STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

Mark Kemp	:	
	:	
v.	:	**A.A. No. 11 - 0055**
	:	
State of Rhode Island	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the appeals panel of the Traffic Tribunal is AFFIRMED.

Entered as an Order of this Court at Providence on this 29th day of September, 2011.

By Order:

___/s/_____
Melvin Enright
Acting Chief Clerk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

Mark Kemp	:	
	:	
v.	:	**A.A. No. 2011-055**
	:	**(T11-0011)**
State of Rhode Island	:	**(07-503-018846)**
(RITT Appellate Panel)	:	

F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. In this case Mr. Mark Kemp urges that an appeals panel of the Rhode Island Traffic Tribunal erred when it affirmed a trial magistrate's decision finding him guilty of refusal to submit to a chemical test, a civil violation, under Gen. Laws 1956 § 31-27-2.1. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. Jurisdiction for the instant appeal is vested in the District Court by Gen. Laws 1956 § 31-41.1-9; the applicable standard of review may be found in Gen. Laws 1956 § 31-41.1-9(d).

Mr. Kemp argues before this Court that the State failed to satisfy the

burden, imposed upon it by the Fourth Amendment, of proving that the initial stop of his vehicle by a South Kingstown Police Officer was predicated on reasonable suspicion that he was involved in unlawful activity. After a review of the entire record, and for the reasons stated below, I have concluded that the decision of the panel is supported by reliable, probative and substantial evidence of record and is not clearly erroneous; I therefore recommend that the decision below be affirmed.

FACTS & TRAVEL OF THE CASE

A. FACTS AND TRAVEL OF THE CASE.[1]

On October 6, 2010 at approximately 1:00 A.M., Officer David Marler — an 8-year veteran of the South Kingstown Police Department with 500 alcohol-related traffic stops — was on duty outside the Ocean Mist Bar on Matunuck Beach Road when a citizen walked up and said that "he had just observed a truck strike another vehicle;" he also told the officer that "he knew the operator was drunk and he was concerned about his driving." (Trial Transcript, at 7-8, 12-13). The citizen then pointed out the vehicle, which was being driven past their location. Id. With this, the officer walked into the street and stopped the vehicle. Id.

[1] The facts of the case were derived solely from the testimony of Officer David Marler. This summary is a somewhat briefer version of the narrative presented by the panel in its opinion. See Decision of Panel, at 1-4. Because of the narrowness of the

After further investigation by the officer, Mr. Kemp was charged with refusal to submit to a chemical test. Mr. Kemp was arraigned on October 18, 2010. The trial began on December 6, 2010 before Magistrate Alan Goulart and was continued for further hearing to January 25, 2011. After the testimony of Officer Marler was concluded, the magistrate found that sufficient proof had been presented on each of the four statutory elements of a refusal case. He then stated — "The only remaining issue is whether there were sufficient and articulable facts for Officer Marler to stop that vehicle … ." (Trial Transcript, at 110). He thereupon reassigned the matter to February 17, 2011 for decision.

B. TRIAL MAGISTRATE'S FINDINGS ON THE FOURTH AMENDMENT ISSUE.

In his oral decision, Magistrate Goulart found that the officer was working a detail at the Ocean Mist bar in Matunuck. Trial Transcript, at 114. It was closing time and about 200 people were outside. Id. From the area of the Joyce pub came an unidentified male, who stated he had seen a truck back into another vehicle in the parking lot and he believed the operator was intoxicated. Id. The officer then stopped the vehicle for two reasons: (1) to investigate the condition of the operator and (2) to investigate the hit-and-run. Trial Transcript, at 114-15.

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issues in this case, I shall terminate my narration at the point of the stop.

Then, after chronicling the officer's subsequent investigation, involving the customary DUI procedures, the magistrate returned to the Fourth Amendment issue. He noted that Officer Marler possessed no information other than that provided by the unidentified man. Trial Transcript, at 117. Specifically, he did not observe any damage to the Kemp vehicle before stopping it. Id. Magistrate Goulart found that Officer Marler acted without delay because he was concerned for the safety of the crowd and because the crowd would have made it impossible to pursue the vehicle while conducting further investigation. Trial Transcript, at 117. The trial magistrate then concluded:

> I am satisfied, based on the totality of the circumstances, that the tip which was provided, or the information which was provided to the police in this matter, was sufficient, both in terms of ... the ... personal observations of the police officer, to corroborate the information that ... established reasonable suspicion, sufficient information, for the police officer to have pulled that vehicle over, for purposes of investigation whether that vehicle was involved in an automobile accident. So, I am satisfied that the officer did have reasonable grounds to believe that ... a hit-and-run accident had occurred and that Mr. Kemp was the individual responsible for that hit-and-run accident. He had reasonable suspicion, based on specific and articulable facts to stop Mr. Kemp's vehicle.

Trial Transcript, at 125-26. Thus, the trial magistrate found the stop of the vehicle was not violative of Mr. Kemp's Fourth Amendment rights.

Having also found all four statutory elements of a refusal charge had been proven to a standard of clear and convincing evidence, Magistrate Goulart adjudicated Mr. Kemp guilty of refusal and sentenced him accordingly. Trial Transcript, at 126-27, 130. Mr. Kemp then filed an appeal.

C. PROCEEDINGS BEFORE THE PANEL AND THE PANEL'S DECISION.

On April 13, 2011, the matter was heard by an appellate panel comprised of Judge Lillian Almeida, Judge Edward Parker, and Magistrate William Noonan. Before the panel, Mr. Kemp asserted that the trial magistrate committed reversible error by failing to dismiss the refusal charge based on a lack of reasonable suspicion supporting his stop. In its May 11, 2011 decision, the panel rejected this assertion of error.

The panel upheld the trial magistrate's finding that the officer had reasonable suspicion to stop Mr. Kemp's vehicle, finding it was supported by substantial evidence and not clearly erroneous. See Decision of Panel, at 8-11. The members of the panel explained their approach to determining whether reasonable suspicion had been provided by the citizen's tip:

> … we look to the specific facts before us in an effort to determine the propriety of the officer's actions in light of the information provided to him from the informant, coupled with a potential need for swift action. First, like the informant in Adams,[2] here the man

[2] A reference to Adams v. Williams, 407 U.S. 143 (1972).

> approached the officer and provided the information to him face to face. Like in Connecticut, Rhode Island General Law 1956 § 11-32-2, "False report of crime," subjected the man to possible fines and imprisonment for providing false information and allegations to Officer Marler. We also recognize that Officer Marler understood that the man claiming to have witnessed the accident was more than likely in the area where he claimed it had happened. Moreover, he provided more than a detailed description but actually pointed out Appellant's vehicle to Officer Marler as it passed by their position on Matunuck Beach Road. See United States v. Zayas-Dias, 95 F.3d 105, 111 (1st. Cir. 1996)(noting that an informant's tip can be bolstered with detail and specificity of facts alleged); see also Commonwealth v. Allen, 549 N.E. 2d 430, 433 (Mass. 1990)(more credence is given to the basis of knowledge of an informant if he himself is an eyewitness).

See Decision of Panel, at 9-10 (Footnote added). Thus, the panel found that the officer was able to corroborate the tip sufficiently to generate articulable facts constituting reasonable suspicion.

D. DISTRICT COURT APPEAL PROCEEDINGS.

On May 23, 2011, appellant filed a second appeal in the Sixth Division District Court. A conference with counsel was held on June 14, 2011 by the undersigned at the close of which a briefing schedule was set. Helpful memoranda have been received from learned counsel for Appellant Kemp and the Appellee State of Rhode Island.

1. Summary of Appellant's Position.

In support of his assertion that Officer Marler did not have reasonable suspicion to stop his car, Mr. Kemp reminds the Court that the officer had

made no personal observations of illegal conduct and that he acted strictly on the basis of the citizen's report. Appellant's Memorandum of Law, at 5. Appellant then urges that the information received by the officer does not satisfy the three-part test enunciated in Alabama v. White, 496 U.S. 325, 328-29 (1990) for determining the reliability of anonymous tips: (1) veracity, (2) reliability, and (3) basis of knowledge. Appellant's Memorandum of Law, at 4. His memorandum of law applies each element of the test to the facts of his case. Appellant's Memorandum of Law, at 5-11. Most notably, appellant distinguishes a case relied upon by the panel, Adams v. Williams, 404 U.S. 143 (1972) on the ground that the tipster discussed therein was not anonymous. Appellant's Memorandum of Law, at 6. Finally, appellant rejects the notion that the stop should be upheld due to "exigent circumstances." Appellant's Memorandum of Law, at 11-13.

2. Summary of the State's Position.

In its Memorandum the State asserts that reasonable suspicion is the standard for a lawful car stop (State's Memorandum of Law, at 2, citing Terry v. Ohio, 392 U.S. 1, 22 [1968] and State v. Bjerke, 697 A.2d 1069, 1071 [R.I. 1997]). It must be evaluated on the basis of the "totality of the circumstances" known to the officer (State's Memorandum of Law, at 3, citing State v. Keohane, 496 A.2d 325, 328-291 [R.I. 1990] and Alabama v.

White, supra, 496 U.S. at 328-29 [1990]). Applying this test, the State urges that the information received from the citizen provided Officer Marler with reasonable suspicion. State's Memorandum of Law, at 5. The State also urges that the stop should be upheld under a theory of exigent circumstances. State's Memorandum of Law, at 4-5. Accordingly, the State urges that the decision of the panel should be affirmed.

STANDARD OF REVIEW

The standard of review which this Court must employ is enumerated in Gen. Laws 1956 § 31-41.1.-9(d), which provides as follows:

> (d) Standard of review. The judge of the district court shall not substitute his or her judgment for that of the appeals panel as to the weight of the evidence on questions of fact. The district court judge may affirm the decision of the appeals panel, or may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudicial because the appeals panel's findings, inferences, conclusions or decisions are:
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> (1) In violation of constitutional or statutory provisions;
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> (2) In excess of the statutory authority of the appeals panel;
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> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This standard is akin to the standard of review found in Gen. Laws 1956 § 42-35-15(g), the State Administrative Procedures Act ("APA"). Accordingly, I shall rely on cases interpreting the APA as guideposts in the review process.

Under the APA standard, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are 'clearly erroneous.' "[3] The Court will not substitute its judgment for that of the agency (here, the panel) as to the weight of the evidence on questions of fact.[4] Stated differently, the findings of the panel will be upheld even though a reasonable mind might have reached a contrary result.[5]

APPLICABLE LAW

Rather than providing an extensive discussion of § 31-27-2.1 and the cases construing it, we shall present in this section a trimmed-down review of the law of refusals in favor of an extensive discussion of the applicable Fourth Amendment case law, commencing with an examination of the law of police stops generally, complemented by an exposition of the law regarding police

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3 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980)(citing R.I. GEN. LAWS § 42-35-15(g)(5)).

4 Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

5 Cahoone v. Board of Review of Department of Employment Security, 104

stops based on anonymous tips. Finally, we shall review a number of cases considering face-to-face tips.

A. THE REFUSAL STATUTE

This case involves a charge of refusal to submit to a chemical test. See Gen. Laws 1956 § 31-27-2.1. The civil offense of refusal is predicated on the implied consent law, which is stated in subsection 31-27-2.1(a):

> (a) Any person who operates a motor vehicle within this state shall be deemed to have given his or her consent to chemical tests of his or her breath, blood, and/or urine for the purpose of determining the chemical content of his or her body fluids or breath. No more than two (2) complete tests, one for the presence of intoxicating liquor and one for the presence of toluene or any controlled substance, as defined in § 21-28-1.02(7), shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle within this state while under the influence of intoxicating liquor, toluene, or any controlled substance, as defined in chapter 28 of title 21, or any combination of these. * * *

The four elements of a charge of refusal which must be proven at a trial before the Traffic Tribunal are stated later in the statute:

> … If the traffic tribunal judge finds after the hearing that: (1) the law enforcement officer making the sworn report had reasonable grounds to believe that the arrested person had been driving a motor vehicle within this state while under the influence of intoxicating liquor, toluene, or any controlled

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R.I. 503, 246 A.2d 213, 215 (1968).

> substance, as defined in chapter 28 of title 21, or any combination of these; (2) the person while under arrest refused to submit to the tests upon the request of a law enforcement officer; (3) the person had been informed of his or her rights in accordance with § 31-27-3; and (4) the person had been informed of the penalties incurred as a result of noncompliance with this section; the traffic tribunal judge shall sustain the violation. The traffic tribunal judge shall then impose the penalties set forth in subsection (b) of this section. …

Gen. Laws 1956 § 31-27-2.1(c).

Noting the presence in the statute of the phrase – "reasonable grounds" – the Rhode Island Supreme Court interpreted this standard to be the equivalent of "reasonable-suspicion." The Court stated simply, "* * * [I]t is clear that reasonable suspicion is the proper standard for evaluating the lawfulness of the stop." State v. Jenkins, 673 A.2d 1094, 1097 (R.I. 1996) citing Terry v. Ohio, 392 U.S. 1 (1968). It is this standard which Mr. Kemp urges was not satisfied when his vehicle was stopped by Officer Marler.[6] This is the nexus of the law of refusal and the Fourth Amendment. A review of Rhode Island Supreme Court refusal cases reveals several in which the legality of the initial stop was considered. But none are precisely on point.

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[6] On most occasions an alcohol-related traffic offense (i.e., driving under the influence or refusal) results after a motorist has been stopped for the violation of a lesser (non-alcoholic related) traffic offense. Such stops have been found to comport with the mandate of the fourth amendment that searches and seizures be reasonable. See Whren v. United States, 517 U.S. 806, 810 (1996)(cited in State v. Bjerke, 697 A.2d 1060, 1072 [1997]).

For instance, in Jenkins, supra, 673 A.2d at 1097, the stop was found to be authorized under the Terry standard of "reasonable suspicion" where the officer observed "erratic movements" being made by Ms. Jenkins' vehicle. Accord, State v. Bruno, 709 A.2d 1048, 1050 (R.I. 1998). In a second refusal case, State v. Bjerke, 697 A.2d 1060, 1070 (1997), issues germane to the instant case were almost decided. However, while en route to the location of a reported drunk driver, the officer learned that the vehicle's registration was suspended, giving him clear authority to make a stop under Whren v. United States, supra at 12, fn. 8. Bjerke, 697 A.2d at 1072. The Court, therefore, never reached the sufficiency vel non of the anonymous tip that had been called-in. Finally, we may recount State v. Perry, 731 A.2d 720 (R.I. 1999), which also bears some superficial similarity to the instant case. In Perry, Central Falls Police Officer Joseph Greenless responded to an accident scene and obtained, from the driver of a damaged vehicle, the license plate of the car that had rear-ended him. Perry, 731 A.2d at 721. After running the plate he learned it was registered to Mr. Perry. Id. Proceeding to the defendant's address, he observed a vehicle with the plates described that had front-end damage. Id. Mr. Perry appeared and indirectly admitted involvement in the accident. Id. On these facts the Supreme Court upheld the trial judge's finding of reasonable suspicion. Perry, 731 A.2d at 723. However, as hinted above, although the

Perry case involves a hit-and-run accident, it is legally distinguishable from the instant case because Mr. Perry admitted being the driver before he was subjected to a Terry stop.

In any event, having received little or no guidance for the question before us from Rhode Island refusal cases, we must prepare to resolve this case by obtaining an understanding of underlying Fourth Amendment principles.

B. REASONABLE SUSPICION TO STOP A VEHICLE — GENERALLY.

The question of the legality of car stops is governed by the Fourth Amendment, which guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures … ." U.S. Constitution, amend. IV.[7] The fundamental principle of the Fourth Amendment is that "for a seizure to be deemed reasonable under the Fourth Amendment, it must be effectuated with a warrant based on probable cause." United States v. Torres, 534 F.3d 207, 210 (3rd. Cir. 2008). But, warrants are not required for arrests in all circumstances. State v. Burns, 431 A.2d 1199, 1202-03 (R.I. 1981) citing United States v. Watson, 423 U.S. 411, 417 (1976). Nevertheless, when a warrantless arrest is made, the requirement of

[7] The Fourth Amendment is made applicable to the several states through the Due Process Clause of the Fourteenth Amendment. State v. Castro, 891 A.2d 848, 853 (R.I. 2006) citing Mapp v. Ohio, 367 U.S. 643, 654-55 (1961).

probable cause is said to be "absolute." Burns, 431 A.2d at 1203 citing Dunaway v. New York, 442 U.S. 200, 208 (1979).[8]

However, since 1968, a further exception to the warrant requirement [and the probable cause requirement] has been recognized by the United States Supreme Court. In Terry v. Ohio, 392 U.S. 1 (1968), the Court declared that certain temporary police detentions — collectively known ever since as "Terry" stops, including "car stops" and "stop and frisks" of pedestrians — have been deemed to be permitted by the Fourth Amendment so long as the officer making the stop has " … a reasonable, articulable suspicion of an individual's involvement in some criminal activity." Terry v. Ohio, 392 U.S. 1, 21 (1968).[9] See also Whren v. United States, 517 U.S. 806, 809-10 (1996); State v. Casas, 900 A.2d 1120, 1131 (R.I. 2006); State v. Keohane, 814 A.2d 327, 330

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[8] The Rhode Island Supreme Court has stated that " … a police officer has probable cause to make an arrest when he personally knows or reliably has been informed of facts sufficient to justify the belief of a person of reasonable caution that a crime has been committed or is being committed by the person to be arrested." State v. Burns, 431 A.2d 1199, 1203 (R.I. 1981) citing Brinegar v. United States, 338 U.S. 160, 175-76 (1949). See also State v. Soroka, 112 R.I. 392, 395, 311 A.2d 45, 46 (1973).

[9] In Terry, this rule was applied when police suspected the target was about to commit a crime. United States v. Hensley, 469 U.S. 221, 227 (1985) citing Terry. Subsequently, in Adams v. Williams, 407 U.S. 143, 145 (1972), the principle was extended to situations where the police suspected the target was committing the crime when stopped. Hensley, Id. Finally, the authority to make a temporary stop (aka a "Terry stop") was also recognized where the police believed the target had already committed an offense. United States v. Hensley, 469 U.S. 221, 229 (1985).

(R.I. 2003). As stated above, in State v. Jenkins, supra, the Rhode Island Supreme Court embraced the reasonable suspicion standard for DUI car stops. If the officers who made the stop cannot show that their knowledge met the reasonable suspicion standard, evidence obtained pursuant to the investigatory stop must be suppressed as "fruit of the poisonous tree." Torres, supra, 534 F.3d at 210 citing United States v. Brown, 448 F.3d 239, 244 (3rd Cir. 2006).

Because our "stop and frisk" case law began — relatively recently, in Terry — as an offshoot of arrest law, many of the procedures used to determine reasonable-suspicion mirror (or at least parallel) those protocols which, historically, have been used to determine probable cause. This may be seen in the three-stepped protocol that is used to determine probable cause or reasonable suspicion:

1. When considering whether the probable cause or the reasonable-suspicion standard has been met in a particular case, the Court must first determine the moment when the defendant was arrested or detained, for it is at that point that the officer must have possessed the requisite quantum and quality of information. Torres, 534 F.3d at 210. See also State v. Firth, 418 A.2d 827, 829 (R.I. 1980) (probable cause) and State v. Doukales, 111 R.I. 443, 449, 303 A.2d 769, 772-73 (1973)(probable cause).

2. Then, when marshaling the facts being proffered in support of an assertion that an officer acted armed with reasonable-suspicion or probable cause, the Court may include hearsay for consideration, so long as there is a "substantial basis" for relying on such information. In re John N., 463 A.2d 174, 177 (R.I. 1983) citing State v. Burns, 431 A.2d 1199, 1204 (R.I. 1981). To be admitted, it must also be found to be "reasonably trustworthy." In re John N., 463 A.2d 174, 177 (R.I. 1983)(reasonable suspicion) citing State v. Belcourt, 425 A.2d 1224, 1227 (R.I. 1981)(probable cause).

3. Finally, we come to the most difficult step of the process. A Court reviewing whether the reasonable suspicion standard was satisfied in a particular case must consider the totality of the circumstances, giving deference to the perceptions of experienced law enforcement officers. See United States v. Cortez, 449 U.S. 411, 417-18 (1981)(Temporary detention) and Illinois v. Gates, 462 U.S. 213 (1983)(Arrest). See also United States v. Andrade, 551 F.3d 103, 109 (1st Cir. 2008) citing United States v. Ruidiaz, 529 F.3d 25, 29 (1st Cir. 2008). The Court then undertakes an inquiry that is highly "fact-sensitive" and variable — because "… suspicion sufficient to justify an investigatory stop may be rooted in any of a variety of permissible scenarios." Andrade, id., citing Ruidiaz, id. See also State v. Abdullah, 730 A.2d 1074, 1077

(R.I. 1999).[10] One such scenario is relevant to the instant case and merits special treatment here: cases where reasonable suspicion is based on information gained from anonymous informants.

C. REASONABLE SUSPICION BASED ON INFORMATION RECEIVED FROM ANONYMOUS INFORMANTS — THE U.S. AND R.I. SUPREME COURT PRECEDENTS.[11]

As we have seen in the prior section, the question of the legality of a stop depends on whether the officer has knowledge of facts that constitute reasonable-suspicion that the detainee is engaged in illegal activity must be resolved by viewing the "totality of the circumstances." Generally, hearsay may be considered if it is "reasonably trustworthy." And as we shall now see,

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[10] Indeed, it may be based on non-criminal conduct, as the Rhode Island Supreme Court has explained:

> … a series of noncriminal acts will often serve as the foundation for reasonable suspicion. United States v. Sokolow, 490 U.S. 1, 9-10 (1989). "In making a determination of [reasonable suspicion] the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attached to particular types of noncriminal acts." Id. at 10 (quoting Illinois v. Gates, 462 U.S. 213, 243-44 n. 13 (1983)). Such "otherwise innocent acts, when observed as a whole by a trained and experienced law enforcement officer aware of other pertinent information, allow that officer to 'draw inferences and make deductions that might well elude an untrained person.' " State v. Ortiz, 609 A.2d 921, 927 (R.I. 1992) (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)). [parallel citations omitted].

Abdullah, 730 A.2d at 1077.

[11] See generally 4 LaFave, Search and Seizure — A Treatise on the Fourth Amendment, § 9.5(h),(4th ed. 2004).

specific protocols have been developed for the consideration of an anonymous informant's statements as part of this process.

But before entering into an exposition of the law governing how anonymous informant's tips shall be reviewed, we should pause to take note of the law governing informants' tips generally. The following admonition about informant's tips, drawn from the Supreme Court's opinion in Adams v. Williams may well serve to put the nature of the problem into perspective:

> … Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. …

Adams v. Williams, 407 U.S. 143, 147, 92 S.Ct. 1921 (1972). We are thus put on notice that there exists no simple rule to apply in evaluating informants' tips; the evaluation of the evidentiary value of such tips is highly fact-intensive.

The particular facts of Adams v. Williams are also worthy of review. After an informant known to a Bridgeport, CT police officer approached him in his cruiser in the early morning hours, in a high-crime area, and told him that an individual in a nearby car possessed narcotics and had a firearm in his waist, the officer proceeded to the car and, when Mr. Williams rolled down the window, reached in and grabbed the gun. Williams, 407 U.S. at 144-45. Based

on Terry's holding that an officer can frisk, for weapons, a person he has reasonable-suspicion to stop, the retrieval of the gun was upheld, as was — based on probable cause — the subsequent seizure of the narcotics found on his person and in his car. Id., 407 U.S. at 146. The Court held that the informant's unverified tip "carried enough indicia of reliability to justify the officer's forcible stop of Mr. Williams. Id., 407 U.S. at 147. Thus, known informants' tips are generally deemed to possess sufficient weight to support a finding of reasonable suspicion, if not probable cause.

And when we turn to the field of anonymous informants' tips, we will find few guiding lights. Given that cases considering the probity of anonymous tips are so fact-intensive, it is regrettable that there are few precedents. Nevertheless, after a few introductory comments we shall review, seriatim, the precedents of the U.S. Supreme Court (of which there are only two) and the Rhode Island Supreme Court (again, only two) that address anonymous informants' tips; none are on point — all consider completely anonymous telephone tips.

1. Overview — Anonymous Tips.

Anonymous tips are viewed warily and are generally accorded less weight than those by a known informant. Commonwealth v. Costa, 448 Mass. 510, 515, 862 N.E. 2d 371 (2007) citing Commonwealth v. Atchue, 393 Mass.

343, 347, 471 N.E.2d 91 (1984) and Commonwealth v. Burt, 393 Mass. 703, 710, 473 N.E.2d 683 (1985). The reason for this skepticism has been explained in two ways: the first involves an understanding of human nature; the second involves the invocation of constitutional principles — specifically, the fourth amendment and the cases interpreting it. As to the first, the Supreme Judicial Court of Massachusetts has explained that: "The rationale for according more weight to the reliability of identified persons is that they 'do not have the protection from the consequences of prevarication that anonymity would afford,' … and consequently may be subject to charges of filing false reports and risk relation." Costa, 448 Mass. at 516 (Citations omitted). Certainly, this is logic well within the ken of the average person — fear of consequences inhibits conduct. As to the second rationale, judicial wariness regarding the worth of anonymous tips may also be ascribed to the fact that they do not interface well with the three factors for evaluating informants' tips which were enunciated in Illinois v. Gates, 462 U.S. 213 (1983), and whose vitality was renewed in Alabama v. White, 496 U.S. 143, 328-29 (1990): (1) "veracity," (2) "basis of knowledge" and (3) "reliability." Thus, from a legal standpoint, anonymous tips are viewed with caution because, by their nature, they generally cannot satisfy the first two of the three enumerated Gates factors. As a result, in circumstances where a tip is truly anonymous, a great burden is

placed on the third factor, reliability, to show — solely — reasonable suspicion. As we shall see, this burden will only be deemed satisfied in extraordinary circumstances — where the reliability factor can be sufficiently buttressed so that it alone may satisfy the standard of reasonable suspicion. In this case we shall consider whether in-person tips, anonymous or identified, carry this same infirmity and also require corroboration.

2. United States Supreme Court Precedents.

As the State and Mr. Kemp agree, the seminal precedent in the area of anonymous informants' tips is Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990) — which the panel also relied upon. I concur that Alabama v. White — although not precisely on point — is illuminating to our effort. And having already presented its *ratio decidendi*, we should review its facts as well.

In White, Corporal Davis of the Montgomery Police Department received an anonymous phone call indicating that Ms. Vanessa White would be exiting a certain apartment at a certain time carrying an attaché case containing cocaine; she would then enter a certain vehicle and travel to Dobey's Motel. White, 496 U.S. at 327. The Corporal and his partner proceeded to the apartment and watched Ms. White exit the apartment and enter the vehicle, which was stopped when it approached the motel. Id. After obtaining Ms.

White's consent to search, the officers found marijuana in the attaché and cocaine in her purse. Id.

After her Motion to Suppress was denied, Ms. White pled guilty — preserving the right to appeal from the denial of the Motion to Suppress. White, 496 U.S. at 327-28. The Alabama Court of Criminal Appeals reversed and the Alabama Supreme Court denied certiorari. White, 496 U.S. at 328. The United States Supreme Court reversed, reinstating Ms. White's conviction. Id.

The White Court, citing Illinois v. Gates, 462 U.S. 213 (1983), reaffirmed that "veracity," "reliability," and "basis of knowledge" are highly relevant factors in determining whether — under the "totality of the circumstances" — an informant's tip establishes probable cause or reasonable suspicion. White, 496 U.S. at 328-29.[12] Speaking generally in White, the Supreme Court expressed its wariness of anonymous tips:

> An anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is "by hypothesis largely unknown and unknowable." [Illinois v. Gates], at 237, 103 S.Ct., at 2332. This is not to say that an anonymous caller could never provide the reasonable suspicion necessary for a Terry stop.

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12 The Court noted that in Gates it had "abandoned the 'two-pronged test' of Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) in favor of a 'totality of the circumstances' approach in determining whether an informant's tip establishes probable cause." White, 496 U.S. at 328.

White, 496 U.S. at 329 (Case name inserted). While the Court indicated the tip in White did not provide much in the way of basis of knowledge or veracity, it did find the tip — based on the corroboration the tip received before Ms. White was stopped — to exhibit "… sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." White, 496 U.S. at 327, 329-31 (Emphasis added). The Court, according particular significance to the fact that the anonymous tip accurately predicted Ms. White's future conduct, found the tip eminently reliable and — on the basis of that factor alone — found the tip met the reasonable suspicion standard. So, while an anonymous tip may be silent as to first and second Gates factors, it may be deemed so reliable as to, on its own, provide reasonable suspicion.

In the second anonymous informant tip case decided by the United States Supreme Court, Florida v. J.L., 529 U.S. 266 (2000), the Court affirmed a Florida Supreme Court decision suppressing evidence seized after an investigatory stop. After an anonymous caller reported to the Miami-Dade Police Department that a young black man standing at a certain bus stop wearing a plaid shirt was carrying a gun, officers responded and — based solely on the tip — frisked the defendant and seized a gun. J.L., 529 U.S. at 268. In a decision authored by Justice Ginsburg, the Court indicated that the

indicia of reliability found in White, particularly the corroborative value of the informant's ability to predict Ms. White's movements, were not present in Florida v. J.L. The Court stressed that although the aspect of the tip that provided the identity of the target was corroborated, the information regarding the criminal activity was not. J.L., 529 U.S. at 272. Accordingly, the Court decided the tip in J.L. fell short of the standard pronounced in White. J.L., 529 U.S. at 271. Finally, the Court declined to adopt a special rule for firearms cases. J.L., 529 U.S. at 272-73.

Given the task which lies before us, it is unfortunate that no additional anonymous tip cases have been decided by the Supreme Court, because it can be hard to establish the parameters of a doctrine from two cases.[13] In J.L. the Court seemed to recognize the dearth of precedent, but specifically decline to offer guiding dicta and instead, dangled the possibility that circumstances might be recognized in which the reliability factor would not need to be specially buttressed:

> The facts do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability.

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[13] According to one commentator, the J.L. dictum has been used to erode the holdings of White and J.L. in "emergency" situations. See Melanie D. Wilson, Since When Is Dicta Enough to Trump Fourth Amendment Rights? The Aftermath of Florida v. J.L., 31 OHIO N.L. REV 211, 225-28 (2005)(criticizing United States v. Holloway, 290 F.3d 1331 [11th Cir. 2002]).

> We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk.

Florida v. J.L., 529 U.S. at 273-74 (Emphasis added).[14] As a result, we are left hungering for more guidance. It is especially regrettable that in one case presented to the Supreme Court — whose outcome might have been particularly illuminating, given that it concerned anonymous telephone tips regarding drunk driving — was never heard, since a majority of the justices declined to grant certiorari.[15]

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[14] Justice Kennedy also evidenced this same desire to postulate circumstances that might require a more flexible approach. He first posited that certain tips might have "features" which, like corroborated predictions of future conduct, would provide reliability. Florida v. J.L., 529 U.S. at 275 (Kennedy, J., concurring opinion). He then offered comments pertinent to our present inquiry:

> If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip. An instance where a tip might be considered anonymous but nevertheless sufficiently reliable to justify a proportionate police response may be when an unnamed person driving a car the police officer later describes stops for a moment and, face to face, informs the police that criminal activity is occurring. This too seems to be different from the tip in the present case. See United States v. Sierra-Hernandez, 581 F.2d 760 (C.A. 9 1978).

Florida v. J.L., 529 U.S. at 276 (Kennedy, J., concurring opinion). Except for the fact that our tipster was on foot, the situation described by Justice Kennedy mirrors the fact-pattern before us.

[15] See Virginia v. Harris, 130 S. Ct. 10, 11-12, 175 L.Ed. 2d 322, 323 (2009) (Mem.)(State of Virginia sought certiorari from a decision of its Supreme Court requiring officers to make observations corroborating anonymous DUI tips; Roberts, C.J. and Scalia, J. file opinion dissenting from Court's denial of certiorari — criticizing what they call the "one free swerve" rule). In Harris,

3. Rhode Island Supreme Court Precedents.

Turning to anonymous tip cases decided by the Rhode Island Supreme Court, we find only two — both in the Alabama v. White prototype of an anonymous phone call predicting drug activities. In State v. Keohane, 814 A.2d 327, 329 (R.I. 2003), the Woonsocket Police received an anonymous tip that the defendant would be traveling to Providence to purchase heroin which he would then sell in Woonsocket. Keohane, 814 A.2d at 328. Mr. Keohane and a companion were followed to Providence, where they met with several men on Bucklin Street, and stopped when they returned to Woonsocket. Keohane, 814 A.2d at 328. Relying on White, the Court — in a per curiam opinion — found the tip had been sufficiently corroborated to become reliable and that the reasonable suspicion standard had been satisfied. Keohane, 814 A.2d at 330-31.

Against Keohane we must contrast a subsequent case — State v. Casas, 900 A.2d 1120 (R.I. 2006). Like Keohane, the case concerned an informant's tip and extensive movements by a suspected drug dealer. But in Casas, "… little, if any, informant information was confirmed before the

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Chief Justice Roberts notes that a number of state supreme courts have upheld investigative stops of alleged drunk drivers even when the police officer did not observe any traffic violations before the stop. Harris, 130 S.Ct. at 11, n.2. It is clear that in the Chief Justice's view these cases were distinguishable from Alabama v. White and J.L. and constitute a separate rule for drunk driving cases.

stop." Casas, 900 A.2d at 1132. As a result, the Court called the justification for the stop "dubious." Casas, 900 A.2d at 1132. However instructive, the Court's comments must be considered mere dicta; because no items were seized as a result of the stop, the Court made no decision regarding reasonable-suspicion. Casas, 900 A.2d at 1132.

Nevertheless, except insofar as they confirm R.I.'s reliance on Alabama v. White, these cases add nothing helpful to our current inquiry, since they center on the question of whether the tip's reliability was satisfied by corroboration. In one it was; in the other it was not. On the other hand, in the case at bar, corroboration is not at issue.

D. SPECIAL TOPIC — ARE TIPS RECEIVED FROM FACE-TO-FACE INFORMANTS GENERALLY DEEMED MORE RELIABLE THAN ANONYMOUS TIPS?

As we learned in the previous section, anonymous tips have been viewed as generally unreliable. But, the anonymous tip that led to Mr. Kemp's stop in this case was not one in classic form. Not given on the telephone, it was in fact provided in person. And so we must ask —

Are face-to-face tips regarded by the law differently?

Are they given more credence?

Are they sufficient to constitute, on their own, reasonable suspicion?

Indeed they are.

1. The View and Its Rationale.

In the last decade the many courts, including a number of the federal courts of appeal, have come to regard tips from "face-to-face" or "in-person" anonymous informants as being outside the White-J.L. anonymous-tip framework.[16] Instead, they place in-person tips somewhere in the void between Adams v. Williams (wherein a known informant provided information to an officer face-to-face) and Florida v. J.L., (wherein information was provided by an anonymous telephone caller) on the range of anonymous tips. This view was well-stated in United States v. Palos-Marquez, 591 F.3d 1272 (9th Cir. 2010):

> An officer may justify an investigatory stop based solely or substantially on an informant's tip, depending on its reliability. At its most reliable, an informant's tip alone may sufficiently establish reasonable suspicion for a stop. This, in Adams v. Williams, the Supreme Court held that where an informant who had provided in the past and was known to the officer made an in-person tip "that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist," 407 U.S. 143, 145, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), the tip "carried enough indicia of reliability to justify the officer's forcible stop" of the defendant, id. at 147, 92 S.Ct. 1921. At the other end of the reliability spectrum, the Court in Florida v. J.L. held that a tip from an anonymous caller telephoning from an unknown location, who reported only that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a

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[16] See 4 La Fave, supra n. 11 § 9.5(h) and cases cited therein at 583 n. 464. See also Wilson, supra n. 14 and cases cited therein at 218-222, nn. 49-82. Wilson discusses at length United States v. Heard, 367 F.3d 1275 (11th Cir. 2004) and United States v. Dotson, 162 Fed. Appdx. 508 (7th Cir. 2004).

> gun," lacked any indicia of reliability and could not provide reasonable suspicion for an investigatory stop. 529 U.S. 266, 268-69, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000).
>
> When the tip is provided in a face-to-face encounter, even when the informant is unidentified, we have deemed it to be closer to the Adams end of the reliability spectrum. See United States v. Sierra-Hernandez, 581 F.2d 760, 763 (9th Cir. 1978).

Palos-Marquez, 591 F.3d at 1275 (Emphasis added). Remarkably, the Court was not satisfied just to assert that a tip given in-person is more believable than one given remotely and anonymously; it proclaimed that in-person anonymous tips are closer to identified ones than they are to purely anonymous ones.

The rationale for treating in-person tips as being more reliable than remote anonymous tips was convincingly explained by Circuit Judge Selya in United States v. Romain, 393 F.3d 63 (1st Cir. 2004). As we shall, his exposition is fully grounded on the applicable standard — the three Gates factors:

> [the tip] cannot plausibly said to be anonymous and unreliable in the sense that concerned the J.L. Court. Unlike a faceless telephone communication from out of the blue, a face-to-face encounter can afford police the ability to assess many of the elements that are relevant to determining whether information is sufficiently reliable to warrant police action. See White, 496 U.S. at 328-29, 110 S.Ct at 2412. A face-to-face encounter provides police officers the opportunity to perceive and evaluate personally an informant's mannerisms, expressions, and tone of voice (and, thus, to assess the informant's veracity more readily than could be done from a purely anonymous telephone tip). See e.g. United States v. Heard, 367 F.3d 1275, 1279 (11th Cir. 2004);

> United States v. Campa, 234 F.3d 733, 738 (1st Cir. 2000). In-person communications also tend to be more reliable because, having revealed one's physical appearance and location, the informant knows that she can be tracked down and held accountable if her assertions prove inaccurate. See J.L., 529 U.S. at 270-71, 120 S.Ct 1375. Finally, a face-to-face encounter often provides a window into an informant's represented basis of knowledge; for example, her physical appearance at or near the scene of the reported events can confirm that she acquired her information through first-hand observation. See e.g., United States v. Lewis, 40 F.3d 1325, 1334 (1st Cir. 1994).

Romain, 393 F.3d at 74 (emphasis added). See also Palos-Marquez, 591 F.3d at 1275. The Court's legal reasoning is clear — in-person tips are unlike their truly anonymous cousins in that they offer substance on the supporting factors of veracity and basis of knowledge. Unlike the tip in White they do not require extraordinary corroboration to buttress reliability because the other two factors are able to contribute justification for the stop. Simply stated, an in-person tip is not a one-legged stool.

Of course it is fine to draw helpful quotations from cases but in order to rely upon them we have a duty to make sure that the holdings are relevant. Both Palos-Marquez and Romain are indeed on point though each may be fairly viewed as being stronger cases than that in the instant case. We shall now consider them seriatim.

In Palos-Marquez the Ninth Circuit Court of Appeals found the tip given by a UPS driver to Border Patrol agents regarding illegal aliens in a pick-

up truck to be sufficient to constitute reasonable–suspicion where it was provided to the officer face-to-face. Palos-Marquez, 591 F.3d at 1274. In particular, the Court noted that (1) the UPS driver risked losing his identity and (2) gave the officer an opportunity to observe his demeanor and evaluate his credibility. Id., at 1275-76. As to the first point, the Court noted that, because the informant was a UPS driver and his identity traced, increased reliability could be accorded his tip. Id., at 1276. The Court also noted that the officer could have asked the driver for identification. Id., at 1275-76. The Court also indicated that the fact that the UPS driver provided his tip close upon his observation — both temporally and geographically — favored its reliability. Id., at 1277. Except for the fact that the tipster's employment affiliation was clear, the remaining factors are all present here as well.

In Romain the facts are rather unique. A woman visiting her sister called 9-1-1 to report that she was visiting a friend and a man there was carrying a gun. Romain, 393 F.3d at 66. Police responded and were admitted. Id. The caller confirmed the tip and added more details — though at the time her name was not known. The police frisked the defendant and seized a weapon. Romain, 393 F.3d at 67. The Court held the tip was reliable because it was not anonymous in the J.L. sense, as stated above. Romain, 393 F.3d at 73.

Undoubtedly, the tips considered in both cases are stronger than the

one received by Officer Marler. The tipster here was not associated with any particular group, except people enjoying themselves at Matunuck on an evening in October of 2010. On the other hand, it does not appear that, in principle, the face-to-face tipster must be identifiable.

At this juncture, we shall review a select number of cases considering face-to-face tips.

2. Other Precedents — Not From Indentifiable Group.

The oldest case we may consider United States v. Sierra-Hernandez, 581 F.2d 760 (9th Cir. 1978). In Sierra-Hernandez a border agent checking on migrant agricultural workers — working about 200 yards north of the Mexican border — was approached by a man in a Mercedes-Benz automobile who indicated that a black pickup truck pulling away had "loaded-up" on marijuana in a nearby cane-break. Sierra-Hernandez, 581 F.2d at 762. Without asking for the man's name, the agent went into pursuit and stopped the truck. Id. Long before the issuance of Alabama v. White and Florida v. J.L., the Court held that there was no per-se rule requiring identification under Adams v. Williams. Sierra-Hernandez, 581 F.2d at 763.

More recently, we may consider United States v. Valentine, 232 F.3d 350 (3rd Cir. 2000), a case decided just after J.L. was issued. In Valentine an officer was patrolling a high-crime area when a man — who refused to identify

himself — approached and provided a tip about a gun being carried by a man, whom he described. Valentine, 232 F.3d at 352-53. The man was stopped; he charged at the officer. Valentine, 232 F.3d at 353. Holding the stop to be legal, the Court held that there is a difference between in-person informants and anonymous telephone calls. Valentine, 232 F.3d at 354-55. Specifically, it found not crucial that the informant could be tracked down. Valentine, id, quoting from Justice Kennedy's concurrence in J.L. The Court found reasonable-suspicion from (1) the contents of the tip, (2) the fact that it was in a high-crime area, and (3) the circumstance that the three men were walking away. Valentine, 232 F.3d at 357.

We may also consider a Massachusetts case, Commonwealth v. Vazquez, 426 Mass. 99, 686 N.E.2d 993 (1997). In Vazquez an officer on patrol saw a number of people gathered on the street. 426 Mass. at 100, 686 N.E.2d at 994. He was told by several people that a Hispanic man in a brown jacket had been chasing another man down the street with a gun; at least two people identified Mr. Vasquez, who was standing next to a Mazda, as the assailant. Id. The officer approached Mr. Vasquez and frisked him; the officer then searched the Mazda and found the gun. Id.

3. **Conclusions**

We have a conundrum, a paradox. The tip received by Officer Marler

was, technically, anonymous. But, as Judge Selya explained, in-person tips do not come within the underlying logic of the rationale for treating anonymous tips as a separate group. In Romain, Judge Selya's reaction was to lament the inadequacies of words — calling them "chameleons." This may well be all that can be done until such time as the Supreme Court clarifies this area — perhaps establishing in-person, unnamed informant tips as a separate category.[17]

Face-to-face tips are like asteroids positioned between two stars, not within either's gravitational pull or orbit. Such tips are not presumptively reliable — like those from known informants, Adams v. Williams; neither are they presumptively unreliable — like those that are purely anonymous, Alabama v. White. They must be viewed on a case-by-case basis. This was explained by the Ninth Circuit thirty-three years ago in Sierra-Hernandez:

> Information from a citizen who confronts an officer in person to advise that a designated individual present on the scene is committing a specific crime should be given serious attention and great weight by the officer. Nevertheless, whether the information is sufficient to justify a stop must be evaluated with reference to the facts of each case, for there is no per se rule of reliability.

Sierra-Hernandez, 581 F.2d at 763. As Judge Selya wrote more recently — "This case falls somewhere between the two descriptions. Romain, 393 F.3d at

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17 Perhaps such informants should not be referred to as anonymous but as "innominate," (i.e., unidentified) in contradistinction to the truly anonymous (i.e., unidentifiable). See United States v. Torres, 534 F.3d 207, 213 (3rd Cir. 2008).

73.

This notion that there is an intermediate position between anonymity and identification has been recognized in other cases. Recently, the United States Court of Appeals for the Third Circuit used the term "innominate" to distinguish informants who are unidentified from those who are anonymous — i.e., unidentifiable. See United States v. Torres, 534 F.3d 207, 213 (3rd Cir. 2008). In Torres, a self-described cabbie called 9-1-1 to report he was following a vehicle, which he described, carrying a Hispanic man who had flashed a gun at a man trying to sell roses. Torres, 534 F.3d at 208. The car was stopped by police and a gun located; thereafter, Mr. Torres was indicted for possession of a firearm by a convicted felon. Torres, 534 F.3d at 209. The District Court granted a motion to suppress and the Government appealed. Id. The Third Circuit reversed, finding reasonable suspicion.

I

DID THE PANEL ERR IN AFFIRMING THE TRIAL MAGISTRATE'S FINDING THAT THE OFFICER HAD LAWFUL GROUNDS TO STOP MR. KEMP'S VEHICLE?

Having reviewed (1) the facts and travel of the case, (2) the standard of review, (3) the law of refusal, (4) the underlying Fourth Amendment principles, including the law governing Terry stops generally, and (5) stops based on anonymous tips, we can now proceed to resolve the instant case.

This extended exegesis of the applicable law was necessary because — in my view — the instant case can only be resolved by a full understanding of the applicable Fourth Amendment principles and case law.

To summarize, Mr. Kemp urges that the State failed to prove that the stop of his vehicle by Officer Marler was permissible under the Fourth Amendment to the United States Constitution. Then, asserting that such proof is a prerequisite to proving the first element of the refusal charge — i.e., that Officer Marler had reasonable grounds to believe that he had been driving while under the influence of intoxicating liquor — Mr. Kemp asserts that he should have therefore been acquitted. See Gen. Laws 1956 § 31-27-2.1(c)(1). The State does not gainsay that reasonable-suspicion for the stop is indeed a necessary component of the first element of a refusal charge. After reviewing the landscape of Fourth Amendment precedents at some length and breadth, we must now place the instant case upon it in order to see if it stands on solid legal ground. Specifically, we must determine whether the State met its burden of showing that the stop in the instant case was legally justified. After much deliberation, I have concluded the prosecution met this burden.

In the law, in areas governed by case precedent, we use reasoning by analogy — The facts in Case B are like those in Case A, so we apply the rule

handed down in Case A. We view precedents as providing area of illumination on an otherwise dark landscape. In deciding the instant case, we must certainly concede that the facts in the instant case are not within an area of illumination provided by either the United States or Rhode Island Supreme Courts. And so, we must look to the logic of rationale of the cases that have been handed down and apply the principles enunciated therein as best we can. We may also, with caution, follow the lead of cases from courts whose decisions are not binding upon us. In sum, after applying the logic of White and Keohane to the situation at hand, and finding the logic of the cases considering face-to-face or in-person tips to be persuasive, I must recommend that this Court find that the stop here was supported by reasonable suspicion and was therefore legal.

To explain my conclusion, I shall proceed through the steps of the protocol outlined above.

1. When was the defendant seized for Fourth Amendment purposes? This is not in controversy. The officer stated that he stopped Mr. Kemp's car on Matunuck Beach Road as soon as he caught up with it. In any event, the Supreme Court has said 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,

436-37 (1984) quoting Delaware v. Prouse, 440 U.S. 648, 653 (1979)(parallel citations omitted).

2. What knowledge did Officer Marler have? As has been stated repeatedly, the knowledge relied upon by Officer Marler came from an anonymous tip. As we noted above, an officer may act on the basis of hearsay, so long as there is a substantial basis for doing so and it is reasonably trustworthy. This tip meets this standard for consideration.

3. Viewing the totality of the circumstances. Assertions of reasonable suspicion based on anonymous tips require special analysis pursuant to the line of cases that commenced with Alabama v. White. The testimony of the officer regarding the tip he received must be viewed in light of the qualities of "veracity," "basis of knowledge," and "reliability."

As to basis of knowledge, it is certainly clear that the tipster was present in an area. He claimed that the incident had just occurred. Thus, on its face, his tip provided fresh information, subject to being confirmed or discredited by the officer quickly. He averred that he was sure regarding the subject being intoxicated.

As to the tipster's veracity, this was subject to the officer's evaluation. The officer was able to size up the informant. There was

certainly no behavior exhibited by the tipster — related by the officer at trial — that would call his veracity into question.

Finally, little was overtly presented on the issue of reliability. For instance, there was no corroboration: The officer did not observe any damage to appellant's vehicle before stopping it — which might have confirmed its being involved in an accident. Cf. Perry, supra, in which the officer was able to match-up damage. On the other hand, the informant placed his anonymity at risk, acknowledged to be a factor militating in favor of reliability. See J.L., supra at fn. 14, (Kennedy, J. — concurring).

Thus, in my view, the officer's actions were reasonable. This is the ultimate Terry test, as we are reminded by the Supreme Court in Adams v. Williams:

> A brief stop of an individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. [Terry v. Ohio, 392 U.S.] at 21-22, 88 S.Ct at 1879-1880; see Gaines v. Craven, 448 F.2d 1236 (CA9 1971); United States v. Unverzagt, 424 F.2d 396 (CA8 1970).

Adams v. Williams, 407 U.S. at 146, 92 S.Ct at 1923 (Case named provided). We may recall that in the instant case Officer Marler stopped Mr. Kemp only briefly before the odor of alcohol necessitated a drunk driving investigation.

In sum, applying the teaching of Alabama v. White, Florida v. J.L., and State v. Keohane, I conclude the tip received by Officer Marler met the Fourth Amendment standard of reasonable suspicion and provided the officer with lawful grounds to stop Mr. Kemp's vehicle.

In light of my recommendation I need not reach the "exigent circumstances" theory advanced by the State.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the appellate panel on the Fourth Amendment issue was not affected by error of law. Gen. Laws 1956 § 31-41.1-9. Furthermore, said decision is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Gen. Laws 1956 § 31-41.1-9.

Accordingly, I recommend that the decision that the Traffic Tribunal appellate panel issued in this matter be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE
SEPTEMBER 29, 2011