

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1351

Cir. Ct. No. 2012TR2338

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SANDRA L. BIANCARDI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: FRED H. HAZLEWOOD, Reserve Judge. *Affirmed.*

¶1 BROWN, C.J.¹ Sandra Biancardi appeals her conviction after a court trial for driving while intoxicated. She contends that the police officer did

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

not have lawful authority to stop her because the stop was predicated on an uncorroborated anonymous tip. We reject her arguments and affirm.

Facts

¶2 On June 18, 2012, at approximately 9:00 p.m., an anonymous 911 caller asked dispatch for help with a potential drunk driver on I-43. Dispatch relayed this information to Wisconsin State Trooper Mitchell Guderski. According to the tipster, the driver was near mile marker 168. Guderski began heading toward that section of the interstate when dispatch further advised him that the vehicle was a black Honda SUV headed south. The tipster identified himself as the passenger of the suspected vehicle, telling the dispatcher that the driver was intoxicated and he feared for his life. The tipster did not provide this information in one continuous conversation but made several short calls to 911.

¶3 While in the left lane of I-43, heading south, Guderski observed a black Honda SUV with bicycles mounted on the back traveling in the right lane. He saw the two right tires of the SUV completely cross over the fog line and then cross back into the lane. Guderski witnessed the SUV's right tires cross the fog line again by at least one foot. He then activated his emergency lights, intending to conduct a traffic stop to see if the driver was impaired or falling asleep. Guderski testified at a motion hearing that given his observations and the 911 calls, he believed he had to stop the vehicle to check on the driver's safety.

¶4 At the time Guderski activated his emergency lights, the SUV's right tires were directly on top of the fog line. Guderski also testified that it took almost ten seconds for the SUV to brake and pull over after he had activated his emergency lights. Guderski further testified that in his experience, he witnesses impaired drivers most often after 8:00 or 9:00 p.m. On cross-examination,

Guderski also added that although he observed the SUV cross the fog line several times, he never saw it cross the dotted line into the other traffic lane. He also testified that the driver's swerving was gradual and not erratic.

¶5 Once Guderski made contact with the vehicle, he discovered the driver to be the defendant, Biancardi. He then observed a passenger in the vehicle, corroborating the information he had received from dispatch about the tipster's location.

¶6 Guderski's testimony occurred at a pretrial hearing initiated by the defense's motion to suppress evidence due to an unlawful traffic stop. After Guderski's testimony at the motion hearing, the circuit court² ruled that Guderski had reasonable suspicion to stop the SUV and denied the defense's motion. In its ruling, the court stated that given Guderski's responsibilities along the highway and the information he had received, it "just seems so reasonable that he would stop and make inquiry to make sure that there is not a dangerous driver on the road, when you add all the facts together, that he had knowledge of." Following a bench trial, Biancardi was convicted of operating a motor vehicle while under the influence of an intoxicant, in violation of WIS. STAT. § 346.63(1)(a). Biancardi appeals.

Standard of Review

¶7 "A trial court's determination of whether undisputed facts establish reasonable suspicion justifying police to perform an investigative stop presents a

² The Honorable Donald A. Poppy issued the oral and written order on Biancardi's motion.

question of constitutional fact, subject to de novo review.” *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394 (citation omitted).

Analysis

¶8 On appeal, Biancardi argues that Guderski did not independently gather sufficient information to corroborate the anonymous tip. In *Illinois v. Gates*, 462 U.S. 213 (1983), the Supreme Court established considerations for determining if an anonymous tip exhibits sufficient indicia of reliability concerning (1) the informant’s veracity and (2) the informant’s basis of knowledge. *Id.* at 233. These two components create a spectrum by which a court can weigh the reliability of a tip; a deficiency in one element may be compensated for by a strong showing as to the other, or by some other indicia of reliability. *Id.*

¶9 The Court examined a situation at one end of this spectrum in *Alabama v. White*, 496 U.S. 325 (1990), where the informant was completely unknown. The Court held that an anonymous tip may nonetheless be deemed reliable if it contains “‘inside information’ or a similar verifiable explanation of how the informant came to know of the information in the tip, which the police in turn independently corroborate.” *State v. Rutzinski*, 2001 WI 22, ¶25, 241 Wis. 2d 729, 623 N.W.2d 516. For instance, in *White*, the tip contained information that the defendant would leave a particular address “at a particular time in a brown Plymouth station wagon with the right taillight lens broken.” *White*, 496 U.S. at 327. The tip also indicated the defendant would be driving to a particular motel. *Id.* Because the tip contained information predicting the defendant’s behavior, and the police then verified that behavior, there was reason to believe that the informant was reliable. *Id.* at 329-31. Under these circumstances, the Court held,

the tip “exhibited sufficient indicia of reliability to justify the investigatory stop.” *Id.* at 332.

¶10 An additional relevant consideration in this balancing test was examined in *Rutzinski*, 241 Wis. 2d 729, which discussed the relevance of whether the informant’s allegations “suggest an imminent threat to the public safety or other exigency that warrants immediate police investigation.” *Id.*, ¶26. In cases such as drunk driving, in which there is a potential for harm to others, an exigency can supplement the reliability of an informant’s tip to form the basis for an investigate stop. *Id.* We do not expect a police officer to idly observe in the hopes that more suspicious behavior will happen before the threat comes to fruition. *Id.*

¶11 In applying this balancing test to assess the reasonableness of a traffic stop, we apply a commonsense test. “The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime.” *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. The reasonableness of a stop depends upon the totality of the facts and circumstances. *Id.*

¶12 Biancardi argues that the anonymous tip in her case was not sufficiently corroborated by Guderski because the information it provided about the vehicle was not specific enough. Biancardi believes the description of a black Honda SUV was not definitive, especially because the tipster did not mention the mounted bicycles or a license plate number. Biancardi further alleges that Guderski’s observation of her driving was not enough on its own to justify the stop. She cites *Post*, where the Wisconsin Supreme Court held that weaving

within a single lane of traffic does not alone give rise to reasonable suspicion to permit an investigatory traffic stop. *Id.*, ¶2.

¶13 We disagree with Biancardi’s application of *Post* to this case as well as her assessment of the indicia of reliability for the tip in her case. To begin with, contrary to Biancardi’s characterization, the facts of *Post* are actually quite similar to this case. In *Post* the defendant’s vehicle was observed “moving between the roadway centerline and parking lane.” *Id.*, ¶29. This was at approximately 9:30 at night. *Id.*, ¶36. We see no distinction between *Post* crossing into a parking lane and Biancardi crossing over a fog line. In both circumstances the drivers were not staying within their designated traveling lanes. These deviations may not alone be illegal, but as the court in *Post* stated: “driving need not be illegal in order to give rise to reasonable suspicion.” *Id.*, ¶24. Plus, there were multiple instances of crossing the fog line, not just one isolated occasion. In our view, the defense’s assertion that Biancardi’s movements over the fog line do not alone create sufficient reasonable suspicion are actually contradicted by *Post*, not supported by it.

¶14 Adding the information from the confidential informant to Guderski’s independent observations of the vehicle’s weaving, there was sufficient reasonable suspicion for an investigatory stop in this case. The tipster’s information certainly satisfies the *White* “inside information” standard. The informant claimed to be a passenger in the very vehicle he was calling about. Furthermore, he provided mile markers indicating where exactly on I-43 the car was and in which direction it was traveling. This allowed Guderski to locate a vehicle matching the tipster’s description, a black Honda SUV, in approximately the same position. Guderski then independently witnessed the SUV travel outside of its lane and over the fog line, more than once. These facts alone satisfy us that

the information was adequately corroborated. The specificity with which the informant gave the location of the car, Guderski's own observations of Biancardi's swerving, and the informant's position within the very car provide sufficient indicia of reliability.

¶15 Lastly, the officer's justification for an investigatory stop was heightened here, because a potentially drunk driver qualifies as a threat to public safety. The passenger stated that he feared for his life. That certainly qualifies as an exigent circumstance, and we do not expect Guderski to wait for the car to swerve into another lane of traffic, endangering other travelers, so that he could gather even more reasonable suspicion. *See Rutzinski*, 241 Wis. 2d 729, ¶26.

¶16 In summary, in this case, there is more than just an anonymous tipster. The caller was in the suspicious car itself and reported fearing for his life. He was able to call out mile markers to specifically indicate the vehicle's location on the interstate. The SUV Guderski spotted was in the area the caller specified, traveling in the same direction, and was the specified color and make. Guderski then independently observed the driver go over the fog line more than once. Weighing the totality of the circumstances, Guderski had the reasonable suspicion necessary to conduct a traffic stop. We affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

