CASE NAME: Nebraska v Rodriguez (Filed August 29, 2014. No. S-13-062)

FACTS/PROCEDURAL HISTORY:

On April 28, 2012, the Scotts Bluff County 911 emergency dispatch center received notification of a possible disturbance near a rental car business. When the dispatch center communicated this information to Officer Aaron Kleensang, the dispatcher noted that the caller stated that he had been pushed out of a moving vehicle. The dispatcher also stated that the caller identified the vehicle as a green GMC Envoy and stated that this vehicle left the area heading westbound on Highway 26.

At the time Kleensang received the dispatch, he was near the vicinity of the reported activity. [He did not see the caller at the rental car business, however, he soon] observed a vehicle matching the description he received from the dispatch center traveling westbound on Highway 26. Kleensang made two turns, followed the vehicle onto 17th Avenue and 20th Street, and observed it stop on its own. The vehicle moved to the side of the road and parked before Kleensang activated his patrol car's emergency lights. Kleensang testified that he activated the lights to signal the driver that Kleensang wanted to talk with him.

Kleensang approached the driver and began to question him about the reported disturbance. Rodriguez was identified as the driver. Kleensang had other officers in the area make contact with the caller, and the caller was eventually brought to a nearby location. No other evidence was adduced about the caller, and there was apparently no further action taken in regard to the disturbance. While discussing the reported disturbance with Rodriguez, Kleensang made several initial observations. He detected a strong odor of alcohol and noticed that Rodriguez had a flushed face, slurred speech, and bloodshot, watery eyes. After administering three field sobriety tests, Kleensang believed Rodriguez was heavily intoxicated. Kleensang arrested Rodriguez following a preliminary breath test and transported him to the detention center in Scotts[b]luff, Nebraska. Rodriguez then submitted to a "DataMaster" test at the detention center, and his breath tested at .226 grams of alcohol per 210 liters of breath.

During the booking process, Rodriguez' wallet was taken from him and inventoried. Kleensang testified this is standard procedure whenever he takes someone to jail. When the wallet was opened, two clear plastic baggies containing apparent controlled substances were discovered at the bottom. Preliminary tests were conducted on these substances at the jail. Subsequent tests at the Nebraska State Patrol crime laboratory revealed that one substance was cocaine and that the other substance was not a controlled substance.

On May 10, 2012, the State filed an information charging Rodriguez with DUI with a blood alcohol level greater than .15, third offense; possession of methamphetamine; and possession of cocaine. Rodriguez moved to suppress any evidence gathered from the stop and subsequent search, contending that the stop was not based on reasonable and articulable suspicion that a crime had been committed or was about to be committed.

The district court overruled the motion to suppress. In its order, the court noted that the stop was justified under two separate analyses. First, the court concluded that the stop could be considered

to be a "'first-tier' contact" for which no Fourth Amendment protections apply. The court found Kleensang had not used emergency lights or a siren to cause Rodriguez to stop. Thus, the court determined that a reasonable person would not have believed he was required to stop or that his movement was impeded in any way before Kleensang activated his patrol car's emergency lights. Second, analyzing the stop as a "'tier-two'" encounter, the court determined reasonable suspicion existed for the stop because Kleensang had corroborated the information from the dispatch center.

On December 18, 2012, the case proceeded to a jury trial. Despite having received laboratory reports demonstrating that Rodriguez did not possess methamphetamine on the night he was arrested, the State did not dismiss the charge in advance of trial. Rodriguez' motions for mistrial based on this failure to dismiss were denied, but the court entered a directed verdict in his favor on the possession of methamphetamine charge at the close of the State's evidence. The jury convicted Rodriguez of DUI, but acquitted him of the possession of cocaine charge. The court sentenced Rodriguez to 60 days in jail and a term of probation, suspended his license for 5 years, and ordered him to pay court costs.

State v. Rodriguez, No. A-13-062, 2013 WL 6246792, *1-2 (Neb. App. Dec. 3, 2013) (selected for posting to court Web site).

Rodriguez appealed his DUI conviction to the Court of Appeals. He claimed that the district court erred when it (1) analyzed the traffic stop as a first-tier police contact; (2) overruled his motion to suppress, despite a lack of corroboration of the anonymous tip; and (3) overruled his motion for a mistrial based on the State's failure to dismiss the methamphetamine charge.

The Court of Appeals affirmed Rodriguez' conviction and sentence. With regard to the assignment of error related to a first-tier police contact, the Court of Appeals noted that the State did little to challenge Rodriguez' argument that he was seized when Kleensang activated his patrol car's lights and that the contact was therefore a second-tier traffic stop requiring reasonable suspicion. The Court of Appeals determined that the State had conceded that the contact was a traffic stop and concluded that because the district court had alternatively concluded that there was reasonable suspicion to support a traffic stop, it was unnecessary for the Court of Appeals to address the first assignment of error related to a first-tier stop.

With regard to whether there was reasonable suspicion for a traffic stop, the Court of Appeals cited Nebraska precedent and concluded that the content of the dispatch and Kleensang's observations consistent with the dispatch gave Kleensang a reasonable suspicion to justify the traffic stop.

With regard to Rodriguez' motion for a mistrial, the Court of Appeals disapproved of the county attorney's failure to dismiss the methamphetamine charge prior to trial and stated that such conduct was "improper in the course of conducting a fair trial because it may tend to expose a jury to irrelevant and prejudicial matters." *State v. Rodriguez*, 2013 WL 6246792 at *5.

Although it disapproved of the prosecution's conduct, the Court of Appeals determined that such conduct did not reach a level requiring the declaration of a mistrial. The Court of Appeals concluded that the district court did not abuse its discretion when it overruled Rodriguez' motion for a mistrial. The Court of Appeals affirmed. *Id.*

We granted Rodriguez' petition for further review.

ISSUE:
Did the lower courts (District Court and Court of Appeals) err in denying the appellant's motion to suppress evidence obtained from the traffic stop based upon an uncorroborated anonymous tip?

HOLDING:
Yes. the district court erred when it overruled Rodriguez' motion to suppress and the Court of Appeals erred when it affirmed this ruling.

The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures. In determining whether there is reasonable suspicion for an officer to make an investigatory stop, the totality of the circumstances must be taken into account.

We review the lower courts' determinations that the content of the dispatch plus Kleensang's observation of Rodriguez' vehicle in the location indicated in the dispatch provided reasonable suspicion to justify the traffic stop.

Because the stop was based on information supplied by a caller, the reliability of such information is key to determining whether there was reasonable suspicion. As discussed below, Fourth Amendment case law indicates that an important factor in assessing the reliability of such information is the distinction between whether the person supplying the information is known to law enforcement or the information comes from an anonymous source.

Both the district court and the Court of Appeals treated the call in this case as an anonymous tip. The State suggests that the call be treated as an anonymous tip for purposes of Fourth Amendment analysis. We agree.

Although the district court and the Court of Appeals both treated the caller as anonymous, neither court relied on certain relevant precedent from the U.S. Supreme Court regarding anonymous tips in the context of Fourth Amendment analysis. Both relied on this court's opinion in *State v. Bowley*, 232 Neb. 771, 442 N.W.2d 215 (1989). In *Bowley*, we noted that the factual basis for a traffic stop need not arise from the officer's personal observation, but may be supplied by information acquired from another person. We further noted that when the factual basis is supplied by another, the information must contain sufficient indicia of reliability, and we stated that a citizen informant who has personally observed the commission of a crime is presumptively reliable. We concluded that the investigatory stop in *Bowley* was reasonable, and in making this determination, we noted that "[w]hile the informants were unidentified until after [the defendant] was stopped, they did remain and identify themselves to police." 232 Neb. at 773, 442 N.W.2d at 217.

Since our decision in Bowley in 1989, the U.S. Supreme Court has decided key Fourth Amendment cases involving anonymous tips but we have not had occasion to discuss these cases. We therefore review the development of relevant Fourth Amendment law regarding

anonymous tips since we decided *Bowley* before applying such law to this case. In *White*, the U.S. Supreme Court determined that an anonymous tip from a telephone caller provided justification for a traffic stop when certain details provided by the caller were corroborated by police observation.

In considering whether the stop in *White* was justified, the U.S. Supreme Court noted that the caller's ability to predict the defendant's future behavior demonstrated inside information and a special familiarity with her affairs which, the Court determined, gave the police reason to believe that the caller was also likely to have access to information about her illegal activity. The Court described the decision in *White* as "a close case" but concluded that "under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop." 496 U.S. at 332.

Neither the district court nor the Court of Appeals in this case cited *Florida v. J. L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000), in which the Court held that an anonymous tip lacked sufficient indicia of reliability to establish reasonable suspicion for an investigatory stop. The anonymous caller in *J. L.* reported that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." 529 U.S. at 268. Officers were instructed to respond to the tip, and when they arrived at the indicated location, they saw three black males, one of whom was wearing a plaid shirt. They made no other observation that would indicate illegal activity; nevertheless, one of the officers approached the man, told him to put his hands up on the bus stop, frisked him, and seized a gun from his pocket.

The Court in *J. L.* compared the facts of the case to those in *White* and determined that "[t]he tip in [*J. L.*] lacked the moderate indicia of reliability present in *White* and essential to the Court's decision in that case." 529 U.S. at 271. The Court noted that the call in *J. L.* "provided no predictive information" as was present in *White*. 529 U.S. at 271. The Court in *J. L.* rejected Florida's argument that the tip was reliable because the defendant met the anonymous informant's description of a particular person at a particular location; the Court stated that "[s]uch a tip . . . does not show that the tipster has knowledge of concealed criminal activity" and that "reasonable suspicion . . . requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." 529 U.S. at 272. The Court in *J. L.* described its decision in *White* as "borderline" and stated that "[i]f *White* was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line." 529 U.S. at 271.
After the Court of Appeals' decision in this case, and after oral argument on further review to this court, the U.S. Supreme Court filed another opinion involving the Fourth Amendment and anonymous tips, *Navarette v. California*, ___ U.S. ___, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014). At this court's direction, the parties filed supplemental briefs. In *Navarette*, the U.S. Supreme Court concluded that under the totality of the circumstances in that case, an anonymous tip regarding reckless driving gave police reasonable suspicion that justified a traffic stop.

Under the facts in *Navarette*, the immediate focus was whether the call was sufficiently reliable to credit the allegation that the defendant's vehicle had run the caller off the road. The majority in *Navarette* determined that due to certain factors, the call did bear adequate indicia of reliability. The factors on which the majority in *Navarette* relied were: (1) eyewitness knowledge, i.e., the caller necessarily claimed to have personally observed the alleged dangerous

driving; (2) contemporaneous reporting, i.e., the caller reported the incident soon after it occurred; and (3) the caller's use of the 911 emergency dispatch system, which system allows for identifying and tracing callers, thus providing some safeguard against false reports.

Justice Scalia, joined by three other justices, dissented in *Navarette*. The dissent found fault with the factors relied on by the majority as indicia of reliability. With regard to the caller's report that the defendant's vehicle had run her vehicle off the road, the dissent stated that "the police had no reason to credit that charge and many reasons to doubt it, beginning with the peculiar fact that the accusation was anonymous." *Navarette v. California*, ___ U.S. ___, 134 S. Ct. 1683, 1692, 188 L. Ed. 2d 680 (2014) (Scalia, J., dissenting; Ginsburg, Sotomayor, and Kagan, JJ., join).

We apply the above-discussed U.S. Supreme Court precedent to the facts of this case.

The majority in *Navarette* noted the following as indicia of reliability: (1) eyewitness knowledge, (2) contemporaneous reporting, and (3) the caller's use of the 911 emergency dispatch system. In the present case, the caller claimed eyewitness knowledge of the event and made the call soon after it occurred. The record also indicates that the call was made to law enforcement through 911 or a similar emergency dispatch system.

Unlike the facts of *Navarette*, the officer in the present case made observations that raised doubts regarding the reliability of the caller's report. Kleensang testified at the suppression hearing that before he saw Rodriguez' vehicle, he drove past the location where the person reported having been pushed out of the vehicle. Upon inspection, Kleensang did not see anyone at that location. The fact that Kleensang did not see anyone at the location claimed by the caller was a contraindication of reliability and weakened the value of the anonymous tip in establishing reasonable suspicion to stop Rodriguez' vehicle. The anonymous tip in this case bore weaker indicia of reliability than the tip in *Navarette.*

(ii) Ongoing Crime

As we have explained above, the fact that the reported crime was seen as ongoing was critical to the outcome in *Navarette v. California*, ___ U.S. ___, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014). Even though the majority and the dissent disagreed on whether the report of driving another vehicle off the road indicated ongoing drunk driving, the majority and the dissent agreed that the officer needed reasonable suspicion of an ongoing crime to justify an investigatory stop. In this regard, it has been stated that "an anonymous 911 call reporting an ongoing emergency is entitled to a higher degree of reliability and requires a lesser showing of corroboration than a tip that alleges general criminality." *U.S. v. Simmons*, 560 F.3d 98, 105 (2d Cir. 2009).

In the present case, the caller indicated only that he had been pushed from the described vehicle. There was nothing in the content of the call that indicated that the driver was driving drunk or that the driver posed a threat of public harm by driving recklessly. The caller did not report an ongoing crime and instead indicated an isolated past episode. The majority in *Navarette* found that the anonymous caller reported an ongoing crime, which finding was key to its decision. Such factor is not present in this case.

(iii) Resolution

Keeping in mind that the decision in *Navarette* that the stop was justified was, in the words of the Court, a "close case," we determine that the important differences present in the instant case as compared to *Navarette* are sufficient to tip the reasonable suspicion analysis in the other direction. The fact that Kleensang saw no one at the location where the caller reported having been thrown from a vehicle created doubt as to the anonymous caller's reliability. Furthermore, the caller did not report an ongoing crime, which under *Navarette* and other case law is necessary to support the finding of reasonable suspicion justifying a traffic stop.

We conclude that on the record presented to the district court in this case, the court erred when it determined that there was reasonable suspicion to justify the traffic stop and overruled Rodriguez' motion to suppress. Therefore, the Court of Appeals committed reversible error when it affirmed the overruling of the motion to suppress and affirmed Rodriguez' conviction of DUI.

(iv) Double Jeopardy Analysis

[5] Having concluded that the denial of the motion to suppress was reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Rodriguez' conviction for DUI. If it was not, then double jeopardy forbids a remand for a new trial. *State v. Ash*, 286 Neb. 681, 838 N.W.2d 273 (2013). But the Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *Id.*

After reviewing the record, we conclude that the evidence presented at trial, including the evidence that should have been suppressed, was sufficient to support the DUI conviction. As such, we conclude that double jeopardy does not preclude a remand for a new trial of the DUI charge.

We conclude that the Court of Appeals' decision must be reversed and the cause remanded to the Court of Appeals with directions to reverse the DUI conviction and remand the cause to the district court for a new trial.

VI. CONCLUSION

We conclude that the district court erred when it overruled Rodriguez' motion to suppress evidence obtained as a result of the traffic stop and that the Court of Appeals erred when it affirmed this ruling and Rodriguez' DUI conviction. We reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with directions to reverse the DUI conviction and remand the cause to the district court for a new trial. With regard to the State's failure to dismiss the possession of methamphetamine count prior to the trial, we share the Court of Appeals' disapproval of the State's conduct. We conclude, however, that it is not necessary for us to decide the correctness of the lower courts' decisions to the effect that a mistrial was not warranted for the misconduct, because it will not be repeated upon remand for a new trial.