

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 11, 2002

Cornelia G. Clark
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. 02-1574
STATE OF WISCONSIN**

**Cir. Ct. Nos. 01-TR-4292
01-TR-4293**

**IN COURT OF APPEALS
DISTRICT II**

CITY OF MEQUON,

PLAINTIFF-RESPONDENT,

V.

SARAH J. PEACOCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Reversed.*

¶1 BROWN, J.¹ This appeal requires us to address whether a totally anonymous tip provides sufficient justification for an investigative traffic stop.

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.

The tip contains an assertion of criminal activity—a possible intoxicated driver traveling along a main thoroughfare—and nothing more. It lacks any verifiable information that could lead to the identification of the tipster or would permit the testing of the informant's basis of knowledge or credibility. Accordingly, we reverse the order denying Sarah J. Peacock's motion to suppress and the judgment of conviction.

¶2 Officer Anthony R. Restivo was the only witness called to testify by either party at the motion hearing held on October 4, 2001. Restivo testified that while on duty on May 26, 2001, he was dispatched to a report of a possible intoxicated driver traveling northbound on Port Washington Road. Dispatch informed Restivo that the driver had just left the area of the East Towne Veterinary Clinic, described the driver's vehicle as a silver-gray Chrysler four-door, and provided the license plate number for the car. The dispatcher further advised Restivo that the license plate number was registered to an individual whose address was 1908 West Bonniwell Road.

¶3 When Restivo turned onto Bonniwell Road, he observed a silver vehicle approximately one-half mile in front of him. By the time Restivo caught up to the vehicle, it had just turned into, and stopped at the end of, the driveway at 1908 West Bonniwell Road. Restivo confirmed that the license plate on the vehicle was the one the dispatcher had provided. As he pulled up, the driver and only occupant of the vehicle exited the car and went to the mailbox adjacent to the driveway. After parking the squad car and greeting the driver through the passenger side window, Restivo exited his vehicle and approached the driver, meeting her at her mailbox. The driver identified herself as Peacock. As he approached her, Restivo advised Peacock that someone had reported to the police department that she was possibly intoxicated and driving a vehicle. Peacock

explained that she had just returned from picking up her dog at the East Towne Veterinary Clinic. Peacock denied that she had been drinking alcohol that morning. However, while conversing with Peacock, Restivo smelled an odor of an alcoholic beverage on her breath and observed that her eyes were glossy and her cheeks and nose were red.

¶4 Based upon these observations, the results of a preliminary breath test he eventually administered and Peacock's subsequent performance on field sobriety tests, Restivo placed Peacock under arrest for operating a motor vehicle while intoxicated. Peacock entered a not guilty plea and filed a motion to suppress this evidence, arguing that the informant's tip was not sufficiently reliable to justify the investigative stop. The trial court denied the motion. Peacock was subsequently found guilty of operating a motor vehicle while intoxicated pursuant to WIS. STAT. § 346.63(1)(a). Peacock appeals from the order denying her motion to suppress and the judgment of conviction.

¶5 The sole question we must address in this case is whether Restivo had the requisite reasonable suspicion to justify his stop of Peacock. The determination of reasonable suspicion for an investigatory stop is a question of constitutional fact. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106, *cert. denied*, *Williams v. Wisconsin*, 122 S. Ct. 343 (U.S. Oct. 9, 2001) (No. 00-10530). We apply a two-step standard of review to questions of constitutional fact. *Id.* First, we review the trial court's findings of historical fact and uphold them unless they are clearly erroneous. *Id.* Second, we review the determination of reasonable suspicion de novo. *Id.*

¶6 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 an individual 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) (citation omitted). When determining if the standard of reasonable suspicion was met, those facts known to the officer must be considered together as a totality of the circumstances. *State v. Richardson*, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990).

¶7 In *Florida v. J.L.*, 529 U.S. 266 (2000), the United States Supreme Court addressed whether an uncorroborated anonymous tip could create the necessary reasonable suspicion to justify a *Terry* stop. *J.L.*, 529 U.S. at 268. In *J.L.*, the police received an anonymous telephone call reporting that “a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun.” *Id.* The police had no audio recording of the call nor did they know anything about the informant. *Id.* Police officers went to the bus stop, saw fifteen-year-old J.L. wearing a plaid shirt and immediately frisked him without having any other reason to suspect illegal conduct. *Id.* The Court explained that the case involved a totally anonymous tip that failed to demonstrate the informant’s veracity. *Id.* at 270. The anonymous call left the police without the means to test the informant’s knowledge or credibility. *Id.* at 271. The Court recognized that under such circumstances, the police were required to corroborate the tip. See *id.* at 270. However, to corroborate a tip, the 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. *Id.* at 271-72. Based on these conclusions, the Court determined that the anonymous tip lacked any indicia of reliability and did not justify the investigative stop. *Id.* at 271.

¶8 In *State v. Rutzinski*, 2001 WI 22, ¶1, 241 Wis. 2d 729, 623 N.W.2d 516, our supreme court considered whether an anonymous cell-phone call from an unidentified motorist provided sufficient justification for an investigative traffic stop. The arresting officer in *Rutzinski* received a dispatch based upon a cell-phone call from an unidentified motorist advising of a truck driving erratically. *Id.* at ¶4. The anonymous tipster remained on the line providing the dispatch with information that permitted the responding officer to strategically position his squad car and await the suspected drunk driver. *Id.* at ¶5. When the truck passed his location, the officer pulled his car behind the truck; the dispatcher then stated that the tipster had indicated that he or she was in the vehicle ahead of the truck and the officer was following the correct vehicle. *Id.* at ¶6. Although the officer did not independently observe any signs of erratic driving, he conducted a traffic stop of the truck. *Id.* at ¶7.

¶9 The court recognized that in some circumstances, information contained in an informant's tip could justify an investigative stop. *Id.* at ¶17. However, the court determined that before an informant's tip would give rise to grounds for an investigative stop, the police had to consider its reliability. *Id.* at ¶18. In assessing the reliability of a tip, the court concluded that due weight had to be given to two important considerations: the informant's veracity and the informant's basis of knowledge. *Id.* The court determined that the two

considerations must be viewed in light of the totality of the circumstances, instead of as discrete elements of a more rigid test: “[A] deficiency in one [consideration] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.” *Id.* The court then explained that although there is no per se rule of reliability, these considerations outline a general spectrum of potential types of tips, which under specific circumstances can give rise to a reasonable suspicion. *Id.*

¶10 Our supreme court then examined cases that have helped create the boundaries for the spectrum of reliable anonymous tips, including *J.L.* The court found significant differences between the anonymous tip in *J.L.* and the anonymous cell-phone tip that led to the traffic stop in *Rutzinski*. First, the informant exposed himself or herself to being identified and, therefore, to possible arrest if the tip proved false, by providing information that he or she was in the car immediately in front of Rutzinski. *Rutzinski*, 2001 WI 22 at ¶32. Second, the informant provided verifiable information and contemporaneous observations indicating his or her basis of knowledge. *Id.* at ¶33. Third, the tip suggested that Rutzinski was an imminent threat to the public’s safety. *Id.* at ¶34. The court determined that these distinctions were enough for it to hold that the informant’s tip contained sufficient indicia of reliability to support a finding of reasonable suspicion to conduct an investigative stop of Rutzinski. *Id.* at ¶37.

¶11 In *Williams*, our supreme court addressed the question of whether an anonymous tip containing a contemporaneous report of drug trafficking, combined with independent observations and corroboration of details from the tip, justified an investigatory stop. *Williams*, 2001 WI 22 at ¶2. In *Williams*, the police department received a 911 call from an anonymous caller who gave her address and stated that there was drug activity going on in the back alley of her residence.

Id. at ¶4. When the police arrived at the scene, they found a vehicle that matched the general description provided by the caller and observed Williams engaging in suspicious activity. *Id.* at ¶¶7-8. The court determined that the anonymous tip contained a number of components indicating its reliability, which distinguished the case from *J.L. Williams*, 2001 WI 22 at ¶¶22, 31. The distinguishing facts included: (1) the anonymous tipster described the criminal activity as she observed it; (2) the anonymous tipster put her identity at risk by placing a 911 call and identifying her location as her home; (3) the police had an audio recording of the anonymous tip; (4) the police independently observed facts giving them reason to suspect criminal activity was afoot; and (5) the police were able to corroborate the innocent, although significant, details of the tip, which lent the tip credibility. *Id.* at ¶¶33, 34, 37, 39, 40. The court then considered the totality of the circumstances and concluded that the cumulative details of the tip and the officers' independent corroboration provided reasonable suspicion that criminal activity was afoot. *Id.* at ¶47.

¶12 We now apply the teachings of *J.L., Rutzinski* and *Williams* to the anonymous tip in this case. The tip was that a possible intoxicated driver had just left the East Towne Veterinary Clinic and was traveling northbound on Port Washington Road. The tipster then provided a description of the vehicle and a direction the car was traveling. The tipster did not state why he or she believed the driver was driving while intoxicated. Thus, like the tip in *J.L.*, this tip did not contain any verifiable information indicating how the tipster came to know of the illegal activity. The tip contained nothing more than readily observable information. Additionally, like the officers in *J.L.*, Restivo did not independently observe any activity that would raise a reasonable suspicion that crime was afoot.

Restivo did not observe Peacock driving erratically or otherwise showing any signs of driving drunk and could not corroborate the allegations in the tip.

¶13 Further, unlike *Rutzinski* and *Williams*, the record contains no information that the tipster risked putting his or her identity at stake. We do not know whether the tipster was calling from his or her home, from a cell phone on the road, or from a pay phone. Thus, we do not know if the phone call could be traced and the identity of the caller ascertained. The record includes no audio recording or transcript of the call, which would offer the limited opportunity to verify the tipster's veracity through the content of the call and the tipster's tone and delivery. In addition, in *Rutzinski* and *Williams*, the tipster observed the alleged illegal activity contemporaneous with his or her call to the police. In contrast, in this case, we do not know when the tipster called in relationship to his or her observing the illegal activity, why the tipster called or where the tipster called from.

¶14 Thus, the tip here is lacking in both quality and quantity. The anonymous tip is unsupported by any indicia of reliability other than innocent information. All the anonymous tip gave Restivo was the bare report of an unknown, unaccountable informant who neither explained how he or she knew that the driver of the vehicle had been drinking alcohol nor supplied any basis for believing the informant had inside information. This tip is nothing more than an uncorroborated bald assertion of criminal activity and cannot support a conclusion that Restivo had the requisite reasonable suspicion when he detained Peacock.

By the Court.—Judgment and order reversed.

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

