

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 14, 2010

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 No. 2009AP992-CR

Cir. Ct. No. 2007CT493

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN D. TISCHER, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County:
JAMES M. MASON, Judge. *Reversed and cause remanded for proceedings
consistent with this opinion.*

¶1 DYKMAN, P.J.¹ John Tischer appeals from a judgment of conviction for operating a motor vehicle with a prohibited alcohol content, third

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08).

offense. *See* WIS. STAT. § 346.63(1)(b). Tischer argues that an anonymous tip to police together with subsequent police observations did not amount to reasonable suspicion to support the traffic stop of his vehicle. We agree. Accordingly, we reverse.

Background

¶2 The following undisputed facts are taken from the motion hearing transcript and the trial court's factual findings. On September 7, 2007, at 8:17 p.m., Officer Christopher Berg was on duty in Marshfield when he received information from dispatch that an anonymous caller had reported that an occupant of a green Ford Escort was dumping beer out of the car in an Arby's drive-through. Berg then drove towards the location where he expected the vehicle to be. About three quarters of a mile from Arby's, Berg observed a vehicle matching the description and bearing the license plate number provided by the anonymous caller. Berg followed the vehicle, and observed that it was travelling about twenty miles per hour in a twenty-five miles per hour zone. He also observed that the Escort, which was in the far right lane of a four-lane road, was riding the dividing line on its left. To the Escort's right was a parking lane. Although the Escort never crossed the dividing line to its left, Berg observed the truck to the Escort's left apply its brakes and move slightly to its left.

¶3 Berg then stopped the Escort. Based on information obtained during the stop, the State charged Tischer with operating a motor vehicle while intoxicated, third offense, under WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(am)3., and operating a motor vehicle with a prohibited alcohol concentration, third offense, under §§ 346.63(1)(b) and 346.65(2)(am)3.

¶4 Tischer moved to suppress the evidence obtained during the stop, arguing that the stop was not supported by reasonable suspicion and therefore violated his right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution. At the motion hearing, Berg testified for the State and the court viewed the video taken from a camera mounted on Berg's squad car that captured Tischer's driving while Berg followed him. The trial court found that there was reasonable suspicion supporting the stop and denied Tischer's motion to suppress evidence obtained during the stop. Tischer then pled guilty to operating a motor vehicle with a prohibited alcohol concentration, third offense, and the court entered a judgment of conviction. Tischer appeals.

Standard of Review

¶5 We review a court's ruling on a motion to suppress evidence in two steps. *State v. Robinson*, 2009 WI App 97, ¶9, _Wis. 2d_, 770 N.W.2d 721. "First, we will uphold the court's factual findings unless they are clearly erroneous." *Id.* Next, we independently apply constitutional principles to those facts. *Id.*

Discussion

¶6 Tischer argues that the traffic stop of his vehicle violated the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution because it was not supported by reasonable suspicion that he had an open intoxicant on a public highway under WIS. STAT. § 346.935 or that he was driving while intoxicated under WIS. STAT. § 346.63. First, he argues that the tip was insufficiently reliable to support reasonable suspicion because the tipster was unknown and unidentifiable and provided only a bare conclusion that beer was

poured from Tischer's vehicle. Next, he argues that even if the tip were sufficiently reliable, the tipster alleged only that beer was poured from Tischer's car in an Arby's drive-through, which is not in and of itself contrary to statute. *See* § 346.935 (prohibiting consuming or possessing alcohol in a motor vehicle *upon a highway*). He argues that Arby's is privately owned and therefore not a "highway," and thus the tip did not allege violation of a traffic regulation. *See* WIS. STAT. §§ 340.01(22) ("Highway' means all public ways and thoroughfares and bridges on the same but does not include private roads or driveways as defined in sub. (46).") and 340.01(46) ("Private road or driveway' is every way or place in private ownership and used for vehicular travel only by the owner and those having express or implied permission from the owner"). Finally, he argues that the information known to police did not provide reasonable suspicion that he was driving while intoxicated, because Berg observed only common non-suspicious driving behaviors, which did not corroborate any information contained in the anonymous tip.

¶7 The State responds that the totality of the circumstances—the anonymous tip that someone was pouring beer out of Tischer's car in the Arby's drive-through, and Berg's observation that Tischer was driving twenty miles per hour in a twenty-five-mile-per-hour zone and rode the dividing line to his left, causing the truck on his left to brake and move over slightly—provided reasonable suspicion that Berg was driving while intoxicated and a traffic violation had occurred. It cites WIS. STAT. § 346.13(1), which requires drivers to "drive as nearly as practicable entirely within a single lane," and argues that there was reasonable suspicion that Tischer was having difficulty maintaining control of his

vehicle, thus supporting the stop.² We conclude that the totality of the circumstances did not amount to reasonable suspicion supporting the stop, and therefore reverse.

¶8 Under the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution, “all searches and seizures [must] be objectively reasonable under the circumstances existing at the time of the search or seizure. Investigative traffic stops, regardless of how brief in duration, are governed by this constitutional reasonableness requirement.” *State v. Rutzinski*, 2001 WI 22, ¶¶13-14, 241 Wis. 2d 729, 623 N.W.2d 516 (citations omitted). Subject to the constitutional reasonableness requirement, “a police officer may in appropriate circumstances temporarily stop an individual when, at the time of the stop, he or she possesses specific and articulable facts which would warrant a reasonable belief that criminal activity was afoot.” *State v. Waldner*, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996).

¶9 Information in a tip to police may support an investigative stop under appropriate circumstances. *Rutzinski*, 241 Wis. 2d 729, ¶17. However, before police may rely on a tip to support reasonable suspicion for a traffic stop, the police must assess the tip’s reliability and content. *Id.*

² The State does not respond to Tischer’s argument that the allegations in the tip do not allege that he violated WIS. STAT. § 346.935 for having an open intoxicant in a motor vehicle on the highway. The State also does not respond to Tischer’s argument that the tip lacked sufficient reliability to justify the stop. Rather, the State argues that the totality of the circumstances provided reasonable suspicion that Tischer was driving while intoxicated. We therefore deem these arguments conceded. See *State ex rel. Sahagian v. Young*, 141 Wis. 2d 495, 500, 415 N.W.2d 568 (Ct. App. 1987). Nonetheless, we address the reliability of the tip below. Because the tip was insufficiently reliable, we need not address whether a reliable tip of an occupant of a car dumping beer in a fast food restaurant drive-through would provide reasonable suspicion of a violation of § 346.935.

¶10 First, “[t]ips should exhibit reasonable indicia of reliability.” *Id.*, ¶18. A tip’s reliability is based on an evaluation of the tipster’s “veracity” and “basis of knowledge.” *Id.* The reliability of a tip is assessed under the totality of the circumstances, so that a deficiency in veracity may be compensated for by a strong basis of knowledge and vice versa, “or by some other indicia of reliability.” *Id.*

¶11 When “the police receive a tip from an unidentifiable informant, the tip nonetheless may be deemed reliable if it contains ‘inside information’ or a similar verifiable explanation of how the informant came to know of the information in the tip, which the police in turn independently corroborate.” *Id.*, ¶25. Thus, “there are situations in which an anonymous tip, suitably corroborated, exhibits sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.” *State v. Williams*, 2001 WI 21, ¶31, 241 Wis. 2d 631, 623 N.W.2d 106 (citation omitted).

¶12 In *Alabama v. White*, 496 U.S. 325, 326-27 (1990), the United States Supreme Court analyzed whether an anonymous tip stating that White would leave a particular apartment complex at a particular time in a particular vehicle, and would go to a particular hotel with an ounce of cocaine in a brown case, supported reasonable suspicion to stop White’s vehicle. The Court concluded that the tip, together with police corroboration of several of the details provided in the tip, amounted to reasonable suspicion for the stop. *Id.* The Court explained that “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.” *Id.* at 332 (citation omitted). The Court said that “[w]hat was important was the caller’s ability to predict [White’s] *future behavior*, because it demonstrated inside information—a

special familiarity with [White's] affairs.” *Id.* The Court concluded that “[a]lthough it [was] a close case, ... under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop.” *Id.*

¶13 Ten years later, the Court distinguished *White* in *Florida v. J.L.*, 529 U.S. 266, 270-71. In *J.L.*, 529 U.S. at 268, police received information from an anonymous caller that a young black male in a plaid shirt at a particular bus stop had a gun. Police proceeded to the identified bus stop, located a black male wearing a plaid shirt, and frisked him, discovering a gun. *Id.* The Court concluded that while the facts in *White* were “borderline” supportive of reasonable suspicion to support an investigative stop, the tip in *J.L.* “lacked the moderate indicia of reliability present in *White* and essential to the Court’s decision in that case.” *J.L.*, 529 U.S. at 271. 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 inside information about J.L.,” the “stop and frisk” was unconstitutional. *Id.* at 269-71.

¶14 Here, the tip was from an unknown informant calling from an unknown location. While Berg testified that dispatch informed him of “what the anonymous complainer observed,” there is no indication in the record that the caller provided simultaneous observations or even why Berg believed that the caller was an eyewitness.³ See *Williams*, 241 Wis. 2d 631, ¶¶4, 33, 37, 39-41 (in transcript of 9-1-1 call by anonymous tipster, which was admitted at suppression

³ The trial court found that the caller had “seen” Tischer’s vehicle at Arby’s, and that the caller “reported” that the driver was dumping beer out of the car.

hearing, caller “explains exactly how she knows about the criminal activity she is reporting: she is observing it,” and thus “has made plain that she is an eyewitness,” and police then corroborated significant details in the tip). Additionally, the tip provided no verifiable information beyond the easily obtained information of the location of Tischer’s car at Arby’s and the car’s description and license plate number.⁴ See *id.* at ¶¶39-41 (explaining significance of police corroboration of details supplied by anonymous tipster). Berg then corroborated the description and license plate number of Tischer’s car and its location in the general vicinity of Arby’s, and observed Tischer driving five miles per hour under the speed limit and riding the dividing line to his left, so that the truck on his left slowed and moved over. These observations, however, did not bolster the reliability of the tip that Tischer had poured beer out of his car in the Arby’s parking lot, as they did not corroborate any information received in the tip. Thus, under *White* and *J.L.*, the tip was not sufficiently reliable to support reasonable suspicion.

¶15 Finally, the supreme court has “recognize[d] that there may be circumstances where an informant’s tip does not exhibit indicia of reliability that fit neatly within the bounds of [case law], but where the allegations in the tip suggest an imminent threat to the public safety or other exigency that warrants immediate police investigation.” *Rutzinski*, 241 Wis. 2d 729, ¶26. Here, the tip contained information that an occupant of Tischer’s car was dumping beer out of the car in the Arby’s drive-through. The State does not argue that the tip provided the police with reason to believe there were “exigent circumstances” requiring

⁴ In its oral ruling, the trial court made findings of fact adopting Berg’s testimony. It also found that the tipster stated that Tischer was “heading down Central Avenue.” As Tischer points out, there was no evidence that the tipster relayed anything about Tischer’s location beyond the Arby’s drive-through. We therefore do not consider this fact.

immediate action despite the tip's lack of reliability. We conclude that a tip that a motorist had poured beer out of a car at a fast food restaurant drive-through does not amount to exigent circumstances supporting deviation from the reliability test set forth in the case law.

¶16 The State argues, however, that the totality of the circumstances provided reasonable suspicion that Tischer was intoxicated. Without the tip, which we have deemed lacking in reliability, we are left only with Berg's observation that Tischer drove five miles per hour under the speed limit and drove on the dividing line to his left, causing the truck on his left to brake and move over slightly. While we recognize that even driving that is not erratic, unsafe, or illegal may give rise to reasonable suspicion under the totality of the circumstances, *see State v. Post*, 2007 WI 60, ¶¶24-25, 301 Wis. 2d 1, 733 N.W.2d 634, we agree with Tischer that the observations by Berg in this case were too common to support reasonable suspicion of criminal activity. Berg stated that Tischer "rode" the dividing line on his left but did not cross it, and that there was a parking lane to his right. Tischer was driving five miles per hour below the speed limit. These facts do not amount to reasonable suspicion of intoxicated driving.

By the Court.—Judgment reversed and cause remanded for proceedings consistent with this opinion.

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

