COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1891-CR **Cir. Ct. No. 01-CT-1485**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON C. TUOMI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Reversed.*

¶1 HOOVER, P.J.[1] Aaron Tuomi appeals an order denying suppression of evidence obtained during a traffic stop. He also appeals his resulting conviction for operating with a prohibited blood alcohol concentration

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

(OWPAC), second offense, contrary to WIS. STAT. § 346.63(1)(b). Tuomi argues that an anonymous tip reporting he had backed into another vehicle and fled the scene did not provide police with reasonable suspicion to stop him. Because we agree that the tip did not provide the police with reasonable suspicion to make a traffic stop, we reverse the order denying the suppression motion and the judgment of conviction.

Background

¶2 The facts are undisputed. On June 23, 2001, Brown County deputy sheriff Matthew Ronk received a dispatch notice of a possible hit and run that had occurred in a bar's parking lot. An anonymous informant, claiming to be in the parking lot and a witness to the accident, had called and provided the dispatcher with a vehicle description and its license plate number.

¶3 Approximately five minutes later, Ronk saw the vehicle a mile from the accident site and initiated a traffic stop. When he made contact with the driver, Tuomi, Ronk noticed a strong odor of alcohol and proceeded with field sobriety tests. Tuomi was ultimately arrested and charged with operating while intoxicated, second, and OWPAC, second. At the suppression hearing, Tuomi conceded the officer had reasonable suspicion to conduct the field tests once he was pulled over, but argued the anonymous tip was insufficient to provide Ronk with reasonable suspicion to make the initial traffic stop. Ronk testified that the tip was the sole basis for the stop—he had not observed Tuomi commit any traffic or moving violations.

Analysis

¶4 Investigative traffic stops are governed by the "reasonableness requirement" of the Fourth Amendment to the United States Constitution and article I, section 11, of the Wisconsin Constitution. *See* ***State v. Rutzinski,*** 2001 WI 22, ¶¶13-14, 241 Wis. 2d 729, 623 N.W.2d 516. To pass constitutional muster, an officer initiating an investigative traffic stop must have, at a minimum, a reasonable suspicion that the driver of the vehicle has committed an offense. *See* ***id.*** at ¶14. Reasonable suspicion is based on specific and articulable facts that together with reasonable inferences therefrom reasonably warrant a suspicion that an offense has occurred or will occur. ***State v. Longcore***, 226 Wis. 2d 1, 6, 594 N.W.2d 412 (Ct. App. 1999). Whether a constitutional violation has occurred as the result of an investigative stop is a question of law we review de novo. ***Rutzinski***, 2001 WI 22 at ¶12.

¶5 In some circumstances, information contained in an informant's tip may justify an investigative stop. ***Id.*** at ¶17. Before an informant's tip can give rise to reasonable suspicion and grounds for an investigative stop, the police must consider its reliability and content. ***Id.*** 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. ***Id.*** at ¶18.

¶6 An anonymous tip alone seldom demonstrates the informant's veracity or basis of knowledge. ***Florida v. J.L.***, 529 U.S. 266, 270 (2000). "[H]owever, there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion ….'" ***Id.*** (citation omitted). A totally anonymous tip must contain not only a bald assertion that the suspect is engaged in illegal activity, but also verifiable information

indicating how the tipster came to know of the alleged illegal activity. ***Rutzinski***, 2001 WI 22 at ¶28.

¶7 The State attempts to analogize Tuomi's case to ***Rutzinski***. In ***Rutzinski***, officer Jerome Sardina was on patrol in Greenfield when he heard a dispatch requesting a squad respond to an area near him. According to the dispatch, an unidentified motorist calling from a cell phone reported that he or she was observing a black pickup truck weaving within its lane, varying its speed from too fast to too slow, and "tailgating." Sardina responded. ***Id.*** at ¶4.

¶8 The dispatcher then issued a second dispatch indicating that the motorist was still on the phone and that he or she and the black pickup had traveled nine blocks. In light of this information, Sardina determined that the vehicles were heading toward him, positioned his squad car in the median and waited. ***Id.*** at ¶5.

¶9 Shortly thereafter, Sardina saw the vehicles pass his location. He then pulled 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 Sardina's squad car, and that Sardina was following the correct truck. ***Id.*** at ¶6.

¶10 Although Sardina did not independently observe any signs of erratic driving, he activated his emergency lights and conducted a traffic stop of the black pickup. During this stop, Sardina observed that Rutzinski, the driver had glassy, bloodshot eyes, smelled like alcohol, and slurred his speech. A subsequent Intoxilyzer test revealed that Rutzinski had a .21% blood-alcohol concentration. The motorist who reported Rutzinski's erratic driving also pulled over when Sardina initiated the stop. Although the motorist did not speak with Sardina, he or she did speak at that time with Sardina's supervisor. However, there is no record

of the motorist's name or other identification, or any indication what was said between Sardina's supervisor and the motorist. ***Id.*** at ¶7.

¶11 In light of the evidence obtained as a result of Sardina's stop, the State charged Rutzinski with one count of operating a motor vehicle while under the influence of an intoxicant, fourth offense, and one count of operating a motor vehicle with a prohibited alcohol concentration, fourth offense. ***Id.*** at ¶8. Rutzinski's motion to suppress was denied. ***Id.*** at ¶9. This denial was affirmed by this court and our supreme court. ***Id.*** at ¶¶2-3.

¶12 The State's analogy to ***Rutzinski*** is unpersuasive. "The reasonableness of official suspicion must be measured by what the officers knew *before* they conducted their search." ***J.L.***, 529 U.S. at 271 (emphasis added). An accurate description of a subject's readily observable location and appearance is reliable in the limited sense that it will help police correctly identify the person whom the tipster means to accuse. ***Id.*** at 272. When they receive an anonymous tip, "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." ***Rutzinski***, 2001 WI 22 at ¶28.

¶13 A tip from a known or identifiable informant whose reputation can be assessed or who can be held responsible if a tip turns out to be fabricated usually provides a basis for ascertaining the informant's veracity or basis of knowledge. *See* ***J.L.***, 529 U.S. at 270. Truly anonymous tipsters, however, do not place their credibility at risk and often may "lie with impunity." *See* ***id.*** at 275 (Kennedy, J., concurring). In ***Rutzinski***, even though there is no record of the motorist's name, the court noted he or she had been exposed to criminal liability

by pulling over and speaking with an officer. The officer had the opportunity to record a name or, absent that, a license plate number to use in ascertaining a name. ***Rutzinski***, 2001 WI 22 at ¶32.

¶14 In Tuomi's case, there is no personally identifiable information about the tipster, and thus no accountability. The caller could just as easily be someone with a "score to settle" with Tuomi instead of a concerned citizen. While the State suggests the caller exposed himself or herself by claiming to be in the parking lot at the time of the accident, no officer ever made contact with this witness and the claim of the caller's location is unproven. There is no way for the law to hold this witness accountable because there is no way to identify this witness.

¶15 In ***Rutzinski***, the caller provided a contemporaneous account of events. He or she had no way to know Sardina's location. Sardina was able to *independently verify* at least one fact the caller had reported—the path of travel. ***Id.*** at ¶33. In Tuomi's case, Ronk did no independent investigation of any facts the tipster reported, save for the easily identifiable information concerning Tuomi's car and license plate. Indeed, had Ronk stopped even briefly at the bar to investigate whether there had been any sort of collision, he likely would not have pursued Tuomi—the damage to the car Tuomi purportedly hit was no more than a minor scratch to the bumper. Ronk only knew this scratch was the damage by talking with the owner of the vehicle after Tuomi was in custody. Had he driven past the bar without speaking to the car's owner, Ronk would have been hard pressed to find any indication that an accident had occurred.

¶16 The State also makes an intriguing argument that "the potentially strong risk to public safety" suggests Ronk's actions were reasonable under the

circumstances. In ***Rutzinski*,** the supreme court indeed noted that Sardina did not need to wait to observe any erratic driving before stopping the truck because of the "tremendous potential danger presented by drunk drivers." ***Id.*** at ¶35. In ***Rutzinski***, however, the driver presented at least three indicia of drunk driving: weaving in traffic, "tailgating," and abnormal varying speed. ***Id.*** at ¶4.

¶17 The only sign Tuomi was intoxicated was that he backed into another vehicle. This is not a sufficient basis, absent more, for an officer to have reasonable suspicion that Tuomi was under the influence or to outweigh his right against an unreasonable search. Tuomi may simply have been inattentive.[2]

¶18 That an innocent explanation for behavior can be provided is often insufficient to overcome the higher standards for a finding of probable cause. *See* ***State v. Welsh***, 108 Wis. 2d 319, 347, 321 N.W.2d 245 (1982) (Abrahamson, J., dissenting), *rev'd on other grounds*, 466 U.S. 740 (1984). Compared to other facts, an innocent explanation may also be insufficient to defeat a finding of reasonable suspicion. In this case, however, there were no other indicia observed by the tipster, and Ronk independently observed no indicia. While we share the State's concern for the risk drunk drivers pose to others on our roadways, the single uncorroborated observation of Tuomi's behavior, which is subject to an innocent explanation, cannot possibly give rise to reasonable suspicion.

¶19 The anonymous phone call in this case had neither a sufficient indication of veracity of the tipster nor a sufficient indication of the tipster's basis

[2] We acknowledge that Tuomi had just left a bar. While we note the primary function of a bar is to serve alcohol, Tuomi's presence at the bar does not, in and of itself, give rise to the inference that he was intoxicated or even that he was drinking.

of knowledge to give Ronk reasonable suspicion to stop Tuomi's vehicle. The evidence obtained as a result of that stop should have been suppressed. The court's order denying suppression is reversed. Without evidence and information from the stop, the State has no cause for the criminal complaint much less Tuomi's conviction, which is also reversed.

By the Court.—Judgment and order reversed.

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