

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 22, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2007AP518-CR

Cir. Ct. No. 2006CT315

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELIZABETH A. WALKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Reversed.*

¶1 ANDERSON, P.J.¹ Elizabeth A. Walker appeals from a judgment of conviction for operating a motor vehicle while under the influence of an

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

intoxicant (OWI), second offense. She argues an anonymous tip was unreliable, the arresting officer did not have reasonable suspicion to stop her, and the trial court should have suppressed any evidence resulting from the stop. We agree with Walker that the anonymous tip contained insufficient indicators of reliability and the police lacked reasonable suspicion to conduct a traffic stop; therefore, we reverse.

¶2 During the evening of March 3, 2006, City of Sheboygan Police Officer Stephen Schnabel received a dispatch advising him that a worker at Burger King, who was working the drive-through, called the police to report that a red SUV appeared to be stuck in the drive-through. Schnabel testified that the caller thought the driver might be intoxicated or in the need of some help. Schnabel was in the area assisting at an accident and got out of his squad to walk around and see if he could spot the vehicle. He spotted a red SUV stopped at an intersection fifty feet away, waiting for a green light. He did not observe any traffic violations but he heard the engine screech twice as if the driver was attempting to start an already running engine. Because he was assisting at an accident scene, Schnabel radioed City of Sheboygan Police Officer Brandon Kehoe to stop the vehicle. Schnabel relayed the dispatch call information he had received, the description of the car and the direction it was headed. As soon as he was able to, Schnabel returned to his squad and went to assist Kehoe.

¶3 Walker was charged in a criminal complaint with OWI and operating with a prohibited alcohol concentration, both second offenses. She filed a motion to suppress any evidence, at the motion hearing she alleged that the anonymous tip was devoid of any reliability and without it the police lacked reasonable suspicion to stop her. The circuit court denied the motion, holding:

I think under these facts there are reasonable suspicions for a temporary detention. There is an anonymous tip, although I guess it is semianonymous given that you know the source, if not the name of the [complainant]. It indicates drinking and what could be characterized as erratic driving, stalling, whatever. Immediately that is verified by Officer Schnabel's observations of the car matching the description and the grinding, the restarting while the car is running, which is irrational. It indicates that something is wrong, and combined with the report of drinking and other verifications, I think, justifies a temporary detention.

¶4 On appeal, Walker renews her argument that the anonymous tip was unreliable and the police did not have reasonable suspicion to stop her. To justify an investigatory seizure, the police must have a reasonable suspicion, grounded in specific articulable facts, and reasonable inferences from those facts, that an individual is violating or has violated the law. *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. “The question of what constitutes reasonable suspicion is a commonsense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience.” *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). Whether reasonable suspicion existed for an investigatory stop is a question of constitutional fact. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. We will uphold the trial court's findings of fact unless clearly erroneous, WIS. STAT. § 805.17(2), but we review de novo whether those facts meet the constitutional standard. *Williams*, 241 Wis. 2d 631, ¶18.

¶5 This appeal requires us to determine the reliability of the call from the Burger King employee. In *State v. Rutzinski*, 2001 WI 22, 241 Wis. 2d 729, 623 N.W. 2d 516, the supreme court distilled the jurisprudence of anonymous tips:

[T]o corroborate a tip ... 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 [*Florida v. J.L.*, 529 U.S. 266 (2000)] ... 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, 241 Wis. 2d 729, ¶28.

¶6 In dissecting the call that triggered Schnabel's getting out of his squad, we first determine that it was not truly anonymous; the caller identified himself or herself as working in the Burger King drive-through. This is enough information for an officer to ask the manager on duty who was working the drive-through when the call was made. The caller's identity was at stake and this supports a conclusion about the credibility of the caller. See *Williams*, 241 Wis. 2d 631, ¶35.

¶7 However, there is nothing else under the totality-of-the-circumstances analysis that supports the reliability of the tip. See *Williams*, 241 Wis. 2d 631, ¶22. The caller reported the driver of a red SUV was stuck in the drive-through and may have been intoxicated. This information is not an assertion of bald criminal activity. See *id.*, ¶33. Being stuck in a private parking lot is not a criminal offense or a violation of a traffic regulation. In and of itself, drinking and driving is not a crime; there must be something more, impairment or a prohibited alcohol concentration. Also, there is no detailed identification information that

would make this red SUV stand out from all the other red SUVs on the streets of Sheboygan.

¶8 What happened after that call further erodes the reliability of the tip. Schnabel observed a red SUV, which he assumed to be the same one described in the call, legally stopped in traffic waiting for a green light. Obviously, the tip was not predictive of future behavior, the red SUV was no longer stuck in the drive-through. Schnabel did not observe any traffic violations; all he observed or heard was the engine screeching twice, as if the driver was attempting to start a running engine. While this is “odd,” a reasonable inference of criminal activity cannot be drawn from this “odd” but perfectly legal behavior; there is nothing in the totality of the circumstances that would make a reasonable person suspicious of the behavior. *State v. Waldner*, 206 Wis. 2d 51, 58-60, 556 N.W.2d 681 (1996) (“[W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry.”).

¶9 In conclusion, the tip here is nothing more than a “bare-boned” tip. It lacks both quality and quantity. *See Williams*, 241 Wis. 2d 631, ¶22. There are no indicia of reliability in the tip and Schnabel did not independently observe criminal behavior or a violation of the traffic regulations. We conclude that the officer did not have reasonable suspicion to stop and detain Walker and that the evidence gathered after her stop must be suppressed.

By the Court.—Judgment reversed.

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

