

IN THE SUPREME COURT OF FLORIDA

CASE NO. 07-1453

GEORGE BAPTISTE,

Petitioner,

-vs.-

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

To maintain consistency with the record references used by the State, the symbol “R” will be used to designate the record on appeal.

ARGUMENT

I.

AN ANONYMOUS TIP STATING THAT A BLACK MAN WEARING JEAN SHORTS AND A WHITE SHIRT STANDING AT A PARTICULAR LOCATION AND WAVING A GUN LACKS THE REQUISITE INDICIA OF RELIABILITY TO ESTABLISH REASONABLE SUSPICION TO CONDUCT A STOP OF A SUSPECT MATCHING THAT DESCRIPTION, WHERE POLICE OBSERVE NOTHING TO CORROBORATE THE CLAIM THAT A GUN WAS BEING WAVED.

The State's entire argument is premised on its assertion that the anonymous caller was at the scene when the police arrived and that he pointed Mr. Baptiste out to the officers prior to the stop. (State's brief at 6,8,11,12). The State relies on this premise to argue that the officers therefore knew that the caller was an eyewitness who had seen Mr. Baptiste wave a gun. (State's brief at 9-10). There is no record support for the State's assertion that the caller met the officers at the scene upon their arrival and the Third District Court of Appeal did not based its decision on any such facts. In fact, the testimony at the motion to suppress established the opposite.

At the hearing on the motion to suppress there was no testimony that the police officers saw the anonymous caller at the scene before they stopped Mr. Baptiste. The only officer who testified at the hearing explained that the man who identified himself to officers as the anonymous caller did not approach until after

she and another officer had already stopped Mr. Baptiste at gunpoint. (R.67-68,71). Further, there was no testimony that other people were present and pointing when officers arrived. (T.66-72). In fact, the only officer who testified at the hearing was the second officer to respond and she did not arrive until after the first officer already had Mr. Baptiste stopped at gunpoint. (T.66-72). Therefore, at the hearing on the motion to suppress there was no testimony as to anything that happened before Mr. Baptiste was stopped by the first officer.

The first officer to arrive at the scene testified only at the trial and not at the hearing on the motion to suppress. While testifying at trial, this officer began to say that when she arrived she saw two people pointing but defense counsel objected immediately on hearsay grounds and moved to strike this comment. (Trial transcript at 176). The trial court sustained the objection, finding it to be inadmissible and the State moved on. (Trial transcript at 176).

In an attempt to make the anonymous tip seem reliable, the State misconstrues the record to make it appear that the caller had contact with the officers prior to the stop. However, when the actual testimony from the hearing on the motion to suppress is reviewed, it is clear that the reliability of the anonymous tip was not established prior to the stop and that the tip was no more reliable than the tip found to be unreliable in *Florida v. J.L.*, 529 U.S. 266 (2000). Additionally, the Third District did not base its opinion on the premise that the anonymous caller

was on the scene when officers arrived. In contrast, the Third District found that the anonymous caller made contact with the officers after the stop but before the pat-down search:

Baptiste was Terry-stopped by police after a then-anonymous informant dialed 911 to report that a person who matched his description was “waving” a firearm in the vicinity. **Immediately after the stop, the person who called came to the scene and, without giving his name, identified himself as the caller and Baptiste as the person he saw with a gun.** A subsequent pat-down and search of Baptiste's person indeed revealed that he was carrying a nine-millimeter Taurus handgun.

Baptiste v. State, 959 So. 2d 815, 816 (Fla. 3d DCA 2007). All of the State’s arguments for why the tip in this case was sufficiently reliable are based on the inaccurate premise that the anonymous caller made contact with the officers prior to the stop.

1- STATE’S ARGUMENT THAT THE TIP WAS RELIABLE BECAUSE IT CAME FROM AN EYEWITNESS

The State argues that the anonymous tip in this case came from an “eyewitness” who observed a gun being waved and that the tipster’s location and basis of knowledge were established in the content of the tip itself. (State’s brief at 9,20). The State cites to *United States v. Perkins*, 363 F.3d 317 (4th Cir. 2004) for the premise that the reliability of a tip can be established if the tip itself makes it clear that caller is a witness to the crime being reported. (State’s brief at 10). In

Perkins, the caller revealed her location and reported that she was observing men pointing guns across the street while she was on the phone. *Perkins*, 363 F. 3d at 324. The court found that one of the eleven reasons that the tip's reliability was enhanced was because the caller alleged a "contemporaneous viewing." *Id.* at 322.

The State attempts to make this case appear similar to *Perkins* by asserting that when the caller met the officers at the scene and pointed at Mr. Baptiste, the officers were justified in making a stop because they knew that this was the eyewitness who had called. (State's brief at 9-10,12-13). However, the testimony at the hearing on the motion to suppress did not establish this and therefore, there was no evidence that the caller was at the scene or that he was an eyewitness. In this case, the anonymous caller did not state that he had personally observed the man waving a gun, nor did he say how he obtained this information. Therefore, this case is not like *Perkins*. Additionally, the ten other factors that the court found enhanced the tip's reliability in *Perkins* are not present in this case.

2- STATE'S ARGUMENT THAT THE TIP WAS RELIABLE BECAUSE IT CAME FROM A CITIZEN INFORMANT

The State also relies on the misrepresentation that the caller was at the scene when officers arrived to argue that the anonymous caller should be classified as a citizen informant. (State's brief at 11-12). However, the testimony at the motion to suppress established that the caller did not arrive at the scene until after the officers had already stopped Mr. Baptiste. (R.67-68,71). Therefore, the caller

remained anonymous and cannot be classified as a citizen informant at the time officers made the stop.

In all the cases cited by the State in support of its argument that the caller in this case was a citizen informant, the citizen informant made contact with the police at the scene before officers conducted a stop. (State's brief at 14-16); *See Carattini v. State*, 774 So. 2d 927 (Fla. 5th DCA 2001) (finding that a complainant was properly classified as a citizen informant where she approached a police officer at a mall, reported that three men had just run out of the store with stolen goods and then accompanied the officer outside the store and pointed to the suspects as they were getting in a car before they were stopped by police), *Evans v. State*, 692 So. 2d 216 (Fla. 4th DCA 1997) (explaining that a McDonald's employee who phoned police and reported that a driver in the drive-thru line was intoxicated was properly classified as a citizen informant even though the officer who responded to the drive-thru knew only that an employee had called, where the employee made contact with the officer when he arrived and pointed the defendant out to the officer before he conducted a stop), *United States v. Heard*, 367 F. 3d 1275 (11th Cir. 2004) (finding that a police officer had reasonable suspicion to conduct a *Terry* stop after an unidentified woman told the officer at a train station that a specific man who was walking away was carrying a gun before the officer stopped the man), *United States v. Thompson*, 234 F. 3d 725 (D.C. Cir. 2000)

(finding that an officer had reasonable suspicion to conduct a stop after a motorist drove up and reported that he had just seen a man carrying a gun get out of an SUV about 100 yards back in a parking lot) and *State v. Rutzinski*, 623 N.W. 2d 516 (Wis. 2001) (finding that a motorist was a citizen informant where the motorist called police and reported that a driver in a car behind him appeared intoxicated, the motorist remained on the phone with police and continued to drive near the car until officers arrived, when the officer pulled up next to the defendant's vehicle, the motorist on the phone reported that the officer was behind the correct vehicle, and where the motorist pulled over when the officer stopped the driver and spoke with police).

In contrast, in this case, the evidence at the hearing on the motion to suppress established that the man approached after officers had already stopped Mr. Baptiste. (R.67-78,71). Therefore, the anonymous caller in this case is nothing like the citizen informants in any of the cases cited by the State.

3- STATE'S ARGUMENT THAT *RIVERA* IS DISTINGUISHABLE

The State's attempt to distinguish *Rivera v. State*, 771 So. 2d 1246 (Fla. 2d DCA 2000) from this case is similarly flawed. (State's brief at 17). Here too, the State relies on the premise that the anonymous caller approached officers before they stopped Mr. Baptiste in its attempt to distinguish *Rivera*. (State's brief at 17). The State asserts that unlike *Rivera*, the caller in this case came to the scene and

met the officers and was therefore a constitutionally reliable citizen informant. (State’s brief at 17-18). As already discussed, the caller did not approach until after the officers had already stopped Mr. Baptiste. (R.67-68,71). Therefore, this case, like *Rivera*, involves nothing more than an anonymous caller reporting an observable criminal activity. In *Rivera*, the court held that an anonymous allegation of open, readily observable criminal activity does not make the tip sufficiently reliable. *Rivera*, 771 So. 2d 1248.

The State also distinguishes *Rivera* because the caller reported “a vague and conclusory allegation...that the occupants of two cars were involved in a gun battle” whereas the caller in this case “reported a simple and direct observation” that a person was waving a gun. (State’s brief at 17). Nowhere in *Rivera* does the court say that the anonymous caller reported that a “gun battle” was occurring. *See Rivera*, 771 So. 2d 1246. Instead, the anonymous caller reported that he had observed a “white Mazda and a maroon Toyota, bearing a specific tag number, exchange gunfire” on a specific road. *Id.* at 1247 (emphasis added). There was nothing vague or conclusory about the caller’s report. The allegation that a gun is being waved was no more direct than an allegation that a gun is being fired.

From the record of the hearing on the motion to suppress and from the decision of the district court of appeal, it is clear that all that the State established through the testimony of the one officer who testified was that Mr. Baptiste was stopped because police received an anonymous call that a man matching his description was waving a gun. (T.7-8,10). The caller did not say who he was, how he knew this information or from whom he had obtained it. Although a man approached the officers after Mr. Baptiste was stopped and stated that he was the caller, the reliability of the tip was not established prior to the stop.

As the reliability of the anonymous tip was not established, the tip did not provide the requisite reasonable suspicion to support a stop. Police lacked reasonable suspicion to stop Mr. Baptiste at gunpoint and order him to get down on the ground as he walked down a street and the trial court erred in denying the motion to suppress.

II.

THE INFORMATION OBTAINED BY POLICE OFFICERS AFTER MR. BAPTISTE HAD ALREADY BEEN STOPPED AT GUNPOINT AND ORDERED TO THE GROUND BY TWO POLICE OFFICERS CANNOT PROVIDE THE REASONABLE SUSPICION NEEDED FOR THAT STOP.

Once again, contrary to the record in this case and the decision of the district court of appeal, the State maintains that in finding the tip to be reliable the Third District relied on information that officers learned about the anonymous caller before they stopped Mr. Baptiste. (State's brief at 22). However, the Third District specifically found that the "transmogrification" did not happen until the caller approached the officer after the stop but before the pat-down search:

Immediately after the stop, the person who called came to the scene and, without giving his name, identified himself as the caller and Baptiste as the person he saw with a gun. A subsequent pat-down and search of Baptiste's person indeed revealed that he was carrying a nine-millimeter Taurus handgun . . . the "anonymous tipster" who made the 911 call was transmogrified into a constitutionally reliable citizen informant when the caller-before the pat-down search and seizure of the gun-came to the scene and identified himself to the officers.

Baptiste, 959 So. 2d at 816-817.

In order to make the argument that the "transmogrification" happened before the stop the State has to rely on the same misrepresentations of the record that were discussed above. The State argues that before the first officer stopped Mr. Baptiste

she observed the 911 caller and another witness pointing at Mr. Baptiste. (State's brief at 23). The State contends that when the anonymous caller later approached the officers after Mr. Baptiste was stopped at gunpoint, it "merely supplemented the information police already had." (State's brief at 23). However, as discussed above, there was no testimony presented at the hearing on the motion and no admissible testimony presented at the trial that established that officers received any information on the scene before stopping Mr. Baptiste. As reasonable suspicion was not established prior to the stop, the trial court erred in denying the motion to suppress.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal affirming the trial court's denial of the motion to suppress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this ____day of February, 2008.

COLLEEN BRADY WARD
Assistant Public Defender

CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

COLLEEN BRADY WARD
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