[Cite as *State v. Whitsette*, 2009-Ohio-4373.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92566

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

ROBERT WHITSETTE

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513603

BEFORE: Blackmon, J., Gallagher P.J., and Stewart, J.

RELEASED: August 27, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant State of Ohio appeals the trial court's decision, which granted appellee Robert Whitsette's motion to suppress the evidence against him. On appeal, the State of Ohio assigns the following error for our review:

> **"I. The trial court erred in granting appellee's motion to suppress evidence and finding a violation of the Fourth and Fourteenth Amendments of the Federal Constitution and Article I, Section 14 of the Ohio Constitution pursuant to *State v. Jordan* (2004), 104 Ohio St.3d 21, 817 N.E.2d 864, 2004-Ohio-6085."**

{¶ 2} Having reviewed the evidence and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} The Cuyahoga County Grand Jury indicted Whitsette for both drug trafficking and drug possession. Whitsette entered a not guilty plea and filed a motion to suppress the evidence. He argued that the officers lacked a reasonable basis to stop him.

Motion to Suppress Hearing

{¶ 4} On June 5, 2008, Cleveland police officers received an anonymous tip that Robert and Terrence Whitsette were engaged in drug activity in the area of 11106 Revere in Cleveland, Ohio. Because the officers were unsure of whether the drug activity occurred at the time the informant called, they decided to wait about a half-hour before proceeding to the area. The informant had told the officers that the men drove a blue Thunderbird and

often had weapons on their person, which they had fired at all hours of the night.

{¶ 5} The officers proceeded to the location and observed a blue Thunderbird parked in the driveway facing toward the street. The vehicle was occupied by two males. As the officers stopped their undercover car, the passenger jumped out of the Thunderbird and ran to the rear of the home. While one officer gave chase to the passenger, the other officer ordered the driver, Robert Whitsette, out of the car. Because the caller-informant had advised the officers that the two males had guns, the officer conducted a pat-down search. The officer asked Whitsette if he had anything on his person; Whitsette responded that he had marijuana in his pocket. During the search of Whitsette's pockets, the officer found the marijuana and a baggie containing several rocks of cocaine, and $386. The passenger was not Terrence Whitsette, but a 14-year old relative of Robert Whitsette.

{¶ 6} Based on the above evidence, the trial court granted the motion to suppress. The court concluded that the officers did not have the required reasonable suspicion of criminal activity to conduct a *Terry* stop[1] because the anonymous tip only provided general information, and the officers did not

[1]*Terry v. Ohio* (1968), 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889.

observe Whitsette engaged in criminal activity. In so holding, the court concluded that the behavior of the person running from the car could not be used to implicate Whitsette.

Denial of Motion to Suppress

{¶ 7} In its sole assigned error, the State contends that the trial court erred in granting Whitsette's motion to suppress. We disagree.

{¶ 8} At a hearing on a motion to suppress, the trial court functions as the trier of fact. Accordingly, the trial court is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of witnesses.[2] On review, an appellate court must accept the trial court's findings of fact if those findings are supported by competent, credible evidence.[3] After accepting such factual findings as true, the reviewing court must then independently determine, as a matter of law, whether or not the applicable legal standard has been met.[4]

{¶ 9} An investigatory stop is permissible if a law enforcement officer has a reasonable suspicion, based on specific and articulable facts, that the

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[2]*State v. Mills* (1992), 62 Ohio St.3d 357, 366.

[3]*State v. Retherford* (1994), 93 Ohio App.3d 586, 592.

[4]Id.

individual to be stopped may be involved in criminal activity. When determining whether or not an investigative traffic stop is supported by a reasonable, articulable suspicion of criminal activity, the stop must be viewed in light of the totality of circumstances surrounding the stop.[5]

{¶ 10} Ohio courts have recognized three categories of informants: (1) citizen informants; (2) known informants, i.e., those from the criminal world who have previously provided reliable tips; and (3) anonymous informants, who are comparatively unreliable.[6] "[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity" to justify an investigative stop.[7] "This is not to say that an anonymous caller could never provide the reasonable suspicion necessary for [an investigative] stop."[8] A stop is lawful if the facts relayed in the tip are "sufficiently corroborated to furnish reasonable suspicion that [the defendant] was engaged in criminal activity."[9]

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[5]*State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph one of the syllabus, cert. denied (1988), 488 U.S. 910, 109 S.Ct. 264, 102 L.Ed.2d 252.

[6]*Maumee v. Weisner*, 87 Ohio St.3d 295, 300, 1999-Ohio-68.

[7]*Alabama v. White* (1990), 496 U.S. 325, 329, 110 S.Ct. 2412, 110 L.Ed.2d 301. (citation omitted).

[8]Id.

[9]Id. at 331.

{¶ 11} In the instant case, the anonymous tip did not provide the officers with information upon which the officers could test the informant's veracity. The caller stated that "Robert and Terrence Whitsette" drive a blue Thunderbird and engaged in drug activity in the area of 11107 Revere. Although the caller-informant described the vehicle, the caller-informant failed to provide a physical description of the men. The information that the Whitsettes could be found in the area of 11107 Revere and drove a blue Thunderbird are general details that anyone who knew the Whitsettes could provide. The caller-informant failed to provide more specific details that the officers could corroborate for veracity and failed to indicate the caller-informant possessed inside knowledge of the criminal behavior. The Ohio Supreme Court, quoting the U.S. Supreme Court, explained the nature of the corroboration required to render an anonymous tip reliable as follows:

> **"'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. * * *.

"'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).' *J.L.*, 529 U.S. at 271-272, 120 S.Ct. 1375, 146 L.Ed.2d 254."[10]

{¶ 12} In the instant case, the tip failed to provide the officers with information that indicated that the caller indeed knew inside information

[10] *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, at ¶¶39, 40 quoting, *Florida v. J.L.*, 529 U.S. 266, 270, 120 S.Ct. 1375, 146 L.Ed.2d 254.

about the illegal activity. Only general descriptive information was provided. Thus, although the officers were able to partially confirm the tip, that is, a blue Thunderbird was located in the vicinity of 11107 Revere, more was needed for the officers to legally conduct an investigative stop.

{¶ 13} Additionally, looking at the totality of the circumstances, there was insufficient surrounding circumstances to provide the officers with reasonable suspicion of criminal activity. Although the area was a high drug/gang activity area, Whitsette was not acting in a suspicious manner. He was merely sitting in the car in the driveway. No one approached the car, and the officers did not observe any furtive movements. He simply sat in the car. Although his passenger ran from the car upon seeing police, this conduct does not implicate Whitsette.

{¶ 14} The State attempts to argue this case is similar to this court's opinion in *State v. Jordan*,[11] which was affirmed by the Ohio Supreme Court.[12] We conclude *Jordan* is distinguishable. In *Jordan*, officers responded to an anonymous tip that a black male was "doing drugs" on the porch of a given address, and that the same male had earlier been seen

[11]Cuyahoga App. No. 80675, 2002-Ohio-4587.

[12]104 Ohio St.3d 21, 2004-Ohio-6085.

driving a light blue car, which was parked in front of the given address. When officers arrived, a black male, later identified as Jordan, was on the porch with another individual. Upon seeing the officers, Jordan yelled something to the person, who then ran into the house and fled out the back door. In that case, this court and the Ohio Supreme Court specifically held that the partial confirmation of the informant's information, the fact the location was a high-drug activity area, and Jordan yelled to the person, who then subsequently fled, together created reasonable suspicion that Jordan was engaged in criminal activity.

{¶ 15} In the instant case, like in *Jordan*, the officer testified it was a high-drug activity area. The officers were also able to partially confirm the informant's information because a blue Thunderbird was parked in the driveway of the given address. However, the officers did not know whether Whitsette was in the car, because the informant did not provide a physical description, not even the race, of the Whitsettes. More importantly, there was no interaction between Whitsette and the fleeing person that would create a reasonable suspicion that he was engaged in criminal activity. There was no evidence that Whitsette said anything to the passenger, he did not make any furtive movements, no one approached the vehicle, and he did

not attempt to flee. Some evidence that criminal activity was afoot was needed, either in the form of the officers observing Whitsette engage in suspicious behavior or upon the informant providing information indicating he or she had "knowledge of concealed criminal activity." Thus, based on the facts before us, we conclude the trial court did not err by suppressing the evidence.

{¶ 16} Accordingly, the State's sole assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

MELODY J. STEWART, J., CONCURS;
SEAN C. GALLAGHER, P.J., CONCURS
IN JUDGMENT ONLY