

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 9, 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. 2009AP1441-CR

Cir. Ct. No. 2008CT781

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL A. STREEKSTRA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Paul Streekstra appeals from a judgment of conviction for operating with a prohibited blood alcohol concentration (PAC),

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

fourth offense. Streekstra contends that the trial court erred in denying his motion to suppress evidence on grounds that the officer lacked reasonable suspicion to stop his vehicle. We conclude that the totality of the circumstances, including the indicia of reliability surrounding the anonymous cell-phone tip and the officer's independent observations, gave rise to reasonable suspicion to conduct an investigative stop. We affirm the judgment.

FACTS

¶2 Streekstra was cited for both operating while intoxicated (OWI) and PAC on September 8, 2008. The facts underlying Streekstra's arrest were set forth at the hearing on his motion to suppress. Deputy Sheriff Eric Halbach of the Fond du Lac county sheriff's office was the only witness to testify. According to Halbach, dispatch received a call regarding a possible intoxicated driver going southbound on State Highway 26. The caller provided dispatch with a license plate number, 842BLD, and a vehicle description, silver Saturn Vue. The caller stated that there was "erratic driving"—the vehicle was all over the road and almost hit a semi-truck head on. At the beginning of the call, the location of the caller was "State Highway 26, north of Rosendale"; however, Halbach testified that the caller subsequently informed dispatch that "they were so afraid of the driver in front of them that they pulled off into a gas station at Rosendale and did not continue following it." Halbach proceeded from his location toward State Highway 26, explaining that because the initial call came in on State Highway 26 north of Rosendale and the caller following the vehicle had pulled over into a gas station in Rosendale, his best estimation was that the vehicle was now south of Rosendale.

¶3 Heading south on Highway 26 from Rosendale, Halbach located a silver Saturn Vue with a license plate of 842BLP.² While following the vehicle for approximately a mile to a mile and one-quarter, Halbach observed it “weaving within its own lane several times.” Based on the initial complaint, the matching vehicle description and license plate, and his own observations, Halbach formed the belief that the driver was possibly impaired or having some sort of medical issue. Halbach initiated a stop of the vehicle, identified Streekstra, and observed an odor of intoxicants emanating from his breath. Streekstra was later cited for OWI and PAC, third offense. The trial court denied his motion to suppress evidence based on lack of reasonable suspicion to initiate the stop, namely that the information from the anonymous tip was not sufficiently reliable to give rise to a reasonable suspicion.

¶4 After a thorough examination of the facts and relevant law, the trial court concluded, based on the totality of circumstances, that the stop was reasonable. Streekstra filed a motion for reconsideration, which the trial court denied, and subsequently entered a no contest plea to the PAC, fourth offense.³

DISCUSSION

¶5 The sole issue on appeal is whether the anonymous tip combined with the officer’s independent observations and corroboration provided the officer

² While the reported license plate differed by one letter from that observed by Halbach, he testified that it happens sometimes that letters such as P and D are confused when reported over the telephone to dispatch.

³ The citations were issued for OWI and PAC, both as a third offense; however, the judgment reflects a conviction of PAC, fourth offense. At the plea hearing, the court noted that the charge had been amended to a fourth offense, and Streekstra subsequently admitted to having three prior OWI convictions.

with reasonable suspicion to initiate a stop of Streekstra's vehicle. A police officer may, in the appropriate circumstances, approach an individual for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968). This temporary detention of a citizen constitutes a seizure within the meaning of the Fourth Amendment and triggers Fourth Amendment protections. *State v. Harris*, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996); *see also* Wis. Const. art. 1, § 11. Therefore, to perform an investigatory traffic stop, an officer must have a reasonable suspicion that the 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.* Then, based on those 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 the intrusion" on a citizen's liberty. *See Terry*, 392 U.S. at 21. 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 Streekstra argues that in light of the United States Supreme Court’s decision in *Florida v. J.L.*, 529 U.S. 266 (2000), and our supreme court’s decision in *State v. Rutzinski*, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516, the trial court erred in its determination that the anonymous tip provided Halbach with reasonable suspicion. However, the State contends, and we agree, that the anonymous tip in this case contained sufficient indicia of reliability, including corroboration by Halbach, so as to provide Halbach with reasonable suspicion.

¶8 Both *J.L.* and *Rutzinski* addressed, under differing circumstances, the issue of whether and when an anonymous tip gives rise to reasonable suspicion. In *J.L.*, the United States Supreme Court addressed whether an uncorroborated anonymous tip could create the necessary reasonable suspicion to justify a *Terry* stop. *J.L.*, 529 U.S. at 268. In *J.L.*, an anonymous caller reported that “a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun.” *Id.* There was no audio recording of the tip, nothing was known about the informant, and the record did not reveal how long it took for officers to respond after receiving the tip. *Id.* When the officers went to the bus stop, they saw fifteen-year-old J.L. wearing a plaid shirt and immediately frisked him without having any reason, apart from the tip, to suspect illegal conduct. *Id.* Recognizing that there are situations in which “an anonymous tip, suitably corroborated, exhibits ‘sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop,’” the *J.L.* court inquired whether the tip pointing to J.L. had those indicia. *Id.* at 270.

¶9 The *J.L.* court noted that the anonymous call (1) provided no predictive information and, therefore, no way for the police to test the informant’s knowledge or credibility and (2) was made by an “unaccountable informant” who had not explained the source of his knowledge or provided any basis for believing

he had “inside information” about the suspect’s alleged illegal activity. *Id.* at 271. Based on these facts, the Court concluded that, although the information tended to identify a specific person, the anonymous tip lacked indicia of reliability in its assertion of illegality, and thus did not justify the stop and frisk of J.L. *Id.* at 274.

¶10 In *Rutzinski*, the Wisconsin Supreme Court examined the Court’s holding in *J.L.* when it considered whether an anonymous cell-phone call from an unidentified motorist provided sufficient justification for an investigative stop. *Rutzinski*, 241 Wis. 2d 729, ¶¶27-29. In *Rutzinski*, the arresting officer received a dispatch based upon a cell-phone call from an unidentified motorist advising of a truck driving erratically. *Id.*, ¶4. The anonymous tipster remained on the line while providing dispatch with information that permitted the responding officer to strategically position his squad car and await the truck. *Id.*, ¶5. When the truck passed and the officer pulled his car behind the truck, the tipster informed dispatch that the officer was following the correct vehicle. *Id.*, ¶6. Although the officer did not independently observe any signs of erratic driving, he conducted a traffic stop. *Id.*, ¶7.

¶11 While the *Rutzinski* court recognized that in some circumstances the information contained in an informant’s tip could justify an investigative stop, it determined that the police must consider the reliability of the tip before it could give rise to grounds for an investigative stop. *Id.*, ¶¶17-18. In assessing whether a tip exhibits reasonable indicia of reliability, the court concluded that due weight must be given to two considerations: (1) the informant’s veracity and (2) the informant’s basis of knowledge. *Id.*, ¶18. The court instructed that these considerations should be viewed “in light of the ‘totality of the circumstances,’ and not as discrete elements of a more rigid test,” noting that “[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.* (citations omitted). Therefore, there is no per se rule of reliability and these considerations serve to outline a general spectrum of potential types of tips that can give rise to a reasonable suspicion under certain circumstances. *Id.*

¶12 The *Rutzinski* court then examined cases that create the boundaries for the spectrum of reliable anonymous tips, including *J.L.* The court found that the anonymous cell-phone tip in *Rutzinski* differed significantly from the tip in *J.L.*, namely: (1) by providing information that he or she was in the car immediately in front of Rutzinski, the informant exposed himself or herself to being identified and to possible arrest if the tip proved false; (2) the informant provided verifiable information and contemporaneous observations indicating his or her basis of knowledge; and (3) the tip suggested that Rutzinski was an imminent threat to the public’s safety. *Id.*, ¶¶32-34. The *Rutzinski* court held that the informant’s tip contained sufficient indicia of reliability to support a finding of reasonable suspicion to conduct an investigative stop. *Id.*, 37.

¶13 Also informing our discussion is *State v. Williams*, 2001 WI 21, 241 Wis. 2d 631, 623 N.W.2d 106, released by the supreme court just prior to its decision in *Rutzinski*. The *Williams* court addressed the question of whether an anonymous tip containing a contemporaneous report of drug trafficking, combined with independent observations and corroboration of details from the tip, justified an investigatory *Terry* stop. *Williams*, 241 Wis. 2d 631, ¶2. In distinguishing the tip in that case from that in *J.L.* the court noted that: (1) the anonymous tipster described the criminal activity as she observed it; (2) the anonymous tipster put her identity at risk by placing a 911 call and identifying her location as her home; (3) the police had an audio recording of the tip; (4) the police independently observed facts giving them reason to suspect criminal activity was afoot; and (5)

the police were able to corroborate the innocent, although significant, details of the tip, which lent the tip credibility. *Id.*, ¶¶ 33, 34, 35, 37, 39, 40. The court upheld the *Terry* stop as lawful based on its conclusion that the “anonymous tip was supported by a wide array of indicia of reliability—contemporaneous eye-witness account accompanied by details promptly verified by the police.” *Williams*, 241 Wis. 2d 631, ¶47. This “cumulative detail, along with reasonable inferences and deductions which a reasonable officer could glean therefrom [is] sufficient to supply reasonable suspicion that crime is afoot and to justify the stop.” *Id.* (citation omitted).

¶14 With the rationales of *J.L.*, *Rutzinski*, and *Williams* as guidance, we now turn to whether the anonymous tip in this case provided sufficient indicia of reliability. Here, the anonymous tip provided to dispatch informed Halbach that the tipster was following a silver Saturn Vue, license plate 842BLD, heading southbound on Highway 26, and that there was “erratic driving”—the vehicle “almost hit a semi [truck] head on.” Therefore, the tipster provided a description of the vehicle, the current location (north of Rosendale) and direction of travel, and the conduct which led him or her to believe that the operator of the vehicle was intoxicated. The tipster stayed on the line with dispatch until he or she informed dispatch that they were pulling over into a gas station in Rosendale because they were too afraid to stay on the road.

¶15 The tip in this case is much more akin to that found reliable in *Rutzinski* and *Williams* than the “bare-boned” tip in *J.L.* See *J.L.*, 579 U.S. at 273. The tipster provided sufficient information as to his or her location at the gas station on Highway 26 in Rosendale so as to expose him or her to identification,

especially given the size of Rosendale.⁴ Moreover, the informant provided the make, model and license plate of the vehicle, in addition to the direction and location of travel, provided verifiable information, contemporaneous observations, predictive information, and his or her basis of knowledge. In other words, the tipster explained how he or she knew about the criminal activity—by observing it and providing an eye witness account. See *Williams*, 241 Wis. 2d 631, ¶33.

¶16 Streekstra responds that all of the information provided by the caller would have been available to anyone in the vicinity of his vehicle and, therefore, like the tip in *J.L.*, must be deemed unreliable. However, Streekstra’s application of *J.L.* on this issue is misplaced. The alleged criminal activity in *J.L.* was concealed; the tip or call was made from an unknown location by an unknown caller who never explained how he knew about the gun. *J.L.*, 529 U.S. at 269-71. The Court’s concern in *J.L.* was that “[a]n accurate description of a subject’s readily observable location and appearance is of course reliable” in the limited sense of aiding police in identifying the person whom the tipster means to accuse; however, it does not show that the tipster has knowledge of concealed criminal activity. *Id.* at 272.

¶17 Here, the alleged criminal activity was not concealed and therefore Streekstra is correct that anybody could have observed it. However, we reject Streekstra’s contention that this somehow decreases the reliability of the tip. Unlike the caller in *J.L.*, the caller provided his or her location (traveling behind the reported vehicle) and the basis for his or her knowledge (contemporaneous

⁴ Pursuant to WIS. STAT. § 902.01(3), we take judicial notice of the 2000 census, which indicates a village population of 924. See <http://factfinder.census.gov> (last visited Oct. 28, 2009).

observations of erratic driving). Nor does Streekstra's suggestion that the tip could have been called in from another county decrease its reliability. Although it is possible that someone could attempt to report a fabricated event, in this case the caller's ability to provide Halbach with sufficient detail so as to enable him to immediately pinpoint the location of the vehicle described lends to the reliability of the tip. Indeed, Halbach subsequently verified the identifying information of the vehicle and its location and direction of travel. While there may be some doubt as to whether the caller could have been identified, we are satisfied that there was enough likelihood of identification so as to weigh in favor of reliability under the first consideration set forth in *J.L.*⁵

¶18 Further, unlike the officer in *Rutzinski* who did not independently observe any signs of erratic driving, Halbach observed Streekstra weaving within his lane prior to initiating an investigative stop. While Streekstra correctly argues that weaving within one's lane in and of itself is not sufficient evidence of intoxication, it *is* something to be considered in light of the totality of the circumstances. See *State v. Post*, 2007 WI 60, ¶¶26-27, 301 Wis. 2d 1, 733 N.W.2d 634. Thus, Halbach's observations of potential signs of drunk driving must be viewed in conjunction with the information provided by the caller and otherwise verified by Halbach. Halbach's corroboration of the innocent details

⁵ There is no evidence in the record that dispatch made any attempt to obtain the name of, or contact information for, the caller. We join the suggestion made in the concurrence in *State v. Rutzinski*, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516, that law enforcement units adopt policies, if they have not already, regarding tips of drunk or erratic driving, such as obtaining the caller's name or verifying that the call was susceptible to instant caller identification. See *id.*, ¶41 (Abrahamson, C.J., concurring); see also *Florida v. J.L.*, 529 U.S. 266, 275 (2000) (Kennedy, J., concurring) (observing that instant caller identification is widely available to the police and police ability to trace the identity of anonymous caller may be a factor which lends reliability to what previously might have been considered an unreliable anonymous tip).

provided by the tipster served to bolster the credibility of the tip, as did his independent observation of potentially suspicious driving. See *Williams*, 241 Wis. 2d 631, ¶¶ 39-40, 41.

¶19 Finally, the allegations in the caller’s tip suggested an imminent threat to the public safety warranting immediate police investigation. Not only had the tipster informed dispatch of a near head-on collision and “erratic driving,” but the anonymous caller had pulled over so as not to share the road with Streekstra. While Halbach was able to make an independent observation of weaving, even absent that observation, he was not required to stand idly by in hopes that his surveillance would “reveal suspicious behavior before the imminent threat comes to its fruition.” See *Rutzinski*, 241 Wis. 2d 729, ¶¶26, 34. “[E]xigency can in some circumstances supplement the reliability of an informant’s tip in order to form the basis for an investigative stop.” *Id.*, ¶26. We conclude that this was one of those circumstances.

CONCLUSION

¶20 We conclude that the anonymous cell-phone tip, when coupled with Halbach’s independent observations and corroboration, contained sufficient indicia of reliability to give rise to reasonable suspicion warranting the investigative stop of Streekstra’s vehicle.⁶ For the reasons set forth above, we affirm the judgment.

⁶ The State raises, but does not develop, a community caretaker justification for Halbach’s investigatory stop of Streekstra’s vehicle. Given our conclusion that Halbach had the requisite reasonable suspicion to stop Streekstra’s vehicle, we need not address whether Halbach was engaged in justified community caretaker activity at the time of the stop. See *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (an appellate court should decide cases on the narrowest possible grounds).

By the Court.—Judgment affirmed.

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

