

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 28, 2003**

Cornelia G. Clark  
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. 03-0239-CR**

**Cir. Ct. No. 02CT000161**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**TIMOTHY ZEILINGER,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Polk County:  
ROBERT RASMUSSEN, Judge. *Affirmed.*

¶1 CANE, C.J.<sup>1</sup> The State appeals a judgment dismissing one count each of third-offense operating while intoxicated, operating with a prohibited blood alcohol concentration, and operating after revocation against Timothy

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Zeilinger. The trial court dismissed the charges after it determined the anonymous tip the police relied on to stop Zeilinger did not establish reasonable suspicion to justify the stop leading to his arrest. We agree with the trial court and therefore affirm the judgment.

### **BACKGROUND**

¶2 On August 25, 2002, officer Eric Lehman of the Osceola Police Department and deputy Robert Rorvick of the Polk County Sheriff's Department both monitored a dispatch call reporting suspicious activity on State Highway 35. The dispatch was based on an anonymous tip. The informant called the police several times regarding the activity, eventually relating that some people were attempting to get a truck out of a ditch.

¶3 Lehman proceeded to the area and noticed a white truck at a stop sign with a go-cart in the back and some weeds hanging from the undercarriage. Believing this to be the truck, Lehman turned onto 50<sup>th</sup> Avenue, where a man<sup>2</sup> was waiting at the end of a driveway. The man told Lehman the white truck was the one stuck in the ditch. Lehman did not ask the man about the driver's possible intoxication nor did he inspect the area where the truck had reportedly been in the ditch.

¶4 After speaking to the man, Lehman began to follow the truck. He did not observe any erratic driving or other traffic violations. Lehman then pulled the truck over. He noticed an odor of intoxicants on the truck's driver, Zeilinger. Shortly thereafter, Rorvick arrived and took over the stop. After performing field

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<sup>2</sup> The record is unclear whether this man was the informant.

sobriety tests and a preliminary breath test, Rorvick arrested Zeilinger. The State charged him with operating while intoxicated, third offense, operating while revoked and operating with a prohibited blood alcohol concentration.

¶5 Zeilinger moved to suppress the evidence obtained from the stop, arguing Lehman had no reasonable suspicion to stop him. After testimony from Lehman and Rorvick regarding the tip and stop, the court granted Zeilinger's motion, concluding the stop was improper. The court reasoned:

But with that whole line of cases on anonymous tips and on probable cause lead to the conclusion that the officer, in order to come in contact with the individual that you want to talk to, that you want to find out about, that you want to have a look-see at what they are doing, there has to be a reasonable suspicion that is articulable in court, and here the basis for the suspicion comes from an anonymous tip. An anonymous tip, which it's questionable whether there was anything other than there was suspicious activity which—in Rorvick's report—"after several calls they finally stated it was a pick-up truck in the ditch."

Neither officers' report mentions anything contained within the anonymous tip to dispatch that would indicate that there was a suspicion of intoxicated operation. If the truck was still in the ditch, as obviously it was at the time dispatch put out this call, there were two good reasons for the officers to go there and have contact.

Number one was protect the public. "Suspicious activity, we want to check it out." Number two, serve the public. "If this guy is in the ditch, needs help getting out of the ditch, let's figure out what he needs to get out of the ditch." Plenty of probable cause to go to that site originally, but once he's out there, the suspicious activity has stopped, the need to serve the public in terms of his dilemma being in the ditch has stopped. That situation no longer exists and you have to have something more than this anonymous tip with a generic characterization of suspicious activity to then develop your probable cause to pull this vehicle over.

As a result of its decision, the court dismissed the charges. The State appeals.

## DISCUSSION

¶6 The State contends the trial court erred when it determined that Lehman did not have probable cause to stop Zeilinger. We first note, as both parties have, that the standard for stopping a driver is reasonable suspicion. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 327, 603 N.W.2d 541 (1999). In order to justify a stop based on reasonable suspicion, an officer must possess specific and articulable facts that would warrant a reasonable belief that criminal activity was afoot. *Id.* at 310 n.11. Whether reasonable suspicion existed to perform the stop is a question of constitutional fact. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. Reasonable suspicion for an investigatory stop is a constitutional fact because it relates to the constitutional protections against unreasonable searches and seizures afforded by the United States Constitution and article I, section 11, of the Wisconsin Constitution. *Id.* We apply a two-step standard of review to questions of constitutional fact. The first step in the two-step standard of review is to “review the circuit court’s findings of historical fact, and uphold them unless they are clearly erroneous.” *Id.* The second step is to “review the determination of reasonable suspicion de novo.” *Id.*

¶7 The State does not dispute that the informant’s tip was the only basis for the stop. In some circumstances, information contained in an informant’s tip may justify an investigative stop. *See Adams v. Williams*, 407 U.S. 143, 147 (1972). However, tips vary greatly in reliability. Thus, before an informant’s tip can give rise to grounds for an investigative stop, the police must consider its reliability and content. Tips should exhibit reasonable indicia of reliability. *Cf. Illinois v. Gates*, 462 U.S. 213, 233 (1983) (applying same standard to probable cause determination). In assessing the reliability of a tip, due weight must be

given to: (1) the informant's veracity; and (2) the informant's basis of knowledge. *Id.* at 230. These considerations should be viewed in light of the "totality of the circumstances," and not as discrete elements of a more rigid test: "[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.* at 233. Although there is no per se rule of reliability, these considerations outline a general spectrum of potential types of tips that, under specific circumstances, can give rise to a reasonable suspicion.

¶8 In support of its claim that the trial court erred, the State compares the facts of the case to *State v. Rutzinski*, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516. There, our supreme court upheld a traffic stop based on an anonymous tip from a driver on a cell phone observing a black truck weaving within its lane, varying its speed from too fast to too slow, and tailgating. *Id.*, ¶4. A police officer determined the vehicles were headed in his direction and he began to follow the truck once it passed him. *Id.*, ¶5-6. The dispatcher informed the officer that the informant was still on the phone and had indicated that the officer was following the correct vehicle. *Id.*, ¶6. The officer did not observe any signs of erratic driving and proceeded to pull the truck over. *Id.*, ¶7. The driver was eventually charged with various drunk driving offenses and filed a suppression motion, claiming there was no reasonable suspicion to stop him. *Id.*, ¶8.

¶9 The supreme court affirmed the stop. It concluded:

First, the tip contained sufficient indicia of the informant's reliability: the information in the tip exposed the informant to possible identification and, therefore, to possible arrest if the tip proved false; the tip reported contemporaneous and verifiable observations regarding Rutzinski's alleged erratic driving, location, and vehicle's description; and Officer Sardina verified many of the details in the informant's tip. Second, the allegations in the tip could suggest to a

reasonable police officer that Rutzinski was operating his vehicle while intoxicated. This exigency strongly weighs in favor of immediate police investigation. For these reasons, we conclude that the stop did not violate the Fourth Amendment or Article I, Section 11.

*Id.*, ¶38.

¶10 The State argues that the anonymous tip in this case offers similar sufficient indicia of reliability. It points to the fact that Lehman contacted the informant at his residence where he identified the vehicle in question. The State contends that the caller's identification of himself and his basis of knowledge are sufficient to establish reasonable suspicion to stop.

¶11 First, we note the record is unclear whether the person Lehman contacted at the end of the driveway was the informant. The informant's veracity and the tip's overall reliability, however, are beside the point. The trial court found that the informant's tip, at best, was a "generic characterization of suspicious activity." Nothing in the police reports, complaint, or testimony at the motion hearing suggest the informant ever told the police he had any basis to suspect the truck's driver was intoxicated or otherwise engaged in illegal activity. Other than a report of suspicious activity, the only thing the informant told police was that a truck was in the ditch. The trial court's finding that the tip was no more than a "generic characterization of suspicious activity" is not clearly erroneous.

¶12 Thus, even if we assume the tip was completely reliable, it did not contain anything that would allow a law enforcement officer to reach a reasonable suspicion that criminal activity was afoot. Merely being stuck in a ditch and attempting to get out is not illegal. In *Rutzinski*, the informant told the police the truck was weaving and speeding. These are traffic violations. Here, in contrast, nothing Lehman knew at the time he stopped Zeilinger would have allowed

Lehman to suspect illegal activity. The stop was improper and the trial court correctly dismissed the charges.

*By the Court.*—Judgment affirmed.

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

