

**COURT OF APPEALS
DECISION
DATED AND FILED**

APRIL 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-3252-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL J. KOCH,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Winnebago County: WILLIAM E. CRANE, Judge. *Affirmed.*

ANDERSON, J. Paul J. Koch appeals from two judgments of convictions, one for operating a motor vehicle while intoxicated (OMVWI) and one for operating with a prohibited alcohol concentration (OWPAC), both as second offenses. Koch does not attack the veracity of the facts underlying his conviction. Rather, Koch takes issue with the format of the criminal complaint. He maintains that the State did not incorporate documents

attached to the criminal complaint into the complaint; therefore, the complaint failed to establish probable cause for the crimes charged. Because the attached documents were properly incorporated by reference in the complaint and because the information which the complainant incorporated by reference in support of the charges was reliable, we conclude that the complaint established probable cause for the crimes charged. We affirm the judgments.

On June 18, 1997, a criminal complaint was filed alleging that Koch was operating his vehicle while intoxicated and with a prohibited alcohol concentration. The affidavit in support of the criminal complaint stated:

D. WOERPEL, your complainant states that he is a Lieutenant with the City of Oshkosh Police Department and has had an opportunity to review the attached police reports and documents supporting this complaint which are kept in the normal and ordinary course of business which your affiant believes to be truthful and reliable and have proven so on numerous occasions in the past and believes them to be accurate and reliable.

The complaint was subscribed and sworn to before an assistant district attorney and approved for filing. The attached documents included the OMVWI and OWPAC citations issued to Koch, a warning for his failure to stop for a flashing red signal, the intoxilyzer test record, the arresting officer's police report and a copy of Koch's driving record.

Koch filed numerous motions. The motion at issue here sought dismissal of the complaint alleging that the complaint failed to state probable cause for any charge because it did not contain a sworn statement of fact and because the attached documents were not incorporated by reference into the complaint. The trial court denied the motion.

The parties then agreed to a stipulated trial. The parties stipulated to the facts and asked the court to enter a judgment of guilt or acquittal based upon those facts. Based on the stipulated facts, the court adjudged Koch guilty of OMVWI and OWPAC as a second conviction. Koch was sentenced to five days in jail with Huber privileges, his driving privileges were revoked for twelve months and he was ordered to pay a \$300 fine and costs and to undergo an alcohol assessment. Koch appeals.

Koch renews his arguments on appeal that the criminal complaint is invalid. A criminal complaint “is a written statement of the essential facts constituting the offense charged.” Section 968.01(2), STATS. To be viable, a complaint must establish probable cause that a crime was committed by the defendant. *See* § 968.03(1), STATS. The sufficiency of a complaint is a question of law that we review de novo. *See State v. Manthey*, 169 Wis.2d 673, 685, 487 N.W.2d 44, 49 (Ct. App. 1992).

Koch insists that the State has attempted to bootstrap the attached police reports and other documents in order to establish probable cause. Instead of specifically incorporating them by reference, Koch argues that the complainant simply referred to the attached reports and indicated that the complainant believed them to be truthful. This, Koch maintains, simply does not make the reports part of the criminal complaint, and therefore, the complaint is insufficient.

“[W]hen the complaint is based on other than eyewitness observations of the complainant himself [or herself], the reliability of the ‘information’ on which he [or she] bases his [or her] ‘belief’ must be established.” *State v. Knudson*, 51 Wis.2d 270, 274, 187 N.W.2d 321, 324 (1971). There must be something in the complaint which shows why the informant should be believed.

See id. In such a case, the complainant must establish: “(1) The underlying circumstances from which he [or she] concludes that the informant is reliable; and (2) that the underlying circumstances or manner in which the informant obtained his [or her] information is reliable.” *Id.* (quoted source omitted). The “underlying circumstances” must be established from the complaint itself, which may include “affidavits or transcripts of testimony [which] are specifically incorporated by reference in the complaint” *State v. Williams*, 47 Wis.2d 242, 252, 177 N.W.2d 611, 617 (1970). “The complaint must be considered in its entirety, and be given a common sense reading.” *Knudson*, 51 Wis.2d at 275, 187 N.W.2d at 324.

A common sense reading of the complaint in this case demonstrates that the primary and essential source of information on which the complainant relied is the police report and other documents submitted by the arresting officer. A complaint need not contain an “encyclopedic listing of all evidentiary facts upon which the state intends to rely;” the essential facts constituting the offense charged are sufficient. *See State v. Chinavare*, 185 Wis.2d 528, 534, 518 N.W.2d 772, 774 (Ct. App. 1994) (quoted source omitted). The complainant in this case swore that he “had an opportunity to review the attached police reports and documents supporting this complaint.” We conclude that this was sufficient to incorporate the attached documents by reference.

Our analysis does not end there however. When a complainant bases a complaint on someone else’s eyewitness observations, the personal and observational reliability of that information must be established. *Cf. Knudson*, 51 Wis.2d at 274, 277, 187 N.W.2d at 325-26. Here, Officer James Strasser, the arresting officer, both observed and participated in the facts as set forth in the police report and, consequently, those alleged in the complaint. Information based

on the personal observations of police officers made while acting in their official capacity is considered trustworthy. See *P.A.K. v. State*, 119 Wis.2d 871, 888, 350 N.W.2d 677, 686 (1984). Although the police report was not made under oath, it was signed by Strasser. If it was falsified, it would subject him to felony prosecution for misconduct in public office under § 946.12, STATS. Lastly, the complainant affirmed that he had the opportunity to review the attached police reports and documents, that such documents are kept in the ordinary course of police business, that such information has proven on numerous occasions in the past to be both truthful and reliable and that he believed these documents were truthful, reliable and accurate.

We conclude that this complaint was signed by the complainant on the basis of information from another officer whose reliability was established. Therefore, the complainant was justified in relying on it. Although Koch opted for a stipulated trial, rather than challenging the officer who prepared the police report and documents, the fact that the officer would have had to come forward to testify at the preliminary hearing and then at trial “is sufficient safeguard to test the question of personal jurisdiction of the particular accused.” See *Knudson*, 51 Wis.2d at 278, 187 N.W.2d at 326.

By the Court.—Judgments affirmed.

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

