[Cite as *State v. Dunn*, 2010-Ohio-6340.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	Appellate Case No. 23884
	:	
Plaintiff-Appellee	:	Trial Court Case No. 08-CR-1363
	:	
v.	:	(Criminal Appeal from
	:	Common Pleas Court)
RICHARD E. DUNN :		
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 23rd day of December, 2010.

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WAITE, J. (Sitting by Assignment)

{¶ 1} Appellant Richard Dunn is challenging the trial court's decision to overrule a motion to suppress. Appellant was arrested while driving in Vandalia, Montgomery County, after a police dispatcher reported that a man driving a tow truck was suicidal and had a gun in the vehicle. While Appellant was being detained

during the traffic stop, he indicated to the arresting officer that there was a gun in the glove compartment and the gun was immediately confiscated. Appellant was later indicted on a charge of improper handling of a firearm in a motor vehicle, to which he eventually pleaded no contest. He was sentenced to community control sanctions in the Montgomery County Court of Common Pleas.

{¶ 2} During the proceedings, Appellant filed a motion to suppress based on his argument that there was no constitutional basis for the traffic stop. Appellant claimed that the police dispatch bulletin precipitating the arrest was not based on a reasonable suspicion of illegal activity. Appellant argues on appeal that the police should not have relied on the information provided to the police dispatcher because the informant who called the police had not observed any criminal activity. He also argues that the state failed to prove the factual basis for the police dispatch that eventually led to his arrest. The second part of Appellant's argument has merit. Because the arrest was based on a police dispatch bulletin, the state was required to establish the factual basis of the bulletin at the suppression hearing. The dispatcher did not testify at the hearing, and the record is completely devoid of any evidence to show that the dispatcher had a reasonable basis to issue the dispatcher's bulletin. Because there was no factual basis established for the traffic stop, all evidence deriving from the stop should have been suppressed. Appellant's argument has merit, and the judgment of the trial court is reversed.

BACKGROUND OF THE CASE

{¶ 3} On March 27, 2008, Vandalia Police Officer Robert Brazel received a dispatch notice that there was a suicidal male driving a tow truck and that he was planning to kill himself when he arrived at 114 Helke Rd. in Vandalia. The dispatcher gave Appellant's name as the driver and mentioned that he had a weapon. (Tr., p. 8.) The dispatcher noted that the vehicle was a "big rig" tow truck displaying the name "Sandy's" towing company. (Tr., p. 6). Officer Brazel spotted the tow truck and called for backup assistance before initiating a traffic stop. Butler Township police arrived and the two officers signaled for Appellant to pull over. After stopping the rig, Appellant immediately exited the vehicle and was visibly upset and crying. The officers saw Appellant holding a cell phone, but did not observe any weapon. The officers drew their weapons, patted Appellant down and handcuffed him. They did not find any weapon on his person other than a small pocketknife. As Officer Brazel was walking back to his police cruiser, Appellant stated: "[I]t's in the glove box." (Tr., p. 11). The officer asked him if he was referring to the gun, and Appellant said "yes." (Tr., p. 11). Butler Township Sergeant Stanley checked the glove compartment and found a loaded weapon, and he confiscated and secured the weapon. Neither officer had explained the Miranda rights in any fashion to Appellant during or after these events. Officer Brazel drove Appellant to Good Samaritan Hospital to be involuntarily committed. During the drive, Appellant told the officer that he had been having problems with his wife and that he intended to shoot himself after he dropped off his tow truck. (Tr., p. 13.)

{¶ 4} On August 10, 2009, Appellant was indicted on one count of improper handling of a firearm, R.C. 2923.16(B), a fourth degree felony. On October 2, 2009,

Appellant filed a motion to suppress on the grounds that the traffic stop violated the Fourth Amendment and that the police improperly interrogated him without giving him a Miranda warning. Appellant also urged that all evidence derived from the illegal stop and interrogation be suppressed, including the gun found in the glove compartment.

{¶ 5} Officer Brazel was the only witness at the suppression hearing. He testified that he received the police dispatch indicating an emergency involving a suicidal driver; that he called another officer for backup; stopped Appellant's truck; pulled his weapon and handcuffed Appellant during the traffic stop, then he took Appellant to the hospital. Officer Brazel also stated that he did not observe any traffic violations or violations of any other laws that might have precipitated the stop. (Tr., pp. 15, 20.) He testified that Appellant did not seem to be impaired and was very cooperative at the time of the traffic stop. He testified that at no time had Appellant been given any Miranda warnings. All of the testimony at the suppression hearing focused on the procedure of the stop, itself.

{¶ 6} The trial court overruled the motion to suppress on December 9, 2009. The court determined that the police were acting in response to an emergency and found that the need to protect or preserve life provided the exigent reasonable circumstances to justify the traffic stop. The court also found that the police officers did not engage in custodial interrogation, and therefore, Appellant's voluntary comments made during the traffic stop should not be suppressed.

{¶ 7} On December 30, 2009, the court held a change of plea hearing in which Appellant agreed to plead no contest to the single count in the indictment. The

sentencing hearing took place on January 27, 2010. The court filed its judgment entry on January 28, 2010, sentencing Appellant to five years of supervised probation, destruction of the weapon, counseling, payment of court costs, and other sanctions. This timely appeal was filed on February 18, 2010.

ASSIGNMENT OF ERROR

{¶ 8} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS."

{¶ 9} This appeal addresses the question as to whether the police made a constitutionally valid warrantless traffic stop based on a dispatcher's report of a gun carrying, suicidal driver. A police officer may conduct a traffic stop without a warrant if he "has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation * * * regardless of the officer's underlying subjective intent or motivation for stopping the vehicle in question." *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 11-12; see also, *Berkemer v. McCarty* (1984), 468 U.S. 420, 439, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317. An officer may also make a warrantless traffic stop in response to an emergency without violating the Fourth Amendment. *Mincey v. Arizona* (1978), 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290; *State v. Oliver* (1993), 91 Ohio App.3d 607; *State v. Stubbs* (Oct. 2, 1998), Montgomery App. No. CA 16907.

{¶ 10} Appellant cites *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, wherein the Ohio Supreme Court held: "[W]here 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." (Emphasis omitted.) Id. at 298. If the dispatch is based solely on an informant's tip, the determination of reasonable suspicion of criminal activity, or the reasonableness of the existence of an emergency, will be limited to an examination of the weight and reliability of that tip. Id. at 299. The appropriate analysis is whether the tip itself contains sufficient indicia of reliability to justify the investigative stop. Id. Factors considered highly relevant are the informant's veracity, reliability, and basis of knowledge. *State v. Reed*, Montgomery App. No. 23357, 2010-Ohio-299, ¶43.

{¶ 11} In *Maumee*, supra, the Ohio Supreme Court reasoned that:

{¶ 12} "Generally, at a suppression hearing, the state bears the burden of proving that a warrantless search or seizure meets Fourth Amendment standards of reasonableness. 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. *Terry v. Ohio* (1968), 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889, 906. But when an investigative stop is made in sole reliance upon a police dispatch, different considerations apply.

{¶ 13} "A police officer need not always have knowledge of the specific facts justifying a stop and may rely, therefore, upon a police dispatch or flyer. *United States v. Hensley* (1985), 469 U.S. 221, 231, 105 S.Ct. 675, 681, 83 L.Ed.2d 604, 613. This principle is rooted in the notion that 'effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be

expected to cross-examine their fellow officers about the foundation for the transmitted information.' Id. at 231, 105 S.Ct. at 682, 83 L.Ed.2d at 614, quoting *United States v. Robinson* (C.A.9, 1976), 536 F.2d 1298, 1299. When a dispatch is involved, therefore, the stopping officer will typically have very little knowledge of the facts that prompted his fellow officer to issue the dispatch. The United States Supreme Court has reasoned, then, that the admissibility of the evidence uncovered during such a stop does not rest upon whether the officers *relying upon a dispatch or flyer* 'were themselves aware of the specific facts which led their colleagues to seek their assistance.' It turns instead upon 'whether the officers who *issued* the flyer' or dispatch possessed reasonable suspicion to make the stop. (Emphasis sic.) Id. at 231, 105 S.Ct. at 681, 83 L.Ed.2d at 613 * * * Thus, '[i]f the flyer has been issued in the absence of a reasonable suspicion, then a stop in the objective reliance upon it violates the Fourth Amendment.' *Hensley*, 469 U.S. at 232, 105 S.Ct. at 682, 83 L.Ed.2d at 614." Id. at 297-298.

{¶ 14} The *Maumee* Court allowed that the state does not necessarily need to bring the police dispatcher or the citizen informant to testify at the suppression hearing. Id. at 298. Nevertheless, the state is required to establish the facts that the dispatcher relied on so that the court can determine whether there was a reasonable basis for issuing the dispatcher's bulletin. Id.

{¶ 15} In the instant case, there is nothing in Officer Brazel's testimony to establish the basis for the dispatcher's bulletin that led to Appellant's traffic stop. Although the parties mention in their appellate briefs that Appellant's wife was the informant, and it is possible that all of the parties understood this to be the case, the

record is completely silent to this fact at the suppression hearing. Officer Brazel testified that he did not know who the informant was at the time and had no direct conversation with the informant. (Tr., p. 19.) In fact, there is no information about the informant contained anywhere within the transcript of the suppression hearing. Nothing in Officer Brazel's testimony explains what precipitated the dispatcher to send a report that Appellant was suicidal and had a gun in the vehicle. Because Officer Brazel was the only person who testified at the suppression hearing, and the officer supplied absolutely no testimony relative to the information, we must conclude that the state did not fulfill its burden to establish that the police dispatcher had a reasonable basis to send the bulletin which led to the traffic stop.

{¶ 16} Appellant's sole assignment of error has merit and the judgment of the trial court overruling the motion to suppress is reversed. The conviction and sentence are vacated, Appellant's plea of no contest is withdrawn, and the motion to suppress is granted. The case is hereby remanded for further proceedings.

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FROELICH, J., concurs.

GRADY, J., dissenting:

{¶ 17} I respectfully dissent from the majority decision. A careful reading of *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, reveals that the evidentiary requirement it imposes on the state in a suppression hearing applies to an "investigative stop" authorized by *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889; that is, seizure of the person effected to investigate a reasonable suspicion of criminal activity. In *Maumee*, the stop was made based on a police

dispatch concerning a suspected crime of drunk driving, which arose from a tip provided by another motorist.

{¶ 18} In the present case, it is undisputed that Officer Brazel stopped Defendant's vehicle, not to investigate suspected criminal activity, but instead to prevent an allegedly suicidal driver from harming himself. In *Mincey v. Arizona* (1978), 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290, 300, the Supreme Court wrote:

{¶ 19} "We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. Cf. *Michigan v. Tyler, supra*, 436 U.S., at 509-510, 98 S.Ct., at 1950-1951. 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.' *Wayne v. United States*, 115 U.S. App. D.C. 234, 241, 318 F.2d 205, 212 (opinion of Burger, J.). And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. *Michigan v. Tyler, supra*, 436 U.S., at 509-510, 98 S.Ct., at 1950-1951; *Coolidge v. New Hampshire*, 403 U.S., at 465-466, 91 S.Ct. at 2037-2038."

{¶ 20} The trial court found that the dispatch Officer Brazel received and on which he acted portrayed exigent circumstances that justified the stop of Defendant's

vehicle. An "exigency" is such a need or necessity as belongs to the occasion. Webster's Third International New Dictionary. The record plainly demonstrates an emergency situation in which Officer Brazel reasonably believed Defendant was in need of immediate aid. The Fourth Amendment does not bar the warrantless seizure the Officer effected for that purpose. *Mincey*.

{¶ 21} When he emerged from his vehicle, Defendant volunteered that a gun was in the vehicle's glove box. Voluntary statements made in the course of a search or seizure not barred by the Fourth Amendment permit officers to seize any evidence of criminal activity the statement reveals. The trial court did not err when it denied Defendant's motion to suppress evidence of the gun that police then seized from his vehicle.

{¶ 22} I would affirm.

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(Hon. Cheryl L. Waite, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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