



# Police Law Bulletin



City Attorneys' Office

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**In this issue:**

Reasonable Suspicion Did Not Support Seizure of Defendant Made as a Result of Anonymous Tip - Pgs. 1-3

Reasonable Suspicion Did Not Support Stop of Juvenile – Pgs. 3-4

Anonymous Information Was Insufficient Evidence to Support Reasonable Suspicion to Stop Vehicle;

Knowledge That Registered Owner's Driver's License Was Suspended Was Sufficient Evidence to Support Reasonable Suspicion to Stop Vehicle;

Ruling in *Arizona v. Gant* Applied Retroactively to Require Suppression of Evidence Seized Pursuant to Search of Vehicle Incident to Arrest of Driver for Driving While License Suspended – Pgs. 4-5

Reasonable Suspicion Based on Information From Confidential Informant Supported Stop of Vehicle – Pgs. 5-6

Reliability of Informant Plus Corroboration of Facts Established Probable Cause For Search of Vehicle – Pgs. 6-7

## NORTH CAROLINA COURT OF APPEALS



### **Reasonable Suspicion Did Not Support Seizure of Defendant Made As A Result of Anonymous Tip**

***State v Harwood*, No. COA11-1513 (3 July 2012).**

On July 15, 2010, Agent McAbee, a deputy with the Buncombe County Sheriff's Department who worked as a member of the Buncombe County Anticrime Task Force, received an anonymous tip indicating that, later that day, defendant would be selling marijuana to an unidentified individual at a certain convenience store located in Weaverville and that defendant would be driving a "white vehicle." Although Agent McAbee had not previously encountered defendant, he had learned from "talking to people in the community...since [being] on patrol" that defendant had been "supposedly...selling illegal drugs in that part of the county for a long time." After obtaining a photograph of defendant, Agent McAbee and Agent Goodridge, another member of the Buncombe County Anticrime Task Force, drove to the convenience store in an unmarked vehicle. As Agent McAbee pulled into the convenience store parking lot, a white vehicle, beside which an individual was standing, began backing out of a parking space. As the white vehicle backed out, McAbee identified defendant as the driver and followed defendant's vehicle onto the highway. After traveling a short distance, defendant's vehicle turned into a housing development. Defendant parked his vehicle in the driveway of a residence which had an address different than that of defendant's own. As a result, Agent McAbee pulled into the driveway behind defendant's vehicle. After Agent Goodridge observed that the front doors to defendant's vehicle appeared to be open, both officers exited their vehicle with weapons drawn, identified themselves, and ordered defendant and his passenger to exit defendant's vehicle. Defendant was then placed on the ground and handcuffed. As other officers arrived, Agent McAbee escorted defendant to his vehicle in order to speak with defendant. At some point, McAbee discovered there was an outstanding warrant for defendant's arrest. Agent McAbee told

defendant about the anonymous tip that he had received and after a certain amount of additional conversation, defendant admitted that he had traveled to the gas station for the purpose of selling marijuana. Defendant then consented to a search of his residence and provided agents with a key. The agents located a loaded SKS rifle, marijuana, cocaine and pills. Defendant was then placed under arrest for the outstanding warrant.

On November 9, 2010, warrants for arrest charging defendant with possession of marijuana with intent to sell or deliver, possession of cocaine with intent to sell or deliver, and simple possession of a Schedule IV controlled substance were issued. On May 2, 2011, defendant was indicted on the same charges plus possession of a firearm by a felon. Defendant filed a motion to suppress all evidence obtained as a result of his encounter with Agent McAbee. The trial court denied defendant's motion. Defendant was convicted and then appealed.

First, the Court of Appeals considered whether the defendant, who had not been the subject of a traffic stop, was nonetheless the subject of a seizure. There are generally two ways in which a person may be seized for Fourth Amendment purposes: 1. by arrest, which requires a showing of probable cause; or 2. by investigatory detention, which must be supported by reasonable suspicion. In the case at hand, the investigating officers parked their vehicle directly behind defendant's vehicle, drew their firearms, and ordered defendant and his passenger to exit the vehicle. After exiting the vehicle, defendant was placed on the ground and handcuffed. Thus, the court concluded, a reasonable person in the defendant's position would not have felt free to leave and therefore, a seizure occurred. Consequently, the agents must have had, at a minimum, reasonable suspicion of criminal activity.\* (*See note below*)

Next, the Court of Appeals determined that the investigating officers lacked reasonable suspicion to detain the defendant. (\**Note* – because the court determined that the officers lacked reasonable suspicion for an investigatory detention, they did not address whether the circumstances surrounding defendant's encounter with the officers constituted the functional equivalent of an arrest requiring probable cause). Where the justification for a warrantless stop is information provided by an anonymous tipster, a reviewing court must assess whether the tip at issue possessed sufficient indicia of reliability. It is well established that the tip must be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. If the tip does not have sufficient indicia of reliability, then there must be sufficient police corroboration of the tip before the stop may be made.

While the tip at issue included identifying details of a person and car allegedly engaged in criminal activity, it offered few details of the alleged crime, no information regarding the informant's basis of knowledge, and scant information to predict future behavior of the alleged perpetrator. As a result, since nothing inherent in the tip itself provided reasonable suspicion to detain the defendant, the only way the defendant's detention could be upheld would be in the event that the tip contained sufficient details, corroborated by the investigating officers, to warrant a reasonable belief that defendant was engaged in criminal activity. Nothing in the subsequent activities of the investigating officers "buttressed" the tip. Agent McAbee's knowledge of defendant's previous drug activity, which consisted of taking to unnamed individuals in the community, was not specific in nature and did nothing more than indicate that, as a general matter, defendant engaged in the business of selling controlled substances. Upon arriving at the convenience store, investigating officers observed a white vehicle driven by an individual identified as defendant backing out of a parking space. The observations consisted of nothing more than identifying a determinate person at a determinate location, a degree of corroboration that does not suffice to justify an investigatory detention. Although Agent McAbee

observed defendant drive away from the convenience store and ultimately pull his vehicle into a driveway of a residence with an address that differed from his own, defendant could just as easily have been visiting an acquaintance, giving his passenger a ride home, or turning around. Therefore, given the limited details contained in the tip, and the failure of the officers to corroborate the tip's allegations of illegal activity, the tip lacked sufficient indicia of reliability to justify a seizure in this case. As a result, the officers lacked the reasonable suspicion necessary to support the detention of the defendant.

\*\*Note that the outstanding warrant could not be used to justify the seizure because officers had no knowledge of its existence until after the seizure had occurred.

### **Reasonable Suspicion Did Not Support Stop of Juvenile**

***In the Matter of: A.J.M.B., No. COA10-1350 (21 June 2011).***

At 1:00 p.m. on January 20, 2010, an anonymous caller reported “two juveniles in Charlie district...walking, supposedly with a shotgun or a rifle” in “an open field behind residence.” A dispatcher relayed the information to Officer Price, who exited his patrol vehicle and proceeded to an open field behind the residence from where the initial call was made. Officer Price did not observe anyone in the field. But, as he looked to his right, he saw two juveniles “pop their heads out of the wood line.” Neither of the juveniles was carrying a shotgun or rifle. When Officer Price called out for them to stop, they ran to the right around the residence. A female outside the residence directed Officer Price to the road she saw the juveniles run down. A.J.M.B. (hereinafter “Andy”) was caught and charged with resisting a public officer. Andy moved to dismiss the charge, and the trial court denied the motion. The trial court then adjudicated Andy delinquent. Andy appealed.

If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor. The officer, however, must be engaged in lawful conduct while discharging or attempting to discharge his duties. In fact, North Carolina appellate courts have recognized the right of a citizen to resist illegal conduct by an officer. So, for example, while flight from a lawful stop may provide probable cause to arrest an individual for violation of N.C.G.S. §14-223 (RDO), flight from an unlawful stop cannot be used to establish probable cause for an arrest.

In the instant case, the State concedes that the officer was attempting an investigatory stop. An investigatory stop is lawful and proper as long as it is supported by reasonable suspicion of criminal activity. Therefore, in order to determine if Officer Price lawfully discharged or attempted to discharge a duty of his office, the court must determine whether he had reasonable suspicion to stop Andy.

The court found the facts of this case to be similar to *Florida v. J.L.*, 529 U.S. 266, 146 L. Ed. 2d 254 (2000). In *J.L.*, there was also an anonymous caller who called law enforcement to express concern that “a young black male standing at a particular bus stop and wearing a plaid shirt [was]...carrying a gun.” Officers approached a group of black males at the bus stop, frisked the defendant who was wearing a plaid shirt, and seized a gun from his pocket. The Supreme Court found that the anonymous tip, with nothing more, did not constitute reasonable suspicion and therefore, did not justify the subsequent frisk of defendant. Reasonable suspicion does not arise merely from the fact that the individual met the description given to the officers. As the Court stated in *J.L.*,

an accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of criminal activity. Reasonable suspicion requires that the tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

In the instant case, just as in *J.L.*, the description of the suspects' location merely helped to identify them. The officer did not articulate any facts that he observed that would corroborate the allegation of criminal activity prior to him attempting to effectuate a stop. Therefore, Officer Price had no lawful authority to order Andy to stop and, consequently, Andy had no legal obligation to abide by his unlawful command. The Court of Appeals found that the trial court erred by denying Andy's motion to dismiss the charge of resisting a public officer.

**Anonymous Information Was Insufficient Evidence to Support Reasonable Suspicion to Stop Vehicle;  
Knowledge That Registered Owner's Driver's License Was Suspended Was Sufficient Evidence to Support Reasonable Suspicion to Stop Vehicle;  
Ruling in *Arizona v. Gant* Applied Retroactively to Require Suppression of Evidence Seized Pursuant to Search of Vehicle Incident to Arrest of Driver for Driving While License Suspended**

***State v. Johnson*, No. COA09-908 (1 June 2010).**

On September 19, 2007, an officer with the Winston-Salem Police Department was assigned to respond to an anonymous tip that dispatch had received. The tipster reported that a black male wearing a white T-shirt and blue shorts was selling illegal narcotics and guns at the corner of Pitts and Birch Streets. The caller alleged that the sales were occurring out of a blue Mitsubishi with license plate WT3456. The police did not know how the caller obtained his or her information. The caller refused to provide a name and the police had no way of identifying him or her.

Prior to the officer's arrival at the alleged location of the crimes, the anonymous tipster called back and stated that the subject had just left the area but would return shortly. Due to construction in the area, there were only two entrances to the neighborhood. Two officers stationed themselves at one entrance and another officer stationed himself at the other entrance. A short time later, a blue Mitsubishi with license plate WTH3453 entered the neighborhood. The car was being driven by a black male with a white T-shirt. One of the officers entered the license plate into his computer. It came back registered to a Kelvin Johnson, a black male with an age that appeared consistent with that of the driver's. The registered owner's driver's license was suspended. The officers then stopped the defendant's vehicle.

During the stop, defendant indicated that he did not have a driver's license. Defendant was arrested for driving while license revoked. The officers then searched the vehicle incident to arrest and found guns and ammunition which formed the basis of several weapons charges against defendant.

Defendant made a motion to suppress evidence seized in connection with his detention and the search of his vehicle. The trial judge denied the motion finding that the officers had reasonable suspicion to stop defendant's vehicle based upon the anonymous tip. Defendant then pled guilty to one count of possession of a firearm by a felon, two counts of possession of a stolen firearm, one count of carrying a concealed gun, and one count of driving while license revoked, but preserved his right to appeal. On appeal, defendant contended that the trial court erred in determining that the anonymous tip possessed sufficient

indicia of reliability to justify a warrantless stop of the vehicle, and that the warrantless search of his vehicle following his arrest for driving with a suspended license was unconstitutional.

The Court of Appeals noted that while the tip at issue included identifying details of a person and car allegedly engaged in illegal activity, our Courts have made it clear that an officer's confirmation of such details will not legitimize the tip:

[a]n accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

The tip in this case offered few additional details and scant information to predict the future behavior of the alleged perpetrator. Thus, given the limited details contained in the tip, and the failure of the officers to corroborate the tip's allegations of criminal activity, the tip lacked sufficient indicia of reliability to justify the warrantless stop in this case.

However, the Court noted that even though the officers did not have reasonable suspicion to stop defendant's car based on the anonymous tip, the officers did lawfully stop the vehicle after discovering that the registered owner's driver's license was suspended.

Despite the legality of the stop though, the Court could not uphold the warrantless search of defendant's vehicle. The Court noted that the ruling in *Arizona v. Gant* applied retroactively to the case. In *Gant*, the United States Supreme Court held that:

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search [which the Court noted should be rare] or it is reasonable to believe the vehicle contains evidence of the offense of arrest.

In this case, defendant was arrested for driving with a suspended license and his vehicle was searched incident to that arrest. Such a warrantless search violates *Gant* because the officers could not have reasonably believed that evidence of defendant's driving while license suspended might have been found in the passenger compartment of the vehicle, and because defendant was in the police car while officers were conducting the search, defendant was not unsecured and within reaching distance of the vehicle.

Thus, the Court of Appeals held that the defendant's motion to suppress was improperly denied, and all the State's evidence of contraband and weapons should have been suppressed.

### **Officer Had Reasonable Suspicion to Stop Vehicle Based on Confidential Informant's Information**

***State v. Crowell*, No. COA09-635 (1 June 2010).**

On February 29, 2008, the Chief of the Benson Police Department received a phone call from a confidential informant whom the Chief had known for thirteen years. A month before the events at hand, the informant had provided information to the Chief about illegal drug activity that proved reliable and resulted in an arrest by the Johnston County Drug Force. This time, the informant stated that a black male would arrive at a carwash on Highway 301 in Benson in just a few minutes, that the man would be

driving a black Lexus SUV, and that the man was in possession of cocaine. The informant indicated that he had seen the cocaine. Upon receiving the information, the Chief and three other officers immediately went to the carwash and set up surveillance. Fifteen minutes after the phone call, a black Lexus SUV pulled into the carwash. The informant was also at the carwash and called the Chief to confirm that the black Lexus SUV and its driver were the ones to which he had referred. The SUV remained parked at the carwash for a couple of minutes with no one exiting the vehicle. The driver then left traveling north on Highway 301. The Chief directed a Sergeant to stop the vehicle for further investigation. The sergeant and another officer stopped the vehicle and informed the driver that he was suspected of possessing illegal narcotics. One of the officers then asked for consent to search the vehicle and the driver, Crowell, agreed. After Crowell stepped out of the vehicle and continued talking with the officers, they noticed that he seemed to adjust the front of his pants a few times. Then, after the Chief arrived and while speaking with Crowell, a clear plastic bag filled with white powder fell from Crowell's pants leg and out by his feet. The Chief frisked Crowell and found another bag of cocaine. Crowell was then placed under arrest. Officers found a loaded gun and electronic scales in his vehicle.

Defendant made a motion to suppress all evidence seized from the stop of his vehicle. The motion was denied by the trial court. Defendant pled guilty to one count of trafficking in cocaine by possession and one count of possession of a firearm by a felon, but he preserved his right to appeal. On appeal, defendant specifically argued that the informant's tip did not provide reasonable suspicion for the stop of his vehicle.

A tip must demonstrate sufficient indicia of reliability to establish reasonable suspicion. Indicia of reliability may include 1. whether the informant was known or anonymous; 2. the informant's history of reliability; and 3. whether information provided by the informant could be and was independently corroborated by the police. In this case, the Chief had known the informant for over thirteen years and he knew that the informant had provided previous information about illegal drug activity that had yielded an arrest about a month earlier. The informant also indicated his source of information i.e. that he had seen cocaine in the defendant's possession. In addition, the informant's tip provided specific information about defendant's future actions, including correctly predicting his mode of transportation, his destination, and his time of arrival. This information was then corroborated by the police. Finally, the informant made a contemporaneous identification of the defendant as he arrived at the predicted location. The Court of Appeals found that the totality of these circumstances gave officers a reasonable articulable suspicion that defendant was transporting drugs.

### **Reliability of Informant Plus Corroboration of Facts Established Probable Cause for Search of Vehicle**

***State v. Green, COA08-144 (6 January 2008).***

On February 1, 2006, Detective Wyatt with the New Hanover County Sheriff's Office instructed an informant to call a man the informant had stated was a heroin dealer. Although Detective Wyatt had never used the informant before, he knew that the informant had previously provided reliable information to another detective in his office which led to the arrest of a man for trafficking in 1,200 bags of heroin. The detective monitored the telephone call and heard a man agree to deliver ½ oz. of heroin, along with ½ oz. of cutting agent, to the informant in Wilmington for \$1,600.00. The man stated that he would leave in approximately 30 minutes and that the trip would take him a while. A KFC restaurant on Dawson Street was the predetermined location for the transaction.

The informant told the detective that he did not know the true name of the man; he knew him only as 'Junior.' He described the man as an older black male, probably in his fifties. He stated that the man would possibly be driving an older model Mercedes or a newer model SUV, both brown in color, and both having South Carolina registrations. He also stated that he believed "Junior" lived in Charleston and that would be his point of origin for the transaction.

The detective estimated an arrival time in Wilmington between 3:30 p.m. and 4:00 p.m. At approximately 3:15, the detective instructed the informant to call "Junior" and obtain a more definite time. "Junior" told the informant that he was about 30 to 40 minutes away.

About six additional officers were stationed on the roads leading into Wilmington and to the KFC restaurant on Dawson Street. Detective Gore was waiting on Highway 17, where it intersects with Highway 87 because this is a possible route by which to enter Wilmington from Charleston. At approximately 3:35, Detective Gore observed a brown Dodge Durango SUV with South Carolina registration pass him heading towards Wilmington on Highway 17. Detective Gore began following the Durango. He observed an older black male driving. The registration information indicated that the Durango was registered to the defendant, who lived in North Charleston.

Shortly after the defendant crossed into New Hanover County, several officers stopped the vehicle. The defendant was removed from the Durango and placed in handcuffs. Detective Wyatt opened up the center console and discovered a black bag. The contents of the bag were later determined to be heroin and a cutting agent.

Defendant was indicted on several controlled substance violations. He made a motion to suppress the evidence arguing that the warrantless search of his vehicle was unlawful. The trial court denied the motion. After being convicted by a jury, defendant appealed.

A search of a motor vehicle which is on a public roadway or in a public vehicular area is not in violation of the Fourth Amendment if it is based on probable cause, even if a warrant has been obtained. When probable cause is based on an informant's tip, a totality of the circumstances test is used to weigh the reliability of the informant. Several factors are used to assess reliability, including: (1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be and was independently corroborated by the police. In this case, the informant used was a known and reliable informant who had previously provided information which led to a similar type of arrest. The officers were able to verify and corroborate much of the information provided by the informant relating to time of arrival, origin and destination, vehicle being operated, and description of the suspect. Therefore, the Court of Appeals found there was probable cause to stop and search defendant's vehicle and that the trial court did not err in denying defendant's motion to suppress.