

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. XXXXXXXX

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UNITED STATES OF AMERICA,

Appellant

v.

XXXXXXXXXXXXXXXXXXXXX,

Appellee

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION

(THE HONORABLE DEBORAH K. CHASANOW,  
UNITED STATES DISTRICT JUDGE)

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BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 3231. The district court granted Mr. XXXXXXXXX motion to suppress evidence on March 1, 1999. J.A. at 50.<sup>1</sup> The Government filed a motion to reconsider on March 11, 1999. J.A. at 5. On March 17, 1999, the district judge denied this motion. J.A. at 55. The Government filed a notice of appeal on April 14, 1999. J.A. at 5. On June 17, 1999, the Government filed the certification

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<sup>1</sup> J.A. denotes references to the Joint Appendix.

required by 18 U.S.C. § 3731. J.A. at 67, 68. This Court has jurisdiction pursuant to 18 U.S.C. § 3731.

**STATEMENT OF THE ISSUE**

Whether the district court correctly decided that the Terry-stop in this case was conducted in the absence of reasonable suspicion where it was based on an anonymous tip with no indicia of reliability.

**STATEMENT OF THE CASE**

On November 2, 1998, XXXXXXXXXXXX was charged in a one-count indictment with possessing a firearm on October 15, 1997, after having been convicted of a crime punishable by imprisonment for a term exceeding one year in violation of 18 U.S.C. § 922(g)(1). J.A. at 6. On January 5, 1999, XXXXXXXXXXXX filed a motion to suppress evidence. J.A. at 4. On March 1, 1999, following an evidentiary hearing, the district judge granted the motion to suppress. J.A. at 56.

The Government moved for reconsideration. J.A. at 5. The district judge denied the Government's motion in a memorandum opinion dated March 17, 1999. J.A. at 55. The Government filed a notice of appeal on April 14, 1999. On June 17, 1999, the Government filed the certification required by 18 U.S.C. § 3731. J.A. at 67.

**STATEMENT OF THE FACTS**

On October 15, 1997, at approximately 9:11 p.m., an anonymous informant placed a telephone call to the police reporting that two individuals believed to be in possession of weapons were at the Capitol Heights Metro Station. J.A. at 13, 17. One individual was described as a black male, approximately twenty-seven years old, wearing a dark hooded navy jacket and green pants. J.A. at 14, 20. The other individual was described as a black female with faded blue jeans and coat, carrying a black purse. J.A. at 14. The individuals were reported to be at a bus bay at the Capitol Heights Metro Station. J.A. at 14. No further information was given.

Capital Heights Metro Station is located in an area that is predominately populated by African Americans. J.A. at 26. The bus bay area at the Capitol Heights Metro Station is shaped like a donut, with several bays located around the circle. J.A. at 15, 30. Each bay has a protective cover that hangs over the area where passengers can sit while they wait for their buses. J.A. at 30.

A dispatcher relayed the information reported by the unknown individual to Metro Transit Authority police officer XXXXXXXXXXXX who was on patrol at the Landover Metro Station. J.A. at 13-14. XXXXXXXXXXXX responded to the Capitol Heights Metro Station. Another Metro Transit Authority police officer, XXXXXXXXXXXX,

also responded to the Metro station, arriving at the same time as XXXXXXXXXXXXX. J.A. at 14-15.

When XXXXXXXXXXXXX arrived at the Metro station, he observed three individuals standing at a bank of pay telephones. J.A. at 23, 24. He and XXXXXXXXXXXXXXXXXXXX pulled their patrol cars into a "V formation" in front of the telephones, shining their headlights on the individuals. The officers drew their weapons on the individuals, ordered them not to move and ordered them to place their hands on the telephones. J.A. at 15, 25. The individuals complied. With his gun drawn on the male, XXXXXXXXXXXXX asked him where the gun was; he replied that it was on his left side. J.A. at 15. The officer reached around the individual and retrieved a .38 caliber handgun from the left side of his waistband. J.A. at 15. The officer placed him in handcuffs and moved him over to his cruiser. J.A. at 16. XXXXXXXXXXXXX then conducted a search of the male and found five .357 rounds of ammunition in the right front pants pocket. J.A. at 16. This individual was later identified as XXXXXXXXXXXXXXXXXXXX. J.A. at 17.

The two female suspects were also detained. J.A. at 16, 24. A .357 magnum revolver was found in the purse that one of the females had been carrying. J.A. at 16.

The identity, location, basis of knowledge, or reliability of the informant was never revealed to the dispatcher or officers prior to the stop. J.A. at 17, 19.

## ARGUMENT

### **I. THE DISTRICT COURT CORRECTLY DECIDED THAT THE ANONYMOUS TIP DID NOT PROVIDE REASONABLE SUSPICION TO SEIZE THE DEFENDANT.**

#### **A. Standard of Review**

The ultimate question of reasonable suspicion is reviewed de novo on appeal. Factual findings underlying this determination are reviewed for clear error. Ornelas v. United States, 517 U.S. 690, 699 (1996); United States v. Rusher, 966 F.2d 868, 873 (4th Cir. 1992).

#### **B. A Seizure Conducted in the Absence of Reasonable, Articulable Suspicion Constitutes an Unreasonable Seizure Under the Fourth Amendment.**

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. The Supreme Court has repeatedly observed that searches and seizures conducted without a warrant are “per se unreasonable subject only to a few specifically established and well-delineated exceptions.” Minnesota v. Dickerson, 508 U.S. 366, 372 (1993). In Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court recognized such an exception. After balancing the competing interests of law enforcement and individuals’ rights to be free from governmental intrusions, the Court recognized a “narrowly drawn” exception to the probable cause rule. This exception permits a police officer to seize an individual and search him

for weapons based on reasonable suspicion that "criminal activity may be afoot" and that he is dealing with an "armed and dangerous individual." Id. at 27, 30 (emphasis added); See Knowles v. Iowa, \_\_\_ U.S. \_\_\_, 119 S.Ct. 484, 488 (1998) (stating that Terry permits officers to perform a "patdown" upon reasonable suspicion that individual may be armed and dangerous).

Under Terry, the Government "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrants that intrusion." 392 U.S. at 21. "Simple good faith on the part of the arresting officer is not enough." Id. at 22. See also United States v. Cortez, 449 U.S. 411, 417 (1981) (stating that "[a]n investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity" (citations omitted)). Thus, a seizure and search of an individual that does not comply with the dictates of Terry, is unreasonable and therefore unconstitutional. The Government bears the burden of demonstrating that the officer's warrantless actions were justified. United States v. Carhee, 27 F.3d 1493, 1496 & n.2 (10th Cir. 1994).

**C. An Anonymous Tip May Not Provide Reasonable Suspicion Unless it Contains Indicia of Reliability.**

Since Terry, the Supreme Court has considered the role of an informant's tip in the reasonable suspicion analysis. In Adams v. Williams, 407 U.S. 143, 145 (1972), an informant told an

officer that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist. The officer approached the car, tapped on the window, and asked the occupant, XXXXXXXXXXXXX, to open the door. Id. When XXXXXXXXXXXXX rolled down the window instead, the officer reached into the car and removed a loaded gun from XXXXXXXXXXXXXXXXXXXX waistband. Id.

The Court held that the officer's actions were justified, noting that is was not dealing with the case of an anonymous telephone tip. Id. at 146. The Court relied heavily on the fact that the officer knew the informant, that he had come forward personally to give information at the scene, and most importantly, that he had previously provided the officer with information. Id. Thus, the "information carried enough indicia of reliability to justify the officer's forcible stop of XXXXXXXXX." Id. at 147.

The Court was careful to note the limits of its holding:

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. But in some situations--for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of a specific impending crime--the subtleties of the hearsay rule should not thwart an appropriate police response.

Id.

In Alabama v. White, 496 U.S. 325, 326-27 (1990), the Court addressed the issue of whether an anonymous telephone tip, "corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop." In White, an anonymous person called the police and informed them that the defendant, Ms. White, whom the informant identified by name, would be leaving from a particular location, XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, at a particular time. Id. at 327. The informant further predicted that Ms. White would be driving a brown Plymouth station wagon with the right taillight lens broken, that she would be traveling to Dobby's Motel, and that she would be have approximately an ounce of cocaine inside a brown attache case. Id.

Two officers proceeded to the Lynwood Terrace Apartments and observed an individual leaving the apartment building and entering a brown Plymouth station wagon with a broken right taillight. Id. The officers followed the vehicle and stopped it just short of Dobby's Motel. Id. The officers stopped the car, informed Ms. White that she had been stopped because she was suspected of carrying cocaine in her vehicle, and obtained her consent to search the vehicle. Id. The officers found a locked brown attache case in the car. Ms. White provided the combination to the lock and the officers opened it, discovering

marijuana inside. Id. The officers later discovered three milligrams of cocaine in Ms. White's purse. Id.

In determining whether the stop was supported by reasonable suspicion, the Court turned to its decision in Illinois v. Gates, 462 U.S. 213 (1983), which addressed anonymous tips in the probable cause context. Id. at 328. In Gates, the Court adopted a "totality of the circumstances" test for determining whether an informant's tip establishes probable cause, abandoning the two-pronged Aguilar-Spinelli test. Id. "Gates made clear, however, that those factors that had been considered critical under Aguilar and Spinelli -- an informant's 'veracity,' 'reliability' and 'basis of knowledge' -- remain 'highly relevant in determining the value of his report.'" Id., citing Gates, 462 U.S. at 230. The Court held that these critical factors which govern the probable cause analysis are likewise relevant in the reasonable suspicion context. Id.; See also Terry, 392 U.S. at 20 (observing that "the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in [the reasonable suspicion] context").

The Court in White further explained:

Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors -- quantity and quality -- are considered in the 'totality of circumstances -- the whole picture,' that must be taken into account when evaluating whether there is reasonable suspicion. Thus, if a tip has a relatively low degree of reliability, more information will be

required to establish the requisite quantum of suspicion than would be required if the tip were more reliable.

Id., citing Cortez, 449 U.S. at 411.

The Court concluded that the tip "standing alone" would not have provided this officers with reasonable suspicion. Id. at 329. However, though it was a "close case," the Court held that the anonymous tip, as corroborated by the police demonstrated sufficient indicia of reliability to provide reasonable suspicion Id. at 332. Central to the Court's holding was the fact that the tip "contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." Id. This ability to predict future behavior was important to the Court "because it demonstrated inside information— a special familiarity with [White's] affairs." Id.

This Court has followed the rule in White that an anonymous tip, standing alone, does not give rise to the requisite level of suspicion under Terry. United States v. Perrin, 45 F.3d 869 (4th Cir. 1995). Other federal courts have applied these principles and found insufficient reasonable suspicion in cases involving informants who were both known and unknown to the police. United States v. Roch, 5 F.3d 894, 898 (5th Cir. 1993) (tip received from confidential informant who had provided reliable information in the past that described individual was in possession of firearms

did not provide reasonable suspicion); United States v. Packer, 15 F.3d 654, 658 (7th Cir. 1994) (anonymous tip reporting a suspicious vehicle with four black men inside insufficient to establish reasonable suspicion); United States v. Jones, 998 F.2d 883, 886 (10th Cir. 1993) (tip from apartment manager that described individual possessed a gun did not establish reasonable suspicion); United States v. Fernandez, 943 F. Supp. 295, 298 (S.D.N.Y. 1996) (anonymous 911 caller's tip that described individual was armed with a gun insufficient to provide reasonable suspicion); See also United States v. Johnson, 170 F.3d 708, 711 (7th Cir. 1999) (report from unspecified citizen from community organization that drug activity was taking place at particular location did not provide reasonable suspicion).

Several state courts have applied White and reached the same conclusion. J.L. v. Florida, 727 So. 2d 204, 208-209 (Fla. 1998), cert. filed, 67 U.S.L.W., Jun. 7, 1999 (anonymous tip involving gun did not provide reasonable suspicion); Commonwealth v. Allen, 725 A.2d 737, 740-41 (Pa. 1999) (same), cert. filed, 67 U.S.L.W. May 27, 1999; Commonwealth v. Hawkins, 692 A.2d 1068, 1070 (Pa. 1997) (same); Cf. Commonwealth v. Alvarado, 667 N.E. 2d 856, 859 (Mass. 1996) (same) (decided on state constitutional grounds, but citing White).

Applying the dictates of White to the instant case compels the conclusion that the district court's ruling was correct.

**1. The Tip, Standing Alone, Contained No Indicia of Reliability.**

The tip in this case consisted of an anonymous individual contacting the police from an unknown location and reporting that two individuals with weapons were at a bus bay at Capital Heights Metro Station.<sup>2</sup> While the informant generally described the clothing the individuals were wearing, their race, sex, and approximate age of one individual, no other descriptive information was given.

Courts have recognized that anonymous tips are generally unreliable. See Gates, 462 U.S. at 237) (stating that the “veracity of persons supplying anonymous tips is by hypothesis largely unknown and unknowable”). However, the circumstances in this case suggest an even greater degree of unreliability than that which accompanies other anonymous tips.

**a. The informant’s basis of knowledge is unknown.**

First, the informant’s basis of knowledge is completely lacking in this case. The information related to the police is devoid of any suggestion how the informant came to know about the information he or she reported. Was the informant an eyewitness? Did someone else tell the informant this information? Did the informant overhear this information? Has the informant ever had

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<sup>2</sup> It should be noted that, unlike in some jurisdictions, possession of a gun is not per se illegal in Maryland.

any dealings with these individuals? Does the informant know this individual? There is simply no way of knowing how the informant, known only to the police officers and dispatcher as a "citizen" was privy to this information. Accordingly, the informant's basis of knowledge does not compensate for his lack of veracity. See United States v. Wilhelm, 80 F.3d 116, 121 (4th Cir. 1996) (holding the tipster known only as "concerned citizen" was not sufficiently reliable to provide reasonable suspicion).

**b. The informant's refusal to identify himself to the police casts doubt on his reliability.**

Second, the identity of the informant was unknown, not because of any particular exigency, but because the informant refused to identify himself despite being repeatedly asked to do so. J.A. at 49. The Government suggests that this Court should overlook this fact because "law-abiding citizens" may be reluctant to provide their names when reporting criminal activity, though the Government does not contend, nor could it, that, in this case, the officers seized the defendant in response to a tip from a law-abiding citizen.<sup>3</sup> There is simply no basis to assume that an anonymous informant who, when asked to reveal his identity, insists on remaining anonymous *to the police*, is a law-abiding citizen. Indeed, courts have recognized that there

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<sup>3</sup> The Defendant requested the Government to disclose the identity of the informant to determine just how law-abiding the informant was. The Government declined.

is good reason to be suspicious of information provided by informants. See United States v. McElroy, 584 F.2d 746, 748 n. 2 (5th Cir. 1978) (holding that informant's tip that man had a shotgun did not provide reasonable suspicion and noting that "informants have a known propensity to fabricate allegations of criminal involvement and to bolster the charges by adding innocent details") (citations omitted); See also United States v. Taylor, 774 F. Supp. 41, 42 (D. Me. 1991) (observing that "[h]istorically, confidential informants have been treated as the least credible source of information about the commission of crimes not only because informants enjoy anonymity, but also because they are often criminals, drug addicts, or even pathological liars") (citations omitted).

It is equally likely that a caller intent on harassing another person or who had a grudge against another person would decline to reveal his identity. Clearly, the refusal of the informant to give any additional information about himself before he hung up raises questions about his reliability. His failure to provide the suspects' names suggests either that he did not know very much about them or that he wanted to avoid engaging in conversation with the police. Thus, the reliability of the informant in this case is questionable.

The Government also contends that the identity of an informant is irrelevant because the police are generally

dispatched before the 911 operator learns of the caller's identity. Of course, in this case, the officers sought the identity of the informant prior to making the stop, but because the caller refused to provide his identity, the officers were merely told that the report came from a "citizen," J.A. at 17, 20, 49. Thus, the government's claim that officers do not have time to learn the identity of a caller is belied by the officers' actions in this case. In addition, even if the officers were not aware of the identity of the individual, the district court held that the reasonable suspicion standard may have been met if the informant's identity was revealed to the dispatcher or some other individual with whom the informant spoke. This did not happen in this case.

More importantly, however, the Government's argument misses the point. The issue is not the propriety of the officers' actions in responding to a 911 call; rather the issue is the propriety of the officers' actions in seizing the defendant after they responded to the anonymous tip and observed no imminent danger or suspicious conduct.

The Government further claims that the identity of the informant is irrelevant to the reasonable suspicion analysis because advances in technology have made it easier to trace 911

calls.<sup>4</sup> Of course, here the Government focuses on means by which the reliability of an informant can be ascertained, if at all, *after* a seizure has occurred. Moreover, the Government's argument is premised on a notion that anonymous informants, like informants known to the police, are accountable and readily available to the police who will be in a position to confront them immediately. See Williams, 407 U.S. at 146; United States v. Miller, 925 F.2d 695, 697 (4th Cir. 1991); United States v. Gorin, 564 F.2d 159, 160 (4th Cir. 1977). This hypothesis is flawed. Anonymous tips present the same constitutional concerns now as they did to the Supreme Court in Alabama v. White.

**c. The information provided by the informant was available to the general public.**

Third, the information provided by the informant does not provide any indicia of reliability. The informant's description consisted of the two individuals' race, sex, clothing, and location. No physical attributes of the individuals were given, nor were any names, nicknames, or other indications that the informant was familiar with the individuals. Furthermore, the tip contained no predictive details. In short, the informant conveyed only information available to the general public. Thus, under the dictates of Alabama v. White, the tip, standing on its

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<sup>4</sup> At present, an "enhanced" 911 tracing system cannot trace calls made from cellular phones. State v. Williams, 591 N.W. 2d 823, 837 n.2 (Wis. 1999).

own, did not provide reasonable suspicion to seize the defendant. See Perrin, 45 F.3d at 869 (holding that anonymous tip which included "very specific information," including the subject's nickname, did not, standing alone, give rise to reasonable suspicion.); United States v. Porter, 738 F.2d 622, 623-26 (4th Cir. 1984) (holding that detailed anonymous tip which included identity and predictive details of suspect which were corroborated by police provide reasonable suspicion).

**2. The Police Corroboration Did Not Tend to Show That the Tip Had Any Indicia of Reliability.**

The police corroboration in this case did nothing to suggest that the tip was reliable. In White, the Supreme Court held that in order for an anonymous tip to amount to reasonable suspicion, the tip must have "indicia of reliability as established through independent police work." 496 U.S. at 330-31. The Court further indicated that mere confirmation of information in the tip that any casual observer would be aware of was not sufficient corroboration of the tip. Id. at 332. Thus, while the Court in White noted that the officers had corroborated such facts as the presence of the car outside the apartment building, it did not suggest that mere corroboration of such "easily obtained facts existing at the time of the tip" would provide the required "indicia of reliability." Id. at 332, quoting Illinois v. Gates, 462 U.S. 213, 245 (1983). The caller's knowledge of what the

"general public would have had no way of knowing" made it reasonable to believe the caller was reliable.

The Court specifically contrasted this kind of corroboration with corroboration of a fact that "[a]nyone could have predicted . . . because it was a fact presumably existing at the time of the call." Id. at 332. The Court noted that finding a car of the exact description in front of the exact apartment building was an example of this latter kind of corroboration. Corroboration of such a fact revealed nothing specific about the reliability of the informant since anyone could have known that. Under White, therefore, the fact that a tip is "corroborated," that is, can be shown to correspond to an existing state of affairs, is not enough. The corroboration must be of a kind that suggests that the informant has specific knowledge not widely available or that adds some additional, independent reason to suspect that the tip is correct.

In this case, the tip consisted of the race, sex, clothing, and location of the individuals. The only facts that the police "corroborated" -- the race, sex, and clothing of the individuals -- were facts available to any casual observer.<sup>5</sup> This was

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<sup>5</sup> The location of the individuals was not corroborated. The informant stated that they were at a bus bay; the officers observed them at the pay telephones. The Government originally maintained that the informant had told the dispatcher that the individuals were at a bus bay. However, the Government conceded, in light of Officer Ray's testimony, that this was incorrect. J.A. at 45. In addition, the officers observed three individuals

precisely the kind of corroboration that White commands is insufficient to create reasonable suspicion.<sup>6</sup> See United States v. Roch, 5 F.3d 894, 898 (5th Cir. 1993) (informant's tip describing person with gun at motel not sufficient); Hardy v. Commonwealth, 11 Va. App. 433, 435, 399 S.E. 2d 27, 29 (1990) (description and name of suspect, along with location, insufficient); See also Ex Parte Barnette, 624 So. 2d 507 (Ala. 1993) (tip containing only "easily obtained facts" but no information that the "general public would not have had" did not constitute reasonable suspicion under White); State v. Bedolla,

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at the telephones, not two. Thus, unlike United States v. Clipper, 973 F.2d 944, 952 (D.C. Cir. 1992), on which the Government relies, the officers in this case did not corroborate all the information provided by the informant.

<sup>6</sup> The Government states that "merely corroborating that the informant is correct about the suspect's location – now or in the future – does not prove the tipster knows what the suspect is carrying." Government's Brief at 26-27 n. 9. Apart from the hyperbolic standard of "proof" that the Government suggests must accompany an anonymous tip, the Supreme Court disagrees with the Government's assertion that predictive details are no more valuable in assessing the reliability of an anonymous tip than static details:

Because only a small number of people are generally privy to an individual's itinerary, it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities. When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop."

White, 496 U.S. at 332.

806 P.2d 588 (N.M. App. 1991) (applying White to tip that drivers of a particular truck were selling drugs at particular motel); Moreland v. State, 418 S.E.2d 788 (1992) (anonymous tip must have predictive aspect to constitute reasonable suspicion); Swanson v. State, 412 S.E. 2d 630, 632 (1991) (tip "that a described person was at a precise location at the time of the call" not sufficient under White); Johnson v. State, 398 S.E. 2d 826, 827 (Ga. App. 1990) (description of men and truck alone insufficient).

In addition to merely confirming these unremarkable facts, the police did not observe any conduct whatsoever that through their training and experience, they believed was suspicious.<sup>7</sup> The only thing the police observed was that the three individuals were standing at the telephones.<sup>8</sup> This observation does not tend

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<sup>7</sup> Thus, this case does not even involve various innocent acts that, taken together, can amount to reasonable suspicion. United States v. Sokolow, 490 U.S. 1, 10 (1989) (holding that, in determining whether reasonable suspicion exists, relevant inquiry is not whether particular conduct is innocent or guilty, but degree of suspicion that attaches to particular types of noncriminal acts); Of course, even aggregating innocent acts does not always constitute reasonable suspicion. United States v. Brugal, \_\_\_ F.3d \_\_\_, 1999 WL 507229 (4th Cir. July 19, 1999); United States v. Sprinkle, 106 F.3d 613, 618 (4th Cir. 1997); United States v. Wilson, 953 F.2d 116, 124-26 (1991).

<sup>8</sup> This case is therefore distinguishable from United States v. Moore, 817 F.2d 1105 (4th Cir. 1987). In Moore, this Court held that the sounding of a burglar alarm provided reasonable suspicion for believing a burglary had occurred and justified the stop of an individual observed in the vicinity of the building shortly after the alarm sounded late at night on dark street where only one officer was present. These facts are not similar to this case. Though the Government contends that the burglar alarm in Moore may have been triggered innocently, it is

to show that the tip was reliable. Contrast United States v. Bold, 19 F.3d 99, 103 (2d. Cir. 1994) (unusual location of the car in the parking lot and darkly tinted windows on car which officer testified were suspicious, in addition to anonymous tip provided reasonable suspicion; United States v. DeBerry, 76 F.3d 884 (7th Cir. 1996) (prior to seizing defendant, officer's observations that defendant took several steps backward, turned slightly to the side, and moved his hands as if he might be about to draw a gun, in addition to anonymous tip, provided reasonable suspicion); United States v. Gibson, 64 F.3d 617, 619 (11th Cir. 1995) (one suspect fled and other turned to officer, faced him, and simultaneously reached behind his back with both hands, in addition to anonymous tip provided reasonable suspicion); State v. Sharpless, 715 A.2d 333, 339 (N.J. Super. 1998) (suspect failed to accede to initial demand that he remove hand from pocket and attempted to walk away).

Moreover, this Court has recently found insufficient reasonable suspicion where "the officers' additional investigation should have allayed their concerns about criminal activity." Brugal, 1999 WL 507229 at \*4. In this case, whatever

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certainly a more reliable indicator of criminal activity than an anonymous tip that an individual possesses a gun. Moreover, the officer in that case testified that he effected the stop based on his own personal observations, including his familiarity with the area. In addition, since Moore did not involve an anonymous tip, it is not governed by the requirements of White.

suspicious the police may have had based on the tip should have been allayed when they arrived at the scene and saw three people peaceably standing at the pay telephones. There was nothing that they observed that tended to corroborate the tipster's belief that the two individuals were armed and certainly nothing that provided the officers with reasonable suspicion to believe that the individuals were armed and dangerous.

**3. The Government's Other Attempt to Justify the Seizure of the Defendant Does Not Support a Finding of Reasonable Suspicion.**

Perhaps recognizing that the evidence presented at the suppression fell fall short of establishing reasonable suspicion, the Government attempts to provide after-the-fact justifications for the seizure of the defendant that were not presented to the district court and are not part of the record. See Fed. R. App. P. 10(a). Therefore, this Court should not consider this "evidence." For example, the Government states that the Capital Heights Metro station is in Prince George's County, a county in which two police officers have been killed in the last decade, according to the newspaper article cited by the Government. See Government's Brief at 3. The Government also states that the Metro station is near Washington, D.C., a city in which five police officers have been killed in the last decade. The articles do not state the proximity of these crimes to the Capital Heights Metro Station.

More importantly, however, the Government introduced no evidence at the suppression hearing about whether XXXXXXXXXXXX or any other officer considered the area in which the Capital Heights Metro Station is located to be a high crime area. In fact, when asked about the area by defense counsel, XXXXXXXXXXXX indicated that he was unfamiliar with the surrounding neighborhood. J.A. at 26.<sup>9</sup> The Court should not permit the Government to attempt to bolster its factual record on appeal. See United States v. Brignoni-Ponce, 422 U.S. 873, 887 n. 11 (1975) (declining to give any weight to the location of a Terry stop in determining whether officer had reasonable suspicion where the officer offered no testimony on this subject); United States v. Sundiata, 3 F.Supp.2d 682, 686 n. 6 (E.D. Va. 1998) (same). Even if, based on the newspaper articles, the Washington, D.C. metropolitan area is deemed to be a "high crime" area, this still does not establish reasonable suspicion. Brown v. Texas, 443 U.S. 47, 52 (1979); Sprinkle, 106 F.3d at 617; Perrin, 45 F.3d 869 at 873 (4th Cir. 1995).

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<sup>9</sup> Thus, this case is unlike Allen v. State, 584 A.2d 1279 (Md. Ct. Spec. App. 1991), a case relied upon the Government. In Allen, the officer testified that the particular intersection where the defendant was seized had "been the source of numerous complaints about drugs and the site of many shootings at least eight of which had resulted in homicides." There is no such testimony in this case.