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NO. COA13-244
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 11 CRS 62170
PAUL ALLEN MERRELL, 11 CRS 729998-730000
Defendant.

Appeal by defendant from judgment entered 4 October 2012 by Judge Lindsay R. Davis, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 29 October 2013.

Attorney General Roy Cooper, by Associate Attorney General J. Rick Brown, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt, for defendant-appellant.

GEER, Judge.

Defendant Paul Allen Merrell appeals from the trial court's denial of his motion to suppress. Defendant was stopped on suspicion of driving while impaired based on a call to 911 from a couple who identified themselves to the dispatcher. We hold that the trial court properly determined that the officer who stopped defendant acted upon reasonable suspicion and, therefore, affirm.

Facts

On or about 12 December 2011, Bruce Gibson and his wife Edith noticed a dark-colored minivan being driven in an erratic manner in front of their vehicle. They observed the minivan swerve inside its lane, travel across the center line, and hit a mailbox with its side mirror. At that point, Mrs. Gibson called 911 and reported the make, model, color, and license plate number of the vehicle in front of them. While Mr. Gibson followed the minivan, Mrs. Gibson remained on the telephone with the 911 dispatcher, describing the erratic driving of the minivan and updating the location of their vehicle by the streets they were passing so that the police could catch up.

Winston-Salem Police Officer R.W. Westmoreland heard over his radio "that there was a vehicle behind a potential intoxicated driver." He said that the dispatcher gave him the details of the vehicle, a couple of turns the vehicle was making, and the direction of travel. In addition, the dispatcher informed the officer that the vehicle had traveled across the center line twice and hit a mailbox. Officer Westmoreland positioned his vehicle along the reported course of travel and noticed a green Plymouth Voyager van that matched the description he had received from dispatch; there was a second vehicle following directly behind the van. When the two

vehicles approached the officer's location, the second vehicle, which was the Gibsons', flashed its lights in order to let the officer know that they were the 911 callers. When asked why he found the flashing lights relevant, Officer Westmoreland testified that this information was relevant "[d]ue to the fact that my communications told me they had someone willing to witness the driving mannerisms directly behind the van that was described."

Officer Westmoreland pulled out between the minivan and the Gibsons' car and followed the minivan for approximately a quarter of a mile before activating his blue lights to initiate a traffic stop. The minivan then pulled into an apartment complex, and Officer Westmoreland followed to conduct the investigatory stop. Mr. Gibson also pulled into the apartment complex to provide whatever information was needed. He eventually gave his identification to another police officer who arrived.

Mr. and Mrs. Gibson never personally spoke with Officer Westmoreland on the evening of the arrest, and they made no other contact with him aside from flashing their headlights. Officer Westmoreland testified that the vehicle he stopped matched the description he had received from the dispatcher and that there were no other vehicles on the road that matched the

same description. Officer Westmoreland did not observe defendant engage in any improper or questionable driving during the short time that he was following the vehicle before initiating the stop. The sole basis for the stop was the information he received from dispatch.

Defendant was indicted for driving while impaired, habitual driving while impaired, driving while license revoked, operating a vehicle without insurance, and resisting a public officer (by giving a false name). Defendant filed a motion to suppress on the grounds that Officer Westmoreland lacked reasonable suspicion of criminal activity sufficient to support a decision to stop him.

The trial court entered an order denying defendant's motion to suppress after a 1 October 2012 hearing. In its findings of fact, the court recited the information that Mrs. Gibson provided to the 911 operator. The court further found that "Officer Westmoreland received a radio dispatch of the report of erratic driving provided by Mrs. Gibson, and positioned his patrol vehicle at a point along the apparent route of travel of the minivan." Based on these findings, the trial court concluded that "[u]nder the totality of the circumstances, the information provided by Mrs. Gibson was sufficiently reliable to provide a basis for the formation by Officer Westmoreland of a

reasonable suspicion of criminal activity by the driver of the minivan." The trial court concluded that "[t]he traffic stop was pursuant to reasonable suspicion, based on specific and articulable facts, [and] that the driver of the minivan was engaged in criminal activity, to wit: impaired driving."

After the denial of his motion to suppress, defendant pled guilty to each of the charges, reserving the right to appeal the denial of his motion to suppress. The trial court consolidated the offenses for judgment and imposed an intermediate suspended punishment of 17 to 33 months imprisonment and 36 months of supervised probation. As a condition of special probation, defendant was required to serve 12 months of active prison time in accordance with N.C. Gen. Stat. § 20-138.5(b) (2011). Defendant timely appealed to this Court.

Discussion

On appeal, defendant challenges the trial court's denial of his motion to suppress. Defendant argues that the arresting officer lacked the reasonable suspicion of criminal activity required for an investigatory stop under the Fourth Amendment.

As defendant does not contest the trial court's findings of fact, we "review the trial court's order only to determine whether the findings of fact support the legal conclusion that the circumstances provided [the officer with] reasonable

suspicion for the stop of defendant." *State v. Hudgins*, 195 N.C. App. 430, 432, 672 S.E.2d 717, 718 (2009). "[A] trial court's conclusions of law regarding whether the officer had reasonable suspicion to detain a defendant [are] reviewable *de novo*." *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297 (2001) (citing *State v. Munoz*, 141 N.C. App. 675, 682, 541 S.E.2d 218, 222 (2001)).

"[I]n order to conduct a warrantless, investigatory stop, an officer must have reasonable and articulable suspicion of criminal activity." *State v. Hughes*, 353 N.C. 200, 206-07, 539 S.E.2d 625, 630 (2000). The Supreme Court has interpreted the reasonable and articulable suspicion standard as requiring that "[t]he stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994).

In determining if reasonable suspicion exists, a court must consider the totality of the circumstances. *Id.* "While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the

stop." *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576, 120 S. Ct. 673, 675-76 (2000).

Reasonable suspicion must arise from the officer's knowledge before the time of the stop. *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630 ("The reasonableness of official suspicion must be measured by what the officers knew before they conducted their stop." (quoting *Florida v. J.L.*, 529 U.S. 266, 271, 146 L. Ed. 2d 254, 260, 120 S. Ct. 1375, 1379 (2000))). However, a tip from an informant can provide the reasonable suspicion necessary to initiate an investigatory traffic stop. See, e.g., *State v. McRae*, 203 N.C. App. 319, 323, 691 S.E.2d 56, 59 (2010); *State v. Nixon*, 160 N.C. App. 31, 34, 584 S.E.2d 820, 822 (2003).

Defendant first claims that Mrs. Gibson's 911 call lacked sufficient indicia of reliability to provide reasonable suspicion for the stop because Officer Westmoreland had insufficient information about the informant to deem her credible. When the basis for reasonable suspicion comes from an informant's tip, "the indicia of the tip's reliability . . . must be considered" when assessing the totality of the circumstances, *State v. Maready*, 362 N.C. 614, 619, 669 S.E.2d 564, 567 (2008), and the officer must be aware of the tip's

reliability before initiating the investigatory stop. *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630.

"The potential indicia of reliability include all 'the facts known to the officers from personal observation[.]'" *Maready*, 362 N.C. at 619, 669 S.E.2d at 567 (quoting *Alabama v. White*, 496 U.S. 325, 330, 110 L. Ed. 2d 301, 309, 110 S. Ct. 2412, 2416 (1990)). However, the United States Supreme Court has "reject[ed] [the] argument that reasonable cause . . . can only be based on the officer's personal observation, rather than on information supplied by another person. Informants' tips . . . may vary greatly in their value and reliability. One simple rule will not cover every situation." *Adams v. Williams*, 407 U.S. 143, 147, 32 L. Ed. 2d 612, 617, 92 S. Ct. 1921, 1924 (1972).

In evaluating the reliability of an informant's tip, there is a difference between (1) a tip from a known and reliable source, (2) a tip given to an officer face-to-face, and (3) an anonymous tip. See, e.g., *Maready*, 362 N.C. at 619, 669 S.E.2d at 567 (discussing reliability of tip received from an informant face-to-face); *McRae*, 203 N.C. App. at 323-25, 691 S.E.2d at 59-61 (addressing known reliable informant); *Hudgins*, 195 N.C. App. at 435, 672 S.E.2d at 720 (examining indicia of reliability of tip from anonymous informant). "The difference in evaluating an

anonymous tip [as opposed to a reliable informant's tip] is that the overall reliability is more difficult to establish, and thus some corroboration of the information or greater level of detail is generally necessary." *Nixon*, 160 N.C. App. at 34, 584 S.E.2d at 822.

Our Supreme Court has explained that the reliability of an informant can be

established by showing that the informant had been used previously and had given reliable information, that the information given was against the informant's penal interest, that the informant demonstrated personal knowledge by giving clear and precise details in the tip, or that the informant was a member of a reliable group[.]

Hughes, 353 N.C. at 203, 539 S.E.2d at 628. Here, Mrs. Gibson is not a known reliable source because there is no evidence that she had ever previously provided information to the police, and therefore Officer Westmoreland would have had no indication that her tip would be accurate in this instance.

A tip given to the police face-to-face from a previously unknown informant is considered more reliable than an anonymous tip, yet not as reliable as a tip from a known informant. See *Adams*, 407 U.S. at 146, 32 L. Ed. 2d at 617, 92 S. Ct. at 1923; *McRae*, 203 N.C. at 324, 691 S.E.2d at 60. "Where the informant is known or where the informant relays information to an officer

face-to-face, an officer can judge the credibility of the tipster firsthand and thus confirm whether the tip is sufficiently reliable to support reasonable suspicion." *Hudgins*, 195 N.C. App. at 434, 672 S.E.2d at 719 (citing *Adams*, 407 U.S. at 146-47, 32 L. Ed. 2d at 617, 92 S. Ct. at 1923-24). In *Maready*, our Supreme Court gave "significant weight" to the fact that the informant approached the police and "gave them information at a time and place near to the scene of the alleged traffic violations," reasoning that "[s]he would have had little time to fabricate her allegations against defendant." 362 N.C. at 619, 669 S.E.2d at 567. The fact that the informant in *Maready* "willingly placed her anonymity at risk" was a "circumstance weigh[ing] in favor of deeming her tip reliable." *Id.* at 620, 669 S.E.2d at 567, 568.

In *Hudgins*, this Court upheld a finding of reasonable suspicion where an officer "received a call from dispatch informing him that a man . . . was driving his car and being followed" by a man with a gun in another vehicle. 195 N.C. App. at 431, 672 S.E.2d at 718. The caller did not identify himself, but "remained on the line with dispatch and described the vehicle by make, model and color and provided various updates on his location." *Id.* After the officer instructed the dispatcher to direct the caller to Market Street, he observed vehicles that

matched the caller's description on Market Street and stopped the defendant. *Id.* The caller identified the defendant to the officer as the man who had followed him and then "drove away." *Id.*

This Court determined that the investigatory stop was valid and supported by the following indicia of reliability:

(1) the caller telephoned police and remained on the telephone for approximately eight minutes; (2) the caller provided specific information about the vehicle that was following him and their location; (3) the caller carefully followed the instructions of the dispatcher, which allowed [the officer] to intercept the vehicles; (4) defendant followed caller over a peculiar and circuitous route . . .; (5) the caller remained on the scene long enough to identify defendant . . .; [and] (6) by calling on a cell phone and remaining at the scene, caller placed his anonymity at risk.

Id. at 435, 672 S.E.2d at 720. In holding that the investigatory stop in *Hudgins* was supported by reasonable suspicion, this Court also noted other "attendant circumstances" known to the officer, including his direction of the caller to Market Street and his observation of vehicles matching the caller's description at that location. *Id.* at 435-36, 672 S.E.2d at 720.

On the other hand, in *Hughes*, a "confidential, reliable" informant gave a tip to the captain of the Onslow County Sheriff's Department. 353 N.C. at 201, 539 S.E.2d at 627. The

captain relayed this information to a detective of the Jacksonville Police Department, who then passed the information on to another Jacksonville Police Department detective. *Id.* at 201-02, 539 S.E.2d at 627. Based on this tip, the two Jacksonville detectives conducted an investigatory stop of the defendant, which led to him being charged with various drug possession offenses. *Id.* at 202-03, 539 S.E.2d at 628. The captain who initially received the information did not testify at the suppression hearing, and the officers who did testify did not know the informant's identity or why the informant was considered reliable. *Id.* at 204, 539 S.E.2d at 629.

Our Supreme Court in *Hughes* determined that the tip had to be judged under the standard used for anonymous informants. *Id.* at 205, 539 S.E.2d at 629. The Court reasoned that this standard was appropriate because the arresting officers did not know anything about the informant other than the captain's assertion that he was reliable, and there was no indication that the informant had been used previously or that the information given was against the informant's penal interest. *Id.* at 204-05, 539 S.E.2d at 628.

Defendant compares this case to *Hughes* and claims that Officer Westmoreland had no more information about Mrs. Gibson than the officers who relied on the informant's tip in *Hughes*.

Defendant argues that because Officer Westmoreland did not know Mrs. Gibson's identity he could not have known whether she was credible, and therefore she must be treated as an anonymous informant. We disagree.

Here, Mrs. Gibson was not entirely a face-to-face informant because Officer Westmoreland did not personally speak to her before he stopped defendant or at any point on the evening of the arrest. However, Mrs. Gibson cannot be classified as a purely anonymous informant either. Although Officer Westmoreland did not know Mrs. Gibson's identity at the time of the stop, he knew there was "someone" willing to witness the driving mannerisms of defendant and that person was driving behind a green minivan. See *Maready*, 362 N.C. at 619, 669 S.E.2d at 567 ("An informant's ability to provide a firsthand eyewitness report is one indicator of reliability.").

We agree with the trial court that Officer Westmoreland had sufficient indicia of reliability regarding Mrs. Gibson's tip to formulate reasonable suspicion to justify the investigatory stop. Like the informant in *Hudgins*, Mrs. Gibson remained on the 911 call and "provided specific information about the vehicle[s] . . . and their location[.]" 195 N.C. App. at 435, 672 S.E.2d at 720. Officer Westmoreland received approximately five minutes of reports of the erratic driving and direction of

travel from the dispatcher before he observed a minivan matching the dispatcher's description, followed by a second vehicle which flashed its lights in his direction. Officer Westmoreland reasonably construed Mr. Gibson's act of flashing his headlights as an indication of "someone willing to witness the driving mannerisms directly behind the van that was described."

Further, by identifying herself to the 911 operator and remaining at the scene of the investigatory stop, Mrs. Gibson placed her anonymity at greater risk than did the informant in *Hudgins* who stayed unnamed and drove away as soon as he identified the defendant. *Id.* at 431, 672 S.E.2d at 718. As in *Hudgins*, here, there were also "attendant circumstances" known to Officer Westmoreland that contributed to the reliability of Mrs. Gibson's information: the paths of the two vehicles were consistent with the dispatcher's report, and Officer Westmoreland did not observe any other minivans in the area matching the description provided by the dispatcher. Officer Westmoreland was therefore aware that "the informant demonstrated personal knowledge by giving clear and precise details in the tip," *Hughes*, 353 N.C. at 203, 539 S.E.2d at 628, and accordingly "there were sufficient indicia of reliability, coupled with attendant circumstances to satisfy the reasonable

suspicion standard." *Hudgins*, 195 N.C. App. at 436, 672 S.E.2d at 720-21.

In his reply brief, defendant also points to *State v. Blankenship*, ___ N.C. App. ___, ___, 748 S.E.2d 616, 617 (2013), in which a taxicab driver anonymously contacted 911 and reported that he had observed a car operating erratically and gave the dispatcher a description of the car, its location, the direction it was travelling, and its license plate number. Two minutes after the dispatcher put out a "be on the lookout" alert, an officer saw and stopped defendant's car based solely on the dispatch and without waiting to observe any erratic driving. *Id.* at ___, 748 S.E.2d at 617.

This Court concluded that the trial court had erred in denying the motion to suppress because, first, the officers who stopped the defendant "did not personally observe any unlawful behavior by defendant or have the opportunity to meet [the taxi driver] prior to the stop." *Id.* at ___, 748 S.E.2d at 620. The taxi driver had not given his name, and the 911 operator was only able to later establish the taxi driver's identity by tracking the personal cell phone he used to make the call. *Id.* at ___, 748 S.E.2d at 620. Further, the Court reasoned, "the officers were also unable to judge [the taxi driver's] credibility and to confirm firsthand that the tip possessed

sufficient indicia of reliability. Since [the taxi driver's] anonymous tip did not possess sufficient indicia of reliability, [the officers] did not possess reasonable, articulable suspicion to stop defendant's car." *Id.* at ____, 748 S.E.2d at 620.

We hold that this case more closely resembles *Hudgins* than *Blankenship*. Although Mrs. Gibson did not personally speak to Officer Westmoreland before he stopped defendant, in contrast to the taxi driver in *Blankenship*, she actually identified herself to the dispatcher; the Gibsons followed defendant's car until Officer Westmoreland stopped defendant; they gave detailed, real-time information about what defendant was doing and where he was going; they flashed their headlights, identifying themselves to Officer Westmoreland and indicating to him their willingness to be witnesses to defendant's driving; and they followed the officer into the parking lot making themselves available should he wish to speak with them.

As in *Maready*, Mrs. Gibson gave information to the police "at a time and place near to the scene of the alleged traffic violations," giving her "little time to fabricate her allegations against defendant." 362 N.C. at 619, 669 S.E.2d at 567. In addition, by giving her name to the 911 operator and following the officer into the apartment complex where he made the stop, Mrs. Gibson "willingly placed her anonymity at risk."

Id. at 620, 669 S.E.2d at 567. Accordingly, we hold that the trial court's findings of fact regarding the information relayed by Mrs. Gibson to 911, the information transmitted to Officer Westmoreland, and the Gibsons' actions after Officer Westmoreland located defendant were sufficient to support the trial court's conclusion that "the information provided by Mrs. Gibson was sufficiently reliable to provide a basis for the formation . . . of a reasonable suspicion of criminal activity by the driver of the minivan."

Defendant next argues that the details of the tip that Officer Westmoreland received from the dispatcher did not show that the tip was reliable in its assertion of illegality. The United States Supreme Court has explained that in order for an anonymous tip to be the basis for reasonable suspicion, the "tip [must] be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *J.L.*, 529 U.S. at 272, 146 L. Ed. 2d at 261, 120 S. Ct. at 1379. It is well-established that while "[a]n accurate description of a subject's readily observable location and appearance is of course reliable in . . . help[ing] the police correctly identify the person whom the tipster means to accuse[,] [s]uch a tip . . . does not show that the tipster has knowledge of concealed criminal activity." *Id.*

Defendant points to *State v. Johnson*, 204 N.C. App. 259, 693 S.E.2d 711 (2010), to support his argument that Mrs. Gibson's tip was not reliable in its assertion of illegality. In *Johnson*, officers responded to an anonymous tip that reported a black male wearing a white t-shirt and blue shorts was selling drugs and guns on a particular street corner out of a blue Mitsubishi with an identified license plate number. *Id.* at 260-61, 693 S.E.2d at 713. The officers went to the reported area and found a car with the identified license plate number driven by a male matching the tipster's description. *Id.* at 261, 693 S.E.2d at 713. The officers initiated a traffic stop, searched the defendant's vehicle, and found guns and ammunition. *Id.*, 693 S.E.2d at 714.

This Court concluded that the anonymous tip alone was insufficient to establish reasonable suspicion to stop the defendant's vehicle, reasoning that "while the tip at issue included identifying details of a person and car allegedly engaged in illegal activity, it offered few details of the alleged crime, no information regarding the informant's basis of knowledge, and scant information to predict the future behavior of the alleged perpetrator." *Id.* at 263, 693 S.E.2d at 714-15. We held that "given the limited details contained in the tip, and the failure of the officers to corroborate the tip's

allegations of illegal activity, the tip lacked sufficient indicia of reliability to justify the warrantless stop in this case." *Id.*, 693 S.E.2d at 715.

Contrary to defendant's argument, when looking at the totality of the circumstances here, Mrs. Gibson's tip is significantly more detailed in its assertion of illegality than the tip in *Johnson*: not only did Mrs. Gibson provide a description and location of defendant's vehicle, but she stayed on the telephone with the 911 operator and provided a real-time report of defendant's erratic driving mannerisms while her husband followed the vehicle. Officer Westmoreland knew the informant's basis of knowledge as he was aware that the informant was following defendant's vehicle. Further, as detailed above, Officer Westmoreland had sufficient facts to establish the reliability of the informant. We, therefore, conclude that the information relayed by Mrs. Gibson was sufficient to provide a reasonable articulable suspicion of criminal activity.

Finally, defendant argues that Officer Westmoreland did not have reasonable articulable suspicion to stop defendant because he did not corroborate Mrs. Gibson's tip. However, as we have concluded that the tip "exhibit[ed] sufficient indicia of reliability," it is not necessary for us to address whether

there was "sufficient police corroboration of the tip[.]" *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630. We note that it is good police practice for an officer to corroborate a tip before conducting an investigatory stop based solely on that information. However, pursuant to *Hughes*, such corroboration is not necessary if, as here, the reliability of the tip alone provides sufficient reasonable articulable suspicion of criminal activity.

For the reasons stated above, we believe that Mrs. Gibson's telephone call to 911 provided Officer Westmoreland with sufficient indicia of reliability to justify an investigatory stop based on reasonable articulable suspicion of criminal activity. The acts described by the dispatcher provided the "'minimal level of objective justification[,]" *Barnard*, 362 N.C. at 247, 658 S.E.2d at 645 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10, 109 S. Ct. 1581, 1585 (1989)), needed to subject defendant to the "minimal intrusion" of a simple investigatory stop. *Wardlow*, 528 U.S. at 126, 145 L. Ed. 2d at 577, 120 S. Ct. at 677.

Affirmed.

Judges ERVIN and DILLON concur.

Report per Rule 30(e).