COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1671-CR **Cir. Ct. No. 2014CF46**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENTON RICARDO EWERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pepin County: JAMES J. DUVALL, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 HRUZ, J. Denton Ewers appeals a judgment of conviction for operating a motor vehicle while intoxicated (OWI), as a ninth offense. The issue in this case is whether a citizen informant's repeated observations of non-driving behaviors that reasonably suggest drunkenness are sufficient to justify an

investigatory traffic stop for OWI. The citizen informant, a female employee of the Family Dollar store in Durand, Wisconsin, called the police on two occasions approximately two and one-half hours apart, stating that an individual—later identified as Ewers—had entered the store, appeared "dazed and confused," and then drove off in a vehicle. During the first call, she also reported that the individual had the "smell of intoxicants coming from his breath." We conclude that, under these facts, the investigatory stop of the defendant's vehicle in response to the second call was based on reasonable suspicion of OWI. Accordingly, we affirm.

BACKGROUND

¶2 An amended Information charged Ewers with OWI, as a ninth offense; operating with a prohibited alcohol concentration, as a ninth offense; failure to install an ignition interlock device; and operating while revoked. Ewers filed a motion to suppress evidence obtained as a result of the traffic stop, asserting the stop that led to his arrest was not supported by reasonable suspicion.

¶3 During an evidentiary hearing on Ewers' suppression motion, officer Mitchell Checkalski testified that he was dispatched to the Family Dollar store in Durand, Wisconsin, on September 11, 2014, at approximately 5:30 p.m. According to Checkalski, police dispatch had received a tip from a female Family Dollar employee that a male had entered the store who "seemed dazed and confused and had the smell of intoxicants coming from his breath." The employee stated the individual had left the store in a gold Ford Focus heading westbound. Checkalski was unable to locate any vehicle matching that description at that time. Dispatch did not provide the name of the complaining employee, and Checkalski did not go to the Family Dollar store to investigate further.

¶4 Checkalski was dispatched to the Family Dollar store again at approximately 7:55 p.m. The same female employee had notified dispatch that the male had returned to the store and then left in the same car, headed in the same direction as before. The employee stated the man again seemed "dazed and confused," but she said nothing in the second call about whether he again smelled of alcohol. Checkalski was able to locate a gold Ford Focus heading in the direction the caller had identified, and he initiated a traffic stop. Checkalski testified the sole basis for the stop was the information the Family Dollar employee provided. Ewers was ultimately identified as the driver, and he acknowledged having been in the Family Dollar store that day. Checkalski observed indicia of intoxication, and after Ewers failed field sobriety testing and a preliminary breath test, he was taken into custody.[1]

¶5 The circuit court concluded Checkalski possessed reasonable suspicion to stop Ewers and denied the suppression motion. Ewers ultimately pled guilty to ninth-offense OWI and the remaining charges were dismissed outright. Ewers now appeals, challenging the denial of his suppression motion. *See* WIS. STAT. § 971.31(10) (2015-16) (permitting review of an order denying a suppression motion as part of an appeal from a final judgment notwithstanding that the judgment was entered upon a guilty plea).[2]

[1] In the circuit court, Ewers also challenged the manner in which the field sobriety tests were conducted. He does not raise that issue on appeal.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

DISCUSSION

¶6 An investigative traffic stop is subject to the constitutional reasonableness requirement. ***State v. Post***, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634. Whether a traffic stop is reasonable is a question of constitutional fact. ***Id.***, ¶8. We review questions of constitutional fact using a mixed standard of review. ***Id.*** A circuit court's findings of historical fact will not be overturned unless they are clearly erroneous. ***State v. Smiter***, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920 (2010). However, we review the application of constitutional principles to those findings of fact de novo. ***Id.***

¶7 A traffic stop is justified when an officer possesses reasonable suspicion that a traffic law has been or is being violated. ***State v. Houghton***, 2015 WI 79, ¶30, 364 Wis. 2d 234, 868 N.W.2d 143. This standard requires that the stop be based on "more than an officer's 'inchoate and unparticularized suspicion or "hunch."'" ***Post***, 301 Wis. 2d 1, ¶10 (quoting ***Terry v. Ohio***, 392 U.S. 1, 27 (1968)). Rather, the officer must be able to point to specific, articulable facts that, together with the specific, reasonable inferences that can be drawn from those facts in light of the officer's training and experience, reasonably justify the stop. ***Id.***, ¶¶10, 13; *see also* ***Terry***, 392 U.S. at 27. "This common sense approach balances the interests of the State in detecting, preventing, and investigating crime and the rights of individuals to be free from unreasonable intrusions." ***Post***, 301 Wis. 2d 1, ¶13. The reasonableness of a stop is determined under the totality of the facts and circumstances. ***Id.***

¶8 Here, the circuit court found the Family Dollar employee had made her reports to police based on her personal observations of Ewers, and it concluded she was akin to a citizen informant. Based upon Ewers' reported behavior and

characteristics—i.e., his appearing "dazed and confused" during both store visits, and his breath smelling of alcohol during at least the first encounter with the female employee—the court concluded Checkalski drew a reasonable inference that Ewers may have been driving while intoxicated. The court determined that Checkalski's subsequently locating a vehicle that matched the description the employee provided, heading in the direction the employee identified, corroborated her report.[3]

¶9 "In some circumstances, information contained in an informant's tip may justify an investigative stop." ***State v. Rutzinski***, 2001 WI 22, ¶17, 241 Wis. 2d 729, 623 N.W.2d 516; *see also* ***Alabama v. White***, 496 U.S. 325, 328 (1990); ***Adams v. Williams***, 407 U.S. 143, 147 (1972). Informants' tips can vary greatly in reliability. ***Rutzinski***, 241 Wis. 2d 729, ¶17. "Thus, before an informant's tip can give rise to grounds for an investigative stop, the police must consider its reliability and content." ***Id.***; *see also* ***White***, 496 U.S. at 330. Both aspects of the tip are part of the totality of the circumstances that must be evaluated when determining whether reasonable suspicion for a stop exists. ***White***, 496 U.S. at 330. "If a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." ***Id.***; ***State v. Miller***, 2012 WI 61, ¶¶31-32, 341 Wis. 2d 307, 815 N.W.2d 349.

¶10 Ewers agrees with the State and the circuit court that the Family Dollar employee was a "citizen informant"—that is, someone who happens upon a

[3] Ewers does not challenge the circuit court's factual findings, which were consistent with Checkalski's testimony.

crime or suspicious activity and reports it to police.[4] *See* ***State v. Kolk***, 2006 WI App 261, ¶12, 298 Wis. 2d 99, 726 N.W.2d 337. Citizen informants are generally the most reliable category of informants. ***Miller***, 341 Wis. 2d 307, ¶31 n.18. When an average citizen tenders information to the police, the police are permitted to assume they are dealing with a credible person—at least in the absence of special circumstances that suggest otherwise. ***State v. Kerr***, 181 Wis. 2d 372, 381, 511 N.W.2d 586 (1994).

¶11 However, Ewers contends that the employee's tip, while reliable, was not highly reliable. This, he argues, is because there is no evidence the informant provided her name or called the 911 system, and the information she provided was "minimal" and "ambiguous." Given these factors, Ewers contends the employee's tip had only a "moderate" degree of reliability that, considered together with the information she provided, was insufficient to establish reasonable suspicion to stop him. We disagree.

¶12 Ewers first argues the informant's tip had reduced reliability because the Family Dollar employee did not give her name to dispatch (or, at a minimum, that information was never relayed to Checkalski, who was the only witness to testify at the suppression hearing). Based on this omission, Ewers asserts the citizen informant here "remained somewhat anonymous." He argues it would be

[4] There are several types of informants, including a citizen informant. Other types include: a confidential informant, who is someone, often with a criminal history, who assists police in catching criminals and whose reliability may be ascertained based on whether he or she provided truthful information in the past; and an anonymous informant, whose reliability rests on the degree to which police are able to corroborate details of the informant's tip. ***State v. Miller***, 2012 WI 61, ¶31 n.18, 341 Wis. 2d 307, 815 N.W.2d 349. Although Ewers concedes the female Family Dollar employee here was akin to a "citizen informant," he challenges her reliability based on her purported failure to identify herself by name. *See infra* ¶¶12-14.

inappropriate "[t]o afford this somewhat anonymous tipster the level of reliability equivalent to a person whose identity is actually known."

¶13 To the contrary, the police department had a substantial amount of information that would have allowed it to identify the caller. Based on the tips, the police knew the informant was a female employee of the sole Family Dollar store in Durand, whose shift would have spanned the hours of approximately 5:30 to 8:00 p.m. on September 11, 2014.[5] When asked whether he was generally familiar with the Family Dollar employees at the Durand location, Checkalski testified he had previously responded to a complaint there and, though he did not know their names, he "would possibly recognize a few employees that work at Family Dollar." Even Ewers concedes the employee's "identity likely could have been discovered by the officer."

¶14 A reasonable police officer can conclude that a citizen informant is being truthful when the informant exposes himself or herself to being identified. ***Rutzinski***, 241 Wis. 2d 729, ¶32. "Risking one's identification intimates that, more likely than not, the informant is a genuinely concerned citizen as opposed to a fallacious prankster." ***State v. Williams***, 2001 WI 21, ¶35, 241 Wis. 2d 631, 623 N.W.2d 106. This form of self-identification occurs "where the informant states that he or she is calling from his or her place of business, or where the informant in person makes contact with the police officer. In such cases courts generally find such a tip to be reliable." ***State v. Slater***, 986 P.2d 1038, 1043 (Kan. 1999), *cited with approval in* ***Rutzinski***, 241 Wis. 2d 729, ¶32. Based on the details the informant provided in this case regarding her employment, she could reasonably

[5] Checkalski testified there is only one Family Dollar store in Durand.

expect that the two tips would be traced back to her and she would be held accountable if they were false. *See* ***Miller***, 341 Wis. 2d 307, ¶34. Under the circumstances here, we conclude the employee's tips were not subject to any diminished reliability based upon her failure to provide her name.[6]

¶15 Additionally, we reject Ewers' assertion that the informant's tips are subject to diminished reliability because it was not clear she called 911 to make her reports. Calls to the 911 emergency system are an indicator of the caller's veracity, as the system has some features that allow for identifying and tracing callers that would make "a false tipster … think twice before using such a system." ***Navarette v. California***, 134 S. Ct. 1683, 1689 (2014). Moreover, callers using the 911 system to make false reports are subject to criminal prosecution. *See* WIS. STAT. § 256.35(10); *see also* ***Rutzinski***, 241 Wis. 2d 729, ¶32 n.8. However, even if the tipster called a general police line or a non-emergency number to make her report, she could still have been located and prosecuted for providing false information to police. *See* WIS. STAT. § 946.41(1), (2)(a); *see also* ***Rutzinski***, 241 Wis. 2d 729, ¶32 n.8. A reasonable officer could conclude the Family Dollar employee knew that she could be arrested and prosecuted—potentially for two false reports—if the tips proved to be fabricated. *See* ***Rutzinski***, 241 Wis. 2d 729, ¶32. This lent additional reliability to her tips.

¶16 Ewers also contends the information the Family Dollar employee provided was "minimal" and was not necessarily indicative of drunk driving. When evaluating the information a citizen informant provided, we apply a relaxed

[6] We do not find compelling the fact that police never identified the employee. What is important for purposes of our analysis is whether police were entitled to act on the tips, not whether they followed up and located the witness after apprehending Ewers.

test for reliability known as "observational reliability." ***Kolk***, 298 Wis. 2d 99, ¶13. A citizen informant's reliability must be evaluated based on the nature of his or her report, his or her opportunity to see and hear the matters reported, and the extent to which the report's details can be verified by independent police investigation. ***Id.***

¶17 The tips in this case were based on the employee's purported first-hand observations of the defendant. Eyewitness knowledge "lends significant support to the tip's reliability." ***Navarette***, 134 S. Ct. at 1689; *see also* ***Williams***, 241 Wis. 2d 631, ¶36. Moreover, a citizen's contemporaneous report of possible unlawful activity "has long been treated as especially reliable." ***Navarette***, 134 S. Ct. at 1689. The law generally regards the "substantial contemporaneity of event and statement" as being especially trustworthy because the closeness in time negates the likelihood of deliberate or conscious misrepresentation. ***Id.***

¶18 Ewers argues the tips here generally suffered from the same defect as the tip in ***Kolk***; that is, the tips provided no information regarding the basis for the employee's knowledge. *See* ***Kolk***, 298 Wis. 2d 99, ¶¶15, 17. Ewers asserts the employee offered only a generic description of Ewers' condition—"dazed and confused"—and the officer knew "nothing about the nature of the interaction between the employee and Ewers or its duration." Moreover, Ewers suggests reasonable suspicion was lacking because the employee did not report that Ewers' apparent disorientation was "inconsistent with his normal affect."

¶19 We reject these arguments. The informant here "provided the police with verifiable information indicating … her basis of knowledge." *See* ***Rutzinski***, 241 Wis. 2d 729, ¶33. The employee noted Ewers appeared "dazed and confused" and she could smell alcohol on his breath. The employee provided the make,

model and color of the vehicle in which Ewers had driven off, as well as the direction he drove. Several reasonable inferences arise from this information: (1) that at some point the employee had an in-person interaction with Ewers; (2) she was within a sufficient proximity to identify that his breath smelled of alcohol; (3) she personally witnessed his disorientation; and (4) she was sufficiently concerned with Ewers' behavior and characteristics that she felt it necessary to watch him enter his vehicle, take note of the vehicle's characteristics and direction of travel, and twice notify police.

¶20 This latter point is particularly compelling. The employee's contemporaneous reports suggested an imminent threat to the public's safety. *See* ***Rutzinski***, 241 Wis. 2d 729, ¶34. Drunk driving presents an "extraordinary danger," one that "must be considered when examining the totality of the circumstances surrounding particular police conduct." ***Id.***, ¶36. The inference of drunk driving here was clear based on the combination of personal observations the employee described in her reports—namely, that Ewers: (1) appeared "dazed and confused"; (2) smelled of alcohol during his first visit; and (3) was seen driving away from the store.

¶21 Ewers asserts the information was collectively insufficient because the employee did not actually witness him driving in an erratic manner during either encounter, nor did she specifically identify him at any time as being "drunk." Ewers believes that under ***State v. Powers***, 2004 WI App 143, 275 Wis. 2d 456, 685 N.W.2d 869, when an individual tipster and the responding police officer both fail to observe erratic driving, an investigative stop is justified only when the layperson offers his or her opinion that the driver is intoxicated, not just that the driver had been drinking. *See* ***id.***, ¶¶12-13.

¶22 This is an incorrect reading of ***Powers***. The court there was dealing with the facts before it, in which a store clerk reported to police that "an intoxicated man had come in to make purchases," including alcohol, and had driven off after his credit card was declined. ***Id.***, ¶2. Nothing in ***Powers*** suggests the court intended for future courts to depart from considering the totality of the circumstances in each individual case. Here, those circumstances involve facts giving rise to a clear inference and reasonable suspicion of drunk driving, even if they are perhaps less compelling than the circumstances in ***Powers***. While Ewers contends his proffered standard is not one of "magic words," his argument effectively requires the adoption of such a standard.

¶23 Ewers nonetheless also argues reasonable suspicion was lacking in this case because the employee did not specifically say she smelled intoxicants on his breath during their second encounter when making her subsequent report. In Ewers' view, the "odor of intoxicants" information was stale by the time of the stop, which occurred approximately two and one-half hours after the first tip. Ewers emphasizes that alcohol naturally dissipates from a person's blood. *See* ***Schmerber v. California***, 384 U.S. 757, 770 (1966) (noting the percentage of alcohol in the blood begins to diminish shortly after drinking stops).

¶24 Ewers fails to appreciate several important facts and reasonable inferences therefrom. First, the employee, during her second call to police, stated Ewers was behaving in the same "dazed and confused" manner as during the first encounter. A reasonable inference from this information was that Ewers was behaving in the same manner as he had when the employee smelled alcohol coming from him, and also that the employee continued to have concerns about his ability to safely operate a vehicle, even without again confirming to the police that he smelled of alcohol. Moreover, to a certain degree Ewers' arguments

presuppose that he had not consumed any alcohol following his initial visit to Family Dollar. To the contrary, his activities were entirely unaccounted for during the time between the first and second Family Dollar visits. Checkalski was not required to draw inferences that supported Ewers' innocence—including the inference that he had stopped drinking, or that his continued dazed and confused condition was unrelated to consumption of alcohol. *See* ***State v. Young***, 212 Wis. 2d 417, 430, 569 N.W.2d 84 (Ct. App. 1997).

¶25 Additionally, here there was independent police corroboration of some important details of the employee's reports. The officer ultimately did discover a gold Ford Focus headed westbound not too distant from the Family Dollar store. Checkalski's independent verification of these innocent details bolstered the reliability of the tip. *See* ***Powers***, 275 Wis. 2d 456, ¶14. Given the totality of the circumstances here, we agree with the circuit court that the employee tips provided reasonable suspicion for the stop.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.