

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 2012

Diane M. Fremgen
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. 2012AP630
STATE OF WISCONSIN**

Cir. Ct. Nos. 2011TR26303
2011TR26304
**IN COURT OF APPEALS
DISTRICT I**

CITY OF WEST ALLIS,

PLAINTIFF-APPELLANT,

V.

KRISTIE J. KAPKE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS FLYNN, Reserve Judge. *Reversed and cause remanded with directions.*

¶1 BRENNAN, J.¹ The City of West Allis appeals the circuit court order, reversing a municipal court judgment against Kristie J. Kapke. Kapke was

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

convicted of operating while intoxicated in municipal court after the municipal court denied her motion to suppress evidence based on an improper stop. Kapke appealed the judgment to the circuit court where it was reversed. The City contends that the circuit court erred by concluding that the named citizen informant's tip lacked sufficient indicia of reliability to justify the stop. We agree with the City and reverse the circuit court's order and remand to the municipal court for further proceedings consistent with this opinion.

BACKGROUND

¶2 On May 21, 2010, at approximately 12:40 a.m., City of West Allis Police Sergeant Clem Corwin received a call from dispatch regarding a citizen informant, who had called to report a possibly intoxicated driver. The informant, a pedestrian on his cell phone, reported observing a silver Monte Carlo, driven by a white female, heading westbound on Lincoln Avenue from 90th Street. The informant gave the license plate number of the car to dispatch, who passed it along to Sergeant Corwin. The informant subsequently spoke to another officer, and told the officer his name. Sergeant Corwin asked dispatch to run the license plate. After doing so, dispatch informed Sergeant Corwin that the Monte Carlo was registered at 9313 West Hayes Avenue in West Allis.

¶3 After receiving the dispatch, Sergeant Corwin first went to Lincoln Avenue and 90th Street but did not see the car. As he continued to look for the driver, other officers were looking for the citizen informant. When Sergeant Corwin did not find the car described by the informant, he immediately went to the address at which the car was registered, as it was close by.

¶4 Sergeant Corwin testified that as he approached the address he observed a silver Monte Carlo parked in the driveway and a blond, white female

sitting alone in the car behind the driver's wheel. Sergeant Corwin observed that the license plate matched the description given by the citizen informant. He activated his emergency lights and made contact with the driver, Kapke, and as he approached Kapke's car he noticed that the keys were still in the ignition. Sergeant Corwin explained the reasons for the stop and asked Kapke basic questions about where she was and where she was coming from.

¶5 Kapke told Sergeant Corwin that she had been at Magoo's Tavern, at 89th Street and National Avenue in West Allis for a few hours. Sergeant Corwin testified, based on his training and sixteen years of experience as a police officer, including his experiences arresting over 200 people for operating while intoxicated and administering over 350 Intoximeter tests, that he detected a strong odor of alcohol on Kapke's breath, slurred speech, and red and glassy eyes. Sergeant Corwin asked Kapke if she had been drinking, and she said that she had consumed one cranberry-vodka drink and one beer. At that point, Sergeant Corwin turned Kapke over to Officer Christopher Beldon who administered the sobriety field tests.

¶6 Officer Beldon testified that Kapke "was horrible on the walk-and-turn" test, even though she "earned no clues" of intoxication on the HGN or one-leg stand tests. Consequently, Kapke was administered the Intoximeter test, which resulted in a reading of .17. She was arrested and given two citations, one for operating while intoxicated and one for operating with a prohibited alcohol concentration.

¶7 Kapke filed a motion to suppress evidence based on an unlawful stop in municipal court. The municipal court heard the motion and denied it. As such, Kapke was convicted of operating while intoxicated. Kapke appealed the

municipal judgment to the circuit court. The circuit court concluded that the municipal court erred in denying the suppression motion and reversed the resulting judgment. The City appeals.

DISCUSSION

¶8 The City contends that the circuit court erred in concluding that the police lacked a lawful basis to stop Kapke. The principal issue on review is the reliability of the citizen informant’s tip to the West Allis police. The circuit court agreed with Kapke that the tip was not sufficiently reliable because the citizen informant did not report his observations of Kapke’s driving or otherwise explain what led him to believe she was intoxicated, but instead only gave his opinion that she was a “possible intoxicated driver.” The City argues that the citizen informant’s tip was sufficiently reliable because he: (1) revealed his identity to law enforcement, exposing himself to perjury or other criminal charges if he made a false report; and (2) gave a detailed contemporaneous account of a crime, identifying the driver, car, license plate, and location, all of which the police were able to corroborate. We agree with the City.

¶9 A law enforcement officer may lawfully stop an individual if he or she has a reasonable suspicion that the person is committing a crime. *See* WIS. STAT. § 968.24; *see also Terry v. Ohio*, 392 U.S. 1 (1968). The United States Supreme Court in *Terry* defined reasonable suspicion as specific and articulable facts, which taken together with rational inferences from those facts, objectively warrant a reasonable person with the knowledge and experience of the officer to believe that criminal activity is afoot. *Id.*, 392 U.S. at 21-22, 27.

¶10 The lawfulness of a stop is a question of constitutional fact to which we apply a two-step standard of review. “First, we review the circuit court’s

findings of historical fact, and uphold them unless they are clearly erroneous. Second, we review the determination of reasonable suspicion de novo.” *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W. 2d 106 (internal citation omitted). Here, although the circuit court made few findings of historical fact, they are not the issue on appeal. The parties do not dispute the facts. Rather, the issue is the circuit court’s legal conclusion that, given the undisputed facts, the stop was unlawful.

¶11 It is well-established that reasonable suspicion can be based on an informant’s tip, provided it is sufficiently reliable. *See id.*, ¶36. The reliability of a tip is measured by viewing the totality of the circumstances with regard to: “(1) the informant’s veracity; and (2) the informant’s basis of knowledge.” *State v. Rutzinski*, 2001 WI 22, ¶18, 241 Wis. 2d 729, 623 N.W.2d 516. “[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.* (citation omitted; brackets in *Rutzinski*). Thus, where less is known about an informant, the tip may nonetheless be sufficiently reliable under the totality of the circumstances if more is known about the informant’s basis of knowledge, and vice versa. *See id.* For example, in the case of an anonymous tip, police corroboration of details provided by the informant further bolster the tip’s reliability. *Williams*, 241 Wis. 2d 631, ¶39. Ultimately, reliability is a question of the reasonableness of the officer’s action under the totality of the circumstances. *Id.*, ¶23.

A. The citizen informant’s veracity was sufficiently reliable.

¶12 In testing the reliability of an informant’s tip, we first evaluate the informant’s veracity. This case involves a citizen informant, as opposed to a

confidential police informant, or an anonymous informant. There is a “relaxed test of reliability” for tips from citizen informants. *See id.*, ¶36. “When an average citizen tenders information to the police, the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such might not be the case.” *State v. Powers*, 2004 WI App 143, ¶9, 275 Wis. 2d 456, 685 N.W.2d 869 (quotation marks, brackets, and citation omitted). When a citizen provides his or her identifying information, risking exposure to perjury or other criminal charges in the event his or her tip is a lie, the tip bears sufficient indicia of reliability. *See Rutzinski*, 241 Wis. 2d 729, ¶20. Where there is strong indicia of an informant’s veracity, there need not be any indicia of the informant’s basis of knowledge. *Id.*, ¶21.

¶13 Applying those tests here, we conclude that the citizen informant’s veracity was high. First, he gave his name to the police. By giving his name, the citizen informant exposed himself to criminal charges in the event his information proved untruthful, which is one recognized factor supporting the veracity of a tip. *See id.*, ¶20. Second, he was interviewed by a police officer after he phoned in his tip. The ability of the officer to have an opportunity to assess the citizen informant’s veracity, is another factor in support of veracity. *See id.*

B. The citizen informant’s basis of knowledge was sufficiently reliable.

¶14 Kapke concedes that the relaxed test of reliability is appropriate here because the citizen informant identified himself, and Kapke does not dispute the citizen informant’s veracity as far as it goes. Kapke does argue that the tip nonetheless fails to meet the *Williams* reliability test because the citizen informant offered no information about the basis of knowledge for his tip. Kapke contends that the informants in *Williams*, *Rutzinski* and *Powers* all explained why they

believed crimes were occurring, while, here, the citizen informant's tip was conclusory. Kapke claims that the citizen informant's failure to describe his observations of Kapke's driving, which led him to believe she was driving under the influence, renders the citizen informant's tip insufficiently reliable. Kapke also argues that the police did not corroborate any part of the citizen informant's information before the stop. The City, citing the same cases, argues that the citizen informant provided a sufficiently reliable basis of knowledge in that he gave a contemporaneous account of a crime in progress, with details that the police were able to corroborate before making the stop. We agree with the City.

¶15 In *Williams*, an anonymous caller to the police said, "I don't want to get involved[,] but there's some activity that's going in ... going around in the back alley of my house where they're selling drugs and everything." *Id.*, 241 Wis.2d 631, ¶4. The caller described observing a drug deal in a "blue and burgundy Bronco" van in the alley behind her home "at 4261 North Teutonia." *Id.* The police went to that location and saw a vehicle generally matching the caller's description, but they did not observe any criminal activity. *Id.*, ¶6.

¶16 In *Williams*, our supreme court concluded that the police had reasonable suspicion for the stop. *Id.*, ¶47. Although the informant did not provide her name, she referred to the location of the crime as "'my house,'" gave its address and described the activities in the present tense, implicitly indicating a contemporaneous viewing of criminal activity, all of which gave the police sufficient information to judge the caller's veracity. *See id.*, ¶33.

¶17 Additionally, because the informant provided details that the police were able to corroborate in some respects—car description, more than one person inside the car, location, layout of the surroundings—the court found the tip

sufficiently reliable: “The reliability of the anonymous tip here was ... bolstered by the police corroboration of innocent, although significant, details of the tip.” *Id.*, ¶¶4, 39.

¶18 Like the anonymous informant in *Williams*, here, the citizen informant’s call to police, reporting “a possible intoxicated driver,” was also a contemporaneous account of criminal activity. Although the citizen informant did not provide a lengthy blow-by-blow of the driving, it was apparent from the context of his statement and the fact that he said he was a pedestrian, that he was contemporaneously viewing driving that he thought was criminal. Additionally, he provided details similar to those provided by the informant in *Williams*—car description, woman driver alone in car, and license plate number—all of which the police corroborated prior to the stop. Furthermore, as a named citizen informant, he was entitled to the relaxed test for reliability, unlike the anonymous caller in *Williams*.

¶19 In *Rutzinski*, an anonymous caller reported to police “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.’” *Id.*, 241 Wis. 2d 729, ¶4. The caller stayed on the phone with police, reported the truck’s new location and stated that he or she was in the vehicle in front of the truck at the time of the stop. *Id.*, ¶¶5, 6.

¶20 The Wisconsin Supreme Court concluded that the caller’s first-person account of the defendant’s driving, his direction of travel and the description of the defendant’s truck, allowed the police to know that the informant had to be contemporaneously viewing the crime, which “provided the police with verifiable information indicating his or her basis of knowledge.” *Id.*, ¶33. Thus, the police “reasonably could have inferred from this information that the

informant had a reliable basis of knowledge.” *Id.* Because of the inherent reliability of a contemporaneous account of a criminal activity, and the corroboration of details provided by the informant, the court found the tip sufficiently reliable. *Id.*

¶21 So too here, the citizen informant’s eye-witness description of Kapke’s car, license plate number, and street location, provided police with verifiable information. They went to Kapke’s home, which was close by, and were able to corroborate, within a very short time after the citizen informant’s call, that Kapke was alone and behind the wheel of a Monte Carlo with a license plate matching the citizen informant’s description.

¶22 Again, the named citizen informant in this case is entitled to a relaxed test of reliability that the anonymous informants were not entitled to in *Williams* and *Rutzinski*, and yet, even under the tougher standard, both of those tips were found sufficiently reliable. Here, the citizen informant’s veracity started at a higher point than the anonymous callers in both cases, and additionally, he provided a contemporaneous account of criminal activity and supplied details the police were able to corroborate.

¶23 The third case on which both sides rely is *Powers*. There, the informant was a clerk in a store who called police to report “that ‘an intoxicated man had come in to make purchases at the store buying beer,’” but that the man left the store when his credit card was declined, saying that he would be back. *Id.*, 275 Wis. 2d 456, ¶2. The clerk provided police with a description of the defendant’s truck and its license plate number. *Id.* The clerk did not see the defendant driving. *Id.*

¶24 The police went to the store, sat outside and were able to corroborate the information provided by the clerk. *Id.*, ¶¶2-3. The police saw the truck the clerk described and then saw the defendant, carrying a case of beer, walk unsteadily to the truck and drive away, at which point the police stopped him. *Id.*, ¶3. We concluded the clerk’s information was inherently reliable because she identified herself and gave the police a firsthand account of her observations of what she believed to be criminal activity, and the police corroborated details of her account. *Id.*, ¶¶9-15. As we have noted, all of the same applies to the citizen informant’s tip to police in this case.

¶25 Still, Kapke faults the citizen informant’s tip here on the grounds that he failed to provide details about Kapke’s driving and to describe to dispatch why he believed her to be possibly intoxicated. In *Powers*, we rejected this same argument. There, the defendant argued that the clerk lacked a sufficient basis for her information because she did not see the defendant drive “in a manner consistent with someone who was under the influence of an intoxicant.” *Id.*, ¶10. We concluded that “the informant’s failure to see the driver actually drive the vehicle [was] not fatal.” *Id.*, ¶12. Further, we concluded that it was reasonable for the police to rely on the informant’s assessment that the defendant was drunk, noting that in Wisconsin a layperson can give an opinion that he or she believes another person is intoxicated. *Id.*, ¶13. The supreme court previously made it clear that the police need not corroborate the criminal activity. *See id.* While corroboration of some, even innocent, details is valued, the police need not corroborate the criminal activity itself. *See State v. Richardson*, 156 Wis. 2d 128, 142, 456 N.W.2d 830 (1990).

¶26 The citizen informant’s tip here, that Kapke was “a possible intoxicated driver,” is no different than the caller’s tip in *Williams*: “they’re

selling drugs.” *Id.*, 241 Wis. 2d 631, ¶4. The caller in *Williams* did not provide any more basis for her opinion of drug selling than the citizen informant did here of intoxicated driving. Yet, the court in *Williams* concluded the caller’s tip was sufficiently reliable. *Id.*, ¶47. Similarly, we conclude the citizen informant’s tip is sufficiently reliable here.

CONCLUSION

¶27 In determining whether reasonable suspicion exists, we are to apply a “commonsense approach” and balance an individual’s interest of being “free from unnecessary or unduly intrusive searches and seizures” with the State’s interest in public safety. *Rutzinski*, 241 Wis. 2d 729, ¶15. Kapke argues that there was no exigency here. We disagree. As the court noted in *Rutzinski*, the tip to police suggested that the defendant posed an imminent threat to public safety. *Id.*, ¶34. Similarly here, the citizen informant’s call to police implicitly showed that he, a pedestrian, was watching a “possible intoxicated driver,” which presented an imminent threat to public safety. For all of the foregoing reasons, we conclude that the circuit court erred in reversing the municipal court, and we therefore reverse the circuit court’s order, with directions that the municipal court judgment be reinstated.

By the Court.—Order reversed and cause remanded with directions.

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

