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STATE OF MICHIGAN

IN THE SUPREME COURT

People of the State of Michigan,
Plaintiff-Appellee,

Supreme Court No: 159981

COA No.: 340859

vs.

Circuit Ct No.:17-105478-AR
Trial Ct No: 16-1285-SD

Victoria Pagano,
Defendant-Appellant

_______________________________/

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BRIEF ON APPEAL –APPELLEE

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TABLE OF CONTENTS

INDEX OF AUTHORITIES 3

JURISDICTIONAL STATEMENT 5

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW 6

I. MAY AN OFFICER MAKE AN INVESTIGATIVE TRAFFIC STOP BASED ON A PARTICULARIZED AND OBJECTIVE BASIS?

II. DID THE COURT OF APPEALS PROPERLY FIND THAT THE DEPUTY PERFORMED A LEGAL TRAFFIC STOP BY HAVING A PARTICULARIZED AND OBJECTIVE BASIS TO SUSPECT THE DEFENDANT OF CRIMINAL ACTIVITY FROM A 911 CALL WHERE THE CALLER STATED THAT THE DEFENDANT WAS INTOXICATED?

COUNTER STATEMENT OF FACTS 7

STANDARD OF REVIEW 11

ARGUMENTS 12

I. AN OFFICER MAY MAKE AN INVESTIGATIVE TRAFFIC STOP BASED ON A PARTICULARIZED AND OBJECTIVE BASIS.

II. THE COURT OF APPEALS PROPERLY RULED THAT THE DEPUTY PERFORMED A LEGAL TRAFFIC STOP BY HAVING A PARTICULARIZED AND OBJECTIVE BASIS TO SUSPECT THE DEFENDANT OF CRIMINAL ACTIVITY FROM A 911 CALL WHERE THE CALLER STATED THAT THE DEFENDANT WAS INTOXICATED

CONCLUSION AND RELIEF REQUESTED 25

INDEX OF AUTHORITIES

Case Law

Alabama v. White, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990) 9, 18, 19, 20, 21

Florida v. *J. L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000) 19, 23

Goodlataw v. State, 847 P.2d 589 (1993) 14

Navarette v. California 572 U.S. 393, 134 S.Ct. 1683, 188 L. Ed. 2d 680 (2014) 9, 10, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

People v Antwine, 293 Mich App 192 (2011) 11

People v. Barbarich, 291 Mich app 468 (2011) 7, 9, 10, 12, 13, 18, 19, 21, 23, 24

People v Horton, 283 Mich. App. 105 (2009) 13

People v Jenkins, 472 Mich 26; 691 NW2d 759 (2005)) 14

People vs. Pagano, No. 2019 WL 2273357, (MI COA: #340859, unpublished) May 28, 2019 .. ..10, 18, 21, 22

People v Roberts, 292 Mich App 492 (2011) 11

People v. Tooks, 403 Mich. 568, 577 (1978).. 9

State v Kissner, 390 N.W.2d 58 (1986) 13, 14

Terry v Ohio, 392 U.S.1, 20 L.Ed.2d 889, 88 S. Ct. 1869 (1969). 19

Michigan Statutes

MCL 257.624a 7

MCL 257.625.... 7

MCL 257.625(7) 7

RECEIVED by MSC 7/15/2020 1:05:29 PM

Michigan Court Rules

MCR 2.119(F)...9

MCR 7.305(B) 5

MCR 7.312(e) 5

RECEIVED by MSC 7/15/2020 1:05:29 PM

JURISDICTIONAL STATEMENT

MCR 7.305(B) provides the grounds for the Supreme Court to hear an appeal by Application for Leave to Appeal a final judgment entered by the Court of Appeals. This is an appeal by Appellant from the May 28, 2019, unpublished opinion by the Court of Appeals. This Honorable Court granted leave to appeal on December 23, 2019.

This responsive brief is timely under MCR 7.312(E).

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. **MAY AN OFFICER MAKE AN INVESTIGATIVE TRAFFIC STOP BASED ON A PARTICULARIZED AND OBJECTIVE BASIS?**

Appellant answers: Yes
Appellee answers: Yes
Trial Court answers: Did not answer
Court of Appeals answers: Yes

II. **DID THE COURT OF APPEALS PROPERLY FIND THAT THE DEPUTY PERFORMED A LEGAL TRAFFIC STOP BY HAVING A PARTICULARIZED AND OBJECTIVE BASIS TO SUSPECT THE DEFENDANT OF CRIMINAL ACTIVITY FROM A 911 CALL WHERE THE CALLER STATED THAT THE DEFENDANT WAS INTOXICATED?**

Appellant answers: No
Appellee answers: Yes
Trial Court answers: No
Court of Appeals answers: Yes

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COUNTER STATEMENT OF FACTS

On July 31, 2016, the Defendant was driving a motor vehicle in Huron County, Michigan. She was stopped and ultimately arrested by Huron County Deputy Sheriff Eric Hessling for Operating While Intoxicated (OWI) in violation of MCL 257.625, and Open Intoxicants in Violation of MCL 257.624a.

Based on the arrest, the Huron County Prosecutor's office issued a two-count Complaint and Warrant for the Defendant on the charges of Operating While Intoxicated – Occupant Less Than 16 in violation of MCL 257.625(7) and for: Alcohol – Open Container in Vehicle in Violation of MCL 257.624a. The Complaint was authorized by the Magistrate on August 1, 2016. (District Court Register of Actions, hereinafter to as RA, pg. 2)

On March 21, 2017, a hearing was held by the 73B Judicial District Court on Defendant's motion that was entitled a "Motion to Dismiss."[1] Deputy Hessling, the arresting officer, was the only witness for the hearing. During the hearing Deputy Hessling testified that he was informed by Central Dispatch (911) of a female driver who was possibly intoxicated (Hearing Transcript, hereinafter HT, pg. 4) and that she had left the area on M-25 near Port Crescent State Park traveling westbound. (HT pg. 5) This information was based on a caller's personal observation stated to the 911 Central Dispatcher. (HT pg. 4)

The caller reported the woman was intoxicated and yelling at her children (HT pg. 7) and then seen getting in a vehicle and driving away. (HT pg. 5, 7) The call was received by 911 at

---

[1] While Defendant's motion was entitled a "Motion to Dismiss," in actuality it should have been a "Motion to Suppress" based on an alleged illegal stop and thus suppress any evidence obtained pursuant to the traffic stop. See *People v Barbarich*, 291 Mich app 468 (2011), where the lower court heard the motion of the alleged traffic stop pursuant to a Motion to Suppress.

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2:46 p.m. (HT pg. 8) Deputy Hessling further testified that he was given the make, model, color, and license plate number of the vehicle by central dispatch. (HT pg. 8)

Deputy Hessling testified that less than 30 minutes later he saw the same vehicle, matching the make, model, color and license plate. (HT pg. 8) He initially saw the Defendant in the vehicle in the parking lot of a convenience store at the intersection of M-25 and State Park Road. (HT pg. 5) He had turned around and as he approached the intersection at M-25 and State Park, he observed the Defendant pulling out of the parking lot. (HT pgs. 5-6) Deputy Hessling testified he did not see any traffic violations committed by the Defendant. After confirming the make, model, color and license plate, and based on the information from 911 Central Dispatch, Deputy Hessling pulled the defendant over. (HT pg. 7)

At the conclusion of the hearing, the Court made the following ruling:

> This case involves a so-called tip by a citizen. And the police officer is, in fact, allowed to investigate a possible crime or a possible problem with a driver that is according to the tipster or the citizen who is apparently concerned or not concerned even. It could be someone with a grudge but regardless, a police officer may investigate that type of information. However, in a tip type situation, the police officer must establish reliability in terms of the information provided by the person who calls 9-1-1.
>
> And in this case, the police officer had the correct information regarding make, model, year, and license plate and so on. He initiated his investigation. However, based upon the police officer's testimony, the defendant was pulled over strictly based upon the information give to 9-1-1. There was no other violation of the motor vehicle code; no erratic driving; no crossing the center line; no equipment failure; no apparent sleeping or under the influence and so on.
>
> And so, although we have a valid tip, we don't have valid reliability or validated reliability. And so Ms. Krohn, you're correct that the police officer has every right to investigate that situation, however, there must be reliability that is established on a reasonable basis. And in this case that didn't happen. I have no doubt that Officer Hessling – Deputy Hessling

was acting in the interest of public safety. However, in this case we don't have probable cause to stop this vehicle.

(HT pgs. 13-14)

The Order of Dismissal was submitted and signed on April 13, 2017. Pursuant to MCR 2.119(F) and within 21 days, the People filed a Motion for Reconsideration based on case law that was not cited during the hearing. The Court issued a written opinion dated May 1, 2017 denying the Motion for Reconsideration.

In its written order denying the Motion for Reconsideration, the Court stated in part:

> In Michigan, the standard to initiate a traffic stop based on a tip is stated in *People v. Barbarich*, 291 Mich. App. 468 (2011), which holds that, "In assessing the reliability of a tip, the Michigan Supreme Court has mandated that courts consider, in light of the totality of the circumstances, "(1) the reliability of the particular informant (2) the nature of the particular information given to the police and, (3) the reasonability of the suspicion in light of the above factors." *People v. Tooks*, 403 Mich. 568, 577 (1978)
>
> The leading case regarding this subject is *Navarette v. California*, 134 S. Ct. 1683 (2014). Although based on the facts cited in *Navarette*, the Court found that the tip given to the police officer was sufficient for probable cause for the stop, it also found that "an anonymous tip alone seldom demonstrates the informants basis of knowledge or veracity." Citing, *Alabama v. White*, 110 S. Ct. 2412 (199) [sic].
>
> Based on the testimony and the facts and circumstances herein, the Court found on the record during the motion hearing that the 911 tip alone did not meet the standards necessary to stop the vehicle in this matter. After review of the transcript from the motion hearing, the Court does not find any palpable error by which the Court or the parties have been misled and a different disposition should have resulted.
>
> *Order Denying Motion for Reconsideration*, May 1, 2017

The People filed a timely Appeal of Right to the Circuit Court on the District Court's ruling that the stop was illegal and the resulting dismissal of the case.

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On September 27, 2017, the parties argued the appeal before the Honorable Gerald M. Prill. On October 18, 2017, the Circuit Court filed a written opinion affirming the District Court's ruling. In part, the court declared:

> Considering the totality of the circumstances, this Court agrees that the unidentified caller's information pertaining to the make, model, description and color of the vehicle contained sufficient indicia of reliability. However, there must be something more in the content of the information as there was in *Navarette* and *Barbarich*. In those cases, the "more" was running someone off the road or a near collision. There is nothing more in this record to provide Deputy Hessling other than the conclusion of an unidentified caller that Ms. Pagano was intoxicated.
>
> *Circuit Court Ruling*, October 18, 2017

The People filed Leave to Appeal with the Court of Appeals. The application to file the Leave to Appeal was granted on April 20, 2018, with oral arguments held on March 13, 2019. The Court of Appeals reversed the lower court's decision in an opinion dated May 28, 2019, finding that the "informant's tip provided accurate details that were corroborated by the officer, making it potential criminal activity. Under the circumstances of this case, the interest in ensuring public safety on a roadway outweighed the minimally invasive nature of a traffic stop." *People vs. Pagano*, No. 340859, MI COA, unpublished opinion, dated May 28, 2019, pg. 5.

Defendant—Appellant filed Leave to Appeal with this Court which was granted on December 23, 2019.

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STANDARD OF REVIEW

While the motion filed in the District Court was entitled "Motion to Dismiss," it was in actuality a "Motion to Suppress" all evidence based allegedly on an illegal traffic stop. When a trial court's decision on a motion to suppress evidence is based on an interpretation of the law, appellate review is de novo. *People v Antwine*, 293 Mich App 192, 194; 809 NW2d 439 (2011). Any findings of fact that are determinative for the motion are reviewed for clear error. *Id.* "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Roberts*, 292 Mich App 492, 502; 808 NW2d 290 (2011).

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ARGUMENT

I. AN OFFICER MAY MAKE AN INVESTIGATIVE TRAFFIC STOP BASED ON A PARTICULARIZED AND OBJECTIVE BASIS.

In the leading case on this issue (although not mentioned by Appellant), the United States Supreme Court in *Navarette v. California* 572 U.S. 393, 134 S.Ct. 1683, 188 L. Ed. 2d 680 (2014) stated that:

> The Fourth Amendment permits brief investigative stops—such as the traffic stop in this case—when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." United States v. Cortez, 449 U.S. 411, 417-418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981); see also Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). **The "reasonable suspicion" necessary to justify such a stop "is dependent upon both the content of information possessed by police and its degree of reliability."** Alabama v. White, 496 U.S. 325, 330, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990). The standard takes into account "the totality of the circumstances—the whole picture." Cortez, supra, at 417, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). Although a mere "'hunch'" does not create reasonable suspicion, Terry, supra, at 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause, United States v. Sokolow, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). [emphasis added]
>
> *Navarette v. California*, *Id*, 396-397.

In the Michigan case of *People v Barbarich*, 291 Mich App 468 (2011), the facts are very similar to this case. In that case, the Court of Appeals upheld a traffic stop based on information from an unnamed citizen who provided contemporaneous information about erratic driving. The witness, while driving and passing a Michigan State Police car, pointed out a car to the state trooper and mouthed the words that the car almost hit her. The trooper, based on that information alone and observing no illegal activity, performed a traffic stop on the vehicle that the driver pointed too.

In reversing the lower court's decision to dismiss, the court of appeals stated:

> In this case, sufficient indicia of reliability supported the citizen's tip, and Bommarito was justified in conducting the investigative stop. The tip provided sufficient information to accurately identify the vehicle and create an inference that a crime or civil infraction had occurred, and the tip was also sufficiently reliable, being based on the woman's contemporaneous observations. Under the totality of the circumstances, Bommarito had a **reasonable, articulable suspicion that justified an investigative stop of defendant's vehicle**. The circuit court erred by concluding otherwise. [emphasis added]
>
> *People v. Barbarich, Id.* at 482 (2011).

In the case of *People v Horton,* 283 Mich. App. 105 (2009), the Michigan Court of Appeals reviewed a motion to suppress where the lower court dismissed charges involving a firearm in a vehicle based on an anonymous tip. The tip, made in person to the officer dealt with a black male driving a burgundy Chevrolet Caprice at a different gas station a short distance away who possibly had an Uzi type firearm. The officers responded to that location within five minutes, pulled behind the vehicle, activated their lights and requested the driver's paperwork. In upholding the detention, the court noted that based on the totality of the circumstances, the officers had reasonable suspicion to briefly detain the defendant.

In a South Dakota case, *State v Kissner,* 390 N.W.2d 58 (1986), the Supreme Court of South Dakota looked at a similar situation to the case at bar. There the police department received a call from a private citizen about a vehicle that was apparently being driving in an intoxicated matter and where it was located. The officer stopped the vehicle as it left a gas station without seeing any traffic violations. In upholding the stop, and ultimately the arrest, the court noted that:

> A police officer must have a specific and articulable suspicion of a violation before the stop of a vehicle will be justified. The factual basis required to support a stop is minimal. The stop cannot be the product of

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> mere whim or idle curiosity; it is enough if the stop is based upon specific and articulable facts which, taken together with rational inferences from those facts, reasonable warrant the intrusion.
>
> *State v Kissner*, *Id*, at pg. 60 (1984). (See also *Goodlataw v. State,* 847 P.2d 589 (1993), Alaskan Court of Appeals upholding stop of intoxicated driver based on anonymous tip.)

Appellant-Defendant states that an investigative stop does not violate the Fourth Amendment if the officer has a reasonable suspicion that criminal activity is afoot, (citing *People v Jenkins*, 472 Mich 26; 691 NW2d 759 (2005)) and that a reasonable suspicion is something more than an "inchoate or unarticulated suspicion or hunch." Appellant's Brief pg. 4. Appellee agrees with that statement. In the case before this court, the officer was not acting on a particularized suspicion or a hunch, but on specific statements that indicated the driver of the vehicle was intoxicated.

The parties agree that if an officer has a particularized and objective basis to suspect a person of criminal activity while driving, the officer can stop the vehicle to investigate further. The question is did the deputy in this case have that basis; was the information reliable for an investigative stop.

II. THE COURT OF APPEALS PROPERLY RULED THAT THE DEPUTY PERFORMED A LEGAL TRAFFIC STOP BY HAVING A PARTICULARIZED AND OBJECTIVE BASIS TO SUSPECT THE DEFENDANT OF CRIMINAL ACTIVITY FROM A 911 CALL WHERE THE CALLER STATED THAT THE DEFENDANT WAS INTOXICATED

The facts in this case are not in dispute by the parties, it is the interpretation of those facts to the law where the dispute arises. The essential issue is: did the Court of Appeals correctly apply the facts to the case law of the U.S. Supreme Court and the Michigan Court of Appeals? The answer to that question is yes, it did.

The Trial Court ruled that the 911 call and the supporting details did not supply sufficient indicia of reliability for reasonable suspicion to conduct an investigatory stop of the defendant's vehicle. The trial court found that the deputy matched all of the information provided by the caller: make, model, color, license plate number, and female driver. But the lower court then declared that even more was needed for a traffic stop. The Circuit Court agreed in part, finding that the 911 call provided sufficient indicia of reliability, but again, holding that more was needed.

In the lower court's ruling, the trial court declared that the deputy did not have probable cause for the stop, however, that is the not the standard. The question is not if there was probable cause, but rather was there **reasonable suspicion** to stop the vehicle and to conduct a further investigation. Was there a particularized and objective basis for suspecting the defendant of criminal activity?

Based on *Navarette*, supra, in determining if the officer had the necessary reasonable suspicion, the first question is: What was the content of the information possessed by the deputy in this case? The deputy in this case was informed that the female driver of a particular vehicle was driving while intoxicated. The deputy had been told the type of vehicle, the make, the

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model, and the license plate and a general area of her location. He was also told that the driver was a woman who was intoxicated as she got into the vehicle. Thus the content of the call provided sufficient information that a crime was being committed that could affect public safety by a particular person. The content of the information would allow an officer to quickly determine if all of the details of the call were correct. With the exception of intoxication, all other details were confirmed prior to the stop

The second question is: Was the information sufficiently reliable for the officer to trust it? During the hearing on the case at bar, there was no indication if the person who called 911 provided her name. Thus, for purposes of this appeal, the caller will be treated as an anonymous caller.

Navarette, supra, looked at that very issue, the anonymous nature of a 911 call and found it reliable for a number of reasons. First, the U.S. Supreme Court noted that based on the information, it was clear that the caller "claimed eyewitness knowledge" and that because it was an eyewitness, that added support to the reliability of the tip. Additionally, it was clear that the call was made contemporaneous with the observations which also added to the reliability and trustworthiness of the report. In the case before this court, the 911 call was by a person who was watching the events unfold, e.g. 'claimed eyewitness knowledge,' and the call to the central dispatch was made contemporaneously with what was observed.

Next, in *Navarette*, supra the Supreme Court stated that: "even assuming for present purposes that the 911 call was anonymous, see n.1, supra, we conclude that the call bore adequate indicia of reliability for the officer to credit the caller's account." *Navarette v. California*, *Id,* at 398. The Supreme Court thus found that the 911 call with the additional details, provided "adequate indicia of reliability" whether it was an anonymous call or not. This was due

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to the timing of the call to 911, the details provided, and the fact that the caller made the report using the 911 emergency system. The court looked at the totality of the circumstances and found that the 911 call and the supporting details were sufficient for the officer's stop to investigate further.

In *Navarette*, the Supreme Court held:

> Under the totality of the circumstances, we find the indicia of reliability in this case sufficient to provide the officer with reasonable suspicion that the driver of the reported vehicle had run another vehicle off the road. That made it reasonable under the circumstances for the officer to execute a traffic stop.
>
> *Navarette v. California*, *Id,* at 404.

In *Navarette,* a person was run off the road by a certain vehicle. The person then called 911, providing the make, model and license plate of the vehicle stating that it had run her off the road. The caller was concerned the person was intoxicated. Approximately 15 minutes later, law enforcement officers observed a vehicle that matched the make, model and license plate with a resulting traffic stopped.

The facts in that opinion are on point to the case before this court. In the case before this Court, a person called 911 providing the make, model, color and license plate of the vehicle as well as that a woman was driving it. ("Motion to Dismiss" [sic] Transcript, pg. 6) The caller also reported that the vehicle was heading south. Approximately 30 minutes later, the deputy observed a vehicle that matched the make, model, color and license plate with a woman driving the vehicle. Those observations resulted in the traffic stop.

In this case, the Trial Court ruled that deputy Hessling "had the correct information regarding make, model, year, and license plate and so on." Thus, the officer had corroborated the details of the 911 call. That provided sufficient reliability for the officer to stop the

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defendant/appellee and do an investigation on the call. The Court of Appeals agreed, citing *People v Barbarich*, supra stating:

> In this case, we are not persuaded that the tip was insufficiently reliable. Less information is required to justify a traffic stop when the informant's tip relates to potentially dangerous driving because the interest in ensuring public safety on a roadway is high compared with the minimally invasive nature of a traffic stop. See *Barbarich*, 291 Mich App at 479. Although the quantity of the tip information must be sufficient to identify the vehicle and to support an inference of a traffic violation, when public safety on the roadway is at stake, less is required with regard to the reliability of the tip, and it is enough "if law enforcement corroborates the tip's innocent details." *Id.* at 479-480.
>
> *People v Pagano*, No.: 340859 MI COA, unpublished, pg. 4

The Supreme Court in *Navarette* ruled the details provided during the 911 call were sufficient for reliability, however, the Trial Court in this case stated that more was needed to corroborate the reliability of the information. That was in direct contradiction to what the U.S. Supreme Court declared when a 911 call is involved and the same additional facts are supplied. The lower court stated in its written ruling of the Motion for Reconsideration that:

> Although based on the facts cited in *Navarette*, the Court found that the tip given to the police officer was sufficient for probable cause for the stop, it also found that "an anonymous tip alone seldom demonstrates the informants basis of knowledge or veracity." Citing, *Alabama v. White*, 110 S. Ct. 2412 (199) [sic].

That is a misreading of the *Navarette* opinion. First, the issue was if the tip was sufficient for reasonable suspicion, not proable cause, a lower standard. Second, the United States Supreme Court started with the premise that an anonymous tip alone seldom provides a sufficient basis; then noted that in *Alabama v White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 110 L. Ed. 2d 301

(1990), but when a number of details[2] are independently corroborated it can provide sufficient reliability. The Supreme Court then continued and declared that in the *Navarette* case that with the details given and the use of the 911 system, it provided sufficient reliability and supported the traffic stop of the officer.

Appellant places a significant amount of reliance on *Florida* v. *J. L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000), arguing that the case is directly on point and the decision holding that the anonymous tip was not sufficient to do a 'stop and frisk' procedure as allowed by *Terry v Ohio*, 392 U.S.1, 20 L.Ed.2d 889, 88 S. Ct. 1869 (1969). However, in that case, the Supreme Court found one other factor significant in finding the tip inadequate, stating:

> All the police had to go on in this case was the bare report of an unknown unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believfing he had inside information about J.L. . . . .
>
> . . . . Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity.
>
> Id. at 271-272.

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[2] "Our decisions in *Alabama* v. *White*, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990), and *Florida* v. *J. L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000), are useful guides. In *White*, an anonymous tipster told the police that a woman would drive from a particular apartment building to a particular motel in a brown Plymouth station wagon with a broken right tail light. The tipster further asserted that the woman would be transporting cocaine. 496 U.S., at 327, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990). After confirming the innocent details, officers stopped the station wagon as it neared the motel and found cocaine in the vehicle. *Id.*, at 331, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990). We held that the officers' corroboration of certain details made the anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity. By accurately predicting future behavior, the tipster demonstrated "a special familiarity with respondent's affairs," which in turn implied that the tipster had "access to reliable information about that individual's illegal activities." *Id.*, at 332, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990). We also recognized that an informant who is proved to tell the truth about some things is more likely to tell the truth about other things, "including the claim that the object of the tip is engaged in criminal activity." *Id.*, at 331, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990) (citing *Illinois* v. *Gates*, 462 U.S. 213, 244, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983))." *Navarette v. California*, 134 S. Ct. 1683, 1688 (2014).

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The Court in that case specifically noted that the criminal activity described was of a **concealed nature** and there was no information that allowed the police or the courts to determine if that information was accurate. In this case, the described criminal activity was not concealed in any fashion. In fact, it was the public nature of the defendant's actions that resulted in the 911 call. While in a parking lot, the defendant was yelling, appearing to be obnoxious; appearing to be intoxicated and that it the intoxication that was causing her behavior with the children. ("Motion to Dismiss" [sic] Transcript, pg. 7)

In *Alabama* v. *White*, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990), the court upheld the anonymous tip as sufficient even though it included concealed criminal activity. The Court noted that independent police work corroborated many of the details, and some of the details were of future actions, such as the time the person was leaving the apartment and where the person was going. This was sufficient to determine that the person calling had inside knowledge about the suspect and the crime.

In this case before the court, again, the caller made the call contemporaneous with the observations made and the criminal activity was in public, thus the person calling had personal knowledge about the suspect and the crime.

The court in *Navarette*, surpa concluded its opinion as follows:

> Although the indicia present here are different from those we found sufficient in *White*, there is more than one way to demonstrate 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.' *Cortez*, 449 U.S., at 417-418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). Under the totality of the circumstances, we find the indicia of reliability in this case sufficient to provide the officer with reasonable suspicion that the driver of the reported vehicle had run another vehicle off the road. That made it reasonable under the circumstances for the officer to execute a traffic stop. We accordingly affirm.

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> *Navarette,* supra at 404.

In the case before this court, the Circuit Court in its written opinion required something more, while specifically finding that while the 911 call had "indicia of reliability" more was needed, questioning if the caller really saw a person who was intoxicated. Appellant also argues that the deputy failed to corroborate "anything about the illegality alleged by the anonymous caller, . . ."

However, that is not the standard, nor is it required. In both *Navarette*, supra, and *Barbarich*, supra, the officers did not observe any criminal activity. Their observations and corroboration was based on visible and legal observations, such as license plate, make and model of the car, etc. That is also true in *Alabama* v. *White* where the officers only observed legal activity, but based on that legal activity, it was sufficient for the stop and resulting arrest. The officer's actions were upheld.

In this case, the Court of Appeals ruled:

> Here, the caller's tip accurately provided the make, model, color, and license plate number of defendant's vehicle, and accurately described the approximate location of the vehicle. The circuit court in this case acknowledged that the caller's accurate information regarding the vehicle contained sufficient indicia of reliability, but held that to justify a stop, something more must be added to the informant's information, such as the witnessing of a traffic violation.
>
> Indeed, in both *Navarette* and *Barbarich* the informant in each case reported to police that the defendant had almost hit them or run them off the road, which arguably suggested to the investigating officers that possible criminal activity, i.e., drunk driving, was afoot. Here, the informant did not report witnessing erratic driving by the defendant; instead, the informant in this case reported witnessing a person who appeared to be intoxicated get in a car and drive away, which, if true, is criminal activity regardless of her ability to pilot her vehicle.

People v Pagano, supra, pg. 4.

Furthermore, it is not required that the officer rule out other possible innocent explanations. That is one of the purposes of an investigatory stop, based on reasonable suspicion. The U.S. Supreme Court acknowledged that while it is possible other innocent actions could cause a driver to swerve and almost hit the 911 caller's vehicle, that for reasonable suspicion, an officer does not have to "rule out the possibility of innocent conduct [citation]" *id*, at 1691.

Continuing, the Supreme Court stated:

> Nor did the absence of additional suspicious conduct, after the vehicle was first spotted by an officer, dispel the reasonable suspicion of drunk driving. Brief for petitioners 23–24. It is hardly surprising that the appearance of a marked police car would inspire more careful driving for a time. Cf. *Arvizu, supra,* at 275 ("'[s]lowing down after spotting a law enforcement vehicle'" does not dispel reasonable suspicion of criminal activity). Extended observation of an allegedly drunk driver might eventually dispel a reasonable suspicion of intoxication, but the 5-minute period in this case hardly sufficed in that regard. Of course, an officer who already has such a reasonable suspicion need not surveil a vehicle at length in order to personally observe suspicious driving. See *Adams* v. *Williams*, 407 U.S., at 147 (repudiating the argument that "reasonable cause for a[n investigative stop] can only be based on the officer's personal observation"). Once reasonable suspicion of drunk driving arises, "[t]he reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques." *Sokolow*, 490 U.S., at 11. This would be a particularly inappropriate context to depart from that settled rule, because allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences.
>
> *Navarette,* supra at 403-404.

Furthermore, unlike *Navarette,* where the caller thought the person may have been intoxicated because of the driving, the caller in this case indicated that based on the caller's personal observations, before the defendant was even driving, the caller believed the defendant to be intoxicated. (HT p 7)

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Appellant cites *Florida v. J.L.,* 529 U.S. 266; 120 S.Ct. 135; 146 L.Ed. 2d 254 (2000) for the proposition that the facts must also be reliable in its assertion of illegality. At the hearing Deputy Hessling testified that:

> Um the information that our dispatch had given us is that she was out of the vehicle at that location at the time. The caller was concerned because she had ah children with her and she was yelling; appearing to be obnoxious; and appeared to be intoxicated, um, that was causing her behavior ah with the children. And then had left is why the caller thought she was intoxicated.
>
> *Hearing Transcript*, March 21, 2017, pg. 7.

In this case, the caller stated that she (the defendant) was acting obnoxious and that she appeared to be intoxicated which was causing her behavior with the children. Operating while intoxicated is a criminal offense, which then is supportive of current and future illegality. Within a short time of the 911 phone call, the defendant was stopped by Deputy Hessling.

Further, unlike *Florida v J.L.,* supra, where the issue of reliability was the critical factor, in the case of *Navarette*, the Supreme Court held that the call being placed on the 911 emergency system along with the additional facts, provided that reliability. In the case before this court, the witness called the 911 emergency system to report what the person observed and details about the vehicle. That provides the indicia of reliability.

Furthermore, in *Navarette,* supra and *Barbarich*, supra, both cases had actions that supported an inference that a crime or civil infraction had occurred, possibly that the person was intoxicated. In this case, the 911 call specifically stated that the caller believed the driver of the vehicle was intoxicated; the caller reported the possible crime of Operating While Intoxicated. Instead of seeing actions that could allow a person to infer a driver was intoxicated such as

swerving, here, the driver was personally observed and it led to the caller's belief that the driver was intoxicated as stated to the 911 operator and reported to the deputy.

Now there is second-guessing occurring by the courts if the caller was correct or not regarding the intoxication. That is not the question. The question is: did the deputy have a particularized and objective basis for suspecting the person particular person stopped of criminal activity? The answer is yes. The information clearly justified an investigative stop of the defendant's vehicle to determine if there was a crime occurring. If there was no crime, if the person was not intoxicated, then the driver would be allowed to continue on unless there was some other criminal activity. But either way, the information provided during the 911 call was sufficient to allow for the stop to determine what was happening. The deputy's actions were not based on a hunch, but on a particularized and objective basis for suspecting the defendant of particular criminal activity.

In N*avarette v. California*, supra, and *People v. Barbarich*, supra, the U.S. Supreme Court and the Michigan Court of Appeals both upheld the tips in those cases finding that no further indicia was needed; no erratic driving need be observed for the officer to have sufficient information to make a traffic stop and further investigate the matter. The tip made via the 911 emergency system with the specific information given, itself provided the indicia of reliability and allowed for the traffic stop. The same is true in the case before this Honorable Court.

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CONCLUSION AND RELIEF REQUESTED

The United States Supreme Court ruled that when the 911 system is used and additional details such as make, model and license plate of a vehicle are provided, the fact that the 911 system was used provides indicia of reliability and therefore a traffic stop of the reported vehicle is valid when based on that information. The totality of the circumstances supports a finding of reliability and they are sufficient to provide an officer the authority to stop the vehicle.

Here in this case when the Court of Appeals properly ruled that the information provided was sufficient for a brief investigatory stop, it appropriately applied the facts to the law.

WHEREFORE, the Plaintiff-Appellee would respectfully request the following:

A. That the decision by Court of Appeals regarding the traffic stop be upheld.

B. That the charge of OWI (Operating While Intoxicated) be sent back to the 73B District Court for a trial to be held on the merits of the charge.

Respectfully Submitted,

Dated: July 15, 2020

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