

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**

vs.

RICHARD E. DUNN

**COURT OF APPEALS
CASE NO: 23884**

Defendant-Appellee.

REPLY BRIEF OF APPELLANT, THE STATE OF OHIO

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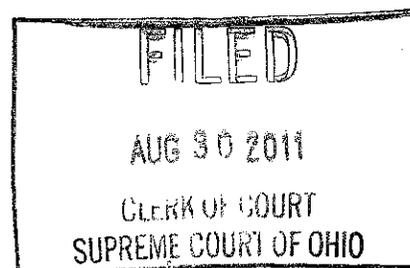
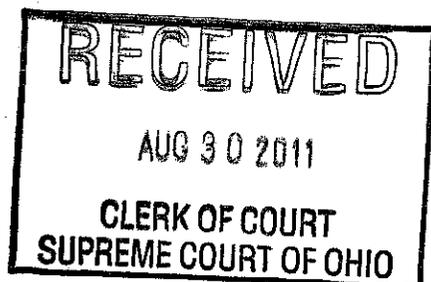


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1

REPLY

To the arguments in Dunn's brief, the State makes the following response:

A. In *Maumee v. Weisner*, 87 Ohio St.3d 295, 297, 1999-Ohio-68, 720 N.E.2d 507, 512, this Court held as follows:

Accordingly, we clarify here 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.

And later:

Where, as here, the information possessed by the police before the stop stems solely from an informant's tip, the determination of reasonable suspicion will be limited to an examination of the weight and reliability due that tip. *Id.* at 299.

The Court of Appeals broadened the reach of the Court's decision in *Maumee v. Weisner* by adding language that equates an emergency stop made by police as part of their community caretaking obligation with an investigative detention.

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. *State v. Dunn* ¶ 10, citing *State v. Maumee* at 299, emphasis added.

The Court of Appeals went beyond this Court's holding in *Maumee v. Weisner* when it determined that a stop under the emergency aid exception is identical to a Terry-stop. In doing so, it ignored the well established principle that 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.

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.

B. The Vandalia police did not have the ability to simply follow Dunn's truck to determine whether he was a threat to himself and others, and this fact distinguishes this case from those where police officers have stopped impaired drivers on nothing more than a bare tip from a citizen or another motorist. See, e.g., *State v. Wagner*, Portage App. No. 2010-P-14, 2011-Ohio-772. The Fourth Amendment ought to prevent an officer from stopping a car on an unverified tip that the driver is "weaving all over the road." That kind of information can alert the officer to follow the car and attempt to verify the caller's information, but cannot support an investigative detention. But when the information is that the driver is armed, suicidal, and intent on killing himself when he reaches a stated location, the police cannot determine by following him whether the driver poses an imminent danger to himself or others.

C. Dunn is mistaken in asserting that the caller's information was not specific or detailed. The tip included his name, gave an address, and described his distinctive truck, and said he was on the road at the time. The tip 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. 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 he 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

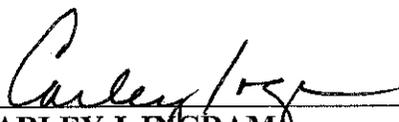
eventually charged. It is evident that they stopped him not because they thought he was breaking the law but because he was suicidal, and he had a plan and a weapon.

Conclusion

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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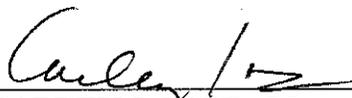
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2011 WL 598433

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Portage County.

STATE of Ohio, Plaintiff-Appellee,

v.

Mark T. WAGNER, Defendant-Appellant.

No. 2010-P-0014. Decided Feb. 18, 2011.

Criminal Appeal from the Portage County Municipal Court, Kent Division, Case No. K 2009 TRC 3624.

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Opinion

DIANE V. GRENDALL, J.

*1 ¶ 1 Defendant-appellant, Mark T. Wagner, appeals the Judgment Entry of the Portage County Municipal Court, Kent Division, in which the trial court denied Wagner's Motion to Suppress. For the following reasons, we reverse and remand the decision of the trial court.

¶ 2 On September 11, 2009, Lieutenant John Altomare of the Kent Police Department was working as an off duty officer for a Taco Bell restaurant in Kent, Ohio. At approximately 2:56 a.m., Altomare was informed by a Taco Bell employee, Michael Stumpf, that a driver at the drive-thru window was "drunk." Altomare radioed to dispatch that there was "a possible drunk driver in the drive-thru" and requested that a marked car respond. The marked car, driven by Officer Jerry Schlosser of the Kent Police Department, responded and stopped the vehicle after it had exited the drive-thru and had turned from East Main Street

onto Linden Street. The driver of this vehicle was Wagner.

¶ 3 Wagner was subsequently arrested and charged with Operating a Vehicle While Intoxicated (OVI), in violation of R.C. 4511.19(A)(1). The summons issued did not contain any traffic violations.

¶ 4 Altomare testified at the suppression hearing that after he received the information from Stumpf about the possible drunk driver and had radioed dispatch, he saw Wagner exit the Taco Bell parking lot, enter East Main Street, and then make a "wide right turn going into the other lane of travel." Altomare stated that he informed Officer Schlosser of this wide turn at some point but that he could not remember if he informed Schlosser or dispatch of the turn before Schlosser committed the stop of the vehicle or if he told Schlosser later, while Schlosser was writing his report of the incident. Altomare also testified that he did not actually witness Wagner face to face and therefore did not observe any behavior that indicated to him whether Wagner was intoxicated.

¶ 5 Wagner filed a Motion to Suppress, contending, among other arguments, that there was no probable cause to conduct a stop of Wagner's vehicle, that Wagner did not receive *Miranda* warnings, and that the sobriety tests were not administered properly.

¶ 6 A hearing on the motion was held on December 17, 2009. At the beginning of the hearing, Wagner's counsel indicated that the parties had agreed to limit the scope of the hearing to the issue of the probable cause of the stop of the vehicle only. During the hearing, the only testimony offered was that of Lieutenant Altomare. Officer Schlosser and Stumpf did not testify. During the hearing, a video from Schlosser's police cruiser was played but was not admitted into evidence. Judge Plough, the trial court judge, stated during the hearing that the tape "really doesn't show the turn" onto Linden Street.

¶ 7 After the hearing, the trial court found Schlosser's stop was based upon Wagner travelling left of center. The court held that this gave Schlosser reasonable and articulable suspicion to believe that Wagner was violating a traffic law and denied the Motion to Suppress.

*2 ¶ 8 On February 10, 2010, Wagner entered a plea of no contest and the court found him guilty of OVI. Wagner was sentenced to 90 days in jail, with 87 suspended and 3 days to serve in the Driver Intervention Program. Walker was also required to pay a \$750 fine, with \$375 suspended, and had his driver's license suspended for 1 year.

¶ 9 Wagner made an oral motion to the trial court for a stay of execution of his sentence, pending appeal. This motion was denied by the trial court. On March 9, 2010, Wagner filed a Motion for a Stay of Execution of Sentence with this court. This court granted Wagner a stay of his 3-day Driver Intervention Program and of his \$375 fine, pending the outcome of this appeal.

¶ 10 Wagner timely appeals and raises the following assignment of error:

¶ 11 "The trial court committed reversible error when it denied the appellant's motion to suppress evidence."

¶ 12 "The trial court acts as trier of fact at a suppression hearing and must weigh the evidence and judge the credibility of the witnesses." *State v. Ferry*, 11th Dist. No.2007-L-217, 2008-Ohio-2616, at ¶ 11 (citations omitted). "[T]he trial court is best able to decide facts and evaluate the credibility of witnesses." *State v. Mayl*, 106 Ohio St.3d 207, 833 N.E.2d 1216, 2005-Ohio-4629, at ¶ 41. "The court of appeals is bound to accept factual determinations of the trial court made during the suppression hearing so long as they are supported by competent and credible evidence." *State v. Hines*, 11th Dist. No.2004-L-066, 2005-Ohio-4208, at ¶ 14. "Once the appellate court accepts the trial court's factual determinations, the appellate court conducts a de novo review of the trial court's application of the law to these facts." *Ferry*, 2008-Ohio-2616, at ¶ 11 (citations omitted); *Mayl*, 2005-Ohio-4629, at ¶ 41, 106 Ohio St.3d 207, 833 N.E.2d 1216 ("we are to independently determine whether [the trial court's factual findings] satisfy the applicable legal standard") (citation omitted).

¶ 13 First, Wagner argues that the trial court's factual findings were not supported by competent, credible evidence. Wagner asserts that the "trial court's ruling fundamentally misrepresents the record" and relies upon mistaken facts.

¶ 14 The trial court found that Officer Schlosser saw Wagner make a wide right hand turn and that Schlosser conducted the stop of Wagner based on this traffic violation, providing reasonable, articulable suspicion to stop Wagner. However, the evidence in the record does not support this factual finding. Schlosser did not testify at the suppression hearing and therefore did not indicate what he observed or why he performed the stop of Wagner's vehicle. Additionally, although the video from Officer Schlosser's police cruiser was not admitted into evidence and is not in the record, Judge Plough stated during the hearing that whether Wagner travelled left of center was not visible in the video. The only person who testified as to seeing Wagner travel left of center was Lieutenant Altomare. As several of the court's factual determinations were not supported by competent and credible evidence, we must conduct a further review to determine if, based on the facts in the record, denial of Wagner's Motion to Suppress was proper.

*3 ¶ 15 Wagner also argues that there was no probable cause or reasonable suspicion to justify the stop of Wagner's vehicle because the only information Officer Schlosser had at the time he conducted the traffic stop was an informant's tip that Wagner was driving while "drunk." We agree.

¶ 16 "A police officer may stop an individual if the officer has a reasonable suspicion, based on specific and articulable facts that criminal behavior has occurred or is imminent. *Terry v. Ohio* (1968), 392 U.S. 1, 21 * * *. Moreover, detention of a motorist is reasonable when there exists probable cause to believe a crime, including a traffic violation, has been committed. *Whren v. United States* (1996), 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89." *State v. McNulty*, 11th Dist. No.2008-L-097, 2009-Ohio-1830, at ¶ 11. The determination of whether a reasonable suspicion exists "involves a consideration of 'the totality of the circumstances.'" *Hines*, 2005-Ohio-4208, at ¶ 16, citing *Maumee v. Weisner*, 87 Ohio St.3d 295, 299, 720 N.E.2d 507, 1999-Ohio-68 (citation omitted).

¶ 17 "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.” *Weisner*, 87 Ohio St.3d 295, 720 N.E.2d 507, at paragraph one of the syllabus. “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.” *Id.* at 297, 720 N.E.2d 507, citing *United States v. Hensley* (1985), 469 U.S. 221, 231, 105 S.Ct. 675, 83 L.Ed.2d 604 (emphasis sic). If the dispatch “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.

{¶ 18} In this case, there were two potential justifications that could have provided probable cause or reasonable suspicion to conduct a stop of Wagner's vehicle. We will first address the State's assertion that there was a traffic violation, that Wagner travelled left of center.

{¶ 19} “It is well established that an officer may stop a motorist upon his or her observation that the vehicle in question violated a traffic law.” *McNulty*, 2009-Ohio1830, at ¶ 13 (citations omitted). “This court has repeatedly held that a minor violation of a traffic regulation * * * that is witnessed by a police officer is, standing alone, sufficient justification to warrant a limited stop for the issuance of a citation.” *State v. Yemma*, 11th Dist. No. 95-P-0156, 1996 Ohio App. LEXIS 3361, at *6-*7, 1996 WL 495076 (citations omitted). A stop may be based solely upon driving a car left of center, in violation of R.C. 4511.25. *State v. Gibson-Sweeney*, 11th Dist. No.2005-L-086, 2006-Ohio-1691, at ¶ 16; R.C. 4511.25 (“Upon all roadways of sufficient width, a vehicle * * * shall be driven upon the right half of the roadway.”)

*4 {¶ 20} An officer typically has sufficient justification to effectuate a stop based on a violation such as travelling left of center, as occurred in this case. However, the failure of the state to prove that Schlosser either personally witnessed the traffic violation or that Altomare conveyed this information to Schlosser via dispatch prior to Wagner being stopped, prevents the stop from being valid.

{¶ 21} Since Officer Schlosser did not testify as to what he saw, any basis for reasonable suspicion must arise from Altomare's testimony as to the information dispatched to Schlosser. As stated in *Weisner*, the facts *precipitating* the dispatch must justify the reasonable suspicion of criminal activity. In this case, there is no evidence that Schlosser conducted the stop of Wagner based on the left of center violation. The state had the burden of presenting such evidence. When “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.” *Weisner*, 87 Ohio St.3d at 298, 720 N.E.2d 507.

{¶ 22} There was no evidence presented at the suppression hearing as to whether Schlosser had seen or even been informed that Wagner was driving left of center. While Altomare testified that he saw Wagner travel left of center, he also testified that he was unable to recall whether he dispatched this information to Schlosser *before* Schlosser performed the stop of Wagner. The record indicates that Altomare's observation occurred *after* he issued the original dispatch and *after* Schlosser had arrived at Taco Bell to wait for Wagner to exit the drive-thru. Since the state presented no evidence that a dispatch regarding the traffic violation was issued to Schlosser prior to conducting the stop of Wagner, no reasonable suspicion existed for a stop on these grounds.

{¶ 23} We must now consider whether the stop was valid because of Stumpf's assertion, conveyed to Schlosser through dispatch, that Wagner was driving while intoxicated.

{¶ 24} “A citizen-informant who is the victim of or witness to a crime is presumed reliable.” *State v. Livengood*, 11th Dist. No.2002-L-044, 2003-Ohio-1208, at ¶ 11 (citation omitted). When determining the validity of such an informant's tip, we should consider whether the “tip itself has sufficient indicia of reliability to justify the investigative stop” by considering the “informant's veracity, reliability, and basis of knowledge.” *Weisner*, 87 Ohio St.3d at 299, 720 N.E.2d 507.

{¶ 25} Stumpf was a Taco Bell employee who relayed information that he believed Wagner was

drunk to Lieutenant Altomare. Because Stumpf is a citizen-informant, we presume that he was generally reliable. However, we must also consider whether the information relayed by Stumpf to Altomare, and ultimately to Schlosser, had sufficient indicia of reliability and a basis of knowledge that would justify a stop of Wagner's vehicle.

*5 ¶ 26 Altomare, the only witness to testify at the suppression hearing, stated that Stumpf informed him that Wagner, who was at the drive-thru window, was "drunk." Altomare did not testify as to any other statements made by Stumpf, or explain any additional details as to why Stumpf believed Wagner was drunk. Additionally, Altomare never observed Wagner face to face on that night and had no personal knowledge of whether Wagner was drunk. Upon receiving information only that Wagner was "drunk," Altomare informed dispatch of a possible drunk driver.

¶ 27 A citizen informant's statement that the suspect was "drunk," without more, does not provide reasonable suspicion. An informant must give some details providing reasonable suspicion of drunk driving. See *State v. Brant*, 10th Dist. No. 01AP-342, 2001-Ohio-3994, 2001 Ohio App. LEXIS 5263, at *8-9 (where a tip given by a citizen indicated that the suspect "was honking his horn for ten minutes, his shirt was on backwards and inside out and his speech was very slow," and the citizen did not indicate that he

"witnessed any traffic violations, unlawful behavior, or evidence of impaired driving," there was not reasonable suspicion of OVI to stop the suspect); *State v. Morgan*, 11th Dist. No.2008-P-0098, 2009-Ohio-2795, at ¶ 22 (the odor of alcohol, strange behavior, and comments made about not being sober provided reasonable suspicion for a stop to be conducted).

¶ 28 Stumpf's information that Wagner was drunk, without any additional description of signs of intoxication such as slurred speech, odor of alcohol, or erratic driving, does not provide reasonable suspicion to conduct a stop. Although an informant's tip may be considered reliable, the tip must also provide some facts that create a reasonable suspicion of criminal activity.

¶ 29 Wagner's sole assignment of error is with merit.

¶ 30 For the foregoing reasons, the Judgment Entry of the Portage County Municipal Court, Kent Division, denying Wagner's Motion to Suppress, is reversed and remanded for further proceedings consistent with this opinion. Costs to be taxed against appellee.

TIMOTHY P. CANNON, P.J., and MARY JANE TRAPP, J., concur.

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