

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 17, 2012

Diane M. Fremgen
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. 2012AP974

Cir. Ct. Nos. 2011TR2822
2011TR2823

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF SHEBOYGAN,

PLAINTIFF-RESPONDENT,

V.

HERBERT BINKOWSKY,

DEFENDANT-APPELLANT.

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

¶1 BROWN, C.J.¹ In this first offense operating while intoxicated case, Herbert Binkowsky appeals from the judgment of conviction, arguing that

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the circuit court should have granted his motion to suppress all evidence obtained during a roadside stop of his vehicle. We agree with the trial court that the arresting officer reasonably suspected Binkowsky of driving from the scene of a physical domestic disturbance. Domestic violence is a crime in Wisconsin. And, while it is true that this information came from an anonymous tipster, its reliability was corroborated because the make, model, description, and license plate number were the same as provided by the caller. We affirm.

¶2 The facts relevant to this appeal are derived primarily from the testimony of the officer who stopped Binkowsky. On June 9, 2011, at about 10:11 p.m., an unknown caller reported that there was a physical domestic disturbance on the north side of the City of Sheboygan and that the suspect had left in a red Cadillac, possibly heading home. The caller also provided the license number: 854 MMK.

¶3 After hearing the details of the call over the police radio, an officer who was in the area ran the registration number and learned that the registered owner was Binkowsky, who resided in Sheboygan Falls. The officer thought it was likely that the suspect would travel along a specific road to get back to his house in Sheboygan Falls, so the officer parked in a driveway off of that road, monitored traffic, and waited to see if the suspect came by in his red Cadillac. A few minutes later, the officer spotted a red Cadillac traveling southbound on the road he was parked along. The vehicle exactly matched the description of the vehicle given by the caller, so the officer pulled out of the driveway and followed the vehicle.

¶4 As soon as the officer got closer to the suspect's vehicle, he observed that it had the exact license plate number that was reported to him. At

that time, the officer initiated a traffic stop. The driver was subsequently identified as Binkowsky. The officer performed field sobriety tests and used a breathalyzer to obtain Binkowsky's blood alcohol concentration (BAC). Binkowsky failed the tests and was arrested for operating while intoxicated—first offense.

¶5 Binkowsky moved to suppress the evidence from the traffic stop, arguing that the initial stop was not supported by the necessary reasonable suspicion. The trial court denied his motion to suppress. The trial court commented that the informant provided enough information for the officer to make the stop. The trial court also reasoned that the informant was reliable because, even though she did not leave her name and phone number, she had to know that police could trace back her number, thus subjecting herself to the potential penalties that would come with obstructing an officer, unless she believed some legitimate wrongdoing was occurring. Moreover, the trial court explained how the officer had information that Binkowsky was headed home and therefore placed himself in a position where he thought he had the best chance of seeing the suspect. After the motion to suppress was denied, Binkowsky moved for reconsideration, citing an unpublished one-judge decision from this court as persuasive authority. The trial court denied that motion as well. He was later found guilty by a jury and now appeals.

Suppression of Evidence

¶6 We begin by addressing the issue related to the suppression of the evidence. The question of whether a traffic stop is reasonable is a question of constitutional fact involving a two-step standard of review. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. First, we review the trial court's findings

of fact, which are typically upheld unless they are clearly erroneous. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. Next, we review the application of constitutional principles to those facts de novo. *Id.*

¶7 In support of its determination that there was reasonable suspicion to stop Binkowsky, the trial court made findings of fact related to the anonymous call. The trial court found that the caller reported a physical domestic disturbance committed by a person who drove away in a red Cadillac with a specific registration number. Also, the caller thought that the driver was heading home after leaving the scene. After review of the transcript, we conclude that these findings of fact are not clearly erroneous. We then turn to the question of whether these facts gave reasonable suspicion to justify the stop.

¶8 The test for determining whether reasonable suspicion exists to justify a traffic stop is an objective test that takes into account the totality of the facts and circumstances. *Id.*, ¶22. An officer's reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion of the stop. *Post*, 301 Wis. 2d 1, ¶10 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). The critical inquiry is "whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime." *Post*, 301 Wis. 2d 1, ¶13. That commonsense approach "balances the interests of the State in detecting, preventing, and investigating crime and the rights of individuals to be free from unreasonable intrusions." *Id.*

¶9 In evaluating the need to seize, the court must also consider the nature and extent of the governmental interests involved. *See Terry*, 392 U.S. at

22. For example, in *Terry*, the governmental interests were those of crime prevention, detection, and the need to temporarily *freeze* a situation to resolve ongoing, possible criminal, ambiguities. *See id.* at 22-23. So, in examining the trial court’s determination that there was a reasonable suspicion of a crime being committed, we also need to consider whether there existed a need to temporarily freeze the situation to resolve ongoing, possibly criminal, ambiguities, seeing as this case involves an ongoing, fluid situation.

¶10 First, we look to the label given to this incident by the dispatcher—that some kind of physical domestic disturbance was occurring, or had just occurred. WISCONSIN STAT. § 968.075 states that “[d]omestic abuse’ means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common: 1. Intentional infliction of physical pain, physical injury or illness.” Although further details were not provided by the informant regarding the possible domestic abuse, a police officer would reasonably suspect that a domestic abuse incident had just taken place. Domestic abuse is a crime. Thus, it was reasonable for the officer to suspect that a crime had just been committed, at least enough to freeze the situation and resolve any ambiguities.

¶11 Before leaving this subject, we pause to briefly address Binkowsky’s argument that an unpublished opinion of this court, *State v. Hoffman*, Nos. 2010AP1949/2220-CR, unpublished slip op. (WI App Sept. 27, 2011), is persuasive authority on his behalf. It is not. In that case, the caller simply reported that a man named Atkinson “may have been involved in a disturbance” at a bowling alley. *Id.* at 2. There was no indication that the man *was* involved and

how he was involved, what the so-called “disturbance” consisted of, or whether there was any violence. *Id.* at 9. The facts are very different.

Reliability of the Anonymous Tip

¶12 Next, we address Binkowsky’s argument that the anonymous tip was not reliable enough to justify a traffic stop in this situation. “Tips 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.” *Id.* These considerations must be viewed within the “totality of the circumstances.” *Id.* “[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.” *Illinois v. Gates*, 462 U.S. 213, 233 (1983).

¶13 “[I]f a tip contains strong indicia of an informant’s basis of knowledge, there need not necessarily be any indicia of the informant’s veracity.” *Rutzinski*, 241 Wis. 2d 729, ¶25. For example, in *Alabama v. White*, 496 U.S. 325, 327 (1990), police received an anonymous tip that the defendant, White, would be leaving a particular apartment at a particular time in a particular vehicle, that she would be going to a particular motel, and that she would be in possession of cocaine. The police then relied on that tip, went to the apartment, followed the suspect, stopped her on her way to the motel, and found cocaine in the vehicle. *Id.* The Court reasoned that though the tip may have lacked the necessary indicia of reliability on its own, “[w]hen significant aspects of the caller’s predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed.” *Id.* at 332. Moreover, the fact that the caller was able

to predict White's future behavior demonstrated a special familiarity with, or knowledge of, White's affairs. *See id.* Thus, the corroboration by the police bolstered the tip's reliability "well enough to justify the stop." *See id.*

¶14 We assume, without deciding, that the anonymous tip lacked the necessary indicia of reliability. This is notwithstanding the trial court's belief that any anonymous tipster would know the police could trace back a call despite the caller's attempt at complete anonymity. Regardless of the assumption, this is a *White* case. Significant aspects of the informant's story were corroborated by the police. First, the informant stated that the suspect was driving a red Cadillac, which is the exact vehicle that the officer stopped. Second, the informant stated that the suspect was heading home and gave the current location of the suspect—the north side of Sheboygan—and the most probable route from the north side of Sheboygan to the suspect's home in Sheboygan Falls, as determined by the officer, is where the officer spotted the suspect driving. Third, the informant stated that the suspect had just left the scene of the incident, and the officer saw the suspect only a few minutes later. Lastly, the license plate number matched the exact license plate number given by the informant. The corroboration is there.

By the Court.—Judgment affirmed.

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

