Blue to Gold
LAW ENFORCEMENT TRAINING

CASE LAW

Anonymous Tips

Table Of Contents:

92 S.Ct. 1921
Supreme Court of the United States

Frederick E. ADAMS, Warden, Petitioner,

v.

Robert WILLIAMS.

No. 70—283.
|
Argued April 10, 1972.
|
Decided June 12, 1972.

Synopsis

Habeas corpus proceeding was brought by a state prisoner. The United States District Court for the District of Connecticut denied the writ and prisoner appealed. The Court of Appeals, 436 F.2d 30, affirmed, but on rehearing en banc the Court of Appeals, 441 F.2d 394, reversed, and certiorari was granted. The Supreme Court, Mr. Justice Rehnquist, held that where informant, who had previously given information to officer, advised officer that individual seated in nearby vehicle was carrying narcotics and had gun at his waist, officer acted justifiably in going to vehicle to investigate and in reaching in and removing loaded gun from occupant's waistband after occupant rolled down window rather than complying with officer's request to open door.

Reversed.

Mr. Justice Douglas dissented and filed opinion in which Mr. Justice Marshall joined.

Mr. Justice Brennan dissented and filed opinion.

Mr. Justice Marshall filed dissenting opinion in which Mr. Justice Douglas joined.

****1922 *143** Syllabus*

Acting on a tip supplied moments earlier by an informant known to him, a police officer asked respondent to open his car door. Respondent lowered the window, and the officer reached into the car and found a loaded handgun (which had not been visible from the outside) in respondent's waistband, precisely where the informant said it would be. Respondent was arrested for unlawful possession of the handgun. A search incident to the arrest disclosed heroin on respondent's person (as the informant had reported), as well as other contraband in the car. Respondent's petition for federal habeas corpus relief was denied by the District Court. The Court of Appeals reversed, holding that the evidence that had been used in the trial resulting in respondent's conviction had been obtain by an unlawful search. been obtained by an unlawful search. S.Ct. 1868, 20 L.Ed.2d 889, recognizes, a policeman making a reasonable investigatory stop may conduct a limited protective search for concealed weapons when he has reason to believe that the suspect is armed and dangerous. Here the information from the informant had enough indicia of reliability to justify the officer's forcible stop of petitioner and the protective seizure of the weapon, which afforded reasonable ground for the search incident to the arrest that ensued. Pp. 1922—1925.

441 F.2d 394, reversed.

Attorneys and Law Firms

Donald A. Browne, Bridgeport, Conn., for petitioner.

Edward F. Hennessey, III, Hartford, Conn., for respondent.

Opinion

***144** Mr. Justice REHNQUIST delivered the opinion of the Court.

Respondent Robert Williams was convicted in a Connecticut state court of illegal possession of a handgun found during a 'stop and frisk,' as well as of possession of heroin that was found during a full search incident to his weapons arrest. After respondent's conviction was affirmed by the Supreme Court of Connecticut, State v. Williams, 157 Conn. 114, 249 A.2d 245 (1968), this Court denied certiorari. 395 U.S. 927, 89 S.Ct. 1783, 23 L.Ed.2d 244 (1969). Williams' petition for federal habeas corpus relief was denied by the District Court and by a divided panel of the Second Circuit, 436 F.2d 30 (1970), but on rehearing en banc the Court of Appeals granted relief. 441 F.2d 394 (1971). That court held that evidence introduced at Williams' trial had been obtained by an unlawful search of his person and car, and thus the state court judgments of conviction should be set aside. Since we conclude that the policeman's actions here conformed to the standards this Court laid down in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), we reverse.

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Police Sgt. John Connolly was alone early in the morning on car patrol duty in a high-crime area of Bridgeport, Connecticut. At approximately 2:15 a.m. a person known to Sgt. Connolly approached his cruiser ***145** and informed him that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist.

After calling for assistance on his car radio, Sgt. Connolly approached the vehicle to investigate the informant's report. Connolly tapped on the car window ****1923** and asked the occupant, Robert Williams to open the door. When Williams rolled down the window instead, the sergeant reached into the car and removed a fully loaded revolver from Williams' waistband. The gun had not been visible to Connolly from outside the car, but it was in precisely the place indicated by the informant. Williams was then arrested by Connolly for unlawful possession of the pistol. A search incident to that arrest was conducted after other officers arrived. They found substantial quantities of heroin on Williams' person and in the car, and they found a machete and a second revolver hidden in the automobile.

Respondent contends that the initial seizure of his pistol, upon which rested the later search and seizure of other weapons and narcotics, was not justified by the informant's tip to Sgt. Connolly. He claims that absent a more reliable informant, or some corroboration of the tip, the policeman's actions were unreasonable under the standards set forth in Terry v. Ohio, supra.

In Terry this Court recognized that 'a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even thoughthere is no probable cause to make an arrest.' Id., at 22, 88 S.Ct., at 1880. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, terry recognizes that it may be the essence of good police work to adopt an intermediate response. ***146** See id., at 23, 88 S.Ct., at 1881. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. Id., at 21—22, 88 S.Ct., at 1879—1880; see Gaines v. Craven, 448 F.2d 1236 (CA9 1971); United States v. Unverzagt, 424 F.2d 396 (CA8 1970).

The Court recognized in Terry that the policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect. 'When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,' he may conduct a limited protective search for concealed weapons. 392 U.S., at 24, 88 S.Ct., at 1881. The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law. So long as the officer is entitled to make a forcible stop,[1] and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose. Id., at 30, 88 S.Ct., at 1884.

Applying these principles to the present case, we believe that Sgt. Connolly acted justifiably in responding to his informant's tip. The informant was known to him personally and had provided him with information in the past. This is a stronger case than obtains in the case of an anonymous telephone tip. The informant here came forward personally to give information that was immediately verifiable at the scene. Indeed, under ***147** Connecticut law, the informant might have been subject to immediate arrest for making a false complaint had Sgt. Connolly's investigation proved the tip incorrect.[2] Thus, ****1924** while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, see, e.g., Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), the information carried enough indicia of reliability to justify the officer's forcible stop of Williams.

In reaching this conclusion, we reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person. Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situations—for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a

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credible informant warns of a specific impending crime—the subtleties of the hearsay rule should not thwart an appropriate police response.

While properly investigating the activity of a person who was reported to be carrying narcotics and a concealed weapon and who was sitting alone in a car in a high-crime area at 2:15 in the morning, Sgt. Connolly ***148** had ample reason to fear for his safety.[3] When Williams rolled down his window, rather than complying with the policeman's request to step out of the car so that his movements could more easily be seen, the revolver allegedly at Williams' waist became an even greater threat. Under these circumstances the policeman's action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure his safety, and we conclude that it was reasonable. The loaded gun seized as a result of this intrusion was therefore admissible at Williams' trial. Terry v. Ohio, 392 U.S., at 30, 88 S.Ct., at 1884.

Once Sgt. Connolly had found the gun precisely where the informant had predicted, probable cause existed to arrest Williams for unlawful possession of the weapon. Probable cause to arrest depends 'upon whether, at the moment the arrest was made . . . the facts and circumstances within (the arresting officers') knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense.' Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964). In the present case the policeman found Williams in possession of a gun in precisely the place predicted by the informant. This tended to corroborate the reliability of the informant's further report of narcotics and, together with the surrounding circumstances, certainly suggested no lawful explanation for possession of the ***149** gun. Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction. See Draper v. United States, 358 U.S. 307, 311—312, 79 S.Ct. 329, 331—332, 3 L.Ed.2d 327 (1959). ****1925** Rather, the court will evaluate generally the circumstances at the time of the arrest to decide if the officer had probable cause for his action:
'In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' Brinegar v. United States, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949).

See also id., at 177. Under the circumstances surrounding Williams' possession of the gun seized by Sgt. Connolly, the arrest on the weapons charge was supported by probable cause, and the search of his person and of the car incident to that arrest was lawful. See Brinegar v. United States, supra; Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). The fruits of the search were therefore properly admitted at Williams' trial, and the Court of Appeals erred in reaching a contrary conclusion.

Reversed.

Mr. Justice DOUGLAS, with whom Mr. Justice MARSHALL concurs, dissenting.

My views have been stated in substance by Judge Friendly dissenting in the Court of Appeals. 436 F.2d 30, 35. Connecticut allows its citizens to carry weapons, concealed or otherwise, at will, provided they have a permit. Conn.Gen.Stat.Rev. ss 29—35, 29—38. Connecticut law gives its police no authority to frisk a person for a permit. Yet the arrest was for illegal possession of a gun. The only basis for that arrest was the informer's ***150** tip on the narcotics. Can it be said that a man in possession of narcotics will not have a permit for his gun? Is that why the arrest for possession of a gun in the free-and-easy State of Connecticut becomes constitutional?

The police problem is an acute one not because of the Fourth Amendment, but because of the ease with which anyone can acquire a pistol. A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment, which reads, 'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.'

There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols should not be barred to everyone except the police.

The leading case is United States v. Miller, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206, upholding a federal law making criminal the shipment in interstate commerce of a sawed-off shotgun. The law was upheld, there being no evidence

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that a sawed-off shotgun had 'some reasonable relationship to the preservation or efficiency of a well regulated militia.' Id., at 178, 59 S.Ct., at 818. The Second Amendment, it was held, 'must be interpreted and applied' with the view of maintaining a 'militia.'

'The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be ***151** secured through the Militia—civilians primarily, soldiers on occasion.' Id., at 178—179, 59 S.Ct., at 818.

Critics say that proposals like this water down the Second Amendment. Our decisions belie that argument, for the Second Amendment, as noted, was designed to keep alive the militia. But if watering-down is the mood of the day, I ****1926** would prefer to water down the Second rather than the Fourth Amendment. I share with Judge Friendly a concern that the easy extension of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, to 'possessory offenses' is a serious intrusion on Fourth Amendment safeguards. 'If it is to be extended to the latter at all, this should be only where observation by the officer himself or well authenticated information shows 'that criminal activity may be afoot.'' 436 F.2d, at 39, quoting Terry v. Ohio, supra, at 30, 88 S.Ct., at 1884.

Mr. Justice BRENNAN, dissenting.

The crucial question on which this case turns, as the Court concedes, is whether, there being no contention that Williams acted voluntarily in rolling down the window of his car, the State had shown sufficient cause to justify Sgt. Connolly's 'forcible' stop. I would affirm, believing, for the following reasons stated by Judge, now Chief Judge, Friendly, dissenting, 436 F.2d 30, 38—39, that the State did not make that showing:

'To begin, I have the gravest hesitancy in extending (Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)) to crimes like the possession of narcotics . . .. There is too much danger that, instead of the stop being the object and the protective frisk an incident thereto, the reverse will be true. Against that we have here the added fact of the report that Williams had a gun on his person. . . . (But) Connecticut allows its citizens to carry weapons, concealed or ***152** otherwise, at will, provided only they have a permit, Conn.Gen.Stat. ss 29—35 and 29—38, and gives its police officers no special authority to stop for the purpose of determining whether the citizen has one. . . .

'If I am wrong in thinking that Terry should not be applied at all to mere possessory offenses, . . . I would not find the combination of Officer Connolly's almost meaningless observation and the tip in this case to to sufficient justification for the intrusion. The tip suffered from a threefold defect, with each fold compounding the others. The informer was unnamed, he was not shown to have been reliable with respect to guns or narcotics, and he gave no information which demonstrated personal knowledge or—what is worse—could not readily have been manufactured by the officer after the event. To my mind, it has not been sufficiently recognized that the difference between this sort of tip and the accurate prediction of an unusual event is as important on the latter score as on the former. (In Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959),) Narcotics Agent Marsh would hardly have been at the Denver Station at the exact moment of the arrival of the train Draper had taken from Chicago unless somenone had told him something important, although the agent might later have embroidered the details to fit the observed facts. . . . There is no such guarantee of a patrolling officer's veracity when he testifies to a 'tip' from an unnamed informer saying no more than that the officer will find a gun and narcotics on a man across the street, as he later does. If the state wishes to rely on a tip of that nature to validate a stop and frisk, revelation of the name of the informer or demonstration that his name is unknown and could ***153** not reasonably have been ascertained should be the price.

'Terry v. Ohio was intended to free a police officer from the rigidity of a rule that would prevent his doing anything to a man reasonably suspected of being about to commit or having just committed a crime of violence, no matter how grave the problem or impelling the need for swift action, unless the officer had what a court would later determine to be probable cause for arrest. It was meant for the serious cases of imminent danger ****1927** or of harm recently perpetrated to persons or property, not the conventional ones of possessory offenses. If it is to be extended to the latter at all, this should be only where observation by the officer himself or well authenticated information shows 'that criminal activity may be afoot.' 392 U.S., at 30, 88 S.Ct., at 1868, 20 L.Ed.2d 889. I greatly fear that if the (contrary view) should be followed, Terry will have opened the sluicegates for serious and unintended erosion of the protection of the Fourth Amendment.'

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Mr. Justice MARSHALL, with whom Mr. Justice DOUGLAS joins, dissenting.

Four years have passed since we decided Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and its companion cases, Sibron v. New York and Peters v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). They were the first cases in which this Court explicitly recognized the concept of 'stop and frisk' and squarely held that police officers may, under appropriate circumstances, stop and frisk persons suspected of criminal activity even though there is less than probable cause for an arrest. This case marks our first opportunity to give some flesh to the bones of Terry ***154** et al. Unfortunately, the flesh provided by today's decision cannot possibly be made to fit on Terry's skeletal framework.

'(T)he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge of magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' '(T)he burden is on those seeking the exemption to show the need for it.'' Coolidge v. New Hampshire, 403 U.S. 443, 454—455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971). In Terry we said that 'we do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.' 392 U.S. at 20, 88 S.Ct., at 1879. Yet, we upheld the stop and frisk in Terry because we recognized that the realities of on-the-street law enforcement require an officer to act at times on the basis of strong evidence, short of probable cause, that criminal activity is taking place and that the criminal is armed and dangerous. Hence, Terry stands only for the proposition that police officers have a 'narrowly drawn authority to . . . search for weapons' without a warrant. Id., at 27, 88 S.Ct., at 1883.

In today's decision the Court ignores the fact that Terry begrudgingly accepted the necessity for creating an exception from the warrant requirement of the Fourth Amendment and treats this case as if warrantless searches were the rule rather than the 'narrowly drawn' exception. This decision betrays the careful balance that Terry sought to strike between a citizen's right to privacy and his government's responsibility for effective law enforcement and expands the concept of warrantless ***155** searches far beyond anything heretofore recognized as legitimate. I dissent.

I

A. The Court's opinion states the facts and I repeat only those that appear to me to be relevant to the Fourth Amendment issues presented.

Respondent was sitting on the passenger side of the front seat of a car parked on the street in a 'high crime area' in Bridgeport, Connecticut, at 2:15 a.m. when a police officer approached his car. During a conversation that had just taken place nearby, the officer was told by an informant that respondent had narcotics on his person and that he had a gun in his waistband. The officer saw that the motor was not running, that respondent was seated peacefully in the car, and that there was no indication that he was about to leave the scene. ****1928** After the officer asked respondent to open the door, respondent rolled down his window instead and the officer reached into the car and pulled a gun from respondent's waistband. The officer immediately placed respondent under arrest for carrying the weapon and searched him, finding heroin in his coat. More heroin was found in a later search of the automobile. Respondent moved to suppress both the gun and the heroin prior to trial. His motion was denied and he was convicted of possessing both items.

B. The Court erroneously attempts to describe the search for the gun as a protective search incident to a reasonable investigatory stop. But, as in Terry, Sibron and Peters, supra, there is no occasion in this case to determine whether or not police officers have a right to seize and to restrain a citizen in order to interrogate him. The facts are clear that the officer intended to make the search as soon as he approached the respondent. He asked no questions; he made no investigation; he simply searched. ***156** There was nothing apart from the information supplied by the informant to cause the officer to search. Our inquiry must focus, therefore, as it did in Terry on whether the officer had sufficient facts from which he could reasonably infer that respondent was not only engaging in illegal activity, but also that he was armed and dangerous. The focus falls on the informant.

The only information that the informant had previously given the officer involved homosexual conduct in the local railroad station. The following colloquy took place between respondent's counsel and the officer at the hearing on respondent's motion to suppress the evidence that had been seized from him.

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'Q. Now, with respect to the information that was given you about homosexuals in the Bridgeport Police Station (sic), did that lead to an arrest? A. No.

'Q. An arrest was not made. A. No. There was no substantiating evidence.

'Q. There was no substantiating evidence? A. No.

'Q. And what do you mean by that? A. I didn't have occasion to witness these individuals committing any crime of any nature.

'Q. In other words, after this person gave you the information, you checked for corroboration before you made an arrest. Is that right? A. Well, I checked to determine the possibility of homosexual activity.

'Q. And since an arrest was made, I take it you didn't find any substantiating information. A. I'm sorry counselor, you say since an arrest was made.

'Q. Was not made. Since an arrest was not made, I presume you didn't find any substantiating information. A. No.

***157** 'Q. So that, you don't recall any other specific information given you about the commission of crimes by this informant. A. No.

'Q. And you still thought this person was reliable. A. Yes.'[1]

Were we asked to determine whether the information supplied by the informant was sufficient to provide probable cause for an arrest and search, rather than a stop and frisk, there can be no doubt that we would hold that it was insufficient. This Court has squarely held that a search and seizure cannot be justified on the basis of conclusory allegations of an unnamed informant who is allegedly credible. Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). In the recent case of Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), Mr. Justice Harlan made it plain beyond any doubt that where police rely on an informant to make a search and seizure, they must ****1929** know that the informant is generally trustworthy and that he has obtained his information in a reliable way. Id., at 417, 89 S.Ct., at 589. Since the testimony of the arresting officer in the instant case patently fails to demonstrate that the informant was known to be trustworthy and since it is also clear that the officer had no idea of the source of the informant's 'knowledge,' a search and seizure would have been illegal.

Assuming, arguendo, that this case truly involves, not an arrest and a search incident thereto, but a stop and frisk,[2] we must decide whether or not the information possessed by the officer justified this interference with respondent's liberty. Terry, our only case to actually ***158** uphold a stop and frisk,[3] is not directly in point, because the police officer in that case acted on the basis of his own personal observations. No informant was involved. But the rational of Terry is still controlling, and it requires that we condemn the conduct of the police officer in encountering the respondent.

Terry did not hold that whenever a policeman has a hunch that a citizen is engaging in criminal activity, he may engage in a stop and frisk. It held that if police officers want to stop and frisk, they must have specific facts from which they can reasonably infer that an individual is engaged in criminal activity and is armed and dangerous.[4] It was central to our decision in Terry that the police officer acted on the basis of his own personal observations and that he carefully scrutinized the conduct of his suspects before interfering with them in any way. When we legitimated the conduct of the officer in Terry we did so because of the substantial reliability of the information on which the officer based his decision to act.

If the Court does not ignore the care with which we examined the knowledge possessed by the officer in Terry when he acted, then I cannot see how the actions of the officer in this case can be upheld. The Court explains what the officer knew about respondent before accosting him. But what is more significant is what he did not know. With respect to the scene generally, the officer had no idea how long respondent had been in the car, how long the car had been parked, or to whom the car belonged. With respect to the gun,[5] the officer did not ***159** know if or when the informant had ever seen the gun, or whether the gun was carried legally, as Connecticut law permitted, or illegally.[6] And with respect to the narcotics, the officer did not know what kind of narcotics respondent allegedly had, whether they were legally or illegally possessed, what the basis of the informant's knowledge was, or even whether the informant was capable of distinguishing narcotics from other substances.[7]

****1930** Unable to answer any of these questions, the officer nevertheless determined that it was necessary to intrude on respondent's liberty. I believe that his determination was

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totally unreasonable. As I read Terry, an officer may act on the basis of reliable information short of probable cause to make a stop, and ultimately a frisk, if necessary; but the officer may not use unreliable, unsubstantiated, conclusory hearsay to justify an invasion of liberty. Terry never meant to approve the kind of knee-jerk police reaction that we have before us in this case.

Even assuming that the officer had some legitimate reason for relying on the informant, Terry requires, before any stop and frisk is made, that the reliable information in the officer's possession demonstrate that the suspect is both armed and dangerous.[8] The fact remains that ***160** Connecticut specifically authorizes persons to carry guns so long as they have a permit. Thus, there was no reason for the officer to infer from anything that the informant said that the respondent was dangerous. His frisk was, therefore, illegal under Terry.

II

Even if I could agree with the Court that the stop and frisk in this case was proper, I could not go further and sustain the arrest and the subsequent searches. It takes probable cause to justify an arrest and search and seizure incident thereto. Probable cause means that the 'facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed . . .' Stacey v. Emery, 97 U.S. 642, 645, 24 L.Ed. 1035 (1878). '(G)ood faith is not enough to constitute probable cause.' Director General of Railroads v. Kastenbaum, 263 U.S. 25, 28, 44 S.Ct. 52, 53, 68 L.Ed. 146 (1923).

Once the officer seized the gun from respondent, it is uncontradicted that he did not ask whether respondent had a license to carry it, or whether respondent carried it for any other legal reason under Connecticut law. Rather, the officer placed him under arrest immediately and hastened to search his person. Since Connecticut has not made it illegal for private citizens to carry guns, there is nothing in the facts of this case to warrant a man 'of prudence and caution' to believe that any offense had been committed merely because respondent had a gun on his person.[9] Any implication that respondent's silence ***161** was some sort of a tacit admission of guilt would be utterly absurd.

It is simply not reasonable to expect someone to protest that he is not acting illegally before he is told that he is suspected of criminal activity. It would have been a simple matter for the officer to ask whether respondent had a permit, but he chose not to do so. In making this choice, he clearly violated the Fourth Amendment.

****1931** This case marks a departure from the mainstream of our Fourth Amendment cases. In Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948), for example, the arresting officer had an informant's tip and actually smelled opium coming from a room. This Court still found the arrest unlawful. And in Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637, we found that there was no probable cause even where an informant's information was corroborated by personal observation. If there was no probable cause in those cases, I find it impossible to understand how there can be probable cause in this case.

III

Mr. Justice Douglas was the sole dissenter in Terry. He warned of the 'powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees . . ..' 392 U.S., at 39, 88 S.Ct., at 1889, 20 L.Ed.2d 889. While I took the position then that we were not watering down rights, but were hesitantly and cautiously striking a necessary balance between the rights of American citizens to be free from government intrusion into their ***162** privacy and their government's urgent need for a narrow exception to the warrant requirement of the Fourth Amendment, today's decision demonstrates just how prescient Mr. Justice Douglas was.

It seems that the delicate balance that Terry struck was simply too delicate, too susceptible to the 'hydraulic pressures' of the day. As a result of today's decision, the balance struck in Terry is now heavily weighted in favor of the government. And the Fourth Amendment, which was included in the Bill of Rights to prevent the kind of arbitrary and oppressive police action involved herein, is dealt a serious blow. Today's decision invokes the specter of a society in which innocent citizens may be stopped, searched, and arrested at the whim of police officers who have only the slightest suspicion of improper conduct.

All Citations

407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Petitioner does not contend that Williams acted voluntarily in rolling down the window of his car.

2 Section 53—168 of the Connecticut General Statutes, in force at the time of these events, provided that a 'person who knowingly makes to any police officer * * * a false report or a false complaint alleging that a crime or crimes have been committed' is guilty of a misdemeanor.

3 Figures reported by the Federal Bureau of Investigation indicate that 125 policemen were murdered in 1971, with all but five of them having been killed by gunshot wounds. Federal Bureau of Investigation Law Enforcement Bulletin, Feb. 1972, p. 33. According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile. Bristow, Police Officer Shootings—A Tactical Evaluation, 54 J.Crim.L.C. & P.S. 93 (1963).

1 App. 96—97.

2 Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), makes it clear that a stop and frisk is a search and seizure within the meaning of the Fourth Amendment. When I use the term stop and frisk herein, I merely intend to emphasize that it is, as Terry held, a lesser intrusion than a full-scale search and seizure.

3 In Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), the Court held that the action of the policeman could not be justified as a stop and frisk. In Peters v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), the Court sustained the validity of a search and seizure by holding that it was incident to a legal arrest.

4 Terry v. Ohio, 392 U.S., at 29, 88 S.Ct., at 1884; Sibron v. New York, 392 U.S., at 64, 88 S.Ct., at 1903.

5 The fact that the respondent carried his gun in a high-crime area is irrelevant. In such areas it is more probable than not that citizens would be more likely to carry weapons authorized by the State to protect themselves.

6 See Conn.Gen.Stat.Rev. s 29—35.

7 Connecticut permits possession of certain narcotics under specified circumstances—e.g., pursuant to a doctor's prescription. See Conn.Gen.Stat.Rev. ss 19—443, 19—456(c), 19—481.

8 The Court virtually ignores the requirement that the suspect be dangerous, as well as armed. Other courts have followed Terry more closely. See, e.g., Commonwealth v. Bourke, 218 Pa.Super. 320, 323, 280 A.2d 425, 427 (1971); Commonwealth v. Clarke, 219 Pa.Super. 340, 343, 280 A.2d 662, 663 (1971); Finley v. People, 176 Colo. 1, 488 P.2d 883 (1971). See also State v. Goudy, 52 Haw, 497, 505, 479 P.2d 800, 805 (1971) (Abe, J., dissenting).

9 The Court appears to rely on the fact that the existence of the gun corroborated the information supplied to the officer by the informant. It cannot be disputed that there is minimal corroboration here, but the fact remains that the officer still lacked any knowledge that respondent had done anything illegal. Since carrying a gun is not per se illegal in Connecticut, the fact that respondent carried a gun is no more relevant to probable cause than the fact that his shirt may have been blue, or that he was wearing a jacket. Moreover, the fact that the informant can identify a gun on sight does not indicate an ability to do the same with narcotics. The corroboration of this one fact is a far cry from the corroboration that the Court found sufficient to sustain an arrest in Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959).

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110 S.Ct. 2412
Supreme Court of the United States

ALABAMA, Petitioner
v.
Vanessa Rose WHITE.

No. 89–789.
|
Argued April 17, 1990.
|
Decided June 11, 1990.

Synopsis
Defendant, reserving right to appeal denial of suppression motion, pled guilty in the Circuit Court, Montgomery County, Charles Price, J., to possession of marijuana and possession of cocaine. On her appeal, the Alabama Court of Criminal Appeals, 550 So.2d 1074, reversed and rendered. After granting the state's petition for certiorari, the Supreme Court, Justice White, held that anonymous telephone tip, as corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to make investigatory stop of defendant's vehicle.

Reversed and remanded.

Justice Stevens filed a dissenting opinion which was joined by Justices Brennan and Marshall.

***325** ****2413** *Syllabus*[*]

Police received an anonymous telephone tip that respondent White would be leaving a particular apartment at a particular time in a particular vehicle, that she would be going to a particular motel, and that she would be in possession of cocaine. They immediately proceeded to the apartment building, saw a vehicle matching the caller's description, observed White as she left the building and entered the vehicle, and followed her along the most direct route to the motel, stopping her vehicle just short of the motel. A consensual search of the vehicle revealed marijuana and, after White was arrested, cocaine was found in her purse. The Court of Criminal Appeals of Alabama reversed her conviction on possession charges, holding that the trial court should have suppressed the marijuana and cocaine because the officers did not have the reasonable suspicion necessary under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, to justify the investigatory stop of the vehicle.

Held: The anonymous tip, as corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop. Pp. 2415–2417.

(a) Under *Adams v. Williams,* 407 U.S. 143, 147, 92 S.Ct. 1921, 1924, 32 L.Ed.2d 612, an informant's tip may carry sufficient "indicia of reliability" to justify a *Terry* stop even though it may be insufficient to support an arrest or search warrant. Moreover, *Illinois v. Gates,* 462 U.S. 213, 230, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527, adopted a "totality of the circumstances" approach to determining whether an informant's tip establishes probable cause, whereby the informant's veracity, reliability, and basis of knowledge are highly relevant. These factors are also relevant in ****2414** the reasonable-suspicion context, although allowance must be made in applying them for the lesser showing required to meet that standard. P. 2415.

(b) Standing alone, the tip here is completely lacking in the necessary indicia of reliability, since it provides virtually nothing from which one might conclude that the caller is honest or his information reliable and gives no indication of the basis for his predictions regarding White's criminal activities. See *Gates, supra,* 462 U.S., at 227, 103 S.Ct., at 2326. However, although it is a close question, the totality of the circumstances demonstrates that significant aspects of the informant's story were sufficiently corroborated by the police to furnish reasonable suspicion. Although not every detail ***326** mentioned by the tipster was verified—*e.g.,* the name of the woman leaving the apartment building or the precise apartment from which she left—the officers did corroborate that a woman left the building and got into the described vehicle. Given the fact that they proceeded to the building immediately after the call and that White emerged not too long thereafter, it also appears that her departure was within the time frame predicted by the caller. Moreover, since her 4-mile route was the most direct way to the motel, but nevertheless involved several turns, the caller's prediction of her destination was significantly corroborated even though she was stopped before she reached the motel. Furthermore, the fact that the caller was able to predict her future behavior demonstrates a special familiarity with her affairs. Thus, there was reason to believe that the caller was honest and well informed, and to impart some degree of reliability to his

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allegation that White was engaged in criminal activity. See *id.,* at 244, 245, 103 S.Ct., at 2335, 2336. Pp. 2415–2417.

550 So.2d 1074 (Ala.Cr.App.1989), reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 2417.

Attorneys and Law Firms

Joseph G.L. Marston III, Assistant Attorney General of Alabama, argued the cause for petitioner. With him on the briefs were *Don Siegelman,* Attorney General, and *Stacy S. Houston, Rosa Hamlett Davis,* and *Andrew J. Segal,* Assistant Attorneys General.

David B. Bryne, Jr., by appointment of the Court, 493 U.S. 1054, argued the cause and filed a brief for respondent.*

* Briefs of *amici curiae* were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro* and *Donald I. Schoen;* and for the Americans for Effective Law Enforcement, Inc., et al. by *Gregory U. Evans, Daniel B. Hales, Joseph A. Morris, George D. Webster, Fred E. Inbau, Wayne W. Schmidt, Bernard J. Farber, William K. Lambie,* and *James P. Manak.*

Opinion

Justice WHITE delivered the opinion of the Court.

Based on an anonymous telephone tip, police stopped respondent's vehicle. A consensual search of the car revealed drugs. The issue is whether the tip, as corroborated by independent ***327** police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop. We hold that it did.

On April 22, 1987, at approximately 3 p.m., Corporal B.H. Davis of the Montgomery Police Department received a telephone call from an anonymous person, stating that Vanessa White would be leaving 235–C Lynwood Terrace Apartments at a particular time in a brown Plymouth station wagon with the right taillight lens broken, that she would be going to Dobey's Motel, and that she would be in possession of about an ounce of cocaine inside a brown attaché case. Corporal Davis and his partner, Corporal P. A. Reynolds, proceeded to the Lynwood Terrace Apartments. The officers saw a brown Plymouth station wagon with a broken right taillight in the parking lot in front of the 235 building. The officers observed respondent leave the 235 building, carrying nothing in her hands, and enter the station wagon. They followed the vehicle as it drove the most direct route to Dobey's Motel. When the vehicle reached the Mobile Highway, on which Dobey's Motel is located, Corporal Reynolds requested a patrol unit to stop the vehicle. The vehicle was stopped at approximately 4:18 p.m., just short of Dobey's Motel. Corporal Davis asked respondent to step to the rear of her car, where he informed her ****2415** that she had been stopped because she was suspected of carrying cocaine in the vehicle. He asked if they could look for cocaine, and respondent said they could look. The officers found a locked brown attaché case in the car, and, upon request, respondent provided the combination to the lock. The officers found marijuana in the attaché case and placed respondent under arrest. During processing at the station, the officers found three milligrams of cocaine in respondent's purse.

Respondent was charged in Montgomery County Court with possession of marijuana and possession of cocaine. The trial court denied respondent's motion to suppress, and she pleaded guilty to the charges, reserving the right to appeal ***328** the denial of her suppression motion. The Court of Criminal Appeals of Alabama held that the officers did not have the reasonable suspicion necessary under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), to justify the investigatory stop of respondent's car, and that the marijuana and cocaine were fruits of respondent's unconstitutional detention. The court concluded that respondent's motion to dismiss should have been granted and reversed her conviction. 550 So.2d 1074 (1989). The Supreme Court of Alabama denied the State's petition for writ of certiorari, two justices dissenting. 550 So.2d 1081 (1989). Because of differing views in the state and federal courts over whether an anonymous tip may furnish reasonable suspicion for a stop, we granted the State's petition for certiorari, 493 U.S. 1042, 110 S.Ct. 834, 107 L.Ed.2d 830 (1990). We now reverse.

Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), sustained a *Terry* stop and frisk undertaken on the basis of a tip given in person by a known informant who had provided information in the past. We concluded that, while the unverified tip may have been insufficient to support an arrest or search warrant, the information carried sufficient "indicia of reliability" to justify a forcible stop. 407 U.S., at 147, 92 S.Ct., at 1924. We did not address the issue of anonymous

tips in *Adams,* except to say that "[t]his is a stronger case than obtains in the case of an anonymous telephone tip," *id.,* at 146, 92 S.Ct., at 1923.

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), dealt with an anonymous tip in the probable-cause context. The Court there abandoned the "two-pronged test" of *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), in favor of a "totality of the circumstances" approach to determining whether an informant's tip establishes probable cause. *Gates* made clear, however, that those factors that had been considered critical under *Aguilar* and *Spinelli*—an informant's "veracity," "reliability," and "basis of knowledge"—remain "highly relevant in determining the value of his report." 462 U.S., at 230, 103 S.Ct., at 2328. These factors are also relevant in the reasonable-suspicion context, although allowance ***329** must be made in applying them for the lesser showing required to meet that standard.

The opinion in *Gates* recognized that an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is "by hypothesis largely unknown, and unknowable." *Id.,* at 237, 103 S.Ct., at 2332. This is not to say that an anonymous caller could never provide the reasonable suspicion necessary for a *Terry* stop. But the tip in *Gates* was not an exception to the general rule, and the anonymous tip in this case is like the one in *Gates:* "[It] provides virtually nothing from which one might conclude that [the caller] is either honest or his information reliable; likewise, the [tip] gives absolutely no indication of the basis for the [caller's] predictions regarding [Vanessa White's] ****2416** criminal activities." 462 U.S., at 227, 103 S.Ct., at 2326. By requiring "[s]omething more," as *Gates* did, *ibid.,* we merely apply what we said in *Adams:* "Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized," 407 U.S., at 147, 92 S.Ct., at 1924. Simply put, a tip such as this one, standing alone, would not " 'warrant a man of reasonable caution in the belief' that [a stop] was appropriate." *Terry, supra,* 392 U.S., at 22, 88 S.Ct., at 1880, quoting *Carroll v. United States,* 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543 (1925).

As there was in *Gates,* however, in this case there is more than the tip itself. The tip was not as detailed, and the corroboration was not as complete, as in *Gates,* but the required degree of suspicion was likewise not as high. We discussed the difference in the two standards last Term in *United States v. Sokolow,* 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989):

> "The officer [making a *Terry* stop] ... must be able to articulate something more than an 'inchoate and unparticularized suspicion or "hunch." ' [*Terry,* 392 U.S.,] at 27 [88 S.Ct., at 1883]. The Fourth Amendment requires 'some minimal ***330** level of objective justification' for making the stop. *INS v. Delgado,* 466 U.S. 210, 217 [104 S.Ct. 1758, 1763, 80 L.Ed.2d 247] (1984). That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means 'a fair probability that contraband or evidence of a crime will be found,' [*Gates,* 462 U.S., at 238, 103 S.Ct., at 2332], and the level of suspicion required for a *Terry* stop is obviously less demanding than for probable cause."

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. *Adams v. Williams, supra,* demonstrates as much. We there assumed that the unverified tip from the known informant might not have been reliable enough to establish probable cause, but nevertheless found it sufficiently reliable to justify a *Terry* stop. 407 U.S., at 147, 92 S.Ct., at 1923–24. Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the "totality of the circumstances—the whole picture," *United States v. Cortez,* 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981), that must be taken into account when evaluating whether there is reasonable suspicion. Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable. The *Gates* Court applied its totality-of-the-circumstances approach in this manner, taking into account the facts known to the officers from personal observation, and giving the anonymous tip the weight it deserved in light of its indicia of reliability as established through independent police work. The same

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approach applies in the reasonable-suspicion context, the only difference ***331** being the level of suspicion that must be established. Contrary to the court below, we conclude that when the officers stopped respondent, the anonymous tip had been sufficiently corroborated to furnish reasonable suspicion that respondent was engaged in criminal activity and that the investigative stop therefore did not violate the Fourth Amendment.

It is true that not every detail mentioned by the tipster was verified, such as the name of the woman leaving the building or the precise apartment from which she left; but the officers did corroborate that a woman left the 235 building and got into the particular ****2417** vehicle that was described by the caller. With respect to the time of departure predicted by the informant, Corporal Davis testified that the caller gave a particular time when the woman would be leaving, App. 5, but he did not state what that time was. He did testify that, after the call, he and his partner proceeded to the Lynwood Terrace Apartments to put the 235 building under surveillance, *id.,* at 5–6. Given the fact that the officers proceeded to the indicated address immediately after the call and that respondent emerged not too long thereafter, it appears from the record before us that respondent's departure from the building was within the timeframe predicted by the caller. As for the caller's prediction of respondent's destination, it is true that the officers stopped her just short of Dobey's Motel and did not know whether she would have pulled in or continued past it. But given that the 4-mile route driven by respondent was the most direct route possible to Dobey's Motel, 550 So.2d, at 1075, Tr. of Oral Arg. 24, but nevertheless involved several turns, App. 7, Tr. of Oral Arg. 24, we think respondent's destination was significantly corroborated.

The Court's opinion in *Gates* gave credit to the proposition that because an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity. 462 U.S., at 244, 103 S.Ct., at 2335. Thus, it is not ***332** unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability to the other allegations made by the caller.

We think it also important that, as in *Gates,* "the anonymous [tip] contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." *Id.,* at 245, 103 S.Ct., at 2335–36. The fact that the officers found a car precisely matching the caller's description in front of the 235 building is an example of the former. Anyone could have "predicted" that fact because it was a condition presumably existing at the time of the call. What was important was the caller's ability to predict respondent's *future behavior,* because it demonstrated inside information —a special familiarity with respondent's affairs. The general public would have had no way of knowing that respondent would shortly leave the building, get in the described car, and drive the most direct route to Dobey's Motel. Because only a small number of people are generally privy to an individual's itinerary, it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities. See *ibid.* When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop.

Although it is a close case, we conclude that under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of respondent's car. We therefore reverse the judgment of the Court of Criminal Appeals of Alabama and remand the case for further proceedings not inconsistent with this opinion.

So ordered.

***333** Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

Millions of people leave their apartments at about the same time every day carrying an attaché case and heading for a destination known to their neighbors. Usually, however, the neighbors do not know what the briefcase contains. An anonymous neighbor's prediction about somebody's time of departure and probable destination is anything but a reliable basis for assuming that the commuter is ****2418** in possession of an illegal substance—particularly when the person is not even carrying the attaché case described by the tipster.

The record in this case does not tell us how often respondent drove from the Lynwood Terrace Apartments to Dobey's Motel; for all we know, she may have been a room clerk or telephone operator working the evening shift. It does not tell

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us whether Officer Davis made any effort to ascertain the informer's identity, his reason for calling, or the basis of his prediction about respondent's destination. Indeed, for all that this record tells us, the tipster may well have been another police officer who had a "hunch" that respondent might have cocaine in her attaché case.

Anybody with enough knowledge about a given person to make her the target of a prank, or to harbor a grudge against her, will certainly be able to formulate a tip about her like the one predicting Vanessa White's excursion. In addition, under the Court's holding, every citizen is subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed. Fortunately, the vast majority of those in our law enforcement community would not adopt such a practice. But the Fourth Amendment was intended to protect the citizen from the overzealous and unscrupulous officer as well as from those who are conscientious and truthful. This decision makes a mockery of that protection.

I respectfully dissent.

All Citations

496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301, 58 USLW 4747

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

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555 Pa. 522
Supreme Court of Pennsylvania.

COMMONWEALTH of
Pennsylvania, Appellee,
v.
William ALLEN, Appellant.

Submitted June 10, 1998.
|
Decided Feb. 26, 1999.

Synopsis

In prosecution for drug offenses, the Court of Common Pleas, Philadelphia County, No. 9411-0024, Levan Gordon, J., suppressed evidence. Commonwealth appealed. The Superior Court, 452 Pa.Super. 200, 681 A.2d 778, No. 02106 Philadelphia 1995, reversed. Defendant appealed. The Supreme Court, No. 0004 E.D. Appeal Docket 1998, Nigro, J., held that non-specific and second-hand information from retired police officer about drug sales at address where defendant was spotted sitting on chair apparently asleep did not justify investigatory stop.

Order of Superior Court reversed.

Castille, J., dissented and filed opinion in which Newman and Saylor, JJ., joined.

Attorneys and Law Firms

****738** ***524** John W. Packel, Karl L. Morgan, Philadelphia, for W. Allen.

Catherine Marshall, Philadelphia, for the Com.

Before FLAHERTY, C.J., and ZAPPALA, CAPPY, CASTILLE, NIGRO, NEWMAN and SAYLOR, JJ.

OPINION OF THE COURT

NIGRO, Justice.

This is an appeal from the order of the Superior Court reversing the trial court's suppression of the drugs found on appellant's person during the course of an investigatory stop made pursuant to *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The issue presented for our review concerns whether the police officer who discovered the drugs on appellant's person during the course of the investigatory stop had a reasonable suspicion that appellant was currently engaged in criminal activity at the time that he conducted the investigatory stop. Because we conclude that the police officer did not have a reasonable suspicion that appellant was currently engaged in criminal activity at the time of the stop, we reverse the Superior Court's order reversing the trial court's suppression of the physical evidence.

Initially, we note that we are bound by the factual findings of the suppression court which are supported by the record, and are limited to determining whether the legal conclusions that the suppression court drew therefrom are correct. *Commonwealth v. Brown,* 551 Pa. 465, 711 A.2d 444, 451 (1998)(citing *Commonwealth v. Cortez,* 507 Pa. 529, 491 A.2d 111, (1985), *cert. denied,* 474 U.S. 950, 106 S.Ct. 349, 88 L.Ed.2d 297 (1985)). With this standard of review in mind, a ***525** recitation of the circumstances underlying the instant appeal are in order.

On October 24, 1994, Philadelphia Police Officer Kyle Bey received information from a retired police lieutenant named Grixbie Stephens that a man nicknamed "Mookie" had been selling drugs out of a house located at 2128 North Natrona Street in North Philadelphia.[1] Upon receiving the information, Officer Bey proceeded to 2128 North Natrona Street with his partner and Stephens, ostensibly to investigate appellant's activities. Upon arriving there, Officer Bey observed appellant sitting, apparently asleep, in a chair in front of the house. Appellant met the general description of "Mookie" given by ****739** Stephens. When Officer Bey exited his patrol car to approach appellant, he noticed a large bulge in appellant's front left pocket. Concerned that appellant might be armed, Officer Bey ordered appellant to get up and put his hands against the wall. Appellant complied, and when he did, his sweatshirt pocket flared open, revealing several packets of crack cocaine. Officer Bey handcuffed appellant, searched him, and found several more packets containing crack cocaine in his front left pocket. Appellant was arrested and charged with several drug possession offenses. He moved to suppress the drugs found on his person as the fruit of an illegal stop and/or arrest, prompting the trial court to hold a suppression hearing on March 13, 1995.

At the suppression hearing, Officer Bey was questioned concerning the content of the information provided to him by Stephens prior to appellant's arrest. Officer Bey's testimony

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regarding the substance of the information given to him by Stephens was as follows:

> I had spoken to him [Stephens] at the district, the 22nd, at 17th and Montgomery. And he had related to me that he was working with a senior citizens organization, some adult ***526** services that he renders. And he had information on the 2100 block of Natrona Street, the exact address of this information being 2128 North Natrona Street. That a woman who had lived there, a senior citizen who he was to be doing work for, handling a service for, was having drugs sold out of her house, not by her, but by others, and that the drugs were also being sold at the street level in front of her property. At that time he also gave me a description of a male and the nickname of a male. This description was of a middle-aged man, heavyset, who went by the name of Mookie.... He gave information to me of this person being known to carry a gun and sell narcotics either from inside of this location or outside.

(N.T., 3/13/95, at 8–9.)

Officer Bey also testified at the suppression hearing that he knew the 2100 block of North Natrona Street to be a high drug traffic area, but he had never personally made any narcotics arrests there. He further stated that upon receiving the information from Stephens, the name "Mookie" clicked in his head, and he believed that he had come into contact with "Mookie" before while on duty. However, he could not remember when, or in what context, that contact took place.

Following the suppression hearing, the trial court concluded that Officer Bey did not have a reasonable suspicion that appellant was currently engaged in criminal activity at the time of the investigatory stop, and therefore suppressed the physical evidence seized from appellant's person. The trial court's decision to suppress the physical evidence was largely based on its finding that the information provided to Officer Bey by Stephens was skeletal at best, and failed to provide any details concerning the dates, times, and frequency of the alleged drug sales. In addition, the trial court noted that Officer Bey failed to personally observe any suspicious conduct on appellant's part that would corroborate the incriminating aspects of the information provided by Stephens.

The Commonwealth took an interlocutory appeal to the Superior Court following the trial court's suppression of the ***527** drugs found on appellant.[2] THE SUPERIOR COURT, WIth judge del sole diSsentiNg, Reversed the trial court's suppression of the drugs. The Superior Court specifically found that the information provided by Stephens did, in fact, create a reasonable suspicion on Officer Bey's part that appellant was engaged in criminal activity at the time of his initial *Terry* stop, that Officer Bey was justified in proceeding to conduct a pat down search for weapons, and that the initial discovery of cocaine inside appellant's sweatshirt provided ****740** probable cause to arrest him. This Court granted appellant's petition for allowance of appeal.[3]

The police are permitted to stop and briefly detain citizens whenever they have a reasonable suspicion, based on specific and articulable facts, that criminal activity may be afoot. *Terry v. Ohio,* 392 U.S. 1, 21, 30, 88 S.Ct. 1868, 1880, 1884, 20 L.Ed.2d 889 (1968); *Commonwealth v. Melendez,* 544 Pa. 323, 676 A.2d 226, 228 (1996); *Commonwealth v. Hicks,* 434 Pa. 153, 160, 253 A.2d 276, 280 (1969). In evaluating whether a stop is justified, courts consider whether or not an informant's tip creates a reasonable suspicion of current criminal activity based on the totality of the circumstances. *Alabama v. White,* 496 U.S. 325, 328–29, 110 S.Ct. 2412, 2415, 110 L.Ed.2d 301 (1990); *Commonwealth v. Martin,* 705 A.2d 887, 892 (Pa.Super.1997); *Commonwealth v. Wilson,* 440 Pa.Super. 269, 275–76, 655 A.2d 557, 560–61 (1995) (citing *Commonwealth v. Epps,* 415 Pa.Super. 231, 233–34, 608 A.2d 1095, 1096 (1992)). The informant's reliability, veracity, and basis of knowledge are all relevant factors. *Alabama v. White,* 496 U.S. 325, 328, 110 S.Ct. 2412, 2415, 110 L.Ed.2d 301 (1990) (citing *Illinois v. Gates,* 462 U.S. 213, 230, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983)). ***528** Of course, the information supplied to the police by the informant must contain "specific and articulable facts" that lead the police to reasonably suspect that criminal activity may be afoot. *See Commonwealth v. Melendez,* 544 Pa. 323, 676 A.2d 226, 228 (1996) (citing *Terry v. Ohio,* 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968)). In addition, if the police reasonably believe that a suspect may be armed and dangerous, then they are permitted to conduct a limited pat-down search of the suspect's outer clothing for weapons to ensure their safety. *Terry v. Ohio,* 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1968); *Ybarra v. Illinois,* 444 U.S. 85, 92–93, 100 S.Ct. 338, 342–43, 62 L.Ed.2d 238 (1979).

Having reviewed the testimony provided at the suppression hearing, the trial court's Findings of Fact and Conclusions of Law, and the Superior Court's opinion reversing the suppression of the drugs found on appellant, we conclude that at the time of the initial *Terry* stop, Officer Bey did not possess

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sufficient information to raise a reasonable suspicion that appellant was currently engaged in criminal activity. Officer Bey offered no indication in his testimony at the suppression hearing that Stephens had given him any information concerning when appellant was alleged to have sold drugs at 2128 North Natrona Street, or with what regularity and frequency he was selling drugs there. In addition, Officer Bey's testimony fails to establish whether or not Stephens told him the specific basis of the knowledge concerning the drug activity. The trial court found that Stephens told Bey that he received his information concerning the drug dealing at 2128 North Natrona Street from a senior citizen for whom he provided services. Bey's testimony provides no indication that Stephens told him how the senior citizen who gave him his information knew that "Mookie" had been selling drugs and carrying a gun at 2128 North Natrona Street. Therefore, the trial court correctly concluded that Officer Bey was unaware of the specific basis of knowledge of the senior citizen who gave the information concerning "Mookie" to Stephens.[4] The ***529** skeletal information provided to Officer Bey by Stephens, combined with the mere fact that appellant was sitting, apparently asleep, outside of 2128 North Natrona Street upon Bey's arrival, simply fails to ****741** support the Superior Court's conclusion that Officer Bey had a reasonable suspicion that appellant was currently engaged in criminal activity at that time.[5]

Importantly, appellant's presence outside 2128 North Natrona Street upon Officer Bey's arrival there corroborated only an innocent detail of the information provided by Stephens. Officer Bey could have corroborated Stephens' information by observing suspicious conduct on the part of appellant, and thereby developed the requisite reasonable suspicion that appellant was dealing drugs to justify a *Terry* stop. *See Commonwealth v. Hawkins,* 547 Pa. 652, 692 A.2d 1068, 1071 (1997) (plurality opinion) ("Upon receiving unverified information that a certain person is engaged in illegal activity, the police may always observe the suspect and conduct their own investigation. If police surveillance produces a reasonable suspicion of criminal conduct, then the suspect may, of course, be briefly stopped and questioned [pursuant to *Terry v. Ohio*]....").

In sum, Officer Bey received second-hand information that lacked any indication with what frequency appellant was selling drugs, or that appellant was currently engaged in doing so. He then proceeded to observe appellant sitting in a chair, apparently asleep, outside the property where Stephens relayed that he had been dealing drugs. Officer Bey should have obtained more information concerning the senior citizen's ***530** basis of knowledge, and appellant's alleged drug dealing, before conducting an investigative stop. In the alternative, as was mentioned above, Officer Bey could have attempted to personally observe suspicious conduct on the part of appellant, which would have corroborated the incriminating aspects of Stephens' information. Unfortunately, Officer Bey instead decided to rely on the non-specific and second-hand information provided to him by Stephens as his justification for stopping appellant. As a result, Officer Bey's decision to stop appellant and pat him down for weapons was not prompted by a reasonable suspicion that appellant was currently engaged in criminal activity.[6]

The Fourth Amendment to the United States Constitution, and Article 1, Section 8 of the Pennsylvania State Constitution require that police officers have within their knowledge "specific and articulable facts" raising a reasonable suspicion that criminal activity is afoot before they conduct an investigatory stop of an individual. *See, e.g., Commonwealth v. Melendez,* 544 Pa. 323, 676 A.2d 226, 228–29 (1996)(discussing federal and state constitutional constraints on police investigatory stops recognized in *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and *Commonwealth v. Hicks,* 434 Pa. 153, 253 A.2d 276 (1969)). We find that, considering the totality of the circumstances, Officer Bey did not have within his knowledge "specific and articulable facts" raising a reasonable suspicion that appellant was currently engaged or about to engage in criminal activity at the time of his investigatory stop. Because the physical evidence seized from appellant's person ***531** was obtained by contravening his rights under the Fourth Amendment to the Federal Constitution and Article 1, Section 8 of the Pennsylvania State Constitution, we reverse the Superior Court's order reversing the trial court's suppression of the physical evidence.

****742** Justice CASTILLE files a dissenting opinion in which Justice NEWMAN and Justice SAYLOR join.

CASTILLE, Justice, dissenting.

I respectfully dissent, as I believe that Officer Bey reasonably suspected that criminal activity was afoot at the time he initiated an investigative stop of appellant. Consequently, I would affirm the Superior Court's determination that the

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investigative stop comported with the requirements of both the United States and Pennsylvania Constitutions.

In its analysis of what Officer Bey observed upon arrival outside 2128 North Natrona Street, the majority correctly points out that Officer Bey observed "Mookie," the subject of the tip and a person with whom he was familiar, sitting in a chair on the sidewalk with his arms folded across his chest and his eyes closed in front of the same house which was identified in the tip and which was located in an area that the officer knew to be a high drug-trafficking area. However, the majority's recitation of the facts omits one rather crucial fact. Namely, Officer Bey, who had been told by the tipster that "Mookie" would be carrying a gun, observed a "big bulge" in appellant's left front pants pocket. N.T. 3/13/95, at 12–13, 23–24. It was the observation of this bulge which, in combination with the officer's corroboration of all other parts of the tip except for the actual witnessing of a narcotics sale, gave Officer Bey a reasonable suspicion that criminal activity was afoot.[1] Indeed, to hold otherwise is to contravene the persuasive precedent of our sister states as well as the federal courts ***532** which have unanimously concluded that observation of a hidden bulge pursuant to a tip predicting the presence of an identifiable armed suspect at a certain location gives rise to a reasonable suspicion of criminal activity afoot and, hence, a justifiable *Terry* stop.[2]

At the outset, it is important to set forth the axiom that Fourth Amendment *Terry* stop analysis balances the "need to search or seize against the invasion which the search or seizure entails." *Michigan v. Long,* 463 U.S. 1032, 1046, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) (quoting *Terry v. Ohio,* 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). When weighing the need to search or seize, we must of course be mindful that a tip which implicates a risk to public safety by alerting police that the individual described has access to a gun suggests a greater need to search or seize than a tip which does not alert the police to this fact. *Speight v. United States,* 671 A.2d 442, 448 (D.C.1996). Thus, courts have consistently upheld the right of police to conduct a limited interrogation and/or search in situations where tipsters described an armed individual and where the officers subsequently corroborated the description of the individual and observed a bulge in the individual's clothing. *See Ramirez v. State,* 672 S.W.2d 480 (Tex.Crim.App.1984) (cited favorably in *Gutierrez v. State,* 1996 WL 50929 *3, 1996 Tex.App. LEXIS 511, at *10) (pursuant to "man with a gun tip" from unnamed witness, police officer observed a man matching the description of the subject of the tip with a bulge in his pocket; ***533** court held that reasonable suspicion existed for a temporary detention and limited search for weapons); ****743** *People v. Quan,* 182 A.D.2d 506, 507, 582 N.Y.S.2d 190 (1992) (even without any tip, officer's observation of bulge in shape of gun handle, in itself, constituted reasonable suspicion); *Gaskins v. United States,* 262 A.2d 810, 812 n. 2 (D.C.1970) (pursuant to tip from " seemingly reasonable" tipster, if officer "saw a gun bulge, he would be warranted in seizing it"); *United States v. Colon,* 1998 WL 122595 *3, 1998 U.S. Dist. LEXIS 3259, at *9 (bulge in coat cited as central observation validating investigative detention). Additionally, the United States Supreme Court has determined that, in the course of an ordinary traffic stop, an officer's observation of a bulge in the driver's jacket is, in itself, sufficient grounds to conduct a limited search. *See Pennsylvania v. Mimms,* 434 U.S. 106, 112, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) ("The bulge in the jacket permitted the officer to conclude that Mimms was armed....")

Thus, at the moment that Officer Bey ordered appellant to get up and put his hands against the wall, he was justified in doing so by having corroborated appellant's presence in a high drug trafficking area, outside the home in which the tipster lived and from which the tipster claimed that appellant trafficked in drugs, with a big bulge in his pants pocket which appeared to the officer to be consistent with the gun with which the tipster predicted appellant would be armed. Indeed, to allow appellant to go forth without even questioning him in this situation, when appellant appeared to be carrying a concealed firearm, would have amounted to a dereliction of Officer Bey's duties—a dereliction which might have had serious implications for the safety of innocent citizens of the Commonwealth.

I believe that the Court's error today is partly a result of its failure to appreciate the principles that drive the distinction between the "reasonable suspicion" required for a *Terry* stop and the "probable cause" required for an arrest. In a *Terry* stop, the intrusiveness of the police conduct at issue is comparatively negligible. The police are not seeking to strip the subject of his liberty and bring him to trial. An individual may well be annoyed by having to respond to questions or by ***534** submitting to a brief detention—especially if that individual is trying to obfuscate some criminal conduct—but police officers do not intrude on any deeply ingrained notion of liberty simply by asking a question or initiating an extremely brief detention to ensure the safety of the citizenry. That is why the standard of "reasonable suspicion" required for an investigative stop is far less exacting than the

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standard of "probable cause" for an arrest, which is itself far less exacting than the necessary "proof beyond a reasonable doubt" required to convict. These different standards are driven by the vastly different levels of intrusion that are implicated by investigative stops, arrests, and finally by convictions.

Here, after an admirable collaboration between a concerned senior citizen, an ex-police officer, and a current police officer, and after diligent police work corroborating the significant details of the senior citizen's tip, two hundred and fifty-six packets of crack cocaine were seized from a purveyor of illegal narcotics. In suppressing this evidence, the majority fails to demonstrate why a departure from the sound reasoning of the United States Supreme Court and our sister states is warranted. I respectfully dissent.

Justice NEWMAN and Justice SAYLOR join this dissenting opinion.

All Citations

555 Pa. 522, 725 A.2d 737

Footnotes

1 Although the lower courts cite Grixbie Stevens as the source of Officer Bey's information, and 2128 North Latona Street as the location of the alleged drug dealing, the record reflects that the correct spelling of the lieutenant's name is Grixbie Stephens and that the correct spelling of the location of the alleged drug dealing is 2128 North Natrona Street.

2 The Commonwealth's interlocutory appeal to the Superior Court was taken pursuant to Pennsylvania Rule of Appellate Procedure 311(d), which permits Commonwealth appeals as of right from lower court decisions that the Commonwealth certifies will either terminate or substantially handicap the prosecution.

3 In addition to arguing that Officer Bey lacked reasonable suspicion justifying an investigatory stop, appellant argues that he was arrested without probable cause. Appellant, however, only argued the lack of reasonable suspicion in his petition for allowance of appeal. Thus, that is the only issue before this Court.

4 Contrary to the trial court, the Superior Court stated that a senior citizen living at 2128 North Natrona Street was the source of Stephens' information concerning the alleged drug activity at that address. However, Bey's testimony does not clearly specify who told Stephens about the drug activity. The trial court's finding that the source of Stephen's information was a senior citizen for whom he provided services is supported by the record and we are thus bound by it. In any event, even if the senior citizen lived at 2128 North Natrona Street, Officer Bey was never made aware of the specific basis of his or her knowledge.

5 We do not question Stephens' veracity or reliability, and we are sure that he relayed the information that he received to Officer Bey with only the most laudable intentions. However, we are not of the opinion that the information that Stephens provided to Officer Bey, in and of itself, is sufficient to justify Officer Bey's investigatory stop of appellant.

6 In reaching the opposite conclusion, the Superior Court relied on *In the Interest of S.D.,* 429 Pa.Super. 576, 633 A.2d 172 (1993), where the court found that reasonable suspicion justified an initial investigative stop. In that case, an individual walking the streets in a high crime area during the early hours of the morning saw two men carrying drugs and guns. He immediately informed an officer patrolling nearby of his observations, and the officer proceeded to conduct a *Terry* stop of the suspects. In the instant case, Stephens was not an eyewitness to any criminal activity. His basis of knowledge was a third person, whose basis of knowledge was unknown to Officer Bey. In addition, Stephens did not provide any information to Officer Bey suggesting that appellant was currently engaged in criminal activity. Thus, *In the Interest of S.D.* is inapposite.

1 In analyzing the nature of the tip itself, the majority suggests that the tip should be deemed less reliable because the former policeman who passed the tip along to Officer Bey did not reveal the name of the senior citizen who provided the information to him. However, the important point is that the senior citizen did not come forward anonymously, but instead sought out a former police officer in person to convey the information, telling him that she knew her information to be reliable because she *lived* in the house out of which "Mookie" was selling drugs. This willingness of the tipster to be identified, as opposed to providing information through an anonymous phone call, placed the tip in a *more* reliable

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category under this Court's jurisprudence, notwithstanding the majority's conclusion to the contrary. *See Commonwealth v. Jackson,* 548 Pa. 484, 698 A.2d 571, 574 (1997) (anonymous tip is less reliable because "a known informant places himself or herself at the risk of prosecution for filing a false claim if the tip is untrue, whereas an unknown informant does not").

2 Assuming arguendo that the initial *Terry* stop was justified, the subsequent arrest was, of course, supported by probable cause. This is manifest since, during the *Terry* stop, the suspect's large sweatshirt pocket flared open, exposing numerous clear plastic packets of cocaine.

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318 F.2d 18
United States Court of Appeals Fifth Circuit.

DADE COUNTY, FLORIDA, Appellant,
v.
PALMER AND BAKER ENGINEERS, INC., Appellee.
PALMER AND BAKER ENGINEERS, INC., Appellant
v.
DADE COUNTY, FLORIDA, Appellee.

No. 20144.
|
May 24, 1963.

Synopsis

Action by design engineering company against county for damages allegedly resulting from breach of contract. From an adverse judgment of the United States District Court for the Southern District of Florida, Emett C. Choate, J., the county appealed and the engineering company cross-appealed. The Court of Appeals, Tuttle, Chief Judge, held that where contract between county and engineering company for design services did not purport to cover what would happen if either party breached agreement, it was not proper for trial court, following determination that breach had occurred, to rewrite contract and supply provision covering damages in event of breach, and court should instead have proceeded to fix damages based on the value of the contract to plaintiff, taking account of the contingencies which would have had to be met.

Reversed and remanded.

Attorneys and Law Firms

***19** Darrey A. Davis, County Atty., Miami, Fla., for appellant-appellee.

Phillip Schiff, for Dubbin, Schiff, Berkman & Dubbin, Miami, Fla., for appellee and cross-appellant.

Before TUTTLE, Chief Judge, and JONES and BELL, Circuit Judges.

Opinion

TUTTLE, Chief Judge.

This is an appeal by Dade County and a cross-appeal by Palmer and Baker Engineers, Inc., from a judgment of the trial court, sitting without a jury, awarding Palmer and Baker Engineers, Inc. $241,626, and interest for out-of-pocket expenses incurred and paid by it in the partial performance of a contract which the trial court found to have been breached by Dade County before its completion.

The circumstances surrounding the execution of the contract between the parties are: The Board of County Commissioners of Dade County, Florida, determined that the County would provide a limited access toll facility, known as the Mid-Bay Drive, provided such project could be constructed on a self-sustaining financial basis by means of revenue bonds payable solely from tolls, and without the use of any County tax funds; in furtherance of such proposed public works project the County contracted for the services of engineers and a financial consultant on a contingency basis, dependent upon the issuance and sale of revenue bonds in an amount sufficient to pay all costs; the County engaged Ewin Engineering Corporation as consultant engineer on a contingent fee basis, the contract providing that the liability of the County for the payment of the engineering fees specified therein was contingent upon the availability and receipt of funds derived by the County from proceeds of revenue bonds issued for the payment of the construction costs of the project; the County also entered into a contract with Ira Haupt & Company for financial consultant services and to serve as underwriter for the proposed revenue bonds when the feasibility of the Mid-Bay Drive had been established. This was the posture of affairs when the contract between the parties here before the Court was entered into.

On November 24, 1959, the County entered into a contract with the plaintiff for design and construction engineering services in connection with the project. This contract expressly provided:

‘5) It is understood and agreed that the entire costs for the construction of the Mid-Bay Drive project must be provided and financed by the proceeds derived from the sale of revenue bonds paid and secured solely from toll revenues produced by such project. Therefore, the payment of all compensation ***20** to the Design Engineer is contingent upon the availability and receipt of funds derived from the proceeds of revenue bonds issued and sold for the purpose of payment

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of the construction costs of said project, and the liability of the County for the payment of any compensation to the Design Engineer is limited to and shall be contingent upon the receipt of such funds. Any sums of money becoming due to the Design Engineer shall not in any event constitute a general debt or obligation of the County payable from any County tax revenues or funds. Provided, however, if the Design Engineer, after full completion and acceptance of the Design Phase work and services, establishes that this project is feasible both as to construction costs and available financing, and Ira Haupt & Co. agrees to purchase or sell revenue bonds sufficient in amount to fully finance the construction of such project, and the County Commission should decline to authorize the issuance and sale of such revenue bonds, then and in such event only, the County shall become liable to the Design Engineer for payment of the agreed compensation for providing the Design Phase engineering services from funds other than the proceeds derived from the sale of revenue bonds as aforesaid.

'7) Except as provided in Paragraph 5 hereof, the Design Engineer (plaintiff) shall not be entitled to receive any payments of compensation until the proceeds of revenue bonds have been received by the County and construction contracts have been awarded and executed. * * *'

After the plaintiff had performed approximately 49% Of the design phase of the engineering work called for under its contract, it urged the Board of County Commissioners to adopt a series of resolutions, at least some of which the County concedes were required of it under its contractual agreement with the plaintiff. Principal among these was approval of the final alignment or route of the Mid-Bay Drive as proposed by the plaintiff and the making of application to the State, and City of Miami, for rights-of-way for the Mid-Bay Drive (the rights-of-way were rights-of-way over the water area of the project and did not involve the expenditure of the County funds). There was considerable delay following these requests and, although several meetings were held by the County Commissioners during the following months, up until November 22, 1960, the County had taken no action. On that date the Board of County Commissioners referred the Mid-Bay Drive project to the County Manager with instructions to make a study with respect to the design, self liquidating features, right-of-way acquisition, physical characteristics, and proposed alignment of the Mid-Bay Drive, in consultation with the County's engineering department, and make a report of recommendations in respect thereto to the Board. The County Manager proceeded to make some investigations but he resigned during February, 1961, and up to February 28, 1961, none of the actions recommended by the plaintiff had been acted on by the Board. On that date the plaintiff requested the Board of County Commissioners to make payment for the engineering services performed to date, the amount to be settled by arbitration. This proposal was declined, and, on March 21, 1961, this action for damages was filed by the plaintiff against the County.

The two questions before the Court for decision are, (1) did the record before the trial court justify its conclusion that the County was guilty of unreasonable delays in the performance of obligations imposed on it by the contract to such an extent that this amounted to a breach of the contract by the County, and, if so, (2) what is the measure of damages to be fixed under such circumstances in the case of a contingent ***21** contract which if carried out in good faith by both parties to its ultimate conclusion might never have produced any compensation to the plaintiff.

The plaintiff contended that the action of the Board of County Commissioners constituted a complete abandonment of the contract. Its suit was based, therefore, on the assumption that for this breach of contract it was entitled to recover the full value of the contract. On the assumption that it permitted to complete the contract, it would have been entitled to its fee of 3.8% Of the minimum cost figures for the construction of the project, less the amount it would have to expend in the performance of the balance of the contract, it claimed damages based on these figures. Dade County, on the contrary, contended that under no circumstances would the plaintiff be entitled to any reimbursement or compensation unless and until all of the contingencies touching on the feasibility and the sale of the bonds had occurred.

The trial court's critical fact findings are contained in the following paragraphs:

'The Actions of the Board of County Commissioners (as distinguished from expressions of intent of individual members of the Board) are insufficient as a matter of law to constitute abandonment of the contract. The actions of the Board were not sufficient to indicate a positive, unequivocal, or absolute refusal to perform the contract, but the defendant did breach the contract by unreasonable delay.'

Although contained in paragraph 5 of the conclusions of law, the Court made the following finding of fact:

'* * * The parties intended in the situation presented by the facts of this case to agree that necessary and reasonable out-of-pocket expenses be reimbursed and reasonable value of

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services rendered be paid, but that no agreed fees should be paid unless the project be completed.'

The finding of fact quoted just above follows this conclusion of law by the Court:

'The Palmer Baker contract, unlike the Ewin Engineering contract, does not contain specific language regarding a quantum meruit or even a mere expense recovery, and thereby leaves a great void in the list of agreed rights of the parties, leaving apparently only the extremes of total recovery of the full contract price plus expenses in the event of a breach by the County, despite the fact that only possibly 1% Of the work contemplated by the contract might have been performed, or no recovery at all despite 99% Completion. This void, coupled with the inclusion in the Palmer Baker contract of the language set forth in Finding #7 reciting that said contract was made in conformity with the Ewin Engineering contract, creates such an ambiguity in the terms of the contract that this Court is required to determine the true intention of the parties; * * *.'

We have here the rare situation in which a trial court has construed a contract which both parties claim to be unambiguous and plain in its terms by adding to the contract an agreement for partial payment which neither party agrees to. It doubtless appeared to the trial court that a substantial injustice would occur if parties entering a contract with the obligation to proceed in good faith to its conclusion which, if successfully accomplished, would cover not only out-of-pocket expenses, but a substantial profit for one of the parties, were faced approximately half way through the performance by a situation where one of the parties simply put an end to the matter by failing to carry out its obligations and thus not only destroyed the possibility, or even probability, of a profitable operation for the other party, but also made it impossible for the other party to recover substantial out-of-pocket expenses thus far made in its good faith performance. We ***22** think, however, that it did not require a rewriting of the contract or a determination that the contract was ambiguous for the Court to be able to prevent this type of injustice.

The parties here take two extreme positions. That contended for by the defendant is that since the contract provided for compensation to Palmer and Baker only in the even certain contingencies were met, the fact that they were never met, even though the opportunity to meet them was the fault of Dade County, made it impossible for a court to find that Palmer and Baker were entitled to anything when a breach occurred. The other extreme asserted by Palmer and Baker is that since they were entitled to a profit if they were permitted to go to a conclusion of the contract without hindrance, a breach of the contract prior to full performance entitled them to the profit which they would have received had they been fortunate enough to find after they had done their work that the other contingencies had also fallen into place. The Court, on the other hand, seemed to feel that in order to meet this situation it was necessary for it to find that the parties had omitted an essential term from the contract which the Court had to supply.

We conclude that the error of appellant is that it viewed the affair on the assumption that the contract itself must make provision for the damages to be recovered in the event of a breach of contract and the failure to make such provision left the appellee helpless to obtain any redress. The essential point which was overlooked by both parties and the trial court is that the contract covered, and was intended to cover, only the compensation to be paid in the event it was carried out. It did not cover, and it did not purport to cover, what would happen if either party breached the agreement. It was, therefore, not necessary for the trial court to reconstruct the contract to cover the precise matter of damages in the event of a breach by the County of its implied agreement to proceed responsibly in the premises. The problem for the Trial Court was to determine, once it found that a breach had occurred, the measure of damages, not under the terms of the contract but because the contract had been breached. Here the question is not what did the contract provide should happen under these circumstances, but what does the law provide where a contract of this kind is broken.

First, we affirm the Trial Court's finding that, although the contract does not expressly provide that time is of the essence, the County's conduct amounted to an unreasonable delay and was thus a breach of the implied term of the contract that it would act with due and reasonable diligence in performance of its obligations under the contract.

Finding, as we do that there was a breach of the contract by the County at a time when more than half of the performance by the engineering company remained to be done, there was no obligation on the part of the latter to continue to perform its services, if in fact this would be possible, which is not clear, in the face of the failure of the County to live up to its bargain. This, then, amounted to an anticipatory breach by the County which could then be accepted by the other party to the contract as a basis for seeking its damages.

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Our effort to determine the true measure of damages under these circumstances is not aided by the parties to the appeal. Although five briefs have been filed, two by the county and three by the engineering company, these briefs are all directed to incorrect legal assumptions, those by the appellant Dade County seeking to establish the proposition that since the contract did not provide for any payment unless all contingencies were met then a breach of the contract would not entitle the engineers to any compensation and those of the appellees adamantly insisting that the Court must treat the contract as if there were no contingencies and grant them a recovery of the total amount provided for just as if they had completed the contract, the feasibility of the contract had been established, ***23** and the bonds had been sold and all other matters satisfactorily concluded. Nevertheless, some citations of authority contained in the briefs deal with the general rule and it is apparent that the general rule may be made to fit this particular situation. The appellees quote:

'As a general rule profits which would have resulted from the performance of a contract may be recovered as damages for its breach. This is especially true where the breach consists in repudiating it or otherwise preventing its performance without default of the other party who was willing to perform it.' 9 Fla.Jur., Damages, § 80.

Appellee further cites the case of Sullivan v. McMillan, 26 Fla. 543, 8 So. 450, for the proposition that where there has been a partial performance by one of the parties until a breach by the other, the measure of damages is the same profit that the innocent party would have earned had he fully performed the contract. We have no doubt that these two citations fairly state the rule as to recovery of damages in the event of a breach. The only question (and it is a big one) is 'what are the profits which would have resulted from a full performance of the contract by Palmer and Baker Engineers?' Under the circumstances existing at the time of the trial, no one attempted to prove that if Palmer and Baker had not been prevented from completing these contracts it was a foregone conclusion that feasibility would have been demonstrated and financing would have been completed.

The appellant refers us to Corbin on Contracts, Volume 5, Section 1030, Page 156, where it is said:

'Ordinarily, the damages recoverable for a breach of contract are measured on the basis of the value of the promised performance. This is on the assumption that the performance would necessarily have been rendered if there had been no breach of contract. This assumption is not always a correct one. There are many cases in which performance might not have taken place even if there had been no breach * * *.

'There are some cases in which it is not possible to prove with the necessary degree of assurance that a condition would have occurred if there had been no breach * * *.

'Where a contract right is conditioned upon the happening of some uncertain event and the breach by the promissor makes it impossible to determine with reasonable certainty whether or not the event would have occurred if there had been no breach, the promisee can recover damages measured by the market value of the conditional right at the time of the breach.' This quotation by Corbin is, it seems to us, simply another way of saying the same thing that is stated in the quotation cited on behalf of the appellees. That is, that the innocent party is entitled to the profits he would have earned if there had been no breach; but, of course, he must prove with reasonable certainty what the profits would have been.

Both parties cite the case of Poinsettia Dairy Products, Inc. v. Wessel Company, 123 Fla. 120, 166 So. 306, 104 A.L.R. 216, which involved an advertising contract and which was wrongly breached by the defendant after partial performance. It is to be noted that there was no contingency involved in this case. A part of the opinion quoted by the appellees is:

'Where a party, as defendant here, is under contract to accept and pay for certain services and materials to be furnished in installments by the other party, the plaintiff, after accepting part of the services and materials, breaches the contract by refusing to accept any further performance of services or delivery of materials, and refused to make the installment payments when due, that party, the defendant, is liable in damages to the other party, the ***24** plaintiff; and the damages recoverable are such damages as would naturally result from the breach of the contract, whether as the ordinary consequence of such a breach, or as a consequence which may, under the circumstances, be presumed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. * * * This would include the reasonable and necessary expenses incurred, in good faith, by the plaintiff in partial performance of the contract, * * * together with the profits that would have been realized, if full performance had been permitted, as the direct and immediate fruits of the contract, as distinguished from remote and speculative profits.' (Citatations omitted.)

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The part of the opinion quoted by the appellant appears at 123 Fla. page 120, 166 So. page 309, 104 A.L.R. 216, and is as follows:

'Whenever, as here, one of the parties to a contract, while the contract is still executory, directs the other party not to proceed further with the performance thereof, the former has breached the contract and the latter may bring an action for damages for the breach of the contract, or an action upon the quantum meruit for the value of the services rendered and materials furnished. (cases cited) And in such cases action cannot be maintained to recover the contract price, but may be maintained to recover the damages for the breach of the contract.'

Appellant argues that the suit by Palmer and Baker Engineers must be treated as a suit based upon rescission following the breach by the County and that it is thus an action upon quantum meruit as suggested by the Florida Court in the last quoted paragraph in the Poinsettia Dairy Products case. It is plain, however, that the suit here was a suit for damages for the breach of the contract and was not a suit for quantum meruit.

Giving full consideration to these Florida authorities, we think the legal principles are reasonably clear: If a party to a contract breaches it by his conduct, the innocent party is entitled to his damages which will represent his lost profits which he would have been entitled to had he completed the contract; in such circumstances, if the contract is still executory, or partially so, the innocent party may sue for quantum meruit for the value of the service rendered and materials furnished up to the date of the breach; if a suit for damages for breach of contract is filed the plaintiff is under the burden of proving what its profits would have been if there had been no breach; in the event that there are contingencies that must be satisfied before the innocent party is entitled to any profit under the contract, then the fact finder must take into consideration the likelihood that these contingencies will actually be met in determining the value of the contract or the profits which he would have made if permitted to complete the undertaking.

Unfortunately, the record before us does not permit us to make a final determination of the rights of the parties. The trial court has not considered what amount the plaintiffs were entitled to as for a breach of the contract. The judgment was based rather on the trial court's determination that the contract should be modified to include a provision that under the circumstances then existing the plaintiff should recover the amount of out-of-pocket expenses to date.

In order to permit the consideration of the issues as now defined the judgment of the trial court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

All Citations

318 F.2d 18

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120 S.Ct. 1375
Supreme Court of the United States

FLORIDA, Petitioner,

v.

J.L.

No. 98–1993.
|
Argued Feb. 29, 2000.
|
Decided March 28, 2000.

Synopsis

Juvenile being tried on weapons charge moved to suppress evidence. The Circuit Court of Dade County, Steve Levine, J., granted motion, and state appealed. The District Court of Appeal, 689 So.2d 1116, reversed. Juvenile petitioned for review, and the Florida Supreme Court, 727 So.2d 204,reversed the court of appeal. After granting state's petition for certiorari, the Supreme Court, Justice Ginsburg, held that anonymous tip lacked sufficient indicia of reliability to establish reasonable suspicion for *Terry* investigatory stop.

Decision of Florida Supreme Court affirmed.

Justice Kennedy filed concurring opinion in which Chief Justice Rehnquist joined.

****1376** *Syllabus*[*]

After an anonymous caller reported to the Miami–Dade Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun, officers went to the bus stop and saw three black males, one of whom, respondent J. L., was wearing a plaid shirt. Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct. The officers did not see a firearm or observe any unusual movements. One of the officers frisked J.L. and seized a gun from his pocket. J.L., who was then almost 16, was charged under state law with carrying a concealed firearm without a license and possessing a firearm while under the age of 18. The trial court granted his motion to suppress the gun as the fruit of an unlawful search. The intermediate appellate court reversed, but the Supreme Court of Florida quashed that decision and held the search invalid under the Fourth Amendment.

Held: An anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a police officer's stop and frisk of that person. An officer, for the protection of himself and others, may conduct a carefully limited search for weapons in the outer clothing of persons engaged in unusual conduct where, *inter alia,* the officer reasonably concludes in light of his experience that criminal activity may be afoot and that the persons in question may be armed and presently dangerous. *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889. Here, the officers' suspicion that J.L. was carrying a ****1377** weapon arose not from their own observations but solely from a call made from an unknown location by an unknown caller. The tip lacked sufficient indicia of reliability to provide reasonable suspicion to make a *Terry* stop: It provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. See *Alabama v. White,* 496 U.S. 325, 327, 110 S.Ct. 2412, 110 L.Ed.2d 301. The contentions of Florida and the United States as *amicus* that the tip was reliable because it accurately described J.L.'s visible attributes misapprehend the reliability needed for a tip to justify a *Terry* stop. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. This Court also declines to adopt the argument that the standard *Terry* analysis should be modified to license a "firearm exception," under which a tip alleging an illegal gun would justify a stop and frisk even if ***267** the accusation would fail standard pre-search reliability testing. The facts of this case do not require the Court to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great—*e.g.,* a report of a person carrying a bomb—as to justify a search even without a showing of reliability. Pp. 1378–1380.

727 So.2d 204, affirmed.

GINSBURG, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, in which REHNQUIST, C.J., joined, *post,* p. 1380.

Attorneys and Law Firms

Michael J. Neimand, Miami, FL, for petitioner.

Irving L. Gornstein, Washington, DC, for the United States as amicus curiae, by special leave of the Court.

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Harvey J. Sepler, Miami, FL, for respondent.

Opinion

***268** Justice GINSBURG delivered the opinion of the Court.

The question presented in this case is whether an anonymous tip that a person is carrying a gun is, without more, sufficient to justify a police officer's stop and frisk of that person. We hold that it is not.

I

On October 13, 1995, an anonymous caller reported to the Miami–Dade Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. App. to Pet. for Cert. A–40 to A–41. So far as the record reveals, there is no audio recording of the tip, and nothing is known about the informant. Sometime after the police received the tip—the record does not say how long—two officers were instructed to respond. They arrived at the bus stop about six minutes later and saw three black males "just hanging out [there]." *Id.,* at A–42. One of the three, respondent J.L., was wearing a plaid shirt. *Id.,* at A–41. Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct. The officers did not see a firearm, and J.L. made no threatening or otherwise unusual movements. *Id.,* at A–42 to A–44. One of the officers approached J.L., told him to put his hands up on the bus stop, frisked him, and seized a gun from J.L.'s pocket. The second officer frisked the other two individuals, against whom no allegations had been made, and found nothing.

***269** J.L., who was at the time of the frisk "10 days shy of his 16th birth [day]," Tr. of Oral Arg. 6, was charged under state law with carrying a concealed firearm without a license and possessing a firearm while under the age of 18. He moved to suppress the gun as the fruit of an unlawful search, and the trial court granted his motion. The intermediate appellate court reversed, but the Supreme Court of Florida ****1378** quashed that decision and held the search invalid under the Fourth Amendment. 727 So.2d 204 (1998).

Anonymous tips, the Florida Supreme Court stated, are generally less reliable than tips from known informants and can form the basis for reasonable suspicion only if accompanied by specific indicia of reliability, for example, the correct forecast of a subject's " 'not easily predicted' " movements. *Id.,* at 207 (quoting *Alabama v. White,* 496 U.S. 325, 332, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)). The tip leading to the frisk of J.L., the court observed, provided no such predictions, nor did it contain any other qualifying indicia of reliability. 727 So.2d, at 207–208. Two justices dissented. The safety of the police and the public, they maintained, justifies a "firearm exception" to the general rule barring investigatory stops and frisks on the basis of bare-boned anonymous tips. *Id.,* at 214–215.

Seeking review in this Court, the State of Florida noted that the decision of the State's Supreme Court conflicts with decisions of other courts declaring similar searches compatible with the Fourth Amendment. See, *e.g., United States v. DeBerry,* 76 F.3d 884, 886–887 (C.A.7 1996); *United States v. Clipper,* 973 F.2d 944, 951 (C.A.D.C.1992). We granted certiorari, 528 U.S. 963, 120 S.Ct. 395, 145 L.Ed.2d 308 (1999), and now affirm the judgment of the Florida Supreme Court.

II

Our "stop and frisk" decisions begin with *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). This Court held in *Terry:*

> "[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his ***270** experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Id.,* at 30, 88 S.Ct. 1868.

In the instant case, the officers' suspicion that J.L. was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller. Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, see *Adams v. Williams,* 407 U.S. 143, 146–147, 92 S.Ct. 1921,

32 L.Ed.2d 612 (1972), "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," *Alabama v. White,* 496 U.S., at 329, 110 S.Ct. 2412. As we have recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." *Id.,* at 327, 110 S.Ct. 2412. The question we here confront is whether the tip pointing to J.L. had those indicia of reliability.

In *White,* the police received an anonymous tip asserting that a woman was carrying cocaine and predicting that she would leave an apartment building at a specified time, get into a car matching a particular description, and drive to a named motel. *Ibid.* Standing alone, the tip would not have justified a *Terry* stop. 496 U.S., at 329, 110 S.Ct. 2412. Only after police observation showed that the informant had accurately predicted the woman's movements, we explained, did it become reasonable to think the tipster had inside knowledge about the suspect and therefore to credit his assertion about the cocaine. ***271** *Id.,* at 332, 110 S.Ct. 2412. ****1379** Although the Court held that the suspicion in *White* became reasonable after police surveillance, we regarded the case as borderline. Knowledge about a person's future movements indicates some familiarity with that person's affairs, but having such knowledge does not necessarily imply that the informant knows, in particular, whether that person is carrying hidden contraband. We accordingly classified *White* as a "close case." *Ibid.*

The tip in the instant case lacked the moderate indicia of reliability present in *White* and essential to the Court's decision in that case. The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J.L. of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L. If *White* was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line.

Florida contends that the tip was reliable because its description of the suspect's visible attributes proved accurate: There really was a young black male wearing a plaid shirt at the bus stop. Brief for Petitioner 20–21. The United States as *amicus curiae* makes a similar argument, proposing that a stop and frisk should be permitted "when (1) an anonymous tip provides a description of a particular person at a particular location illegally carrying a concealed firearm, (2) police promptly verify the pertinent details of the tip except the existence of the firearm, and (3) there are no factors that cast doubt on the reliability of the tip...." Brief ***272** for United States 16. These contentions misapprehend the reliability needed for a tip to justify a *Terry* stop.

An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. Cf. 4 W. LaFave, Search and Seizure § 9.4(h), p. 213 (3d ed.1996) (distinguishing reliability as to identification, which is often important in other criminal law contexts, from reliability as to the likelihood of criminal activity, which is central in anonymous-tip cases).

A second major argument advanced by Florida and the United States as *amicus* is, in essence, that the standard *Terry* analysis should be modified to license a "firearm exception." Under such an exception, a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing. We decline to adopt this position.

Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious threat that armed criminals pose to public safety; *Terry* 's rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern. See 392 U.S., at 30, 88 S.Ct. 1868. But an automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing ****1380** police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun. Nor could one securely confine such an exception

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to allegations involving firearms. ***273** Several Courts of Appeals have held it *per se* foreseeable for people carrying significant amounts of illegal drugs to be carrying guns as well. See, *e.g., United States v. Sakyi,* 160 F.3d 164, 169 (C.A.4 1998); *United States v. Dean,* 59 F.3d 1479, 1490, n. 20 (C.A.5 1995); *United States v. Odom,* 13 F.3d 949, 959 (C.A.6 1994); *United States v. Martinez,* 958 F.2d 217, 219 (C.A.8 1992). If police officers may properly conduct *Terry* frisks on the basis of bare-boned tips about guns, it would be reasonable to maintain under the above-cited decisions that the police should similarly have discretion to frisk based on bare-boned tips about narcotics. As we clarified when we made indicia of reliability critical in *Adams* and *White,* the Fourth Amendment is not so easily satisfied. Cf. *Richards v. Wisconsin,* 520 U.S. 385, 393–394, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997) (rejecting a *per se* exception to the "knock and announce" rule for narcotics cases partly because "the reasons for creating an exception in one category [of Fourth Amendment cases] can, relatively easily, be applied to others," thus allowing the exception to swallow the rule).*

The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the ***274** indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk. Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports, see *Florida v. Rodriguez,* 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984) (*per curiam*), and schools, see *New Jersey v. T.L.O.,* 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere.

Finally, the requirement that an anonymous tip bear standard indicia of reliability in order to justify a stop in no way diminishes a police officer's prerogative, in accord with *Terry,* to conduct a protective search of a person who has already been legitimately stopped. We speak in today's decision only of cases in which the officer's authority to make the initial stop is at issue. In that context, we hold that an anonymous tip lacking indicia of reliability of the kind contemplated in *Adams* and *White* does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm.

The judgment of the Florida Supreme Court is affirmed.

It is so ordered.

Justice KENNEDY, with whom THE CHIEF JUSTICE joins, concurring.

On the record created at the suppression hearing, the Court's decision is correct. The Court says all that is necessary to resolve this case, and I join the opinion in all respects. It might be noted, however, that there are many indicia of reliability ****1381** respecting anonymous tips that we have yet to explore in our cases.

When a police officer testifies that a suspect aroused the officer's suspicion, and so justifies a stop and frisk, the courts can weigh the officer's credibility and admit evidence seized pursuant to the frisk even if no one, aside from the officer and defendant themselves, was present or observed the seizure. ***275** An anonymous telephone tip without more is different, however; for even if the officer's testimony about receipt of the tip is found credible, there is a second layer of inquiry respecting the reliability of the informant that cannot be pursued. If the telephone call is truly anonymous, the informant has not placed his credibility at risk and can lie with impunity. The reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable.

On this record, then, the Court is correct in holding that the telephone tip did not justify the arresting officer's immediate stop and frisk of respondent. There was testimony that an anonymous tip came in by a telephone call and nothing more. The record does not show whether some notation or other documentation of the call was made either by a voice recording or tracing the call to a telephone number. The prosecution recounted just the tip itself and the later verification of the presence of the three young men in the circumstances the Court describes.

It seems appropriate to observe that a tip might be anonymous in some sense yet have certain other features, either supporting reliability or narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action. One such feature, as the Court recognizes, is that the tip predicts future conduct of the alleged criminal. There may be others. For example, if an unnamed caller with a voice which sounds the same each time tells police on two successive nights about criminal activity which in fact occurs each night, a similar call on the third night ought not be treated automatically like the tip in the case now before us. In

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the instance supposed, there would be a plausible argument that experience cures some of the uncertainty surrounding the anonymity, justifying a proportionate police response. In today's case, however, the State provides us with no data about the reliability of anonymous tips. Nor do we know whether the dispatcher or arresting officer had any ***276** objective reason to believe that this tip had some particular indicia of reliability.

If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip. An instance where a tip might be considered anonymous but nevertheless sufficiently reliable to justify a proportionate police response may be when an unnamed person driving a car the police officer later describes stops for a moment and, face to face, informs the police that criminal activity is occurring. This too seems to be different from the tip in the present case. See *United States v. Sierra–Hernandez,* 581 F.2d 760 (C.A.9 1978).

Instant caller identification is widely available to police, and, if anonymous tips are proving unreliable and distracting to police, squad cars can be sent within seconds to the location of the telephone used by the informant. Voice recording of telephone tips might, in appropriate cases, be used by police to locate the caller. It is unlawful to make false reports to the police, *e.g.,* Fla. Stat. Ann. § 365.171(16) (Supp.2000); Fla. Stat. § 817.49 (1994), and the ability of the police to trace the identity of anonymous telephone informants may be a factor which lends reliability to what, years earlier, might have been considered unreliable anonymous tips.

These matters, of course, must await discussion in other cases, where the issues are presented by the record.

All Citations

529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254, 68 USLW 4236, 00 Cal. Daily Op. Serv. 2409, 2000 Daily Journal D.A.R. 3223, 2000 CJ C.A.R. 1642, 13 Fla. L. Weekly Fed. S 216

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* At oral argument, petitioner also advanced the position that J.L.'s youth made the stop and frisk valid, because it is a crime in Florida for persons under the age of 21 to carry concealed firearms. See Fla. Stat. § 790.01 (1997) (carrying a concealed weapon without a license is a misdemeanor), § 790.06(2)(b) (only persons aged 21 or older may be licensed to carry concealed weapons). This contention misses the mark. Even assuming that the arresting officers could be sure that J.L. was under 21, they would have had reasonable suspicion that J.L. was engaged in criminal activity only if they could be confident that he was carrying a gun in the first place. The mere fact that a tip, if true, would describe illegal activity does not mean that the police may make a *Terry* stop without meeting the reliability requirement, and the fact that J.L. was under 21 in no way made the gun tip more reliable than if he had been an adult.

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276 Va. 689
Supreme Court of Virginia.

Joseph A. Moses HARRIS, Jr.
v.
COMMONWEALTH of Virginia.

Record No. 080437.
|
Oct. 31, 2008.

Synopsis

Background: Defendant was convicted after a bench trial in the Circuit Court, City of Richmond, Bradley B. Cavedo, J., of feloniously operating a motor vehicle while intoxicated (DWI). He appealed. The Court of Appeals affirmed, 2008 WL 301334. Appeal was granted.

Holdings: The Supreme Court, S. Bernard Goodwyn, J., held that:

anonymous tip was insufficient in itself to establish reasonable suspicion for a traffic stop, and

police officer's observations of defendant's conduct combined with anonymous tip did not establish reasonable suspicion for a traffic stop.

Reversed, vacated, and dismissed.

Kinser, J., dissented and filed opinion in which Lemons and Millette, JJ., joined.

Attorneys and Law Firms

****143** Cassandra M. Hausrath, Assistant Public Defender (Karen L. Stallard, Supervising Appellate Defender, on briefs), for appellant.

Eugene Murphy, Senior Assistant Attorney General (Robert F. McDonnell, Attorney General, on brief), for appellee.

Present: All the Justices.

Opinion

OPINION BY Justice S. BERNARD GOODWYN.

***692** In this appeal, we consider whether an anonymous tip, combined with observations by a police officer, provided the officer with the reasonable suspicion required to conduct an investigative traffic stop in compliance with the Fourth Amendment of the United States Constitution.

Joseph A. Moses Harris, Jr. ("Harris") was charged with feloniously operating a motor vehicle while intoxicated in violation of Code § 18.2–266. Harris filed a motion to suppress in the Circuit Court of the City of Richmond, claiming that the investigative stop of his car was in violation of the Fourth Amendment. The court denied the motion to suppress and convicted Harris.

****144** Harris appealed to the Court of Appeals. The Court of Appeals affirmed the conviction in an unpublished opinion. *Harris v. Commonwealth,* Record No. 2320–06–2, 2008 WL 301334 (February 5, 2008). This Court granted Harris an appeal.

***693** *FACTS*

On December 31, 2005, Officer Claude M. Picard, Jr. ("Officer Picard"), of the Richmond Police Department, received a call from a dispatcher informing him that "there was a[n] intoxicated driver in the 3400 block of Meadowbridge Road, [who] was named Joseph Harris, and he was driving [a green] Altima, headed south, towards the city, possibly towards the south side." The dispatcher also gave Officer Picard a partial license plate number of "Y8066" for the green Altima and stated that the driver was wearing a striped shirt. The dispatcher did not include any information concerning the identity of the person who had called in the information communicated in the dispatch or the time frame in which the caller had observed the car or the driver.

Officer Picard responded to the call, and shortly thereafter, saw a green Altima traveling south on Meadowbridge Road. Officer Picard began to follow the car. While following the car that Harris was driving, Officer Picard noticed that the license plate number, "YAR–8046", was similar to the one reported by the anonymous caller. Harris was driving within the posted speed limit, and Officer Picard did not observe the car swerve at any time.

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While following Harris' car, Officer Picard observed the car's brake lights flash three times. The first time Harris activated the car's brake lights was when Harris "slowed down" at an intersection although he had the right of way. The second time was approximately 50 feet prior to a red traffic light at the intersection of Meadowbridge Road and Brookland Park Boulevard, when Harris "slowed down" as he approached the red traffic light. The third time the brake lights flashed was when Harris brought the car to a complete stop for the red traffic light at the intersection of Meadowbridge Road and Brookland Park Boulevard.

When the traffic light turned green, Harris proceeded through the intersection, drove his car to the side of the road and stopped of his own accord. Officer Picard activated his emergency lights to signify the initiation of a traffic stop, and positioned his car behind Harris' already stopped car. During the traffic stop, Officer Picard detected a strong odor of alcohol on Harris' breath and noticed that his eyes were watery and his speech was slurred. Harris was charged with feloniously operating a motor vehicle while intoxicated after being previously convicted of two like offenses.

***694** *ANALYSIS*

Harris claims that he was stopped by Officer Picard in violation of the Fourth Amendment and that the Court of Appeals erred in affirming the circuit court's denial of Harris' motion to suppress, which was based on that alleged violation of the Fourth Amendment. Responding, the Commonwealth asserts that the Court of Appeals properly affirmed the circuit court's denial of Harris' motion to suppress because the anonymous tip, coupled with Officer Picard's observations, provided reasonable suspicion for Officer Picard to conduct an investigative stop.

The Fourth Amendment protects the privacy and security of individuals against arbitrary searches and seizures by governmental officials. *Camara v. Municipal Court,* 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *Brown v. Commonwealth,* 270 Va. 414, 418, 620 S.E.2d 760, 762 (2005). Although limited in purpose and length of detention, an investigative traffic stop constitutes a seizure within the meaning of the Fourth Amendment. *Delaware v. Prouse,* 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *Jackson v. Commonwealth,* 267 Va. 666, 672, 594 S.E.2d 595, 598 (2004). An investigative stop must be justified by a reasonable suspicion, based upon specific and articulable facts, that criminal activity is "afoot." *United States v. Sokolow,* 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); *McCain v. Commonwealth,* 275 Va. 546, 552, 659 S.E.2d 512, 516 (2008); *Jackson,* 267 Va. at 672, 594 S.E.2d at 598; *see* ****145** *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Further, pursuant to the "the fruit of the poisonous tree" doctrine, evidence seized as a result of an illegal stop is inadmissible against the defendant at trial. *Jackson,* 267 Va. at 672, 594 S.E.2d at 598; *see Wong Sun v. United States,* 371 U.S. 471, 484–85, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

A defendant's claim that he was seized in violation of the Fourth Amendment presents a mixed question of law and fact that we review de novo on appeal. *Murphy v. Commonwealth,* 264 Va. 568, 573, 570 S.E.2d 836, 838 (2002); *see Bolden v. Commonwealth,* 263 Va. 465, 470, 561 S.E.2d 701, 704 (2002); *McCain v. Commonwealth,* 261 Va. 483, 489, 545 S.E.2d 541, 545 (2001); *see also Ornelas v. United States,* 517 U.S. 690, 691, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). In making such a determination, we give deference to the factual findings of the circuit court, but we independently determine whether the manner in which the evidence was obtained meets the requirements of the Fourth Amendment. *Bolden,* 263 Va. at 470, 561 S.E.2d at 704; *McCain,* 261 Va. at 490, 545 S.E.2d at 545; ***695** *Bass v. Commonwealth,* 259 Va. 470, 475, 525 S.E.2d 921, 924 (2000). The defendant has the burden to show that, considering the evidence in the light most favorable to the Commonwealth, the trial court's denial of his suppression motion was reversible error. *Bolden,* 263 Va. at 470, 561 S.E.2d at 704; *McCain,* 261 Va. at 490, 545 S.E.2d at 545; *Fore v. Commonwealth,* 220 Va. 1007, 1010, 265 S.E.2d 729, 731 (1980).

Harris contends that the anonymous tip and Officer Picard's observations were not sufficient to create the reasonable suspicion necessary to justify the stop of Harris' car. Whether the Fourth Amendment has been violated is a question to be determined from all the circumstances. *Samson v. California,* 547 U.S. 843, 848, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006); *see Ohio v. Robinette,* 519 U.S. 33, 39, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996).

Whether an officer has reasonable suspicion for a *Terry* stop is based on an assessment of the totality of the circumstances, which includes " 'the content of information possessed by police and its degree of reliability.' " *Jackson,* 267 Va. at 673, 594 S.E.2d at 598–99 (quoting *Alabama v. White,* 496 U.S.

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325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)). When the factual basis for probable cause or reasonable suspicion is provided by an anonymous informant, the informant's veracity or reliability, and the basis of his or her knowledge are "highly relevant" factors in the overall totality of the circumstances analysis. *Illinois v. Gates,* 462 U.S. 213, 230, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *see White,* 496 U.S. at 328–31, 110 S.Ct. 2412.

The analysis regarding the use of an anonymous tip to provide reasonable suspicion for an investigative stop was clarified by this Court in *Jackson,* in which we relied upon the United States Supreme Court's Fourth Amendment jurisprudence in *Florida v. J.L.,* 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), and *White,* 496 U.S. at 328–31, 110 S.Ct. 2412. *See Jackson,* 267 Va. at 674–75, 594 S.E.2d at 599–600. An anonymous tip has a relatively low degree of reliability, requiring more information to sufficiently corroborate the information contained in the tip. *See J.L.,* 529 U.S. at 270, 120 S.Ct. 1375; *Jackson,* 267 Va. at 673, 594 S.E.2d at 599. "Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.' " *J.L.,* 529 U.S. at 270, 120 S.Ct. 1375 (quoting *White,* 496 U.S. at 329, 110 S.Ct. 2412) (citation omitted).

The indicia of reliability of an anonymous tip may be bolstered when the tipster provides predictive information, which the police can use to test the tipster's basis of knowledge and credibility. *Jackson,* 267 Va. at 676, 594 S.E.2d at 600. However, for such predictive ***696** information to bolster the tipster's basis of knowledge or credibility, the information must relate to the alleged criminal activity. Providing information observable or available to anyone is not predictive information and can only "help the police correctly identify the person whom the tipster ****146** [meant] to accuse." *J.L.,* 529 U.S. at 272, 120 S.Ct. 1375. An anonymous call that provides no predictive information leaves the police without a means to test the tipster's knowledge or credibility. *J.L.,* 529 U.S. at 271, 120 S.Ct. 1375.

In this case, the anonymous tip included the following information: Joseph Harris, described as wearing a striped shirt, was intoxicated and driving a green Altima with a partial license plate number of "Y8066," southward in the 3400 block of Meadowbridge Road. The informant in this case was not known to the police nor did he or she personally appear before a police officer. Thus, the informant was not subjecting himself or herself to possible arrest if the information provided to the dispatcher proved false. *See* Code § 18.2–461. In other words, the informant was not placing his or her credibility at risk and could "lie with impunity." *J.L.,* 529 U.S. at 275, 120 S.Ct. 1375 (Kennedy, J., concurring). The informant provided information available to any observer, whether a concerned citizen, prankster, or someone with a grudge against Harris. *See Jackson,* 267 Va. at 679, 594 S.E.2d at 602. The tip received by Officer Picard failed to include predictions about Harris' future behavior. Thus, the anonymous tip, in this case, lacked sufficient information to demonstrate the informant's credibility and basis of knowledge. Such an anonymous tip cannot, of itself, establish the requisite quantum of suspicion for an investigative stop.

An anonymous tip need not include predictive information when an informant reports readily observable criminal actions. *See Jackson,* 267 Va. at 680, 594 S.E.2d at 603. However, the crime of driving while intoxicated is not readily observable unless the suspected driver operates his or her vehicle in some fashion objectively indicating that the driver is intoxicated; such conduct must be observed before an investigatory stop is justified.

This Court, in *Jackson,* held that an investigative stop violated the Fourth Amendment because the tip lacked indicia of reliability and the officer's observations did not reveal any suspicious behavior. 267 Va. at 677–78, 681, 594 S.E.2d at 601, 603. This case is analogous to *Jackson* in that under the totality of the circumstances presented here, the anonymous tip lacked sufficient indicia of reliability ***697** to justify an investigatory stop, absent observations indicating criminal conduct. Thus, the resolution of this case is dependent upon whether Officer Picard's observations, when considered together with the anonymous tip, were sufficient to establish a reasonable suspicion that criminal activity was afoot.

In testifying during the motion to suppress about Harris' driving behavior, Officer Picard did not describe Harris' driving as erratic. Furthermore, an officer's subjective characterization of observed conduct is not relevant to a court's analysis concerning whether there is a reasonable suspicion because the Court's review of whether there was reasonable suspicion involves application of an objective rather than a subjective standard. *Terry,* 392 U.S. at 21–22, 88 S.Ct. 1868; *Bass,* 259 Va. at 475, 525 S.E.2d at 923–24; *Ewell v. Commonwealth,* 254 Va. 214, 217, 491 S.E.2d 721, 722

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(1997); *Zimmerman v. Commonwealth,* 234 Va. 609, 611–12, 363 S.E.2d 708, 709 (1988); *Leeth v. Commonwealth,* 223 Va. 335, 340, 288 S.E.2d 475, 478 (1982). Importantly, Officer Picard's testimony, describing what he actually observed at the time, does not indicate that Harris' driving behavior was erratic.

Officer Picard, while following Harris' car, observed that Harris was driving within the speed limit. Harris' car did not swerve. Officer Picard testified that Harris "slowed down" at an intersection where Harris had the right of way and that Harris "slowed down" 50 feet before he got to a red traffic light, at which Harris stopped properly. After the traffic light turned green, Harris proceeded through the intersection, drove to the side of the road, and stopped of his own accord. Thereafter, Officer Picard initiated the investigative stop.

An officer may briefly detain an individual for questioning if the officer has a reasonable suspicion, based on particularized and objective facts, that the individual is involved in criminal activity. ****147** *Zimmerman,* 234 Va. at 611, 363 S.E.2d at 709. To establish reasonable suspicion, an officer is required to articulate more than an unparticularized suspicion or "hunch" that criminal activity is afoot. *McCain,* 275 Va. at 552, 659 S.E.2d at 516. Lawful conduct that the officer may subjectively view as unusual is insufficient to generate a reasonable suspicion that the individual is involved in criminal activity. *Harris v. Commonwealth,* 262 Va. 407, 416–17, 551 S.E.2d 606, 611 (2001); *Ewell,* 254 Va. at 217, 491 S.E.2d at 722–23; *Barrett v. Commonwealth,* 250 Va. 243, 248, 462 S.E.2d 109, 112 (1995); *Zimmerman,* 234 Va. at 612, 363 S.E.2d at 709–10.

***698** When viewed in the context of the anonymous tip, Harris' act of slowing his car at an intersection, or of slowing before stopping at a red traffic signal, did not indicate that he was involved in the criminal act of operating a motor vehicle under the influence of alcohol. Driving to the side of the road and stopping may be subjectively viewed as unusual, but that conduct was insufficient to corroborate the criminal activity alleged in the anonymous tip. *See Barrett,* 250 Va. at 248, 462 S.E.2d at 112. Therefore, we hold that Officer Picard's observations, when considered together with the anonymous tip, were not sufficient to create a reasonable suspicion of criminal activity, and that, therefore, Harris was stopped in violation of his rights under the Fourth Amendment. Thus, the circuit court erred in denying Harris' motion to suppress.

Accordingly, we will reverse the judgment of the Court of Appeals affirming Harris' conviction, vacate Harris' conviction, and dismiss the indictment against him.

Reversed, vacated, and dismissed.

Justice KINSER, with whom Justice LEMONS and Justice MILLETTE join, dissenting.

The majority decides today that an investigative traffic stop by a police officer acting on an anonymous tip corroborated by the officer's own observation of the defendant's driving behavior violated the defendant's Fourth Amendment rights. In my view, the majority fails to understand that the anonymous tip in this case, if reliable, provided the requisite reasonable, articulable suspicion to justify the minimally intrusive traffic stop. So the question is whether, under the totality of the circumstances, the anonymous tip, as corroborated, exhibited sufficient indicia of reliability. I answer the question affirmatively and therefore conclude the police officer had a reasonable, articulable suspicion that the defendant was engaged in criminal conduct.

An investigative traffic stop, such as the one at issue, does not violate the Fourth Amendment "so long as the officer has reasonable, articulable suspicion that criminal activity may be afoot." *McCain v. Commonwealth,* 275 Va. 546, 552, 659 S.E.2d 512, 516 (2008) (citing *United States v. Sokolow,* 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)). As this Court has previously explained, "[r]easonable suspicion is something 'more than an "inchoate and unparticularized suspicion or ***699** 'hunch' " of criminal activity.' " *Jackson v. Commonwealth,* 267 Va. 666, 673, 594 S.E.2d 595, 598 (2004) (quoting *Illinois v. Wardlow,* 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) (quoting *Terry v. Ohio,* 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968))). "However, it is something less than probable cause." *Id.* (citing *Bass v. Commonwealth,* 259 Va. 470, 475, 525 S.E.2d 921, 923 (2000)). In *Alabama v. White,* 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), the Supreme Court of the United States explained that

> [r]easonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

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"[T]here are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.' " *Florida v. J.L.,* 529 U.S. 266, 270, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) (quoting *White,* 496 U.S. at 327, 110 S.Ct. 2412). The constitutionality of the investigative traffic stop at issue in this case thus turns on ****148** whether the anonymous tip, corroborated by the police officer's personal observations of the defendant's driving behavior, exhibited sufficient indicia of reliability to provide reasonable, articulable suspicion to effect the traffic stop. In making that determination, we must consider the "totality of the circumstances—the whole picture," *United States v. Cortez,* 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981), which includes "the content of information possessed by police and its degree of reliability," i.e. "quantity and quality." *White,* 496 U.S. at 330, 110 S.Ct. 2412. "[U]nder the totality of the circumstances the anonymous tip, as corroborated, [must exhibit] sufficient indicia of reliability to justify the investigatory stop." *Id.* at 332, 110 S.Ct. 2412.

There is an inverse relationship between an informant's reliability and the informant's basis of knowledge. "[I]f a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." *Id.* at 330, 110 S.Ct. 2412; *see also Illinois v. Gates,* 462 U.S. 213, 233, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) ("a deficiency in one [the informant's 'veracity' or 'reliability' and his or her 'basis of knowledge'] may be compensated for, in determining the overall reliability of a tip, by a ***700** strong showing as to the other, or by some other indicia of reliability"). Conversely, if a police officer's information contains strong indicia of an informant's veracity, then less indicia of the informant's basis of knowledge is needed. *Id.; see also State v. Rutzinski,* 241 Wis.2d 729, 623 N.W.2d 516, 522 (2001) ("if there are strong indicia of the informant's veracity, there need not necessarily be any indicia of the informant's basis of knowledge").

In the case at bar, the informant identified the defendant by name and described the shirt he was wearing. The informant further provided specific details about the type and color of the vehicle the defendant was driving, a partial license plate number, the city block in which the defendant was then driving, and the direction he was traveling. I recognize that some of this information only enabled the police officer to correctly identify the person whom the informant accused of driving while intoxicated. *See J.L.,* 529 U.S. at 272, 120 S.Ct. 1375 (an accurate description of an "observable location and appearance" merely "help[s] the police correctly identify the person whom the tipster mean[t] to accuse").

The majority, however, overlooks the significance of the informant's statement that the defendant's vehicle was traveling in the 3400 block of Meadowbridge Road and was heading south. Contrary to the majority's assertion that the informant provided no predictions about the defendant's future behavior, this information is predictive. Also, to know the exact location and direction of the moving green Altima at any moment indicates that the informant personally observed the vehicle being operated by an intoxicated driver. *See State v. Melanson,* 140 N.H. 199, 665 A.2d 338, 340 (1995) (although anonymous informant provided only "innocent" details, they nevertheless were sufficient to support the conclusion that the informant had personally observed a vehicle being operated by an intoxicated driver and thus helped to demonstrate the informant's reliability).

Furthermore, when the police officer verified the accuracy of the "innocent" details provided by the informant, he had reason to believe the informant was also accurate as to the defendant's criminal activity. "[B]ecause an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity." *White,* 496 U.S. at 331, 110 S.Ct. 2412; *accord Gates,* 462 U.S. at 244, 103 S.Ct. 2317.

Because the majority believes (incorrectly, in my view) that the informant in this case provided no predictions about the defendant's ***701** future behavior, the majority concludes the anonymous tip "lacked sufficient information to demonstrate the informant's credibility and basis of knowledge." We explained in *Jackson,* however, that every anonymous tip does not have to include predictive information in order for the tip to have sufficient indicia of reliability. 267 Va. at 680, 594 S.E.2d at 603. This is especially so when an informant reports observable ****149** criminal activity as opposed to concealed criminal conduct. *See United States v. Wheat,* 278 F.3d 722, 734 (8th Cir.2001) ("emphasis on the predictive aspects of an anonymous tip may be less applicable to tips purporting to describe contemporaneous, readily observable criminal actions, as in the case of erratic driving witnessed by another motorist"); *State v. Walshire,* 634 N.W.2d 625, 627 (Iowa 2001) (distinguishing between concealed criminal activity and illegality open to the public while also noting that

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reasonable suspicion does not necessarily require prediction of future events).

> Unlike with clandestine crimes such as possessory offenses, including those involving drugs or guns, where corroboration of the predictive elements of a tip may be the only means of ascertaining the informant's basis of knowledge, in erratic driving cases the basis of the tipster's knowledge is likely to be apparent. Almost always, it comes from his eyewitness observations, and there is no need to verify that he possesses inside information.

Wheat, 278 F.3d at 734.

In contrast to *Jackson* and *J.L.,* the police officer in this case did not immediately stop the defendant as soon as he spotted the vehicle described by the informant.[1] Rather, the police officer followed the green Altima and observed the defendant's driving, which the officer ***702** described at trial as "erratic behavior."[2] The defendant's driving, as observed by the police officer, corroborated the informant's assertion of criminal activity and indicated that the defendant was operating his vehicle while intoxicated.

The majority, however, concludes that the defendant's driving was merely "unusual." The defendant's driving behavior alone did not need to provide reasonable, articulable suspicion. The appropriate question is whether it corroborated the informant's assertion of criminal activity. While I disagree with the majority's view that the defendant's driving was merely "unusual," even if the majority's characterization is accurate, the defendant's driving behavior, nevertheless, corroborated the informant's assertion that the defendant was driving while intoxicated. Furthermore, while the case before us involves the lesser legal standard of reasonable, articulable suspicion, " 'innocent behavior' when considered in its overall context may [actually] 'provide the basis for a showing of probable cause.' " *United States v. Thomas,* 913 F.2d 1111, 1116 (4th Cir.1990) (quoting *Gates,* 462 U.S. at 244 n. 13, 103 S.Ct. 2317). And, "reasonable suspicion can arise from information that is less reliable than that required to show probable cause." *White,* 496 U.S. at 330, 110 S.Ct. 2412.

The majority also ignores the principle that, when viewing the totality of the circumstances, an officer's training and experience are proper factors for consideration in determining not only whether the less stringent test of reasonable articulable suspicion is satisfied but also whether probable cause exists. *See Cost v. Commonwealth,* 275 Va. 246, 251, 657 S.E.2d 505, 507 (2008) (totality of the circumstances, in determining whether an officer ****150** has sufficient probable cause, includes "a consideration of the officer's knowledge, training and experience"); *Brown v. Commonwealth,* 270 Va. 414, 420, 620 S.E.2d 760, 763 (2005) ("We have considered a number of instances in which an officer's expertise and training made his observation of an item suspected to contain contraband a significant factor in the ***703** probable cause analysis."); *Harris v. Commonwealth,* 241 Va. 146, 149, 400 S.E.2d 191, 193 (1991) (in determining whether the officer has reasonable articulable suspicion, " 'due weight must be given ... to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience' " (quoting *Terry,* 392 U.S. at 27, 88 S.Ct. 1868)); *Hollis v. Commonwealth,* 216 Va. 874, 877, 223 S.E.2d 887, 889 (1976) (In determining whether probable cause exists, we focus on "what the totality of the circumstances meant to police officers trained in analyzing the observed conduct for purposes of crime control."). In concluding that the defendant's driving down Meadowbridge Road corroborated the informant's assertion that the defendant was driving while intoxicated, the police officer undoubtedly drew on his training and experience in identifying intoxicated drivers. This Court must give due weight to that reasonable inference, which the officer was entitled to draw from the facts in light of his experience. *See Harris,* 241 Va. at 149, 400 S.E.2d at 193. In my view, the police officer's conclusion reflects what the totality of the circumstances would mean to a reasonable police officer trained in analyzing observed driving behavior in order to determine whether there is reasonable suspicion that the driver is intoxicated. *See Hollis,* 216 Va. at 877, 223 S.E.2d at 889.

Finally, we explained in *Jackson* that " '[i]n contrast to the report of an individual in possession of a gun, an anonymous report of an erratic or drunk driver on the highway presents a qualitatively different level of danger, and concomitantly greater urgency for prompt action.' " 267 Va. at 681, 594 S.E.2d at 603 (quoting *State v. Boyea,* 171 Vt. 401, 765 A.2d 862, 867 (2000)); *accord Rutzinski,* 623 N.W.2d at 526; *Walshire,* 634 N.W.2d at 629. We further stated, " '[A] drunk driver is not at all unlike a 'bomb,' and a mobile one at that.' " *Jackson,* 267 Va. at 681, 594 S.E.2d at 603 (quoting *Boyea,* 765 A.2d at 867). Although the majority analogizes the case before us to *Jackson,* it ignores this portion of the *Jackson* opinion and never addresses the distinction between an intoxicated driver on the highway and a person carrying a

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concealed weapon in terms of the need for prompt action by the police.[3]

***704** For these reasons, I conclude that the anonymous tip, as corroborated, exhibited sufficient indicia of reliability and provided reasonable, articulable suspicion to justify the investigative traffic stop. I therefore respectfully dissent and would affirm the judgment of the Court of Appeals of Virginia.

All Citations

276 Va. 689, 668 S.E.2d 141, 84 A.L.R.6th 729

Footnotes

1 In *Jackson,* the police responded to a dispatch based on an anonymous tip reporting "three black males in a white Honda ... and one of the subjects brandished a firearm." 267 Va. at 670, 594 S.E.2d at 597. After merely identifying the white Honda with the three black males inside, the police initiated a traffic stop that led to the discovery of a firearm in Jackson's possession. *Id.* at 670–71, 594 S.E.2d at 597.

In *J.L.,* police officers responded to an anonymous tip "that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." 529 U.S. at 268, 120 S.Ct. 1375. Apart from the anonymous tip, the officers did not observe any suspicious behavior, nor did they see the firearm. *Id.* The officers nevertheless frisked the defendant and recovered a firearm from the defendant's pocket. *Id.*

2 The majority states that "during the motion to suppress[, the officer] did not describe [the defendant's] driving as erratic." The officer, however, did use the adjective "erratic" to describe the defendant's driving during the Commonwealth's case in chief. This testimony can properly be considered by this Court on appellate review. *See Murphy v. Commonwealth,* 264 Va. 568, 574, 570 S.E.2d 836, 839 (2002) (considering officer's trial testimony as dispositive in reversing trial court's denial of a motion to suppress evidence); *see also Wells v. Commonwealth,* 6 Va.App. 541, 548–49, 371 S.E.2d 19, 23 (1988) (holding that "an appellate court may consider trial evidence in ruling on the correctness of a denial of a pretrial motion to suppress").

3 On brief, the Commonwealth discusses at length the decisions from other jurisdictions holding that anonymous tips about incidents of drunk driving require less corroboration than tips concerning matters presenting less imminent danger to the public, *see, e.g., People v. Wells,* 38 Cal.4th 1078, 45 Cal.Rptr.3d 8, 136 P.3d 810 (2006); *People v. Shafer,* 372 Ill.App.3d 1044, 311 Ill.Dec. 359, 868 N.E.2d 359 (2007), and decisions holding that anonymous tips concerning drunk driving may be sufficiently reliable to justify an investigatory stop without independent corroboration, *see, e.g., Cottrell v. State,* 971 So.2d 735 (Ala.Crim.App.2006). In light of its decision, the majority, in my view, should address the Commonwealth's argument.

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672 S.W.2d 480
Court of Criminal Appeals of Texas,
En Banc.

Hector RAMIREZ, Appellant,

v.

The STATE of Texas, Appellee.

No. 1039–83.
|
July 18, 1984.

Synopsis

Defendant was convicted in the 138th Judicial District Court, Cameron County, Harry Lewis, J., of carrying a weapon on premises licensed to sell alcoholic beverages, and he appealed. The Court of Appeals, Thirteenth Supreme Judicial District, 658 S.W.2d 808, affirmed. Discretionary review was granted. The Court of Criminal Appeals, Miller, J., held that, where a police officer had an uncorroborated "tip" that a person in a nearby bar had a gun, the officer proceeded directly to the bar, and, after approaching the defendant, who matched the given description, the officer observed a bulge in the defendant's pocket, the officer had sufficient facts to justify a limited search for weapons.

Judgment affirmed.

Clinton, J., dissented.

Teague, J., dissented with opinion.

Attorneys and Law Firms

***481** Jerrold R. Davidson, Brownsville, for appellant.

Feynaldo S. Cantu, Jr., Dist. Atty., and Malcolm S. Nettles, Asst. Dist. Atty., Brownsville, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

MILLER, Judge.

Appellant was convicted of carrying a weapon on premises licensed to sell alcoholic beverages, in violation of V.T.C.A. Penal Code, Sec. 46.02(a) and (c). Punishment, enhanced by two prior felony convictions, was assessed at life in the Texas Department of Corrections. On appeal appellant's conviction was affirmed by the Corpus Christi Court of Appeals in *Ramirez v. State,* 658 S.W.2d 808, (Tex.App.—Corpus Christi 1983). We granted the appellant's petition for discretionary review in order to consider the Court of Appeals' holding that the action of the police officer in searching appellant and the admission into evidence of a gun obtained as a result of that search was proper. We affirm the holding of the Court of Appeals.

A brief review of the facts surrounding the search is appropriate.

Officer Reynaldo Martinez was patrolling the downtown area of Brownsville when a man approached the police officer and told the officer that a Latin male wearing a yellow T-shirt had a gun in a nearby bar. The informant described the man as having a tattoo of a knife on his right arm. At that time, Officer Martinez got in his patrol car and proceeded directly to the bar. Once inside, the officer recognized one of approximately eight patrons as matching the description given to him by the man on the street. Officer Martinez approached the man sitting at a table and ordered him to stand. Upon standing, Officer Martinez noticed a large bulge in his right pocket. He patted down the suspect, determined that the bulge was a gun, and removed the gun from appellant's pocket. The police officer then arrested the appellant.

Appellant's contention that the State failed to show sufficient probable cause to justify the warrantless search of appellant in that there was no showing that the informant had first-hand knowledge of the facts or reasonably trustworthy information is without merit.

As stated by the Court of Appeals, there is no evidence that the person supplying the information to Officer Martinez was anything but a witness to the crime. The man told the police officer that he was coming from the bar. Officer Martinez testified that he did not know the man who approached him with the information. Upon receiving the information, Martinez proceeded directly to the bar. At the time the officer entered the bar, he had uncorroborated information specifically describing appellant and indicating that he had a gun. He did not search or arrest appellant solely upon the information supplied by the man on the street. Only after

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approaching appellant, who matched the given description, *and after observing the bulge in appellant's pocket* did Officer Martinez pat down the appellant. A police officer in circumstances short of probable cause for arrest may justify temporary detention for the purpose of investigation since an investigation is considered to be a lesser intrusion upon the personal security. *Adams v.* ***482** *Williams,* 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Milton v. State,* 549 S.W.2d 190, 193 (Tex.Cr.App.1977); *Leighton v. State,* 544 S.W.2d 394 (Tex.Cr.App.1976). "An officer must have specific, articulable facts, which in light of his experience and general knowledge taken, together with rational inferences from those facts, would reasonably warrant the intrusion on the citizen." *Morrison v. State,* (Tex.Cr.App. No. 68,323, Delivered June 20, 1984) (State's Motion for Rehearing) citing *Terry,* supra. See also *Williams v. State,* 621 S.W.2d 609 (Tex.Cr.App.1981) and *Brem v. State,* 571 S.W.2d 314 (Tex.Cr.App.1978). In the course of such a temporary detention, an officer may conduct a limited search for weapons where it is reasonably warranted for his safety or the safety of others. Once Officer Martinez, armed with the uncorroborated "tip", observed the bulge in appellant's pocket he then had sufficient facts to justify a search under *Terry,* supra. In *Terry,* supra, the United States Supreme Court wrote,

> "In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." 392 U.S. at 24, 88 S.Ct. at 1881, 20 L.Ed.2d at 907. See also *Cortinas v. State,* 571 S.W.2d 932 (Tex.Cr.App.1978) and *Perez v. State,* 548 S.W.2d 47 (Tex.Cr.App.1977).

It is this limited pat down search for weapons that we, under the facts of this case, and the Supreme Court in *Terry,* supra, sanction; not a full-blown search for contraband. Under the facts of this case the police officer's actions that resulted in the finding of the weapon were justified. Upon finding the weapon, Officer Martinez was justified in arresting the appellant. See Art. 14.01, V.A.C.C.P. No fruits of any search incident to that arrest were introduced at appellant's trial.

The judgment of the Court of Appeals is affirmed.

CLINTON, J., dissents.

TEAGUE, Judge, dissenting.

Because the majority erroneously sustains the search of the person of Hector Ramirez, appellant, that was made by Reynaldo Martinez, a Brownsville police officer, inside of the Lighthouse Bar, located "on skid row" in Brownsville, I must dissent.

In light of what the majority upholds in this Orwellian year of 1984, I find the following comment rather interesting: "One hopes the year 2000 will ... find the courts manning [the search and seizure] barrier against whatever form unreasonable governmental intrusion then takes... As for [Art. 1, Section 9, of the Texas Constitution], it should remain as the important bulwark against unreasonable governmental intrusion that it is." *The Constitution of the State of Texas: An Annotated and Comparative Analysis,* at page 35. After reading what the majority upholds today, I shudder to think what it will sustain in the year 2,000.

Art. 1, Section 9, of the Texas Constitution, expressly provides in no uncertain terms: "The people shall be secure in their persons ... from all unreasonable seizures or searches..."

Even though it is only unreasonable searches and seizures that are forbidden by Art. 1, Section 9, as a practical matter, this Court in the past has equated reasonableness with the requirements of probable cause for a warrant. One exception to this rule of construction, that is inapplicable to this cause, is that where the detaining police officer has specific and articulable ***483** facts which, taken together with rational inferences from those facts, reasonably warrant suspicion on his part that the suspect is armed and about to engage in criminal conduct, then the officer has the right to physically seize the suspect and conduct a protective frisk for weapons without a warrant. See *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The majority, unfortunately, creates today another exception to the warrant requirement.

The facts that relate to the issue are undisputed.

A lay person, who was unknown to Officer Martinez, approached Martinez and told him that an individual was in a nearby bar in possession of a gun. He did not articulate

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to Martinez how he knew the individual had a gun in his possession. Thus, it is just as reasonable to assume that the information was based upon hearsay as it is to assume that the information was from personal knowledge. Martinez did not question the person as to why he had concluded that an individual in the bar had possession of a gun. However, the person did give Martinez a physical description of the person he said was in possession of a gun in the bar.

Armed only with this information, Martinez went inside of the bar, where he eventually saw a person, who was later identified as appellant, who matched the physical description that the unknown person had given Martinez.

At that moment in time, appellant was merely sitting at a table, doing nothing of a criminal nature, nor acting out of the ordinary. Prior to this occasion, Martinez did not know appellant.

Martinez "ordered" appellant to stand up, and appellant obeyed that command, after which Martinez saw a bulge in appellant's right pants pocket. Martinez then frisked appellant and found a gun on his person, for which appellant was prosecuted for possessing. See V.T.C.A., Penal Code, Section 46.02(a) and (c). His punishment, enhanced, was assessed at life imprisonment.

The majority holds that "Under the facts of this case [Martinez'] actions that resulted in the finding of the weapon were justified." I strongly disagree with this conclusion.

In arriving at its conclusion, the majority relies upon *Terry v. Ohio,* supra. Its reliance, however, is misplaced.

Terry v. Ohio, supra, mandates that before a lawful stop and frisk are permissible, the following must first be established: the detaining police officer must have specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant suspicion on his part that the suspect is armed and about to engage in criminal conduct. If the police officer has satisfied these requirements, he may then, *but only then,* physically seize the suspect and conduct a protective frisk for weapons.

In this instance, Martinez was not armed with specific and articulable facts that would lead a reasonable and cautious person to believe that appellant was armed with a gun. Martinez was possessed only with a conclusory statement from an unknown person when he "ordered" appellant to stand up. From that moment forward, appellant had been "seized," if not arrested, by Martinez.

By allowing a bare, uncorroborated conclusory statement by an unknown and unidentified person to constitute the "articulable suspicion" required by *Terry v. Ohio,* supra, to become the law of this State, the majority subjects all of our citizenry to warrantless searches by police officers based on nothing more than unsupported and uncorroborated statements by unknown persons.

Terry v. Ohio, supra, did not hold or approve of arrests or seizures of persons being made by the police for mere purposes of making an investigation. Nor did *Terry v. Ohio,* supra, hold that the good faith belief of the police officer justified an arrest or seizure of a person for mere purposes of making an investigation. Nor did *Terry v. Ohio,* supra, hold that an officer's ***484** inarticulate hunch justified unwarranted intrusions upon a citizen's constitutionally guaranteed right to be free from unreasonable searches and seizures.

The majority, however, has now engrafted onto our law what the Supreme court did not hold in *Terry v. Ohio,* supra. To this novel, but frightening holding, I respectfully dissent. Orwell, have you read what the majority has written?

All Citations

672 S.W.2d 480

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221 W.Va. 720
Supreme Court of Appeals of
West Virginia.

STATE of West Virginia, Appellee,
v.
Kenneth BOOKHEIMER,
Defendant Below, Appellant.
State of West Virginia, Appellee,
v.
Jessica Marie Tingler,
Defendant Below, Appellant.

Nos. 33289, 33290.
|
Submitted Oct. 23, 2007.
|
Decided Nov. 8, 2007.

Synopsis

Background: Following a joint trial, defendants were convicted in the Circuit Court, Braxton County, Richard Facemire, J., of conspiracy and operating a clandestine drug laboratory. Defendants appealed.

The Supreme Court of Appeals held that no emergency situation or exigent circumstance existed that would have made responding officers' warrantless entry into defendant's residence reasonable.

Reversed and remanded.

Albright, J., filed a separate concurring opinion in which Starcher, J., joined.

Maynard, J., filed a dissenting opinion.

Benjamin, J., filed a dissenting opinion.

****473 *722** *Syllabus by the Court*

1. "When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error." Syllabus point 1, *State v. Lacy,* 196 W.Va. 104, 468 S.E.2d 719 (1996).

2. "In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed *de novo.* Similarly, an appellate court reviews *de novo* whether a search warrant was too broad. Thus, a circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made." Syllabus point 2, *State v. Lacy,* 196 W.Va. 104, 468 S.E.2d 719 (1996).

3. " 'Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution ***723 **474** -subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative.' Syllabus Point 1, *State v. Moore,* [165] W. Va. [837], 272 S.E.2d 804 (1980) [, *overruled on other grounds by State v. Julius,* 185 W.Va. 422, 408 S.E.2d 1 (1991)]." Syllabus point 1, *State v. Weigand,* 169 W.Va. 739, 289 S.E.2d 508 (1982).

4. "Although a search and seizure by police officers must ordinarily be predicated upon a written search warrant, a warrantless entry by police officers of a mobile home was proper under the 'emergency doctrine' exception to the warrant requirement, where the record indicated that, rather than being motivated by an intent to make an arrest or secure evidence, the police officers were attempting to locate an injured or deceased child, which child the officers had reason to believe was in the mobile home, because of information they received immediately prior to the entry." Syllabus point 2, *State v. Cecil,* 173 W.Va. 27, 311 S.E.2d 144 (1983).

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5. "A protective search is defined as a quick and limited search of premises for weapons once an officer has individualized suspicion that a dangerous weapon is present and poses a threat to the well-being of himself and others. This cursory visual inspection is limited to the area where the suspected weapon could be contained and must end once the weapon is found and secured." Syllabus point 8, *State v. Lacy,* 196 W.Va. 104, 468 S.E.2d 719 (1996).

6. "A key issue in determining whether information provided by an informant is sufficient to establish probable cause is whether the information is reliable. An informant may establish the reliability of his information by establishing a track record of providing accurate information. However, where a previously unknown informant provides information, the informant's lack of a track record requires some independent verification to establish the reliability of the information. Independent verification occurs when the information (or aspects of it) is corroborated by independent observations of the police officers." Syllabus point 4, *State v. Lilly,* 194 W.Va. 595, 461 S.E.2d 101 (1995).

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Opinion

PER CURIAM.

The appellants, Kenneth Bookheimer and Jessica Marie Tingler (hereinafter "appellants" collectively, or "Mr. Bookheimer" and "Ms. Tingler" individually), appeal from separate sentencing orders entered May 11, 2006, by the Circuit Court of Braxton County. In those orders, the circuit court sentenced each of the appellants to one to five years' imprisonment on a charge of conspiracy and to two to ten years' imprisonment on a charge of operating a clandestine drug laboratory, both sentences to be served consecutively. On appeal, the appellants assert three common assignments of error, and Ms. Tingler asserts one additional assignment of error.[1] Based upon the parties' arguments, the record designated for our consideration, and the pertinent authorities, we determine that the circuit court erred by allowing the introduction of evidence seized as a result of an illegal search and seizure.[2] Thus, the circuit court's denial of the motion to suppress ***724 **475** is reversed, and the subsequent convictions are vacated. Both cases are remanded for a new trial consistent with this Opinion.

I.

FACTUAL AND PROCEDURAL HISTORY

Jessica Marie Tingler lived in Braxton County, West Virginia. Kenneth Bookheimer lived with Ms. Tingler at her rented residence. On February 9, 2005, Braxton County 911 received an anonymous call of a domestic dispute involving gunshots and yelling and screaming at Ms. Tingler's residence. Two deputies were dispatched to the scene.[3] When they arrived, they saw Ms. Tingler appear from the side of the trailer. Her behavior was described as hysterical, and it was reported that she was yelling and screaming. When questioned by the deputies, Ms. Tingler denied any domestic dispute. Further, she told the police they were not needed, were not wanted, and to leave. When questioned as to Mr. Bookheimer's location, Ms. Tingler told the police that he was inside the residence.

One of the officers opened the front door and identified himself. Mr. Bookheimer responded that he was in the bathroom and would be out once he was finished.[4] The officers proceeded to the bathroom door. Upon reaching the bathroom door, the officers noted materials normally used in the manufacture of methamphetamine in plain view in the nearby bedroom. The deputies procured Mr. Bookheimer and removed him from the residence. The officers asked for consent to search, which was denied. Both Ms. Tingler and Mr. Bookheimer were detained outside the trailer, while one of the officers went to the magistrate court to obtain a search warrant. The basis of the search warrant was to search and obtain evidence showing the operation of a clandestine drug laboratory. Upon execution of the warrant, the officers obtained various materials, all allegedly used in the manufacture of methamphetamine.

Both Ms. Tingler and Mr. Bookheimer were indicted for operation of a clandestine drug laboratory and conspiracy. A suppression hearing was held on November 28, 2005, at which the appellants argued that the search was illegal and

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that all materials found therefrom should be suppressed. The circuit court denied the motion to suppress on the basis that exigent circumstances existed. Specifically, the order by the circuit court entered December 5, 2005, found as follows:

> 4. The defendant Jessica Tingler was found outside the residence in what the officers described as an agitated state when they arrived.[5]
>
> 5. The defendant Jessica Tingler did not give the officers consent to enter or search the residence and in fact objected to a search and denied that any incident of domestic violence had taken place.
>
> 6. The officers were aware the residence was shared by the defendant Kenneth Bookheimer, and they did not know if he had been injured in the reported incident of domestic violence or if he was in the residence with a weapon.
>
> 7. That exigent and emergency circumstances existed in that the defendant Kenneth Bookheimer could have presented a ***725 **476** danger to the officers or others if he had been inside the residence with a weapon.
>
> 8. That exigent and emergency circumstances existed in that the defendant Kenneth Bookheimer could have been inside the residence injured based upon the report of domestic violence with a weapon being discharged and the agitated state in which the officers found the defendant Jessica Tingler.
>
> 9. The officers had a right to enter the residence based on the said exigent and emergency circumstances to determine if the defendant Kenneth Bookheimer was present and armed with a weapon or injured.
>
> 10. The officers found what they believed to be evidence of a clandestine methamphetamine laboratory in plain view when they entered the residence in search of the defendant Kenneth Bookheimer.
>
> ....
>
> 12. The defendant Kenneth Bookheimer did not give the officers consent to search the residence and in fact objected to a search.
>
> ....
>
> 14. A search warrant for the defendants' residence was properly issued by [the magistrate court].
>
> 15. The evidence sought to be suppressed was seized under the search warrant.

(Footnote added).

The case proceeded to a joint trial. Ms. Tingler and Mr. Bookheimer were found guilty of all charges and were sentenced to one to five years' imprisonment on the conspiracy charge and to two to ten years' imprisonment on the clandestine drug laboratory charge, with both sentences to be served consecutively. They appeal their convictions and sentencing to this Court.

II.

STANDARD OF REVIEW

The crucial issue before this Court relates to the circuit court's denial of a motion to suppress evidence. We have previously explained in Syllabus point one of *State v. Lacy,* 196 W.Va. 104, 468 S.E.2d 719 (1996), as follows:

> When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.

Further,

> In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed *de novo.* Similarly, an appellate court reviews *de novo* whether a search warrant was too broad. Thus, a circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made.

Syl. pt. 2, *Lacy, id.* We have also explained that "we review *de novo* questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement

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action." *State v. Lilly,* 194 W.Va. 595, 600, 461 S.E.2d 101, 106 (1995). Mindful of these applicable standards, we now consider the substantive issues raised herein.

III.

DISCUSSION

On appeal to this Court, Ms. Tingler and Mr. Bookheimer argue three common assignments of error. The appellants argue together that the circuit court: (1) erred in denying the motion to suppress evidence obtained as a result of an illegal search, (2) improperly allowed the State to introduce expert testimony as to the identity of certain substances without a proper foundation, and ***726 **477** (3) improperly failed to dismiss the conspiracy charge after the State failed to prove a prima facie case. Ms. Tingler's fourth assignment of error alleges that the circuit court erred in proceeding to trial when she was incompetent due to drug abuse. The State contends that the circuit court was correct on all decisions, and that the convictions and the sentencings should be affirmed. We determine that the search was illegal and that all evidence flowing therefrom should have been suppressed. Thus, this Opinion will discuss the illegal search and seizure, without need to analyze the other asserted assignments of error that are now moot. The circuit court's denial of the motion to suppress is reversed, and the subsequent convictions are reversed.

The issue of whether a search and seizure is proper is governed by both state and federal constitutions.[6] As has been previously recognized by this Court,

> "[s]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment and Article III, Section 6 of the West Virginia Constitution-subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative." Syllabus Point 1, *State v. Moore,* [165] W. Va. [837], 272 S.E.2d 804 (1980) [, *overruled on other grounds by State v. Julius,* 185 W.Va. 422, 408 S.E.2d 1 (1991)].
>
> Syl. pt. 1, *State v. Weigand,* 169 W.Va. 739, 289 S.E.2d 508 (1982). More specific to the present case,
>
> > [a]lthough a search and seizure by police officers must ordinarily be predicated upon a written search warrant, a warrantless entry by police officers of a mobile home was proper under the "emergency doctrine" exception to the warrant requirement, where the record indicated that, rather than being motivated by an intent to make an arrest or secure evidence, the police officers were attempting to locate an injured or deceased child, which child the officers had reason to believe was in the mobile home, because of information they received immediately prior to the entry.
>
> Syl. pt 2, *State v. Cecil,* 173 W.Va. 27, 311 S.E.2d 144 (1983). Stated more generally,
>
> > the emergency doctrine has been defined in various ways and must be considered upon a case by case basis.... [T]he emergency doctrine may be said to permit a limited, warrantless search or entry of an area by police officers where (1) there is an immediate need for their assistance in the protection of human life, (2) the search or entry by the officers is motivated by an emergency, rather than by an intent to arrest or secure evidence, and (3) there is a reasonable connection between the emergency and the area in question.
>
> *Cecil,* 173 W.Va. at 32, 311 S.E.2d at 149 (internal citations omitted). Thus, the case-by-case analysis rests on the reasonableness of the actions of the police and has been explained in the following manner:
>
> > the "reasonableness" of a warrantless search or entry under the emergency doctrine is established by the "compelling need to render immediate assistance to the victim of a crime, or insure the safety of the occupants of a house when the police reasonably believe them to be in distress and in need of protection."
>
> *Id.,* 173 W.Va. at 32, 311 S.E.2d at 150 (internal citations omitted).

****478 *727** Applying the above-cited legal principles to the present case, we find it unreasonable for the officers to have conducted a warrantless entry and search. At the suppression hearing, the responding officers testified that Ms. Tingler clearly told them that there was no domestic dispute, they were not wanted, they were not needed, and that she wanted them to leave. In the face of this clear rebuke, it would not be reasonable for an officer to proceed to enter and search the premises unless there was some other condition lending to an emergency circumstance.[7]

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While the officer testified that Ms. Tingler was acting in a "hysterical" manner, a review of the record reveals the contrary. After listening to the officer's testimony at the suppression hearing, the trial judge could not agree that "hysterical" was a proper characterization of Ms. Tingler's behavior. From the bench, the judge "note[d] that upon arriving at the scene the testimony of [the] Deputy ... was that Ms. Tingler was yelling, and was in a state of less than quite [sic] demeanor. I would not say that she was irrate [sic], but it appears that there was yelling by Ms. Tingler [.]" Moreover, the order stemming from the suppression hearing referred to Ms. Tingler's demeanor as "agitated." Being less than "irate" and "agitated" does not lend support to the officer's contention that Ms. Tingler was hysterical. An objective review of the record reveals a woman who was angry and who was, indeed, probably yelling. However, her anger and yelling were not caused by circumstances occurring prior to the arrival of the officers. Rather, her agitation was aimed at the fact that the officers were present on her property. Thus, Ms. Tingler's behavior did not create an emergency or an exigent circumstance justifying entry into the residence.

The United States Supreme Court recently authored an opinion supportive of our conclusion that the warrantless entry and search of the appellants' residence was unconstitutional. *See Georgia v. Randolph,* 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006).[8] In *Randolph,* the police were called by the estranged wife to come to her aid in a domestic dispute. Upon their arrival, the wife informed the police that the husband was a drug addict and that there was evidence of cocaine in the house. When asked for consent to search the house, the wife agreed, but the husband refused. The police entered with the wife and after seeing some evidence of cocaine use, left and obtained a search warrant. The police then returned, finished the search, and procured evidence.

The *Randolph* Court ultimately held "that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident" *Randolph,* 547 U.S. at 120, 126 S.Ct. at 1526, 164 L.Ed.2d at 226 (footnote omitted). The ruling determined that the evidence should have been suppressed as illegally obtained against the husband. In drawing this conclusion, the high court determined that there was no protective need indicated for the police to enter the home. In so deciding, the opinion stated: "The State does not argue that she gave any indication to the police of a need for protection inside the house that might have justified entry into the portion of the premises where the police found the powdery straw[.]" *Id.,* 547 U.S. at 123, 126 S.Ct. at 1528, 164 L.Ed.2d at 227.

Likewise, neither resident in the present case indicated a need for protection from the ***728 **479** police.[9] The facts of the case before this Court are even more egregious than the facts in *Randolph* because the police never had consent from either co-tenant in the case *sub judice.* In fact, at the suppression hearing, the officer confirmed that the responding deputies were expressly told they were not needed, they were unwanted, and they were told to leave by Ms. Tingler. The deputies in the present case then proceeded to enter the front door to check on Mr. Bookheimer, who responded that he was in the bathroom and would be out when he finished. Neither tenant exhibited any signs that would make it reasonable for the deputies to think entry into the residence was necessary on the basis of affording protection to any resident. Further, when asked for consent to search, Mr. Bookheimer also refused consent. Indeed, one deputy testified that Mr. Bookheimer, while being detained outside the residence, attempted to educate the deputies on the constitutional implications of their entry into his place of residence.

The State argues that the entry into the home was proper as both a protective sweep for the safety of the deputies, as well as to determine the health status of Mr. Bookheimer. However, both arguments fail. As we have previously recognized,

> [a] protective search is defined as a quick and limited search of premises for weapons once an officer has individualized suspicion that a dangerous weapon is present and poses a threat to the well-being of himself and others. This cursory visual inspection is limited to the area where the suspected weapon could be contained and must end once the weapon is found and secured,

Syl. pt. 8, *Lacy,* 196 W.Va. 104, 468 S.E.2d 719. In this case, the officers had no individualized suspicion that a firearm was present, or that a firearm posed a threat to the well-being of anyone present. As previously explained, the anonymous tip mentioned that a domestic dispute was taking place, with shots fired. However, the deputies never heard shots and never saw any evidence of firearms.

We have previously addressed the issue of information provided by an informant as a basis for probable cause to issue a warrant as follows:

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> A key issue in determining whether information provided by an informant is sufficient to establish probable cause is whether the information is reliable. An informant may establish the reliability of his information by establishing a track record of providing accurate information. However, where a previously unknown informant provides information, the informant's lack of a track record requires some independent verification to establish the reliability of the information. Independent verification occurs when the information (or aspects of it) is corroborated by independent observations of the police officers.

Syl. pt. 4, *Lilly,* 194 W.Va. 595, 461 S.E.2d 101. In the present case, the situation did not involve an informant whose track record could be examined. Rather, the present case involved an even more mistrustful situation: a tip by an anonymous caller. Our case law provides many caveats when relying on tips from an anonymous caller. *See, e.g.,* Syl. pt. 5, *Muscatell v. Cline,* 196 W.Va. 588, 474 S.E.2d 518 (1996) ("For a police officer to make an investigatory stop of a vehicle the officer must have an articulable reasonable suspicion that a crime has been committed, is being committed, or is about to be committed. In making such an evaluation, a police officer may rely upon an anonymous call if subsequent police work or other facts support its reliability, and, thereby, it is sufficiently corroborated to justify the investigatory stop under the reasonable-suspicion ***729 **480** standard."); Syl pt. 4, *State v. Stuart,* 192 W.Va. 428, 452 S.E.2d 886 (1994) ("A police officer may rely upon an anonymous call if subsequent police work or other facts support its reliability and, thereby, it is sufficiently corroborated to justify the investigatory stop under the reasonable-suspicion standard."). Thus, it follows that an anonymous tip requires more corroboration than the tip of an informant whose identity is known and who may or may not have a track record. In the present case, there was absolutely no independent evidence at the residence to corroborate the information supplied by the anonymous tip. Indeed, all information at the scene was in direct contravention of the information supplied in the anonymous call. Moreover, the health status of Mr. Bookheimer was known as soon as officers called out to him and he replied he would be out when he finished using the bathroom. There was no need to enter the home at that time. Thus, there was no indication that a protective sweep was warranted or justified. No emergency situation or exigent circumstance existed that would have made the warrantless entry reasonable under the state and federal constitutions.

IV.

CONCLUSION

For the foregoing reasons, the circuit court's denial of the motion to suppress is reversed. The search and seizure was illegal, and all evidence flowing therefrom should have been suppressed. Accordingly, the subsequent trial was also in error and the resulting convictions are vacated. The cases are remanded for a new trial consistent with this Opinion.

Reversed and Remanded.

Justices MAYNARD and BENJAMIN dissent and reserve the right to file dissenting opinions.

Justices STARCHER and ALBRIGHT concur and reserve the right to file concurring opinions.

MAYNARD, Justice, dissenting.

I dissent because I believe the circuit court properly concluded that the deputies had a right to enter the appellants' residence based on exigent circumstances.

The deputies below responded to a report of a potential domestic dispute involving a gunshot and yelling. Once the deputies arrived on the scene, they were confronted by Ms. Tingler who was acting in an agitated manner. The deputies also had reason to believe that Mr. Bookheimer was in the residence either armed with a gun or wounded. Under the law as articulated by this Court and the United States Supreme Court, this emergency afforded the deputies the right to enter the residence without first obtaining a warrant.

The United States Supreme Court has indicated that "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Warden v. Hayden,* 387 U.S. 294, 298-299, 87 S.Ct. 1642, 1646, 18 L.Ed.2d 782 (1967). This Court has held that the warrantless search of a residence by police officers was proper where the police were attempting to locate an injured or deceased child whom the officers had reason to believe was in the residence. *See State v. Cecil,* 173 W.Va. 27, 311 S.E.2d 144 (1983). In the instant case, the deputies had a duty to enter the residence and speak with Mr. Bookheimer face to face to ensure that he was not

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injured and that he was not a threat to Ms. Tingler. Also, until the deputies determined Mr. Bookheimer's whereabouts, they had reason to fear for their own safety due to the fact that Mr. Bookheimer may have been armed. Anytime a gunshot is fired inside a home, the police have a right and a duty to enter the home to investigate without a warrant. The majority has created a dangerous precedent for domestic violence situations with this decision. To say the police cannot enter a home without a warrant where there is gunfire and loud yelling does great damage to domestic violence victims. In sum, the deputies in the instant case were compelled to act quickly to ensure their own safety as ***730 **481** well as the safety of Ms. Tingler and Mr. Bookheimer.

Finally, the majority opinion is based on wholly unwarranted assumptions. The majority opinion assumes that Ms. Tingler's anger and yelling were not caused by circumstances occurring prior to the officers' arrival, but rather were aimed at the fact that the officers were present on her property. The majority opinion also assumes that the deputies' entry into the residence was not motivated by a possible emergency, but rather by an intent to arrest or secure evidence. Neither of these assumptions is compelled by the evidence.

For the reasons stated above, I would affirm the judgment of the circuit court. Accordingly, I dissent.

ALBRIGHT, Justice, concurring.

I fully agree with the majority opinion and write separately only to briefly address the unfounded criticism raised in the dissenting opinion.

First of all, the majority opinion is based on the facts set forth in the record and not what the dissent characterizes as unwarranted assumptions. Secondly, the bald facts in this case simply do not support invoking any of the narrow exceptions to the constitutional right of all citizens to be protected from unreasonable searches of "their persons, houses, papers, and effects" by the police. U.S. Const. amend. IV; W. Va. Const. art. III, § 6.

Contrary to the dissent's position, the police had no "right" to enter the mobile home residence without first obtaining a warrant. They were acting on an *anonymous* phone call alleging that a domestic dispute was occurring at the mobile home and there was a gunshot. Upon arriving at the scene, the officers did not observe any physical injuries or evidence of guns or a shooting which would have corroborated the allegations of the anonymous caller. As the majority clearly relates, Ms. Tingler's agitated state was directly related to the officers' presence at her home. It is hard to believe that the officers felt the need to enter the residence in order to protect Mr. Bookheimer, Ms. Tingler or themselves. The residence was very small and the officers were able to speak with Mr. Bookheimer from the front door without entering the residence. It was also clear from the record that neither occupant consented that the officers' entering the residence. From what the officers saw and heard, no domestic dispute had occurred on the premises and no gun shots had been fired. No exigent or emergency circumstances existed to abridge the constitutional right of Ms. Tingler and Mr. Bookheimer to be secure from a search by the police absent a search warrant. Nor was there any impediment to the officers acquiring a search warrant had they probable cause to seek and obtain one. The fact here is that the record does not demonstrate that there was any such probable cause to obtain a warrant.

At its heart, this case has little if anything to do with domestic violence or drugs. While the fruit of the warrantless search gave rise to a drug-related prosecution, the legal issue at stake is according the proper respect to a fundamental principle guaranteed citizens through our federal and state constitutions to be free of an unreasonable search of one's home. The significance of this case is that the fundamental ideals of democracy, memorialized by our founding fathers in our constitutions, should always have real meaning and effect and not merely be words on paper without concrete significance.

By virtue of the majority opinion, this Court again gives real, concrete meaning to those words by faithfully enforcing the rights of citizens to be safe from unwarranted intrusion by the government in their homes. Accordingly, I respectfully concur.

BENJAMIN, Justice, dissenting.

I agree with the principle espoused by the majority that the protection of citizens from unwarranted search and seizure by the state is a valuable right entitled to great protection. However, I believe the majority opinion goes far beyond the protections heretofore recognized by this Court and by the United States Supreme Court in situations such as the case before us, and establishes a rigidity of unreasonableness which infringes ***731 **482** upon other potential rights, exigencies and obligations of the state.

Here, I fear the majority's understandable zeal for protecting the sanctity of one's home from unreasonable searches and

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seizures ironically may have the harmful effect of placing the safety of innocent persons, particularly those who are unable to speak for or defend themselves, in jeopardy. By ignoring any meaningful balancing as required by our search and seizure jurisprudence, I fear the majority opinion in this matter could have the unfortunate effect of placing the lives of victims of domestic violence in harm's way. Now, police responding to an emergency domestic violence call may be stopped in their duties by the unverified representation that all is well by the first person they encounter at a residence where violence has been reported and is reasonably suspected. An abuser may now stop, or effectively delay, the police from rendering assistance and aid to a victim spouse or child by precluding the law enforcement officer from entering a home to verify the well-being of all present. And while the argument can be made that all the victim would have to do is request assistance or inform the police that he or she is injured, the reality is that responding law enforcement officers have no way of knowing who may be at risk within a residence when they respond to such an emergency call. Many domestic violence victims live in fear and, so long as the abuser is present, will not contradict their abuser's representation to the police that all is well and there is no need for assistance. Moreover, responding to an emergency domestic violence call places the responding police officers themselves at an increased risk of harm. No reading of either the United States Constitution or West Virginia Constitution supports the proposition that such valid concerns should be disregarded or even minimized. The specific exigencies of the situation must be balanced-a task best suited to trial courts-and reasonable expectations of privacy should be considered.

In the instant matter, law enforcement was alerted to a potential domestic violence incident with gunshots fired by way of an anonymous 911 telephone call.[1] Upon arriving at scene, law enforcement personnel found Appellant Jessica Marie Tingler (hereinafter "Ms. Tingler") outside the mobile home in an agitated state.[2] Upon questioning, she denied any domestic dispute and indicated to deputies that Appellant Kenneth Bookheimer (hereinafter "Mr. Bookheimer") was in the mobile home. Thereafter, the officers entered the mobile home to verify the location and condition of Mr. Bookheimer. At that time, the officers noticed evidence of a clandestine drug lab in plain view. After hearing all testimony at the suppression hearing, the trial court specifically found: 1) at the time they entered the premises, the officers did not know if Mr. Bookheimer "had been injured in the reported incident of domestic violence or if he was in the residence with a weapon"; 2) "that exigent and emergency circumstances existed in that [Mr. Bookheimer] could have presented a danger to officers or others if he had been inside the residence ***732 **483** with a weapon"; 3) "that exigent and emergency circumstances existed [because Mr. Bookheimer] could have been inside the residence injured based upon the report of domestic violence with a weapon being discharged and the agitated state in which the officers found Jessica Tingler"; and (4) the "officers had a right to enter the residence based on the said exigent and emergency circumstances to determine if [Mr. Bookheimer] was present and armed with a weapon or injured."

As the majority correctly recognizes, under our law:

> When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's findings are reviewed for clear error.

Syl. Pt. 1, *State v. Lacy,* 196 W.Va. 104, 468 S.E.2d 719 (1996). Recently, this Court recognized the inherently factual nature of exigent circumstances, finding that whether exigent circumstances exist is generally a question which should be left to the finder of fact. *See State v. Kendall,* 219 W.Va. 686, 694, 639 S.E.2d 778, 785-6 (2006) (*per curiam*) (finding that whether exigent circumstances exist to justify a warrantless entry into a home to secure the arrest of the defendant presents question of fact for jury resolution). However, instead of affording the appropriate deference to the trial court's factual findings, the majority has substituted its judgment[3] and credibility determinations for that of the trial court and, in so doing, has failed to properly justify its findings under the applicable, established principles of law regarding exigent circumstances, protective searches and warrantless entries into homes.

The preeminent case of exigent circumstances or the emergency doctrine exception to our constitutional warrant requirement is *State v. Cecil,* 173 W.Va. 27, 311 S.E.2d 144 (1983). Therein, this Court recognized that the warrantless entry into a mobile home to attempt to locate a missing and possibly injured child was proper under the "emergency doctrine" exception to the warrant requirement where the record did not indicate the entry was motivated by an intent to make an arrest or secure evidence. Explaining the scope of

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its holding in *Cecil,* this Court stated in *Wagner v. Hedrick,* 181 W.Va. 482, 489, 383 S.E.2d 286, 293 (1989), that

> [w]e adopted the emergency doctrine in *State v. Cecil,* 173 W.Va. 27, 311 S.E.2d 144 (1983), in which we held that the emergency doctrine permitted "a limited, warrantless search or entry of an area by police officers where (1) there is an immediate need for their assistance in the protection of human life, (2) the search or entry by the officers is motivated by an emergency, rather than by an intent to arrest or secure evidence, and (3) there is a reasonable connection between the emergency and the area in question." *Id.* 173 W.Va. at 32, 311 S.E.2d at 149.
>
> The application of the emergency doctrine requires the existence of a "compelling need to render immediate assistance to the victim of a crime, or insure the safety of the occupants of a house when the police reasonably believe them to be in distress and in need of protection." *Id.* at 150 (citing *State v. Kraimer,* 99 Wis.2d 306, 315, 298 N.W.2d 568, 572 (1980)).

In the instant matter, law enforcement arrived at the Tingler residence after having been notified of a domestic dispute with gun shots having been fired. The officers found Ms. Tingler outside the mobile home in an agitated state. She denied anything was wrong, asked them to leave and refused their entry into the mobile home even though she admitted Mr. Bookheimer was inside. Having a reasonable suspicion that gunshots had been fired based upon the 911 report, the officers were confronted with a situation where they had knowledge of at least two people on the premises, only one of which was visible, and a report of gunshots. In ***733 **484** such a circumstance, I do not find the trial court was clearly wrong in its factual determination that the officers were justified in entering the mobile home to determine if Mr. Bookheimer was injured based upon the report of domestic violence with a weapon fired and Ms. Tingler's demeanor. Entry into the mobile home was necessary to determine if Mr. Bookheimer was injured and in need of assistance. There was no evidence that entry into the mobile home was motivated by an attempt to secure evidence.[4] Further, there was a reasonable connection between the emergency and the area entered as Ms. Tingler had told the officers that Mr. Bookheimer was in the mobile home. Thus, the requirements of *Cecil* were met herein by the officers' entry into the mobile home.

Because the trial court was not clearly wrong in its factual determination that exigent and emergency circumstances existed to permit the officers to enter the mobile home without a warrant, the trial court did not err, in my opinion, in denying the motion to suppress to the extent the evidence of the clandestine drug laboratory was in plain view in this initial entry.[5] Contrary to the majority's finding, I believe that a simple denial of a reported domestic violence incident by one of the purported participants is insufficient to remove a reasonable suspicion that there may be an injured person nearby, particularly where gunshots fired had also been reported.

The report of gunshots being fired provides additional justification for the initial entry into the mobile home to secure Mr. Bookheimer. In syllabus points 5-8 of *State v. Lacy,* 196 W.Va. 104, 468 S.E.2d 719 (1996), former Justice Cleckley, writing for the Court, set forth the parameters of law enforcement's ability to conduct a warrantless protective sweep for weapons in light of constitutional search and seizure concerns in this jurisdiction. Therein, this Court held:

> 5. Law enforcement officials may interfere with an individual's Fourth Amendment interests with less than probable cause and without a warrant if the intrusion is only minimal and is justified for law enforcement purposes. To determine whether the intrusion complained of was minimal, a circuit court must examine separately the interests implicated when the police feel a search for weapons is necessary to keep the premises safe during the search and the privacy interests of the defendant to be free of an unreasonable search and seizure of his or her residence. Only when law enforcement officers face a circumstance, such as a need to protect the safety of those on the premises, and a reasonable belief that links the sought after information with the perceived danger is it constitutional to conduct a limited search of private premises without a warrant.
>
> 6. Neither a showing of exigent circumstances nor probable cause is required to justify a protective sweep for weapons as long as a two-part test is satisfied: An officer must show there are specific articulable facts indicating danger and this suspicion of danger to the officer or others must be reasonable. If these two elements are satisfied, an officer is entitled to take protective precautions and search in a limited fashion for weapons.
>
> 7. The existence of a reasonable belief should be analyzed from the perspective of the police officers at the scene; an inquiring court should not ask what the police could have

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done but whether they had, at the time, a reasonable belief that there was a need to act without a warrant.

8. A protective search is defined as a quick and limited search of premises for weapons once an officer has individualized suspicion that a dangerous weapon is present ***734 **485** and poses a threat to the well-being of himself and others. This cursory visual inspection is limited to the area where the suspected weapon could be contained and must end once the weapon is found and secured.

The trial court specifically found that the officers responding to the domestic violence call herein were justified in entering the mobile home to determine if Mr. Bookheimer was inside with a weapon.

It bears repeating that the officers were responding to a call reporting gunshots fired. I find the majority's attempt to minimize this fact unpersuasive. Under the majority's reasoning, law enforcement would only be permitted to search for weapons if they actually heard the gunshots fired. That is not the law of this State as set forth in *Lacy.* Under *Lacy,* an officer is justified in conducting a protective sweep for weapons if there are "specific articulable facts indicating danger and this suspicion of danger to the officer or others must be reasonable." Syl. Pt. 6, *Lacy.* The trial court was not clearly wrong in finding that the report of gunshots coupled with Ms. Tingler's demeanor justified the officer's entry into the mobile home to determine if Mr. Bookheimer was armed. To the contrary, the majority has apparently decided this matter based upon its own view of what the officers *could* have done not "whether they had, at the time, a reasonable belief that there was a need to act without a warrant." *See,* Syl. Pt. 7, *Lacy.*[6] Because I believe the trial court did not err in denying the motion to suppress based upon its factual finding of the existence of exigent circumstances and the need for a protective sweep for weapons, I respectfully dissent.

All Citations

221 W.Va. 720, 656 S.E.2d 471

Footnotes

1 The appellants argue that the circuit court: (1) erred in denying the motion to suppress evidence obtained as a result of an illegal search, (2) improperly allowed the State to introduce expert testimony as to the identity of certain substances without a proper foundation, and (3) improperly failed to dismiss the conspiracy charge after the State failed to prove a prima facie case. Ms. Tingler's fourth assignment of error alleges that the circuit court erred in proceeding to trial when she was incompetent due to drug abuse.

2 Our reversal based on the determination that the search and seizure was unlawful disposes of our need to address the other three assignments of error. Therefore, this Opinion will not address the merits of the mooted assignments of error.

3 En route to the scene, the responding deputies were notified by dispatch that the residence was believed to have drugs on the premises.

4 The residence was described as a small mobile home with all rooms in close proximity to each other.

5 As testified to at the suppression hearing by one of the responding deputies,

> I initially uh, noticed a female, uh, Jessica Tingler ... running around the uh, what, what appeared to me facing the front of the trailer would have been running around the left side of the trailer. Uh, at that point, uh, she was yelling and, and making some type of garble. Uh, I immediately went towards her direction.... And, the only thing she could say is, we shouldn't have been there. We're not wanted here, uh, don't be around here, uh, you need to leave, um, uh, we did ask her if there was anybody else there. She advised us that Kenny was inside the house.
>
> ....
>
> I saw her running around going hysterical, around the back side of the trailer. Which is sometimes evidence to me to be a domestic in progress.

6 Amendment IV to the United States Constitution provides as follows:

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> 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.

Similarly, W. Va. Constitution, art. III, § 6, provides as follows:

> The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.

7 The facts show that the officers were warned, en route, that the residence possibly contained drugs. Thus, the facts suggest that the deputies' entry into the residence was not motivated by a possible emergency, but rather was motivated by an intent to arrest or secure evidence.

8 We wish to make clear that we believe our decision is supported by the United States Supreme Court decision in *Georgia v. Randolph,* 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006). However, the same conclusion would have been reached based on our current state jurisprudence and absent the *Randolph* decision. We have previously explained that "[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution." Syl. pt. 2, *Pauley v. Kelly,* 162 W.Va. 672, 255 S.E.2d 859 (1979).

9 We wish to reiterate that had the facts been different, the result of this decision would have been different based on our case by case analysis. "[T]he question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes." *Randolph,* 547 U.S. at 118, 126 S.Ct. at 1525, 164 L.Ed.2d at 225 (internal citations omitted). Thus, the facts of this case turn on the reasonableness of the deputies' entry into the house based on the facts as found upon arrival at the scene. However, had facts been present to suggest a possible domestic dispute, including injury or the presence of firearms, the resulting decision by this Court may have been different.

1 The majority's perfunctory dismissal of the validity of this call is troubling to me. To justify its holding in this case, the majority likens the 911 caller to an informant without a proven track record, thereby casting doubt on the very presence of law enforcement at the Tingler residence. I believe this analogy ignores the reality of domestic violence situations where neighbors and friends seek to obtain assistance for the victim, but fear disclosure of their identity due to the likelihood of retaliation or alienation of the victim. Does the majority really intend for law enforcement to ignore anonymous calls regarding domestic violence situations because the validity of the information cannot be independently verified? I worry that such may be the unintended consequence of the majority's opinion.

2 After listening to all of the testimony at the suppression hearing, the trial court specifically found that Ms. Tingler was "in what the officers described as an agitated state when they arrived." Ignoring this factual finding by the trial court, the majority substitutes its judgment for that of the trial court finding that Ms. Tingler's "anger and yelling were not caused by circumstances occurring prior to the arrival of the officers. Rather, [the majority now concludes,] her agitation was aimed at the fact that the officers were present on her property." Majority opinion, 221 W.Va. at 727, 656 S.E.2d at 478. I believe it to be improper for this Court to so cavalierly disregard the record and the findings of a trial court (made after seeing and comprehending all forms of evidence not readily available or apparent to an appellate court on its review of a cold record) on such factual issues.

3 *See* footnote 2, *supra.*

4 That the officers may have been alerted to the possibility of drugs in the home is insufficient, without more, to find that their entry into the mobile home was motivated by an attempt to secure evidence where the officers were dispatched to the scene to respond to a reported domestic violence incident with gunshots fired.

5 A suggestion was made that at least one of the officers re-entered the mobile home without a warrant after Mr. Bookheimer had been found to be uninjured and secured. To the extent that an officer may have re-entered the mobile home after exigent or emergency circumstances had ceased due to the securing of Mr. Bookheimer, any evidence obtained during the re-entry may properly be subject to a suppression motion.

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6 In footnote 14 of *Lacy,* 196 W.Va. at 115, 468 S.E.2d at 730, this Court explained:

> Officers should be permitted to search for a suspected weapon and secure it if the officers have a reasonable belief that failure to secure the weapon will endanger themselves or private citizens. Although there is no ready test for determining reasonableness other than by balancing the need to search [or seize] ... [and such searches involve a] severe, though brief, intrusion upon cherished personal security, this Court finds limited searches are reasonable when weighed against the interest in crime prevention and detection, ... and the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for a search even though something has raised the officers' suspicions of danger.

(Internal quotations and citation omitted).

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692 So.2d 216
District Court of Appeal of Florida,
Fourth District.

STATE of Florida, Appellant,

v.

Henry D. EVANS, Appellee.

No. 96–2551.
|
April 9, 1997.
|
Rehearing Denied May 15, 1997.

Synopsis

State appealed from an order of the Nineteenth Judicial Circuit Court, Indian River County, L.B. Vocelle, J., which granted defendant's motion to suppress on basis that information which police used to justify stop was uncorroborated, anonymous tip. The District Court of Appeal, Stevenson, J., held that tipster was "citizen-informant," whose tip was presumed to be reliable and justified investigatory stop.

Reversed and remanded.

Attorneys and Law Firms

***217** Robert A. Butterworth, Attorney General, Tallahassee, and Denise S. Calegan, Assistant Attorney General, West Palm Beach, for appellant.

Richard L. Jorandby, Public Defender, and Louis G. Carres, Assistant Public Defender, West Palm Beach, for appellee.

Opinion

STEVENSON, Judge.

This is an appeal from an order of the Circuit Court of Indian River County granting defendant Henry Evans' Motion to Suppress. The trial court granted the motion on the basis that the information which the police used to justify the stop—although apparently providing reasonable suspicion of criminal activity—was an uncorroborated, anonymous tip. We reverse because the tipster in the instant case was a "citizen-informant," whose tip is presumed in the law to be reliable, needing little, if any, corroboration before it can justify an investigatory stop.

The Facts

Drema Steele, a manager at a McDonald's on U.S. 1 in Vero Beach, was working at the drive-through one evening at around 10:30 p.m., when the defendant, Henry Evans, placed an order. Ms. Steele believed that Evans was intoxicated and testified that, to the best of her knowledge, Evans "was wasted." She noticed that he was "incoherent," "fumbling to get the bag of food," and "his eyes were ... really dilated." Furthermore, she could smell alcohol.

While Evans was still in line between two other vehicles, Ms. Steele phoned 911. She reported her name, her address, her location, and that she was the manager of the McDonald's. Likewise, she reported the customer's apparent drunkenness, and provided a description of his vehicle—a small blue Honda low rider truck—and its tag number.

Officer Roger Hall arrived at McDonald's after being advised by the dispatcher that a McDonald's employee had called about an intoxicated driver. Officer Hall did not know the caller's name, but he knew that the caller was "somebody from McDonald's." When Officer Hall pulled into the parking lot, he and Ms. Steele looked at each other, and she pointed at the defendant's vehicle to let him know it was the suspect. The vehicle's description and tag number matched those provided by Ms. Steele to the dispatcher and relayed to Officer Hall. Officer Hall waited for the truck to exit the drive-through and pull onto the street, after which he pulled over the vehicle.

According to Officer Hall's police report, Evans smelled of alcohol and his speech was "mumbled." After conducting some physical performance tests, Officer Hall attempted to arrest Evans; however, Evans resisted and a struggle ensued. After Evans was subdued, a search of his vehicle revealed half a bottle of beer and ten packages of marijuana. Evans was charged with driving under the influence of alcohol, resisting arrest, and possession of marijuana with intent to sell.

Evans moved to suppress all physical and testimonial evidence on the ground that the initial stop was without the requisite reasonable suspicion. At a hearing on the motion, defense counsel argued that Ms. Steele's call was an "anonymous tip," which was not sufficiently corroborated —as anonymous tips must be—to justify stopping him. In rebuttal, the State argued that this case is governed by *Alabama v. White,* 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d

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301 (1990), which ***218** addresses anonymous tips.[1] The prosecutor then argued that Ms. Steele's tip was a "very good tip" because it was highly detailed. The defense then pointed out that *Alabama v. White* requires corroboration of the tip and that, here, "there was no corroboration whatsoever."

The trial court granted Defendant's Motion to Suppress, citing *Pinkney v. State,* 666 So.2d 590 (Fla. 4th DCA 1996). *Pinkney* addresses the reasonable suspicion necessary to stop a vehicle when the police respond to an **anonymous tip**.

The State does not argue on appeal that the tip in this case was not anonymous. Thus, both parties start from the assumption that Ms. Steele was an anonymous informant. As explained below, this assumption is incorrect. The true character of the tipster in this case was that of a "citizen-informant." Unfortunately, both parties enticed the trial judge to assess the reliability of Ms. Steele's tip under the wrong legal standard and, therefore, led the court to error in granting the motion to suppress.

Reasonable suspicion

An investigatory stop, like the one in this case, must be based upon "reasonable suspicion." *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Among the definitions of "reasonable suspicion" is such suspicion as would "warrant a man of reasonable caution in the belief that [a stop] was appropriate." *Id.* at 22, 88 S.Ct. at 1880 (quoting *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925)).

Tips and tipsters

Not all tips are of equal value in establishing reasonable suspicion; they "may vary greatly in their value and reliability." *Adams v. Williams,* 407 U.S. 143, 147, 92 S.Ct. 1921, 1924, 32 L.Ed.2d 612 (1972). For this reason, the classification of Ms. Steele's call as an anonymous tip is of critical importance. Anonymous tips are at the low-end of the reliability scale:

> The opinion in [*Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)] recognized that an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is "by hypothesis largely unknown, and unknowable." *Id.* at 237, 103 S.Ct. at 2332.

Alabama v. White, 496 U.S. at 329, 110 S.Ct. at 2415.[2]

Because an anonymous caller's basis of knowledge and veracity are typically unknown, these tips justify a stop only once they are "sufficiently corroborated" by police. *Id.* at 330, 110 S.Ct. at 2416. *Accord Pinkney v. State,* 666 So.2d 590 (Fla. 4th DCA 1996)(anonymous tip requires "detailed and specific information corroborated by police investigation" since the informant's veracity, reliability, and basis of knowledge are unknown).

In this case, it is difficult to see how Ms. Steele can be deemed an "anonymous" caller: she provided her name, location, and occupation to the police. The ample information in the hands of the dispatcher regarding Ms. Steele's identity is constructively imputed to Officer Hall because Florida courts apply the "fellow officer rule," which operates to impute the knowledge of one officer in the chain of investigation to another.[3] *See Berry v. State,* 493 So.2d 1098 (Fla. 4th DCA 1986)(an officer receiving a radio transmission to detain a certain individual has authority to stop the person described; the legitimacy ***219** of the stop will depend on whether the reporting officer had sufficient grounds to order the person detained); s*ee also United States v. Hensley,* 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985)(holding that when a police communique has been issued on the basis of articulable facts supporting a reasonable suspicion, any authorized officer may make an investigatory stop on the basis of that bulletin, even though the officer making the stop is not aware of the underlying facts).

The second reason why Ms. Steele was not "anonymous" was that, even considering only the facts known to Officer Hall himself, her identity was readily ascertainable. Officer Hall knew that the informant was a McDonald's employee, and they acknowledged each other when he arrived at the scene, with Ms. Steele pointing to Defendant's vehicle. The cases support the proposition that an informant's actual name need not be known so long as her identity is readily discoverable. *See Lachs v. State,* 366 So.2d 1223 (Fla. 4th DCA 1979)(holding that a tipster, "fully identified by occupation and address," was "entitled to as much credibility as ... a paid informer or the victims themselves").

A "citizen-informant"

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Not only was Ms. Steele an identified informant, rather than an anonymous one, but she qualifies as a "citizen-informant," whose information is at the high end of the tip-reliability scale. "A citizen-informant is one who is 'motivated not by pecuniary gain, but by the desire to further justice.' " *State v. Talbott,* 425 So.2d 600, 602 n. 1 (Fla. 4th DCA 1982)(quoting *Barfield v. State,* 396 So.2d 793, 796 (Fla. 1st DCA 1981)). As one commentator has explained:

> [T]he courts have quite properly drawn a distinction between [informers likely to have been involved in the criminal activity] and the average citizen who by happenstance finds himself in the position of a victim of or a witness to criminal conduct and thereafter relates to the police what he knows as a matter of civic duty. One who qualifies as the latter type of individual, sometimes referred to as a "citizen-informer," is more deserving of a presumption of reliability than the informant from the criminal milieu. As Justice Harlan pointed out in *United States v. Harris,* [403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971)], the ordinary citizen who has never before reported a crime to the police may, in fact, be more reliable than one who supplies information on a regular basis. "The latter is likely to be someone who is himself involved in criminal activity or is, at least, someone who enjoys the confidence of criminals."

Wayne R. LaFave, *Search and Seizure* § 3.3 (3d ed.1996).

This case is governed by *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), which instructs that the totality of the circumstances determines whether reliance on the tip was reasonable. Key considerations include Ms. Steele's "veracity" and "reliability." These factors were presumed since she was a citizen-informant reporting criminal activity in the scope of her employment. *See Edwards v. Cabrera,* 58 F.3d 290, 294 (7th Cir.1995)(holding that a tip from a bus driver made via the bus dispatcher was entitled to a bolstered inference of reliability since he would be risking his employer's displeasure by making a false report). Accordingly, the lower court erred in relying upon *Pinkney,* which addresses anonymous informants and requires the police to corroborate the tip. *See United States v. Williams,* 3 F.3d 69 (3d Cir.1993)(although a search warrant labelled the informant as "anonymous," the warrant itself revealed that she was really an identified housekeeper, and the lower court, therefore, erred in not presuming her reliability).

The order of suppression is REVERSED, and this cause REMANDED for further proceedings.

FARMER and GROSS, JJ., concur.

All Citations

692 So.2d 216, 22 Fla. L. Weekly D912

Footnotes

1 The State briefly raised the argument below that this was not an anonymous tip but, apparently, abandoned the argument, and provided no legal authority to the trial judge on the issue.

2 The Court explained, however, that "[t]his is not to say that an anonymous caller could never provide the reasonable suspicion necessary for a *Terry* stop." *Id.*

3 An arresting officer is not required to have sufficient firsthand knowledge to constitute probable cause, and it is sufficient if an officer initiating the chain of communication receive information from an official source or eyewitness who, it seems reasonable to believe, is telling the truth. This so-called fellow officer rule has been applied to search warrants as well as arrests....

14 Fla. Jur.2d *Criminal Law* § 650 (1993).

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900 F.3d 892
United States Court of Appeals, Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

David WATSON, Defendant-Appellant.

No. 17-1651
|
Argued April 25, 2018
|
Decided August 17, 2018

Synopsis

Background: Defendant was charged with being a felon in possession of a firearm. The United States District Court for the Northern District of Indiana, No. 2:15CR79-001, Rudy Lozano, J., 2016 WL 4578152, denied defendant's motion to suppress and defendant entered conditional guilty plea. Defendant appealed.

The Court of Appeals, Barrett, Circuit Judge, held that anonymous call did not provide reasonable suspicion to block defendant's car.

Reversed and remanded.

Hamilton, Circuit Judge, filed a concurring opinion.

***893** Appeal from the United States District Court for the Northern District of Indiana, Hammond Division, No. 2:15CR79-001—**Rudy Lozano**, *Judge*.

Attorneys and Law Firms

David E. Hollar, Attorney, Office of the United States Attorney, Hammond, IN, for Plaintiff-Appellee.

Thomas W. Patton, Attorney, Office of the Federal Public Defender, Peoria, IL, Peter W. Henderson, Attorney, Office of the Federal Public Defender, Urbana, IL, for Defendant-Appellant.

Before Manion, Hamilton, and Barrett, Circuit Judges.

Opinion

Barrett, Circuit Judge.

The police received an anonymous 911 call from a 14-year-old who borrowed a stranger's phone and reported seeing "boys" "playing with guns" by a "gray and greenish Charger" in a nearby parking lot. A police officer then drove to the lot and blocked a car matching the caller's description. The police found that a passenger in the car, David Watson, had a gun. He later conditionally pleaded guilty to possessing a firearm as a felon, 18 U.S.C. § 922(g)(1), but preserved for appeal his argument that the court should have suppressed the gun because the stop lacked reasonable suspicion.

We agree with Watson that the police did not have reasonable suspicion to block the car. The anonymous tip did not justify an immediate stop because the caller's report was not sufficiently reliable. The caller used a borrowed phone, which would make it difficult to find him, and his sighting of guns did not describe a likely emergency or crime—he reported gun possession, which is lawful. We therefore vacate the judgment and remand for further proceedings.

I.

Around 9:30 a.m. on Sunday, July 5, 2015, an unidentified caller in Gary, Indiana, phoned 911 to report that "boys" were "playing with guns and stuff" in a parking lot at an address that the caller specified. He explained that the boys "were standing there" by a "gray and greenish Charger" and "just out there playing with they guns." The caller said that he was 14 years old and was calling from a McDonald's across the street. The 911 operator elicited a few more details: the "boys" were black, were in a group of four to five, and had two guns. The caller added that he was calling from a phone that he had just borrowed from "this man" and that he would "try to stay close" to it.

The 911 operator radioed this information to Officer Anthony Boleware of the Gary Police Department: "Have a man with a gun 1532 West Fifth Avenue. 1-5-3-2 West Fifth Avenue. Have five male blacks in the parking lot across from McDonald's in a green—check that, a gray and green Charger displaying weapons. 1-5-3-2 West Fifth Avenue [inaudible]." Boleware testified at the suppression hearing that after hearing the dispatch, he identified the address as "a heavy area for crime" where the police were frequently

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called. He thought that this particular call was urgent because "[i]f it was described ***894** like three or four guys displaying weapons, they might [be] about to shoot somebody." Officer Wayne Dodson, another officer who responded to the call, also testified that he knew that address to be "a hot area" and considered the call urgent because "[a]ny time you have males with weapons, there's always a sense of urgency 'cause anything could happen."

Boleware drove to the address and saw in the parking lot "a Charger with about four guys sitting in it." Using his patrol car, he blocked the Charger before approaching it on foot. All of the occupants denied having any weapons in the car. Within nine minutes, three other officers arrived in response to Boleware's request for backup, and each officer blocked a car door. At that point, Boleware told the other officers to take each occupant out of the car and frisk him for weapons. When another officer ordered Watson, the front seat passenger, out of the car, Watson threw a gun onto the backseat floor. Boleware grabbed the gun and noticed another gun inside the pouch in front of the backseat passenger.

Watson was charged with possessing a firearm as a felon, *see* 18 U.S.C. § 922(g)(1). He moved to suppress the two firearms recovered from the car. At a hearing, Boleware and Dodson testified as recounted above, and the court received the recording and transcript of the 911 call, the recording of the dispatch, and the surveillance video of the parking lot.

Watson argued that Boleware unlawfully seized him by blocking the Charger without reasonable suspicion that a crime had occurred or was imminent. The 911 caller, Watson said, reported only gun possession, which is lawful in Indiana, and did not establish the reliability of his anonymous tip. The government countered that under *Navarette v. California*, 572 U.S. 393, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014), the anonymous tip was reliable and established reasonable suspicion of a crime because the caller reported his own contemporaneous observations about persons playing with guns in a high-crime area. And the government contended that the collective-knowledge doctrine permitted the court to rely on facts that the dispatcher knew but did not convey to Boleware to support reasonable suspicion.

The district court concluded that the seizure was lawful and denied Watson's motion to suppress. The court reasoned that the anonymous caller, like the tipster in *Navarette*, reported activity that he witnessed contemporaneously and provided enough detail to supply reasonable suspicion of a crime. In addition, the court agreed with the government that the collective-knowledge doctrine applied.[1] Following this ruling, Watson pleaded guilty to unlawfully possessing the gun but reserved the right to appeal the denial of his suppression motion. He was sentenced to 30 months in prison and 2 years of supervised release.

II.

Under the Fourth Amendment, an officer cannot stop someone to investigate potential wrongdoing without reasonable suspicion that "criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Reasonable suspicion turns on "the totality of the ***895** circumstances" and whether the officer had "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Navarette*, 134 S.Ct. at 1687 (quoting *United States v. Cortez*, 449 U.S. 411, 417–18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)). The government bears the burden of establishing reasonable suspicion, *United States v. Uribe*, 709 F.3d 646, 650 (7th Cir. 2013), and we review the reasonableness of a stop de novo. *United States v. Miranda-Sotolongo*, 827 F.3d 663, 666 (7th Cir. 2016).

Because anonymous tips relayed to a police officer "seldom demonstrate[ ] the informant's basis of knowledge or veracity," they alone usually are not reliable enough to establish reasonable suspicion. *Florida v. J.L.*, 529 U.S. 266, 270, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) (quoting *Alabama v. White*, 496 U.S. 325, 329, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)). But the Supreme Court, in its most recent anonymous-tip case (which it called a "close case"), identified three factors that make an anonymous tip reliable enough to create reasonable suspicion: the tipster (1) asserts eyewitness knowledge of the reported event; (2) reports contemporaneously with the event; and (3) uses the 911 emergency system, which permits call tracing. *Navarette*, 134 S.Ct. at 1689–90. In that case, the Court ruled that an anonymous caller's 911 report that a specified truck had just run her off the road gave the responding officer reason to stop the truck and its driver on suspicion of drunk driving. *Id.* at 1689–92.

The government argues that *Navarette* controls because its three factors are present here, thereby making the tip about "boys" "playing with guns" sufficiently reliable. The anonymous caller claimed to have personally observed two guns; he reported the event when he was just across the street

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from the guns; and he made the report via 911, which allowed the call to be traced. Several factors, however, distinguish this case from *Navarette*.

First and most significantly, *Navarette*'s rationale for deeming 911 calls reliable has much less force here. The Supreme Court concluded that 911 calls are more dependable because their features "provide some safeguards against making false reports with immunity." *Navarette*, 134 S.Ct. at 1689. Specifically, the calls are recorded, so a victim of a false report may be able to identify the anonymous caller's voice later, and the calls can be traced back to a particular phone number and geographic location. *Id.* at 1690. But here, the caller borrowed a stranger's phone, limiting the usefulness of the system's tracing ability. Any phone number identified would not lead back to the caller because he had no permanent connection to the phone, and the phone's geographic location at the time of the call would be useful only so long as the caller remained near the phone. Under these circumstances, it is not obvious that the young caller would be worried about getting caught providing false information and therefore "think twice" before doing it. *Id.*

The second distinction is that the tip in *Navarette* reported conduct that the officers reasonably suspected to be criminal. There, the caller reported being run off the road by a truck, which "created reasonable suspicion of an ongoing crime such as drunk driving as opposed to an isolated episode of past recklessness." 134 S.Ct. at 1690–91. In contrast, the caller's report in this case about the presence of guns did not create a reasonable suspicion of an ongoing crime, because carrying a firearm in public is permitted with a license in Indiana. *See* Ind. Code § 35-47-2-1(a). To be sure, the presence or use of guns is not always legal. The caller's reference to "boys" might have meant minors, who generally cannot legally possess firearms in ***896** Indiana. *See* Ind. Code § 35-47-10-5(a). And "playing with guns" might mean using them illegally or dangerously, including by pointing a gun at another or engaging in "tumultuous conduct" (conduct "likely to result in[ ] serious bodily injury to a person or substantial damage to property," Ind. Code § 35-45-1-1). *See* Ind. Code §§ 35-45-1-3(a), 35-47-4-3(b). Finally, those seen with guns might not have had the required gun licenses.

But "a mere possibility of unlawful use" of a gun is not sufficient to establish reasonable suspicion. *United States v. Paniagua-Garcia*, 813 F.3d 1013, 1014–15 (7th Cir. 2016). It must instead be "sufficiently probable that the observed conduct suggests unlawful activity." *Miranda-Sotolongo*, 827 F.3d at 669. And the connection to unlawful activity is just too speculative here. "Boys" could be a generic term for men of any age, and "playing with guns" could mean displaying them, which is not criminal conduct. Lacking detail, the report of guns in public does not suggest likely criminal activity.

Finally, unlike in *Navarette*, the police here were not called to resolve an emergency situation. The anonymous caller in *Navarette* reported activity that put others at imminent risk: she said that the truck driver had continued down the highway after he ran her off the road. 134 S.Ct. at 1689. The stop was lawful because "allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences." *Id.* at 1691–92.

The circumstances in this case, however, did not necessitate an emergency response. The anonymous caller reported no tense situation, like a verbal argument or physical confrontation, that suggested violence would erupt. Moreover, although he dialed 911, he never asked for or hinted that a quick response was needed to prevent imminent harm to others. Reports of emergencies have a "special reliability," requiring "a lower level of corroboration." *United States v. Hicks*, 531 F.3d 555, 559–61 (7th Cir. 2008) (concluding that tip was sufficiently reliable where caller reported "armed black-clothed black man was involved in an ongoing domestic disturbance"); *see also United States v. Williams*, 731 F.3d 678, 684 (7th Cir. 2013) (determining that emergency justified stop where "large group of people [were] being loud and waving guns" in known violent-crime area). This call lacked that "special reliability."

But even if the caller's use of 911 and report of "boys" "playing with guns" made the officers worry about an emergency, that worry should have dissipated when Officer Boleware arrived at the scene. What he saw did not match the caller's report: no one was playing with guns in the parking lot. Instead, men were seated inside the identified car with no guns in sight. If there had been a potential emergency at the time of the call, it no longer existed when the police arrived.

These three factors make *Navarette* distinguishable, but for completeness we reject a fourth distinction that Watson proposes: that we should treat an anonymous report from a child as less reliable. Watson argues that, just as the law treats children differently than adults in other areas, we should treat a child's tip with considerable skepticism. *See Hardaway v. Young*, 302 F.3d 757, 763–64 (7th Cir. 2002) (reviewing distinctions between adults and minors under the law). But

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a caller's age alone should not be reason to disregard his tip where, as here, he responded appropriately to the operator's questions, described the events in some detail, presented an internally consistent report, and remained available.

Putting *Navarette* to the side, the government contends that the tip reliably conveyed likely criminal activity because the ***897** caller reported guns in what the officers considered a high-crime area. This argument is unpersuasive. People who live in rough neighborhoods may want and, in many situations, may carry guns for protection. They should not be subject to more intrusive police practices than are those from wealthy neighborhoods. *See Williams*, 731 F.3d at 694 (Hamilton, J., concurring).

Watson persuasively argues that this case is controlled by *J.L.* and distinguishable from *Williams*, our most analogous case, both decided before *Navarette*. In *J.L.*, the Supreme Court also dealt with a tip about a gun. *See* 529 U.S. at 268, 120 S.Ct. 1375. An anonymous tipster had reported "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." *Id.* But the tipster did not use the 911 system, he did not reveal how he knew that the man was armed, and the tip itself did not predict future behavior. *Id.* at 271, 120 S.Ct. 1375. In ruling that this tip was not sufficiently reliable, the Court rejected two arguments that are relevant here. First, *Terry* did not permit a "firearm exception" to the reliability requirement. *Id.* at 272–273, 120 S.Ct. 1375. Such an exception "would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun." *Id.* at 272, 120 S.Ct. 1375. Second, the tip must be reliable even if it is about a minor carrying a gun. *See id.* at 273 n.*, 120 S.Ct. 1375.

In *Williams*, the anonymous 911 caller reported that a group of 25 people was "being loud while loitering" in a bar's parking lot and that three or four group members had "guns out." 731 F.3d at 681. Arriving at most 5 minutes after the call, police found 8 to 10 persons remaining in the bar's parking lot, and they were neither speaking loudly nor displaying guns. *Id.* As the group began slowly dispersing, the officers stopped and patted down some of the group members. *Id.* We concluded that while it was a "very close call," the "emergency report" gave the police reasonable suspicion to stop the persons they saw in the bar's parking lot when they arrived. *Id.* at 684.

The circumstances here are similar enough to *J.L.*—and sufficiently distinguishable from the "very close call" in *Williams*—for us to rule that this tip was not reliable. Although the caller used the 911 system and explained that he himself saw "boys" with guns, the report at its core was one of firearm possession, just as in *J.L.*, which is not criminal. In *Williams*, by contrast, the caller described something more than mere possession—25 rowdy people outside a bar at night, some of whom were waving guns. This reasonably suggested a volatile situation requiring a quick response. The small group here, however, was standing outside an apartment building on a Sunday morning—a situation that does not convey the same sense of volatility.

We close by noting that the police were right to respond to the anonymous call by coming to the parking lot to determine what was happening. But determining what was happening and immediately seizing people upon arrival are two different things, and the latter was premature. We recognize that the calculus is complicated when police respond to tips involving firearms, at least in areas where carrying a firearm in public is not itself a crime. On the one hand, police are understandably worried about the possibility of violence and want to take quick action; on the other hand, citizens should be able to exercise the constitutional right to carry a gun without having the police stop them when they do so.

***898** For those cases like this one in which the tip does not establish reasonable suspicion of a crime, the police have options other than an instant *Terry* stop. It would, for example, be "appropriate to respond to the 911 call with a strong and visible police presence, one that involved talking with people on the scene when they arrived." As long as communication with the police remained voluntary, there would be no Fourth Amendment stop. *Williams*, 731 F.3d at 693 (Hamilton, J., concurring). Alternatively, the police could arrive on the scene and make their own observations about the developing situation, which could transform an innocuous tip into reasonable suspicion to seize an individual. *See, e.g., White*, 496 U.S. at 331–32, 110 S.Ct. 2412 (concluding that police corroboration of anonymous tip through surveillance justified *Terry* stop). And if the subjects of the call are in a car as they were here, the police can stop the car, even if they do so because they want to investigate the report further, as long as they have probable cause to believe that a traffic violation has occurred. *See Whren v. United States*, 517 U.S. 806, 810–13, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

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Like *Navarette*, Watson's case presents a close call. But this one falls on the wrong side of the Fourth Amendment.

Vacated and Remanded

Hamilton, Circuit Judge, concurring.

I join the court's opinion and judgment. I agree that the situation here is distinguishable from the *Terry* stop that was found permissible in *United States v. Williams*, 731 F.3d 678 (7th Cir. 2013). For the reasons explained in my separate opinion in *Williams*, however, I believe that after recent expansions of legal rights to possess and display firearms, the stop in that case was not justified under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and the myriad cases applying it. See 731 F.3d at 690–94 (Hamilton, J., concurring). There should be no need to distinguish this case from *Williams*. In both cases the officers received information that justified a police response. But in both cases, without more indications that a crime had been or was about to be committed, the information the police had did not justify the indignities and the sometimes severe restraints on liberty that we accept under the bland phrase "*Terry* stop."

All Citations

900 F.3d 892

Footnotes

1 The collective-knowledge doctrine permits an officer to "stop ... a suspect at the direction of another officer or police agency, even if the officer himself does not have firsthand knowledge of facts that amount to the necessary level of suspicion." *United States v. Williams*, 627 F.3d 247, 252 (7th Cir. 2010). Because Watson does not challenge on appeal the district court's reliance on the doctrine, we do not address whether the district court applied it correctly here.

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