

[Cite as *State v. Cisternino*, 2010-Ohio-6027.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94674

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY J. CISTERNINO

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-532246

BEFORE: Gallagher, A.J., Sweeney, J., and Cannon, J.*

RELEASED AND JOURNALIZED: December 9, 2010
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SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant Anthony Cisternino challenges the denial of his motion to suppress by the Cuyahoga County Court of Common Pleas. For the reasons stated herein, we affirm.

{¶ 2} On December 22, 2009, a Cuyahoga County grand jury indicted Cisternino on one count of carrying a concealed weapon, in violation of R.C. 2923.12(A)(2), a fourth-degree felony, with a forfeiture specification, and one count of having a weapon while under disability, a third-degree felony, in

violation of R.C. 2923.13(A)(3), with a forfeiture specification. On January 19, 2010, Cisternino filed a motion to suppress the gun police seized from him as a result of a warrantless search. A suppression hearing was held, and the following evidence was adduced.

{¶ 3} Officer Edward Rock is a police officer with the Cleveland Police Department. On December 13, 2009, he and his partner, Officer Andrew Desatnik, were in their zone car parked at a 7-11 store located on E. 185th Street. An unidentified male, referred to only as “the citizen,” approached Officers Rock and Desatnik and told them he had seen a white male, later identified as Cisternino, wearing a black leather jacket and jeans standing near the Sunoco gas station approximately one block from where they were presently parked. The citizen told the officers that the male had a gun tucked into the waistband of his jeans, covered by his jacket, and that the male “flashed” the gun at him. Officer Rock testified that the citizen told him and Officer Desatnik that this male was standing on the sidewalk close to the door of the Sunoco station. The citizen also told them he was concerned there was going to be a robbery. Neither officer knew who the citizen was, and neither officer asked the citizen for his name or contact information before rushing to the Sunoco station.

{¶ 4} Officer Rock testified that he and Officer Desatnik drove directly to the Sunoco station, arriving there about one minute after they had spoken

with the citizen. When they arrived at the Sunoco station, Cisternino was standing on the sidewalk with a female, near the door to the Sunoco station and some distance from the closest bus stop. Officer Rock specifically stated that when he and his partner observed Cisternino and the female, the two individuals “were not doing anything out of the ordinary that [he] could see.”

{¶ 5} Officer Rock instructed his partner to stop the car quickly and cover him with his gun, as Rock apprehended Cisternino. Officer Rock grabbed Cisternino, told him to put his hands over his head, put him over the hood of the car, and searched him. While conducting a patdown, Officer Rock found a gun in the waistband of Cisternino’s pants; prior to patting Cisternino down, Officer Rock had not observed a weapon.

{¶ 6} Cisternino was arrested and read his rights. Officer Rock testified that neither he nor Officer Desatnik spoke further with the citizen who had approached them at the 7-11, and no attempt was made to identify him after Cisternino’s arrest.

{¶ 7} On cross-examination, Officer Rock testified again that the citizen told him he saw a gun on Cisternino. Defense counsel asked him about the police report authored by Officer Rock in which he wrote the following: “Citizen states that while he was getting gas he saw male reach inside his coat and *possibly* seen [sic] a handgun in his waistband * * *.

Citizen further stated male was *possibly* going to rob the store or someone.”
(Emphasis added.)

{¶ 8} In its closing argument, the state argued that although the citizen offered an anonymous tip, it was immediately corroborated by the officers’ observations of a male fitting the physical description the citizen provided, thus making the tip inherently more reliable than an anonymous tip from someone over the telephone. The state further argued that based on the citizen’s tip, the police had a reasonable suspicion of criminal activity, which made stopping Cisternino lawful.

{¶ 9} In his closing argument, defense counsel argued that the citizen’s information showed a degree of uncertainty as to whether he had even seen a gun at all. Counsel also argued that the information qualified as an anonymous tip that required independent corroborating evidence by one of the officers that Cisternino had a weapon.

{¶ 10} The trial court denied Cisternino’s motion, and he pleaded no contest to both charges. The trial court sentenced him to 18 months on Count 1 and 12 months on Count 2, to run concurrent. Cisternino filed a timely notice of appeal. In his sole assignment of error, appellant argues that the trial court erred in denying his motion to suppress due to an illegal and warrantless search.

{¶ 11} “Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court’s findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.” (Citations omitted.) *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8.

{¶ 12} The Fourth and Fourteenth Amendments to the United States Constitution prohibit warrantless searches and seizures. Unless an exception applies, warrantless searches are per se unreasonable. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576. One exception was announced by the United States Supreme Court in *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, in which the court held that a brief investigative stop of a person does not violate the Fourth Amendment if the police have reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity. Additionally, the court balanced the right to be free from unreasonable searches against the need to protect the police and the public, and held that a police officer may frisk a

detainee's outer clothing for concealed weapons when the officer has a reasonable suspicion that the suspect is armed and dangerous. *Id.*, 392 U.S. at 27. Analyzing whether the police had reasonable suspicion in any given situation requires us to review the "totality of the circumstances." *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 1999-Ohio-68, 720 N.E.2d 507, citing *United States v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621.

{¶ 13} In the case before us, whether Officers Rock and Desatnik had reasonable suspicion to stop Cisternino rests primarily on the reliability of the citizen, or "informant," who approached the officers and told them that Cisternino had a gun concealed under his coat. In *Weisner*, the supreme court noted that informants usually fit into one of three categories: "the anonymous informant, the known informant (someone from the criminal world who has provided previous reliable tips), and the identified citizen informant." *Weisner*, 87 Ohio St.3d at 300.

{¶ 14} In this hierarchy of informants, the identified citizen informant is the most reliable, while the anonymous informant is the least reliable and requires independent police corroboration. See *id.* Cisternino argues that the unidentified citizen informant who directed the officers to him should be considered an anonymous informant, requiring the police to independently corroborate the information.

{¶ 15} We disagree with Cisternino, and instead find, as did the *Weisner* court, that an ordinary citizen informant who does not happen to give a name should not be treated like an anonymous informant. See *State v. Jordan*, Montgomery App. No. 18600, 2001-Ohio-1630, citing *Weisner*. The Second District Court of Appeals held that “[i]nformation from an ordinary citizen who has personally observed what appears to be criminal conduct carries with it indicia of reliability and is presumed to be reliable.” *State v. Carstensen* (Dec. 18, 1991), Miami App. No. 91-CA-13, unreported. Similarly, the First District Court of Appeals held that an unidentified informant who stops an officer to provide information about a crime is not anonymous: “There is nothing even remotely anonymous, clandestine, or surreptitious about a citizen stopping a police officer on the street to report criminal activity.” *State v. Ramey* (1998), 129 Ohio App.3d 409, 416, 717 N.E.2d 1153.

{¶ 16} In the case before us, the citizen who flagged down Officer Rock to report what he suspected was criminal conduct was not “anonymous” under the three classifications of informants. There is nothing in the record to suggest that the citizen would have refused to give his name if asked or that he attempted to conceal his identity in any way. Whether an informant is “anonymous” depends on whether the informant himself took steps to

maintain anonymity, not on whether the police had time to get his name. See *Ramey*, supra.

{¶ 17} Therefore we treat the citizen in this case like an identified citizen informant, requiring the police to show less independent corroboration. Nonetheless, we find that his reliability must still be viewed within the totality of the circumstances to determine if the police had reasonable suspicion to stop Cisternino.

{¶ 18} The facts in the record show that the citizen provided his tip face-to-face with the officers; he gave an accurate description of what Cisternino looked like, what he was wearing, and where he was standing. The citizen also indicated Cisternino looked as if he were going to commit a robbery and that he had a gun concealed under his jacket. The officers were able to locate Cisternino within one minute of having received the tip, and he fit the precise description the citizen provided for them.

{¶ 19} We are cognizant of the need to protect individual liberty and not trample on the rights afforded by the Fourth Amendment. Therefore, this case should not be read to stand for the proposition that every time a citizen informant reports what he or she considers suspicious activity, the police are given carte blanche to stop and search an alleged suspect. The facts in this case are unique.

{¶ 20} Here the immediacy of the events, both in terms of the time from when the citizen first saw the gun and when the police effectuated the stop, as well as in terms of the proximity between where the citizen encountered the police and the gas station where the police apprehended Cisternino, is significant to our analysis. Furthermore, the concern that a possible violent crime may be imminent, as demonstrated by the presence of a weapon, cannot be diminished in assessing the need for the officers to act without hesitation.

{¶ 21} Specifically, Officer Rock testified that the distance from where he received the tip to where he encountered Cisternino was less than one block; additionally, the time from when he received the tip to when he apprehended Cisternino was less than one minute. He also testified that the citizen expressed concern about a possible robbery, after Cisternino “flashed” the weapon he had secured in his waistband and concealed under his jacket. These facts, coupled with Officer Rock’s observation that Cisternino and his companion were not standing near a bus stop but were instead standing in front of the door to the gas station, enhanced the officers’ need to act quickly to prevent harm to innocent patrons at that location.

{¶ 22} Given these unique facts, we are compelled to agree with the sound determination of the trial court in finding the police had to act to diffuse a potentially volatile situation. We find the officers had sufficient reasonable suspicion that Cisternino was engaged in some criminal activity,

permitting them to stop and pat him down. The trial court did not err in denying Cisternino's motion to suppress. His sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

JAMES J. SWEENEY, J., and
TIMOTHY P. CANNON, J.,* CONCUR

*(Sitting by assignment: Judge Timothy P. Cannon of the 11th District Court of Appeals.)