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## State v. Nelson: Determining "Reasonable Suspicion" for Investigatory Stops in Maine

Sandra Denison Shannon  
*University of Maine School of Law*

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STATE v. NELSON: DETERMINING  
“REASONABLE SUSPICION” FOR  
INVESTIGATORY STOPS IN MAINE

I. INTRODUCTION ..... 226

II. THE “REASONABLE SUSPICION” STANDARD FOR THE  
CONSTITUTIONALITY OF AN INVESTIGATORY STOP ..... 227

    A. *The Terry-Stop* ..... 228

    B. *The United States Supreme Court Doctrine of  
Totality of the Circumstances* ..... 230

    C. *The Terry-Stop in Maine* ..... 231

    D. *Maine’s Subjective Requirement for Reasonable  
Suspicion* ..... 234

III. *STATE V. NELSON*..... 235

    A. *The Nelson Decision*..... 235

    B. *Maine’s Dual Subjective and Objective Standards for  
Reasonable Suspicion Are Problematic in Nelson*.... 237

    C. *Misuse of Officer’s Testimony is a Source of  
Confusion* ..... 237

IV. INCONSISTENT MAINE DECISIONS STRAY FROM THE  
CONSTITUTIONAL STANDARD FOR REASONABLE  
SUSPICION ..... 240

    A. *The Nelson Decision Illustrates the Law Court’s  
Inconsistent Application of the Totality of  
Circumstances Doctrine* ..... 241

    B. *Maine Cases that Give Insufficient Weight to Totality  
of Circumstances Stray from the Cortez Standard*.... 243

V. CONCLUSION..... 247

## STATE v. NELSON: DETERMINING "REASONABLE SUSPICION" FOR INVESTIGATORY STOPS IN MAINE

### I. INTRODUCTION

In 1994 the Maine Supreme Judicial Court, sitting as the Law Court, held in *State v. Nelson*<sup>1</sup> that a police officer's observation of motorist Theodore Nelson consuming a single can of beer over a one-hour time period did not, by itself, give rise to a reasonable suspicion<sup>2</sup> that Nelson thereafter illegally operated the vehicle under the influence of alcohol. The officer had watched Nelson, who was parked in the parking lot of a housing complex from which several complaints of theft had been registered, consume one sixteen-ounce beer during the early morning of Christmas Eve.<sup>3</sup> The officer observed no indicia of physical impairment nor anything unusual in Nelson's appearance nor any signs of erratic driving.<sup>4</sup> The majority focused on the shortcomings of the officer's observations. The dissent, however, focused on a combination of objective facts. This judicial difference of opinion in *State v. Nelson*, concerning which criteria should characterize reasonable suspicion, illustrates the Law Court's struggle to maintain a consistent approach in resolving the Fourth Amendment issue of unreasonable search and seizure in investigatory stops.

This Note analyzes the Law Court's decision in *Nelson*. It begins in Part II by tracking the development of the "reasonable suspicion" standard for constitutional investigatory stops. As established by United States Supreme Court decision, the standard for a constitutional stop is objective and incorporates the totality of the circumstances for determining reasonable suspicion. Part II goes on to describe Maine's current approach to determining the constitutionality of investigatory stops. It focuses on the distinction between the Supreme Court's objective standard and Maine's requirement that stops meet both objective *and* subjective standards of reasonable suspicion. In Part III this Note demonstrates the potential for the

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1. 638 A.2d 720 (Me. 1994).

2. The concept of reasonable suspicion as grounds for a police stop was first raised in 1940 by the promulgation of the Uniform Arrest Act, section 2(1) of which states that "[a] peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed, or is about to commit a crime . . . ." Richard M. Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 393 n.4 (1963) (citing Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 343-47 (1942)).

3. *Id.* at 723 (Collins, J., dissenting). The dissent drew certain inferences by viewing these established facts in combination with the common practice in American society of having a second beer.

4. *State v. Nelson*, 638 A.2d at 722.

Law Court to confuse its subjective and objective tests for suspicion and explains how *Nelson* illustrates this confusion of standards. Part IV compares Maine's approach to determining reasonable suspicion with that of the United States Supreme Court and points out how the Law Court's analysis in *Nelson* strays from both prior Law Court decisions and United States Supreme Court doctrine. In its analysis, this Note compares *Nelson* to several other Maine opinions and recommends that, if the Maine Law Court is to continue to adhere to both objective and subjective standards in its determination of reasonable suspicion, it must take care to apply the "totality of the circumstances" doctrine appropriately.

## II. THE "REASONABLE SUSPICION" STANDARD FOR THE CONSTITUTIONALITY OF AN INVESTIGATORY STOP

The Fourth Amendment to the United States Constitution guarantees that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."<sup>5</sup> Nevertheless, "stop and frisk," which consists of an officer's stopping, questioning, and even perhaps searching a suspicious person, was standard practice for generations without constitutional challenge. In 1914, however, the United States Supreme Court in *Weeks v. United States*<sup>6</sup> provided the first check on this police procedure. In *Weeks* the Court excluded from a federal prosecution evidence that had been seized in a "stop and frisk" search the Court held to be unconstitutional under the Fourth Amendment.<sup>7</sup> Thirty-five years later, in 1949, the Court in *Wolf v. Colorado*<sup>8</sup> addressed under the Due Process Clause of the

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5. U.S. CONST. amend. IV. The Supreme Court has stated that:

The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law enforcement agents, in order " 'to safeguard the privacy and security of individuals against arbitrary invasions . . . .' " Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard" . . . .

*Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (citations omitted).

6. 232 U.S. 383 (1914).

7. *Id.* at 391-92. The Court specifically stated:

The Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.

8. 338 U.S. 25 (1949).

Fourteenth Amendment the issue of limitations on investigatory stops in state prosecutions. The Court stated that a state sanction of police incursion into privacy "would run counter to the guaranty of the Fourth Amendment."<sup>9</sup> Nevertheless, the Court decided that the *Weeks* exclusionary rule, applicable as against the federal government, would *not* be imposed upon the states as a requirement of due process.<sup>10</sup> In 1961, however, in *Mapp v. Ohio*,<sup>11</sup> the Court reversed its decision in *Wolf*. *Mapp* established that all evidence obtained in violation of the Fourth Amendment standard for reasonable searches and seizures is inadmissible in a state court.<sup>12</sup>

### A. *The Terry-Stop*

Under the *Mapp* requirement that evidence gathered in an unconstitutional police stop must be excluded from state prosecution, the Supreme Court in 1968 decided *Terry v. Ohio*.<sup>13</sup> In *Terry* the Court addressed the narrow question of whether it is constitutional for a police officer to seize a person and subject him to a limited search for weapons where the officer has no probable cause for an arrest.<sup>14</sup> In balancing the constitutional protection of the right to privacy with

9. *Id.* at 28.

10. *Id.* at 27-29. The Court stated that "the contrariety of views of the States [on the adoption of the exclusionary rule of *Weeks* was] particularly impressive" and that it could not "brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy . . . by overriding the [States'] relevant rules of evidence." *Id.* at 29-32.

11. 367 U.S. 643 (1961).

12. *Id.* In reviewing *Wolf's* holding that all evidence obtained by an unconstitutional search and seizure was inadmissible in a federal court regardless of its source, the *Mapp* Court stated that it was "led by [*Wolf*] to close the only courtroom door remaining open to evidence secured by official lawlessness . . ." *Id.* at 654-55.

13. 392 U.S. 1 (1968). In *Terry v. Ohio*, the police officer seized a revolver from the defendant after observing the defendant and one other man each pace back and forth in front of a store window, peer into the window, and then confer on the street corner. "The two men repeated this ritual alternately between five and six times apiece—in all roughly a dozen trips," leading the officer to conclude they were contemplating a robbery. *Id.* at 6. The officer stopped and frisked the defendant, thereby securing the revolver that the prosecution introduced into evidence at the defendant's trial. *Id.* at 6-7.

14. Professor LaFave, in his treatise on search and seizure, discusses the *probable cause* standard for arrest by stating, "For arrest, the traditional formula is that the officer must have reasonable grounds to believe that an offense has been committed and that the person to be arrested has committed it . . . it must appear more probable than not that criminal conduct has occurred." WAYNE R. LAFAVE, 3 SEARCH AND SEIZURE § 9.3(b), at 431-32 (2d. ed. 1987). Professor LaFave explains the *reasonable suspicion* standard for investigatory stops as follows:

[F]or a brief stop, it is said to suffice that the officer "reasonably suspects" criminal activity, or, as was put in *Terry*, that the officer reasonably believes "that criminal activity may be afoot;" . . . [I]t will suffice that there exists a substantial possibility that criminal conduct has occurred, is occurring, or is about to occur.

*Id.* (citation omitted).

the needs of law enforcement, the *Terry* Court considered the nature and extent of the governmental interests involved. The Court noted that the government's interest in crime prevention and detection "underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest."<sup>15</sup> Validating an investigatory stop under just such circumstances in *Terry*, the Court held:

[I]n 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. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?<sup>16</sup>

To satisfy the Constitution an officer making a stop thus must be able to point to "specific and articulable facts" supporting a "reasonable suspicion" that criminal activity may be afoot. This reasonable suspicion standard for Constitutional investigatory stops requires less justification than does the probable cause standard for arrest.<sup>17</sup> Several Circuit Courts of Appeal opinions hold that, in order for an officer to meet the reasonable suspicion requirement, the officer is not required to rule out the possibility of innocent behavior before making a stop.<sup>18</sup> In fact, an officer may be neglecting her duties by *not* making the stop.<sup>19</sup> Specifically, the Ninth Circuit has noted:

The test [for a constitutional stop] is founded suspicion . . . . Even if it was equally probable that the vehicle or its occupants were innocent of any wrongdoing, police officers must

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15. *Terry v. Ohio*, 392 U.S. at 22.

16. *Id.* at 21 (citations omitted).

17. *LaFAVE*, *supra* note 14.

18. See *United States v. Trullo*, 809 F.2d 108 (1st Cir. 1987) (reasonable suspicion though circumstances capable of innocent interpretation); *United States v. Ogden*, 703 F.2d 629, 633 (1st Cir. 1983) (holding there were grounds for a stop, the court declared, "[U]nder these facts, the officers would have been derelict in their duty if they had not stopped the trucks for investigation.").

19. *United States v. Ogden*, 703 F.2d at 633.

be permitted to act *before* their reasonable belief is verified by escape or fruition of the harm it was their duty to prevent.<sup>20</sup>

*B. The United States Supreme Court Doctrine of  
Totality of the Circumstances*

Although the *Terry* Court undeniably acknowledged the propriety of an investigatory stop based on something less than the "probable cause" necessary for arrests, no single shorthand formula adequately expresses the constitutional grounds for a *Terry* stop.<sup>21</sup> It has been clearly established, however, that the Supreme Court's objective test for reasonable suspicion requires a view of all the circumstances surrounding the stop. As the Court in *United States v. Cortez*<sup>22</sup> noted:

Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.<sup>23</sup>

The Supreme Court discussed the doctrine of totality of the circumstances at length in *Cortez*,<sup>24</sup> noting:

[T]he assessment [of the whole picture] must be based upon all of the circumstances. The analysis proceeds with various objective observations . . . and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.<sup>25</sup>

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20. *United States v. Holland*, 510 F.2d 453, 455 (9th Cir. 1975) (citation omitted).

21. *LAFAVE*, *supra* note 14, § 9.3(a).

22. 449 U.S. 411 (1981) (holding that objective facts and circumstantial evidence justified an investigative stop by Border Patrol agents of a vehicle subsequently found to contain several illegal aliens).

23. *Id.* at 417-18 (citations omitted). In a decision prior to the Supreme Court's elaboration on the doctrine of totality of the circumstances in *United States v. Cortez*, Justice Powell noted: "*Terry v. Ohio* establishes that a reasonable investigatory stop does not offend the Fourth Amendment. The reasonableness of a stop turns on the facts and circumstances of each case." *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring). Similarly, the Court has stated that the Fourth Amendment requires some minimal level of objective justification in making the stop, in view of the totality of the circumstances confronting the officer. *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

24. *United States v. Cortez*, 449 U.S. at 418.

25. *Id.* at 418.

The *Cortez* Court went on to say that "the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."<sup>26</sup> In other words, in addition to the *officer's* consideration of the surrounding circumstances in forming reasonable suspicion, the *court* must view the totality of the circumstances in its review of the officer's actions, and it is not acceptable for the court to determine the reasonableness of an officer's suspicion based on how the court would react in similar circumstances. Rather, in deciding the objective reasonableness of the officer's suspicion, the court must consider all the circumstances, taking into consideration the inferences and deductions likely to be made by a *trained officer*.

### C. *The Terry-Stop in Maine*

Although the Fourth Amendment technically has no direct impact on the states,<sup>27</sup> the Maine Law Court typically cites to the Fourth Amendment of the United States Constitution as authority for its decisions in the area of investigatory stops.<sup>28</sup> In doing so the Law Court relies upon the Supreme Court's 1949 decision in *Wolf v. Col-*

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26. *Id.*

27. The Fourth Amendment has been held to limit only the federal government, not the states; however, the adoption of the Fourteenth Amendment in 1868 began a process that ultimately would give citizens rights as against the states effectively the same as those they enjoy against the federal government. Historian Leonard W. Levy noted:

[Historically] there was a double standard in the United States. The first eight amendments enjoined the national government to respect enumerated procedures and to refrain from enacting certain laws, but left the states free to do as they wished in relation to the same matters. . . . The point of [Justice] Black's [dissent in *Adamson v. California*] was that the first section of the Fourteenth Amendment transformed that situation by embracing the Bill of Rights, thereby nationalizing its operation: what the United States could not do, the individual states could not do.

LEONARD W. LEVY, JUDGMENTS—ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 67-68 (1972) (citing *Adamson v. California*, 332 U.S. 46 (1947)). Justice Black's dissenting position in *Adamson*, advocating total incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, was never accepted by the Supreme Court; by the 1960s, however, the Court had begun to rely on "selective incorporation." *Id.* at 76.

Under selective incorporation, a right held to be fundamental is incorporated into due process as the full right guaranteed by the matching provision in the Bill of Rights. The guarantee of a fundamental right as against the states, under Fourteenth Amendment due process, therefore becomes coextensive with the guarantees of the Bill of Rights against the federal government. In *Mapp v. Ohio*, 367 U.S. 643, 649-55 (1961), the Supreme Court held that freedom from unreasonable search and seizure is a fundamental right, thereby under the doctrine of selective incorporation making it applicable against the states under the same legal standards as those imposed on the federal government by the Fourth Amendment.

28. See, e.g., *State v. Fitzgerald*, 620 A.2d 874, 875 (Me. 1993); *State v. Hatch*, 614 A.2d 1299, 1301 (Me. 1992); *State v. Burnham*, 610 A.2d 733, 734 (Me. 1992).



*orado*, in which the Court noted, "[T]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."<sup>29</sup>

The Maine Law Court first applied the United States Supreme Court's objective *Terry* standard for reasonable suspicion in police stop cases in 1976 in *State v. Babcock*.<sup>30</sup> In *Babcock* a police officer made an investigatory stop of the defendant's automobile based on the description of a crime-implicated vehicle, the automobile's location, and the defendant's suspicious behavior. The defendant appealed the trial court's denial of his motion to suppress evidence obtained in the stop, and the Law Court held that "[t]here are many situations in which an automobile may be stopped by police officers even though 'probable cause,' either for arrest or for a search, does not exist."<sup>31</sup> Of course, in every event the stop must be reasonable."<sup>32</sup> After noting that the *Terry* holding "has now been extended to include investigatory stops of automobiles,"<sup>33</sup> the Law Court discussed the underlying rationale of *Terry*:

*Terry* applied a balancing test to justify the officer's conduct, weighing the harm of the invasion of individual privacy against the government's interest in effective crime prevention and detection. The officer's conduct in that case, the Court said, was based on something more than "inarticulate hunches" and "good faith," and outweighed the annoyance and humiliation resulting from the "stop and frisk."<sup>34</sup>

For a period of time after *Babcock* the Law Court continued to rely on the objective *Terry* "reasonableness" standard in addressing

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29. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). See *supra* text accompanying note 8.

30. 361 A.2d 911 (Me. 1976).

31. Meeting the reasonable suspicion standard for investigatory stops, as defined by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), and adopted by the Maine Law Court in *State v. Babcock*, 361 A.2d 911 (Me. 1976), requires a lesser measure of evidence than does meeting the traditional probable cause standard for arrest. Intrusion into privacy by means of an investigatory stop, as opposed to an arrest, is justified if an officer has suspicion of "criminal conduct which has taken place, is occurring, or *imminently will occur*." *State v. Fitzgerald*, 620 A.2d 874, 875 (Me. 1993). The observed conduct giving rise to an officer's suspicion that criminal activity is imminent may be entirely lawful in itself. *Id.* at 875 (citing *State v. Griffin*, 459 A.2d 1086, 1088 (Me. 1983)). In light of this assertion by the Law Court in *Fitzgerald*, the *Nelson* majority's observation that "[t]he consumption of liquor in a motor vehicle by an adult while not operating the vehicle on a public way is neither a crime nor a civil violation" is irrelevant. *State v. Nelson*, 638 A.2d 720, 722 (Me. 1994).

32. *State v. Babcock*, 361 A.2d at 914.

33. *Id.* (citing *United States v. Collins*, 532 F.2d 79 (8th Cir. 1976)).

34. *Id.* at 914 (citation omitted).

the constitutionality of police stops. In *State v. Darling*<sup>35</sup> the court applied the objective test of *Terry* and held:

The officer had specific and "articulable" facts giving rise to a reasonable suspicion that defendant was engaged in criminal activity . . . . In such circumstances, the police officers had reasonable grounds to suspect that defendant might have been engaged in illegal night hunting . . . and their initial intrusion was not constitutionally invalid.<sup>36</sup>

The Law Court's adherence to the objective *Terry* standard for reasonable suspicion was reiterated in *State v. Griffin*,<sup>37</sup> a case in which the officer conducted an investigatory stop based on the defendant's furtive behavior.<sup>38</sup> The *Griffin* court held:

[T]he standard to be used to assess the constitutional sufficiency of the factual basis underlying a *Terry*-type temporary stop or detention of an individual must be an objective one: would the facts available to the officer at the time of the stop or detention, when viewed in their totality, "warrant a man of reasonable caution in the belief" that the existing specific and articulable facts do give rise to a reasonable suspicion of criminal activity and that an investigatory temporary stop or detention of the individual is appropriate to clear up the suspicion?<sup>39</sup>

Although similar to the Supreme Court's language in *Terry v. Ohio*,<sup>40</sup> the Law Court's language in *Griffin* included the phrase "when viewed in their totality," which mirrored the standard the Supreme Court established in *United States v. Cortez*.<sup>41</sup> In this reference to the totality of the circumstances, the Law Court in *Griffin* did not refer specifically to the language of *Cortez*. Nevertheless, the totality of the circumstances doctrine thereafter became an element in the determination of objective reasonable suspicion in investigatory stops in Maine.<sup>42</sup>

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35. 393 A.2d 530 (Me. 1978). In *State v. Darling*, the defendant was indicted on two counts of criminal mischief with a firearm. *Id.* at 531. Prior to stopping the defendant, the investigating officer was aware of a warden's earlier report of sounds of shots in the area where the defendant was found. The officer discovered the defendant's car with its headlights on by the side of a country road and subsequently made an investigatory stop of the defendant.

36. *Id.* at 532 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

37. 459 A.2d 1086 (Me. 1983).

38. In *Griffin* the defendant slid from the driver's seat to the rear seat of his parked car immediately upon realizing he was being observed by a law enforcement officer. *Id.* at 1088.

39. *Id.* at 1089 (citing *Terry v. Ohio*, 392 U.S. at 21-22).

40. 392 U.S. 1 (1968).

41. 449 U.S. 411, 418 (1981).

42. The Law Court first applied the totality of the circumstances standard of *United States v. Cortez* in *State v. McKenzie*, 440 A.2d 1072, 1076 (Me. 1982). Later, in *State v. Fillion*, 474 A.2d 187, 189 (Me. 1984), the Law Court noted that the standard cited by the *Griffin* court "requires that based upon the 'totality of the circum-

#### D. Maine's Subjective Requirement for Reasonable Suspicion

Although the Law Court after *Griffin* continued to follow the Supreme Court in investigatory stop cases by requiring evaluation of the objective criteria of reasonable suspicion under the totality of the circumstances,<sup>43</sup> the Law Court's holding in *State v. Chapman*<sup>44</sup> added a second test, a subjective test, to the standard for reasonable suspicion. In *Chapman*, the officer parked immediately behind the defendant's truck, blocking its movement, for no reason other than to glance into the truck bed. The defendant had not committed any motor vehicle infractions of which the officer was aware, and the officer admitted that he "had no reason to stop it. It just struck [his] suspicion why it was parked there."<sup>45</sup>

The trial court in *Chapman* found that these circumstances could raise "the question in a reasonable man's mind or a reasonable officer's mind that there may have been a break, under all the circumstances, into those stores . . . ."<sup>46</sup> The Law Court ruled on appeal, however, that without a finding that the officer *himself* actually had held such a suspicion, the ruling that the stop was objectively reasonable was irrelevant.<sup>47</sup> *Chapman* held that "the court clearly must find that the police *actually had* such a suspicion at the time of the investigatory stop. A finding that a *reasonable person could have had* a reasonable suspicion on the given facts is not *alone* sufficient . . . ."<sup>48</sup>

The Law Court's decision in *Chapman* established that, in Maine, *both* a subjective standard *and* an objective standard will be applied in assessing an officer's "reasonable suspicion" for a police stop. The absence of the officer's subjective suspicion, as in *Chapman*,

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stances,' the detaining officer must 'have a *particularized* and *objective* basis for suspecting the particular person stopped of criminal activity.' " *Id.* (quoting *State v. McKenzie*, 440 A.2d 1072, 1076 (Me. 1982) (emphasis added) and *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)). See also, *State v. Fortin*, 632 A.2d 437, 438 (Me. 1993); *State v. Dulac*, 600 A.2d 1121, 1122 (Me. 1992); *State v. Kneeland*, 552 A.2d 4, 7 (Me. 1988); *State v. Jarrett*, 536 A.2d 1111, 1112 (Me. 1988).

43. See, e.g., *State v. Fillion*, 474 A.2d at 189; *State v. Thurlow*, 485 A.2d 960, 963 (Me. 1984) ("For such an investigatory stop without a warrant to be 'reasonable' under controlling constitutional mandates [the police] need have only an articulable suspicion that criminal activity is afoot.").

44. 495 A.2d 314 (Me. 1985).

45. *Id.* at 315 n.1.

46. *Id.* at 316. The trial court in *Chapman* held that, because the defendant was spotted behind a shopping mall after dark, the officer reasonably could have suspected that the defendant was attempting to rob the mall stores. *Id.*

47. *Id.* at 317. Express analysis of this subjective requirement does not surface in all of the Law Court's decisions. This discrepancy, however, does not reflect inconsistencies in Maine's approach; rather, while the Law Court *applies* a subjective standard in all investigatory stop cases, an articulation of this standard factors into the court's discussion only in those cases where there is a question as to whether the subjective test has been met.

48. *Id.*

will result in a stop being invalidated. On the other hand, the absence of objective reasonableness, as in *Nelson*, also results in an invalid stop. Maine appears to be the only state that requires both an objective and a subjective component of reasonable suspicion.<sup>49</sup>

### III. *STATE V. NELSON*

#### A. *The Nelson Decision*

In *State v. Nelson*<sup>50</sup> an investigating officer observed an unoccupied automobile in a well lit parking lot of a housing complex at approximately 1:30 A.M. on Christmas Eve. On account of recent reports of theft, the officer took up an observation post approximately fifty to 100 yards from the automobile. He observed a pickup truck with a driver, Nelson, and one passenger enter the parking lot. After Nelson parked the pickup truck next to the unoccupied vehicle, he and the passenger each began drinking a sixteen-

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49. LAFAVE, *supra* note 14, § 9.3(a) at 425. While Professor LaFave cited both Maine and California as applying a subjective standard, California since has rejected such a test. *People v. Sherman*, 24 Cal. App. 4th 1309 (1993). Professor LaFave also notes that the "reasonable suspicion" test, as applied by the Supreme Court, "as is the case with the legal standard for arrest, is purely objective and thus there is no requirement that an actual suspicion by the officer be shown." LAFAVE, *supra* note 14, § 9.3(a), at 425 (footnote omitted). The Supreme Court has explicitly rejected a subjective inquiry; rather, the Court has emphasized the need for a purely objective test to determine the reasonableness of an officer's suspicion. In *Scott v. United States*, 436 U.S. 128, 137-38 (1978), the Supreme Court stated:

[I]n evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him. . . . [T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.

Arguably, the rationale for not requiring a subjective standard revolves around the belief (or hope) that, prior to making an investigatory stop, an officer necessarily and logically *would* have some kind of suspicion. Another possible rationale is that requiring a subjective state of mind would be too troublesome for courts.

[A] test that requires courts to analyze an officer's subjective intent logically would require an examination of the officer in court and evaluation of any other evidence that would tend to show the officer's state of mind at the time in question. That requirement alone would make the subjective test burdensome even if courts could determine the actual subjective intent of officers.

Andrew J. Pulliam, Note, *Developing a Meaningful Fourth Amendment Approach to Automobile Investigatory Stops*, 47 VAND. L. REV. 477, 519 (1994). Even if an officer did not in actuality harbor any suspicion at the time of the stop, it would be easy to fabricate that suspicion at trial, and thus a suspicion inquiry seems meaningless. *Id.* (citing Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436-37 (1974)) ("Professor Amsterdam has indicated that police officers easily and undetectably can fabricate a legitimate subjective purpose to do something that is objectively lawful.").

50. 638 A.2d 720 (Me. 1994).

ounce can of beer. After approximately forty-five to fifty minutes, the passenger exited the truck, and Nelson drove out of the parking complex.<sup>51</sup> When Nelson's pickup reached the officer's observation site, the officer immediately made an enforcement stop of the pickup. Although he observed nothing unusual about the operation of the pickup or any evidence of mechanical defects or excessive speed, the officer stopped the pickup because, as he said, "[I] observed the operator . . . drinkin' a can of beer . . . [and suspected that] the person may be under the influence of intoxicating liquor."<sup>52</sup>

Nelson subsequently was charged with operating a motor vehicle while under the influence of intoxicating liquor.<sup>53</sup> Nelson filed a motion to suppress the evidence<sup>54</sup> secured as a result of the stop; the district court denied the motion, holding that the officer "had reasonable articulable suspicion to stop the Defendant's vehicle."<sup>55</sup> Upon conviction by the superior court,<sup>56</sup> Nelson appealed to the Law Court on the ground that the district court erred in not granting his motion to suppress the evidence secured as a result of the stop. Specifically, Nelson contended that "the totality of the circumstances related by [Officer] Holmes did not give rise to an objectively reasonable articulable suspicion of criminal conduct and, accordingly, the stop was not justified."<sup>57</sup>

The Law Court vacated the judgment and remanded to the superior court, holding that "[b]ased on the whole picture presented by this case, it cannot be said that it was objectively reasonable to believe that 'criminal activity was afoot.'"<sup>58</sup> Accordingly, the Law

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51. *Id.* at 721.

52. *Id.* at 721-22.

53. The statute under which Nelson was charged provides, "A person is guilty of a criminal violation under this section if he operates or attempts to operate a motor vehicle: A. While under the influence of intoxicating liquor or drugs or a combination of liquor and drugs . . ." ME. REV. STAT. ANN. tit. 29, § 1312-B(1) (West Supp. 1994-1995).

54. Each of the Maine decisions cited in this Note adjudicated a motion to suppress evidence secured as a result of an unlawful stop. As noted by the Supreme Court:

[E]videntiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

Terry v. Ohio, 392 U.S. 1, 13 (1968).

55. State v. Nelson, 638 A.2d at 722.

56. Judgment subsequently was entered against Nelson by the Penobscot County Superior Court in accordance with a jury verdict finding him guilty of operating a motor vehicle under the influence of intoxicating liquor. *Id.* at 721.

57. *Id.* at 722.

58. *Id.* (citing State v. Griffin, 459 A.2d 1086 (Me. 1983)).

Court held that the district court should have granted Nelson's motion to suppress the evidence secured as a result of the claimed illegal stop. Citing both United States Supreme Court and Maine Law Court cases,<sup>59</sup> the court found, as a matter of law, what it held to be a clear deficiency in the evidence supporting the objective reasonableness of the suspicion that prompted the officer to stop Nelson.<sup>60</sup> The Law Court found in *Nelson* that, "based on the whole picture,"<sup>61</sup> it was not "objectively reasonable to believe that criminal activity was afoot in this case."<sup>62</sup>

*B. Maine's Dual Subjective and Objective Standards for Reasonable Suspicion Are Problematic in Nelson*

The central difficulty in reconciling *Nelson* with Supreme Court decisions and with other Maine Law Court decisions arises from Maine's objective-subjective approach to the reasonable suspicion inquiry in investigatory stop cases. In order to determine that the *Nelson* investigating officer demonstrated actual suspicion (the subjective test), the Law Court appropriately focused on the officer's *stated reasons* for his suspicion. However, in deciding the *objective* reasonableness of the officer's suspicion, the Law Court mistakenly confined itself to only those facts offered by the officer to establish his own suspicion. The Court failed to take into account, as required by both *Cortez* and *Griffin*, the totality of the circumstances.

*C. Misuse of Officer's Testimony is a Source of Confusion*

In *State v. Carnevale*<sup>63</sup> the Law Court stated that "[t]he officer's subjective suspicion of ongoing criminal activity may be established either by the *direct testimony* of the officer or by *circumstantial evidence* . . ."<sup>64</sup> If, as in *Carnevale*, the officer does *not* testify specifically as to what he suspected, yet the court infers from the circumstances that the officer did in fact entertain actual suspicion of criminal activity, the court logically will have found not only subjective suspicion but also that the officer's suspicion was objectively reasonable. In other words, if the court reasons from the circumstances, rather than from an officer's testimony, and finds that the

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59. *Id.*

60. In support of the *Nelson* decision Justice Glassman noted:

The record reveals that the officer observed nothing to support his suspicion that Nelson was operating under the influence of alcohol other than Nelson's consumption of a single can of beer over the course of nearly one hour. . . . The officer offered no reason for his stop of the motor vehicle other than his suspicion that Nelson was under the influence of alcohol.

*Id.*

61. *Id.*

62. *Id.*

63. 598 A.2d 746 (Me. 1991).

64. *Id.* at 748 (emphasis added).

officer had actual suspicion, the court also has found that it was objectively reasonable for the officer, when faced with those particular circumstances, to have suspicion of criminal activity. In cases such as these, where the court relies not on an officer's direct testimony but on surrounding circumstances to determine his actual suspicion, the court necessarily must have considered more than the limits of the officer's awareness.

However, in cases like *Nelson*, where the officer *does* testify directly that he had an actual suspicion of criminal activity, the court is *not* forced necessarily to look at all circumstances in order to determine subjective suspicion. In such a case the court must be wary, in determining objectively reasonable suspicion, not to rely only on those circumstances the officer specifically offers as his subjective reasons for the stop. This approach becomes problematic when the officer, in testifying to his actual suspicion, does not invoke every circumstance of the stop. A court's reliance on only those limited circumstances testified to by the officer as grounds for his actual suspicion would violate the Law Court's requirement that an officer's suspicion of criminal activity must be objectively reasonable *under the totality of the circumstances*.<sup>65</sup>

A law enforcement officer often relies on his full experience in the field when formulating inferences of suspicion. He does not always specifically testify to all of his inferences at trial, however.<sup>66</sup> "[T]here are limits, of course, on what may be expected from the police in terms of verbalizing their observations and impressions . . . ."<sup>67</sup>

The potential for losing the totality of the circumstances in the confusion of Maine's two separate tests for reasonable suspicion was realized in the *Nelson* decision. Once Officer Holmes established subjective suspicion by testifying directly that he actually did suspect Nelson of operating under the influence of alcohol, the Law Court

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65. See *State v. Fortin*, 632 A.2d 437, 438 (Me. 1993) ("The court must look to the totality of the circumstances surrounding the stop.") (citing *State v. Thurlow*, 485 A.2d 960, 963 (Me. 1984)); *State v. Jarrett*, 536 A.2d 1111, 1112 (Me. 1988) ("In determining whether a reasonable suspicion existed, a court must take into account the totality of the circumstances surrounding the stop.") (citing *United States v. Cortez*, 449 U.S. 411, 417 (1981)). But see *State v. Garland*, 482 A.2d 139, 145 (Me. 1984) ("[W]e cannot relieve an officer of the duty to actually testify respecting the basis for, and the nature of, his suspicions. To do otherwise would impute to the officer a suspicion of criminal activity that perhaps he never entertained . . .").

66. In addition to drawing inferences based on their training and experience, officers are permitted to make common-sense deductions. The Court in *United States v. Cortez*, 449 U.S. 411, 418 (1981), noted that an assessment of the whole picture "does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers."

67. LAFAYE, *supra* note 14, § 9.3(a), at 428.

should have shifted its inquiry to the objective test to determine whether, *under the totality of the circumstances*, the officer's suspicion was reasonable. In seeking to determine the objective reasonableness of Officer Holmes's suspicion, however, the *Nelson* court focused solely on the observations attested to by the officer as grounds for forming his *own* suspicion. The court failed to consider all the surrounding circumstances in establishing whether that suspicion was objectively reasonable.<sup>68</sup>

While an officer's stated observations will be one factor the court must consider in evaluating the reasonableness of the officer's suspicion, the rationale given by the officer for her actual, suspicion alone cannot determine the objective reasonableness of her suspicion.<sup>69</sup> The Maine Law Court in *Nelson*, having found that Officer Holmes actually did entertain a suspicion of criminal activity, should have gone on to examine the totality of the circumstances in evaluating the objective reasonableness of that suspicion.

In vacating the superior court's judgment, the *Nelson* court relied upon the insufficiency of objective reasonableness in Officer Holmes's suspicion. Because the investigating officer testified that he did in fact have a suspicion that Nelson might be under the influence of alcohol, the court's subjective test was met. The constitutionality of the stop turned on the objective reasonableness of the officer's suspicion, but the court's analysis of the stop's objective reasonableness failed in two respects.

First, although the majority purported to consider the "whole picture,"<sup>70</sup> it failed to acknowledge important objective facts, as Justice

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68. In his dissenting opinion Justice Collins noted:

The stop in this instance was not based on mere speculation that Nelson was driving while under the influence. Rather, the officer had observed Nelson drinking a 16 ounce beer, at 1:30 in the morning on Christmas Eve, while parked in the parking lot of a housing complex for the elderly from which several complaints of theft had been registered.

State v. Nelson, 638 A.2d 720, 723 (Me. 1994) (Collins, J., dissenting).

69. See *United States v. Cortez*, 449 U.S. 411, 418 (1981) ("The analysis proceeds with various objective observations . . . and consideration of the modes or patterns of operation of certain kinds of lawbreakers.") (emphasis added). The *Cortez* Court here implies that the officer's observations *alone* do not justify the suspicion; rather, from these observations and the officer's training and knowledge of the various circumstances accompanying certain crimes, the officer makes inferences and deductions.

In *Nelson*, Officer Holmes observed Nelson drink a sixteen-ounce can of beer. Although Officer Holmes did not testify specifically as to his knowledge of the typical circumstances surrounding the crime of driving while under the influence of alcohol, his training and experience necessarily would be expected to lead him to consider the time and date in the totality of circumstances surrounding his decision to make the investigatory stop of Nelson.

70. State v. Nelson, 638 A.2d at 722. It is interesting to note the Law Court's statement that "[t]he consumption of liquor in a motor vehicle by an adult while not operating the vehicle on a public way is neither a crime nor a civil violation." *Id.* In



Collins's dissenting opinion reveals.<sup>71</sup> In particular, Justice Collins notes the date, Christmas Eve, and the time, 1:30 A.M., as two crucial factors overlooked by the majority. The Law Court's failure to consider these surrounding circumstances not only deviates from the Supreme Court's holding in *Cortez* but also runs contrary to prior Law Court decisions.<sup>72</sup>

Second, in its analysis of surrounding circumstances the Law Court did not account for the inferences and deductions concerning these additional circumstances that necessarily would have been made by an investigating officer trained in the field of law enforcement. While the investigating officer in *Nelson* did not testify that the time and date factored into his own suspicion of Nelson, he did include time and date in his testimony. The court should have considered these circumstances and a trained officer's reaction to them in its consideration of the reasonableness of the officer's decision to stop Nelson.

#### IV. INCONSISTENT MAINE DECISIONS STRAY FROM THE CONSTITUTIONAL STANDARD FOR REASONABLE SUSPICION

The Law Court in *Nelson*, in its "totality of the circumstances" assessment of the reasonableness of Officer Holmes's suspicion, gave insufficient weight not only to the time and date of the stop but also to the reaction a trained officer would have to such factors. The lack of recognition of an officer's experience strays from the Supreme Court's *Terry* and *Cortez* holdings, which stressed that the objective legal standard for reasonable stops requires viewing the circumstances through the eyes of a trained officer.<sup>73</sup> The Law Court's failure to recognize the date and time of night in its objective test for reasonable suspicion strays not only from the Supreme Court's standard but from the Law Court's own totality of the circumstances doctrine as well.

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*State v. Richford*; 519 A.2d 193 (Me. 1986), the court held that the stop of an apparently intoxicated defendant seated in the driver's seat of a parked car was lawful. Although the defendant argued that he was not in the process of attempting or conspiring to commit a crime, the court responded that there "is no requirement that the reasonable suspicion be that the defendant is in the act of committing a crime. It is enough if the police officer could reasonably suspect him of intending the imminent commission of a crime." *Id.* at 195 (citing *State v. Garland*, 482 A.2d at 139, 145 (Me. 1984)).

71. *State v. Nelson*, 638 A.2d at 723 (Collins, J., dissenting).

72. See *State v. Dean*, 645 A.2d 634 (Me. 1994); *State v. Hatch*, 614 A.2d 1299 (Me. 1992); *State v. Burnham*, 610 A.2d 733 (Me. 1992).

73. "[I]n determining whether the officer acted reasonably . . . due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry v. Ohio*, 392 U.S. at 1, 27 (1968).

A. *The Nelson Decision Illustrates the Law Court's Inconsistent Application of the Totality of Circumstances Doctrine*

A review of six recent Law Court decisions highlights the court's inconsistent application of the totality of the circumstances doctrine in the determination of reasonable suspicion in investigatory stop cases. In three of these cases, the court explicitly refers to the totality of the circumstances determining the reasonableness of an officer's suspicion as including the time of night. In the other three decisions, the court appears to ignore the element of time in the objective totality of the circumstances.

In *State v. Dean*,<sup>74</sup> as in *Nelson*, the defendant, whose driving was otherwise unremarkable, parked late one night in an area where recent complaints of vandalism<sup>75</sup> had been reported. Although the facts differ slightly from *Nelson* in that the defendant was parked in an uninhabited housing development as opposed to the parking lot of a housing complex for the elderly, the court noted that "[the officer's] suspicion of Dean was engendered by prior complaints [of vandalism] combined with other facts—the time of night and the absence of any apparent reason to be in an uninhabited housing development."<sup>76</sup>

In *State v. Burnham*<sup>77</sup> an officer stopped the defendant at 12:45 A.M. after seeing the defendant's car weave back and forth between the center line and the line marking the breakdown lane about six times. The car never actually crossed either line. Defendant was traveling between thirty-five and forty miles per hour even though the posted speed limit was fifty miles per hour. The Law Court stated that on the basis of all of these factors, including the *lateness of the hour*, "it was not clear error for the [trial] court to conclude that the officer was justified in stopping [the defendant]."<sup>78</sup>

In *State v. Hatch*<sup>79</sup> an officer observed the defendant and a female companion in the early morning hours parked next to a local lounge. The officer then followed the defendant, who "had a fixed stare and messy hair"<sup>80</sup> as he drove two or three miles to a Dunkin Donuts Shop. The officer arrested the defendant after observing his inability to maintain his balance while trying to enter the donut shop.<sup>81</sup> Several more factors of circumstance appear in *Hatch* than in *Nelson*, but the court acknowledged that "[t]he cumulative effect of

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74. 645 A.2d 634 (Me. 1994).

75. In *Nelson*, recent complaints of burglaries had been reported.

76. *State v. Dean*, 645 A.2d at 637 (emphasis added). Dean's arrest occurred at 11:00 P.M.

77. 610 A.2d 733 (Me. 1992).

78. *Id.* at 734-35 (citing *State v. Mehuren*, 594 A.2d 1073, 1075 (Me. 1991); *State v. Pinkham*, 565 A.2d 318, 319-20 (Me. 1989)).

79. 614 A.2d 1299 (Me. 1992).

80. *Id.* at 1301.

81. *Id.*

these observations,"<sup>82</sup> including "the defendant's late night parking,"<sup>83</sup> reasonably warranted the officer's suspicion.

Although the Law Court did consider time of night in the preceding three cases, in two other Maine decisions the court appeared to ignore, as it did in *Nelson*, this factor of the circumstances. In *State v. Caron*,<sup>84</sup> even though the defendant was stopped in the early morning hours, the court nonetheless vacated the denial of the motion to suppress, finding that the officer's suspicion, based "solely on the single, brief straddling of the center line of the undivided highway,"<sup>85</sup> was unreasonable. The lateness of the hour, although disregarded by the court, obviously did factor into the officer's decision to stop the defendant because the officer testified that he "suspected the operator to be [either] under the influence of [alcohol] or asleep."<sup>86</sup> Since it is unlikely that the officer would have believed the defendant asleep if he had observed the defendant during the daytime, the time of night logically played a role in the officer's decision to stop the defendant. Whether or not it did, however, for that particular officer is not determinative of the objective reasonableness of the stop. The court should have considered time as a material surrounding circumstance in determining objective reasonableness of suspicion regardless of whether it played any role in the officer's own actual suspicion. *Caron* serves to illustrate the inconsistency in Maine's approach to using the doctrine of totality of the circumstances in determining the reasonableness of an officer's suspicion.

In *State v. Kneeland*<sup>87</sup> the Law Court majority failed, as in *Nelson* and *Caron*, to consider all the surrounding circumstances. In *Kneeland* the investigating officer testified that in the early morning hours he had been told by a second officer that the defendant's vehicle had backed into a snow bank and made a wide turn in driving out of a parking lot. The testifying officer stopped the vehicle after he observed it crossing the center line and operating at low speed.<sup>88</sup> The motion judge, however, noted that "the most damaging evidence would be backing into a snow bank across the parking lot."<sup>89</sup> The Law Court held that because the comments made by the motion judge were "incomplete and unfocused"<sup>90</sup> and did not "present a

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82. *Id.* (emphasis added).

83. *Id.* (emphasis added).

84. 534 A.2d 978 (Me. 1987).

85. *Id.* at 979 (emphasis added).

86. *Id.* (emphasis added).

87. 552 A.2d 4 (Me. 1988).

88. *Id.* at 5.

89. *Id.*

90. *Id.* at 6.

clear statement of the basis for the trial court's decision,"<sup>91</sup> the state's appeal necessarily must fail.

In his *Kneeland* dissent Justice Wathen took issue with the majority's failure to consider all the circumstances presented. He noted that the officer "testified to other significant factors which, when taken together, clearly give rise to a reasonable suspicion of criminal activity."<sup>92</sup> Two of the significant factors cited by Justice Wathen were the fact that it was 2:00 A.M. and that it was New Year's morning. Ironically, Justice Wathen concurred in both the *Caron* and *Nelson* opinions, where time of night (and the fact that it was Christmas Eve in *Nelson*) was overlooked by the court.<sup>93</sup>

*B. Maine Cases that Give Insufficient Weight to Totality of Circumstances Stray from the Cortez Standard*

*Nelson* departs from the reasonable suspicion doctrine articulated in the Supreme Court's analysis in *United States v. Cortez*.<sup>94</sup> While the Maine Law Court in numerous decisions<sup>95</sup> makes reference to the totality of the circumstances doctrine for determining objective suspicion, in *Nelson* adherence to the concept gives way to formality of words.

In fact, the *Nelson* court focuses *solely* on Officer Holmes's observation of Nelson "drinkin' a can of beer."<sup>96</sup> With the exception of a brief reference to time and date in the court's initial statement of facts related by the officer, the court lends no weight to these factors in determining the objective reasonableness of the officer's stop of Nelson.

Although the court refers to the "totality of the circumstances" and the "whole picture" three times in its one-page analysis of the case,<sup>97</sup> in its decision it never considers the surrounding circumstances of time and date. The court's failure to address time and date results from the court confusing the two different sources of

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91. *Id.* (quoting *Conger v. Conger*, 304 A.2d 426, 429 (Me. 1973)).

92. *State v. Kneeland*, 552 A.2d 4, 6-8 (Me. 1988) (Wathen, J., dissenting).

93. The conclusion that the *Nelson* court overlooked the surrounding circumstances is bolstered by Justice Glassman's dissent in *State v. Dean*, 645 A.2d 634, 636-37 (Me. 1994) (Glassman, J., dissenting). In *Dean* the defendant parked late one night in an uninhabited housing development where recent complaints of vandalism had been reported. In an attempt to distinguish *Nelson* from *Dean*, Justice Glassman reasoned that while the *Dean* case turned on the site of the stop, *Nelson* "turned on whether *merely* drinking a can of beer in a parked car provided a reasonably articulable suspicion that a crime had taken place." *State v. Dean*, 645 A.2d at 637, n.1 (Glassman, J., dissenting) (emphasis added).

94. 449 U.S. 411, 417 (1981) (holding that when determining what cause is sufficient to authorize a police stop, a court must take into account "the totality of circumstances—the whole picture").

95. *See supra* note 65.

96. *Id.* at 722.

97. *Id.*

evidence against which to apply its subjective and objective standards for reasonable suspicion: the officer's actual suspicion versus the totality of the circumstances as addressed by a trained officer.<sup>98</sup>

In addition to stressing the importance of a court's consideration of the totality of the circumstances, the *Cortez* Court emphasized that a court must assess the facts and circumstances of the stop "as understood by those versed in the field of law enforcement."<sup>99</sup> In failing to give adequate consideration to the circumstances of time and date, the *Nelson* court thus was unable to consider inferences that would be drawn from that time and date by a trained officer.

In his treatise on the Fourth Amendment, Professor Wayne LaFave notes, "There are several other factors, none of which individually would justify a stopping for investigation, which nonetheless are properly considered together with other suspicious circumstances in determining whether there are grounds for such a brief seizure. One is the time of day."<sup>100</sup> Professor LaFave quotes an empirical study:

Most field interrogations are conducted at night. The later the hour, the more likely it is that a person observed will be stopped for interrogation. Officers apparently feel that the risk of error is much greater during daylight hours, when, as one officer put it, there are many "legitimate" persons on the streets. The widely held attitude of patrol officers is that persons found on the streets late at night are more likely to be guilty of some criminal offense; "decent" people are in bed, and those remaining on the streets without clear indications of legitimate business are "up to no good."<sup>101</sup>

By ignoring the date and the time of night in *Nelson*, the Law Court failed to recognize both important circumstances of the stop and the inferences that reasonably would have been drawn from them by Officer Holmes.

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98. *United States v. Cortez*, 449 U.S. at 417-18.

99. *Id.* at 418.

100. LAFAVE, *supra* note 14, § 9.3(c) at 454. It is interesting to note that in a LEXIS search of approximately 75 Maine cases in which a defendant was charged with operating under the influence of alcohol and subsequently moved to suppress the evidence, well over one-half of the arrests occurred after dark and over one-third occurred after midnight. Only two of those stops occurred in the daytime. The remaining cases failed to mention the time of the stop; some of these cases were decided on issues of law and thus the discussion of facts was limited, and others of these cases were memorandum opinions. While these statistics are not dispositive on the issue of the reasonableness of the officer's suspicion in *Nelson*, they tend to support the proposition that experienced police officers are well aware that drivers are much more likely to be intoxicated at night.

101. *Id.* (quoting LAWRENCE P. TIFFANY ET AL., *DETECTION OF CRIME* 21 (1967)).

C. *The Nelson Decision Follows Caron's Misguided Lead*

Because the *Nelson* court failed to give adequate weight to certain circumstances that, when viewed objectively from the point of view of a trained officer, would have justified the investigating officer's reasonable suspicion to make a stop, the decision necessarily departs from United States Supreme Court precedent in *Cortez*. In an attempt to identify the precise ways in which the *Nelson* decision differs from the Supreme Court's approach in *Cortez*, it is instructive to look again, in more detail, at the Law Court's opinion in *State v. Caron*.<sup>102</sup>

In *Caron* the investigating officer stopped the operator of a motor vehicle after observing the vehicle straddle the center line of the road for twenty-five to fifty yards. There was neither oncoming traffic nor any other erratic or unusual driver behavior. The stop led to Caron's arrest for operating under the influence of intoxicating liquor. In vacating the judgment of conviction, the *Caron* court noted that the officer's suspicion that Caron was driving under the influence of alcohol

was based solely on the single, brief straddling of the center line of the undivided highway, with no oncoming traffic in sight and no vehicles passing on the left, not constituting a violation of any traffic law. The observation, even when taken with all rational inferences that can be drawn from it,<sup>103</sup> did not give rise to an objectively reasonable suspicion that criminal activity was involved.<sup>104</sup>

In a critical analysis of the *Caron* decision, Maine District Court Judge Sheldon<sup>105</sup> states his reading of the case as follows: "[L]ots of people drive in the center of the road at least momentarily for lots of reasons, many of which are legitimate, and few of which derive from the unsafe condition of the driver or of the vehicle; therefore, stopping a car for one such aberration is unjustifiable."<sup>106</sup> If Judge Sheldon's interpretation of the court's holding is correct, then the *Caron* court, in saying that the officer did not have enough *cause* to stop Caron's vehicle, may have been articulating a "reasonable cause," rather than a reasonable suspicion, standard.<sup>107</sup> A "reasonable cause" standard is highly objective; it does not consider infer-

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102. 534 A.2d 978 (Me. 1987). See *supra* text accompanying note 84.

103. The *Caron* decision differs in this respect from the *Nelson* opinion: the *Nelson* court made no indication that it even considered the officer's rational inferences.

104. *State v. Caron*, 534 A.2d at 979.

105. The Honorable John C. Sheldon assumed Maine's District Court bench on December 21, 1987, and was "pelted immediately with suppression motions engendered by the still fresh decision in *State v. Caron*." The experience led Judge Sheldon to prepare a critique of *Caron* and its precedential limitations. See Hon. John C. Sheldon, *Vehicular Stops and the Maine Constitution*, 3 ME. B. J. 182 (1988).

106. *Id.* at 184.

107. *Id.*

ences a trained officer would make. Rather, only observable circumstances of the stop are judged by the court to determine whether enough evidence exists to amount to "cause." As Judge Sheldon notes:

Not once did the Law Court mention the combined facts of the day and time of the stop; all the Court talked about was the operation of the vehicle. Not once, therefore, did the Court discuss whether the officer, on that day and at that time, should have read more into the operation of the vehicle than he might have on a Sunday at noon. I doubt that the Court merely overlooked important facts; I wonder, however, why the Court—at least in its published opinion—overlooked important experience. To all appearances, the Court was prepared to ignore the officer's tutored suspicion in favor of its own, antiseptic view of things. This is why many attorneys argue that *Caron* represents a reasonable cause standard: the Court apparently *did* ignore police suspicion.<sup>108</sup>

The Supreme Court's "reasonable suspicion" test, as articulated in *Terry v. Ohio*<sup>109</sup> and *Delaware v. Prouse*,<sup>110</sup> is preferable to a "reasonable cause" standard because the reasonable suspicion standard also "relies upon the rich background of police experience to determine what is reasonable in any particular case."<sup>111</sup>

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108. *Id.* at 185 (footnote omitted). It is important to distinguish between the role of "a trained officer's" inferences in the determination of objective suspicion (which are necessary for "reasonable suspicion" but ignored under a reasonable cause standard) and any inferences drawn by the *particular* investigating officer (which apply only to Maine's subjective suspicion requirement for reasonable suspicion).

109. 392 U.S. 1 (1968).

110. 440 U.S. 648 (1979).

111. Sheldon, *supra* note 105, at 184. Judge Sheldon, in his discussion of how the *Caron* decision strays from United States Supreme Court precedent, notes that the *Caron* Law Court

may, by default of support in the federal constitution, have created its own exclusionary rule under the Maine Constitution. This is unlikely to have been the court's intention . . . [I]n citing the federal and state constitutions as authority for its holding, the Law Court mentioned them in conjunction, so the Court must have assumed that the same exclusionary rule applied to both.

*Id.* at 183 (footnote omitted).

In favor of the argument that the Law Court has not attempted to create its own exclusionary rule separate from that of the United States Supreme Court, the *Nelson* decision likewise cites both the Maine and federal constitutions (as well as Supreme Court case law). In addition, the Law Court previously has said that it is "unnecessary to decide the issue whether there is a separate exclusionary rule under article I, section 5 [sic] of the Maine Constitution." *State v. Marquis*, 525 A.2d 1041, 1043 (Me.1987).

In support of the position that Maine may be on the path to creating its own exclusionary rule, however, is the lack of a citation to a federal authority in its recent decision of *State v. Cusack*, 649 A.2d 16 (Me. 1994), in which the Law Court refers *only* to Maine case law and Article I, Section 5 of the Maine Constitution, not to the United States Constitution.

The *Nelson* court seems either to have applied a *Caron* "reasonable cause" standard to determine the lawfulness of the officer's stop or to have limited its determination of objective suspicion to the subjective grounds articulated by the officer, ignoring the totality of circumstances and all the inferences a trained officer would draw from them. The state was obligated to prove "enough suspicion" rather than mere "nonarbitrariness."<sup>112</sup> Applying Judge Sheldon's analysis of *Caron* to the *Nelson* case, a legitimate reading of the holding might be the following: many people consume an alcoholic beverage while in a parked car, few instances of which lead to the unsafe operation of a motor vehicle; therefore, stopping a car upon viewing such an occurrence is unjustifiable. Either *Nelson* reveals a court inconsistently applying its own "reasonable suspicion" standard for a police stop or it suggests a court relying upon a "reasonable cause" standard whose implications would alter significantly the basis for determining the propriety of an officer's actions in investigatory stops.<sup>113</sup>

## V. CONCLUSION

The *Nelson* decision illustrates the difficulties the Law Court encounters in the application of both its subjective and objective standards to the determination of reasonable suspicion under constitutional constraints. By judging an officer's reasonable suspicion against two separate standards, the Maine Law Court may tend, as it did in *Nelson*, to lose sight of the requirement that it view the totality of the circumstances in assessing the objective reasonableness of an officer's suspicion. The Law Court instead, as arguably occurred in *Nelson*, may limit its assessment to circumstances stated by the investigating officer as reasons for his stop. If the Maine Law Court is to continue to adhere to a subjective test, use of the officer's testimony should be limited to the determination of his suspicion and must not be used as the sole criteria for circumstances defining the objective reasonableness of the stop.

While a purely *subjective* standard would contravene the Supreme Court's objective standard for "reasonable suspicion," a "reasonable cause" absolutist standard, arguably applied by the *Nelson* court, is unworkable in its lack of consideration of the inferences and deductions made by a trained officer. Consistent adherence to the objective totality of the circumstances doctrine, evaluated in light of a

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112. Judge Sheldon notes that "on a motion to suppress, the State's burden is *supposed* to be to prove a negative—nonarbitrariness—rather than a positive—enough suspicion." Sheldon, *supra* note 105, at 183 (citing *Delaware v. Prouse*, 440 U.S. 648 (1979) (emphasis added)).

113. *Id.* at 184. Judge Sheldon believes that the adoption of a "reasonable cause" standard would lead to factoring police suspicion out of traffic-stop suppression cases. *Id.* at 185.



trained officer's experience, would put an end to the inconsistencies which have led to the absence of clear guidance in the area of investigatory stops in Maine.

*Sandra Denison Shannon*