

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 18, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

Nos. 00-0313, 00-0314

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DOUGLAS COUNTY,

PLAINTIFF-APPELLANT,

V.

STEVEN LEINWEBER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Douglas County:
MICHAEL T. LUCCI, Judge. *Affirmed in part; reversed in part and cause remanded.*

¶1 PETERSON, J.¹ Douglas County appeals a judgment dismissing the charges against Steven Leinweber for operating a motor vehicle while

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All statutory references are to the 1997-98 edition unless otherwise noted.

intoxicated, operating a motor vehicle with a prohibited blood alcohol content and possessing open intoxicants in a motor vehicle on a public highway, contrary to WIS. STAT. §§ 346.63(1)(a), (1)(b), 346.935.² The trial court concluded that the arresting officer conducted an unlawful traffic stop of Leinweber and dismissed the charges. The court's credibility determinations control the legality of the stop. Suppression, however, was the appropriate remedy, not dismissal of the charges. Therefore the matter is remanded for further proceedings.

BACKGROUND

¶2 On the evening of October 20, 1999, Douglas County Sheriff Deputy William Webber was on routine patrol in the Village of Oliver when his dispatch service notified him of a possible intoxicated driver traveling in his direction. An anonymous tipster had relayed the following information by telephone: a dark-colored pickup truck with no topper was traveling westbound at a high rate of speed from South Superior toward Oliver on Highway 105, a distance of approximately five miles. Webber decided to watch for the vehicle.

¶3 From this point the evidence presented at the motion hearing conflicted. Webber testified that while he was parked he saw a vehicle matching the tipster's description approach the village. The vehicle was being driven between two others. Webber continued to watch as the vehicle jerked in and out of its traffic lane in an apparent effort to pass the vehicle in front. Although Webber was unsure how fast any of the vehicles was traveling, he thought that Leinweber was traveling faster than the posted speed limit because he had to brake several times when approaching the front vehicle. Webber continued to observe

² This court consolidated the appeals on its own motion.

Leinweber turn and roll through a stop sign without stopping completely. At that point, Webber pulled Leinweber over.

¶4 Leinweber testified to a different scenario. He claimed that Webber could not have seen him driving into the village. Leinweber explained that Webber was actually parked and observing from a different location, and that photographs he presented showed Webber could not have observed his driving at all because a hump in the road and trees fully blocked the view. The trial court found Leinweber's testimony more credible and concluded that Webber's observations were insufficient to corroborate the anonymous tip.

ANALYSIS

¶5 Whether evidence should be suppressed because it was obtained in violation of the Fourth Amendment is a question of constitutional fact that this court reviews under a two-step standard. *See State v. Phillips*, 218 Wis. 2d 180, 189-90, 577 N.W.2d 794 (1998). First, this court will accept the trial court's findings of evidentiary or historical fact unless they are contrary to the great weight and clear preponderance of the evidence.³ *See id.* at 190 (citation omitted). Second, this court independently applies constitutional principles to the facts as found by the trial court. *See id.*

¶6 Under *Terry v. Ohio*, 392 U.S. 1, 27 (1968), the police must possess sufficient information to form a reasonable suspicion of illegal activity to justify an investigative stop. Reasonable suspicion must be based on "specific and

³ Under WIS. STAT. § 972.11(1), this court may only overturn a trial court's findings of fact if the findings are clearly erroneous. The "clearly erroneous" and "great weight and clear preponderance" standards are interchangeable because they are essentially the same test. *See State v. Harris*, 206 Wis. 2d 243, 250 n.6, 557 N.W.2d 245 (1996).

articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990) (quoting *Terry*, 392 U.S. at 21). Reasonableness is measured against an objective standard, taking into consideration the “totality of the circumstances.” *Id.* at 139-40.

¶7 In this case the two-step standard of review is critical. As will be seen, Webber did not have authority to stop Leinweber without first observing corroborating evidence of suspicious activity.

¶8 The trial court found that Webber “was not at the intersection [where he claimed to have been when he] first observed [Leinweber’s] vehicle,” and that “it is unlikely that Webber could have observed [Leinweber] approaching the village limits and operating his vehicle in the manner [Webber] described.” The trial court is the ultimate arbiter of the credibility of witnesses, *see State v. Angiolo*, 186 Wis. 2d 488, 495, 520 N.W.2d 923 (Ct. App. 1994), and its credibility determinations will not be upset unless clearly erroneous, *see* WIS. STAT. § 805.17(2). The County mischaracterizes the trial court’s factual findings and fails to address this court’s deferential standard of review regarding credibility determinations. The trial court’s credibility determinations mean that this court will not rely on Webber’s claimed observations of Leinweber’s erratic driving.

¶9 Thus, the remaining question is whether the other facts provide a sufficient basis for the traffic stop. Without observing Leinweber’s driving, Webber’s only justification for stopping Leinweber was the anonymous tip.

¶10 Leinweber concedes that an anonymous tip can form the basis for reasonable suspicion to support a *Terry* stop, but argues that the tip must be

sufficiently corroborated and here it was not. This court agrees. “The mere fact that a tip, if true, would describe illegal activity does not mean that the police may make a *Terry* stop without meeting the reliability requirement” *Florida v. J.L.*, 120 S. Ct. 1375, 1380 n.* (2000). Unlike tips from known informants whose reputations can be assessed, “an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity.” *Id.* (quoting *Alabama v. White*, 496 U.S. 325, 329 (1990)).⁴

¶11 Although an anonymous tip may form the basis of reasonable suspicion when “sufficient indicia of reliability” make the tip “suitably corroborated,” the police must be able to corroborate more than the readily observable location and appearance of the person whom the tipster means to accuse. *Id.* at 1378-79. “The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.” *Id.* (citing 4 WAYNE LAFAYETTE, SEARCH AND SEIZURE § 9.4(h), at 213 (3d ed. 1996)).

¶12 Here the anonymous tipster provided identifying information and an allegation that the driver was driving at a high rate of speed. However, based on the trial court’s credibility determination, Webber did not corroborate any suspicious or illegal activity. Without those independent observations, there were

⁴ Following its decision in *Florida v. J.L.*, 120 S. Ct. 1375, 1378 (2000), the United States Supreme Court vacated our supreme court’s recent decision in *State v. Williams*, 225 Wis. 2d 159, 169, 591 N.W.2d 823 (1999). See *Williams v. Wisconsin*, 120 S. Ct. 1552 (2000). *Williams* sustained a *Terry* stop conducted after an anonymous tip was verified by confirming readily observable information without independently observing any suspicious activity. See *Williams*, 225 Wis. 2d at 161. As of this opinion’s release date, *Williams* was still pending before our supreme court on remand.

insufficient indicia of reliability for Webber to reasonably rely on the anonymous tip in stopping Leinweber.⁵ *See id.*

¶13 The County argues that *J.L.* is distinguishable because it involved a *Terry* frisk for weapons. That is plainly wrong. The *J.L.* Court stated,

the requirement that an anonymous tip bear some standard indicia of reliability in order to justify a stop in no way diminishes a police officer's prerogative, in accord with *Terry*, to conduct a protective search of a person who has already been legitimately stopped. We speak in today's decision only of cases in which the officer's authority to make the initial stop is at issue.

Id. at 1380. Because *J.L.* controls, the stop was unlawful.⁶

⁵ Webber also testified that an unidentified driver of a third vehicle, who was driving behind Leinweber, stuck his arm out and pointed at Leinweber. Webber testified that he understood this gesture as identifying Leinweber as the suspected intoxicated driver. Concurring in *J.L.*, Justice Kennedy distinguished anonymous tips made by phone calls from face to face encounters. *See J.L.*, 120 S. Ct. at 1381 (Kennedy, J., concurring). He wrote:

If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip. An instance where a tip might be considered anonymous but nevertheless sufficiently reliable to justify a proportionate police response may be when an unnamed person driving a car the police officer later describes stops for a moment and, face to face, informs the police that criminal activity is occurring.

Id. The County has not argued, and the trial court did not consider that, by sticking his arm out and pointing at Leinweber, the unidentified third driver, risked his anonymity to an extent that would justify Webber's reliance. This court will not consider an argument not before it. *See State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

⁶ The County also intimates that drunk driving is sufficiently dangerous to the public to justify a stop under these circumstances. But *J.L.* rejected the similar argument in the context of a concealed weapon. *See id.* at 1379-80. The County does not suggest any reason that an intoxicated driver would inherently pose a substantially greater risk to the public than someone carrying a concealed weapon.

¶14 The appropriate remedy when evidence has been illegally obtained is suppression, not dismissal of the charges. The County is free to prosecute Leinweber using other evidence it may have or attain that is not significantly tainted by the unlawful stop. *See State v. Stevens*, 213 Wis. 2d 324, 333, 570 N.W.2d 593 (Ct. App. 1997)

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

