COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2423-CR **Cir. Ct. No. 2016CM25**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. MANSFIELD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County: JAMES C. BABLER, Judge. *Affirmed*.

¶1 STARK, P.J.[1] Michael Mansfield appeals a judgment convicting him of third-offense operating a motor vehicle while intoxicated (OWI). He

[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.

challenges the circuit court's denial of his suppression motions on three grounds: (1) law enforcement lacked reasonable suspicion to perform a traffic stop; (2) after Mansfield was stopped, law enforcement lacked reasonable suspicion to frisk him for weapons; and (3) Wisconsin's implied consent statute is inherently coercive, thereby rendering his consent to a blood draw involuntary and the implied consent statute facially unconstitutional. We reject Mansfield's arguments and affirm.

BACKGROUND

¶2 Mansfield was charged with third-offense OWI; third-offense operating with a restricted controlled substance in his blood; possession of tetrahydrocannabinols (THC); possession of drug paraphernalia; and possession of a switchblade knife. He filed a motion to suppress evidence obtained as a result of a traffic stop and a pat-down search of his person conducted after the stop. Mansfield also filed a second motion to suppress the results of a blood draw.

¶3 At the suppression hearing on both motions, detective Randy Cook testified he received a dispatch report stating that the Turtle Lake Casino had advised law enforcement "a male and a female were smoking marijuana in the parking lot" and had recently left on a dark colored motorcycle. Cook explained that his partner had received a phone call directly from the casino regarding this tip, which his partner then relayed to dispatch. The report stated the male had hair that was buzz cut and was wearing jeans and a black sweatshirt with skulls on it, while the female had blonde hair and wore a white shirt with a black jacket. The report further indicated the individuals left the casino parking lot at about 11:30 a.m. on a Harley-Davidson motorcycle with saddlebags containing three bags of marijuana, traveling on State Highway 63. Cook testified that he had received reliable information from the casino in the past, and he explained the casino had a

surveillance system covering its entire premises. The identity of the person who observed the information relayed through the tip was not disclosed.

¶4 Cumberland police chief Richard Rieper testified that he received the same dispatch report Cook described, and he also noted he had received reliable information from the casino in the past. Rieper drove to a location twelve miles from the casino to head off the motorcycle. Fifteen minutes after the tip was reported, Rieper observed a motorcycle with two riders matching the tip's description travel past him, and he conducted a traffic stop.

¶5 Officer Greg Chafer testified that he later responded to the stop, having also received the dispatch report, and he observed the driver and the female passenger matched the descriptions in the report. Chafer made contact with the driver, identified as Mansfield, and Mansfield admitted he had been at the casino that morning. Chafer observed Mansfield's eyes were bloodshot. Chafer then explained to Mansfield he was going to pat down Mansfield to check for weapons. Chafer testified he decided to frisk Mansfield because he was unfamiliar with him and, based on his seventeen years of law enforcement experience, he knew that persons who used drugs often carried knives.

¶6 Before he conducted the pat down, Chafer asked Mansfield if he had any sharp objects on him, to which Mansfield replied he had a butterfly knife in his front pants pocket. Chafer then removed a knife from that pocket, after which Mansfield himself pulled out a glass bowl containing burnt residue from his other pocket. Mansfield then revealed three bags of marijuana in the motorcycle's saddlebags and admitted to smoking marijuana previously that day. Chafer did

not otherwise search Mansfield. Mansfield agreed to a blood draw after Chafer read him the Informing the Accused form.[2] *See* WIS. STAT. § 343.305(4).

¶7 The circuit court concluded the tip from the casino was reliable, providing a reasonable basis for the traffic stop, and Chafer had reasonable suspicion that Mansfield was armed, permitting Chafer to "ask for the pat-down." In a later decision, the court concluded Mansfield's consent to the blood draw was voluntary, and it denied Mansfield's suppression motion questioning the constitutionality of the implied consent statute. Mansfield pled guilty to the third-offense OWI charge, and the remaining charges were dismissed and read in for sentencing. Mansfield now appeals, and we review the denial of his suppression motions. *See* WIS. STAT. § 971.31(10).

DISCUSSION

¶8 Our review of an order denying a motion to suppress presents a question of constitutional fact, which is subject to a two-step standard of review. ***State v. Tullberg***, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120. First, we uphold the circuit court's findings of historical fact unless they are clearly erroneous. ***State v. Williams***, 2002 WI 94, ¶17, 255 Wis. 2d 1, 646 N.W.2d 834. Then, we review the circuit court's determination of the constitutional question de novo. ***Id.***

[2] A blood sample was later taken and sent to the state crime laboratory for testing. According to the complaint, a test of Mansfield's blood sample revealed the presence of delta-9 THC.

I. Traffic Stop

¶9 Mansfield first argues that chief Rieper lacked reasonable suspicion to stop Mansfield's motorcycle based upon what he terms was an "anonymous" tip from the casino. A law enforcement officer may seize an individual when he or she has reasonable suspicion based upon specific, articulable facts that wrongful conduct is afoot, ***Terry v. Ohio***, 392 U.S. 1, 27 (1968), including when that suspicion is based upon an informant's tip, ***Navarette v. California***, 134 S. Ct. 1683, 1688 (2014). Whether a tip provides reasonable suspicion requires us to consider (1) "the quality of the information, which depends upon the reliability of the source," and (2) the "quantity or content of the information." ***State v. Miller***, 2012 WI 61, ¶31, 341 Wis. 2d 307, 815 N.W.2d 349. An "inversely proportional" relationship exists between these factors, ***id.***, which our supreme court has described as follows:

> [I]f an informant is more reliable, there does not need to be as much detail in the tip or police corroboration in order for police to rely on that information to conduct an investigatory stop. On the other hand, if an informant has limited reliability—for example, an entirely anonymous informant—the tip must contain more significant details or future predictions along with police corroboration. The relevant question is whether the tip contained "sufficient indicia of reliability," along with other information known to police, to support reasonable suspicion for an investigatory stop.

Id., ¶32 (quoting ***Alabama v. White***, 496 U.S. 325, 332 (1990)) (footnotes omitted).

¶10 Mansfield argues the tip from the casino lacked "the meticulous specificity and predictive nature" required by ***White***, 496 U.S. at 326-27, for an officer to act on an "anonymous" tip. He contends the tipster failed to indicate how he or she knew the subject was smoking marijuana or predict the subject's

future conduct after the subject and his companion left the parking lot. He argues "the ambit of reasonable suspicion does not extend to allow police to stop motorists randomly based on [an] anonymous and generic tip."

¶11 The State contends the tip from the casino was not from an "anonymous" source and instead was provided by a "citizen informant." "[A] citizen informant is someone who happens upon a crime or suspicious activity and reports it to police." ***State v. Kolk***, 2006 WI App 261, ¶12, 298 Wis. 2d 99, 726 N.W.2d 337. Citizen informants are generally considered the most reliable type of informant, *see* ***Miller***, 341 Wis. 2d 307, ¶31 n.18, because they are presumed to "act[] with an intent to aid the police in law enforcement because of [their] concern for society or for [their] own safety" after witnessing wrongful conduct. ***State v. Paszek***, 50 Wis. 2d 619, 630, 184 N.W.2d 836 (1971).

¶12 The State argues the tipster was a citizen informant because the casino directly called Chafer's partner to report the information, allowing police to more easily trace the source of the tip, and because the casino had provided reliable information to law enforcement in the past. We agree. Individuals who risk identification—and thus consequences for providing false information—as well as those who have previously given reliable tips to law enforcement may be presumed to be personally reliable. *See* ***State v. Rutzinski***, 2001 WI 22, ¶20, 241 Wis. 2d 729, 623 N.W.2d 516. Mansfield does not reply to the State's argument that the tipster was a citizen informant, and he did not preemptively address it in his brief-in-chief. We therefore deem the issue conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded). We next consider whether the content of the tip from the "citizen informant" provided reasonable suspicion to support the traffic stop.

¶13 Our courts recognize the importance of citizen informants and accordingly apply a relaxed test of reliability that shifts from a question of "personal reliability"—i.e., the extent to which the informant was trustworthy—to "observational reliability"—i.e., the extent to which the tipster could know of the matters reported. *See* ***Kolk***, 298 Wis. 2d 99, ¶13. In terms of "observational reliability," we consider the nature of the report, the citizen informant's opportunity to hear and see the matters reported, and the extent to which independent police investigation could verify the tip. ***Id.***

¶14 The tip here evidenced significant observational reliability. As Cook testified, the casino's surveillance system covered its entire premises, including the parking lot. From this the officers could reasonably infer that casino personnel observed the subject of the tip was smoking marijuana and placed the three bags of marijuana in his saddlebag. A citizen informant's tip must provide a sufficient amount of observational detail of wrongful conduct, but it need not explicitly describe an eyewitness basis for knowledge to be reliable. ***Id.***, ¶15; *see also* ***State v. Powers***, 2004 WI App 143, ¶11, 275 Wis. 2d 456, 685 N.W.2d 869. In addition, although law enforcement did not review the surveillance footage from the casino parking lot here, the existence of such footage could allow for independent viewing and verification of the basis for the tip.

¶15 Mansfield seems to acknowledge direct visual observation was the basis for the tip, but he hypothesizes the tipster could have instead witnessed Mansfield smoking a legal substance and mistakenly concluded it was marijuana. However, officers need not rule out innocent explanations before an investigatory stop based upon a tip alleging wrongful conduct once the tip is established to have come from a reliable source. *See* ***Miller***, 341 Wis. 2d 307, ¶32; *see also* ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). Moreover, the tipster's

allegations that the subject ingested a restricted controlled substance and was operating a motor vehicle provided additional reason for law enforcement to act quickly upon the tip. *See* ***Rutzinski***, 241 Wis. 2d 729, ¶26 (exigency may bolster reliability of tip).

¶16 Furthermore, despite Mansfield's argument that any motorcycle on a nearby road could have been "randomly" stopped pursuant to the tip, the content of the tip allowed law enforcement to reliably identify the subjects before the stop. *See* ***Powers***, 275 Wis. 2d 456, ¶14 (independent verification of details of tip may support reasonable suspicion). The tip provided a detailed description of the type of motorcycle and its two riders' appearance, both of which Rieper testified he observed before the traffic stop. Rieper also observed the motorcycle traveling on Highway 63 within the expected amount of time it would take to travel from the casino to his location, corroborating the tipster's prediction of future travel. *See* ***Miller***, 341 Wis. 2d 307, ¶55. These facts establish a reasonable inference that Mansfield and his passenger were the subject of the tip from the casino and had engaged in the alleged wrongful conduct. Accordingly, we conclude that reasonable suspicion based upon information from the tip supported the traffic stop.

II. Protective Search for Weapons

¶17 Law enforcement officers may conduct a protective search during a traffic stop when a reasonably prudent person in the circumstances would be warranted in the belief that his or her safety and that of others was in danger because the individual may be armed with a weapon and dangerous. ***State v. Kyles***, 2004 WI 15, ¶10, 269 Wis. 2d 1, 675 N.W.2d 449. This objective test is meant to balance "the safety of law enforcement officers," particularly in the

context of traffic stops, "and the right of persons to be free from unreasonable government intrusions." ***State v. Bridges***, 2009 WI App 66, ¶12, 319 Wis. 2d 217, 767 N.W.2d 593. Whether a protective search for weapons is justified is evaluated under the totality of the circumstances on a case-by-case basis. ***Kyles***, 269 Wis. 2d 1, ¶5. We may look to any fact in the record, as long as it was known to the officer at the time he or she conducted the frisk and is otherwise supported by testimony at the suppression hearing. ***Id.***, ¶10.

¶18 Mansfield argues Chafer had no basis to conduct a protective search because Chafer had no reason to suspect Mansfield was armed. He observes Chafer testified that he did not consider Mansfield to be a threat to himself or others, that Mansfield was at all times cooperative, that the stop occurred during the middle of the day, and there were three or four police officers at the scene.

¶19 Chafer testified he intended to pat the outside of Mansfield's pockets because he was not familiar with Mansfield. Moreover, as the circuit court found, Chafer explained in his seventeen years of experience it was not uncommon for drug investigation suspects to be armed with knives. Prior to any pat down, Chafer properly inquired if Mansfield had any sharp objects. *See* ***Bridges***, 319 Wis. 2d 217, ¶19 (Before conducting a protective search, an officer may permissibly "make inquiries to obtain information confirming or dispelling the officer's suspicions concerning weapons or other dangerous articles."). Mansfield's admission that he had a butterfly knife clearly indicated he was armed, providing a reasonable basis for a protective search. *See* ***Kyles***, 269 Wis. 2d 1, ¶10. It was only after Mansfield told Chafer that he had a knife in his pocket that Chafer reached into Mansfield's pocket and removed the knife, constituting the total extent of the protective search. Accordingly, we conclude

the totality of the circumstances provided reasonable suspicion supporting Chafer's reach into Mansfield's pocket to retrieve the knife.

III. Constitutionality of Implied Consent Statute

¶20 Warrantless searches are per se unreasonable under the Fourth Amendment. ***State v. Jones***, 2005 WI App 26, ¶9, 278 Wis. 2d 774, 693 N.W.2d 104. Mansfield acknowledges that voluntary consent obviates the need for a warrant for a blood draw. However, Mansfield asserts his Fourth Amendment rights were violated because his consent to a blood draw, pursuant to the implied consent statute, was involuntarily compelled. Mansfield argues that when Chafer explained through the Informing the Accused form, *see* WIS. STAT. § 343.305(4), that Mansfield could lose his driving privileges if he refused a blood test, he was improperly "given an ultimatum and put under duress" to agree to a search. In support, Mansfield compares Wisconsin's civil penalties for refusal, *see* WIS. STAT. § 343.305(10), to criminal penalties imposed in ***Birchfield v. North Dakota***, 136 S. Ct. 2160, 2185-86 (2016), where the Supreme Court held that consent to a blood draw is involuntary if a refusal is conditioned "on pain of committing a criminal offense."

¶21 Mansfield's argument is meritless. We have previously rejected the proposition that an officer's reading of the Informing the Accused form alone, without threat or improper coercion, renders a suspect's consent to a blood test involuntary.[3] ***State v. Wintlend***, 2002 WI App 314, ¶¶8, 17-18, 258 Wis. 2d 875,

[3] In his statement on oral argument and publication regarding the implied consent statute, Mansfield insisted, without developing an argument, that the "same legal issue" presented by the petition for review in ***State v. Blackman***, 2017 WI 77, ___ Wis. 2d ___, 898 N.W.2d 774, governed this case. The supreme court released ***Blackman*** after briefing was completed here. However, ***Blackman*** is not on point.

(continued)

655 N.W.2d 745; ***Village of Little Chute v. Walitalo***, 2002 WI App 211, ¶¶6, 10-11, 256 Wis. 2d 1032, 650 N.W.2d 891. And the holding in ***Birchfield*** is inapt here, as the Supreme Court unambiguously declared: "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them." ***Birchfield***, 136 S. Ct. at 2185 (citations omitted). Accordingly, we conclude the implied consent statute is not facially unconstitutional, and Mansfield voluntarily consented to the blood draw.

By the Court.—Judgment affirmed.

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

In ***Blackman***, our supreme court addressed whether consent to a blood test was voluntary when requested pursuant to WIS. STAT. § 343.305(3)(ar)2. ***Blackman***, 898 N.W.2d 774, ¶2. That part of the implied consent statute permits law enforcement to request via the Informing the Accused form that an individual submit to a chemical test when involved in an accident that causes death or great bodily harm and is suspected of a traffic violation, in the absence of suspicion of or arrest for an OWI offense. *See* ***id.***, ¶¶32-35. However, revocation of a driver's operating privilege may only occur under WIS. STAT. § 343.305(9)(a)5. if, at a refusal hearing, it is shown the officer "had probable cause to believe" an OWI offense was committed. ***Blackman***, 898 N.W.2d 774, ¶¶5, 43-44, 50.

As such, our supreme court held that consent obtained pursuant to the Informing the Accused form was involuntary because the officer, through the form, misrepresented to the non-OWI-suspected defendant that his operating privilege would be revoked if he refused a blood draw, when the now-existing statutory structure would render that consequence impossible. ***Id.***, ¶¶15, 44, 63-64. By contrast, the record here readily establishes Mansfield was suspected of, and arrested for, an OWI offense, meaning Chafer accurately stated the consequences of a refusal.