

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

v

VICTORIA PAGANO,
Defendant-Appellant.

Supreme Court No. _____

COA No. 340859
Circuit Court No. 17-105478-AR
Circuit Court No. 16-1285-SD

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DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

Victoria Pagano prays for leave to appeal the Court of Appeals' May 28, 2019 decision of the People's appeal of her case. MCR 7.303, 7.305. The district court granted her motion to dismiss, the circuit court affirmed the district court's dismissal, and the Court of Appeals reversed the dismissal and remanded the case.

This application is timely under MCR 7.305(c).

STATEMENT OF QUESTIONS PRESENTED

1. Did the trial court correctly grant Ms. Pagano’s motion to dismiss based on the officer lacking a valid reasonable suspicion to seize Ms. Pagano for an investigatory stop?

Ms. Pagano answers “yes”

The trial courts answer “yes”

The Court of Appeals answers “no”

2. Did the Court of Appeals erroneously reverse the trial courts’ well-reasoned granting of Ms. Pagano’s motion to dismiss based on the officer lacking a valid reasonable suspicion to seize Ms. Pagano for an investigatory stop?

Ms. Pagano answers “yes”

The trial courts answer “yes”

The Court of Appeals answers “no”

STATEMENT OF FACTS

Huron Deputy Sheriff Eric Hessling pulled over Victoria Pagano and charged her with driving while intoxicated. Ms. Pagano then filed a motion to dismiss in which she argued that Deputy Hessling lacked sufficient probable cause or reasonable suspicion to support the stop.

The district court held an evidentiary hearing on Ms. Pagano's motion. (3/21/2017 Tr at 1–15). Hessling was the only witness to testify. (*Id.* at 3–9). Hessling testified that he pulled over Ms. Pagano based solely on information that an unidentified caller reported to 911 dispatch. (*Id.* at 5–7). The caller reported that “a female driver was possibly intoxicated,” and that “[t]he caller was concerned because she had . . . children with her and she was yelling, appearing to be obnoxious, and appeared to be intoxicated . . . that was causing her behavior . . . with the children.” (*Id.* at 5, 7). Deputy Hessling also agreed that “the caller . . . gave a description of the vehicle to central dispatch, . . . include[ing] the make, model, color, and license plate number.” (*Id.* at 8).

The district court granted Ms. Pagano's motion and dismissed her case, ruling that Hessling failed to establish the 911 caller's reliability. (*Id.* at 13–14; 4/13/17 Order).

The district court denied the prosecution's motion for reconsideration and the prosecutor appealed to the circuit court. (5/1/17 Order; 10/18/17 Order).

The circuit court affirmed, ruling that the stop required something more than confirming the caller's report of the vehicle's "make model, description, and color" to support a reasonable suspicion that Ms. Pagano was intoxicated. (10/18/17 Order at 4).

The prosecution was then granted leave to appeal to the Michigan Court of Appeals. (10/27/17 Application; 4/20/18 Order). On appeal, the Court of Appeals reversed the lower courts' dismissal, holding that "[u]nder the totality of the circumstances, the officer had reasonable, articulable suspicion that justified an investigative stop of defendant's vehicle, and the circuit court erred by concluding otherwise."¹

Ms. Pagano now prays for leave to appeal the Court of Appeals' reversal of the lower courts' decisions.

STANDARD OF REVIEW

This Court reviews "[a] court's factual findings at a suppression hearing . . . for clear error, but the application of the underlying law — the Fourth Amendment of the United States Constitution and article 1, § 11 of the Michigan Constitution — is reviewed de novo."²

¹ *People v Pagano*, 2019 WL 2273357, at *4 (Mich App May 28, 2019) (unpublished).

² *People v Slaughter*, 489 Mich 302, 310; 803 NW2d 171, 176 (2011).

ARGUMENT

A. IN LIMITED CIRCUMSTANCES, AN “INVESTIGATIVE STOP” MAY BE AN EXCEPTION TO THE UNITED STATES AND MICHIGAN CONSTITUTIONS’ PROTECTIONS AGAINST UNREASONABLE SEARCHES AND SEIZURES.

“The United States Constitution and the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures.”³ “Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions.”⁴

“One of the categories of ‘seizures’ guarded by the Fourth Amendment is the investigatory stop, which is a brief, non-intrusive detention.”⁵ “Under certain circumstances, a police officer may approach and temporarily detain a

³ *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759, 763 (2005) (citing US Const Amend IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”); Mich Const art 1, § 11 (“The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation.”)); see *Slaughter*, 489 Mich at 310; 803 NW2d at 176–77.

⁴ *People v Champion*, 452 Mich 92, 98; 549 NW2d 849, 853 (1996).

⁵ *People v Bloxson*, 205 Mich App 236, 241; 517 NW2d 563 (1994).

person for the purpose of investigating possible criminal behavior even though there is no probable cause to support an arrest.”⁶

1. A valid investigatory stop must be justified at its inception by a “reasonable suspicion” that criminal activity is afoot.

An investigative stop “does not violate the Fourth Amendment if the officer has a reasonably articulable suspicion that criminal activity is afoot.”⁷

“A valid investigatory stop must be justified at its inception and . . . must be based on an objective manifestation that the person stopped was or was about to be engaged in criminal activity as judged by those versed in the field of law enforcement when viewed under the totality of the circumstances.”⁸

“Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or ‘hunch’ but less than the level of suspicion required for probable cause.”⁹ The officer must have an articulable, “particularized and objective basis that would lead a reasonable person to suspect the occupants of the vehicle of criminal activity”¹⁰

⁶ *Jenkins*, 472 Mich at 32 (citing *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L E d2d 889 (1968)).

⁷ *Id.* (citing *People v Custer*, 465 Mich 319, 325–326; 630 NW2d 870 (2001); *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001); *Terry*, 392 US at 30–31).

⁸ *Champion*, 452 Mich at 98.

⁹ *Id.* (quoting *United States v Sokolow*, 490 US 1; 109 S Ct. 1581; 104 L Ed 2d 1 (1989)).

¹⁰ *Oliver*, 464 Mich at 205.

“Whether an officer has a reasonable suspicion to make such an investigatory stop is determined case by case”¹¹ “A determination regarding whether a reasonable suspicion exists ‘must be based on commonsense judgments and inferences about human behavior.’”¹²

2. Reasonable suspicion based on anonymous tips requires sufficient “indicia of reliability.”

“In cases involving an anonymous tip, the test to determine whether there is reasonable suspicion is based on ‘the totality of the circumstances with a view to the question whether the tip carries with it sufficient indicia of reliability to support a reasonable suspicion of criminal activity.’”¹³ “An anonymous tip that provides sufficient detail may provide reasonable suspicion of criminal activity, especially, though not necessarily, when there is independent corroboration of relevant facts.”¹⁴

3. A tip must be reliable in its assertion of illegality, not merely its tendency to identify a particular person.

The United States Supreme Court explained that “[t]he reasonable suspicion here at issue requires that a tip be reliable in its assertion of

¹¹ *Jenkins*, 472 Mich at 32 (citing *Oliver*, 464 Mich at 192).

¹² *Id.* (citing *Oliver*, 464 Mich at 197).

¹³ *People v Perreault*, 486 Mich 914, 915; 781 NW2d 796, 797 (2010) (quoting *People v Faucett*, 442 Mich 153, 169; 499 NW2d 764 (1993)).

¹⁴ *Id.* (citing *Faucett*, 442 Mich at 170–172).

illegality, not just in its tendency to identify a determinate person.”¹⁵ The Court cited Professor LaFave as a supporting comparison on this point, insofar as LaFave “distinguish[ed] reliability as to identification, which is often important in other criminal law contexts, from reliability as to the likelihood of criminal activity, which is central in anonymous-tip cases.”¹⁶ Although “[a]n accurate description of a subject’s readily observable location and appearance . . . will help the police correctly identify the person whom the tipster means to accuse, [s]uch a tip . . . does not show that the tipster has knowledge of concealed criminal activity.”¹⁷

B. THE COURT OF APPEALS ERRONEOUSLY REVERSED THE LOWER COURTS BASED ON ITS INCORRECT UNDERSTANDING OF REASONABLE SUSPICION.

1. The courts and parties agreed on the facts, but the Court of Appeals reached a different legal conclusion.

The trial courts, parties, and Court of Appeals all agree that Deputy Hessling stopped Ms. Pagano based solely on information obtained through an anonymous tip and that Hessling only corroborated the identifying information

¹⁵ *Florida v JL*, 529 US 266, 272; 120 S Ct 1375, 1379; 146 L Ed 2d 254 (2000); see also *People v Levine*, 461 Mich 172, 178; 600 NW2d 622 (1999) (The Michigan Constitution is construed to provide the same protection as that provided by the Fourth Amendment absent a compelling reason to do otherwise.).

¹⁶ *JL*, 529 US at 272 (citing 4 LaFave, Search and Seizure § 9.4(h), p. 213 (3d ed.1996)).

¹⁷ *Id.*

related to the caller's description of Ms. Pagano's car and location.¹⁸ (3/21/2017 Tr at 13–14; 10/18/17 Order at 4).

Based on those facts, the district court ruled that the deputy failed to establish the 911 caller's reliability "in terms of the information provided [to] 911," and thus lacked a valid reasonable suspicion. (3/21/2017 Tr at 13–14). The circuit court ruled that although "the unidentified caller's information pertaining to the make, model, description, and color of the vehicle contained sufficient indicia of reliability," "there must be something more in the content of the information as there was in *Navarette* and *Barbarich*." (10/18/17 Order at 4).

The Court of Appeals, however, held that "[u]nder the totality of the circumstances, the officer had reasonable, articulable suspicion that justified an investigative stop of defendant's vehicle."¹⁹ The court explained:

Here, the caller's tip accurately provided the make, model, color, and license plate number of defendant's vehicle, and accurately described the approximate location of the vehicle. . . .

We disagree that the caller's information was rendered less reliable because the caller described defendant's actions as having the appearance of intoxication, as opposed to merely describing her actions. Just as an observer might describe someone as appearing ill or appearing irrational, describing a person's behavior as appearing intoxicated conveys to the officer a general

¹⁸ *Pagano*, 2019 WL 2273357 at *1–2.

¹⁹ *Id.* at *4.

notion of the behavior being described. Here, the caller reported that defendant had been at a public access area at the state park, was yelling at her children and behaving obnoxiously, and appeared to be intoxicated, which if true, would make it illegal, as well as dangerous, for her to drive on the public roadway. The caller reported those observations to the police; from there, the officer was entrusted with the decision of how to proceed in light of that information. We are not prepared, as the circuit court was in this case, to draw a fine distinction between slurred speech and stumbling versus yelling and acting obnoxious as indicia of intoxication.^[20]

2. The Court of Appeals' decision is directly contrary to Michigan and United States constitutional requirements and precedent.

As Ms. Pagano argued and the lower courts agreed, the problem with the deputy's stop is that he failed to corroborate anything about the illegality alleged by the anonymous caller, and that the reliability of the caller's assertions of illegality was not otherwise established. But as explained above, the Court of Appeals held that the deputy's confirmation of the "make, model, color, . . . license plate . . . and . . . approximate location of the vehicle" as alleged by the caller was sufficient to establish the caller's reliability.²¹

²⁰ *Id.* at 3–4.

²¹ *Id.*

The Court of Appeals holding is directly contrary to the United States Supreme Court's decision in *Florida v JL*²² and inconsistent with the prior Michigan Court of Appeals case *People v Barbarich*.²³

***a. Florida v JL* validates the district and circuit courts' decisions dismissing Ms. Pagano's case because the deputy lacked a valid reasonable suspicion of criminality.**

In *JL*, the United States Supreme Court specifically held that reasonable suspicion requires confirming the reliability of a tipster's assertion of illegality. The facts of that case mirrored the facts of the instant case in important ways. As the United States Supreme Court explained:

[A]n anonymous caller reported to . . . [p]olice that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. So far as the record reveals, there is no audio recording of the tip, and nothing is known about the informant. Sometime after the police received the tip — the record does not say how long — two officers were instructed to respond. They arrived at the bus stop about six minutes later and saw three black males “just hanging out [there].” One of the three, respondent J.L., was wearing a plaid shirt. Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct. The officers did not see a firearm, and J.L. made no threatening or otherwise unusual movements. One of the officers approached J.L., told him to put his hands up on the bus stop, frisked him, and seized a gun from J.L.'s pocket.^[24]

²² *JL*, 529 US 266.

²³ *People v Barbarich*, 291 Mich App 468; 807 NW2d 56 (2011).

²⁴ *JL*, 529 US at 268.

A Florida district court of appeals held that the officers were justified in having a reasonable suspicion that the defendant was carrying a concealed weapon, but the Florida Supreme Court reversed, holding that the information in the tip and the officers' observations failed to sufficiently establish the tipster's reliability.²⁵

When the case went to the United States Supreme Court, the Florida government presented an argument essentially identical to the People's in this case that that "the tip was reliable because its description of the suspect's visible attributes proved accurate: There really was a young black male wearing a plaid shirt at the bus stop."²⁶ As amicus curiae, the United States government argued that "a stop and frisk should be permitted 'when (1) an anonymous tip provides a description of a particular person at a particular location illegally carrying a concealed firearm, (2) police promptly verify the pertinent details of the tip except the existence of the firearm, and (3) there are no factors that cast doubt on the reliability of the tip'"²⁷

The United States Supreme Court disagreed. The Court discussed its previous "close" decision of *Alabama v White*, where the Court upheld a stop

²⁵ *Id.*; *State v JL*, 689 So 2d 1116, 1117 (Fla Dist Ct App 1997).

²⁶ *JL*, 529 US at 271.

²⁷ *Id.*

based on a tip that contained slim but predictive information.²⁸ The Court held that “[t]he tip [in *JL*] lacked the moderate indicia of reliability present in *White* and essential to the Court’s decision in that case.”²⁹ As the Court explained, although “an accurate description of a subject’s readily observable location and appearance . . . will help the police correctly identify the person whom the tipster means to accuse[,] [s]uch a tip . . . does not show that the tipster has knowledge of concealed criminal activity.”³⁰

The instant case is substantially indistinguishable from *JL* and is certainly controlled by *JL*’s interpretation of the Fourth Amendment’s requirements. Like *JL*, the record in instant case lacked any recording of the tip. Like *JL*, the caller in this case provided identifying details that were later confirmed by police. Like *JL*, the confirmable details did not pertain to the suspected illegality. And like *JL*, the deputy did not observe any other indicia of illegality before stopping Ms. Pagano. Thus, applying *JL*’s holding to Ms. Pagano’s case shows why the district and circuit courts’ decisions were correct: based on the caller’s information and the deputy’s subsequent observations, the deputy did not have a valid reasonable suspicion that Ms. Pagano was involved in any illegality.

²⁸ *Id.* (discussing *Alabama v White*, 496 US 325, 332; 110 S Ct 2412; 110 L Ed 2d 301 (1990)).

²⁹ *Id.*

³⁰ *Id.*

b. People v Barbarich

Although the facts of *Barbarich* are distinguishable from the instant case, that case provides an example of the type of information sufficient to support a tip involving the stop of a moving vehicle. There, an officer was patrolling around a bar on St. Patrick's Day. A woman driving another vehicle made eye contact with the officer, pointed to the defendant's vehicle, and mouthed the words "almost hit me." The Court of Appeals held that the officer had a valid reasonable suspicion of criminality to conduct an investigative stop:

The woman's action of pointing to the vehicle in front of her was sufficient to accurately identify defendant's vehicle and provided precise and verifiable information to the officer, which also strongly suggests that the information was reliable. The basis of the informant's knowledge was obvious—it can be inferred from her statement, "Almost hit me," and her action of pointing to the vehicle traveling immediately in front of her that defendant's vehicle had recently almost come into contact with the woman's vehicle; her tip was clearly based on firsthand and contemporaneous observations, which further confirms the veracity of the information. Moreover, had Bommarito wished to obtain the informant's personal information he could have, by looking up her license plate number. Accordingly, the fact that the tipster was actually face to face with Bommarito when she relayed the tip, and thus likely knew that she could be subject to police questioning, further indicates that she was credible and that the information she provided was reliable. In addition, her statement, "Almost hit me," was sufficient to support an inference that an actual traffic violation had occurred. While it is true that the statement could be consistent with legal behavior, it was also enough to create an inference that defendant

had been driving erratically in contravention of MCL 257.626 (reckless driving, a misdemeanor), MCL 257.626b (careless or negligent operation of a motor vehicle, a civil infraction), or MCL 257.625 (operating a motor vehicle while intoxicated). It is not vital that [the officer] knew exactly what crime was being committed or would be charged when [the officer] decided to stop defendant, only that the circumstances justified the stop. The circumstances here, together with the citizen's statement, certainly justified the stop.^{31]}

Thus, because of the officer's first hand observations of the other driver, the officer had a valid reasonable suspicion of criminality to stop that defendant. Additionally, to the extent that the other driver made her allegation to the officer face-to-face, she was not actually an anonymous tipster. Thus, the officer in *Barbarich* had significantly more information to evaluate that reporter's reliability than did the deputy in Ms. Pagano's case.

c. Judge Gleicher's dissent in *Barbarich*

In her dissent in *Barbarich*, Presiding Judge Gleicher explained that “[t]he Michigan Constitution is construed to provide the same protection as that provided by the Fourth Amendment absent a compelling reason to do otherwise.”³² Judge Gleicher explained that “[a]s most relevant here, the Supreme Court instructed that reasonable suspicion ‘requires that a tip be

³¹ *Barbarich*, 291 Mich App at 480–81 (internal citations and quotations omitted).

³² *Barbarich*, 291 Mich App at 487 (Gleicher, P.J., dissenting) (citing *Levine*, 461 Mich at 178).

reliable in its assertion of illegality, not just in its tendency to identify a determinate person.”³³ And Judge Gleicher unambiguously explained that “[w]ith regard to the issue whether an anonymous tip supports a reasonable suspicion to stop a suspect, Michigan case law tracks federal precedent.”³⁴

Based on those considerations, Judge Gleicher argued that the officer in *Barbarich* lacked a valid reasonable suspicion. Both Judge Gleicher’s dissent and the majority opinion supports the trial courts’ decision in the instant case. The only reliability established in the instant tip pertained to innocuous location and appearance information and did not relate the alleged illegality.

CONCLUSION

The trial courts were correct to conclude that the deputy lacked a valid reasonable suspicion to subject Ms. Pagano to an investigatory stop. The stop was therefore an illegal seizure under the United States and Michigan Constitutions. The Court of Appeals’ reversal of the lower court decisions was therefore erroneous and should be corrected. Accordingly, Ms. Pagano prays that this Court grant her leave to appeal, or preemptively reverse the Court of Appeals’ decision.

³³ *Barbarich*, 291 Mich App at 487 (quoting *JL*, 529 US at 272).

³⁴ *Id.* (citing *Faucett*, 442 Mich at 163).

DATED at Kingsley, Michigan on this 23th day of July 2019.

LAW OFFICE OF MICHAEL HOROWITZ

/s/ Michael Horowitz

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