

ORIGINAL (e filed)

20050202

20050229

IN THE SUPREME COURT OF NORTH DAKOTA

November 25, 2005

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| State of North Dakota. |) | |
| Plaintiff and Appellee, |) | |
| |) | Supreme Court No. 20050229 |
| v. |) | |
| |) | Cass County No. 05-K-00418 |
| Jesse Mikal Anderson. |) | |
| Defendant and Appellant. |) | |
| |) | |
| AND |) | |
| |) | |
| State of North Dakota. |) | |
| Plaintiff and Appellee, |) | |
| |) | Supreme Court No. 20050202 |
| v. |) | |
| |) | Cass County No. 05-K-422 |
| Daniel James Anderson, |) | |
| Defendant and Appellant. |) | |

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

NOV 25 2005

STATE OF NORTH DAKOTA

APPEAL FROM THE DISTRICT COURT
CASS COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE FRANK L. RACEK, PRESIDING

REPLY BRIEF OF APPELLANTS

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LAW & ARGUMENT

I. LAW ENFORCEMENT DID NOT HAVE A REASONABLE SUSPICION TO STOP THE APPELLANTS.

[¶ 3] The State argues that the involved officers had a reasonable suspicion to stop the Appellants and that the search of Jesse and Daniel Anderson's pickup was justified as a weapons search requiring only a reasonable suspicion. Appellee's Brief at ¶¶ 15, 26. Assuming for the sake of argument that the officers did have a reasonable suspicion, that level of proof is sufficient to conduct a stop only. See City of Jamestown v. Jerome, 2002 ND 34, ¶ 5, 639 N.W.2d 478 (explaining that a reasonable suspicion is required for an investigatory stop but that probable cause is needed for an arrest). Of course, a stop may yield additional information creating probable cause and thereby justify the more intrusive step of making an arrest. See State v. Langseth, 492 N.W.2d 298, 299-300 (N.D. 1992). However, that is not what happened in this case. Jesse and Daniel Anderson have argued and still contend that the State's officers did not affect a Terry stop but immediately arrested the Appellants. Therefore, the actions of law enforcement must have been supported by probable cause, and the lower standard of reasonable suspicion is wholly inadequate to justify those actions. However, even if a reasonable suspicion were adequate to justify the actions of law enforcement, there was not a reasonable suspicion in this case.

[¶ 4] The State makes much of the fact that the primary informant in this case, Greg Anderson, was known to Deputy Gress, the Barnes and Stutsman County officer who passed Greg's information on to Fargo authorities. Appellee's Brief at ¶¶ 18-19. According to the State, Greg Anderson should be treated as more reliable than an anonymous informant because Gress was able to vouch for him. Appellee's Brief at ¶¶ 19, 22. Although Greg

Anderson did not furnish information anonymously, an examination of the United States Supreme Court's treatment of anonymous tips is nonetheless useful to determine whether the officers in this case had a reasonable suspicion.

[¶ 5] In Alabama v. White, 496 U.S. 325, 327 (1990), police received an anonymous phone call indicating that the defendant, White, would leave a particular apartment building at a specified time in an identified car. The anonymous caller further suggested that White would then proceed to a particular motel and that she would be in possession of cocaine. Id. Upon receiving this information, two officers went to the named address and observed as White left the building and got into the described car. Id. The officers followed as she proceeded to drive the most direct route to the named motel. Id. They stopped her as she pulled onto the street on which the motel was located. Id. At that point, White consented to a search and the officers found quantities of marijuana and cocaine. Id. Although the Supreme Court found that it was a close case, it held that the tip provided sufficient indicia of reliability to justify the stop. Id. at 332.

[¶ 6] Central to the White Court's decision was the fact that the caller had accurately predicted the defendant's future actions. Id. According to the Court, "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." Id. (quoting Illinois v. Gates, 462 U.S. 213 (1983)). The Court noted that anyone could have "predicted" that the particular car would be sitting in front of White's building because it was a "condition presumably existing at the time of the call." Id. Of real significance to the Court's holding was that White left the building within the timeframe that the caller said she would and that she took the most direct route possible to designated motel. Id. at 331.

Although White was stopped shortly before reaching her presumed destination, the Court thought it significant that the four-mile route driven by White was the most direct possible and consisted of several turns. Id. The Court ultimately decided that since very few people generally have access to another individual's itinerary, "it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities." Id. at 332. As the Supreme Court would later explain, "only after police observation showed that the informant had accurately predicted the woman's movements...did it become reasonable to think the tipster had inside knowledge about the suspect and therefore to credit his assertion about the cocaine." Florida v. J.L., 529 U.S. 266, 270 (2000).

[¶ 7] The Supreme Court further clarified the analysis pertaining to the ability of an anonymous tip to establish reasonable suspicion in J.L., 529 U.S. 266 (2000). In J.L., the police received an anonymous tip that a young, black male wearing a plaid shirt and standing at a particular bus stop was carrying a gun. Id. at 268. Acting on the tip, officers went to the bus stop where they observed three black males, one of whom was wearing a plaid shirt. Id. The officers did not see a gun or observe any illegal conduct nor did they have reason to suspect such conduct apart from the tip. Id. at 270. One of officer's frisked the individual in the plaid shirt and seized a gun. Id. at 268.

[¶ 8] Although this was a stop and frisk case as opposed to a vehicle stop, the Supreme Court applied the same analysis as it did in White. The Court ruled that the officers did not have a reasonable suspicion because the tip lacked sufficient indicia of reliability. Id. at 271. The Court explained that the tip "provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility."

Id. The State argued that the tip was sufficiently reliable because it was partially corroborated in that the description of the offending individual proved accurate. Id. The Court disagreed and noted that “the reasonable suspicion...at issue requires that the tip be reliable in its assertion of illegality, not just its tendency to identify a determinate person.” Id. at 272. (citing 4 W. LaFare, Search and Seizure § 9.4(h), p. 213 (3d ed. 1996)). Ultimately, the J.L. Court explained that the tip at issue lacked even the “moderate indicia of reliability present in White” and ruled that “[i]f White was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line.” Id. at 271.

[¶ 9] As noted above, there is at least one significant difference between the J.L. and White cases and the case currently at issue. J.L. and White are concerned with anonymous tips whereas a tip from a member of the “criminal milieu” is at issue here. Nevertheless, J.L. and White offer guidance because they demonstrate where the bar has been set in a particular context, which is useful in ascertaining where the bar ought to exist in this context.

[¶ 10] In order to gain from reading J.L. and White, their obvious contrast with the current case must not only be acknowledged but explored. It is important to examine the reasons that contribute to the disfavored status of information furnished anonymously and by members of the “criminal milieu.” In the case of the former, the United States Supreme Court has noted that where the source of information remains anonymous, there is a lack of accountability and the reliability of the source cannot be assessed. J.L., 529 U.S. at 270. In the case of the latter, this Court has articulated other more ominous concerns. Specifically, this Court has observed that criminal informants provide information “for reasons other than the call of civic duty.” State v. Dahl, 440 N.W.2d

716, 718 (N.D. 1989) (quoting Rebell, The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards. 81 Yale L.J. 703, 712-713 (1972)). On the whole, it seems that where the source is unknown there is no demonstrable reason to credit the information, but where the “criminal milieu” is concerned, there are affirmative reasons to distrust the informant’s assertions.

[¶ 11] In light of the distinction between the issues addressed in J.L., and White and question to be decided in this case, it seems reasonable to conclude that a more exacting standard should apply in this case. In J.L. and White the informants were unknown, and yet there was not as much cause for concern as in the instant case. The informants in J.L., and White had no ascertainable reputation. Here, Greg Anderson had a demonstrably bad reputation. He was known to be a drug addict with an extensive criminal record. (5/3/05 Trans. at 57, 60-61). He was facing serious criminal charges and was so concerned about those charges that he became suicidal and was involuntarily committed to a mental institution. (5/3/05 Trans. at 60-61). Perhaps most ominously, he was motivated to get someone else in trouble and had gone so far as to falsely accuse a neighbor of participating in a drug transaction. (5/3/05 Trans. at 51-52, 59-60). Nothing Gress knew about Greg Anderson made Greg more reliable than an anonymous caller. If Greg had furnished information anonymously, there would have been less of a reason to doubt his truthfulness. The fact that Gress knew Greg Anderson decreased the credibility of Greg’s assertions and did not, as the State suggests, increase the level of reliability. This would not necessarily be true of every member of the criminal milieu but it is true in this case. since Greg Anderson had a clear motive to lie and had shamelessly demonstrated his capacity to do so in the past. (5/3/05 Trans. at 51-52, 59-60).

[¶ 12] To complete the analysis, Greg Anderson's assertions must be compared with the information furnished by the informants in J.L. and White. In White, the anonymous source was not known to be a criminal or a liar and yet the number of predictive details that were furnished were barely enough to support a reasonable suspicion. See White, 496 U.S. at 332 (referring to the decision as a "close case"); See also J.L., 529 U.S. at 271 (describing the indicia of reliability in White as "moderate"). Here, the only corroboration was akin to that which took place in J.L. In this case, law enforcement arguably verified that Greg Anderson knew where Jesse and Daniel Anderson were. The State suggests that Greg Anderson told Gress that Jesse and Daniel were at McDonald's or Stop and Go and that they were driving an Intrepid or a green Ford pickup with four doors. Appellee's Brief at ¶ 6. However, the record does not support that assertion. Greg Anderson did tell Gress about Jesse and Daniel's location, but the information pertaining to the vehicle they were driving seems to have come from Gress himself. At the motion hearing Gress was asked how he knew what type of vehicle Jesse and Daniel would be driving. (5/3/05 Trans. at 49). In response, Gress said that this knowledge was based on his own observations. (5/3/05 Trans. at 49). Since the description of the vehicle came from Gress and not Greg Anderson, officers really did not verify any of Greg's information until they actually confirmed that Jesse and Daniel were actually at McDonald's. Officers did not confirm Jesse and Daniel's identities until long after they had been arrested. The State also suggests that the fact that officers were able to verify that Jesse Anderson was wearing a bulletproof vest, as Greg Anderson had claimed, made Greg's information more trustworthy. Appellee's Brief at ¶ 9, 26. Admittedly, the discovery of the vest did corroborate Greg's tip, but that bit of

corroboration happened too late. Officers were able to verify that information after they arrested Jesse Anderson and not before. Therefore, the discovery of the vest cannot be used to prove the validity of actions taken prior to its discovery. A Fourth Amendment seizure must be valid at its inception. See Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County, 542 U.S. 177 (2004) (stating that “an officer’s action must be justified at its inception, and...reasonably related in scope to the circumstances which justified the interference in the first place.”) (quoting United States v. Sharpe, 470 U.S. 675, 682 (1985)). Clearly, a seizure cannot be justified by evidence obtained after its inception. See Id.

[¶ 13] At most then, law enforcement in this case corroborated an easily obtainable fact existing at the time of the tip. This is simply not enough. As the United States Supreme Court explained in J.L.,

An accurate description of a subject’s readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

529 U.S. at 272. Arguably Greg Anderson did not even help officers to identify the person he was accusing, since the identifying characteristics of the vehicle came from Gress. There was simply no reason to trust Greg Anderson’s accusations, since the factors suggesting he was credible were far outweighed by those suggesting he was not. He was able to tell law enforcement where Jesse and Daniel Anderson could be found, but the State has failed to show that there was enough reason to believe his assertions of criminal conduct. Although Jesse Anderson had been accused of being involved in drug

dealing in the past there is no evidence that anyone other than Greg Anderson made such allegations. Furthermore, Greg Anderson did not furnish any predictive information. Moreover, the fact that Jesse Anderson's ex-wife had once told Gress that Jesse would carry weapons on occasion did nothing to bolster Greg Anderson's assertions of criminal behavior. This is especially true when one considers that the claims of Jesse Anderson's ex-wife did not necessarily suggest that he was even breaking the law. See (5/3/05 Trans. at 48, 52, 55).

CONCLUSION

[¶ 14] For all of the foregoing reasons, Jesse and Daniel Anderson ask this Court to reverse the lower court's denial of their motion to suppress and to allow them to withdraw their guilty pleas.

Dated this the 25th day of November, 2005.

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[¶ 15] CERTIFICATE OF SERVICE

A copy of this document was e-filed with the North Dakota Supreme Court and served upon Aaron Birst, pursuant to Administrative Order 14 on the 25th of November, 2005. Specifically, this document was electronically filed and served as follows:

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