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IN THE COURT OF APPEALS OF INDIANA

O.A.O.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0908-JV-775
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn A. Moores, Judge
The Honorable Gary Chavers, Magistrate
Cause No. 49D09-0904-JD-001209

March 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

O.A.O. was adjudicated a delinquent child for carrying a handgun without a license and dangerous possession of a firearm, both Class A misdemeanors if committed by an adult. He now appeals, arguing that the juvenile court abused its discretion by admitting the handgun into evidence because the investigatory vehicle stop that led to the discovery of the handgun was not based upon reasonable suspicion and violated the Fourth Amendment to the United States Constitution. Concluding that the police had reasonable suspicion to stop the vehicle, we affirm.

Facts and Procedural History

At approximately 2:30 a.m. on April 26, 2009, Indianapolis Metropolitan Police Officers Justin Toussing and Brian Raney received a report of "shots fired" in the Sycamore Forge apartment complex located at 56th Street and Georgetown Road. The officers were located approximately three miles south of that location at the time of the first report from dispatch. The report indicated that there were several shots fired from a dark colored, two-door hatchback Honda with two male Hispanic occupants. The report also indicated that the Honda was heading southbound on Georgetown Road from 56th Street.

The officers, traveling in separate marked cruisers, traveled northbound on Georgetown Road receiving continual reports from dispatch regarding multiple 911 callers describing the same incident and vehicle. The officers estimated that given their own time and distance from 56th Street they would intercept the suspected vehicle at approximately the 4700 block of Georgetown Road. As they arrived at the 4700 block of

Georgetown Road they immediately saw a dark colored, four-door Honda traveling southbound on Georgetown Road. The officers quickly turned around and began following the Honda. The officers further testified that they only saw one other car heading in that direction, and it did not come close to matching the description they were given. Tr. p. 12. Officer Toussing pulled up diagonally next to the vehicle and saw that it had two Hispanic male occupants. At this time, Officer Toussing, with Officer Raney behind him, initiated a stop. At no time before initiating the stop did either officer observe the Honda commit a traffic violation or its occupants exhibit suspicious conduct.

As Officer Raney approached the vehicle from the passenger side, he saw the passenger, later identified as O.A.O., "making a kind of an assertive movement as if he was possibly maybe going to hide something or retrieve something from either underneath his seat or off on [sic] the floorboard." *Id.* at 34. At that time, the officers, for their own safety, ordered the two occupants out of the vehicle. As the occupants were exiting the vehicle, the officers saw in plain view three spent shell casings on the driver seat, one shell casing on the passenger floorboard, and one shell casing on the back seat. Officer Raney then searched the car and found a .40 caliber loaded handgun underneath O.A.O.'s passenger seat and a box of .40 caliber ammunition on the back floorboard. O.A.O. was then arrested.

Thereafter, the State filed a petition alleging that O.A.O. was a delinquent child for carrying a handgun without a license[1] and dangerous possession of a firearm,[2] both Class A misdemeanors if committed by an adult. O.A.O. filed a motion to suppress the

[1] Ind. Code § 35-47-2-1.

[2] Ind. Code § 35-47-10-5.

handgun, arguing that the investigatory stop was not based on reasonable suspicion. Following a hearing, the juvenile court denied the motion. During the fact-finding hearing that immediately followed, the juvenile court incorporated the evidence from the suppression hearing and entered true findings on both counts. Following the disposition hearing, the juvenile court placed O.A.O. on formal probation. He now appeals.

Discussion and Decision

O.A.O. contends that the trial court erred in admitting the handgun into evidence because the police did not have reasonable suspicion of criminal activity to conduct an investigatory *Terry* stop of the vehicle in which O.A.O. was riding. Therefore, O.A.O. argues that the seizure of the handgun violated the Fourth Amendment to the United States Constitution.[3]

Although O.A.O. initially challenged the admission of the handgun through a motion to suppress, he is now appealing following a completed trial. Our standard of review is thus whether the juvenile court abused its discretion by admitting the evidence at trial. *A.M. v. State*, 891 N.E.2d 146, 148-49 (Ind. Ct. App. 2008), *trans. denied*. A trial court has broad discretion in ruling on the admissibility of evidence, and we will disturb its ruling only where it is shown that the trial court abused that discretion. *Ware v. State*, 782 N.E.2d 478, 481 (Ind. Ct. App. 2003), *reh'g denied*. The standard is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection. *A.M.*, 891 N.E.2d at 149. We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. *Id.* However, we

[3] Although O.A.O. also challenges the investigatory stop under Article 1, Section 11 of the Indiana Constitution, he provides no independent analysis under this provision and therefore waives the issue. *See State v. Eichholtz*, 752 N.E.2d 163, 164 n.4 (Ind. Ct. App. 2001).

must also consider the uncontested evidence favorable to the defendant. *Id.* We will affirm the trial court's ruling if it is supported by substantial evidence of probative value. *Id.*

The Fourth Amendment to the United States Constitution provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Pursuant to the Fourteenth Amendment of the United States Constitution, individual states must provide their citizens with the protections afforded by the Fourth Amendment. *State v. Eichholtz*, 752 N.E.2d 163, 165 (Ind. Ct. App. 2001).

The United States Supreme Court created an exception to the Fourth Amendment's requirement that a police officer have probable cause or a warrant before stopping a person in *Terry v. Ohio*, 392 U.S. 1 (1968). Pursuant to *Terry*, a police officer may briefly detain a person for investigational purposes if the officer has reasonable suspicion, based on specific and articulable facts, taken together with rational inferences from those facts "that criminal activity may be afoot." *Id.* at 21. "Reasonable suspicion consists of a minimal level of objective justification for making a stop that is more than an inchoate and unparticularized suspicion or hunch." *Eichholtz*, 752 N.E.2d at 165 (quotations omitted). "Whether the officer's suspicion was reasonable is determined on a case-by-case basis by engaging in a fact-sensitive analysis of the totality of the circumstances." *Id.*

As a general rule, an anonymous tip alone is not likely to constitute the reasonable suspicion necessary for a valid *Terry* stop. *Lampkins v. State*, 682 N.E.2d 1268, 1271

(Ind. 1997) (citing *Alabama v. White*, 496 U.S. 325, 329-330 (1990)), *modified on reh'g on other grounds*, 685 N.E.2d 698 (Ind. 1997). Specifically,

> an anonymous telephone tip, absent any independent indicia of reliability or any officer-observed confirmation of the caller's prediction of the defendant's future behavior, is not enough to permit police to detain a citizen and subject him or her to a *Terry* stop and the attendant interruption of liberty required to accomplish it.

Washington v. State, 740 N.E.2d 1241, 1246 (Ind. Ct. App. 2000), *trans. denied*. O.A.O. cites *Florida v. J.L.*, 529 U.S. 266 (2000), and *State v. Stickle* 792 N.E.2d 51 (Ind. Ct. App. 2003), *trans. denied*, for this very proposition, claiming there was no evidence presented regarding the reliability of the callers or the information itself.

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." *J.L.*, 529 U.S. at 270 (quotation omitted). Such corroboration has been found when multiple 911 callers describe the same situation and general description of the suspect, as happened in *Beverly v. State*, 801 N.E.2d 1254 (Ind. Ct. App. 2004), *trans. denied*.

In *Beverly*, two Marion County Sheriff Deputies received reports from dispatch regarding shots fired from a "gold, full-size SUV driven by a black male" near Michigan Road and 71st Street in Indianapolis. *Id.* at 1262. These reports were based on numerous 911 calls reported within a span of six minutes all reporting a gold SUV driving on Michigan Road firing shots. In reviewing the reliability of these multiple anonymous callers, this Court said:

> Although the deputies did not observe any activity that would have provided an independent basis or reasonable suspicion for stopping Beverly

> and the callers failed to provide any predictions of Beverly's future behavior, the calls bear independent indicia of reliability because they corroborate each other in regards to the fact that shots were being fired and to the general description of the car, driver, and their location. *See United States v. Schaefer*, 87 F.3d 562, 566 (1st Cir. 1996) ("Courts often have held that consistency between the reports of two independent informants helps to validate both accounts.").

Id.

Here, the multiple 911 callers corroborated one another and provided sufficient indicia of reliability to give the officers reasonable suspicion. Yet O.A.O. further argues that because the arresting officers knew that the vehicle they were following was a four-door car and not a two-door car as the general description given by dispatch had provided, reasonable suspicion did not exist to stop the car in which O.A.O. was riding. Our research has not revealed a case in Indiana in which police officers conducted a *Terry* stop of a vehicle which displayed a characteristic that did not exactly match the general description provided to the officers. We do not believe that each characteristic of a given description must match a suspect in order for officers to have reasonable suspicion to conduct a *Terry* stop. Rather, a more practical approach is that

> investigating officers must be allowed to take account of the possibility that some of the descriptive factors supplied by victims or witnesses may be in error. What must be taken into account is the strength of those points of comparison which do match up and whether the nature of the descriptive factors which do not match is such that an error as to them is not improbable . . . .

Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.5 (4th ed. 2004) (footnote omitted). This approach places the focus on the totality of the circumstances surrounding the description rather than on any one individual piece of the description.

O.A.O. cites no precedent to support the proposition that a difference between the description of a vehicle received from dispatch and the actual vehicle police are following precludes a finding of reasonable suspicion to initiate a *Terry* stop. In fact, there are many cases in other jurisdictions holding exactly the opposite. In *People v. Hicks*, 500 N.E.2d 861 (N.Y. 1986), officers received a call from dispatch after 4:00 a.m. regarding a holdup at a nearby factory. Dispatch "identified the robbers as two black men, both about five-feet [sic] five-inches tall, in a green Pontiac with black trim." *Id.* at 862. As the description was coming through the radio, the officers observed two black men in a grey and black Buick Sedan approximately a quarter mile from the factory. *Id.* The subsequent *Terry* stop of the vehicle by the officers was upheld by the New York Court of Appeals despite the fact that the make and color of the defendant's car did not match the description relayed by dispatch. *Id.* at 863.

Rather than focusing on the discrepancies, the court focused on the fact that there was "evidence corroborating the radio report, including the presence of two men of apparently equal size in a car close to, and coming from the direction of, the factory where a robbery had occurred only minutes before, at 4:00 a.m., with little or no traffic in the area." *Id.* (emphasis omitted). Citing these reasons, the court found that the record supported the presence of reasonable suspicion. *Id.*; *see also United States v. Hurst*, 228 F.3d 751 (6th Cir. 2000) (upholding the finding of reasonable suspicion to stop a dark blue Mercury Cougar that did not match the make or model of the description given by the victim who stated that the vehicle was a dark colored Ford Thunderbird); *United States v. Wantland*, 754 F.2d 268 (8th Cir. 1985) (finding reasonable suspicion when an

officer received a description of a 1971 Dodge Dart and license plate number and stopped a 1971 Plymouth Duster that matched only five of the six license plate numbers); *State v. Giddens*, 922 A.2d 650 (N.H. 2007) (finding reasonable suspicion existed although the defendant's car was a maroon two-door Pontiac Grand Am and the victim's description was of a maroon four-door Pontiac Grand Am or Grand Prix).

The facts surrounding the stop of O.A.O.'s car are extremely similar to those found in *Hicks*. Officers Toussing and Raney received a call of shots fired from dispatch at approximately 2:30 a.m. at an apartment complex three miles from the officers' location. The description of the suspects was of two Hispanic males traveling southbound on Georgetown Road in a dark colored, two-door hatchback Honda. The officers discovered a dark colored, four-door Honda without a hatchback traveling southbound on Georgetown Road with two Hispanic male occupants approximately where the officers believed the suspects' vehicle would be given the officers' distance and rate of travel toward the apartment complex. Furthermore, the officers testified that there was only one other car heading southbound on Georgetown Road at that time, and it did not come close to matching the description given. The time of the stop and absence of traffic are notable since the stop occurred in the early morning hours when the streets are not typically as busy, and the likelihood of having multiple vehicles match so many of the described criteria is diminished. These specific and articulable facts, taken together with the officers' rational inferences, amount to reasonable suspicion despite the discrepancy in the number of doors the vehicle had.

Nevertheless, O.A.O. cites numerous cases for the proposition that officers must "make more than a cursory showing that an individual is connected to criminal activity . . . to justify a stop." Appellant's Br. p. 10. With the exception of *Burkett v. State*, 736 N.E.2d 304 (Ind. Ct. App. 2000), these cases are readily distinguishable because they do not involve an officer responding to the occurrence of a crime, nor do they involve reasonable suspicion based on the informants' descriptions of the suspects. *Burkett* itself is also distinguishable based on its facts. In *Burkett*, this Court found that the description from a single anonymous caller of possible drug dealing by three or four black males at a precise location was not specific enough to give the officer reasonable suspicion to stop a single black man standing at the precise location. This case is distinguishable from *Burkett* because of the similarity between multiple 911 reports, the specificity of the description, and the consistency of the facts observed by the officers with that description. Because there was reasonable suspicion to stop the car in which O.A.O. was riding, the trial court did not abuse its discretion by admitting the handgun found during the stop into evidence. We therefore affirm O.A.O.'s juvenile delinquency adjudication.

Affirmed.

RILEY, J., and CRONE, J., concur.