

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 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. 00-2691-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUIS E. HERNANDEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County:
JOHN R. STORCK, Judge. *Affirmed.*

¶1 DEININGER, J.¹ Luis Hernandez appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant

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

(OMVWI), contrary to WIS. STAT. § 346.63(1). Hernandez contends that the trial court erred in denying a motion to suppress evidence gathered after an allegedly illegal traffic stop. We conclude, contrary to Hernandez's assertion, that the arresting police officer had a reasonable suspicion that Hernandez was engaging in unlawful activity, thereby justifying an investigatory detention. Accordingly, we affirm Hernandez's conviction.

BACKGROUND

¶2 A Village of Reeseville police officer testified at the suppression hearing that he was sitting in his squad car at about 10:00 p.m. when "a young lady approached me in an excited manner stating that her exhusband was at her house ... and he had been drinking and had a weapon in his car." The woman told the officer that her ex-husband had followed her from her mother's house to her residence. She stated that when she arrived at her residence, her ex-husband attempted to get into her car.

¶3 The officer testified that he did not know the woman, this being his first contact with her, but he indicated in his police report that she provided him her name and address. He also testified that the woman was "excited," in that after parking her car, "she ran up to the side of the police car, and then she just blurted out" her story. The woman told the officer that she was frightened of her ex-husband, who she identified as Hernandez, because of his intoxication and because of the weapon in his vehicle, which she told the officer was a "nine

millimeter weapon.”² The conversation lasted around fifteen minutes and ended abruptly when the woman pointed out a passing car as her ex-husband’s.

¶4 The officer testified that he observed a male driver as the only occupant of the passing vehicle to which the woman had pointed.³ It had come from the direction of the woman’s residence. Although he did not observe the vehicle commit any traffic violations, the officer stopped it “on the suspicion of the drunk driving report from the exwife and the report of a possible weapon in the vehicle.” After stopping the vehicle, the officer identified the driver as Hernandez, and following field sobriety tests, he arrested Hernandez for OMVWI.

¶5 Hernandez moved to suppress all evidence gathered following the allegedly illegal stop. The trial court determined that the officer had reasonable suspicion to make an investigatory stop and denied the motion. Hernandez then pled guilty to OMVWI, second offense, a traffic crime. Hernandez appeals the judgment of conviction.⁴

² According to the officer’s report, he found a nine millimeter semi-automatic weapon in the trunk of Hernandez’s car after the arrest. Hernandez was not charged with any gun-related crimes.

³ The officer gave a somewhat contradictory account during cross-examination, acknowledging that he first saw Hernandez’s car after it “just passed the squad car”; that “at that point I would have seen just the silhouette of one person, the driver,” and that he was “unable to tell at that point” whether it was a male or female. It is thus not clear from the record precisely when the officer determined that the vehicle he stopped was being driven by a male.

⁴ See WIS. STAT. § 971.31(10) (“An order denying a motion to suppress evidence [in a criminal case]... may be reviewed upon appeal from a judgment of conviction notwithstanding the fact that such judgment was entered upon a plea of guilty.”).

ANALYSIS

¶6 When reviewing the denial of a suppression motion, we will uphold the trial court's findings of fact unless they are clearly erroneous. *State v. Gaulrapp*, 207 Wis. 2d 600, 604, 558 N.W.2d 696 (Ct. App. 1996). Here, the relevant facts are largely undisputed, and whether those facts satisfy the Fourth Amendment's requirement of reasonableness is a question of law which we decide de novo. *State v. Waldner*, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996).

¶7 Hernandez contends that the officer did not have a lawful basis to conduct an investigative stop of Hernandez's car. The temporary detention of a driver of a motor vehicle during a police stop, even if brief, constitutes a "seizure" under the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809-10 (1996). Thus, the basis for a motor vehicle stop must satisfy the reasonableness standard of the Fourth Amendment. *Florida v. Royer*, 460 U.S. 491, 500 (1983).⁵ The initial stop of a motor vehicle is "generally reasonable if the officers ... have grounds to reasonably suspect a violation has been or will be committed." *Gaulrapp*, 207 Wis. 2d at 605. "[R]easonable suspicion must be based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.'" *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990) (quoted source omitted).

¶8 Hernandez attempts to support his claim of error with principles derived from the "anonymous tip" cases. See, e.g., *State v. Williams*, 2001 WI 21,

⁵ See also *State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990) ("[T]he fundamental focus of the fourth amendment ... is on reasonableness. The question of what constitutes reasonableness is a common sense test. What is reasonable under the circumstances? What would a reasonable police officer reasonably suspect in light of his or her training and experience? What should a reasonable police officer do?" (citation omitted)).

241 Wis. 2d 631, 623 N.W.2d 106. We agree that *Williams* and other “anonymous tip” cases have some bearing on our analysis, but we note the obvious distinction that here the “tip” to the arresting officer was far from “anonymous.” While it is true that the citizen-witness who approached him was not known to the officer, she identified herself, engaged in face-to-face communication with the officer and responded to his questions.⁶ A citizen who personally presents herself or himself to the police to provide information, thereby risking identification and further interrogation, is entitled to greater credibility than an anonymous caller or the writer of an anonymous letter. *See id.* at ¶35.

¶9 The supreme court also noted in *Williams* that “citizens who purport to have witnessed a crime” may be viewed as reliable, allowing police to act on their information “even though other indicia of reliability have not yet been established.” *Id.* at ¶36. The focus when information is provided by “citizen informants” is on the witness’s “observational reliability,” that is, the nature of the report, the person’s opportunity to see and hear the matters reported, and the extent to which information provided can be verified. *See State v. Doyle*, 96 Wis. 2d 272, 287, 291 N.W.2d 545 (1980), *overruled on other grounds by State v. Swanson*, 164 Wis. 2d 437, 446, 475 N.W.2d 148 (1991). Hernandez argues that his ex-wife’s statements to the officer fail on this score. He points out that his ex-wife did not mention how she acquired the information that Hernandez had a gun

⁶ The trial court noted in its written decision denying Hernandez’s motion that “[i]t was later determined that this woman was Ms. Shannon Hernandez, though it is not clear when that determination was made, and it may not even have been made on the night” of the arrest. The officer had not specifically testified regarding when he identified Ms. Hernandez. His police report, however, states that after the “very excited female” approached his squad car and began her story, “I asked the woman her name and was advised that it was Shannon Hernandez. Ms. Hernandez stated that she lived at [address].” Regardless of when the officer obtained her name and address, the point remains that Ms. Hernandez presented herself personally to the officer, thereby permitting both identification and interrogation, and she was not an “anonymous” tipster.

in his car, or how she knew that Hernandez was intoxicated, and she did not relate to the officer any objective indicia of Hernandez's intoxication, such as slurred speech, staggering, or erratic driving.

¶10 We disagree with Hernandez that his ex-wife's report to the officer lacked a foundation for her claims that he was intoxicated and carrying a gun in his car. First, we note her relationship to Hernandez, which sets her apart from a "stranger-witness" who happens upon an event. The officer could reasonably infer that the woman was familiar with Hernandez's general bearing and demeanor, and would have a basis for evaluating his state of intoxication. By the same token, an ex-wife's knowledge of her former spouse's property and habits would provide a basis for her to know that he kept a gun in his car, even if she did not specify to the officer that she had seen it that evening.

¶11 We acknowledge that the witness may have had a motive to lie about her ex-husband's activities in order to get him into trouble with the law, as Hernandez asserts. Our focus at present, however, is on the "observational reliability" or foundation for the information she reported to the officer. We conclude that the woman's in-person statement to the officer, placing her at risk of an obstruction charge if it were false, offsets any hypothetical revenge motive to lie about Hernandez's activities on the night in question, and that her relationship to Hernandez enhances the credibility of her report rather than diminishing it.

¶12 Moreover, the very circumstances and nature of the report from the woman tended to support its reliability. The officer observed that she ran up to him and blurted out her story in an excited manner, expressing fear for her safety. She told the officer that she had had at least three contacts with Hernandez that evening—one by phone, and two in person. The contact at her residence included

Hernandez's alleged attempt to get into her car. The officer could reasonably conclude from these reported events that the woman had sufficient opportunity to observe Hernandez's condition, and that his behavior of apparently "stalking" his ex-wife and attempting to have contact with her, was consistent with his being intoxicated.

¶13 The standard for evaluating the reliability of information provided by citizen victims and witnesses is "much less stringent" than that applied to "police informers." *Doyle*, 96 Wis. 2d at 286-87. We conclude that the report given by the woman to the officer contained sufficient indicia of "observational reliability" for the officer to reasonably rely on it for purposes of pursuing further investigation.

¶14 Finally, the witness provided an opportunity for the officer to verify what she had been telling him when she identified a car coming from the direction of her residence as Hernandez's. Whether we view this as a confirmation of "predictive information," or simply corroborating her claim that her ex-husband had been driving his vehicle in the vicinity of her residence, is immaterial. The point is that the arrival of Hernandez's vehicle, occupied by only its driver, from the direction where the woman claimed Hernandez had been pursuing her, supported the veracity of the woman's account. These facts contrast to circumstances where an officer, acting on a tip or citizen information, locates a suspect at a time and place well removed from that of the alleged unlawful activity. A partially corroborated tip, from even an anonymous informant, can give rise to reasonable suspicion, even though only innocent details of the tip are corroborated. *See State v. Richardson*, 156 Wis. 2d 128, 142, 456 N.W.2d 830 (1990).

¶15 The question of whether the action of a law enforcement officer was reasonable for Fourth Amendment purposes must be addressed in light of all the facts and circumstances present. *Id.* at 139-40. Here, those facts and circumstances include the fact that the officer interacted directly with Hernandez’s ex-wife, allowing the officer to assess the reliability of her information by observing her demeanor. The officer spoke with her for about fifteen minutes, providing him an opportunity to interrogate her. She had run up to his car in an excited state and told him that she was being pursued by her ex-husband who was intoxicated and had a gun in his car. Then, when Hernandez’s vehicle appeared, we conclude that it was reasonable for the officer to stop it to investigate the woman’s claims.

¶16 Hernandez points out that the officer did not observe Hernandez speeding, deviating from his traffic lane, or violating any other traffic laws. But observation of a traffic violation is not a prerequisite for a traffic stop if the officer has a reasonable suspicion that the driver may be engaging in unlawful activity. *See State v. Anderson*, 155 Wis. 2d 77, 86-87, 454 N.W.2d 763 (1990) (noting that “particular criminal activity” need not be suspected prior to an investigatory stop, the proper standard being the reasonableness of the officer’s actions under the circumstances). Here, the officer, based on the citizen-witness’s statements, could reasonably suspect that Hernandez was committing OMVWI, and possibly a weapons offense as well.

CONCLUSION

¶17 For the reasons discussed above, we affirm the judgment convicting Hernandez of OMVWI.

By the Court.—Judgment affirmed.

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

