

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Appeal Nos. 2015AP1233,
2015AP2260,

JIMMIE JOHNSON,

Milwaukee County Circuit
Court Case Nos. 2013CF3474,
2013CF4393

Defendant-Appellant,

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF
CONVICTION ENTERED IN THE CIRCUIT COURT FOR
MILWAUKEE COUNTY, THE HONORABLE CLARE FIORENZA
PRESIDING

APPELLANT'S BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	3
ISSUES PRESENTED	4
STATEMENT ON ORAL ARGUMENT	4
STATEMENT ON PUBLICATION	4
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	6
ARGUMENT	12
CONCLUSION	21
CERTIFICATIONS	23

TABLE OF AUTHORITIES

CASES

	<u>PAGE</u>
<i>State v. Blatterman</i> , 2015 WI 46, 362 Wis.2d 138, 864 N.W.2d 26	13, 14
<i>State v. Kolk</i> , 2006 WI App 261, 298 Wis.2d 99, 726 N.W.2d 337	18, 19, 20
<i>State v. McAttee</i> , 2001 WI App 262, 248 Wis.2d 865, 637 N.W.2d 774	15
<i>State v. Miller</i> , 2012 WI 61, 341 Wis.2d 307, 815 N.W.2d 349	14
<i>State v. Popke</i> , 2009 WI 37, 317 Wis.2d 118, 765 N.W.2d 569	12
<i>State v. Richardson</i> , 156 Wis.2d 128, 456 N.W.2d 830 (Wis. 1990)	13
<i>State v. Romero</i> , 2009 WI 32, 317 Wis.2d 12, 765 N.W.2d 756	16

STATUTES

WIS. STAT. § 946.41	5
WIS. STAT. § 946.49	5
WIS. STAT. § 961.41	5

ISSUE PRESENTED

Whether police had probable cause to stop a vehicle driven by Jimmie Johnson and subsequently arrest him for possessing heroin.

STATEMENT ON ORAL ARGUMENT

Mr. Johnson requests oral argument on this case. Although Johnson believes this brief fully presents the issues on appeal, he does not believe that oral argument would be of marginal value and is therefore appropriate under WIS. STAT. § 809.22(2)(b).

STATEMENT ON PUBLICATION

Mr. Johnson believes the Court's opinion in the instant case will merit publication because resolving the issues will develop the law regarding the evidence necessary for police to justify stopping a vehicle and arresting its driver after receiving a tip from an informant.

STATEMENT OF THE CASE

Jimmie Johnson was charged in a criminal complaint in the Milwaukee County Circuit Court (Circuit Court Case No. 2013CF3474) on August 2, 2013, with two counts of possessing heroin with intent to distribute on June 19, 2013, contrary to WIS.

STAT. § 961.41(1m)(d). (R1-3:1-4).¹

Johnson was charged in a criminal complaint in the Milwaukee County Circuit (Circuit Court Case No. 2013CF4393) on September 24, 2013, with possessing heroin with intent to distribute, bail jumping, and resisting or obstructing an officer on September 20, 2013, contrary to WIS. STAT. §§ 961.41(1m)(d), 946.49(1)(b), and 946.41(1). (R2-2:1-9).

The cases were consolidated for pleas and sentencing. Johnson pled guilty on July 22, 2014, to one heroin count in Circuit Court Case No. 2013CF3474, one heroin count in Case No. 2013CF4393, and bail jumping; the other charges were dismissed but read-in for sentencing. (R1-50:1-37).

On October 9, 2014, the circuit court sentenced Johnson to four-years imprisonment on the heroin charge in Case No. 2013CF3474, six-years imprisonment on the heroin charge in Case No. 2013CF4393—concurrent with his sentence for Case No. 2013CF3474, and two-years imprisonment for bail jumping – concurrent with his sentences for the heroin counts. (R1-26:1-3; R2-

¹ Johnson appeals from two judgments of conviction. This Court has consolidated the cases for briefing. Citations to the record in Appeal No. 2015AP1233CR, Circuit Court Case No. 2013CF3474, will be referred to as “R1.” Citations to the record in Case No. 2015AP2260CR, Circuit Court Case No. 2013CF4393, will be referred to as “R2.”

33:1-3). Johnson was also sentenced to four-years extended supervision in Case No. 2013CF3474, four-years extended supervision for the heroin count in Case No. 2013CF4393 – concurrent to his sentence for Case No. 2013CF3474, and two-years extended supervision for bail jumping – concurrent with count one and with Case No. 2013CF3474. (R1-26:1-3; R2-33:1-3). Johnson’s total sentence is six-years imprisonment and four years of extended supervision.

Johnson filed a notice of appeal in Case No. 2013CF3474 on June 19, 2015. (R1-34:1-2).

Johnson filed a motion for postconviction relief in Case No. 2013CF4393 on June 19, 2015. (R2-36:1-12). The circuit court denied the motion on October 15, 2015. (R2-42:1-6). Johnson filed a notice of appeal in Case No. 2013CF4393 on November 2, 2015. (R2-43:1-2).

On January 19, 2016, this Court consolidated for briefing and disposition Appeal Nos. 2015AP1233CR (13CF3474) and 2015AP2260CR (13CF4393).

STATEMENT OF FACTS

The criminal complaint in Milwaukee County Circuit Court Case 13CF3474 states that on June 19, 2013, Milwaukee police

stopped a 2002 Chevrolet Tahoe driven by Johnson. (R1-3:2). The complaint states that police stopped the car because they received a tip that the driver of the car possessed a controlled substance. (R1-3:1-2). A police dog alerted twice to the exterior driver's side of the Tahoe.

Police then obtained a search warrant for the vehicle, and the dog alerted to the center console area. Police searched the console and seized 136 bindles of heroin wrapped inside a sock. (R1-3:3). The total weight of the heroin was 14 grams. (R1-3:3). Johnson was charged with possessing between 10 to 50 grams of heroin with intent to distribute. (R1-3:1-3).

Johnson filed a motion to suppress all items seized from his car because the police stopped the car without probable cause or reasonable suspicion. He argued that the search warrant was therefore the fruit of the improper stop. (R1-7:1-3).

The circuit court held an evidentiary hearing regarding the motion to suppress on March 13, 2014. West Allis Police Detective Nick Stachula testified that on June 13, 2013, he spoke to a citizen witness when she walked into the West Allis Police Department to report a package she suspected contained narcotics. (R1-44:6). The

informant told police that she parked her car in the Chuck E. Cheese parking lot on Highway 100 in West Allis and saw a Crown Royal satchel on the ground near the car parked next to her. (R1-44:8). Trudeau said she picked up the bag, opened it and saw a plastic baggie with a number of "aluminum foil folds." (R1-44:8).

The informant told police that she then went into the Chuck E. Cheese restaurant and observed a man walk from the Pet World and enter the car near where the bag was found around 1:45 p.m. (R1-44:9, 38). She said the man initially drove away, but then drove back to the parking lot and started "circling around" and "appeared to be looking for something." (R1-44:9). The informant told police that the man got out of the car, looked around, got back in the car and then drove away. (R1-44:10).

The informant described the driver of the car as a black male in his 20's, approximately 5'8" to 5'9", light to medium complexion, and weighing 200 pounds. (R1-44:12). The informant said he wore a black t-shirt and black shorts. (R1-44:12).

After the informant spoke to police by telephone, she went to the West Allis police department on June 13, 2013, with the Crown Royal bag. (R1-44:12). Detective Stachula observed the items inside

the bag and believed them to be heroin. (R1-44:13). Stachula said the items later tested positive for heroin. (R1-44:14).

On June 14, 2013, Stachula observed surveillance video from Pet World for the previous day and observed a man matching the description provided by the informant walk into Pet World at 1:13 p.m. (R1-44:15). Stachula testified that the man had a tattoo on his right forearm. (R1-44:15). Stachula did not show the video to the informant. (R1-44:41).

The informant took a picture of the vehicle, which she provided to police. Stachula testified that the picture showed a Chevy Tahoe with Wisconsin license plate number 190 UNY. (R1-44:17). Stachula testified that he determined through the Wisconsin Department of Transportation's database that the license plate was registered to a female named Danaya Anderson who lived at 3360 North 48th Street in Milwaukee. (R1-44:17-18).

Stachula testified that he then conducted surveillance at the 48th Street residence, but did not observe the Tahoe. (R1-44:19). Stachula then emailed other police departments to ask if they made contact with the Tahoe or license plate 190 UNY. Milwaukee Police Detective Zimmerman responded that the vehicle received a parking

citation at 4460 North 52nd Street in Milwaukee on June 7, 2013. (R1-44:19-20).

On June 19, 2013, Stachula conducted surveillance outside the 52nd Street address at 11 a.m. and observed the Tahoe parked outside. (R1-44:21). Eventually, Stachula observed a black male exit the residence, enter the Tahoe and drive northbound on 52nd Street. (R1-44:21). Stachula testified that, although he confirmed the driver was a black male, he could not confirm it was the man viewed in the Pet World video. (R1-44:21). Stachula and other West Allis police officers followed the vehicle to 30th and Villard, where the vehicle parked and the driver exited. (R1-44:21). Stachula testified that he pulled within a car length of the Tahoe and identified a tattoo on the man's right forearm. (R1-44:22). Stachula said he was then able to identify the man as the man he observed in the Pet World video. (R1-44:22).

Stachula testified that the Tahoe was parked briefly at 30th and Villard, and he then lost track of it. (R1-44:23). Stachula returned to the 52nd Street residence and he saw the vehicle parked and the man walk into the residence. (R1-44:25). Five to ten minutes later, the man returned to the Tahoe and drove north on 52nd Street. (R1-

44:26). Stachula testified that he then contacted Milwaukee police and requested that they stop the Tahoe. (R1-44:27).

The Tahoe was stopped near 51st and Hampton. (R1-44:27). Stachula testified that he drove to the scene and identified the driver as the man he saw in the Pet World video. (R1-44:28).

Stachula testified that Milwaukee police used a drug-sniffing dog to search the exterior of the vehicle within one to two minutes after it was pulled over. (R1-44:59). Stachula said the dog alerted to the front driver's side area of the car. (R1-44:60). Stachula testified that Johnson was placed in a squad car while police searched the exterior of the car with the dog, and that Johnson told police he did not want to discuss the case until he consulted with a lawyer. (R1-58, 60).

Stachula testified that after the dog alerted to the front of the Tahoe, the car was transported to the West Allis Police Department and police obtained a warrant to search the car. (R1-44:66). The warrant was executed and heroin was seized from the car. (R1-44:67).

Johnson argued that the heroin seized from the Tahoe should be suppressed because law enforcement did not have probable cause

to stop the Tahoe driven by Johnson, and the subsequent search warrant was therefore fruits of the improper arrest. (R1-44:83).

On March 24, 2014, the circuit court denied Johnson's motion to suppress. (R1-45:1-20). The circuit court found that police had probable cause to stop and arrest Johnson for possessing heroin in light of Detective Stachula's testimony regarding the information from the informant and Stachula's follow-up investigation. (R1-45:17).

II.

ARGUMENT

A. Standard of Review

Whether there is probable cause to stop a vehicle is a question of constitutional fact. *State v. Popke*, 2009 WI 37, ¶ 10, 317 Wis.2d 118, 765 N.W.2d 569. The circuit court's findings of fact are reviewed for clear error, and how those facts are applied to constitutional principles are reviewed de novo. *Id.*

B. Analysis

The circuit court upheld stopping the vehicle driven by Johnson because it found the police had probable cause to suspect that Johnson was engaged in drug trafficking. Johnson therefore

addresses only whether police had probable cause to arrest him; Johnson will address whether the police had reasonable suspicion to stop his car, and whether using a dog to sniff the exterior of the vehicle exceeded the scope of an investigatory stop, if the State makes that argument in its brief.

A warrantless arrest is unlawful unless supported by probable cause. *State v. Blatterman*, 2015 WI 46, ¶ 34, 362 Wis. 2d 138, 864 N.W.2d 26. Probable cause to arrest refers “to that quantum of evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe” that the defendant was in possession of narcotics. *Id.* The burden is on the state to show it had probable cause to arrest.” *Id.*

In determining whether probable cause exists, this Court examines the totality of the circumstances and considers whether the police had “facts and circumstances within his or her knowledge sufficient to warrant a reasonable person to conclude that the defendant ... committed or [was] in the process of committing an offense.” *State v. Richardson*, 156 Wis.2d 128, 148, 456 N.W.2d 830 (1990). The probable cause requirement “deals with probabilities” and must be sufficient “to lead a reasonable officer to believe that

guilt is more than a possibility.” *Blatterman*, 2015 WI 46, ¶ 35. This standard is case-specific: “the quantum of information which constitutes probable cause to arrest must be measured by the facts of the particular case.” *Id.*

When police rely on information from an informant, this Court considers two factors to determine “whether officers acted reasonably in reliance on that information; the quality of information – which depends on the source’s reliability, and the quantity or content of the information. *State v. Miller*, 2012 WI 61, ¶ 31, 341 Wis.2d 307, 815 N.W.2d 349. “There is an inversely proportional relationship between the quality and the quantity of information required to reach the threshold of reasonable suspicion.” *Id.* ¶ 32 The more reliable an informant, the less detail that is required “in the tip or police corroboration in order for police to rely on that information to conduct an investigatory stop.” *Id.*, at ¶ 32. If the informant has limited reliability, “the tip must contain more significant details or future predictions along with police corroboration.” When an informant’s reliability is unknown to the police, law enforcement must independently corroborate the information provided by the informant to establish probable cause

to arrest a suspect. *See State v. McAttee*, 2001 WI App. 262, ¶ 12, 248 Wis.2d 865, 637 N.W.2d 774.

Johnson was not stopped for a traffic violation, so his arrest must be justified because police had probable cause that he possessed heroin when they arrested him on June 19, 2013. The State is unable to meet its burden of proof.

First, the information Detective Stachula learned from the informant regarding the suspect's activities in the Chuck E. Cheese parking lot on June 13 was second-hand; Detective Stachula did not observe the suspect's activities himself. And no evidence was offered by the State that the citizen informant had previously provided reliable information; Detective Stachula's testimony did not demonstrate any prior communication between law enforcement and the citizen informant. Detective Stachula did not testify that law enforcement attempted to review the informant's credibility; for example, he did not indicate that police verified whether she had a criminal record. Further, the informant did not tell police that she bought or sold heroin from the driver of the vehicle. So her credibility was not established by statements against her penal interest. *See State v. Romero*, 2009 WI 32, ¶36, 317 Wis.2d 12, 765

N.W.2d 756 (“When a declarant makes statements against his penal interest that are closely related to the criminal activity being investigated, under circumstances providing the declarant with no apparent motive to speak dishonestly, such statements may be taken as establishing the declarant's credibility and thus his veracity.”).

Detective Stachula did not verify with the informant whether the person he viewed in the video from Pet World was the person observed by the informant. The suspect's actions that Stachula viewed on the video were not incriminating or unusual, and did not provide any independent basis to believe the suspect was engaged in criminal activity. Further, the informant did not view the suspect with the bag she believed contained narcotics; the only link to the suspect and the bag was the proximity of the bag to the car. But the informant did not see the suspect drop the bag, and did not know whether the bag fell from the car or how long the bag was lying on the ground.

Detective Stachula was not able to link vehicle registration records for the vehicle identified by the informant to Johnson. Rather, the vehicle was registered to Danaya Anderson, who lived on North 48th Street.

By the time Stachula located the Chevy Tahoe parked outside a residence on North 52nd Street on June 19, 2013, six days had passed since the vehicle was seen in the Chuck E. Cheese parking lot. And Johnson's actions, on June 19, did not provide police probable cause to arrest him. Detective Stachula followed Johnson from 52nd Street to 35th and Villard, where Johnson got out of his car, went into a business, and returned to his car and drove away a short time later. Stachula did not observe Johnson with any drugs, did not observe Johnson engage in any drug transaction, or even meet with anyone. Although Stachula suggested that the short duration of Johnson's trip could indicate drug dealing, he acknowledged that there could be "a hundred different explanations" for why Johnson drove to 35th and Villard and only stopped for five minutes. (R1-44:49).

To summarize, no witness saw Johnson possess any heroin, engage in any heroin transaction, and did not observe any heroin in the vehicle driven by Johnson. The only information to connect Johnson to heroin was that a bag, later determined to contain heroin, was found next to a car driven by Johnson in a public parking lot.

The totality of circumstances do not establish probable cause in light of the State's burden to justify the warrantless stop and arrest.

This case is similar to *State v. Kolk*, 2006 WI App. 261, 298 Wis.2d 99, 726 N.W.2d 337, where the Court of Appeals held that police did not have reasonable suspicion to detain a suspect for possessing Oxycontin based on a citizen informant's tip. The informant told the Washington County Sheriff's Department that Kolk was on his way to Milwaukee to pick up Oxycontin. The informant -- who identified him- or herself and provided police with a date of birth, address, and phone number -- had not previously provided information to the investigator. *Id.*, 2006 WI App. 261, ¶ 2. The informant described Kolk's physical appearance and the car he drove. *Id.*, ¶ 3.

Police drove past Kolk's house and observed the car described by the informant. The informant told police that Kolk had already been to Milwaukee, returned, and would leave for Madison that afternoon. *Id.* Police set up surveillance outside Kolk's house, and observed him get into his vehicle and drive north on Highway 175. *Id.*, ¶ 4. After Kolk exceeded the speed limit, police stopped him for speeding. *Id.*

During the traffic stop, police obtained consent to search Kolk's vehicle and frisked Kolk. *Id.*, ¶¶ 6-7. Police seized Oxycodone from the vehicle and from Kolk's pocket. *Id.*, ¶ 7.

The Court of Appeals affirmed the circuit court's order suppressing the Oxycodone from evidence because police did not have reasonable suspicion that Kolk possessed drugs. The Court noted that the informant did not tell police how he or she knew about the activities ascribed to Kolk. *Id.*, ¶ 15. The Court also considered that the informant provided the police with Kolk's identity and described his vehicle, but that such information were "innocent details" that were "readily available" and did not "significantly bolster the reliability of the informant's claims." *Id.*, ¶ 16. The Court also noted that the informant's predictive information that Kolk would drive his vehicle "in a direction that would not preclude his being headed to Madison" was too general to support reasonable suspicion. *Id.*, ¶ 18. Finally, the Court observed that the informant did not report directly observing a crime: "the officers received a tip that neither demonstrated a basis of knowledge nor allowed for much significant corroboration." *Id.*, ¶ 19.

Similarly, the informant's tip at issue in this case did not provide any predictive information, and the informant did not observe the driver of the vehicle possess heroin. The corroborating details about the driver's physical appearance and license plate information were general and not, by themselves, incriminating. Further, as in *Kolk*, police were not able to corroborate the informant's suspicion that the driver of the Tahoe possessed drugs with any independent observation that Johnson possessed heroin.

The information provided by the informant in *Kolk* that did not justify reasonable suspicion is similar in quantity and quality to the information provided by the informant in this case. Given that this Court is reviewing under the more demanding standard of probable cause, *Kolk* directs that this Court reverse the circuit court's order denying Johnson's motion to suppress.

III.

CONCLUSION

Johnson asks the Court to reverse the circuit court's order denying Johnson's motion to suppress in Circuit Court Case No. 2013CF3747.

Johnson also asks the Court to vacate the judgments of conviction in Milwaukee County Circuit Court Case Nos. 2013CF3474 and 2013CF4393 and to direct the circuit court to allow Johnson to withdraw his guilty pleas in those cases. Although Johnson is not appealing from the circuit court's order denying his motion to suppress in Case No. 2013CF4393, Johnson asks the Court to allow him to withdraw his guilty plea in that case if he is allowed to withdraw his guilty plea in Case No. 2013CF3474 because the plea agreement between Johnson and the State contemplated that he would plead guilty to counts in both cases. If he is allowed to withdraw his guilty plea in one case, the plea agreement is no longer valid.

Dated at Milwaukee, Wisconsin, May 29, 2016.

Respectfully submitted,

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,381 words.

Dated at Milwaukee, Wisconsin May 29, 2016.

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CERTIFICATION FOR APPENDIX CONTENTS

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 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 at Milwaukee, Wisconsin May 29, 2016.

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**CERTIFICATION OF ELECTRONIC COPY OF BRIEF BEING
IDENTICAL TO PAPER COPY OF BRIEF**

I hereby certify, pursuant to Wis. Stat. 809.19(12)(f), that the electronic copy of the brief, excluding the appendix, if any, filed in this case is identical to the text of the paper copy of the brief filed in this case.

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CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Wis. Stat. 809.80(4)(a), that this Appellant's Brief and Appendix will be deposited in the United States mail for delivery to the Clerk of the Court of Appeals, P. O. Box 1688, Madison, WI 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on the 31st day of May, 2016. I further certify that the brief will be correctly addressed and postage pre-paid. Copies will be served on the parties by the same method.

Dated at Milwaukee, Wisconsin May 29, 2016.

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APPENDIX TABLE OF CONTENTS

Circuit Court's Order Denying Motion to Suppress	1
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