

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 1, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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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.

No. 01-0423-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DEANN K. BAER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Reversed.*

¶1 ANDERSON, J.¹ The State of Wisconsin appeals from an order suppressing all the evidence gathered after an investigative traffic stop following an anonymous cell phone call and dismissing the complaint against Deann K.

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

Baer. We reverse the judgment of acquittal and the order of the trial court because we conclude that, under the tip provided, reasonable suspicion required an investigative stop.

¶2 After being charged with second offense drunk driving, Baer brought a motion to suppress evidence on the grounds that the arresting officer lacked a reasonable suspicion to justify an investigative stop.² The only witness at the evidentiary hearing was Deputy Christopher Schmaling of the Racine County Sheriff's Department. Schmaling testified that he was patrolling southwest Racine county on August 23, 2000, when he received a call from dispatch at approximately 11:15 p.m. Dispatch advised the deputy that an anonymous 911 caller reported an individual driving while intoxicated with two minors in the vehicle on Waukesha Road. The caller described the vehicle as a black Oldsmobile Bravada with a Wisconsin registration plate, A1BAER. While en route to the area of Waukesha Road, Schmaling was told by dispatch that the address for the registration plate was 26000 Church Road, and he headed toward that address. While still en route, dispatch informed the deputy that the anonymous caller reported that the driver had dropped the minors off at a location on Waukesha Road and was possibly heading to the Church Road location.

¶3 Schmaling testified that at the Church Road location there was poor visibility due to heavy fog. As he slowly drove down Church Road, Schmaling saw a vehicle approaching him; he pulled over to let it pass by him. As the vehicle

² The criminal complaint charged one count of operating a motor vehicle while intoxicated with a minor passenger under sixteen years of age in the motor vehicle, second offense, in violation of WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(b) and (f), and one count of operating a motor vehicle with a prohibited alcohol concentration with a minor passenger under sixteen years of age in the motor vehicle, second offense, in violation of §§ 346.63(1)(b) and 346.65(2)(b) and (f).

went past, he identified it as a black Oldsmobile Bravada with A1BAER on the registration plate. The Bravada pulled into the driveway at 26000 Church Road; Schmaling followed and stopped behind the vehicle. The deputy described the driveway as long and shaped like a horseshoe and he testified that the Bravada stopped on the bend of the driveway. He did not activate his emergency lights or siren.

¶4 The driver stepped out of the vehicle, swaying from side to side. When she asked the deputy what was the problem, her speech was slurred and, as she got closer, he could detect a strong odor of intoxicants on her breath. When the deputy told her about the anonymous call, the driver was outraged. After performing field sobriety tests, the deputy identified the driver as Baer and arrested her for drunk driving.

¶5 The trial court granted Baer's motion to dismiss. The court concluded that under the totality of the circumstances, the anonymous call lacked sufficient indicia of reliability to provide reasonable suspicion to conduct an investigative stop. The court rejected the State's argument that there was no need for reasonable suspicion to justify the investigative stop because the deputy gained probable cause to arrest Baer as the result of a consensual conversation in Baer's driveway. The court also rejected the State's argument that Baer has no reasonable expectation of privacy in her driveway, and therefore it is not part of the protected curtilage. The State renews both of these arguments in this appeal.

¶6 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). 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, approach 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). 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).

¶7 The State argues that the encounter between Schmalig and Baer was consensual and occurred on the driveway of her home, which is not within the curtilage of the home. Therefore, the State reasons that the protections of the Fourth Amendment do not apply.

¶8 We do not have to reach the State’s argument because the resolution of this appeal is controlled by *State v. Rutzinski*, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516.³ *Rutzinski* has a strikingly similar factual pattern to the case at hand. A city of Greenfield police officer was on patrol when he overheard a police dispatch requesting a squad to respond to an anonymous call. According to the dispatch, an unidentified motorist calling from a cell phone reported that he or

³ In its brief, the State admits that the information from the anonymous cell phone call did not provide enough information to justify an investigative traffic stop. This is a concession of law which does not bind an appellate court. *State v. Gomaz*, 141 Wis. 2d 302, 307, 414 N.W.2d 626 (1987).

she was observing a black pickup truck driving erratically. The officer responded to the dispatch. *Id.* at ¶4. Based on a second dispatch, the officer determined that the vehicles were heading toward him and he positioned his squad car in the median and waited. *Id.* at ¶5. Shortly thereafter, the vehicles passed his location. He then pulled his squad car behind the black pickup. Upon doing so, the dispatcher stated that the motorist had indicated that he or she was in the vehicle ahead of the truck and saw the squad car and that the officer was following the correct truck. *Id.* at ¶6. Although the officer did not independently observe any signs of erratic driving, he then activated his emergency lights and conducted a traffic stop of the black pickup. During this stop, the officer observed that Rutzinski, the driver of the pickup, had glassy, bloodshot eyes, smelled of alcohol, and was slurring his speech. A subsequent Intoxilyzer test revealed that Rutzinski had a .21 blood alcohol concentration. *Id.* at ¶7.

¶9 The issue presented to the supreme court was “under what circumstances a cell-phone call from an unidentified motorist provides sufficient justification for an investigative traffic stop.” *Id.* at ¶1. The court examined several decisions from the United States Supreme Court dealing with anonymous tips, *Adams v. Williams*, 407 U.S. 143 (1972); *Alabama v. White*, 496 U.S. 325 (1990); and *Florida v. J.L.*, 529 U.S. 266 (2000). *Rutzinski*, 2001 WI 22 at ¶¶17-29. The Wisconsin Supreme Court then synthesized those decisions:

[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).

¶10 Applying this conclusion to the facts in *Rutzinski*, the supreme court held that the anonymous cell phone tip had sufficient indicia of reliability to provide reasonable suspicion that Rutzinski was intoxicated. *Id.* at ¶34. The court also dismissed Rutzinski's assertion that the officer was required to independently verify that Rutzinski might have been intoxicated before making an investigatory stop. *Id.* at ¶35.

Because drunk driving is an extraordinary danger, we cannot adopt Rutzinski's position that the police must dismiss allegations of possible drunk driving when assessing whether an informant's tip justifies a traffic stop. While such allegations cannot form the sole basis for an investigative stop, they certainly must be considered when examining the totality of the circumstances surrounding particular police conduct.

Id. at ¶36.

¶11 Applying the teachings of *Rutzinski* to the case at hand, we conclude that under the totality of the circumstances, the anonymous tip contained a number of components supporting its reliability. *State v. Williams*, 2001 WI 21, ¶31, 241 Wis. 2d 631, 623 N.W.2d 106. The indicia of reliability included the anonymous caller exposing himself or herself to being identified because from the caller's constant updating of the information, it can be inferred that the informant understood that law enforcement could discover his or her identity. *Rutzinski*, 2001 WI 22 at ¶32. The informant provided easily verifiable information, including a description of the vehicle, license plate number, the driver dropping children off at an address on Waukesha Road, and the direction of travel. *Id.* at

¶12. Finally, the tip in this case suggested that Baer posed an imminent threat to the public's safety because she was driving while intoxicated with two minor children in her vehicle. *Id.* at ¶34. “This exigency strongly weighs in favor of immediate police investigation.” *Id.* at ¶38.⁴ In sum, we hold that the cell phone tip in this case provided a sufficient justification for an investigative stop for drunk driving.

By the Court.—Judgment and order reversed.

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

⁴ In 1999, in the United States, 520 children under fifteen years of age were killed in alcohol-related motor vehicle crashes. Available at <http://www.nhtsa.dot.gov/people/ncsa/pdf/child99.pdf>.

