COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2524-CR **Cir. Ct. No. 00-CF-198**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN M. CHRISTOPHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Brian M. Christopher appeals from a judgment of conviction of operating a motor vehicle with a prohibited blood alcohol concentration, fifth offense. He argues that the police officer lacked the requisite reasonable suspicion to stop his vehicle and that his sentence, which required both

vehicle forfeiture and an ignition interlock, was not statutorily authorized. We affirm the circuit court's denial of the motion to suppress evidence seized as a result of the stop but reverse the sentence and remand to the circuit court for imposition of a sentence which requires either an ignition interlock or forfeiture of the vehicle, but not both.

¶2 To make an investigative stop that is constitutionally reasonable, the initiating officer must have, at a minimum, a reasonable suspicion that the driver or occupants of the vehicle have committed an offense. ***State v. Rutzinski***, 2001 WI 22, ¶14, 241 Wis. 2d 729, 623 N.W.2d 516. "At the time of the stop, 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.***

¶3 This case is similar to ***Rutzinski*** in which the supreme court determined that information provided in a cell-phone call from an unidentified motorist was sufficient justification for an investigative traffic stop. ***Id.*** at ¶3. Like ***Rutzinski***, Christopher's vehicle was stopped in response to a cell-phone call reporting that the caller had observed a vehicle speeding and weaving within the traffic lane. Like ***Rutzinski***, the officer was able to identify the vehicle and its location as described by the cell-phone caller but did not personally observe any erratic driving before making the traffic stop. Like ***Rutzinski***, the cell-phone caller identified his location as following the vehicle. ***Rutzinski*** summarized these circumstances as supporting the reliability of the cell-phone tip and a reasonable suspicion of intoxication because: (1) by giving the location of his or her vehicle with respect to the suspect vehicle, the informant exposed himself or herself to being identified by police; (2) the informant provided police with verifiable

information indicating his or her basis of knowledge; and (3) the tip suggested that the driver of the suspect vehicle posed an imminent threat to the public's safety. ***Id.*** at ¶¶37-38.

¶4 Christopher concedes that the first two factors identified in ***Rutzinski*** are satisfied.[1] He argues that the officer lacked any information to demonstrate an imminent threat to the public safety, particularly in light of the officer's knowledge that Christopher was only a half block from home, there was no other traffic on the street, and the officer observed Christopher driving flawlessly. He points out that ***Rutzinski*** rejected a blanket rule excepting tips alleging drunk driving from reliability and exigency requirements. ***Id.*** at ¶36. He suggests that a blanket rule is effectively adopted if other circumstances militating against the suspicion of drunk driving are ignored.

¶5 While the ***Rutzinski*** court indicated that a blanket rule did not apply, it explicitly recognized that "drunk driving is an extraordinary danger," justifying unusual precautions. ***Id.*** The court found that the minimal intrusion that the stop would have presented had the suspect driver indeed not been intoxicated was outweighed by the extraordinary danger presented by drunk drivers. ***Id.*** at ¶37. This case is on all fours with ***Rutzinski*** with respect to the exigency that exists when potential drunk driving is involved. Indeed, this case is even a bit stronger

[1] Christopher makes a specific acknowledgement in his brief-in-chief that the first two factors existed but that "the third and most critical factor did not." In his reply he retreats from that concession, stating that he did not concede that those two factors "rose to the level of ***Rutzinski***." He specifically challenges the veracity of the cell-phone caller because the caller was at no real risk for submitting a false report and the content of the tip was nothing more than a description and location of Christopher's vehicle. We do not address the argument made for the first time in Christopher's reply brief. *See* ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). Christopher waived argument on the first two factors by his concession in his brief-in-chief and his reply argument "sandbags" the State.

than ***Rutzinski*** because the cell-phone caller was interviewed by an officer before Christopher's arrest. Moreover, an officer is not required to rule out potential innocent behavior prior to executing a stop. ***State v. Fields***, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279. In sum, we hold that the officer acted reasonably in conducting the investigative stop.

¶6 Christopher's sentence required that his vehicle be forfeited and that other vehicles he would drive be equipped with an ignition interlock device. Christopher argues that the circuit court was not authorized by statute to order both the forfeiture of his vehicle and an ignition interlock device. The State concedes that at the time of Christopher's April 21, 2000 offense, the court could not order both under WIS. STAT. § 346.65(6)(a)1 (1997-98).[2] The State concedes the case must be remanded for resentencing to permit the court to order either vehicle seizure or an ignition interlock, and if seizure is ordered, to permit the court to make a recommendation to the Department of Transportation that any grant of an occupational license be restricted to vehicles equipped with ignition interlock.[3] We agree that this is the correct result. We reverse the sentence and

[2] WISCONSIN STAT. § 346.65(6)(a)1 (1997-98), provides in part: "the court may order a law enforcement officer to seize a motor vehicle, or, if the motor vehicle is not ordered seized, shall order a law enforcement officer to equip the motor vehicle with an ignition interlock device or immobilize any motor vehicle owned by the person …." The statute was amended by 1999 Wis. Act 109, § 56g, effective July 1, 2000, to read: "The court may order a law enforcement officer to seize the motor vehicle used in the violation or improper refusal and owned by the person, or, if the motor vehicle is not ordered seized, shall order a law enforcement officer to equip the motor vehicle with an ignition interlock device or immobilize any motor vehicle owned by the person."

Christopher's argument quotes the amended version of the statute. We need not decide whether the amended version of the statute permits the court to order both vehicle forfeiture and an ignition interlock device on other vehicles.

[3] *See* WIS. ADMIN. CODE § Trans 117.03(5)(a)2.

remand to the circuit court for imposition of a sentence which requires either an ignition interlock or forfeiture of the vehicle, but not both.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).