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COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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 OF THE PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not request oral argument or publication.

SUPPLEMENTAL STATEMENT OF THE CASE

Denton Ricardo Ewers, the defendant-appellant, was charged with one count of operating while intoxicated, ninth offense, contrary to Wis. Stat. §§ 346.63(1)(a) and 346.65(2)(am)6, and one count of failure to install an ignition interlock device, contrary to Wis. Stat. § 347.413(1). (1:1.)

At 5:30 p.m. on September 11, 2014, Pepin County Dispatch notified Officer Mitchell Checkalski that an employee of the Family Dollar had called in a traffic complaint. (43:6, 17; 52:6–7.) The employee alleged that a male patron was dazed, confused, and smelling of intoxicants. (43:6; 52:6–7.) The man had just left the Family Dollar in a gold Ford Focus with a Minnesota license plate and was headed towards Country Lane. (43:6–7; 52:6, 25.) Officer Checkalski was unable to locate the vehicle. (52:6.)

At 7:55 p.m. the same evening, dispatch notified Officer Checkalski that the Family Dollar employee had called again concerning the same man. (52:6.) The individual had returned to the store, was still acting dazed and confused, and left in the same gold Ford Focus, traveling in the same direction as before. (52:6, 8, 10–11, 28.) Officer Checkalski located a gold Ford Focus, confirmed the license plate number, and activated his emergency lights to initiate a traffic stop. (43:7.) His decision to stop the vehicle was based entirely on the traffic complaints called in by the Family Dollar employee. (52:9–10.)

Ewers moved to suppress any evidence resulting from the traffic stop, alleging that Officer Checkalski did not have reasonable suspicion to perform an investigatory stop nor probable cause to arrest. (15.) The circuit court denied Ewers' motion. (52:38.) On appeal, Ewers argues only that Officer Checkalski did not have reasonable suspicion to perform the investigatory stop.

ARGUMENT

The Family Dollar employee's tips gave sufficient specific and articulable facts to justify an investigatory stop.

This Court should affirm the trial court's order denying the motion to suppress because the information provided by the Family Dollar employee contained specific and articulable facts that supported Officer Checkalski's reasonable inference that Ewers was operating a motor vehicle while intoxicated.

The Wisconsin Supreme Court has recognized that reasonable suspicion for an investigatory stop can be based solely on a reliable tip. *State v. Rutzinski*, 2001 WI 22, ¶¶ 17–26, 241 Wis. 2d 729, 623 N.W.2d 516. And that principle was recently affirmed by the United States Supreme Court. *Navarette v. California*, 134 S. Ct. 1683, 1690 (2014) (“Even a reliable tip will justify an investigative stop only if it creates reasonable suspicion that ‘criminal activity may be afoot.’”).

In the context of drunk driving, a layperson's opinion that another person is intoxicated can provide an officer with reasonable suspicion to initiate an investigatory stop. *State v. Powers*, 2004 WI App 143, ¶ 13, 275 Wis. 2d 456, 685 N.W.2d 869 (citation omitted). And neither the informant

nor the officer needs to observe erratic or dangerous driving as “improper driving is not an element of an OWI offense.” *Id.* ¶ 12 n.2.

An investigatory stop may also be based upon an informant’s first-hand account of a person’s driving behavior without a specific allegation of drunkenness. *Navarette*, 134 S. Ct. at 1691. It is only required that the informant provide sufficient information such that the inference of drunk driving is reasonable. *Id.* And again, the officer need not personally observe any unsafe or erratic driving. *Id.* at 1691–92.

This case presents a closely related fact scenario and gives rise to the question whether, an informant’s first-hand observations of non-driving related behaviors suggesting drunkenness are sufficient for an investigatory stop when the informant does not explicitly opine that the individual is intoxicated? To make such a determination, this Court must consider the reliability of the tips at issue and whether the specific facts alleged would lead a reasonable officer to suspect criminal activity. If the tips were sufficiently reliable and detailed, the tips alone can be the basis for a reasonable suspicion of criminal activity. *See Rutzinski*, 241 Wis. 2d 729, ¶¶ 17–26.

Upon review of a denial of a motion to suppress, this Court upholds findings of historical fact unless they are clearly erroneous. *State v. Sykes*, 2005 WI 48, ¶ 12, 279 Wis. 2d 742, 695 N.W.2d 277. This Court reviews the application of constitutional principles to those facts de novo. *Id.*

A. The Family Dollar employee's tips were reliable.

In assessing the reliability of a tip, the court considers the type of informant, how the informant came about the information, and what, if any, details were corroborated by the police before the tip was acted upon. *Rutzinski*, 241 Wis. 2d 729, ¶ 18. These considerations are viewed in light of the totality of the circumstances. *Id.* A deficiency in one consideration may be compensated for by a strong showing as to the others, or even by some other indicia of reliability. *Id.*

There are three basic types of informants. A citizen informant is “someone who happens upon a crime or suspicious activity and reports it to police.” *State v. Miller*, 2012 WI 61, ¶ 31 n.18, 341 Wis. 2d 307, 815 N.W.2d 349 (citation omitted). A citizen informant is generally considered among the most reliable informants. *Id.* A confidential informant is someone “often with a criminal past him-or her-self, who assists the police in identifying and catching criminals.” *Id.* A confidential informant’s reliability is generally measured by evidence that he or she provided truthful information to police in the past. *Id.* And finally, an anonymous informant is someone “whose identity is unknown even to the police.” *Id.* A anonymous informant is considered reliable if police are able to corroborate details in the informant’s tip. *Id.*

Ewers asserts that the tipster in this case does not fit neatly into the citizen informant category because the lack of information about the Family Dollar employee allowed her to “remain[] somewhat anonymous.” (Ewers’ Br. 7–8.) Ewers has a point. But the fact that the Family Dollar employee was unnamed does not exclude her from the class of inherently reliable citizen informants. “The key to this

analysis is the informant’s knowledge or presumed knowledge that a consequence of disclosing his or her identity is accountability for providing a false tip.” *Miller*, 341 Wis. 2d 307, ¶ 34. Even when an informant does not provide her name, “an informant who risks disclosing his or her identity is more likely to be providing truthful information because the informant knows that police can hold him or her accountable for providing false information.” *Id.*

The informant in this case disclosed that she was a female employee of the Family Dollar in Durand, and that she was calling about a patron. (52:26.) Durand is a small community of roughly 2,000 residents.¹ And there is only one Family Dollar store in the city. (52:8.) Thus, the circuit court concluded that even if Officer Checkalski did not know the informant’s name, he knew how to locate her. (52:36.) The informant was easily identifiable from the information provided. Therefore, although unnamed, the informant was not truly anonymous. *See State v. Williams*, 2001 WI 21, ¶¶ 34–35, 241 Wis. 2d 631, 623 N.W.2d 106; *see also Rutzinski*, 241 Wis. 2d 729, ¶ 32 (distinguishing a potentially identifiable but unnamed informant from the anonymous informant in *Florida v. J.L.*, 529 U.S. 266 (2000)).

In addition to being easily identifiable, the informant was someone who happened to personally observe suspicious activity due to her employment and reported that activity to the police. That is the definition of a citizen informant. *See Miller*, 341 Wis. 2d 307, ¶ 31 n. 18. She was so concerned about Ewers’ behavior that she called in a traffic complaint

¹ *About Durand* http://www.durand-wi.com/index.asp?Type=B_BASIC&SEC={4669F97F-410F-4AEE-9A12-778DB3342CA4} (last visited Dec. 13, 2016).

twice. And regardless of whether she reached the dispatcher by calling 9-1-1 or a non-emergency line, she exposed herself to prosecution and penalties for making a false report. Risking one's identification multiple times implies that "the informant is a genuinely concerned citizen as opposed to a fallacious prankster." *Williams*, 241 Wis. 2d 631, ¶ 35.

Furthermore, where, as here, an informant calls from a place of business to report suspected drunk driving, courts have little trouble concluding that such a tip is reliable. *See, e.g., People v. Shafer*, 868 N.E.2d 359, 366–67 (Ill. Ct. App. 2007) (reasonable suspicion found based on Wendy's employee's report of a suspected drunk driver); *State v. Slater*, 986 P.2d 1038, 1043 (Kan. 1999) ("Second on the scale of reliability are those tips in which, although the informant does not identify himself or herself, the informant gives enough information that his or her identity may be ascertained."); *State v. Sampson*, 669 A.2d 1326, 1328 (Maine 1996) (reasonable suspicion found based on doughnut shop employee's report that a possible drunk driver had been through the drive-through); *Playle v. Comm'r of Pub. Safety*, 439 N.W.2d 747, 749 (Minn. Ct. App. 1989) (reasonable suspicion found based on Burger King employee's report of a suspected drunk driver).

The veracity of the informant, and the information she provided, is bolstered by the fact that her concerns stemmed from her personal observation of Ewers' behavior, his vehicle and, and his direction of travel. Officer Checkalski was able to corroborate innocent details of the informant's traffic complaint like the make, model, and color of the vehicle, the license plate number, and the direction of Ewers' travel. (52:6–9.) This gave more "reason to believe not only that [she] was honest but also that [she] was well informed, at least well enough to justify the stop." *Williams*, 241 Wis. 2d 631, ¶ 28 (quotation omitted).

The totality of the circumstances indicates that the Family Dollar employee was trustworthy and the tip was truthful. Thus, reasonable suspicion may properly be founded on the tip alone. *Navarette*, 134 S. Ct. at 1690; *Powers*, 275 Wis. 2d 456, ¶ 14; *Rutzinski*, 241 Wis. 2d 729, ¶¶ 20–21. Therefore, this Court must now consider whether the details contained within the two tips were sufficient to give rise to reasonable suspicion of criminal activity.

B. The Family Dollar employee’s tips provided sufficient specific and articulable facts to give rise to a reasonable suspicion that Ewers was committing a crime.

A traffic stop is reasonable if a law enforcement officer has “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. Ohio*, 392 U.S. 1, 21 (1968). In other words, the seizure is reasonable if the officer can point to specific and articulable facts that would lead the officer, in light of the officer’s training and experience, to reasonably suspect that the individual committed, or was about to commit a crime. *State v. Walli*, 2011 WI App 86, ¶ 8, 334 Wis. 2d 402, 799 N.W.2d 898.

Reasonable suspicion must be based on more than a hunch, but when an officer encounters a situation in which an individual’s behavior leads to reasonable interferences of both lawful and unlawful behavior, it is reasonable for the officer to perform a brief stop. *See State v. Begicevic*, 2004 WI App 57, ¶ 7, 270 Wis. 2d 675, 678 N.W.2d 293 (citing *State v. Waldner*, 206 Wis. 2d 51, 61, 556 N.W.2d 681 (1996)). In fact, it is considered “the essence of good police work . . . to freeze the situation until [the officer can] sort out the ambiguity.” *Begicevic*, 270 Wis. 2d 675, ¶ 7.

Ewers suggests that, when a traffic stop is based solely on information from a citizen informant, reasonable suspicion of drunk driving is limited to cases in which there is (1) a complaint of contemporaneous erratic or dangerous driving, or (2) a complaint that the individual is intoxicated. (Ewers' Br. 9.) It is undisputed that there was no erratic driving in this case. And Ewers argues that the Family Dollar employee did not suggest that he was intoxicated.

The State disagrees and fails to see how the Family Dollar employee's tips did not suggest that Ewers was intoxicated. It seems that Ewers wants to limit reasonable suspicion to cases in which the informant expressly opines that the person is "drunk" or "intoxicated." Such a rule is contrary to the Fourth Amendment's touchstone of reasonableness. Courts are to examine the totality of the circumstances. *Walli*, 334 Wis. 2d 402, ¶ 8. And here, the totality of the circumstances supports a reasonable inference that Ewers was driving while intoxicated.

Officer Checkalski received *two* reports from the dispatch center within approximately two and one-half hours that a patron of the Family Dollar was in the store acting dazed and confused, that the patron had just left the store in a gold Ford Focus with a Minnesota license plate number, and that the vehicle was traveling in a specific direction. (52:6–7, 36–37.) The first report also included an explicit allegation that the patron smelled of intoxicants. (52: 36–37.)

The circuit court concluded that this information supported a reasonable inference of intoxication. (52:36–37.) This was not a case where an informant merely reported an

instance of drinking and driving. The tips concerned suspected intoxication.² And the Family Dollar employee was so concerned about Ewers' behavior that when she re-encountered Ewers a couple of hours later, she called in the second traffic complaint. (52:37.) The reasonable inference being that Ewers was behaving in a manner that led the informant to believe that he was still intoxicated. (52:37.)

Ewers argues that the more reasonable inference was that whatever led the informant to believe that Ewers was dazed and confused was actually normal behavior for Ewers. (Ewers' Br. 12–13.) He argues that there was nothing to suggest that the informant was familiar with Ewers, she did not report that Ewers smelled of intoxicants when she called in the second traffic complaint, and the effects of intoxicants wear off over time. Thus, it was more likely that Ewers' behavior was normal, not suspicion, as there was nothing to suggest that criminal activity was afoot. (Ewers' Br. 12–13.)

Ewers' argument ignores well-settled principles of our Fourth Amendment jurisprudence. Suspicious conduct by its very nature is ambiguous. *Waldner*, 206 Wis. 2d at 60. When an officer encounters a situation in which an individual's behavior leads to reasonable inferences of both lawful and unlawful behavior, it is reasonable for the officer to perform a brief stop. *Begicevic*, 270 Wis. 2d 675, ¶ 7. Officer Checkalski was not required to ignore the reasonable inference that Ewers was intoxicated and thus ignore the

² Therefore, this case is distinguishable from recent unpublished decisions regarding allegations of drinking and driving with no information suggesting that the driver was impaired. (See Ewers' Br. 11.)

tremendous potential for imminent danger that a drunk driver poses to the public. *Rutzinski*, 241 Wis. 2d 729, ¶¶ 34–35.

The investigatory stop was based on a reliable tip, and that tip contained sufficient details for Officer Checkalski to reasonably suspect that Ewers was operating a vehicle while intoxicated. Thus, the circuit court properly denied Ewers’ motion to suppress.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of conviction.

Dated this 3rd day of January, 2017.

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 2519 words.

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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 3rd day of January, 2017.

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