

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 21, 2001**

Cornelia G. Clark  
Clerk of Court of Appeals

**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. 01-0928-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**THOMAS F. FETZNER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed.*

¶1 PETERSON, J.<sup>1</sup> Thomas Fetzner appeals his judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, second offense, contrary to WIS. STAT. § 346.63(1)(a). He argues that the circuit court erred by denying his motion to suppress evidence because the

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

citizen informant's tip did not give the police reasonable suspicion to stop Fetzner. We disagree and affirm the conviction.

## BACKGROUND

¶2 The facts are undisputed. On September 3, 1999, at approximately 9:45 p.m. in North Hudson, a citizen informant, Kevin Schmidt, called police dispatch. He reported that while driving in the parking lot of the Village Inn, he observed a man coming out of the bar, stagger to a small gray Ford station wagon, and then drive south on Sixth Street.

¶3 North Hudson police officer Rick Meissner received the dispatch and positioned his patrol car in a driveway on Sixth Street and waited for the vehicle. Several seconds later, Meissner observed a tan station wagon pass his location. Meissner immediately pursued and stopped the vehicle. The sole basis for stopping the vehicle was the tip.

¶4 Meissner determined that the driver of the vehicle was Fetzner. Meissner also noticed an odor of intoxicants coming from Fetzner. Fetzner's eyes were glossy and bloodshot and he was slurring his words. After conducting several field sobriety tests, Meissner arrested Fetzner. Fetzner was transported to a local hospital for a blood draw. A blood test indicated that Fetzner's blood alcohol content was .239%.

¶5 Fetzner challenged the traffic stop and moved to suppress the evidence. The circuit court denied the motion. Fetzner entered a plea of no contest. This appeal followed.

## STANDARD OF REVIEW

¶6 In reviewing a circuit court's order denying the suppression of evidence, we will not reverse the circuit court's factual findings unless they are clearly erroneous. *State v. Roberts*, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). However, whether the trial court's findings of fact pass statutory or constitutional muster is a question of law that this court reviews independently. *Id.*

## DISCUSSION

¶7 Fetzner argues that the substance of Schmidt's tip was insufficient to arouse suspicion of criminal activity. According to Fetzner, while the tip provided information that was readily observable, it did not suggest criminal activity. Further, Fetzner argues that Meissner did not corroborate Schmidt's tip and was unable to verify Fetzner's vehicle through an independent police investigation.

¶8 "A brief investigatory stop is a seizure and is therefore subject to the requirement of the Fourth Amendment to the United States Constitution that all searches and seizures be reasonable." *State v. Young*, 212 Wis. 2d 417, 423, 569 N.W.2d 84 (Ct. App. 1997). "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio*, 392 U.S. 1, 22 (1968). In executing a valid investigatory stop of an individual, a law enforcement officer need only reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place. See *State v. Williams*, 2001 WI 21, ¶21, 241 Wis. 2d 631, 623 N.W.2d 106. This constitutional standard was codified in WIS. STAT. § 968.24.

“We determine whether a stop was lawful in light of *Terry* and the cases following it.” *Williams*, 2001 WI 21 at ¶21.

¶9 In determining whether the police have lawfully conducted a *Terry* stop, we consider the totality of the circumstances. *Alabama v. White*, 496 U.S. 325, 328 (1990). “Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability.” *Id.* at 330. In considering the totality of the circumstances, however, our focus is upon the reasonableness of the officers' actions in the situation facing them. *Williams*, 2001 WI 21 at ¶23. “The essential question is whether the action of the law enforcement officer was reasonable under all the facts and circumstances present.” *State v. Richardson*, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990) (citation omitted).

¶10 Reasonable suspicion to justify a traffic stop may be based on information provided by citizen informants, but the information must have some indicia of reliability. *White*, 496 U.S. at 330. “[C]itizens 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.” *Williams*, 2001 WI 21 at ¶36. The focus when “citizen informants” provide information 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. *State v. Doyle*, 96 Wis. 2d 272, 287, 291 N.W.2d 545 (1980) (citation omitted), *overruled on other grounds by State v. Swanson*, 164 Wis. 2d 437, 475 N.W.2d 148 (1991).

¶11 Here, Schmidt reported that he observed a man stagger to his vehicle and drive away. Fetzner argues that this information standing alone fails to

implicate criminal activity. He contends that, like *Florida v. J.L.*, 529 U.S. 266 (2000), the information reported to the police consisted of readily observable facts that did not arouse suspicion of any criminal activity.

¶12 In *J.L.*, the United States Supreme Court struck down a stop and frisk based on an anonymous call advising police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. *Id.* at 266. After receiving the dispatch, two officers arrived at the bus stop and observed a young black man wearing a plaid shirt. The officers did not see a firearm, and the man made no threatening or unusual movements. Apart from the tip, there was no reason to believe the man was engaged in illegal activity. The officers then frisked the man and found a gun in his pocket. *Id.* at 268.

¶13 The Court indicated the significance of the distinction between information provided by an anonymous tipster and provided by a known informant. *Id.* at 271. In *J.L.*, all the police had to go on was the bare report of an unknown tipster who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about the defendant.

¶14 Fetzner argues that like *J.L.*, the information reported to the police in the present case consisted of readily observable activity that did not arouse suspicion. However, Fetzner misses a crucial distinction between the present facts and *J.L.* The reasonableness of an officer's actions must be measured by what the officer knew before conducting the stop. *Id.* Had the officer in *J.L.* merely observed the man in the plaid shirt standing at a particular bus stop without the anonymous tip, he would have no articulable basis upon which to stop the defendant. In the present case, had Meissner observed Fetzner come out of a bar,

stagger to his vehicle, and drive off, we are satisfied that Meissner would have been justified in taking further action by conducting a brief investigatory stop.

¶15 Fetzner argues that a stagger without additional information is not a basis for suspicion of criminal activity. However, suspicious activity justifying an investigative stop is, by its very nature, ambiguous. *State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989). Unlawful behavior may be present or it may not. The behavior may be innocent. Still, “officers have the right to temporarily freeze the situation in order to investigate further.” *Id.*

¶16 Next, Fetzner argues that Meissner did not have reasonable suspicion to stop him because he did not corroborate Schmidt’s tip and did not have any independent basis for the stop. Fetzner contends that the tip was uncorroborated because Schmidt’s description of the vehicle did not match the vehicle stopped by Meissner.

¶17 In *State v. Krier*, 165 Wis. 2d 673, 676-77, 478 N.W.2d 63 (Ct. App. 1991), we upheld the stop of a vehicle based on an anonymous tip that a “blue station wagon” was being operated at a particular place and a particular time by an unlicensed driver. Acting on this information, and without independently observing any illegal or suspicious conduct, the officer stopped the vehicle, identified the driver, and confirmed his unlicensed status. We concluded that the officer’s stop of the described vehicle at the time and place reported by the anonymous tipster provided “sufficient corroboration to permit the officer to infer that the caller was well informed about [the defendant’s unlicensed status] ....” *Id.* at 676-77.

¶18 Unlike *Krier*, the tipster in the present case was not anonymous. Schmidt identified himself to the police dispatch. Identified citizens who purport

to have witnessed a crime are assumed to be reliable. *Williams*, 2001 WI 21 at ¶36. A relaxed test of reliability applies. *Id.*

¶19 In *Krier* we found reasonable suspicion with minimal independent corroboration and then of only otherwise innocent conduct observed by the officer. *Krier*, 165 Wis. 2d at 677. Here, Schmidt's tip was even more reliable because he identified himself. Meissner was advised by dispatch that Schmidt had reported seeing a male stagger to a small gray Ford station wagon and leave the area southbound on Sixth Street. Seconds later, Meissner, who was in the area, observed a small Ford station wagon southbound on Sixth Street. While Schmidt described the vehicle as gray instead of tan, the slight discrepancy is not fatal to the stop under the totality of the circumstances when considering the time and Meissner's close proximity to the bar.

¶20 Meissner had the requisite reasonable suspicion to stop Fetzner. The intrusion was justified by the totality of the circumstances. A citizen informant provided the information that Fetzner had come out of a bar, staggered to his car, and drove off. Together with Meissner's location, and observations, reasonable suspicion existed to stop Fetzner. Therefore, we conclude that the circuit court properly denied Fetzner's motion to suppress the evidence.

*By the Court.*—Judgment and order affirmed.

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

