IN THE SUPREME COURT OF THE STATE OF DELAWARE

DALE GUILFOIL,	§	
	§	No. 740, 2009
Defendant Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
	§	
STATE OF DELAWARE,	§	ID No. 0906008900
	§	
Plaintiff Below-Appellee.	§	

Submitted: June 14, 2010
Decided: September 7, 2010

Before **HOLLAND**, **BERGER**, and **RIDGELY**, Justices.

O R D E R

This 7th day of September 2010, it appears to the Court that:

(1) Defendant-below Dale Guilfoil appeals from his conviction by the Superior Court of driving under the influence of alcohol. He contends that the Superior Court erred in denying his motion to suppress evidence because it relied on after-acquired facts to justify the stop of his vehicle and because the police lacked reasonable articulable suspicion of criminal activity at the time of the stop. Although after-acquired facts cannot be used to justify a stop, the facts known prior to the stop in this case provided a reasonable articulable suspicion of criminal activity. Accordingly, we affirm.

(2) At approximately 12:13 a.m. on June 11, 2009, the State Police received a call from an unidentified employee of the Super G supermarket in Bear, Delaware who reported that a white male and female shopper suspected of being under the influence of alcohol and were hitting their child. The informant's tip was not recorded, nor did the informant testify at trial. Corporal Susan Lowman of the Delaware State Police was dispatched and received continuous and contemporaneous updates from the informant over the radio while on the way to the scene. Specifically, the informant relayed that the couple exited the store, entered a green Subaru Forrester with the child unsecured in the back seat, and proceeded towards the exit of the parking lot. The informant also provided Corporal Lowman the license plate number of the vehicle.

(3) When Corporal Lowman arrived on the scene, she encountered a white male and female who were driving a green station wagon towards the exit of the supermarket's parking lot. She activated her emergency lights and parked her patrol car to block their exit. At the time of the stop, Corporal Lowman could not see if there was a child in the back or the vehicle's license plate number. After she stopped the Subaru, she immediately confirmed that a child was unrestrained in the backseat of the car. Corporal Lowman conducted field sobriety tests and a portable breath test in the parking lot. Guilfoil, the driver of the stopped vehicle, was arrested and charged with driving under the influence.

(4) Guilfoil filed a motion to suppress the evidence obtained as a result of the stop. At the suppression hearing the Superior Court denied the motion. The trial judge explained:

> Taking the largely undisputed record into account, the [c]ourt is satisfied that the police generally, and in particular the arresting officer, had a reasonable, articulable suspicion about the car that the officer stopped, sufficient to justify the brief interference with the driver's freedom to leave the supermarket's parking lot after midnight on the day in question.
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> The officer was looking for a particular make and model of a car in that parking lot. The officer had reason to believe that the occupants of the car had been hitting a child while intoxicated and, significantly, that the car was in motion with the child not being restrained. Regardless of whether it was a private parking lot or not, it was totally reasonable for the police officer to stop a car driving with an unrestrained child to speak to the driver of the car about the hazards of that sort of behavior.
>
> The [c]ourt is satisfied that the officer was not obligated to let the car pass and head out, in effect, onto the open road so that the officer could check the license plate from behind. The [c]ourt is satisfied that the officer was reasonable in stopping the car before it got by her so that she could then take the limited steps that she took to see if she had the car that was referred to in the broadcast to which she was responding.
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> And the [c]ourt emphasizes again, this is after midnight in a supermarket parking lot. It is not, as Defense has argued, the idea that the police were going to stop every car or stop every car matching a particular description. They had one car coming out of a supermarket parking lot very late at night matching the description. The officer stopped the car just long enough to walk up to it and see that there was an unrestrained child, that this was the car in question, that there was a violation or at least a sufficiently unsafe practice that some interaction between the police and the driver was appropriate.
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> Taking all of that into account, the [c]ourt is satisfied that the officer's actions that have been called into question were entirely reasonable and appropriate for the safety of the child, the public, and

> indirectly, as it turns out, the safety of the driver himself, although the last finding is somewhat unnecessary for the purposes of justifying the stop.

(5) At a non-jury trial, Guilfoil was convicted of driving under the influence and the state *nolle prossed* all remaining charges.[1] Guilfoil was sentenced to three years at Level 5; suspended after two years, for Level 4 supervision. This appeal followed.

(6) In *Lopez-Vazquez v. State*[2] we explained our standard of review on the grant or denial of a motion to suppress. "We review the grant or denial of a motion to suppress for an abuse of discretion. To the extent that we examine the trial judge's legal conclusions, we review the trial judge's determinations *de novo* for errors in formulating or applying legal precepts. To the extent the trial judge's decision is based on factual findings, we review for whether the trial judge abused his or her discretion in determining whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous. Where as here, we are reviewing the denial of a motion to suppress evidence based on an allegedly illegal stop and seizure, we conduct a *de novo* review to determine

[1] The remaining charges were driving with a suspended or revoked license, failure to have a registration card, and failure to have insurance identification in possession while driving.
[2] 956 A.2d 1280 (Del. 2008).

whether the totality of the circumstances, in light of the trial judge's factual findings, support a reasonable and articulable suspicion for the stop."[3]

(7) The Fourth Amendment[4] and the Delaware Constitution[5] reserve the right for individuals to be free from unreasonable search and seizures. Under *Terry v. Ohio*,[6] a police officer is permitted to conduct a brief investigatory seizure of a person if there is "reasonable articulable suspicion that criminal activity is afoot."[7] A seizure has occurred when an officer makes a "show of official authority" that would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."[8] There is no dispute that in this case Guilfoil was seized when Corporal Lowman parked her car blocking their exit with her police cruiser's emergency lights activated.

(8) If an officer does not observe any violations prior to the stop, this Court "must decide whether the tip contained sufficient indicia of reliability to support a stop on the basis of the tip alone."[9] In *Florida v. J.L.* the United States Supreme Court held that a tip regarding "a young black male standing at a

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[3] *Id.* at 1284 (citations omitted).
[4] U.S. Const. amend. IV.
[5] Del. Const. art. I, § 6.
[6] 392 U.S. 1 (1968).
[7] *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).
[8] *Jones v. State*, 745 A.2d 856, 862 (Del. 1999) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)).
[9] *Bloomingdale v. State*, 842 A.2d 1212, 1219 (Del. 2004).

particular bus stop and wearing a plaid shirt was carrying a gun" was not enough to be reasonable articulable suspicion.[10] A tip must "be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."[11] In *Jones v. State,* this Court held that observing a defendant acting "suspicious" in a high crime area while wearing the same color coat as the subject of a tip was not reasonable articulable suspicion.[12] Unlike *Jones*, unsafe driving was readily observed in this case by the informant and relayed to the officer.

(9) Guilfoil argues that the Superior Court erroneously relied on after-acquired facts. The Superior Court stated "[t]he [c]ourt is using what happened immediately after the stop to bring into sharper relief the reason why there was the stop in the first place." We agree with Guilfoil that this was error. A court cannot rely upon information obtained after the stop to justify the stop.[13] But in this case there was reasonable articulable suspicion to stop the vehicle based upon the information known prior to the stop. The facts are similar to *Bloomingdale v. State*,[14] where this Court relied on a Vermont case, *State v. Boyea*,[15] to determine whether the totality of the circumstances established reasonable articulable suspicion. In *Boyea*, the police received an anonymous tip that a blue-purple Jetta

[10] *Florida v. J.L.*, 529 U.S. 266, 272 (2000).
[11] *Id.* at 268
[12] *Jones*, 745 A.2d at 871.
[13] *Flonnery v. State*, 805 A.2d 854, 859 (Del. 2001).
[14] 842 A.2d 1212.
[15] 765 A.2d 862 (Vt. 2000).

was driving erratically on I-89 between exits 10 and 11.[16] There, the police officer followed the vehicle for over a mile without observing any erratic behavior before stopping the vehicle.[17] After she was stopped, the officer observed behavior that indicated the driver was intoxicated and she was arrested.[18] Based on *Boyea*, this Court determined in *Bloomingdale* that a tip about readily observable criminal activity is more reliable than one concerning concealed criminal activity such as the facts of *J.L.* or *Jones*.[19] This Court held:

> An officer therefore should be permitted to give greater credence to an anonymous report of unsafe driving when it is supported by: (a) the precise description of the vehicle; and (b) the officer's corroboration of the descriptive features of the vehicle and the location of its travel in close temporal proximity to when the report was made.[20]

(10) The informant, an employee of Super G, provided the make, model, color, and license plate number of the vehicle. Corporal Lowman noticed the color and type of the car driving towards the exit of the parking lot leading to Route 40. The car was occupied by a white male and female, in accordance with the informant's description. The tip occurred within a close temporal proximity, as the informant relayed Guilfoil's actions and had not exited the parking lot when

[16] *Id.* at 863.
[17] *Id.*
[18] *Id.*
[19] *Bloomingdale*, 842 A.2d at 1220.
[20] *Id.* at 1221.

Corporal Lowman arrived on the scene. Further, Corporal Lowman testified that it only took a few minutes for her to reach the Super G.

(11) In *Bloomingdale,* the minimal intrusion for a motor vehicle stop was balanced against the "great risk of harm" in erratic driving cases. Ultimately, this Court held that the immediate stop without further corroboration was reasonable under the circumstances.[21] There, after the stop, the officer observed alcohol containers, smelled alcohol and the defendant admitted to drinking which was supported by the results of sobriety tests.[22] Here, the stop was reasonable because stopping the car before leaving the parking lot was minimally intrusive when balanced against the potential harm of a child traveling unsecured in the back seat of a car driven by an intoxicated individual. The stop occurred in a supermarket parking lot at midnight, where the vehicle was leaving the parking lot as the informant continuously and contemporaneously relayed the information to Corporal Lowman, with a detailed description of the vehicle and its occupants established the reliability of the tip. Although Corporal Lowman did not observe any illegal or suspicious activity that standing alone would have warranted a stop, the tip as corroborated by the officer's timely observations before the stop established a reasonable and articulable suspicion of unsafe driving.

[21] *Id.* at 1221-22.
[22] *Id.* at 1222.

(12) Based upon the totality of the circumstances, there was a reasonable and articulable suspicion of criminal activity to justify the stop of Guilfoil's vehicle. Accordingly, the Superior Court did not err in denying his motion to suppress.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice