

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA
Petitioner,

vs.

GREGORY MAYNARD
Respondent.

FSC. NO. 95,782

DISCRETIONARY REVIEW OF A DECISION OF
THE DISTRICT COURT OF APPEAL, SECOND DISTRICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

All references to the record on appeal shall be designated by the letter “R,” followed by the page number. References to the transcripts of the hearing held on June 22, 1998 will be designated by the letters “RT,” followed by the page number. References to the supplemental transcript shall be designated by the letters “ST,” followed by the page number. Petitioner shall be referred to as the State or Petitioner and Respondent shall be referred to as Respondent or defendant.

STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Times New Roman, a font that is not proportionately spaced.

STATEMENT OF CASE AND FACTS

The Respondent adopts the statement of the case and facts as stated by Petitioner.

SUMMARY OF ARGUMENT

The trial court incorrectly determined that the informant's call to the police and the identifying information which she provided, constituted a citizen informant tip which was properly relied upon by police to stop, detain, and search the Respondent. The Second District Court of Appeal correctly determined that the informant's call constituted an anonymous tip, which required additional independent corroboration of the caller's identity in order to provide law enforcement with sufficient cause to stop and search the respondent. This decision is supported by *J.L. v. State*, 727 So. 2d 204 (Fla. 1999) and *Miller v. State*, 613 So. 2d. 1351 (Fla. 2d DCA 1993).

ARGUMENT

WHETHER A CALL, RECEIVED BY THE POLICE IN WHICH THE CALLER IDENTIFIES HERSELF AS A SUSPECT'S MOTHER, GIVES DETAILED AND SPECIFIC INFORMATION UNIQUE TO THE SUSPECT AND THE CRIMINAL ACTIVITY, CONSTITUTES A CITIZEN INFORMANT TIP WHICH IS TREATED AS BEING AT THE HIGH END OF THE SCALE OF RELIABILITY NEEDING NO INDEPENDENT CORROBORATION OF CRIMINAL ACTIVITY BY POLICE BEFORE STOPPING AND FRISKING A SUSPECT?

In the Initial Brief on the Merits, the Petitioner asserts that the Second District Court of Appeal erroneously overturned the ruling of the trial court. In doing so, the Petitioner notes that the decision in the instant case is in conflict with that of *Foy v. State*, 717 So. 2d 184 (Fla 5th DCA 1998).

The District Court in the instant case relied in part, upon *Miller v. State*, 613 So. 2d. 1351 (Fla. 2d DCA 1993) to overturn the decision of the trial court. Petitioner correctly states that in *Miller*, the District Court treated a caller claiming to be the suspect's wife as an anonymous informant. Petitioner claims that the District Court improperly analyzed the facts of the instant case, and treated a caller claiming to be the Respondent's mother, as an anonymous informant.

Petitioner is correct in stating that Respondent's mother called the police station, identified her relationship to Respondent, gave a detailed description of his appearance, location, and direction of travel. In addition, Petitioner is correct that Respondent's mother informed police that she was at home, gave the address of her home, and stated that the Respondent had just left.(RT42-43) What Petitioner fails to note however, is that the police officer who stopped and searched the Respondent had not had any prior contact with his mother, and did not make any attempt to contact her (by telephone or otherwise) to verify the source of the tip. In fact, police dispatch possessed her telephone number, but did not relay that information to the officer that detained and searched the Respondent.

These distinctions are important and serve to confirm that the decision of the District Court in the instant case did not result from an improper analysis of the facts or an improper recategorization of Respondent's mother as an anonymous informant. As the District Court noted in *Miller*, although one officer knew the wife's telephone number from a previous investigation, he had not utilized her as a confidential informant. Further, that officer's limited knowledge concerning the suspect's wife was not relayed to the officers that stopped, searched and arrested the suspect. Accordingly, the District Court in *Miller* treated the suspect's wife as an anonymous informant. Therefore, both the facts and the decision in *Miller* are consistent with those of the Second District Court of Appeal in the instant case. In both cases, law enforcement possessed information sufficient to enable them to contact the informant and verify identity, which would thereby serve to confirm the informant's reliability. In both cases, law enforcement failed to take this simple but important step.

In citing *Aguilar v. State*, 700 So. 2d 58 (Fla. 4th DCA 1997), Petitioner observes that the District Court found that "Officers may stop and frisk a person on a tip deemed sufficiently reliable, based on either 'the surrounding circumstances or the nature of the information given in the tip itself.'" However, Petitioner's limited reference to *Aguilar* ignores what the District Court did in the application of this standard to the facts of that case. In *Aguilar*, the informant was a thirteen- or fourteen-year-old boy who approached officers in a trailer park as they spoke with the park manager. The boy stated that he had seen a man with a gun in the trailer park washroom and subsequently saw him enter a store on park property. Although the officers did not know the boy's name or the specific trailer in which he lived, they did recognize him as a resident of the area. The District Court concluded that the boy was not an anonymous informant, but that his identity was readily discoverable and therefore, his status and reliability were elevated to that of a citizen informant. *Id*

at 59. Key to the decision in *Aguilar* is the fact that the tip was provided by the informant in person, and that law enforcement officers recognized the boy as a local resident. The facts of *Aguilar* are therefore distinguishable from those of the instant case. Respondent's mother did provide information of her relationship to the Respondent and her residence, thereby making her potentially identifiable. However, law enforcement did not meet with her in person, nor did they take any action that would raise her status and reliability to that of the citizen informant. In other words, the boy in *Aguilar* was both known to law enforcement and immediately accountable when he provided the tip in person. These same important qualities, which might otherwise establish identity and reliability, are conspicuously absent in the instant case.

The Petitioner cites *J.L. v. State*, 727 So. 2d 204 (Fla. 1999) in order to illustrate a distinction in status and reliability between the anonymous informant and the identifiable citizen who reports his identity to the police. The Petitioner attempts to distinguish *J.L.* from the instant case by asserting that the information provided in *J.L.* amounted to no more than a "bare-boned anonymous tip," whereas the details provided by Respondent's mother were more extensive and specific. Upon closer scrutiny, it is apparent that the only distinction of significance between the facts of the instant case and those of *J.L.*, are that in the instant case the caller identified herself by address, telephone number, name, and relationship to the respondent. The Second District Court of Appeal in the instant case addressed this distinction when it noted that *J.L.* held that innocent details without more, were not sufficient to establish reasonable suspicion to stop and frisk an individual under *Terry*. The District Court further noted that *J.L.* recognized two instances where anonymous tips would be considered sufficient to establish reasonable suspicion: 1) by confirmation of suspicious details concerning the conduct of the suspect; and 2) by verification of innocent details, coupled with an independent police

investigation *Maynard v. State*, 24 Fla. L. Weekly D1322 (Fla. 2d DCA, June 4, 1999), see *J.L. v. State*, 727 So. 2d 204, 206-207 (Fla. 1999). The Second District Court, in the instant case, went on to note:

In this case the informant provided the police with an innocent detailed tip similar to that provided in *J.L.* The informant gave the police a location where Maynard could be found, describing his clothing and appearance, and stated he was carrying a firearm. Like the informant in *J.L.*, the informant's tip was limited to a description of the suspect and his location. Accordingly, the anonymous tip was not sufficient to establish reasonable suspicion to stop and frisk Maynard under Terry.

It is clear that the Second District Court of Appeal believed that the caller in the instant case did not provide any suspicious details, nor did law enforcement verify an innocent detailed tip and conduct an independent investigation. That the Second District Court of Appeal gave careful consideration to the failure to confirm the caller's identity is apparent from its review of various decisions including *Evans v. State*, 692 So. 2d 216 (Fla. 4th DCA 1997), *State v. Rewis*, 722 So. 2d 863 (Fla. 5th DCA 1998), *Aguilar v. State*, 700 So. 2d 58 (Fla. 4th DCA 1997), and *Persaud v. State*, 659 So.2d 1191 (Fla. 3d DCA 1995). The Second District Court of Appeal in the instant case utilized the appropriate totality of the circumstances standard in determining that the caller did not qualify as a citizen informant, who was sufficiently identified as such.

The Petitioner cites *Evans v. State* as further support of its proposition that if an informant's identity is potentially ascertainable, that the informant should not be considered anonymous. However, a careful reading of *Evans* clearly indicates that the totality of circumstances known to law enforcement included direct and personal contact with the informant. This contact, however brief, was obviously considered by the District Court in *Evans* when it determined that the informant was not anonymous. In the instant case, law enforcement indeed possessed identifying information for

the caller, but did not possess any further indicia of reliability. Such could have been easily obtained by additional telephone confirmation as was acquired by the initial law enforcement/informant contact in *Miller*.

Petitioner's attempt to distinguish the case of *R.A. v. State*, 725 So. 2d 1240 (Fla. 3d DCA 1999), on the basis of the failure of the caller to identify himself or herself, ignores the fact that the caller gave no specific information concerning the suspects, other than their general location and the nature of the alleged crime. As the Third District Court of Appeal noted, "The totality of the circumstances test is used to determine the requisite level of suspicion...The reliability of an anonymous tipster's information is evaluated in part on its degree of specificity, and in part on the independent corroboration of significant aspects of the informant's predictions," citing *Butts v. State*, 644 So. 2d 605, 606 (Fla. 1st DCA 1994). It is therefore apparent that the informant's unwillingness to be identified in *R.A.* was not the only factor that the District Court considered in its decision to suppress the evidence of that case.

Petitioner next cites *Grant v. State*, 718 So. 2d 238 (Fla. 2d DCA 1998) for the proposition that under the totality of the circumstances standard, the information which identified the caller was very similar to that provided in the instant case. However, this conclusion ignores the subtle but important fact that the trial court in *Grant* was aware that the caller had knowledge of recent burglaries in the neighborhood and was in fact a victim of one of those burglaries. *Id* at 239.

The Petitioner finds further support in *Grant* from the following:

...A brief stop of a suspicious individual in order to determine his identity, or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. *Id* at 240. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Petitioner submits that the action of law enforcement in the instant case is an example of merely a limited intrusion, which did not violate the Respondent's Fourth Amendment rights. However, the language of *Terry* and *Grant* is in fact echoed by and prudently applied in the decision of the District Court in the instant case. The District Court noted that it would not unduly hamper an officer at the scene from locating a suspect, observing him, or participating in a consensual encounter for the brief time necessary to gain additional information necessary to justify a search (emphasis added). The actions taken by law enforcement in the instant case go well beyond the minimal intrusion envisioned in *Terry*.

Petitioner cites *Illinois v. Gates* 103 S. Ct. 2317, 462 U.S. 213 (U.S. Ill. 1983) and *Draper v. United States*, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959) as demonstration of the efforts by law enforcement to corroborate the tip provided by an informant. It is certainly true that in both *Draper* and in the instant case, detailed information was provided by a caller, which was in turn confirmed by the law enforcement officers. However, once again, this simple comparison ignores an important distinction between the two cases. In *Draper*, law enforcement obtained the underlying details from an informant that had provided them with information on previous occasions, and which information had been proven to be both accurate and reliable. The caller in the instant case certainly had no such track record with law enforcement.

A central theme runs throughout Petitioner's Brief on the Merits. Petitioner seems to suggest that an intrusion by law enforcement into a citizen's privacy is not only justified, but a small price to

pay in order to protect the public from the potential of youth-related violence. The Petitioner cites Justice Overton in his dissent in *J.L.* and the United States Supreme Court in *United States v. Clipper*, 973 F.2d 944, 951 (D.C. Cir. 1992) in support of this proposition. Petitioner suggests that this situation be considered an exigent circumstance, such that simple confirmation of an informant's identification should not be required prior to an invasion of a citizen's right to privacy.

This represents an exchange of the fundamental right of a citizen to be free from unreasonable governmental intrusion upon his privacy, for the emotional and political concern of the moment. The majority of this Court rejected this trade-off in its decision in *J.L.*:

We join the Supreme Court of Pennsylvania in rejecting this exception: “FN3 Often, carving out exceptions to constitutional principals can lead one to the top of a “slippery slope.” In *Terry*, the United States Supreme Court recognized a limited exception to the probable cause requirement. The Supreme Court reasoned: “There must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.” *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Those jurisdictions recognizing a “firearm exception” are in essence carving out an exception to an exception, by requiring less than reasonable suspicion for a *Terry* stop in response to an anonymous tip which alleges that an individual is carrying a firearm. We are unwilling to carve out this new exception from the original exception recognized in *Terry*. *J.L.* at 209 citing *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L. Ed. 2d 889 (1968)

CONCLUSION

It is humbly submitted that the well-balanced decision of the Second District Court of Appeal in the instant case is in fact consistent with a reasonable interpretation of the case law, including this Court's most recent decision in *J.L.* As a result, the District Court's decision in the instant case should be accorded the respect it deserves, and this Court should reject Petitioner's argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by U.S. Mail to Diane K. Bock, Assistant Attorney General, and Robert J. Krauss, Assistant Attorney General, Westwood Center, 2002 N. Lois Avenue, Suite 700, 4th Floor, Tampa, Florida 33607, Counsel for Petitioner, and to James T. Miller, 233 E. Bay Street, Suite 920, Jacksonville, Florida 32202, Amicus Curiae on behalf of Respondent.

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