

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 2009

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. 2008AP3225-CR

Cir. Ct. No. 2008CT179

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADAM H. WESTENBERGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Adam H. Westenberg 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) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

intoxicant, third offense. He contends that the circuit court improperly held that law enforcement had reasonable suspicion to make an investigatory stop of his vehicle. Consequently, he argues, all of the evidence obtained from the investigation should have been suppressed. We disagree and affirm.

¶2 On February 17, 2008, at approximately 2:30 a.m., Sheboygan Police Officer Michael Beringer received a dispatch that there had been a complaint of “an erratic driver in a golden-colored Mercury.” The complainant provided a license number as well. Beringer positioned himself in the vicinity and made visual identification of the vehicle, which he later learned was driven by Westenberger. Beringer pulled his squad car behind Westenberger’s car and began to follow. Dispatch contacted Beringer to confirm the caller saw the squad car and that it was following the correct vehicle. Beringer followed Westenberger to “get some observations of [his] own.”

¶3 At the intersection of 14th Street and Erie, Westenberger proceeded through in the right-hand lane and the rear of the vehicle swerved out and struck a snow bank and curb on the northeast corner. Beringer described the weather on February 17, 2008, as “extremely cold” with heavy snow and rain turning to ice. He noted that other vehicles were ahead of him while he followed Westenberger and that “one to two cars in front of [Westenberger], also heading northbound in the right-hand lane, [went] through the intersection without any issues.” After observing Westenberger’s vehicle swerve and hit the snowbank and curb, Beringer initiated a traffic stop.

¶4 The State charged Westenberger with operating while intoxicated and operating with a prohibited blood alcohol concentration, as third offenses. Westenberger moved to suppress the evidence obtained during the stop, along with

the results of the chemical test for blood alcohol content, on grounds that Beringer did not have reasonable suspicion for the stop and did not have probable cause for the arrest. The circuit court held a hearing on May 23, 2008, and in an oral ruling denied the motion to suppress. Westenberger then entered a plea of no contest and judgment on the charge of OWI, third offense, was entered accordingly. Westenberger now appeals, renewing his argument that the investigative stop of his vehicle was illegal.

¶5 Investigative stops are considered seizures within the meaning of the Fourth Amendment; therefore, the stop must be based on a reasonable suspicion in order to pass constitutional muster. *State v. Harris*, 206 Wis. 2d 243, 258, 557 N.W.2d 245 (1996). Whether evidence obtained following an investigative stop should be suppressed is a question of constitutional fact. *State v. Samuel*, 2002 WI 34, ¶15, 252 Wis. 2d 26, 643 N.W.2d 423. In reviewing questions of constitutional fact, we will uphold a circuit court's factual findings unless they are clearly erroneous, but we will independently decide whether those facts meet the constitutional standard. *Id.*

¶6 The relevant facts are undisputed, and the record indicates nothing to suggest the court's factual findings are erroneous. Thus, our review is limited to whether the traffic stop was supported by reasonable suspicion, in light of the totality of the circumstances. See *State v. Williams*, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106; *State v. Rutzinski*, 2001 WI 22, ¶¶17-18, 241 Wis. 2d 729, 623 N.W.2d 516. The burden of establishing reasonable suspicion falls upon the State. *State v. Taylor*, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973). Determination of reasonableness is guided by a common sense test that asks whether the facts known to the officer at the time of the stop would warrant that

officer, given his or her training, to suspect that a crime has or is about to occur. See *State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990).

¶7 Wisconsin courts have consistently followed the U.S. Supreme Court's decisions regarding the constitutionality of investigatory search and seizures. *State v. Richardson*, 156 Wis. 2d 128, 138, 456 N.W.2d 830 (1990). In justifying the intrusion the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Furthermore, on the part of the investigating officer, "[a]n inchoate and unparticularized suspicion or hunch will not suffice." *State v. Fields*, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279.

¶8 Police often rely on citizen informants for effective law enforcement, and when officers receive a tip from an informant that they are reasonably justified in believing to be truthful, officers may rely on the tip to provide reasonable suspicion. See, e.g., *Rutzinski*, 241 Wis. 2d 729, ¶17. When determining reliability, relevant factors include (1) the informant's veracity and (2) the informant's basis of knowledge, viewed in light of the totality of the circumstances. *Id.*, ¶¶17-18. "[T]he reliability of [the citizen informant] should be evaluated from the nature of his [or her] report, his [or her] opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation." *State v. Kolk*, 2006 WI App 261, ¶13, 298 Wis. 2d 99, 726 N.W.2d 337 (citation omitted).

¶9 Westenberger argues that the tip from the informant did not have the necessary indicia of reliability because the report of "erratic" driving was subjective and non specific, and because the informant did not identify himself

until after Beringer arrested Westenberger. He asserts that the veracity and knowledge source of the informant were unknown to Beringer at the time. He further argues that Beringer's own observations revealed Westenberger's "normal driving behavior when the weather and driving conditions are taken into account."

¶10 The State counters that the informant called with a tip about an erratic driver that included specific information about the vehicle, including a license plate number. Also, the informant stayed on the line and when Beringer pulled in behind Westenberger, the informant told the dispatcher that he had seen the squad car and it was following the correct vehicle. This also added to the reliability of the tip, because the informant demonstrated his proximity and ability to observe Westenberger's driving. See *Kolk*, 298 Wis. 2d 99, ¶13 (citizen informant should be evaluated on basis of "observational reliability"); *State v. Patton*, 2006 WI App 235, ¶10, 297 Wis. 2d 415, 724 N.W.2d 347 (anonymous tips may be reliable if the tipster provides verifiable explanation of how he or she came to know the information).

¶11 Beringer did not rely on the anonymous tip alone. He followed Westenberger in order to personally observe his driving and corroborate the tipster's information. Beringer testified that he had watched other vehicles navigate the intersection without incident and only Westenberger swerved into a snowbank and curb. Although Beringer confirmed that driving conditions February 17 were bad and becoming worse, he was not required to eliminate all other possible causes of Westenberger's swerving before initiating an investigatory stop. See *State v. Williams*, 2001 WI 21, ¶46, 241 Wis.2d 631, 623 N.W.2d 106 ("[I]f any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences

that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry.” (citation omitted)).

¶12 Here, Beringer presented specific and articulable factors that led to his decision to investigate further. We conclude that he had reasonable suspicion sufficient to support an investigatory traffic stop. Accordingly, Westenberger’s motion to suppress was properly denied.

By the Court.—Judgment affirmed.

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

