COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3095-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SYLVESTER GORDON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM R. MOSER,[1] Reserve Judge. *Affirmed.*

CURLEY, J.[2] Sylvester Gordon appeals from the judgment of conviction entered after he pleaded guilty to operating a motor vehicle under the influence of an intoxicant, contrary to §§ 346.63(1)(a) and 346.65(2), STATS.

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[1] The judgment of conviction was entered by the Hon. William R. Moser, Reserve Judge, acting for the Hon. Dennis P. Moroney.

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

Prior to pleading guilty, Gordon filed a motion to suppress, contending that Milwaukee Police Officer Jeanette Roycraft lacked reasonable suspicion to stop his car, which the trial court denied. Gordon claims that the trial court erred by denying his suppression motion. Although the tip which Officer Roycraft relied upon failed to predict future behavior on Gordon's part, and although Officer Roycraft did not independently investigate whether Gordon was intoxicated, we conclude that, under the totality of the circumstances, Officer Roycraft's stop of Gordon's car was based on reasonable suspicion. Therefore, the trial court properly denied Gordon's motion to suppress, and we affirm.

I. BACKGROUND.

On October 27, 1996, Officer Roycraft was in her squad car heading southbound on North 35th Street in the City of Milwaukee. Officer Roycraft stopped for a red light at the intersection of 35th and Michigan Streets. When the light turned green, a man riding a motorcycle who was stopped for the stop light in the northbound lane flagged her down. Officer Roycraft stopped her vehicle and rolled down her window to find out what the man wanted. The man then informed Officer Roycraft that the car directly behind him had almost hit him a little earlier, and that it was his opinion that the driver might be intoxicated. As the man told Officer Roycraft this information, he pointed to a white station wagon that was approximately ten yards behind his motorcycle. After giving Officer Roycraft the information, the motorcyclist immediately drove away, and Officer Roycraft did not obtain either his name or his motorcycle's license plate number.

After speaking to the motorcyclist, Officer Roycraft immediately made a U-turn and pulled into traffic directly behind the white station wagon. Officer Roycraft then activated her red emergency lights and pulled the driver

over, who was identified as Gordon. Before stopping Gordon's car, Officer Roycraft did not observe any erratic driving, weaving, excessive speed, or other signs of drunk driving.

Gordon was eventually arrested for, and charged with, operating under the influence of an intoxicant and refusal to comply with Wisconsin's implied consent law. In the trial court, Gordon filed a motion to suppress, contending that Officer Roycraft lacked reasonable suspicion to stop his car. The trial court denied Gordon's motion following a hearing at which Officer Roycraft was the only witness. Gordon subsequently pleaded guilty, was sentenced, and now appeals.

II. ANALYSIS.

When reviewing a trial court's denial of a motion to suppress, this court "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, 833 (1990) (citation omitted). However, whether a search or seizure occurred, and, if so, whether it passes statutory and constitutional muster, are questions of law which we review *de novo*. ***Id.***

The United States Supreme Court held in ***Terry v. Ohio***, 392 U.S. 1 (1968), that police officers may "in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." ***Id.*** at 22. To execute a valid investigatory stop, a law enforcement officer must reasonably suspect, in light of his or her experience, that criminal activity has, is, or is about to take place. *See* ***Richardson***, 156 Wis.2d at 139, 456 N.W.2d at 834. Such reasonable suspicion must be based on specific and articulable facts which,

taken together with rational inferences from those facts, and judged against an objective standard, would warrant a person of reasonable caution to believe that the action taken was appropriate. *See* ***id.*** This test applies to an investigatory stop of a vehicle and the detention of its occupants. ***Id.*** An officer's ability to execute an investigatory stop based on reasonable suspicion has also been codified in Wisconsin, at § 968.24, STATS. As the Wisconsin Supreme Court has stated:

> The focus of an investigatory stop is on reasonableness, and the determination of reasonableness depends on the totality of the circumstances:
>
> It is a common sense question, which strikes the balance between the interests of society in solving crime and the members of that society to be free from unreasonable intrusions. The essential question is whether the action of the law enforcement officer was reasonable under all the facts and circumstances present.

Richardson, 156 Wis.2d at 139-40, 456 N.W.2d at 834 (citations omitted).

In the instant case, Officer Roycraft based her decision to stop Gordon's vehicle on information gained from an unknown man on a motorcycle, who left the scene before Officer Roycraft was able to determine his identity. Thus, although this case involves a face-to-face encounter, rather than an anonymous telephone call, the motorcyclist's information amounted to an anonymous tip. Therefore, the validity of this investigatory stop must be analyzed in light of the relevant case law concerning ***Terry*** stops based on anonymous tips.

In ***Richardson***, the Wisconsin Supreme Court reviewed the principles for analyzing an anonymous tip which the United States Supreme Court had established in ***Illinois v. Gates***, 462 U.S. 213 (1983), and confirmed in ***Alabama v. White***, 496 U.S. 325 (1990). ***Richardson***, 156 Wis.2d at 138-43, 456 N.W.2d at 834-36. Our supreme court noted that the United States Supreme

Court, in ***Gates***, had stated that whether information from an anonymous informant gives rise to probable cause for a search warrant is to be determined under a totality of the circumstances test. ***Id.*** at 140, 456 N.W.2d at 834. By doing so, the ***Gates*** court abandoned the "overly rigid" ***Aguilar-Spinelli*** test, but stated that an informant's "veracity," "reliability," and "basis of knowledge" remained highly relevant when examining the totality of the circumstances. ***Id.*** at 140, 456 N.W.2d 834-35.

Our supreme court also noted that ***White*** was the definitive decision by the United States Supreme Court dealing with anonymous tips in a ***Terry*** stop context. *See* ***id.*** at 141, 456 N.W.2d at 835. In ***White***, the court dealt with an anonymous telephone tip that the defendant would leave an apartment building at a particular time, and drive in a particular car to a particular motel carrying an attaché case containing cocaine. ***White***, 496 U.S. at 327. The Court held that the tip, like that in ***Gates***, provided "virtually nothing from which one might conclude that [the caller] is either honest or his information reliable; likewise, the [tip] gives absolutely no indication of the basis for the [caller's] predictions …." ***Id.*** at 329 (citation omitted; alterations in ***White***). Thus, the Court stated that the tip, standing alone, would not justify a ***Terry*** stop. *See* ***id.*** The Court, however, concluded that "it is not unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability to the other allegations of the caller." ***Id.*** at 331-32. Most importantly, however, the court explained:

> We think it also important that, as in ***Gates***, "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. … When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest, but also that he was well informed, at least well enough to justify the stop.

Id. at 332 (citations omitted; alterations in ***White***).

In ***Richardson***, the Wisconsin Supreme Court held that "the reasoning in ***White*** is reasonable and appropriate not only for the Fourth Amendment of the United States Constitution but also Article I, sec. 11 of the Wisconsin Constitution." ***Richardson,*** 156 Wis.2d at 141-42, 456 N.W.2d at 835 (citation omitted). In so doing, the supreme court noted that:

> When attempting to define the nature of the verified details of the tip necessary, the ***White*** court placed special emphasis on the police verification of the caller's prediction of the third party/suspect's future actions. The court referred to this as a verification of significant aspects of the tip.

Id. at 142, 456 N.W.2d at 835-36 (citation omitted). The court then stated: "We adopt this aspect of verification of the anonymous tip which serves to avoid investigative stops based on minimal facts that any passerby or resident on the street could enunciate." ***Id.*** at 142, 456 N.W.2d at 836.

In ***State v. Williams***, 214 Wis.2d 411, 570 N.W.2d 892 (Ct. App. 1997), this court recently held that an anonymous telephone tip did not provide reasonable suspicion for an investigatory stop because it was insufficiently corroborated. In that case, police received an anonymous telephone call indicating that someone was dealing drugs out of a blue and burgundy Bronco parked in the

caller's apartment building's parking lot. ***Id.*** at 415-16, 570 N.W.2d at 893-94. Police officers responded to the call, and after arriving on the scene, observed a blue and burgundy Chevy Blazer with two occupants in the parking lot which the caller had described. ***Id.*** at 413, 570 N.W.2d at 893. The officers, without conducting any independent surveillance, or observing any suspicious activity, drew their weapons and ordered the defendant and his passenger out of the car. ***Id.*** at 414, 570 N.W.2d at 893. This court held that the stop was unreasonable, specifically focusing on the fact that the tip failed to predict the defendant's future behavior, and instead, only reported readily observable information. ***Id.*** at 417-24, 570 N.W.2d at 894-97. In so doing, this court relied, in part, on ***United States v. Roberson***, 90 F.3d 75 (3rd Cir. 1996), and approvingly quoted the following language from that case:

> Refusing to stretch ***Alabama v. White*** any further, we hold 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.

Williams, 214 Wis.2d at 422, 570 N.W.2d at 896.

Given the importance placed through ***Gates, White, Richardson,*** and ***Williams***, on the corroboration of "significant aspects" of an anonymous tip, specifically defined as the prediction of future behavior as opposed to the description of readily observable facts, the stop in the instant case at first glance

seems problematic. Officer Roycraft did not independently investigate whether Gordon was intoxicated, but instead, relied solely on the anonymous tip given by the motorcyclist. The unknown motorcyclist in this case pointed at Gordon's car, and told Officer Roycraft that: (1) Gordon had previously almost hit him; and (2) in the motorcyclist's opinion, Gordon was intoxicated. Neither the motorcyclist's statements, nor his pointing at Gordon's vehicle, constituted a prediction of Gordon's future behavior. Although the State argues that according to ***State v. Krier***, 165 Wis.2d 673, 478 N.W.2d 63 (Ct. App. 1991), the motorcyclist predicted Gordon's future behavior by indicating the direction his car was traveling, there is no evidence in the record that the motorcyclist actually did so. The evidence from the record only indicates that the motorcyclist pointed to Gordon's car, and does not show that the motorcyclist, by doing so, communicated any information about the future direction of Gordon's travel. Therefore, this case seems to pose a problem similar to that in ***Williams***. By pointing at Gordon's car, the anonymous tipster only communicated readily observable information that any "anonymous prankster, rival, or misinformed individual" in the motorcyclist's position could have had access to, namely, that there was a white station wagon directly behind his motorcycle. *See* ***Williams***, 214 Wis.2d at 422, 570 N.W.2d at 896. The corroboration of this information could not, therefore, constitute corroboration of the "significant aspects" of the anonymous tip which the supreme court explicitly adopted in ***Richardson*** in order to "avoid investigative stops based on minimal facts that any passerby or resident on the street could enunciate." *See* ***Richardson***, 156 Wis.2d at 142, 456 N.W.2d at 836. This court concludes, however, that the instant case is distinguishable from ***Williams***, and that, under the totality of the circumstances, notwithstanding the lack of a prediction of future behavior, or an independent investigation of Gordon's intoxication, Officer Roycraft's stop was reasonable.

The first important distinguishing factor is the fact that Officer Roycraft received the anonymous tip in person, rather than through a telephone call to the police department. As the Supreme Court has stated, an informant's "veracity" or "reliability" remains "highly relevant" to a determination of the reasonableness of a ***Terry*** stop based on a tip. ***Gates***, 462 U.S. at 230. Although by the very nature of an anonymous telephone tip it is usually difficult to assess the credibility of the tipster, this case presents the unusual situation of an in-person, face-to-face encounter with an anonymous individual. Although Officer Roycraft was not able to determine the motorcyclist's identity, she was able to observe his demeanor and to evaluate his credibility and the consequent reliability of his statements concerning Gordon. Therefore, from a common sense viewpoint, the fact that the motorcyclist communicated this information personally to Officer Roycraft makes the stop more reasonable.

Second, in this case, Officer Roycraft could reasonably conclude that the motorcyclist had had an opportunity to directly observe Gordon's conduct because, as Officer Roycraft observed at the time of the tip, the motorcyclist was physically located directly in front of Gordon's car. When police officers receive an anonymous telephone call, without tracing the call, they are unable to determine whether the caller has actually had an opportunity to observe the suspect, and the possibility that the caller is a prankster, or misinformed, is therefore greater. The fact that Officer Roycraft saw for herself that the motorcyclist could have personally observed Gordon's driving thus contributed to the reliability of the tip, and made the stop more reasonable.

Third, because of a number of factors, there was little danger of misidentification in this case, and it was unlikely that Officer Roycraft would have stopped the wrong person. Although anonymous tip situations fit the framework

established by cases such as ***Gates, White, Richardson*** and ***Williams***, the factors contributing to the reasonableness of a non-anonymous tip ***Terry*** stop remain relevant to the analysis. In ***State v. Guzy***, 139 Wis.2d 663, 407 N.W.2d 548 (1987), the Wisconsin Supreme Court adopted Professor LaFave's six-factor analysis for use in determining the reasonableness of ***Terry*** stops in general:

> (1) The particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in the area; (4) the known or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.

Id. at 677, 407 N.W.2d at 554. The first four factors of the test clearly relate to the likelihood that the police officer conducting a stop is detaining the correct suspect. If the police officers do not have a particular description of the suspect, or the direction of the person's flight, or if the area in which the suspect might be found is large and filled with other non-suspects, the officer is less likely to detain the correct person, and thus, a stop is less reasonable. In the instant case, however, the motorcyclist, by pointing at Gordon's car, gave Officer Roycraft a very particular description of his vehicle and made it next to impossible that Officer Roycraft would detain the wrong person. Therefore, this fact also increases the reasonableness of Officer Roycraft's stop.

Fourth, in this case, if Officer Roycraft did not act quickly, opportunity for further investigation may have been lost. The ***Guzy*** court, in addition to citing Professor LaFave's six-factor test, determined that three additional factors were relevant to a determination of reasonableness:

> (1) alternative means available to the officer to investigate short of making the stop; (2) the opportunity for further investigation, if action was not taken immediately; and (3) whether the description of the individual known to the officer would allow him to quickly identify the individual so that there would be minimal intrusion.

See ***State v. King***, 175 Wis.2d 146, 153, 499 N.W.2d 190, 192 (Ct. App. 1993). In ***King***, this court held that a ***Terry*** stop of a moving car was justified, in part, because the opportunity for investigation may have been lost if the officer did not react immediately. *See* ***id.*** at 154, 499 N.W.2d at 193. Thus, in this case, Officer Roycraft's stop of Gordon's car was made more reasonable by the fact that if she did not act immediately, the opportunity to stop Gordon's car may have been lost.

Finally, the instant case, as opposed to ***Williams***, did not involve drugs, but instead, involved a tip that Gordon was driving drunk, and a specific claim that Gordon had recently almost caused an accident. This court has held that "the severity or inherently dangerous nature of the criminal activity reported is a relevant consideration" when determining the reasonableness of a ***Terry*** stop based on an anonymous tip. *See* ***King***, 175 Wis.2d at 153, 499 N.W.2d at 193 (citing ***United States v. Johnson***, 540 A.2d 1090, 1091-92 (D.C. 1988)). Also, in ***Williams***, this court stated:

> Like the court in … ***Roberson*** … we limit our analysis to the facts of a drug case. "We do not address whether a tip is sufficient to create reasonable suspicion when the tip involves an allegation that the defendant was carrying a gun rather than dealing drugs."

Williams, 214 Wis.2d at 423 n.8, 570 N.W.2d at 897 n.8 (citing ***Roberson***, 90 F.3d at 82). The court in ***Roberson*** distinguished between gun cases and drug cases in part by citing ***United States v. Clipper***, 973 F.2d 944, 951 (D.C. Cir. 1992), where the D.C. Circuit stated that: "The element of imminent danger

distinguishes a gun tip from one involving possession of drugs [because] … [w]here guns are involved, … there is the risk that an attempt to "wait out" the suspect might have fatal consequences." In this case, the anonymous motorcyclist told Officer Roycraft that Gordon's car had recently almost hit his motorcycle and that he believed Gordon was drunk. Drunk driving, like a crime involving a gun, is a dangerous type of criminal activity that may result in fatal consequences. Given the likelihood that Gordon was driving drunk and might cause a collision similar to the one which he had almost caused with the motorcyclist, it was reasonable for Officer Roycraft to immediately stop Gordon, instead of waiting for Gordon to possibly cause a potentially dangerous accident.

Therefore, for all of these reasons, despite the fact that the anonymous motorcyclist's tip did not predict future behavior on Gordon's part, and that Officer Roycraft did not independently investigate whether Gordon was driving drunk, under the totality of the circumstances, this court concludes that Officer Roycraft's stop of Gordon's car was reasonable. Thus, the trial court properly denied Gordon's suppression motion, and this court affirms Gordon's judgment of conviction.

By the Court.—Judgment affirmed.

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