STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2016AP1671-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DENTON RICARDO EWERS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Pepin County Circuit Court, the Honorable James J. Duvall, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Whether Ewers' Fourth Amendment right to be free from unreasonable seizures was violated when an officer stopped his vehicle based entirely on a store employee's observations that Ewers appeared dazed and confused on two occasions prior to the stop and that Ewers smelled of intoxicants during the employee's first observation, which occurred more than two hours before the stop.

The circuit court answered: No, the officer had reasonable suspicion to stop Ewers' vehicle based on the store employee's observations.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because the briefs will adequately address all relevant issues. Publication is likely unwarranted because this case can be decided based on well-established law.

STATEMENT OF THE CASE AND FACTS

Synopsis

The State charged Ewers with four counts related to driving under the influence of an intoxicant. (10). The charges were the result of a traffic stop based entirely on two calls made by a Family Dollar employee who observed a male patron of the store who appeared dazed and confused, and who smelled of intoxicants at the time of the employee's first observation. (53:9-10). Ewers filed a motion to suppress evidence obtained as a result of the traffic stop arguing that

the officer lacked reasonable suspicion to stop him. (17). The circuit court denied the motion to suppress and Ewers subsequently pled guilty to count one, operating while intoxicated ninth offense, with the other three counts dismissed and read in at sentencing. (53:36-38; 56:11).

The Store Employee's Observations

At approximately 5:30pm on September 11, 2014, Officer Mitchell Checkalski was on patrol when he received a "traffic complaint" from dispatch. (53:5, 21-22, 24). Officer Checkalski testified that dispatch relayed to him that a Family Dollar employee reported that a dazed and confused male who smelled of intoxicants had been in the store. (53:24-25). Dispatch also relayed that the individual left in a gold colored Ford Focus travelling in a certain direction. (53:6-7, 26-27). Dispatch did not inform Officer Checkalski whether the individual was the driver or a passenger of the described vehicle. (53:27). Officer Checkalski unsuccessfully attempted to locate the vehicle. (53:6).

At approximately 7:55pm the same evening, dispatch contacted Officer Checkalski a second time regarding the same male Family Dollar patron. (53:8). Officer Checkalski testified that dispatch told him the same employee called again to report that the same individual had returned to the store, that the individual was "dazed and confused," and had left in the same vehicle. (53:6-7). Officer Checkalski provided somewhat conflicting testimony as to whether the store employee told dispatch that the man smelled of intoxicants during the second call. (53:6, 10, 27). However, when directly asked whether dispatch told him that the person smelled of intoxicants both times, Officer Checkalski stated:

> From my recollection, sir, the first complaint I received from the dispatch center had initially stated that the male

> they were calling to complain about had smelled of intoxicants, that he had intoxicants coming from his breath. The second time I received the complaint, I don't believe they stated the second time they smelled intoxicants coming from his breath.

(53:10).

Officer Checkalski stopped a vehicle matching the description given almost immediately following the second call. (53:9, 28). He did not observe any traffic or equipment violations before stopping the vehicle and he observed no unusual or dangerous driving. (53:9, 28). Rather, his decision to stop the vehicle was based entirely on the information dispatch received from the Family Dollar employee. (53:9).

Officer Checkalski also testified that he never spoke with the Family Dollar employee, that he did not know the employee's name, and that he never went to the store to investigate further. (53:8, 25-26).

Ewers filed a motion to suppress evidence seized as the result of the traffic stop. (17). He argued the information from the Family Dollar employee failed to establish the reasonable suspicion necessary to effectuate a lawful stop under the Fourth Amendment. (17:1, 4). The circuit court disagreed finding that the officer had reasonable suspicion to stop the vehicle based on the employee's observations of Ewers. (53:37; App. 104). Specifically, the circuit court found that the Officer was told of the "dazed and confused" behavior and that this behavior along with an "odor of intoxicant[s]" indicated a reasonable inference of intoxication. (53:36-37; App. 103-04).

This appeal follows. (34; 38).

ARGUMENT

Ewers was Subject to an Unreasonable Seizure when the Officer Stopped his Vehicle Based Entirely on a Store Employee's Observations that Ewers Appeared Dazed and Confused on Two Occasions and that He Smelled of Intoxicants More than Two Hours Prior to the Stop.

A. Introduction and standard of review.

Ewers does not contest the circuit court's factual findings that the officer was told the employee thought Ewers appeared dazed and confused and, during the first observation, the employee smelled an odor of intoxicants.[1] (53:36-37). In addition, Ewers does not contest the circuit court's characterization of the Family Dollar employee as a "citizen informant" who personally observed Ewers' behavior. (53:36). As a result, Ewers does not assert that the information relayed from the employee to dispatch to Officer Checkalski was unreliable. Rather, based on applicable case law, Ewers asserts that the information from the store employee is best viewed as having a moderate level of reliability.

At issue is whether the content of the information relayed to Officer Checkalski, considered in conjunction with a moderate level of reliability attributable to the store clerk, would lead a reasonable officer to believe that Ewers was driving under the influence of an intoxicant. Ewers contends

[1] The circuit court did not make an explicit finding as to the timing of the odor of intoxicants information; however, Officer Checkalski specifically testified that the odor of intoxicants information was relayed to him during the first call from dispatch and not the second call. (53:10, 36-37).

that the information the officer received—dazed, confused, and smelling of an intoxicant more than two hours prior to the stop—does not result in the reasonable suspicion necessary to effectuate a lawful stop.

The review of whether a traffic stop was reasonable and thus constitutionally permitted raises a question of constitutional fact. ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. "A question of constitutional fact is a mixed question of law and fact to which [an appellate court] appl[ies] a two-step standard of review." ***Id.*** A reviewing court will first uphold factual findings unless clearly erroneous and will then independently apply findings of fact to constitutional principles. ***Id.***

B. Information from a moderately reliable source that Ewers had appeared "dazed and confused" and had smelled of intoxicants more than two hours prior to the stop of his vehicle does not warrant a reasonable belief that Ewers was driving while intoxicated.

The United States Constitution and the Wisconsin Constitution protect against unreasonable searches and seizures. U.S. Const. amend. IV; Wis. Const. Art. I, § 11. However, a police officer's temporary detention of an individual is lawful if the officer "possesses specific and articulable facts which would warrant a reasonable belief that criminal activity was afoot." ***State v. Waldner***, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996). The reasonable suspicion necessary to effectuate a lawful stop "is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the 'totality of the circumstances—the whole picture' that must be taken into account when evaluating

whether there is reasonable suspicion." ***Alabama v. White***, 496 U.S. 325, 330 (1990) (quoting ***United States v. Cortez***, 449 U.S. 411, 417 (1981)).

Investigative traffic stops constitute seizures and, as such, are subject to these same reasonableness requirements. *See* ***Whren v. United States***, 517 U.S. 806, 809-10 (1996). "The burden of establishing that an investigative stop is reasonable falls on the state." ***Post***, 301 Wis. 2d 1, ¶12.

1. The store employee is best viewed as a source of moderately reliable information.

Police officers are not required to make personal observations before conducting lawful investigative stops. ***Navarette v. California***, 572 U.S. __, 134 S.Ct. 1683, 1688 (2014); ***State v. Rutzinski***, 2001 WI 22, ¶¶7, 16-17, 241 Wis. 2d 729, 623 N.W.2d 516. In some instances, tips from informants may provide the requisite reasonable suspicion to effectuate a stop. ***Rutzinski***, 241 Wis. 2d 729, ¶17. However, "before an informant's tip can give rise to grounds for an investigative stop, the police must consider its reliability and content." ***Id.***

The reliability of informants varies greatly from case to case. ***Id.*** The Wisconsin Supreme Court has explained that in reviewing reliability of informant information, "due weight must be given to: (1) the informant's veracity; and (2) the informant's basis of knowledge." ***Id.***, ¶18. An informant may be reliable because he or she is personally known by police and has previously provided truthful information to law enforcement. ***Adams v. Williams***, 407 U.S. 143, 146-47 (1972). Similarly, a tip has a "high degree of reliability" when an "informant identifie[s] himself or herself and the police independently verify the information

before conducting a stop." ***State v. Powers***, 2004 WI App 143, ¶14, 275 Wis. 2d 456, 685 N.W.2d 869. On the other hand, an anonymous informant who provides no indication of the basis or source of the information provided to law enforcement is not considered sufficiently reliable. ***Florida v. J.L.***, 529 U.S. 266, 271-72 (2000). The reliability of the store employee in this case falls below that of a highly reliable source who fully discloses his or her identify and who provides ample information that may be independently verified by further investigation.

Here, the circuit court correctly concluded that the store employee was a "citizen informant." *See* ***State v. Kolk***, 2006 WI App 261, ¶12, 298 Wis. 2d 99, 726 N.W.2d 337 ("[A] citizen informant is someone who happens upon a crime or suspicious activity and reports it to police."). Citizen informants who provide self-identifying information are considered to be likely sources of reliable information. *See* ***State v. Miller***, 2012 WI 61, ¶33, 341 Wis. 2d 307, 815 N.W.2d 349. However, "[a] citizen informant's reliability must be evaluated from the nature of his report, his opportunity to hear and see the matter reported, and the extent to which it can be verified by an independent police investigation." ***State v. Boggess***, 110 Wis. 2d 309, 316, 328 N.W.2d 878 (Ct. App. 1982).

Here, there is nothing in the record indicating that the store employee gave her name to the dispatcher.[2] Nor is there any indication of whether her call was recorded or made to a 911 emergency system.[3] However, it is undisputed that the

[2] Officer Checkalski testified that he believed dispatch identified the caller as a female employee of Family Dollar. (53:26).

[3] The United States Supreme Court has held that one factor to consider in determining whether an anonymous call is reliable is whether the call was made to a 911 system, which would give law enforcement

caller did give some identifying information—her employment at the Family Dollar store. It is also undisputed that the store employee gave information based on her personal observations of Ewers. However, this information—dazed, confused, and smelling of intoxicants—was minimal and not verified by law enforcement before the stop occurred. Furthermore, aside from gender, the employee gave no description of the individual and gave no indication of the person's behavior in the store, which would lead her to conclude he was "dazed and confused." While the employee did give a vehicle description and direction of travel, the officer was unable to verify this information following the first call as he did not locate a vehicle matching this description.

In sum, the fact that the caller remained somewhat anonymous and provided information that was ambiguous and largely unverified by law enforcement, this court should not afford the highest degree of reliability to the store employee when determining, under the totality of the circumstances, whether the officer had reasonable suspicion to make a traffic stop.

2. The content of the information derived from the store employee's observations of Ewers does not warrant a reasonable belief that Ewers was driving while intoxicated.

More importantly, the content of the information relayed from the store employee to dispatch to Officer Checkalski would not lead a reasonable officer to conclude that Ewers was driving while intoxicated. Courts have had

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the ability to trace the source of the call. ***Navarette***, 134 S.Ct. at 1689-90.

numerous occasions to review the constitutionality of traffic stops made on the basis of tips of intoxicated drivers. These cases generally reveal two scenarios where information from a citizen informant establishes reasonable suspicion. First, a citizen informant's contemporaneous report of dangerous and/or erratic driving typically supports a traffic stop based on reasonable suspicion of drunk driving. Second, when erratic driving is not observed, a citizen's report that an individual is intoxicated may result in reasonable suspicion when an officer makes additional observations of the person's behavior. This case is distinguishable from both scenarios.

The United States Supreme Court has held that a motorist's 911 call conveying information that a fellow driver had just run her off the road provided reasonable suspicion to conduct a traffic stop of the offending vehicle. ***Navarette***, 134 S.Ct. at 1689. The Court explained: "The 911 caller in this case reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: running another car off the highway." ***Id.*** at 1691.

Prior to ***Navarette,*** the Wisconsin Supreme Court came to a similar conclusion holding that a motorist's tip that another car was weaving, greatly varying its speed, and tailgating other vehicles provided the reasonable suspicion necessary for an officer to conduct an investigative stop. ***Rutzinski***, 241 Wis. 2d 729, ¶¶3-4. In so holding, the court stated: "Erratic driving is one possible sign of intoxicated use of a motor vehicle." ***Id.***, ¶34.

Reports of erratic driving from concerned motorists combined with police officers' additional observations also constitute reasonable suspicion for an officer to conduct a

traffic stop to investigate further. ***Vill. of Hales Corners v. Adams***, No. 2013AP1128, unpublished slip op., ¶¶2, 4, 14 (Wis. Ct. App. Jan. 14, 2014) (holding reasonable suspicion existed when a tipster described a vehicle as "all over the road" and an officer observed an individual stumble out of the driver's seat); ***State v. Streekstra***, No. 2009AP1441-CR, unpublished slip op., ¶¶1-3 (Wis. Ct. App. Dec. 9, 2009) (concluding that reasonable suspicion to effectuate a traffic stop existed when another motorist reported erratic driving, which an officer independently verified); ***Washington Cty. v. Welch***, No. 2009AP47, unpublished slip op., ¶12 (Wis. Ct. App. July 29, 2009) (holding that an off-duty officer's tip of an intoxicated driver plus the officer's observation of a minor traffic violation resulted in reasonable suspicion for a stop). (App. 106-17).[4]

Although erratic driving is generally held as providing reasonable suspicion of drunk driving, an observation of erratic driving is not required. *See* ***Powers***, 275 Wis. 2d 456, ¶12. In ***Powers***, a store clerk, identified by name, called police to report that "an intoxicated man" had attempted to purchase beer in the store with a declined credit card and that he would be returning to complete the transaction. ***Id.***, ¶2. An officer parked near the individual's vehicle, as described by the clerk, observed an individual leaving the store with a case of beer, and independently observed that the man was unsteady on his feet. ***Id.***, ¶3. This Court first held that the tip was reliable as it was given by a named store clerk and based on first-hand observations. ***Id.***, ¶¶9-11. It also concluded that a layperson could give an opinion as to whether another person was intoxicated. ***Id.***, ¶13. Finally, the police officer was able to independently verify the tip by observing the

[4] All of the unpublished, authored opinions are cited in this brief for their persuasive value pursuant to Wis. Stat. § (Rule) 809.23(3)(b).

individual walk unsteadily shortly after the clerk's call. ***Id.***, ¶14. The court concluded that the officer had reasonable suspicion to stop the individual as he drove out of the parking lot based on the highly reliable tip and the independent verification by the officer, which occurred prior to the stop. ***Id.***

However, this Court has very recently concluded that not all information from citizen informants related to alcohol consumption results in the reasonable suspicion necessary to conduct a traffic stop. For example, a call reporting that an individual had been drinking beers at a movie theatre, had left with an unopened beer in his pocket, and had driven away in a white vehicle did not result in reasonable suspicion that the person was driving drunk. ***State v. Vanderlinden***, No. 2015AP901-CR, unpublished slip op., ¶¶4, 11 (Wis. Ct. App. Aug. 30, 2016). (App. 118-21). This Court explained that without more than "[a] statement that an individual was observed at night drinking an unspecified number of beers, during an unspecified amount of time, and leaving a theater with a beer in his pocket is not sufficient to give rise to a reasonable suspicion that criminal or wrongful activity is afoot." ***Id.***, ¶14. (App. 120). Similarly, this Court has held that vague witness statements that another person had been drinking alcohol and then driving do not result in the reasonable suspicion required for an investigative stop. ***Vill. of DeForest v. Braun***, No. 2011AP2116, unpublished slip op., ¶¶11-12 (Wis. Ct. App. Mar. 15, 2012) (noting that "drinking and driving in and of itself is not a crime"). (App. 122-24).

Here, it is undisputed that neither the Family Dollar employee nor Officer Checkalski observed any erratic or dangerous driving; therefore, this case is distinguishable from ***Navarette*** and ***Rutzinki*** as well as a number of unpublished

decisions from this Court involving citizens' observations of erratic driving. Furthermore, this case is distinguishable from ***Powers*** where a store clerk's observation that a customer was intoxicated was bolstered by an officer's observation that the individual was unsteady on his feet while carrying a case of beer. Here, the officer made no independent observation of Ewers' behavior. Instead, the only information Officer Checkalski knew prior to stopping Ewers at approximately 7:55pm was that he was looking for a Gold Ford Focus with either a male driver or occupant who had appeared "dazed and confused" and who had smelled of intoxicants at approximately 5:30pm. Furthermore, prior to the stop, the only observation the officer made was of the vehicle itself, which matched the description given by dispatch. There is no indication in the record that the Officer observed whether a male driver or male passenger was even in the vehicle. The information the officer had and his sole observation of the vehicle itself is not enough for a reasonable officer to conclude that a drunk driver is on the road.

First, the description of "dazed and confused" given during both calls is conclusory and offers no indication of the behavior that Ewers allegedly displayed in the Family Dollar store.[5] Furthermore, the officer knew nothing about the nature of the interaction between the employee and Ewers or its duration. There is no indication the employee had prior contacts with the 51-year-old Ewers that would allow her to more accurately assess whether his demeanor that evening was inconsistent with his normal affect. Without any

[5] Although the phrase "dazed and confused" may conjure up memories of the cult classic movie by the same name involving illegal drug use and underage drinking, the conclusory description itself does not point to wrongful or illegal activity. *See Dazed and Confused* (Gramercy Pictures 1993).

description of specific behavior or an officer's independent observation of the individual, a store employee's impression that a patron appears "dazed and confused" is not enough to suggest that the person is under the influence of an intoxicant.

Second, the information that Ewers smelled of an intoxicant at approximately 5:30pm combined with the conclusory description of "dazed and confused" does not result in reasonable suspicion that Ewers was driving under the influence at 7:55pm when the traffic stop occurred. As ***Vanderlinden*** and ***Braun*** demonstrate, the fact that a person may have consumed alcohol (or smell as though he or she has consumed alcohol) before driving does not necessarily indicate that a crime is occurring.

Furthermore, even assuming for argument sake that the dazed and confused description along with the smell of intoxicants reported at 5:30pm would establish reasonable suspicion at that time, reasonable suspicion does not last indefinitely. Rather "[a]t the time of the stop, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the officer to believe that *criminal activity is afoot*." ***Rutzinski***, 241 Wis. 2d 729, ¶14 (emphasis added). Any reasonable suspicion arguably established at 5:30pm when the officer was told Ewers smelled of intoxicants no longer existed at the time of the 7:55pm stop due to the natural dissipation of alcohol from a person's blood. *See* ***Missouri v. McNeely***, 569 U.S. __, 133 S.Ct. 1552, 1560 (2013)("[A]s a result of the human body's natural metabolic processes, the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated."). In sum, the information conveyed to Officer Checkalski from an

unidentified store employee, a moderately reliable source, would not lead a reasonable officer to conclude that Ewers was driving while intoxicated.

Wisconsin courts have rightfully recognized the dangers presented by drunk driving and the need for police to protect the public from intoxicated drivers. ***Rutzinski***, 241 Wis. 2d 729, ¶36; ***Strenke v. Hogner***, 2005 WI App 194, ¶21, 287 Wis. 2d 135, 704 N.W.2d 309. The significant problem of drunken driving on Wisconsin roads, however, does not lessen the Fourth Amendment's requirement that an officer have reasonable suspicion that criminal activity is taking place. *See* ***Navarette***, 134 S.Ct. at 1697 (Scalia, J., dissenting) ("Drunken driving is a serious matter, but so is the loss of our freedom to come and go as we please without police interference."). Nor should Ewers' conviction of driving while intoxicated alter the applicable Fourth Amendment analysis. "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." ***Arizona v. Hicks***, 480 U.S. 321, 329 (1987).

CONCLUSION

For the reasons set forth above, Ewers respectfully requests that this Court reverse the judgment of conviction and remand to the circuit court with directions to suppress all evidence derived from the stop.

Dated this ____ day of November, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,660 words.

CERTIFICATE 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 ____ day of November, 2016

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A P P E N D I X

I N D E X
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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or 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 one or more initials or other appropriate pseudonym or designation 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.

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