

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 19, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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No. 99-2036

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW K. GREEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Andrew K. Green appeals from a judgment convicting him of operating a motor vehicle while intoxicated pursuant to WIS. STAT. § 346.63(1)(a) and from a denial of his suppression motion. The arresting

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version.

officer conducted a *Terry*² stop of Green's vehicle based upon information from a citizen eyewitness that the vehicle was being operated in an erratic fashion. Green contends that because the officer relied solely upon an anonymous tip, the officer did not have reasonable suspicion to stop his vehicle and that the trial court erred in refusing to grant his motion to suppress all statements and evidence obtained from the illegal stop. We conclude that the totality of the circumstances supports the officer's investigatory stop and affirm the judgment.

¶2 The facts relevant to the legality of the stop are undisputed. At approximately 2:30 a.m. on February 15, 1998, Wisconsin State Trooper Steven Lindemann was monitoring channel 9, the "emergency channel," on his citizen band (CB) radio³ as his squad car was about to enter I-94 from Highway 18 in Waukesha county. Lindemann received a CB report of a potentially intoxicated driver, responded and asked for the caller's location. The caller stated that he was traveling west on Bluemound Road and Lindemann asked the caller to keep giving him information while he returned to Highway 18. Twenty to thirty seconds later, the caller advised Lindemann that he was approaching Goerke's Corners.

¶3 Lindemann testified that the caller described the vehicle that he was following as "a dark colored auto, a number of occupants in the vehicle" and that the dark-colored auto was "weaving all over the road." The caller reported that he was past Goerke's Corners proceeding west on Bluemound Road and approaching

² *Terry v. Ohio*, 392 U.S. 1 (1968).

³ Lindemann testified that CB radios are installed in State Patrol squad cars and that "[p]rimarily we monitor channel 9, considered the emergency channel. A lot of the truck drivers and even motorists that have CB radios will contact us with accidents or broken down vehicles or possible drunk drivers, that sort of thing. That happens very frequently." During cross-examination, Lindemann stated that he received CB reports of intoxicated drivers "maybe twice a month or so" during the seven years that he was "working midnights."

Sam's Club. Lindemann realized that the caller was on Highway JJ and drove west on Highway 18 to Springdale Road where he could head north to the reported location. The caller reported that he was coming up to the stoplights at Sam's Club as Lindemann's squad car was approaching the same intersection.

¶4 At the intersection, Lindemann observed "a dark colored four door auto being followed by a white jeep" and asked if the caller was driving a white jeep. The caller answered "yes." There was no other traffic at the intersection. Both the dark four-door auto and the jeep vehicle made a left turn to proceed south on Springdale Road, and Lindemann made a U-turn behind the dark auto, ahead of the jeep. Lindemann activated his emergency lights prior to making the U-turn because he "was making an illegal U-turn at that intersection." Lindemann conceded that he intended to perform a traffic stop of the dark-colored auto at the time he turned on his emergency lights prior to the U-turn and had left the squad car's emergency lights on after the turn.

¶5 Lindemann testified that the dark vehicle had "moved very far to the right when he made his turn" from Highway JJ onto Springdale Road and that the vehicle turned into an apartment parking lot a couple hundred feet from the intersection. That was the only driving of the dark-colored auto observed by the officer. Prior to Lindemann coming to a complete stop in the apartment parking lot, the CB caller reported that Lindemann was behind the right vehicle and that he had the right vehicle stopped. Lindemann requested that the jeep driver stop at the State Patrol headquarters and provide a written statement. The jeep driver never did so and remains anonymous.

¶6 Lindemann testified that he approached the dark-colored vehicle in the parking lot based upon the information provided by the CB caller and the wide

turn he observed the vehicle make at the intersection. The officer stated that he could not recall exactly what words were spoken to him by the anonymous CB caller.

¶7 Green argues that the information received from the anonymous CB caller was insufficient to justify the traffic stop and that the wide intersection turn cannot be used to support the stop because it occurred after Lindemann had decided to stop Green's vehicle. The State contends that the anonymous CB radio tip received by the officer was reliable and sufficient to support an investigatory traffic stop.

¶8 In reviewing a trial court's denial of a motion to suppress, we will "uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence." *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). However, whether a search or seizure occurred and, if so, whether it passes statutory and constitutional muster are questions of law that we review de novo. *See id.* at 137-38. In *Richardson*, the supreme court concluded that an anonymous tip and the verification of its innocent details provided the police with reasonable suspicion to conduct an investigatory stop. *See id.* at 144. The court held that the "corroborated actions of the suspect ... need not be inherently suspicious or criminal in and of themselves. Rather, the cumulative detail, along with reasonable inferences and deductions which a reasonable officer could glean therefrom, is sufficient to supply the reasonable suspicion that crime is afoot and to justify the stop." *Id.* at 142.

¶9 The *Richardson* court identified two principles that courts are to consider in assessing the reliability of an anonymous tip. First, "the greater the amount, specificity and uniqueness of the detail contained in an anonymous tip,

the more likely it is that the informant has an adequate basis of knowledge.” *Id.* Second, verification of the future predictions of the suspect’s behavior is important “to avoid investigative stops based on minimal facts that any passerby or resident on the street could enunciate.” *Id.* Under the second principle, when significant portions of an anonymous tip are corroborated by the police, an inference arises that the anonymous caller is truthful and that the caller is “more probably than not correct as to the ultimate fact of criminal activity.” *Id.* at 142-43.

¶10 If an anonymous tip provides the police with information concerning ongoing illegal activity that the tipster is observing at the time the call to police is made, the tip may be just as certain as when a tip contains a prediction of an individual’s future activity. *See State v. Williams*, 225 Wis. 2d 159, 174, 591 N.W.2d 823 (1999). In such cases, an officer may corroborate the tip by establishing that the tip meets the critical factors of “veracity,” “reliability” and “basis of knowledge.” We are satisfied that this case is governed by the supreme court’s holding in *Williams*.

¶11 In *Williams*, an anonymous 911 telephone caller reported suspected drug dealing in a van parked in a driveway adjacent to his residence. The caller provided a description of the vehicle and a general description of the area of the alleged activity. Based upon the reported information, the police responded to the location and discovered drugs, and Williams was charged with possession of cocaine with intent to deliver. *See id.* at 162-66.

¶12 Williams challenged the sufficiency of the tipster’s 911-related information. The trial court held that the information was sufficient, but the court of appeals reversed, holding that the tipster’s information failed to reach the requisite level of reasonable suspicion necessary for a stop. *See id.* at 166-67. The

supreme court reversed the court of appeals, holding that the tipster's information satisfied the "veracity," "reliability" and "basis of knowledge" factors under the totality of the circumstances test. *See id.* at 174-83.

¶13 The key question concerning the tipster's "basis of knowledge" is "how does the tipster know the information that he or she is relaying?" *Id.* at 175. In *Williams*, the tipster's basis of knowledge was satisfied by the fact that the information provided was contemporaneous with the tipster's observations. *See id.* The same is true in this case. The CB caller's information was provided contemporaneously with the caller's observations. The "basis of knowledge" requirement is satisfied.

¶14 The key question concerning "reliability" is whether the tipster is probably correct about the ultimate fact of unlawful activity. *See id.* The *Williams* case noted that the officers' observations in response to the tip corroborated much of the tipster's information. *See id.* The supreme court made that determination despite the fact that the tipster provided incorrect information in describing the van. *See id.* at 178. Here, Lindemann's observations as to the location and route of travel of the suspect vehicle, the description of the vehicle and the number of occupants were consistent with and confirmed the reliability of the CB caller's information. Based upon the caller's reports, Lindemann was able to locate the suspect auto. The supreme court in *Williams* noted that the test of a citizen-informant's reliability is less strict than the test applicable to a police informant. *See id.* at 176. We conclude that the tip was reliable in reporting the ultimate fact of erratic and possibly intoxicated driving of a motor vehicle.

¶15 As to "veracity," the key question is whether the tipster was "able to predict future events accurately." *Id.* The *Williams* court concluded that in most

cases “honesty must be inferred from the circumstances” and that the veracity of the anonymous informant had been satisfied because “an anonymous caller’s use of an emergency telephone system to report a current and ongoing crime provides [a] sufficient ... reason to believe that the caller is honest.” *Id.* The same is true here. Lindemann received a citizen report at approximately 2:30 a.m. over an emergency CB channel of a possibly intoxicated driver operating a described vehicle at a certain location proceeding in a certain direction. Lindemann testified that he had used and relied upon the CB monitoring procedure numerous times prior to this incident. It was reasonable under the circumstances for an officer to determine that the citizen’s information represented an honest and true report of the citizen’s observations. The veracity of the report was satisfied by the circumstances of its receipt.

¶16 Under *Williams*, the totality of the circumstances in which the anonymous caller’s information was received must also be considered, *see id.* at 178, requiring that we balance Green’s right to privacy against society’s need for protection from intoxicated drivers. Here, the CB caller described the operation of the dark four-door auto as indicating a possibly intoxicated driver. While that driving could not be documented with specificity by the caller, the information was sufficient to represent a potential hazard to other users of the roadway, including the anonymous CB caller. Erratic driving is often associated with intoxicated driving and *Williams* speaks to the reporting of such circumstances as supporting the protection of society’s safety interests. *See id.* at 179-80. We conclude that under the *Williams* criteria, Lindemann had the requisite reasonable

suspicion to conduct an investigatory stop of Green's vehicle based upon the contemporaneous information provided by the anonymous CB caller.⁴

By the Court.—Judgment and order affirmed.

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

⁴ We need not address Green's second appellate issue that the trial court wrongly relied upon Lindemann's observation of the suspect vehicle making a wide turn at the Highway JJ and Springdale Road intersection to support the traffic stop because we conclude that the officer acted reasonably in making the stop based upon sufficient information from the anonymous CB caller. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

