COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 12, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-1461-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DENNIS W. TUSHOSKI,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Affirmed.*

LaROCQUE, J. Dennis Tushoski appeals a judgment of conviction for operating a vehicle while intoxicated (OWI) in violation of § 346.63(1)(a), STATS., and possession of cocaine in violation of § 161.41(3m), STATS. Tushoski argues that evidence discovered after a ***Terry***[1] stop should be suppressed because the arresting officer did not adequately corroborate an anonymous tip before making the stop. Tushoski also challenges the seizure of evidence found when the officer frisked him. This court rejects Tushoski's arguments and affirms the judgment.

[1] ***Terry v. Ohio***, 392 U.S. 1 (1968).

An anonymous tipster called the Oneida County Sheriff's Department and stated that an individual named Dennis had been drinking and doing drugs at a bar west of Rhinelander and was now leaving the bar and heading toward Rhinelander. The tipster stated that Tushoski was leaving in a white Toyota pickup with multi-colored stripes and a plate number of AD12222.

About two miles from the bar, deputy Bryan Wege of the Oneida County Sheriff's Department observed a pickup truck heading east toward Rhinelander. The truck was white with multicolored stripes, and Wege observed a partial license plate number of AD122.

Wege started to follow the truck, but the truck immediately turned into a private driveway. Wege knew the driveway was that of the Marquardts and that the owner of the truck, Tushoski, did not live there. Wege pulled into the driveway and turned on his red and blue emergency lights.

Wege noticed the odor of alcoholic beverages on Tushoski's breath as he was questioning him. Wege inquired if he could frisk Tushoski for weapons. Tushoski replied, "go ahead." While frisking Tushoski, Wege felt a hard object in Tushoski's pocket, which he thought may have been a knife. Wege reached into the pocket and found a marijuana pipe and plastic bag containing marijuana. Wege then conducted field sobriety tests and, based on these tests, arrested Tushoski for OWI. Thereafter, incident to the OWI arrest, Wege searched Tushoski's truck and discovered cocaine.

Tushoski moved to suppress the evidence obtained at the stop, claiming the stop and search were illegal. After the circuit court denied the motions, Tushoski pled guilty to possession of cocaine and operating a vehicle while intoxicated. The State dismissed other charges. Tushoski was sentenced and now appeals the judgment based on the Fourth Amendment issues.

In reviewing a circuit court order regarding suppression of evidence, this court will uphold findings of fact unless they are clearly erroneous. *See* ***State v. Moley***, 171 Wis.2d 207, 214, 490 N.W.2d 764, 767 (Ct. App. 1992); § 805.17(2), STATS. However, whether a stop complies with

statutory and constitutional standards is a question of law this court reviews de novo. ***State v. Richardson***, 156 Wis.2d 128, 137-38, 456 N.W.2d 830, 833 (1990).

Not all contact between police officers and citizens is a stop for Fourth Amendment purposes. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude a 'seizure' has occurred." ***Terry v. Ohio***, 392 U.S. 19 n.16 (1968). A stop occurs when a reasonable person believes he or she is not free to leave in view of all the circumstances surrounding the contact with police. ***Michigan v. Chesternut***, 486 U.S. 567, 573 (1988). The stop occurred when the officer activated his flashing lights.

The Fourth Amendment requires some minimal level of justification for an officer to stop a subject. ***Terry***. The officer must be able to "articulate something more than an 'inchoate and unparticularized suspicion or "hunch".'" ***United States v. Sokolow***, 490 U.S. 1, 7 (1990) (quoting ***Terry***, 392 U.S. at 27). In ***Alabama v. White***, 496 U.S. 325 (1990), the United States Supreme Court established factors for determining whether an anonymous tip justifies an officer to stop a subject. The Supreme Court concluded that when the officer can corroborate details of the anonymous informant's predictions, the officer has reason to believe the caller is honest and well-informed about the illegal activity. ***Id.*** at 332. The Court noted the special importance of the caller's ability to predict the defendant's future behavior because this ability demonstrated a familiarity with the defendant's affairs. ***Id.***

Tushoski contends that at the time of the stop, Wege had not corroborated the tip because the caller did not predict any future behavior. This court concludes to the contrary. In ***State v. Krier***, 165 Wis.2d 673, 478 N.W.2d 63 (Ct. App. 1991), an anonymous caller alleged to police that Krier did not possess a driver's license and was getting into a blue station wagon, and then called again, stating that Krier had left and was driving northbound on a particular street. Krier was stopped driving his vehicle at the time and place specified and cited for driving without a license.

In ***Krier***, we held that the officer adequately corroborated the call. ***Krier*** reasoned that "A man was driving the vehicle on the very street and in the direction stated by the informant. This meant that the anonymous caller had

accurately predicted *future* behavior ...." ***Id.*** at 676-77, 478 N.W.2d at 65 (emphasis in original).

In this case, as in ***Krier***, the tipster accurately stated the route and direction in which the defendant traveled. Wege verified the informant's detailed description of the vehicle and the direction the vehicle was traveling, i.e., toward Rhinelander.

Tushoski argues that the tipster did not indicate that he was committing a crime, so Wege had no reason to be suspicious. He argues that a police officer could not infer from the call that he was under the influence of intoxicants while driving or that he possessed drugs.

This court disagrees. If any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for purposes of inquiry. ***State v. Anderson***, 155 Wis.2d 77, 84, 454 N.W.2d 763, 766 (1990).

Wege could draw reasonable inferences that Tushoski both possessed drugs and was driving while intoxicated. Because the tipster alleged that Tushoski was doing drugs shortly before, a police officer could reasonably infer that he possessed drugs or drug paraphernalia in violation of ch. 161, STATS.

Driving under the influence of intoxicants in § 346.63(1)(a), STATS., does not require proof of substantial impairment of the defendant's ability to drive. ***State v. Waalen***, 130 Wis.2d 18, 386 N.W.2d 47 (1986). This court concludes that Wege could reasonably suspect, under the ***Terry*** standard, that Tushoski was either under the influence or in possession of drugs, or both, so as to justify a brief stop in a public place to inquire further.

Next, Tushoski argues that Wege's frisk violated the Fourth Amendment because Wege did not have a reasonable suspicion that Tushoski was armed. We agree that a frisk is a search, thus an officer normally must have

a reasonable suspicion before frisking. ***State v. Guy***, 172 Wis.2d 86, 93, 492 N.W.2d 311, 313-14 (1992). However, a search may be conducted without reasonable suspicion if the officer obtains consent. *See* ***State v. Rogers***, 148 Wis.2d 243, 248, 435 N.W.2d 275, 277 (Ct. App. 1988). The burden is on the State to prove that Tushoski consented to the search. *See* ***State v. Schwegler***, 170 Wis.2d 487, 498, 490 N.W.2d 292, 296 (Ct. App. 1992).

The trial court found that Tushoski consented to the frisk based on his "verbal agreement" to the search. This finding is not clearly erroneous. Section 805.17(2), STATS. Consent is voluntary if given in the "absence of actual coercive, improper police practices designed to overcome the resistance of a defendant." ***State v. Xiong***, 178 Wis.2d 525, 532, 504 N.W.2d 428, 430 (Ct. App. 1993) (quoting ***State v. Clappes***, 136 Wis.2d 222, 245, 401 N.W.2d 759, 769 (1987)).

There is no evidence that Wege used any improper tactics to coerce Tushoski's consent. Wege had minimal contact with Tushoski before the consent. Wege was under no duty to inform Tushoski of his right to refuse consent. *See* ***id.*** at 533, 504 N.W.2d at 428.

Wege did not go beyond the scope of his search for weapons when he reached into Tushoski's pocket and found the marijuana pipe and marijuana.[2] A consent search is constitutional only if the search remains within the scope of the actual consent. ***Rogers***, 148 Wis.2d at 248, 435 N.W.2d at 277. Tushoski gave Wege consent to frisk him for weapons. During the frisk, Wege felt a hard object in Tushoski's pocket, which he testified he thought may have been a knife. Wege's removal of the object to discern its nature was reasonable.

By the Court. – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

[2] The plastic bag of marijuana was lying on top of the pipe in Tushoski's pocket. Tushoski does not argue that the seizure of the marijuana was illegal if the seizure of the pipe was legal.