[Cite as *State v. Hicks*, 2015-Ohio-1324.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 14 CO 10
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
CHRIS HICKS	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Columbiana County, Ohio Case No. 12 CR 235
JUDGMENT:	Reversed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Robert Herron Columbiana County Prosecutor Atty. John E. Gamble Assistant Prosecuting Attorney 105 South Market Street Lisbon, Ohio 44432
For Defendant-Appellant:	Atty. Dominic A. Frank Betras, Kopp & Harshman, LLC 1717 Lisbon Street East Liverpool, Ohio 43920
JUDGES:	
Hon. Cheryl L. Waite Hon. Gene Donofrio Hon. Mary DeGenaro	
	Dated: March 31, 2015

[Cite as *State v. Hicks*, 2015-Ohio-1324.]
WAITE, J.

{¶1} Appellant Chris Hicks appeals a Columbiana County Common Pleas Court's denial of his motion seeking to suppress evidence found on his person after a *Terry v. Ohio,* 392 U.S. 1, 24, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) patdown. As the informant in this case was previously unknown to police and had never acted as an informant before, Appellant argues that his tips were not trustworthy. Also, Appellant argues that the informant was facing unrelated criminal charges which further called his credibility into question. As the informant provided a low amount of information that was not corroborated, Appellant urges that the patdown was unjustified. Even if it were justified, Appellant further argues that the officers could not have reasonably believed using the patdown that the contraband block was a weapon nor was it immediately apparent that it was contraband, thus, the officers violated the plain feel doctrine.

{¶2} The state responds by arguing that the officers did corroborate the information provided by the informant before conducting the patdown. As the informant's information was corroborated and Appellant has not explained why he pulled into the driveway at the time the drug sale was to be completed, the state urges that the officers were justified in conducting the patdown. Further, as the contraband found on Appellant, a heroin block, felt like an object that could have been a weapon or used as a weapon, the state argues that it was proper for the officers to remove it. For the following reasons, Appellant's arguments have merit and the judgment of the trial court is reversed.

Factual and Procedural History

{¶3} A man who had been arrested by the Carroll County Police indicated that he would be willing to assist in the arrest of his heroin supplier. The man had never acted as an informant before and the officers involved with the investigation were not familiar with this proposed informant. However, based on his current arrest and his prior criminal record, it became apparent to the officers that he was involved in drug-related activities. The informant named Appellant as his supplier. The officers were familiar with Appellant's name as it was listed within their drug taskforce database after police had received tips that he was involved in the sale of drugs. The officers also recognized his name due to his previous drug-related convictions. The officers obtained and reviewed Appellant's prior record and confirmed Appellant's identity by showing the informant Appellant's photograph.

{¶4} The informant agreed to call Appellant and request a block of heroin to be delivered at the informant's house. The police observed the phone call but could only hear the informant's side of the conversation. After the phone call was completed, the informant told the officers that Appellant would arrive in a tan Buick in about an hour, but he was usually late. The officers took up a position outside the house and awaited Appellant's arrival.

{¶5} More than an hour later, the informant notified the officers that Appellant had called and said that he would arrive in about five minutes and that he would meet him halfway up the driveway. Shortly thereafter, the officers observed a tan Buick arrive and pull halfway up the driveway. The officers boxed in the vehicle and used their headlights to see and identify the driver, who they recognized as

Appellant. The officers also observed a female passenger in the vehicle, who was removed from the vehicle and handcuffed.

{¶6} As the officers approached the vehicle, they ordered Appellant to show his hands, which he failed to do. After Appellant failed to comply with the order, the officers noticed that he held a red plastic cup in his hand that appeared to contain an alcoholic beverage. One of the officers removed Appellant from the vehicle, placed him on the ground, handcuffed him, and then conducted a patdown.

{¶7} During the patdown, the officer felt a hard object approximately 2½ inches by 1 inch which was removed and found to be a heroin block. After finding the heroin block, the officer placed Appellant under arrest and searched both him and his vehicle. The facts also reveal that a sum of money was recovered at some point, although it appears that it was not recovered during the initial patdown.

{¶8} Appellant moved to suppress the evidence as a product of an unlawful search, which was denied after a hearing was held. As a result of the trial court's ruling, Appellant changed his plea from not guilty to no contest. On February 13, 2014, Appellant was sentenced to eighteen months on the first count of drug trafficking and eleven months on the second count, both sentences to be served concurrently. This timely appeal followed.

FIRST ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS.

{¶9} A review of a trial court's decision on a motion to suppress evidence presents a mixed question of law and fact. *State v. Ward,* 7th Dist. No. 10 CO 28, 2011-Ohio-3183, ¶31, citing *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶100. An appellate court "must accept the trial court's findings of fact so long as they are supported by competent, credible evidence." *Ward* at ¶31, citing *Roberts* at ¶100. The appellate court then reviews the trial court's application of the law to facts *de novo. Ward* at ¶31, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8.

Informants

{¶10} "Informants typically fall into three categories: the anonymous informant, the known informant (someone from the criminal world who has provided previous reliable tips), and the identified citizen informant." *State v. Ruff,* 7th Dist. No. 01 BA 31, 2002-Ohio-2999, ¶28, citing *City of Maumee v. Weisner*, 87 Ohio St.3d 295, 300, 720 N.E.2d 507 (1999). Identified citizen informants are typically considered highly reliable while anonymous tipsters require corroboration as they may be unreliable. *Ruff* at ¶28.

{¶11} An informant's veracity, reliability, and basis of knowledge are highly relevant in evaluating the informant's tip. *City of Maumee, supra*, at 299, citing *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), quoting *Illinois v. Gates*, 462 U.S. 213, 230, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). However, an "anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity" to justify an investigative stop. *State v. Anderson,* 11th Dist. No. 2003-G-2540, 2004-Ohio-3192, ¶12, citing *Alabama v. White*, 496 U.S. 325, 329,

110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). If the informant's facts are "sufficiently corroborated to furnish reasonable suspicion that [the defendant] was engaged in criminal activity," then a stop is lawful. *Anderson* at ¶12, citing *Alabama v. White, supra*. When an officer can point to "specific, articulable facts" along with any rational inferences that warrant an investigation, reasonable suspicion exists. *State v. Hughley,* 7th Dist. No. 09 MA 200, 2010-Ohio-6010, ¶11, citing *Terry v. Ohio,* 392 U.S. 1, 24, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

{¶12} A tip that, standing alone, would lack sufficient indicia of reliability may establish reasonable suspicion if it is sufficiently corroborated through independent police work. *State v. Langston,* 5th Dist. No. 2006-CA-24, 2007-Ohio-4383, ¶25, citing *Alabama v. White, supra*. The police must establish that the tip was reliable in its claims as to illegal activity, not merely in its tendency to identify a person. *Langston* at ¶26.

{¶13} Appellant contends that the informant did not provide the police with reasonable suspicion to justify his stop, search, and arrest. First, Appellant argues that the informant was previously unknown to police and the police had no reason to believe that the informant was credible. Second, Appellant notes that the informant had incentive to lie as he was facing charges for having stolen property in Carroll County. Third, Appellant urges the informant was unable to provide detailed information about Appellant and specifically failed to provide Appellant's address, his method of transporting drugs, and his license plate number. Further, Appellant claims that the informant was unable to provide details of their previous transactions. As the police completely relied on these unreliable statements without conducting an

independent investigation, Appellant urges that the trial court erred in finding that the stop and patdown was justified and, so, erred in denying his motion to suppress the evidence.

{¶14} The state argues in response that previously known information about both the informant and Appellant gave them reason to believe that the informant was credible. Further, the state disputes Appellant's assertion that the police did not undertake their own independent investigation. The state explains that the informant became known to them as a person involved in drug activities after he was arrested for having stolen property and because he was previously convicted of a drug-related offense. The state further contends that the police knew Appellant, as he had previously been convicted of a drug-related offense and because his name was listed on the drug taskforce database once several tips regarding his alleged drug activity were reported.

{¶15} The state also emphasizes that the informant was able to predict much of Appellant's behavior the night of the arrest and the police were able to corroborate that information. First, the police were present for the phone call where the informant requested two blocks of heroin from Appellant. Second, after the phone call, the informant told police that Appellant would arrive in approximately one hour, although he was never on time. Third, the informant told police that Appellant would be driving a tan Buick. Fourth, and finally, the police were notified of a second call where Appellant told the informant that he was five minutes away.

{¶16} The state asserts that each piece of information was independently corroborated by the police before the patdown. The state highlights the fact that

Appellant did show up late and arrive in a tan Buick, as predicted by the informant. Shortly after the second call the police observed a tan Buick entering the driveway. In addition to the color and make of the car, the informant correctly said that Appellant would pull only halfway up the driveway. As the informant's information supplemented previously known information and was able to be corroborated as the events unfolded, the state argues that the trial court properly denied Appellant's motion.

{¶17} Although the informant was previously unknown to police and had pending charges against him, the police were able to corroborate each tip that he provided. In determining whether information obtained by an informant gave police reasonable suspicion to conduct a *Terry* patdown, we examine the totality of the circumstances. First, we determine the classification of the informant. In this case, he does not fit squarely within one of the three categories as he is not an innocent citizen, but also is not a confidential informant and has not provided information to police in the past. As he is more closely aligned with the latter category, we believe a higher emphasis must be placed on corroboration as per *Ruff.*

{¶18} Next, we must determine whether the police were able to corroborate the information through an independent investigation. The first piece of information was a phone call from the informant to Appellant where Appellant agreed to deliver two blocks of heroin to the informant's house. Although the police could only hear the informant's side of the conversation, Appellant did show up at the informant's house around the time the deal was supposed to occur. Thus, there is evidence that Appellant was involved in the phone call and the police were able to corroborate this.

{¶19} Second, the informant stated that Appellant would arrive in approximately one hour, but that he usually arrived late. Officer Adam Little testified that they waited more than one hour for Appellant to arrive. There was also a second phone call that night where Appellant allegedly told the informant that he was five minutes away and would meet him halfway up the driveway. Officer Little further testified that Appellant arrived at the house shortly after the second phone call. Thus, the police were able to corroborate the details from both phone calls.

{¶20} Third, the informant predicted that Appellant would arrive in a tan Buick. The police were able to observe a tan Buick pull halfway into the drive and identified Appellant as the driver of the vehicle. Thus, the police were able to corroborate this information as well.

{¶21} Finally, the informant was able to independently provide Appellant's name, which the police were able to find within the drug taskforce database. The informant was able to identify Appellant in a photograph supplied by the officers. Thus, it appears that the major components of the informant's tip were corroborated by police before the stop and patdown.

Officer Safety

{¶22} A patdown is justified when a police officer has reasonable grounds to believe that the suspect is armed and dangerous, and believes that the patdown is necessary to protect himself and others. *Terry*, *supra,* at 30. When the officer observes unusual conduct that leads him to reasonably believe, based on his experience,

> that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id.

{¶23} As previously discussed, it appears that the police were able to corroborate the information obtained from the informant. Thus, it is likely that the officers had a reasonable belief that criminal activity was afoot. Next, the officers must have a reasonable belief that Appellant was armed and presently dangerous. Officer Dan Downward testified that dealing with drug traffickers creates a high risk for officer danger as traffickers often carry guns and knives, which they are known to use to protect their supply. Officer Downward further testified that they were in a rural area well outside of a populated area and it was dark, which further compromised their safety. As the officers were dealing with a suspected drug trafficker in a secluded, dark area, their belief that Appellant was dangerous and presently armed was reasonable.

{¶24} As the officers had a reasonable belief that criminal activity was taking place and that Appellant may be dangerous and presently armed, the next part of the

analysis is to determine whether anything in the encounter dispelled the officers' reasonable present fear for their safety. Again, it is only this fear that justifies the patdown search. Officer Little filed an incident report stating that he was the officer who conducted the patdown. Although Officer Little could not remember when testifying whether he personally conducted the patdown or not, he conceded that if his report stated that he did, then he must have personally conducted the patdown.

{¶25} During his testimony at the suppression hearing, Officer Little clearly admitted, however, that once Appellant was handcuffed he was no longer deemed a threat to officer safety:

Q He's already on the ground?

A Yes, sir.

Q He's already cuffed?

A Yes.

Q And you were detaining him for officer safety at that point?

A Pending the investigation.

Q Did you feel at that point in time that he was any danger to you or any of the officers?

A Once he was handcuffed, no.

Q Did you end up searching Mr. Hicks?

A Absolutely.

Q And did you search him after he was handcuffed?

A Yes, sir.

(5/9/13 Supp. Hrg. Tr., p. 31.)

{¶26} Officer Little was unsure whether the contraband was found before or after Appellant was arrested. However, the record clearly shows that the heroin block was found during the patdown which occurred before Appellant's arrest. Although the nature of a drug deal and the time of night may reasonably make the officers fearful for their safety, Officer Little admitted that once Appellant was handcuffed, the danger was no longer present. Thus, the officer's reasonable fear for their safety had been dispelled. Once the officer's reasonable fear was dispelled, the patdown cannot be justified using safety concerns and was not justified under *Terry*. Accordingly, Appellant's first assignment of error has merit and is sustained.

SECOND ASSIGNMENT OF ERROR

ASSUMING THE PROTECTIVE SEARCH WAS WARRANTED UNDER TERRY, THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT WHEN IT RULED THE OFFICER HAD A RIGHT TO SEARCH THE PERSON OF THE APPELLANT AND REMOVE SUSPECTED CONTRABAND FROM HIS PERSON ABSENT A RESAONABLE [SIC] BELIEF ON THE PART OF THE OFFICER THE OBJECT REMOVED WAS A WEAPON OR THAT THE OFFICER IMMEDIATELY RECOGNIZED THE OBJECT AS CONTRABAND.

{¶27} As the patdown was not justified, it is unnecessary to discuss whether the search exceeded its scope and violated the plain-feel doctrine.

Conclusion

{¶28} As the officer's patdown search was undertaken only after their fear for their safety was dispelled, the *Terry* patdown here was not justified. The trial court erred in denying Appellant's motion to suppress the evidence. For the reasons provided, Appellant's first assignment of error has merit, the second assignment is moot, and the judgment of the trial court is reversed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.