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Could high court let non-felony behavior prompt *Terry* stops?

Let's be clear: Drunken drivers are a deadly menace on the nation's highways. But how far may law enforcement go in getting them off the road?

That is the issue the U.S. Supreme Court recently faced in *Prado Navarette v. California*, No. 12-9490 (April 22).

In 2008, the California Highway Patrol received a 911 call in which an anonymous caller reported that a Ford pickup had just run her car off the road on southbound Highway 1. The caller gave the truck's license plate number, and the dispatcher broadcast this information over the police radio.

A CHP officer spotted the truck within minutes. He proceeded to follow it for several more minutes before pulling over the driver on suspicion of driving while intoxicated. As they approached the truck, the two officers smelled marijuana. A subsequent search uncovered 30 pounds of the drug. The driver and passenger were both arrested and charged with transporting marijuana.

The defendants filed a motion to suppress. They conceded that *Terry v. Ohio* gives officers the right to conduct an investigative stop if there is reasonable suspicion of criminal activity. But here, the officers only possessed an anonymous tip of reckless driving. Moreover, the officers observed nothing that would confirm that the driver was recklessly operating the car.

The defendants contended that this information does not rise to the level of "reasonable suspicion" of drunken driving. California courts rejected this claim, and the U.S. Supreme Court granted review.

In a 5-4 decision, the court also rejected the defendants' claim and affirmed the convictions.

The majority agreed that a *Terry* stop could be based on reasonable suspicion. It noted that reasonable suspicion "is dependent upon both the content of information possessed by police and its degree of reliability." Also, the information need not come from the officer's personal observations but can be provided by another person.

But this case deals with an anonymous tip. And the problem is that it falls between the court's prior two decisions on when an anonymous tip is sufficient to support a *Terry* stop.

In *Alabama v. White*, an anonymous tipster told the police that Vanessa White would leave a particular address and would drive to a specific motel to deliver drugs. 496 U.S. 325 (1990). The tip provided a precise description of her car. After the police confirmed that her behavior matched several of the tip's details — her address, her car and her driving route — they stopped the car and found drugs.

The Supreme Court conceded that the police had only confirmed innocent details from the anonymous tip. Nonetheless, it held that the tipster's prediction of her future behavior demonstrated a "special familiarity" with White's affairs. It thus found that the anonymous tip provided the police with "reasonable suspicion" to make the *Terry* stop.

The most disturbing aspect is where the court is clearly heading. ... Here, the court used completed subfelony activity to support reasonable suspicion of an ongoing crime.

But the court limited anonymous tips in *Florida v J.L.*, 529 U.S. 266 (2000). There, the anonymous tip simply said that a young black male in a plaid shirt at a bus stop was carrying a gun. The court held this tip was insufficient. Unlike the tip in *White*, this tip did not provide any predictions of future behavior. Nor did the tipster explain how he knew about the gun. Thus, the court held the tip did not establish reasonable suspicion.

Thus, *Prado Navarette* is different from *White* because the tip did not include any distinctive predictive behavior. But, unlike *J.L.*, the tip did in fact provide a basis of knowledge (i.e., being run off the road) that could arguably support a suspicion of intoxication.

The court found that the tip was sufficient to establish reasonable suspicion of drunken driving. First, the tip actually described an act of reckless driving. Also, the location of the car was consistent with where the behavior allegedly occurred. And despite the anonymity, the court found it reasonable to assume that the caller was aware that the 911 system included ways to identify the caller.

Finally, the court found that the act of running a car off the road could support a conclusion that the driver was legally impaired. Conceding it was a close case, the majority nonetheless found there was reasonable suspicion to support a stop for drunken driving.

Justice Antonin G. Scalia, writing for three other dissenters, vehemently disagreed. He referred to the court's opinion as "a freedom-destroying cocktail consisting of two parts patent falsity."

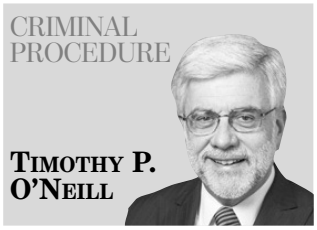
First, the court suggests that an anonymous report of a traffic violation is reliable as long as it can correctly identify a car and its location. But Scalia argues that "everyone in the world who saw the car would have that knowledge." And in no way would this general knowledge make it plausible that this car ran another off the road.

The second false premise, according to Scalia, is that a single instance of careless driving would necessarily suggest that a driver was intoxicated. Scalia emphasized that the police followed the car for five minutes before pulling it over. And during that time they admitted that they failed to see dangerous driving. Not only was the tip uncorroborated; as Scalia notes, "it was affirmatively undermined."

Scalia then identifies what he calls the court's "new rule": "So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop." And he denies this "rule" is constitutional.

The most disturbing aspect is where the court is clearly heading. As of today, the court has allowed *Terry* stops for only one kind of completed criminal activity: felonies. See *U.S. v Hensley*, 469 U.S. 221 (1985). Here, the court used completed subfelony activity to support reasonable suspicion of an ongoing crime.

In a footnote, the court said it was leaving to another day whether reasonable suspicion of a completed non-felony could per se support a stop. But based on *Prado Navarette*, it certainly looks like the same 5-4 lineup is ready to further extend *Terry*.



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