COURT OF APPEALS
DECISION
DATED AND FILED

July 25, 2017

Diane M. Fremgen
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. 2017AP296-CR **Cir. Ct. No. 2015CT1041**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRACY DEAN MARTIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEAN M. KIES, Judge. *Affirmed*.

¶1 BRASH, J.[1] Tracy Dean Martin appeals from a judgment of conviction, entered by the trial court upon accepting Martin's plea to operating while intoxicated (OWI) as a fourth offense.

¶2 Specifically, Martin appeals the trial court's denial of his motion to suppress all of the evidence gathered against him as a result of his arrest, which he had filed prior to entering his plea. His argument in the motion, which he reiterates on appeal, is that neither the anonymous tip of an intoxicated driver nor the officers' independent observations of Martin was sufficient to ascertain reasonable suspicion. Therefore, he contends that his arrest was an unreasonable search and seizure in violation of the Fourth Amendment.[2]

¶3 The trial court found that the officers had established reasonable suspicion for Martin's arrest, and thus the search and seizure of Martin was justified. We agree and affirm.

BACKGROUND

¶4 On May 22, 2015, around 12:30 a.m., West Allis Police Officer Daniel Foy was dispatched to a Taco Bell after receiving a report of a male sleeping in his car who the caller believed to be intoxicated. When Officer Foy arrived at the Taco Bell, he observed the vehicle parked perpendicular at about a forty-five degree angle to any parking spot, occupying about four different spots. The parking lot was otherwise fairly empty.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] U.S. CONST. amend. IV; *see also* WIS. CONST. art. I, § 11.

¶5 Before approaching the vehicle, Officer Foy testified that he ran a check on the registration. The check revealed that the vehicle was registered to Martin, and that he had three prior OWI convictions along with a .02 alcohol restriction.

¶6 When he approached the vehicle, Officer Foy saw Martin asleep with his head back against the head rest and a taco in one of his hands. Officer Foy saw that the headlights were on and the keys were in the ignition, but the vehicle's engine was not running. Another West Allis police officer who arrived at the scene shortly after Officer Foy went to the passenger side door of Martin's vehicle and removed the keys from the ignition.

¶7 Officer Foy then knocked on the window to wake the man. The man started to speak, but Officer Foy could not hear him with the window closed, so the officer opened the car door. The officer immediately smelled a strong odor of intoxicants when he opened the door; additionally, he saw that Martin's eyes were red and glassy, and that Martin moved very slowly and lethargically. Officer Foy asked Martin for his driver's license, which he had difficulty removing from his wallet; in fact, Martin had difficulty remembering what the officer had asked of him.

¶8 Martin admitted to drinking that night in a bar in West Allis. He also admitted to having driven from the bar to the Taco Bell, although he thought he was at a location in South Milwaukee. Officer Foy administered several standardized field sobriety tests to Martin, which he performed poorly. Ultimately, Officer Foy arrested Martin for operating a vehicle while intoxicated.

¶9 While Officer Foy was making contact with Martin, West Allis Police Officer Bryan McNally spoke with the manager of the Taco Bell who had

made the initial call to the police department regarding Martin. Officer McNally testified that the manager had told him that she observed Martin in the drive-thru and that he was hard to understand as he was ordering. She also stated that he appeared "wobbly," that he was "squinting with one eye," and that he was "nodding off" while still in the drive-thru.

¶10 After placing Martin in custody, Officer Foy spoke with another Taco Bell employee who had taken Martin's order in the drive-thru. She explained that Martin had been slurring his words when he placed his order, that his eyes were very red, and that he appeared rather lethargic. She therefore believed he was intoxicated. She then saw Martin park the vehicle in the parking lot, where he had remained for thirty to forty-five minutes before the employees contacted the police.

¶11 Based on this evidence, the State charged Martin with one count of OWI as a fourth offense and one count of operating with a prohibited alcohol concentration as a fourth offense. Martin subsequently filed a motion to suppress the evidence from his arrest on Fourth Amendment grounds. Specifically, Martin argued that the anonymous tip that led to his being investigated and detained by police was insufficient to warrant the search and seizure, and that the observations by the officers only amounted to a "hunch" and did not meet the reasonable suspicion standard. Therefore, he asserted that the police officers did not have sufficient facts upon which to establish reasonable suspicion that Martin was intoxicated under the standard set forth in ***Terry v. Ohio***, 392 U.S. 1 (1968). As a result, Martin contends that his arrest amounted to an unreasonable search and seizure.

¶12 The trial court denied Martin's motion to suppress. It found that there was sufficient evidence to provide the officers with a reasonable suspicion that Martin had been operating his vehicle while intoxicated. In fact, the court noted that a "vast majority of reasonable people" would conclude from the circumstances under which Martin was arrested that Martin was intoxicated. Therefore, the trial court found the ***Terry*** stop to be valid.

¶13 Subsequently, Martin filed a motion for reconsideration on the grounds that the trial court had misapplied the law relating to anonymous tips, set forth in ***State v. Rutzinski***, 2001 WI 22, ¶14, 241 Wis. 2d 729, 623 N.W.2d. 516, as it related to the initial call from the Taco Bell employee. The trial court denied that motion also, finding that the personal observations of the police officer as he approached Martin's car were sufficient to establish reasonable suspicion for the arrest. Martin filed a second motion for reconsideration before a different court, but that trial court denied the motion as well.[3]

¶14 On December 19, 2016, Martin pled guilty to OWI as a fourth offense and a judgment of conviction was entered. The charge of operating with a prohibited alcohol concentration as a fourth offense was dismissed. This appeal follows.

DISCUSSION

¶15 Martin argues that the police officers did not have sufficiently reasonable suspicion to carry out a search and seizure when they found him

[3] The motion to suppress and the first motion for reconsideration were heard by the Honorable Paul J. Rifelj; the second motion for reconsideration was heard by the Honorable Jean M. Kies.

sleeping in his vehicle. Therefore, he contends that his detention and subsequent arrest violated the constitutional prohibition against unreasonable searches and seizures. As a result, he asserts that all of the evidence related to that allegedly illegal detainment and arrest should be suppressed. "In reviewing a denial of a motion to suppress, we will uphold the [trial] court's findings of fact unless they are clearly erroneous." ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

¶16 In order for an investigative stop to be valid, a police officer must "reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place." ***State v. Williams***, 2002 WI App 306, ¶12, 258 Wis. 2d 395, 655 N.W.2d 462. This reasonable suspicion should be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Terry***, 392 U.S. at 21. The standard for determining reasonableness is a "common sense test," ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996), where the "totality of the circumstances" is considered. ***Williams***, 258 Wis. 2d 395, ¶12.

¶17 Furthermore, reasonable suspicion is a "'less demanding'" standard than probable cause. ***State v. Allen***, 226 Wis. 2d 66, 71, 593 N.W.2d 504 (Ct. App. 1999) (citation omitted). Not only can reasonable suspicion be "'established with information that is different in quantity or content than that required to establish probable cause,'" it can also "'arise from information that is less reliable than that required to show probable cause.'" ***Id.*** (citation omitted). Whether this reasonableness requirement has been met is a question of law that we review *de novo*. *See* ***Young***, 212 Wis. 2d at 424.

¶18 In this case, the trial court determined that a seizure occurred when the officers removed the keys from the ignition, thereby rendering Martin detained and no longer able to leave. However, Martin asserts that at this point the officers did not have sufficient information to meet the reasonable suspicion test, and that the anonymous tip on its own was not reliable enough to warrant a seizure.

¶19 For his argument relating to anonymous tips Martin relies on ***Rutzinski***, wherein our supreme court set a standard for considering the reliability of anonymous tips. That standard requires that an anonymous tip contain "verifiable information indicating how the tipster came to know of the alleged illegal activity." ***Rutzinski***, 241 Wis. 2d 729, ¶28. In ***Rutzinski***, an officer conducted a traffic stop based on an anonymous tip about an erratic driver. ***Id.***, ¶¶4, 7. The tipster remained on the telephone with dispatch, giving further information about the erratic driver's location and direction. ***Id.***, ¶5. The tipster then saw the squad car that was responding, and confirmed with the dispatcher that it was following the correct vehicle. ***Id.***, ¶6. After the vehicle was pulled over by police, the tipster told the dispatcher that he or she had pulled over in the same area; however, the officer who made the arrest never spoke with the tipster, and there is no record of his or her identity. ***Id.***, ¶7.

¶20 Although the officer did not personally observe any erratic driving, and thus the whole basis for the stop was the anonymous tip, the court nevertheless determined that it was reliable enough on its own to warrant the stop. ***Id.***, ¶34. They based this finding of reliability on the fact that the tipster had exposed himself or herself to being identified, and had provided a detailed description about his or her observation, including the type of car and the direction it was headed in. ***Id.***, ¶¶32-33. The court also found that because erratic driving is a sign of driving while intoxicated, it was reasonable for the officer to suspect that

Rutzinski was a drunk driver, further noting that if that was indeed the case then Rutzinski was an imminent threat to the public. ***Id.***, ¶34.

¶21 The ***Rutzinski*** case is indeed quite similar to the present case, but in a manner that does not support Martin's argument. In the present case, the anonymous tipster, the Taco Bell manager, had exposed herself to being identified by directing the police to a particular Taco Bell where she was employed. She also stated that Martin had come through the drive-thru, slurred his words, and appeared lethargic, leading her to believe he was intoxicated. She then described how he had parked askew across four spaces in the parking lot and had fallen asleep for over half an hour. This was a very detailed description of Martin's conduct that further identified the tipster as an employee of that Taco Bell, bolstering her reliability. Moreover, the probability that Martin was intoxicated and behind the wheel of his vehicle made him an imminent threat to public safety. *See* ***id.***, ¶34.

¶22 Martin also compares the seizure and anonymous tip in this case to the facts in ***Florida v. J.L.***, 529 U.S. 266 (2000). In ***J.L.***, officers received an anonymous tip about a young black male in a plaid shirt carrying a gun at a bus stop. ***Id.*** at 268. A search and seizure was performed on the defendant only because he was standing at the bus stop and his physical description matched that given by the tipster. ***Id.*** The U.S. Supreme Court held that the anonymous tip was not sufficient on its own to justify the search and seizure, and apart from the tip, the officers had no reason to suspect the defendant of illegal activity. ***Id.*** at 271. Because of this, the officers had no right to stop and frisk the defendant. ***Id.*** at 274.

¶23 The facts of ***J.L.*** are distinguishable from this case because responding officers here were not acting solely on the tip they received. Instead, the trial court found that the officers had made their own independent observations upon which to base their reasonable suspicions. Accordingly, the trial court did not evaluate the reliability of the tip from the Taco Bell employees, but rather denied Martin's suppression motion based the sufficiency of the officers' independent observations.

¶24 When investigating a situation, police officers use facts as "building blocks" and, as they accumulate, "reasonable inferences about the cumulative effect can be drawn." ***Waldner***, 206 Wis. 2d at 58. Martin asserts that the officers' observations amounted only to a "hunch" and not reasonable suspicion. He argues that his vehicle was not blocking anyone, it was unknown how long he had been parked there, and the officers observed no physical signs of inebriation, such as slurred speech, prior to the seizure.

¶25 This is not an accurate portrayal of the circumstances. The tip received by the police department directed the officers to a Taco Bell at 12:30 a.m. and described a man who had driven his vehicle through the drive-thru, exhibiting behavior indicative of someone who was intoxicated, who then parked his car and fell asleep for over half an hour. Officer Foy testified that this situation occurred at a time of night and at a business where they "generally encounter more people that are intoxicated."

¶26 Upon arriving at the Taco Bell, Officer Foy observed the man asleep in his car while parked askew across four spaces. The next logical step in an investigation of this sort is to run the license plates of the vehicle; the resulting information the officers received here included Martin's prior convictions for

OWI, which included the .02 alcohol restriction. Furthermore, although the engine of Martin's car was not running, the officers observed that his keys were still in the ignition, which is indicative of his having recently driven the vehicle. This, of course, is an illegal activity when the driver is intoxicated.

¶27 At that point the officers removed the keys from the ignition of Martin's car, which the trial court determined was a seizure. Based on the facts adduced by these officers upon observing Martin up to that point, together with the reasonable inferences they made based on the circumstances, we agree with the trial court that the officers had attained a reasonable suspicion that Martin had been operating his vehicle while he was under the influence of intoxicants. *See* ***Terry***, 392 U.S. at 21.

¶28 Therefore, the subsequent search and seizure of Martin was valid. Accordingly, we affirm both the trial court's denial of Martin's motion to suppress the evidence resulting from that search and seizure, as well as Martin's judgment of conviction.

By the Court.—Judgment affirmed.

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