

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
PREBLE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-08-009
	:	
- vs -	:	<u>OPINION</u>
	:	5/14/2012
	:	
KEVIN D. BUNN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 10-CR-10592

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PIPER, J.

{¶ 1} Defendant-appellant, Kevin Bunn, appeals a decision of the Preble County Court of Common Pleas denying his motion to suppress.

{¶ 2} On November 18, 2010, the Preble County Sheriff's Office received a notice to "be on the lookout" (BOL) for a motor vehicle being operated recklessly or possibly by an intoxicated driver. The BOL was issued after dispatch received a call from another driver who saw the vehicle drive "all over the roadway." The caller, who identified himself as

"Frank," told dispatchers that he was following the car, that the car was cream color, and tried to give the license plate number to police. The caller was not able to provide a full and accurate license plate number, but followed the car the entire time until police arrived and executed a stop. The call between Frank and dispatch lasted over eight minutes.

{¶ 3} Deputies Joshua Wing and Robert Schneider responded separately to the BOL and soon located and began to follow the car. The deputies received word through dispatch that they were following the correct car, as Frank was able to see the deputies move in behind the car. While following the car, the deputies did not witness any traffic violations, but nonetheless pulled the car over. The driver, later identified as Bunn, had bloodshot eyes, and slurred speech. Deputy Schneider smelled a strong odor of mouthwash when he spoke to Bunn, and also noted that Bunn was chewing tobacco, a common substance used to mask an odor of alcohol. The deputies administered several field sobriety tests, and Bunn failed each. Bunn also submitted to a breathalyzer test, and results indicated that Bunn had a blood alcohol content of .137.

{¶ 4} Bunn was charged with four counts of driving while under the influence, along with specifications because he had seven previous convictions for driving while intoxicated, six within the last 20 years. Bunn pled not guilty to the charges, and filed a motion to suppress in which he argued that the deputies did not have probable cause to execute the stop. After a hearing, the trial court denied the motion and Bunn pled no contest to one count of driving while under the influence with the accompanying specification. The trial court sentenced Bunn to a mandatory one-year term on the driving under the influence charge and one year on the specification, to be served consecutively. Bunn now appeals the trial court's decision to deny his motion to suppress, raising the following assignment of error.

{¶ 5} THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS.

{¶ 6} Bunn argues in his sole assignment of error that the trial court erred in denying his motion to suppress.

{¶ 7} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, 12th Dist. No. CA2006-10-023, 2007-Ohio-3353. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. *Id.* Therefore, when reviewing a trial court's decision regarding a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, 12th Dist. No. CA2005-03-074, 2005-Ohio-6038. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶ 12.

{¶ 8} Ohio recognizes two types of lawful traffic stops, a noninvestigatory stop in which the officer believes a traffic violation has occurred, and an investigatory stop. *Id.* at ¶ 13. The record is undisputed that the deputies did not witness Bunn commit a traffic violation. Instead, both testified at the hearing on Bunn's motion to suppress that they executed the stop solely on Frank's information that Bunn was driving erratically.

{¶ 9} The Fourth Amendment to the United States Constitution protects people from illegal searches and seizures. *United States v. Hensley*, 469 U.S. 221, 105 S.Ct. 675 (1985). Before an intrusion is justified, the officer must demonstrate "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868 (1968). "The United States Supreme Court has interpreted the Fourth Amendment to permit police stops of motorists in order to investigate a reasonable suspicion of criminal activity." *City of Maumee v. Weisner*, 87 Ohio St.3d 295, 1999-Ohio-68, citing *Terry* at 22.

{¶ 10} Instead of employing an inflexible standard to determine whether an officer has a reasonable suspicion of criminal activity, its determination involves a consideration of "the totality of the circumstances." *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690 (1981). Accordingly, "both the content of information possessed by police and its degree of reliability" are pertinent when determining whether there is a reasonable suspicion of criminal activity to justify a stop. *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412 (1990).

{¶ 11} The Ohio Supreme Court has specifically held that,

where an officer making an investigative stop relies solely upon a dispatch, the state must demonstrate at a suppression hearing that the facts precipitating the dispatch justified a reasonable suspicion of criminal activity. A telephone tip can, by itself, create reasonable suspicion justifying an investigatory stop where the tip has sufficient indicia of reliability.

Weisner, 87 Ohio St.3d at paragraphs one and two of the syllabus.

{¶ 12} Specific to an instance where the officer's information is generated solely from an informant's tip, "the determination of reasonable suspicion will be limited to an examination of the weight and reliability due that tip." *Id.* at 299. "The appropriate analysis, then, is whether the tip itself has sufficient indicia of reliability to justify the investigative stop. Factors considered 'highly relevant in determining the value of [the informant's] report are the informant's veracity, reliability, and basis of knowledge.'" *Id.* at 300, quoting *Illinois v. Gates*, 462 U.S. 213, 230, 103 S.Ct. 2317(1983).

To assess the existence of these factors, it is useful to categorize informants based upon their typical characteristics. Although the distinctions between these categories are somewhat blurred, courts have generally identified three classes of informants: the anonymous informant, the known informant (someone from the criminal world who has provided previous reliable tips), and the identified citizen informant. While the United States Supreme Court discourages conclusory analysis based solely upon these categories, insisting instead upon a totality of the circumstances review, it has acknowledged their relevance to an informant's reliability. The court has observed, for example, that an anonymous informant is comparatively unreliable and his tip,

therefore, will generally require independent police corroboration. The court has further suggested that an identified citizen informant may be highly reliable and, therefore, a strong showing as to the other indicia of reliability may be unnecessary[.]

Id.

{¶ 13} Based upon the classification and varying degrees of veracity associated with each, it is wise to begin our analysis by categorizing Frank as an anonymous informant, a known informant, or an identified citizen informant. We can eliminate the known informant because Frank was not a person from the criminal world who had previously provided reliable tips. At first blush, it might seem prudent to categorize Frank as an anonymous informant because he did not give his full name to dispatch. However, further analysis is necessary because, and as recognized by the Ohio and United States Supreme Courts, the lines between classifications are "blurred."

Courts have been lenient in their assessment of the type and amount of information needed to identify a particular informant. Many courts have found, for instance, that identification of the informant's occupation alone is sufficient. In *United States v. Pasquarille*, *supra*, the court concluded that, although the informant's name was unknown, information that he was a transporter of prisoners was enough to remove him from the anonymous informant category. Likewise, in *Edwards v. Cabrera*, *supra*, the court was satisfied with the knowledge that the informant was a bus driver whose identity was ascertainable. Furthermore, at least one court has considered simple face-to-face contact to be enough. In *State v. Ramey* (1998), 129 Ohio App.3d 409, 717 N.E.2d 1153, the court held that an unnamed informant who flagged down an officer to provide information concerning a suspected drunk driver was in no way "anonymous": "There is nothing even remotely anonymous, clandestine, or surreptitious about a citizen stopping a police officer on the street to report criminal activity." *Id.*

Weisner at 301.

{¶ 14} Similar to these cases noted by the Ohio Supreme Court in which an otherwise unidentified informant becomes an identified citizen informant by virtue of some identifying quality, Frank's identify was ascertainable and was not clandestine or surreptitious. Frank

identified himself by his first name, and also told dispatch that he was driving behind Bunn's car in a black pickup truck. Frank stayed on the telephone with dispatch the entire time, and gave constant information to dispatch regarding his own location, both in relation to Bunn's vehicle and to his own position on the streets, and verified to dispatch that the deputies were positioned directly behind Bunn's vehicle. Had officers wanted to speak directly to Frank, they were just a few feet away from him as he drove behind Bunn, and the officers could have pulled him over just as easily as they did Bunn's car. Similarly, and because two deputies responded to the BOL, one could have stopped Bunn's car, and one could have easily approached Frank had additional information been necessary. After reviewing the record and considering the totality of the circumstances, we find that Frank's identity was ascertainable, and that the information he provided to dispatch was enough to remove him from the anonymous informant category.

{¶ 15} Though a tip from a citizen informant weighs in favor of reliability and veracity, Frank's characterization as a citizen informant is not dispositive of the case, and instead, goes to only a portion of the totality of the circumstances. We continue our review, and determine that Frank's basis of knowledge also furthers his credibility.

{¶ 16} Normally, a personal observation by a citizen informant is afforded greater credibility and reliability than a secondhand description. *Gates*, 462 U.S. at 233-234. "The immediacy of the report lends further credibility to the accuracy of the facts being relayed, as it avoids reliance upon the informant's memory." *State v. Abercrombie*, 12th Dist. No. CA2001-06-057, 2002-Ohio-2414, ¶ 15. Frank's call to dispatch constituted an eyewitness account of Bunn's erratic driving, and moreover, constituted an exact relay of the circumstances as they unfolded.

{¶ 17} Bunn argues that Frank's tip was unreliable because he did not relay information during the call that Bunn continued to drive erratically. However, we find this

argument unpersuasive. Frank had already witnessed Bunn's erratic driving, and specifically told dispatch that Bunn was "all over the roadway." Once Frank observed Bunn's erratic driving, he called dispatch to report his observations, and the mere fact that Frank did not continue to describe each possible traffic violation to dispatch does not negate the fact that Bunn was witnessed driving "all over the roadway." The fact that Frank called dispatch upon witnessing Bunn's erratic driving, and then continued to follow him in order to relay Bunn's location, lends further credibility to the statement, as it was based on a firsthand account rather than a past recollection.

{¶ 18} Frank was also able to describe Bunn's car to dispatch with sufficient detail to allow officers to execute the stop. While Bunn asserts that Frank's call did not contain accurate information, the small discrepancies he alludes to do not render Frank's information unreliable. First, Bunn argues Frank's tip was unreliable because Frank misstated the color of Bunn's car as cream during his call to dispatch, when his car is actually registered as silver. However, Deputy Wing testified that in his observation "it's more of a creme [sic] color if you see it in person * * *." As the events unfolded at night, and the deputy agreed that the color was more cream than silver, the color difference would not render Frank's statement unreliable.

{¶ 19} Secondly, Bunn challenges Frank's tip because Frank was not able to provide a full license plate number for Bunn's car. It is undisputed that Frank did not provide a full and accurate license plate number. However, an accurate license plate was not necessary in order for officers to correctly identify Bunn's car because Frank continued to stay behind Bunn's car and gave dispatch a turn-by-turn, first-hand account of where it was going. The information Frank gave was sufficient to allow officers to find Bunn's car, and Frank was able to directly confirm that the officers were behind Bunn's car seconds before they initiated the

stop. In fact, Frank specifically verified that officers were directly behind Bunn's car so that there was no possibility that the officers were going to pull over the wrong car.

{¶ 20} We also note that Frank's motivation supports the credibility and reliability of his tip. Frank reported to dispatch that Bunn's car was driving "all over the roadway" and he made this observation as a fellow motorist, one who shared the road with Bunn. Based on these circumstances, we comfortably infer that Frank considered Bunn a threat to himself and other motorists, and therefore, called dispatch based on a desire to remove the risk.

{¶ 21} After reviewing the facts, we find that Frank's tip was reliable and was properly given significant weight by the trial court when denying Bunn's motion to suppress. Frank, a citizen informant, initiated his call to dispatch because he personally viewed Frank driving erratically, and shared information as it unfolded with dispatch. Based on Frank's tip, the dispatch was issued on sufficient facts to justify the deputies' investigatory stop.

{¶ 22} Having found that Bunn's Fourth Amendment right was not violated because deputies properly stopped his car to investigate their reasonable suspicion of criminal activity, Bunn's single assignment of error is overruled.

{¶ 23} Judgment affirmed.

HENDRICKSON, P.J., and RINGLAND, J., concur.