

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 27, 2011**

A. John Voelker  
Acting 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. 2010AP1817-CR**

**Cir. Ct. No. 2009CT2931**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOSHUA J. HYSELL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dane County:  
MARYANN SUMI, Judge. *Affirmed.*

¶1 VERGERONT, P.J.<sup>1</sup> Joshua Hysell appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

(PAC) of .08 or more, in violation of WIS. STAT. § 346.63(1)(b), second offense. He contends the circuit court erred in denying his motion to suppress evidence because, he asserts, the officer did not have reasonable suspicion to make the traffic stop. For the reasons we explain below, we affirm.

## BACKGROUND

¶2 Hysell was arrested for operating a motor vehicle while intoxicated (OWI) and PAC as a result of evidence obtained after Trooper Matthew Noah of the Wisconsin State Patrol stopped his vehicle. Trooper Noah testified at the hearing on Hysell's motion to suppress as follows.<sup>2</sup>

¶3 On August 14, 2008, at about 3:56 a.m., Trooper Noah received information from dispatch reporting that a semi driver had called in a tip that he was following a vehicle which he described as being "all over the road." The informant indicated that the vehicle was a white Chevy S-10 pickup driving

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<sup>2</sup> Hysell was originally charged with operating a motor vehicle while intoxicated (OWI) and with a prohibited alcohol content (PAC), in violation of WIS. STAT. § 346.63(1)(a) and (b), both as first offenses. He moved to suppress evidence, and the court, the Honorable Daniel R. Moeser presiding, denied the motion. At the close of that hearing, the State moved to dismiss the charges because Hysell had recently pled to a charge of OWI, first offense, in Brown County. The court granted that motion. The State then filed a criminal complaint in this action for OWI and PAC, as second offenses, and Hysell filed the motion to suppress that is at issue on this appeal. This motion was heard by the Honorable Maryann Sumi. In the parties' briefs before this court, they discuss the circuit court's proceeding and decision on the motion to suppress in both cases. However, the OWI and PAC, first offense, charges were dismissed. Accordingly, Judge Moeser's ruling in that case is not before us for review on this appeal. Neither party explains why we should consider evidence presented during the suppression hearing in the dismissed case that was not before the circuit court in the suppression hearing in this case. To the extent that Hysell is arguing that Trooper Noah's testimony in the dismissed case is inconsistent with his testimony in this case, Hysell had the opportunity to cross-examine Trooper Noah on any prior inconsistent statements. Statements of Trooper Noah made at the hearing in the dismissed case are properly before us only if they were admitted into evidence at the hearing before Judge Sumi in this case. Accordingly, we consider only the evidence presented at the hearing in this case.

northbound on I-39, and was currently at approximately mile marker 150. The informant also gave the vehicle's license plate number. The informant gave dispatch his name, but Trooper Noah did not know this fact prior to the stop.

¶4 Upon receiving the information from dispatch, Trooper Noah immediately drove to the area described in the call. He was parked there for several minutes. During this time, one white truck passed his location, and he did not follow that vehicle. Shortly thereafter, another white truck passed him. At this point, the informant was still on the phone with dispatch giving updates on the location of the vehicles. Trooper Noah began following the second white truck and verified that its license plate number matched that given by the informant. He then followed the truck for several miles and did not observe the truck swerving or veering.

¶5 While Trooper Noah was following the truck, he noticed its right wheels cross over the fog line for a short period of time. He then saw it make two lane changes without signaling, which he believed violated WIS. STAT. § 346.34. He activated his lights and siren to stop the truck. Evidence obtained during this stop led to Hysell's arrest for OWI and PAC.

¶6 Hysell moved to suppress this evidence. He argued that his driving as described by Trooper Noah did not violate WIS. STAT. § 346.34, and that the tip was insufficiently reliable.<sup>3</sup> Therefore, he alleged, the trooper did not have reasonable suspicion for the stop. The circuit court denied the motion, concluding

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<sup>3</sup> Neither Hysell nor the State specifically addressed in the circuit court whether the informant's tip alone was sufficient to constitute reasonable suspicion for the stop.

that under the totality of the circumstances, including the tip and the violations of § 346.34, there was reasonable suspicion for the stop.

## DISCUSSION

¶7 On appeal, Hysell argues that Trooper Noah did not have reasonable suspicion to stop him because he had not violated WIS. STAT. § 346.34. The State contends there was a violation of that statute, and, in the alternative, argues that there was reasonable suspicion even without that violation because of the informant's tip. Hysell did not file a reply brief and therefore does not address this second argument.

¶8 We conclude that the information provided by the informant provided reasonable suspicion for the stop, and we therefore do not address WIS. STAT. § 346.34. See *State v. Earl*, 2009 WI App 99, ¶18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755 (“On appeal, we may affirm on different grounds than those relied on by the trial court.”).

¶9 In reviewing the circuit court's decision, we accept its factual findings unless they are clearly erroneous. *State v. Samuel*, 2002 WI 34, ¶15, 252 Wis. 2d 26, 643 N.W.2d 423. However, the constitutionality of the stop, based on the undisputed facts or the facts as found by the circuit court, is an issue we review de novo. See *State v. Guzman*, 166 Wis. 2d 577, 586, 480 N.W.2d 446 (1992).

¶10 The Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution both protect against unreasonable searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. To execute a valid investigatory stop consistent with the United States and Wisconsin Constitutions, a law enforcement officer must reasonably suspect, in light of his or

her experience, that some kind of criminal activity is occurring. *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). In assessing whether a stop is supported by reasonable suspicion, we consider whether “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the intrusion of the stop. *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). We determine the reasonableness of a stop based on the totality of the facts and circumstances. *Post*, 301 Wis. 2d 1, ¶13.

¶11 In some circumstances, information contained in an informant’s tip may justify an investigative stop. *State v. Rutzinski*, 2001 WI 22, ¶17, 241 Wis. 2d 729, 623 N.W.2d 516. Because informants’ tips vary greatly in reliability, police must consider the reliability and content of the tip before it can give rise to grounds for such a stop. *Id.* In assessing a tip’s reliability, we must give due weight to: “(1) the informant’s veracity; and (2) the informant’s basis of knowledge.” *Id.*, ¶18. We view these considerations in light of the totality of the circumstances, thus a deficiency in one consideration may be compensated by a strong showing as to the other. *Id.* An exigency, such as an imminent threat to public safety, can in some circumstances supplement the reliability of an informant’s tip that might otherwise be insufficient to justify an investigative stop. *Id.*, ¶26.

¶12 In this case, the informant’s veracity was high. Trooper Noah knew that the informant was a semi driver in the same area as the white Chevy S-10 pickup. Additionally, the informant provided his name to dispatch. The informant was thus not anonymous. While Trooper Noah was unaware of the semi driver’s name at the time of the stop, “[u]nder the collective knowledge doctrine, there are situations in which the information in the hands of an entire police department

may be imputed to officers on the scene to help establish reasonable suspicion or probable cause.” *State v. Orta*, 2000 WI 4, ¶20, 231 Wis. 2d 782, 604 N.W.2d 543 (citing *State v. Mabra*, 61 Wis. 2d 613, 625-26, 213 N.W.2d 545 (1974) (“The police force is considered as a unit and where there is police-channel communication to the arresting officer and he acts in good faith thereon, the arrest is based on probable cause when such facts exist within the police department.”)). In the absence of any contrary argument by Hysell, we conclude this doctrine is applicable here and that knowledge of the semi driver’s name can be imputed to Trooper Noah. Based on this imputed knowledge and the information Trooper Noah himself had about the location of the semi driver, a reasonable officer could conclude that the informant knew that he could be arrested if the tip were proven to be fabricated. See *Rutzinski*, 241 Wis. 2d 729, ¶32. In such situations, a reasonable police officer could conclude that the informant is being truthful. *Id.* Furthermore, Trooper Noah was able to verify innocent details of the tip, including the truck’s description, license plate number, and location, further bolstering the informant’s veracity. See *State v. Williams*, 2001 WI 21, ¶¶39-40, 241 Wis. 2d 631, 623 N.W.2d 106.

¶13 The informant’s basis for knowledge was also apparent to Trooper Noah. The informant indicated that he was observing the erratic driving and was on the same road as the truck. The informant also stayed on the phone with dispatch and provided updates on the location of the vehicles. When Trooper Noah saw a truck matching the informant’s description and verified that the license plate number matched that given by the informant, it was reasonable for him to believe that this was the truck the informant had seen.

¶14 Finally, based on the information provided in the tip, a reasonable officer could infer that, if permitted to continue driving, the driver of the truck

posed an imminent threat to public safety. *See Rutzinski*, 241 Wis. 2d 729, ¶34. Erratic driving such as that reported by the informant is one possible sign of intoxicated use of a motor vehicle. *Id.* Though Trooper Noah did not observe the erratic driving the informant reported, he could reasonably rely on the observation provided by the informant. *See id.*, ¶¶ 34-36.

¶15 Under the totality of the circumstances, the information provided by the identified informant and the trooper's confirmation of some of those details through his own observations were sufficient to lead a reasonable officer to suspect that the driver of the truck was operating the vehicle while under the influence of an intoxicant.

#### CONCLUSION

¶16 On the basis of the informant's tip, Trooper Noah had reasonable suspicion to conduct the stop of Hysell's vehicle. Accordingly, we affirm.

*By the Court.*—Judgment affirmed.

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

