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November 27, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2013AP743-CR

State of Wisconsin v. John E. Behrmann (L.C. # 2012CF198)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

John E. Behrmann appeals from a judgment of conviction entered upon his no contest plea to one count of operating a motor vehicle while intoxicated as a fifth offense. Behrmann argues that the trial court erred in denying his motion to suppress because the officer did not possess the reasonable suspicion necessary to justify the traffic stop leading to his arrest. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The following information is taken from the trial court's evidentiary hearing on Behrmann's motion to suppress. At 2:00 a.m., police received a call reporting that an intoxicated driver was leaving a local resort² traveling eastbound at a high rate of speed. The caller identified himself or herself as a resort security officer and provided a description of the car, including its license plate number, make, model and color. Officer Jeff Horneck located the car and was told by dispatch that the informant would be an identified, named complainant in the case. Horneck followed the car as it traveled over to the center of the roadway and drove briefly with all four tires in the oncoming lane while passing a large construction dumpster. According to Horneck, the dumpster was placed "where a car would park" on the side of the road, and did not extend into the roadway any more than would a parked car. Horneck testified that he did not have to move his squad car into the oncoming lane in order to pass the dumpster. Horneck stopped the car and soon arrested Behrmann for operating while intoxicated.

The trial court denied Behrmann's suppression motion.³ The court considered that Horneck was responding to a 2:00 a.m. report from security personnel indicating a suspected drunk driver. The trial court noted that the report described Behrmann's car in detail and indicated that it left the resort at a high rate of speed. The trial court determined that circumstances of the tip alone "probably form[ed] the basis for reasonable suspicion." The trial court went on to consider Horneck's observations of Behrmann's car "deviat[ing] into the

² There was undisputed testimony that the resort served alcohol and that police frequently responded to alcohol-related "fights and arguments" at that location.

³ At the parties' request, the trial court also viewed the squad car's video recording of the traffic stop.

oncoming lane” and concluded that the addition of these facts likely went “beyond reasonable suspicion” to form the basis for probable cause to stop the car.

On appeal, Behrmann does not dispute the reliability of the citizen informant but contends that the stop was not justified because the officer did not observe any signs of erratic driving. In reviewing a motion to suppress, we apply a two-step standard of review. *State v. Eason*, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. We will uphold a trial court’s factual findings unless they are clearly erroneous. *Id.* We decide independently whether those facts violate constitutional principles. *Id.*

An officer may lawfully perform a traffic stop where, based on specific and articulable facts, he or she reasonably suspects that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 21, 30 (1968). The determination of reasonableness is a commonsense test based on the totality of the facts and circumstances. *State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. Reasonable suspicion need not derive from an officer’s firsthand observation of suspicious or criminal activity, but may be based on a tip exhibiting reasonable indicia of reliability. *State v. Rutzinski*, 2001 WI 22, ¶¶18, 31, 38, 241 Wis. 2d 729, 623 N.W.2d 516. The reliability of a tip is assessed by weighing the informant’s veracity and his or her basis of knowledge. *Id.*, ¶18. A tip from an identified citizen informant⁴ is subject to a relaxed test of reliability because he or she is assumed to be truthful. See *State v. Kolk*, 2006 WI App 261, ¶¶12-13, 15, 298 Wis. 2d 99, 726 N.W.2d 337. The relaxed test focuses on “observational reliability,” which is evaluated

⁴ A citizen informant is distinguished from both an anonymous tipster, who cannot later be held accountable for providing false information, and a “confidential informant,” who is known to police through prior contacts and often has a prior criminal record. See *State v. Kolk*, 2006 WI App 261, ¶12, 298 Wis. 2d 99, 726 N.W.2d 337.

“from the nature of [the] report, [the] opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation.” *Id.*, ¶13 (citation omitted). Thus, reasonable suspicion exists where a citizen informant has personally observed signs of intoxication, provides a description of the vehicle, and the officer verifies the descriptive information. See *Rutzinski*, 241 Wis. 2d 729, ¶38; see also *State v. Powers*, 2004 WI App 143, ¶¶11-14, 275 Wis. 2d 456, 685 N.W.2d 869 (where named store clerk described suspect and opined that he was intoxicated, officer was justified in stopping the suspect after verifying identifying details of the clerk’s description).

Officer Horneck had reasonable suspicion to believe that Behrmann was operating while intoxicated based solely on the security guard’s report because the informant was a named citizen who reported contemporaneous observations of Behrmann’s driving and intoxication, as well a detailed description of the car and its approximate location, which Horneck was then able to verify. *Rutzinski*, 241 Wis. 2d 729, ¶38. *Rutzinski* makes it abundantly clear that an officer need not verify erratic driving or other signs of intoxication prior to stopping a car under these circumstances. *Id.*, ¶¶36-37 (where a reliable tip alleges drunk driving, a potential imminent danger to public safety, principles of reasonableness justify the “minimal intrusion that the stop would have presented had [the driver] indeed not been intoxicated.”).

Further, though precedent establishes that an officer need not personally observe suspicious driving prior to stopping a car based on a reliable tip of intoxicated driving, we agree with the State that regardless of whether Behrmann’s lane deviation violated any traffic ordinance, Horneck could reasonably consider this action as a factor adding to his objectively reasonable suspicion. The trial court credited Horneck’s testimony that “the car deviated into the

oncoming lane” and “almost in its entirety, was in the opposite lane of travel.” These findings are not clearly erroneous and only add to the officer’s quantum of reasonable suspicion.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the trial court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals