COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP707-CR **Cir. Ct. No. 2011CF345**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PETER J. LONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: JAMES G. POUROS, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 NEUBAUER, P.J. In this eighth-offense operating a motor vehicle while intoxicated (OWI) case, Peter J. Long argues that his stop and arrest were unconstitutional because the police relied on unverified claims of an anonymous informant, the facts known by the police were insufficient to justify Long's stop,

and the police conduct in executing the stop was "overbearing and harassing," turning the stop into an arrest for which the police did not have probable cause. We conclude that the police had reasonable suspicion to stop Long and affirm.

BACKGROUND

¶2 The following facts are largely taken from testimony at the hearing on Long's motion to suppress and are, for the most part, undisputed. Long was arrested for OWI after police stopped his vehicle on U.S. Highway 41. A resident in Long's town of Menasha apartment building had called the police when Long was pounding on a tenant's door demanding money. The responding officer, Corey Colburn, tried to contact Long in his apartment, but he did not respond. Colburn had dispatch call Long, and Colburn testified that he heard Long tell the dispatcher, in a loud voice, that he was in Milwaukee. Colburn informed Long, through his apartment door, that he was going to cite him for disorderly conduct. Colburn left.

¶3 About two hours later, at 1:22 a.m. on September 15, 2011, a different tenant called the police reporting that Long was driving to Milwaukee to kill his former cellmate. Colburn testified that the caller identified herself as a concerned friend. The tenant told Colburn, on the telephone, that Long was possibly under the influence of alcohol or narcotics and that he was driving at speeds in excess of 120 miles per hour. The tenant also told Colburn that Long planned to cut off the arm of his former cellmate and bring it back and cook it. Colburn testified that the tenant was concerned for Long's safety and that of the other drivers on the road. Colburn went to the tenant's apartment. While he was there, Long called on the telephone. The tenant put the call on speaker phone, and Colburn heard Long say that he was on the way to Milwaukee, traveling ninety

miles per hour. Long also said that he had had police contact earlier in the day and "he was going to go to jail so he wanted to have one last night of fun." During this conversation, Colburn noticed that Long's speech was very loud and sounded slurred and that Long "appeared not to make a whole lot of sense." After talking with the tenant and hearing this phone call from Long, Colburn issued an attempt to locate (ATL) notice on Long.[1]

¶4 At about 1:50 a.m., Washington County Deputy Sheriff John Binsfeld heard the ATL over his squad radio. Binsfeld read the teletype, which indicated that the subject had been involved in a disturbance earlier that evening and that officers were unable to make face-to-face contact, but had obtained information via telephone that Long was en route from Menasha to the Milwaukee area "to kill someone." The ATL directed law enforcement to "stop, hold and advise," in other words, to stop the individual if in a vehicle, hold for the town of Menasha, and attempt to locate and advise the town police of the stop to make a determination of what to do with Long. The ATL contained a "please use caution" warning.

¶5 Binsfeld set up on Highway 41 to try to find Long. He positioned himself at an exit between Menasha and Milwaukee and looked for Long's vehicle. After he had identified Long's vehicle by its PWRHSE license plate, he called other squads to set up a "high risk traffic stop" because he was not sure if Long had weapons. The stop was coordinated with two other deputies. The

[1] Long maintains that Colburn issued the ATL after talking to the tenant on the telephone but before going to the tenant's apartment and hearing Long over the speaker phone. The circuit court concluded that Colburn issued the ATL after going to the tenant's apartment and hearing Long over the speaker phone. The record supports this conclusion, and we will not overturn it. ***State v. Fields***, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279.

deputies shut down traffic on the southbound side of Highway 41. While following Long, Binsfeld saw him cross about a foot to a foot and a half over the fog line on the edge of the road for about fifty feet. Binsfeld stopped Long's vehicle. Binsfeld testified that in a high risk situation like this officers have the subject exit the vehicle, instead of approaching, and have their weapons drawn. When Binsfeld confronted Long, he noticed an odor of alcohol and observed that Long had glassy, bloodshot eyes. Binsfeld administered field sobriety tests and ultimately arrested Long for OWI.

¶6 Long moved to dismiss the case or suppress the evidence. Long argued that the evidence pointing toward his guilt "was seized on the basis of an illegal stop." As grounds, Long asserted that "the law enforcement officers in this case acted without reasonable suspicion to stop the client." The circuit court denied Long's motion and Long pleaded guilty to OWI.

DISCUSSION

Standard of Review

¶7 "When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. However, the application of constitutional principles to the facts is a question of law we decide without deference to the circuit court's decision." ***State v. Fields***, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279 (citation omitted).

Long's Arguments

¶8 In his motion to suppress, at the hearing thereon, and in his subsequent briefs on the motion, Long argued that the State failed to demonstrate that the police had collective knowledge of specific, articulable facts supporting a

reasonable suspicion to perform a traffic stop. We first address this issue. On appeal Long has changed his tune and argues that the stop was in fact an arrest requiring probable cause, which, he further argues, the deputies did not have. Although Long forfeited this issue, *see* ***State v. Caban***, 210 Wis. 2d 597, 606, 563 N.W.2d 501 (1997), we exercise our discretion to address it, *see* ***Wirth v. Ehly***, 93 Wis. 2d 433, 444, 287 N.W.2d 140 (1980).

Reasonable Suspicion

¶9 For an investigatory stop to be constitutionally valid, the officer's suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion" on the citizen's liberty. ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). What constitutes reasonable suspicion in a given situation depends on the totality of the circumstances. ***State v. Post***, 2007 WI 60, ¶¶37-38, 301 Wis. 2d 1, 733 N.W.2d 634. There need not be a violation of the law to support an investigative stop. ***State v. Anagnos***, 2012 WI 64, ¶47, 341 Wis. 2d 576, 815 N.W.2d 675. "The law allows a police officer to make an investigatory stop based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot." ***State v. Waldner***, 206 Wis. 2d 51, 57, 556 N.W.2d 681 (1996).

¶10 Where, as here, an officer relies on information provided by dispatch, "reasonable suspicion is assessed by looking at the collective knowledge of police officers." *See* ***State v. Pickens***, 2010 WI App 5, ¶11 & n.1, 323 Wis. 2d 226, 779 N.W.2d 1 (2009). If a defendant moves to suppress, the prosecutor must prove that the collective knowledge supports the stop. ***Id.***, ¶13. When an officer relies on an ATL in making a stop, the inquiry is whether the officer that initiated

the ATL, not the responding officer, had knowledge of specific and articulable facts supporting reasonable suspicion. *See* ***United States v. Hensley***, 469 U.S. 221, 231-33 (1985) (evidence uncovered in the course of a ***Terry*** stop "is admissible if the police who issued the flyer or bulletin possessed a reasonable suspicion justifying a stop").

¶11 Colburn initiated the ATL, so we examine Colburn's knowledge to see if the ATL was supported by reasonable suspicion, thus justifying Binsfeld's stop. On the night/morning Colburn issued the ATL, he responded to two calls about Long. Both callers were from the apartment complex Long owned. Although Colburn did not speak to the first caller, he knew the caller's address. Colburn spoke in person to the second caller. Colburn knew her telephone number and address. Both calls involved erratic behavior by Long. In responding to the first call, Colburn attempted to contact Long, but Long was uncooperative; he did not answer Colburn's repeated knocks. Colburn could see Long through the window and saw his vehicle parked outside. When Colburn had dispatch call Long, Colburn heard Long tell the dispatcher, in a very loud voice, that he was in Milwaukee. In responding to the second call, Colburn talked with one of Long's tenants, who told him that she was concerned about Long. She thought he was intoxicated and was driving at 120 miles per hour to Milwaukee to kill his old cellmate. When Colburn got to the apartment complex to talk to the caller in person, he noticed that Long's vehicle was gone. While he was talking to the tenant/caller, Long called and said he was driving ninety miles per hour on his way to Milwaukee and that he intended to have fun because he figured he was going to jail tomorrow. Colburn testified that Long's speech was loud and slurred.

¶12 The specific facts known to Colburn, as detailed above, supported reasonable suspicion that Long had committed, was committing, or was about to

commit a crime. Long himself reported that he was traveling at high rates of speed on the highway, and Long had told his tenant that he intended to kill his former cellmate. Long's tenant suspected that Long was intoxicated, which belief was furthered by Colburn's perception of Long's speech. Colburn had reasonable suspicion sufficient to justify the ATL—which only asked officers to check on Long's condition, not to arrest him. The warning in the ATL to use caution was reasonable under the circumstances, as Colburn had reason to believe that Long might be armed. In turn, Binsfeld's reliance on the ATL and subsequent investigatory stop based on the collective knowledge of law enforcement were justified.

¶13 Long argues that it was unreasonable to rely on the second caller's information because she did not want her name disclosed. This argument fails; the second caller was not unidentified. Colburn knew the second caller's telephone number and address prior to issuing the ATL. Colburn spoke to the second caller in person. This was not a situation where an unidentified person calls the police station with an anonymous tip. The second caller did not want her name used because she owed Long money and feared retaliation. But she did disclose her telephone number and address. When a caller provides self-identifying information that places his or her anonymity at risk, like a telephone number and address and in-person conversation, and when the totality of the circumstances establishes reasonable suspicion, the police may execute an investigatory stop. *See* ***State v. Sisk***, 2001 WI App 182, ¶9, 247 Wis. 2d 443, 634 N.W.2d 877; ***State v. Robinson***, 2010 WI 80, ¶28, 327 Wis. 2d 302, 786 N.W.2d 463.

Probable Cause

¶14 Long argues for the first time on appeal that this is a probable cause to arrest case, not a reasonable suspicion to stop. The failure to make this argument below with specificity forfeits Long's right to raise this issue on appeal. *See* ***Caban***, 210 Wis. 2d at 606 (general Fourth Amendment argument that does not specifically address probable cause does not preserve probable cause argument on appeal). However, we, in our discretion, may decide to address an issue that has been forfeited. ***Wirth***, 93 Wis. 2d at 444.

¶15 Long seems to argue that the manner in which the officers executed the high risk traffic stop transformed the investigatory stop into an instantaneous arrest that must be supported by probable cause. No such transformation took place. The officers stopped Long and had him exit his vehicle, instead of approaching, and had their weapons drawn, all for officer security. Binsfeld testified that this is the usual procedure in a high risk traffic stop. Long had reportedly told his tenant he was going to Milwaukee to kill a former cellmate. The ATL justifiably advised officers to use caution and Binsfeld and his colleagues justifiably did so.

CONCLUSION

¶16 We conclude that the police had the requisite reasonable suspicion to stop Long's vehicle. The manner of the stop did not transform it into an arrest requiring probable cause. We therefore uphold the circuit court's order in denying the motion to suppress and affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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