

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

SEPTEMBER 24, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

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

No. 96-0356-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JERALD J. HUPE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Green County:
DAVID G. DEININGER, Judge. *Affirmed.*

LaROCQUE, J. Jerald J. Hupe appeals the denial of his motion to suppress evidence following a "*Terry*" stop and his conviction based on that evidence. Hupe claims that the trial court erred when it found the police had a reasonable and articulable basis for stopping him. This court agrees that officer Richard Bennett's actions were reasonable under the circumstances and affirm.

The relevant facts are not in dispute. On April 22, 1995, Bennett was in his parked squad car observing traffic in the City of Brodhead. Bennett observed a dark-colored Lincoln drive past his squad. He noticed nothing unusual about the Lincoln or its driver; he was not speeding, driving erratically or violating any other traffic law. However, almost immediately after observing

the Lincoln, a pickup truck pulled up next to Bennett's squad. Bennett testified that he recognized the driver of the pickup as a resident of Brodhead, although he had no prior contact with him. Bennett also testified that this person seemed very excited and upset, claimed to have been following the Lincoln and that the Lincoln's driver "Must be drunk" and was weaving all over the road. Bennett then pointed to the Lincoln to confirm that it was the vehicle referred to. After receiving confirmation, Bennett told the driver of the pickup to remain at the scene and drove over to where the Lincoln was then parked. Bennett observed the driver of the Lincoln, Hupe, crossing the street and asked to speak with him about the other driver's complaint. Bennett testified that Hupe at first refused, but after further prompting approached Bennett. As he approached, Bennett detected a "strong odor of intoxicants" from Hupe and noticed that Hupe's balance was poor and that his eyes were "bloodshot and glassy." At that time, Bennett had Hupe perform several sobriety tests and arrested him on suspicion of operating a motor vehicle while intoxicated.

As a preliminary matter, Hupe contends that when Bennett initially confronted him he was "seized," thereby implicating constitutional protections. The State, however, argues that Hupe was not seized. For purposes of this appeal, we assume without deciding that Hupe was seized in the constitutional sense. Hupe's main argument is that the tip provided by the pickup truck driver was insufficient to give Bennett justification to detain Hupe. This court disagrees.

The constitutional validity of an investigatory stop is governed by *Terry v. Ohio*, 392 U.S. 1 (1968), as codified by § 968.24, STATS.¹ *Terry* and its

¹ Both the Fourth Amendment to the United States Constitution and art. I, § 11, of the Wisconsin Constitution guarantee citizens the right to be free from "unreasonable searches and seizures." *State v. Richardson*, 156 Wis.2d 128, 137, 456 N.W.2d 830, 833 (1990). The Wisconsin Supreme Court consistently follows the United States Supreme Court's interpretation of the search and seizure provision of the Fourth Amendment in construing the same provision of the Wisconsin Constitution. See *State v. Fry*, 131 Wis.2d 153, 171-72, 388 N.W.2d 565, 573 (1986). The Wisconsin legislature has codified the *Terry v. Ohio*, 392 U.S. 1 (1968), rule in § 968.24 STATS. That section reads as follows:

After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has

progeny require that a police officer reasonably suspect, in light of the officer's experience, that some criminal activity has taken place or is taking place before stopping an individual. *Terry*, 392 U.S. at 30. Reasonable suspicion must be grounded in specific, articulable facts and reasonable inferences arising from those facts. *State v. Richardson*, 156 Wis.2d 128, 139, 456 N.W.2d 830, 834 (1990) (quoting *Terry*, 392 U.S. at 21-22). When acting upon a tip, the tip must have sufficient indicia of reliability for a police officer to reasonably rely on that tip. *Alabama v. White*, 496 U.S. 325, 328-29 (1990). The determination of reasonableness "is a common sense question, which strikes a balance between the interests of society in solving crime and the [interests of individual] members of that society to be free from unreasonable intrusions. The essential question is whether the action of the law enforcement officer was reasonable under all the facts and circumstances present." *Richardson*, 156 Wis.2d at 139-40, 456 N.W.2d at 834 (quoting *State v. Jackson*, 147 Wis.2d 824, 831, 434 N.W.2d 386, 389 (1989)). This court will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *Id.* at 137, 456 N.W.2d at 833. However, whether an investigatory stop passes constitutional muster is a question of law that we review de novo. *Id.* at 137-38, 456 N.W.2d at 833.

We conclude that Bennett's conduct was reasonable under the circumstances. Contrary to Hupe's claims, Bennett was not confronted with an anonymous tip; the "tipster" presented himself to Bennett in person and agreed to remain at the scene until another officer could arrive.² This raises an inference of the tipster's reliability and negates the uncertainty associated with an anonymous tip. See *id.* at 140-43, 456 N.W.2d at 835-36, discussing *White*, 496 U.S. at 328-29 (stating that an anonymous tip, standing alone, rarely evidences sufficient credibility to justify a *Terry* stop). This inference is further strengthened by the fact that Bennett was familiar with the tipster as a resident of Brodhead.

(.continued)

committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

² In addition, Bennett had radioed the pickup truck's license plate number to dispatch to allow another squad to locate the truck.

Other facts available to Bennett lead us to conclude that his conduct was reasonable. The tipster appeared genuinely excited and upset after witnessing Hupe's driving, lending credibility to his claims. The pickup approached immediately after the officer observed the Lincoln, which suggests the truck was indeed behind Hupe, which lends credibility to the tipster's claim that he had occasion to observe Hupe's driving. With these facts in mind, Bennett's decision to stop Hupe to investigate the complaint was entirely reasonable and constitutional.

Hupe claims that Bennett should have independently investigated the veracity of the complaint by following or observing Hupe's conduct after receiving the complaint. He cites *Richardson* for support. In that case, police received an anonymous tip regarding future drug trafficking in which they were able to corroborate the tipster's information by observing the accused's behavior over a certain period of time. The court held that because the police were able to corroborate some details of the tip, they could properly rely on the tip and detain the suspect. *Id.* at 142-43, 456 N.W.2d at 835-36. We conclude, however, that this case is governed by *State v. King*, 175 Wis.2d 146, 499 N.W.2d 190 (Ct. App. 1993). Like the instant case, *King* concerned a tip regarding dangerous ongoing criminal activity. *King* held that *Richardson* was inapplicable and that a police officer need not undertake independent investigation of the tip as long as the tip evidenced sufficient other indicia of reliability. *King*, 175 Wis.2d at 151-52, 499 N.W.2d at 192.

To require Bennett to independently investigate Hupe's driving could seriously endanger the public. Furthermore, as noted, Bennett had sufficient facts before him to reasonably believe the citizen informant.

Hupe also argues that Bennett's reliance on the tip was unreasonable because it was contradicted by Bennett's own observations. Bennett, however, testified that he only observed Hupe's driving for about two seconds. It was entirely reasonable for Bennett to conclude that the pickup truck driver had a better opportunity to observe Hupe's driving and therefore had a superior knowledge of his conduct.

Finally, this court rejects Hupe's complaint that an affirmance would "lead to absurd results and give police officers virtually unlimited power

to detain citizens." An anonymous tip, standing alone, is rarely sufficient to justify an investigatory stop. *White*, 496 U.S. at 329. Furthermore, any tip, whether anonymous or not, must evidence sufficient indicia of reliability before a stop is justified. *Id.* at 330. This requirement restricts a law enforcement officer's ability to detain citizens to situations where the tip is reasonably reliable. A citizen is unlikely to make a false report to police when he is known to the officer and remains at the scene. Because this is such a case, this court affirms Hupe's conviction and the denial of his motion to suppress.

By the Court. — Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.