

No. 32707-8-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

**FILED**  
**Nov 09, 2015**  
Court of Appeals  
Division III  
State of Washington

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

NATHAN TRACEY MITCHELL,  
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT  
Honorable Linda G. Tompkins, Suppression Hearing Judge

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SUPPLEMENTAL BRIEF OF APPELLANT

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A. ADDITIONAL ISSUE PRESENTED

The Court has requested supplemental briefing regarding an issue raised in Mr. Mitchell's Statement of Additional Grounds: "Whether, in its findings of fact and conclusions of law on defendant's motion to suppress evidence (filed June 9, 2014), the trial court correctly concluded that based on the totality of all the circumstances known to the trooper at the time of the arrest, there was probable cause to arrest Nathan Mitchell for the traffic offense of Driving While Revoked."

B. ANSWER TO ISSUE PRESENTED

Based on the totality of all the circumstances known to the trooper at the time, there was insufficient reliable information to justify stopping Mr. Mitchell and subsequently arresting him for the traffic offense of Driving While Revoked.

C. SUPPLEMENTAL FACTS

The trial court entered the following findings of facts after hearing on Mr. Mitchell's motion to suppress.

1. On April 13, 2014, Trooper T. M. Corkins of the Washington State Patrol, while on duty on routine patrol, received a radio dispatched report of a single vehicle roll over on westbound I-90 at milepost 257. Trooper Mehaffey was also dispatched and was first to arrive at the scene.
2. The incident had been reported by a citizen's report which also advised that the driver of the vehicle was walking around the vehicle

and appeared dazed and confused. He was described as wearing a black hooded sweatshirt and was hitchhiking away from the scene.

3. WSP radio provided information on the registered owner, who had a drivers' license which was revoked in the first degree. A photograph was electronically obtained by Trooper Corkins. The trooper also determined that the defendant had prior similar offenses.

4. Trooper Mehaffey reported that the vehicle had not rolled over but had 'spun out', remaining upright.

5. Trooper Corkins located the defendant approximately one mile west of where the vehicle was left, and identified him by his black hooded sweatshirt and the DOL photograph the trooper had viewed. His appearance was consistent with the description given by the witness.

6. The defendant told Trooper Corkins that the driver of his vehicle was a male black named Sean Martin who had left the vehicle in the other direction from that which the defendant was going.

7. When asked where the keys to the vehicle were, the defendant said he had them.

8. The defendant was arrested for Driving While Revoked in the First Degree

CP 50-51.

D. ARGUMENT

THE *TERRY* STOP WAS UNSUPPORTED BY REASONABLE SUSPICION OF CRIMINAL ACTIVITY AND THE SUBSEQUENT SEIZURE OF MR. MITCHELL WAS UNLAWFUL.

1. Police may not stop or arrest a person based on an informant's tip that is unreliable.

Although information provided by an informant may support probable cause, that information must be carefully scrutinized. *State v. Mickle*, 53 Wn. App. 39, 41, 765 P.2d 331 (1988). In determining whether an informant's tip is sufficient to establish probable cause, Washington has traditionally applied the two-pronged *Aguilar-Spinelli*<sup>1</sup> test. *State v. Jackson*, 102 Wn.2d 432, 433, 688 P.2d 136 (1984); *State v. Connor*, 58 Wn. App. 90, 98, 791 P.2d 261 (1990). Under this standard, the State must establish that (1) the informant is reliable and credible, and (2) the informant has a factual basis for his or her allegations. *Jackson*, 102 Wn. 2d at 443.

The "veracity" prong requires the police to obtain background facts to support a reasonable inference that the informant is credible and without motive to falsify. *State v. Bauer*, 98 Wn. App. 870, 876, 991 P.2d 668 (2000). In general, a professional informant is considered less reliable

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<sup>1</sup> See *Spinelli v. United States*, 393 U.S. 410, 413, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969); *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964).

than an identified citizen informant, because a professional informant is more likely to be motivated by self-interest. *State v. Northness*, 20 Wn. App. 551, 557, 582 P.2d 546 (1978).

The “basis of knowledge” prong requires the State to explain the manner in which the informant acquired her information. This prong may be satisfied if the facts alleged are based on the informant’s direct personal observations. *Id.* at 558; *State v. Merkt*, 124 Wn. App. 607, 613, 102 P.3d 828 (2004). Establishing a factual basis for the informant’s allegations is essential to ensure that the information communicated to police was not based on sheer speculation or provided by an honest informant who simply misconstrued innocent conduct. *State v. Seiler*, 95 Wn. 43, 48–49, 621 P.2d 1272 (1980); see *State v. Adame*, 39 Wn. App. 574, 577, 694 P.2d 676 (1985) (search warrant invalid where informant reliable but nothing in affidavit establishing the source of the information).

However, “if an informant’s tip fails under either or both prongs, probable cause still may be established by independent police investigation. These investigations should point to suspicious activities or indications of criminal activity along the lines suggested by the informant.” *Jackson*, 102 Wn.2d at 438.

In a recent case, *State v. Z.U.E.*, 184 Wn.2d 610, 352 P.3d 796 (2015), the Court determined the appropriate constitutional analysis for a *Terry* stop precipitated by an informant is a review of the reasonableness of the suspicion of criminal activity under the totality of the circumstances. *Z.U.E.*, 184 Wn.2d at 620–21. The Court held that when an officer bases his or her suspicion on an informant’s tip, the State must show that the tip bears some “indicia of reliability” under the totality of the circumstances. “We require that there either be (1) circumstances establishing the informant’s reliability or (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer’s information was obtained in a reliable fashion. These corroborative observations do not need to be of particularly blatant criminal activity, but they must corroborate more than just innocuous facts, such as an individual’s appearance or clothing.” *Z.U.E.*, 184 Wn.2d at 618–19 (citations omitted).

While it “decline[d] to strictly apply the two-pronged *Aguilar/Spinelli* analysis,” the *Z.U.E* Court emphasized “but we recognize the two factors’ relevance and usefulness to the reliability analysis.” *Z.U.E.*, 184 Wn.2d at 624.

In considering the reliability of a witness informant, the *Z.U.E* court approved the analysis set forth in *Navarette v. California*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014). In that case, the caller’s report that the defendant’s pickup truck ran her off the road was sufficient to support a stop of the suspected drunk truck driver. The United States Supreme Court decided that reliability was established by several factors: the caller was an eyewitness, she made the report contemporaneously to the incident, and she called the emergency 911 line, “making her accountable for the provided information since police can trace those calls.” *Z.U.E*, 183 Wn.2d at 621, citing *Navarette*, 134 S.Ct. at 1689.

In *Z.U.E*, the veracity of one citizen 911 caller was identically established. *Z.U.E*, 183 Wn.2d at 622. However, the court concluded the caller’s mere assertion of a potentially incriminating “fact” that the possessor of a firearm was underage “cannot create a sustainable basis for a *Terry* stop” because the caller did not offer any factual basis in support of the allegation and thus the officers had no factual basis on which to evaluate the accuracy of her estimation of age. *Z.U.E*, 183 Wn.2d at 623–24. The court also concluded the State failed to establish independent corroboration of presence of criminal activity or that the informer’s information was obtained in a reliable fashion where the officers did not

see the female passenger with a gun or confirm her age prior to the stop, and failed to contact any of the 911 witnesses to establish whether the tips were obtained in a reliable manner. *Z.U.E.*, 183 Wn.2d at 623. At most, police verified a female matching description was located in the general area. “But corroboration of an innocuous fact, such as appearance, is insufficient.” *Z.U.E.*, *id.* (citation omitted). Finally, the *Z.U.E.* court rejected the State’s argument that “exigency of the circumstances” warranted the immediate and invasive action of a *Terry* stop. The court read the *Navarette* decision—that a single anonymous 911 call may justify pulling over a reported drunk driver—as “largely resting on this factor. Drunk drivers pose a threat to everyone on the road, and officers must be able to take action to prevent a potentially imminent accident.” *Z.U.E.*, 183 Wn2d at 623–24 (citation omitted).<sup>2</sup> The court concluded the *Terry* stop and arrest of the male passenger were unlawful:

In any specific case, each [*Aguilar-Spinelli*] factor may weigh differently. In the case before us, the State has not established that the series of 911 calls provided the officers with any articulable reason to suspect any of the passengers in this particular car were engaged in criminal activity. We conclude that the officers’ subsequent seizure of Z.U.E. was therefore unlawful, and any evidence obtained as a result of that seizure should have been suppressed at trial.

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<sup>2</sup> Notably, the *Navarette* Court was careful to limit its holding on the 911 call to ongoing crimes. *Navarette*, 134 S.Ct. at 1690 n. 2 (“Because we conclude that the 911 call created reasonable suspicion of an ongoing crime, we need not address under what circumstances a stop is justified by the need to investigate completed criminal activity.”).

*Z.U.E.*, 183 Wn2d at 624–25.

Similarly, this stop and resulting arrest was not permissible.

Unlike in *Z.U.E.* or *Naverette*, there was no evidence the relayed call came through an emergency 911 line rather than the police business line or that the caller provided his or her name and contact information. The single informant here was unknown to law enforcement and provided only a conclusory allegation of non-criminal activity, an accident. Unlike in *Northness* and *Merkt*, the informant did not observe any criminal activity. The citizen informant reported seeing a dazed and confused person walking around a vehicle that had apparently rolled over on the freeway. The citizen did not report he or she saw the roll over occur or saw the person driving the car. But “[t]o satisfy the ‘basis of knowledge’ prong, the informant must declare that [s]he personally has seen the facts asserted and is passing on first-hand information.” *Jackson*, 102 Wn.2d at 437. No factual basis supported the informant's allegation that the person standing outside the car was the driver or that the person engaged in any criminal activity at all.

The State failed to establish independent corroboration of presence of criminal activity or that the informer's information was obtained in a reliable fashion. The officers did not see Mr. Mitchell driving the car and

failed to contact the citizen informant to establish whether the tip was obtained in a reliable manner. In locating Mr. Mitchell a mile away by virtue of the clothes he was wearing and the Department of Licensing photograph of the registered owner of the vehicle, police officers corroborated only innocuous facts.

The burden is on the State to show that a warrantless search or seizure is constitutional. *Seattle v. Mesiani*, 110 Wn. 2d 454, 457, 755 P.2d 775 (1988). The State failed to show that the police officers received reliable information of any crime from a credible informant, or that independent police investigation compensated for the deficiencies in the informant's tip. The officers had no articulable reason to suspect the person seen outside the car and located one mile away was engaged in criminal activity. The officers' stop and subsequent seizure of Mr. Mitchell was therefore unlawful. *Z.U.E.*, 183 Wn2d at 624–25.

2. A valid arrest requires probable cause.

A warrantless arrest is valid only if officers have probable cause to believe that a crime is being committed and that the person seized committed the crime. *State v. Mance*, 82 Wn. App. 539, 541, 918 P.2d 527 (1996); U.S. Const. amend. IV; Const. art. I, § 7. Under both the federal and state constitutions, the probable cause standard is an objective

one. *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004); *Beck v. Ohio*, 379 U.S. 89, 96, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). “Probable cause to arrest must be judged on the facts known to the arresting officer before or at the time of arrest.” *State v. Gillenwater*, 96 Wn. App. 667, 670, 980 P.2d 318 (1999). Probable cause to arrest exists only when the arresting officer is aware of facts and circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been or is being committed. *State v. Graham*, 130 Wn.2d 711, 724, 927 P.2d 227 (1996); *State v. Green*, 97 Wn. App. 473, 478, 983 P.2d 1190 (1999). Further, the officer must have reasonable grounds to believe that the particular person arrested committed the crime in question. *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979); *Wong Sun c. United States*, 371 U.S. 471, 480–81, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Grande* 164 Wn.2d 135, 145, 187 P.3d 248 (2008).

3. The police lacked probable cause to arrest Mr. Mitchell.

Trooper Corkins arrested Mr. Mitchell for Driving While Revoked in the First Degree. Finding of Fact 8, CP 51. By statute, a person commits driving while revoked if he or she “drive[s] a motor vehicle in

this state while that person is in a suspended or revoked status . . . .” RCW 46.20.342(1). Conviction of the offense requires proof beyond a reasonable doubt that (1) a license had been issued to operate a motor vehicle and (2) the offender had driven such vehicle on a public highway while such license was revoked. *State v. Markley*, 34 Wn.2d 766, 766-67, 210 P.2d 139, 140 (1949). First degree driving while revoked is a gross misdemeanor. RCW 46.20.342(1)(a). The legislature has authorized custodial arrests where an officer has probable cause to believe that a person has committed driving while revoked. See RCW 10.31.100(3)(f). Accordingly, an officer may arrest a person if the officer is aware of facts and circumstances, based on reasonable trustworthy information, sufficient to cause a reasonable officer to believe the particular person has driven a vehicle while his license was in revoked status. See RCW 46.20.342(1); *Graham*, 130 Wn.2d at 724; *Markley*, 34 Wn.2d at 766-67.

As discussed above, the unidentified caller’s informant’s tip was unreliable. It also did not place Mr. Mitchell in the driver’s seat. There was no eyewitness testimony that he was seen driving the car. In some circumstances police investigation can compensate for deficiencies in an informant’s tip, but that is not the case here. Police only ascertained Mr. Mitchell was the registered owner of the car and had the car keys with

him. Under the totality of the circumstances, the police lacked “reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been or is being committed.” *Graham*, 130 Wn.2d at 724; *Greene*, 97 Wn. App. at 478. Absent probable cause, the arrest was invalid. *Mance*, 82 Wn. App. at 54

E. CONCLUSION

For the reasons stated, based on the totality of all the circumstances known to the trooper at the time, there was insufficient reliable information to justify stopping Mr. Mitchell and subsequently arresting him for the traffic offense of Driving While Revoked.

Respectfully submitted November 9, 2015,

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PROOF OF SERVICE

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on November 9, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of supplemental brief of appellant:

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