

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2001

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.

No. 00-2057-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAMIYEN S. COLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Reversed.*

¶1 ANDERSON, J.¹ In this appeal, we are required to analyze whether a totally anonymous tip has sufficient indicia of reliability to provide reasonable suspicion to conduct an investigative stop. While the tip does contain an assertion

¹ This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

of criminal activity, it lacks any verifiable information that would permit the testing of the informant's basis of knowledge or credibility. Therefore, we reverse.

¶2 Damiyen S. Coley was charged with one count of receiving stolen property with a value of less than \$1,000 in violation of WIS. STAT. § 943.34(1)(a). She was arrested by a Village of Butler police officer responding to an anonymous complaint that two people were having sex in a parked vehicle. The officer arrested the passenger in Coley's car after conducting an identification check and being informed that the passenger had two outstanding warrants for his arrest. In a search incident to the arrest, the officer found three credit cards in Coley's purse that were not in her name. Coley's motion to suppress the physical evidence was denied by the trial court. The State and Coley subsequently entered into a plea agreement where, in exchange for an *Alford*² plea to the charge, the State would recommend a \$50 fine plus costs. The circuit court found Coley guilty and imposed a fine of \$75.50 plus costs.

¶3 Coley now appeals from the denial of her motion to suppress physical evidence seized as the result of an investigative stop by the Village of Butler police and the denial of her postconviction motion seeking reconsideration of the circuit court's decision not to suppress the physical evidence. Coley contends that under *Florida v. J.L.*, 529 U.S. 266 (2000), and *State v. Williams*, 2001 WI 21, 241 Wis. 2d 631, 623 N.W.2d 106, the anonymous tip that led the

² The term "*Alford* plea" is derived from the name of the defendant in the United States Supreme Court case that first upheld the constitutionality of this type of plea. See *North Carolina v. Alford*, 400 U.S. 25 (1970). An *Alford* plea "is a guilty plea in which the defendant pleads guilty while either maintaining his innocence or not admitting having committed the crime." *State v. Garcia*, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995).

police to her car lacked sufficient indicia of reliability to establish a reasonable suspicion for a *Terry*³ investigative stop.⁴

¶4 This appeal involves the application of constitutional standards to undisputed facts, a question of law which we review de novo. *State v. Foust*, 214 Wis. 2d 568, 571-72, 570 N.W.2d 905 (Ct. App. 1997).

¶5 Officer James Komar testified at the suppression hearing that at 10:48 a.m. on February 27, 1998, he was dispatched to the 12800 block of Hampton Avenue in the Village of Butler. Komar related that a police department dispatcher told him that an anonymous caller had complained about two people having sex in a parked vehicle. He was told that the anonymous caller had described the vehicle as being maroon in color; however, the caller had not related the make, model, year of manufacture or license plate number of the vehicle.

¶6 When Komar arrived at the location, he saw a maroon vehicle legally parked and there were no other vehicles within one hundred yards. He saw two fully clothed individuals in the front seat; Coley was in the driver's seat with her feet on the passenger's seat and a male was lying down with his head in Coley's lap and feet on the passenger's side window. Nothing about the vehicle or the passengers aroused Komar's suspicions. He did not see any sexual activity, the windows of the car were not fogged over and the car was not rocking or

³ *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

⁴ After this appeal was submitted for decision, we issued an order placing this case on hold pending a decision by the Wisconsin Supreme Court in *State v. Williams*, 2001 WI 21, 241 Wis. 2d 631, 623 N.W.2d 106. When that decision was released on March 13, 2001, we ordered the parties to simultaneously file supplementary briefs applying the decision in *Williams* to the facts of this case.

swaying. The car had a current registration plate, it was legally parked and Komar did not notice any other violations of traffic regulations.

¶7 Komar asked Coley to step out of the car, after making certain that she was not being held against her will and, being told that Coley and the male were “just goofing around,” Komar asked both individuals for identification. Komar arrested the male passenger after finding out that there were outstanding warrants for his arrest. During a search incident to the male’s arrest, Komar found three credit cards in Coley’s purse that were in other people’s names.

¶8 Both Coley and the State agree that whether the physical evidence should be suppressed depends upon the application of *J.L.* and *Williams* to the undisputed facts. Predictably, they disagree on the result.

¶9 The temporary detention of a citizen constitutes a seizure within the meaning of the Fourth Amendment and triggers Fourth Amendment protections. *State v. Harris*, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996). A police officer may, in the appropriate circumstances, detain a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968). When police make an investigative stop of a person, it is not an arrest, and the standard for the stop is less than probable cause. *State v. Allen*, 226 Wis. 2d 66, 70-71, 593 N.W.2d 504 (Ct. App. 1999), *review denied*, 228 Wis. 2d 168, 599 N.W.2d 409 (Wis. June 7, 1999) (No. 98-1690-CR). The standard is reasonable suspicion, “a particularized and objective basis” for suspecting the person stopped of criminal activity. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). When determining if the standard of reasonable suspicion was met, those facts known to the officer must be considered together as a totality of circumstances. *State v. Richardson*,

156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). Here, part of the circumstances we must evaluate includes an anonymous tip. Both *J.L.* and *Williams* address the examination of the reliability of the anonymous tip and whether the police are justified in acting on the anonymous tip.

¶10 In *J.L.*, the Miami-Dade Police Department received an anonymous call stating “that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun.” *J.L.*, 529 U.S. at 268. Police officers arrived at the bus stop and saw fifteen-year-old J.L. wearing a plaid shirt and standing with two other males. *Id.* One officer immediately frisked J.L. and found a concealed firearm. *Id.* The United States Supreme Court granted certiorari to review the decision by the Florida Supreme Court which held the search invalid.

¶11 A unanimous United States Supreme Court affirmed the decision of the Florida Supreme Court. Writing for the court, Justice Ruth Ginsburg was skeptical that an anonymous tip could create the necessary reasonable suspicion to support a *Terry* stop, noting that “an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity.” *J.L.*, 529 U.S. at 270 (quoting *Alabama v. White*, 496 U.S. 325, 329 (1999)). Justice Ginsburg subsequently recognized that “there are situations in which an anonymous tip, suitably corroborated, exhibits ‘sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.’” *Id.* (quoting *White*, 496 U.S. at 327). The Court concluded that the anonymous tip lacked any indicia of reliability. “The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant’s knowledge or credibility.” *Id.* at 271.

¶12 The concurring opinion of Justice Arthur Kennedy explains that whether an anonymous tip meets the “reasonable suspicion” standard depends upon the reliability of the tip. Justice Kennedy described why anonymous tips pose a unique reliability problem: “If the telephone call is truly anonymous, the informant has not placed his credibility at risk and can lie with impunity. The reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable.” *Id.* at 275.

¶13 The Wisconsin Supreme Court applied *J.L.* in *Williams*. *Williams* was before the court for a second time. The first decision of the court was vacated by the United States Supreme Court and remanded for further consideration in light of *J.L. Williams*, 2001 WI 21 at ¶1. The issue in *Williams* was “whether an anonymous tip containing a contemporaneous report of drug trafficking, combined with independent observations and corroboration of details from the tip justified the investigatory stop.” *Id.* at ¶2. In *Williams*, the Milwaukee police department received a 911 telephone call from an anonymous caller. The caller stated that she did not want to get involved, but there was drug activity going on in the back alley of her residence. *Id.* at ¶4. The caller described the vehicle involved as a “blue and burgundy Bronco” in the driveway of the caller’s residence at 4261 North Teutonia. *Id.*

¶14 The officers dispatched to the scene saw a vehicle matching the general description of the vehicle reported by the anonymous caller, although the vehicle was a Chevy Blazer rather than a Ford Bronco and was parked at the rear of the apartment building instead of the side. *Id.* at ¶6. The officers turned into the alley and observed that the vehicle had no license plates and saw Williams, seated in the driver’s seat, reach down and behind the front passenger seat. *Id.* at

¶¶7-8. At this time, the officers ordered Williams and his passenger out of the vehicle. *Id.* at ¶8.

¶15 Writing for the majority, Justice N. Patrick Crooks applied a “totality of the circumstances” approach and found that the anonymous tip contained a number of components indicating its reliability. *Id.* at ¶22. The court found “myriad distinctions” between the anonymous tip before it and the tip in *J.L. Williams*, 2001 WI 21 at ¶31. Included among the facts distinguishing *Williams* from *J.L.* are:

- (1) The anonymous tipster described the criminal activity as she was observing it. *Williams*, 2001 WI 21 at ¶33.
- (2) The anonymous tipster identified her location as her home. *Id.* at ¶34.
- (3) The anonymous tipster put her identity at risk by placing a 911 telephone call. The court considered this significant because “more likely than not, the informant is a genuinely concerned citizen as opposed to a fallacious prankster.” *Id.* at ¶35.
- (4) There was an audio recording of the anonymous tip. *Id.* at ¶37.
- (5) Upon arriving at the scene, there were two facts, independent of the anonymous tip, that gave officers reason to suspect that criminal activity was afoot. *Id.* at ¶43. First, Williams reaching behind the seat may have indicated that he was either reaching for a weapon or concealing evidence. *Id.* Second, the Bronco had no license plates. *Id.* at ¶45.
- (6) The court found it significant that the police were able to corroborate the “innocent, although significant details of the tip.” *Id.* at ¶39. According to the court, the police corroboration “lent reliability to the tips.” *Id.* at ¶40.

¶16 The supreme court concluded that the anonymous tip in *Williams* was much more than the “bare-boned” tip in *J.L. Williams*, 2001 WI 21 at ¶47. The court found that the tip was substantial in both quality and quantity. *Id.* In considering the totality of the circumstances, the court was compelled to reach the conclusion that cumulative details of the tip and the officers’ independent corroboration provided reasonable suspicion that crime was afoot. *Id.*

¶17 The Wisconsin Supreme Court also examined *J.L.* in *State v. Rutzinski*, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516. The issue facing the court in *Rutzinski* was whether an anonymous cell-phone call provided sufficient justification for an investigative traffic stop. *Id.* at ¶1. The anonymous cell-phone caller was reporting a suspected drunk driver and remained on the line giving information that permitted the responding officer to position his squad car in the area the suspected drunk driver was headed towards and verify that the officer was behind the correct vehicle. *Id.* at ¶¶5-6.

¶18 The court again found significant distinctions between the anonymous tip in *J.L.* and the anonymous cell-phone tip that led to the traffic stop in *Rutzinski*:

- (1) The informant exposed himself or herself to being identified by providing information that he or she was in the car immediately in front of Rutzinski. *Rutzinski*, 2001 WI 22 at ¶32.
- (2) The informant provided verifiable information indicating his or her basis of knowledge. *Id.* at ¶33.
- (3) The tip suggested that Rutzinski was an imminent threat to the public’s safety. *Id.* at ¶34.

The court rejected Rutzinski's argument that the officer should have delayed the stop until he personally observed signs that Rutzinski was operating while intoxicated because the "tremendous potential danger presented by drunk drivers" is qualitatively different than the danger posed in the case of a concealed weapon. *Id.* at ¶35.

¶19 These distinctions were enough for the court to hold that the investigative stop of Rutzinski did not involve the same constitutional deficiencies present in the stop and frisk of J.L. *Id.* at ¶37. The court concluded that there was reasonable suspicion to conduct an investigative stop of Rutzinski because the informant's tip contained sufficient indicia of reliability and alleged a potential imminent threat to public safety. *Id.*

¶20 *Rutzinski* makes clear that *J.L.* requires the police to corroborate an anonymous tip:

[T]o corroborate a tip, the [United States Supreme] Court explained, the police must do more than verify easily obtainable information that tends to identify the suspect; they must verify information that tends to indicate the informant's basis of knowledge about the suspect's alleged illegal activity. Hence, a totally anonymous tip must contain not only a bald assertion that the suspect is engaged in illegal activity (*e.g.*, that the suspect illegally possesses a gun), but also verifiable information indicating how the tipster came to know of the alleged illegal activity (*i.e.*, the informant's basis of knowledge). In [*J.L.*] ... the anonymous tip did not contain any information such as a prediction regarding the suspect's future behavior which, if corroborated, would indicate the informant's basis of knowledge.

Rutzinski, 2001 WI 22 at ¶28 (citations omitted).

¶21 We turn now to the anonymous tip in this case. The tip was that two people were having sex in a maroon vehicle parked in the 12800 block of

Hampton Avenue. The tip contains a bald assertion of criminal activity: engaging in sexual relations in public could either be fornication in violation of WIS. STAT. § 944.15(2)⁵ or lewd and lascivious behavior in violation of WIS. STAT. § 944.20(1).⁶ The tip does not contain any verifiable information indicating how the tipster came to know of the illegal activity. Like *J.L.*, all the tip contains is a description—in *J.L.*, a young black male in a plaid shirt, *J.L.*, 529 U.S. at 268, and in this case, a maroon vehicle—and a location—in *J.L.*, a particular bus stop, *id.*, and in this case, the 12800 block of Hampton Avenue. Like *J.L.*, the tip contains nothing more than information readily observable by a passerby. *Williams*, 2001 WI 21 at ¶30.

¶22 Unlike *Williams* and *Rutzinski*, there is no information that the tipster risked putting his or her identity at stake; it is unknown whether the tipster was calling from his or her home or if the tipster made a 911 telephone call. Unlike *Williams*, there is no audio recording or transcript of the call, which would offer the limited opportunity to verify the tipster’s veracity through the content of the call, as well as the caller’s tone and delivery. *Williams*, 2001 WI 21 at ¶37.

⁵ WISCONSIN STAT. § 944.15 states:

Fornication. (1) In this section, “in public” means in a place where or in a manner such that the person knows or has reason to know that his or her conduct is observable by or in the presence of persons other than the person with whom he or she is having sexual intercourse.

(2) Whoever has sexual intercourse in public is guilty of a Class A misdemeanor.

⁶ WISCONSIN STAT. § 944.20 states in relevant part:

Lewd and lascivious behavior. (1) Whoever does any of the following is guilty of a Class A misdemeanor:

(a) Commits an indecent act of sexual gratification with another with knowledge that they are in the presence of others; or

(b) Publicly and indecently exposes genitals or pubic area.

Unlike *Williams*, the responding officer did not independently observe any activity that would raise a reasonable suspicion that crime was afoot—in *Williams*, the vehicle did not have a license plate and Williams reached behind the passenger seat. *Id.* at ¶¶43-45. In contrast, in this case, the maroon vehicle was legally parked and the passengers were not observed making any unexplained movements. In addition, unlike *Williams* or *Rutzinski*, there is no information that the tipster was contemporaneous with the call, observing allegedly illegal activity.

¶23 In sum, the tip here, like the tip in *J.L.*, is nothing more than a “bare-boned” tip. It lacks both quality and quantity. The anonymous tip is unsupported by any indicia of reliability other than information observable by a passerby and that is the only information the officer verified when he arrived on the scene. Moreover, the officer did not observe any independent facts when he arrived at the scene. Accordingly, consideration of the totality of the circumstances requires the conclusion that the officer did not act reasonably in detaining Coley. All the anonymous tip gave the officer was the bare report of an unknown, unaccountable informant who neither explained how he or she knew that two people were having sex in a car nor supplied any basis for believing the informant had inside information. *J.L.*, 529 U.S. at 271.

By the Court.—Judgment and order reversed.

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

