

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 14, 2011

A. John Voelker
Acting 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. 2011AP700

Cir. Ct. No. 2009CV1210

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF SHEBOYGAN FALLS,

PLAINTIFF-RESPONDENT,

v.

JOHN D. PRINSEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County:
JAMES J. BOLGERT, Judge. *Affirmed.*

¶1 REILLY, J.¹ John D. Prinsen appeals his conviction for operating a motor vehicle while intoxicated and driving with a prohibited alcohol

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

concentration. Prinsen was pulled over after another driver called 911 to report that Prinsen was driving in the wrong direction on a highway. Prinsen alleges that the individual who called 911 was not a reliable informant such that the arresting officer should not have relied on the dispatch report in pulling over Prinsen. We reject Prinsen's argument and affirm his conviction.

BACKGROUND

¶2 Late in the evening on July 26, 2008, Brian Liebenthal was driving on Highway 57 when he noticed a car on the opposite side of the highway median driving in the wrong direction. Liebenthal called 911 to report the driver, and continued to follow the car by driving parallel with it on the highway. After about two or three miles of driving side by side, the other vehicle turned onto another highway and Liebenthal followed by driving behind the vehicle. Liebenthal reported the vehicle's make and license plate number to the 911 operator.

¶3 As this was occurring, Officer Scott Hoogester received a call from dispatch indicating that there was a vehicle that had been driving on the wrong side of the highway. The officer also received the vehicle's license plate number from dispatch. When the officer ran the license plate number on his laptop, he found that the vehicle was a 1995 green four-door Pontiac registered to John Prinsen. Dispatch also informed the officer that the suspect vehicle was being followed by the individual who called 911. The officer parked his vehicle at an intersecting highway to wait for the suspect vehicle. When the officer saw the suspect car drive by, he immediately pulled out. As he followed the suspect car, the officer noted that the license plate number matched the number he was given by dispatch. The officer then pulled over the suspect vehicle and identified the driver as Prinsen. Liebenthal also pulled over to the side of the road and later

provided a statement to the police. Prinsen failed the field sobriety tests and subsequently registered a .21 percent blood alcohol level.

¶4 Prinsen was prosecuted by the City of Sheboygan Falls and convicted in municipal court of operating a motor vehicle while intoxicated and operating with a prohibited alcohol content. He appealed his conviction to the circuit court, arguing that the evidence used to convict him should be suppressed because the officer lacked reasonable suspicion to conduct a traffic stop. The circuit court denied Prinsen's motion to suppress, finding that the officer had probable cause that Prinsen was driving the wrong way on a highway, and reasonable suspicion that Prinsen was impaired. Prinsen's conviction was subsequently affirmed and he now appeals.

STANDARD OF REVIEW

¶5 The parties dispute whether Prinsen's stop should be reviewed under the probable cause standard or the reasonable suspicion standard. Ironically, it is the City arguing for the higher probable cause standard and Prinsen arguing for the lower reasonable suspicion standard. The transcript of the motion to suppress hearing indicates that the officer stopped Prinsen for allegedly driving on the wrong side of the highway, and not on suspicion of drunk driving. We will therefore apply the probable cause standard of review.

¶6 Whether a traffic stop was supported by probable cause is a question of constitutional fact. *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. A question of constitutional fact is a mixed question of law and fact. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. We apply a two-step standard of review to this type of question. *Id.* First, we review the circuit

court's findings of historical fact under the clearly erroneous standard, and second, we review de novo the application of those facts to constitutional principles. *Id.*

¶7 An officer may conduct a traffic stop when he or she has probable cause to believe that a traffic violation has occurred. *Popke*, 317 Wis. 2d 118, ¶13. Probable cause exists when the officer has reasonable grounds to believe that the suspect is committing or has committed a crime. *Id.*, ¶14.

DISCUSSION

¶8 It appears that Prinsen is arguing that Officer Hoogester should not have relied on the dispatch report in conducting the traffic stop because Liebenthal was not a reliable informant. The only evidence Prinsen cites to establish unreliability is that Liebenthal could not recall the color of Prinsen's car. Prinsen has not met his burden of proof on appeal.

¶9 In *State v. Rutzinski*, 2001 WI 22, ¶¶17-18, 241 Wis. 2d 729, 623 N.W.2d 516, the Wisconsin Supreme Court held that police may rely on informants' tips in conducting investigative stops as long as the tips exhibit "reasonable indicia of reliability." Courts must look to the informant's veracity and the informant's basis of knowledge. *Id.*, ¶18. "[I]f there are strong indicia of the informant's veracity, there need not necessarily be any indicia of the informant's basis of knowledge." *Id.*, ¶21.

¶10 The supreme court relied on three factors in concluding that the anonymous 911 informant in *Rutzinski* was reliable. First, the informant exposed him- or herself to being identified, as the informant told the police that he or she was in the vehicle in front of Rutzinski. *Id.*, ¶32. As the informant likely knew that he or she could be prosecuted for giving false information to the police, the

police were justified in relying upon the informant's tip. *Id.* Second, the informant explained that he or she was making personal observations of Rutzinski's behavior as it occurred. *Id.*, ¶33. Finally, the informant alleged that Rutzinski was driving erratically, which suggested that Rutzinski posed an imminent threat to public safety. *Id.*, ¶34.

¶11 The *Rutzinski* standard is met in this case. Liebenthal, unlike the informant in *Rutzinski*, was not anonymous. He identified himself and provided a statement to the police, which significantly bolsters his credibility. Liebenthal also observed Prinsen's driving firsthand, and was close enough to report Prinsen's license plate number. Finally, Prinsen was allegedly driving on the wrong side of a highway, an immense threat to public safety. Liebenthal was an amply reliable informant, and Officer Hoogester was justified in relying on the information conveyed by the dispatch operator.

CONCLUSION

¶12 Prinsen's conviction is affirmed.

By the Court.—Order affirmed.

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

