[Cite as *State v. McKinney*, 2016-Ohio-5737.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff - Appellee	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
BRYAN W. MCKINNEY	:	Case No. 15-CA-55
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Fairfield County Municipal Court, Case No. TRC 1502764
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	August 29, 2016

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DANIEL E. COGLEY Lancaster City Prosecutor's Office P.O. Box 1008 Lancaster, Ohio 43130	SCOTT P. WOOD Conrad/Wood 120-1/2 East Main Street Lancaster, Ohio 43130

Baldwin, J.

{¶1} Appellant Bryan W. McKinney appeals a judgment of the Fairfield County Municipal Court denying his motion to suppress. Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On March 22, 2015, Officer Jamie Shell, a Deputy of the Fairfield County Sheriff's Office, was dispatched to 2170 Main Street in Baltimore, Ohio. The resident at that address, later identified as Tracey Myers, contacted the Sherriff's Office to complain that an individual named "Bryan" was at her residence and, having consumed alcohol, attempted to kiss her against her consent. Myers provided a description of Bryan's vehicle and reported that after leaving her residence, Bryan continued to drive up and down the street past her home. This "Bryan" would later be identified as Bryan McKinney, Defendant-Appellant.

{¶3} Upon arriving in the area of Myers's residence, Deputy Shell identified a vehicle matching the description provided. Appellant committed no observed traffic violations, however, Deputy Shell initiated a stop and pulled the vehicle over. Appellant was identified as the operator of the motor vehicle and was arrested and charged with operating a vehicle while under the influence, in violation of O.R.C. § 4511.19(A)(1)(a).

{¶4} On May 6, 2015, Appellant filed a motion to suppress any evidence obtained by law enforcement as a result of the stop. The oral hearing for Appellant's motion to suppress was held on July 31, 2015. On September 8, 2015, the trial court overruled Appellant's motion to suppress stating that Deputy Shell possessed reasonable suspicion to stop the vehicle based upon the witness, Tracey Myers, providing both firsthand information that Appellant was harassing her after drinking and sufficient information

regarding Appellant's vehicle and location to make an accurate identification. Appellant entered a plea of no contest on October 8, 2015. Appellant filed a notice of appeal in a timely manner on October 27, 2015.

{¶5} Appellant assigns one error on appeal arising from the September 8, 2015, overruling of his motion to suppress:

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

{¶7} There are three methods of challenging a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *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 (1991); *State v. Guysinger*, 86 Ohio App.3d 592, 621 N.E.2d 726 (1993). 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. *State v. Williams*, 86 Ohio App.3d 37, 619 N.E.2d 1141 (1993). Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, 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 any given case. *State v. Curry*, 95 Ohio App.3d 93, 641 N.E.2d 1172 (1994); *State v. Claytor*, 85 Ohio App.3d 623, 620 N.E.2d 906 (1993); *Guysinger, supra.* As the

United States Supreme Court held in *Ornelas v. U.S.*, 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996), ". . . as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal." When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and to evaluate the credibility of witnesses. See *State v. Dunlap,* 73 Ohio St.3d 308, 314, 1995–Ohio–243, 652 N.E.2d 988; *State v. Fanning* , 1 Ohio St.3d 19, 20, 437 N.E.2d 583 (1982).

{¶8} In the instant case, Appellant argues that (1) the trial court's findings of fact are against the manifest weight of the evidence because the tip was provided by an anonymous source and (2) the trial court erred in finding that the officer had a reasonable suspicion of criminal activity to justify a stop.

{¶9} We first address appellant's argument that the trial court's findings of fact are against the manifest weight of the evidence. To determine whether a finding of fact is against the manifest weight of the evidence, an appellate court examines the entire record, the weight the evidence and all reasonable inferences; considers the credibility of the witnesses; and determines whether the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶10} Tips used by law enforcement to execute a stop that are provided by anonymous informants are granted little inherent veracity and reliability versus when the informant is known or an identified citizen. *See City of Maumee v. Weisner*, 87 Ohio St.3d 295, 300, 720 N.E.2d 507, 1999 Ohio LEXIS 3816 (1999) ("[C]ourts 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."). The United States Supreme Court has held that "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," and often requires further, police corroboration, *Alabama v. White*, 496 U.S. 325, 329, 110 S. Ct. 2412, 110 L. Ed.2d 301 (1990). The Ohio Supreme Court has found, similarly, "that an anonymous informant is comparatively unreliable and his tip, therefore, will generally require independent police corroboration." *Maumee*, 87 Ohio St.3d at 300.

{¶11} However, "under appropriate circumstances, an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop,'" which becomes especially true in the case of firsthand accounts, recent events, and a caller's use of the 911 emergency system. *Navarette v. California*, 134 S.Ct. 1683, 1688-1690, 188 L. Ed.2d 680, 2014 U.S. LEXIS 2930 (2014) (citing *White*, 496 U.S. at 327). In *Navarette*, the United States Supreme Court affirmed the denial of a motion to suppress. The Petitioners were stopped by California Highway Patrol Officers because their pickup truck matched the description of a vehicle that a 911 caller had recently reported as having run her off the road. According to the United States Supreme Court in *Navarette*, observing an event firsthand "entitles [a] tip to greater weight than might otherwise be the case." *Id.* at 1689 (citing *Gates* at 234). Also, when an anonymous caller reports an incident soon after it occurs, it is treated as "especially reliable." *Id.* Finally, the United States Supreme Court found that a caller's use of the 911 emergency system is another indicia of veracity. *Id.* In general, the Court found that tips received through 911 calls are more reliable because 911 callers can be identified through tracing and recording, and false calls are subject to prosecution. *Id*. Therefore, "a

reasonable officer could conclude that a false tipster would think twice before using such a system," thus enhancing the reliability of 911 calls. *Id.* at 1690.

{¶12} In the instant case, the caller, whose name is missing from Deputy Shell's report, may be classified as "anonymous," but because of the totality of circumstances under which the call was made, the tip demonstrates sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop. Because there is no record of Deputy Shell receiving the name of "Tracey Myers" from the dispatcher when he received word of Appellant's activities, the call could be seen as an anonymous tip. However, the trial court did not err in finding that the deputy could justifiably rely on the call in stopping appellant's vehicle. Much like the phone call made in *Navarette*, Ms. Myers (1) called into the Sherriff's Office to report a firsthand account of Appellant's harassment and the fact that he had been drinking prior to driving, (2) made the call either shortly after the event happened or while Appellant was still driving past her residence, and (3) called in to the Sherriff's Office, where one might expect that a call would be traced or recorded, much like a call to a 911 system (and, in this case, Myers's information *was* recorded using the CAD system at the Sherriff's Office, Tr. of Oral Hearing at 12). Therefore, Ms. Myers's call, while anonymous with regard to Deputy Shell, met the standard set in *Navaratte*, providing sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop.

{¶13} Therefore, the trial court's finding that the anonymous tip, under the totality of circumstances in which it was given, demonstrated sufficient indicia of reliability to support an investigatory stop was not against the manifest weight of evidence.

{¶14} Appellant also argues that even if the court's findings concerning the reliability of the anonymous tip were supported by the evidence, the officer lacked a reasonable, articulable suspicion of criminal activity to justify the stop.

{¶15} In order for a stop by an officer of the law to avoid violating the United States Constitution and the Ohio Constitution, the stop must be made on reasonable, articulable facts that, when viewed in the totality of circumstances, infer that criminal activity may be afoot. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). According to *State v. Spradlin* 5th Dist. Licking No. 11 CA 59, 2012-Ohio-1211, at ¶ 21, "an officer may 'approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.' However, . . . an officer must rely upon reasonable, articulable facts and inferences indicating that criminal activity is in progress or is about to be committed." (citing *Terry, supra*). Reviewing this reliance on "reasonable, articulable facts and inferences" requires that "an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances." *State v. Bobo*, 37 Ohio St.3d 177, 524 N.E.2d 489, syllabus one (1988).

{¶16} The appellate court, in reviewing the ultimate or final issue raised in the motion to suppress adopts the guise of a trier of fact, and must independently determine whether the facts meet the appropriate legal standard. *State v. Curry*, 95 Ohio App.3d 93, 641 N.E.2d 1172 (1994); *State v. Claytor*, 85 Ohio App.3d 623, 620 N.E.2d 906 (1993); *Guysinger, supra.* As the United States Supreme Court held in *Ornelas v. U.S.*, 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996), ". . . as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶17} Both the Ohio Supreme Court and the United States Supreme Court have held that a reliable tip, standing alone, may provide a reasonable, articulable suspicion to justify an investigatory stop. In *City of Maumee v. Weisner*, *supra,* the Ohio Supreme Court held that "[w]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." *Maumee*, 87 Ohio St. 3d at 299. The officer in *Maumee* made an investigatory stop of a suspected drunk driver based solely off a tip provided by a citizen informant, the most inherently reliable and trustworthy form of tipster. Because the tip came from a reliable source, the Ohio Supreme Court decided that the officer had an articulable, reasonable suspicion that criminal activity may be afoot, thus making the stop constitutional under the Fourth Amendment. *Id.* at 302-303.

{¶18} Further, in *Navarette v. California*, *supra,* the United States Supreme Court found that an "anonymous" informant was able to provide a tip that provided the reasonable suspicion that justified the stop. Specifically, the court found that "a reliable tip alleging . . . dangerous behaviors . . . would justify a stop on suspicion of drunk driving." *Navarette*, 134 S.Ct. at 1691. In that case, a 911 caller provided a firsthand account of another vehicle driving her off the road. She was able to provide a location and description of the vehicle, and reported the incident shortly after it happened. Once the Supreme Court determined that the 911 caller provided a reliable tip, they found that the tip gave the officer the reasonable suspicion required to execute a stop. *Id.* at 1691. The Supreme Court also held that the officer executing the stop did not need additional indicia of drunk

driving to make a stop because once an officer is provided reasonable suspicion, he "need not surveil a vehicle at length in order to personally observe suspicious driving." *Id*.

{¶19} Although appellant argues that the tip standing alone did not justify the stop, pursuant to the law set forth in *Maumee,* Ms. Myers is a reliable informant, and as such, her tip is sufficient to be the sole justification for a stop. Though it was not in his report, Officer Shell testified that the dispatcher informed him of Ms. Myers's complaint of harassment and potential stalking, and that Appellant was possibly driving while intoxicated. Tr. of Oral Hearing at 9. Further, like the informant in *Navarette*, Ms. Myers provided the identifying information of the appearance and location of Appellant's vehicle, and did so shortly after the incident. Officer Shell found Appellant's vehicle, as described, in the area it was reported. Officer Shell need not have waited for further indicia of drunk driving, particularly as the complaint did not relate solely to the possibility that appellant was driving while intoxicated. Instead, he elected to execute a stop at that time in response to Ms. Myers's complaint. The trial court did not err in finding that the tip alone was sufficient to justify the stop of Appellant's vehicle.

{¶20} The assignment of error is overruled. Accordingly, the judgment of the Fairfield County Municipal Court is affirmed. Costs are assessed to appellant.

By: Baldwin, J.

Wise, J. concurs separately

and Farmer, P.J. dissents

Wise, J., concurring

{¶21} I concur with Judge Baldwin's decision to affirm the denial of appellant's motion to suppress. While I recognize the categorization of an informant does not in itself determine the outcome of a case of this nature, I write separately to point out my observations regarding the nature of the tipster in this matter.

{¶22} In its response brief, the State tells us that the trial court "correctly found that the complaining witness in this instance was not anonymous due to her firsthand observations of the Appellant's unlawful conduct." Appellee's Brief at 4. Appellant has not challenged this assertion via a reply brief.

{¶23} Indeed, the trial court initially describes the call of the complaining witness to law enforcement as a "citizen complaint." Judgment Entry, September 8, 2015, at 1. However, the trial court later cites case law regarding anonymous tips, and proceeds to conclude the caller was unknown to Deputy Shell. *Id*. at 2. The record reveals Deputy Shell, who was the sole testifying witness, conceded on cross-examination that he never spoke to the complaining witness on the evening in question. When the deputy was asked by defense counsel if he was ever told her name, he responded: "*** I believe it was in our CAD system." Tr. at 12. He added that he "believe[d] it was aired over the radio." Tr. at 13. Ultimately, it is not clear from the record in what manner the name of the caller was ascertained by the dispatcher, or exactly how and when that information was disseminated to any responding officers.[1] For these reasons, I disagree with the State's assertion that the call at issue was not anonymous.

[1] Adding to the murkiness of the issue, there is a written police incident report included as a file-stamped document in the trial court file, but the transcript of the suppression hearing indicates the report was not accepted as an exhibit.

{¶24} I would add that my research shows a dearth of case law discussion as to what constitutes an "anonymous" call in Ohio. In particular, is it necessary that the name of the caller be passed on to the officer in order for the tipster to be viewed as an "identified citizen informant"? What if the caller requests to remain anonymous, but his or her identity is effectively ascertained by the dispatcher via a caller identification system?

{¶25} Nonetheless, given what I see as the potentiality in this case of an incident of attempted sexual assault or stalking from the perspective of the time of the call for assistance, I reach the same result as Judge Baldwin that the deputy had reasonable articulable suspicion to stop appellant under the circumstances.

Farmer, J., dissents.

{¶26} I respectfully dissent from the majority's view that the stop was supported by reasonable suspicion of criminal activity. I base this dissent on the fact that the tipster was anonymous and the "tip" involved non-criminal activity e.g. the consumption of alcohol and acting out by kissing the tipster.

{¶27} There were no observations of impaired operation of the vehicle by the tipster or the officer.

{¶28} Although appellant's behavior might have appeared to be bizarre to the tipster, the activity described was not criminal. Even though this case involved a 911 call and the caller was eventually identified, it does not raise the caller at the time of the stop to a reliable or identifiable informant.

{¶29} The central issue is the existence of probable cause à la *Terry, supra.* I would find probable cause did not exist to justify the stop.