STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appellate Case No. 2017AP296

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

TRACY D. MARTIN,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Appealed From a Judgment of Conviction Entered in the Circuit Court for Milwaukee County, the Honorable Jean Marie Kies Presiding, Trial Court Case No. 15 CT 1041

Respectfully Submitted:

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STATEMENT OF THE ISSUE

I. WHETHER THE ARRESTING OFFICER HAD A REASONABLE SUSPICION TO SEIZE MR. MARTIN?

Trial Court Answered: Yes.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant believes oral argument is unnecessary in this case. Pursuant to Rule 809.22(2)(b), the briefs will fully develop and explain the issues. Therefore, oral argument would be of only marginal value and would not justify the expensditure of court time.

STATEMENT ON PUBLICATION

Defendant-Appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedures for publication. Moreover, the common law is well settled on the issue presented, and therefore, publication would do little, if anything to clarify this area of the law. Hence, publication is not sought.

STATEMENT OF THE FACTS AND CASE

On May 22, 2015, at approximately 12:30 A.M., Officer Daniel Foy of the West Allis Police Department was dispatched to the parking lot of a Taco Bell in the City of West Allis due to a report of a male sleeping in his vehicle. (R. 35, pp. 2-5.) Dispatch advised that the caller believed that the party inside of the vehicle was intoxicated. (R. 35, p. 5.) Officer Foy did not know if the caller had identified themselves and did not get a description of the car from dispatch. (R. 35, p. 17.)

Upon arriving on scene, Officer Foy observed the vehicle parked perpendicular, at about a forty-five degree angle, to an actual parking spot and was occupying "about" four different parking spots. (R. 35, p. 7.) However, it was a "very empty parking lot" and there was plenty of room to park. (R. 38, p. 18.) The driver also appeared to be sleeping. (R. 35, p. 7.) The engine was not running and the vehicle was in park, but the headlights were operating and the keys were in the ignition. (R. 35, pp. 6, 13.) Officer Foy ran the vehicle's registration and observed that the vehicle belonged to Tracy Martin who had three prior convictions for Operating While Intoxicated and thus had a .02 alcohol restriction. (R. 35, p. 7.)

Officer Kleinfeldt, who arrived with Officer Foy, then went through the passenger side door and removed the keys. (R. 35, p. 6.) The subsequent investigation led to the arrest of Martin for Operating While Intoxicated. (R. 35, pp. 9-10.)

On May 29, 2015, a criminal complaint was filed charging Martin with Operating While Intoxicated–Fourth Offense and Operating with a Prohibited Alcohol Concentration–Fourth Offense. (R. 1.) On November 30, 2015, Martin filed a motion to suppress challenging the initial

seizure. (R. 8.) The State filed a written response on December 22, 2015, and a motion hearing was held on February 19, 2016, before the Honorable Paul J. Rifelj. (R. 35.)

At the motion hearing, Officer Daniel Foy testified.[1] At the conclusion of testimony and arguments, Judge Rifelj denied Martin's motion. (R. 35, p. 28.) On April 29, 2016, Martin filed a motion for reconsideration. (R. 13.) The State filed a response on May 12, 2016. (R. 14.) On May 31, 2016, Judge Rifelj denied Martin's request for reconsideration in an oral ruling. (R. 36.) On August 1, 2016, a judicial transfer occurred and on August 8, 2016, another motion for reconsideration was filed before the Honorable Jean M. Kies. (R. 17.). On September 16, 2016, Judge Kies denied Martin's second motion for reconsideration. (R. 37.) On December 19, 2016, Martin entered a plea of Guilty to Operating While Intoxicated–Fourth Offense and finding of guilt was entered. The charge of Operating With a Prohibited Alcohol Concentration–Fourth Offense was dismissed. (R. 30.) Martin was sentenced accordingly, and the sentence was stayed pending this appeal. (R. 29.)

ARGUMENT

I. LEGAL FRAMEWORK.

The legality of an investigative stop is a question of law that this Court reviews *de novo*. *See State v. Harris*, 206 Wis. 2d 243, 250, 557 N.W.2d 245 (1996). When the issue, as here, is whether the police have sufficient justification to detain a citizen, this Court examines that detention in the

[1] Officer Bryan McNally also testified, however, his testimony was deemed irrelevant and terminated by the Court before it was concluded. (R. 35, pp. 19-23.)

framework of *Terry v. Ohio*, 392 U.S. 1 (1968). *See State v. Swanson*, 164 Wis. 2d 437, 448, 475 N.W.2d 148 (1991) (discussing a "*Terry* investigative detention").

Citizens have a constitutional right to be free from "unreasonable searches and seizures." *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990) (citing the Fourth Amendment to the United States Constitution and Article I, sec. 11 of the Wisconsin Constitution). When an officer detains a person, the Fourth and Fourteenth Amendments are implicated and reasonable suspicion, at a minimum, must exist for the seizure to be constitutional. *See Richardson*, 156 Wis. 2d at 139, citing *United States v. Hensley*, 469 U.S. 221, 226 (1985); *see generally Terry*, 392 U.S. 1; Wis. Stat. § 968.24 (2015-16) (codifying the *Terry* standard).

As held by the trial court, the point of seizure in the present case was when Officer Kleinfeldt opened Martin's vehicle's door, reached in, and removed the keys from the ignition. (R. 25, p. 27.) "A seizure occurs 'when an officer, by means of physical force or a show of authority, restrains a person's liberty.'" *State v. Kelsey C.R.*, 2001 WI 54, ¶ 30, 243 Wis. 2d 422, 626 N.W.2d 777 (quoting *Harris*, 206 Wis. 2d at 253); *see also Terry*, 392 U.S. 1 ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person").

"The State bears the burden of proving that a temporary detention was reasonable." *State v. Pickens*, 2010 WI App 5, ¶14, 323 Wis. 2d 226, 779 N.W.2d 1. To execute a valid investigatory stop, *Terry* and its progeny require that a law enforcement officer reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. *Richardson*, 156 Wis. 2d at 139 (citing

Terry, 392 U.S. at 27, 30). An officer's "inchoate and unparticularized suspicion or hunch'" will not suffice. *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (citing *Terry*, 392 U.S. at 27). Therefore, to justify a *Terry* stop, law enforcement officers "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts" lead them to suspect criminal activity was afoot. *Terry*, 392 U.S. at 21, 30; *State v. Waldner*, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996). The determination of reasonableness is a common sense test based on the totality of the facts and circumstances known to the officer at the time of the stop. *Richardson*, 156 Wis. 2d at 139-40; *see also Post*, 2007 WI 60, ¶13. This common sense approach balances the rights of the individuals to be free from unreasonable intrusions, and the interests of the State to effectively prevent, detect, and investigate crimes. *State v. Rutzinski*, 2001 WI 22, ¶15, 241 Wis. 2d 729, 623 N.W.2d 516; *Post*, 2007 WI 60, ¶13.

II. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE OFFICERS HAD A REASONABLE SUPICION TO DETAIN MR. MARTIN.

In the present case, at the time of detention there was no indication that the driver of the vehicle was intoxicated or had even consumed alcohol. What must be treated as an anonymous tipster, calls police and reports that an individual is sleeping in a parking lot at 12:30 A.M. and they believed the driver was intoxicated. This naked assertion was made without any supporting reasons given.

Police arrive and observe a vehicle parked askew in more than one parking spot in an otherwise empty lot with plenty of room for other vehicles to park. Based upon this lone observation and that the registered owner has prior

Operating While Intoxicated convictions, they seize the driver. In this factual context, there are simply too few objective indicia to support a reasonable suspicion that the driver was intoxicated and therefore subject to immediate seizure without first tapping on a window to wake the driver and ask him a few questions, such as where he was coming from, whether he had been drinking, and the like. This too would have given the officers an opportunity to observe whether the vehicle occupant had slurred speech, bloodshot or glassy eyes, an odor of intoxicants emanating from his person, among other things. Without gathering such particularized evidence, the officers were simply acting on a hunch.

Beginning with the anonymous call, this case fails constitutional scrutiny. The anonymous call clearly lacks the necessary reliability to support a seizure by itself. In some circumstances, information provided by a tipster may justify an investigative stop. *See Rutzinski*, 2001 WI 22, ¶17. However, before an "informant's tip can give rise to grounds for an investigative stop, police must consider its reliability and content." *Rutzinski*, 2001 WI 22, ¶17.[2] In assessing the reliability of a tip, courts must consider the tipster's veracity, credibility and/or the tipster's basis of knowledge. *Rutzinski*, 2001 WI 22, ¶18.

In *Rutzinski*, the Wisconsin Supreme Court specifically considered "under what circumstances a cell-phone call from an unidentified motorist provides sufficient justification for

[2] While *Rutzinski* concerned a stop of a vehicle and here we are dealing with a detention, the distinction is one of insignificance. To conduct a lawful traffic stop, an officer needs to have reasonable suspicion that a crime or traffic violation has been or will be committed. *State v. Popke*, 2009 WI 37, ¶¶ 13, 23, 317 Wis. 2d 118, 765 N.W.2d 569. This is the same as for a *Terry* detention. *See* Section I, at pp. 4-5.

an investigative stop." *Id*., ¶1. The tip in *Rutzinski* described a truck "weaving within its lane, varying its speed from too fast to too slow, and tailgating." *Id*., ¶4. Thus, the content of the tip involved illegal conduct. The *Rutzinski* court upheld the stop based on three facts. First, the anonymous tipster left himself open to identification and arrest. *Id*., ¶32 (citing the crimes of obstruction and misuse of "911"). Specifically, the tipster remained in constant contact with dispatch and pulled over at the scene of the stop. *Id*., ¶¶ 6-7, 32. Second, the tipster provided verifiable information and contemporaneous observations, indicating their basis of knowledge. *Id*., ¶33. Third, the tip suggested that Rutzinski was an imminent threat to the public's safety. *Id*., ¶34.

Unlike *Rutzinski*, the United States Supreme Court in *Flordia v. J.L.*, 529 U.S. 266 (2000), held that the tipster's information fell below the required threshold for reliability. Specifically, the facts in *J.L.* were:

> [A]n anonymous caller reported to the Miami-Dade Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. So far as the record reveals, there is no audio recording of the tip, and nothing is known about the informant. Sometime after the police received the tip-the record does not say how long-two officers were instructed to respond. They arrived at the bus stop about six minutes later and saw three black males "just hanging out [there]." One of the three, respondent, J.L., was wearing a plaid shirt. Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct. The officers did not see a firearm, and J.L. made no threatening or otherwise unusual movements. One of the officers approached J.L., told him to put his hands up on the bus stop, frisked him, and seized a gun from J.L.'s pocket.

J.L., 529 U.S. at 268 (citations omitted). The *J.L.* Court noted

that as an anonymous tip, it failed to demonstrate the informant's veracity, and thus the police were required to corroborate the tip. *Id*. at 274. Moreover, the *J.L.* Court explained that police must do more than verify easily obtainable information that tends to identify the suspect, they must verify information that tends to indicate the informant's basis of knowledge about the suspect's illegal activity. *Id*. at 272; *Rutzinski*, 2001 WI 22, ¶28 (anonymous tips must contain not only a bald assertion that the suspect is engaged in illegal activity but also verifiable information indicating how the tipster came to know of the alleged illegal activity). Importantly, the *J.L.* Court held that the anonymous tip did not contain any information such as prediction regarding the suspect's future behavior which, if corroborated, would indicate the informant's basis of knowledge. *J.L.*, 529 U.S. at 271. Rather, "all the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he [or she] knew about the gun nor supplied any basis for believing he [or she] had inside information about [the suspect]." *Id*.

Here, the content of the tip was more akin to the facts of *J.L.* We have nothing more than a bare report of an unknown, unaccountable informant who neither explained how he [or she] knew about the individual being intoxicated nor supplied any basis for believing he [or she] had inside information about Martin. Put another way, there was no verifiable information indicating how the tipster came to believe Martin was intoxicated. Nor was there any way to judge the credibility of the tipster.

Next, the remaining facts do not add the necessary suspicion. The fact that the vehicle was parked diagonally in the lot does not provide reasonable suspicion that the driver is intoxicated. It was on private property, the vehicle was not impeding any traffic, the parking lot was "very" empty, and

there was plenty of room for other vehicles to park. Even if combined with the fact that the registration came back to someone with prior convictions for Operating While Intoxicated, this is simply not enough to provide anything more than a hunch that the driver was impaired. Notably absent are the typical indicators of impairment noted by officers such as slurred speech, the odor of intoxicants, red or bloodshot eyes, glossy eyes, glassy eyes, fumbling with documentation, *etc*.. Moreover, at the time of the seizure, it was unknown how long the vehicle had been parked or whether this was even the same driver being complained about.

Again, without providing a basis for why the caller believed the person to be intoxicated, such a bald assertion provides no support for the reasonable suspicion analysis. By itself, the call would certainly not provide sufficient articulable facts. While the combination of the facts may justify a hunch, there are simply insufficient facts to reasonably believe that Martin was intoxicated. Rather than immediately seizing the driver in such circumstances, simply speaking with the driver before initiating the seizure would have been reasonable. Any ongoing emergency or danger to the public was greatly minimized as the vehicle was not running and the vehicle was parked. Likewise, the tipster's report failed to carry any urgency justifying the immediate seizure. Initiating a seizure was thus unreasonable under the circumstances.

CONCLUSION

For all the foregoing reasons, Mr. Martin respectfully requests that this Court reverse the denial of his motion to suppress, vacate the judgment of conviction, and remand for further proceedings not inconsistent therewith.

Dated this ___ day of May, 2017.

Respectfully submitted,

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APPENDIX

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I also certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 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.

Finally, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on April 21, 2017. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

A copy of this certificate is included in the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ____ day of May, 2017.

Respectfully submitted,

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