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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2

City of West Bend,
Plaintiff-Respondent,

v.

Appeal No. 18-AP-151

Erik J. Wille,
Defendant-Appellant.

*ON APPEAL FROM AN ORDER AND JUDGMENT ENTERED
BY THE WASHINGTON COUNTY CIRCUIT COURT
THE HONORABLE TODD K. MARTENS, PRESIDING*

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON PUBLICATION

This will be a one-judge opinion which will not qualify for publication under Wis. Stats. §§ 809.23(1)(b)(4), 752.31(2)(c). The City does not request a three-judge panel.

STATEMENT ON ORAL ARGUMENT

The City does not request oral argument.

STATEMENT OF FACTS

On November 10, 2016 at about 7:50 p.m., Wille, with one passenger in his car, drove to the drive-thru at the Wendy's restaurant in West Bend. (R. 29:4.) When Wille was at one of the drive-thru windows, a Wendy's manager saw an open beer in Wille's center cupholder, and also saw Wille's passenger had an open beer between his legs. (R. 29:5.) The manager called the police: "I'm the manager at the Wendy's in West Bend, and I have a car in the drive-thru; both the driver and the passenger have beers open in the car." (R. 28.)¹ The Wendy's manager identified herself by first name to the dispatcher and provided her telephone number. (*Id.*) Officer Timothy Behagen was dispatched to Wendy's. (R. 45:4.) Officer Behagen could see the dispatcher's notes on his in-squad computer, which read as follows:

¹ The audio recording of the manager's call to police was not transcribed during the motion hearing, but a compact disc containing the recording was offered as evidence at the hearing and is part of the record.

Vehicle in drive thru, driver and passenger have
open beer in car, blue 4 Civic, 278xxx²/WI
Caller: K_____ 262-xxx-xxxx³

(R. 45:5-6, R. 27.) The officer also received a voice dispatch over the police radio with substantially similar information. (R. 45:4-5.) Officer Behagen arrived less than three minutes after being dispatched. (R. 27.) After the officer arrived and parked his squad car, Wille's car began to drive forward. (R. 45:8.) Officer Behagen, now on foot, yelled "stop the vehicle" twice and flashed his flashlight at the car. (*Id.* at 8-9.) The car stopped after moving forward about 20 feet. (*Id.* at 9.)

Officer Behagen made contact with Wille, noting two empty beer cans at Wille's feet. (R. 29:4.) Wille's speech was slow and slurred, and Wille had balance issues when getting out of the car. (*Id.*) Wille performed poorly on field sobriety tests. (R. 29:6-7.) Officer Behagen arrested Wille on suspicion of driving while under the influence of an intoxicant. (R. 29:8.) Wille consented to a blood test; analysis of Wille's blood revealed a blood alcohol concentration of 0.216%. (R. 29:1, 8, 10, 13.)

Officer Behagen issued Wille uniform traffic citations for operating a motor vehicle while under the influence, operating with a prohibited alcohol concentration, and possession of an open

² This is the license plate number of Wille's car, which is partially redacted here.

³ These are the first name and phone number of the Wendy's manager, which are partially redacted here.

intoxicant in a motor vehicle; the officer also cited Wille's passenger for possession of an open intoxicant. (R. 1:3; R. 29:4.)

STATEMENT OF THE CASE

The citations were set for trial in municipal court, where Wille moved to suppress evidence, arguing that Officer Behagen lacked reasonable suspicion to stop Wille's vehicle. (R. 4.) The municipal court denied Wille's suppression motion and found Wille guilty of the OWI and PAC citations⁴. (*Id.*) Wille appealed the convictions to circuit court, requesting *de novo* proceedings. (R. 1:1.) Wille filed a motion to suppress evidence, arguing that Officer Behagen lacked reasonable suspicion to stop Wille's vehicle. (R. 23.) The circuit court held a hearing and denied Wille's motion. (R. 45.) At a bench trial, the City and Wille stipulated that the City's witnesses would testify consistent with their earlier written reports and/or statements⁵. (R. 29.) The circuit court reviewed the stipulated testimony, and on that basis found Wille guilty of the OWI and PAC citations, and affirmed the sentence previously imposed by the municipal court. Wille appeals.

⁴ The record does not include the disposition of the open intoxicant citation.

⁵ In criminal cases, a defendant may enter a plea of guilty or no contest without forfeiting or waiving his or her right to appeal an earlier denial of a suppression motion. Wis. Stat. § 971.31(10). No statutory counterpart exists for non-criminal traffic cases, so a trial is held in some form to preserve the appellate issue.

ARGUMENT

I. OFFICER BEHAGEN HAD REASONABLE SUSPICION TO STOP WILLE'S CAR

A Wendy's manager, who gave police her first name and phone number, called police to report that there was a car in the drive-thru whose occupants had open beers. This report was sufficient to provide the responding officer with reasonable suspicion to stop the car and investigate. Therefore, this Court should affirm the circuit court.

In reviewing a circuit court's denial of a motion to suppress evidence, the circuit court's findings of fact are to be upheld unless they are clearly erroneous; the application of the law to those factual findings are reviewed *de novo*. *State v. Parisi*, 2016 WI 10 ¶ 26, 367 Wis. 2d 1, 875 N.W.2d 619.

Police may stop a vehicle and temporarily detain its occupants when an officer has a reasonable suspicion of a noncriminal traffic violation. *State v. Floyd*, 2017 WI 78 ¶ 20, 377 Wis. 2d 394, 898 N.W.2d 560, *citing State v. Houghton*, 2015 WI 79 ¶ 30, 364 Wis. 2d 234, 868 N.W.2d 143. To meet the reasonable suspicion threshold, an officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the stop. *Floyd, supra*, at ¶ 20. An officer may conduct a traffic stop if the officer has reasonable suspicion of a traffic violation that "has been or will be committed." *State v. Popke*, 2009

WI 37 ¶ 11, 317 Wis. 2d 118, 767 N.W.2d 569, *citing State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996).

Wis. Stat. § 346.935(3) prohibits open intoxicants in motor vehicles:

The owner of a privately owned motor vehicle, or the driver of the vehicle if the owner is not present in the vehicle, shall not keep, or allow to be kept in the motor vehicle when it is upon a highway any bottle or receptacle containing alcohol beverages or nitrous oxide if the bottle or receptacle has been opened, the seal has been broken or the contents of the bottle or receptacle have been partially removed or released. This subsection does not apply if the bottle or receptacle is kept in the trunk of the vehicle or, if the vehicle has no trunk, in some other area of the vehicle not normally occupied by the driver or passengers. A utility compartment or glove compartment is considered to be within the area normally occupied by the driver and passengers.

The dispatch received by Officer Behagen contained ample specific, articulable facts to give Officer Behagen reasonable suspicion to conduct an investigatory stop. First, the call came from a manager at Wendy's. (R. 45:6.) From this, the officer could reasonably infer that the manager had the opportunity to make an eyewitness observation of the inside of the suspect car when it was at the drive thru window. Second, the information was reasonably specific as to the observations made: that there was a driver and a passenger, and they both had "open beers." (R. 27.) Third, the report

identified the vehicle's type ("4", short for "4-door"), color (blue), model (Civic) and license plate number. (R. 27, R. 45:5.)

When "an average citizen tenders information to police, the police should be permitted to assume they are dealing with a credible person" absent contrary information. *State v. Sisk*, 2001 WI App 182 ¶ 9, 247 Wis. 2d 443, 634 N.W.2d 877, quoting *State v. Kerr*, 181 Wis. 2d 372, 381, 511 N.W.2d 586 (1994). "[W]e view citizens who purport to have witnessed a crime as reliable, and allow the police to act accordingly, even though other indicia of reliability have not yet been established." *Sisk, supra*, at ¶ 9, quoting *State v. Williams*, 2001 WI 21 ¶ 36, 241 Wis. 2d 631, 623 N.W.2d 106. There are no facts here to suggest the manager or her report was untrustworthy, so Officer Behagen was entitled to rely upon it.

Wille argues that because the manager's call did not contain *additional* information about the beer cans—such as their precise location within the vehicle, the amount of liquid in the cans, or whether anyone was seen drinking from them—the tip was not sufficient. (A. Br. at 8.) Wille's argument misses the mark. Whether anyone was drinking from the cans is immaterial; § 346.935(3) makes no reference to drinking. "Keep[ing]" an open container in the passenger compartment is sufficient to constitute a violation of § 346.935(3). Reasonable suspicion does not require that a citizen witness provide enough factual detail to make a *prima facie* case. Although additional information about the precise location of the

cans or whether there was liquid in them might in some cases be necessary to prove a violation of the statute to the requisite burden of proof, it is not necessary to reach the threshold of reasonable suspicion. The relevant question is whether the officer had enough particularized information to justify stopping the car to investigate further. The information the Wendy's manager provided to the dispatcher, which was in turn provided to Officer Behagen, was sufficiently detailed and particular to give rise to reasonable suspicion of a violation.

Ultimately, Wille argues Officer Behagen was simply operating on an "unparticularized and inchoate hunch." (A. Br. at 9.) Officer Behagen did not stop Wille because Behagen had a "hunch" that Wille might have open beers in the car; rather, Officer Behagen stopped Wille because a reliable citizen called police to report she saw Wille and his passenger did, in fact, have open beers in the car.

As part of the reasonable suspicion analysis, the officer was entitled to rely on the facts before him, as well as reasonable inferences from those facts. Although Wille is correct that the Wendy's drive-thru is not a public highway, the circuit court correctly noted that one would have to travel on a public highway to get to Wendy's. (R. 45:13.) Reasonable suspicion may exist of a traffic violation that "has been or will be committed." *Popke, supra*, at ¶ 11. It was, therefore, objectively reasonable for the officer to

infer that the Wille had driven to Wendy's on a public highway, and was also going to drive away on a public highway.

Officer Behagen's stop of Wille's car was based on specific, articulable facts that would lead any reasonable police officer to believe Wille had violated and/or was about to violate the law prohibiting keeping open intoxicants in motor vehicles on public highways. Therefore, this Court should affirm the circuit court.

CONCLUSION

A Wendy's manager called police to say she saw Wille and his passenger with open beers in Wille's car as it proceeded through the drive-thru. The manager gave police her name, her phone number, a description of the car, and its license plate number. This report provided reasonable suspicion for the officer to conduct an investigatory stop to determine whether there was a violation of Wisconsin law prohibiting keeping open intoxicants in motor vehicles. The circuit court properly denied Wille's motion to suppress evidence of drunk driving obtained after the stop.

Therefore, this Court should affirm the circuit court's order denying Wille's suppression motion and the resulting convictions.

Respectfully submitted June 6, 2018.

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FORM AND LENGTH CERTIFICATION

Wis. Stat. § 809.19(8)(d)

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §§ 809.19(8)(b)-(c) for a brief produced with a proportional serif font. The length of this brief is 1,853 words.

ELECTRONIC BRIEF CERTIFICATION

Wis. Stat. § 809.19(12)(f)

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Dated June 6, 2018.

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