COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2902-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

THOMAS F. KALLENBACH,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed.*

DEININGER, J.[1] The State appeals an order suppressing evidence collected after an investigative traffic stop of Thomas F. Kallenbach. The State contends that a Marquette County sheriff's deputy had a reasonable suspicion that Kallenbach was driving while intoxicated, based on two anonymous telephone

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

calls and the deputy's own observation of Kallenbach's driving. We disagree and affirm the trial court's order.

BACKGROUND

The Marquette County Sheriff's Department received an anonymous telephone tip that a GMC truck was being operated recklessly. The call gave the location of the truck and its license number. The dispatcher passed the information to a deputy on patrol, who investigated. A few minutes later, a second anonymous call updated the truck's location, and alleged that the truck had also failed to stop at a stop sign.

The deputy located a GMC truck in the area identified by the tip, and confirmed the license number. The deputy followed the truck for approximately three miles. The officer observed the tires of the truck touch the fog line on the right edge of the road once and come within six inches of the fog line twice more. The tires of the truck also came within an inch of the center line at one point during the three-mile stretch. As the truck turned off the highway onto a street, the deputy activated his emergency lights and stopped the truck. The officer also testified that the truck made a "wide radius turn" as it turned from the highway onto the street, but that it did not cross the centerline at any time.

The deputy interviewed and administered field sobriety tests and a preliminary breath test to Kallenbach, the driver of the truck. The deputy arrested Kallenbach for operating a motor vehicle while under the influence of an intoxicant. He was also later charged with operating with a prohibited blood alcohol level.

Kallenbach moved to suppress the evidence collected after the stop on the grounds that the deputy lacked a reasonable suspicion that Kallenbach had violated the law. The trial court granted the motion, and the State appeals.

ANALYSIS

When reviewing a trial court's determination regarding the suppression of evidence, we will uphold the trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See* ***State v. Richardson***, 156 Wis.2d 128, 137, 456 N.W.2d 830, 833 (1990). However, whether an investigative stop meets statutory and constitutional standards is a question of law which we review de novo. *See* ***State v. Krier***, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991).

Under the holding of ***Terry v. Ohio***, 392 U.S. 1 (1968), the police must possess sufficient information to form a reasonable suspicion of illegal activity to justify an investigative stop. Reasonable suspicion must be based on "'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion.'" ***Richardson***, 156 Wis.2d at 139, 456 N.W.2d at 834 (quoting ***Terry***, 392 U.S. at 21). Reasonableness is measured against an objective standard, taking into consideration the "totality of the circumstances." *See* ***id***. at 139-40, 456 N.W.2d at 834-35. It is "a common sense question, [one] which strikes a balance between the interests of society in solving crime and the members of that society to be free from unreasonable intrusions." ***State v. Jackson***, 147 Wis.2d 824, 831, 434 N.W.2d 386, 389 (1989). These principles are codified in § 968.24, STATS.[2]

[2] Section 968.24, STATS., provides as follows:

(continued)

The State contends that the deputy had reasonable suspicion justifying the stop based on the anonymous telephone calls and the deputy's own observation of Kallenbach's driving. We disagree.

We consider first the anonymous telephone tips. An anonymous telephone tip can form the basis of a reasonable suspicion if it is sufficiently reliable. In ***Alabama v. White***, the United States Supreme Court held that an anonymous tip formed the basis for a reasonable suspicion because

> "the anonymous [tip] contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted." The fact that the officers found a car precisely matching the caller's description in front of the 235 building is an example of the former. Anyone could have "predicted" that fact because it was a condition presumably existing at the time of the call. What was important was the caller's ability to predict respondent's future behavior, because it demonstrated inside information—a special familiarity with respondent's affairs.

496 U.S. 325, 332 (1990) (citation omitted, quoting ***Illinois v. Gates***, 462 U.S. 213, 245 (1983)).

Applying these principles from ***White***, this court held that an anonymous tip did not form a basis for reasonable suspicion in ***State v. Williams***, 214 Wis.2d 412, 570 N.W.2d 892 (Ct. App. 1997), *petition for review granted,* 217 Wis.2d 517, 580 N.W.2d 688 (Wis. Mar. 17, 1998) (No. 96-1821-CR). The

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> After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

police had received an anonymous telephone tip that someone was dealing drugs out of a particular type of vehicle parked in a particular location. The police confirmed that that type of vehicle was parked in that location, and on that basis conducted an investigative stop and arrested the occupants. We adopted the reasoning of ***United States v. Roberson***, 90 F.3d 75, 80-81 (3rd Cir. 1996), in which the Third Circuit held that

> the police do not have reasonable suspicion for an investigative stop when, as here, they receive a fleshless anonymous tip of drug-dealing that provides only readily observable information, and they themselves observe no suspicious behavior. To hold otherwise would work too great an intrusion on the Fourth Amendment liberties, for any citizen could be subject to police detention pursuant to an anonymous phone call describing his or her present location and appearance and representing that he or she was selling drugs. Indeed anyone of us could face significant intrusion on the say-so of an anonymous prankster, rival, or misinformed individual. This, we believe, would be unreasonable.

In ***Williams***, we concluded that because the police could corroborate only readily observable information, the anonymous tip did not form the basis of a reasonable suspicion. *See* ***Williams***, 214 Wis.2d at 423, 570 N.W.2d at 896.

The calls reporting Kallenbach's reckless driving are analogous to the anonymous call in ***Williams***. The only information from the calls that the deputy corroborated prior to his stop was that Kallenbach's vehicle was in a particular area. This did not constitute a "prediction" of future behavior, rather it was a fact readily observable by anyone in the area. We conclude therefore, that the anonymous calls do not provide a basis for reasonable suspicion justifying an investigative stop.

We consider next the deputy's own observation of Kallenbach's driving. According to the deputy's report and testimony, during the deputy's

three-mile observation, Kallenbach's tires touched the fog line once, approached within six inches of the fog line twice, and approached within one inch of the center line once. The trial court determined from this testimony that Kallenbach was not weaving, and that the officer had not observed any reckless driving. On the basis of the facts as found by the trial court, we conclude that the deputy's observations of Kallenbach's driving were insufficient to form a basis for reasonable suspicion justifying an investigative stop, either standing alone or in conjunction with the anonymously provided information. As Kallenbach's counsel argued in the trial court, one could more easily conclude that the officer's observations of Kallenbach's driving served to dissipate rather than corroborate any suspicion aroused by the anonymous tip alleging reckless driving by Kallenbach.

The State contends that Kallenbach's stop is analogous to the investigative stop we upheld in ***State v. King***, 175 Wis.2d 146, 499 N.W.2d 190 (Ct. App. 1993). We disagree. In ***King***, we distinguished the facts at issue from those in ***White*** and declined to analyze those facts in terms of "corroboration" and "predicted future activity." Rather, we noted that the circumstances in ***King*** involved a tip to police "regarding gunshots in the street, a dangerous activity already in progress." ***Id***. at 152, 499 N.W.2d at 192. We then analyzed the ***King*** facts by evaluating various factors deemed relevant in "fleeing suspect" cases. *See* ***id***. at 153-54, 499 N.W.2d at 192-93.

Here, the anonymous information received by the deputy was not that Kallenbach's vehicle was fleeing the scene of a violent felony, but that he was violating traffic laws by driving recklessly. Just as we concluded in ***King*** that the ***White*** analysis was inapposite on the ***King*** facts, we conclude here that the ***King*** analysis should not be applied to the present facts. In order to form a reasonable

suspicion that Kallenbach was driving recklessly or while intoxicated, the holdings in ***White*** and ***Williams*** require that the deputy corroborate the anonymously provided information before making the stop. As we have noted, the deputy's observations failed to corroborate the anonymous tip.

In view of the totality of the circumstances, we conclude that the trial court did not err in determining that the deputy did not have a reasonable suspicion, based on specific and articulable facts, that warranted the investigative stop of Kallenbach's vehicle. Accordingly, we affirm the trial court's order suppressing the evidence collected after this stop.

By the Court.—Order affirmed.

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