

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

* Case No.: 2011-0213

Plaintiff/Appellant

*

-vs-

*

RICHARD DUNN

*

Defendant/Appellee

*

APPELLEE'S MERIT BRIEF

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STATEMENT OF THE CASE

On March 27, 2008, the Appellee was arrested for Improper Handling of a Firearm in a Motor Vehicle in violation of §2923.16(B) of the Ohio Revised Code, a felony of the fourth degree.

Appellee waived his speedy trial rights and was screened to participate in a Pre-Trial Diversion Program operated by the Montgomery County Prosecuting Attorney pursuant to §2935.36 of the Ohio Revised Code.

Unfortunately, Appellee was unable to successfully complete Diversion and the Montgomery County Grand Jury returned an Indictment on August 10, 2009.

At an Arraignment held on September 17, 2009, Appellee stood mute and the Court entered a plea of not guilty. Bond was set at conditional own recognizance with supervision by Pretrial Services.

After retaining counsel, a Motion to Suppress was filed on October 2, 2009 which proceeded to hearing on November 15, 2009.

On December 11, 2009, the Trial Court issued a Decision, Order and Entry Overruling the Motion to Suppress.

Dunn next appeared before the Trial Court on December 30, 2009 and tendered a plea of no contest to the indicted charge. Following a colloquy, the Judge found Appellee guilty as charged and set the matter for sentencing for January 27, 2010.

According to the Termination Entry filed on January 28, 2010, Dunn was sentenced to community control sanctions.

From that final Entry, a Notice of Appeal was filed on February 18, 2010.

On appeal, a majority of the Court of Appeals found there was nothing in the arresting officer's testimony to establish the basis for the dispatcher's bulletin that led to the traffic stop of Appellee. In fact, the majority found the record to be completely silent to this fact, noting there was no information about the informant even mentioned during the suppression hearing.

The majority concluded that the State did not meet its burden to establish that the police dispatcher had a reasonable basis to send the bulletin which led to the traffic stop.

In reversing the decision of the Trial Court, Appellee's conviction and sentence were vacated, the plea of no contest was withdrawn, and the motion to suppress was granted. The case was remanded for further proceedings.

The State filed a Notice of Appeal to this honorable Court on February 7, 2011 and jurisdiction was accepted on April 20, 2011.

STATEMENT OF FACTS

On March 27, 2008, Richard Dunn was driving a commercial tow truck for his employer, Sandy's Towing, on North Dixie Drive in the City of Vandalia, proceeding south into Butler Township, within Montgomery County, Ohio.

Apparently, while en route to his next destination, Dunn may have been speaking with his wife on a cellular telephone. At the conclusion of that conversation, someone apparently called the police and suggested that Dunn was distraught, possibly suicidal, and had a weapon in the truck.

A dispatcher broadcasted certain information and Vandalia police officers stopped Appellee's truck. In doing so, the officers had not observed any moving violation or any equipment violation on the part of Appellee. Further, there was no report that Appellee had broken any law.

At the time of the stop, the officers drew their weapons and ordered Appellee out of his vehicle. The Appellee was handcuffed and frisked for weapons.

After Appellee was secured in a police cruiser, a search of the vehicle resulted in the recovery of a loaded hand gun found in the passenger glove compartment. The weapon was secured and Dunn was arrested for improper handling of a firearm in a motor vehicle.

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.

The Motion to Suppress filed in this case was based upon Appellee's belief that the traffic stop of the commercial vehicle he was operating was not constitutionally permissible, thereby violating the prohibition against an unreasonable search and seizure as set forth in the Fourth and Fourteenth Amendments to the United States Constitution and Article I, §14 of the Ohio Constitution.

Thus, Appellee argued that any contraband obtained as a result must be excluded as evidence.

Further, the Motion claimed that any statements made by Dunn after he was handcuffed, without Miranda warnings having been given, should also be excluded as evidence, having been obtained in violation of his constitutional right to remain silent.

In support of the Motion, Appellant cited State vs. Dilger, 2004-Ohio-7271, Knox County Court of Appeals (2004). The Court noted in that case that "[t]he law concerning when a traffic stop is constitutionally permissible is abundantly clear." A police officer may conduct a traffic stop only where he/she "has an articulable suspicion or probable cause to stop a motorist for any criminal violation... regardless of the officer's underlying subjective intent or motivation for stopping the vehicle in question." Dayton vs. Erikson, 76 Ohio St. 3d 3, 11-12 (1996).

In Maumee vs. Weisner, 87 Ohio St.3d 295 (1999), the Court held that where 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. Even if the citizen informant was identified, she had not personally observed any criminal conduct and it was unreasonable under the totality of the circumstances for officers to rely upon such a tip. And there was no risk to public safety as the officer did not observe any equipment or moving violations.

Thus, in his Motion to Suppress, Appellee argued that the reliability of the dispatched information was inadequate by itself to support a stop of the vehicle and, just as in Dilger, the stop was unreasonable and any contraband obtained as result should be suppressed.

At the hearing held on the Motion to Suppress, the State called Officer Brazel of the Vandalia Police Department. He testified that he heard the dispatch about a suicidal male subject operating a Sandy's tow truck. (Tr. Page 4)

Shortly thereafter, the officer observed such a tow truck proceeding south on North Dixie and began following the vehicle. (Tr. Page 5)

After requesting back-up, Brazel initiated a traffic stop of Appellee's truck. (Tr. Page 8). Appellee exited the vehicle and the officers ordered him to put his hands up. (Tr. Page 9). At that time, Appellee appeared upset, discontinued a cell phone conversation, and sat down as directed by the officers. He was handcuffed at that time. (Tr. Page 10).

After being handcuffed, according to the officer, Appellee made a spontaneous statement that there was a gun in the glove box. Another officer checked the truck and located a loaded weapon in the passenger side glove box. (Tr. Page 11).

At no time did an officer read Appellee his Miranda Rights (Tr. Page 12).

On cross-examination, Officer Brazel clarified that he had followed Dunn for a mile and a half. During that time, no moving violations were observed and no equipment violations were observed. (Tr. Page 15)

At the time of the stop, at approximately 8:00 p.m., after dark, the scene consisted of two police cruisers with overhead lights activated, at least one of which used its siren, and one of which drove in front of the tow truck to block its path. (Tr. Page 16). Two officers had their weapons drawn immediately. (Tr. Page 17) and Brazel agreed that citizens have a strong emotional response to being pulled over by officers having their weapons drawn (Tr. Page 18).

After Appellee exited his vehicle, no weapon was observed and no illegal weapon or contraband was found when Appellee was frisked after being handcuffed (Tr. Page 18).

Officer Brazel further testified on cross-examination that he had no conversation with the dispatcher regarding any information concerning Appellee. (Tr. Page 19)

When Appellee exited his vehicle, he made no menacing moves toward the officers and complied with their demands (Tr. Page 19). Appellee was not impaired or under the influence of anything in the opinion of the officer. There was no yelling or screaming or improper behavior (Tr. Page 20)

In its Decision, the Trial Court found that the traffic stop in this case was a legitimate response to an emergency situation in compliance with Mincey vs. Arizona, 437 U.S. 385 (1978). The Court further found that the incriminating statements made by Appellee were not obtained as a result of a custodial interrogation, citing Rhode Island vs. Innis, 446 U.S. 291 (1980). On that basis, the Motion to Suppress was overruled.

In reaching its conclusion, the Trial Court improperly failed to consider Dilger, supra. In that case, an officer had received a dispatch to be on the lookout for Dilger's vehicle being operated by a possibly intoxicated driver and a possible suicide threat. Based on that dispatch, an officer initiated a stop of the vehicle to check on Dilger's well being. Dilger was found to be under the influence of alcohol and arrested. An unloaded shotgun was found on the front seat covered by a blanket and Dilger was also charged with improper handling of a firearm in a motor vehicle.

A police officer does not always need to have knowledge of the specific facts justifying a stop and may rely on a police dispatch. United States vs. Hensley, 469 U.S. 221 (1985).

The United States Supreme Court has held that the admissibility of evidence uncovered during such a stop does not rest upon whether the officer who relied upon a dispatch was himself aware of the specific facts which led to the dispatch, but turns instead upon whether the officer who issued the dispatch possessed reasonable suspicion to support the stop. See, Whiteley vs. Warden, Wyoming State Penitentiary, 401 U.S. 560 (1971).

Most courts have interpreted Hensley and Whiteley to require proof at the suppression hearing that the officer issuing the dispatch possessed sufficient knowledge of facts or information to justify the stop where the stopping officer himself did not. Maumee vs. Weisner, supra.

Here, as in Dilger, the information possessed by the police before the stop stems solely from an informant tip and the determination of reasonable suspicion must be limited to an examination of the weight and reliability due that tip. No evidence was produced at the suppression hearing by the State as to the source of the information which led to the radio

dispatch and it becomes impossible to gauge the reliability of the information or its source without the demonstration of facts precipitating the dispatch. The State cannot possibly meet its burden because the dispatcher did not testify.

In reversing, the Court of Appeals concluded that while the State does not necessarily need to bring the police dispatcher or the citizen informant to testify at a suppression hearing, but the State is still 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 dispatch.

The Court of Appeals found that, in this case, there was nothing in the officer's testimony to establish the basis for the dispatch which led to the stop of Appellee's vehicle. In fact, the record from the suppression hearing is totally silent on this most crucial fact.

Nothing in the dispatch was specific. Nothing was detailed. Nothing at all was verified. The officer provided no testimony relative to the informant or what precipitated the dispatcher to send a report.

The State simply failed to meet its burden and should not be able to bootstrap its position by changing the rules of engagement.

In Michigan vs. Fisher, ___ U.S. ___, 130 S. Ct. 546 (2009), police officers responded to a complaint of a disturbance. Officers approached the area and were directed by a couple to a residence where a man was "going crazy". Upon arrival, the officers found chaos, including a damaged truck in the driveway, broken windows, glass on the ground, and blood on the hood of the truck. Fisher was inside the house screaming and throwing things. He had a cut on his hand and refused to open the door. One of the officers pushed open the door and went inside.

Fisher was charged with assault with a dangerous weapon and possession of a firearm during the commission of a felony. He filed a Motion to Suppress which was granted by the Trial Court, affirmed in a split decision by the Court of Appeals, and reversed by the U.S. Supreme Court.

Citing Brigham City vs. Stuart, 547 U.S. 398 (2006), the Court noted that the need to assist persons who are seriously injured or threatened with such injury presents an exigent circumstance allowing law enforcement officers to enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from eminent injury.

Officers do not need iron clad proof of a likely serious life threatening injury to invoke the emergency aid exception, but there must be an objectively reasonable basis for believing that an emergency has arisen.

In these past few years since Fisher was decided, the focus has become fact intensive in analyzing whether the actions of police officers were objectively reasonable when confronted with a potential emergency situation.

In this case, the record is sparse. This is not a case of an officer viewing a motionless body through a window, observing fresh blood on a damaged vehicle, entering a home to find a missing parent, or to aid someone having a seizure.

From an objective stand point, the officers in this case observed absolutely nothing unusual. There was nothing wrong with Appellee's vehicle and nothing wrong with the way he was operating that vehicle.

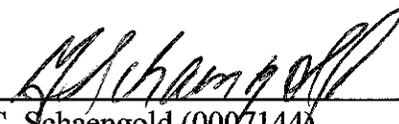
Recently, in State vs. Laprairie, 2011-Ohio-2184 (2011), the Second District Court of Appeals noted that "when relying on the emergency aid exception to the warrant requirement, the

State assumes the burden to prove by clear and convincing evidence that officers were presented with a compelling need to enter a home or other private premises in order to provide immediate aid to persons inside who were seriously injured or threatened with such injury. Furthermore, the officers must have had an objectively reasonable basis for believing that such a need to enter presently exists. A mere nexus to a need that formally did exist is insufficient.” And the Court went on hold that a consent to search is tainted where there was no objectively reasonable basis in the first place. The same rule should logically extent to motor vehicle stops and searches.

CONCLUSION

The Court of Appeals correctly determined the State simply failed to meet its burden. On this record, there was no reasonable basis for the traffic stop. Further, the facts do not establish an objectively reasonable basis to invoke the emergency aid doctrine.

Respectfully submitted,



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PROOF OF SERVICE

I certify that a copy of this Memorandum in Response was sent by ordinary U.S. Mail to counsel for Appellant, Carley J. Ingram, Assistant Prosecuting Attorney, Appellate Division, Montgomery County Prosecutor's Office, P. O. Box 972, 301 West Third Street - Suite 500, Dayton, Ohio 45422, and Alexandra T. Schimmer, Counsel for Amicus Curiae, Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, by regular U.S. mail on this 9th day of August, 2011.



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