COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2007

David R. Schanker
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 No. 2006AP2340-CR

Cir. Ct. No. 2004CT507

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT R. BRODEUR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County: JAMES MILLER, Judge. *Affirmed*.

¶1 DYKMAN, J.[1] Robert Brodeur appeals from an order denying his motion to suppress evidence the State obtained when a police officer conducted a

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

traffic stop of Brodeur's vehicle. Brodeur contends that the police officer lacked reasonable suspicion to perform the traffic stop based on the information in an informant's tip and the officer's personal observations. We conclude that the officer had reasonable suspicion to perform the traffic stop of Brodeur's vehicle, and accordingly affirm.

Background

¶2 The following facts are taken from the motion hearing testimony and the circuit court's order. Shortly after midnight on October 3, 2004, Deputy Laughlin was dispatched to investigate a report of a vehicle driving erratically on the highway. The erratic-driving complaint had been phoned in to 9-1-1 by J.R., who was also driving on the highway and had observed the vehicle. J.R. gave the 9-1-1 dispatcher the license plate of the vehicle and a description and location of the vehicle, and stated that the vehicle was driving excessively fast and swerving. He also gave the dispatcher his name. The dispatcher relayed to Deputy Laughlin the description of the vehicle, its license plate number, and its location.

¶3 Laughlin proceeded to that location and observed a vehicle matching the description relayed to him by dispatch. Laughlin pulled behind the vehicle and followed it for a few miles. During this time, Laughlin observed the vehicle cross the fog line and move onto the gravel portion of the road. Based on his observations and the information he had received from dispatch, Laughlin activated his lights and performed a traffic stop of the vehicle. As a result of the evidence obtained during the stop, Brodeur was charged with driving while intoxicated.

¶4 Brodeur filed a motion to suppress the evidence obtained during the stop, arguing that Laughlin did not have reasonable suspicion to stop him. At the

motion hearing, Laughlin and J.R. testified on the State's behalf. The court denied the suppression motion, and Brodeur was convicted of driving while intoxicated, third offense. Brodeur appeals.

Standard of Review

¶5 We review a circuit court's findings of fact on a suppression motion under the clearly erroneous standard. ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Whether those facts satisfy constitutional standards is a question of law, which we review de novo. ***State v. Rutzinski***, 2001 WI 22, ¶12, 241 Wis. 2d 729, 623 N.W.2d 516.

Discussion

¶6 Brodeur contends that Laughlin did not possess reasonable suspicion to stop him because (1) the information given by J.R. to 9-1-1 was an "anonymous tip," which, together with Laughlin's own observations, did not amount to reasonable suspicion; and (2) even if the tip was not anonymous, it did not provide reasonable suspicion because it did not allege criminal activity. We disagree. We conclude that J.R.'s tip to 9-1-1 was not an anonymous tip, and, taken with the totality of the circumstances, provided reasonable suspicion for Laughlin's stop of Brodeur.

¶7 In ***Rutzinski***, 241 Wis. 2d 729, ¶14, the supreme court explained that "[i]nvestigative traffic stops, regardless of how brief in duration, are governed by [the] constitutional reasonableness requirement."[2] ***Id.***, ¶14. That standard

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[2] *See* U.S. CONST. amend. IV; WIS. CONST. art. 1, § 11.

> requires that the stop be based on something more than the officer's "inchoate and unparticularized suspicion or 'hunch.'" At the time of the stop, the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the officer to believe that criminal activity is afoot.

Id. (citation omitted).

¶8 The issue in ***Rutzinski*** was "under what circumstances a cell-phone call from an unidentified motorist provides sufficient justification for an investigative traffic stop." ***Id.***, ¶1. There, an unidentified motorist called police dispatch and reported that he or she was observing a pickup truck weaving, varying speed from too fast to too slow, and "tailgating." ***Id.***, ¶4. Based on that information, an officer stopped the vehicle described by the unidentified caller. ***Id.***, ¶7. The caller also pulled over when the officer initiated the stop. ***Id.*** During the stop, the officer obtained evidence that Rutzinski had been driving while intoxicated, which Rutzinski moved to suppress. ***Id.***, ¶¶1-2.

¶9 In concluding that the stop was supported by reasonable suspicion, the supreme court explained that, under certain circumstances, an informant's tip will provide reasonable suspicion to perform an investigative stop. ***Id.***, ¶¶3, 17. Because informant's tips have widely varying degrees of reliability, however, police must first assess a tip's reliability and content. ***Id.***, ¶17. Assessing the reliability of a tip requires officers to evaluate the informant's veracity and the informant's basis of knowledge as components of the totality of the circumstances surrounding the tip. ***Id.***, ¶18.

¶10 The ***Rutzinski*** court distinguished Rutzinski's case from ***Florida v. J.L.***, 529 U.S. 266 (2000), in which the Supreme Court held that an investigative

stop based on a totally anonymous tip without sufficient corroboration was unconstitutional. ***Id.***, ¶¶27-37. "In ***J.L.***, the police received an anonymous telephone call reporting 'that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun.'" ***Id.***, ¶27 (quoting ***J.L.***, 529 U.S. at 268). Based on that information, and without observing any suspicious behavior, the police initiated an investigative stop of a person matching the description given by the anonymous tip. ***Id.*** Under the totality of the circumstances, the Court concluded the stop was not constitutionally reasonable. ***Id.***, ¶¶28-29.

¶11 The ***Rutzinski*** court identified three major distinctions between Rutzinski's case and ***J.L.*** that supported its conclusion: (1) the informant in ***Rutzinski*** exposed him- or herself to being identified; (2) the informant in ***Rutzinski*** had provided the police with verifiable information indicating his or her basis of knowledge; and (3) the tip in ***Rutzinski*** indicated that Rutzinski posed an imminent threat to public safety. ***Id.***, ¶¶32-34. Brodeur argues that none of these distinctions are met in this case, and thus his case is more analogous to ***J.L.*** than ***Rutzinski***. We disagree.

¶12 First, Brodeur's argument that J.R.'s tip was an anonymous tip is unavailing. Brodeur bases his argument on the fact that J.R. testified that he gave his name, and that he thought he also gave his phone number. Thus, Brodeur argues, J.R. only stated he gave his name, and that alone is an anonymous tip.[3]

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[3] In his reply brief, Brodeur also argues that the tip should be categorized as an anonymous tip because the record does not establish *when* J.R. gave his name—before or after Laughlin stopped Brodeur. First, we note that we need not address this argument because Brodeur raised it for the first time in his reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. Moreover, we are not convinced that the record need establish conclusively that J.R. gave his name before the traffic stop for us to categorize the tip as non-anonymous. The record indicates that J.R. called 9-1-1 and reported that

(continued)

¶13 In ***State v. Sisk***, 2001 WI App 182, ¶1, 247 Wis. 2d 443, 634 N.W.2d 877, we addressed the categorization of a tip from a caller who gave only his name. In ***Sisk***, the police dispatcher received a call from a person reporting having seen two men enter a building with guns. ***Id.***, ¶3. The informant described where the men were and what they looked like. ***Id.*** He gave his name, but no other identifying information. ***Id.*** Based on the information in the tip, police stopped and frisked Sisk, and found a gun. ***Id.***, ¶4.

¶14 Sisk moved to suppress the evidence, arguing that the police lacked reasonable suspicion. ***Id.***, ¶5. The circuit court agreed, finding that the tip was anonymous even though the caller gave his name because the caller had not opened himself up for verification. ***Id.***

¶15 We reversed, concluding that the call was not anonymous because the caller had given what he said was his name. ***Id.***, ¶¶1, 8-11. We explained that "[w]hether the caller gave correct identifying information, or whether the police ultimately could have verified his identity, the fact remains that the police could have reasonably concluded that the caller, by providing self-identifying information, risked that his identity would be discovered." ***Id.***, ¶8 (citation omitted). We also said that the police were not required to verify the caller's identity before relying on the tip, and that a citizen who claims to have witnessed a crime may be presumed credible. ***Id.***, ¶9. Thus, we concluded that "when a caller

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he was driving on the highway and had witnessed a vehicle driving erratically, and gave the description of the vehicle, its location, and his name. Dispatch then gave the information to Laughner, who proceeded to the location given to him. There is nothing in the record indicating that J.R. remained on the phone with 9-1-1 after giving the initial information. We conclude that it is a reasonable inference from the record that J.R. gave his name at the same time he gave his report to dispatch, which was before the stop was conducted.

identifies himself or herself by name, thus providing self-identifying information that places his or her anonymity at risk, and when the totality of the circumstances establishes a reasonable suspicion that criminal activity may be afoot, the police may execute a lawful stop." ***Id.***, ¶11 (citations omitted). Here, J.R. gave his name, thus exposing his identity and entitling the police to give weight to his report of erratic driving.

¶16 Next, as in ***Rutzinski***, J.R.'s tip contained verifiable information that indicated he was contemporaneously observing Brodeur when he made the call and thus established his basis of knowledge. *See* ***Rutzinski***, 241 Wis. 2d 729, ¶33. The ***Rutzinski*** court explained that the tip there was more reliable than the tip in ***J.L.*** because the informant gave personal observations of the defendant's contemporaneous actions, providing not only a description of the vehicle but the specific location and direction of travel, and thus police could have inferred that the informant had a reliable basis of knowledge. ***Id.*** While we agree with Brodeur that the facts are not identical—in ***Rutzinski***, the informant stayed on the line with dispatch, giving the times at which the vehicle passed specific locations and confirming that police were following the correct vehicle, facts not present here—we conclude that, as in ***Rutzinski***, J.R. provided more than the description of the vehicle and the direction it was traveling. *See* ***id.***, ¶¶5, 6, 33. J.R. was able to identify the mile marker Brodeur's vehicle was passing at the time J.R. made the call, thus establishing his basis for knowledge—contemporaneous observation.

¶17 Finally, also as in ***Rutzinski***, the informant alleged that the defendant was driving erratically. *See* ***id.***, ¶34. The ***Rutzinski*** court explained as follows:

> Erratic driving is one possible sign of intoxicated use of a motor vehicle. As such, based on the reliability of and the allegations contained in the informant's tip, [the police] reasonably could have suspected that Rutzinski was

> intoxicated. Accordingly, [the police were] justified in initiating an investigative traffic stop of Rutzinski.

Id., ¶34. The court quoted with approval the following language from ***State v. Boyea***, 765 A.2d 862, 867 (Vt. 2000), a Vermont Supreme Court case with a similar fact pattern:

> In contrast to the report of an individual in possession of a gun [as in ***J.L.***], an anonymous report of an erratic or drunk driver on the highway presents a qualitatively different level of danger, and concomitantly greater urgency for prompt action. In the case of a concealed gun, the possession itself might be legal, and the police could, in any event, surreptitiously observe the individual for a reasonable period of time without running the risk of death or injury with every passing moment. An officer in pursuit of a reportedly drunk driver on a freeway does not enjoy such a luxury. Indeed, a drunk driver is not at all unlike a "bomb," and a mobile one at that.

Rutzinski, ¶35 (alteration in original).

¶18 Thus, while we agree with Brodeur that we may not adopt a *per se* rule of reasonable suspicion based on an allegation of drunk driving, the supreme court has recognized the extraordinary danger of drunk driving and the significance of an allegation of erratic driving in the totality of the circumstances surrounding police conduct. *See* ***id.***, ¶36.

¶19 We thus consider the information in J.R.'s tip as a component of the totality of the circumstances surrounding Laughner's stop of Brodeur. In addition to J.R.'s report that Brodeur was driving excessively fast and swerving, Laughlin also witnessed Brodeur cross the fog line and drive onto the gravel portion of the

road.[4] It was after midnight, when drivers are more likely to be intoxicated.[5] Based on the reliability of the tip and the other facts in the record, we conclude that the totality of the circumstances provided Laughner with reasonable suspicion to conduct an investigative stop of Brodeur. Accordingly, we affirm.

By the Court—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

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[4] We decline to address Brodeur's argument that crossing the fog line is not a traffic violation. We do not consider this issue dispositive. Rather, Laughner's observation that Brodeur crossed the fog line is one component in the totality of the circumstances.

[5] We are not convinced by Brodeur's argument that the time of night was not significant because it was not "bar time." After midnight is certainly late enough to increase a reasonable officer's suspicion of intoxicated driving. Parents often caution their children that nothing good happens after midnight.