STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

2018-AP-571-CR

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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

I. THE INFORMATION IN THE 911 CALL WAS RELIABLE AND MET THE REQUISITE AMOUNT OF EVIDENCE FOR AN INVESTIGATORY STOP

In Mays' brief, she argues that the 911 caller did not have direct knowledge of Mays' intoxication, only a hearsay conclusion from a child within the vehicle (Mays' Brief at 13). It is true that the facts of *State v. Rutzinski* involved a 911 caller who was observing erratic driving first-hand. *State v. Rutzinski*, 2001 WI 22, 241, Wis. 2d 729, 623 N.W.2d 516. The *Rutzinski* court specifically noted that the reliability of the tip was linked to the fact that the caller disclosed his or her location; the identity of the caller was discoverable; and, the caller provided verifiable information. *Id.* at ¶32-33. Mays' brief claims that the facts of this case are of a significant difference (Mays' Brief at 13). They are not.

In fact, the information provided by the caller in this case is actually equally, if not more reliable, than the tipster in *Rutzinski*. In *Rutzinski,* real-time descriptions of driving are provided by another observer who is on the road. There is no

ability of that observer to know why the driving is as it is described. That information was found to be reliable because of the position of the observer in relation to the driving and the verifiability of the information. *Rutzinski*, 2001 WI 22 ¶ 32-33. In the case at bar, the information is more reliable than even that in *Rutzinski* because of who is ultimately providing it: a child in the vehicle who observed her mother to be drunk, the teenage girl named Stephanie (19, Hearing Exhibit S-1). The 911 caller is ultimately acting only as a conduit.

There is no evidence or even allegation that the child was not in the car, lying or mistaken. There is evidence (the 911 call) that the child told the caller that her mother (Mays) had the girl and the girl's siblings in the car and was driving drunk. *Id.* The information was verified as much as it could be. Officer Paskiewicz observed a blue truck in the area of Frank School, just as the caller had relayed from the child (27:21). He also did not observe any other traffic in the area. *Id.* Officer Paskiewicz had enough information to conduct an investigatory stop on the details in the 911 call alone.

Mays also questions the reliability of the child's conclusion that Mays was drunk (Mays' Brief at 13). This argument implies that because the facts that lead to the conclusion are absent, the conclusion is suspect or unreliable.

The State could find no authority for the proposition that the specific details that support the conclusion must be provided in order for a conclusion or opinion to be acted upon by a law enforcement officer. 911 calls are the mechanism by which citizens report emergencies. 911 calls are nearly always conclusions. For example, "I've been robbed by a man in a black hoodie near Frank School," or "My boyfriend is going to beat me up." Both of these statements are conclusions. To discover the precise information about who, what, when, where (and possibly why) requires further investigation. These hypothetical statements are conclusions, and they provide the requisite amount of reasonable suspicion to conduct an investigatory stop of a suspect.

If Mays' proposition is adopted, law enforcement would be required in these hypotheticals presented to know

precisely what was taken in the robbery or the mechanism of abuse in order to detain a suspect. To require that a person in an emergency situation describe why he or she thinks or knows someone is drunk is above and beyond what the law requires for the purpose of reasonable suspicion. The information that a woman was drunk is one of the many articulable facts in this case upon which Officer Paskiewicz could act.

II. EVEN IF MAYS' DRIVING DID NOT ENDANGER OFFICER PASKIEWICZ, THE SUSPICIOUS DRIVING IS STILL A FACTOR IN DETERMNING REASONABLE SUSPICION UNDER A TOTALITY OF THE CIRCUMSTANCES

Mays argues essentially, that there was just not enough to amount to reasonable suspicion. She specifically argues that the suspicious driving observed by Officer Paskiewicz must endanger his safety (Mays' Brief at 16). As the *Waldner* Court held, there is no single, specific fact that is required give rise to reasonable suspicion; rather, it is a totality of the circumstances. *State v. Waldner*, 206 Wis. 2d 51, 556 N.W.2d 681 (1996). Just because the driving in this case does not

endanger one specific person on the road does not mean that it cannot go toward an evaluation of the entire circumstance.

That being said, the nature of drunk driving is that anyone in the path of a drunk driver's vehicle is at risk. This is true whether a person is two blocks away crossing a street during a walk or whether a person is five miles down the road in the drunk driver's path of travel. In drunk driving situations, one can never predict the exact second where a drunk driver's inability to control the vehicle turns fatal. This is exactly why the *Waldner* court justifies the actions of "good police work." *Id.* at 60.

III. OFFICER PASKIEWICZ'S INVESTIGATORY STOP FOR OPERATING WHILE INTOXICATED SECOND OFFENSE WITH A MINOR CHILD IN THE VEHICLE WAS CONSISTENT WITH THE COMMON SENSE APPROACH REQUIRED UNDER THE FOURTH AMENDMENT

When answering a Fourth Amendment question, the ultimate question is one of reasonableness. *State v. Anderson*, 155 Wis. 2d 77, 454 N.W.2d 763 (1990). Whether actions are reasonable is a common sense test. *Id.* at 77, 83. The *Waldner*

court expressed, "This common sense approach strikes a balance between individual privacy and the societal interest in allowing the police a reasonable scope of action in discharging their responsibility." *Waldner*, 206 Wis. 2d at 56.

If reasonable suspicion does not exist in this case, officers are put in an impossible position. Officer Paskiewicz knew that a child in Mays' vehicle was reporting that Mays was drunk driving with a car full of children. He observed acts of suspicious driving. If he were to wait until the driving became so bad that a pedestrian was struck or so bad that the driver failed to negotiate a turn, resulting in harm to children in the vehicle, he would have to explain how, under the law, he did not have enough information to stop the vehicle. It is this predicament that is recognized in employing a common sense test for reasonableness when it comes to questions of the Fourth Amendment. For the crime of Operating while Intoxicated Second Offense, With a Minor Child in the Vehicle, Officer Paskiewicz had reasonable suspicion to investigate the information he obtained through the 911 caller

and through his own observations of Mays' suspicious driving.

CONCLUSION

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

Respectfully dated this 21st day of September, 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 1538 words.

Dated this 21st day of September, 2018.

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EMILY K. TRIGG

CERTIFICAT OF COMPLIANCE WITH WIS. STAT. SEC. RULE 809.10(12)

I hereby certify that:

I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. Sec. (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 21st day of September, 2018.

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EMILY K. TRIGG