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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2018AP571

STATE OF WISCONSIN,

Plaintiff-Appellant,
v.

Emily J. Mays,

Defendant-Respondent.

ON APPEAL FROM AN ORDER ENTERED IN THE
CIRCUIT COURT FOR KENOSHA COUNTY FILE NO.
17-CT-711, THE HONORABLE DAVID M.
BASTIANELLI, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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STATEMENT OF ISSUES

- I.. Was the trial court clearly erroneous in finding that Officer Paskiewicz was three to four car lengths behind Mays?

The trial court made the factual finding that he was.

- II. Is the anonymous tip in the 911 call sufficiently reliable, giving rise to reasonable suspicion?

The trial court answered no.

- III. Did Officer Paskiewicz possess the requisite amount of reasonable suspicion to conduct an investigatory stop?

The trial court answered no.

STATEMENT ON ORAL ARGUMENT OR
PUBLICATION

The State does not request oral argument. Oral argument is not necessary because” the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost.” Wis. Stat. Sec. 908.22(20(b)). Publication is not necessary.

STATEMENT OF FACTS

Defendant Emily Mays (“Mays”) was charged with Operating While Intoxicated Second Offense, With a Minor Child in the Vehicle, contrary to Wisconsin Statute §346.63(1)(a) and Operating with a Prohibited Alcohol Concentration Second Offense, With a Minor Child in the Vehicle, contrary to Wisconsin Statute Section §346.63(1)(b) on September 28, 2017. (9). Mays filed a Motion to Suppress on October 16, 2017 (12). An Amended Motion to Suppress was filed on October 24, 2017 (13). A hearing on the motion was held on January 8, 2018.

On July 19, 2017, at 2:53 a.m., Officer Gary Paskiewicz, a four-year veteran of the City of Kenosha Police Department, received information that a 911 caller was reporting information that the mother of a teenager was driving a blue truck, was drunk with children in the vehicle and was in the area of Frank School (27:20-21). The caller knew this information because the teenager in the blue truck had called her. *Id.*

Officer Paskiewicz was in the area of 56th Street and 10th Avenue when he received this information about the blue truck (27:19). The caller relayed that she was the employer of a teenage girl named Stephanie (19, Hearing Exhibit S-1). Stephanie told the caller that her mother had her and her siblings in the car and was driving drunk. *Id.* The caller provided the type of vehicle involved - a blue truck as well as the location - Frank School. *Id.* Frank School is located at 1816 57th Street (27:25). The caller indicated that she knew the driver was drunk because the daughter called her (19, Hearing Exhibit S-1). The caller knew that the mother's name was Emily and articulated ongoing concerns that had taken place over the past day. *Id.*

Officer Paskiewicz observed a blue truck traveling northbound on 18th Avenue while he was westbound on 56th Street approaching 19th Avenue (27:21). There was no other traffic in the area, and Officer Paskiewicz began to follow the blue truck (27:21-22). After turning westbound onto 52nd Street from 18th Avenue, Officer Paskiewicz conducted a

stop of the vehicle after the 2400 block of 52nd Street (27:23-24).

In addition to the information provided by the 911 caller, Officer Paskiewicz also observed the blue truck engage in some suspicious driving. The blue truck and the squad car were traveling westbound on 52nd Street. Officer Paskiewicz was in the curb lane, and Mays was in the inside lane about 10-15 feet ahead (27:25). Officer Paskiewicz chose his position in a different lane due to the nature of the drunk driving call. Being in the lane next to, rather than directly behind, a suspected drunk driver gave him a better opportunity to observe the driving. It also gave more “cushion” in the event that erratic driving would occur. *Id.*

Shortly after being in this position, Officer Paskiewicz observed Mays’ vehicle make a slight deviation toward the center lane (27:32). He then slows down because Mays’ vehicle is drifting toward the curb lane before she ultimately swerves into the curb lane. See *Id.* The squad video shows Mays’ vehicle drift toward the curb lane before a slight

swerve completely into the curb lane without signaling. (19, Hearing exhibit D-3). At that time, Officer Paskiewicz conducted a stop of the vehicle.

On the day the motion hearing was held, the Honorable David M. Bastianelli granted Mays' motion to suppress. The trial court's factual finding was that Officer Paskiewicz was at least three to four car lengths, or 28 to 40 feet behind (27:48). The court also held that there was not a violation of Wisconsin Statute §346.34. (The State does not contest this ruling.) In the issue at hand the trial court also held, "There are no criteria which were observed by the officer for an investigatory stop except he knew that a blue vehicle in that vicinity may have a drunk driver and the vehicle made a slight deviation toward the center line before staying in the left lane and then turned from the left lane into the right lane without a traffic signal. That I believe is insufficient for an investigatory stop in and of itself" (25:47-48).

ARGUMENT

I. THE TRIAL COURT WAS CLEARLY ERRONEOUS IN FINDING THAT OFFICER PASKIEWICZ WAS THREE TO FOUR CAR LENGTHS BEHIND MAYS

An appellate court review of a motion to suppress is a two-step inquiry. *State v. Gralinski*, 2007 WI App 233, ¶13, 306 Wis.2d 101, 743 N.W.2d 448. First, an appellate court is to give deference to a circuit court's factual findings unless those findings are clearly erroneous. *Id.* A trial court's factual finding is clearly erroneous if it is contrary to the great weight and clear preponderance of the evidence. *State v. Turner*, 136 Wis. 2d 333, 344, 401 N.W.2d 827 (1987). Second, an appellate court is to review the trial court's application of law to the facts. *Gralinski*, 2007 WI App 233, ¶13. This second step is a question of law that is reviewed independently. *Id.*

First, the trial court was clearly erroneous in finding that Officer Paskiewicz was three to four car lengths behind Mays' car. Officer Paskiewicz testified that he was about one car length behind Mays (25:31-32). There are points of

reference in the squad video. At 02:57:54, there is Mays' vehicle, the front hood of the squad car, and another vehicle (19, Hearing Exhibit D-3). It appears that approximately two of the vehicles could fit between the back of Mays' vehicle and the front of the squad car. There are also two, full hash lines in the roadway. *Id.* At 2:57:47, Mays makes the "swerve" into the curb lane. *Id.* When looking at the hash lines in the roadway and the distance between Mays vehicle and the squad car, one can see that the distance between May's vehicle and squad car is the same, if not closer. This error in factual finding ultimately goes the dangerousness Mays' driving and drunk driving in general. This argument will be developed further in the Section III below.

II. THE ANONYMOUS TIP WAS SUFFICIENTLY RELIABLE THUS GAVE RISE TO REASONABLE SUSPICION

To pass constitutional muster, all searches and seizures must be objectively reasonable under the circumstances existing at the time of the search or seizure. *State v. Rutzinski*, 2001 WI 22, ¶ 13, 241 Wis.2d 729, 623 N.W.2d 516 (citing

Whren v. United States, 517 U.S. 806 (1996); *State v. Waldner*, 206 Wis. 2d 51, 556 N.W.2d 681 (1996)).

Investigative traffic stops are governed by this same constitutional reasonableness requirement. *Id.* at ¶14 (citing *Whren*, 517 U.S. 806 at 809-810; *State v. Guzy*, 139 Wis. 2d 663, 407 N.W.2d 548 (1987)). An officer conducting an investigative stop must have reasonable suspicion that the driver or occupants of the vehicle have committed an offense. *Id.* (citing *United States v. Hensley*, 469 U.S. 221 (1985); *Guzy*, 139 Wis.2d at 675)). Courts must review the facts surrounding the particular search or seizure and determine whether the government's need to conduct the search or seizure outweighs the searched or seized individual's interests in being secure from such police intrusion. *Id.* at ¶15 (citing *Hensley*, 469 U.S. at 228; *State v. McGill*, 2000 WI 38, 234 Wis.2d 560, 609 N.W.2d 795; *Waldner*, 206 Wis.2d at 56, 556 N.W.2d 681)).

This case specifically involves whether an anonymous 911 caller who provided information that Mays was driving

while intoxicated combined with an officer's independent observations of suspicious driving constitute reasonable suspicion. First, the reliability of information provided anonymous tipsters can vary greatly in reliability. As such, law enforcement must consider the tip's reliability and content before the tip can give rise to an investigative stop. *Rutzinski*, 2001 WI 22, ¶17. In assessing the reliability of a tip, the veracity of the informant as well as the informant's basis of knowledge should be given due weight. *Id.* at ¶18 (citing *Illinois v. Gates*, 462 U.S. 213 (1983)).

The *Rutzinski* court held that that tips must be viewed under a totality of the circumstances rather than a rigid two-part test. *Id.* The court explained, “[A] deficiency in one [consideration] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.” *Id.* Another vitally important consideration is whether the tip suggests that an imminent threat to public safety or some other exigency is present. *Id.* at ¶26. The court reasoned, “...the Fourth

Amendment and Article I, Section 11 do not require the police to idly stand by in hopes that their observations reveal suspicious behavior before the imminent threat comes to its fruition. Rather, it may be reasonable for an officer in such a situation to conclude that the potential for danger caused by a delay in immediate action justifies stopping the suspect without any further observation.” *Id.* Ultimately, when reviewing whether an anonymous tip is reliable and justifies a seizure, a reviewing court must not only review the circumstances surrounding the tip and the tipster but also must also consider the safety of the public.

The *Rutzinski* court considered three important facts surrounding the anonymous tip before it ultimately determining that the tip was reliable enough to warrant an investigative stop. *Id.* First, the court considered that the 911 caller disclosed his or her location in relation to the suspect vehicle, which was driving erratically. *Id.* at ¶32. The court interpreted this factor as giving credibility to the caller, not only because he or she was observing the erratic driving but

also because the caller's identity could ultimately be discovered. *Id.* An anonymous caller putting his or her anonymity at risk is a factor favoring the reliability of the tip. *State v. Williams*, 2001 WI 21, ¶35, 241 Wis. 2d 631, 623 N.W.2d 106 (citing *Florida v. J.L.*, 120 S.Ct. 1375, 1381 (Kennedy, J., concurring)). Second, the court noted that the informant provided verifiable information based on his or her position and provided detailed location information as the suspect vehicle progressed toward the police officer. *Rutzinski*, 2001 WI 22 ¶33. Finally, the court considered that the erratic driving being described posed an imminent threat to public safety. *Id.* at ¶34.

The anonymous tip provided in this case was enough to warrant reasonable suspicion that the driver of the vehicle was committing an offense, specifically, Operating while Intoxicated with a Child Under 16. The caller relayed that she was the employer of a teenage girl named Stephanie (19, Hearing Exhibit S-1). The girl told the caller that her mother had the girl and her siblings in the car and was driving drunk.

Id. The caller provided the type of vehicle involved - a blue truck as well as the location - Frank School. *Id.* The caller indicated that she knew the driver was drunk because the daughter called her. *Id.* The caller knew that the mother's name was Emily and articulated ongoing concerns that had taken place over the past day. *Id.*

It is true that the 911 caller did not personally observe Mays driving. She was acting as a surrogate for a juvenile Stephanie who needed help but did not want to call the police on her mother. Stephanie reported to the caller that she was in the car. *Id.* The caller and the officer then had reason to believe that information coming from a juvenile inside the car would be true and reliable.

The 911 caller did put her anonymity at risk, making her information more reliable. She indicated that she was the employer of a teenager named Stephanie. Additionally, there is a memorialization of the 911 call (19, Hearing exhibit S-1). In fact, the caller put her anonymity at risk in such a severe way, she was present at the motion to testify to the

authentication of the 911 call. (See 25:6). Several facts provided by the caller were verified. Mays was driving a blue truck. Mays was driving in the area of Frank School. Within 8 blocks of his initial location, Officer Paskiewicz observes the blue truck in the area of Frank School with no other traffic in the area (See 27:19; 27:25). The caller is providing information about a drunk driver with children in the car in the early hours of the morning - a very serious and very concerning crime. All other drivers, pedestrians, bicyclists on the road are at risk when an impaired driver takes the road. In this case, not only that classification of people were at risk but also the minor children in Mays' car. Under a totality of the circumstances, the tip from the 911 caller was reliable to support the investigatory stop conducted by the officer.

If the Court does not believe that the 911 tip and verification of certain facts by Officer Paskiewicz rose to the level of reasonable suspicion for the stop, then what the 911 caller lacked in reliability was made up by observations of Officer Paskiewicz.

III. OFFICER PASKIEWICZ POSSESSED THE REQUISITE AMOUNT OF REASONABLE SUSPICION TO CONDUCT AN INVESTIGATIVE TRAFFIC STOP

Suspicious driving can be the basis for an investigatory stop, even if the driving is not per se illegal. *State v. Waldner*, 206 Wis.2d 515, 56 N.W.2d 681 (1996). In *Waldner*, an officer observed a vehicle at 12:30 a.m., traveling at a low rate of speed. The car stopped briefly at an uncontrolled intersection. The car accelerated at a high rate of speed. The vehicle pulled into a legal parking space. The driver of the vehicle poured a liquid/ice mixture from a plastic glass onto the roadway. The driver exited the vehicle and began walking away from the squad car. The officer told the driver to stop. *Id.* at 53-54. There were no laws broken by the driver of the vehicle. *Id.* The *Waldner* court held that there was sufficient reasonable suspicion based on the officer's observations, regardless of the fact that no law had been broken. The court reasons that any single one of Waldner's acts, viewed in isolation may not give rise to an investigatory stop, but isolation is not the standard - totality is. *Id.* at 60. The

Waldner court characterized the actions of the officer as “good police work” and failing to investigate his observations would have been “poor police work.” *Id.* Just like the officer in *Waldner*, Officer Paskiewicz was engaging in good, and constitutional, police work.

Officer Paskiewicz had all of the information given by the concerned driver: a concerned juvenile, with her siblings, were with their mother, who was drunk while driving at nearly 3:00 a.m. He himself then viewed some suspicious driving: drifting toward the center line and a swerve into the curb lane after some drifting (27:32) (19, Hearing exhibit D-3). Officer Paskiewicz testified that he was about one car length behind Mays’ vehicle with the acts of drifting and swerving took place. Even if the trial court’s finding that Officer Paskiewicz was three to four car lengths behind Mays is upheld by this Court, that factual basis in conjunction with the tip gave rise to reasonable suspicion. The only difference in finding that Officer Paskiewicz was one to two car lengths behind Mays, rather than three to four, is how dangerous

Mays' driving was. The suspicious driving (drifting and swerving) is a fact that goes to reasonable suspicion regardless of whether the suspicious driving is dangerous. The dangerousness simply goes to further the argument that the public was at risk due to the arguably erratic driving.

Officer Paskiewicz was engaging in good police work when he conducted an investigatory stop. He had reason to know that the truck he was following, the truck that had just engaged in suspicious driving, was likely a drunk driver. Officer Paskiewicz knew this because there had been a stated explanation by a concerned citizen, and that stated reason was intoxication. Suspicious driving can undoubtedly be evidence of impaired driving. There are also numerous explanations for erratic driving that do not implicate intoxication-an unpredictable medical emergency, vehicle malfunction, dropping something on the floor of the car, a sneeze, etc. Officer Paskiewicz (and any officer) is not required to consider innocent reasons for the concerning driving he observed. *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d

763 (1990) (citing *State v. Jackson*, 147 Wis. 2d 824, 434 N.W.2d 386 (1989)). He could specifically contribute that bad driving to Mays' intoxication as reported by the caller. In a totality of the circumstances, taking into consideration everything that Officer Paskiewicz knew and observed, there was reasonable suspicion to conduct an investigatory stop of Mays' vehicle.

CONCLUSION

For all the reason state above, the State respectfully moves this Court to reverse the trial court's decision suppression evidence in this case and remand to the trial court for further proceedings.

Respectfully submitted this 16th day July, 2018.

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CERTIFICATION AS TO FORM

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 3705 words.

Dated this 16th day of July, 2018.

EMILY K. TRIGG

**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 16th day of July, 2018.

EMILY K. TRIGG

CERTIFICATE AS TO APPENDICES

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 s. 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 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.

Dated this 16th day of July, 2018.

Emily K. Trigg
Assistant District Attorney

TABLE OF APPENDICES

Appendix 1An unsigned order of Judge
Bastianelli's February 5, 2018 order

Appendix 2 Transcript of January 8, 2018
motion hearing