



# *DPS Legal Review*

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## **RELIABILITY OF INFORMANT TIP**

On September 4, 2013, an officer's "trusted friend" (the informant) that he had known for eight years, called and reported that they had witnessed the defendant selling heroin out of his restaurant. The informant told the officer that the defendant carried heroin in a backpack with him everywhere he went. The tip did not predict any future criminal behavior nor relayed any information concerning the amount of drugs that the defendant possessed, his comings and goings, or how the alleged sales transpired. Based on his relationship with the informant, the officer believed the information was truthful.

The officer relayed the tip to another officer who advised that he had received similar information from another person. The officer asked the initial officer if he could get more information from the informant. The officer contacted the informant who sent him a photograph of the defendant's car from Facebook and told him where the defendant routinely parked. An officer who was the narcotics investigator drove by the defendant's restaurant to confirm the description of the defendant's vehicle and location. A few days later, the officer observed the defendant exit the building with his wife and baby and a backpack. The officer did not approach the defendant at that time. During his surveillance, the officer did not see the defendant engage in any drug transaction, nor did he see any lookouts or drugs.

The officer returned the next day and observed the defendant drive up in his vehicle outside the building. The officer and another officer approached the vehicle to interview the defendant. The defendant appeared nervous upon seeing the officers. The defendant leaned forward in his seat with his hands extended towards the floor of the car. The officer believed, based upon his experience, that the defendant may have been putting something under the seat or reaching for a weapon. The officer observed a backpack sitting in the passenger seat of the vehicle. Based upon his observations, the officer believed the tip gave him reasonable suspicion to detain the defendant briefly to investigate further.

The officer asked to speak to the defendant outside of the vehicle. The officer advised the defendant about the tip and asked whether the defendant had any narcotics or weapons on him. The defendant replied that he had none. The officer asked to search the vehicle and the defendant asked why. The officer explained that the police were searching

the vehicle because of the tip. The defendant did not say anything further. The officer requested a canine unit to sniff for drugs in the vehicle.

After the canine unit arrived the dog alerted to the vehicle. The officers searched the vehicle and discovered a .38 caliber revolver lying on the driver's floorboard. The defendant was arrested for possession of a firearm by a convicted felon. The officers searched the backpack revealing 21 aluminum packets of heroin, other plastic baggies with heroin, several prescription bottles with the defendant's name containing various pills, a digital scale, plastic tubing, a spoon, and syringes. The defendant gave the officers permission to search his apartment and the officers discovered .38 caliber ammunition and several empty clear plastic baggies of the type commonly used to package narcotics.

The defendant was indicted on three counts: (1) possession with intention to distribute heroin, in violation of 21 U.S.C. §841(a)(1); (2) possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. §942(c); and (3) possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§922(g) and 924(a)(2). The defendant was under a term of supervised release from previous convictions at the time of his arrest. The defendant filed a motion to suppress all of the evidence seized on the ground that the officers lacked reasonable suspicion to conduct the investigatory stop. The defendant argued that the informant's tip was insufficient to create reasonable suspicion of criminal activity and that the officers failed to observe anything that, in conjunction with the informant's tip, would give rise to reasonable suspicion of criminal activity. The trial court denied the motion and the defendant entered a conditional negotiated guilty plea to Count 1. The defendant was sentenced to 188 months imprisonment in the heroin case and 41 months imprisonment in the revocation case. The defendant appealed.

**HOLDING:** The Court held that the officers had reasonable suspicion to make the initial stop based on the informant's tip and any information corroborated by the officers. Reasonable suspicion for a brief warrantless investigatory stop of an individual exists when an officer has a "particularized and objective basis" for suspecting a person of criminal activity, given the totality of the circumstances. Determining whether an informant's tip was reliable enough to give rise to an officer's reasonable suspicion, the Court

must evaluate the reliability of the informant and the tip.

The Court determined that the informant was reliable enough to create reasonable suspicion. The Court reasoned that initial officer's personal relationship with the informant and consideration of the officer's ability to locate the informant at a later date were indicators of reliability. The Court determined that the tip itself was also reliable enough. "[A] known, albeit unproven, informant coupled with subsequent corroboration of the tip's details can justify a reasonable suspicion of criminality." The Court reasoned that since the informant had witnessed the defendant selling drugs and the police corroborated presently observable facts, including the defendant's usual business practice that the tip was sufficiently reliable to create reasonable suspicion. United States v. Brown, 2016 WL 106141(11<sup>th</sup> Cir.).

### **QUALIFIED IMMUNITY FOR EXCESSIVE FORCE CLAIM**

On July 13, 2012, around 12:30 a.m., an officer saw a black Ford F-250 truck run a stop sign. The officer ran the tag on the truck and was advised that it was stolen. The officer lost visual contact with the truck and radioed in a B.O.L.O. Around 2 or 3 a.m., another officer responded to the B.O.L.O, reporting that the truck was parked and unoccupied outside a local residence. The initial officer and two other officers set up surveillance on the truck and monitored it for several hours hoping to apprehend the driver. The truck, however, at some point left its parked spot unnoticed by the officers. Several hours later, one of the officers spotted the truck while answering another call. The officer got behind the truck and radioed for assistance. The two other officers responded to the call and the three officers converged on the truck as it was stopped at a red light in the middle lane of a three-lane road. One of the officers parked his patrol vehicle directly behind the truck. The initial officer pulled up on the driver's side of the truck and stopped his patrol car. The other officer passed the truck on the passenger's side, pulling into the intersection and stopping his patrol vehicle to the right side and out in front of the truck.

The initial officer and the officer on the passenger's side of the truck got out of their patrol vehicles to investigate. Within seconds, the initial officer fired shots at the truck. One of the bullets entered the driver's side door and hit the driver in the leg. The officer on the passenger's side of the driver's truck testified that the truck was accelerating towards him and that was when the initial officer shot at the truck. The officer still in his vehicle testified that he did not hear the truck's engine rev or move until after the shots were fired. Subsequently, the driver led the officers on a high speed chase that lasted several minutes. The driver veered off of the road and crashed into a fence. The driver got out and ran into a yard

where he was eventually apprehended by other officers who had joined the pursuit. The driver was arrested and transported to the hospital for treatment.

The driver was convicted of: (1) third degree theft of a motor vehicle; (2) resisting arrest without violence; (3) aggravated assault on one of the officer's with a motor vehicle; and (4) fleeing and eluding officers at a high rate of speed or in a reckless manner. The driver filed a §1983 claim action against the initial officer. The officer filed a motion to dismiss the claim arguing that it was barred by qualified immunity. The district court denied the motion. The officer appealed.

**HOLDING:** The Court upheld the motion to dismiss holding that the driver had an alleged basis for overcoming qualified immunity and imposing individual liability on the officer under §1983. To determine whether dismissal is warranted on the ground of qualified immunity, the Court asks whether the plaintiff has alleged the violation of a constitutional right that was clearly established at the time of the incident.

The Court first analyzed the driver's excessive force claim under the "objective reasonableness" standard. The standard depends on the circumstances relevant to an officer's decision to use force and the amount of force used, as viewed "from the perspective of a reasonable officer on the scene." The Court assumed that the officer fired at the truck while it was stopped; his actions were unprovoked by any action of the driver; and that the officer had no other indication than the stolen vehicle that the driver was dangerous or posed an imminent threat of harm. The Court concluded that the officer's conduct was unreasonable and thus, unconstitutional. The Court further concluded that there was case law at the time of the facts in this case to put the officer on notice that his conduct was unconstitutional. Harrigan v. Metro Dade Police Department Station, 2015 WL 9311383 (11<sup>th</sup> Cir.).

### **ALS REMINDERS**

⊗ If a Petitioner fails to abide by an ALS plea agreement, it may be possible to reinstate the ALS. Please notify either Dee or Monique if the Petitioner fails to follow through with the ALS plea agreement. A copy of the joint withdrawal form with your signature on the Affidavit/Motion to Vacate and a brief explanation of how the ALS agreement was violated will be needed to reinstate the ALS. The paperwork will then be prepared and submitted on your behalf to the Administrative Court to reinstate the ALS. If the DUI case is dismissed or reduced to a charge other than DUI (such as Reckless), the ALS cannot be reinstated.

Published with the approval of Colonel Mark W. McDonough. Legal Services: Melissa Rodgers, Director, Joan Crumpler, Deputy Director, Christina Calloway, Legal Officer, and Dee Brophy, ALS Attorney. Send questions/comments to ccalloway@gsp.net.