

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 2, 2002**

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.

**Appeal No. 02-0467-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 01-CT-105**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**KIRK W. HOLSTEIN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Menomonie County: ROD W. SMELTZER, Judge. *Affirmed.*

¶1 HOOVER, P.J.<sup>1</sup> Kirk Holstein appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, contrary to WIS. STAT. § 346.63(1)(a). He argues that the trial court erroneously denied his

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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.

suppression motion by concluding that the arresting officer had reasonable suspicion to conduct a traffic stop of Holstein's vehicle. Specifically, he argues that the officer did not have reasonable suspicion because he did not see Holstein's vehicle being driven in the aggravated erratic manner that an "anonymous" informant described observing. Moreover, Holstein claims, this fact, along with the officer's lack of information about the informant's reliability, called that reliability into question.

¶2 This court concludes that contrary to Holstein's arguments, the record is replete with evidence demonstrating both the informant's and his information's reliability and reasonable suspicion that Holstein was operating while under the influence of an intoxicant. The trial court's order denying Holstein's motion to suppress and the judgment of conviction are affirmed.

## BACKGROUND

¶3 Holstein's principal brief ignores or minimizes critically important facts and trial court findings. This court therefore relies primarily on the State's recitation of the facts and background, as supplemented by the court's review of the record.

¶4 Trooper Jason Spetz of the Wisconsin State Patrol responded to a dispatch report of a motor vehicle driving erratically on Interstate Highway 94. The complaint was made by cell phone from an individual who identified himself as Rick Johnson. Johnson described the suspect vehicle as a "ZEP products van." Johnson indicated that he was driving a courier service van. The dispatcher advised Spetz that according to Johnson, the vehicle was weaving all over the road, crossing the centerline and speeding up and slowing down for no apparent

reason. The dispatcher also informed Spetz that the vehicle's turn signals were being used without turns being made and that the vehicle was changing lanes for no apparent reason. Johnson also indicated to the dispatcher that he would leave all of his call-back information to provide a statement if needed.

¶5 Johnson stayed on the line until he passed Spetz's location and then told the dispatcher that the vehicle was passing where Spetz was parked. Spetz then observed the ZEP van, and the courier van directly behind it, pass by his patrol car.

¶6 Spetz passed Johnson's van, got behind the suspect vehicle and followed it for approximately two miles. Spetz testified that he observed the ZEP van weave within its lane. However, it did not make significant lane changes or cross onto the shoulder. Spetz had a video camera activated in his vehicle while following the ZEP van. Spetz eventually stopped the van and conducted an investigation leading to Holstein's arrest for operating a motor vehicle while under the influence of an intoxicant.

¶7 Holstein filed a motion to suppress based upon his contention that Spetz lacked reasonable suspicion to stop him. The trial court denied Holstein's motion based upon the foregoing evidence, presented at the motion hearing. The court found that Johnson and his information were reliable. Further, a copy of the videotape was offered as an exhibit at the hearing. The court observed the tape and found that it showed the intra-lane weaving to which Spetz testified. The court noted that the vehicle was either close to the fog line or on the fog line and close to the center of the highway on at least two or three occasions. The court also observed that Holstein's vehicle at one point did not make a complete or

appropriate stop at a stop sign. Holstein eventually pled guilty to and was convicted of operating a motor vehicle while intoxicated. This appeal followed.

### STANDARD OF REVIEW

¶8 This court upholds the trial court’s findings of fact unless they are clearly erroneous. *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). Whether the circumstances of a stop satisfy constitutional standards, however, is a question of law this court reviews de novo. *Id.*

### DISCUSSION

¶9 On appeal, Holstein posits that the “anonymous” report of very erratic driving “seemed to indicate a very impaired driver.” Yet, he observes, Spetz stopped Holstein notwithstanding that after following him for a substantial distance, the officer did not observe similar driving. Holstein then argues that the “anonymous citizen report does not meet the level necessary for reasonable suspicion to stop” Holstein. This is because, he contends, Spetz did not know anything about the informant’s reliability and there were “no indicia of reliability as to the citizen’s report.” Indeed, Holstein argues, Spetz’s failure to “note any impaired driving” itself calls into question the informant’s reliability.<sup>2</sup> This court rejects Holstein’s arguments that call into question Spetz’s reliance on Johnson’s information.

¶10 A traffic stop is a form of seizure implicating Fourth Amendment protections against unreasonable searches and seizures. *State v. Guzy*, 139

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<sup>2</sup> Holstein argues, “If anything, this could lead one to believe that the informant was lying, intoxicated and subject to a Chapter 51 commitment.”

Wis. 2d 663, 675, 407 N.W.2d 548 (1987). Law enforcement must have a reasonable suspicion, based upon specific articulable facts, reasonable inferences from those facts, and in light of his or her experience, that an individual is violating the law. *Id.*; *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). This court must consider whether all the specific and articulable facts, taken together with the rational inferences from those facts, amount to reasonable suspicion. *State v. Dunn*, 158 Wis. 2d 138, 146, 462 N.W.2d 538 (Ct. App. 1990). If any reasonable inference of wrongful conduct can be objectively discerned, officers have the right to temporarily detain the individual for purposes of inquiry. *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). An officer need not observe an unlawful act to have reasonable suspicion to effect a traffic stop. *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). The law allows a police officer to make an investigatory stop based on observations of lawful conduct as long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot. *Id.* at 57.

¶11 In order for an officer to rely on a tip, the tip should exhibit reasonable indicia of reliability. *State v. Rutzinski*, 2001 WI 22, ¶18, 241 Wis. 2d 729, 623 N.W.2d 516. “In assessing the reliability of a tip, due weight must be given to: (1) the informant’s veracity; and (2) the informant’s basis of knowledge. These considerations should be viewed in light of the ‘totality of circumstances’ and not as discrete elements of a more rigid test.” *Id.* (citation omitted).

¶12 There are several problems with Holstein’s contentions. First, Spetz testified, and the trial court found as fact, that Holstein’s driving *was* impaired. Both Spetz and the court, via the videotape, observed Holstein weave

significantly.<sup>3</sup> While weaving in one's own lane of travel may not constitute a traffic violation, when it occurs several times over a distance of approximately two miles, the weaving is reasonably indicative of impaired driving. See *Waldner*, 206 Wis. 2d at 59. A law enforcement officer would be remiss in failing to investigate the reason for the driver's relative lack of steering control.

¶13 Similarly problematic from Holstein's perspective is his attack on Johnson's and his information's reliability. Holstein's position in large part depends upon his mischaracterization throughout his principal brief of Johnson as "anonymous." This is, of course, a misapplication of the term. The informant identified himself by name. Holstein, however, seems to equate anonymity with the absence of verification that the informant is who he or she proclaims to be.<sup>4</sup> This position was squarely rejected in *State v. Sisk*, 2001 WI App 182, ¶10, 247 Wis. 2d 443, 634 N.W.2d 877, a case the State cites but which Holstein does not address.

¶14 In *Sisk*, a police dispatcher received a 9-1-1 call from an informant who reported seeing two men with guns enter a building at a specific address. *Id.*

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<sup>3</sup> The trial court stated:

Now, what the court saw on that tape ... this one does show the court some—the weaving that was testified [to] by the officer. At least on two or three occasions it appeared that the—it was either close to the fog line or on the fog line and close to the center of the highway, at least based on what—or this court was able to observe.

I also notice that the stop was ... it wasn't a complete stop ... that that stop wasn't handled entirely appropriate[ly] ....

<sup>4</sup> Holstein first acknowledges in his reply brief that Johnson identified himself to the authorities. He nevertheless argues that there is no indication Spetz had personal knowledge as to whether the informant provided his real name.

at ¶3. The caller identified himself by providing his name and described the suspects' race and clothing. *Id.* Officers responded to the described address, arriving six minutes after the informant's call. *Id.* at ¶4. They observed two men matching the caller's descriptions sitting in a vehicle near the specified address. The officers approached the vehicle, briefly questioned the suspects, and asked Sisk, who was the passenger, to exit. A frisk revealed a gun in Sisk's pant pocket. *Id.*

¶15 The trial court granted Sisk's motion to suppress the evidence, ruling that the police did not have reasonable suspicion to stop Sisk. *Id.* at ¶5. The court considered the 9-1-1 call to be an anonymous tip, concluding that the caller's self-identification was not enough to establish the reliability of the information because the call came from a pay phone and the caller, who merely left his name to identify himself, "had not allowed for verification." *Id.*

¶16 This court reversed. Relying on established precedent, we concluded that because the caller gave what he said was his name, the call was not anonymous. *Id.* at ¶10. Whether the caller gave correct identifying information, or whether the police ultimately could have verified his identity, the fact remains that the police could have reasonably concluded that the caller, by providing self-identifying information, risked that his identity would be discovered. *Id.* at ¶8. We also noted that it would be dangerous to require police to take critically important time to attempt to verify an informant's identification rather than respond to crimes in progress. *Id.* at ¶9.

¶17 We concluded that when an informant provides name identification, thus providing self-identifying information that places his or her anonymity at risk, and when the totality of the circumstances establishes a reasonable suspicion that

criminal activity may be afoot, a law enforcement officer may execute a lawful stop. *Id.* at ¶11.

¶18 This court concludes that Johnson's tip contained sufficient indicia of reliability to justify Spetz's investigative stop. At the time of dispatch, Spetz knew that the information had come from an individual who had identified himself by name and who gave call-back information. If an informant reveals sufficient information about himself or herself such that an officer can reasonably conclude that the informant knew that he or she potentially could be arrested if the tip proved to be fabricated, this threat of arrest could lead a reasonable officer to conclude that the informant is being truthful. *Rutzinski*, 2000 WI 22 at ¶ 32.

¶19 Further, Johnson provided verifiable information concerning the basis for his knowledge. He claimed to have made firsthand observations of Holstein's driving. He provided a description of both his and Holstein's vehicles, which Spetz was able to verify as the two vans passed Spetz's location, as Johnson verified to the dispatcher they were doing. One is hard pressed to conceive of circumstances demonstrating a scenario of greater reliability.

¶20 This court concludes that based on Spetz's reasonable suspicions, predicated upon Johnson's reported observations as well as his own and the reliability of Johnson's tip, the trial court properly determined Spetz's investigative stop was justified. Holstein's judgment of conviction is therefore affirmed.

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

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



