

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 26, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

**Appeal Nos. 2007AP2037-CR
2007AP2038-CR**

**Cir. Ct. Nos. 2006CT165
2006CM267**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD S. GORETSKI,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Portage County:
THOMAS T. FLUGAUR, Judge. *Reversed.*

¶1 DYKMAN, J.¹ Chad Goretski appeals from judgments convicting him of Operating a Motor Vehicle While Under the Influence of an Intoxicant

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

(Third Offense) in violation of WIS. STAT. § 346.63(1)(a) and Misdemeanor Bail Jumping in violation of WIS. STAT. § 946.49(1)(a). Goretski argues that police did not have reasonable suspicion to stop him based on a tipster's call. We conclude that the totality of the circumstances did not provide police with reasonable suspicion to conduct an investigative stop and therefore reverse.

Background

¶2 On April 30, 2006, around 1 a.m., a tipster called the Portage County Sheriff's Department with a report of a possible drunken driver leaving from a bar in Stevens Point. The caller, David Lemke, identified the suspect as Chad Goretski. Dispatch then relayed the caller's name and tip to Village of Plover Police Department Officer Jason Bayer. Dispatch further provided Bayer with a description of Goretski's vehicle, his license plate number, and his home address. Bayer testified that dispatch also advised him of Goretski's two prior convictions for operating a vehicle while intoxicated and bond condition not to consume or possess alcohol.²

¶3 Bayer followed up on the tip by driving to Goretski's home address. Goretski's truck was not there, but within a short amount of time a truck matching dispatch's description appeared in the area. Bayer testified that the arrival of the truck corresponded with the amount of time it would take a vehicle to travel from Stevens Point to Goretski's home. Bayer followed the truck for one to two minutes and confirmed that the license plate number matched dispatch's

² Because the voice recordings of the tipster's call were recorded over, it is unclear whether the details given to Bayer, including Lemke's name, originated from Lemke or were independently obtained by dispatch.

information. Though Bayer did not observe any driving errors or traffic violations, he did observe Goretski take an indirect route to his home. Bayer then initiated an investigative stop.

¶4 During the stop, Bayer identified the driver as Goretski and confirmed that Goretski had been drinking. He arrested Goretski. The trial court denied Goretski's motion to suppress evidence from the stop, finding that under all the facts and circumstances Bayer had reasonable suspicion to conduct the investigative stop. Goretski pled no contest to Operating a Motor Vehicle While Under the Influence of an Intoxicant (Third Offense) in violation of WIS. STAT. § 346.63(1)(a) and Misdemeanor Bail Jumping in violation of WIS. STAT. § 946.49(1)(a).

Standard of Review

¶5 When we review the trial court's findings of fact on a motion to suppress, we uphold the trial court's factual findings unless those findings are clearly erroneous. *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). However, whether an investigative stop meets constitutional and statutory standards is a question of law, which we review de novo. *Id.* at 137-38.

Discussion

¶6 Goretski argues that police did not have reasonable suspicion to stop him based on a tipster's call. Goretski contends the tip was unreliable for two reasons: First, the tip was anonymous. Second, even if the tip was not anonymous, the tipster did not state his basis of knowledge or offer specific details showing inside knowledge. Therefore, the tip could not support reasonable suspicion. The State argues that the tip was not anonymous and that the tipster

relayed first-hand information, and thus was reliable to support reasonable suspicion. We conclude that the record does not establish the tipster's basis of knowledge, and thus the tip was not sufficiently reliable to support reasonable suspicion.

¶7 An investigative traffic stop must be supported by reasonable suspicion to satisfy constitutional reasonableness requirements. *State v. Rutzinski*, 2001 WI 22, ¶¶12-14, 241 Wis. 2d 729, 623 N.W.2d 516 (citing U.S. CONST. amend. IV; WIS. CONST. art 1, § 11).³ The standard of reasonableness requires the officer to base the stop not on an “inchoate and unparticularized suspicion or

³ The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is enforceable against the states by means of the Due Process clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

State v. Rutzinski, 2001 WI 22, ¶12 n.3, 241 Wis. 2d 729, 623 N.W.2d 516.

Article I, Section 11 of the Wisconsin Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Id., ¶12 n.4.

‘hunch.’” *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Rather, reasonable suspicion must be based on “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.” *Id.* at 21. The determination of reasonableness is a common sense test, which asks whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect the commission of a crime. *State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990).

¶8 Courts recognize that tips fall on a spectrum of reliability. *See Rutzinski*, 241 Wis. 2d 729, ¶17. Whether a particular tip is reliable and supports reasonable suspicion for an investigative stop depends on the tipster’s veracity and basis of knowledge. *See id.*, ¶¶17-18. Veracity and basis of knowledge are not discrete elements, but rather are viewed in light of all the circumstances. *Id.* “A deficiency in one consideration may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.” *Id.* (citation omitted).

¶9 The veracity of tips ranges from high to low. Courts attribute the highest degree of veracity to a tipster who is personally known to police and has given police reliable tips in the past. *Adams v. Williams*, 407 U.S. 143, 146-47 (1972). When a tipster has a high degree of veracity, the tip is sufficiently reliable to justify an investigative stop. *Id.* Courts reason that with such a “strong indicia of the informant’s veracity, there need not necessarily be any indicia of the informant’s basis of knowledge.” *Rutzinski*, 241 Wis. 2d 79, ¶21. When an informant has a lesser degree of veracity, such as when police know only a tipster’s name, courts require at least some indication of the tipster’s basis of knowledge. *State v. Kolk*, 2006 WI App 261, ¶¶2, 19, 298 Wis. 2d 99, 726 N.W.2d 337. And when police are faced with an anonymous tipster, courts

require a strong indication of the tipster's basis of knowledge in order to find that the tip is reliable. *Rutzinski*, 241 Wis. 2d 729, ¶25. An officer may infer a tipster's basis of knowledge either from an eyewitness account or the corroboration of details that demonstrate the tipster's inside knowledge. *See id.*, ¶33. Ultimately, it is the State's burden to prove a tipster's veracity and basis of knowledge by clear and convincing evidence. *See State v. Kieffer*, 217 Wis. 2d 531, 541-42, 577 N.W.2d 352 (1998).

¶10 Without veracity, basis of knowledge, or corroboration of significant details, a tip is not sufficiently reliable to support reasonable suspicion for an investigative stop. *See Rutzinski*, 241 Wis. 2d 729, ¶¶18-25; *Florida v. J.L.*, 529 U.S. 266, 271 (2000). In *J.L.*, 529 U.S. at 271, the Supreme Court held that the tip was unreliable where the tipster was not named and gave no basis for knowing about the crime. The *J.L.* tipster called police to report "that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." *Id.* at 268. Police went to the bus stop, located a black male wearing a plaid shirt, and without independently observing any suspicious behavior, initiated an investigative stop and found a concealed weapon. *Id.* at 268-69. The court held the tip was unreliable because "[a]ll the police had to go on ... was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had any inside information about J.L." *Id.* at 271. Therefore, the tip in *J.L.* fell outside the spectrum of reliability. *Id.*

¶11 Conversely, a tip is firmly within the reliability spectrum when a tipster provides his or her name and relays an eyewitness account. *State v. Sisk*, 2001 WI App 182, ¶¶3, 8-11, 247 Wis. 2d 443, 634 N.W.2d 877. In *Sisk*, the court held a tipster was reliable because he provided what he said was his name

and reported that he saw two armed men enter a building. *Id.*, ¶¶3, 9. Even though police corroborated only innocent details—the suspects’ descriptions and location—the court found those details along with the named tipster’s eyewitness account supported reasonable suspicion. *Id.*, ¶¶3, 8-11.

¶12 Here, Goretski argues that the tip was unreliable because it was anonymous. Although police knew Lemke’s name, Goretski argues the tip is anonymous because there are no facts showing Lemke offered his name to dispatch. Goretski instead suggests that dispatch may have obtained Lemke’s name through a caller identification system.

¶13 We agree that the record does not establish that Lemke provided his name to dispatch.⁴ However, reliability does not turn only on whether a tipster is

⁴ Although the trial court found Lemke identified himself, the record does not support that finding. The transcript of the motion hearing contains the following cross-examination of Bayer:

Q: Do you know one way or the other as to whether or not the person, Drew Lemke, identified himself when he called or could it have been, as far as you know, that maybe his identity was anonymous but it was discovered later by staffers at the 911 center?

A. Are you asking me if I know that?

Q. Yeah.

A. At that time, no, I did not know that.

Q. So you don’t know whether we were dealing with an anonymous tip or someone who actually called in and identified himself?

A. Before I made contact with him, they did tell me the name of the person who called and said it was a Drew Lemke.

Q. But you don’t know how he was identified?

(continued)

anonymous or known. The significance of a known versus anonymous tip is the degree of veracity courts may assign to the tip. *Williams*, 407 U.S. at 146-47. The less veracity a tipster has, the greater his or her basis of knowledge must be. *Rutzinski*, 241 Wis. 2d 729, ¶38. Lemke was not personally known to police, had not supplied reliable tips in the past, and did not offer the information to police in person. See *Williams*, 407 U.S. at 146 (finding reasonable suspicion based on a tip from an informant known personally to police). Therefore, the tip also required at least some indication of Lemke’s basis of knowledge for it to be reliable. See *Kolk*, 298 Wis. 2d 99, ¶¶2, 19. The State does not establish Lemke’s basis of knowledge, nor does the State offer any significant corroborated details. Thus, even accepting the State’s argument that Lemke had veracity because his name was known to police, that on its own is not enough. Because the State cannot establish Lemke’s basis of knowledge, the tip does not support reasonable suspicion.

¶14 The State argues that it has established Lemke’s basis of knowledge because Lemke was an eyewitness. The State asserts that not only did Lemke see Goretzki drinking at the bar, but Lemke also provided inside information—including a description of Goretzki’s car and license plate number as well as Goretzki’s prior driving offenses and bond conditions. We conclude that the record does not establish Lemke as an eyewitness and that the details Lemke provided do not clearly establish that he had inside information.

¶15 In *Kolk*, we considered a similar situation in which the tip from a named tipster was void of a basis of knowledge and details that demonstrated

A. No, I don’t.

inside knowledge. *Id.*, ¶¶2, 19. There, the tipster identified himself to an investigator by providing his name, date of birth, address, and cell phone number. *Id.*, ¶2. He told the investigator that Calvin Kolk was heading to Milwaukee to pick up some OxyContin. *Id.* The tipster conveyed information to the investigator four or five times over the course of the day. *Id.* However, the record did not state what that information was. *Id.* The officer drove by Kolk's home and saw Kolk's car there. *Id.*, ¶3. The tipster stated Kolk would head to Madison that afternoon. *Id.* Police then set up surveillance at Kolk's home. *Id.* Later, Kolk left his home, got in his car, and headed north. *Id.*, ¶4. The police followed Kolk and stopped him for speeding. *Id.*, ¶4. After the traffic stop concluded, the officer frisked Kolk and found drugs. *Id.*, ¶¶6-7.

¶16 We rejected the State's argument that the tip provided reasonable suspicion for Kolk's continued detention once the traffic stop was concluded. *Id.*, ¶1. The tipster had not told the police how he knew of Kolk's intentions. *Id.*, ¶15. Further, police corroborated only insignificant facts: Kolk's identity, the kind of car he drove, and that he might drive to Madison. *Id.*, ¶17. We held that all the tipster provided was a "prognostication that Kolk would drive his vehicle in a direction that would not preclude his being headed to Madison." *Id.*, ¶18. We stated that the tipster had not provided specific details or confirmed predictions that allowed for significant corroboration. *Id.*, ¶19. Such specific details or confirmed predictions would demonstrate that the tipster was familiar enough with the situation to be trustworthy. *Id.* Thus, the tip lacked "observational reliability," and was not sufficiently reliable to support reasonable suspicion. *Id.*, ¶15.

¶17 Similarly, we cannot conclude that Lemke was familiar enough with Goretzki's criminal acts to be trustworthy. We cannot determine Lemke's basis of knowledge from Bayer's testimony.⁵ Bayer's testimony shows only that someone saw Goretzki drinking. Thus, the record does not reveal how Lemke came to know that Goretzki had been drinking at the bar, and it does not clearly or convincingly establish Lemke as an eyewitness. It follows then that "[t]he tip here might have been based on first-hand knowledge, but it might also have been the product of rumor or speculation. We do not know, either because the informant did not tell the police or because the police did not tell the circuit court." *Id.*, ¶15.

⁵ The transcript of the motion hearing contains the following cross-examination of Bayer:

Q. And just to make sure I am clear, the information then from the caller, as far as we can tell, is just that *someone said they saw* [Goretzki] drinking at a bar?

A. That was part of it.

Q. Okay. But there is nothing in your report and nothing in your testimony that would establish how much he had to drink; is that correct?

A. That's correct.

Q. And there is also no detail in this tipster information about whether he seemed impaired; is that correct?

A. The call that I received was that it was an intoxicated driver and that our dispatch center had obtained that from the caller.

Q. But in your report, the only information there is is that *somebody said they saw* him consume alcohol, correct?

A. Correct.

(Emphasis added.) We have no way of knowing the identity of the "somebody" who saw Goretzki drinking.

Thus, the State has not met its burden of establishing the reliability of the tip by clear and convincing evidence. *See Kieffer*, 217 Wis. 2d at 542.

¶18 The record also does not show that Lemke offered any particular details or predictions that showed inside knowledge. Instead, even if we assume the details dispatch relayed to Bayer came from Lemke directly, those details offered only insignificant facts: Goretski's identity, the kind of car he drove, his criminal history, and that he might drive home. Those details do not establish inside knowledge regarding Goretski's drunk driving in this particular incident. Anyone on the street could know what kind of car Goretski drove. Knowledge of Goretski's criminal history is also not dispositive because it does not establish that Lemke saw Goretski that night. Further, while Bayer testified that Goretski arrived in the vicinity of his home within the estimated time it would take to drive from the bar, Lemke did not provide contemporaneous updates that would give Bayer the opportunity for verifiable observations. Therefore, Bayer acted on "a tip that neither demonstrated a basis of knowledge nor allowed for much significant corroboration." *Kolk*, 298 Wis. 2d 99, ¶19.

¶19 Finally, the State argues that Bayer corroborated Lemke's allegation that Goretski was intoxicated through Bayer's observation that Goretski took an indirect route home. We disagree. In cases where officers have based reasonable suspicion on innocent acts, those innocent acts are also supported by eyewitness accounts or corroborated inside information to support reasonable suspicion of unlawful conduct. *See, e.g., Rutzinski*, 241 Wis. 2d 729, ¶33. Here, the record does not establish that Lemke was an eyewitness or that he supplied corroborated inside information. Thus, the question is whether an officer's observation of a driver taking an indirect route to his assumed destination, with nothing more,

amounts to significant corroboration of a drunk-driving report. We hold it does not. Accordingly, we reverse.

By the Court.—Judgments reversed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

