ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

vs.

RICHARD E. DUNN

Defendant-Appellee.

CASE NO. 2011-0213

ON APPEAL FROM THE MONTGOMERY COUNTY COURT OF APPEALS, SECOND APPELLATE DISTRICT

COURT OF APPEALS CASE NO. 23884

APPELLANT'S MERIT BRIEF

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STATEMENT OF THE CASE

Appellee, Richard E. Dunn was charged in the Common Pleas Court in Montgomery County with improper handling of a firearm in a motor vehicle, a violation of R.C. 2923.16(B). After he was unsuccessful in completing a Pre-Trial Diversion program, he moved to suppress the gun police recovered from his truck and the statements he'd made at the scene. The trial court overruled the motion, finding that the stop was a legitimate police response to an emergency situation. (Decision, Dec. 11, 2009, App. C) Dunn pled no contest and received a sentence of five years of community control sanctions.

The Second District Court of Appeals reversed. Relying on *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 720 N.E.2d 507, the Court held that the State had not demonstrated that the dispatcher had a reasonable basis to send the bulletin that caused the officer to stop Dunn's truck. In dissent, Judge Grady noted that police stopped Dunn not to investigate criminal activity, but to prevent an allegedly suicidal driver from harming himself. "The record plainly demonstrates an emergency situation in which [the officer] reasonably believed Defendant was in need of immediate aid. The Fourth Amendment does not bar the warrantless seizure the officer affected for that purpose."

This Court accepted the State's appeal on April 20, 2011.

STATEMENT OF FACTS

On March 27, 2008, the Vandalia Police Department put out a dispatch that a man named Richard Dunn was armed and suicidal. According to the dispatch, Dunn was on the road at the time, driving a "big rig" tow truck from Sandy's Towing, and he planned to kill himself when he arrived at 114 Helke Rd. Motion to Suppress Hearing. (Tr. 3-5) That rang a bell with Officer Robert Brazel, who had often seen that very truck parked in front of the house at 114 Helke Rd. (Tr. 4-6) Within 60 to 90 seconds of hearing the dispatch, and while other officers were headed

on this "hot call" to the address on Helke, Officer Brazel spotted the truck about two miles away from the house. (Tr. 5-7) Brazel followed until backup arrived, and then he and the other officer turned on the lights and siren and stopped the truck. (Tr. 8-9, 15-17) Richard Dunn, talking to someone on a cell phone and crying, immediately stepped out of the cab and put his hands in the air. (Tr. 9) Because the report said Dunn had a weapon, the officers drew their weapons and ordered him to keep his hands up. (Tr. 10) He complied, and the officers sat him down, put handcuffs on him, and frisked him for weapons. (Tr. 10) As Officer Brazel walked with him towards the cruiser, Dunn, apropos of nothing, told him that the gun was in the glove box. (Tr. 10-11) Which it was – police found a loaded firearm in the passenger-side glove compartment. (Tr. 11)

Dunn confirmed at the scene that his plan had been to shoot himself after he'd dropped off the semi he was towing at the time. (Tr. 13) He also said he'd been having marital troubles lately, and his distress had been so great that he'd been hospitalized on an involuntary commitment for evaluation just the week before. (Tr. 11-13) Sensitive to the fact that Dunn was upset that he'd been billed for the cost of transport for that hospitalization, Brazel arranged to have an officer drive him to a local hospital that evening for evaluation. (Tr. 13)

Brazel agreed that he had not observed Dunn commit any crime or traffic violation before the stop, nor had it been reported to him that Dunn had broken any law. (Tr. 16-17, 20)

ARGUMENT

Proposition of Law: Where the danger reported is great, the intrusion of the police relatively small, and the information in the dispatch is specific, detailed, and partly verified, the police do not violate the Fourth Amendment by stopping a vehicle to determine whether an occupant is in need of emergency assistance.

"[T]he business of policemen and firemen is *to act,* not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation of the judicial process."[1]

Richard Dunn was stopped after a caller gave his name to Vandalia Police, described his vehicle, and stated that he was armed, suicidal, and had a specific plan to kill himself when he reached 114 Helke Road. Officer Robert Brazel recognized the truck the caller had described – a big-rig tow-truck from Sandy's Towing, and he had seen it parked regularly in front of 114 Helke Road. When Brazel stopped Dunn in that tow-truck with the help of another officer just moments after the dispatch, he was not conducting an investigative stop based on a reasonable suspicion of criminal activity; he was taking emergency action because he had reason to believe that Dunn was armed and a danger to himself and others.

The Court of Appeals should have asked whether the totality of the circumstances supported an objectively reasonable belief that immediate action was necessary to protect life or prevent serious injury, not whether the State proved that the dispatcher had reason to believe that the information in the broadcast was reliable or the caller credible. Thus, the court of appeals erred by imposing a test used in criminal investigatory stops to emergency situations.

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[1] *State v. Applegate,* 1994-Ohio-356, 68 Ohio St. 3d 348, 350, 626 N.E.2d 942, 944, quoting *Wayne v. United States* (C.A.D.C.1963), 318 F.2d 205, 212, certiorari denied (1963), 375 U.S. 860, 84 S.Ct. 125, 11 L.Ed.2d 86.

A. The trial court correctly concluded that the stop was a "legitimate response to an emergency situation."

Citing *Mincey v. Arizona* (1978), 437 U.S. 385, 392-393, 98 S.Ct. 2408, 57 L.Ed.2d 290, the trial court found that stopping Dunn was a legitimate response to an emergency situation. The Court was right. The dispatch was detailed and specific: it described the truck, named the driver, and it stated that he was a) armed; b) suicidal; and c) had a plan to kill himself when he reached a named location. What's more, Officer Brazel knew the truck, and knew that it was linked to the given address because he had seen it parked there on many occasions. And while the record does not reveal the identity of the caller, the details suggested that he or she was well informed. Not only did this make the tip more reliable, it increased the chances of identifying the caller if the call turned out to be a prank.

In short, it was reasonable for the police to stop the truck to determine whether the driver was in fact, armed, suicidal, and planning to kill himself when he got to the house where he parked his truck. The error the court of appeals made was equating the stop of a vehicle under the emergency-aid doctrine to a Terry stop, or investigative detention, and determining that the officer could not stop Dunn unless there was evidence from which the dispatcher could have concluded that the information supplied by the caller had sufficient indicia of reliability. The question should have been whether the stop was objectively reasonable under the circumstance. The answer is that it was most assuredly was.

B. Emergency action by the police that is undertaken to protect life or avoid serious injury does not violate the Fourth Amendment if the action is reasonable under the circumstances.

The Supreme Court of the United States first referred to the "community caretaking" component of police work in *Cady v. Dombrowski*, (1973), 413 U.S. 443, 93 S. Ct. 2523, 37 L.Ed.2d 706, which it described as those police functions that are "totally divorced from the

detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." 413 U.S. at 441. In that case, police searched a wrecked car in an unsecured location because they had reason to believe it contained the service revolver of the injured and intoxicated driver, a Chicago police officer. What they found in the car eventually led to a body and then a charge of murder against Dombrowski, who argued that the warrantless search of the car violated his Fourth Amendment rights. The Court disagreed: "Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not 'unreasonable' within the meaning of the Fourth and Fourteenth Amendments." Id at 448, 2531. The decision in *Cady v. Dombrowski* established that when police act in their role as caretakers for the community, the Fourth Amendment requires not that they obtain a warrant, but only that the action they take is reasonable.

Police are charged not only with the duty to prevent or investigate crime - the primary duties of a peace officer are preserving the peace, protecting life and limb, and enforcing the law. See R.C. 109.71(A)(1). The emergency-aid doctrine recognizes that in their role as community caretakers, police have an obligation to take action in an emergency to prevent the loss of life or serious injury. "The need to preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *State v. Applegate* (1994), 68 Ohio St.3d 348, 350, 626 N.E.2d 942, quoting *Mincey v. Arizona* (1978), 437 U.S. 385, 392-393, 98 S.Ct. 2408, 57 L.Ed.2d 290. Nevertheless, police action under the emergency-aid doctrine must be limited to the exigencies that justified it in the first place. *Mincey v. Arizona*, supra, at 393.

The U.S. Supreme Court has twice reaffirmed the emergency aid exception in recent years. In *Brigam City v. Stuart* (2006), 547 U.S. 398, 126 S. Ct. 1943, 164 L.Ed.2d 650, the

court found that one exigency that eliminates the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. The entry into the home in that case did not violate the Fourth Amendment because it was reasonable in light of the circumstances. The "circumstances" included the officers' having been sent to the scene at 3:00A.M. on the report of a loud party, the thumping and crashing of a fight inside the house, the presence of juveniles drinking in the backyard, and their view through a window of a juvenile inside the house being held back by several adults, only to break free and strike one of the adults in the face and send him spitting blood into the kitchen sink. In that case, the court found that the warrantless entry did not offend the Fourth Amendment because under the circumstances, it was "reasonable" for the officers to enter the house to restore the peace and tend to the injured.

And officers do not need ironclad proof of a likely serious life-threatening injury to invoke the emergency aid exception to the warrant requirement. *Michigan v. Fisher* (2009), ___ U.S. ___, 130 S.Ct.546, 175 L.Ed.2d 410. All that is required is an objectively reasonable belief that medical assistance was needed or persons were in danger. Id., 549. Thus, in that case, it was error for the Michigan court to replace the objective inquiry as to the reasonableness of the entry with its after-the-fact conclusion that no emergency existed: "Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances." The Court reiterated the role of a peace officer "includes preventing violence and restoring order, not simply rendering first aid to casualties."

C. The emergency aid doctrine is analytically distinct from the investigative detention exception to the warrant requirement.

The mistake the court of appeals made was treating the stop of this stop of a motor vehicle, which was made under the emergency-aid doctrine, as if it were an investigative detention under *Terry v. Ohio* (1968), 392 U.S.1, 88 S.Ct.1868, 20 L.Ed.2d 89. The Second

district imported the holding of *City of Maumee v. Weisner* (1999), 87 Ohio St.3d 295, into a context where it has no application and makes no sense.

Police actions taken as a part of their community caretaking function are different from the kind of citizen-police encounters that occur when police are detecting, investigating, or acquiring evidence of crime, and which require the court to determine whether the event was an arrest, an investigative detention, or a consensual encounter and then to categorize the informant so that the court may assess whether the tip was accompanied by "sufficient indicia of reliability." Community caretaking instead refers to a capacity when police are performing some task unrelated to the investigation of a crime. *People v. McDonough* (Ill. 2010), 940 N.E.2d 1100, 239 Ill. 2d 260. And thus, these kinds of encounters between police and citizens are not properly evaluated by reference to the categories of "consensual encounter," "investigative detention" and "arrest." Id. In *McDonough*, supra, the Illinois Supreme Court specifically rejected the theory that an the interaction between a police officer and a citizen who reasonably appears to be in need of assistance must be classified and then analyzed as either an arrest, a consensual encounter, or an investigative detention, and held that the only question was whether the officer's actions were objectively reasonable under the circumstances. Accord, *Kansas v. Tucker* (Kan. App. 1994), 878 P.2d 855, 19 Kan.App.2d 920.

That is the error the Court of Appeals made in this case. Instead of considering whether the stop was objectively reasonable under the circumstances of the emergency, it insisted on applying a formula that is used for determining whether there existed reasonable suspicion to believe the person detained was, had been, or was about to be involved in criminal behavior. This Court's decision in *City of Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 720 N.E. 2d 507, sets the standard for evaluating the reliability of information upon which an investigative

detention is based, but it has no application to police action taken in an emergency as part of their community-caretaking function. The court was simply wrong to decide, as it did in ¶ 10 of its opinion, that "the reasonableness of the existence of an emergency" is to be tested by the same standard applied to the question of whether there existed reasonable suspicion of criminal activity to justify an investigative detention. As shown above, the question is whether the action the officers took was reasonable in light of the emergency that confronted them, not whether the tip was "reliable" as that term is understood in the context of criminal investigations.

In any case, the stop here was not based solely on the tip. It was corroborated by the officer's own knowledge that linked the truck to the residence, and by the fact that, as stated, the truck was on the road at the time. What's more, the record shows that the officer spoke to the dispatcher just before he stopped the truck to confirm the information he'd gotten and to make sure he had the right vehicle. And proof that the stop was motivated by the risk of danger Dunn presented is shown by the fact that it does not appear that the police checked to see whether Dunn had a license to carry the gun before they stopped him. Surely if they were crime-fighting and not protecting the public, they would have determined whether he was actually committing the crime with which he was eventually charged. It is evident that they stopped him not because they thought he was breaking the law but because he was suicidal, and he had a plan *and* a weapon.

When officers have reasonable grounds upon which to believe that an emergency exists, they have a duty to investigate, provided that any intrusion is strictly circumscribed by the exigencies which justify its initiation. See e.g., *State v. Applegate* (1994), 68 Ohio App.3d 348, 350, 626 N.E.2d 942, and *State v. Robinson* (1995), 103 Ohio App.3d 490, 496, 659 N.E.2d 1292.

Because the record here showed that the officer's decision to stop Dunn was based on a "probability or substantial chance" of dangerous behavior due to his present emotional state, the police were justified in a brief detention, or "mental health" seizure. See *Fisher v. Harden* (C.A. 6, 2005) 398 F.3d 837, 843. Officer Brazel was entirely justified under the Fourth Amendment in stopping him to investigate.

CONCLUSION

As a result of this decision, police who are dispatched to respond to an ongoing emergency, where life or limb may hang in the balance, will be found to have violated the Fourth Amendment unless they have ascertained that the information relayed by the dispatcher is reliable. The Fourth Amendment imposes no such requirement. The State asks the Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

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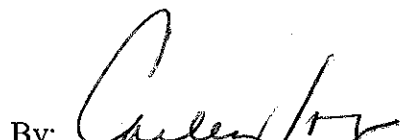
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by first class on this 30th day of June, 2011, to Opposing Counsel: Gary C. Schaengold, 4 East Schantz Avenue, Dayton, OH 45409 and Alexandra T. Schimmer, Solicitor General, 30 East Broad Street, 17th Floor, Columbus, OH 43215.

By: 

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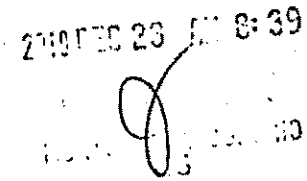

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	Appellate Case No. 23884
Plaintiff-Appellee	:	Trial Court Case No. 08-CR-1363
v.	:	(Criminal Appeal from Common Pleas Court)
RICHARD E. DUNN Defendant-Appellant	:	

. . . . . .

OPINION

Rendered on the 23rd day of December, 2010.

. . . . . .

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WAITE, J. (Sitting by Assignment)

Appellant Richard Dunn is challenging the trial court's decision to overrule a motion to suppress. Appellant was arrested while driving in Vandalia, Montgomery County, after a police dispatcher reported that a man driving a tow truck was suicidal and had a gun in

the vehicle. While Appellant was being detained during the traffic stop, he indicated to the arresting officer that there was a gun in the glove compartment and the gun was immediately confiscated. Appellant was later indicted on a charge of improper handling of a firearm in a motor vehicle, to which he eventually pleaded no contest. He was sentenced to community control sanctions in the Montgomery County Court of Common Pleas.

During the proceedings, Appellant filed a motion to suppress based on his argument that there was no constitutional basis for the traffic stop. Appellant claimed that the police dispatch bulletin precipitating the arrest was not based on a reasonable suspicion of illegal activity. Appellant argues on appeal that the police should not have relied on the information provided to the police dispatcher because the informant who called the police had not observed any criminal activity. He also argues that the state failed to prove the factual basis for the police dispatch that eventually led to his arrest. The second part of Appellant's argument has merit. Because the arrest was based on a police dispatch bulletin, the state was required to establish the factual basis of the bulletin at the suppression hearing. The dispatcher did not testify at the hearing, and the record is completely devoid of any evidence to show that the dispatcher had a reasonable basis to issue the dispatcher's bulletin. Because there was no factual basis established for the traffic stop, all evidence deriving from the stop should have been suppressed. Appellant's argument has merit, and the judgment of the trial court is reversed.

BACKGROUND OF THE CASE

On March 27, 2008, Vandalia Police Officer Robert Brazel received a dispatch notice that there was a suicidal male driving a tow truck and that he was planning to kill

himself when he arrived at 114 Helke Rd. in Vandalia. The dispatcher gave Appellant's name as the driver and mentioned that he had a weapon. (Tr., p. 8.) The dispatcher noted that the vehicle was a "big rig" tow truck displaying the name "Sandy's" towing company. (Tr., p. 6). Officer Brazel spotted the tow truck and called for backup assistance before initiating a traffic stop. Butler Township police arrived and the two officers signaled for Appellant to pull over. After stopping the rig, Appellant immediately exited the vehicle and was visibly upset and crying. The officers saw Appellant holding a cell phone, but did not observe any weapon. The officers drew their weapons, patted Appellant down and handcuffed him. They did not find any weapon on his person other than a small pocketknife. As Officer Brazel was walking back to his police cruiser, Appellant stated: "[i]t's in the glove box." (Tr., p. 11). The officer asked him if he was referring to the gun, and Appellant said "yes." (Tr., p. 11). Butler Township Sergeant Stanley checked the glove compartment and found a loaded weapon, and he confiscated and secured the weapon. Neither officer had explained the Miranda rights in any fashion to Appellant during or after these events. Officer Brazel drove Appellant to Good Samaritan Hospital to be involuntarily committed. During the drive, Appellant told the officer that he had been having problems with his wife and that he intended to shoot himself after he dropped off his tow truck. (Tr., p. 13.)

On August 10, 2009, Appellant was indicted on one count of improper handling of a firearm, R.C. 2923.16(B), a fourth degree felony. On October 2, 2009, Appellant filed a motion to suppress on the grounds that the traffic stop violated the Fourth Amendment and that the police improperly interrogated him without giving him a Miranda warning. Appellant also urged that all evidence derived from the illegal stop and interrogation be suppressed,

including the gun found in the glove compartment.

Officer Brazel was the only witness at the suppression hearing. He testified that he received the police dispatch indicating an emergency involving a suicidal driver; that he called another officer for backup; stopped Appellant's truck; pulled his weapon and handcuffed Appellant during the traffic stop, then he took Appellant to the hospital. Officer Brazel also stated that he did not observe any traffic violations or violations of any other laws that might have precipitated the stop. (Tr., pp. 15, 20.) He testified that Appellant did not seem to be impaired and was very cooperative at the time of the traffic stop. He testified that at no time had Appellant been given any Miranda warnings. All of the testimony at the suppression hearing focused on the procedure of the stop, itself.

The trial court overruled the motion to suppress on December 9, 2009. The court determined that the police were acting in response to an emergency and found that the need to protect or preserve life provided the exigent reasonable circumstances to justify the traffic stop. The court also found that the police officers did not engage in custodial interrogation, and therefore, Appellant's voluntary comments made during the traffic stop should not be suppressed.

On December 30, 2009, the court held a change of plea hearing in which Appellant agreed to plead no contest to the single count in the indictment. The sentencing hearing took place on January 27, 2010. The court filed its judgment entry on January 28, 2010, sentencing Appellant to five years of supervised probation, destruction of the weapon, counseling, payment of court costs, and other sanctions. This timely appeal was filed on February 18, 2010.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS."

This appeal addresses the question as to whether the police made a constitutionally valid warrantless traffic stop based on a dispatcher's report of a gun carrying, suicidal driver. A police officer may conduct a traffic stop without a warrant if he "has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation * * * regardless of the officer's underlying subjective intent or motivation for stopping the vehicle in question." *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 11-12; see also, *Berkemer v. McCarty* (1984), 468 U.S. 420, 439, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317. An officer may also make a warrantless traffic stop in response to an emergency without violating the Fourth Amendment. *Mincey v. Arizona* (1978), 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290; *State v. Oliver* (1993), 91 Ohio App.3d 607; *State v. Stubbs* (Oct. 2, 1998), Montgomery App. No. CA 16907.

Appellant cites *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, wherein the Ohio Supreme Court held: "[W]here an officer making an investigative stop relies solely upon a dispatch, the state must demonstrate at a suppression hearing that the facts precipitating the dispatch justified a reasonable suspicion of criminal activity." (Emphasis omitted.) Id. at 298. If the dispatch is based solely on an informant's tip, the determination of reasonable suspicion of criminal activity, or the reasonableness of the existence of an emergency, will be limited to an examination of the weight and reliability of that tip. Id. at 299. The appropriate analysis is whether the tip itself contains sufficient indicia of reliability to justify the investigative stop. Id. Factors considered highly relevant are the informant's

veracity, reliability, and basis of knowledge. *State v. Reed*, Montgomery App. No. 23357, 2010-Ohio-299, ¶43.

In *Maumee*, supra, the Ohio Supreme Court reasoned that:

"Generally, at a suppression hearing, the state bears the burden of proving that a warrantless search or seizure meets Fourth Amendment standards of reasonableness. 5 LaFave, Search and Seizure (3 Ed.1996), Section 11.2(b). In the case of an investigative stop, this typically requires evidence that the officer making the stop was aware of sufficient facts to justify it. *Terry v. Ohio* (1968), 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889, 906. But when an investigative stop is made in sole reliance upon a police dispatch, different considerations apply.

"A police officer need not always have knowledge of the specific facts justifying a stop and may rely, therefore, upon a police dispatch or flyer. *United States v. Hensley* (1985), 469 U.S. 221, 231, 105 S.Ct. 675, 681, 83 L.Ed.2d 604, 613. This principle is rooted in the notion that 'effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information.' Id. at 231, 105 S.Ct. at 682, 83 L.Ed.2d at 614, quoting *United States v. Robinson* (C.A.9, 1976), 536 F.2d 1298, 1299. When a dispatch is involved, therefore, the stopping officer will typically have very little knowledge of the facts that prompted his fellow officer to issue the dispatch. The United States Supreme Court has reasoned, then, that the admissibility of the evidence uncovered during such a stop does not rest upon whether the officers *relying upon a dispatch or flyer* 'were themselves aware of the specific facts which led their colleagues to seek their

assistance.' It turns instead upon 'whether the officers who *issued* the flyer' or dispatch possessed reasonable suspicion to make the stop. (Emphasis sic.) Id. at 231, 105 S.Ct. at 681, 83 L.Ed.2d at 613 * * * Thus, '[i]f the flyer has been issued in the absence of a reasonable suspicion, then a stop in the objective reliance upon it violates the Fourth Amendment.' *Hensley*, 469 U.S. at 232, 105 S.Ct. at 682, 83 L.Ed.2d at 614." Id. at 297-298.

The *Maumee* Court allowed that the state does not necessarily need to bring the police dispatcher or the citizen informant to testify at the suppression hearing. Id. at 298. Nevertheless, the state is required to establish the facts that the dispatcher relied on so that the court can determine whether there was a reasonable basis for issuing the dispatcher's bulletin. Id.

In the instant case, there is nothing in Officer Brazel's testimony to establish the basis for the dispatcher's bulletin that led to Appellant's traffic stop. Although the parties mention in their appellate briefs that Appellant's wife was the informant, and it is possible that all of the parties understood this to be the case, the record is completely silent to this fact at the suppression hearing. Officer Brazel testified that he did not know who the informant was at the time and had no direct conversation with the informant. (Tr., p. 19.) In fact, there is no information about the informant contained anywhere within the transcript of the suppression hearing. Nothing in Officer Brazel's testimony explains what precipitated the dispatcher to send a report that Appellant was suicidal and had a gun in the vehicle. Because Officer Brazel was the only person who testified at the suppression hearing, and the officer supplied absolutely no testimony relative to the information, we must conclude that the state did not fulfill its burden to establish that the police dispatcher

had a reasonable basis to send the bulletin which led to the traffic stop.

Appellant's sole assignment of error has merit and the judgment of the trial court overruling the motion to suppress is reversed. The conviction and sentence are vacated, Appellant's plea of no contest is withdrawn, and the motion to suppress is granted. The case is hereby remanded for further proceedings.

. . . . . .

FROELICH, J., concurs.

GRADY, J., dissenting:

I respectfully dissent from the majority decision. A careful reading of *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, reveals that the evidentiary requirement it imposes on the state in a suppression hearing applies to an "investigative stop" authorized by *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889; that is, seizure of the person effected to investigate a reasonable suspicion of criminal activity. In *Maumee*, the stop was made based on a police dispatch concerning a suspected crime of drunk driving, which arose from a tip provided by another motorist.

In the present case, it is undisputed that Officer Brazel stopped Defendant's vehicle, not to investigate suspected criminal activity, but instead to prevent an allegedly suicidal driver from harming himself. In *Mincey v. Arizona* (1978), 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290, 300, the Supreme Court wrote:

"We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come

upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. Cf. *Michigan v. Tyler, supra*, 436 U.S., at 509-510, 98 S.Ct., at 1950-1951. 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.' *Wayne v. United States*, 115 U.S. App. D.C. 234, 241, 318 F.2d 205, 212 (opinion of Burger, J.). And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. *Michigan v. Tyler, supra*, 436 U.S., at 509-510, 98 S.Ct., at 1950-1951; *Coolidge v. New Hampshire*, 403 U.S., at 465-466, 91 S.Ct. at 2037-2038."

The trial court found that the dispatch Officer Brazel received and on which he acted portrayed exigent circumstances that justified the stop of Defendant's vehicle. An "exigency" is such a need or necessity as belongs to the occasion. Webster's Third International New Dictionary. The record plainly demonstrates an emergency situation in which Officer Brazel reasonably believed Defendant was in need of immediate aid. The Fourth Amendment does not bar the warrantless seizure the Officer effected for that purpose. *Mincey*.

When he emerged from his vehicle, Defendant volunteered that a gun was in the vehicle's glove box. Voluntary statements made in the course of a search or seizure not barred by the Fourth Amendment permit officers to seize any evidence of criminal activity the statement reveals. The trial court did not err when it denied Defendant's motion to suppress evidence of the gun that police then seized from his vehicle.

I would affirm.

. . . . . .

(Hon. Cheryl L. Waite, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Mathias H. Heck
Ciara S. Parks
Gary C. Schaengold
Hon. Barbara P. Gorman

The Supreme Court of Ohio

FILED
APR 20 2011
CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

v.

Richard E. Dunn

Case No. 2011-0213

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Montgomery County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Montgomery County Court of Appeals; No. 23884)

Maureen O'Connor
Chief Justice

Case: 2008 CR 01363
0001463305
Ord: DZE

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GREGORY A. BRUSH
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MONTGOMERY CO. OHIO
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Montgomery County Common Pleas Court
General Division

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY
CRIMINAL DIVISION

STATE OF OHIO,	:	CASE NO. 2008-CR-1363
Plaintiff,	:	(Judge Barbara P. Gorman)
v.	:	
RICHARD E. DUNN,	:	**DECISION, ORDER AND ENTRY OVERRULING DEFENDANT'S MOTION TO SUPPRESS**
Defendant.	:	

This matter is before the Court on Defendant Richard E. Dunn's *Motion to Suppress* filed on October 2, 2009. A hearing was held in open court on November 15, 2009. City of Vandalia Police Officer Robert Brazel testified for the State. This matter is properly before the Court.

I. FACTS

Officer Robert Brazel ("Brazel") testified that on March 27, 2008, he was on patrol when he heard a dispatch to another crew regarding a possible suicide at 114 Helke Road. According to Brazel, a second dispatch provided information that the potential suicidal person was then driving a large Sandy's Towing rig. Brazel testified that he had regularly seen a Sandy's towing rig parked in the vicinity of 114 Helke Road. Brazel further testified that Helke Road is a main thoroughfare in Vandalia.

According to Brazel, the dispatcher also indicated that the driver of the rig may have a weapon. Brazel decided to head toward 114 Helke Road. On his way, he spotted the Sandy's Towing rig that he recognized as being frequently parked at the Helke Road address and began to follow it. The dispatch also confirmed that the potentially suicidal subject was driving the large

towing rig. Brazel decided to stop the vehicle, but because he was concerned about the possibility of the driver having a weapon, he called for back-up before he stopped the towing rig.

When the stop was made, Brazel and the other officer drew their weapons because of concern for their own safety. According to Brazel, he stopped the rig out of concern that the driver would harm himself and that he did not observe any traffic or equipment violations. Brazel testified that when the rig stopped, Defendant Richard E. Dunn ("Defendant') immediately exited the truck without being told to do so and with his hands in the air. Brazel testified that Defendant had a cell phone in one hand and was visibly upset. For officer safety, Brazel handcuffed Defendant. According to Brazek, as he was being held, Defendant stated spontaneously, "It's in the glove box." Brazel testified that he asked if Defendant was referring to the gun and that Defendant responded, "yes." A loaded gun was retrieved from the glove box.

Brazel testified that Defendant was not in a condition to be left on his own, so he droved Defendant in his cruiser to the hospital to be involuntarily committed for seventy-two hours. Brazel testified that, during the drive, he and Defendant had a conversation his well-being and safety. Defendant was not mirandized.

Defendant moves to suppress the evidence allegedly seized from his truck and the statements allegedly made by him by arguing that the stop of his vehicle was unconstitutional, and that any statements by him must be excluded because he was not informed of his rights under *Miranda.*

II. LAW AND ANALYSIS

In a motion to suppress hearing, the state must prove that the contested evidence is admissible by a preponderance of the evidence. *Athens v. Wolf* (1974), 38 Ohio St.2d 237, 313 N.E.2d 405. The weight of the evidence and the credibility of the witnesses both at trial and suppression hearings is primarily for the trial court. *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583.

. The Second Appellate District has held that, "[i]n most traffic stops, the appropriate constitutional inquiry is whether the police officer's 'observations lead him to reasonably suspect that a particular person has committed, is committing, or is about to commit a crime." *State v. Stubbs* (Mont. Cty.), 1998 Ohio App. LEXIS 4647 (citations omitted). In the case at bar, Brazel testified that there was no evidence of a violation that formed the basis of the stop. *Stubbs* further reasoned, however, that:

> The United States Court has recognized that police officers may respond appropriately to emergency situations without violating the Fourth Amendment. In *Mincey v. Arizona* (1978), 437 U.S. 385, 392, the court made the following observation: Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. * * * 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.

Id. at *5, quoting *Wayne v. United States* (C.A.D.C. 1993), 115 U.S. App.D.C. 234.

In the case at bar, Brazel had received information over the dispatch that the driver of the towing rig had a weapon and may be in danger of harming himself. Under these circumstances, the traffic stop was "a legitimate response to an emergency situation." Id at *6. Accordingly, the Court finds that the stop of Defendant was not an unreasonable seizure under the Fourth Amendment and the evidence derived therefrom may not be suppressed.

Likewise, the Court finds that Defendant's statements are not subject to suppression. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *State v. Biros* (1997), 78 Ohio St.3d 426, 439, 1997 Ohio 204, quoting *Miranda v. Arizona* (1966), 384 U.S. 436, 444-445, 86 S. Ct. 1602; See also, *State v. Kier*, Montgomery App. No. 18918, 2002 Ohio 2619, ¶ 20, Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. Unsolicited and spontaneous statements are not subject to Miranda and are not the product of interrogation. *Rhode*

Island v. Innis (1980), 446 U.S. 291, 100 S. Ct. 1682. Miranda rights apply only where a suspect is subject to both custody and interrogation. *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602.

It is uncontroverted that Defendant was not mirandized when he spoke with Brazel. However, it is uncontroverted that Defendant's statement regarding the gun being in the glove box was spontaneuous and unsolicited by the police. Thus, it was not the product of an interrogation. Further, Blazel testified that his conversation with Defendant on the way to the hospital related solely to Defendant's safety and well-being. Again, Defendant was not under custodial interrogation. Thus, his statements are not suppressible.

Based on the foregoing, the Court finds that Defendant's motion to suppress must be OVERRULED.

III. CONCLUSION

Accordingly, Defendant's *Motion to Suppress* is hereby OVERRULED in its entirety.

SO ORDERED:

BARBARA P. GORMAN, JUDGE

Copies of this Decision, Order and Entry were forwarded to all parties listed below by e-mail this filing date.

Sarah Schenck

Gary Schaengold

WILLIAM HAFER, Bailiff 225-4392

APP D

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ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	CASE NO. 11-1-0213
Plaintiff-Appellant,	ON APPEAL FROM THE MONTGOMERY COUNTY COURT OF APPEALS, SECOND APPELLATE DISTRICT
vs.	
RICHARD E. DUNN	COURT OF APPEALS CASE NO: 23884
Defendant-Appellee.	

NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

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COUNSEL FOR APPELLEE, **RICHARD E. DUNN**

FILED
FEB 07 2011
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

Appellant, the State of Ohio, through the Office of the Prosecuting Attorney for Montgomery County, hereby gives notice of appeal to the Supreme Court of Ohio, from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *State of Ohio v. Richard E. Dunn,* Case No. 23884, on December 23, 2010.

This felony case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

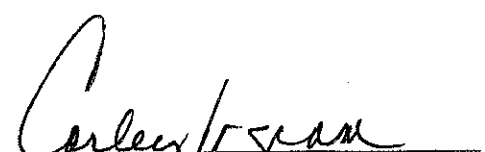
MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

BY
CARLEY J. INGRAM
REG NO. 0020084
Assistant Prosecuting Attorney
APPELLATE DIVISION

COUNSEL FOR APPELLANT,
STATE OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was sent by first class mail on this 7th day of February, 2011, to the following: Gary C. Schaengold, 707 Shroyer Road, Suite B, Dayton, OH 45419 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.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