

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 3, 2007

David R. Schanker
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. 2007AP1034-CR

Cir. Ct. No. 2006CT392

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RUSSELL M. JAROSINSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

¶1 BROWN, C.J.¹ This case involves a motorist informant who reported to police that the defendant was speeding and “cutting off” other drivers.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

After conducting an investigatory stop, two police officers determined that Russell Jarosinski was driving under the influence of alcohol. Jarosinski filed a motion to suppress, contending that the report of his “cutting off” other drivers does not provide sufficient support for the police to conduct an investigatory stop. However, “cutting off” is not a legal term of art that requires further explanation, but is a widely understood description of a dangerous driving behavior. In the alternative, Jarosinski contends that his identification by the informant resulted from an improper “showup.” This argument fails because the identification was not the product of a police procedure, and the informant remained at the scene of the incident, in constant view of Jarosinski. We affirm the trial court’s denial of Jarosinski’s motion.

¶2 On March 31, 2006, the Sheboygan Police Department received a phone call from a woman who reported that she had just been “cut off” by a speeding vehicle. While speaking with the police dispatcher, the woman reported that she was driving “right behind him” and that the vehicle was “cutting people off left and right.” The woman continued to follow this vehicle into a gas station and notified the dispatcher of her location. The caller remained at the scene, described the vehicle she had been following, and gave the dispatcher her full name and phone number.

¶3 A Sheboygan police officer, responding to this report, arrived at the scene. The officer parked his police car at the gas station and identified a vehicle that matched the description given in the police dispatch report. At this time, Jarosinski was standing outside the vehicle pumping gas. When the officer approached Jarosinski to question him about his driving behavior, he smelled intoxicating beverages. Jarosinski denied being the driver of the vehicle and claimed that the driver was inside the gas station purchasing some beer. However,

no other drivers approached the vehicle during this interaction. After a short period of time, a second police officer arrived at the gas station and confirmed with the informant that Jarosinski was the driver of the vehicle in question.

¶4 At this point, the first officer administered a Horizontal Gaze Nystagmus Test. Jarosinski failed this test and was taken into custody for operating a motor vehicle while intoxicated—third offense. Jarosinski filed motions to suppress based upon lack of reasonable suspicion to detain and lack of probable cause to arrest. In the alternative, Jarosinski claims that the officers’ actions amount to an impermissible “showup.”

¶5 Information provided by an informant can justify an investigatory stop. *State v. Rutzinski*, 2001 WI 22, ¶17, 241 Wis. 2d 729, 623 N.W.2d 516. When assessing the reliability of an informant’s tip, the court must consider two factors: (1) the veracity of the informant and (2) the basis of knowledge from which the informant is reporting. *Id.*, ¶18. These two factors are not elements of a mandatory test, and “[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.*

¶6 Applying these factors, the officers were justified in relying upon the tip provided by the informant. An informant who subjects himself or herself to identification is generally deemed to be truthful because of the potential for arrest if the informant has fabricated the information. *See id.*, ¶32. When stopping Jarosinski, the officers knew that the informant had not only identified herself to the Sheboygan police department, but had remained at the scene to identify the defendant. The officers thus had no reason to question her veracity. There was also no reason to doubt the informant’s basis of knowledge. An informant is

generally deemed to be reliable if his or her basis of knowledge involved contemporaneous observations. *See id.*, ¶33. After hearing the dispatch report, the officers were aware that the informant had been following behind Jarosinski's vehicle and had personally observed Jarosinski's driving behavior.

¶7 While Jarosinski does not question the informant's veracity or basis of knowledge, he argues that the officers did not have objective knowledge of specific facts to constitute a driving violation. More specifically, Jarosinski contends that it is insufficient to state that a driver is speeding and "cutting off" other drivers. It is true that the test for determining the constitutionality of an investigative stop is objective. *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). This objective test requires that under the totality of the circumstances a reasonable police officer would have reason to believe that the defendant has committed the offense. *See State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). Jarosinski correctly points out that neither officer personally observed any traffic violations but instead relied upon information given by a witness, who claimed that Jarosinski was "cutting off" other drivers. According to Jarosinski, a witness is required to give specific objective facts such as the speed of the driver, the distance between vehicles, and the manner in which the driver "cut off" other motorists. However, "cutting off" is not a term of legal art requiring that specific elements be satisfied. Rather, it is a term commonly used in society that does not require detailed explanation.

¶8 The sufficiency of an informant's tip was explored in *Rutzinski*, in which the supreme court found that a police officer was justified in conducting an investigatory stop based upon the report of an informant who claimed that a vehicle was "weaving within its lane, varying its speed from too fast to too slow, and 'tailgating.'" *Rutzinski*, 241 Wis. 2d 729, ¶¶3-4. The court held that this

level of specificity was sufficient to merit an investigatory stop. *See id.*, ¶34. The term “cutting off,” like the term “tailgating” or “swerving,” does not evoke specific objective facts such as the speed of the automobile or the distance between cars. However, all three terms are sufficient to express unacceptable driving practices that may merit police intervention. Furthermore, as in *Rutzinski*, the informant in this case claimed that Jarosinski’s vehicle was speeding.²

¶9 In addition to the claim that there was not reasonable suspicion to conduct an investigatory stop, Jarosinski also alleges that the actions of the officers amount to an unlawful “showup.” Jarosinski relies upon *State v. Dubose*, 2005 WI 126, ¶1 n.1, 285 Wis. 2d 143, 699 N.W.2d 582, which defines a “showup” as “an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes.” Studies have shown that “showups” are inherently suggestive and have many times resulted in eyewitness misidentification and, as a result, wrongful conviction. *Id.*, ¶¶29-30. However, it is important to note that “[t]he term ‘showup’ itself denotes a *police procedure*.” *State v. Hibl*, 2006 WI 52, ¶33, 290 Wis. 2d 595, 714 N.W.2d 194 (emphasis added). Under this standard, the officers did not conduct an unlawful “showup” by confirming that Jarosinski was the driver of the vehicle. The officers did not present the defendant to the informant. In fact, the informant was constantly in the presence of the defendant. The informant followed Jarosinski into the gas station to ensure that the arrest took place. This scenario is a far cry from the situation in *Dubose*, where the defendant was singly presented to the

² Because we have determined that the investigatory stop was justified by the informant’s report of dangerous driving, we need not address Jarosinski’s argument that the officers could not have had reasonable suspicion that he was driving while intoxicated.

witness by police officers for identification purposes. *Dubose*, 285 Wis. 2d 143, ¶9. In contrast, it was the informant in this case who presented Jarosinski to the police officers.

By the Court.—Judgment affirmed.

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

