COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1408-CR **Cir. Ct. No. 2006CT1001**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES E. RUSSELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

¶1 NETTESHEIM, J.[1] Following the denial of his motion to suppress evidence obtained incident to his arrest, James E. Russell pled guilty to operating 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.

motor vehicle while under the influence of an intoxicant (OWI), second offense, pursuant to WIS. STAT. §§ 346.63(1)(a) and 346.65(2). Russell appeals from the ensuing judgment of conviction, renewing his arguments in support of his motion to suppress. We uphold the trial court's denial of the motion to suppress. Consequently, we affirm the judgment of conviction.

¶2 The relevant facts are undisputed. On October 10, 2006, at approximately 12:29 a.m., City of Sheboygan Police Officer Daniel Vlietstra heard a dispatch reporting that the police department had received a telephone call from a citizen reporting "a possible intoxicated driver." The citizen reported seeing a male stumble and fall down in the parking lot behind the Salvation Army before getting into a red pickup truck and driving northbound on 7th Street. The citizen also provided the license plate number of the vehicle and further stated a willingness to provide a statement and be identified. At the time Vlietstra heard this dispatch, he was traveling in the opposite direction, southbound on 7th Street.

¶3 Shortly thereafter, as he approached an intersection, Vlietstra observed a red pickup truck stopped at the intersection, traveling in the opposite direction, northbound on 7th Street. The vehicle license plate matched that reported by the citizen. Vlietstra made a U-turn and followed the vehicle. While following, Vlietstra observed the vehicle make an abrupt swerve to the right near some parked cars. However, the vehicle did not cross over the center line dividing the northbound and southbound lanes of traffic. Because of this maneuver and the information received via the dispatch, Vlietstra was concerned that the vehicle might become involved in an accident and that the operator might be intoxicated. So he activated his emergency lights and stopped the vehicle. Russell proved to be the driver and, after further investigation, he was arrested for OWI.

¶4 The State filed a complaint charging Russell with second-offense OWI, operating with a prohibited blood alcohol concentration (BAC) and operating after revocation. Russell brought a motion to suppress the evidence obtained incident to his arrest, contending that Vlietstra did not have reasonable suspicion to stop the vehicle. The trial court denied the motion. Russell then pled guilty to OWI[2] and he now appeals from the judgment of conviction.

¶5 Although Russell does not contest the reliability of the citizen's report, we deem it appropriate to note some black letter law on this topic. A citizen informant is someone who happens upon a crime or suspicious activity and reports it to the police. ***State v. Kolk***, 2006 WI App 261, ¶12, 298 Wis. 2d 99, 726 N.W.2d 337. "[T]here is a difference between 'citizen-informers' and 'police contacts or informers who usually themselves are criminals.'" ***Id.*** (citation omitted). Citizen informants are deemed reliable even though their reliability has not previously been provided or tested. *See* ***id***.

¶6 While not challenging the reliability of the citizen's information, Russell does challenge the sufficiency of the information to support Vlietstra's stop of the vehicle. Specifically, Russell argues that the citizen's information "did not provide Officer Vlietstra with sufficient specific articulable facts to effectuate an investigatory stop of Mr. Russell's vehicle." But the fallacy in this argument is that Vlietstra's stop of Russell's vehicle was not premised solely on the information provided by the citizen informant. Rather, the stop was premised on the citizen's information *and* Vlietstra's observation of Russell's operation of the

[2] In exchange for Russell's guilty plea, the State dismissed the BAC charge and the operating after revocation charge.

pickup truck. As the State correctly notes, "There are two separate but sequentially related portions to the facts giving rise to the reasonable suspicion for [Vlietstra] to perform the traffic stop."

¶7 On the flip side of this same coin, Russell also argues that the single act of erratic driving observed by Vlietstra—the abrupt swerve by Russell within his lane of traffic—was not sufficient to warrant the stop. But here again, Russell is overlooking the other component of Vlietstra's collective knowledge—the report of the citizen informant.

¶8 Were this case limited to just one component or the other, Russell would have a stronger argument. But we are required to assess the full array of information known to an officer who makes an investigatory stop. "[T]he determination of reasonableness is made in light of the totality of the circumstances known to the … officer." ***State v. Morgan***, 197 Wis. 2d 200, 209, 539 N.W.2d 887 (1995). With this principle in mind, we turn to the totality of the facts known to Vlietstra at the time he stopped Russell's vehicle.

¶9 WISCONSIN STAT. § 968.24 permits a law enforcement officer to temporarily detain a person for the purpose of limited investigation when the officer reasonably suspects that the person may have committed, is committing, or is about to commit an offense. To execute a valid investigatory stop, the officer must reasonably suspect, in light of his or her experience, that criminal activity is afoot. ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Such reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Id***. (citation omitted). Bottom line, this is a "commonsense" test. ***Id.*** at 139-40. Moreover, police officers are not required to rule out the possibility of

innocent behavior before initiating a temporary detention. *See* ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). As the ***Anderson*** court noted:

> [S]uspicious conduct by its very nature is ambiguous, and the princip[al] function of the investigatory stop is to quickly resolve that ambiguity. Therefore, 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.

Id.

¶10 Here, before encountering Russell's vehicle, Vlietstra knew that the operator had been observed stumbling and falling down just before entering the vehicle. Stumbling and falling down are, of course, classic symptoms of intoxication, perhaps severe intoxication. Armed with that knowledge, Vlietstra then observed the suspect vehicle make an abrupt swerve to the right causing Vlietstra to fear that the vehicle might become involved in an accident. Based on these collective facts, Vlietstra decided to stop the vehicle. This strikes us as a prudent decision based on the commonsense test under ***Richardson***. *See* ***Richardson***, 156 Wis. 2d at 139. In fact, to have acted otherwise might well have constituted the "poor police work" noted by our supreme court in ***Anderson*** and the United States Supreme Court in ***Terry v. Ohio***, 392 U.S. 1 (1968), the seminal investigatory stop case. ("Under these circumstances, '[i]t would have been poor police work indeed for an officer … to have failed to investigate this behavior further.'" ***Anderson***, 155 Wis. 2d at 84 (quoting ***Terry***, 392 U.S. at 23)).

¶11 Russell points to possible innocent explanations for the citizen's report that the person observed had stumbled and fallen—to wit, he may have slipped or tripped. That may be, but it does not negate the equally plausible

scenario suggesting intoxication, especially when combined with the driving conduct later observed by Vlietstra. As to his driving, Russell points to ***State v. Post***, 2007 WI 60, ¶38, 301 Wis. 2d 1, 733 N.W.2d 634, which holds that "[w]eaving within a single traffic lane does not alone give rise to the reasonable suspicion necessary to conduct an investigative stop of a vehicle." But the key phrase in ***Post*** is "does not *alone* give rise." ***Id.*** (emphasis added). Here, as we have noted, Vlietstra had more than Russell's act of weaving in his lane of traffic. He also had the information provided by the citizen informant. In short, Vlietstra was confronted with the ambiguity inherent in most investigatory stop/temporary detention situations. In light of the totality of the circumstances, we hold that Vlietstra was entitled to conduct a stop to resolve that ambiguity.

¶12 We uphold the trial court's order denying Russell's motion to suppress. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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