

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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Case No. 2013AP001684-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 OF PLAINTIFF-RESPONDENT

By: JEFFREY M. SHOCK
Assistant District Attorney
State Bar #1055164

Attorney for Plaintiff-Respondent

District Attorney's Office
Jefferson County, Wisconsin
320 South Main Street
Room 225
Jefferson, Wisconsin 53549
(920)-674-7220

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STATEMENT ON PUBLICATION

Plaintiff-Respondent (hereinafter “State”) agrees that this appeal, as a one-judge appeal, does not qualify for publication.

STATEMENT ON ORAL ARGUMENT

The State stands ready to provide oral argument should the Court deem oral argument to be necessary.

STATEMENT OF FACTS

On October 24, 2013 at approximately 1:58 a.m., Officers Leffler and Stuetngen of the Watertown Police Department were dispatched to the McDonald's located at 625 South Church Street, in the City of Watertown, Jefferson County, Wisconsin. Def. App. Appendix C, pp. 3-6. Dispatch advised that a McDonald's employee reported that a female subject had come through the drive-thru who was argumentative and refused to take her change. *Id.* at p. 4. The employee reported that they smelled or believed the subject was intoxicated. *Id.* Dispatch advised the subject was driving a silver Subaru. *Id.* at p. 5. Officer Leffler responded to the McDonald's. *Id.* When she arrived in the area, Officer Leffler observed a silver Subaru sitting at the stoplight on South Church Street at Bernard Street, which is a few hundred yards from the McDonald's restaurant drive-thru. *Id.* Officer Leffler confirmed with dispatch, who was still in contact with the McDonald's employee, that the silver Subaru at the stoplight was the suspect vehicle. *Id.* at pp. 6-7. Dispatch confirmed that the McDonald's employee reported that the suspect vehicle was at the stoplight. *Id.*

Officer Stuetngen, who arrived prior to Officer Leffler, informed Officer Leffler that he saw the vehicle leave McDonald's. *Id.* at p. 7. Officer Stuetngen got behind the silver Subaru and had dispatch run a check of the registration. *Id.* at p. 8. Dispatch advised that the vehicle's registration was expired. *Id.* The traffic light turned green, and Officer Stuetngen activated his emergency lights to conduct a traffic stop. *Id.* The vehicle pulled over, and dispatch advised that they had run the wrong plates, and that the vehicle's registration was actually valid. *Id.* At this point, Officer Leffler approached the

vehicle and made contact with the driver, who was later identified as Mary Kamuchey, the appellant herein. *Id.* at pp. 8-9.

Upon making contact with the appellant, who was the sole occupant of the vehicle, Officer Leffler observed that the appellant's eyes were bloodshot and glassy, and that her speech was slowed and slurred. *Id.* at p. 12. Officer Leffler also could smell an odor of intoxicants emanating from the vehicle. *Id.* The appellant started to smoke a cigarette, and Officer Leffler told her to stop. *Id.* at pp. 12-13. The appellant ignored Officer Leffler's instructions to stop, at which point Officer Leffler had the appellant get out of her vehicle and administered Standard Field Sobriety tests and a preliminary breath test. *Id.* at pp. 13-19. Eventually, the appellant was arrested for Operating While Intoxicated, 3rd Offense. *Id.*

The circuit court refused to consider any of the facts related to the initial stop due to the erroneous report that the appellant's license plate was expired. *Id.* at pp. 37-38. However, the court still denied the appellant's motion to suppress finding that the tip by an identifiable citizen was sufficient to support the stop. *Id.* at p. 57.

STANDARD OF REVIEW

The reasonableness of a traffic stop is a question of constitutional fact. *State v. Post*, 2007 WI 60, ¶8, 301 Wis.2d 1, 733 N.W.2d 634. A question of constitutional fact is a mixed question of law and fact. *Id.* The circuit court's findings of fact are reviewed under the clearly erroneous standard while the application those facts to constitutional principles is reviewed independently. *Id.*

ARGUMENT

I. THE OFFICER HAD REASONABLE SUSPICION THAT THE DEFENDANT WAS OPERATING A MOTOR VEHICLE WHILE INTOXICATED BASED ON A TIP FROM A RELIABLE AND CREDIBLE CITIZEN INFORMANT.

The appellant argues that the officer could not rely on the tip from the citizen informant standing alone as the basis for the traffic stop. An anonymous informant's tip can provide reasonable suspicion for a *Terry* stop. *See State v. Rutzinski*, 2001 WI 22, ¶ 3, 241 Wis. 2d 729, 623 N.W.2d 516. In *Rutzinski*, an unidentified motorist following a black pickup truck reported to law enforcement that the truck was weaving within its lane, varying its speed, and tailgating. *Id.* at ¶ 4. An officer observed a truck matching the caller's description pass his location and began to follow the truck. *Id.* at ¶ 6. The caller advised that he or she was in the vehicle ahead of the truck, and that the Officer was following the correct truck. *Id.* Although the Officer did not independently observe any signs of erratic driving, he conducted a traffic stop of the truck and eventually arrested the driver for operating while intoxicated. *Id.* at ¶¶ 7-8. The defendant moved to suppress evidence obtained as a result of the stop arguing that the stop was unreasonable because the unidentified motorist's call was not a sufficiently reliable or credible basis upon which to justify the stop. *Id.* at ¶ 8.

In determining whether this stop was reasonable, the court looked at different citizen informant cases and how credibility and reliability of citizen informants is measured. *Id.* at ¶¶ 17 – 29. The first case the court reviewed was *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921 (1972). In *Adams*, an informant who the police officer personally

knew and who had provided the officer reliable information in the past informed the officer that there was an individual in a nearby vehicle that had drugs and a gun. *Adams*, 407 U.S. at 144-45, 92 S.Ct. at 1922. The officer located the individual and conducted an investigative stop and pat-down search but took no action to independently corroborate the defendant's tip. *Id.* at 145, 92 S.Ct. at 1922-23. The *Rutzinski* court stated, "*Adams* illustrates that in some circumstances, an informant's veracity can afford a tip with sufficient reliability to justify an investigative stop . . . if there are strong indicia of the informant's veracity, there need not necessarily be any indicia of the informant's basis of knowledge." *Rutzinski*, 2001 WI 22, ¶ 21.

Switching gears, the *Rutzinski* court turned to *Alabama v. White*, 496 U.S. 325, 327, 110 S.Ct. 2412, 2414-15 (1990), where an anonymous informant provided tips that were corroborated through independent police investigation, and that investigation showed the informant possessed "inside information." In *White*, the court stated, "if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion that would be required if the tip were more reliable." *White*, 496 U.S. at 330, 110 S.Ct. at 2416. The *Rutzinski* court stated:

White illustrates that in cases where the police receive a tip from an unidentifiable informant, the tip nonetheless may be deemed reliable if it contains 'inside information' or a similar verifiable explanation of how the information came to know of the information in the tip, which the police in turn independently corroborate. Stated another way, if a tip contains strong indicia of an informant's basis of knowledge, there need not necessarily be any indicia of the informant's veracity.
Rutzinski, 2001 WI 22, ¶ 25.

The final case the *Rutzinski* court examined was *Florida v. J.L.*, 529 U.S. 266, 268, 120 S.Ct. 1375, 1377 (2000), in which police received an anonymous telephone call

reporting that a young black male standing at a bus stop and wearing a plaid shirt was carrying a gun. The police proceeded to the bus stop and, without independently observing any suspicious behavior, proceeded to perform an investigative stop of the subject. *Id.* As a result, the police discovered that the subject was carrying a concealed weapon and was under the age of 18. *Id.* at 269, 120 S.Ct. at 1377. The Supreme Court found this stop to be unconstitutional. *Id.* at 268, 120 S.Ct. at 1377. The Court stated that an anonymous tip that consists of simply identifying the location and appearance of a suspect has limited reliability. *Id.* at 272, 120 S.Ct. at 1379. The Court found that what is required to satisfy the reasonable suspicion standard is that the anonymous tip “be reliable in its assertion of illegality, not just its tendency to identify a determinate person.” *Id.*

In *Rutzinski*, the defendant tried to argue that the unidentified caller was analogous to the anonymous caller in *Florida v. J.L. Rutzinski*, 2001 WI 22, ¶ 30. The Wisconsin Supreme Court rejected this argument citing many reasons why *Rutzinski* was different. *Id.* at ¶¶ 31-38. First, the informant in *Rutzinski* exposed himself to being identified by telling authorities that he or she was in the vehicle ahead of the suspect vehicle. *Id.* at ¶ 32. The court noted that many jurisdictions have held unidentified tips to be reliable when the informant gives enough information that his or her identity can be determined. *Id.* Second, the informant provided enough information to determine the basis of his or her knowledge. *Id.* at ¶ 33. The court noted:

While many people may have been able to identify Rutzinski’s vehicle and the general direction in which it was traveling, only a person contemporaneously observing the

vehicle or possessing ‘inside information’ . . . would have been able to indicate where the vehicle was located and the setting surrounding the vehicle at the given time.
Id.

Finally, the court considered that Rutzinski posed an imminent threat to the public’s safety. *Id.* at ¶ 34. The court considered that given the danger to the public that drunk driver’s pose, “the informant’s allegations suggesting that Rutzinski may have been intoxicated supplemented the reliability of the tip and further justified Officer Sardina’s investigative stop.” *Id.* The court held that unlike the stop in *J.L.*, the informant’s tip in this case contained sufficient indicia of reliability and posed a danger to public safety that outweighed the minimal intrusion to the defendant that the stop presented. *Id.* at ¶ 37.

This case is analogous to *Rutzinski* in that we have a citizen informant whose identity was not known to the officer who performed the traffic stop. However, the arresting officer knew she might be able to ascertain the identity of the informant as she knew it was a McDonald’s employee that was working the drive-thru and called shortly after the defendant came through as a customer of the drive-thru. Def. App. Appendix C, pp. 4-5. Also like *Rutzinski*, the informant provided enough information to determine the basis of her knowledge. Officer Leffler testified that the informant remained on the phone with dispatch and was relaying information regarding the suspect vehicle’s location to dispatch as Officer Leffler was responding to the call. *Id.* at pp. 6-7. As Officer Leffler arrived in the area, she saw a silver Subaru at the stoplight, and the informant verified that this was the same vehicle they were calling about. *Id.* Finally, the informant in this case reported that the appellant was argumentative, smelled of alcohol, and that she

believed the appellant was intoxicated. *Id.* at pp. 4-5. Like *Rutzinski*, this is exactly the kind of exigent circumstance in which concerns for public safety may justify the minimal intrusion that a traffic stop would entail.

Appellant indicates that cases such as *State v. Powers*, 2004 WI App 143, 275 Wis. 2d 456, 685 N.W.2d 869 require that tips from reliable citizen informants must be supplemented by a police officer's corroboration of said tip to support reasonable suspicion for a stop. Def.App.Brief at 10. The State does not believe that *Powers* requires police corroboration of reliable citizen informant tips to support reasonable suspicion.¹ However, *Powers* is instructive for a few reasons. First, like the informant in this case, in *Powers*, the citizen informant did not observe bad driving by the defendant. *Id.* at ¶ 12. Second, the citizen informant was found to be reliable because he could be identified, and he made contemporaneous observations of the defendant as he was in the store. *Id.* at ¶¶ 10-13. Finally, the officer was allowed to rely on the clerk's assessment that Powers was drunk. *Id.* at 13. Therefore, *Powers* is instructive, because like the citizen informant in *Powers*, the citizen informant in our case could be identified, made contemporaneous observations that could be corroborated by Officer Leffler, and the citizen informant could give a reliable opinion as to whether the appellant was drunk.

¹ To be precise, in *Powers*, the Court of Appeals states, "Where a tip has a high degree of reliability . . . and the police independently verify the information before conducting the stop, the resulting stop is supported by reasonable suspicion." *Id.* at ¶ 14 (*citations omitted*). The court continues, "Other jurisdictions have held that independent verification of an informant's tip is a relevant factor in assessing whether there was reasonable suspicion to conduct an investigative stop." *Id.* Given this language, the State believes that independent verification of a citizen informant's tip is a factor that is considered in assessing reasonable suspicion rather than a requirement to support reasonable suspicion.

In determining what facts are sufficient to authorize police to stop a person, the court must take the totality of the circumstances into account. *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681, 685 (1996). In considering the totality of the circumstances, the court focuses upon the reasonableness of the officers' actions. *State v. Williams*, 2001 WI 21, ¶ 23, 241 Wis. 2d 631, 623 N.W.2d 106. The courts apply a common sense test that considers what a reasonable police officer would reasonably suspect in light of his or her training and experience. *Waldner*, 206 Wis. 2d at 56, 556 N.W.2d at 684.

Therefore, this court must not only consider the citizen informant's tip as the basis for the stop but the "totality of the circumstances." The appellant had just gone through the drive-thru of McDonald's at 1:58 a.m. Def. App. Appendix C, p. 4. Officer Leffler testified that in her training and experience, 1:58 a.m. is bar time, and they receive a lot of calls from McDonald's around that time regarding intoxicated people that go through the drive-thru. *Id.* at p. 10. When Officer Leffler learned that the appellant's license plate was valid, having a reliable and credible tip from a citizen information that the appellant was drunk and operating a motor vehicle, should Officer Leffler then have just let the appellant continue driving, fully aware that the appellant might pose a danger to those on the road? The State believes not. The State believes that Officer Leffler was allowed to make contact with the appellant to determine whether she showed signs of impairment.

CONCLUSION

Reasonable suspicion existed to support the stop as argued above. Because it did, decision of the trial court denying the Kamuchey's motion to suppress should be affirmed by this Court.

Dated this _____September, 2013.

Respectfully submitted,

JEFFREY M. SHOCK
Assistant District Attorney,
Jefferson County
State Bar No. 1055164

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s.809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 11 pages with 2,341 words.

In addition, I hereby certify that an electronic copy of this brief has been submitted pursuant to §809.19(12) and that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this ____ day of September, 2013.

Respectfully submitted,

JEFFREY M. SHOCK
Assistant District Attorney,
Jefferson County
State Bar No. 1055164