STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE CITY OF KEEGO HARBOR, Plaintiff-Appellee,	UNPUBLISHED November 7, 2013
v	No. 309154 Oakland Circuit Court
MATTHEW ROBERT-CHARLES LUCKINS, Defendant-Appellant.	LC No. 2011-009484-AR

Before: STEPHENS, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant appeals by leave granted a circuit court order affirming defendant's district court conviction for possession of marijuana, MCL 333.7403(d), following a bench trial. Defendant challenges the denial of his district court motion to suppress the marijuana evidence. We reverse the district court's order denying defendant's motion to suppress.

I. BASIC FACTS

At an evidentiary hearing on defendant's motion to suppress, Officer David McKeon testified that at approximately 2:00 a.m. on February 4, 2011, he received a dispatch report of a 911 call of a possible road-rage incident between two vehicles in Keego Harbor. Officer McKeon described the nature of the call as follows:

> That there was a road rage incident involving a possible gun that a [sic] the two vehicles had exchanged some gest-the-the suspect vehicle had exchanged some gestures with the victim vehicle an-an that they were in fear for their lives based on the gestures being made from the car.

Officer McKeon was not told that a gun was actually seen. When the district court asked for clarification about what information was received from dispatch, Officer McKeon testified:

> They advised that they had a caller on the line who was making hand gestures as if they had a weapon and that they were involved in a road rage incident that had occurred down the road on Orchard Lake and that they were now in my city at the intersection of Orchard Lake and Cass Lake and that the person was calling 9-1-1 cause he was afraid that the person way [sic] trying ta' [sic]

> harm them in some, way, shape or form by the gesture that they might have a weapon in their vehicle.
>
> * * *
>
> Based on the callers information 9-1-1 dispatch was explaining to me that they thought that the caller who was calling thought there might be a weapon in the car based on the hand gestures that they're-that were being made to them. Such as like we have a you know such as a-a handgun, I guess. Our dispatch it was --- our dispatch relayed the information the same time the information was being relayed . . . .

The caller reported the model and license plate number of the vehicle involved. Officer McKeon was approximately half a mile from the reported location of the vehicles. As he proceeded to the location, dispatch, which had the 911 caller on the telephone, advised that the vehicles were still on Orchard Lake Road. Officer McKeon saw the subject vehicle and another vehicle pass by. He saw both vehicles "take off" from a traffic light at a normal pace for the time of day. The subject vehicle went first, and the other vehicle went a "brief second later." Officer McKeon made a U-turn and followed. He followed for a short distance and verified the license plate number, but also observed that the license plate light was not working and stopped the vehicle.

As standard procedure, two other officers assisted Officer McKeon. Officer McKeon and Officer Kaminski approached the vehicle while a third officer provided cover. They asked the three occupants to put their hands in the air. The occupants complied. Officer McKeon approached the driver's side and asked defendant for his license, registration, and proof of insurance. Officer McKeon explained the reason for stopping the car, informing defendant "[t]hat somebody had called stating that there might be a weapon in his car and he was involved in a possible road-rage incident that was . . . taking place that moment." Defendant was polite and cooperative, and provided his identification. The other officers obtained identification from the other occupants as well. The officers then had the occupants exit the car one at a time.

When the other two occupants were secured in the patrol vehicle, Officer McKeon had defendant step out of the car and patted him down. Officer McKeon described the pat down search as "[v]ery limited." While patting on top of defendant's jacket, Officer McKeon felt a round object inside defendant's jacket pocket. Officer McKeon asked defendant what the object was, and defendant responded that it was a grinder. Officer McKeon asked what a grinder was, and defendant responded that it was for marijuana. Officer McKeon then asked defendant if he had any marijuana on his person. Defendant said that he had some marijuana in his jacket pocket. Officer McKeon thereafter retrieved the grinder and the marijuana, and issued defendant a citation for possession of marijuana.

II. ANALYSIS

Defendant does not challenge the validity of the initial traffic stop for the equipment violation (a faulty license plate light) or the validity of Officer McKeon's order directing the occupants to leave the car. *Pennsylvania v Mimms*, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977). Defendant argues, however, that the pat down search was unlawful because the

information from dispatch concerning the 911 call that described hand gestures did not provide reasonable suspicion that there was a gun in the car or that the occupants had a gun.

Because the parties do not dispute the facts, this Court reviews de novo the district court's denial of defendant's motion to suppress. *People v White*, 493 Mich 187, 193; 828 NW2d 329 (2013).

"An officer may order occupants out of a car, pending completion of a traffic stop, without violating the Fourth Amendment's proscription against unreasonable searches and seizures." *People v Chapo*, 283 Mich App 360, 368; 770 NW2d 68 (2009) (citation omitted). However, a pat down search of the occupants is not permissible "as a general precautionary measure." *People v Parham*, 147 Mich App 358, 360; 382 NW2d 786 (1985). The validity of the pat down search following a traffic stop is evaluated under the rules of *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). *Arizona v Johnson*, 555 US 323, 326; 129 S Ct 781, 784; 172 L Ed 2d 694 (2009). "First, the investigatory stop must be lawful. . . . Second, to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous." *Id*. at 326-327. In *Johnson*, the Supreme Court explained that

> in a traffic-stop setting, the first *Terry* condition—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation. The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity. To justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous. [*Id*. at 327.]

"Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996).

Officer McKeon did not testify about any personal observations (such as a bulging pocket or nervousness) that suggested that defendant was armed and dangerous. Cf. *People v Harmelin*, 176 Mich App 524; 440 NW2d 75 (1989), aff'd *Harmelin v Mich*, 501 US 957; 111 S Ct 2680; 115 L Ed 2d 836 (1990); *Mimms*, 434 US at 112. Defendant was cooperative and did not make any furtive movements. The reasonableness of the pat down search, therefore turns on the information provided by the 911 caller and not any independent observations by Officer McKeon.

To determine whether information provided by a "citizen informant" carries enough indicia of reliability to provide officers with a reasonable suspicion, this Court considers "(1) the reliability of the particular informant, (2) the nature of the particular information given to the police, and (3) the reasonability of the suspicion in light of the above factors." *People v Barbarich*, 291 Mich App 468, 474; 807 NW2d 56 (2011), citing *People v Tooks*, 403 Mich 568, 577; 271 NW2d 503 (1978) Information from an unknown informant is not necessarily unreliable or incredible. *Tooks*, 403 Mich at 577. "[I]nformation provided to law enforcement officers by concerned citizens who have personally observed suspicious activities is entitled to a

finding of reliability when the information is sufficiently detailed and is corroborated within a reasonable period of time by the officers' own observations." *Id*.

The tip in this case was from a caller to 911 who reported seeing hand gestures by one or more occupants of another vehicle. The caller reported a "road rage incident" involving a specific vehicle and location, and hand gestures that led the caller to believe there might be a weapon in the car and caused the caller to become afraid. The hand gestures were "as if they had a weapon," "[s]uch as like we have a you know such as a-a handgun, I guess." Officer McKeon was able to corroborate the information that the specific vehicle was in the area as had been reported. However, a tip must be "reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Florida v JL*, 529 US 266, 272; 120 S Ct 1375; 146 L Ed 2d 254 (2000). Although the tip in this case provided reliable evidence identifying the vehicle, a report of hand gestures does not provide reliable information that any of its occupants are armed and dangerous. See *United States v Bellamy*, 619 A2d 515 (DC App 1993). Thus, because he did not observe anything corroborating the report of road rage activity or hand gestures suggesting the possession of a gun, Officer McKeon lacked a reasonable and articulable basis for believing that defendant was armed and dangerous, thereby rendering the pat down search unlawful.

The application of the exclusionary rule is a separate inquiry from whether the police violated a person's Fourth Amendment rights. *People v Reese*, 281 Mich App 290, 295; 761 NW2d 405 (2008). Suppression depends on "whether the evidence was discovered through exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id*. at 295-296 (citation and quotation marks omitted). In this case, the evidence showed that defendant admitted possessing marijuana in response to police questioning that was prompted by Officer McKeon's detection of a round object inside defendant's jacket pocket during the pat down search. The parties do not dispute that if the pat down search was unlawful, the marijuana should be suppressed. Accordingly, we reverse the district court's order denying defendant's motion to suppress the marijuana and remand for further proceedings. See *People v Ferengel*, 216 Mich App 420, 426; 549 NW2d 361 (1996).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Kurtis T. Wilder
/s/ Donald S. Owens