

2011 IL App (2d) 100177-U
No. 2-10-0177
Order filed September 29, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09-CF-2167
)	
SHAWN A. POWYER,)	Honorable
)	John J. Kinsella,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Bowman and Zenoff concurred in the judgment.

ORDER

Held: The trial court erred in denying defendant's motion to quash and suppress, as he was subjected to an invalid *Terry* stop: the anonymous tip on which the stop was based was sufficient to permit the police to identify defendant, but it provided no indicia of reliability as to its assertion of illegality and thus did not establish reasonable suspicion of same. We reversed the judgment.

¶ 1 Following a stipulated bench trial, defendant, Shawn A. Powyer, was found guilty of two counts of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2008)). The trial court sentenced him to two years' probation. Defendant appeals, contending that the trial court erred when it denied his motion to quash arrest and suppress evidence where the police arrested him

following an anonymous tip without corroborating the informant's assertions of illegal conduct. Alternatively, he contends that the trial court erred when it assessed a court automation fee and a document storage fee for each of his two convictions. Because we reverse on the basis of defendant's first contention, we do not reach the second.

¶ 2 A grand jury indicted defendant on two counts of unlawful possession of a controlled substance. Defendant moved to quash his arrest and suppress evidence. At a hearing on the motion, Officer Ryan Sheehan testified that on April 15, 2009, his dispatcher informed him that a "refused complainant" reported that a "hand-to-hand drug transaction" occurred at an apartment complex in Glendale Lakes. To be more precise, the caller reported that a black male had exited his vehicle and approached another man, "and a possible hand-to-hand drug transaction had occurred." The dispatch further reported that the black male, who was wearing sunglasses, was getting into a Chevrolet Malibu with license plate number 7774470 and preparing to leave the apartment complex.

¶ 3 Sheehan testified that he observed a vehicle leaving the apartment complex that matched the description he had received except that its license plate number was two digits off. He stopped the vehicle. A search of the vehicle, which defendant was driving, revealed some pills, two small baggies, one of which contained white powder, and other items such as a digital scale.

¶ 4 Sheehan testified that the only information he had about the possible drug transaction was that "the black male exited the car, spoke to a male white, handed something—or some transaction occurred and the black male subject was leaving." Sheehan described a "hand-to-hand transaction" as one in which drugs or money is passed from hand to hand.

¶ 5 The trial court denied the motion to quash and suppress. The case proceeded to a stipulated bench trial, following which the court found defendant guilty and sentenced him to probation. Defendant timely appeals.

¶ 6 Defendant contends that the trial court erred when it denied his motion to quash and suppress. He contends that the police acted upon a tip from an anonymous informant that gave no indication of how the informant acquired his or her knowledge. Moreover, the police corroborated only the innocent details of the tip, that a black male wearing sunglasses and driving a Chevrolet Malibu was leaving a particular apartment complex.

¶ 7 In reviewing a ruling on a motion to suppress evidence, we employ a two-part standard. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). First, we review for clear error the trial court's findings of historical fact, and reverse those findings only if they are against the manifest weight of the evidence. *People v. Geier*, 407 Ill. App. 3d 553, 556 (2011). Second, we review *de novo* the court's ultimate ruling whether suppression is warranted. *Id.* Here, it does not appear that the court's ruling rested on findings of contested facts. Sheehan was the only witness and his credibility was not seriously challenged. Defendant does not challenge any credibility findings. Therefore, we review *de novo* the court's ultimate conclusion denying the motion to suppress.

¶ 8 The fourth amendment protects against unreasonable searches and seizures. U.S. Const., amend. IV. Consistent with the fourth amendment, a police officer may briefly detain a person for questioning if the officer reasonably believes, based on reasonable and articulable facts, that the person has committed, or is about to commit, a crime. *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *People v. Miller*, 355 Ill. App. 3d 898, 900-01 (2005). Anonymous tips generally do not demonstrate the informant's basis of knowledge or veracity, since ordinary citizens frequently do not provide extensive recitations of the basis of their everyday observations and the veracity of persons supplying anonymous tips is largely unknown. *Alabama v. White*, 496 U.S. 325, 329 (1990). However, that does not mean that an informant's tip can never provide the reasonable suspicion necessary for a *Terry* stop. See *Adams v. Williams*, 407 U.S. 143, 146-47 (1972) (reasonable

suspicion to stop established where a *known informant* indicated that a particular man in a specific nearby automobile was carrying narcotics and had a gun in his waistband). “The tip, however, must provide some indicia of reliability; otherwise, the police are forced to conduct additional investigation to verify the information or simply not respond to the tip.” *People v. Sparks*, 315 Ill. App. 3d 786, 793 (2000).

¶9 Defendant cites *Sparks* and *Florida v. J.L.*, 529 U.S. 266 (2000), to support his argument that the anonymous tip was not sufficiently reliable to justify the *Terry* stop. In *J.L.*, the Court held that an anonymous tip reporting that a man wearing a plaid shirt and standing at a bus stop was carrying a gun was insufficient, without further indicia of reliability, to justify a *Terry* stop. The majority pointed out:

“The anonymous call *** provided no predictive information and therefore left the police without means to test the informant’s knowledge or credibility. That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting [defendant] of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search.” *J.L.*, 529 U.S. at 271.

¶10 In addition, even if a court believes the officer’s testimony about the informant, it cannot judge the reliability of the actual informant. If we cannot judge the credibility of the informant, the risk of fabrication becomes unacceptable. *J.L.*, 529 U.S. at 275 (Kennedy, J., concurring, joined by Rehnquist, C.J.).

¶11 The Court stressed that tips that merely describe a suspect’s readily observable appearance do not demonstrate knowledge of criminal activity. The reasonable suspicion at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

J.L., 529 U.S. at 272 (citing 4 W. LaFare, Search & Seizure §9.4(h), at 213 (3d ed. 1996) (distinguishing reliability as to identification, which is important in other criminal contexts, from reliability concerning the likelihood of criminal activity)).

¶ 12 In *Sparks*, the police received an anonymous tip that the defendants would be traveling from Odessa, Texas, carrying contraband. The informant gave the defendants' names, their race and approximate ages, the make, model, color, and license plate number of their car, and the date and approximate time that they would be arriving in Springfield. Police intercepted the defendants' car on Interstate 55 at the correct time and effected a traffic stop. After a drug dog alerted on the trunk, the police found two duffel bags containing cannabis. *Sparks*, 315 Ill. App. 3d at 788-89. The trial court granted the defendants' motion to quash and suppress, and the Fourth District affirmed. The court noted that the tip provided no details of criminal activity that police were able to verify before the stop; the details the informant provided about the defendants and their car did not point to criminal activity. *Id.* at 795.

¶ 13 This case is substantively similar to *Sparks* and *J.L.* An anonymous informant reported that someone matching defendant's description had engaged in criminal activity. However, Sheehan did not know how the informant acquired this information, or at least he did not testify to anything that would allow him to discern how the informant learned of defendant's illicit activities. Moreover, the facts that Sheehan was able to corroborate did not demonstrate criminal activity. Defendant was a black man wearing sunglasses and driving a Malibu with a license plate number similar to that reported, and was leaving the apartment complex named, but nothing of this information was vaguely criminal. Thus, the tip accurately described a particular person, but nothing showed that the tip was reliable in its assertion of illegality. See *J.L.*, 549 U.S. at 272. Defendant here was like

the man in the plaid shirt standing at the bus stop (*J.L.*, 549 U.S. 266), or the couple driving down I-55 (*Sparks*, 315 Ill. App. 3d 786).

¶ 14 The State relies on *People v. Rollins*, 382 Ill. App. 3d 833 (2008). There, the police received an anonymous report that the defendant was selling drugs from the trunk of a four-door Chevrolet without hubcaps outside an apartment complex. Police located a car matching that description in the area mentioned and stopped it. A search found drugs in the car. The trial court suppressed the evidence, but the Fourth District reversed.

¶ 15 The reviewing court held that the anonymous tip, “unlike the types in *J.L.* and *Sparks*, provided the officers with a reasonable basis for suspecting that defendant was involved in criminal activity. The tip here was corroborated by a physical description of the driver (black male), the vehicle ***, the location ***, and the viewed criminal activity (selling drugs from the trunk of the car).” *Id.* at 838-39. Later in the opinion, responding to the dissenting justice’s assertion that the case was virtually indistinguishable from *J.L.*, the majority stated that the “tipster in the case *sub judice* did explain how he knew about the drugs ***.” *Id.* at 840-41.

¶ 16 We decline to apply *Rollins* here. The majority opinion is problematic for several reasons. First, the majority did not explain how it was able to conclude that the tipster “explain[ed] how he knew about the drugs.” *Id.* If facts existed tending to show the basis of the informant’s knowledge, the majority did not include them in the opinion. The dissent argued that there were no such facts and that the majority had merely jumped to the conclusion that the informant must have seen the purported activity. *Id.* at 843-44 (Appleton, P.J., dissenting).

¶ 17 This omission is rather glaring to us, given the importance that *J.L.* placed on knowing the basis of the informant’s knowledge. The *Rollins* majority seems to have assumed that, because the activity in question was public, the informant must have personally witnessed it; whereas, because

the activity in *J.L.* was covert, the informant had not necessarily seen it. See *Rollins*, 382 Ill. App. 3d at 840 (“this tipster had knowledge of ongoing public criminal activity, not concealed criminal activity”); *cf. id.* at 843-44 (Appleton, P.J., dissenting).

¶ 18 In this case, we are not as confident as was the *Rollins* majority that the informant here physically observed the purported drug transaction. As noted, Sheehan did not testify to any facts underlying the basis for the informant’s conclusion, and he personally corroborated only innocent details. Moreover, even assuming that the purported distinction between “overt activity” and “covert activity” is valid, the activity here falls into the latter category. A hand-to-hand transaction as Sheehan described it is meant to be secretive, and it is not clear from the meager evidence how the informant knew that the parties were exchanging something, much less how the informant knew that drugs were involved.

¶ 19 The other cases the State cites are similarly unavailing. In *People v. Ledesma*, 327 Ill. App. 3d 805 (2002), an anonymous caller told police that he intercepted a cellular telephone conversation about a drug transaction, and accurately predicted when it would occur. Thus, not only did the tip include an accurate prediction, but, unlike here, the police *did* know how the informant acquired his information. In *People v. Horton*, 283 Mich. App. 105, 767 N.W.2d 672 (2009), the court found dispositive that the tip was reported to police in person, even though the informant refused to give his name. Moreover, the informant’s personal appearance to report the activity that occurred less than a mile away made it more reasonable to infer that the informant had witnessed it.

¶ 20 Based on the foregoing, we hold that the trial court erred in denying defendant’s motion to suppress. Because defendant could not have been convicted without the evidence that should have been suppressed, we reverse his convictions. See *People v. Green*, 358 Ill. App. 3d 456, 464 (2005). Accordingly, we do not reach the issue of the propriety of the various fees.

¶ 21 The judgment of the circuit court of Du Page County is reversed.

¶ 22 Reversed.