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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT I

Case Nos. 2015AP1233-CR and 2015AP2260-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JIMMIE C. JOHNSON,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION
AND ORDER DENYING A MOTION TO SUPPRESS
EVIDENCE, ENTERED IN THE MILWAUKEE COUNTY
CIRCUIT COURT, THE HONORABLE CLARE FIORENZA,
PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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QUESTION PRESENTED

A citizen informant gave police a bag of heroin she found next to Johnson's Chevrolet Tahoe and explained that a man matching Johnson's description appeared to be circling the area and searching for something at the spot she discovered the bag. Police arrested Johnson after corroborating the statement with surveillance video and witnessing Johnson participate in a suspected drug transaction. Did police have adequate probable cause to arrest Johnson?

The circuit court held police had adequate probable cause to arrest Johnson.

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Oral argument. The State does not request oral argument.

Publication. The State does not request publication of the Court's opinion.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

- 1. An identified citizen tips off police that she found a bag of drugs lying beside a Chevrolet Tahoe and gives a description of the driver.**

On June 13, 2013, a citizen informant, J.T., came into the West Allis police department with a small purple cloth "Crown Royal" bag containing heroin that she discovered in a West Allis Chuck E. Cheese parking lot. (15AP1233 44:7.)

J.T. told Officer Bradley Tillman and Detective Nick Stachula that she was a social worker on her way to conduct a client visit when she noticed the bag as she was exiting her car. (*Id.* at 8.) The bag sat next to the driver's-side door of a neighboring Chevrolet Tahoe as if it had fallen out of the SUV. (*Id.*) J.T. opened the bag and suspected the aluminum foil folds inside the bag contained drugs. (*Id.*) After taking the bag, she snapped a photo of the Tahoe's license plate with her cell phone and went inside the Chuck E. Cheese. (*Id.* 8-9.)

J.T. continued to observe the Tahoe through the front display window at Chuck E. Cheese and saw a black man wearing a black T-shirt and black shorts walk from the direction of the neighboring business, Pet World, and get into the Tahoe. (*Id.* at 9, 12, 14.) J.T. stated the man had a medium complexion, was between 5'8" and 5'9", approximately 200 pounds and appeared to be in his 20s. (*Id.* at 12.)

The man started the SUV and began to drive toward the exit when he abruptly stopped, turned around, and began to circle the parking lot while appearing to look for something. (*Id.* at 9.) The man eventually stopped in the parking lot and exited the SUV to search the area on foot. (*Id.* at 10.) Soon after, the man got back into the Tahoe and departed. (*Id.* at 10.)

2. Police independently verify the citizen informant's tips.

West Allis police were able to corroborate the information J.T. provided to police. Detective Stachula first examined the Crown Royal bag and found 69 bindles of suspected heroin weighing 6.29 grams. (3:2; 44:12, 13-14.) A field test yielded positive results for opiates. (44:14.)

Detective Stachula also recovered surveillance video from Pet World and independently corroborated J.T.'s account. The video showed a man matching J.T.'s description of the driver in the Tahoe walking inside Pet World. (*Id.* at 15.) Detective Stachula described the man as black, in his 20s, approximately 5'8", and wearing a black T-shirt and black shorts. (*Id.*) The man also had a tattoo on his right forearm. (*Id.*) Once inside, the man headed to a fish display and appeared to look for a lost item. Focused on a trash can beside the display, the man looked around the trash can and underneath it. (*Id.* at 16.) Soon after, the man exited the store without looking at any merchandise. (*Id.*)

Detective Stachula also ran the license plate that J.T. provided in her photo. The Chevrolet Tahoe was registered to a woman located at a North 48th Street address in Milwaukee. (*Id.* at 18-19.) Based on this information, Detective Stachula conducted surveillance at this address but did not find the man or the Tahoe. (*Id.* at 19.)

Detective Stachula then followed up on a separate lead—a parking citation for the Tahoe issued days earlier at a separate residence on North 52nd Street in Milwaukee. (*Id.*) On June 19, 2013, Detective Stachula, accompanied by Officer Jeffrey Zeintek, drove to the North 52nd Street address. (*Id.* at 20.) There, they located the parked and unoccupied Tahoe. (*Id.* at 20-21.)

3. Police conduct surveillance on the parked Tahoe and observe the man matching the informant's description get into the Tahoe and drive away.

After setting up surveillance north of the Tahoe, Detective Stachula saw a black man leave the residence, get into the Tahoe, and drive away. (*Id.* at 21.) Both Detective Stachula and Officer Zeintek followed the Tahoe until the man parked on the street in front of several businesses. (*Id.* at 21, 22.) As the man left the SUV, Detective Stachula confirmed that the man matched J.T.'s description and had the same tattoo on his right forearm as the man seen in the Pet World surveillance video. (*Id.* at 22.)

The man walked toward several businesses and Detective Stachula lost sight of him. (*Id.* at 23.) When Detective Stachula turned his car around and returned to the parked Tahoe, the man had, in the meantime, returned to the SUV and had pulled back out into the street. (*Id.* at 23, 49.) The man had left no later than one to two minutes after he arrived. (*Id.* at 23, 24.)

Detective Stachula and Officer Zeintek returned to the North 52nd Street address five minutes later, just as the man was leaving the Tahoe and returning inside the residence. (*Id.* at 50.) Officer Zeintek then called Milwaukee police for a marked squad car to conduct a stop. (*Id.* at 51.)

4. Police, based on their experience, suspect that the man in the Tahoe is actively partaking in drug distribution.

At the time of the investigation, Detective Stachula was a detective with approximately 14 years of police experience and part of a unit where he primarily worked on drug investigations. (*Id.* at 5-6, 24.) Detective Stachula believed that the man's activities were consistent with short-term drug distribution. (*Id.* at 24-25.) He also summarized his observations in conjunction with his work in drug investigations:

[G]enerally ... these street deals or quick meets are very short, brief meetings where the idea is you have something illegal on you, you want to make that transaction as quick as possible and then move back to your stash house or locations where you're keeping your narcotics; and generally they don't like to, so to speak, stay around very long, a quick, short, brief transaction as possible.

(*Id.* at 25.)

5. Police stop the Tahoe and a drug dog alerts to the presence of additional drugs.

Five to ten minutes after the man went inside, he reemerged, got back into the Tahoe, and drove down North 52nd Street to a nearby gas station. (*Id.* at 26-27.) An

available Milwaukee police officer in a marked squad car, accompanied by Detective Stachula and Officer Zeintek, stopped the Tahoe. (*Id.* at 27, 30.)

Police identified the man as defendant-appellant Jimmie Johnson, (*id.* at 22, 28), and ordered Johnson outside of the Tahoe (*id.* at 29). Johnson admitted to police that there was a gun and knife inside the Tahoe, but disclaimed any responsibility for anything else police might find in his SUV. (*Id.* at 28-29.) Police secured Johnson in handcuffs and later placed him in a transport van. (*Id.* at 58.)

After Johnson was inside the transport van, Officer Zeintek, a K-9 officer, retrieved his dog, who alerted to the presence of drugs by the driver's-side door of the Tahoe. (*Id.* at 30-31, 60.) After securing a search warrant, the ensuing search revealed the presence of 14.26 grams of heroin in the Tahoe's center console. (3:3; 44:66.)

6. Johnson is charged with two counts of possession with intent to deliver heroin and moves to suppress the evidence.

The State initially charged Johnson in Milwaukee County Case No. 13-CF-3474 with one count of possession with intent to deliver for the heroin recovered subject to the vehicle stop, (3), and later filed an amended information adding a second count for the heroin recovered at the Chuck E. Cheese (12).

While on bond, Johnson committed a separate offense and the State charged Johnson in Milwaukee County Case No. 13-CF-4393 with possession with intent to deliver, felony bail jumping, and obstruction of justice. (15AP2260 2.)

Johnson moved to suppress the evidence seized from his vehicle based on an invalid stop in both cases. (15AP1233 7.) At the suppression hearing in 13-CF-3474, Johnson argued that police made a warrantless arrest during his vehicle stop without supporting probable cause. (44:76.) Johnson also challenged the search of his vehicle in his second case, 13-CF-4393. (15AP2260 50:5.)

7. The circuit court denies Johnson's motion to suppress and Johnson enters a guilty plea.

The circuit court denied both motions to suppress. (15AP1233 45:17; 15AP2260 52:5-6). Relevant to the issues in this appeal, the circuit court in 13-CF-3474 determined that probable cause existed to arrest Johnson at the vehicle stop based on the corroborated informant statement and the police's later on-scene investigation. (15AP1233 45:13-17.)

Johnson entered guilty pleas in both pending cases pursuant to a global plea agreement. (50:3-6, 21-22.) Johnson pled guilty in 13-CF-3474 to the amended information for one count of possession with intent to deliver with the second count dismissed but read in for sentencing purposes. (*Id.* at 21-22.) He also pled guilty in 13-CF-4393 to possession with intent to deliver and bail jumping, with the third count for obstruction dismissed and read in. (*Id.*)

Johnson now appeals the circuit court's denial of his motion to suppress in his first case, 13-CF-3474, and asks this Court to vacate his convictions in both cases obtained pursuant the parties' global plea agreement. (Johnson's Br. 21.)

ARGUMENT

The police had probable cause to arrest Johnson based on his apparent connection to the drugs recovered beside his SUV on June 13, 2013.

A. Applicable law and standard of review.

Review of a motion to suppress evidence involves a two-step analysis. *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463 (citations omitted). First, appellate courts will uphold the circuit court's findings of historical fact unless clearly erroneous. *Id.* Next, the reviewing court will independently apply constitutional principles to those facts. *Id.*

The United States Constitution and the Wisconsin Constitution prohibit unreasonable searches and seizures, U.S. Const. amend. IV; Wis. Const. art. 1, § 11. Wisconsin's constitutional provisions on searches and seizures are understood to be "coextensive" with the federal constitution. *State v. Houghton*, 2015 WI 79, ¶¶ 49-50, 364 Wis. 2d 234, 868 N.W.2d 143 (citation omitted).

It is well established that an arrest is considered a "seizure" under the Fourth Amendment. *California v. Hodari D.*, 499 U.S. 621, 624 (1991). An officer may lawfully

conduct an arrest if the officer has probable cause to believe the arrestee has committed a criminal offense. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). A warrant is not required to arrest in a public place where probable cause exists. *Florida v. White*, 526 U.S. 559, 565-66 (1999).

Probable cause to arrest “is not that quantum of evidence which might later support a conviction.” *Ball v. State*, 57 Wis. 2d 653, 659, 205 N.W.2d 353 (1973). Instead, it is “that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime.” *Id.*; see Wis. Stat. § 968.07(1)(d).

Probable cause includes the totality of the circumstances within police knowledge at the time of the arrest. *State v. Richardson*, 156 Wis. 2d 128, 148, 456 N.W.2d 830 (1990). In addition, probable cause may be predicated upon hearsay and circumstantial evidence. See *State v. Cheers*, 102 Wis. 2d 367, 386, 391, 306 N.W.2d 676, 687 (1981). These circumstances are “to be judged by the factual and practical considerations of everyday life one which reasonable and prudent persons, not legal technicians, act.” *State v. Truax*, 151 Wis. 2d. 354, 360, 444 N.W.2d 432 (Ct. App. 1989).

B. Application of the law to the facts of this case.

Johnson argues that, when police arrested him, they seized him illegally because they did not have probable

cause to arrest him. (Johnson's Br. 12-13.) Because of the alleged illegal seizure, Johnson contends that the circuit court should have suppressed the evidence seized from his SUV pursuant to a later search warrant. (*Id.* at 12, 20.)

In this case, the following factors demonstrate that police had probable cause to arrest Johnson:

- Police knew from J.T. that she recovered a bag of packaged heroin in a Chuck E. Cheese parking lot lying beside the driver's-side door of a parked Chevrolet Tahoe.
- Police knew from J.T.'s account that she saw a man later drive the Tahoe as its sole occupant. Shortly after J.T. recovered the bag of drugs, she saw the man come from Pet World and circle around the parking lot in the Tahoe. He also appeared to be looking for a lost item in the spot where she recovered the bag of drugs.
- Police matched J.T.'s physical description of the man with the man in the Pet World surveillance video and also saw the same man apparently searching for a lost item in the store.
- Police later located the Tahoe in Milwaukee with the license plate number that J.T. provided to police.
- Police saw a man, later identified as Johnson, enter the Tahoe alone and matched both J.T.'s report and the man in the surveillance video.
- Police observed a nexus of conduct consistent with drug distribution on the day they performed surveillance on Johnson's Tahoe.

On this record, the police had sufficient information, based on the totality of the circumstances, to lead them to reasonably believe that Johnson was involved in a crime. The police had sufficient information from an identified citizen informant to believe that Johnson possessed drugs and involvement in drug distribution was “more than a possibility.” *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999).

With respect to information from citizen informants, probable cause to arrest may be based on hearsay information that is shown to be reliable and emanating from a credible source. *State v. McAttee*, 2001 WI App 262, ¶ 9, 248 Wis. 2d 865, 637 N.W.2d 774. Information from an informant may supply probable cause to arrest if police know the informant and know the informant to be reliable. *Id.* Whether information from an informant is sufficient to establish probable cause to arrest depends on the totality of the circumstances, including the informant’s “veracity, reliability, and basis of knowledge.” *Id.* (citation omitted).

Courts recognize distinctions between citizen informants and police informants. *State v. Paszek*, 50 Wis. 2d 619, 630, 184 N.W.2d 836 (1971). In contrast to many police informants, a citizen who reports a crime presumably acts out of a concern for public safety and presumably expects no personal gain from making the report. *Id.* Because of this, when examining police reliance on a citizen

informant, courts apply a “relaxed test of reliability,” which shifts the focus from the personal reliability of the informant (the primary focus for police informants) to the informant’s reliability in observing the particular events at issue (the primary focus for citizen informants). *State v. Williams*, 2001 WI 21, ¶ 36, 241 Wis. 2d 631, 623 N.W.2d 106.

This Court evaluates the reliability of a citizen informant by looking at “the nature of [the citizen’s] report, his [or her] opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation.” *Paszek*, 50 Wis. 2d at 631. This evaluation is a “safeguard” intended to ensure the reliability of information provided by a citizen informant. *Allison v. State*, 62 Wis. 2d 14, 22, 214 N.W.2d 437 (1974). Police verification is not strictly required; it is simply one of the ways to ensure a “sufficient safeguard.” *Id.* at 22-23.

Here, an independent and named citizen informant, J.T., revealed to police that a man driving a Chevrolet Tahoe, next to which she found a bag of drugs, appeared to be searching for a lost item near the Tahoe. These were not bare-bones tips. Rather, J.T. provided the actual bag of drugs to police that contained heroin individually packaged for sale. J.T. also provided a photo of the Tahoe’s license plate and a description of the man that the Pet World surveillance camera corroborated.

Detective Stachula testified that J.T. had given him detailed background information that included the man's race, height, weight, and clothing and said he appeared to have come from Pet World. Detective Stachula's review of Pet World's surveillance video showed a man matching J.T.'s description. Also notable, the video showed a nexus to similar conduct that J.T. described in the parking lot—the same man that J.T. described as circling the parking lot was also in the video apparently “looking for something inside the store that wasn't being sold” beside a Pet World trash can. (15AP1233 44:16.)

Detective Stachula also verified and corroborated J.T.'s tip in the field by matching the Tahoe to an address listed in a traffic ticket that led him to its location. There, he saw the same man from Pet World get into the Tahoe and drive away. A few days after J.T.'s report, Detective Stachula pursued the Tahoe and observed conduct consistent with drug distribution based on his training and experience.

Thus, Detective Stachula knew that J.T. was a credible and reliable informant, because J.T. had provided him with accurate and corroborated information. *See State v. Kolk*, 2006 WI App 261, ¶ 13, 298 Wis. 2d 99, 726 N.W.2d 337. The information that J.T. provided was corroborated enough—and matched Johnson's description enough—to give rise to probable cause to arrest Johnson. A reasonable

officer would conclude that Johnson's involvement in a crime was more than a possibility. *See State v. Kutz*, 2003 WI App. 205, ¶ 11, 267 Wis. 2d 531, 671 N.W.2d 660.

Johnson argues that no probable cause existed for his arrest because police had no evidence that he actually possessed any heroin. (Johnson's Br. 17.) Johnson's argument is not tethered to the proper inquiry. Wisconsin courts do not require the fact of actual possession to support probable cause. *See Secrist*, 224 Wis. 2d at 217-18. In *Secrist*, the supreme court held that the odor of marijuana may provide probable cause to arrest. *Id.* In making the determination of probable cause, the court reiterated, "probable cause eschews technicality and legalisms in favor of a 'flexible, common-sense measure of the plausibility of particular conclusions about human behavior.'" *Id.* at 215 (citation omitted). In short, Johnson's call for actual possession rings hollow where even an odor of a controlled substance may suffice to show probable cause.

Johnson also challenges the reliability of J.T.'s tips to police by analogizing the facts of this case to *Kolk* where the court found a citizen informant's tip was not reliable. *Kolk*, 298 Wis. 2d 99, ¶ 19. (Johnson's Br. 18-20.) Johnson first argues that J.T. failed to provide officers with any predictive information that might increase her reliability. But the court in *Kolk* clearly held that predictive information is not necessary for information to be reliable but instead is an indicia of reliability. *Kolk*, 298 Wis. 2d 99, ¶ 18.

Moreover, in the absence of “predictive information,” an informant’s “direct observation” of a crime “can provide reason to believe that the tipster has truthful and accurate information.” *Id.* at ¶ 19. Here, the basis of J.T.’s knowledge was direct: she found a bag of heroin lying beside Johnson’s Tahoe. Johnson’s criticism of J.T.’s other “general” tips such as Johnson’s physical appearance and license plate does not make her statement incredible. Instead, the bag of heroin that J.T. brought to police indicates a first-hand knowledge of the events she told police and supports the criminal activity that she observed. The ability of police to later corroborate Johnson’s suspicious conduct when presumably trying to retrieve his missing heroin at Pet World bolstered her statement. J.T.’s tips were also more credible after police observed Johnson’s suspicious drug-related conduct several days later at the 52nd Street address. Accordingly, J.T.’s tips were reliable and this Court should affirm Johnson’s conviction.

In summary, police had ample probable cause to arrest Johnson based on J.T.’s tips and their observations. Johnson is not entitled to suppression based on an illegal arrest.

CONCLUSION

For the aforementioned reasons, the State respectfully requests that this Court affirm Johnson's judgment of conviction and the circuit court's order denying Johnson's motion to suppress evidence.

Dated this 19th day of August, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 3,326 words.

JASON A. GORN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 19th day of August, 2016.

JASON A. GORN
Assistant Attorney General