[Cite as *State v. Goslin*, 2009-Ohio-3487.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- DOUGLAS E. GOSLIN Defendant-Appellant	JUDGES: Hon. John W. Wise, P. J. Hon. Julie A. Edwards, J. Hon. Patricia A. Delaney, J. Case No. 08 CA 42 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Municipal Court, Case No. 07 TRC 03386
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 13, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
R. KYLE WITTE ASSISTANT PROSECUTOR 121 East Chestnut Street, P.O. Box 1008 Lancaster, Ohio 43130	JAMES A. FIELDS 117 West Main Street Suite 206 Lancaster, Ohio 43130

Wise, P. J.

{¶1} Appellant Douglas E. Goslin appeals his conviction and sentence entered in the Fairfield County Municipal Court on one count of O.V.I.

{¶2} Appellee is the State of Ohio.

STATEMENTS OF FACTS AND CASE

{¶3} On April 21, 2007, Appellant was stopped and cited by Officer Finan of the Lancaster Police Department for impaired driving in violation of R.C. §4511.19(A)(1)(a) and driving in violation of a license restriction pursuant to R.C. §4510.11(A).

{¶4} The primary basis for the stop, if not the sole basis for the stop, was a 9-1-1 call made the evening of April 21, 2007 by a concerned female citizen. The caller never identified herself, nor did the dispatcher ever ask that she identify herself. The caller stated that the vehicle was a GMC Sonoma pickup truck, dark in color, and bearing a license plate number of DCX7710. She further stated that it was in the T.J.'s Family Restaurant Parking Lot. She reported that the driver "was passing out and has no business driving." The caller followed the vehicle for some distance and continued to report on its movements as it traveled through other parking lots, including K-Mart and McDonald's, before exiting onto the street. She stated the driver was "having a lot of real bad problems [driving]," that he was "getting ready to go over a curb," and that he was "swerving all over the place." The caller even gave her motive for calling, indicating that she just lost an aunt to a drunk driver and didn't want to see anyone else get killed. The call lasted approximately five minutes.

{¶5} The vehicle described by the 9-1-1 caller was quickly located and stopped by Officer Finan, and he found Appellant to be the driver. After a roadside investigation, he placed Appellant under arrest and cited him with impaired driving.

{¶6} Appellant was arraigned on the charges on April 25, 2007, in the Fairfield County Municipal Court, at which time he entered not guilty pleas to the charges and was released on a $1,000.00 recognizance bond

{¶7} On January 9, 2008, Appellant filed a Motion in Limine to limit the admissibility of a 9-1-1 call made by a concerned citizen reporting that Appellant was driving badly. Appellee filed a response on January 10, 2008.

{¶8} Prior to the start of trial on January 15, 2008, counsel for both the prosecution and defense were given an opportunity to put their positions on the record regarding the motion. The parties agreed, with the trial court's consent, to continue the case so that the issue could be fully briefed. It was further agreed that Appellant would be granted leave to file a Motion to Suppress so that an appeal could be made immediately thereafter. A copy of the 9-1-1 call was admitted into evidence by stipulation of the parties as "Joint Exhibit 1."

{¶9} Appellant filed a Motion for Leave to File Motion to Suppress Instanter on January 30, 2008, which the trial court granted on February 20, 2008. Appellant also filed its Motion to Suppress on January 30, 3008. Appellee responded with its Memorandum in Opposition to Suppression Motion on February 5, 2008.

{¶10} The trial court overruled Appellant's Motion to Suppress on March 18, 2008, finding that the 9-1-1 call was a present sense impression under Evid.R. 803(1) and was admissible as an exception to the hearsay rule.

{¶11} After the trial court overruled the motion, Appellant withdrew his previously entered pleas of "not guilty" and entered a plea of "no contest" to one count of O.V.I., in violation of R.C. §4511.19(A)(1)(a).

{¶12} The court sentenced Appellant to thirty days in jail and suspended twenty-seven of those days. Appellant was permitted to serve the three days in a residential alcohol treatment program. Appellant's license was suspended for one year from June 2, 2008. The court also imposed a fine of two hundred fifty dollars ($250.00) and costs. The entire sentence was stayed pending appeal.

{¶13} It is from this conviction and sentence that Appellant now appeals, setting forth the following assignment of error:

ASSIGNMENT OF ERROR

{¶14} "I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS TESTIMONIAL STATEMENTS MADE BY AN OUT OF COURT WITNESS AS THESE STATEMENTS VIOLATED THE DEFENDANT'S SIXTH AMENDEMENT [SIC] RIGHT TO CONFRONT WITNESSES."

I.

{¶15} In his sole assignment of error, Appellant challenges the trial court's denial of his motion to suppress.

{¶16} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's finding of fact. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When

reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in the given case. *State v. Curry* (1994), 95 Ohio App.3d 93, 96; *State v. Claytor* (1993), 85 Ohio App.3d 623, 627; *State v. Guysinger* (1993), 86 Ohio App.3d 592.

{¶17} In the instant appeal, Appellant's challenge of the trial court's ruling on his motion to suppress is based on the third method. Accordingly, this Court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in this case.

{¶18} Appellant first argues that the use of the statements contained in the 911 call should have been suppressed because the use of such statements violated his fundamental right to confront witnesses.

{¶19} Upon review, we find that the Ohio Supreme Court has ruled that recordings of 911 calls that were made to avoid immediate danger are not testimonial and do not violate the Confrontation Clause when the declarant is not available to testify at trial. *State v. Naugler*, 111 Ohio St.3d 130, 2006-Ohio-5340, 855 N.E.2d 456. Other Ohio courts have deemed similar 911 calls to be admissible as excited utterances. See, e.g., *State v. Byrd*, 160 Ohio App.3d 538, 542, 2005-Ohio-1902, 828 N.E.2d 133, ¶ 17 (further holding that “under Evid.R. 803(2), the availability of the declarant is immaterial.”)

{¶20} We therefore find that the trial court did not violate Appellant’s Sixth Amendment rights in allowing the State to introduce the 911 call at the suppression hearing.

{¶21} Appellant also argues that the police officer lacked probable cause to stop him.

{¶22} To justify a particular intrusion, the officer must demonstrate "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio* (1968), 392 U.S. 1, 21. 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. *City of Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 297, citing *United States v. Hensley* (1985), 469 U.S. 221, 231. 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. *Maumee*, 87 Ohio St.3d at paragraph 1 of the syllabus. A telephone tip can, by itself, create reasonable suspicion justifying an investigatory stop where the tip has sufficient indicia of reliability. Id.

{¶23} Where, as here, the information possessed by the police before the stop stems 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. 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 328, quoting *Illinois v. Gates* (1983), 462 U.S. 213, 230.

{¶24} A police officer necessarily relies on information he receives over the police radio, and it is his duty to act when he receives that information. *State v. Carstensen* (Dec. 18, 1991), Miami App. No. 91-CA-13, citing *State v. Fultz* (1968), 13 Ohio St.2d 79, 81. In the present case, the police dispatcher relayed information which had been received in a 911 call from a local citizen.

{¶25} Information 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. *Gates*, 462 U.S. at 233-234. The ordinary citizen is on a different footing from a police informant who is himself implicated in criminal conduct; the credibility and reliability of the latter must be apparent before the information can be acted upon. *State v. Adamson* (Nov. 17, 1987), Greene App. No. 87-CA-13, unreported.

{¶26} In this case, Officer Finan responded to a 911 call from a citizen informant who personally observed Appellant's drunken behavior and gave a detailed description of Appellant's erratic driving, along with a description of his car and location to dispatch. The information relayed by the citizen constituted an eyewitness account of the crime. In addition, her call was motivated by concern for the personal safety of other motorists, not by dishonest or questionable motives. In fact, the citizen caller followed Appellant and stayed on the phone with dispatch for approximately five (5) minutes, all the time relaying and describing his movements.

{¶27} In *Carstensen*, supra, the stop was upheld when a 911 caller gave a description of the car, location, and direction of travel, and relayed that the driver was "obviously drunk," but did not leave a name or phone number. The court stated that "[the officer] was not required to wait until the driver had harmed himself or others before he was allowed to stop the driver to investigate whether in fact he was intoxicated." Id.

{¶28} Based on the above and the circumstances in this case, we find that the facts precipitating the dispatch justified a reasonable suspicion of criminal activity.

{¶29} Appellant's sole assignment of error is overruled.

{¶30} For the reasons stated in the foregoing opinion, the judgment of the Municipal Court of Fairfield County, Ohio, is affirmed.

By: Wise, P. J.

Edwards, J., and

Delaney, J., concur.

/S/ JOHN W. WISE

/S/ JULIE A. EDWARDS

/S/ PATRICIA A. DELANEY

JUDGES

JWW/d 65

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DOUGLAS E. GOSLIN	:	
Defendant-Appellant	:	Case No. 08 CA 42

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Municipal Court of Fairfield County, Ohio, is affirmed.

Costs assessed to Appellant.

/S/ JOHN W. WISE

/S/ JULIE A. EDWARDS

/S PATRICIA A. DELANEY

JUDGES