LEXSEE 1997 OHIO APP. LEXIS 4710

STATE OF OHIO, Plaintiff-Appellant v. DAROHEEM JOHNSON (71249), DONALD CHANDLER (71250), Defendants-Appellees

NOS. 71249, 71250

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

1997 Ohio App. LEXIS 4710

October 23, 1997, Date of Announcement of Decision

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDING: Criminal appeal from Common Pleas Court. Case No. CR-329557.

DISPOSITION: JUDGMENT: Reversed and Remanded.

COUNSEL: For Plaintiff-Appellant: STEPHANIE TUBBS JONES, ESQ., Cuyahoga County Prosecutor, EDWARD F. FERAN, ESQ., Assistant County Prosecutor.

For Defendants-Appellees: WILLIAM A. CARLIN, ESQ., NICHOLAS A. PAPA, ESQ., CARLIN & CARLIN, Pepper Pike, Ohio. CHARLES L. PATTON, ESQ., Cleveland, Ohio.

JUDGES: DIANE KARPINSKI, JUDGE. BLACKMON, P.J., CONCURS; ABOOD *, J., DISSENTS.

* Judge Charles D. Abood, Retired, of the Sixth District Court of Appeals, sitting by assignment.

OPINION BY: DIANE KARPINSKI

OPINION

JOURNAL ENTRY AND OPINION

KARPINSKI, J.:

The State of Ohio appeals from the decision of the trial court which granted defendants' motion to suppress. On appeal, the state argues that the trial court erred by granting the motion to suppress, because the officers had a reasonable suspicion to justify stopping defendants' car. For the reasons that follow, we find merit to this argument and reverse the judgment of the court below.

On July 26, 1995, a Cleveland Police dispatcher sent out a police radio call at 10:10 p.m. This call, which has been transcribed, [*2] asks, "anyone care to respond to 98 and Anderson for shots fired coming from a bright yellow (inaudible) auto." A few moments later, in a follow-up call, the dispatcher added "newer model." In response, Officers John Dlugolinski and Tom Balak drove to this area and five blocks away on Anderson, observed a "bright yellow newer model auto parked in the driveway of 9318 Anderson." The officers arrived at this location at 10:20 p.m. They immediately parked behind the car and observed two males in the car, one in the back seat and one in the driver's seat. The officers then drew their weapons and ordered the two men out of the car.

After the two men were secured in the police car, the officers searched the yellow car "so we could further investigate the automobile for the public and my safety, to make sure there were no weapons in that vehicle." In their search for weapons, the officers found a black

leather pouch in the glove-box. Protruding from this pouch was a bag containing a white substance packaged in several smaller bags. The police never recovered any weapon. Nor did the officers notice any suspicious activity by the defendants in the yellow car.

The recording of the call giving [*3] the tip to the police was destroyed. [1] The police records reveal that the reported tip was made from the address where Kevin Gardner lives. Mr. Gardner testified, however, that he did not recall any gunshots on the night in question. More importantly, he did not remember making a call to the police.

> 1 This tape was destroyed pursuant to police procedure by which audio tapes of incoming calls are erased after 30 days unless a request is made to save them. We agree with the trial judge's recommendation that "where a felony arrest is made, the police could routinely request retention of the tape until the defendant is sentenced or acquitted or until it is otherwise apparent the tape is not likely to be needed."

The trial court granted defendants' motion to suppress, on the grounds that the police did not have a reasonable suspicion to stop defendants' auto.

The state timely appeals, raising the following sole assignment of error:

> I. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S [*SIC*] MOTION [*4] TO SUPPRESS EVIDENCE.

In granting the motion to suppress, the trial court explained as follows:

> Where police rely on a radio broadcast to establish probable cause for a search, the State must establish the reliability of the informant either through police observation, experience, or communication with the informant, through the informant himself, or by corroboration at the investigative scene prior to the search. Here the reputed informant has no recollection of the call; the police did not corroborate any alleged criminal conduct prior to the search; and the reliability of the informant was not established.

Opinion at 5. We disagree with this analysis.

When reviewing a trial court's decision on a motion to suppress, we defer to the trial court and accept the lower court's findings of fact if supported by competent credible evidence. *State v. Klein* (1991), 73 Ohio App. 3d 486, 488, 597 N.E.2d 1141. However, "accepting the findings of fact of the trial court as true, an appellate court must then independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court erred in applying the substantive law to the case." [*5] *State v. Harris* (1994), 98 Ohio App. 3d 543, 546, 649 N.E.2d 7.

The Supreme Court, in *Alabama v. White* (1990), 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301, held that the totality of circumstances test is used to determine whether a tip to the police is sufficient to justify an investigatory stop. Generally, an anonymous tip, standing alone, is insufficient because it lacks the necessary indicia of reliability to support an investigatory stop of a suspect. *Id.* at 329, 330. The anonymous tip, "provides virtually nothing from which one might conclude that [the caller] is either honest or his information reliable; likewise, the [tip] gives absolutely no indication of the basis for the [caller's] predictions regarding *** criminal activities." *Id.* at 328, 329, quoting *Illinois v. Gates* (1983), 462 U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317. The tip can suffice, however, if it is (1) corroborated by independent police investigation or observation or (2) shows an accuracy of detail or ability to predict future events so that the tip may exhibit a sufficient indicia of reliability. Finally, even under the totality of the circumstances approach of *Alabama v.* [*6] *White*, reasonable suspicion to support an investigatory stop can be based on a police officer's independent observations of suspicious or criminal activity. *State v. Evans* (1993), 67 Ohio St. 3d 405, 410, 618 N.E.2d 162.

Regarding the level of corroboration necessary to justify the stop, the U.S. Supreme Court emphasized that the police in *White* corroborated the tipster's predictions of future behavior. The Court specifically noted the difference between identifying easily obtainable facts and predicting future facts.

> We think it also important that, as in *Gates*, "the anonymous [tip] contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." *** The fact that the officers found a car precisely matching the caller's description in front of the 235 building is an example of the former. Anyone could have "predicted" that fact because it was a condition presumably existing at the time of the call. What was important was the caller's ability to predict respondent's future behavior, because it demonstrated inside information--a special [*7] familiarity with respondent's affairs. (Citation omitted.)

White at 333. In other words, "simple corroboration of neutral details describing the suspect or other conditions existing at the time of the tip, without more, will not produce reasonable suspicion for an investigatory stop." *State v. Ramsey*, 1990 Ohio App. LEXIS 4120 (Sept. 20, 1990), Franklin App. Nos. 89AP-1298, 89AP-1299, unreported at 5. [2] However, see also, *U.S. v. Johnson* (8th Cir. 1995), 64 F.3d 1120 at 1125, "[*Alabama v. White*] does not create a rule requiring that a tip predict future action."

> 2 The failure to predict future behavior was a prominent factor in this court's decision to suppress the results of an investigatory stop which had relied on an anonymous tip. *State v. Rose*, 1997 Ohio App. LEXIS 1119 (Mar. 20, 1997), Cuyahoga App. No. 69599, unreported. While the tip in *Rose* concerned a description of a car and the driver as well as the possession of an illegal firearm, the tip was a day old and not an immediate response to gunshots.

Information from [*8] an anonymous tip which is broadcast from a police dispatcher can form the basis of an investigatory stop if the police sufficiently corroborate the information pursuant to *Alabama v. White*. So held the Hamilton County Court of Appeals in *State v. Franklin* (1993), 86 Ohio App. 3d 101, 619 N.E.2d 1182. In upholding the investigatory stop, the court stated,

> Officer Anderson had a reasonable basis for stopping the defendant to make inquiry. The police dispatcher's radio broadcast--a presumptively trustworthy source--provided reasonable suspicion of criminal activity even though the information was anonymous. *See State v. Holden* (1985), 23 Ohio App. 3d 5, 23 OBR 38, 490 N.E.2d 629. Although he did not discern a weapon at the scene, when the officer observed the green automobile and a group of persons at the specified location, the anonymous report was sufficiently corroborated to justify the investigative stop. *Alabama v. White* (1990), 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301.

Franklin at 104. *See also, State v. Butler*, 1996 Ohio App. LEXIS 2155 (May 23, 1996), Cuyahoga App. No. 68581, unreported. [3]

> 3 In *State v. Smartt* (1989), 61 Ohio App. 3d 137, 138, 572 N.E.2d 204, this court held "the specific nature of the information contained in a police bulletin cannot alone be used to prove that the action of the police was based on reliable information." *Smartt* was decided, however, prior to the Supreme Court's holding in *Alabama v. White, infra.* Moreover, the case at bar differs from *Smartt* in that the within case involves gunshots.

[*9] In the case at bar, although we do not know all the details of the tip, the dispatch reported gunshots as well as drug activity. A line of recent federal appellate decisions has held that under the totality of circumstances approach of *Alabama v. White*, it is not necessary to predict future behavior when the tip concerns firearms.

In *U.S. v. Gibson* (11th Cir. 1995), 64 F.3d 617, certiorari denied (1996), U.S. , 116 S. Ct. 1580, 134 L. Ed. 2d 678, the court upheld the stop after officers responded to an anonymous tip of two African-American males in a bar, one of whom appeared to be armed. The tip further noted what the two males were wearing. The court held that the police were justified in relying on a tip which did not predict future behavior, because the tip concerned an armed man in a bar.

Similarly, the Second Circuit in *U.S. v. Bold* (2nd Cir. 1994), 19 F.3d 99, upheld the stop and frisk of two

men and their car after police acted on an anonymous tip of three black males, one of whom was armed, in a gray Cadillac parked in a lot. The court held that the stop was justified because the tip concerned guns, not merely drugs. Quoting a prior D.C. [*10] Circuit case, the court stated at 104, "the unique dangers presented to law officers and law-abiding citizens by firearms are well chronicled. *** An officer who is able to corroborate other information in an anonymous tip that another person is in actual possession of a gun is faced with an unappealing choice. *** He must either stop and search the individual, or wait until the individual brandishes or uses the gun." (Citations omitted.)

Finally, in *U.S. v. Clipper* (D.C. Cir. 1992), 297 U.S. App. D.C. 372, 973 F.2d 944, certiorari denied (1993), 506 U.S. 1070, 113 S. Ct. 1025, 122 L. Ed. 2d 171, the court held that *Alabama v. White* does not establish a categorical rule that the police must predict future behavior. The court upheld the stop and frisk of the defendant after corroborating an anonymous tip of an armed black male wearing a green and blue jacket with a black hat. See also, *U.S. v. Roberson* (3rd Cir. 1996), 90 F.3d 75; *U.S. v. Lee* (11th Cir. 1995), 68 F.3d 1267 (both stating that a different rule may apply for tip involving guns as opposed to drugs).

In the case at bar, the tip concerned guns in addition to drugs. Most importantly, the report was for more [*11] than just guns, it was for **gunshots recently fired**. We agree with *Clipper*, *Bond*, and *Gibson* to the extent that a report of recent gunshots must be taken into consideration under the totality of the circumstances test. In a drug tip, mere corroboration of neutral details is insufficient to satisfy the Fourth Amendment for an investigatory stop. However, the fact the tip reported recently fired gunshots increases the need for more immediate action by the police. Second, the car was identified within ten minutes in the immediate area of the tipster. Third, the tip reported the gunshots came from a bright yellow car, recent model. Admittedly, the color of a car is a readily observable fact. The uniqueness of this auto color, however, together with the close proximity in time and space between the tip and the discovery of the car, was sufficient to justify the stop of the car but only because of the urgency of recent gunshots. Under the totality of circumstances test, the police had a reasonable suspicision justifying the stop of the car. Accordingly, the trial court erred when it suppressed the evidence found in the car.

Judgment reversed and remanded.

This cause is reversed [*12] and remanded. It is, therefore, ordered that appellant recover of appellees its costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

BLACKMON, P.J., CONCURS;

ABOOD *, J., DISSENTS.

* Judge Charles D. Abood, Retired, of the Sixth District Court of Appeals, sitting by assignment.

DIANE KARPINSKI

JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 27. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by [*13] the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).