COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP1782-CR **Cir. Ct. No. 2011CT168**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ANTHONY JAMES WILSON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County: RANDY R. KOSCHNICK, Judge. *Reversed and cause remanded*.

¶1 BLANCHARD, J.[1] The State of Wisconsin appeals a circuit court order granting Anthony James Wilson's motion to suppress evidence in its case

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

alleging fourth offense operating a motor vehicle while intoxicated and fourth offense operating a motor vehicle with a prohibited alcohol concentration. The State argues that, contrary to the circuit court's conclusion, the arresting officer had reasonable suspicion to stop and detain Wilson. This court agrees and therefore reverses the order and remands for further proceedings.

BACKGROUND

¶2 At approximately 2:30 a.m. on May 7, 2011, while patrolling the downtown area of Watertown, an officer was flagged down by a man who the officer recognized as a bouncer at a downtown bar. The bouncer reported to the officer that a vehicle had just struck a parked car and left the immediate area. The bouncer pointed to the allegedly offending vehicle, which was traveling in a direction 180-degrees opposite to the direction in which the officer's squad car was then facing. The bouncer made a reference to a maroon-colored vehicle. The officer took the bouncer to mean that the vehicle that had struck the parked car was maroon.

¶3 The officer spotted the vehicle the bouncer had pointed to in his side view mirror when it was approximately one block away from him. He then turned his squad car around to pursue the vehicle and for a moment lost sight of it. After briefly losing sight of the vehicle, the officer reaffirmed with the bouncer that he was pursuing the correct vehicle. In confirming, the bouncer again pointed to the vehicle driving away from the officer.

¶4 There were no other vehicles on the road at the time and the circuit court found that the officer pursued the vehicle that was identified by the bouncer. The officer caught up with the vehicle after about fifteen or twenty seconds and

stopped it. After pulling the vehicle over, the officer found that it was actually green in color.

¶5 Upon approaching the vehicle, the officer asked Wilson if he had been drinking alcohol and Wilson admitted he had consumed four or five drinks since 7:00 p.m. that night. The officer performed three field sobriety tests on Wilson, all of which indicated that Wilson was impaired. Wilson submitted to a PBT which registered a 0.237.

¶6 In ruling on Wilson's motion to suppress, the circuit court found it to be "a very close case," but ruled that the evidence obtained from the stop should be excluded. The court concluded that the officer initially had reasonable suspicion to stop Wilson's vehicle based on the bouncer's report, but also concluded that, once the officer realized the vehicle color information he received from the bouncer was inaccurate, reasonable suspicion dissipated and the officer was obligated to discontinue the stop.[2]

DISCUSSION

¶7 When reviewing a motion to suppress, this court will uphold the factual findings of the circuit court unless those findings are clearly erroneous.

[2] On the topic of the bouncer's accuracy as to vehicle color, there is record evidence that could be construed in one of two ways: (1) the bouncer told the officer that the offending vehicle was maroon, and the bouncer was mistaken as to the color, or (2) the bouncer told the officer that the *parked* vehicle was maroon, but the officer misunderstood. In addressing this factual issue, the court at one point in its oral ruling found that "it turns out apparently [the bouncer] was using [the maroon color] to describe the color of the collided with vehicle … [b]ut [the officer] … assumed that color description applied to the offending vehicle." Almost immediately following that finding, however, the court found that "[i]t's now apparent that [the bouncer] apparently was confused or mistaken about the color of the vehicle." We take the finding that the bouncer was mistaken to be the ultimate finding of the court on this issue.

State v. Phillips, 2009 WI App 179, ¶6, 322 Wis. 2d 576, 778 N.W.2d 157. Whether the facts found by the circuit court meet the reasonable suspicion standard is a question of law and will be reviewed de novo by this court. ***Id.***

¶8 In ***Terry v. Ohio***, 392 U.S. 1, 30 (1967), the United States Supreme Court authorized police officers to stop and detain individuals when officers possess reasonable suspicion to believe a crime has occurred. The reasonable suspicion standard applies to motor vehicle stops. ***Arizona v. Johnson***, 555 U.S. 323, 333 (2009). The Wisconsin Supreme Court has embraced this rule, *see* ***State v. Chambers***, 55 Wis. 2d 289, 294, 198 N.W.2d 377 (1972), and it is codified in WIS. STAT. § 968.24.

¶9 The reasonable suspicion necessary for a ***Terry*** stop is a lower standard than probable cause. ***Alabama v. White***, 496 U.S. 325, 330 (1990). An officer's reasonable suspicion must be "grounded in specific, articulable facts … that the individual has committed a crime." ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). In determining whether the officer had reasonable suspicion, this court examines the totality of the circumstances known to the officer. ***State v. Williams***, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106.

¶10 Neither party disputes that the collision and flight by the offending vehicle, as reported by the bouncer, constituted reasonable suspicion that the offending vehicle was involved in a law violation. Rather, the issue is, stated broadly, whether there was reasonable suspicion that *Wilson's vehicle* was the offending vehicle.

¶11 In arguing that this court should affirm, it is unclear if Wilson argues that this court should conclude that reasonable suspicion that his vehicle was involved never existed or that, as the circuit court concluded, reasonable suspicion

existed initially but dissipated once the officer determined the vehicle's color. If Wilson intends to make the first argument, it is unavailing. As this court's discussion of case law below makes clear, there is no reasonable view of the facts that would support a conclusion that the officer lacked reasonable suspicion at the time he initially pursued and stopped Wilson's vehicle following the bouncer's report.

¶12 This court takes Wilson to argue, based on ***White***, 496 U.S. at 330,[3] that the officer's discovery that Wilson's car was not maroon but green was enough to deprive him of reasonable suspicion, because the initial report was not especially strong. More specifically, Wilson argues that indicia of reliability surrounding the bouncer's report were minimal because the officer had no corroborating information to confirm what he was told by the bouncer and the officer did not personally observe the collision. Because of this low reliability, Wilson argues, a large quantity of corroborating information was required for the officer reasonably to rely on the report, and once the officer learned of the color discrepancy he lacked reasonable suspicion.

¶13 Thus, the issue before this court is whether the bouncer's identification of the offending vehicle to the officer was sufficiently reliable to provide reasonable suspicion for the officer's detention of Wilson, even after the officer realized the color discrepancy. The key is the reliability of the bouncer's report, which formed the entire basis for the officer's suspicion in this case.

[3] In his brief, Wilson cites ***United States v. Cortez***, 449 U.S. 411 (1981), but it is plain that he is relying on ***Alabama v. White***, 496 U.S. 325, 330 (1990).

¶14 Where appropriate, courts draw distinctions between citizen informants and police informants. ***State v. Paszek***, 50 Wis. 2d 619, 630, 184 N.W.2d 836 (1971). In contrast to many police informants, a citizen who reports a crime committed in his or her presence presumably acts out of a concern for public safety and presumably expects no personal gain from making the report. ***Id.*** Because of this, when examining police reliance on a citizen informant, courts apply a "relaxed test of reliability," which shifts the focus from the personal reliability of the informant (the primary focus for police informants) to the informant's reliability in observing the particular events at issue (the primary focus for citizen informants). ***Williams***, 241 Wis. 2d 631, ¶36. Courts "view citizens who purport to have witnessed a crime as reliable and allow the police to act accordingly, even though other indicia of reliability have not yet been established." ***Id.*** This relaxed test applies to the bouncer under the circumstances here.

¶15 Focusing on reliability based on the opportunity to observe, the reliability of a citizen informant is evaluated by looking at "the nature of [the citizen's] report, his opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation." ***Paszek***, 50 Wis. 2d at 631. This evaluation is a "safeguard" intended to ensure the reliability of information provided by a citizen informant. ***Allison v. State***, 62 Wis. 2d 14, 22, 214 N.W.2d 437 (1974). Verification is not required; it is simply one of the ways to provide a "sufficient safeguard." ***Id.*** at 22-23. "[I]f the citizen … informant is an eyewitness this will be enough to support probable cause even without specific corroboration of reliability." ***Id.*** at 23.

¶16 Additionally, courts may look to the status of an informant as either anonymous or known to the police in weighing his or her reliability. ***Williams***,

241 Wis. 2d 631, ¶35. Police are aware that when an informant's identity is known to police, as the bouncer's was in this case, it is more likely that the informant "is a genuinely concerned citizen," and this lends reliability to his or her statements. ***Id.*** The non-anonymous nature of the informant shows reliability to the police because the informant could be arrested for providing false information to the officer. ***State v. Rutzinski***, 2001 WI 22, ¶20, 241 Wis. 2d 729, 623 N.W.2d 516.

¶17 Separately, when an informant is not only known to police from past interactions, but has earned a reputation for trustworthiness in those interactions, officers are entitled to consider such an informant more reliable. ***Id.*** In this case, the bouncer was not only known to the officer, but he had provided information to the officer in the past that the officer had found reliable. This is an additional reason that a reasonable officer in this officer's position would consider the bouncer's tip highly reliable.

¶18 In this case, as to observational reliability, both the nature of the bouncer's report and his apparent opportunity to see and hear the matters reported suggest a high degree of reliability to a reasonable officer in the position of the officer here. The bouncer personally reported observing the vehicle strike a parked car and reported it directly to the officer. The bouncer then directly identified the specific allegedly offending vehicle for the officer by pointing it out. As indicated above, there is no doubt that the vehicle that the officer stopped was the one that the bouncer identified.

¶19 Based on the standards discussed above, it is apparent that the bouncer's report regarding the "maroon" vehicle would reasonably be treated as highly reliable, at least absent the bouncer's apparent mistake as to color. The

question remains whether the color mistake so undermined that reliability as to dispel a reasonable suspicion that the vehicle the bouncer pointed out to the officer was in fact the offending vehicle.

¶20 The State argues that reasonable suspicion is a sufficiently low standard that this color discrepancy did not undermine reasonable suspicion.

¶21 On the specific facts of this case, this court agrees with the State's position. Although the circuit court correctly recognized that the color discrepancy "detract[ed] from" the bouncer's reliability concerning the identification overall, this court disagrees that that discrepancy was so significant as to undermine the reliability of the report and dispel reasonable suspicion under the totality of circumstances.

¶22 Wilson argues that the lone identifying piece of information given to the officer was the vehicle color, and because the color turned out to be incorrect, reasonable suspicion was lacking. However, it is inaccurate to say that color was the lone piece of identifying information. It is undisputed that the bouncer directly pointed out the car that the officer stopped. This fact, combined with the presumptive reliability of an on-the-scene citizen informant, the bouncer's proven track record in providing the officer with reliable information on prior occasions, and the absence of other vehicles on the road at the time, makes it reasonable to place comparatively little weight on the color discrepancy.

¶23 In determining whether a ***Terry*** stop is reasonable, "common sense and ordinary human experience must govern over rigid criteria." ***United States v. Sharpe***, 470 U.S. 675, 685 (1985). Common sense suggests that people sometimes mistake vehicle colors.

¶24 While not controlling here, ***State v. Sherry***, 2004 WI App 207, ¶12, 277 Wis. 2d 194, 690 N.W.2d 435, is informative and supports this court's conclusion. In that case, an anonymous informant provided a tip that included the color of a vehicle expected to be used in a crime. Because at the time of the investigation it was "dark out and the vehicle was a dark color" the investigating officer could not confirm that the color given by the informant matched the vehicle color. ***Id.*** However, the other information given by the informant, when considered in its totality, showed enough reliability to create reasonable suspicion. ***Id.***, ¶23. The identification in this case was similar to that in ***Sherry***, at least insofar as that the tip included incorrect or unverified color information.

¶25 This court acknowledges, as Wilson asserts, that the record reflects that when the officer realized the color discrepancy, this caused him subjectively to doubt the reliability of the bouncer's report at least to a degree, although he did proceed to detain Wilson. However, the officer's subjective beliefs do not determine whether the reliability of the tip remained sufficient to meet the objective standard of reasonable suspicion. *See* ***State v. Buchanan***, 178 Wis. 2d 441, 447 n.2, 504 N.W.2d 400 (Ct. App. 1993) (in reasonable suspicion analysis, "it is the circumstances that govern, not the officer's subjective belief").

¶26 In sum, the color discrepancy was not sufficient here to undermine reasonable suspicion to detain Wilson.

CONCLUSION

¶27 For the reasons stated above, this court reverses the circuit court's order granting Wilson's motion to suppress evidence gained from the stop, and remands for further proceedings.

By the Court.—Order reversed and cause remanded.

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