COURT OF APPEALS
DECISION
DATED AND FILED

April 5, 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. 2010AP2531 **Cir. Ct. No. 2010TR1808**

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

CITY OF WEST ALLIS,

PLAINTIFF-RESPONDENT,

V.

SUSAN SCHNEIDLER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARY TRIGGIANO, Judge. *Affirmed.*

¶1 BRENNAN, J.[1] Susan Schneidler appeals from a judgment entered after she pled no contest to operating a motor vehicle while under the influence of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

an intoxicant or other drug, first offense, contrary to WIS. STAT. § 346.63(1)(a).[2] She argues that: (1) she did not waive her right to appeal by entering a no contest plea; and (2) the circuit court erred in concluding that there was reasonable suspicion on which to base the investigative traffic stop. We affirm.

BACKGROUND[3]

¶2 On July 24, 2009, at approximately 1:30 a.m., Officer Tuschl[4] of the West Allis Police Department responded to the area of South 80th Street and West Greenfield Avenue after Jennifer Parr, a citizen witness, contacted the police department and reported a possible intoxicated driver travelling westbound on West Greenfield Avenue. The intoxicated driver was later identified as Schneidler. Parr told police dispatch that she personally knew Schneidler, that she had observed Schneidler drinking alcohol inside Tomkens bar, and that she then saw Schneidler get into her car, a tan Chevrolet Malibu with a Wisconsin license

[2] The parties agree, and the plea questionnaire signed by Schneidler confirms, that Schneidler pled no contest. However, the circuit court clerk's docket entry, from which Schneidler appeals, erroneously states that Schneidler pled not guilty. *See* ***City of Sheboygan v. Flores***, 229 Wis. 2d 242, 247-48, 598 N.W.2d 307 (Ct. App. 1999) (In appeals from cases involving traffic regulations, WIS. STAT. § 808.03(1)(c) allows the circuit court clerk's docket entry of the final disposition of the case to stand as an order or judgment for appeal purposes.). The circuit court clerk is directed to amend the docket entry to reflect Schneidler's no contest plea.

[3] We note with some displeasure that Schneidler's statement of facts and statement of the case contain no citations to the record and only two citations to the attached appendix, despite WIS. STAT. RULE 809.19's requirement that the appellant include appropriate citations to the record. The fact that this is an appeal from a traffic forfeiture and that the record is not voluminous does not exempt the parties from our rules of appellate procedure. Furthermore, one of the citations to the appendix is to a May 21, 2010 motion hearing transcript that is not included in the record. Because that transcript is not included in the record, we do not consider it. *See* ***Suburban State Bank v. Squires***, 145 Wis. 2d 445, 451, 427 N.W.2d 393 (Ct. App. 1988).

[4] Officer Tuschl's full name is not provided in the record.

plate of 224-FNA, and drive off. Parr was following Schneidler in a dark colored Oldsmobile at the time she called police dispatch.

¶3 Officer Tuschl was informed that the Malibu had turned northbound on South 84th Street from West Greenfield Avenue. As Officer Tuschl turned northbound onto South 84th Street, he observed Parr's Oldsmobile in the right lane heading northbound. Officer Tuschl pulled along side of the Oldsmobile and observed Parr pointing straight ahead, at a vehicle further north of their location, indicating that Schneidler was up the road. The only car Officer Tuschl observed ahead was a tan Chevrolet Malibu with a Wisconsin license plate of 224-FNA. Because the vehicle matched Parr's description, Officer Tuschl activated his squad car's emergency lights and initiated a traffic stop.

¶4 Based upon Schneidler's answers to Officer Tuschl's questions and his observations of her condition after stopping her vehicle, Schneidler was arrested and cited for operating a motor vehicle while under the influence of an intoxicant or other drug, first offense.

¶5 Schneidler filed a motion to suppress any evidence obtained by officers that night, arguing that Officer Tuschl lacked reasonable suspicion to believe that she was committing a crime. The municipal court granted the motion and dismissed the action.

¶6 The City of West Allis appealed the municipal court's ruling. The circuit court reversed, after its *de novo* review, finding that Officer Tuschl had reasonable suspicion to stop Schneidler's vehicle based upon Parr's tip.

¶7 Thereafter, Schneidler pled no contest to operating under the influence of an intoxicant or other drug, first offense. She now appeals.

DISCUSSION

¶8 Schneidler argues that the circuit court erred in concluding that Parr's tip—that she saw Schneidler drinking alcohol and then watched her drive off in her car—was enough to provide Officer Tuschl with reasonable suspicion on which to stop Schneidler's vehicle. We asked the parties to also address whether Schneidler waived her right to appeal by entering a no contest plea. While we decide not to apply the waiver doctrine, we do conclude that Officer Tuschl had reasonable suspicion on which to base his investigative traffic stop.

I. Waiver

¶9 To begin, we address whether Schneidler waived her right to appeal by pleading no contest. Generally, a guilty or a no-contest plea waives the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). In a criminal case, an exception exists for orders denying motions to suppress evidence or motions challenging the admissibility of a statement of a defendant. WIS. STAT. § 971.31(10). That exception, however, does not apply to traffic regulation cases in which the penalty is a civil forfeiture. ***County of Racine***, 122 Wis. 2d at 436.

¶10 Waiver, however, is not a jurisdictional bar to an appeal, but rather a principle of judicial administration. When determining whether a defendant has waived his or her right to appeal by pleading no contest in a traffic forfeiture matter, this court may consider: (1) the administrative efficiencies resulting from the plea; (2) whether an adequate record has been developed on which to decide issues raised on appeal; (3) whether the appeal appears motivated by the severity of the sentence; and (4) the nature of the potential appellate issue. ***County of***

Ozaukee v. Quelle, 198 Wis. 2d 269, 275-76, 542 N.W.2d 196 (Ct. App. 1995), *abrogated on other grounds by* ***Washburn Cnty. v. Smith***, 2008 WI 23, ¶64, 308 Wis. 2d 65, 746 N.W.2d 243.

¶11 Having contemplated those considerations, we decide not to apply waiver here. First, Schneidler's no contest plea saved the circuit court from having to proceed to trial, conserving judicial time and resources. *See* ***id.*** at 275. Second, because the circuit court addressed the issue of whether the traffic stop was based upon reasonable suspicion, we have an adequate record on which to decide the issue. *See* ***id.*** Third, it does not appear from the record that Schneidler took a chance on a more lenient sentence and then brought this appeal when the sentence was higher than she hoped.[5] *See* ***id.*** at 276. Consequently, we turn to the merits of Schneidler's appeal.

II. Reasonable Suspicion

¶12 Schneidler argues that Officer Tuschl lacked reasonable suspicion to make the traffic stop because the only information he had suggesting that Schneidler was intoxicated came from Parr, the citizen witness, and Officer Tuschl made no independent observations suggesting that Parr's tip was reliable. We conclude that Officer Tuschl did not need to independently verify the tip received from Parr and that based on the totality of the circumstances there was reasonable suspicion for the investigative stop.

[5] Schneidler was sentenced to a six-month driver's license revocation, a $731 forfeiture, and an alcohol and drug offense assessment.

¶13 In order to conduct an investigative stop consistent with the Fourth Amendment prohibition against unreasonable searches and seizures, a law enforcement officer needs at least reasonable suspicion, in light of his or her experience and training, to believe that some kind of criminal activity has taken, is taking, or is about to take place. ***State v. Post***, 2007 WI 60, ¶¶10, 13, 301 Wis. 2d 1, 733 N.W.2d 634. An officer's reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion" of the stop. ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). An "inchoate and unparticularized suspicion or 'hunch'" will not suffice. ***Id.*** at 27. "[W]hat constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

¶14 When reviewing a circuit court's order denying or granting a motion to suppress evidence, an appellate court will uphold the court's factual findings unless they are clearly erroneous, but will independently review the application of those facts to constitutional principles. ***Post***, 301 Wis. 2d 1, ¶8. To determine whether an officer had reasonable suspicion, a court looks at the totality of the circumstances. ***State v. Williams***, 2002 WI App 306, ¶12, 258 Wis. 2d 395, 655 N.W.2d 462.

¶15 Here, the totality of the circumstances provided Officer Tuschl with reasonable suspicion to perform the investigative stop.

¶16 First, Parr was a known citizen witness who provided her name when she called police dispatch and who made herself available to police. "When an average citizen tenders information to the police, the police should be permitted

to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such might not be the case." ***State v. Kerr***, 181 Wis. 2d 372, 381, 511 N.W.2d 586 (1994) (citation, bracketing, and quotation marks omitted). Here, Officer Tuschl had no reason to believe that Parr would provide him with false information because she was known to police, had no known motive to lie, and, in fact, had motive to be truthful, because she could be prosecuted for obstructing justice if she purposefully misinformed the police.

¶17 Second, Parr's accusations were based on her first-hand observations. Parr told police dispatch that while at Tomkens bar she personally observed Schneidler drinking alcohol and saw Schneidler leave the bar in her vehicle. Furthermore, Parr noted that she was not drinking at the bar because she was pregnant, thereby verifying that her own judgment was not likely impaired.

¶18 In short, Parr was a reliable witness who told police that she personally observed Schneidler drink alcohol and then drive and who made herself available to the police for questioning. Her knowledge of Schneidler drinking alcohol and then driving, provided specific articulable facts upon which Officer Tuschl was entitled to make an investigative stop of Schneidler's vehicle.

¶19 Schneidler argues that ***State v. Powers***, 2004 WI App 143, 275 Wis. 2d 456, 685 N.W.2d 869, stands for the proposition that a citizen witness's tip is not enough to support an investigative stop and that a police officer must independently verify the tip. Schneidler is mistaken.

¶20 Indeed, the police officer in ***Powers*** did have an opportunity to verify the veracity of a citizen witness's tip that a customer at an Osco Drug was suspected of driving under the influence. ***Id.***, ¶¶2-3. However, that the officer's independent observations supported reasonable suspicion in ***Powers***, does not

mean that such independent observation is always necessary. *See* ***id.***, ¶14. In ***Powers***, there was not evidence that the citizen witness personally knew the defendant, had seen the defendant drinking, or had seen the defendant get into his car. ***Id.***, ¶2. Instead, the citizen witness merely told police that he believed the defendant was "intoxicated" and identified the defendant's car in the Osco parking lot. ***Id.*** The court found that those two observations, coupled with the police officer's observation of the defendant stumbling to his car with a case of beer, constituted reasonable suspicion. ***Id.***, ¶¶10-15.

¶21 Here, however, Parr's observations were more concrete than those of the citizen witness in ***Powers***: Parr knew Schneidler, saw her drinking alcohol, and saw her drive away in her car. Based on those observations, we conclude that Officer Tuschl did not need to independently observe Schneidler's intoxicated state to establish reasonable suspicion.[6]

By the Court.—Order affirmed.

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

[6] We also note that a citation for operating a motor vehicle while under the influence of an intoxicant or other drug does not require proof of erratic driving; therefore, proof of erratic driving is obviously not required for purposes of reasonable suspicion. ***State v. Powers***, 2004 WI App 143, ¶12 n.2, 275 Wis. 2d 456, 685 N.W.2d 869.