



A “Close Call” Falls on the Wrong Side of the Fourth Amendment and Results in Suppression



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In *United States v. Watson*, ___ F.3d ___, 2018 WL 3954109 (7th Cir. Aug. 17, 2018), the United States Court of Appeals for the Seventh Circuit was asked to review what the Seventh Circuit characterized as a “close call.”

Around 9:30 a.m. on Sunday, July 5, 2015, an unidentified caller in Gary, Indiana, called 911 to report that “boys” were “playing with guns and stuff” in a parking lot at an address that the caller specified. The caller explained that the boys “were standing there” by a “gray and greenish Charger” and “just out there playing with they [sic] guns.” The anonymous caller said that he was 14 years old and was calling from a McDonald’s across the street. The 911 operator elicited a few more details: the “boys” were black, were in a group of four to five, and had two guns. The fourteen-year-old caller added that he was calling from a phone that he had just borrowed from “this man” and that he would “try to stay close” to it.

The 911 operator radioed this information to Officer Anthony Boleware of the Gary Police Department: “Have a man with a gun 1532 West Fifth Avenue. 1-5-3-2 West Fifth Avenue. Have five male blacks in the parking lot across from McDonald’s in a green—check that, a gray and green Charger displaying weapons. 1-5-3-2 West Fifth Avenue [inaudible].” Officer Boleware testified at the suppression hearing that, after hearing the dispatch, he identified the address as “a heavy area for crime” where the police were frequently called. Officer Boleware thought that this particular call was urgent because “[i]f it was described like three or four guys displaying weapons, they might [be] about to shoot somebody.” Officer Wayne Dodson, another officer who responded to the call, also testified that he knew that address to be “a hot area” and considered the call urgent because “[a]ny time you have males with weapons, there’s always a sense of urgency ‘cause anything could happen.”

Officer Boleware drove to the address and saw in the parking lot “a Charger with about four guys sitting in it.” Using his patrol car, he blocked the Charger before approaching it on foot. All of the occupants denied having any weapons in the car. Within nine minutes, three other officers arrived in response to Officer Boleware’s request for backup, and each officer blocked a car door. At that point, Officer Boleware told the other officers to take each occupant out of the car and frisk him for weapons. When another officer ordered Defendant Donald Watson, the front seat passenger, out of the car, Watson threw a gun onto the backseat floor. Officer Boleware grabbed the gun and noticed another gun inside the pouch in front of the backseat passenger.

Thereafter, Watson was charged with possessing a firearm as a felon. Watson moved to suppress the two firearms recovered from the car as being discovered and taken in violation of his Fourth Amendment rights. At the suppression hearing, Officer Boleware and Officer Dodson testified as recounted above, and the United States District Court for the Northern District of Indiana received the recording and transcript of the 911 call, the recording of the dispatch, and the surveillance video of the parking lot.

Watson argued that Officer Boleware unlawfully seized him by blocking the Charger without reasonable suspicion that a crime had occurred or was imminent. According to Watson, the 911 caller reported only gun possession, which is lawful in Indiana, and did not establish the reliability of his anonymous tip. The

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Government responded that, under *Navarette v. California*, 572 U.S. 393 (2014), the anonymous tip was reliable and established a reasonable suspicion of a crime because the caller reported his own contemporaneous observations about persons playing with guns in a high-crime area. And, the Government contended that the collective-knowledge doctrine permitted the District Court to rely on facts that the dispatcher knew but did not convey to Officer Boleware to support reasonable suspicion.

At the conclusion of the suppression hearing, the District Court concluded that the seizure was lawful and denied Watson's motion to suppress. The District Court reasoned that the anonymous caller, like the tipster in *Navarette*, reported activity that he witnessed contemporaneously and provided enough detail to supply reasonable suspicion of a crime. In addition, the District Court agreed with the Government that the collective-knowledge doctrine applied. Following this ruling, Watson pleaded guilty to unlawfully possessing the gun but reserved the right to appeal the denial of his suppression motion. The District Court sentenced Watson to thirty months in prison and to two years of supervised release.

Watson focused his argument on appeal and the Seventh Circuit focused its Opinion on the issue of whether the anonymous call to the 911 operator provided a reasonable suspicion to block Watson's car. The Seventh Circuit explained that, under the Fourth Amendment, an officer cannot stop someone to investigate potential wrongdoing without a reasonable suspicion that criminal activity may be afoot. Reasonable suspicion turns on the totality of the circumstances and whether the officer had a particularized and objective basis for suspecting the particular person stopped of criminal activity.

Moreover, because anonymous tips relayed to police officers seldom demonstrate the informant's basis for knowledge or veracity, the tips alone are usually not sufficiently reliable to establish a reasonable suspicion. Instead, the United States Supreme Court has identified three factors that make an anonymous tip sufficiently reliable to create reasonable suspicion. The anonymous tipster must: (1) assert eyewitness knowledge of the reported event; (2) report contemporaneously with the event; and (3) use the 911 emergency system, which permits call tracing. *Navarette*, 134 S.Ct. at 1689-90.

The Government argued that *Navarette* controlled the Seventh Circuit's decision and that all three factors were present in this case. The Seventh Circuit disagreed.

First, unlike *Navarette*, the Seventh Circuit stated that there was much less reason to find the anonymous 911 call reliable in this case. Here, the anonymous caller borrowed a stranger's phone, thereby limiting the ability of the police to track the phone and the user's location—a key feature of *Navarette's* holding because the Supreme Court based the reliability of a 911 call, at least in part, on the ability of the police to track down false reports. Therefore, the Seventh Circuit opined that the fourteen-year-old caller would not necessarily be worried about getting caught providing false information to the police because the call could not be traced back to him.

Second, the caller in *Navarette* reported conduct that the officers reasonably suspected to be criminal, i.e., the caller reported being driven off of the road by a truck creating a reasonable suspicion of drunk driving. In this case, simply possession a gun in public did not create a reasonable suspicion, according to the Seventh Circuit, because carrying a firearm in public is permitted with a license under Indiana law. A "mere possibility of unlawful use" of a gun is not sufficient to establish reasonable suspicion. *United States v. Paniagua-Garcia*, 813 F.3d 1013, 1014-15 (7th Cir. 2016). It must, instead, be sufficiently probable that the observed conduct suggests unlawful activity. The Seventh Circuit determined that the connection between the anonymous 911 call to any unlawful activity under these circumstances was too speculative.

Third, unlike Navarette, the police were not called in order to resolve an emergency situation. In this case, the anonymous caller reported no tense situation, like a verbal argument or physical confrontation, that suggested violence would erupt. In addition, although he dialed 911, the anonymous caller never asked for or hinted that a quick response was needed to prevent imminent harm to others. Reports of emergencies have a “special reliability,” requiring “a lower level of corroboration.” *United States v. Hicks*, 531 F.3d 555, 559-61 (7th Cir. 2008). According to the Seventh Circuit, this call lacked that “special reliability.”

But, even if the caller’s use of 911 and report of “boys” “playing with guns” made the officers worry about an emergency, the Seventh Circuit concluded that the worry should have dissipated when Officer Boleware arrived at the scene. What Officer Boleware saw did not match the caller’s report: no one was playing with guns in the parking lot. Instead, men were seated inside the identified car with no guns in sight. If there had been a potential emergency at the time of the call, it no longer existed when the police arrived. Accordingly, the Seventh Circuit held that the Navarette factors were not present or were otherwise distinguishable.

The Seventh Circuit then went on to make two other key holdings. First, the Seventh Circuit rejected Watson’s argument that the reliability of the 911 caller’s tip was inherently less reliable based upon the caller’s age. The Seventh Circuit noted that a caller’s age alone should not be a reason to disregard a tip where, as in this case, the caller responded appropriately to the 911 operator’s questions, appropriately described the events in some detail, and presented an internally consistent report.

Second, the Seventh Circuit was unpersuaded by the Government’s argument that the 911 tip was reliable because the report contained alleged wrongdoing in what was known to be a high crime area. In rejecting this argument, the Seventh Circuit stated: “People who live in rough neighborhoods may want and, in many situations, may carry guns for protection. They should not be subject to more intrusive police practices than are those from wealthy neighborhoods.” *Watson*, ___ F.3d___, 2018 WL 3954109, at * 4.

Accordingly, the Seventh Circuit agreed with Watson that the police did not have a reasonable suspicion to block the car. The anonymous tip did not justify an immediate stop because the caller’s report was not sufficiently reliable. The caller used a borrowed phone, which would make it difficult to find him, and his sighting of guns did not describe a likely emergency or crime—he reported gun possession, which is lawful. The Seventh Circuit, therefore, vacated the judgment and sentence entered against Watson and remand for further proceedings.