COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2773

Cir. Ct. Nos. 2008TR376
2008TR377

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

COUNTY OF OZAUKEE,

PLAINTIFF-RESPONDENT,

V.

ERIC A. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed*.

¶1 ANDERSON, P.J.[1] Eric A. Johnson challenges the investigatory stop that led to his arrest for operating a motor vehicle while intoxicated (OWI). Johnson argues that the citizen who contacted the police ought not qualify as a reliable informant because he both lacked a record of being a reliable informant and because his information lacked enough specificity. Johnson further argues that the arresting officer lacked sufficient articulable facts required to initiate a stop and, consequently, that the officer lacked requisite reasonable suspicion to initiate the stop. We reject Johnson's appeal and affirm because, based on the totality of the circumstances, there was reasonable suspicion to initiate the stop.

BACKGROUND

¶2 At 12:56 a.m. on January 12, 2008, Ozaukee County Sheriff Deputy Patrick Daniels was on duty. Daniels received a call from dispatch stating that a concerned citizen informant had telephoned to report that a motorist was "weaving in and out of its lane of traffic" on Interstate 43 near mile marker 95. The complaining motorist had identified himself to the dispatcher as Travis Tappa and provided a vehicle description for the vehicle in question, while further indicating that he was following the vehicle. Daniels did not recall a statement from Tappa regarding whether he believed the weaving motorist was intoxicated or possibly impaired, whether the motorist had crossed the centerline or the fog line, or regarding the nature and frequency of the weaving.

¶3 Daniels intercepted and followed the motorist, Johnson, after identifying both Johnson's and Tappa's vehicles based on the description given to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

dispatch. Daniels moved between Tappa and Johnson to begin observation as the vehicles began their turn left onto State Highway 33 in Ozaukee County. Daniels proceeded to observe Johnson drift across and back again over the fog line while going thirty to thirty-three miles per hour in a thirty-five mile per hour zone. Johnson then negotiated an unusually wide right-hand turn onto Mill Road. Daniels continued to observe Johnson weave within his lane of traffic. At this time, Daniels estimates that he had followed Johnson for one-half to three-quarters of a mile. Before initiating the traffic stop, Daniels confirmed with dispatch that Tappa was willing to stop and give a statement. Upon receiving confirmation that Tappa would pull over and give a statement, Daniels proceeded with the stop resulting in the arrest.

¶4 Johnson was charged with operating a vehicle while under the influence of an intoxicant and with a prohibited alcohol concentration contrary to WIS. STAT. § 346.63(1)(a) and (b) (2007-08).[2] Johnson filed a motion for suppression of evidence on January 24, 2008, asserting that the arresting officer lacked the requisite reasonable suspicion to stop his vehicle. After a hearing on April 24, 2008, the circuit court denied the motion. On August 19, 2008, the circuit court found Johnson guilty on both counts.

STANDARD OF REVIEW

¶5 The sole question we must address in this case is whether Daniels had the requisite reasonable suspicion to justify the stop. To perform an investigatory traffic stop, an officer must have a reasonable suspicion that the

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

person stopped has committed, or is about to commit, a law violation. ***State v. Colstad***, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 659 N.W.2d 394. Whether reasonable suspicion exists is a question of constitutional fact. ***State v. Powers***, 2004 WI App 143, ¶6, 275 Wis. 2d 456, 685 N.W.2d 869. When reviewing questions of constitutional fact, we apply a two-step standard of review. ***Id.*** First, we will uphold a circuit court's findings of historical fact unless they are clearly erroneous. ***Id.*** Second, based on the historical facts, we review de novo whether a reasonable suspicion justified the stop. ***Id.***

¶6 For an investigatory stop to be constitutionally valid, the officer's suspicion must be based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion" on a citizen's liberty. ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). What is reasonable in a given situation depends upon the totality of the circumstances. *See* ***State v. Anderson***, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990). Thus, individual facts that may be insufficient to give rise to a reasonable suspicion when viewed alone may amount to a reasonable suspicion when taken together. ***State v. Waldner***, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996).

¶7 Therefore in considering whether the standard for reasonable suspicion has been met, we may include in the totality of the circumstances everything beginning with the tip from the concerned motorist to the initiation of the stop by Daniels. *See* ***State v. Powers***, 275 Wis. 2d 456, ¶8.

DISCUSSION

¶8 The one issue presented, whether the totality of the circumstances on the night in question gave rise to reasonable suspicion for Daniels to initiate the stop, can be broken down into two sub-issues: (1) the status accorded to the tip by

Tappa and (2) an examination of Daniels' direct observations of Johnson prior to the commencement of the stop.

¶9 Johnson contends that Tappa has no known history as a reliable witness and therefore his tip should carry little weight in determining the existence of reasonable suspicion. We begin by restating the obvious: when a caller provides his or her name, the tip is not anonymous; it is a tip from a citizen informant. *See* ***State v. Sisk***, 2001 WI App 182, ¶8, 247 Wis. 2d 443, 634 N.W.2d 877. In ***Sisk***, we explained the significance of a tip from a known citizen:

> "[I]f 'an informant places his [or her] anonymity at risk, a court can consider this factor in weighing the reliability of the tip.'" Further, when a caller gives his or her name, police need not verify the caller's identity before acting on the tip. ("'[W]hen 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.'") []. As the Wisconsin Supreme Court declared, "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 have not yet been established." ("'A citizen who purports ... to have witnessed a crime is a reliable informant even though his reliability has not theretofore been proved or tested.'") []. Dangerously, any other holding would require police to take critically important time to attempt to verify identification rather than respond to crimes in progress.

Sisk, 247 Wis. 2d 443, ¶9 (citations and footnotes omitted). The inherent reliability of a citizen informant trumps Johnson's argument that his fellow motorist did not have a history of providing reliable information to law enforcement.

¶10 Johnson also argues that Tappa's tip is unreliable because it lacked enough specificity to create reasonable suspicion given that Daniels did not recall if Tappa specified in his call whether Johnson's vehicle had crossed the center

line, whether the vehicle had crossed the fog line, the number of times Johnson weaved, or whether the weaving was gradual or abrupt.

¶11 We disagree. Tappa relayed his first-hand account and concerns of the situation to the police. His call may not have captured the circumstances with the same clarity as would a dashboard camera, but it contained enough information to state his concern about Johnson, Johnson's description and his location, amongst other facts. There is no rule stating that Tappa need provide the police with certain specific facts or that only a few special words unlock the vault of a reliable informant contributing to reasonable suspicion. Consequently, Tappa's description of the situation as simply that Johnson was weaving "in and out" of his lane, helped to establish reasonable suspicion.

¶12 Finally, Johnson argues that the tip would not lead a reasonable officer to suspect that there was an imminent danger to public safety. Specifically, Johnson cites the fact that Daniels was not concerned enough to initiate an immediate stop but instead preferred to put Johnson under direct observation for a measure of time as being indicative of the dearth of an immediate public threat. This line of argument would have us establish a bright-line rule stating that an immediate threat to public safety will not be held to exist unless the police initiate an immediate stop upon coming into contact with a vehicle in question. We decline to adopt such a rule. Furthermore, if the police did follow this course of action and allowed no time for their own direct observation, they would risk infringing upon the rights of those they immediately stopped by not taking the time to add their own direct observation to the totality of the circumstances.

¶13 Daniels properly employed an ad hoc balancing test between containing an immediate threat to public safety and safeguarding the rights of the

citizen in question. However, just because Daniels did not choose to immediately stop the vehicle does not mean there is no basis to conclude that there was no immediate threat to public safety. Perhaps the vehicle had paused in its weaving the moment the officer arrived only to resume later. The test does not have to be black and white between a grave threat to public safety and only something of a passing concern, nor must the test last for only the instant that the officer comes into contact with the vehicle in question. Instead, the proper analysis would allow for shades of gray necessitating the officer's direct observation over the appropriate period of time to determine whether the situation amounts to reasonable suspicion. Simply stated, the relationship between immediate threat to public safety and immediately initiating a stop need not be so strictly causative by law.

¶14 Next, we turn to whether Daniels, under the circumstances, had reasonable suspicion to initiate the stop. In ***State v. Post***, 2007 WI 60, ¶26, 301 Wis. 2d 1, 733 N.W.2d 634, our supreme court refused to adopt a bright-line rule that weaving within a lane of traffic, by itself, gives rise to a reasonable suspicion for a traffic stop. Instead, the court examined the totality of the circumstances and concluded that reasonable suspicion justified the stop. ***Id.***, ¶¶29-37. It noted that Post's weaving constituted more than a slight deviation within his traffic lane. ***Id.***, ¶29. The officer in ***Post*** testified that the lane in which Post was traveling was between twenty-two and twenty-four feet wide, with parking along the curb. ***Id.***, ¶¶30-32. Within this wide lane, Post weaved in an "S-type manner," coming within one foot of the centerline and six to eight feet of the curb. ***Id.***, ¶¶31-32. Additionally, the court noted that Post's weaving continued for two blocks, encroached on the parking area along the curb, and that it occurred around 9:30 at night. ***Id.***, ¶36. Taken together, our supreme court concluded these facts created a

reasonable suspicion that the driver was intoxicated, justifying a traffic stop. ***Id.***, ¶37.

¶15 Here, we conclude that Daniels had reasonable suspicion to stop Johnson and investigate whether he was driving while intoxicated. Under ***Post***, the reasonable suspicion inquiry is not simply whether Johnson was weaving within his lane, but instead focuses on the totality of the circumstances. *See* ***id.***, ¶26. In ***Post***, the court's analysis of the totality of the circumstances focused primarily on the details of Post's weaving. *See* ***id.***, ¶¶29-37.

¶16 Like the driver in ***Post***, Johnson was not weaving slightly within his lane. Johnson's swerving brought his vehicle into contact with and even across the fog line and was not confined to his traffic lane. The swerving also occurred after midnight, at about 12:56 a.m. Additionally, Johnson also made an unusually wide turn. Much like in ***Post*** where the weaving within the lane alone was not enough to meet reasonable suspicion but when considered in conjunction with the totality of the circumstances contributed to the reasonable suspicion algorithm, here, Johnson's weaving or his unusually wide turn each standing alone may not rise to the level of reasonable suspicion. However, when combined and supported by additional facts—a reliable citizen informant tip and the officer's observations of Johnson's swerving outside the lane—the reasonable suspicion algorithm is satisfied.

¶17 We therefore conclude that under the totality of the circumstances, Daniels had reasonable suspicion to initiate the stop.

By the Court.—Judgment affirmed.

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