

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 28, 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. 2016AP2404-CR

Cir. Ct. No. 2015CT1412

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

XAVIER GRULLON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
MARC A. HAMMER, Judge. *Affirmed.*

¶1 SEIDL, J.¹ Xavier Grullon appeals a judgment convicting him of operating a motor vehicle while intoxicated (OWI) as a misdemeanor fourth

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.

offense.² Grullon challenges the circuit court's order denying his motion to suppress evidence obtained as a result of his arrest. He claims that his seizure by law enforcement prior to his arrest was constitutionally unreasonable. We affirm the judgment, concluding that, assuming a pre-arrest seizure occurred, the totality of the circumstances provided reasonable suspicion justifying Grullon's seizure.

BACKGROUND

¶2 Grullon was charged with OWI and operating a motor vehicle with a prohibited alcohol concentration. He brought a motion to suppress evidence that he contended was the result of an unlawful seizure prior to his arrest.

¶3 Officer Steven Mahoney of the Green Bay Police Department testified at the suppression hearing. Mahoney was on patrol in an unmarked police cruiser during the warm, dry night of July 22, 2015, at about 1:45 a.m. Mahoney received a dispatch report stating that an anonymous 911 caller recently reported a man had "dumped" or fallen off a Harley-type motorcycle in a roadway near 1074 Western Avenue, the man had trouble getting the motorcycle back up, and he appeared intoxicated.³ The report further indicated that once the rider righted the motorcycle and started it, he traveled eastbound on Western Avenue.

¶4 Mahoney drove north on 13th Avenue toward the general vicinity of the reported incident in anticipation that the motorcycle would continue east on

² Grullon was subject to misdemeanor penalties for fourth-offense OWI under WIS. STAT. § 346.65(2)(am)4. (2013-14) because, according to the complaint, his most recent OWI conviction occurred over five years before the date of this offense.

³ A second police officer testified at the hearing and supplemented Mahoney's testimony on the details of the tip. A printout of the dispatch report was also entered into evidence at the suppression hearing. The report included the caller's address and phone number.

Western Avenue. According to Mahoney, Western Avenue does not continue eastward so as to intersect with 13th Avenue, so a motorist who wished to continue eastward would have to turn north onto an intersecting street before turning east onto School Place. As Mahoney approached the intersection of 13th Avenue and School Place, he saw an eastbound motorcycle stopped at the intersection on School Place. Although Mahoney described the motorcycle as a “Harley type” and did not recall if it appeared damaged, he testified that he was searching for any type of motorcycle at that time. Mahoney observed there was “slow” to no traffic at that time of night.

¶5 Mahoney continued north through the intersection on 13th Avenue. After doing so, Mahoney observed in his cruiser’s rear-view mirror that the motorcycle waited about “five to ten seconds” before it turned south onto 13th Avenue. Mahoney found this turn unusual because, based upon his experience, it indicated the motorcyclist was trying to evade him by going in the other direction Mahoney was traveling. Mahoney explained that if motorists wait at an intersection in police presence, “they are looking to see where I might be turning and then they proceed as they might be nervous there is a police car in the area.” Mahoney believed his unmarked vehicle was identifiable as a police cruiser because of its visible antennae, light bars, and a flood lamp.

¶6 Mahoney did a Y-turn and followed the motorcycle, which pulled into a driveway on 13th Avenue about forty yards south of the intersection. Mahoney pulled partway into the driveway. As the rider dismounted the motorcycle and walked toward a residence, Mahoney activated his cruiser’s emergency lights to draw the rider’s attention. The rider stopped walking before reaching the residence. Mahoney approached and spoke to the rider, who identified himself as Grullon. Mahoney observed that Grullon slurred his speech,

his breath smelled of intoxicating beverages, and his balance was poor.⁴ Those indicators eventually led to Grullon's arrest for OWI.

¶7 After briefing the issue of whether Mahoney had "seized" Grullon in the driveway, the circuit court entered a written order denying the suppression motion. The court concluded that Grullon was not seized under the Fourth Amendment and, regardless, the totality of the circumstances provided Mahoney with reasonable suspicion of unlawful conduct for him to perform an investigatory stop.

¶8 Grullon entered a no-contest plea to fourth-offense OWI and was sentenced to 175 days in jail. His sentence was stayed pending this appeal.

DISCUSSION

¶9 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution both protect against unreasonable searches and seizures. *State v. Young*, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729. These safeguards extend to investigatory stops by police officers. *Id.*, ¶20; *see also Terry v. Ohio*, 392 U.S. 1, 22 (1968). Initially, the parties dispute whether a Fourth Amendment seizure occurred when Grullon halted after Mahoney pulled into the driveway and activated his police cruiser's emergency lights. We assume without deciding that Grullon was seized at that point. We instead turn to whether Mahoney had reasonable suspicion warranting an investigatory stop of Grullon.

⁴ Grullon also testified about his contact with Mahoney in the driveway, the details of which are not relevant to the issue on appeal.

¶10 Before conducting an investigatory stop, an officer “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the officer to believe that criminal activity is afoot.” *State v. Rutzinski*, 2001 WI 22, ¶14, 241 Wis. 2d 729, 623 N.W.2d 516 (citing *Terry*, 392 U.S. at 21-22, 27). Reasonable suspicion analysis takes into account the totality of the facts and circumstances. See *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). Facts that are innocent in isolation may accumulate to the point of allowing an inference of suspicious conduct. *Id.* at 58-59.

¶11 Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact, consisting of two steps. *State v. Parisi*, 2016 WI 10, ¶26, 367 Wis. 2d 1, 875 N.W.2d 619. The circuit court’s findings of fact are upheld unless clearly erroneous, while the application of constitutional principles to those findings is reviewed de novo. *Id.*

¶12 Here, the parties narrow the dispute over reasonable suspicion to the facts of the 911 tip and Grullon’s prolonged stop and turn. An officer may rely on information provided through an informant’s tip before conducting an investigatory stop. *Rutzinski*, 241 Wis. 2d 729, ¶17. To determine whether an officer reasonably relied on a tip, however, we must balance the “quality of the information, which depends upon the reliability of the source,” with the “quantity or content of the information.” *State v. Miller*, 2012 WI 61, ¶31, 341 Wis. 2d 307, 815 N.W.2d 349. There is an inversely proportional relationship between these two factors, and a stronger showing on one may remedy any deficiency on the other. *Id.*, ¶¶31-32.

¶13 In *Navarette v. California*, 134 S. Ct. 1683 (2014), an anonymous 911 caller reported that a silver Ford truck swerved and ran the caller’s vehicle off a road five minutes prior to the call, and the caller provided the offending truck’s license plate information. *Id.* at 1686-87. Acting on this tip, law enforcement officers located the truck on the same road and, after observing it for five minutes without additional suspicious conduct, performed a traffic stop. *Id.* at 1687, 1691. The Supreme Court held that this tip provided reasonable suspicion to support the stop. *Id.* at 1692. On the tip’s reliability, the Court concluded the caller necessarily claimed an eyewitness basis for knowledge by reporting the make, color and plate of the vehicle. *Id.* at 1689. The Court further determined the tip was reliable because the caller necessarily provided the information near in time to the alleged incident, and the call was made through the 911 system. *Id.* at 1689-90. The Court concluded that the tip’s information on the truck swerving and running another vehicle off the road provided a sufficient description of drunk driving. *Id.* at 1690-91.

¶14 The tip in this case is analogous to the one in *Navarette*. First, this tip, while anonymous, provided several important signs of reliability. The caller here used the 911 system, which generally has “some features that allow for identifying and tracing callers” such that “a false tipster would think twice before using the system.” *Id.* at 1689-90; *see also* WIS. STAT. § 256.35(10) (imposing penalties for knowingly reporting nonexistent facts through a 911 call). The circuit court found the report disclosed both the phone number and a nearby address of the 911 caller, which could be used to identify the caller, and supported reliability.

¶15 Nevertheless, Grullon argues the tip carried a “potential for bias” and was thus unreliable because the anonymous caller may have known the person

who was the subject of the report. Grullon bases his theory on the facts that the caller was from a nearby address on Western Avenue and that the caller indicated the motorcycle fell near 1074 Western Avenue. Grullon’s argument is purely speculative. The circuit court reasonably found the caller was able to “witness[]” the incident firsthand on Western Avenue, close to his or her residence, and “report[] the event moments after it occurred.” An inference of firsthand observation further supports the reliability of the caller. See *Navarette*, 134 S. Ct. at 1689-90; *State v. Powers*, 2004 WI App 143, ¶11, 275 Wis. 2d 456, 685 N.W.2d 869. In addition, the 911 tip provided predictive information that allowed Mahoney to corroborate the tip and identify its subject. Mahoney located a man riding a “Harley-type” motorcycle—on a night with limited traffic—on a street close by, and a short time after the 911 call was made, all of which bolsters the reliability of the tip.⁵ See *Navarette*, 134 S. Ct. at 1689-90.

¶16 Second, this tip sufficiently informed dispatch that suspicious conduct was afoot. While the 911 caller alleged only that the rider appeared “intoxicated,” a reasonable police officer could infer motorcycle riders typically do not “dump” their motorcycles in a roadway without reason, particularly because Mahoney testified there was neither a weather problem nor much traffic that night. See *Waldner*, 206 Wis. 2d at 58. Rather, the 911 caller alleged that the rider appeared intoxicated. The circuit court reasonably inferred the eyewitness

⁵ Grullon inaptly compares the detail of this tip to that of the tip in *Alabama v. White*, 496 U.S. 325 (1990). In *White*, the anonymous tip at issue provided extensive detail that the police in part independently corroborated, and it was deemed sufficient on that basis, while there were no indications that the tipster was reliable. *Id.* at 331-32. The anonymous 911 caller here may have included less detailed corroborating information than the tipster in *White*, but the 911 caller provided more in terms of reliability to support the tip—that is, his or her address and phone number. See *Navarette v. California*, 134 S. Ct. 1683, 1689 (2014).

caller was in a position to form the intoxication opinion because the caller observed the rider's difficulty in getting the motorcycle upright. *See Powers*, 275 Wis. 2d 456, ¶13 (officers may rely upon layperson's assessment of intoxication).

¶17 There may be other reasons why the motorcycle fell over and why the rider struggled to get it upright. However, reasonable suspicion does not require officers to hypothesize innocent explanations. *See Navarette*, 134 S. Ct. at 1691; *Waldner*, 206 Wis. 2d at 60. This principle is especially true given the exigency of an impaired motorist traveling on a roadway—one who had already lost control of his motorcycle. *See Navarette*, 134 S. Ct. at 1691; *Rutzinski*, 241 Wis. 2d 729, ¶35. The circuit court reasonably concluded the tipster was a reliable informant.

¶18 Mahoney observed an additional factor supporting reasonableness after he saw the motorcycle—namely, the prolonged stop of the motorcycle at the intersection and subsequent turn away from his police cruiser. Based upon his law enforcement experience, Mahoney interpreted that as evasive action by the motorcyclist. Mahoney was entitled to rely on his training and experiences in deducing evasion. *See Waldner*, 206 Wis. 2d at 58.

¶19 Grullon argues Mahoney's "police avoidance" inference was implausible because Grullon may not have noticed Mahoney's unmarked police cruiser. In addition, Grullon posits that if he was truly attempting to elude the cruiser, he would have turned immediately instead of waiting at the intersection. However, based upon Mahoney's testimony, the circuit court reasonably found his vehicle was readily identifiable as a police vehicle from the visible flood lamp,

numerous antennas, and a light bar across the vehicle's full windshield.⁶ While Grullon's stop and turn may be innocent in isolation, his actions nevertheless strengthen an inference that the motorcycle rider did not want to confront police because the rider was under the influence of an intoxicant. *See id.* at 61.

¶20 Grullon also cites *State v. Fields*, 2000 WI App 218, ¶23, 239 Wis. 2d 38, 619 N.W.2d 279, for the proposition that a vehicle's "slightly longer than normal stop" late at night at a stop sign in the presence of a police vehicle cannot give rise to reasonable suspicion. *Fields* is distinguishable. Other than the time of night, the officers in *Fields* relied solely on a prolonged stop in making a traffic stop. *Id.*, ¶¶5-6, 17, 21. Here, the tip provided Mahoney with more. Indeed, a vehicle's prolonged hesitation at a stop sign, when combined with an anonymous tip alleging drunk driving and describing the location of the vehicle, provides reasonable suspicion. *See State v. Guthmiller*, 499 N.W.2d 590, 592 (N.D. 1993), *cited with approval in Fields*, 239 Wis. 2d 38, ¶20.

¶21 We conclude Mahoney was able to point to specific and articulable facts which, taken together with rational inferences from those facts, would objectively warrant a reasonable person with the knowledge and experience of the officer to believe that criminal activity was afoot. Accordingly, we agree with the circuit court that Mahoney had reasonable suspicion to justify a seizure of Grullon for purposes of an investigative stop.

⁶ Mahoney also testified the intersection was illuminated by streetlights. *Cf. State v. Fields*, 2000 WI App 218, ¶15, 239 Wis. 2d 38, 619 N.W.2d 279 (lack of evidence on appearance of police vehicle or lighting of intersection provided no inference the vehicle was recognizable as a police vehicle).

By the Court.—Judgment affirmed.

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

