COURT OF APPEALS DECISION DATED AND FILED

March 21, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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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 Nos. 2006AP2701

Cir. Ct. Nos. 2005TR4311
2005TR4312

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

WASHINGTON COUNTY,

PLAINTIFF-RESPONDENT,

V.

ROBERT C. VANDENBERG,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Affirmed*.

¶1 BROWN, J.[1] Robert C. Vandenberg's wife called 911 and reported that he was driving while intoxicated. She apparently wished to remain

[1] This appeal is decided by one judge pursuant to Wis. Stat. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

anonymous and give the impression that she had simply seen an unfamiliar car driving erratically, when in fact she knew the driver was her husband because he had just left their house. She therefore did not give her name, and in fact lied to the 911 dispatcher about her identity: the 911 system notified the dispatcher that the call was coming from Vandenberg's house, but when the dispatcher asked the caller whether she was the wife, she replied "no." She gave a description of the vehicle, the license plate number and her husband's probable avenue of travel. Based on this, Vandenberg was stopped. Subsequently, he was cited for operating while intoxicated and driving with a prohibited blood alcohol concentration. He complained to the trial court and complains here that there was no reasonable suspicion to stop him because his wife lied about seeing him driving "radically drunk" and "swerving around," and that the police did not verify significant details of the wife's report or independently observe him driving erratically.

¶2 The circuit court rejected Vandenberg's Fourth Amendment claim, and we affirm. The essential question in this case is whether the information held by the police could give rise to reasonable suspicion that Vandenberg was committing a crime. *See* ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). The 911 dispatcher heard an eyewitness account of intoxicated driving. Even though there were some indications that the caller was not being completely honest with the dispatcher, the fact remains that she claimed to be, and in fact was, in a good position to give information about the reasonable possibility that a crime was being committed. The evidence does not show, as Robert claims, that she did not see the erratic driving that she reported. And her story was corroborated to the extent that the police found the described car on the route she said he was driving.

¶3 Vandenberg admits that his wife was what the law calls a "citizen informant." A citizen informant is someone who happens upon a crime or

suspicious activity and reports it to police. ***State v. Kolk***, 2006 WI App 261, ¶12, __ Wis. 2d __, 726 N.W.2d 337. Our courts recognize the importance of citizen informants and accordingly apply a relaxed test of reliability that shifts from a question of "personal reliability" to "observational reliability." ***Id.***, ¶13 (citation omitted). There must still be an evaluation of reliability, but it is based on the nature of the report, the ability to hear and see the matters reported and the extent to which it is verified by independent police investigation. ***Id***. The ultimate question is whether, under the totality of the circumstances, the quantity and quality of information justify a reasonable suspicion of criminal activity. *See* ***Alabama v. White***, 496 U.S. 325, 330 (1990).

¶4 Vandenberg argues first that the nature of his wife's tip was "suspect" because it was "a fabrication." He points to two false statements that his wife made during the 911 call: she denied that she was who she was in an attempt to pass herself off as a stranger instead of Vandenberg's wife, and she claimed that there was alcohol in the car (which turned out to be false). However, Vandenberg incorrectly looks at these two falsehoods from the perspective of what we know now. The correct question is what was known to the police at the time of the stop. *See* ***State v. Washington***, 2005 WI App 123, ¶16, 284 Wis. 2d 456, 700 N.W.2d 305 (reasonable suspicion based on "those facts known to the officer *at the time of the stop*") (emphasis added). The fact that Vandenberg's wife turned out to be wrong about the alcohol in the car has no bearing on the credibility of her report because the police had no reason to know that she was wrong when they stopped the car. As to the first falsehood, it does bear on the credibility of her report, because the dispatcher did have reason to suspect that the wife was being deceptive, since he knew that she was calling from the Vandenbergs' house.

However, the fact that the dispatcher was suspicious about the identity of the caller does not necessarily invalidate the content of her report.

¶5 Vandenberg next claims that his wife could not have seen what she claimed to have seen: him driving "radically drunk down the street" and "swerving around." He also points out that she told the dispatcher that he was on Hubertus Road heading toward 167, when the two roads are parallel. Again, we look not to the ultimate truth of the wife's statements but to whether the police could reasonably rely on them at the time of the stop. *See **id.*** We further note that reasonable suspicion must be based on the facts known to the police, "together with rational inferences from those facts." ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). The dispatcher knew that a caller inside the Vandenbergs' house was reporting Vandenberg's car swerving in the area near the house. It was reasonable to infer either that the caller had seen the bad driving from inside the house or that the caller knew Vandenberg was driving drunk because she had seen him leave.

¶6 As for the mistake about the exact location of the car, the dispatcher and the wife were able to come to an agreement about the location after some discussion. It is apparent from the record that, because the wife knew Vandenberg's destination was her father's house, she had a pretty good idea of the route he would take. The fact that she initially made a mistake about the layout of the roads is not fatal to her credibility with regard to what she purported to have witnessed.

¶7 Vandenberg finally argues that the police were unable to verify significant details of the wife's report that would bolster its credibility. The officer who spotted Vandenberg's vehicle stopped him immediately and so did not witness any erratic driving. However, she did find the vehicle matching the

caller's description, including at a partial license match, driving in the area the caller had reported it would be.

¶8 The core of Vandenberg's argument is that the facts of his case are less supportive of reasonable suspicion than those in ***Kolk***, in which we upheld the suppression of evidence. In ***Kolk***, the police received a tip from a citizen informant that Kolk would be transporting drugs to Madison in his car. ***Kolk***, 726 N.W.2d 337, ¶¶2-3. The police followed Kolk and stopped him for traffic violations. ***Id.***, ¶4. After the business of the routine traffic stop was concluded, the officer searched Kolk and his car and found drugs. ***Id.***, ¶¶6-7. The State argued that the tip provided reasonable suspicion for Kolk's continued detention once the traffic stop was concluded, but we rejected this argument. The tipster had not told the police how he or she knew of Kolk's legal or illegal activities, ***id.***, ¶15, the information that the police were able to confirm was widely available, and the informant's predictions were general and weakly confirmed. ***Id.***, ¶¶16-18.

¶9 The essential distinction between this case and ***Kolk*** is that here, the informant was, or at least claimed to be, an eyewitness to the criminal activity, whereas in ***Kolk***, there was simply no indication of how the caller knew of the alleged crimes. We agree that, as in ***Kolk***, the information that the police were able to confirm was only weakly predictive—but as we stated in that case, neither prediction nor confirmation of innocent details are rigid requirements for reasonable suspicion. ***Id.***, ¶19.

¶10 Though the case law as stated in ***Kolk*** lays out the logical framework for courts to evaluate cases involving citizen informants, ***id.***, ¶¶12-13, the ultimate question remains whether, under all the facts and circumstances, there were reasonable grounds to suspect criminal activity. Here, the police received a call

from a person claiming to be a witness to drunk driving. Though we now know that the caller lied in an ultimately unsuccessful attempt to conceal her identity, the information available to the police at the time was sufficient to justify a reasonable suspicion that Kolk was driving while intoxicated.

By the Court.— Orders affirmed.

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