

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2013 AP 001684 CR
Circuit Court Case No. 12 CT 429

STATE OF WISCONSIN,

Plaintiff-Respondent.

v.

MARY J. KAMUCHEY,

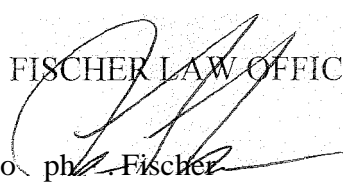
Defendant-Appellant.

ON APPEAL FROM AN ORDER OF THE TRIAL COURT'S DENIAL OF
SUPPRESSION OF EVIDENCE, IN THE CIRCUIT COURT FOR JEFFERSON
COUNTY, BRANCH III, THE HONORABLE JACQUELINE R. ERWIN, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Respectfully submitted,

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STATEMENT OF THE ISSUE

Whether law enforcement possessed the requisite reasonable suspicion to conduct a stop of the Defendant's vehicle based solely on the information provided by a citizen informant.

STATEMENT ON ORAL ARGUMENTS

Defendant is not requesting that this Court hear oral arguments on the issues presented.

STATEMENT ON PUBLICATION

Defendant takes no position on the publication of the Court's decision.

STATEMENT OF THE CASE

On October 24th, 2012, the Defendant was arrested on suspicion of operating her motor vehicle while intoxicated. The officer observed the Defendant's vehicle in the parking lot of the McDonalds in Watertown, Wisconsin. The officer had received a call from dispatch indicating that recently a female patron in the drive-thru was being argumentative and refused to take her change. It was reported that the driver smelled of an intoxicant. The caller believed the driver to be intoxicated. (Appendix A, pg 6)

The Defendant's vehicle pulled out of the parking lot and proceeded through the intersection near the McDonalds. Law enforcement got behind the vehicle based upon the description of the vehicle by the caller. The officer called the vehicle's registration into dispatch and was advised that the driver's plates were expired with no vehicle information associated with them. Based upon this information, the officer conducted a traffic stop. While this was occurring, dispatch advised that they had made a mistake on the registration. (Appendix A, pgs. 7-9)

Officer Leffler approached the Defendant's vehicle and made contact with the Defendant. The officer indicated that she was able to smell a strong odor of an intoxicant while speaking with the Defendant and subsequently asked her to get out of the vehicle. The officer noticed slurred speech and bloodshot eyes. (Appendix A, pg. 12)

Law enforcement subjected Ms. Kamuchey to field sobriety tests. She performed the horizontal gaze nystagmus test, the walk and turn test, the one leg stand test, the backwards counting test and the alphabet test. Officers allege to have seen clues on each

of the tests. The Defendant was given the portable breath test which registered a .176 at which time she was placed under arrest. (Appendix A, pgs. 13-18)

The Defendant was charged by Criminal Traffic Complaint on October 30¹\ 2012. (Appendix B) She made an initial appearance on November 5th and entered a plea of not guilty. Her attorneys filed a Motion to Suppress - Unlawful Stop and Detention on November 16th, 2012. (Appendix C)

A hearing was held on the Defendant's Motion to Suppress on December 6th, 2012. After hearing the testimony of the arresting officer and the arguments of counsel, the Court denied the motion of the Defendant. Defendant subsequently entered a no contest plea to the charge and was found guilty. Sentence was stayed for the purpose of the appeal.

ARGUMENT

- I. THE STOP OF THE DEFENDANT'S VEHICLE WAS MADE WITHOUT REASONABLE SUSPICION AS REQUIRED BY STATE AND FEDERAL LAW.

At the hearing on the 6th of December, Officer Leffler testified initially that the basis for the stop was the belief that the vehicle was not registered. (Appendix A, pg 20) The Court, due to the fact that this mistaken belief had been dispelled prior to contact with the Defendant, took the registration mistake off the table as any part of the basis for the stop. (Appendix A, pgs. 37-38) The officer then testified that she relied upon the dispatch call reporting a call from a McDonald's employee reporting that a customer in the drive-thru was refusing to take her change, being argumentative and "then they smelled or believed that she was intoxicated." (Appendix A, pg. 4.) This was the basis for the stop of the Defendant's vehicle.

There has been a fairly significant amount of law on the issue of reasonable suspicion based upon information provided by a citizen informant. As in all seizure cases, the Court must find that the officer possessed a reasonable, articulable suspicion based upon the totality of the circumstances that a crime had been committed. Terry v. Ohio, 392 US 1 (1968). Reasonable suspicion is a common sense test and presents a lower burden than the probable cause necessary to justify and arrest or a search warrant. State v. Waldner, 206 Wis 2d 51, 56, 556 NW 2d 681 (1996). In considering the totality of the circumstances, our focus is upon the reasonableness of the officers' actions in the situation facing them. State v. Williams, 2001 WI 21, 241 Wis 2d, 623 NW 2d 106.

In Ms. Kamuchey's case, the stop is based entirely on the tip from the citizen informant. While it is helpful to the State's case that the informant was identifiable as a McDonalds employee, it is not dispositive. It is important to note that at the time of the stop, the officer did not know the identity of the informant nor was she aware if dispatch knew the identity of the informant. This issue was addressed in the case of State v. Sisk, 247 Wis. 2d 443, 634 NW 2d 877 (Wis. App 2001). In Sisk the Court opined that it was not necessary to show that the informant had a history of reliable reporting or that the informant witnessed the operation of the motor vehicle. What is crucial from Sisk, however is that the officer in that case independently verified the information provided by the informant. The Sisk court clearly indicated a tip from an informant is not enough. It must still be coupled with the reasonable suspicion that criminal activity may be afoot. id., 247 Wis 2d at 450.

The Courts also addressed the issue of a tip by an informant in the case of State v. Powers, 275 Wis 2d 456, 685 NW 2d 869 (Wis App 2004). In that case, the Defendant was called in by a clerk at an Osco Drug store. The clerk reported that an intoxicated man was in the store. Police responded and saw the man come out of the store with a case of beer and appeared unsteady. The man got into his vehicle and pulled out of the parking lot before being pulled over. The Court upheld the Circuit Court's ruling denying the Defendant's motion to suppress. The Court found that the officer could rely on the tip from the clerk. Again, however, what is crucial is that the Court ruled that "the information given by the citizen informant and the police officer's corroboration of the

information before the investigatory stop were sufficiently reliable to provide the officer with the reasonable suspicion of criminal activity. Powers, 275 Wis 2d 456, 467-468.

In the case at bar, the clerk at the McDonalds called law enforcement and advised that she had a person at the drive through that smelled an intoxicant and was argumentative. The Defendant does not ask the Court to discount this information based upon there being no showing of reliability by this clerk. The case law addresses this. The Defendant contests that the content of her reporting was sufficient to establish reasonable suspicion. The fact that the Defendant smelled of an intoxicant is in no way sufficient to establish reasonable suspicion because, certainly, a person can have one drink and have breath that smells of alcohol. If this was the test for reasonable suspicion, law enforcement would be able to pull over anyone that walks out of a bar.

The only other thing that the clerk stated was that the Defendant was argumentative. Defendant argues that it was wholly inappropriate that the officer rely on that to stop the Defendant.

In the Powers case, officers made the very wise decision to allow the Defendant to walk out of the store and get into his vehicle before making the stop thus allowing law enforcement to obtain corroborating information. Police in Mr. Roy's case had no such corroborating information. This shortcoming combined with the extremely vague and limited information given by the clerk leaves the officer well short of the requisite reasonable suspicion to make the stop.

The State, in front of the Judge Erwin, relied heavily on the 2001 Wisconsin Supreme Court case of State v. Rutzinski, 241 Wis 2d 729, 623 NW 2d 516 (Wis. 2001).

While in Rutzinski, the court relied on the call of an unidentified citizen informant, there were circumstances that existed that distinguishes that case from this one. Most importantly, the call to dispatch did not simply refer to indications of intoxication. Rather, the call specifically referenced dangerous and erratic driving. It is on this basis that the Court found that Rutzinski met the Adams-White test for using an informant for reasonable suspicion. This test requires that there be "sufficient indicia of reliability to justify the investigatory stop." Alabama v. White, 496 US 325, 110 S. Ct. 2412, 110 L. Ed. 2 301 (1990); Adams v. Williams, 407 US 143, 92 S. Ct. 1921, 32 L. Ed. 612. The Court in Rutzinski, made a lot of the fact that the "erratic driving as reported posed an imminent threat to public safety." Rutzinski, 241 Wis. 2d at 751. The Court opined that "the exigency strongly weighs in favor of immediate police investigation." id., at 752. What is noteworthy from that decision is that the Court wrote "while allegations cannot form the sole basis for an investigative stop, they certainly must be considered when examining the totality of the circumstances surrounding the police contact." Id., at 751. This, in no unclear terms, requires that there be something more than the tip from the informant.

With Ms. Kamuchey's case, there is nothing but the tip from the McDonalds employee and the tip is not in any way sufficient to establish probable cause that the driver is intoxicated. As stated previously, if an odor of an intoxicant at 2 a.m. was sufficient to establish reasonable suspicion, law enforcement would be able to pull people over carte blanche.

CONCLUSION

The stop of the Defendant's vehicle required that reasonable suspicion under State and Federal Constitutional Law and corresponding statute. It did not. The information that the officer received prior to making the stop was insufficient to perform the stop. The Officer had the obligation to perform additional investigation that did not include the infringement on the personal liberty of the Defendant until such time as he obtained reasonable suspicion to do so. The decision of the Circuit Court should be overturned and the case should be returned to the Court for further proceeding consistent with the Appellate Court's ruling.

CERTIFICATION

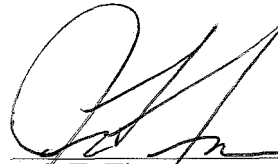
I hereby certify that this brief conforms to the rules contained in § 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,356 words and 16 pages.

I also certify that an electronic copy of this brief has been submitted along with the brief pursuant to section 809.19(12) of the Wisconsin Statutes.

Dated this 3th day of August, 2013 at Watertown, Wisconsin.

Respectfully submitted,

FISCHER LAW OFFICE

A handwritten signature in black ink, appearing to read "Joseph F. Fischer", written over a horizontal line.

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