

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 2009

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. 2009AP47

Cir. Ct. Nos. 2007TR4725
2007TR4726

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

WASHINGTON COUNTY,

PLAINTIFF-RESPONDENT,

v.

DONALD W. WELCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Donald W. Welch appeals from a judgment adjudicating him guilty of a first offense of operating a motor vehicle while under

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

the influence of an intoxicant (OWI). He contends that the circuit court erred when it denied his motion to suppress evidence obtained during the investigatory stop of his vehicle. Welch asserts that the stop was not supported by reasonable suspicion. We disagree and affirm the judgment.

BACKGROUND

¶2 On November 10, 2007, at approximately 2:19 a.m., Officer Brian Forsyth of the Village of Slinger Police Department overheard the Washington County Sheriff's Department dispatch concerning a possible drunk driver. Dispatch stated that the tip had come in from an off-duty police officer. The tipster described a red vehicle with license plate number 909 GCZ traveling east on Highway 60, which meant the vehicle was traveling toward Forsyth. Dispatch also indicated that the tipster was driving behind the vehicle and had it in sight.

¶3 Forsyth saw the red vehicle pass by and observed a second vehicle, which he believed was the tipster, slow substantially and allow Forsyth to pull in behind the red vehicle. Forsyth confirmed the license plate matched that reported by the tipster and proceeded to follow at about twenty-five miles per hour, the posted speed limit. Forsyth observed the vehicle turn right onto Jackson Drive from Highway 60 without using a directional signal. Forsyth followed for about a tenth of a mile and then initiated a traffic stop. Forsyth identified the driver as Welch and, after further investigation, cited him for OWI.

¶4 Welch filed a motion to suppress and argued that Forsyth did not have reasonable suspicion to conduct a traffic stop. The circuit court denied the motion. Welch was convicted of OWI and now appeals.

DISCUSSION

¶5 When we review the denial of a motion to suppress evidence for lack of reasonable suspicion, we apply a two-step standard of review. See *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. We uphold the trial court’s finding of fact unless they are clearly erroneous. *Id.* On the other hand, the application of constitutional principles to the facts as found is a question of law which we decide without deference to the trial court’s decision. *State v. Horngren*, 2000 WI App 177, ¶7, 238 Wis. 2d 347, 617 N.W.2d 508. Whether law enforcement had reasonable suspicion to effectuate a valid investigatory stop is a question of law and we will review the trial court’s decision de novo. *Williams*, 241 Wis. 2d 631, ¶18.

¶6 Investigatory stops are subject to the constitutional imperative that all searches and seizures be objectively reasonable under the circumstances existing at the time of the search or seizure. *State v. Rutzinski*, 2001 WI 22, ¶13, 241 Wis. 2d 729, 623 N.W.2d 516. This requires that the stop be based on something more than the officer’s “inchoate and unparticularized suspicion or ‘hunch.’” *Id.*, ¶14 (citation omitted). 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.*; *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

¶7 Here, Forsyth articulated two grounds for his decision to make an investigatory stop. First, he points to the information in the tip from the off-duty police officer. An informant’s tip may justify an investigative stop in some circumstances. *Rutzinski*, 241 Wis. 2d 729, ¶17. However, before a tip can give

rise to grounds for an investigative stop, the police must consider its reliability and content. *Id.* Welch argues that the tip was not reliable because the tipster did not give his name and did not describe specific details about Welch's driving behavior. Therefore, Welch concludes, Forsyth's reliance on the tip was unreasonable.

¶8 In *Rutzinski*, the officer received a tip from dispatch that an unidentified motorist called to report a black pickup truck weaving within its lane, varying its speed, and tailgating. *Rutzinski*, 241 Wis. 2d 729, ¶4. Following a second call from the tipster, the officer determined that the vehicle was heading toward him and positioned his squad car. *Id.*, ¶5. When the officer pulled his squad car behind the black pickup truck, the tipster saw the officer's squad car, and confirmed that officer was following the correct truck. *Id.*, ¶6. The officer did not independently observe any signs of impairment before initiating an investigatory stop. *Id.*, ¶7. The supreme court held that the tip was reliable because the informant exposed himself or herself to being identified, provided verifiable information indicating his or her basis of knowledge, and described behavior that is a "possible sign of intoxicated use of a motor vehicle." *Id.*, ¶¶32-34.

¶9 We agree with Welch that the tip here lacks some of the qualities that enhanced the reliability of the *Rutzinski* tip. Specifically, Forsyth's tipster did not give updates on Welch's location or verbally confirm that Forsyth was following the right vehicle when he pulled in behind Welch. Also, the tipster here reported possible drunk driving, but did not describe the particular behaviors that led to that conclusion. On the other hand, it is reasonable for an officer to attach greater credibility to an off-duty officer. Also, the tip did include specific facts about the vehicle that Forsyth could confirm such as the color, license plate

number, and direction of travel. Finally, Forsyth did observe that a vehicle following Welch slowed down when Forsyth pulled in behind Welch, thus suggesting that the tipster had been in the vehicle behind Welch as reported. We conclude that the tip, although not as reliable as that in *Rutzinski*, was sufficiently reliable to contribute to the totality of circumstances leading to the investigatory stop. Unlike the officer in *Rutzinski*, Forsyth proceeded to independently observe Welch's driving before making the stop. That is when he saw Welch fail to use his blinker before turning onto Jackson Drive.

¶10 Welch argues that Forsyth's reference to his turn onto Jackson Drive without signaling could not form the basis of the investigatory stop. However, an officer has the authority to stop a vehicle when the officer has reasonable grounds to believe that a traffic violation has occurred. *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987). WISCONSIN STAT. § 346.34(1)(b) provides: "In the event any other traffic may be affected by such movement, no person may so turn any vehicle without giving an appropriate signal in the manner provided in [WIS. STAT. §] 346.35."

¶11 Welch argues that the County has not shown that his failure to use his blinker affected any other traffic and therefore no violation occurred. He emphasizes that Forsyth never testified that he was affected by Welch's failure to signal. However, Forsyth was following Welch at a distance of two to three car lengths. He was sufficiently close that the operation of his squad car may have been affected by the unsignaled turn of the vehicle in front of him. Nothing more is required to violate WIS. STAT. § 346.34(1)(b). A driver preceding another has the duty to use the roadway in the usual manner with proper regard for all others using the road. *Burlison v. Janssen*, 30 Wis. 2d 495, 502, 141 N.W.2d 274 (1966). A driver has a duty to be aware of vehicles that might be following before

deciding whether to make a turn with or without a signal. *See Pedek v. Wegemann*, 275 Wis. 57, 61, 81 N.W.2d 49 (1957). Forsyth reasonably inferred that a traffic violation occurred when Welch made a turn without using his blinker.

CONCLUSION

¶12 Reasonable suspicion is measured in light of the totality of circumstances. *Williams*, 241 Wis. 2d 631, ¶22. Here, Forsyth had a tip from an off-duty officer with verifiable details and his own personal observation of what he reasonably believed to be a traffic violation. Taken together, we hold that Forsyth articulated reasonable suspicion for the traffic stop. The circuit court properly denied Welch's motion to suppress and we affirm the judgment.

By the Court.—Judgment affirmed.

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

