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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2015AP000332

Columbia County Circuit Case No. 2014TR001077
2014TR001254

Columbia County,
Plaintiff-Respondent,

v.

Jessica N. Johnson,
Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF COLUMBIA COUNTY,
BRANCH 1, THE HONORABLE DANIEL S GEORGE, PRESIDING

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The County is not requesting oral argument or publication of this opinion. The issues presented in this case can be resolved by reliance upon established principles of law applied to the particular facts of this case.

STATEMENT OF THE ISSUE

Did Deputy Greg Kaschinske have reasonable suspicion to detain Jessica Johnson for the purposes of an OWI investigation after an anonymous tipster reported that a blue Dodge Minivan with the license plate of "WILDFR" was driving 90 miles per hour, and that driver of the blue Dodge Minivan had opened the door to vomit and where Deputy Kaschinske later observed the blue Dodge Minivan with the license plate of "WILDFR" parked, but running, outside of a closed business at approximately 2:00 a.m., and where Jessica Johnson was the only occupant of the blue Dodge Minivan.

The Circuit Court answered: Yes.

STATEMENT OF THE CASE AND FACTS

A jury found Jessica Johnson guilty of operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited alcohol concentration on November 13, 2014. She now appeals the Circuit Court's July 30, 2014 order denying her motion to suppress evidence. The Circuit Court heard the testimony at a June 6, 2014 hearing. Deputy Greg Kaschinske of the Columbia County Sheriff's Office was the only witness to testify.

At approximately 2:00 a.m. on Sunday, February 23, 2014 Deputy Kaschinske received a dispatch regarding a driving complaint. R. 42: 6. Dispatch informed Deputy Kaschinske that an anonymous party reported a vehicle southbound on Highway 22 was going approximately 90 mph. R. 42: 6-7. Deputy Kaschinske was "right in the immediate area when the call came out." R. 42: 6-7. Dispatch advised that the anonymous reporting party said that the driver of the blue Dodge van had stopped the vehicle and opened the door to vomit. R. 42: 11, 43: 5. Based upon the reported speed and reported direction of travel, Deputy Kaschinske believed that the vehicle would have already passed the intersection of Highway 22 and Highway 60 when he himself got to that location. R: 42: 7. Deputy

Kaschinske headed southbound on Highway 51 in an attempt to catch up to a vehicle he observed in the distance. R. 42: 7.

As Deputy Kaschinske was trying to catch up to the vehicle, he was advised that the vehicle that he was looking for was a blue Dodge van with a license plate of "WILDFR." R. 42: 7, 8-9. Deputy Kaschinske shortly thereafter observed a blue Dodge van with the "WILDFR" license parked in the "vehicle for sale" parking lot of Johnson Sales as he was driving Southbound on Highway 51. R. 42: 8. The blue Dodge van was not parked like any other vehicle in the parking lot and Johnson Sales was closed at that time. R. 42: 8-9. Even so, the lights of the blue Dodge van were on and Deputy Kaschinske could tell that the vehicle was running. R. 42: 8.

Deputy Kaschinske pulled in behind the van and activated his emergency lights as he was pulling into the parking lot. R. 42: 9, 18. Jessica Johnson was sitting in the driver's seat and was the only person in the vehicle. R. 42: 10. Ms. Johnson emerged from the van as Deputy Kaschinske approached on foot. R. 42: 20. Deputy Kaschinske could smell a strong odor of intoxicants coming from inside the vehicle, and later, coming from Ms. Johnson

herself. R. 42: 11, 12. Ms. Johnson admitted drinking.
R. 42: 12.

Ms. Johnson advances two arguments. First, she contends that Deputy Kaschinske lacked the requisite reasonable suspicion to initiate an investigative stop at the moment of first contact. Second, Ms. Johnson argues that Deputy Kaschinske could not have reasonably suspected that she had been driving while intoxicated and thus violated her constitutional rights by “expanding” the stop to have her perform Standardized Field Sobriety Tests (SFSTs).

ARGUMENT

I. Standard of Review

To resolve the issue presented in this case, the Court must determine whether Deputy Kaschinske reasonably suspected that Jessica Johnson was operating a Motor Vehicle While intoxicated. As such, the question presented is a mixed question of fact and law. State v. Popke, 2009 WI 37, ¶ 10, 317 Wis. 118, 765 N.W.2d 569. This Court should review the Circuit Court’s findings of fact for only clear error. State v. Post, 2007 WI 60, ¶ 8, 301 Wis.2d 1, 733 N.W.2d 634. Application of those facts to

Constitutional principles should be reviewed independently.

Id.

Traditionally, the Wisconsin Supreme Court has interpreted Article I Section 11 of the Wisconsin Constitution in accordance with the United States Supreme Court's Interpretation of the Fourth Amendment. State v. Williams, 2001 WI 21, at ¶ 18.

II. Based upon an anonymous driving complaint, Deputy Kaschinske had an objectively reasonable suspicion that the driver of a blue Dodge van with a "WILDFR" license plate was operating a motor vehicle while intoxicated.

A. Police may rely on an anonymous informant so long at the information exhibits sufficient indicia of reliability.

In State v. Rutzinski, 2001 WI 22, ¶ 17, 241 Wis.2d 729, 623 N.W.2d 516, the Wisconsin Supreme Court held that an anonymous phone call can give rise to a reasonable suspicion so long as the call contains sufficient indicia of reliability. In assessing the reliability of an informant's tip, the Court must give due weight to "(1) the informant's veracity; and (2) the informant's basis of knowledge." Id. at ¶ 18. In assessing veracity and basis of knowledge the court must examine the totality of the

circumstances, rather than isolating the basis and veracity as elements of a more rigid test. Id.

In Rutzinski, the Supreme Court considered a case where a police officer overheard a dispatch in which an unidentified driver called in and reported a black pickup truck weaving within its lane, varying its speed from too fast to too slow, and tailgating. Id. at ¶ 4. Dispatch later issued a second dispatch indicating that the caller was still on the phone and providing the officer with updated information regarding the location of the vehicles as they traveled down the road. Id. at ¶ 5. The officer surmised that the caller and the suspect vehicle were heading in his direction. Id. When the officer observed a black pickup truck matching the description dispatch had provided, he began to follow. Id. at ¶ 6. Dispatch informed the officer that the reporting party was in front of the black truck and could see that the officer was following the correct vehicle. Id. The officer then initiated the traffic stop of the black pickup truck without himself ever observing signs of erratic driving. Id. at ¶ 7.

The Wisconsin Supreme Court found that the tip was sufficiently reliable for three reasons. First, the

Supreme Court reasoned that even though the caller was anonymous at the time the stop occurred (and ultimately remained anonymous) that police *could* have gleaned the identity of the caller as the caller had revealed that he or she was in the vehicle ahead of the black truck, which police could have stopped. Id. at ¶ 32. The ultimate anonymity of the caller did not negate the otherwise reliable call.

Second, the call enjoyed increased reliability because the caller revealed a reliable basis of for the reported knowledge—personal observation. Id. at ¶ 33. The Court reasoned that police were able to verify the basis for the caller's report based upon the updated information regarding the direction and location of the suspect vehicle. Id.

Third, the Court explained that the when the police ultimately verified predictive information provided, police had further reason to believe that the caller had a reliable basis for the report. The Court analogized the verified predictive behavior to that of an informant with "inside information." Id.

More recently, the United States Supreme Court has weighed in on circumstances similar to Rutzinski and this

case. Navarette v. California, 572 U.S. _____, 134 S. Ct. 1683. In that case, police had the following report from a 911 caller: "Showing southbound Highway 1 at mile marker 88, Silver Ford 15 pickup. Plate of 8-David-94925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago." Id. at 1687. Approximately 18 minutes after the original call, officers located the described vehicle approximately 19 miles south of its last reported location. Id. at 1689. Five minutes after first spotting the truck, police initiated a traffic stop without observing any driving violations. Id. at 1687.

The United States Supreme Court held that the anonymous report was sufficiently reliable for police to credit and that the call raised a reasonable suspicion that the driver of the truck was drunk driving. Id. at 1688-1689, 1690. The Supreme Court reasoned that the reporting party necessarily claimed eyewitness knowledge of the alleged dangerous driving and therefore had a reliable basis for his or her knowledge. Id. at 1689. The Supreme Court also pointed out that when police confirmed the location of the specific vehicle where they could have inferred it might be based upon the 911 call, the police

had reason to think that the reporting party was telling the truth about the dangerous driving as well. Id. The United States Supreme Court also counted the caller's use of a 911 emergency network—which had some features that allow for identifying and tracing callers—as a factor adding to the reliability of the caller. Id. at 1689-90. Finally, the United Supreme Court credited the contemporaneous nature of the report as a factor further bolstering the reliability of the information. Id. at 1689. Despite the identity of the caller being unknown to the police who initiated the stop, and ultimately unknown by the United States Supreme Court, the call was otherwise reliable to merit reasonable police action. Id. at 1688-1689.

After holding that the information in the call was sufficiently reliable, the Court determined that the report also established a reasonable suspicion that the driver of the silver Ford truck was driving while intoxicated. According to the Supreme Court, the report known to police bore "too great a resemblance to the paradigmatic manifestation of drunk driving." Id. at 1691.

B. The tip in this case exhibited sufficient indicia of reliability.

First, the information provided by the caller in this case allowed police to infer that the reporting driver was another motorist and making the report based upon personal observation. As in Rutzinski and Navarette, the reporting party provided the color of the vehicle and the license plate suggesting close personal observation of the vehicle. The information regarding Ms. Johnson's location and direction of travel, when verified by police further established the caller as an individual who could only provide such accurate information from a reliable basis. So, similar to the callers in Rutzinski and Navarette the reporting party necessarily claimed first hand observations and therefore had a reliable basis for the driving complaint.

Further, the predictive information, once verified, added to the credibility of the caller generally. As the United States Supreme Court recognized in Navarette, the verified information gave additional "reason to think that the 911 caller in this case was telling the truth." Navarette, 134 S.Ct at 1689. Identically to the facts in Navarette, the reporting party in this case described a specific vehicle by its make, model, license plate, and the direction of travel. The caller in this case actually gave

more details that were even more predictive about the location of the vehicle by describing its unusually fast speed. Deputy Kaschinske used the speed and direction of travel reported to infer where the blue Dodge should be located. Because the predictive behavior was reliable, Deputy Kaschinske was entitled to credit the descriptive information too.

Just as in Rutzinski and in Navarette, the caller in this case was making a reliable contemporaneous report. Deputy Kaschinske testified that he was "right in the immediate area" when dispatch aired the report. R. 42: 6. Later, Deputy Kaschinske testified that "This happened so quick because I was right in the immediate area, that dispatch information was somewhat delayed." R. 42: 7. Given how quickly Deputy Kaschinske was able to respond to the location, and how quickly he was able to find the suspect vehicle, he could only infer that the caller in this case was making the sort of contemporaneous report relied upon by the United States Supreme Court in Navarette.

Though it is not clear whether the caller in this case was using the 911 emergency call network, given that this caller was in contact with police dispatcher and the

necessary first hand observations, the caller could not have absolutely expected complete anonymity. Regardless, the caller in this case, just as the callers in Navarette and Rutzinski, was anonymous at the moment the stop occurred and ultimately not identified in the record. The anonymity present in this case does not negate the ultimate reliability. Just as police were entitled to rely on the information provided by anonymous parties in Rutzinski and Navarette, so too was Deputy Kaschinske entitled to rely on the report in this case after the call exhibited other indicia of reliability.

C. The content of the tip supports reasonable suspicion that the driver of the blue Dodge van was operating a motor vehicle while intoxicated.

Reasonable suspicion exists where a reasonable officer, in light of his or her training and experience, would be warranted in suspecting that an individual has committed, was committing, or was about to commit a crime. State v. Post, 2007 WI 60 at ¶ 13. In determining whether or not Deputy Kaschinske possessed the reasonable suspicion he needed to temporarily detain Ms. Johnson, this Court must assess the totality of the circumstances known to Deputy Kaschinske. State v. Williams, 2001 WI 21, at ¶ 22.

Driving a motor vehicle while intoxicated is an offense that consists of two elements. Wis. Stat. § 346.63 (1). A defendant meets the first element if he or she drives a motor vehicle on a public highway. Id. A defendant meets the second element if he or she is under the influence of an intoxicant at the time of driving on the public highway. Id.

Instead of confronting the totality of the circumstances known to Deputy Kaschinske, Ms. Johnson attempts to isolate and dismiss the known facts. For example, she characterizes the tip as a report of a speeding vehicle, and nothing more. Def. Br. at 10. That is not this case. Deputy Kaschinske testified that Dispatch had also relayed that the driver of the blue Dodge Van "was actually stopped on Highway 22 at one point and that he or she saw the driver get out of the vehicle - or open up the door of the vehicle and vomit." R. 42: 11.

The facts reported to Deputy Kaschinske leave no doubt that the caller was reporting that someone was driving a blue Dodge van on a public highway. Accordingly, the call would raise a reasonable suspicion of drunk driving violation if Deputy Kaschinske could reasonably suspect that the driver was intoxicated.

Contrasting this case with the facts in Navarette, clearly demonstrates that Deputy Kachinske reasonably suspected that the driver of the blue Dodge van was intoxicated. Stopping a vehicle to vomit and then speeding off at approximately 90 miles per hour are the sort of "paradigmatic manifestations" that a police officer with "commonsense" would recognize as being tied to intoxication. Navarette, at 1690-1691. The fact that these events occurred at approximately 2:00 am on a weekend only serve to increase the reasonable inference that the driver was intoxicated. See, State v. Allen, 226 Wis. 2d 66, 593 N.W2d 504 (Ct. App. 1999), and, State v. Waldner, 206 Wis.2d 51, 556 N.W.2d 681, (1995) (Time of day is a relevant factor in a reasonable suspicion inquiry). Based upon the known facts, a reasonable officer in Deputy Kaschinske's position could reasonably suspect that the driver of the blue Dodge van was driving while intoxicated. Therefore, Deputy Kaschinske's seizure did not violate the reasonableness requirement of the Fourth Amendment and the Circuit Court correctly denied Ms. Johnson's motion.

III. Deputy Kaschinske had reasonable suspicion to initiate an investigative stop because the blue Dodge van

was parked at a closed auto dealership at approximately 2:00 a.m.

While reasonable suspicion must be determined in the totality of the circumstances, it is worth noting that independently of whether Deputy Kaschinske could rely upon the anonymous driving complaint, the Circuit Court held that Deputy Kaschinske was justified in conducting an investigative stop given that Ms. Johnson was parked unusually outside of a closed business at approximately 2:00 a.m. R. 43: 6. Deputy Kaschinske testified that when he observed this vehicle it was the only vehicle in the lot that was out of place. R. 42: 13-14. Under the circumstances, a reasonable officer in Deputy Kaschinske's shoes could reasonably suspect that criminal activity was afoot. See, 4 LaFave, Search & Seizure § 9.5(e) (5th ed. 2014) (Especially during the hours of darkness, police have a sufficient basis to stop and investigate possible burglary of a closed commercial establishments when a suspect appears to be more than a passerby). The possibility of an innocuous explanation of Ms. Johnson's location does not invalidate a reasonable officer from the minimal intrusion of an investigatory stop. Navarette, at 1691.

IV. By the time Deputy Kaschinske asked Ms. Johnson to perform SFSTs, the totality of the circumstances raised an objectively reasonable suspicion that Ms. Johnson had been driving while intoxicated.

As argued above, Deputy Kaschinske already possessed and objectively reasonable suspicion that Ms. Johnson was driving while intoxicated when he first encountered the blue Dodge van. Yet, before asking Ms. Johnson to perform standardized field sobriety tests, (an action that Ms. Johnson challenges as an unconstitutional seizure) Deputy Kaschinske had several additional pieces of information. Def. Br. at 12. By the time Deputy Kaschinske asked Ms. Johnson to perform SFSTs the totality of the circumstances amply supported a reasonable suspicion that Ms. Johnson had been driving while intoxicated.

1) It was reasonable for Deputy Kaschinske to suspect that Ms. Johnson had driven the blue Dodge van to its location at the closed car dealership.

First, given the reliable anonymous report, Deputy Kaschinske could reasonably infer that the blue Dodge van had recently been driven from Highway 22 to its present location. Given that the blue Dodge van was running, and that Ms. Johnson was the only person in the vehicle—sitting

in the driver's seat—it was reasonable for Deputy Kaschinske to presume Ms. Johnson was the suspect driver he was looking for.

2) It was reasonable for Deputy Kaschinske to suspect that Ms. Johnson was intoxicated when she was driving.

In addition to the information provided by dispatch regarding a driver who had stopped to vomit before driving away at high speed, Deputy Kaschinske had also detected a "strong" odor of alcohol coming from inside the blue Dodge van, and shortly later, coming from Ms. Johnson herself.

R. 42: 11. Ms. Johnson's admission that she had been drinking only served to raise, not dispel, further suspicion that she may have consumed too much alcohol. See, County of Jefferson v. Renz, 231 Wis.2d 293, 317, 603 N.W.2d 293 (1999). (Defendant's admission to consuming three beers considered an indicator of intoxication).

Ms. Johnson again attempts to consider the facts of this case in isolation by arguing that the odor of alcohol alone could not have justified a continuing investigation into the possibility that she had been driving while intoxicated. Def. Br. at 12. But, of course, that is not the only information that Deputy Kaschinske had. Given the driving complaint with specific information provided to—and

confirmed by—Deputy Kaschinske, the presence of Ms. Johnson behind the wheel, the odor of alcohol emanating from Ms. Johnson, and her admittance to drinking, it was objectively reasonable for Deputy Kaschinske to fully investigate whether Ms. Johnson had been driving while intoxicated. Asking Ms. Johnson to perform SFSTs was not the unlawful expansion that Ms. Johnson claims. It was, instead, the natural focus of Deputy Kaschinske's investigation. Therefore, Deputy Kaschinske did not violate the Fourth Amendment when he detained Ms. Johnson for the purpose of investigating whether or not she had been operating a motor vehicle while intoxicated. The Circuit Court did not err when it denied her motion to suppress and this court should uphold this conviction.

CONCLUSION

For the reasons above, the County respectfully asks
this Court to affirm the conviction.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

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Signed,

Attorney

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

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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 July, 2015.

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