

# Recent Case Report

## **U.S. v. Hicks**

(7<sup>th</sup> Cir. 2008) \_\_ F.3d \_\_ [2008 WL 2673112]

### **ISSUE**

Did officers have sufficient grounds to detain a suspect based on a 911 call from a man who had furnished the operator with inconsistent information?

### **FACTS**

Hicks went to the home of David Woodbury in Indiana where he pushed his way inside and confronted his girlfriend, Lynn McClendon, who had been spending time with Woodbury. While this was going on, Woodbury went outside and phoned 911 on his cordless phone, saying, "There's a guy beating a woman up in my house." He gave his address and also said the assailant was armed with a handgun and was threatening to shoot the woman. When the 911 operator asked for Woodbury's name, he gave a fake one, "Albert C."

At this point, Woodbury said some things that indicated to the operator that his report might not have been entirely truthful. At first he said he was calling from inside his house, but when the operator said she didn't hear any fighting he said he was standing outside and was calling on a cell phone. When the operator asked for the number of his cell phone, he said he was actually calling on a cordless phone. She then asked him to repeat his name, and this time he gave his true name. Finally, when asked to confirm that the perpetrator had a handgun, Woodbury changed his story and said the assailant was unarmed. The officers who were dispatched to the call were notified that it was a domestic disturbance with an armed suspect.

When they arrived, they located Hicks and Woodbury standing in the driveway of a house nearby. The officers detained Hicks following a short scuffle, after which they pat searched him and discovered a loaded handgun in his pants pocket. As the result, Hicks was charged with being a felon in possession of a firearm.

### **DISCUSSION**

Hicks argued that his detention was unlawful because it was based on "miscommunicated information gleaned from a nearly anonymous and completely uncorroborated tip that contained several inconsistencies." Consequently, he contended that his gun should have been suppressed.

As a general rule, a detention based solely on information from a phone call is lawful only if officers had reason to believe the caller was reliable or that his information was accurate. Although officers and 911 operators can never be sure of these things, it is usually sufficient that there was some indication of reliability based on the various circumstances surrounding the call.

For example, it is usually reasonable believe that a caller is reliable if he exposed himself to identification by, for example, giving the operator his name, phone number, and/or present location. For this reason, it is especially relevant that the caller phoned

911 (as opposed to a non-emergency line) because most people know that 911 calls are automatically traced and recorded.<sup>1</sup> As the California Supreme Court observed, “[M]erely calling 911 and having a recorded telephone conversation risks the possibility that the police could trace the call or identify the caller by his voice.”<sup>2</sup>

Other circumstances that the courts have cited as evidence of a caller’s reliability are as follows:

DETAILS OF INCIDENT: Whether the caller furnished a detailed explanation of what was happening, or whether his report was vague or skimpy.<sup>3</sup>

PERPETRATOR DESCRIPTION: Whether he furnished a sufficiently detailed description of the perpetrator or his vehicle so that officers could be reasonably certain they were detaining the right person.<sup>4</sup>

DEMEANOR: Whether the caller’s manner of speaking—his “tone, demeanor, or actual words”<sup>5</sup>—was consistent with that of someone who was reporting an emergency.<sup>6</sup>

MULTIPLE CALLERS: Whether other callers had provided the same or similar information.<sup>7</sup>

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<sup>1</sup> See *People v. Lindsey* (2007) 148 Cal.App.4<sup>th</sup> 1390, 1398 [“It is unlikely that a caller would phone in a ‘hoax’ when police can travel to the person’s home after receiving only a [911] hang-up call.”]; *U.S. v. Terry-Crespo* (9<sup>th</sup> Cir. 2004) 356 F.3d 1170, 1175 [“[T]he Portland police recorded both of Mr. Domingis’s 911 calls and provided the court with a recording and transcription. Therefore, we do not believe that the same concerns that may have animated the Court to treat *J.L.* as an unreliable, anonymous tip apply here.”]; *U.S. v. Ruidiaz* (1<sup>st</sup> Cir. 2008) \_\_ F.3d \_\_ [2008 WL 2375090] [“[T]he police were well aware of the trace capabilities of the 911 system, so they knew that a caller could be tracked down if he provided false information.”].

<sup>2</sup> *People v. Dolly* (2007) 40 Cal.4<sup>th</sup> 458, 467.

<sup>3</sup> See *People v. Wells* (2006) 38 Cal.4<sup>th</sup> 1078, 1088 [caller’s reliability was enhanced by his “relatively precise and accurate description.”]; *People v. Dolly* (2007) 40 Cal.4<sup>th</sup> 458, 467 [the caller provided “an accurate and complete description of the perpetrator and his location”]; *Lowry v. Gutierrez* (2005) 129 Cal.App.4<sup>th</sup> 926, 939 [a tip’s reliability “depends on its detail”]; *U.S. v. Wheat* (8<sup>th</sup> Cir. 2001) 278 F.3d 722, 732 [“[T]he caller identified the color and make of the vehicle, named the first three letters of its license plate, and gave its location and direction.”]; *U.S. v. Copening* (10<sup>th</sup> Cir. 2007) 506 F.3d 1241, 1247 [“[T]he caller’s detailed description of the QuikTrip events and the individuals involved, as well as their vehicle and its tag number, further bolstered the tip’s reliability.”].

<sup>4</sup> See *Lowry v. Gutierrez* (2005) 129 Cal.App.4<sup>th</sup> 926, 938 [“As in every case involving an anonymous tip the report must contain a sufficient quantity of information to allow the responding officer to be certain she is stopping the ‘right’ suspect.”]; *People v. Lindsey* (2007) 148 Cal.App.4<sup>th</sup> 1390, 1400 [“The caller accurately described the defendant as being a Black man with small ponytails, and correctly identified his location.”]; *US v. Sanchez* (10<sup>th</sup> Cir. 2008) \_\_ F.3d \_\_ [2008 WL 697398] [“Overly generic tips, even if made in good faith, could give police excessive discretion to stop and search large numbers of citizens.”]; *U.S. v. Wheat* (8<sup>th</sup> Cir. 2001) 278 F.3d 722, 731 [the caller must furnish sufficient information “so that the officer, and the court, may be certain that the vehicle stopped is the same as the one identified by the caller.”]; *U.S. v. Copening* (10<sup>th</sup> Cir. 2007) 506 F.3d 1241, 1247 [“[T]he detailed nature of the tip significantly circumscribed the number of people police could have stopped in reliance on it.”].

<sup>5</sup> Quote from *People v. Dolly* (2007) 40 Cal.4<sup>th</sup> 458, 467, fn.2.

<sup>6</sup> See *U.S. v. Terry-Crespo* (9<sup>th</sup> Cir. 2004) 356 F.3d 1170, 1176 [the caller was “laboring under the stress of recent excitement”]; *U.S. v. Joy* (7C 1999) 192 F3 761, 766 [“[A] person is unlikely to fabricate lies (which presumably takes some deliberate reflection) while his mind is preoccupied with the stress of an exciting event.”].

**CORROBORATION:** Whether the responding officers saw or heard something that tended to corroborate the caller's information.<sup>8</sup>

**TIME LAPSE:** Whether the caller was reporting an incident that was now occurring or had just occurred, or whether he was reporting a past incident.<sup>9</sup>

In addition to these circumstances, officers and operators must take into account any circumstances that tend to cast doubt on the caller's report. And here, as noted, there were several: He gave conflicting statements as to his identity, where he was calling from, whether he was calling on a cell or cordless phone, and whether the perpetrator was armed.

And so the court was faced with a dilemma: some of the circumstances indicated the caller was reliable, while others indicated he was flaky. To its credit, the court recognized the importance of providing officers with a practical basis for making a decision in these situations, especially because these types of calls are not uncommon and because they often have life-and-death consequences. As the court pointed out, in situations such as these, operators and officers should not be required to carefully balance the various circumstances before deciding whether to act because that "would unacceptably delay the necessary responses to *all* emergency calls, including genuine ones."<sup>10</sup>

Consequently, the court ruled there is a tie-breaking circumstance: whether the caller was reporting an emergency, or whether he was merely furnishing information about "general criminality." And because Woodbury was reporting an emergency—"There's a guy beating a woman up in my house"—it ruled that the officers had sufficient grounds to detain Hicks and seize his handgun.

## COMMENT

The reliability of anonymous 911 callers was the subject of two other recent cases. In *U.S. v. Casper*,<sup>11</sup> an anonymous caller phoned 911 in Dallas and reported that he had just been assaulted by a man with a gun at a motel. He described the man and his vehicle, a

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<sup>7</sup> See *People v. Dolly* (2007) 40 Cal.4<sup>th</sup> 458, 468 ["The tip's reliability was further enhanced by the tipster-victim's second call to 911"].

<sup>8</sup> See *Illinois v. Gates* (1983) 462 U.S. 213, 244 ["Because an informant is right about some things, he is more probably right about other facts."]; *Florida v. J.L.* (2000 529 U.S. 266, 270 ["[T]here are situations in which an anonymous tip, suitably corroborated, exhibits sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop."]; *U.S. v. Brown* (1<sup>st</sup> Cir. 2007) 500 F.3d 48, \_\_ ["In terms of corroboration, the authorities need not totally eliminate the risk that an informant is providing erroneous information. That would be an unrealistically heavy burden, and the law does not impose it: the police need only act with due diligent to reduce the risk of a mendacious or misguided informant."].

<sup>9</sup> See *People v. Jordan* (2004) 121 Cal.App.4<sup>th</sup> 544, 557 ["In *Florida v. J.L.*, the police officers reached the bus stop approximately six minutes after being [dispatched]."]; *U.S. v. Valentine* (3<sup>rd</sup> Cir. 2000) 232 F.3d 350, 354 ["[T]he officers in our case knew that the informant was reporting what he had observed moments ago, not what he learned from stale or second-hand sources. . . . So the officers could expect that the informant had a reasonable basis for his beliefs."]; *U.S. v. Wheat* (8<sup>th</sup> Cir. 2001) 278 F.3d 722, 731 ["The time interval between receipt of the tip and location of the suspect vehicle [goes] principally to the question of reliability"].

<sup>10</sup> **NOTE:** The court also pointed out the following: "The danger posed by not quickly responding to a 911 emergency call is reflected in the case of one overly-skeptical 911 operator who was prosecuted for doubting and refusing to order a response to a genuine emergency report." Citing *The Detroit News*, January 19, 2008.

<sup>11</sup> (5<sup>th</sup> Cir. 2008) \_\_ F.3d \_\_ [2008 WL 2779268].

white Ford Ranger with Illinois plates. When officers pulled into the motel's parking lot, they saw a man in a pickup truck that matched the description. The man, identified as Casper, admitted he had a gun in the truck. So after officers seized it, they searched the truck incident to the arrest on the gun charge and found methamphetamine and sales paraphernalia. It turned out that the call was a hoax, but because the caller had phoned 911 the officers were able to locate him.

Nevertheless, Casper argued that the detention was unlawful because, from the officers' perspective at the time they detained him, the caller was nothing more than an anonymous informant whose information had not been corroborated. But, in a close decision, the court ruled there were sufficient grounds for the detention mainly because the caller had phoned 911 and had reported a serious crime that had just occurred. Said the court, "Based on the captured telephone number and the victim status of the caller, the government has established some reliability and credibility for the instant informer, thereby creating reasonable suspicion."

The court also made the following observation that may be helpful to prosecutors in such cases: "Instant caller identification is so pervasive today that no one fails to grasp that the police, who have long been able to trace a call, are able to capture the number and initiate a trace."

In the second case, *U.S. v. Torres*,<sup>12</sup> a taxi driver phoned 911 in Philadelphia and said he was following a man who, while pumping gas at a service station, had brandished a handgun at a "bum" who had tried to sell him a rose. Although the taxi driver was technically anonymous (the 911 operator did not ask for his name) the court pointed out there were several things about his call that tended to demonstrate his reliability.

For one thing, he told the operator he was driving "a green cab," and he gave her the name of his company. Thus, said the court, he "could be found if his tip proved false." In addition, he conveyed "a detailed account of the crime he had witnessed seconds earlier, and he provided the operator with "a stream of information meant to assist officers in the field," including the route they were taking and the "make, model, and license plate number" of the suspect's car. Consequently, the court ruled that the officers "had reasonable articulable suspicion sufficient to justify [the car stop]." POV

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<sup>12</sup> (3<sup>rd</sup> Cir. 2008) \_\_F.3d\_\_ [2008 WL 2813035].