

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TIMOTHY MICHAEL JOHNSON,

Defendant-Appellee.

UNPUBLISHED
November 9, 2001

No. 230938
Oakland Circuit Court
LC No. 99-164251-FH

Before: Griffin, P.J., and Markey and Meter, JJ.

GRIFFIN, P.J. (*concurring*).

I agree with the result of the majority opinion and with much of its analysis. I write separately to state only that I would not rely on *People v Faucett*, 442 Mich 153, 157; 499 NW2d 764 (1993), because the Michigan Supreme Court's decision is inconsistent with the Fourth and Fourteenth Amendments as construed by the United States Supreme Court in *Florida v JL*, 529 US 266, 272; 120 S Ct 1375; 146 L Ed 2d 254 (2000).

In *JL*, an anonymous telephone caller reported to the police that a young African American man was illegally carrying a firearm. According to the tipster, the criminal was wearing a plaid shirt and could be found standing at a particular bus stop. Thereafter, the police proceeded to the bus stop and observed three black males "hanging out." One of the three was wearing a plaid shirt. Based on the anonymous tip and their observation of the man matching its description, the police conducted a *Terry v Ohio*¹ "stop and frisk." The search revealed a gun in the defendant's pocket that was seized by the police. In affirming the lower court orders granting the defendant's motion to suppress the firearm as a product of an illegal search and seizure, the United States Supreme Court applied and clarified its earlier holding in *Alabama v White*, 496 US 325; 110 S Ct 2412; 110 L Ed 2d 301 (1990). In *JL, supra* at 146 L Ed 2d 260, the Supreme Court characterized *Alabama v White* as a "borderline" and "close case."

In *White, supra*, an anonymous caller reported that a woman carrying cocaine would be leaving an apartment building at a specified time, enter a particular automobile, and drive to a named hotel. Such a detailed prediction of defendant's future movements, confirmed by police observation prior to the stop and frisk, was deemed to be marginally sufficient to withstand a

¹ *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

Fourth Amendment challenge. The Supreme Court in *White*, *supra* at 110 L Ed 2d 310, explained:

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 [*Illinois v*] *Gates*, [462 US 213] *supra*, at 245; 76 L Ed 2d 527; 103 S Ct 2317. 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. [Emphasis in original and added.]

In contrast to *White*, the anonymous tipster in *JL*, *supra*, did not predict the defendant's future itinerary, but merely reported what was readily observable. Any member of the public could see a young African-American man wearing a plaid shirt at the bus stop. Therefore, the report was insufficient to establish that the caller had reliable information regarding criminal activity of the defendant:

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. [*JL*, *supra* at 146 L Ed 2d 261.]

In my view, our Supreme Court's decision in *Faucett*, *supra*, should not be followed because it is contrary to *JL*, *supra*. In *Faucett*, the majority identified the following four facts that it deemed sufficient to establish the reliability of the anonymous caller:

(1) the anonymous caller identified defendant, (2) the caller knew at the time of the call that defendant was en route, (3) the caller described the pickup truck with substantial accuracy, and (4) defendant's travel route was described in significant detail. [*Id.* at 177.]

As noted by Justice Levin in dissent, the first three factors were conditions that were readily observable by the public. Any person at the locale could have reported that he had seen the defendant driving his pickup truck in a general direction. The only information conveyed by the caller predicting future activity was that the defendant was traveling toward town and may be turning from "Hobbs Drive on to either Third or Grant Streets." However, unlike *White*, such an equivocal prediction of a traffic turn is not a detailed prediction of the defendant's itinerary. In this regard, I agree with the following analysis by Justice Levin:

Evaluating the majority's four "critical facts," there was not sufficient indicia of reliability to justify a stop in this case. Although the officers verified that it was Faucett in the truck and that the truck appeared to have been traveling along Werth Road, this part of the tip, the first three of the four "critical facts" relied on by the majority, did not provide indicia of reliability under the principles set forth in *White*. The tipster's statement that Faucett was traveling in his blue pickup into Alpena on Werth Road did not indicate that the caller had inside information, and is more properly characterized as a condition existing at the time of the tip, observable by any member of the general public.¹¹

This leaves what is left of the fourth "critical fact," namely, that Faucett would turn from Hobbs Drive onto either Third or Grant. And thus the majority concludes that the Alpena police had reasonable suspicion to make an investigative stop of Faucett's truck simply because the police had verified that Faucett would turn from Hobbs Drive – where Faucett was first observed by the Alpena Police – onto either Third or Grant.

Under the principles set forth in *White*, this was not sufficient indicia of the reliability of the tip.

¹¹ Faucett was identified by name, and this might have some relevance in determining whether the remainder of the tip was credible. Anyone who knew Faucett but lacked "inside information" or "special familiarity" with his affairs could, however, have so identified him.

[*Faucett, supra* at 177-178 (footnotes omitted).]

In the present case, I agree with the majority that under the totality of the circumstances the tip provided sufficient reasonable suspicion necessary to justify the stop of defendant's vehicle. Unlike *JL*, the tip came from a known source, not from an anonymous caller. According to Officer Wells, the informant is an acquaintance whom he has known for fifteen years. Further, the informant had given accurate information to Wells on one prior occasion that resulted in the recovery of a stolen car. Because the informant is known and his credibility can be assessed, the reliability concerns litigated in *White* and *JL* are not applicable.

I join with the majority in reversing and remanding for further proceedings.

/s/ Richard Allen Griffin