4-10-2013

State v. Stewart Appellant's Brief Dckt. 39887

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. ALEX EAMONN STEWART, Defendant-Appellant.	NO. 39887 ELMORE COUNTY NO. CR 2011-493 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

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STATEMENT OF THE CASE

Nature of the Case

Alex Stewart appeals from his judgment of conviction and sentence pursuant to the terms of his conditional plea agreement. Specifically, he reserved the right to appeal the district court's denial of his suppression motion. The district court sentenced him to a unified term of five years, with two years fixed, and retained jurisdiction. Mr. Stewart subsequently completed the period of retained jurisdiction and the district court suspended his sentence for a period of probation.

Mr. Stewart contends on appeal that the district court erroneously determined that a tip from a confidential informant (*hereinafter*, CI) gave the officers reasonable suspicion to initiate a *Terry*[1] stop on his vehicle. Because the information provided to officers by the CI was not specific, consisted of mainly the CI's beliefs, and was based on hearsay statements of undisclosed declarants, the information was not reliable and did not give the officers reasonable suspicion to seize Mr. Stewart and his co-defendant, Daniel Widner.[2] Therefore, this Court should reverse the district court's order denying Mr. Stewart's motion.

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[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

[2] Mr. Stewart understands that Mr. Widner also entered a conditional guilty plea preserving the same issue for appeal, and that he has appealed to the Supreme Court in accordance with the terms of that plea in Docket Number 39908. It is also Mr. Stewart's understanding that Mr. Widner has recently filed his own appellant's brief in that case.

Statement of the Facts and Course of Proceedings

Officer Ryan Malenese pulled over Mr. Stewart's vehicle claiming it had failed to signal at two different times. (Tr., Vol.1, p.13, Ls.12-13.)[3] When Officer Malenese approached the window of the vehicle, he was able to detect the odor of marijuana coming from the vehicle. (*See, e.g.,* Tr., Vol.1, p.32, L.18 - p.33, L.2.) This ultimately led to a search of the vehicle and the boxes found within. (*See generally* R., pp.51-56) Inside the boxes, officers found 2.9 pounds of marijuana. (R., p.70.)

Mr. Stewart initially challenged the stop based on Officer Malenese's articulated reason for the stop, asserting that there was no requirement for him to signal at either location identified by Officer Malenese.[4] (R., pp.36-48.) The district court ultimately agreed with Mr. Stewart, finding there was no obligation to signal at either location, and thus, no reasonable suspicion to justify the stop in that regard. (Tr., Vol.2, p.115, Ls.1-12 (finding no requirement to signal where the road, though bending to the right, did not stop, but rather, constituted the continuing road of a "T" intersection); Tr., Vol.2, p.118, L.14 - p.119, L.15) (finding no requirement to signal where the road widened from one lane into two); Tr., Vol.3, p.9, Ls.11-21 (reaffirming that ruling after viewing a video submitted by the state).) The State, however, argued that the officers gained

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[3] The transcripts in this case are provided in several independently bound and paginated volumes. To promote clarity, "Vol.1" will refer to the volume containing the transcripts of the motion hearing held on September 13, 2011, as well as the transcript form the sentencing hearing held on March 19, 2012. "Vol.2" will refer to the volume containing the continued transcript of the motion hearing held on October 11, 2011. "Vol.3" will refer to the volume containing the final part of the motion hearing, held on October 27, 2011. "Vol.4" will refer to the volume containing the change of plea hearing held on December 19, 2011."

[4] Mr. Stewart's motion was captioned as "Motion *in Limine*." (R., p.36.) As the relief requested was "excluding all evidence obtained in this manner" it is referred to throughout the brief as a motion to suppress. (*See generally* Trs.)

reasonable suspicion to stop the vehicle based on information received from a CI. (R., pp.119-31.)

Officer Chris Jessup was the officer who talked with the CI. (*See* Jessup Report, dated February 1, 2011, attached to the Presentence Investigation Report (*hereinafter*, PSI).) He testified as to his interactions with the CI during the hearings on Mr. Stewart's motion in limine. (*See generally* Tr., Vol.3.) According to Officer Jessup, the informant began providing officers with information pursuant to an agreement with the State, and in exchange, the State agreed not to prosecute him/her for delivery of a controlled substance. (Tr., Vol.3, p.18, Ls.7-8.) That agreement was subject to termination if the CI provided officers with bad information. (Tr., Vol.3, p.21, Ls.4-12.) Officer Jessup testified that this informant had four prior successful tips to his credit, including two controlled drug buys from Mr. Widner. (Tr., Vol.3, p.18, L.16 - p.19, L.18.) There was no indication that the CI had any such interactions with Mr. Stewart. (*See generally* Tr., Vol.3.) Officer Jessup described several calls he had with this CI in regard to this particular case.

First, the CI contacted Officer Jessup on January 11, 2011, telling him that he/she believed Mr. Widner would be traveling to California on one of the next two weekends (January 14 or January 21, 2011) to buy more marijuana. (Tr., Vol.3, p.21, L.21 - p.22, L.4.) The officer did not testify as to any basis provided by the CI to support that belief. (Tr., Vol.3, p.21, L.21 – p.22, L.11.) Mr. Widner did not, to the officer's knowledge, make such a run on either of those dates. (Tr., Vol.3, p.40, L.24 - p.41, L.2.) After not hearing from the CI for ten days, Officer Jessup initiated contact with the CI. (Tr., Vol.3, p.22, Ls.10-16.) Again, the CI told the officer that he/she believed Mr. Widner would be making a run for more marijuana based on the fact that the CI had

not had contact with Mr. Widner. (Tr., Vol.3, p.22, Ls.17-24.) The CI followed up later that day, informing the officer that Mr. Widner had not left, but was "going to be travelling to California." (Tr., Vol.3, p.23, Ls.7-10.)

Officer Jessup contacted the CI again on January 26, 2011, and the CI said he/she believed Mr. Widner was going to be making a run that weekend, again based on the fact that the CI had not had contact with Mr. Widner for several days, the CI had not spoken with Mr. Widner in several days. (Tr., Vol.3, p.23, L.20 - p.24, L.15.) "The informant eventually told [Officer Jessup] that he or she had learned that Mr. Widner was going to be travelling to California on that weekend." (Tr., Vol.3, p.24, Ls.13-15.) Officer Jessup subsequently contacted the CI on January 29, 2011, and the CI said that he/she believed Mr. Widner had left town, again based on the fact that he/she had not had contact with Mr. Widner. (Tr., Vol.3, p.25, Ls.2-4.) Officer Jessup attempted to corroborate this information, but observed Mr. Widner's cars parked at his house throughout the day. (Tr., Vol.3, p.26, Ls.5-13.) As a result, the officer contacted the CI again, who told Officer Jessup he/she would ask around for more information. (Jessup Report, dated February 1, 2011, p.2; *see* Tr., Vol.3, p.28, L.17 - p.29, L.2.) The CI called the officer back and told him only that Mr. Widner had gone with his roommate, Mr. Stewart, and they had taken Mr. Stewart's car. (Tr., Vol.3, p.28, Ls.7-11.) The CI did not provide any information about the car; rather, Officer Jessup relied on his own knowledge about Mr. Stewart's car.[5] (Tr., Vol.3, p.54, Ls.5-13.) Officer Jessup did not remember seeing the car of which he was thinking at Mr. Stewart's and Mr. Widner's

[5] At the hearing on the suppression motion, Officer Jessup did not testify about any basis the CI had given for this information. (*See generally* Tr., Vol.3.) However, his report indicated that the CI had received this information from an individual whose name had been blacked out of the report. (Jessup Report, dated February 1, 2011.)

residence from his previous surveillance. (Tr., Vol.3, p.29, Ls.3-12.) There was no information presented about the route the car was going to take. (*See generally* Tr., Vol.3.)

Nevertheless, based on that information, Officer Jessup arranged a surveillance operation with his partner, Sergeant Griggs, to try and stop Mr. Stewart's car as it returned to Mountain Home. (Tr., Vol.3, p.54, L.23 - p.55, L.6.) The officers informed Sergeant Bradshaw, the shift commander, of their plan. (Tr., Vol.3, p.30, Ls.7-12.) That information was subsequently passed onto Officer Malenese when he came on duty. (Tr., Vol.3, p.70, Ls.6-12.) Officer Malenese testified he received specific instructions in regard to that information: "I was told . . . [i]f we were able to develop our own probable cause to stop the vehicle, then [the narcotics officers] would come and assist with the stop. If we couldn't develop our own probable cause [we were] to radio over to them as we were behind the suspect vehicle, and they would advise us what to do at that point." (Tr., Vol.3, p.73, L.21 - p.74, L.4.) As such, when Officer Malenese identified Mr. Stewart's car, he tried to justify his traffic stop based on the failure to signal. (*See* Tr., Vol.3, p.72, Ls.17-25.)

The district court ultimately determined that the informant had been able to give reliable information regarding the date of the trip and which car was being used, which was corroborated by the officers. (Tr., Vol.3, p.95, L.24 - p.96, L.7.) As such, the district court found reasonable suspicion to perform a *Terry* stop on the vehicle. (Tr., Vol.3, p.97, L.16 - p.98, L.18.) Mr. Stewart timely appealed his conviction challenging that decision pursuant to his conditional plea agreement. (R., pp.203-05.)

ISSUE

Whether the information provided by the CI was insufficient to give the officers reasonable suspicion to justify their warrantless seizure of Mr. Stewart's vehicle.

ARGUMENT

The Information Provided By The CI Was Insufficient To Give The Officers Reasonable Suspicion To Justify Their Warrantless Seizure Of Mr. Stewart's Vehicle

A. Introduction

When a CI provides an officer with a tip, that tip must be reviewed for its reliability. If it is not reliable, it cannot justify the officer's warrantless seizure of the suspect. In this case, the CI's information, when considered in the totality of the circumstances, was not reliable, and therefore, cannot justify the officers' warrantless seizure of Mr. Stewart's vehicle. As such, this Court should reverse the district court's order denying Mr. Stewart's motion to suppress the evidence discovered during that illegal seizure.

B. The CI's Information In Regard To This Particular Case Was Not Reliable, As It Consisted Primarily Of The CI's Beliefs And Third Party Hearsay, Rather Than His/Her Own Observations

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. . . ." U.S. CONST. amend IV. The Fourth Amendment is enforceable against the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *State v. Johnson*, 110 Idaho 516, 524 (1986). The Idaho Constitution provides its own, similar protections against unreasonable searches and seizures. IDAHO CONST. Art. I, § 17; *State v. Donato*, 135 Idaho 469, 471 (2001).

A unanimous United States Supreme Court has held that warrantless searches are *per se* unreasonable. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). Therefore, a warrantless search is presumed to violate the Fourth Amendment, unless the State

demonstrates that one of the exceptional, well-established, and well-delineated exceptions to this requirement is applicable to the facts. *Id.* at 390-91; *see also State v. Holton*, 132 Idaho 501, 503-04 (1999) (holding the same standard applies to Art. I, § 17 of the Idaho Constitution).

Officers are allowed to temporarily detain citizens if they possess a reasonable suspicion that the person has committed or is about to commit a crime. *Terry*, 392 U.S. at 30; *State v. Maland*, 140 Idaho 817, 820 (2004). Officers cannot garner reasonable suspicion from hunches, instinct, speculation, or lucky guesses. *See, e.g.*, *United States v. Sokolow*, 490 U.S. 1, 16 (1989), Marshall, J., *dissenting*, ("For law enforcement officers to base a search, even in part, on a 'pop' guess . . . stretches the concept of reasonable suspicion beyond recognition . . . ."); *State v. Bishop*, 146 Idaho 804, 811 (2009) ("[R]easonable suspicion requires more than a mere hunch or 'incohate and unparticularized suspicion.'"). Such reasonable suspicion may arise from a reliable tip provided to officers. *Alabama v. White*, 496 U.S. 325, 329 (1990); *Bishop*, 146 Idaho at 812. When the person providing the tip is known to the police, they are presumed to be reliable.[6] *Bishop*, 146 Idaho at 812. In Idaho, that presumption of reliability is rebuttable. *Id.* The information provided by the CI is subject to evaluation for reliability in the totality of the circumstances, and if it is shown to not be reliable, it does not generate reasonable suspicion to justify the warrantless seizure. *See id.*

One factor that impacts the determination of reliability is the source of the CI's information. *Bishop*, 146 Idaho at 812. For example, personal observation of events by the CI is a strong indicator of reliable information. *State v. Swindle*, 148 Idaho 61, 66 (Ct. App. 2009). However, when the information is based on a third party's hearsay

[6] The informant in this case is a known informant. (Tr., Vol.3, p.17, Ls.19-20.)

statements, the information is less reliable because the declarant's veracity also affects the reliability of the information.[7] *Bishop*, 146 Idaho at 813-14; *see also United States v. Monteiro*, 447 F.3d 39, 45-46 (1st Cir. 2006) (concluding that an informant's tip that was based on information that his relative told to the informant did not give rise to reasonable suspicion because the relative was unidentified and "the police here had no way of knowing the state of mind of [the informant's] relative when she gave her information, or whether she was a person who could be relied on to relate events accurately"). As such, even though the CI may be presumed reliable, that presumption does not automatically make hearsay statements in the tip reliable. *See Bishop*, 146 Idaho at 813-14.

Another factor that impacts this determination is the content of the tip. *Bishop*, 146 Idaho at 812. For example, the more specific information in the tip, the more likely it is to be reliable. *See, e.g., United States v. Fernandez-Castillo*, 324 F.3d 1114, 1119 (9th Cir. 2003). Additionally, where the risk that the information is fabricated is increased, the reliability of that information is decreased. *Florida v. J.L.*, 529 U.S. 266, 275 (2000). Therefore, it is necessary to examine the information provided by the CI in this case to determine if it was reliable before it can be determined to justify a warrantless seizure. *See Bishop*, 146 Idaho at 812.

In this case, the CI provided a series of tips. (*See* Tr., Vol.3, p.21, L.25 - p.28, L.11.) Most of those tips provided very little in terms of content, stating only that the CI could not get hold of Mr. Widner, and therefore, the CI *believed* Mr. Widner was on a

[7] This is not to say that reasonable suspicion can never arise from a known informant's tip which is based on third party hearsay, because it can. *Bishop*, 146 Idaho at 814. Rather, the fact that the tip is based on hearsay is one factor that is to be considered in the totality of the circumstances surrounding the reliability or non-reliability of the information, and it can affect whether reasonable suspicion arises therefrom. *Id.*

drug run.[8] (*See, e.g.,* Tr., Vol.3, p.21, L.25 - p.22, L.4; Tr., Vol.3, p.22, Ls.21-24; Tr. Vol.3, p.25, Ls.2-4.) Furthermore, the information initially provided by the CI was that Mr. Widner would be making a run on January 14 or January 21, 2011. (Tr., Vol.3, p.40, Ls.2-4.) However, there was no evidence that any such trip actually occurred, meaning the CI's beliefs, and thus, the tips, were incorrect.[9] (*See* Tr., Vol.3, p.40, L.24 - p.41, L.2.)

Officer Jessup called the CI again on January 29, and the CI said he/she believed that Mr. Widner had gone on a drug run and would return on January 30, 2011. (Tr., Vol.3, p.24, L.16 – p.25, L.4.) Again, this tip was predicated on the fact that the CI had been out of contact with Mr. Widner, and it was his/her belief that Mr. Widner was making a drug run. (*See, e.g.,* Tr., Vol.3, p.47, Ls.17-20; Tr., Vol.3, p.25, Ls.2-4.) Officer Jessup decided to attempt to corroborate that information. (Tr., Vol.3, p.26, Ls.5-9.) However, his investigation revealed that neither of the vehicles Mr. Widner was known to drive left Mr. Widner's home that day, and as such, tended to disprove the CI's information. (*See* Tr., Vol.3, p.26, Ls.10-13.) The inference form Officer Jessup's conversation with the CI following Officer Jessup's attempted corroboration was that the CI would try to get more information in that regard. (*See* Tr., Vol.3, p.26, L.14 - p.27,

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[8] The fact that the CI could not get in contact with Mr. Widner may have indicated nothing more than the battery on Mr. Widner's cell phone had died. It certainly does not provide an objectively reasonable and articulable suspicion of criminal activity. Subjective intent is not relevant to a determination of reasonable suspicion. *Whren v. United States*, 517 U.S. 806, 813 (1996); *State v. Schwartz*, 133 Idaho 463, 467 (1999).

[9] It is not disputed that this CI had several tips which were accurate, including two involving Mr. Widner. (Tr., Vol.3, p.18, L.19 - p.19, L.18.) However, when considered in the totality of the circumstances, this CI's information is incorrect at least one-third of the time (two times out of six known disclosures). Additionally, the prior two incidents involving Mr. Widner were controlled purchases, which means the CI was having direct contact with Mr. Widner. (Tr., Vol.3, p.19, Ls.11-18.) Therefore, they are of less value in determining the veracity of the information arising from the lack of direct contact with Mr. Widner.

L.2; Tr., Vol.3, p.50, L.18 - p.51, L.15.) Inherent therein is that the CI would be speaking to third parties, as he/she was not able to get in contact with Mr. Widner, who (if the CI was correct) was gone.[10] (*See* Tr., Vol.3, p.47, Ls.17-20; Tr., p.25, Ls.2-4.)

Finally, the information that the CI subsequently provided regarding Mr. Stewart's car had no specifics about the car, which further indicates that the information was unreliable. (*See* Tr., Vol.3, p.28, Ls.7-11; Tr., Vol.3, p.54, Ls.5-13 (Officer Jessup admitting the CI did not give him specifics about Mr. Stewart's car, but that he had relied on his own knowledge of the car).[11] The CI also did not provide any specific information about the car's route or destination, beyond "California." (*See generally* Tr., Vol.3.) The lack of specifics, when considered in combination with the fact that the only information was premised on the CI's beliefs arising from a lack of contact with Mr. Widner, indicates that this was nothing more than a lucky guess, which does not give rise to reasonable suspicion. *See Sokolow*, 490 U.S. 16, Marshall, J., *dissenting*; *Bishop*, 146 Idaho at 811; *compare Fernandez-Castillo*, 324 F.3d at 1119 (finding that a tip which provided specific details about the suspect car, as well as specific details about the route it would take, gave the officers reasonable suspicion). In fact, Officer Malenese

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[10] While the record does not indicate it was before the district court at the time it ruled on Mr. Stewart's motion, Officer Jessup's report from February 1, 2011, which detailed his contact with the CI, was appended to the PSI. It indicated that the CI did, in fact, get his/her subsequent information in this regard from a third party. (Jessup Report dated February 1, 2011, p.2.) That third party was not identified in the record (in fact, his/her name was blacked out of the report), nor was his/her veracity questioned. (*See generally* R., Tr.) Therefore, the information he/she provided, relayed to officers through the CI, is less likely to be reliable. *See Bishop*, 146 Idaho at 813-14; *see also J.L.*, 529 U.S. at 275 (where the court is unable to judge the credibility of the source of the information, the statement is more unreliable, particularly if there is a risk of fabrication); *Monteiro*, 447 F.3d at 45-46 (uncorroborated hearsay tips are more likely to be unreliable).

[11] As a result of the officer's reliance on his own knowledge, rather than having the CI describe the car, it is not even possible to conclude with certainty that the CI and the officer were talking about the same car.

was instructed that, unless he was able to identify independent probable cause, he was not to pull over Mr. Stewart's vehicle, even though the officers had received the tip from the CI. (*See* Tr., Vol.3, p.73, L.21 - p.74, L.4.) Rather, he was supposed to request further instruction from Officer Jessup or Sergeant Griggs. (*See* Tr., Vol.3, p.73, L.21 - p.74, L.4.)

Therefore, even though this CI was known to the police, the information he/she provided in this case was not reliable so as to give officers a reasonable suspicion to seize Mr. Stewart's car. Therefore, the district court's order denying the suppression motion was in error and should be reversed.

CONCLUSION

Mr. Stewart respectfully requests that this Court reverse the district court's order denying his suppression motion and remand this case for further proceedings.

DATED this 10th day of April, 2013.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of April, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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HONORABLE LYNN NORTON
ELMORE COUNTY DISTRICT JUDGE
EMAILED BRIEF

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