

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-CR,
2015AP22260-CR

JIMMIE JOHNSON,

Defendant-Appellant,

ON NOTICE OF APPEAL TO REVIEW A FINAL DECISION AND
ORDER ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE
COUNTY, THE HONORABLE CLARE FIORENZA PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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ARGUMENT

Jimmie Johnson appeals from the circuit court's order denying his motion to suppress evidence seized from a car he was driving on June 19, 2013. Johnson argues that he was stopped by police without probable cause, and that the heroin seized from the car was a fruit of his unlawful arrest.

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 in a public parking lot next to a car driven by Johnson six days later. Further, the information on which police relied to justify arresting Johnson was from a citizen informant with no track record of reliably providing law enforcement with information. The totality of circumstances do not establish probable cause in light of the State's burden to justify the warrantless stop and arrest.

Before addressing the State's legal arguments, Johnson will clarify the State's factual summary. First, the State suggests that Johnson's actions inside Pet World on the day that the informant recovered heroin from the shopping center parking lot supported

probable cause to arrest him for possessing heroin six days later. The State cites West Allis Police Detective Nicholas Stachula's testimony that he viewed a man on Pet World's surveillance video who matched the description of the suspect provided by the informant. Stachula testified that it "appeared they were looking for something inside the store that wasn't being sold." (R1:44). The State argues that the man was "presumably trying to retrieve his missing heroin at Pet World." (State's Brief at p. 15).

But the chronology of events does not support the State's theory, which requires that the man in the video knew his bag of heroin was missing when he was taped. The informant told police that she found the bag of heroin next to the Tahoe in the parking lot. A short time later, she saw a man walk from Pet World and enter the Tahoe. The man left the parking lot, made an abrupt stop and returned to the parking lot, got out and looked on the ground as if he lost something, got back into the Tahoe and left the area. (R1:9-10). The informant did not state that the suspect returned to Pet World. And the Pet World video was from 1:13 p.m., while the informant said the man left the area around 1:45 p.m. (R1:14-15). The suspect's actions only show that he might have realized he left

something in the parking lot after he left and returned to the parking lot. But there is no evidence that the suspect had reason to believe he misplaced the bag at any time before returned to the car, which is when the suspect was in Pet World. So the suspect's actions in Pet World should not be a factor when analyzing whether police had probable cause to arrest Johnson.

Second, the State asserts that police "observed a nexus of conduct consistent with drug distribution on the day they performed surveillance" on the Tahoe. (State's Brief at p. 10). The State refers to Stachula's testimony that he observed the driver of the Tahoe make a brief stop at a storefront on 35th and Villard, which Stachula said was consistent with selling narcotics. But Stachula acknowledged that there could be "a hundred different explanations" for why someone would make a short stop at a storefront. (R1-49).

These factual distinctions are important because they undermine the State's argument that law enforcement corroborated the informant's tip. And, as discussed below, law enforcement did not otherwise thoroughly corroborate the witness's information.

The State claims that Johnson is arguing that, because the police did not see Johnson possess heroin, they did not have probable cause. The State then argues that Wisconsin courts do not require police to witness a suspect possessing contraband to support probable cause.

But the State's characterization of Johnson's argument is overly simplistic. The fact that neither the police, nor the citizen informant, saw Johnson possess heroin is *a* factor when determining whether there was probable cause to arrest Johnson. But it is not the only factor Johnson discusses; he also argues that police did not observe the bag in the parking lot but relied on second-hand information, the vehicle identified by the informant was not registered to Johnson, Johnson's activities on the day of his arrest could have been motivated by "a hundred different explanations" other than selling drugs, six days passed between the informant viewing activities in the parking lot and Johnson's arrest, Johnson's actions on the Pet World video were not incriminating, police did not verify with the informant whether the person they viewed in the Pet World video was the same person observed by the informant, the informant did not indicate whether other cars were near the bag

she found in the parking or how many other cars were in the parking lot, and the informant had no track record of providing reliable information to police.

The State argues that citizen informants are subject to less scrutiny than police informants, and need not have a track record with providing reliable information to establish probable cause. To support its argument, the State cites *State v. Williams*, 2001 WI 21, 241 Wis.2d 631, 623 N.W. 2d 106. But *Williams* concerned whether police had reasonable suspicion, not probable cause, to stop a suspect based upon a citizen informant's tip; so *Williams* is not directly on point.

Nevertheless, Johnson acknowledges that citizen informants might be reliable even if they have not previously provided information to law enforcement. See *State v. Paszek*, 50 Wis.2d 619, 631, 184 N.W.2d 836, 843 (Wis. 1971). A citizen informant's reliability is evaluated according to the nature of her report, her opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation. *Id.*

As reviewed above, even under this relaxed standard the informant's report and the subsequent police investigation were not

sufficient to establish probable cause. The informant saw a bag lying on the ground in a public parking lot that was later determined to contain heroin. The fact that the bag was in a public parking lot, rather than a private driveway, expands the universe of suspects to anyone who drove or walked through the Chuck E. Cheese/Pet World parking lot on or around June 13, 2013. Further, the bag was not found sitting on the car or even under the car, but next to the car, which attenuates the car from the bag of heroin.

While the driver returning to the scene and appearing to look for something might provide reasonable suspicion to stop the suspect, the totality of circumstances is not enough to link the bag of heroin to a specific person, which is the State's burden where an arrest is made without a warrant. *See State v. Secrist*, 224 Wis.2d 201, 216-217, 589 N.W.2d 387, 395 (Wis. 1999).

The State attempts to distinguish this case from *State v. Kolk*, 2006 WI App. 261, 298 Wis.2d 99, 726 N.W.2d 337, where this Court determined that a citizen informant's tip to law enforcement did not provide reasonable suspicion to stop the suspect. *Kolk* noted that neither direct observation of a crime nor predictive information are necessary for a tip to be reliable, but "the presence of either can

provide reason to believe that the tipster has truthful and accurate information.” *Id.*, at ¶19.

The State argues that the informant directly observed a crime when she viewed the bag next to the Tahoe. Johnson maintains, however, that this Court referred in *Kolk* to directly observing a crime in progress, such as an informant viewing a drug transaction. The informant in this case, however, only observed evidence of a crime and did not observe a crime in progress.

Where a citizen informant provides evidence of heroin, but the informant did not witness anyone possess or distribute the substance, law enforcement must independently corroborate the informant’s tip with additional incriminating information to support probable cause. Here, the police did not observe Johnson possess heroin, distribute heroin, or engage in any behavior that could not be explained a hundred different ways. The State therefore did not meet its burden to show that Johnson’s warrantless arrest was supported by probable cause.

CONCLUSION

Johnson asks this Court to reverse the circuit court's order denying his motion to suppress, 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.

Dated at Milwaukee, Wisconsin, September 8, 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 1,445 words.

Dated at Milwaukee, Wisconsin September 8, 2016.

BRIAN P. MULLINS
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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.

Dated at Milwaukee, Wisconsin September 8, 2016.

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CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Wis. Stat. 809.80(4)(a), that this Appellant's Reply Brief and Appendix will be delivered by Federal Express to the Clerk of the Court of Appeals, P. O. Box 1688, Madison, WI 53701-1688, on the 9th day of August, 2016. I further certify that the brief will be correctly addressed and postage pre-paid. Copies will be served on the parties by the United States Postal Service.

Dated at Milwaukee, Wisconsin September 8, 2016.

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