COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2994-CR **Cir. Ct. No. 2005CT2173**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON DUROCHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JAMES L. MARTIN, Judge. *Reversed and cause remanded.*

¶1 BRIDGE, J.[1] Jason Durocher appeals a judgment convicting him of operating a motor vehicle while intoxicated, second offense. He argues that the circuit court erred by failing to grant his motion to suppress evidence of his

[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.

intoxication. Durocher contends that the arresting officer did not have reasonable suspicion to perform the traffic stop. We agree and reverse the judgment.

BACKGROUND

¶2 At 3:11 a.m. on August 14, 2005, an unidentified individual called the University of Wisconsin Police Department regarding a possible drunk driver at the Citgo Open Pantry located at the corner of Old University Avenue and Walnut Street. The U.W. Police Department relayed the message to Sergeant Martens of the Village of Shorewood Hills Police Department at approximately 3:15 a.m. Sergeant Martens was told that the suspect was a white male in a burgundy Ford Contour. The dispatch included the partial plate number 341-CF. It took Sergeant Martens approximately two to three minutes to reach the location. Upon his arrival at the Open Pantry, the officer located a burgundy Ford in the parking lot with its headlights and reverse lights on. Sergeant Martens testified that, without activating his own emergency lights, he pulled his marked squad car between eight and fifteen feet behind and perpendicular to the vehicle. Sergeant Martens testified that he pulled his squad car about eight feet behind the vehicle, and then changed that estimate to ten or fifteen feet.[2]

¶3 Sergeant Martens exited his squad car, at which time the suspect vehicle began to move backwards. The driver, later identified as Durocher, did not turn to look behind his vehicle as he backed up. Believing that the vehicle

[2] Sergeant Martens testified that the vehicle could have been backed out of its spot without hitting his squad car. Durocher disagreed and testified that the squad car was in a position that effectively blocked him from leaving. For purposes of this opinion, we assume that Durocher was not free to leave and that a seizure occurred within the meaning of the Fourth Amendment to the United States Constitution and article 1, section 11 of the Wisconsin Constitution. *See* ***State v. Griffith***, 2000 WI 72, 236 Wis. 2d 48, 613 N.W.2d 72.

would strike his squad car if it kept moving backwards, the officer said, "stop, stop, stop," at which time the car came to a stop after backing up about three to five feet. Sergeant Martens testified that the vehicle did not back up quickly and did not come close to striking the squad car. After the vehicle stopped, Sergeant Martens motioned for Durocher to roll down his window, which he did.

¶4 As a result of evidence obtained during the stop, Durocher was charged with operating a motor vehicle while intoxicated, second offense and operating a motor vehicle with a prohibited alcohol concentration, second offense. Durocher filed a motion to suppress evidence of his intoxication, asserting that there was no reasonable basis for the stop leading to his arrest. The court denied the motion. Durocher subsequently pled no contest to count one, operating a motor vehicle while intoxicated, second offense. The court imposed a sentence, which was stayed pending this appeal.

¶5 For the reasons discussed below, we conclude that the anonymous tip lacked sufficient indicia of reliability to provide reasonable suspicion to make an investigative stop. Accordingly, we reverse.

DISCUSSION

¶6 When reviewing a circuit court's denial of a motion to suppress, we uphold the trial court's findings of fact unless they are clearly erroneous. *See* ***State v. Waldner***, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996); WIS. STAT. § 805.17(2). However, whether those facts satisfy the statutory and constitutional requirement of reasonableness is a question of law that we review de novo. ***Id.***

¶7 The Fourth Amendment to the United States Constitution and article 1, section 11 of the Wisconsin Constitution, prohibit unreasonable searches

and seizures. Detention of a suspect must be based on a reasonable suspicion of criminal activity. ***Id***. at 55-56. Reasonable suspicion is dependent upon whether an officer's suspicion is grounded in "specific, articulable facts and reasonable inferences from those facts" indicating the individual committed a crime. ***Id***. at 56. What constitutes reasonable suspicion is a common sense test. ***Id***. We look to what a reasonable police officer would "reasonably suspect in light of his or her training and experience." ***Id***.

¶8 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. However, informants' tips vary greatly in reliability. Accordingly, before an informant's tip can give rise to grounds for an investigative stop, the police must consider its reliability and content. ***Id***. In assessing the reliability of a tip, due weight must be given to: (1) the informant's veracity; and (2) the informant's basis of knowledge. ***Id***., ¶18. These considerations are to be viewed in light of the totality of the circumstances. ***Id***.

¶9 For an anonymous tip to be reliable enough to justify an investigative stop, the tip must be suitably corroborated. *See* ***id.***, ¶22. An anonymous tip "must contain not only a bald assertion that the suspect is engaged in illegal activity … but also verifiable information indicating how the tipster came to know of the alleged illegal activity." ***Id***., ¶28.

¶10 Finding a described individual at a particular time and place is not enough. *See* ***Florida v. J.L.***, 529 U.S. 266, 272 (2000). In ***J.L.***, police received an anonymous tip that a young black male standing at a bus stop and wearing a plaid shirt was carrying a gun. ***Id***. at 268. The informant did not explain how he knew about the gun. ***Id.*** at 271. Based on the information provided, and without

observing any suspicious behavior, the police initiated an investigative stop of a person matching the description given by the anonymous tip. ***Id.*** The court concluded that the "accurate description of a subject's readily observable location and appearance" did not provide reasonable suspicion to justify an investigative stop. ***Id***. at 272.

¶11 Our supreme court distinguished ***J.L.*** in ***Rutzinski***, 241 Wis. 2d 729, ¶¶32-35. In ***Rutzinski***, an unidentified motorist called police dispatch via cell phone 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.

¶12 The ***Rutzinski*** court concluded that the stop was supported by reasonable suspicion, and 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*** 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. The State argues that the present case is more closely analogous to ***Rutzinski***; Durocher argues that it is more closely analogous to ***J.L.*** We agree with Durocher.

¶13 Unlike ***Rutzinski***, the caller here did not make his or her identity known to the officer.[3] The State argues that the identity of the caller could have been confirmed because Sergeant Martens arrived at the Open Pantry within ten minutes. It contends that knowing that the police would be en route, the caller would have exposed himself or herself to criminal liability for lying to a police officer if he or she relayed inaccurate information.[4] Hence, this risk made the information inherently reliable. The State's argument presumes that Sergeant Martens could easily have determined the identity of the caller. However, the officer did not know whether the caller was inside of the Open Pantry, in the parking lot, or calling from a cell phone while in the vicinity. Moreover, the caller could have been long gone from the scene by the time the officer arrived. The record in this case does not demonstrate that the caller was vulnerable to criminal liability had the information given to police proven untrue. We find the State's argument to the contrary unpersuasive.

¶14 Second, unlike ***Rutzinski***, the informant's tip in the present case contained no verifiable information that indicated a contemporaneous observation of the alleged drunk driver. Although the informant stated that Durocher was "now in the store" and provided a physical description and a partial license plate number, the informant did not state why he or she thought Durocher was drunk. The only aspect of the tip that was corroborated was the license plate number and

[3] The information was relayed to Sergeant Martens via a CAD printout, which is a record sent to a computer in police squad cars. The printout confirmed neither the identity of the caller nor the number from which the call was made.

[4] *See* WIS. STAT. § 946.41 regarding obstructing an officer.

Durocher's physical description. This is precisely the sort of situation that did not justify an investigative stop in ***J.L.***

¶15 Third, unlike ***Rutzinski***, the tip in the present case contained no information regarding erratic driving that would suggest an imminent threat to public safety. The only information contained in the record before us regarding Durocher's behavior behind the wheel was when he backed up for a distance of one to five feet. Nothing in the officer's description of that event suggests drunken driving. Instead, the officer testified that the reason he stopped Durocher was because he believed that Durocher was not looking where he was going, and might hit the officer's squad car.

¶16 Because the record contains no convincing indicia regarding the reliability of the informant's tip, we are left to rely exclusively on the testimony of Sergeant Martens. Regardless of what happened or what the officer thought at the time, our inquiry is confined to how the officer described the events in the record. Sergeant Marten's testimony does not describe that he observed any conduct that would lead him to suspect that Durocher was intoxicated. In addition, because his description of the distance between his squad car and Durocher's vehicle varies significantly from eight feet at a minimum to fifteen feet at a maximum, we are unable to infer that a near collision was imminent, which may potentially have justified the stop. Moreover, the officer testified that Durocher's vehicle did not come close to striking his squad car.

¶17 We recognize that, as the supreme court stated in ***Rutzinski***, a drunk driver poses the potential for imminent danger, and this factor should be considered when determining whether an investigative stop is justified. *See* ***Rutzinski***, 241 Wis. 2d 729, ¶7. At the same time, however, the court has declined

to advocate a blanket rule excepting tips regarding alleged drunk driving from the overall reliability requirement. ***Id***. Because we find that other indicia of reliability are lacking in the present case, we are unable to conclude that the investigative stop was justified for this reason alone.

¶18 We agree that the facts in the present case are closely analogous to those in ***J.L.*** The call was anonymous. It suggested that police would find a certain individual at a certain location. The police were not given any inside information capable of corroboration or other indicia of special knowledge regarding Durocher's intoxication. Under the totality of these circumstances, we must conclude that Sergeant Martens did not have reasonable suspicion for performing the investigative stop of Durocher. Accordingly, we reverse.

By the Court.—Judgment reversed and cause remanded.

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