narcotics dog should not accompany every state trooper at all times. *Hardy*, 855 F.2d at 760.

135. *Damato v. State*, 64 P.3d 700, 704 (Wyo. 2003).

136. *Id.*

137. *Id.* at 702.

Majority

Justice Golden, writing for the majority, first addressed the fact that a traffic stop is a seizure, which makes it fall within the protection of the Fourth Amendment.¹³⁸ While a traffic stop is a seizure, it is more similar to an investigative detention than a custodial arrest and should be analyzed under the principles of *Terry v. Ohio*.¹³⁹

The court then evaluated the circumstances of Patrolman Bauer's stop under the two-part inquiry set out in *Terry*.¹⁴⁰ The court expressed concerns about Patrolman Bauer following Damato's vehicle "to get probable cause to stop it."¹⁴¹ The court also expressed concern that it believed that Damato was being stopped and released in a "tag team" fashion with the hopes that the next officer would be more successful in getting the canine unit in a reasonable time.¹⁴² The court also acknowledged that under *Whren* the subjective intentions of the officer do not affect an ordinary, probable cause Fourth Amendment analysis.¹⁴³ Because Damato was contesting the search under the United States Constitution, the court admitted that it had no choice but to follow the rule of law set forth in *Whren*.¹⁴⁴ Despite its reluctance to follow this rule, the court found that the first part of the inquiry was met since Patrolman Bauer witnessed Damato driving seventy-seven (77) in a seventy-five (75) mile-per-hour zone.¹⁴⁵

After finding the initial stop valid, the court analyzed the facts to determine whether the actions taken by Patrolman Bauer were reasonably related in scope to the circumstances that justified the stop.¹⁴⁶ Since Patrolman Bauer pulled Damato over for speeding, he was authorized to request a driver's license and vehicle registration, run a computer check, and issue a citation.¹⁴⁷ However, the driver must then be allowed to proceed without further delay unless the continued detention can be justified by a reasonable articulable suspicion.¹⁴⁸ The Wyoming Supreme Court agreed with the dis-

138. *Id.* at 704 (citing *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)).

139. *Damato*, 64 P.3d at 704 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

140. *Damato*, 64 P.3d at 705.

141. *Id.*

142. *Id.* at 705-06. The Wyoming Supreme Court's fears were similar to those of the Arkansas Supreme Court noted in *Sullivan*. *Id.* at 705. Part of the Arkansas Supreme Court's fears was that by validating arrests based on pretext stops, police officers would have "disturbing discretion to intrude on individuals' liberty and privacy." *Arkansas v. Sullivan*, 532 U.S. 769, 772-73 (2001).

143. *Damato*, 64 P.3d at 705 (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)).

144. *Id.*

145. *Id.* at 706. See WYO. STAT. ANN. § 31-5-1201 (LexisNexis 2001).

146. *Damato*, 64 P.3d at 706 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

147. *United States v. Wood*, 106 F.3d 942, 945-46 (10th Cir. 1997) (citing *United States v. Miller*, 84 F.3d 1244, 1250 (10th Cir. 1996)).

148. *Damato*, 64 P.3d at 706 (citing *Burgos-Seberos v. State*, 969 P.2d 1131, 1133 (Wyo. 1998)).

trict court's ruling that Patrolman Bauer did not adequately explain the necessity of requesting Damato to exit the vehicle to view the monitor, or why Damato needed to get into the patrol car to view the monitor when it was visible from outside of the vehicle.¹⁴⁹ Since Patrolman Bauer did not have any reason to believe Damato was armed and dangerous, the frisk violated Damato's Fourth Amendment rights.¹⁵⁰

The court then addressed the issue of whether Patrolman Bauer could detain Damato for longer than the time it takes to complete a routine traffic stop.¹⁵¹ Initially, the Wyoming Supreme Court noted that it has previously held that a detention must be justified by a reasonable articulable suspicion of criminal activity.¹⁵² The Wyoming Supreme Court then disagreed with the district court on the issue of whether a forty-four minute detention of Damato was too long for a routine traffic stop.¹⁵³ The court did not believe the factors Patrolman Bauer relied on were enough to establish a reasonable suspicion of criminal activity.¹⁵⁴

First, the court refused to take into consideration Damato denying consent to a search of the vehicle during the stop initiated by Patrolman Rettinger.¹⁵⁵ This refusal caused Patrolman Rettinger to suspect drugs, which Patrolman Bauer relied on in his stop.¹⁵⁶ The only remark the court made about this factor was that "[t]he failure to consent to a search cannot form any part of the basis for reasonable suspicion. Thus, [it] has no place in our determination."¹⁵⁷

Next, the court considered Damato's "extreme nervousness."¹⁵⁸ The court stated nervousness is generally of limited significance due to the fact that most citizens, whether innocent or guilty, exhibit signs of nervousness when confronted by law enforcement.¹⁵⁹ However, the court did acknowledge "extreme and continued nervousness" can be taken into consideration.¹⁶⁰ Officer Rettinger explained Damato's extreme nervousness as heavy sweating, his carotid artery pulsating hard and fast, and an inability to keep eye contact.¹⁶¹ The court believed that this nervousness was as consistent with innocence as with criminal activity because of the continued line of

149. *Damato*, 64 P.3d at 706.

150. *Id.* at 707.

151. *Id.*

152. *Id.*

153. *Id.* at 708.

154. *Id.* at 710.

155. *Id.* at 708.

156. *Id.*

157. *Id.* (quoting *United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997)).

158. *Damato*, 64 P.3d at 708.

159. *Id.*

160. *Id.* (quoting *United States v. Williams*, 271 F.3d 1262, 1268 (10th Cir. 2001)).

161. *Damato*, 64 P.3d at 709.

questioning by Patrolman Rettinger.¹⁶² The court did not believe Patrolman Rettinger treated this as a routine traffic stop, so there was no reason Damato should have reacted to it as a routine traffic stop.¹⁶³

Next, the court evaluated the importance of the discrepancies in Damato's answers to where he rented the car, and where the rental agreement stated he rented the car.¹⁶⁴ The court did not concede to the argument that the officers knew that both San Diego and Omaha were known drug hubs, because most large cities in the western states are known drug hubs.¹⁶⁵ The court stated that the discrepancy could have been evidence of criminal activity, but since Patrolman Rettinger did not believe Damato was in possession of a stolen car he should have asked for an explanation.¹⁶⁶ Since he did not ask for an explanation, Patrolman Rettinger based his suspicion upon inconsistency, which is prohibited.¹⁶⁷

The final factors the court looked at were the luggage in the back seat and the fast food wrappers on the floor.¹⁶⁸ The court did not take these factors into consideration because these factors can be used to describe "a very large category of presumably innocent travelers and any suspicion associated with these items is virtually nonexistent."¹⁶⁹ The court decided each of the factors was innocent under the totality of the circumstances, and neither of them was sufficient to give rise to a reasonable suspicion for Patrolman Rettinger.¹⁷⁰ Since Patrolman Bauer relied on these facts, and called the canine unit before he did an investigation of his own, the court ruled that Damato was detained without reasonable suspicion, in violation of the Fourth Amendment.¹⁷¹

Dissent

The dissent, written alone by Justice Hill, described the majority decision as an "inexplicable departure" from previous precedent at a state and national level.¹⁷² The dissent argued the majority "shrugs off" the issue of

162. *Id.* After Patrolman Rettinger ran Damato's license he returned to the vehicle and began asking if Damato had any large amounts of money or drugs in the car. *Id.* He also asked Damato if there was some reason why he could not search the vehicle. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 710.

167. *Id.*; *United States v. Wood*, 106 F.3d 942, 947 (10th Cir. 1997). *See also infra* notes 203-05 and accompanying text.

168. *Damato*, 64 P.3d at 710.

169. *Id.* (quoting *Wood*, 106 F.3d at 947 (citation omitted)).

170. *Damato*, 64 P.3d at 710.

171. *Id.* The court reversed the decision of the district court and allowed Damato to withdraw his plea of guilty. *Id.* *See* WYO. R. CRIM. P. 11(a)(2).

172. *Damato*, 64 P.3d at 710 (Hill, J., dissenting).

inevitable discovery too quickly.¹⁷³ The dissent stated that even if it decided the pat down and the opening of the trunk were in violation of the Fourth Amendment, it could accept the drugs would have been inevitably discovered by the canine unit due to the reasonableness of the detention.¹⁷⁴

The dissent also disagreed with the fact that Damato was “commanded to exit his car” by Patrolman Bauer, leading to the subsequent pat-down search.¹⁷⁵ The dissent argued Damato exited the car and proceeded with Patrolman Bauer voluntarily, and Patrolman Bauer patted Damato down as a safety precaution before allowing him into the patrol car.¹⁷⁶ The dissent then stated that Patrolman Bauer was “within the bounds of the Fourth Amendment in using the pat down to uncover weapons (of which there were two), as well as contraband (marijuana).”¹⁷⁷

Justice Hill also believed that the majority did not rule correctly concerning Patrolman Bauer’s articulable suspicion.¹⁷⁸ The dissent argued that when the information gathered by Patrolman Rettinger was combined with what Patrolman Bauer gathered, one must be forced to conclude that the patrolmen acted responsibly and within the limits set forth by the Fourth Amendment and the Wyoming Constitution in performing daily duties on the state’s highways.¹⁷⁹ The dissent was satisfied that the patrolmen observed an articulable suspicion based on the experience and training they had received as highway patrol officers.¹⁸⁰

ANALYSIS

When analyzing the issues present in *Damato v. State*, one will find more than bargained for. Not only does the decision analyze the obvious issues, but it also gets into some underlying issues on how the Wyoming Supreme Court thinks law enforcement may be overstepping its boundaries on the state’s highways. This analysis will first look at the Wyoming Supreme Court’s analysis of reasonable suspicion, and why it may be flawed. Next, the subject of frisk will be analyzed. The analysis of this issue will have an emphasis on the dissent’s line of reasoning, and how it misconstrues the exceptions to the scope of a frisk. Third, the question of inevitable discovery will be discussed. Finally, the analysis will ponder whether the Wyoming Supreme Court may be willing to depart from federal constitu-

173. *Id.* at 715 (Hill, J., dissenting).

174. *Id.* at 715-16 (Hill, J., dissenting).

175. *Id.* at 715 (Hill, J., dissenting).

176. *Id.* (Hill, J., dissenting).

177. *Id.* (Hill, J., dissenting).

178. *Id.* (Hill, J., dissenting).

179. *Id.* (Hill, J., dissenting).

180. *Id.* (Hill, J., dissenting).

tional law concerning pretext stops when analyzed under state constitutional law.

Reasonable Suspicion

The Wyoming Supreme Court was correct in holding Patrolman Bauer did not have reasonable suspicion of criminal activity, other than the traffic stop, to prolong the detention of Damato.¹⁸¹ When Patrolman Rettinger initially pulled Damato over, he noticed all of the circumstances that were used to form Patrolman Bauer's reasonable suspicion.¹⁸² While Patrolman Rettinger observed these circumstances, he believed he did not have reasonable suspicion to detain Damato, and he let him proceed on his way.¹⁸³ The only additional piece of evidence Patrolman Bauer had, and that the court acknowledged in its analysis, was the fact that Damato refused to have his vehicle searched by Patrolman Rettinger.¹⁸⁴

The majority was very brief when discussing Damato's refusal to have his vehicle searched.¹⁸⁵ The court simply ruled "[t]he failure to consent to a search cannot form any part of the basis for reasonable suspicion."¹⁸⁶ Based on this grounded rule of law, the court could not, and did not, use Damato's failure to consent when determining if there was reasonable suspicion present.¹⁸⁷

Without the "failure to consent" factor, the state's argument for reasonable suspicion becomes much weaker. Patrolman Rettinger let Damato proceed on his way because he felt he lacked reasonable suspicion to detain him longer.¹⁸⁸ With very similar circumstances, Patrolman Bauer believed

181. See *infra* notes 182-215 and accompanying text.

182. *Damato*, 64 P.3d at 702.

183. *Id.*

184. *Id.* at 708. The court states in the facts that there were a few extra factors Patrolman Bauer noticed that were not discussed by Patrolman Rettinger. *Id.* at 703. Patrolman Bauer noticed Damato appeared to have pink "dope" eyes, and had Visine on the console. *Id.* When the defendant retrieved his registration from the glove box, he mentioned something about them being in the trunk, but he then corrected himself. *Id.* While these factors could probably have been incorporated into the analysis, for some reason the majority decided not to discuss them in the opinion. See also Janet Koven Levit, *Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio*, 28 LOY. U. CHI. L.J. 145, 149 (1996). Levit points out that the United States Supreme Court has cautioned that when police conduct is based upon hunches "[it] erodes the protections of the Fourth Amendment." *Id.*

185. See *Damato*, 64 P.3d at 708.

186. *Id.* (quoting *United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997)).

187. *Damato*, 64 P.3d at 708. See also *United States v. White*, 890 F.2d 1413 (8th Cir. 1989) (refusal to consent could not be used to form basis for a *Terry* stop); *United States v. Wilson*, 953 F.2d 116 (4th Cir. 1991) (refusal to consent could not be used as partial basis for a *Terry* stop); *United States v. Carter*, 985 F.2d 1095 (D.C. Cir. 1993) (an officer can not use a withdrawal of consent during a consensual search as part of the basis for reasonable suspicion).

188. *Damato*, 64 P.3d at 702.

he did have reasonable suspicion to detain Damato.¹⁸⁹ While it is possible for two officers to evaluate things differently in the same situation, this difference can create confusion about what the officer was really taking into consideration. It is very likely that Patrolman Bauer relied heavily on Damato's failure to consent to a vehicle search when he was formulating reasonable suspicion.¹⁹⁰ Every person has a constitutional right to refuse a search, and it was unlawful for Patrolman Bauer to rely on Damato's refusal to contribute to his reasonable suspicion.¹⁹¹

The Wyoming Supreme Court also gave little weight to the fact Damato had his luggage in the back seat of his car and there were many fast food wrappers on the floor of the vehicle.¹⁹² The court was correct in concluding that these factors, and any suspicion associated with these factors, do not provide reasonable suspicion.¹⁹³ These items can be associated with a majority of innocent travelers.¹⁹⁴ Some people like to keep things, including luggage, in a readily available place while traveling. Or, maybe the luggage is too heavy to get into the trunk so the traveler leaves it in the back seat. Many people, especially along Interstate 80, are often traveling long distances and it is not uncommon for people to eat fast food and leave trash on the floor when on road trips.¹⁹⁵ Many law abiding Americans could be tar-

189. *Id.* at 703.

190. *Id.*

191. See *United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997); Rachel Karen Laser, Comment, *Unreasonable Suspicion: Relying on Refusals to Support Terry Stops*, 62 U. CHI. L. REV. 1161, 1177 (1995). Laser states there are four reasons why refusal to consent to a search should not contribute to reasonable suspicion:

First, the use of a refusal contaminates the voluntariness of a truly consensual search. Second, it effectively turns noncoercive police encounters into seizures. Third, it undermines the purpose of the Fourth Amendment by giving police officers a tool with considerable potential for abuse. Fourth, allowing the courts to find reasonable suspicion based on a failure to consent grants them too much discretion. Under the "totality of the circumstances" test, courts would be able to accord the refusal the weight needed to arrive at the outcome they desire. This is particularly dangerous because courts have already considerably narrowed the traditional protections of the Fourth Amendment.

Id.

192. *Damato*, 64 P.3d at 710.

193. See *Karnes v. Skrutski*, 62 F.3d 485, 496 (3rd Cir. 1995) (holding fast food wrappers in the car have become ubiquitous in modern interstate travel and do not serve to separate the suspicious from the innocent traveler); *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (holding that having no luggage, other than a shoulder bag, can describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures if the Court decided this would justify a foundation for a seizure); *United States v. Wood*, 106 F.3d 942, 947 (10th Cir. 1997) (holding the possession of open maps and trash from fast food meals describe a large category of presumably innocent travelers).

194. *Wood*, 106 F.3d at 942.

195. *Id.* at 946.

geted for criminal behavior if these were the factors law enforcement used to form reasonable suspicion.¹⁹⁶

Patrolman Rettinger and Patrolman Bauer stated Damato's departure and destination points were factors that contributed to their reasonable suspicion.¹⁹⁷ The Wyoming Supreme Court could have looked more closely at the fact that Damato did not provide the correct cities to which and from which he was traveling.¹⁹⁸ People usually know their departure and destination points. However, Patrolman Rettinger used this evidence in a different manner.¹⁹⁹ Patrolman Rettinger stated he was suspicious of Damato because San Diego and Omaha are both known drug hubs.²⁰⁰ The Wyoming Supreme Court was correct in concluding that this reasoning is a very weak factor in trying to formulate reasonable suspicion.²⁰¹ As the majority stated, "Few large cities in the western states are not known drug hubs."²⁰²

196. See *Reid*, 448 U.S. at 441; Mark J. Kadish, *The Drug Courier Profile: In Planes, Trains, And Automobiles; And Now In The Jury Box*, 46 AM. U. L. REV. 747, 748 (1997). Kadish explains in his article that police officers often rely on drug courier profiles to determine who to stop and question about whether they are carrying illegal drugs. *Id.* The author then explains that innocent citizens can easily match these profiles:

Citizens easily may match one of these profiles, because the profiles list general and often contradictory characteristics: traveling by plane, train, automobile, or bus; traveling alone, with friends, or with your children; being young, middle-aged, or "older"; having short or long hair; traveling to or from Fort Lauderdale, Miami, New York, Los Angeles, San Diego, Atlanta, Chicago, Detroit, Austin, Birmingham, Chattanooga, Charlotte, Dayton, Indianapolis, Kansas City, Newark, Tulsa, Dallas-Fort Worth, or any foreign country; traveling in a business suit, casual clothes, or disheveled clothing; paying cash for your ticket; traveling without checking your luggage, carrying only a garment bag, or checking several large suitcases; traveling and returning home in twenty-four to forty-eight hours; being nervous or anxious when traveling; glancing around the airport, bus, or train terminal; looking over your shoulder; making telephone calls immediately after arriving at your destination; and taking public transportation to your destination.

Id. The author continues, stating that many courts prohibit the use of profile evidence as evidence of guilt. *Id.* at 782. The courts have stated that using the drug courier profile will cover many innocent individuals and that "every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by the law enforcement officers in investigating criminal activity." *Id.*

197. *Damato*, 64 P.3d at 708.

198. *Wood*, 106 F.3d at 947. The Tenth Circuit stated that inconsistencies in information may give rise to a reasonable suspicion of criminal activity. *Id.*

199. *Damato*, 64 P.3d at 709.

200. *Id.*

201. *Id.* at 709.

202. *Id.* See also *United States v. Nicholson*, 144 F.3d 632, 638 (10th Cir. 1998) (identifying the entire West Coast as a drug source area); *United States v. Williams*, 271 F.3d 1262, 1270 (10th Cir. 2001) (police testimony has identified an extremely broad range of known drug source areas); Charles L. Becton, *The Drug Courier Profile: "All Seems Infected That*

The Wyoming Supreme Court was also correct in ruling the confusion over the departure and destination points would have weighed differently in its analysis if Patrolman Rettinger would have asked Damato for an explanation regarding the inconsistency.²⁰³ There are a number of reasons a person could misstate a city name, but unless the officer asks for an explanation the reason will go unknown.²⁰⁴ It is not fair for an officer to assume the worst-case scenario when the person may have a legitimate reason why the answer seemed inconsistent.²⁰⁵

Damato's extreme nervousness was the final factor the Wyoming Supreme Court had to evaluate in determining if there was reasonable suspicion in his behavior.²⁰⁶ This final factor could be considered the court's "scapegoat" of reasoning. When the "extreme nervousness" in this case is compared to the situation in *United States v. Williams*, there seems to be some conflict as to what constitutes "extreme nervousness."²⁰⁷ In *Williams*, the Tenth Circuit stated nervousness plays a small role in determining whether reasonable suspicion exists, but extreme and continued nervousness can be given more weight.²⁰⁸ According to the Tenth Circuit, if the nervousness continues throughout the entire traffic stop, and even appears to get worse, the officer is entitled to take that into consideration.²⁰⁹

In *Damato*, it did not appear from the facts that the defendant's nervousness ever dissipates into the "normal" nervousness exhibited during a traffic stop.²¹⁰ Patrolman Rettinger said he observed Damato sweating heavily, his carotid artery was pulsating hard and fast, and he was unable to keep eye contact.²¹¹ Based on the holding in *Williams*, the Wyoming Supreme Court could have put more weight into this factor than they did.²¹² However, the court did not seem to want to find Damato's behavior suspicious in any way, which may have caused them to diminish the possible im-

Th' Infected Spy, As All Looks Yellow To The Jaundic'd Eye," 65 N.C. L. REV. 417, 449 (1987) ("DEA agents have an 'ipse dixit' tendency to classify any city as a drug trafficking center.").

203. *Damato*, 64 P.3d at 710.

204. *United States v. Wood*, 106 F.3d 942, 947 (10th Cir. 1997). The Tenth Circuit stated that an officer could be suspicious of a person who misstated something but once the person corrected the mistake "suspicious inconsistencies virtually evaporated and any justification his error yielded for further investigation dissipated." *Id.*

205. *Id.*

206. *Damato*, 64 P.3d at 708.

207. *Id.* at 708-09; *Williams*, 271 F.3d at 1268-69.

208. *Williams*, 271 F.3d at 1268.

209. *Id.* The Tenth Circuit discussed that in *Wood* the officer and defendant had what appeared to be a more common traffic stop encounter. *Id.* When encountering law enforcement, a citizen usually shows signs of nervousness but eventually tends to settle down later in the traffic stop. *Id.* at 1268-69.

210. *See id.* at 1268.

211. *Damato*, 64 P.3d at 709.

212. *Williams*, 271 F.3d at 1268.

portance of his nervousness.²¹³ For example, the Wyoming Supreme Court concluded that the way in which Patrolman Rettinger continued to question Damato would make any citizen nervous.²¹⁴ Furthermore, the court noted that since Patrolman Rettinger did not treat the situation as a routine traffic stop, Damato should not have to react to it as if it were a routine traffic stop.²¹⁵

There is another problematic issue with the majority's evaluation of Damato's nervousness. In the beginning of the decision, the court indicated that the inquiry of reasonable suspicion is limited to Patrolman Bauer's stop, the second officer to pull Damato over.²¹⁶ The problem here is that the majority analyzed Damato's nervousness based on Patrolman Rettinger's stop.²¹⁷ This evaluation does not give an adequate representation whatsoever of what Patrolman Bauer actually witnessed. It is difficult to provide an appropriate analysis to a problem when the correct information is not being evaluated. Accordingly, the Wyoming Supreme Court should have analyzed Damato's nervousness as observed by Patrolman Bauer only.²¹⁸

Although the majority's analysis of Damato's nervousness is questionable, the dissent also failed to correctly analyze the issue. In the dissent, Justice Hill gives too much credit to the highway patrol officers. He stated,

When the information gathered by Rettinger is combined with the information gathered by Bauer, the "articulable suspicion" cases mandate a conclusion that the state troopers acted responsibly, within the limits erected by the Fourth Amendment (as well as the Wyoming Constitution), and in conformance with the duties they are required to carry out daily on our state's highways.²¹⁹

As discussed, there was no "combining" of information going on in this stop.²²⁰ The only additional information Patrolman Bauer had to form reasonable suspicion when stopping Damato was that Damato refused to have his vehicle searched by Patrolman Rettinger.²²¹ The dissent does not evaluate the factors individually because it "find[s] it unnecessary to further

213. See *Damato*, 64 P.3d at 707-10.

214. *Id.*

215. *Id.*

216. *Id.* at 705.

217. *Id.* at 708.

218. *Id.* at 705. See also *Becton*, *supra* note 202, at 452. The author concludes that using nervousness as a sign of guilt has the potential for abuse. *Id.* There are many psychological factors that could be taken into consideration such as innate personality syndrome or fatigue. *Id.*

219. *Damato*, 64 P.3d at 715 (Hill, J., dissenting).

220. *Id.* at 708.

221. *Id.*

characterize or attempt to parse what the state troopers related in their testimony.”²²² The dissent was satisfied with Rettinger and Bauer’s experience and training to determine articulable suspicion.²²³ Unfortunately, the articulable suspicion was based on factors that could be found in a majority of vehicles on United States highways.²²⁴

An issue that could have an impact on this analysis, which was not discussed by either the majority or dissent in *Damato* is the United States Supreme Court’s decision in *United States v. Arvizu*.²²⁵ *Arvizu* could leave the majority’s analysis in *Damato* suspect because of the way in which the Wyoming Supreme Court analyzed the factors.²²⁶ The majority did not address *Arvizu* in the opinion at all, and it evaluated the factors individually.²²⁷ While the majority does acknowledge the “totality of the circumstances” test, it did not really apply it in the way the United States Supreme Court set out in *Arvizu*.²²⁸ *Damato* is similar to *Arvizu* because both courts had to deal with many seemingly innocent factors, and determine if all of those innocent factors could be added up to make reasonable suspicion.²²⁹ The United States Supreme Court did find reasonable suspicion, while the Wyoming Supreme Court did not.²³⁰ This could be problematic for the state court due to the binding effect of the United States Supreme Court decision on issues of interpreting the United States Constitution. *Arvizu* was decided on January 15, 2002, which gave the Wyoming Supreme Court plenty of notice of the decision because *Damato* was not decided until January 29, 2003.²³¹ The Wyoming Supreme Court probably could have correctly applied the “totality of the circumstances” test, as outlined in *Arvizu*, and still have come out with the same result.²³²

It is also interesting that Justice Hill did not bring up *Arvizu* in the dissent.²³³ The rule in *Arvizu* was exactly what the dissent was looking for when it argued an officer should be able to use experience and training when

222. *Id.* at 715 (Hill, J., dissenting).

223. *Id.* (Hill, J., dissenting).

224. *Id.* at 710.

225. *United States v. Arvizu*, 534 U.S. 266 (2002).

226. For a discussion of how the factors should be analyzed, see *infra* note 228 and accompanying text.

227. *Damato*, 64 P.3d at 708-10. The United States Supreme Court held that the way the Ninth Circuit Court of Appeals evaluated and rejected the factors in isolation from each other is not looking at the “totality of the circumstances” as previous cases have defined the phrase. *Arvizu*, 534 U.S. at 274.

228. *Damato*, 64 P.3d at 710. The United States Supreme Court stated in *Arvizu* that “[a]lthough each of the series of acts was perhaps innocent in itself, we held that taken together, they warranted further investigation.” *Arvizu*, 534 U.S. at 274 (citations omitted).

229. *Damato*, 64 P.3d at 708-10; *Arvizu*, 534 U.S. at 275-76.

230. See *Arvizu*, 534 U.S. at 277-78; *Damato*, 64 P.3d at 710.

231. *Arvizu*, 534 U.S. at 266; *Damato*, 64 P.3d at 700.

232. See *supra* notes 182-215 and accompanying text.

233. See generally *Damato*, 64 P.3d at 710-16 (Hill, J., dissenting).

evaluating situations and determining reasonable suspicion.²³⁴ Using *Arvizu* to argue the ideas in the dissent would have been much stronger than the arguments that were actually used.²³⁵

While the Wyoming Supreme Court was correct in ruling there was no reasonable suspicion for Patrolman Bauer to detain Damato as long as he did, it is apparent the court was not even going to consider looking for reasonable suspicion in the available factors. The state made some valid arguments, which the court seemed to gloss over, and the rule of law in *Arvizu* should have been addressed. Perhaps the Wyoming Supreme Court had concerns with the way the Wyoming Highway Patrol was conducting itself on the state's interstates and highways and was not willing to allow the behavior to continue.

Frisk

Before analyzing the frisk, it is worth pointing out that there is some disagreement about the facts surrounding the frisk. Patrolman Bauer testified that Damato argued with him about how fast he was traveling, so Patrolman Bauer told Damato he could look at the radar.²³⁶ The district court found no such argument between Damato and Patrolman Bauer on the Highway Patrol videotape of the stop.²³⁷ This disagreement, while discussed in the court's opinion and dissent, is not of particular importance. Regardless of which set of facts are used, the Wyoming Supreme Court was correct in concluding the frisk Patrolman Bauer performed on Damato was illegal.

The court was correct in stating Patrolman Bauer could have removed Damato from his vehicle for the sake of safety, as stated in *Mimms*.²³⁸ The court was also correct in concluding that although Patrolman Bauer could legally ask Damato to exit the vehicle, there was no grounds for the frisk. *Terry v. Ohio* is very clear that an officer may only frisk an individual if the officer is justified in believing the person may be armed and dangerous.²³⁹ The majority stated Patrolman Bauer did not adequately explain why

234. See *Damato*, 64 P.3d at 715 (Hill, J., dissenting) ("I am satisfied that, based upon their experience and training, what they observed constituted 'articulable suspicion.'"); *Arvizu*, 534 U.S. at 273 ("This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" (quoting *United States v. Cortez*, 449 U.S. 411, 418)).

235. Compare *Damato*, 64 P.3d at 713-16, with *Arvizu*, 534 U.S. at 266.

236. *Damato*, 64 P.3d at 703.

237. *Id.* at 703 n.1. The Highway Patrol videotape does not show any sort of conversation at all regarding how fast Damato was traveling, or a request to see the radar. *Id.*

238. *Id.* at 706-07.

239. *Terry v. Ohio*, 392 U.S. 1, 24 (1968); 4 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.5(a) (3d ed. 1996) ("An officer must be allowed to conduct a protective search . . . when he is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous, that

he needed Damato to get into the patrol car and he did not have any reason to believe Damato was armed and dangerous.²⁴⁰ Patrolman Bauer was looking for any possible reason to frisk Damato to find drugs, so he used the excuse of Damato needing to get into the patrol car to view the radar. Because Patrolman Bauer did not have a justifiable belief that Damato was armed, he did not have a right to infringe on Damato's rights and frisk him.²⁴¹

While the majority's argument on this issue is very strong, the dissent offers a very different and flawed argument. First, the dissent argues that Damato exited the car voluntarily to view the radar, and as a safety precaution Patrolman Bauer conducted the pat-down search.²⁴² The dissent states this is consistent with the Highway Patrol videotape.²⁴³ The district court and the majority found this explanation to be inconsistent with the video.²⁴⁴

The dissent also argued, "Bauer was within the bounds of the Fourth Amendment in using the pat-down to uncover weapons (of which there were two), as well as contraband (marijuana)."²⁴⁵ When conducting a frisk it must first be determined whether the officer has a right to frisk the suspect.²⁴⁶ This right is dependent upon whether the officer justifiably believed the suspect was armed and dangerous.²⁴⁷ The next step is to evaluate whether the officer was within the scope of the frisk.²⁴⁸ This step allows the officer to pat-down the suspect for weapons, and weapons only.²⁴⁹ This rule

is, where he has reason to believe that he is dealing with an armed and dangerous individual.").

240. *Damato*, 64 P.3d at 706.

241. *Id.* at 706-07. See also LAFAVE, *supra* note 239, § 9.5(a). According to LaFave there are some instances where a right to frisk must follow directly from the right to stop the suspect. *Id.* Some lower courts have viewed the right to frisk as automatic when the suspect was stopped on suspicion of an offense where a weapon would be present in committing the offense, to escape the scene, or for protection against the victim or others. *Id.* These types of offenses include robbery, burglary, rape, assault with weapons, homicide, and dealing with large quantities of narcotics. *Id.* But for other offenses, more circumstances must be present in order for the frisk to be valid. *Id.* These types of offenses include trafficking in small quantities of narcotics, possession of marijuana, and lesser traffic offenses. *Id.*

242. *Damato*, 64 P.3d at 715 (Hill, J., dissenting).

243. *Id.* (Hill, J., dissenting).

244. *Id.* at 708.

245. *Id.* at 715 (Hill, J., dissenting). It is not clear why Justice Hill felt it was necessary to point out that Damato had two weapons in his pocket. *Id.* The issue here is whether a constitutionally protected right was infringed, not whether the officer can disregard constitutionally protected rights based on the number of weapons found in a frisk. There is no rule that states if you find more than one weapon in the frisk, the officer may disregard the Constitution. See generally *Terry v. Ohio*, 392 U.S. 1 (1968).

246. *Terry*, 392 U.S. at 20.

247. *Id.*

248. *Id.*

249. *Id.* at 30.

has been expanded by the “plain-feel” doctrine in limited situations.²⁵⁰ The United States Supreme Court has ruled that if an officer lawfully pats down a suspect’s outer clothing and feels an object whose contour or mass makes it immediately apparent that it is contraband, the warrantless seizure would be justified.²⁵¹

Based on the wording, the dissent argued that according to this exception Patrolman Bauer had a right to frisk for weapons *or* contraband.²⁵² This explanation of the rule grossly misconstrues the meaning. The plain-feel exception does not authorize officers to frisk for weapons or contraband.²⁵³ It simply makes a seizure of contraband legal if the officer felt the contraband and it was immediately apparent that it was in fact contraband; however, the initial frisk can only be justified as a search for weapons.²⁵⁴ In *Damato*, if the frisk had been lawful then the discovery of the marijuana would have been lawful, under the plain-feel doctrine, only if it was immediately apparent to Patrolman Bauer that it was marijuana in Damato’s pocket.²⁵⁵ According to the facts, Patrolman Bauer felt what he “believed” to be marijuana in a cellophane bag.²⁵⁶ “Believing” and something being “immediately apparent” are arguably two completely different standards.

The problem in this situation is that Patrolman Bauer did not take the contraband out of Damato’s pocket.²⁵⁷ Patrolman Bauer asked Damato what was in his pocket, and Damato pulled out the bag of marijuana.²⁵⁸ Damato pulled the bag out on his own, making it voluntary.²⁵⁹ As long as the frisk was legal, and no matter what Patrolman Bauer thought the object was, the confiscation would be legal because Damato voluntarily pulled the bag out of his pocket and gave it to Patrolman Bauer.²⁶⁰

Regardless of what Patrolman Bauer “believed” or who pulled the marijuana out of Damato’s pocket, the plain-feel exception is irrelevant in *Damato*. Since Patrolman Bauer had no reason to frisk Damato for weapons

250. *Minnesota v. Dickerson*, 508 U.S. 366, 375-76 (1993).

251. *Id.* at 376. See also 1 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 2.2(a) (3d ed. 1996). The “plain touch” analysis is appropriate only after the initial contact has been determined to be lawful. *Id.*

252. *Damato v. State*, 64 P.3d 700, 715 (Wyo. 2003).

253. *Dickerson*, 508 U.S. at 376.

254. *Id.*

255. *Id.*

256. *Damato*, 64 P.3d at 703.

257. *Id.*

258. *Id.*

259. *Id.*

260. 3 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 8.1 (3d ed. 1996). The author points out that if consent is given, in this case a voluntary removal of the drugs, evidence may be uncovered in situations where there is no other lawful means for the search. *Id.*

in the first place, the subsequent discovery of marijuana was not within the bounds of the Fourth Amendment.²⁶¹

Inevitable Discovery

The dissent states that the majority “shrugs off the concept of inevitable discovery far too hastily.”²⁶² Nevertheless, the majority concluded that since the state did not argue the inevitable discovery doctrine applied when no reasonable suspicion exists for calling a canine unit, it did not need to address the issue.²⁶³ The United States Court of Appeals for the Tenth Circuit held in *Wood* that unless the officer has reasonable suspicion criminal activity is occurring, the officer must allow the driver of a vehicle to proceed on his way if he can produce a valid driver’s license and prove that he is entitled to drive the vehicle.²⁶⁴ Since the majority did not find reasonable suspicion, and the state did not argue the inevitable discovery doctrine applied when no reasonable suspicion existed, the issue was unreviewable.²⁶⁵

Nevertheless, the dissent may have a valid point on this issue. The dissent stated, “[E]ven if I were convinced that Trooper Bauer’s actions (in patting down Damato and opening the trunk of the car) transgressed the Fourth Amendment, then I can readily accept that the sniffer dog would have inevitably discovered the damning evidence, and Damato would be in the same hot water.”²⁶⁶ The United States Supreme Court has ruled tainted evidence can be admitted if it inevitably would have been discovered by an independent source.²⁶⁷ In *Damato*, the marijuana in the trunk was discov-

261. *Damato*, 64 P.3d at 706-07.

262. *Id.* at 715 (Hill, J., dissenting).

263. *Id.* at 710.

264. *United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997).

265. *Damato*, 64 P.3d at 710, 715.

266. *Id.* at 715-16 (Hill, J., dissenting).

267. *Murray v. United States*, 487 U.S. 533, 539 (1988). See also Troy E. Golden, Note and Comment, *The Inevitable Discovery Doctrine Today: The Demands of the Fourth Amendment, Nix, and Murray, and the Disagreement Among the Federal Circuits*, 13 BYU J. PUB. L. 97, 98 (1998). In *Nix v. Williams*, the United States Supreme Court was asked to impose a good faith requirement of police officers before being able to invoke the inevitable discovery doctrine. *Id.* at 101; *Nix v. Williams*, 467 U.S. 431 (1984). The Court rejected the idea of a good faith requirement stating:

[A] police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered; and even if an officer were in such a position he will try to avoid engaging in any questionable practice . . . because in that situation there will be little to gain from any dubious ‘shortcuts’ to obtain the evidence.

Golden, *supra*, at 101. However, some people argue that police officers are often in a position to determine whether the evidence would be inevitably discovered because they know that inventory procedures are in place. *Id.* at 104. This gives no incentive to the police to obtain a warrant or wait for a lawful inventory to occur during normal processing. *Id.*

ered outside the bounds of the Fourth Amendment making the evidence inadmissible.²⁶⁸ However, a canine unit was on its way to the scene, and the dog would have discovered the marijuana in the trunk.²⁶⁹ In fact, once the dog arrived it did indicate that there were narcotics in the trunk of Damato's vehicle.²⁷⁰ The narcotics dog would have fulfilled the requirement for an independent source discovering the evidence.²⁷¹ Based on the prior case law, the state could have had a strong argument on appeal in regards to the inevitable discovery doctrine.²⁷² It is not clear why they did not argue this, but it could be argued that the outcome of *Damato* would have been dramatically different if it had been argued.²⁷³

Pretext Stops

The *Damato* majority seemed to be concerned with the issue of pretext stops and the "tag-team" fashion used to detain the defendant.²⁷⁴ The majority spent a considerable amount of time on the issue by discussing *Arkansas v. Sullivan*.²⁷⁵ The Wyoming Supreme Court expressed having the same fears as the Arkansas Supreme Court.²⁷⁶ The courts feared the officers would look for any traffic violation as a pretext to conduct a narcotics investigation.²⁷⁷ Traveling seventy-seven (77) in a seventy-five (75) mile-per-hour zone was not seemingly something for which an officer would pull a driver over, and Patrolman Bauer was aware that Patrolman Rettinger suspected this particular driver of drug trafficking.²⁷⁸ Patrolman Bauer stopping

268. *Damato*, 64 P.3d at 711.

269. *Id.* at 703. See also James A. Adams, *The Supreme Court's Improbable Justifications For Restriction Of Citizens Fourth Amendment Privacy Expectations in Automobiles*, 47 DRAKE L. REV. 833, 846 (1999). Canine sniffs are not considered searches and do not require a warrant because the smell is emanating for the vehicle into a domain where any member of the public has access to it. *Id.* If the officers and dogs are in legally permissible area then the findings are permissible. *Id.*

270. *Damato*, 64 P.3d at 715 (Hill, J., dissenting).

271. 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4(a) (3d ed. 1996). Circumstances justifying the use of the inevitable discovery rule are most likely to be present if investigative procedures were already in progress before the evidence was discovered illegally. *Id.* In *Damato*, Patrolman Bauer had called for the canine unit before he had approached Damato's vehicle. *Damato*, 64 P.3d at 703. The canine unit was already on its way when Patrolman Bauer found the marijuana in the trunk. *Id.* at 714 (Hill, J., dissenting).

272. *Murray*, 487 U.S. at 539.

273. *Id.*; *Damato*, 64 P.3d at 715 (Hill, J., dissenting).

274. *Damato*, 64 P.3d at 705-06.

275. *Id.* at 705 (citing *Arkansas v. Sullivan*, 532 U.S. 769 (2001)).

276. *Damato*, 64 P.3d at 705.

277. *Id.*

278. Levit, *supra* note 184, at 157-58. This issue falls into the two competing standards the United States Supreme Court has dealt with when evaluating pretext stops. *Id.* The first standard is called the "would" approach. *Id.* This approach asks whether a reasonable officer would have made the stop absent ulterior motives. *Id.* In the case of *Damato*, it is not likely an officer would have pulled a vehicle over for traveling two miles per hour over the speed limit. The second approach is called the "could" approach. *Id.* This approach asks only

Damato was a textbook example of a pretext stop.²⁷⁹ The court explicitly stated, “[B]ecause Damato does not contend that the Wyoming Constitution provides greater protection in this area, we must follow the federal constitutional decisions in *Whren* and *Sullivan*.”²⁸⁰ The Wyoming Supreme Court continued this line of reasoning by addressing the “tag-team” fashion in which the Wyoming Highway Patrol pursued Damato.²⁸¹ Once again, the court stressed it was limited to an analysis of federal constitutional law.²⁸² When analyzing federal constitutional law, the court was forced to find *Whren* the controlling precedent because Patrolman Bauer observed Damato committing a traffic violation.²⁸³

The lengthy discussion on this established doctrine makes it reasonable for one to believe that if Damato had challenged the search and seizure under the Wyoming Constitution, the Wyoming Supreme Court may have been prepared to find the pretext stop and the “tag-teaming” maneuver illegal.²⁸⁴ The Wyoming Supreme Court has previously acknowledged that even though the federal law establishes minimum requirements for individual protection, it does not mandate any maximum criteria as to the degree of protection afforded an individual under state law.²⁸⁵ Because of this criteria the federal interpretations of the United States Constitution are merely persuasive when applied to a state constitution.²⁸⁶ The Wyoming Supreme Court attempts to adhere as closely to the federal interpretation as possible unless there is some contrary direction by the state legislature.²⁸⁷ Here, the

whether a reasonable officer could have legally made the stop. *Id.* This “could” standard is what the United States Supreme Court has adopted through its decision in *Whren v. United States*. *Id.* at 165. In *Damato*, the Wyoming Supreme Court did discuss that Damato was committing a traffic violation and Patrolman Bauer had the authority to pull him over. *Damato*, 64 P.3d at 706. The presumption that highway patrol officers do not normally pull motorists over for going two miles over the speed limit is enforced by the fact that Damato was traveling seven miles over the speed limit when Patrolman Rettinger pulled him over, and was not even issued a speeding citation. *Id.* at 702.

279. *See id.* at 703. Patrolman Bauer stated that he was going to pursue the vehicle to “get probable cause to stop him.” *Id.* *See also* Levit, *supra* note 184, at 146.

280. *Damato*, 64 P.3d at 705.

281. *Id.* at 705-06.

282. *Id.* at 706.

283. *Id.*

284. Levit, *supra* note 184, at 167, 172. The Wyoming Supreme Court may have some concerns with the “could” standard. In her article, Ms. Levit expresses the common concerns. *Id.* One concern is the “could” standard sanctions pretextual traffic stops, ignores reasonable suspicion, and undermines the purposes of the Fourth Amendment. *Id.* at 167. Put simply, the “could” standard eliminates the requirement of reasonable suspicion in traffic stops. *Id.*

285. *Saldana v. State*, 846 P.2d 604, 611 (Wyo. 1993). In *Saldana*, the court states that “[u]nder the Tenth Amendment to the United States Constitution, the freedom of the state to provide greater expectations of privacy for its citizens than those provided under the federal constitution is guaranteed if, in either its legislative or judicial discretion, it deems it necessary or appropriate to do so.” *Id.* at 612.

286. *Id.*

287. *Id.*

majority was obviously troubled by the liberties Patrolman Rettinger and Patrolman Bauer took in their attempts to detain Damato, and it appears the court may be ready to take the necessary steps to limit this type of intrusion on individuals' Fourth Amendment rights on the state's interstates and highways if a challenge is brought under the Wyoming Constitution.

CONCLUSION

In *Damato v. State*, the Wyoming Supreme Court correctly suppressed the evidence found by the State of Wyoming and used against Nicholas Damato. Patrolman Bauer did not have reasonable suspicion to detain Damato. Nevertheless, while the decision may be correct, its analysis could be considered suspect due to the recent United States Supreme Court decision in *United States v. Arvizu*. In *Arvizu*, the United States Supreme Court explicitly held that factors are not to be analyzed individually but only under the "totality of the circumstances." The Wyoming Supreme Court claimed it was looking at the facts under a "totality of the circumstances" test, but it appears the court neglected to use that standard and evaluated all of the factors individually. The court individually excluded the fast food wrappers, the luggage in the back seat, Damato's departure and destination points, and Damato's nervousness. Because each of these factors were excluded individually it is hard to say they were considered in the "totality of the circumstances." The Wyoming Supreme Court was also correct in ruling that the frisk of Damato was illegal. There was no compelling reason shown by Patrolman Bauer to make a frisk reasonable under the circumstances. Because the contraband was found as a result of the frisk, the drugs found on Damato's person should have been excluded. The dissent bought up a good argument regarding the inevitable discovery doctrine. The canine sniff would have discovered the drugs in the trunk regardless of the previous actions taken by Patrolman Bauer. However, the majority was correct in not reviewing this argument, as the state decided not to argue it as a possible way of admitting the evidence. From the decision, it appears the Wyoming Supreme Court may be willing to divert from federal search and seizure precedent when evaluating issues under the Wyoming Constitution. It is possible the court would rule pretext stops and "tag team" efforts by the highway patrol to be unlawful.

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