[Cite as *State v. Davis*, 2009-Ohio-2538.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22775
v.	:	T.C. NO. 2006 CR 3252
GERRY D. DAVIS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 29th day of May, 2009.

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JOHNNA M. SHIA, Atty. Reg. No. 0067685, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

ANTHONY S. VANNOY, Atty. Reg. No. 0067052, One First National Plaza, Suite 1600, 130 W. Second Street, Dayton, Ohio 45402
Attorney for Defendant-Appellant

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FROELICH, J.

{¶ 1} Gerry D. Davis was found guilty in the Montgomery County Court of Common Pleas of possession of crack cocaine after the trial court overruled his motion to suppress evidence. He appeals from his conviction.

{¶ 2} We find that the trial court erred in overruling Davis' motion to suppress. Sheriff's

deputies, acting on an unverified tip from an unknown source, lacked a reasonable suspicion of criminal activity. The judgment will be reversed and the matter will be remanded for further proceedings.

I

{¶ 3} The state's evidence at the suppression hearing established the following facts. We note that additional facts were developed at trial; however, we may consider only the evidence presented at the suppression hearing in determining whether the trial court properly overruled the motion to suppress. *State v. Tapke*, Hamilton App. No. C-060494, 2007-Ohio-5124, at ¶47. We confine our discussion of the facts to those presented at the suppression hearing.

{¶ 4} Club Sub-Zero in Harrison Township is located in a high-crime area from which sheriff's deputies receive frequent calls for shots fired, fights, and drug activities. On May 21, 2006, at approximately 2:57 a.m., Montgomery County Sheriff's deputies responded to a report from an unidentified caller that a man at Club Sub-Zero was "possibly" carrying a gun. The dispatch described the person as a black man wearing a blue and white shirt. The deputies received a second dispatch a short time later describing the man as heavyset and reporting that he had moved into the parking lot. The deputies were not informed of the source of this additional information.

{¶ 5} When the deputies arrived, they saw Davis, who fit the description given in the dispatch, sitting in the front passenger seat of a car in the parking lot. Three women were in the car with him. Deputy Paul Henson approached the car with his weapon and flashlight drawn. He saw Davis reach into the open glove compartment and then shut it. The occupants were ordered out of the car and frisked for weapons, but none were found. Deputies then searched the car for weapons. Although no weapons were recovered from the car, deputies found crack cocaine in the glove

compartment and a bag of marijuana underneath the front passenger seat.

{¶ 6} Davis was charged with one count of possession of crack cocaine in an amount equal to or exceeding ten grams, but less than twenty-five grams, in violation of R.C. 2925.11(A). Davis filed a motion to suppress, challenging the admission of all evidence obtained as a result of the search of the car. After a hearing on the motion, the trial court overruled the motion to suppress. A subsequent bench trial found Davis guilty of possession of crack cocaine, as charged in the indictment. Davis was sentenced to two years of imprisonment, with five years of post-release control, and his driver's license was suspended for six months.

{¶ 7} Davis raises two assignments of error on appeal.

II

{¶ 8} Davis' first assignment of error states:

{¶ 9} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS EVIDENCE GAINED AGAINST HIM IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS."

{¶ 10} Davis contends that the information on which the deputies relied – a general physical description from an unknown caller of someone who might be armed with a gun – was insufficient to form a reasonable basis to search the car in which he was a passenger. He relies on *Florida v. J.L.* (2000), 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254.

{¶ 11} In a hearing on a motion to suppress, the trial court assumes the role of the trier of fact and is in the best position to resolve issues regarding credibility of witnesses and the weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 20; *State v. Wilcox*, 117 Ohio App.3d 609, 2008-Ohio-3856, at ¶8. An appellate court's role, while relying on the trial court's findings of fact, is to

determine, without deference to the trial court, whether the facts meet the appropriate legal standard. Accordingly, conclusions of law are reviewed de novo. *Wilcox* at ¶8.

{¶ 12} At a suppression hearing, the state bears the burden of proving that a warrantless search or seizure meets Fourth Amendment standards of reasonableness. *Maumee v. Weisner*, 87 Ohio St.3d 295, 297, 1999-Ohio-68, citing 5 LaFave, Search and Seizure (3 Ed.1996), Section 11.2(b). In the case of an investigative stop, this typically requires evidence that the officer making the stop was aware of sufficient facts to justify it. Id., citing *Terry v. Ohio* (1968), 392 U.S. 1, 22, 88 S.Ct. 1868, 20 L.Ed.2d 889.

{¶ 13} When an investigative stop is made in sole reliance upon a police dispatch, the state must demonstrate at a suppression hearing that the facts precipitating the dispatch justified a reasonable suspicion of criminal activity. Id. "This can be accomplished in either of two ways. The State may show that the source had previously provided the officer information that proved to be correct. Or, if that prior experience is lacking or the source was anonymous, the State may show that subsequent events corroborated the substance of the tip. *Illinois v. Gates* (1983), 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527. However, the corroboration must demonstrate that the tip was 'reliable in its assertion of illegality, not just its tendency to identify a determinate person.'" *State v. Yeatts*, Clark App. No. 02CA45, 2002-Ohio-7285, at ¶12, citing *J.L.*, 529 U.S. at 272.

{¶ 14} In his motion to suppress, Davis challenged the reliability of the tip that caused the deputies to respond to Club Sub-Zero and, specifically, to focus on him. The state presented no information at the suppression hearing about the caller. There was no indication, for example, that the identity of the caller was known to the deputies or that the department had worked with this person in the past. Deputy Henson was asked twice whether he did anything to "verify the person

who sent the tip" when he arrived at the scene and before he searched the parking lot. He answered this question in the negative, noting that "[t]ime is of the essence."

{¶ 15} In *Florida v. J.L.*, an anonymous caller reported to the police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. Officers went to the bus stop and found three black males, one of whom, J.L., was wearing a plaid shirt. Apart from the tip, the officers had no reason to suspect any of the three of criminal activity. The officers did not see a firearm or observe any unusual movements. The officers approached J.L, frisked him, and seized a gun. *J.L.*, 529 U.S. at 268.

{¶ 16} The Supreme Court reversed J.L.'s conviction. It held that an anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a police officer's stop and frisk of that person. Id. at 271. The court concluded that the anonymous tip lacked the indicia of reliability necessary to justify a stop, noting that the tip must be reliable in its assertion of illegality, not just its tendency to identify a determinate person. Id. at 272. We have followed the reasoning in *J.L.* in numerous cases. See, e.g., *State v. Riley* (2001), 141 Ohio App.3d 409; *State v. Black*, Montgomery App. No. 19695, 2003-Ohio-6231; *State v. Kemp*, Montgomery App. No. 19099, 2002-Ohio-2059 (all cases holding that an anonymous or otherwise unverified tip giving a description of a person alleged to be involved in criminal activity was an insufficient basis for a search).

{¶ 17} "This is not to say that an anonymous caller could never provide the reasonable suspicion necessary for [an investigative] stop." *Alabama v. White* (1990), 496 U.S. 325, 329, 110 S.Ct. 2412, 110 L.Ed.2d 301. A stop is lawful if facts relayed are sufficiently corroborated to furnish reasonable suspicion that the defendant was engaged in criminal activity. Id. at 331.

{¶ 18} As in *State v. Langston*, Guernsey App. No. 2006-CA-24, 2007-Ohio-4383, the

anonymous tip, at most, helped the officers identify a "determinate person," but did not provide any basis upon which to test its assertion of illegal activity. Id., ¶26

{¶ 19} Because no information was presented at the suppression hearing about the identity of the person who provided the tip that led to the search of Davis and the car, the trial court could not presume any pattern of past reliability on the part of the tipster. According to the testimony, the deputies did not verify any of the information provided in the telephone call. Although Davis did match the general description given by the caller, the state failed to present evidence that the source had any reliable knowledge of criminal activity. Neither the high level of criminal activity in the area nor the observation that Davis placed something in the glove compartment justified the search in the absence of any other reliability indicia of criminal activity.

{¶ 20} We are very sympathetic to the officer's statement that "time [was] of the essence" in responding to a report, anonymous or otherwise, that a weapon may be present in the club's parking lot, but the *J.L.* court explicitly declined to adopt the argument that the standard *Terry* analysis should be modified by a "firearm exception" which would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing. *J.L.* 529 U.S. at 272 as cited in *U.S. v. Blackshaw* (N.D. Ohio, 2005), 367 F.Supp.2d 1165, 1171, fn 9. With the facts presented at the hearing, Davis' motion to suppress should have been granted.

{¶ 21} The first assignment of error is sustained.

III

{¶ 22} We note that "an illegal arrest does not invalidate a subsequent conviction which is otherwise proper." *State v. Henderson* (1990), 51 Ohio St.3d 54. However, the evidence is not admissible at trial. See, e.g., *State v. Jackson*, Montgomery App. No. 21805, 2007-Ohio-6625, ¶9.

Therefore, our resolution of Davis' first assignment of error renders his second assignment, dealing with the "sufficiency and/or manifest weight of the evidence," moot.

IV

{¶ 23} The judgment of the trial court will be reversed and the matter will be remanded for further proceedings.

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GRADY, J. and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Johnna M. Shia
Anthony S. Vannoy
Hon. Dennis J. Langer