IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. **GREGORY MAYNARD,** Respondent.	**FSC. NO. 95,782**

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

PETITIONER'S 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 Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

On February 3, 1998, the State Attorney for the Sixth Judicial Circuit, Pinellas County, Florida, charged Respondent Gregory Maynard, with carrying a concealed firearm in violation of section 790.01, Florida Statutes. (R 7)

On January 13, 1998, between 9:30 and 10:00 a.m., a call was received by the Clearwater Police Department from a woman caller identifying herself as the defendant's mother. (RT 35, 37, 44) The caller described the defendant as "a white male, nineteen years of age, wearing a black and white shirt and black pants, and it also described that he would be wearing a bright green backpack." (RT 37) The caller further informed the police that the defendant was carrying a firearm in his backpack; specifically, a Mac-10 Uzi. (RT 38, 40) Additionally, the caller provided police with the defendant's location and direction of travel. (RT 38-39) She further informed the police that the defendant had just left her home at 15 North Fernwood Avenue after a dispute. (RT 39, 42-43)

Officer Adam Lee Weinberg (hereinafter "Weinberg") located the defendant in the area given by the caller. (RT 38-39) Officer Weinberg testified that he stopped the defendant at 10:07 a.m. on January 13, 1998. (RT 41) The only reason Weinberg stopped the defendant was because of the BOLO, he did not witness any independent acts of the defendant that were either suspicious or illegal. (RT 41)

Upon locating the defendant, Officer Weinberg stopped his vehicle and verbally asked the defendant to stop. The defendant stopped and turned around. Defendant was asked to approach Weinberg's vehicle with his hands up for safety purposes. When the defendant was in close proximity to Weinberg the officer waited until back-up was in place to pat down defendant's backpack. (RT 39) Upon patting down defendant's backpack Weinberg felt "a very hard object, a large hard object." (RT 39-40) In the backpack was a nine millimeter machine gun type weapon. (RT 40) The defendant was taken into custody. (RT 40)

On June 22, 1998, defendant's motion to suppress was heard before the Honorable Frank Quesada. (R 10-11, RT 32-62) The trial judge denied defendant's motion to suppress by finding that the mother's call was in the "very wide area of good citizen informant. . . ." (RT 53) Respondent pled no contest to the charge on June 23, 1998, reserving his right to appeal the trial court's denial of his motion to suppress. (R 12-13, ST 68-72) The trial court accepted Respondent's plea adjudicating him guilty and sentencing him to a term of nineteen months in the Department of Corrections. (R 16-20, ST 71)

Respondent timely filed his notice of appeal. (R 23) The Second District Court of Appeal reversed the trial court's ruling on Respondent's motion to suppress and remanded this case to the trial court, acknowledging conflict with the Fifth District Court of Appeal in Foy v. State, 717 So. 2d 184 (Fla. 5th DCA 1998).

Maynard v. State, 24 Fla. L. Weekly D1322(Fla. 2d DCA, June 4, 1999). On June 15, 1999, this Court entered its order postponing a decision on jurisdiction, but setting a schedule for briefs on the merits.

SUMMARY OF THE ARGUMENT

The trial court correctly determined that the Respondent's mother's call to the police, identifying herself, giving her address, a complete physical description of Respondent, informing the police that Respondent was carrying a Mac-10 Uzi in his green backpack, and his route of travel, and advising them that she had observed his placing the gun in his backpack before leaving the home, constituted a citizen informant tip which was properly relied upon by the police to stop, detain and pat down the Respondent, revealing a Mac-10 Uzi in his backpack. The Second District Court of Appeal erroneously re-categorized the mother's call as an anonymous tip requiring independent corroboration of illegal activity before the officer had sufficient cause to stop and frisk the Respondent, which decision expressly and directly conflicts with both Foy v. State, 717 So. 2d 184 (Fla. 5th DCA 1998) and J.L. v. State, 727 So. 2d 204 (Fla. 1999).

ARGUMENT

ISSUE

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?

Based upon the facts of this case, the Second District Court erroneously overturned the ruling of the trial court denying Respondent's Motion To Suppress based upon the search of his backpack which revealed his illegal possession of a Mac-10 Uzi. In direct conflict with the decision of the district court in the case now upon review, is the case of Foy v. State, 717 So. 2d 184 (Fla. 5th DCA 1998). The court in Foy was faced with the identical circumstances presented by the underlying facts of this case. In Foy the court found that:

> . . .although the caller was a previously unknown female, the court finds that the tip was not anonymous because the caller identified herself as the mother of the person about whom she was calling. Further, **the tip reflects an indicia of reliability because the caller identified herself, and the information she gave regarding Defendant, his car and his whereabout was specific**. At 185. [emphasis added]

In the instant case the district court relied upon Miller v. State, 613 So. 2d 1351 (Fla. 2d DCA 1993) to overturn the trial court's denial, stating that:

> While it can be argued that a suspect's mother is more reliable than the average citizen because of the inherent difficulty in implicating a loved one, we shall continue to follow Miller and certify conflict with Foy [v. State, 717 So. 2d 184 (Fla. 5th DCA 1998)].

In Miller the court below treated a caller who claimed to be the suspect's wife as an anonymous informant. In instant case the court below found that simply because the caller was not independently identified before Respondent was stopped and searched, that it was reversible error resulting in a necessity to suppress the evidence found in his backpack. However, the district court improperly analyzed the facts of this case when making that determination and improperly re-categorized Respondent's mother's call as an anonymous tip.

In this case Maynard's mother called into the police station, identified herself as his mother, gave a detailed description of the Respondent, his location, direction of travel, dress and physical appearance. She further advised the police of her unique and personal knowledge of her son's possession of a Mac-10 Uzi concealed in his backpack. Importantly, Maynard's mother informed the police that she was at home, gave the address of her home and stated that the Respondent had just left the home.

In Aguilar v. State, 700 So. 2d 58 (Fla. 4th DCA 1997), the Fourth District Court of Appeal 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.'" *Citing* Hetland v. State, 387 So. 2d 963, 963 (Fla. 1980).

Certainly, in this case, the ***nature of the information given in the tip*** by Respondent's mother was sufficiently reliable based upon the surrounding circumstances. This was not a caller that failed or refused to identify herself, this was an ***identifiable*** citizen reporting a crime, a citizen with unique, first-hand knowledge derived from her close relationship with the Respondent and, consequently, close observation of the crime. This information was provided to the police by Mrs. Maynard, including the basis of her knowledge that her son was carrying a Mac-10 Uzi in his backpack. This means that Mrs. Maynard was readily ***identifiable*** as required to be considered a citizen-informant. This placed her tip at the high end of the reliability scale, **not** requiring independent corroboration, contrary to the district court below.

Recently in J.L. v. State, 727 So. 2d 204 (Fla. 1999), this Honorable Court found that:

> The law is well established that a police officer may, in appropriate circumstances, stop a person for the purpose of investigating possible criminal behavior, even

> though there is no probable cause for an arrest, as long as the officer has reasonable suspicion that the person is engaged in criminal activity. The circumstances may even require a frisk of the person to determine whether the person is carrying a weapon, if the police officer has a reasonable suspicion that the person is armed and poses a threat to the officer or others. However, when the police act on the information of an informant, the reliability of that information must be established before a citizen can be stopped and frisked. [citations omitted]
>
> . . .Tips from known reliable informants, such as an **identifiable citizen who observes criminal conduct and reports it, along with his own identity to the police,** will almost invariably be found sufficient to justify police action. At 206. [emphasis added]

Though this Court found that there was not sufficient reliability of the informant's tip to justify a stop and frisk of J.L., the reasoning was that there was a failure of the informant to provide more than a "bare-boned anonymous tip." In the case at issue there was substantially more than a bare-boned tip. The details given by Respondent's mother were extensive and specific, carrying the requisite indicia of reliability. As noted by Justice Overton in his dissent in J.L.:

> The possession without authority of a concealed firearm by any individual in a public place or at a public event is a prescription for disaster, but the possession

> of a concealed firearm by a child is an especially dangerous and explosive situation.
>
> . . . What must be remembered is that the Florida and United States constitutions protect against 'unreasonable searches and seizures.' Under the circumstances of this case, stopping and frisking this child and seizing the concealed weapon is not unreasonable. At 211.

These words ring especially true in the case now being reviewed: "[t]he unfortunate reality of today's society is that dangerous persons of all ages stand armed and ready to shoot law enforcement officers and citizens." Ibid.

It is inconceivable that under the circumstances presented herein that the officer, who had confirmed all aspects of the information given by Mrs. Maynard with the exception of the actual possession of the firearm, was impotent to intercede to forestall or avoid a potential deadly situation. Furthermore, the district court's comments regarding the possibility of first making specific identification of the caller, i.e., assuring themselves that the caller was in fact Respondent's mother, is best responded to by the words of the United States Supreme Court in United States v. Clipper, 973 F.2d 944, 951 (D.C.Cir. 1992):

> Th[e] element of imminent danger distinguishes a gun tip from one involving possession of drugs. If there is any doubt about the reliability of an anonymous tip in the latter case, the police can limit their response to surveillance or engage in 'controlled buys.' Where guns are involved, however, there is the risk that an attempt to 'wait out' the suspect might have fatal consequences.

Without indulging in histrionics or unnecessarily dramatizing the situation, it is more than plausible that the nature of the information created an exigent circumstance.

Once the tip was acted upon the police had to be able, for purposes of officer safety and public safety, to follow through to secure what they reasonably believed was, or could quickly become, a dangerous situation. This required a pat-down of Respondent's backpack. Officer Weinberg testified that he patted down the outside of the backpack and felt a large, hard object that he believed to be a weapon. Upon examination of the inside of the backpack that belief was confirmed when the search revealed a Mac-10 Uzi.

As in Aguilar, this citizen-informant found herself in a situation where she observed criminal activity, that of her own son, and as hard as it was for her she properly and promptly reported this criminal activity to the police. Mrs. Maynard's basis of knowledge was demonstrated by her ability to describe in detail the criminal activity of the Respondent and the circumstances surrounding that criminal activity. The stop of the Respondent was based on reasonable suspicion and the search that ensued was lawful. *See*: Evans v. State, 692 So. 2d 216, 218 (Fla. 4th DCA 1997).

The facts of this case are analogous to those in Evans, in which the district court found:

> . . .it is difficult to see how Ms. Steele can be deemed an 'anonymous' caller: she provided her name, location, and occupation to the police. The ample information in the hands of the dispatcher regarding Ms. Steele's identity is constructively imputed to Officer Hall because Florida courts apply the 'fellow officer rule,' which operates to impute the knowledge of one officer in the chain of investigation to another.

Nor does the fact that in Evans the arresting officer made eye contact with the informer before stopping the suspect negate the importance of the court's logic. The logic is simple; if an informant's identity is readily ***ascertainable***, then they are not considered anonymous. Mrs. Maynard's identity was readily ascertainable and the officer was not required to first verify her identity before acting on the information she had provided, given the nature of the information and the circumstances surrounding the informant's obtaining of the knowledge of the criminal activity, i.e., being a first-hand witness.

The limited intrusion upon Respondent's Fourth Amendment rights, when balanced against the potential of disaster foretold by the nature of the information provided by Mrs. Maynard, demonstrates that the Officer reasonably relied upon the information provided in stopping and searching the Respondent.

As in Foy, the detailed description given by Mrs. Maynard of the Respondent, his attire, physical appearance, circumstances surrounding the criminal activity, location and direction of

travel, were specific enough to establish a clear level of reliability based upon the circumstances of this case. The "totality-of-the-circumstances" is the correct standard by which to measure whether or not the police had a reasonable suspicion that permitted the Respondent to be stopped and searched. Illinois v. Gates, 103 S.Ct. 2317, 462 U.S. 213 (U.S. Ill. 1983).

Importantly, the trial court in this case made a specific determination at the evidentiary hearing on Respondent's Motion to Suppress Evidence, that Mrs. Maynard was a citizen-informant and not an anonymous tipster. (R 53) "A citizen-informant is one who is 'motivated not by pecuniary gain, but by the desire to further justice.'" Evans, supra at 219. This fact alone distinguishes the case below from R.A. v. State, 725 So. 2d 1240 (Fla. 3d DCA 1999).

However, Appellee would further distinguish the case of R.A., in which the court found that an anonymous tip received by the police was insufficient to justify a juvenile's detention. The court went on to state that it was the informant's unwillingness to be identified that lowered the level of reliability in the information provided to the police. In R.A. the trial court determined that the informer was an anonymous tipster. The court went on to state: "[h]ad the anonymous tipster in this case identified himself or herself, we would be in a position to affirm the trial court's denial of R.A.'s motion to suppress, because the tip would then have possessed the necessary reliability to justify R.A.'s temporary detention." *Quoting* Evans, supra.

In Grant v. State, 718 So. 2d 238 (Fla. 2d DCA 1998), the court found that a telephone call from a resident of a neighborhood that had experienced several burglaries, in which the caller described a vehicle driving up and down the street with its lights off, as being sufficient to provide the responding officer with a reasonable suspicion to support an investigatory stop. The description in Grant, given by the caller, was a general description of the vehicle and its behavior. In the case now before this Honorable Court, the caller, calling from her home gave her location, identified herself as the suspect's mother, gave specific details concerning her first-hand observation of the criminal activity, advised the police of her son's physical appearance, his manner of dress; specifically, that he was carrying a green backpack, and that he was illegally in possession of a Mac-10 Uzi.

Given the totality of the circumstances surrounding the information provided to the police, the officer possessed a reasonable suspicion of criminal activity. The lone dissent in Grant, Judge Casanueva, was concerned with what he termed a failure to "link" the car stopped with specific criminal activity. In Grant several hours had elapsed from the time of an initial burglary and the report of the vehicle that was detained. There is no such time gap in the case now being reviewed. Respondent's mother placed the telephone call to the police as soon as her son left the house with the gun. Police responded to the mother's

call within minutes, actually projecting the route of travel based upon the information given to them by the mother. The police were able to intercept the Respondent. As in Grant:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry*[1] recognizes that it may be the essence of good police work to adopt an intermediate response. 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. At 240.

Judge Casanueva's concerns were based upon the generality of the description given the caller and the fact that the caller himself did not have first-hand information that the suspect was engaged in any criminal activity, only that he was driving his car in a suspicious manner.

Here the police were presented with much more. The Respondent's mother observed the Respondent place the Mac-10 Uzi into the backpack. She had a direct, one-on-one conversation with the Respondent before he left the home regarding his possession of the gun. All this was communicated to the police and the officer making the stop was imputed to have been imbued with all of this

[1]Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

information at the time he located Respondent and stopped him. Evans, supra. Officer Weinberg acted reasonably and sanely. A general pat-down once the stop was effected, for purposes of safety, was prudent and necessary. This limited intrusion did not violate Respondent's Fourth Amendment rights.

In the case below, the Officer had verified virtually all of the information given through dispatch, except for the final determination as to whether or not Respondent carried a concealed Mac-10 Uzi in the green backpack. This set of circumstances is akin to those discussed by the United States Supreme Court in Gates, supra.

In Gates the Court reflected back upon its prior decision in Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959), regarding the corroborative nature of the police officers visual observations as it relates to the information provided in a tip. The Court noted that:

> Our decision in *Draper* [. . .], however, is the classic case on the value of corroborative efforts of police officials. There an informant named Hereford reported that Draper would arrive in Denver on a train from Chicago on one of two days, and that he would be carrying a quantity of heroin. The informant also supplied a fairly detailed physical description of Draper, and predicted that he would be wearing alight colored raincoat, brown slacks and black shoes, and would be walking 'real fast.' [citations omitted] Hereford gave

> no indication of the basis for his information.
>
> On one of the stated dates police officers observed a man matching this description exit a train arriving from Chicago; his attire and luggage matched Hereford's report and he was walking rapidly. We explained in *Draper* that, by this point in his investigations, the arresting officer 'had personally verified every facet of the information given him by Hereford except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of Hereford's information being thus personally verified, [the officer] had 'reasonable grounds' to believe that the remaining unverified bit of Hereford's information -- that Draper would have the heroin with him -- was likewise true[.]'

The detailed description provided by Respondent's mother in this case is no less impressive than that provided by the informant in Draper. Officer Weinberg was able to verify all aspects of the information save whether or not the backpack worn by Respondent concealed a Mac-10 Uzi. This officer was not required to verify this last point of information at the cost of putting himself and others in jeopardy.

As Justice Wells stated in his dissent in J.L., ". . .to guard the constitutionally protected right to be free from unreasonable searches and seizures, this Court is not required to ignore the reality of what is happening daily in our country, our

state, and in every local community of Florida." At 215. The key is the word 'unreasonable.' "What is unreasonable has to be measured against what are the contemporary facts of life." As abhorring as it is, the facts of life now include children killing with guns. This is not an emotional plea to react to current headlines, this is simply an argument that the facts of life must be examined and interwoven into the laws, and the application of those laws, in our society.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Petitioner respectfully requests that the ruling of the district court be reversed, and that trial court's ruling determining that the tip was from a citizen informant and denying Respondent's motion to suppress be reinstated, upholding the conviction and sentence of Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Charles H. Holloway, Esq., Attorney for Respondent, 611 Druid Road, Suite 512, Clearwater, Florida 33756, and James T. Miller, Esq., representing Amicus Curiae; Florida Association Of Criminal Defense Lawyers, 233 E. Bay Street, Suite 920, Jacksonville, Florida 32202, this ____ day of July, 1999.

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