

Probable Cause: More Than a Hunch

By Erich Eiselt, Assistant General Counsel and Editor

In August 2008, the California Highway Patrol (CHP) in Mendocino received a call from the CHP in neighboring Humboldt County, relaying a tip from a 911 caller who stated that she had been run off Highway 1 by a southbound Silver Ford 150 pickup only five minutes earlier. The caller provided the offending vehicle's license plate and its milepost location.

Approximately 20 minutes later, a CHP officer spied the pickup, followed it briefly and pulled it over. Another squad car soon arrived. Neither officer had witnessed the truck weaving or otherwise being operated in an unusual fashion. As the officers approached the vehicle, they smelled marijuana. A subsequent search of the truck bed uncovered 30 pounds of the contraband. The pickup's driver and passenger were arrested.

Petitioners moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment because the officers lacked reasonable suspicion of criminal activity. The magistrate who presided over the suppression hearing disagreed, as did the California Superior Court. Petitioners pleaded guilty to transporting marijuana and were sentenced to 90 days in jail plus three years of probation. The California Court of Appeal affirmed and the California Supreme Court denied review.

The Supreme Court granted certiorari, heard the case in January and issued its opinion on April 22, 2014.

The majority opinion, written by Justice Thomas and joined by Justices Roberts, Kennedy, Alito and Breyer, affirmed the lower courts, confirming that the Fourth Amendment permits a traffic stop when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States* v. *Cortez*, 449 U.S. 411,417-418 (1981); see also *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968). Although a mere "hunch" does not create reasonable suspicion, the level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause. *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989).

The Court held that these principles "apply with full force to investigative stops based on information from anonymous tips." Reasonable cause for an investigative stop need not be based solely on an officer's personal observation; while anonymous tips *alone* seldom demonstrate an informant's veracity, under appropriate circumstances, an anonymous tip can demonstrate "sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop." *Alabama v. White*, 426 U.S. 325, at 327.

The scenario in *White* was instructive. There, an anonymous tipster had informed police that a woman would transport cocaine at a particular time from a particular apartment building to a particular motel via a brown Plymouth station wagon with a broken right tail light. Officers observing the scene confirmed the station wagon's details and then stopped it as it neared the motel, finding cocaine in the vehicle. The officers' corroboration of certain details about the car "made the anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity." By accurately predicting future behavior, the tipster demonstrated "a special familiarity with respondent's affairs," which in turn implied that the tipster had "access to reliable information about that individual's illegal activities." 426 U.S. 325, at 332.

In this case, the anonymous call about the pickup truck "bore adequate indicia of reliability" to justify the officers' action. The caller provided a specific license plate number, a specific vehicle model, make and color–and the tip was phoned in minutes after the incident.

The Court acknowledged that *White* was a "close case," because mere knowledge of a person's future actions does not confer knowledge that the person is carrying contraband. Here, the caller's claim that another vehicle ran her off the road, however, "necessarily implies that the informant knows the other car was driven dangerously."

The majority found additional reason for credibility due to the caller's use of the 911 system, which allows capture of data about the caller and would presumably discourage fraudulent reports.

Under *Terry* standards, even a reliable tip justifies an investigative stop only if it creates reasonable suspicion that "criminal activity may be afoot." 392 U.S. at 30. The majority concluded that the behavior alleged by the 911 informant, "viewed from the standpoint of an objectively reasonable police officer, amount[s] to reasonable suspicion" of drunk driving—a criminal offense.

> The 911 caller in this case reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: run-

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ning another car off the highway. That conduct bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness. Running another vehicle off the road suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues.

Petitioners attempted to discredit the officers' suspicion of drunk driving, with no success. While the Court acknowledged that the reported behavior might also be explained by, for example, a driver responding to "an unruly child or other distraction," it has consistently recognized that reasonable suspicion "need not rule out the possibility of innocent conduct." *United States* v. *Arvizu*, 534 U. S. 266, 277 (2002).

The majority disagreed that the absence of additional suspicious conduct, after the vehicle was first spotted by an officer, should dispel the reasonable suspicion of drunk driving. "It is hardly surprising that the appearance of a marked police car would inspire more careful driving for a time."

Under the totality of the circumstances, the majority found the indicia of reliability sufficient to provide the officer with reasonable suspicion that the driver of the reported vehicle had run another vehicle off the road and was driving while intoxicated. That made it reasonable under the circumstances for the officer to execute a traffic stop.

DISSENT:

Justice Scalia, normally a reliable member of the Court's conservative cohort, wrote the dissent, which was joined by Justices Ginsburg, Sotomayor, and Kagan.

Nowhere did he discern the "sufficient indicia of reliability" that the majority had found. The 911 tip was completely uncorroborated, and the CHP knew nothing about the tipster—not her name, her address or even her phone number. The facts bore little resemblance to *White*, in which the tipster had predicted, with "the finest detail" the future movements of the drug-bearing suspect—here, anyone could have noted a license plate number and vehicle description of a pickup, and could have made the "amazing, mystifying prediction" that petitioners' vehicle "*would be traveling South on Highway 1*."

Scalia also had little patience for the argument that the 911 caller was more likely to be credible because she believed her identity would be discoverable. He challenged the majority to support such an assertion about 911 callers' state of mind.

Finally, he pointed out that the *sine qua non* of the traffic stop—criminal activity in the form of drunk driving—was nowhere to be seen. Petitioners had not even been accused of driving drunk. The tipster made no such accusation; she merely stated that the pickup had forced her off the road. Therefore, at the time the CHP officer saw the pickup and pulled it over, he had no reason to believe that the driver was drunk. The pickup driver's only 'crime' if in fact there had been one, was that he had driven recklessly some 30 minutes earlier. And that infraction, if it had in fact occurred, might have been caused by a distraction.

For the minority, there was simply no basis to make the traffic stop. It was the same group of dissenters who had objected to the use of mouth-swab DNA evidence from arrestees in the 2013 *Maryland v. King* decision, written by the same author. Scalia was no less outraged in this case.

He warned:

> Law enforcement agencies follow closely our judgments on matters such as this, and they will identify at once our new rule: So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop. This is not my concept, and I am sure would not be the Framers', of a people secure from unreasonable searches and seizures. I would reverse the judgment of the Court of Appeal of California.

Navrette v. California, No. 12-9490 (U.S. Apr. 22, 2014). ML

Practice Tips *Cont'd from page 21*

14. The Contractor provides a copy of its Certificate of Insurance.
15. The insurer named on the Certificate of Insurance exists and is authorized to do business in the state.
16. The Contractor's correct name is shown on the Certificate of Insurance as the insured.
17. The insurance coverage is shown on the Certificate of Insurance and meets the minimum amounts required by the contract:
General Liability
$_____aggregate
$_____per occurrence
Automobile Liability
$_____ aggregate or
$ _____ for bodily injury
$_____ for property damage
Workers Compensation
Statutory Limits
18. If required by the contract, the Certificate of Insurance shows the City (or "Certificate Holder") named as an Additional Insured on:
General Liability
Auto Liability
19. If required by the contract, the Certificate of Insurance shows that subrogation is waived for:
General Liability
Auto Liability
Workers Compensation

20. If required by the contract, the Certificate of Insurance contains a statement that the insurer will mail at least 30 days' advance written notice of cancellation of the insurance policy to the Additional Insured.
21. If the contract requires a Payment Bond and/or Performance Bond, the following items are checked:

- The name of the contractor (the Principal) on each bond is exactly the same name as stated in the contract;
- The bonding company is qualified to do business in the state and is listed on the US Treasury Department list of approved sureties. The US Treasury list can be found at the following website: www.fms.treas.gov/c570/c570.html;
- The amount of each bond is the same as the stated amount of the contract;
- The contract to which each bond refers or the work to which each bond refers