

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-11-1306

Appellant

Trial Court No. CR0201003038B

v.

Ruben Daniels

DECISION AND JUDGMENT

Appellee

Decided: March 22, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, and
Kevin A. Pituch, Assistant Prosecuting Attorney, for appellant.

Peter J. Wagner and Eric Allen Marks, for appellee.

* * * * *

OSOWIK, J.

{¶1} This is an appeal by the state of Ohio from a judgment of the Lucas County Court of Common Pleas that granted appellee Ruben Daniels' motion to suppress evidence obtained following an investigatory stop and warrantless search of Daniels and

his vehicle. As a result of the stop and search, Daniels was arrested and charged with possession of cocaine and trafficking in cocaine. For the reasons that follow, the judgment of the trial court is affirmed.

{¶2} On November 12, 2010, Daniels was indicted on one count of possession of cocaine in violation of R.C. 2925.11(A) and (C)(4)(d) and one count of trafficking in cocaine in violation of R.C. 2925.03(A)(2) and (C)(4)(e). Daniels filed a motion to suppress and an evidentiary hearing was held on April 4, 2011.¹

{¶3} At the suppression hearing, the trial court heard the testimony of Toledo Police Detective Michael Awls, assigned to the metro drug task force, and Toledo Police Lieutenant Randy Pepitone, who was in charge of the metro drug task force at the time of Daniels' arrest. Awls testified that during the summer of 2010, Toledo police conducted an investigation of suspected cocaine supplier Rito Sigarroa. Based on information received from the informant Robin Hackney, police believed Daniels was a middleman in a local narcotics ring run by Sigarroa. Hackney told Awls that over the course of the past year, he had purchased cocaine from Daniels numerous times and that Daniels always obtained the cocaine from Sigarroa. Awls had not used Hackney as an informant prior to this case. Awls testified that in order to get to Sigarroa, police had to first get to Daniels. Awls further testified that, relying on information received from Hackney, the task force

¹ Also before the trial court was defendant's motion seeking to disclose the identity of a confidential informant. Finding that the identity of the informant in this case had been "unwittingly" disclosed at the hearing, the trial court determined the motion to be moot and it was denied.

planned a controlled narcotics purchase for August 25, 2010. In accordance with the plan, police established surveillance on that date on the residences of Hackney, Daniels and Sigarroa, all located in Toledo. Awls testified that police observed Daniels leave his residence and drive to another address and briefly talk to several unidentified individuals. Daniels then got back in his vehicle and drove to Hackney's residence. Shortly before Daniels arrived at Hackney's residence, Awls went to the residence and provided Hackney with \$4,200 to give Daniels to purchase a predetermined amount of cocaine from Sigarroa. When Daniels arrived at Hackney's residence, he went inside. Awls testified that he was sure Hackney gave the money to Daniels as planned because, during the time Daniels was inside, Awls called Hackney to confirm that the cash had been handed over. After approximately ten minutes, Daniels left and drove to Sigarroa's residence, still under police surveillance. Awls testified that Hackney told him Daniels was going to purchase narcotics at the Sigarroa residence. Police observed Daniels arrive at Sigarroa's residence, where Sigarroa greeted him at the door. The two men went inside and remained there for approximately 45 minutes until Daniels left in his vehicle.

{¶4} Moving surveillance continued when Daniels drove away from Sigarroa's house. As Daniels was observed driving along Sylvania Avenue toward the entrance to I-75/475, Awls ordered Lieutenant Pepitone, who was observing from a marked Toledo Police cruiser, to conduct an investigatory stop of Daniels. When Daniels pulled over, Pepitone, Awls and several other officers approached the vehicle. At that time, the

officers were aware that Daniels had a concealed carry permit and frisked Daniels for a weapon. Awls further testified he detected the odor of marijuana either inside the car or on Daniels himself. During the patdown, Awls noticed a clear plastic bag partially concealed in the waistband of Daniels' pants. Officers removed the bag and saw that it contained what appeared to be powder cocaine. Daniels was placed under arrest at that time.

{¶5} Awls further testified that he initially came into contact with Hackney about a month before Daniels' arrest. Prior to that, Awls had conducted surveillance on Hackney but had not arrested him. Awls testified that when he approached Hackney he told the informant that if he assisted in the current investigation, narcotics charges pending against him might not be filed.

{¶6} Lieutenant Pepitone testified that while the surveillance was occurring he was monitoring the activity on his cruiser radio because Awls had told him there may be reason to stop Daniels' vehicle at some point. When Awls called Pepitone and told him he wanted Daniels stopped, Pepitone caught up with Daniels' vehicle and signaled him to pull over. Pepitone approached and instructed Daniels to step out of the car. At that time, Pepitone smelled the odor of marijuana coming from inside the vehicle.

{¶7} On November 28, 2011, the trial court granted the motion to suppress, finding that the state had failed to establish facts sufficient to warrant the investigatory

stop and subsequent search. The state of Ohio now appeals that judgment, setting forth two assignments of error:

First Assignment of Error: An informant's reports, coupled with the officers' corroborating observations of the movements of a middleman and his supplier, provided a reasonable and articulable suspicion that the middleman was involved in a criminal activity to justify an investigatory stop, and the detection of marijuana odor on appellee's person and in his truck justified the subsequent search of his vehicle and person.

Second Assignment of Error: Alternatively, probable cause existed for a warrantless arrest and a search incident to that arrest.

{¶8} In support of its first assignment of error, the state argues that information received from the informant, along with the officers' observations of Daniels' and Sigarroa's movements, provided police with a reasonable and articulable suspicion sufficient to justify an investigatory stop. The state further asserts that the odor of marijuana on Daniels' person and in his truck justified the subsequent search of Daniels and the truck. Accordingly, the state argues that Daniels' search was reasonable and that the evidence seized should have been admissible.

{¶9} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is, therefore, in the best position to resolve factual questions

and evaluate witness credibility. *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). A disputed motion to suppress judgment supported by competent, credible evidence must not be disturbed. *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982).

{¶10} When a police officer has a reasonable, articulable suspicion of criminal activity, he may, without a warrant, detain a suspect in a brief investigatory stop, even absent probable cause. *Terry v. Ohio*, 392 U.S. 1, 22, 88 St.Ct. 1868, 20 L.Ed.2d 889(1968); *State v. Godwin*, 6th Dist.No. WD-04-094, 2005-Ohio-3204, ¶ 11. (“An investigatory stop is the motorized equivalent of a ‘Terry’ stop * * *.”) To justify an investigatory stop, an officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.

{¶11} Where the source of a tip is a confidential informant from the criminal milieu, as in this case, courts are more concerned with establishing an informant’s veracity than when the source of the information is an average identified citizen. *Maumee v. Weisner*, 87 Ohio St.3d 295, 300, 720 N.E.2d 507(1999). A confidential informant may be more likely to have a bad motive in giving police a tip, a factor relevant to veracity. *State v. Shepherd*, 122 Ohio App.3d 358, 366-367, 701 N.E.2d 778 (2d Dist.1997).

{¶12} When an informant's tip lacks sufficient indicia of reliability to create a reasonable suspicion of criminal activity, but police fail to investigate or corroborate the reliability of the informant, the tip will not justify an investigatory stop. *Adams v. Williams* (1972), 407 U.S. 143, 147, 92 S.Ct. 1921, 32 L.Ed.2d 612. Independent corroboration by police of significant aspects of an informant's predictions about a suspect's behavior, particularly where such facts would not ordinarily be easily predicted, can impart some degree of reliability to the criminal activities alleged by an informant. *Alabama v. White*, 496 U.S. 325, 331-332, 110 S.Ct. 2412, 110 L.Ed.2d 301(1990).

{¶13} The sole basis for the stop in this case was information provided by Hackney, who had no prior history providing the Toledo police with reliable information and was himself a member of the criminal milieu. Detective Awls had no indicia to support Hackney's veracity or the reliability of his statement that he would give Daniels the \$4,200 and that Daniels would then go directly to Sigarroa to purchase cocaine. The record in this case reflects no independent investigation conducted by police to corroborate Hackney's information other than determining that the address Hackney provided for Sigarroa's residence was accurate.

{¶14} The only information provided by Hackney that could be verified was his statement that Daniels would come to his house, leave and then drive to Sigarroa's residence. Detective Awls and the other officers did not personally observe Daniels engage in criminal activity. Awls and Pepitone did not testify to seeing any behavior

sufficient to create a reasonable, articulable suspicion that Daniels was engaged in, or about to engage in, criminal activity to justify his detention. Police observed no exchange of drugs and money between Daniels and Sigarroa. They did not see Daniels engage in criminal activity or violate any traffic laws. Police merely observed Daniels driving about and entering and leaving two residences.

{¶15} The trial court herein noted that the police did not observe any exchange of drugs or money between Daniels and Sigarroa. The trial court cited several reasons for questioning Awls' veracity as to what actually took place, including discrepancies between his testimony and what appeared in his supplemental report, and concluded that the case was "nothing more than a vain attempt to salvage a poorly planned and executed undercover purchase." The trial court noted at the outset that the state conceded the search of Daniels was carried out without his consent. Additionally, the trial court noted that the state conceded in its supplemental brief in response to the motion to suppress that officers had not observed any traffic violations and therefore, the trial court concluded, had no reason to stop Daniels' car "other than the suspicion that Daniels had been engaged in a transaction involving illegal drugs (cocaine) at the time his car was stopped."

{¶16} The trial court in this case properly cited this court's decision in *State v. Rivera*, 6th Dist. No. L-04-1369, 2006-Ohio-1867. In *Rivera*, as here, the sole basis for an investigatory stop was a tip supplied by an informant who had no prior history of

providing the police with reliable information and was himself a member of the criminal milieu. We found in *Rivera* that the police had not observed behavior sufficient to create a reasonable, articulable suspicion that the defendant was engaged in, or was about to engage in, criminal activity to sufficient to justify the investigatory stop.

{¶17} Accordingly, we find in this case that because the police lacked a reasonable, articulable suspicion to justify an investigatory stop, the ensuing search of Daniels was unlawful. Therefore, the trial court properly granted the motion to suppress and appellant's first assignment of error is not well-taken.

{¶18} Appellant's second assignment of error is essentially a reiteration of its first assignment of error and is without merit based on our finding above that the investigatory stop and ensuing search were unlawful. Accordingly, appellant's second assignment of error is not well-taken.

{¶19} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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