STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2022AP000389-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

IAIN A. JOHNSON,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT AND ORDER, ENTERED IN THE CIRCUIT COURT FOR EAU CLAIRE COUNTY, CASE NO. 20 CM 258, THE HONORABLE SARAH M. HARLESS, PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

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I. TROOPER WOJCIK LACKED REASONABLE SUSPICION OF IMPAIRMENT OF ALCOHOL TO JUSTIFY EXPANDING THE SCOPE OF THE TRAFFIC STOP TO HAVE JOHNSON PERFORM FIELD SOBRIETY TESTS.

The state did not prove that Trooper Wojcik had reasonable suspicion to expand his initial traffic stop to an OWI investigation. The state argues in its brief that "the initial traffic complaint and the observations of speeding," taken together with Wojcik's pre-stop and post-stop observations provided him with the necessary reasonable suspicion of impairment of alcohol to justify expanding the scope of the traffic stop. (State's Resp. Br. at 9–10).

The state, however, greatly overstates the weight of the initial traffic complaint in the reasonable suspicion calculus. When police have relied, at least in part, on information from a complainant, two factors are relevant to a determination of reasonable suspicion. "The first is the quality of the information, which depends upon the reliability of the source." ***State v. Miller***, 2012 WI 61, ¶ 31, 341 Wis. 2d 307, 815 N.W.2d 349. "The second is the quantity or content of the information." ***Id***.

Regarding the first factor, our case law indicates that the reliability of the complainant turns on his or her classification as a citizen complainant, an anonymous complainant, or a confidential informant. ***State v. Kolk***, 2006 WI App 261, ¶ 12, 298 Wis. 2d 99, 726 N.W.2d 337; *see also* ***Miller***, 2012 WI 61 at ¶ 31 n.18.

A citizen complainant is "someone who happens upon a crime or suspicious activity and reports it to police." ***Miller***, 2012 WI 61 at ¶ 31 n.18. A citizen complainant is a *known* citizen. ***State v. Powers***, 2004 WI App 143, ¶ 9, 275 Wis. 2d 456, 685 N.W.2d 869. Wisconsin courts view citizen complainants "as reliable, and allow the police to act accordingly, even though other indicia of reliability have not yet been established." ***State v. William***s, 2001 WI 21, ¶ 36, 241 Wis. 2d

631, 623 N.W.2d 106. In other words, citizen complainants are subject to a relaxed test of reliability. ***Kolk***, 2006 WI App 261 at ¶ 12.

By contrast, an anonymous complainant is "one whose identity is unknown even to the police…." ***Id***. There is variation "within the realm of [complainants] who wish to remain anonymous depending upon whether the [complainant] risked disclosing his or her identity to police." ***Miller***, 2012 WI 61 at ¶ 33. A complainant who reveals some self-identifying information "is likely more reliable than an [entirely] anonymous [complainant]…." ***Id***. However, an entirely anonymous complainant has limited reliability. ***Id***. at ¶ 32. Therefore, an entirely anonymous complaint must be rich in content to support reasonable suspicion—it is critical that the complaint contain significant details and future predictions that the police corroborate. ***Id***. at ¶ 37; *see also* ***State v. Silverstein***, 2017 WI App 64, ¶ 16, 378 Wis. 2d 42, 902 N.W.2d 550 (the test for evaluating an anonymous complainant focuses on personal reliability and police corroboration).

Here, the record supports only one conclusion about the initial traffic complaint: the complainant was entirely anonymous. There is no evidence in the record regarding the caller's identity, veracity, or basis of knowledge on whose information Wojcik relied. (22:15). *See* ***State v. VanBeek***, 2021 WI 51, ¶ 55, 397 Wis. 2d 311, 960 N.W.2d 311 ("'[A] [complainant]'s "veracity," "reliability," and "basis of knowledge,"' are 'highly relevant' to testing the strength of anonymous information within the totality of circumstances.") (quoting ***State v. Richardson***, 156 Wis. 2d 128, 140, 456 N.W.2d 830 (1990)).

Given the bare record, the state attempts to invoke the collective knowledge doctrine to repair the lack of reliability attached to the anonymous complaint. (State's Resp. Br. at 10). Under the collective knowledge doctrine, an investigating officer "may rely on all the collective information in the police department" to establish reasonable suspicion. ***State v. Mabra***, 61 Wis. 2d 613, 625, 213 N.W.2d 545 (1974). Again, however, the state presented no evidence from anyone else in the department who knew the caller's identity. (22:15). As such, there is no

"knowledge" demonstrating the complainant's reliability or credibility that can be imputed to Wojcik. The collective knowledge doctrine therefore does not advance reasonable suspicion. ***State v. Pickens***, 2010 WI App 5, ¶ 13, 323 Wis. 2d 226, 779 N.W.2d 1 (holding that in a collective knowledge situation, the prosecutor must prove the collective knowledge that supports the challenged police action).

Since the entirely anonymous complainant is not inherently reliable, the complaint "must contain more significant details or future predictions along with police corroboration." ***Miller***, 2012 WI 61 at ¶ 37. Here, however, the details of the driving complaint that Wojcik was able to corroborate were relatively weak. Wojcik was able to corroborate that Johnson's vehicle "roughly matched the [complainant's] description." (22:16–17). That the caller would have possessed such readily available information undermines the reliability of the complainant's other claims. ***Kolk***, 2006 WI App 261 at ¶ 16.

More importantly, Wojcik did not personally observe Johnson engaging in the type of driving behavior alleged by the complainant. (22:16). While Wojcik observed Johnson traveling ten miles per hour over the posted speed limit, he never corroborated any "weaving" or impaired driving behavior as the caller alleged. (22:6, 14–15, 19–22).

Given the complete lack of information regarding the complainant's identity, his veracity, or basis of knowledge, as well as the weak corroborating evidence, the initial traffic complaint is insufficient to be given much weight.

Wojcik's observation of speeding likewise adds little to the reasonable suspicion calculus. Contrary to the state's contention, (State's Resp. Br. at 11), per the NHTSA's *DWI Detention & Standardized Field Sobriety Testing* manual, speeding, by itself, is not one of the driving behaviors linked to impairment by alcohol or other controlled substances.[1] Wisconsin courts have similarly found that

[1] NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *DWI Detection and Standardized Field Sobriety Testing*, Instructor's Guide, at 239 (Rev. Feb. 2018). *See https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/sfst_full_instructor_manual_2018.pdf.*

exceeding the speed limit is not relevant evidence of intoxication. *See, e.g.,* ***State v. Betow***, 226 Wis. 2d 90, 95–98, 593 N.W.2d 499 (Ct. App. 1999).

In addition to the initial traffic complaint and the observation of speeding, the state claims that Wojcik's pre-stop observations are as follows:

> (1) After Wojcik activated his emergency lights the vehicle failed to immediately pull over.
>
> (2) The vehicle traveled for approximately three quarters of a mile until the vehicle pulled over.

(State's Resp. Br. at 9).

With respect to each of the above alleged pre-stop observations, the state ignores the entirety of the facts of record. Both Wojcik's testimony at the evidentiary hearing, as well as the video footage from his squad cam, confirm that Johnson pulled over promptly and appropriately in response to Wojcik activating his emergency lights. (22:20–22; 23 at 00:00:32–00:01:05).

The state additionally argues that Wojcik's post-stop observations "support finding Trooper Wojcik had reasonable suspicion to ask the defendant to step out of the vehicle to determine if there was an odor of intoxicants coming from his breath and to perform field sobriety tests." (State's Resp. Br. at 9–10). The state claims that Wojcik's post-stop observations are as follows:

> (1) Wojcik's initial observations of Johnson included a freshly lit cigarette;
>
> (2) Johnson had red and glossy eyes;
>
> (3) Johnson had thick and slowed, almost slurred speech.

(State's Resp. Br. at 9).

The state cites the unpublished case ***State v. Kolman***, 2012 WI App 27, 339 Wis. 2d 492, 809 N.W.2d 901 (unpublished but citable pursuant to Wis. Stat.

(Rule) 809.23(3)), in support of its argument. (State's Resp. Br. 13). However, ***Kolman*** is easily distinguishable from this case.

In ***Kolman***, the trooper conducted a traffic stop for a vehicle with a defective brake light. ***Id***. at ¶ 3. Upon making contact with Kolman, the trooper noted that she had "bloodshot and glassy eyes." ***Id***. at ¶ 4. The trooper also testified that there was an overwhelming odor of cigarette smoke coming from the vehicle as Kolman had just lit up a cigarette. ***Id***. He testified that in his experience, it is "not uncommon for someone to try to dover the odor of intoxicants with [a] cigarette[]." ***Id***. Based on those initial observations, the trooper asked Kolman to recite the alphabet, which she did poorly, slurring letters together and missing others, and he conducted a "mini" horizontal gaze nystagmus ("HGN") test, all while Kolman remained seated in the vehicle. ***Id***. at ¶¶ 7–8.

Kolman argued the trooper unreasonably expanded the traffic stop when he asked her to recite the alphabet and perform the "mini" HGN test. ***Id***. at ¶ 17. This Court concluded:

> [U]sing the supreme court decision in ***Arias*** as its primary authority, that the trooper's apparently diligent and speedy attempt to confirm or dispel the suspicion of impaired driving raised by Kolman's bloodshot and glassy eyes and lighting of a cigarette, by asking Kolman to recite the alphabet, while still seated in her vehicle, represented an incremental intrusion on her liberty that is outweighed by the public interest served by the request. The trooper's request was only minimally more intrusive than asking Kolman if she had been drinking, a question that clearly was permissible, under the totality of the circumstances here, in light of the case law cited in this opinion.

Id. at ¶ 25.

While this Court found the minimal intrusion in ***Kolman*** to be justified, it based that conclusion upon the fact that the trooper "did not require [Kolman] even to leave the driver's seat." ***Id***. at ¶ 24. Here, Wojcik intruded more significantly and thus unconstitutionally by ordering Johnson out of his vehicle so that he could "run him through [horizontal gaze nystagmus], and see if I see anything." (22:29; 23 at 00:07:27–00:07:34).

The ***Kolman*** court further acknowledged that "the facts possessed by the trooper at the time of this request may have fallen short of reasonable suspicion of intoxicated driving." 2012 WI App 27 at ¶ 22.

The facts of record also contradict Wojcik's claim that Johnson's eyes were red and glossy, and his speech was slurred. While Wojcik alleges that Johnson eyes were "red and glossy," (22:8), he conceded that at the time he made this observation, Johnson was wearing tinted sunglasses while inside his vehicle. (22:31). Johnson continued to wear his tinted sunglasses for the entire time that he was inside his vehicle. (22:31; 23 at 00:14:07–00:15:14).

Similarly, while Wojcik testified that Johnson's speech appeared "[t]hick and slow, almost to a slurred manner," (22:8), the video footage from his squad cam belies that contention, (23 at 00:01:30–00:03:21). In any event, this Court should review the body camera footage capturing Johnson's speech and make its own factual findings. (23).

Additionally, Wojcik never mentioned anything to Trooper Aguilar about Johnson's eyes being bloodshot and glossy or his speech being thick and slowed. (22:28–29). And Aguilar likewise said nothing about Johnson's speech being slurred or his eyes being red and glossy despite speaking with Johnson for several minutes. (22:30; 23 at 00:8:07–00:10:50).

Wojcik's observation of a freshly lit cigarette also adds little to the reasonable suspicion calculus. While the state is correct that an officer's training and experience is one factor to consider in the reasonable suspicion calculus, here, Wojcik made no connection between his longevity or his OWI detection training and his ability to form a reasonable suspicion that a particular cigarette smoke was being deployed as a cover odor. *See* ***State v. Conaway***, 2010 WI App 7, ¶¶ 8–13, 323 Wis. 2d 250, 779 N.W.2d 182 (holding that while an officer's training and experience is often relevant to the reasonable suspicion inquiry, it fails to support reasonable suspicion where there is nothing to suggest that the officer's suspicions regarding a particular ambiguous fact had ever been borne out). In short, Wojcik's

testimony simply failed to provide a basis for a finding that his belief that Johnson may have been smoking a cigarette to mask the odor of alcohol was reasonably likely to be accurate.

Accordingly, when Wojcik expanded the scope of the stop, there were insufficient facts to lead a reasonable police officer to believe that Johnson had consumed a sufficient amount of alcohol to cause him to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle. ***State v. Resch***, 20l1 WI App 75, ¶ 16, 334 Wis. 2d 147, 799 N.W.2d 929 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)). Thus, all of the evidence obtained as a result of the unlawful extension must be suppressed. ***State v. Carroll***, 2010 WI 8, ¶ 19, 322 Wis. 2d 299, 778 N.W.2d 1; ***Wong Sun v. United States***, 371 U.S. 471, 484 (1963); *see also* ***Mapp v. Ohio***, 367 U.S. 643, 655 (1961).

CONCLUSION

For the foregoing reasons, this Court should vacate Johnson's conviction, reverse the order of the circuit court denying his suppression motion, and remand for further proceedings.

Dated this 27th day of October, 2022.

Respectfully submitted,

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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in §. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 2,148 words.

I further certify that filed with this brief is an appendix that complies with §. 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 §. 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 one or more initials or other appropriate pseudonym or designation 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 27th day of October, 2022.

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