

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 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 Nos. 2010AP1949-CR
2010AP2220-CR**

**Cir. Ct. Nos. 2007CT161
2010CF56**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CURTIS W. HOFFMAN,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Shawano County:
LEON D. STENZ, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Curtis Hoffman appeals from judgments convicting him of operating while intoxicated, third offense, and possession of narcotic drugs. Hoffman argues the circuit court erred by refusing to suppress

evidence obtained during an investigatory stop. We agree with Hoffman that the stop was not supported by reasonable suspicion. We therefore reverse and remand with directions to suppress all evidence obtained from the stop.

BACKGROUND

¶2 In the early morning hours of March 25, 2007, Shawano police received a 911 call. The record does not contain a recording or transcript of the call, and the circuit court made no findings as to what the caller said. However, based on representations in the parties' briefs, it is undisputed the caller reported that Hoffman "may have been involved in a disturbance" at Lakeshore Lanes bowling alley. The caller also stated that Hoffman was leaving Lakeshore Lanes on a motorcycle. The caller revealed her identity to dispatch, but apparently requested to remain anonymous.¹

¶3 Dispatch relayed the caller's tip to officer Ryan Atkinson, but did not reveal the caller's identity. Atkinson proceeded toward Lakeshore Lanes. He encountered two motorcycles a few blocks from the bowling alley. Atkinson identified one of the cyclists as Hoffman. After turning his patrol car around so that he could follow the motorcycles, Atkinson immediately activated his car's emergency lights. At the suppression hearing, Atkinson testified his sole basis for stopping Hoffman was the report from dispatch about a possible disturbance at Lakeshore Lanes.

¹ Shortly before the 911 call reporting that Hoffman may have been involved in a disturbance at Lakeshore Lanes, Shawano police had received two other calls regarding Hoffman. The first call reported that Hoffman was violating a bond condition by drinking alcohol. However, dispatch verified that Hoffman was not under any bond. The second call stated that Hoffman had an outstanding arrest warrant. Again, dispatch verified that Hoffman did not have an outstanding warrant.

¶4 After stopping Hoffman and administering a preliminary breath test, Atkinson arrested Hoffman for operating while intoxicated. During a search incident to arrest, Atkinson found a cellophane wrapper in Hoffman's pocket containing nine pills, which were later identified as oxycodone. Hoffman was charged with operating while intoxicated, third offense.

¶5 Hoffman moved to suppress, arguing that Atkinson lacked reasonable suspicion for the investigatory stop. The circuit court held an evidentiary hearing on Hoffman's motion, but before rendering a decision, the court visited the site of the stop and took measurements, listened to the recording of the 911 call, and viewed video recordings of the stop. The court then denied the motion. We granted leave to appeal a nonfinal order and reversed and remanded for a new hearing, concluding the circuit court had exceeded its authority by conducting its own fact-finding outside the presence of the parties and without notice.²

¶6 Following remand, the State added a charge of possession of narcotic drugs, based on the oxycodone found during the March 25 stop. The circuit court then held a new hearing on Hoffman's suppression motion. Once again, the court denied the motion, concluding Atkinson had reasonable suspicion to stop Hoffman based on the information provided by the 911 call. Hoffman then pled no contest to operating while intoxicated and possession of narcotic drugs, as part of a global plea agreement involving seven cases.

² The Honorable James R. Habeck presided over the initial hearing on Hoffman's motion to suppress. Following remand, Hoffman's case was transferred to the Honorable Leon D. Stenz.

DISCUSSION

¶7 Whether reasonable suspicion existed for an investigatory stop is a question of constitutional fact. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. We review questions of constitutional fact under a mixed standard of review, upholding the circuit court’s findings of fact unless clearly erroneous, but independently reviewing the application of those facts to the constitutional standard. *Id.*

¶8 A police officer may initiate an investigatory stop if he or she “reasonably suspect[s] ... that some kind of criminal activity has taken or is taking place.” *State v. Allen*, 226 Wis. 2d 66, 71, 593 N.W.2d 504 (Ct. App. 1999). An inchoate and unparticularized hunch will not suffice. *Post*, 301 Wis. 2d 1, ¶10. “Rather, the officer ‘must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ the intrusion of the stop.” *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). Reasonable suspicion is a common sense test based on the totality of the circumstances. *Id.*, ¶13.

¶9 Here, the totality of the circumstances did not establish reasonable suspicion for the stop. The 911 caller told dispatch, and dispatch told Atkinson, that Hoffman “may have been involved in a disturbance at Lakeshore Lanes.” This information, without more, was too indefinite and equivocal to justify an investigatory stop. First, the caller did not report that Atkinson *had* been involved in a disturbance, merely that he “may have been involved” in a disturbance. Second, the caller did not specify what she meant by “a disturbance.” The caller did not state that any violence had taken place, that anyone had suffered an injury, or that any weapon had been involved. The caller did not state that Hoffman had

been drinking or appeared intoxicated. At the suppression hearing, Atkinson conceded he did not even have enough information to conclude Hoffman had been in an argument, let alone that he had threatened, pushed, or struck anyone. Atkinson merely knew that Hoffman may have been involved in some kind of disturbance at some unspecified time that evening. On these facts, Atkinson could not reasonably suspect that Hoffman had committed or was committing a crime.

¶10 The parties argue at length about whether the caller who reported the disturbance was anonymous,³ whether the collective knowledge doctrine applies,⁴ and whether the tip exhibited sufficient indicia of reliability.⁵ However, even assuming the caller was not anonymous, the collective knowledge doctrine applies, and the tip exhibited indicia of reliability, the *content* of the information provided to police was insufficient to create reasonable suspicion. The tip simply was not definite enough for Atkinson to suspect a crime had taken or was taking place. Accordingly, we need not address the parties' arguments regarding anonymity, collective knowledge, and reliability. See *State v. Castillo*, 213

³ See *State v. Batt*, 2010 WI App 155, ¶¶19-20, 330 Wis. 2d 159, 793 N.W.2d 104 (“[A]nonymous informant tips, because they involve tipsters whose veracity is by nature unknown, require some corroboration before a stop may be justified.”).

⁴ Hoffman contends that, because Atkinson believed the caller was anonymous when he made the stop, the tip should be treated as an anonymous tip. In response, the State argues that dispatch knew the informant's identity, and this knowledge should be imputed to Atkinson under the collective knowledge doctrine. See *State v. Orta*, 2000 WI 4, ¶20, 231 Wis. 2d 782, 604 N.W.2d 543 (“Under 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.”).

⁵ See *State v. Rutzinski*, 2001 WI 22, ¶18, 241 Wis. 2d 729, 623 N.W.2d 516 (To give rise to reasonable suspicion, “[t]ips should exhibit reasonable indicia of reliability.”).

Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (cases should be decided on the narrowest possible grounds).⁶

By the Court.—Judgments reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

⁶ Hoffman also contends he is entitled to a new evidentiary hearing because the circuit court refused to provide him with access to a recording of the 911 call. Because we reverse the judgments and remand with directions to suppress evidence obtained from the stop, we need not address Hoffman's alternative argument. See *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997).

