COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2576-CR **Cir. Ct. No. 2012CT001103**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW K. WENZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed.*

¶1 BRENNAN, J.[1] Andrew K. Wenz appeals from a judgment of conviction entered after he pled guilty to operating a motor vehicle while under

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

the influence of an intoxicant ("OWI") as a second offense. *See* WIS. STAT. § 346.63(1)(a). Wenz argues that the police lacked reasonable suspicion to stop his car because the content of the known, reliable informant's tip was too minimal to permit police to reasonably ascertain whether they were stopping the correct vehicle.[2] We disagree and affirm.

BACKGROUND

¶2 The facts of this case are well established by the record and are uncontested.

¶3 On December 26, 2011, at 3:46 a.m., a clerk at the Open Pantry convenience store located at the intersection of Port Washington and Brown Deer Roads called police to report a suspicious vehicle. The clerk told the dispatcher her name and where she worked, and said that she had become suspicious of a "yellow" "sporty-type" car that had passed through the Open Pantry parking lot four times without making a stop in the store or purchasing gasoline. Police officers were familiar with the clerk because the Open Pantry was the only business open in the area at three in the morning for police to buy coffee and the clerk had called police before to report "retail thefts, attempted thefts, gas drive-offs, [and] things of that nature."

¶4 Following the clerk's call, the dispatcher advised all law enforcement officers in the area of the suspicious behavior. Village of Fox Point Police Officer Kyle Arendt responded to the area ten minutes later. He observed a

[2] The Honorable Charles F. Kahn, Jr., presided over the suppression hearing and denied Wenz's motion to suppress. The Honorable Bonnie L. Gordon presided over Wenz's plea hearing and entered the judgment of conviction from which Wenz appeals.

yellow Dodge Neon that he believed matched the clerk's description approximately thirty to thirty-five yards away from the Open Pantry. He did not observe any other vehicles on the road at that time. Officer Arendt conducted an investigatory stop of the car. Wenz was later identified as the driver.

¶5 Wenz was subsequently charged with an OWI.[3] He filed a motion to suppress evidence based upon the validity of the traffic stop. Following a hearing, the circuit court denied Wenz's motion. The circuit court concluded that Officer Arendt had reasonable suspicion to suspect Wenz had or was about to commit a crime based upon the content of the clerk's tip, the reliability of the clerk, the past history of crimes committed at the Open Pantry, the unusual color of the car, and the vehicle's proximity to the Open Pantry when spotted by police. Wenz pled guilty to an OWI as a second offense.[4] He now appeals, arguing that the circuit court erred when it denied his motion to suppress based on the validity of the traffic stop.

DISCUSSION

¶6 Wenz argues that the police lacked reasonable suspicion to stop his car because the clerk's tip was too vague, lacking in both reliability and content. We disagree.

[3] The parties do not include the basis for Wenz's OWI charge, and therefore, we do not include those facts in our decision. The sole basis for Wenz's appeal is whether police had a legal basis to stop his vehicle.

[4] In most instances, a defendant who pleads guilty waives all nonjurisdictional defects and defenses. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). However, WIS. STAT. § 971.31(10) makes an exception to this rule, which allows appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea. ***Smith***, 122 Wis. 2d at 434-35.

¶7 Whether police had reasonable suspicion to perform an investigatory stop is a question of constitutional fact, to which we apply a two-step standard of review. ***State v. Walli***, 2011 WI App 86, ¶10, 334 Wis. 2d 402, 799 N.W.2d 898. The circuit court's findings of historical fact are upheld unless clearly erroneous. ***Id.*** We apply those facts to the applicable law *de novo*. ***Id.*** Here, Wenz does not challenge the circuit court's findings of fact, but rather argues that the facts do not provide a legal basis for the stop.

¶8 Both the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. ***State v. Garrett***, 2001 WI App 240, ¶8, 248 Wis. 2d 61, 635 N.W.2d 615. However, a law enforcement officer may lawfully conduct an investigatory stop if, "based upon the officer's experience, [he or she] reasonably suspects 'that criminal activity may be afoot.'" ***State v. Williams***, 2001 WI 21, ¶21, 241 Wis. 2d 631, 623 N.W.2d 106 (quoting ***Terry v. Ohio***, 392 U.S. 1, 30 (1968)). Reasonable suspicion is dependent on whether the officer's suspicion was grounded in specific, articulable facts, and reasonable inferences from those facts, that an individual was committing a crime. ***State v. Waldner***, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996).

¶9 "The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). "[A] police officer may, under the appropriate circumstances, detain a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." ***Waldner***, 206 Wis. 2d at 55. Police officers are not required to rule out the possibility of innocent behavior before initiating a

Terry stop. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). "[S]uspicious activity by its very nature is ambiguous," ***id.***, and when there is reason to suspect wrongful conduct, "officers have the right to temporarily freeze the situation in order to investigate further," ***State v. Jackson***, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989).

¶10 "In some circumstances, information contained in an informant's tip may justify an investigative stop." ***State v. Rutzinski***, 2001 WI 22, ¶17, 241 Wis. 2d 729, 623 N.W.2d 516. Because informants' tips vary greatly in reliability, an officer must consider the reliability and content of the tip before it can give rise to grounds for such a stop. ***Id.*** In assessing a tip's reliability, we must give due weight to: "(1) the informant's veracity; and (2) the informant's basis of knowledge." ***Id.***, ¶18. We view these considerations in light of the totality of the circumstances. ***Id.*** Therefore, a deficiency in one consideration may be compensated by a strong showing as to the other. ***Id.*** When an ordinary citizen, as opposed to a police informant, is the source of information provided to the police, a more relaxed test of reliability applies that "'shifts from a question of personal reliability to 'observational' reliability.'" ***Williams***, 241 Wis. 2d 631, ¶36 (citations omitted).

¶11 Here, the clerk was extremely reliable. She provided her name, location, and place of employment to the dispatcher, subjecting herself to arrest if her tip was fabricated. *See* ***State v. Miller***, 2012 WI 61, ¶34, 341 Wis. 2d 307, 815 N.W.2d 349 ("[P]olice may infer that an informant who risks disclosing his or her identity is more likely to be providing truthful information because the informant knows that police can hold him or her accountable for providing false information."). She was also known to police, having given them reliable information in the past regarding illegal activity at the store. *See* ***State v. Jones***,

2002 WI App 196, ¶14, 257 Wis. 2d 319, 651 N.W.2d 305 ("The confidential informant's favorable track record is one consideration supporting the reliability of the information he or she provided."). Furthermore, her tip was based on her own personal firsthand observations of a "yellow" "sporty type" car in the store parking lot, and her experience as a clerk at the store, which suggested to her that a car driving through the parking lot four times at 3:46 a.m. without stopping in the store or buying gas was suspicious.

¶12 When Officer Arendt stopped Wenz's car, Wenz was only thirty to thirty-five yards away from the Open Pantry. Not only was Wenz's car the only one in the area observed by Officer Arendt, Wenz's car matched the description of the suspicious car given by the clerk, that is, a "yellow" "sporty type" car. Under the totality of the circumstances, Officer Arendt could reasonably infer that Wenz may be engaged in criminal activity, based on the clerk's reliability, the proximity of Wenz's car to the store, the fact that Wenz's car matched the description given by the clerk, including the unusual color of the car, the time of day, and the history of criminal activity at the store. *See* ***State v. Begicevic***, 2004 WI App 57, ¶7, 270 Wis. 2d 675, 678 N.W.2d 293. While there may have been a lawful explanation for Wenz's behavior, Officer Arendt was not required to ignore the otherwise reasonable inference that Wenz was engaged in or about to be engaged in criminal activity. *See* ***id.*** "It was the essence of good police work for [Officer Arendt] to freeze the situation until [he] could sort out the ambiguity." *See* ***id.***

¶13 Wenz makes much of the fact that the clerk here described the car only as a "yellow" "sporty-type" car and did not provide any additional information, such as the make, model, or license plate number. However, we are not satisfied that such details were necessary here. The circumstantial evidence in this case, including the proximity of Wenz's car to the store, the unusual color of

Wenz's car, and the fact that there were very few other cars on the road, was enough for Officer Arendt to reasonably suspect that Wenz's vehicle was the one described by the clerk. As such, we affirm the circuit court.

By the Court.—Judgment affirmed.

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