IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

IN RE: J.T.	:	APPEAL NOS.	C-220609
			C-220610
	:		C-220611
			C-220612
	:	TRIAL NOS.	21-1601Z
			21-1603Z
			21-1604Z
	:		21-1610Z

O P I N I O N.

Appeal From: Hamilton County Juvenile Court

Judgment Appealed From Is: Reversed and Appellant Discharged

Date of Judgment Entry on Appeal: August 4, 2023

Melissa A. Powers, Hamilton County Prosecutor, and *Sean M. Donovan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee State of Ohio,

Raymond T. Faller, Hamilton County Public Defender, and *Andrew Hakala-Finch*, Assistant Public Defender, for Defendant-Appellant J.T.

CROUSE, Presiding Judge.

{¶1} Following a no-contest plea, sixteen-year-old J.T. was adjudicated delinquent for carrying a concealed weapon, receiving stolen property, possession of drugs, and having a weapon under disability. J.T. now appeals from the juvenile court's decision denying his motion to suppress the evidence recovered from his person during an investigatory stop and the subsequent delinquency adjudications. For the following reasons, we reverse the juvenile court's denial of J.T.'s motion to suppress. As a result, we vacate J.T.'s adjudications.

I. Factual and Procedural History

{¶2} On Friday, May 28, 2021, Cincinnati Police Department ("C.P.D.") Officers Loeding and Merritt were sent to follow up on a tip received by C.P.D. Officer Delk. Delk had been investigating a shooting near a church that took place earlier in the week. On the afternoon of the 28th, Delk received a tip from the pastor of the church that individuals who appeared to match those seen on surveillance video of the shooting were at a particular gas station. Delk contacted Loeding to follow up on the tip. Loeding testified at the suppression hearing that the pastor's tip alleged that the youths at the gas station "were wearing the same clothes as they were on the day of the incident" and had speculated that they still had the firearm with them.

{¶3} Delk sent still photos of the suspects from the surveillance video to Loeding's phone. Loeding testified that Delk "sent us the photographs from the security footage from the church, so we had that. No names." When asked for clarification if Loeding and his partner had been given "Names, descriptions, or photographs?" Loeding stated, "No names. Just the pictures from the security, so that's what we went off of." The photos did not show the faces of the suspects. Rather,

the photos showed "four or five" individuals, one of whom was holding a handgun and wearing a red, hooded sweatshirt with a white logo in the center of the chest. Loeding testified that he could not say with any certainty whether the individuals in the photo were juveniles or adults, but that he believed they were juveniles based on their size. Loeding also did not know exactly when the shooting took place, merely that it was earlier in the week.

{¶4} A couple of minutes after Delk contacted Loeding, Loeding and his partner drove to the gas station. Loeding did not see anyone at the gas station, so he and his partner drove around the area. They discovered J.T. and two companions, one of whom was wearing a red sweatshirt, about a block away from the gas station.

{¶5} Loeding testified that when they saw the group, he and Merritt "stopped them, detained them since we knew that they matched the description. They were actually wearing the same clothes from the photo that was sent to us. We detained them, [and] did a quick pat-down for weapons." Loeding testified about the photo sent by Delk as follows:

> Q: And there was only one individual in that photograph with the firearm, correct?
>
> A: Yes.
>
> Q: Okay. And the only suspect you were looking for, you had one description, correct?
>
> A: Yes.
>
> Q: And that was a male black teen wearing a red hoody, correct?
>
> A: Yes.
>
> Q: And that was armed with a gun last week in the picture. That's

what Officer Delk sent you?

A: Yes.

{¶6} After reviewing the body-camera footage of the individuals he stopped, Loeding was asked:

Q: And [name redacted] is the one that is wearing a red hoody, correct?

A: Yes.

Q: And so that is the individual that Officer Delk gave you guys the description for, correct?

A: Yes.

* * *

Q: Okay, and I just want to clarify too. You guys had a tip that an individual in a red hoody, who was suspected to be involved in a shooting, was at a Shell gas station, correct?

A: We were told the whole group. The picture that Delk sent us was of four or five, six juveniles.

Q: But the only description put out was for a black male, in a red hoody, correct? I mean, he was the only one with the gun in the security camera footage, right?

A: Yes.

{¶7} The magistrate also questioned Loeding about the reason he suspected that the individuals he stopped were the individuals in the photos:

Q: Officer, you're saying that they're wearing the same clothes that you see them in here today?

A: That's what we were told.

Q: But really its just the red sweatshirt guy?

A: Red sweatshirt and jeans.

Q: And jeans. Did you know any of their names?

A: Not at the time, no.

Q: Can you see their faces in these photos?

A: Nope.

Q: So what made you – is the red sweatshirt person the reason why you stopped these three?

A: Yes. He was the initial, based on that photo.

{¶8} Loeding also testified that he did not remember what clothing J.T. was wearing at the time of his arrest.

{¶9} When asked about the justification for the pat-down, Loeding testified, "We believed Delk said they probably still had the gun on them. We didn't know for sure, so when we stopped them, that was the first thing we did was pat them down." Loeding first patted down the individual in the red sweatshirt, but found nothing. Then another officer patted down J.T. Following the pat-down of J.T.'s outer clothing, officers recovered a firearm from the front pocket of J.T.'s sweatshirt.

{¶10} After discovering the firearm in J.T.'s possession, the officers arrested J.T. In a more thorough search of J.T.'s person incident to his arrest, the officers discovered a small amount of pills that were later determined to be methamphetamine.

{¶11} J.T. moved to suppress the evidence seized from him. Following a hearing on the motion, the magistrate granted J.T.'s motion. The magistrate found

that the only description Loeding had of the suspect was someone "wearing a red hoodie and jeans." The officers did not have the name of anyone involved, nor could any faces be seen in the surveillance photos. The magistrate found that while "the officers may have had reasonable suspicion to stop the person wearing the red hoodie and jeans, they did not have that same suspicion to stop the Defendant. The Court cannot find that the Defendant matched the description of anyone in the still photos."

{¶12} The state filed objections to the magistrate's decision. After a hearing on the objections, the juvenile court rejected the magistrate's decision and denied J.T.'s suppression motion. The juvenile court found that "Officer Loeding was provided with a picture of the individuals, including an individual in a red hoody believed to be the shooter. Officer Loeding responded to the area, which was nearby the church where the shooting took place, and located an individual who matched the description of the shooter walking with two other individuals." The juvenile court did not make any factual findings regarding the similarity between J.T.'s clothing and the surveillance photo. The juvenile court also did not address whether Officer Loeding had a reasonable, articulable suspicion to conduct a *Terry* stop, but rather solely addressed whether the officer had a reasonable, articulable suspicion to conduct a protective search. *See Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The court held, "[b]ased on the totality of the circumstances, the Court finds Officer Loeding had a reasonable, articulable suspicion to conduct a protective search."

{¶13} J.T. subsequently pled no-contest to all four of the charges and was adjudicated delinquent on each charge. J.T. timely appealed the juvenile court's denial of his motion to suppress and subsequent delinquency adjudications.

II. Analysis

{¶14} In his sole assignment of error, J.T. argues that the trial court erred in denying his motion to suppress the evidence recovered from the warrantless search because the officers did not have any reasonable, articulable suspicion to stop him nor to conduct a protective frisk. Therefore, he argues that the evidence obtained during his stop and subsequent arrest must be suppressed.

{¶15} An appellate court's review of a motion to suppress presents a mixed question of law and fact. *State v. Tidwell*, 165 Ohio St.3d 57, 2021-Ohio-2072, 175 N.E.3d 527, ¶ 18, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. We "must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.* However, we review de novo whether the facts meet the applicable legal standard. *Id.*, citing *Burnside* at ¶ 8. Under the Fourth Amendment, an officer may conduct a brief investigative stop of a person "when the officer has a reasonable suspicion based on specific and articulable facts that criminal behavior has occurred or is imminent." *State v. Hairston*, 156 Ohio St.3d 363, 2019-Ohio-1622, 126 N.E.3d 1132, ¶ 9, citing *Terry*, 392 U.S. at 30, 88 S.Ct. 1868, 20 L.Ed.2d 889.

{¶16} Once the person is lawfully stopped, an officer may conduct a limited, protective search for weapons if the officer has a justified belief that the subject might be armed. *Id.*, citing *Terry* at 24. "The stop and the search are independent actions, and each requires its own justification." *United States v. Rembert*, N.D.Ohio No. 1:20-cr-347-2, 2020 U.S. Dist. LEXIS 219127, 12-13 (Nov. 23, 2020). Since the stop necessarily preceded the search, if the stop was improper, the search is also improper. *See Sen v. Los Angeles*, C.D.Cal. No. 2:21-cv-02326, 2022 U.S. Dist. LEXIS 114487, 25

(Apr. 20, 2022) ("The search is the fruit of an unlawful stop if the officers did not have reasonable suspicion to conduct the stop in the first place.") *See also Mentor v. Webb*, 11th Dist. Lake No. 92-L-158, 1993 Ohio App. LEXIS 3369, 6 (June 30, 1993) ("Thus, under *Terry*, we must first determine whether the stop was reasonable and, if the stop was reasonable, then we need to determine whether the pat-down search of appellee was reasonable."); *State v. Shoenberger*, 11th Dist. Ashtabula No. 2021-A-0011, 2022-Ohio-253, ¶ 21 (applying a three-step *Terry* analysis: first, justification for the stop; second, justification for a limited pat-down; finally, justification for a more thorough pat-down).

{¶17} The evaluation of the constitutionality of a *Terry* stop and search should be "based on the totality of circumstances 'viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold.' " *Hairston* at ¶ 10, quoting *State v. Andrews*, 57 Ohio St.3d 86, 87-88, 565 N.E.2d 1271 (1991). It is the state's burden to prove the constitutionality of a *Terry* stop or protective search. *State v. Henson*, 1st Dist. Hamilton No. C-210244, 2022-Ohio-1571, ¶ 16; *State v. Frank*, 1st Dist. Hamilton Nos. C-990079, C-990080, and C-990081, 2000 Ohio App. LEXIS 559, 8 (Feb. 18, 2000).

{¶18} Reasonable suspicion is difficult to define, but it requires more than an "inchoate or unparticularized suspicion" and is a lower standard than probable cause. *Henson* at ¶ 17, quoting *State v. Hawkins*, 158 Ohio St.3d 94, 2019-Ohio-4210, 140 N.E.3d 577, ¶ 20, quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989), quoting *Terry*, 392 U.S. at 27, 88 S.Ct. 1868, 20 L.Ed.2d 889. Courts should consider whether the "facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' " to take the same

actions. *Terry* at 22, quoting *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

{¶19} An officer may rely on dispatch from another officer or a tip from a reliable citizen witness to make a stop. *Maumee v. Weisner*, 87 Ohio St.3d 295, 297, 720 N.E.2d 507 (1999), citing *United States v. Hensley*, 469 U.S. 221, 231, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985). When officers rely solely on a flyer or dispatch to make a stop, we must look to whether the dispatcher had reasonable, articulable suspicion to justify the stop. *Id.* at 297. The state bears the burden to show facts that justify the dispatching officer's reasonable suspicion sufficient to justify the stop; it is insufficient for the stopping officer to testify that he relied on the dispatch. *Id.* at 298.

{¶20} When the dispatch is based "solely from an informant's tip, the determination of reasonable suspicion will be limited to an examination of the weight and reliability due that tip." *Id.* at 299. A court determines whether the informant's tip had "sufficient indicia of reliability to justify the investigative stop" based on factors of "the informant's veracity, reliability, and basis of knowledge." *Id.*

{¶21} When judging the reliability of an informant's tip, courts often distinguish between three categories of informants: "(1) anonymous informant, (2) known informant (someone from the criminal world who has provided previous reliable tips), and (3) identified citizen informant." *Tidwell*, 165 Ohio St.3d 57, 2021-Ohio-2072, 175 N.E.3d 527, at ¶ 29, citing *Weisner* at 300. Although an identified citizen informant may be considered to be more reliable than an anonymous informant, the categorization of the informant does not "determine the outcome of the case but rather [is] just one element in the totality of the circumstances." *Id.* at ¶ 32, citing *Weisner* at 302.

{¶22} In the case at bar, Loeding did not testify about any detail of the pastor's tip, other than that a group of individuals wearing the same clothing as the suspects in the surveillance video were located at the gas station. Though the pastor may be considered a reliable source of information as a citizen informant, the record does not show any basis of the pastor's knowledge linking the individuals at the gas station to the shooting days earlier other than having seen the same surveillance video that was provided to Delk. For instance, nothing in the record suggests that the pastor was a contemporaneous witness to the shooting or had any greater insight into the identity of the individuals shown in the video than the images contained in the video itself. Thus, there is no reason to believe that the pastor was in a better position to identify the suspects than anyone else who had also seen the surveillance video.

{¶23} Without any stronger basis of knowledge than having viewed the identical video in police possession, the pastor's tip can be afforded little weight in providing reasonable suspicion to stop J.T. and his companions. The only reliable, descriptive information of the suspects known to police, as described in Loeding's testimony, is from the surveillance photos. Loeding testified that the photos did not show faces. Loeding also testified that he was not sure whether the individuals in the photos were adults or juveniles. Consequently, the only concrete description that Loeding relied on when stopping J.T. and his companions was that the shooting suspect had been wearing a red sweatshirt.

{¶24} In addition to the red sweatshirt worn by one of J.T.'s companions, the facts available to Loeding when he stopped the group were that the shooting took place earlier in the week, and it occurred somewhere nearby the gas station.

{¶25} The significant length of time between the shooting and the stop of J.T.

and his companions is the main problem in this case when examining the totality of the circumstances. While we do not know the exact number of days between the shooting and the stop, we do know that the stop did not occur immediately after the shooting.

{¶26} In *State v. Hairston*, the Ohio Supreme Court held that "the most important considerations here are that the stop occurred very close in time to the gunshots and Hairston was the only person in the area from which the shots emanated." *Hairston*, 156 Ohio St.3d 363, 2019-Ohio-1622, 126 N.E.3d 1132, at ¶ 13. In *Hairston*, the officers personally heard the shots fired, drove immediately in the direction of the gunfire, and arrived 30 to 60 seconds later to find Hairston alone at the scene. *Id.* The court also specifically noted, "This is not a case in which the officers relied on a radio dispatch or the secondhand information about shots being fired, but one in which they heard and *immediately* reacted to the sound of nearby gunfire." (Emphasis added.) *Id.* at ¶ 11. The concurring justice also emphasized that the officers "*immediately* went to the location where the sound had originated," holding that the officers had reasonable suspicion to stop Hairston "[g]iven how close Hairston was to the crime, in both time and place." (Emphasis added.) *Id.* at ¶ 27 (Donnelly, J., concurring in judgment only).

{¶27} We must remember that the reasonable suspicion standard is objective and not subjective. Thus, in evaluating the reasonableness of the stop, *Terry* instructs:

> [I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Cf. *Carroll v. United States*, 267 U.S. 132

> (1925); *Beck v. Ohio*, 379 U.S. 89, 96-97 (1964). Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. See, *e. g*., *Beck v. Ohio*, *supra*; *Rios v. United States*, 364 U.S. 253 (1960); *Henry v. United States*, 361 U.S. 98 (1959). And simple "'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Beck v. Ohio*, *supra*, at 97.

Terry, 392 U.S. at 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889.

{¶28} Perhaps if the officers had stopped J.T. and his red-sweatshirt-wearing companion nearby the church immediately after the shooting, the totality of the circumstances could have supported reasonable suspicion for the stop. *See, e.g., Hairston* at ¶ 44 (O'Connor, C.J., dissenting) (collecting cases that have required additional evidence besides temporal and spatial proximity that directly implicates the defendant, such as similar clothing or suspicious behavior). But the fact that J.T. and his companions were stopped days after the shooting weighs against a finding of reasonable suspicion.

{¶29} The state asks us to consider as part of the totality of the circumstances that, when police ordered J.T. and his companions to stop, J.T. continued walking away from the officers. We reject this argument. J.T.'s "actions following the uniformed police officers' requests to stop cannot be used to justify the stop." *In re M.P.*, 1st Dist. Hamilton Nos. C-130663 and C-130741, 2014-Ohio-2846, ¶ 13.

{¶30} Based on the juvenile court's factual findings, the only description of the shooter is the red sweatshirt and jeans, which is not unusual or distinctive clothing, especially in Cincinnati.[1] The pastor's tip provided no additional detail as to the identity of the suspects in the shooting, merely the location of a red-sweatshirt-wearing individual walking with two other people. The relevant timeframe is not the few minutes it took Loeding to respond to the tip, but rather the days between the reported criminal activity and the encounter. Loeding pointed to no indicia that J.T. or his companions were engaged in criminal behavior at the time of the stop, nor does the state argue that Loeding had any independent basis to conduct a *Terry* stop beyond the vague tip and photo with no faces and so lacking in detail that it was difficult to determine whether the suspects were adults or juveniles.

{¶31} We hold that the totality of the circumstances does not support a reasonable suspicion to justify the *Terry* stop of J.T. and his companions. Because the stop was unreasonable, the subsequent protective frisk was also unreasonable. Consequently, the juvenile court erred by denying J.T.'s motion to suppress. J.T.'s assignment of error is sustained.

III. Conclusion

{¶32} The juvenile court's denial of J.T.'s motion to suppress is reversed. There being no other evidence to support J.T.'s adjudication, the judgments of the juvenile court adjudicating J.T. delinquent are vacated, and J.T. is discharged from further prosecution for these offenses.

Judgment accordingly.

WINKLER and **KINSLEY, JJ.**, concur.

[1] Cincinnati is home to many sports teams that prominently feature the color red, including the Cincinnati Reds, the University of Cincinnati Bearcats, and the Cincinnati Cyclones.

Please note:

The court has recorded its entry on the date of the release of this opinion.