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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2015AP000332
Columbia County Circuit Court Case Nos. 2014TR001077
2014TR001254

COLUMBIA COUNTY,

Plaintiff-Respondent,

v.

JESSICA N. JOHNSON

Defendant-Appellant.

AN APPEAL FROM THE JUDGEMENT OF CONVICTION AND THE DECISION OF THE TRIAL COURT DENYING THE DEFENDANT-APPELLANT'S MOTION FOR SUPPRESSION OF EVIDENCE IN THE CIRCUIT COURT FOR COLUMBIA COUNTY, THE HONORABLE DANIEL S. GEORGE, JUDGE, PRESIDING

THE BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT JESSICA N. JOHNSON

By: Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Piel Law Office
500 W. Silver Spring Drive
Suite K-200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

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STATEMENT OF THE ISSUES

Did the anonymous tip coupled with the observations of Deputy Kaschinske rise to the level of suspicion to continue the detention requiring Ms. Johnson to perform field sobriety tests?

The trial court answered: Yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Because this is an appeal within Wis. Stats. Sec. 752.31(2), the resulting decision is not eligible for publication. Because the issues in this appeal may be resolved through the application of established law, the briefs in this matter should adequately address the arguments; oral argument will not be necessary.

STATEMENT OF THE CASE/FACTS

The defendant-appellant, Jessica N. Johnson (Ms. Johnson) was charged in the Columbia County Circuit Court with having operated a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration contrary to Wis. Stat. §346.63(1)(a) and (b) occurring on February 23, 2014. On March 20, 2014, Ms. Johnson, by counsel, entered a not guilty plea to the charges, and filed a motion for suppression of evidence challenging the detention and arrest of Ms. Johnson. A hearing on said motion was held on June 6, 2014. The court issued an oral ruling on said motion on July 30, 2014, denying the defendant's motion, the Honorable Daniel S. George, judge, Columbia County Circuit Court presiding. (R. 43:1-8). A written Order denying the defendant's motion was filed on August 6, 2014. (R.16:1/ A.App. 1).

A jury trial was held on November 13, 2014. The jury found Ms. Johnson guilty of both charges.

On February 11, 2015, the defendant timely filed a Notice of Appeal. The appeal stems from the Court's Order denying Ms. Johnson's motion for suppression of evidence.

Facts in support of this appeal were adduced at the motion hearing held on June 6, 2014 and were introduced through the testimony of Columbia County Sheriff Deputy Gregory Kaschinske. Deputy Kaschinske testified that he was working as a deputy on February 23, 2014, when he received a dispatch regarding an anonymous driving complaint. (R.42:6/ A.App. 2). The complaint indicated that a vehicle last seen on Highway 22 and Attoe Road was traveling southbound at ninety miles per hour. (R.42:7/ A.App. 3). Deputy Kaschinske was in the area and when he arrived at Highway 22 on Highway 60, he immediately proceeded southbound to try to catch a vehicle he saw in the distance proceeding south on Highway 51. Dispatch indicated that the vehicle was a blue van, and the driver had allegedly opened the door and vomited. (R.42:11/ A.App. 7). As Deputy Kaschinske was trying to catch up to the vehicle in the distance, he observed a blue van parked in the "for sale parking area of Johnson Sales". (R.42:8/ A.App. 4). According to Deputy Kaschinske, the vehicle was running and the headlights were on. ***Id.*** Dispatch was given a license plate number, and Deputy Kaschinske observed that the plate of the vehicle in the lot matched that of the number given to dispatch. (R.42:9/ A.App. 5). Deputy Kachinske activated his emergency lights

and pulled into the lot to investigate the vehicle. (R.42:10, 19-20/ A.App. 6,12-13).

When Ms. Johnson opened the door, Deputy Kaschinske observed a strong smell of intoxicant coming from inside the vehicle. (R.42:11/ A.App. 7). However, Deputy Kaschinske observed no signs of vomit in or on the vehicle. ***Id***. In their conversation, Ms. Johnson told Deputy Kaschinske that she was at a fire department event with her husband and that she had consumed some alcohol. (R.42:12/ A.App. 8). Deputy Kaschinske then asked Ms. Johnson to exit the vehicle to perform field sobriety tests. (R.42:14/ A.App. 9). It was cold outside, and Ms. Johnson said she only had a coat, no gloves or hat. ***Id.***

Deputy Kaschinske performed the horizontal gaze nystagmus test (HGN) outside the vehicle, and observed six of six clues. Kaschinske observed that during the HGN test Ms. Johnson was exhibiting signs of shaking due to the cold, and because of this Kaschinske transported Ms. Johnson to the Arlington Fire Department to perform the remainder of the tests. (R.42:16/ A.App. 10). After transporting Ms. Johnson to the fire department and performing the additional tests, Kaschinske

arrested Ms. Johnson for operating a motor vehicle while impaired.

On cross examination, Kaschinske conceded that the original complainant did not identify the driver of the vehicle as a female. (R.42:17/ A.App. 11). Furthermore, he conceded that he did not observe any erratic or deviant driving, and after watching the video of the incident, testified that he did activate his lights as he entered parking lot. (R.42:19-20/ A.App. 12-13). Deputy Kaschinske also agree that the odor of intoxicant simply indicates someone had consumed alcohol, and does not necessarily indicate impairment. (R.42:20/ A.App. 13). Furthermore, Ms. Johnson did not exhibit any motor coordination problems, and her speech was unimpaired. (R.42:21/ A.App. 14). More importantly, Deputy Kachinske volunteered that the only reason he had Ms. Johnson perform field sobriety tests was "based on the odor I could smell from her and inside the vehicle and the fact that she told me she had been drinking earlier." ***Id***. However, Kachinske conceded that he never asked Ms. Johnson when she started and stopped drinking and never inquired as to how much alcohol Ms. Johnson had consumed. ***Id.*** By written argument, Ms. Johnson, by counsel, contended that Deputy Kaschinske did not have the requisite

level of suspicion to detain Ms. Johnson initially and did not have the requisite level of suspicion to continue the detention by having Ms. Johnson exit the vehicle for field sobriety testing. (R.15:1-2/ A.App. 21-22). The County by written argument claimed that the initial and continued detention were justified. (R.14:1-2/ A.App. 19-20).

On July 30, 2014, the court issued an Oral ruling denying Ms. Johnson's motion for suppression of evidence. The court found that there was an anonymous call alerting the deputy to Ms. Johnson's vehicle. (R.43:4/ A.App. 15). The court found that after making contact with Ms. Johnson, the deputy observed a strong odor of intoxicant, and the defendant acknowledged consuming alcoholic beverages. (R.43:5/ A.App. 16). The court found that even without the anonymous call, the deputy had reasonable suspicion to approach the vehicle. The court pointed to the "circumstances of the timing, time of day and location" of the vehicle in a closed business. (R. 43:6-7/ A.App. 16-17). The court found that "everything was able to be corroborated by the officer in discovering this vehicle" and denied Ms. Johnson's motion. (R.43:6/ A.App. 16). However, while the type of vehicle and plate number were corroborated, there is absolutely nothing in the record that corroborated the anonymous caller's

statement that the driver was a female, speeding or vomited out of the vehicle.

A written Order denying said motion was filed on August 6, 2014. Ms. Johnson timely filed a Notice of Appeal on February 11, 2015.

STANDARD OF REVIEW

On appeal, the circuit court's factual findings are reviewed pursuant to the clearly erroneous standard. The appellate court will uphold those factual findings unless they are clearly erroneous. ***State v. Popke,*** 2009 WI 37, ¶10, 317 Wis.2d 118, 765 N.W.2d 569. However, applying those facts to constitutional principles is a question of law that is reviewed *de novo.* ***Id.***

ARGUMENT

A. THE ANONYMOUS TIP COUPLED WITH THE ODOR OF INTOXICANT DID NOT RISE TO THE LEVEL OF SUSPICION NECESSARY TO EXTEND THE DETENTION OF MS. JOHNSON FOR FIELD SOBRIETY TESTS

Temporarily detaining an individual during a traffic stop constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment. ***Whren v. United States,*** 517 U.S. 806, 809-10 (1996), ***State v. Post***, 2007 WI 60, ¶10, 301 Wis.2d 1, 733 N.W.2d 634. The Fourth Amendment to the United States

Constitution and Article 1 Section 11 of the Wisconsin Constitution protect individuals against unreasonable searches and seizures. Thus, a traffic stop is lawful only if it is reasonable under Fourth Amendment jurisprudence. ***Id.*** at 810. If an officer has probable cause to believe a traffic violation has occurred, an officer may conduct a traffic stop. ***State v. Gaulrapp,*** 207 Wis.2d 600, 558 N.W.2d 696 (Ct.App. 1996). An investigative detention must be supported by a reasonable suspicion grounded in specific articulable facts and reasonable inferences from those facts that an individual is or was violating the law. ***State v. Colstad,*** 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. An inchoate and unparticularized hunch will not suffice. ***State v. Guzy***, 139 Wis.2d 663, 675, 407 N.W.2d 548 (1987).

Initially, the Court must determine if the initial detention of Ms. Johnson was justified. If so, the court must determine whether during the initial detention, Deputy Kachinske became aware of additional "suspicious factors or additional information that would give rise to, an objective, articulable suspicion that criminal activity [was] afoot…" ***State v. Malone,*** 2004 WI 108, ¶24, 274 Wis.2d 540, 683 N.W.2d 1, (**citing *State v. Betow,*** 226 Wis.2d 90, 94-94, 593 N.W.2d 499 (Ct.App. 1999)). However,

the additional facts must be sufficient to give rise to an articulable suspicion that Ms. Johnson was committing an offense separate from that for which the initial detention made. That is, the additional facts must provide a reasonable suspicion that Ms. Johnson was operating her motor vehicle while impaired.

The initial detention herein was made based on both an alleged anonymous tip and the location of Ms. Johnson's vehicle. The anonymous tip did not provide Deputy Kaschinske with sufficient reasonable suspicion that Ms. Johnson was operating her motor vehicle while impaired.

"In some circumstances, information contained in an informant's tip may justify an investigative stop." ***State v. Rutzinski***, 2001 WI 22, ¶17, 241 Wis.2d 729, 738, 623 N.W.2d 516. In determining whether a tip is sufficient, courts look at the "reliability and content" of the tip. ***Id.*** at ¶¶19-26. "In assessing the reliability of a tip, due weight must be given to: (1) the informant's veracity and (2) the informant's basis of knowledge." ***Id at*** ¶18**.** The court looks at the totality of the circumstances in determining whether a tip rises to the level of reasonable suspicion. Reliability, veracity and basis of knowledge are all

highly relevant factors in determining the value of a tip. ***Alabama v. White***, 496 U.S. 325, 328, 110 S.Ct.2412 (1990).

In determining the veracity and reliability of an informant, it is critical to determine whether the informant is known or anonymous. A known tipster increases the reliability of the tip and corroboration of the details of the tip are not required. ***see Adams v. Williams***, 407 U.S. 143 (1972). "An anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." ***Alabama v. White,*** 496 U.S. 325, at 329, 110S.Ct. 2412, 110 L.Ed.2d 301 (1990).

In ***Rutzinski,*** the court concluded that if the tipster is anonymous, as in this case, the officer must gather sufficient information to corroborate the tip. ***Rutzinski*** at 741. Sufficient corroboration of the information in the tip is essential. A failure to sufficiently corroborate the details of the tip diminishes the tip's value and reliability to such a degree that a seizure based on that information could violate the provisions of the Fourth Amendment.

Recently, in ***Navarette v. California,*** 572 U.S. ____, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014), the court held that under appropriate circumstances, the tip itself could provide sufficient indicia of reliability justifying the stop. In ***Navarette,*** the court

found that an anonymous tip describing a potential drunk driver might provide reasonable suspicion without additional corroboration. The ***Navarette*** court held that a tip reporting erratic driving, weaving all over the roadway, almost causing a collision, running a vehicle off the roadway or driving on the median would provide sufficient reasonable suspicion of intoxicated driving to justify an investigative stop. However, the Court specifically found that "not all traffic infractions imply intoxication." For instance, a speeding or seatbelt violation are "so tenuously connected to drunk driving that a stop on those grounds alone would be constitutionally suspect." ***Id.*** at 1689-1691.

Here, the complainant described a speeding violation, and a person exiting the vehicle and vomiting. However, the anonymous tip provided no description of the person exiting the vehicle. The tip is tenuous at best inasmuch as it did not even provide the sex of the person exiting the vehicle. Furthermore, the report was that the vehicle was speeding. A speeding violation without more would not provide the officer with reasonable suspicion to suspect that the driver was operating the vehicle while impaired. Thus, the tip alone would not have provided Deputy Kaschinske with the requisite level of

suspicion that Ms. Johnson operated her vehicle while impaired justifying the initial detention.

Moreover, after the initial detention, the observations made by Deputy Kachinske did not provide him with sufficient additional articulable suspicion that Ms. Johnson was operating a motor vehicle while impaired thus justifying her continued detention for field sobriety testing. In ***Betow,*** the court held that "[i]f, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun." ***Id.*** at 94-95.

"The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." ***State v. Young,*** 212 Wis.2d 417, 424, 569 N.W.2d 84 (Ct.App. 1997). To meet this test, the officer must show specific and articulable facts, which taken together with rationale inferences from those

facts, reasonably warrant the officer's continued intrusion. ***Terry v. Ohio***, 392 U.S.1, 21, 88 S.Ct. 1868, 20 L. Ed.2d 889 (1968).

Here, Deputy Kaschinske impermissibly and unconstitutionally extended the stop when he asked Ms. Johnson to exit the vehicle to perform field sobriety tests. At that moment, Kaschinske observed an odor of intoxicant. He made no observations of Ms. Johnson's speech, eyes, or motor coordination suggesting that Ms. Johnson was impaired. He made no observations of erratic driving, and no observations that corroborated the anonymous caller's statement that Ms. Johnson was vomiting outside vehicle. This further diminishes the reliability of the anonymous tip inasmuch as Kaschinske acknowledged that he observed no signs of vomiting.

Aside from the vehicle description, Deputy Kaschinske corroborated no details of the tip. The observations of Ms. Johnson after the initial contact did not rise to the level of reasonable suspicion to continue to detain Ms. Johnson for field sobriety testing. Because of the above, the continued detention of Ms. Johnson violated her right to be free from unreasonable seizures thus violating her rights under both the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution.

CONCLUSION

Because Deputy Kaschinske did not possess sufficient reasonable suspicion to extend the detention of Ms. Johnson for field sobriety testing, the trial court erred in denying her motion for suppression of evidence. The Court should reverse the trial court's ruling and vacate the judgment of conviction.

Dated this 15th day of June, 2015.

Respectfully Submitted

Piel Law Office

_____

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:
500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this brief and appendix conform to the rules contained in secs. 809.19(6) and 809.19(8) (b) and (c). This brief has been produced with a proportional serif font. The length of this brief is 22 pages. The word count is 4153.

Dated this 15th day of June, 2015.

Respectfully Submitted

Piel Law Office

_____

Walter A Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

Mailing Address:
500 W. Silver Spring Drive
Suite K200
Milwaukee, WI 53217
(414) 617-0088
(920) 390-2088 (FAX)

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of June, 2015.

Respectfully submitted,

Piel Law Office

_____

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or a judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 15th day of June, 2015.

Respectfully submitted,

_____

Walter A. Piel, Jr.
Attorney for the Defendant-Appellant
State Bar No. 01023997

APPENDIX

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