

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<p style="text-align:center">UNITED STATES OF AMERICA</p> <p style="text-align:center">v.</p> <p style="text-align:center">JOHNNY TORRES, Defendant.</p>	<p style="text-align:center">CRIMINAL ACTION No. 06-630</p>
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MEMORANDUM AND ORDER

Katz, S.J.

February 5, 2007

I. FACTS

On February 22, 2005, at 2:59 p.m., a Philadelphia police radio dispatcher received a radio transmission from an anonymous tipster reporting that a Hispanic male had just flashed a gun at “a bum” at Broad and South Streets in Philadelphia, Pennsylvania. The tipster further reported that the Hispanic male was driving east on South Street in a silver BMW, with a license tag number of FVA-7726. At 3:02 p.m. the police radio dispatcher transmitted this report over police radio. Police Officers James Balmer and Daniel Kearney observed Defendant driving a silver BMW with a license tag number of FVA-7726 east bound on South Street less than five minutes later. They subsequently requested that a marked police car stop Defendant’s vehicle. In response, a marked police car directed Defendant to stop

his BMW at approximately 3:07 p.m. Defendant complied with this order and pulled his car over in the 100 block of South Street.¹ At no time prior to stopping Defendant's car did the police observe Defendant committing a motor vehicle violation or exhibiting any criminal or suspicious behavior. Defendant was detained solely because of the anonymous caller's tip.

After arriving at the scene, Officers Balmer and Kearney observed that Defendant had both of his hands down on the left side of the car, by the driver's side door. The Officers testified that they ordered Defendant to show his hands but that he did not comply initially and that he made furtive movements in the car, although this alleged furtive behavior is not reflected in the official police report of this incident. At that time, Officer Balmer ordered Defendant out of the car and secured Defendant at the back of the BMW. Police Officer Kearney then searched the inside of Defendant's car where he found and seized a 9 millimeter pistol and ammunition inside the driver's side door.

Now before the court is Defendant's Motion to Suppress Physical Evidence.

¹Defendant established that the car did belong to him.

II. DISCUSSION

“Under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and subsequent cases, an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.” United States v. Valentine, 232 F.3d 350, 353 (3d Cir. 2000) (citations and quotations omitted). In evaluating reasonable suspicion, the court should consider the “totality of the circumstances.” Id. Any evidence obtained pursuant to an investigatory stop that is not supported by reasonable suspicion must be suppressed as fruit of the poisonous tree. United States v. Brown, 448 F.3d 239, 244 (3d Cir. 2006).

If under the totality of the circumstances, the Philadelphia Police Officers did not have reasonable suspicion to stop and search Defendant’s car, the court must grant Defendant’s Motion and suppress the firearm and ammunition found in Defendant’s car.

A. Defendant was Seized at the Time of His Initial Stop of His Car

The court begins its analysis by determining when the seizure of Defendant occurred, as the court may consider only the facts available to the officer at the moment of the seizure in determining whether reasonable suspicion existed. See Brown, 448 F.3d at 245. “[I]nformation acquired subsequent to the initial seizure

cannot retroactively justify a *Terry* stop.” United States v. Goodrich, 450 F.3d 552, 559 (3d Cir. 2006) (citing Florida v. J.L., 529 U.S. 266, 271, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000)).

Here, Defendant was seized as soon as he complied with the police officer’s order to pull his car to the side of the road. The government provides no justification for departing from the well-settled rule that “stopping an automobile and detaining its occupants constitute a ‘seizure’ within the meaning of [the Fourth] Amendment, even though the purpose of the stop is limited and the resulting detention quite brief.” See Berkemer v. McCarty, 468 U.S. 420, 436-437, 104 S.Ct. 3138,3148 (1984) (quoting Delaware v. Prouse, 440 U.S. 648, 653, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979)).

“A seizure occurs when there is either (a) ‘a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful,’ or (b) submission to ‘a show of authority.’” Brown, 448 F.3d at 245 (quoting California v. Hodari D., 499 U.S. 621, 625, 111 S.Ct. 1547, 1550 (1991)). Here, there was a clear show of authority when the police officer in a marked vehicle ordered Defendant to stop his car. There is no dispute that Defendant

submitted to this order, nor is there any allegation that Defendant attempted to flee at any point.² Thus, he submitted to the show of authority by the police, and a seizure occurred.

Even if the court had found that Defendant did not comply fully with the officers' orders to show his hands as alleged by Officers Balmer and Kearney, such a failure to comply with the latter order would not negate the fact that he fully complied with the order to stop his car. Cf. Brown, 448 F.3d at 246 (holding that the defendant was seized after he initially yielded to the police officer's authority by turning to face the police car and placing his hands on the vehicle, even though he attempted to flee a short time later). The court, therefore, cannot consider in determining the existence of reasonable suspicion, any suspicious activity Officers Balmer and Kearney may have witnessed after Defendant's car was stopped.³

¹ This not a case where Defendant refused to submit to the authority of the police. Cf. Valentine, 232 F.3d at 357-358 (holding that in assessing whether reasonable suspicion exists the court could consider Defendant's actions after the police ordered him to stop but only because the defendant refused to submit to police authority). Nor is this a case where Defendant only momentarily complied with the police officer's order before disobeying it. Cf. United States v. Washington 12 F.3d 1128, 1132 (D.C. Cir.1994) (holding that Defendant had not submitted to the police officer's assertion of authority because he did not submit when he initially stopped his car in response to a police order but drove off before the officer reached his car).

³The court finds that record does not support the contention of Officers Balmer and Kerney that Defendant did not comply with their orders to show his hands.

B. The Seizure Was Not Supported by Reasonable Suspicion

As the court cannot consider any alleged suspicious activity by Defendant after the seizure, the central question in this case is whether the radio dispatcher had sufficient information to view the tip as reliable and issue it as a radio bulletin. See United States v. Nelson, 284 F.3d 472, 481 (3d Cir. 2002) (“Because the officers stopping the car did so based on the fact that the car and individuals matched the description broadcast over the police radio, the reasonableness of the stop in this case depends on the reliability of the tip itself.”).⁴ “Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity. Valentine, 232 F.3d at 354 (citations and quotations omitted). There are, however, “situations in which an anonymous tip, suitably corroborated, exhibits ‘sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.’” Florida v. J.L., 529 U.S. 266, 270, 120 S.Ct. 1375, 1378 (2000) (quoting Alabama v. White, 496 U.S. 325, 328, 110 S.Ct. 2412, 2415 (1990)).

⁴ Neither party disputes that Defendants silver 745I BMW driven by a Hispanic male with a Pennsylvania license tag FVA-7726 traveling eastbound on South Street precisely matched the broadcast information, nor that Defendant’s car was the one described in the broadcast.

Here, the anonymous tip did not exhibit sufficient indicia of reliability to provide reasonable suspicion. The tip did not contain predictive information, demonstrate other particularized knowledge. Moreover, nothing else bolstered the reliability of the tip.

1. The Tip Did Not Contain Predictive Information

A tip that predicts what will follow indicates reliability because predictive information provides police the “means to test the informant's knowledge or credibility.” Brown, 448 F.3d at 250 (citing J.L., 529 U.S. at 271, 120 S.Ct. at 1375). In contrast, an anonymous tip that contains only information readily observable at the time the tip is made does not supply reasonable suspicion. United States v. Roberson, 90 F.3d 75, 75 (3d Cir. 1996).

The government argues that the anonymous caller correctly “predicted” that Torres would be driving a silver, 745I BMW with Pennsylvania license # FVA-7725 on South Street. Response to Motion to Suppress at 6. The court disagrees with the assessment of this information as “predictive.” The anonymous caller did not *predict* Torres would be driving a silver, 745I BMW with Pennsylvania license # FVA-7725 on South Street; he stated that he *observed* that Defendant was driving a silver BMW East bound down South Street. It was the police officers who reasonably posited that Defendant would continue driving down South Street.

In short, “[a]nyone could have ‘predicted’ the facts contained in the tip because they were “condition[s] presumably existing at the time of the call.” Alabama v. White, 496 U.S. 325, 332, 110 S.Ct. 2412, 2417 (1990) (differentiating between anonymous tips that provide easily obtained facts and conditions existing at the time of the tip and those that provide future behavior of third parties ordinarily not easily predicted, which demonstrate inside information); Roberson, 90 F.3d at 75 (holding that an anonymous call stating that a heavy-set, black male wearing dark green pants, a white hooded sweatshirt, and a brown leather jacket was selling drugs on the 2100 block of Chelton Avenue did not provide reasonable suspicion). The fact that the police could infer Defendant’s future location based on the caller’s observations does not render the caller’s observations predictive.

2. The Caller Did Not Demonstrate Particularized Knowledge

The caller’s tip also failed to demonstrate other particularized knowledge sufficient to demonstrate reliability. The Third Circuit has held that in addition to “predictive information. . . other aspects of the tip can reflect particularized knowledge,” such as when “specific details of language, type of activity and location matched a pattern of criminal activity known to the police, but not to the general public,” and

“the tip could not have been generated by the general public, nor based solely on observation.” Nelson, 284 F.3d at 482-84. Here, the anonymous caller did not provide any inside information of the sort contemplated in Nelson. There is no evidence in the record that the crime reported by the tipster here, brandishing a firearm matched a pattern of criminal activity known to the police at all, let alone one known to the police and not the general public. The information reported by the anonymous caller in the instant case was readily observable by anyone, and did not imply any special knowledge on the part of the observer. See Nelson 284 F.3d at 484 (contrasting the facts of J.L. with those in Nelson). The tip, therefore, did not demonstrate any other particularized knowledge.

3. There Are No Other Factors that Support Finding Reasonable Suspicion

The mere fact that the police officer’s found that the suspect's visible appearance matched the description provided by the anonymous caller does not make the tip reliable. “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.” J.L., 529 U.S. 266 at 272, 120 S.Ct. 1375 at 1379. Thus, in the instant case, the mere fact that the officers corroborated the anonymous caller’s description of the

suspect and his vehicle was insufficient, because it did not demonstrate that the caller had knowledge of concealed criminal activity.

Furthermore, the police had no additional information that they could have used to corroborate the anonymous caller's tip. The Supreme Court and the Third Circuit have also identified the following as suggesting suspicious behavior that, if observed by police, can serve to corroborate an otherwise insufficient tip: (1) the suspect's presence in a high crime area; (2) the suspect's presence on a street at a late hour; (3) the suspect's nervous, evasive behavior or flight from police; and (4) behavior of the suspect conforming to police officers' specialized knowledge of criminal activity. Brown, 448 F.3d at 250 (summarizing factors that can serve to corroborate a tip that lacks sufficient indicia of reliability). Here, none of these conditions existed. Defendant was not in a high crime area. The detention took place in the afternoon. The suspect did not display any nervous or evasive behavior before the detention. Finally, the suspect did not behave in a way that conformed to police officers' specialized knowledge.

Moreover, allegations of gun possession by an anonymous caller do not lessen the reliability that is otherwise required to establish "reasonable suspicion." J.L., 529

U.S. at 272, 120 S.Ct. at 1379-1380. In certain cases, the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability, such as a report of someone carrying a bomb. J.L., 529 U.S. at 273-74, 120 S.Ct. 1375 at 1380; Nelson, 284 F.3d at 483 (“The court may consider we think that the critical element alleged in the tip was not the mere presence of a gun, but the fact that violent crimes *were in the process of being committed*”) (emphasis added). This is not such a case. Here, no violent crimes were in the process of being committed, and the alleged act of brandishing a gun does not pose a sufficient risk of danger to lessen the reliability that is required to establish reasonable suspicion. Cf. Jackson v. Commonwealth, 267 Va. 666, 681, 594 S.E.2d 595, 603 (Va. 2004) (reversing the decision of a lower court that had held that the brandishing a firearm represented an imminent danger to the public). Thus, there are no facts that would serve to excuse the tip’s lack of objective indicia of reliability.

C. Conclusion

For the reasons stated above, Defendant’s Motion is **GRANTED**.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA

C

v.

**JOHNNY TORRES,
Defendant.**

CRIMINAL ACTION NO. 06-630

ORDER

AND NOW, this 5th day of February, 2007, upon consideration of the Defendant's Motion to Suppress Physical Evidence, the Government's response, and a hearing, it is hereby **ORDERED** that said Motion is **GRANTED**. The physical evidence obtained as a result of the search and seizure of Mr. Torres on February 22, 2005 is suppressed.

BY THE COURT:

/s/ Marvin Katz

MARVIN KATZ, S.J.