[Cite as *State v. Shepherd*, 2014-Ohio-4611.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 2014CA0003
	:	2014CA0009
RUSSELL R. SHEPHERD, JR.	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Coshocton Municipal Court, Case Numbers TRC 1301654A-B, CRB 1300773A-B
JUDGMENT:	REVERSED AND REMANDED
DATE OF JUDGMENT ENTRY:	October 6, 2014

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
CHRISTIE M.L. THORNSLEY 760 Chestnut St. Coshocton, OH 43812	JEFFREY G. KELLOGG 239 North Fourth St. Coshocton, OH 43812

Delaney, J.

{¶1} Appellant Russell R. Shepherd appeals from the January 16, 2014 Judgment Entry of the Coshocton Municipal Court overruling his motion to suppress. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arose on November 16, 2013 around 2:37 a.m. in the city of Coshocton. Deputy Udischas was dispatched to 315 South Fourth Street for a report of a "suspicious vehicle." Dispatch advised a caller reported a blue van parked in the driveway at that address and the caller didn't know what it was doing there.

{¶3} Udischas testified the neighborhood of 315 South Fourth Street contains older homes and there had been some break-ins in the area recently, although none he knew of at that address.

{¶4} As Udischas was en route to the address, dispatch advised the caller called back to say the van left.

{¶5} Udischas observed a blue van turn east onto Walnut Street; he turned around in a parking lot and started following the vehicle. He testified as he came up behind the vehicle, along with another office in a separate cruiser, the blue van immediately turned left and entered an unnamed alley.

{¶6} Udischas testified he believed the driver of the van was being evasive so he stopped the vehicle. As Udischas approached the vehicle, the driver, appellant, opened the door. Udischas told him to stay in the van and appellant stated the driver's-side window did not work. Udischas recognized appellant and smelled an odor of an

alcoholic beverage emanating from his person. He also spotted a marijuana pipe inside the door of the van.

{¶7} Udischas asked appellant why he was leaving the area and appellant wanted to know why he was stopped. Udischas told appellant about the call of a suspicious blue van and appellant said it wasn't him.

{¶8} Appellant voluntarily turned over a small bag of marijuana. He submitted to standardized field sobriety tests and was placed under arrest for O.V.I., possession of marijuana, and possession of drug paraphernalia.

{¶9} Appellant entered pleas of not guilty and filed a motion to suppress evidence from the stop and arrest arguing the officer had no articulable reasonable suspicion to stop the vehicle. A suppression hearing was held before the trial court. Appellee presented the testimony of Deputy Udischas.

{¶10} Appellant presented the testimony of Scott Christner, who testified he and appellant had been out together in the early morning hours of November 16, 2013. Appellant gave Christner a ride home in his van, dropping him off at 315 South 4th Street. Appellant and Christner talked in the van for a few minutes, then Christner got out and went upstairs to his apartment. Appellant left. Christner did not know he was arrested until the next day.

{¶11} The trial court overruled appellant's motion to suppress. On February 12, 2014, appellant entered pleas of no contest to the charges of O.V.I., possession of marijuana, and possession of drug paraphernalia.

{¶12} Appellant now appeals from the trial court's decision overruling his motion to suppress.

{¶13} Appellant raises one assignment of error:

ASSIGNMENT OF ERROR

{¶14} "I. THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE."

ANALYSIS

{¶15} Appellant argues the trial court should have granted his motion to suppress because the officer did not have articulable reasonable suspicion to stop the blue van. We agree.

{¶16} Appellate review of a trial court's decision to deny a motion to suppress involves a mixed question of law and fact. *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist.1998). During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Brooks*, 75 Ohio St.3d 148, 154, 661 N.E.2d 1030 (1996). A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Medcalf*, 111 Ohio App.3d 142, 145, 675 N.E.2d 1268 (4th Dist.1996). Accepting these facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal standard. *State v. Williams*, 86 Ohio App.3d 37, 42, 619 N.E.2d 1141 (4th Dist.1993), overruled on other grounds.

{¶17} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial

court's findings of fact are against the manifest weight of the evidence. See, *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Klein*, 73 Ohio App.3d 486, 597 N.E.2d 1141 (4th Dist.1991). Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See*, Williams*, supra. Finally, an appellant may argue, as here, the trial court has incorrectly decided the ultimate or final issues raised in a 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 any given case. *State v. Curry*, 95 Ohio App.3d 93, 96,620 N.E.2d 906 (8th Dist.1994).

{¶18} The facts in this case are not in dispute. The issue is whether the dispatch of "suspicious blue van" justified the officer's traffic stop of appellant. Our purpose, then, is to independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard. Id.

{¶19} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). An investigative stop, or *Terry* stop, is a common exception to the Fourth Amendment warrant requirement. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 889 (1968). Because the "balance between the public interest and the individual's right to personal security" tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity "may be afoot." *United States v. Brignoni-*

Ponce, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). In *Terry*, the Supreme Court held that a police officer may stop an individual if the officer has a reasonable suspicion based upon specific and articulable facts that criminal behavior has occurred or is imminent. See, *State v. Chatton*, 11 Ohio St.3d 59, 61, 463 N.E.2d 1237 (1984).

{¶20} We have reviewed the record to weigh the totality of the circumstances surrounding the stop of appellant. The propriety of an investigative stop must be viewed in light of the totality of the circumstances surrounding the stop "as viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews*, 57 Ohio St.3d 86, 87–88, 565 N.E.2d 1271 (1991); *State v. Bobo*, 37 Ohio St.3d 177, 178, 524 N.E.2d 489 (1988).

{¶21} An investigative stop does not violate the Fourth Amendment to the United States Constitution if the police have reasonable suspicion that "the person stopped is, or is about to be, engaged in criminal activity." *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). Reasonable suspicion can arise from information that is less reliable than that required to show probable cause. *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). But it requires something more than an "inchoate and un-particularized suspicion or 'hunch.'" *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). "[T]he Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).

{¶22} The instant case also involves an anonymous tip communicated to the officer by dispatch. A police officer need not always have knowledge of the specific

facts justifying a stop and may rely upon a dispatch. *Maumee v. Weisner*, 87 Ohio St.3d 295, 297, 720 N.E.2d 507 (1999). The admissibility of evidence uncovered during a stop does not rest upon whether the officers relying upon a dispatch were themselves aware of the specific facts that led the colleagues to seek their assistance, but turns instead upon whether the officer who issued the dispatch possessed a reasonable suspicion to make a stop. Id., citing *United States v. Hensley*, 469 U.S. 221, 231, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985). Thus, if the dispatch has been issued in the absence of a reasonable suspicion, then a stop in objective reliance upon it violates the Fourth Amendment. Id. The state must therefore demonstrate at a suppression hearing that the facts precipitating the dispatch justified a reasonable suspicion of criminal activity. Id. 87 Ohio St.3d at 298.

{¶23} Where the information possessed by the police before the stop was solely from an informant's tip, the determination of reasonable suspicion will be limited to an examination of the weight to be given the tip and the reliability of the tip. Id. at 299. Courts have generally identified three classes of informants: the anonymous informant, the known informant from the criminal world who has provided previous reliable tips, and the identified citizen informant. Id. at 300. An identified citizen informant may be highly reliable, and therefore a strong showing as to other indicia of reliability may be unnecessary. Id.

{¶24} An anonymous informant, however, is comparatively unreliable and his tip will generally require independent police corroboration. *Maumee v. Weisner*, 87 Ohio St.3d 295, 300, 720 N.E.2d 507, 513 (1999), citing *Alabama v. White,* 496 U.S. at 329, 110 S.Ct. at 2415, 110 L.Ed.2d at 308. As we have observed, a stop is lawful if the

facts relayed in the tip are "sufficiently corroborated to furnish reasonable suspicion that [the defendant] was engaged in criminal activity." *State v. Williams*, 5th Dist. Stark No. 2004CA00354, 2005-Ohio-3345, ¶ 21, citing *Maumee v. Weisner*, supra.

{¶25} In this case, the tip of the blue van in a driveway does not support a reasonable suspicion of criminal activity. This case is similar to *State v. Anderson*, 11th Dist. Geauga No. 2003-G-2540, 2004-Ohio-3192, ¶ 13, in which a police officer relied upon an anonymous tip of a suspicious vehicle to support a traffic stop, absent any observation of criminal activity. The Court observed, "* * * [S]ince an officer's mere conclusion that an individual or a situation appears suspicious does not provide the requisite reasonable belief that a defendant is engaged in criminal activity, *Brown v. Texas* (1979), 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357, it would be even more tenuous to find that an officer possesses such a reasonable belief based only upon an anonymous third party's conclusion that an individual or situation appears suspicious." See also, *City of Bowling Green v. Tomor*, 6th Dist. Wood No. WD-02-012, 2002-Ohio-6366, ¶ 11.

{¶26} In the instant case, the anonymous informant reported only a suspicious vehicle parked briefly in a driveway; the deputy therefore needed further corroboration to stop the blue van driven by appellant. Although appellee argues the deputy possessed articulable facts which formed the necessary corroboration, including the time of night and break-ins in the neighborhood, "viewed in its totality, this information does not rise to the level of reasonable suspicion." *Tomor*, supra, 2002-Ohio-6366 at ¶11. The case appellee relies upon, *U.S. v. Caruthers*, is inapposite because the anonymous emergency call to police alleged obvious criminal activity, the description of

the suspect arguing with a woman and firing a gun was detailed and specific, and the suspect behaved in an unambiguously evasive manner after law enforcement attempted to flag him down. 458 F.3d 459, 463 (6th Cir.2006).

{¶27} Upon review of the evidence presented at the suppression hearing, we find the anonymous call, as relayed by dispatch, did not sufficiently indicate bad driving or inappropriate activity to indicate appellant was engaged in criminal activity prior to the stop. The facts provided by the caller, when relayed to Deputy Udischas, were insufficient to demonstrate a reasonable and articulable suspicion appellant was engaged in unlawful behavior and the deputy did not himself observe appellant engage in any unlawful activity. *State v. Hipp*, 5th Dist. Holmes No. 12CA013, 2013-Ohio-1684, ¶ 65; see also, *State v. Burnap*, 5th Dist. Delaware No. 11CAC090086, 2012-Ohio-2047 , 133 Ohio St.3d 1411, 2012-Ohio-4650, 975 N.E.2d 1029, ¶ 40, appeal not allowed, 133 Ohio St.3d 1411, 2012-Ohio- 4650, 975 N.E.2d 1029; *State v. Kraft*, 5th Dist. Knox No. 02CA000015, 2002-Ohio-6606, ¶ 26.

{¶28} We therefore conclude the traffic stop of the blue van was not premised upon articulable reasonable suspicion and the evidence derived therefrom must be suppressed. Accordingly, we sustain appellant's sole assignment of error.

CONCLUSION

{¶29} Appellant's sole assignment of error is sustained and the judgment of the Coshocton Municipal Court is reversed and this matter is remanded for further proceedings consistent with this opinion.

By: Delaney, J. and

Farmer, P.J.

Baldwin, J., concur.