Supreme Court of Ohio Clerk of Court - Filed August 03, 2020 - Case No. 2020-0290

In the Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2020-0290
	:	
Appellant,	:	On Appeal from the
	:	Hamilton County
v.	:	Court of Appeals,
	:	First Appellate District
SHERRY TIDWELL,	:	
	:	Court of Appeals
Appellee.	:	Case Nos. C-180511, C-180512

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLANT STATE OF OHIO

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INTRODUCTION

This case presents the following question: If a citizen approaches an officer in a parking lot to report that a driver is driving away drunk, may the officer constitutionally make an investigative stop? The answer is yes. Neither the federal Constitution nor the Ohio Constitution requires an officer credibly tipped off about a drunk driver to let that driver violate a law—potentially killing someone in the process—before stopping the driver. The First District erred in holding otherwise, and this Court should reverse.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law enforcement officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. The State is directly interested here. In 2017, Ohio had almost 12,000 alcohol-related car crashes, causing 314 deaths and almost 7,000 injuries. See Traffic Crash Facts, Ohio Department of Public Safety, at 84, Table 6.02 (April 2018), https://bit.ly/35d3Uey. In addition to the Attorney General's interest in giving clear guidance to all police officers, local or State, he has a special interest in advising the State Highway Patrol how and when troopers may stop drunk drivers to save lives. Thus, the Attorney General has many interests in ensuring that traffic stops are lawful and that the State's DUI laws are enforced.

STATEMENT OF THE CASE AND FACTS

1. This case began in a Speedway parking lot. That is where Sergeant Jacques Illanz, an officer of the State Highway Patrol, found himself on November 11, 2017, dealing with a minor accident that had occurred on a nearby road. App. Op. ¶2; Transcript of Hearing on Motion to Suppress ("Tr."), May 2, 2018, 6, 9.

That accident has nothing to do with this case. What happened next, does. While Illanz dealt with the minor accident, a customer yelled to him from the Speedway doorway, saying: "hey, you need to stop that vehicle. That lady is drunk." *State v. Tidwell*, 2019-Ohio-4493 (1st Dist.) ("App. Op.") ¶2; Tr. 10, 21. The customer pointed to Sherry Tidwell, the defendant here, and her Hummer. She was just getting into it. Illanz watched Tidwell back out of a parking spot very slowly, and he observed the blank stare on Tidwell's face. App. Op. ¶3; Tr. 21–22. Illanz stood in front of Tidwell's vehicle to stop her, and then went to the driver's side window. App. Op. ¶3; Tr. 14–15. He later explained that he decided to make the stop out of a concern for public safety—he feared the danger a drunk driver might pose. Tr. 72–73. Once the trooper saw Tidwell up close and talked to her, he saw her glassy eyes, heard her slurred speech, and smelled alcohol. App. Op. ¶3; Tr. 23–24. When asked, Tidwell said that she had been watching a football game at a party, and was out buying alcohol. App. Op. ¶3; Tr. 24–25. Tidwell denied she had been drinking. Tr. 24–25.

Another officer, a sheriff's deputy, arrived and took over dealing with Tidwell, while Sergeant Illanz went into the Speedway to talk to the customer who had alerted him to Tidwell's drunkenness. App. Op. ¶4; Tr. 26–27. Once in the store, the trooper discovered that the customer had already left. Tr. 27. But he spoke to the clerk at the counter, who identified himself as Daniel Bate. Tr. 28. It turned out that Bate, not the customer who shouted to Illanz, was the one who had actually witnessed Tidwell's drunkenness, having observed her while selling her alcohol. Tr. 28–29. But because Bate was behind the counter when he saw Sergeant Illanz in the parking lot, he had asked the customer to tell the trooper to stop Tidwell. Tr. 28-29.

Meanwhile, the sheriff's deputy had Tidwell perform field sobriety tests, which she failed. App. Op. ¶4 ; Tr. 46–53. He arrested her. App. Op. ¶4, Tr. 70. Eventually, a blood-alcohol test showed that she registered .213, or over two-and-a-half times the legal limit of .08. App. Op. ¶4.

2. Tidwell moved to suppress all of the evidence against her. She argued that Illanz lacked reasonable suspicion to stop her, that the search was therefore unconstitutional, and that the evidence collected should therefore be suppressed. Tr. 4–5. The trial court agreed. Transcript of Hearing on Decision, Aug. 31, 2018 ("Decision Tr."), 82–83. The court explained that a tip from "an unidentified citizen," such as the customer who tipped off Illanz, is insufficient to give an officer reasonable suspicion of illegal conduct. *Id.*

The First District affirmed. App. Op. ¶¶19-20. It, too, viewed the customer as "unknown and [un]identified." *Id.* ¶17. Further, the court said, the "tip itself provided no predictive information." *Id.* What might the tipster have said to make the tip confer reasonable suspicion? The First District suggested that the customer might have made some falsifiable assertion; for example, the customer might have reported "that Tidwell was falling down drunk, or consuming alcohol inside the Speedway, or nearly hit something while driving to the Speedway." *Id.* Without any such statements, the court reasoned, Illanz had "no means to test the unknown customer's credibility." *Id.* And nothing else gave Illanz reasonable suspicion to justify a stop. Thus, "under the totality of the circumstances, the information provided by the unknown Speedway customer and the independent observations of Sergeant Illanz were not sufficient to constitute reasonable suspicion for a Terry stop." *Id.* ¶19.

3. This Court granted review. *05/12/2020 Case Announcements*, 2020-Ohio-2819 (May 12, 2020).

ARGUMENT

<u>*Amicus* Attorney General's Proposition of Law:</u>

> *A police officer has reasonable and articulable suspicion to stop a car from driving off when a citizen urgently warns the officer, in person, that the driver is drunk.*

1. The Fourth Amendment of the United States Constitution and Article I, Section 14 of the Ohio Bill of Rights prohibit "unreasonable searches and seizures." Reasonable searches and seizures, therefore, do not violate the Fourth Amendment or Arti-

cle I, Section 14. What makes a search or seizure "reasonable"? As is generally true of laws that employ a "reasonableness" standard, there are few bright-line rules. There are, however, some guiding standards.

Take, for example, the standards that govern the legality of traffic stops. *Florida v. Royer*, 460 U.S. 491, 501–07 (1982); *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968). Officers may perform such stops if they have "reasonable suspicion" of criminal activity. *City of Maumee v. Weisner*, 87 Ohio St. 3d 295, 299 (1999) (citing *Terry*, 392 U.S. at 22). An officer has "reasonable suspicion" whenever, given the "totality of the circumstances,'" *id*. (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)), he has "a particularized and objective basis for suspecting the particular person stopped of criminal activity," *Kansas v. Glover*, 140 S. Ct. 1183, 1187 (2020) (internal quotation marks omitted); *accord State v. Hawkins*, 158 Ohio St. 3d 94, 2019-Ohio-4210, ¶19. In assessing the reasonableness of an officer's suspicion, courts must consider "'both the content of information possessed by police and its degree of reliability.'" *Weisner*, 87 Ohio St. 3d at 299 (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)).

Officers may develop reasonable suspicion based on an informant's tip, depending on "the informant's veracity, reliability, and basis of knowledge." *Id.* This Court and the U.S. Supreme Court "have generally identified three classes of informants," while recognizing that "the distinctions between these categories are somewhat blurred." *Id.* at 300. Those classes are "the anonymous informant, the known informant

(someone from the criminal world who has provided previous reliable tips), and the identified citizen informant." *Id.* A brief word on each is in order here.

"An anonymous informant is comparatively unreliable and his tip, therefore, will generally require independent police corroboration" before it can justify a stop. *Id.* (citing *Alabama v. White*, 496 U.S. at 329). By contrast, a known informant is "someone from the criminal world who has provided previous reliable tips." *Id.* For such an informant, "[c]ourts are much more concerned with veracity when the source of the information is an informant from the criminal milieu." *Id.* (quotation omitted). But a tip from such an informant may have greater indicia of reliability based on the informant's track record, or when the tip's details are easily verified. *Adams v. Williams*, 407 U.S. 143, 146–47 (1972). Finally, there is the "citizen informant." When "'an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability'"—that is generally enough to provide reasonable suspicion. *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 233–34 (1983). In other words, a citizen informant has "higher credibility" and is presumptively reliable, meaning officers generally need no further corroboration before performing an investigative stop. *Id.*

Giving more credence to reports by citizen informants makes sense, especially if the citizen is reporting a crime that just occurred or is imminent. Recall that the question whether a tip confers reasonable suspicion turns ultimately on the tip's reliability. Common experience tells us that people who report wrongdoing during in-person en-

counters are more likely to tell the truth—their tips are more likely to be reliable—than those who report wrongdoing behind the cloak of anonymity. Courts are "'not required to exhibit a naiveté from which ordinary citizens are free." *DOC v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States* v. *Stanchich*, 550 F. 2d 1294, 1300 (2d Cir. 1977)). What is more, falsely reporting a crime is itself a crime. *See* R.C. 2917.32. People do not generally commit crimes while speaking with law-enforcement officers (except perhaps to cover up more-serious crimes), making face-to-face tips reliable. Indeed, in *Weisner*, the Court even noted that an extended phone call contained the *possibility* of later face-to-face contact, and that this possibility made an informant "unlikely to offer a false report because of the potential consequences." *Weisner*, 87 Ohio St. 3d at 302. The citizen-informant's tip becomes more reliable still if it concerns criminal activity that the citizen just witnessed. *Id.* "This immediacy lends further credibility to the accuracy of the facts being relayed, as it avoids reliance upon the informant's memory." *Id*. Combine all this, and face-to-face tips from citizens who report having just witnessed a crime tend to be reliable, and their tips alone often confer reasonable suspicion. *See id.* at 301 (citing *State v. Ramey*, 129 Ohio App. 3d 409 (1998)).

Indeed, *Ramey,* which this Court cited approvingly in *Weisner*, 87 Ohio St. 3d at 301, illustrates the point. This Court cited *Ramey* as a case that "considered simple face-to-face contact to be enough" to make an informant identifiable, and thus more likely reliable. The *Ramey* court "held that an unnamed informant who flagged down an of-

ficer to provide information concerning a suspected drunk driver was in no way 'anonymous.'" *Id.* (citing 129 Ohio App. 3d at 416). "There is nothing even remotely anonymous, clandestine, or surreptitious about a citizen stopping a police officer on the street to report criminal activity." *Ramey*, 129 Ohio App. 3d at 416. Thus, a tip from an informant in those circumstances confers reasonable suspicion.

The question whether a citizen is "anonymous" does not turn on whether he shares his name or otherwise provides personally identifying information to the officer. *State v. Yu*, 2015-Ohio-637, ¶24 (11th Dist.). To the contrary, "the eyewitness reports of ordinary citizens, otherwise unidentified, are entitled to high credibility." *Id.* ¶26 (citing *State v. Cisternino*, 2010-Ohio-6027, ¶16 (8th Dist.); *State v. Goslin*, 2009-Ohio-3487, ¶26 (5th Dist.); *State v. Clark*, 2007-Ohio-3777, ¶31 (8th Dist.)). Even the First District had said so before its decision below. *Ramey*, 129 Ohio App. 3d at 416; *State v. Oney*, 1995 Ohio App. LEXIS 526, *3–4; *State v. Gatewood*, 2000 Ohio App. LEXIS 6061, *8–10. Courts around the country agree. *See, e.g., State v. Slater*, 267 Kan. 694 (1999); *Anderson v. Dir., N.D. DOT*, 2005 ND 97; *City of Naperville v. Schiavo*, 327 Ill. App. 3d 230 (2002). These courts have it right. Even when a citizen-informant does not provide personally identifying information in the course of providing a tip, he does reveal his visage. And again, people tend not to reveal themselves to officers in order to commit a crime.

In addition, as *Weisner* emphasized, "categorization of the informant as an identified citizen informant does not itself determine the outcome." *Weisner*, 87 Ohio St. 3d at

302. "Instead it is one element of our totality of the circumstances review of [an] informant's tip, weighing in favor of the informant's reliability and veracity." *Id.* That is especially true in cases of ongoing drunk driving, as the totality of circumstances involves not just the commission of a crime, but also an ongoing danger to public safety that requires quick action. An officer is "not required to wait until [a] driver ha[s] harmed himself or others before he [is] allowed to stop the driver to investigate whether in fact he [is] intoxicated." *State v. Carstensen*, 1991 Ohio App. LEXIS 6116, *6 (2d Dist.). In other words, the ultimate "reasonableness" of the stop has to be weighed against the alternative of performing no investigative stop and instead trailing the driver to see if he or she violates some other law, perhaps killing someone in the process.

2. Applying these principles here, Illanz had reasonable suspicion to stop Tidwell. The Speedway customer told Illanz in person that Tidwell was "drunk." The customer made this report right on the scene of where Tidwell was visibly drunk—eliminating any concerns about a faulty memory—and he could have been held responsible for any false statement. (Whether the customer had personally witnessed Tidwell's drunkenness is irrelevant; reasonable suspicion turns exclusively "on what the officer knew at the time he made the stop," *City of Dayton v. Erickson*, 76 Ohio St. 3d 3, 10 (1996), not based on facts unknown to the officer and discovered later.) Further, the customer had no apparent reason to deceive Illanz.

Moreover, the "'totality of the circumstances,'" *Weisner*, 87 Ohio St. 3d at 299 (quoting *Cortez*, 449 U.S. at 417), gave Illanz "a particularized and objective basis for suspecting" that Tidwell was too drunk to drive and for concluding that a stop was justified, *Glover*, 140 S. Ct. at 1187 (internal quotation marks omitted); *accord Hawkins*, 158 Ohio St. 3d 94, ¶19. The trooper was not required to let Tidwell drive off and merely follow her, risking lives while awaiting corroboration.

The First District erred. This Court should reverse.

CONCLUSION

For the above reasons, the Court should reverse the First District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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