ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2011-0213
Plaintiff-Appellant,	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District Case No. 23884
vs.	:	
RICHARD E. DUNN,	:	
Defendant-Appellee.	:	

MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE RICHARD E. DUNN

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STATEMENT OF THE CASE AND OF THE FACTS

On March 27, 2008, Vandalia Police Officer Robert Brazel received a dispatch that there was a suicidal man driving a tow truck, and that he was planning to kill himself when he arrived at 114 Helke Road. The dispatcher stated that Richard Dunn was the driver and mentioned that he had a weapon. The dispatcher noted that the vehicle was a tow truck for "Sandy's" towing company. 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 Mr. Dunn to pull over. *State v. Dunn,* 2d Dist. No. 23884, 2010-Ohio-6340, ¶3.

Mr. Dunn exited the vehicle and was visibly upset. The officers saw Mr. Dunn holding a cell phone, but did not observe any weapon. The officers drew their weapons, patted down Mr. Dunn, and handcuffed him. The officers did not find any weapon on Mr. Dunn. As Officer Brazel was walking back to his police cruiser, Mr. Dunn stated, "it's in the glove box." The officer asked Mr. Dunn if he was referring to a gun, and Mr. Dunn said "yes." Another officer checked the glove compartment and found a loaded gun. *Dunn,* at ¶3.

Mr. Dunn was indicted on one count of improper handling of a firearm, a violation of R.C. 2923.16(B) and a felony of the fourth degree. Mr. Dunn filed a motion to suppress on the grounds that the traffic stop violated the Fourth Amendment. *Dunn,* at ¶4. Officer Brazel was the only witness at the suppression hearing. He testified that he received the police dispatch involving a suicidal driver, called for backup, stopped Mr. Dunn's truck, pulled his weapon and handcuffed Mr. Dunn, and then took Mr. Dunn to the hospital. *Dunn,* at ¶5. Officer Brazel explained that he did not observe any traffic violations or violations of any other laws that might have precipitated the stop. He also testified that Mr. Dunn did not seem to be impaired and was cooperative at the time of the traffic stop. *Dunn,* at ¶5.

The trial court overruled the motion to suppress. The court reasoned that the police were acting in response to an emergency and found that the need to protect or preserve life provided the justification for the traffic stop. As a result, the evidence uncovered during the traffic stop was not suppressed. *Dunn,* at ¶6. Mr. Dunn pleaded no contest to the single count in the indictment, and was sentenced to five years of supervised probation. *Dunn,* at ¶7.

Mr. Dunn appealed his conviction, arguing that the trial court had erred in overruling his motion to suppress evidence resulting from the traffic stop. *Dunn,* at ¶9. The court of appeals initially acknowledged that "[a]n 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." *Dunn,* at ¶9.

Relying upon this Court's opinion in *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 1999-Ohio-68, the court of appeals explained that when an officer makes an investigative stop based 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. The court further explained that if the dispatch is based solely on an informant's tip, the determination of reasonable suspicion of criminal activity, <u>or the reasonableness of the existence of an emergency</u>, will be limited to an examination of the weight and reliability of that tip. (Emphasis added.) *Dunn,* at ¶10. The court of appeals held that the State had not met its burden to demonstrate a reasonable basis for issuing the dispatch:

> 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. *Dunn,* at ¶10.

The court of appeals held that the trial court erred in overruling Mr. Dunn's motion to suppress, reversed Mr. Dunn's conviction, and remanded to the trial court for further proceedings. The State filed a Memorandum in Support of Jurisdiction, and this Court accepted the present case for review.

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an

interest in the present case insofar as this Court may address the propriety of warrantless searches and seizures under the circumstances presented by this case.

ARGUMENT

THE STATE'S 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.

A. The Fourth Amendment.

The Fourth Amendment to the United States Constitution provides, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." A search or seizure conducted without a prior finding of probable cause by a judge or magistrate is per se unreasonable, subject to a few specific and well-delineated exceptions. *California v. Acevedo* (1991), 500 U.S. 565, 580, 111 S.Ct. 1982. A court may exclude any evidence obtained in violation of the defendant's Fourth Amendment rights. *Mapp v. Ohio* (1961), 367 U.S. 643, 655, 81 S.Ct. 1684. The purpose of the exclusionary rule is to remove any incentive to violate the Fourth Amendment and, thereby, deter police from unlawful conduct. *State v. Jones*, 88 Ohio St.3d 430, 435, 2000-Ohio-374.

An exception to the warrant requirement of the Fourth Amendment involves exigent circumstances. Exigent circumstances is synonymous with an emergency, whether it be actual or ongoing. *State v. Bethel,* 5th Dist. No. 10-AP-35, 2011-Ohio-3020, ¶22, citing *Mincey v. Arizona*, 392. Under certain circumstances, an officer may make a warrantless traffic stop in response to an emergency without violating the Fourth Amendment. *Mincey v. Arizona*, 392.

However, warrantless searches and seizures conducted in response to a perceived emergency are not immune from Fourth Amendment scrutiny. Whether a particular situation qualifies as an exigent circumstance, sufficient to excuse the absence of a warrant, constitutes a question answered by traditional Fourth Amendment search and seizure analysis.

B. The State's Contention.

The State has argued that because the police in the present case were investigating a potential emergency, the trial court erred in analyzing the search and seizure of Mr. Dunn in terms of *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868. (June 30, 2011 Brief of Appellant, p. 6). Similarly, the State has argued that the court of appeals erred by applying *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 1999-Ohio-68, and requiring that the tip which precipitated the search and seizure in the present case possess sufficient indicia of reliability in order to justify the officers' actions. (June 30, 2011 Brief of Appellant, p. 6). Instead, the State contends that the court of appeals should have considered whether the stop was objectively reasonable under the circumstances. (June 30, 2011 Brief of Appellant, p. 7-9).

C. The Relevant Cases.

This Court has addressed the issue of rendering emergency aid as a exigent circumstance, sufficient to excuse the lack of a warrant, in the context of searches and seizures. *State v. Applegate* (1994), 68 Ohio St.3d 348, 1994-Ohio-356. This Court held that exigent circumstances justified a warrantless entry into a home when the police were responding to a domestic violence call, and upon arrive at the home the police heard sounds indicating that violence was taking place inside the home. *Applegate,* at 349. In so holding, this Court cited *Terry* for the proposition that "[a] warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation." *Applegate,* at 349.

In *Maumee v. Weisner,* this Court explained that when an officer making an investigate stop relies solely upon a dispatch, the State must demonstrate at a suppression hearing that the facts precipitating the dispatch justified a reasonable suspicion sufficient to warrant an investigatory stop. And this Court explained that a telephone tip can create a reasonable suspicion, justifying a stop, when the tip possesses sufficient indicia of reliability. *Maumee v. Weisner,* syllabus. This Court also discussed the reliability to be imputed to anonymous informants, know informants, and identified-citizen informants. This Court explained that anonymous informants are comparatively unreliable, and will generally require independent police corroboration in order to support a search and seizure. *Maumee v. Weisner,* at 300-301.

While *Maumee v. Weisner* turned upon a finding of reasonable suspicion of criminal activity, this Court favorably cited a case that addressed a telephone tip leading to an emergency-aid investigatory traffic stop. In *State v. Loop* (March 14, 1994), 4th Dist. No. 93AP2153, the court held that a telephone tip, stating that a driver might be having a seizure, was sufficient to justify an investigatory stop when the telephone caller later personally pointed out the driver when the police arrived. The police then discovered that the driver was intoxicated. *Maumee v. Weisner,* at 300.

D. Reasonable Suspicion is the Same Standard as Reasonable Belief.

The State has argued that the appellate court applied the wrong standard, that of reasonable suspicion of criminal activity, to the stop of Mr. Dunn's car. (June 30, 2011 Brief of Appellant, p. 6-9). The State claims that the appropriate standard is that of whether the police possessed a reasonable belief that an emergency existed. (June 30, 2011 Brief of Appellant, p. 7-9). However, the State's argument amounts to a distinction without a difference. Both questions require the same analysis in determining whether a warrantless search or seizure was justified

based upon the circumstances. Analyzing whether a warrantless search or seizure was justified, in the context of a potential emergency, Ohio courts have considered those issues in terms of traditional Fourth Amendment analysis and *Terry*. *Applegate,* at 349; *State v. Bethel,* 5th Dist. No. 10-AP-35, 2011-Ohio-3020, ¶20-26. *Terry* set out the reasonable-suspicion-of-criminal-activity standard for justifying an investigative search or seizure. *Terry,* at 31.

As the Supreme Court has explained, "[t]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse* (1979), 440 U.S. 648, 654, 99 S.Ct. 1391. The State's contention that the reasonable-suspicion standard is somehow different that the reasonable-belief standard is untenable. (June 30, 2011 Brief of Appellant, p. 7-9). Each standard requires an examination of the surrounding circumstances and available information known to the police at the time of the search. Each is premised upon the reasonableness of the police action, in light of those circumstances, in creating an exception to the warrant requirement. In terms of the Fourth Amendment, there is no analytical difference between the requirement that police must reasonably "suspect" criminal activity is afoot and reasonably "believe" an emergency exists. The two terms are merely different ways of asking whether a police officer's actions were objectively reasonable under the circumstances and therefore justified.

E. The Present Case.

In the present case, the court of appeals applied the appropriate law to the facts presented. If a police dispatch is based solely on an informant's tip, the determination of reasonable suspicion of criminal activity, <u>or the reasonable belief of the existence of an emergency</u>, will be limited to an examination of the weight and reliability of that tip. (Emphasis added.) *Dunn,* at

¶10, citing *Maumee v. Weisner*, at 299. The appropriate analysis is whether the tip itself contains sufficient indicia of reliability to justify the stop, regardless of whether the stop is based upon suspected criminal activity or a possible emergency. Factors considered highly relevant are the informant's veracity, reliability, and basis of knowledge. *Maumee v. Weisner,* at 300.

In the present case, the court of appeals explained that the State did not necessarily need to bring the police dispatcher or the citizen informant to testify at the suppression hearing. *Dunn,* at ¶14. But the State was required to establish the facts on which the dispatcher relied, so that the court could determine whether there was a reasonable basis for issuing the dispatcher's bulletin. *Maumee v. Weisner*, at 298.

In the present case, there was nothing in Officer Brazel's testimony to establish the basis for the dispatcher's bulletin that led to Mr. Dunn's traffic stop. As the court of appeals noted, the record of the suppression hearing is silent regarding the identity of the caller. Officer Brazel testified that he did not know who the informant was at the time and had no direct conversation with the informant. *Dunn,* at ¶15. Nothing in Officer Brazel's testimony explains what precipitated the dispatcher to send a report that Mr. Dunn was suicidal and had a gun in his truck. The court of appeals correctly concluded that because Officer Brazel was the only person who testified at the suppression hearing, and he supplied absolutely no testimony relative to the telephone tip, 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. *Dunn,* at ¶15.

The State has relied upon the fact that the telephone tip identified the appearance of Mr. Dunn's truck, as well as the direction in which it was traveling. The State contends that those facts sufficiently corroborated the telephone tip. In doing so the State has cited a number of emergency-aid cases that address the corroboration of telephone tips. However, unlike the

neutral facts involved in the present case, the cases cited by the State involve corroboration of the existence of an emergency. In *Brigham City v. Stuart* (2006), 547 U.S. 398, 126 S.Ct. 1943, the responding officers witnessed an assault resulting in injuries. In *Michigan v. Fischer* (2009), __ U.S. __, 130 S.Ct. 546, the responding officers observed blood outside a home, and violent behavior, as well as an injured person within the home.

The present case does not involve the corroboration of the existence of an emergency before the police stopped Mr. Dunn. Rather, the present case involves the corroboration of some neutral facts based upon an anonymous tip. All that was corroborated was the appearance of Mr. Dunn's truck and his general location. In that regard, the present case bares more of a resemblance to *Florida v. J.L.* (2000), 529 U.S. 266, 120 S.Ct. 1375, than the cases cited by the State. In *Florida v. J.L.*, an anonymous caller told police that an African-American male, wearing a plaid shirt and standing at a bus stop, had a gun. *Florida v. J.L.*, at 268. The Court explained that the "reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Florida v. J.L.*, at 272. Likewise, the reasonable belief at issue in the present case required that the tip be reliable in its assertion of an *emergency,* and not its ability to identify Mr. Dunn.

The State's argument amounts to a request to create a "suicide exception" to traditional Fourth Amendment analysis. However, the Supreme Court rejected a similar "firearm exception" in *Florida v. J.L.*, explaining that "[u]nder such an exception, a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing." *Florida v. J.L.*, at 272. "[A]n automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply

by placing an anonymous call falsely reporting the target's unlawful carriage of a gun." *Florida v. J.L.*, at 272. This Court should reject the State's argument in the present case, and affirm the court of appeals' decision, for the same reasons.

CONCLUSION

The Office of the Ohio Public Defender, as amicus curiae, urges this Court to affirm the judgment of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE RICHARD E. DUNN** was forwarded by regular U.S. Mail, postage prepaid to Timothy J. Cole, Assistant Prosecuting Attorney, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45402; Alexandra T. Schimmer, Solicitor General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215; and Gary C. Schaengold, 4 East Schantz Avenue, Dayton, Ohio 45409, on this 22 day of August, 2011.

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