[Cite as *State v. Lanier*, 2011-Ohio-66.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93375

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WALTER LANIER

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515848

BEFORE: Blackmon, P.J., Celebrezze, J., and Jones, J.

RELEASED AND JOURNALIZED: January 13, 2011

ATTORNEY FOR APPELLANT

Steve W. Canfil
Standard Building, Suite 2000
1370 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Mary McGrath
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Walter Lanier ("Lanier") appeals the trial court's decision denying his motion to suppress and assigns the following errors for our review:

> **"I. The trial court erred in denying appellant's motion to suppress evidence when the police lacked a reasonable basis upon which to conduct a stop of the vehicle."**
>
> **"II. The trial court committed plain error in convicting and sentencing appellant for allied offenses."**

{¶ 2} Having reviewed the record and pertinent law, we reverse the trial court's decision. The apposite facts follow.

{¶ 3} On October 24, 2008, a Cuyahoga County Grand Jury issued a seven-count indictment against Lanier and his codefendant, Mark McCord, for drug trafficking, drug possession, and possession of criminal tools, all with forfeiture specifications. The forfeiture specifications included $5,300, a 2004 Hummer, and a cell phone. Lanier and McCord both entered not guilty pleas at the arraignment and subsequently filed motions to suppress the evidence. On December 15, 2008, the trial court conducted a hearing on the motion.

Suppression Hearing

{¶ 4} City of Cleveland police officer Robert Taylor testified at the suppression hearing. On September 16, 2008, while on routine patrol, Officer Taylor learned from dispatch that the department's community service unit had received an anonymous call about drug activity taking place in a black Hummer that was parked in front of 11903 Ablewhite in Cleveland, Ohio. Approximately three months earlier, Officer Taylor had arrested the driver of a black Hummer that was parked in front of the same address. Officer Taylor testified that because the passenger in the prior incident had been carrying a firearm, he requested backup assistance before proceeding to the address.

{¶ 5} As Officer Taylor approached the address, he observed the black Hummer legally parked in front of the house. Officer Taylor stated that one patrol car pulled in front of the Hummer and the other alongside it. Upon exiting, Officer Taylor approached the Hummer and saw that there were three male occupants in the parked vehicle. Officer Taylor ordered the occupants to show their hands and all three occupants initially raised there hands, but the front seat passenger, who was later identified as Lanier, lowered his left hand to his waist. Officer Taylor repeated the order for the occupants to show their hands and Lanier raised both hands, but again lowered his left hand to his waist.

{¶ 6} Officer Taylor testified that because Lanier lowered his left hand twice, he and fellow officers drew their service revolvers. Officer Taylor directed Officer Carl Dooley to remove Lanier from the vehicle and conduct a pat-down search for weapons. Officer Taylor testified that after Lanier was removed from the vehicle and was being patted down, a little bag containing suspected heroin fell out of his left pants leg. After Lanier was arrested and placed in the patrol car, the officers discovered a bag containing suspected ecstacy pills on the ground near the patrol car, and also discovered a package of crack cocaine in the vicinity of the passenger side of the Hummer.

{¶ 7} On December 23, 2008, the trial court denied the respective motions to suppress. McCord proceeded to trial by jury.[1] On March 9, 2009, prior to trial, Lanier pleaded no contest to the charges and the trial court found him guilty of all counts. On April 28, 2009, the trial court sentenced Lanier to a total of four years in prison.

Denial of Motion to Suppress

{¶ 8} In the first assigned error, Lanier argues the trial court erred when it denied his motion to suppress. We agree.

{¶ 9} At a hearing on a motion to suppress, the trial court functions as the trier of fact. Accordingly, the trial court is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. On review, an appellate court must accept the trial court's findings of fact if those findings are supported by competent, credible evidence. *State v. Retherford* (1994), 93 Ohio App.3d 586, 592, 639 N.E.2d 498. After accepting such factual findings as true, the reviewing court must then independently

[1]At the close of the state's case against McCord, the trial court granted a Crim.R. 29 motion as to Counts 1-4, with respect to the trafficking and possession charges for MDMA/BZP and heroin, and the forfeiture specification with respect to the cell phone. The jury found McCord not guilty of trafficking, but guilty of drug possession (cocaine) in violation of R.C. 2925.11(A), possession of criminal tools in violation of R.C. 2923.24(A), and the forfeiture specifications relating to the cash and vehicle.

determine, as a matter of law, whether or not the applicable legal standard has been met. Id.

{¶ 10} An investigatory stop is permissible if a law enforcement officer has a reasonable suspicion, based on specific and articulable facts, that the individual to be stopped may be involved in criminal activity. *Terry v. Ohio* (1968), 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889. When determining whether or not an investigative traffic stop is supported by a reasonable, articulable suspicion of criminal activity, the stop must be viewed in light of the totality of circumstances surrounding the stop. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph one of the syllabus, cert. denied (1988), 488 U.S. 910, 109 S.Ct. 264, 102 L.Ed.2d 252.

{¶ 11} Ohio courts have recognized three categories of informants: (1) citizen informants; (2) known informants, i.e., those from the criminal world who have previously provided reliable tips; and (3) anonymous informants, who are comparatively unreliable. *Maumee v. Weisner*, 87 Ohio St.3d 295, 300, 1999-Ohio-68, 720 N.E.2d 507. "[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity" to justify an investigative stop. *Alabama v. White* (1990), 496 U.S. 325, 329, 110 S.Ct. 2412, 110 L.Ed.2d 301. (citation omitted). "This is not to say that an anonymous caller could never provide the reasonable suspicion necessary for [an investigative] stop." Id. 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." Id. at 331.

{¶ 12} In our decision in the direct appeal involving McCord, Lanier's codefendant, we found that the officers who conducted the search and seizure of the vehicle did not possess a reasonable and articulable suspicion of criminal activity before initiating a *Terry* stop. *State v. McCord*, Cuyahoga App. No. 93127, 2010-Ohio-1979. In reversing the trial court's decision denying McCord's motion to suppress, we stated:

> **"In *State v. Whitsette*, Cuyahoga App. No. 92566, 2009-Ohio-4373, which involved a fact pattern similar to the one in this case, this court affirmed the trial court's decision to grant the defendant's motion to suppress because 'the caller-informant failed to provide more specific details that the officers could corroborate for veracity and failed to indicate the caller-informant possessed inside knowledge of the criminal behavior.' Quoting *Florida v. J.L.*, 529 U.S. 266, 270, 120 S.Ct. 1375, 146 L.Ed.2d 254, this court noted, 'The anonymous call concerning [the defendant] provided no predictive information and, therefore, left the police without means to test the informant's knowledge or credibility. That the allegation * * * turned out to be correct does not suggest that the officers, * * *, had a reasonable basis for suspecting [the defendant] of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about [the defendant].'"**

> **"In the case before us, Officer Taylor testified that he received a call from Officer Stucin saying that an anonymous caller reported suspected drug activity in a black Hummer parked at 11903 Ablewhite Avenue. Officer Taylor testified that when he arrived at the scene, he did not observe any drug activity. He further testified the only reason he called for backup before approaching the vehicle was because three or four months earlier, he approached a similar looking vehicle at this address, and the passenger had a weapon. In short, Officer Taylor admitted he relied solely on evidence of a prior encounter with a person who may or may not have been the same individual parked in the vehicle identified by the anonymous tipster."**
>
> **"Like the defendant in *Whitsette*, McCord was merely sitting in his parked car; no one approached the car, and no furtive movements were observed by the officers prior to initiating the stop. Thus, we find there were insufficient surrounding circumstances to provide the officers with reasonable suspicion of criminal activity."** Id.

{¶ 13} The search and seizure, the subject of McCord's appeal, also forms the basis of the instant appeal. As such, Lanier's appeal having a common basis in fact and law, we conclude as we did in *McCord*, that the trial court erred in denying the motion to suppress. Accordingly, we sustain Lanier's first assigned error.

{¶ 14} Our disposition of the first assigned error renders the second assigned error moot. App.R. 12(A)(1)(c).

Judgment reversed and remanded to the trial court for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, J., CONCUR