**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 15, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2005AP1563-CR** **Cir. Ct. No. 2004CT37**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**PATRICK J. DELEBREAU,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Kewaunee County: DENNIS J. MLEZIVA, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Patrick Delebreau appeals his conviction for operating while under the influence, second offense, contrary to WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

§ 346.63(1)(a). Delebreau argues that the arresting officer lacked reasonable suspicion for the investigatory detention. We disagree, and affirm.

¶2 On April 2, 2004, Deputy Dustin Smidle of the Kewaunee County Sheriff's Department was dispatched at 12:38 a.m. to Crevice Road, based upon an anonymous tip that a possible intoxicated driver in a black Jeep Cherokee had just pulled out in front of him while leaving a bar in Casco. The informant advised that the Jeep was heading south on County Highway C. A second dispatch issued nine minutes later specified that the vehicle was parked in a field south of Rockledge on Crevice Road.

¶3 After receiving this information, Smidle went to the location of the field on Crevice Road. Smidle observed a vehicle parked fifty yards into a field road, with its lights off, "out in the middle of nowhere." The field road winds its way through a marshy area back to a farm field. At the motion hearing, Smidle testified that when he first noticed the vehicle, he had driven past the field road, and saw a reflection from the vehicle's "reflectives." Smidle then backed up and went into the field driveway, whereupon he recognized the vehicle. Smidle got out of his squad car and approached the vehicle, "to see what was going on." Smidle observed two people in the back seat of the vehicle, "adjusting clothing." Smidle recognized Delebreau, and asked him what he was doing parked in the field road. Delebreau replied, "we just came back here to talk." Smidle then asked Delebreau to step out of the vehicle, and noticed the odor of intoxicants and that Delebreau had bloodshot eyes. Smidle noticed that Delebreau's pants were undone and he had one shoe on. Delebreau admitted that he had driven to that location from "Pribek's tavern." Smidle asked Delebreau if he knew whose land he was on, and Delebreau responded that he "thought it was a Seidl's." Smidle had Delebreau put his other shoe on, escorted him to the paved portion of Crevice

Road, and then initiated field sobriety tests. Following the field sobriety tests, Smidle administered a preliminary breath test that produced a reading of 0.14%, and Smidle arrested Delabreau. Delebreau subsequently consented to a chemical test of his blood, which indicated a blood alcohol concentration of 0.16 grams. Delebreau was charged with operating a motor vehicle while intoxicated–second offense, contrary to WIS. STAT. § 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration–second offense, contrary to WIS. STAT. § 346.63(1)(b). Delebreau pled not guilty to both charges.

¶4 Delebreau filed a motion to dismiss, challenging the constitutionality of the investigatory detention. A hearing was held on June 20, 2004. The circuit court concluded the information from the anonymous tipster provided reasonable indicia of reliability. The court concluded there was a reasonable inference that the tipster was giving ongoing contemporaneous information as he was following the vehicle because the police corroborated significant information. The circuit court also emphasized that Smidle testified he was advised that the informant believed that the driver was intoxicated. The court found Smidle's testimony to be credible. The court further considered, based upon ***State v. Rutzinski***, 2001 WI 22, ¶26, 241 Wis. 2d 729, 623 N.W.2d 516, that an intoxicated driver on a public road presents a risk to public safety. The court noted that although the driver was not on a public road at the time of the detention, it was reasonable for the officer to infer the vehicle would not remain in the field indefinitely and would move back onto the public road, thereby causing a concern for public safety at that time. The circuit court concluded Smidle would have been derelict in his duty had he not investigated the vehicle to determine if the tipster's information was true, especially when the general location and other initial information provided by the tipster proved to be reasonably accurate.

¶5 In balancing the interests of the individual being stopped against the interests of the public in effective law enforcement, the circuit court concluded the specificity of the location and description of the vehicle which Smidle was provided, together with the threat to the public safety posed by a person driving intoxicated, outweighed any lack of knowledge as to the identity of the informant.

¶6 As an alternative basis, the circuit court also concluded the detention was appropriate under the community caretaker function. The court indicated that there was a need to investigate the reason for the vehicle being in the field in the early hours of the morning, to determine whether someone was in need of assistance or was injured, and to determine what has happening with the vehicle. The court found under the same balancing test that the need to investigate why this vehicle was in the field at one o'clock a.m. outweighed any intrusion upon the driver.

¶7 As a result, the circuit court denied the motion to dismiss. After a motion to reconsider was denied, Delebreau entered a change of plea to guilty to Count 1, operating a motor vehicle while intoxicated, contrary to WIS. STAT. § 346.63(1)(a). The court imposed a sentence, which was stayed pending this appeal.

## DISCUSSION

¶8 Under both the Fourth Amendment to the United States Constitution, and Article I, section 11 of the Wisconsin Constitution, investigative stops are governed by the imperative that all searches and seizures be objectively reasonable under the circumstances existing at the time of the search or seizure. ***Rutzinski***,

241 Wis. 2d 729, ¶26. Investigative traffic stops, regardless of how brief in duration, are governed by this constitutional requirement.[2] ***Id.***

¶9 Although an investigative detention is technically a "seizure" under the Fourth Amendment, a police officer may in appropriate circumstances detain a person for purposes of investigation even though there is no probable cause to make an arrest. ***Terry v. Ohio***, 392 U.S. 1, 27 (1968).[3] In accordance with the ***Terry*** standard, a police officer may stop or detain a suspicious vehicle to maintain the status quo while determining the identity of the driver or obtaining other relevant information. ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). However, the stop must be based upon something more than the officer's "inchoate and unparticularized 'hunch.'" ***Terry***, 392 U.S. at 27. To pass constitutional muster, an officer initiating an investigative stop must have at a minimum a reasonable suspicion that wrongful activity is afoot. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

¶10 The question of what constitutes reasonable suspicion is a common sense test. ***State v. Jackson***, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989). A temporary stop is permissible if the specific and articulable facts available to the officer at the moment of the seizure, taken together with rational inferences from those facts, would objectively "'warrant a man of reasonable caution in the belief' that the action taken was appropriate." ***Terry,*** 392 U.S. at 22 (citation omitted).

---

[2] The officer did not have to stop the vehicle in this case, but there is no dispute that the officer engaged in an investigative detention implicating constitutional requirements.

[3] The position of the Court in ***Terry v. Ohio***, 392 U.S. 1, 27 (1968), was adopted by our supreme court in ***State v. Chambers***, 55 Wis. 2d 289, 294, 198 N.W.2d 377 (1972). Our legislature codified the ***Terry*** standard in WIS. STAT. § 968.24. *See* ***State v. Jackson***, 147 Wis. 2d 824, 830-31, 434 N.W.2d 386 (1989).

¶11 We will uphold the circuit court's factual findings unless they are against the great weight and clear preponderance of the evidence. ***State v. Krier***, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991). However, whether a stop meets statutory and constitutional standards is a question of law subject to review without deference. ***Id.*** When reviewing a set of facts to determine whether those facts could give rise to a reasonable suspicion, courts must apply a commonsense approach to strike a balance between the interests of the individual being stopped to be free from unnecessary or unduly intrusive searches, and the interests of the state to effectively prevent, detect, and investigate crime. ***Rutzinski***, 241 Wis. 2d 729, ¶15.

¶12 We turn to the issue of whether the anonymous tip provided a basis for an articulable and reasonable suspicion of improper activity. The United States Supreme Court has established factors for evaluating anonymous tips in the context of investigative stops. When details of an anonymous informant's information can be verified, there is reason to believe the caller is honest and well-informed. ***Krier***, 165 Wis. 2d at 676 (citing ***Alabama v. White***, 496 U.S. 325 (1990)). When significant aspects of an anonymous tip are independently corroborated by the police, the inference arises that the anonymous informant is telling the truth. ***Krier***, 165 Wis. 2d at 676.

¶13 In the present case, the circuit court concluded that the anonymous informant was providing contemporaneous and ongoing information. There were multiple calls made. As the circuit court concluded, there was a reasonable inference that the tipster was following the vehicle. The police were informed that a black Jeep Cherokee with a possible intoxicated driver had allegedly cut off the tipster while leaving a bar in Casco, and was headed south on County Highway C. Another call nine minutes later stated the vehicle was parked in a

field road off Crevice Road. Deputy Smidle observed a black Jeep Cherokee in the field off Crevice Road, verifying the path of travel, as well as the location and description of the vehicle. As the court noted, the information was described in general terms, but it was accurately provided. Significant aspects of the anonymous tip were corroborated, sufficient to permit the deputy to infer that the caller was informed and telling the truth. Only a person contemporaneously observing the vehicle or possessing "inside information" would have been able to indicate the route of the vehicle, where it was located and the setting surrounding the vehicle at that given time of the morning. *See* ***Rutzinski***, 241 Wis. 2d 729, ¶33. We agree with the circuit court that based on the totality of the circumstances, Smidle reasonably could have inferred that the informant had a reliable basis of knowledge.

¶14 The next issue is whether the specific and articulable facts available to the officer at the moment of the investigative stop, together with rational inferences from those facts, would objectively lead to a suspicion of wrongful activity. Delebreau argues that "there was no indication whatsoever that Deputy Smidle observed any criminal activity as it relates to the Jeep." This argument was settled in ***Krier***, contrary to Delebreau's position:

> [This] argument would require police to have *knowledge* of criminal activity rather than mere *suspicion* of criminal activity before performing an investigative stop …. Section 968.24, Stats. … is operative in this case because the police had an articulable and reasonable suspicion that he was engaged in activity that *could* be criminal. That verb is all that is required here.

***Krier***, 165 Wis. 2d 678; *see also* ***Adams v. Williams***, 407 U.S. 143, 147 (1972) (rejecting the argument "that reasonable cause for a stop and frisk can only be

based on the officer's personal observation, rather than on information supplied by another person.").

¶15 Delebreau insists that his act of parking in a field at approximately one o'clock a.m. does not necessarily imply criminal conduct. Delebreau contends that the tipster provided little, if any, detail that could lead to a suspicion that he was involved in anything that could constitute criminal activity. Delebreau claims that the tipster only informed Smidle that a vehicle "pulled out" in front of the informant. Delebreau concedes that he was, at worst, inattentive when he pulled out in front of the tipster, if he did at all. According to Delebreau, that does not, in and of itself, give rise to an inference that Delebreau was intoxicated or even that he was drinking.

¶16 At the outset, we note ***Krier*** held that regardless of whether a person's activity may constitute a crime or merely a civil forfeiture, a police officer may validly perform an investigative stop. ***Krier***, 165 Wis. 2d at 678. By Delebreau's own concession, Smidle had a reasonable suspicion of inattentive driving based solely upon the report that the black Jeep Cherokee had cut the tipster off while leaving the bar in Casco, a violation of WIS. STAT. § 346.89, punishable by civil forfeiture under WIS. STAT. § 346.95. However, we need not decide whether suspicion of inattentive driving in and of itself gave rise to an inference that Delebreau was intoxicated, because we conclude the totality of the circumstances justified the detention. The facts and circumstances available to the officer were not solely that a vehicle pulled out in front of the informant. Delebreau would have this court ignore the totality of the information in this case, which weighs in favor of police investigation. We agree with the circuit court that the deputy would be authorized under the totality of the circumstances to freeze the situation temporarily to investigate the reason for the vehicle being in a field

"in the middle of nowhere" at that time of the morning and to further investigate the tip that the driver was intoxicated.

¶17 Doubtless, many innocent explanations could be hypothesized for Delebreau's conduct. However, police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. ***Anderson***, 155 Wis. 2d at 84. The principal function of the investigative stop is to quickly resolve whether the activity is legal or illegal. ***Id***. In this regard, the ***Jackson*** court noted that the suspects in ***Terry*** "might have been casing the store for a robbery, or they might have been window-shopping or impatiently waiting for a friend in the store." ***Jackson***, 147 Wis. 2d at 835 (citing 3 W. LAFAVE, *Search & Seizure*, § 9.2(c) 357-58 (2d ed. 1987)). Nevertheless, as the court held in ***Anderson***, 155 Wis. 2d at 84:

> If any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry.

¶18 In the present case, parking in a farm field in the early morning hours does not necessarily imply wrongful conduct. As in ***Terry***, the activity may have been innocent. The black Jeep Cherokee parked in the field could have belonged to a farmer working in the field, or it could have been innocently parked with the permission of the property owner. But contrary to Delebreau's argument, a reasonable inference of wrongful conduct may also be discerned under the totality of the circumstances. We cannot adopt Delebreau's position that the police must simply shrug their shoulders and dismiss allegations of possible drunk driving under circumstances such as presented here. While allegations of possible intoxicated driving alone cannot form the basis of an investigative stop, they

certainly must be considered among the totality of all the facts and circumstances surrounding the event.

¶19 We also agree with the circuit court's conclusion that notwithstanding the fact that Delebreau was not presently operating his vehicle on the highway when detained, the officer had a reasonable inference that Delebreau would not remain in that field indefinitely and would be moving from that location. Although this case does not present the urgency of investigating a possible drunk driver weaving, varying his or her speed, and tailgating in an urban area, such as occurred in ***Rutzinski,*** we nevertheless agree that the informant's tips in this case contained sufficient indicia of reliability that alleged a sufficient potential danger to public safety, which outweighed the minimal intrusion that the detention would have presented had Delebreau not been intoxicated. *See* ***Rutzinski***, 241 Wis. 2d 729, ¶37.

¶20 In conclusion, we agree with the circuit court that based upon the totality of the facts and circumstances, the police officer had a reasonable and articulable suspicion that Delebreau was engaged in possible wrongful conduct. Because we conclude that the anonymous tips provided a proper basis for the investigatory detention, we need not reach the alternative basis found by the circuit court to justify the stop.

*By the Court.*—Judgment affirmed.

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