

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 14, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2007AP818-CR

Cir. Ct. No. 2006CT658

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FRANK POST,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, P.J.¹ Frank Post appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant

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.

(OWI), fourth offense, and operating with a prohibited blood alcohol concentration (BAC). Post argues the arresting officer did not have reasonable suspicion to execute the traffic stop, and therefore all evidence from the stop should be suppressed. We conclude that, under the totality of the circumstances, a citizen informant's tip provided a sufficient factual basis to support the reasonableness of the stop. We therefore affirm.

BACKGROUND

¶2 During the afternoon of February 13, 2006, City of Madison Police Officer Brian Baney received a call from dispatch advising him a citizen had reported that a very intoxicated white male had just driven out of the parking lot of the Don Miller auto dealership, in a gray Dodge Durango. The caller also provided the license plate number, the direction the vehicle was last seen heading, west on Odana Road, and the caller's contact information. After receiving the dispatch, Baney drove his police squad eastbound on Odana Road, hoping to locate the vehicle.

¶3 Baney spotted a gray Dodge Durango with matching plates pass him traveling westbound on Odana Road. Baney turned his squad car around and followed the Durango. Baney did not see the driver of the Durango commit any traffic violations. With Baney still following, the Durango eventually pulled into a strip mall lot and parked in a stall. Baney parked behind the Durango, blocking it in. Baney then made contact with the driver, Frank Post. As a result of the stop, Baney issued Post citations for fourth-offense OWI and operating with a prohibited BAC. Test results showed Post had a BAC of .20.

¶4 Post brought a motion to dismiss, arguing the stop was not based on reasonable suspicion, which the circuit court denied. Post then pleaded no contest

and was ordered to undergo an alcohol and drug assessment, sentenced to seventy-five days in jail, fined \$2,983 and had his license revoked for thirty-four months. Post appeals.

DISCUSSION

¶5 To justify an investigatory stop, police must have reasonable suspicion, grounded in specific, articulable facts and any reasonable inferences drawn thereof, that an individual is violating or has violated the law. *State v. Post*, 2007 WI 60 ¶¶10-11, 301 Wis. 2d 1, 733 N.W.2d 634. What constitutes reasonable suspicion is a commonsense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of their training and experience. *Id.*, ¶13. Whether reasonable suspicion existed for an investigatory stop is a question of constitutional fact. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. We apply a two-step standard of review to questions of constitutional fact. *Id.* First, we review the circuit court’s findings of historical fact and uphold them unless clearly erroneous. *Id.* Second, we review the determination of reasonable suspicion de novo. *Id.*

¶6 Information contained in an informant’s tip will, in some cases, provide a reasonable basis for an investigative stop. *Adams v. Williams*, 407 U.S. 143, 147 (1972). Whether a particular tip provides legal grounds for an investigative stop depends on the tip’s reliability and content. See *State v. Rutzinski*, 2001 WI 22, ¶17, 241 Wis. 2d 729, 623 N.W.2d 516. In assessing the reliability of a tip, due weight must be given to the informant’s veracity and the informant’s basis of knowledge. *Illinois v. Gates* 462 U.S. 214, 233 (1983). These considerations, veracity and basis of knowledge, should be viewed in light of the “totality of the circumstances,” and not as discrete elements of a more rigid

test: “[A] deficiency in one [consideration] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.” *Id.*

¶7 Post argues Baney did not have specific and articulable facts that a crime occurred when he was stopped. Post asserts that the citizen informant never gave dispatch a basis for believing Post was intoxicated, rendering the tip unreliable. He further asserts that Baney also did not observe the vehicle commit any traffic violations or identify any maintenance violations. Therefore, Post maintains, there was no reasonable basis for the stop and the circuit court should have suppressed any evidence resulting from the stop. We disagree.

¶8 We have concluded that a tip shows sufficient indicia of reliability to justify an investigative stop when the informant identifies himself or herself to the dispatcher, and police independently verify the information provided by the informant before conducting the stop. *State v. Sisk*, 2001 WI App 182, ¶¶10-11, 247 Wis. 2d 443, 634 N.W.2d 877. In *Sisk*, a City of Milwaukee Police Department dispatcher received a telephone call from a person reporting that he had seen two men enter a building with guns. *Id.*, ¶3. The caller identified himself by name, and described the race of the gunmen and their clothing. Police responded to the building and observed two men matching the caller’s descriptions sitting in a car one half block away. The police made an investigative stop, which led to the arrest and conviction of Sisk for illegal possession of a firearm.

¶9 We concluded in *Sisk* that the officer had reasonable suspicion to execute an investigative stop of the defendant based upon the caller giving information about the suspects and their location, which the officers verified before stopping them, and upon the caller identifying himself. *Id.*, ¶11. We

concluded that the fact that the caller provided his name to the dispatcher was an important indicia of reliability, distinguishing the tip from that of an anonymous caller. *Id.*, ¶9 (“If an informant places his or her anonymity at risk, a court can consider this factor in weighing the reliability of the tip.”) (citations omitted). “When an average citizen tenders information to the police, the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such might not be the case.” *Id.* (quoting *State v. Kerr*, 181 Wis. 2d 372, 381, 511 N.W.2d 586 (1994)). As the supreme court stated, “we view citizens who purport to have witnessed a crime as reliable, and allow the police to act accordingly, even though other indicia of reliability may not yet have been established.” *Williams*, 241 Wis. 2d 631, ¶36.

¶10 Like *Sisk*, the citizen informant in the present case identified himself or herself to the dispatcher. This factor alone is persuasive indicia of reliability because the informant could potentially be arrested if the tip proved to be fabricated. WIS. STAT. § 946.41 (Class A misdemeanor to knowingly give false information to a police officer while the officer is doing any act in an official capacity and with lawful authority); WIS. STAT. § 146.70 (establishing a penalty for “prank” 911 calls).

¶11 Further, as in *Sisk*, the investigating officer independently verified the information provided in the caller’s tip before stopping Post. Baney observed a gray Dodge Durango, with the reported license plate number, driving westbound on Odana Road, not far from the Don Miller Dodge parking lot it had reportedly recently exited.

¶12 Accordingly, we conclude that the tip in this case possessed a sufficient degree of reliability to justify the investigative stop because the

informant identified himself or herself, and Baney independently verified the tipster's information before conducting the stop. We therefore affirm.

By the Court.—Judgment and order affirmed.

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

