

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 21, 2008

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. 2007AP1121-CR

Cir. Ct. No. 2006CT227

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK A. SKAU,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County:
RANDY R. KOSCHNICK, Judge. *Affirmed.*

¶1 DYKMAN, J.¹ Mark Skau appeals from a judgment of conviction for operating while intoxicated, second offense. Skau argues that an unidentified

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

informant's tip that Skau had passed in a no-passing zone and was tailgating was insufficient to provide police with reasonable suspicion to stop him. We disagree and therefore affirm.

Background

¶2 The following facts are uncontested. On March 8, 2006, Deputy Scott Gukich was on duty in Jefferson County. Around 10:30 p.m., Gukich received information from dispatch that a person driving on Highway 12 had called on a cell phone reporting that another vehicle had passed in a no-passing zone and was tailgating. The caller described the vehicle as a gray pickup truck and had given its license plate number. The caller stated that the truck was driving eastbound through the intersection of Highway 12 and Highway J. The caller also stated that he or she was willing to stop and talk to the officer if necessary, and provided his or her phone number. Dispatch informed Gukich that the caller was currently on the phone reporting the information.

¶3 Upon receiving the information from dispatch, Gukich immediately went to the area described in the call. Gukich testified that he continued to receive updated information as the truck proceeded into the City of Fort Atkinson. He located a gray pickup truck with the license plate number provided to him driving eastbound near the intersection of Highway 12 and Banker Road in Fort Atkinson. Gukich followed the vehicle for approximately a mile and did not observe any unusual driving during that time.

¶4 Gukich then stopped the vehicle and spoke with the driver, Mark Skau. Gukich identified the smell of intoxicants in the vehicle. Skau was charged with operating a motor vehicle while under the influence of an intoxicant, second offense, contrary to WIS. STAT. § 346.63(1)(a), and operating a motor vehicle with

a prohibited alcohol concentration, second offense, contrary to § 346.63(1)(b), based on the information obtained during the stop. Skau moved to suppress the evidence, arguing police did not have reasonable suspicion to stop him or probable cause to arrest him. Following a hearing, the trial court denied the motion, and Skau pled no contest to operating while intoxicated, second offense. Skau appeals.²

Standard of Review

¶5 “Investigative traffic stops, regardless of how brief in duration, are governed by [the] constitutional reasonableness requirement” under the Fourth Amendment to the United States Constitution and article 1, section 11 of the Wisconsin Constitution. *State v. Rutzinski*, 2001 WI 22, ¶¶12-14, 241 Wis. 2d 729, 623 N.W.2d 516. This case requires that we determine whether police action in conducting an investigative traffic stop of Skau violated these constitutions. Whether undisputed facts meet constitutional standards is a question of law that we review de novo. *Id.*, ¶12.

Discussion

¶6 Skau argues that police did not have reasonable suspicion to stop him based on the tip they received from an unidentified informant. Skau contends that the tip in this case did not meet the requirements for reasonable suspicion because it came from an unidentified informant. We disagree.

² On appeal, Skau argues only that police did not have reasonable suspicion to stop him. He does not argue that they lacked probable cause to arrest him based on the information obtained during the stop.

¶7 The reasonable suspicion standard requires an officer to base an investigative traffic stop on “something more than the officer’s inchoate and unparticularized suspicion or hunch.” *Id.*, ¶14 (citation omitted). Thus, “[a]t the time of the stop, the officer must be able to point to 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.*

¶8 In *Rutzinski*, the supreme court addressed “under what circumstances a cell-phone call from an unidentified motorist provides sufficient justification for an investigative traffic stop.”³ *Id.*, ¶1. There, a police officer received information from dispatch that an unidentified motorist had called in a complaint of a pickup truck weaving within its lane, varying in speed from too fast to too slow, and tailgating. *Id.*, ¶4. The officer heard another dispatch stating that the caller was still on the phone and that the caller and the pickup truck were heading towards his location. *Id.*, ¶5. The officer waited for the vehicles, and pulled behind the truck as they passed. *Id.*, ¶6. Dispatch told the officer that the caller stated that he or she was in the next vehicle ahead of the truck and that the officer was behind the correct vehicle. *Id.* The officer did not observe any improper driving but pulled the truck over and identified Rutzinski as the driver. *Id.*, ¶7. The officer obtained evidence of Rutzinski’s intoxication. *Id.* The trial

³ Rutzinski conceded that police would have had reasonable suspicion to stop him if they had personally observed the indications of impaired driving provided in the tip. *State v. Rutzinski*, 2001 WI 22, ¶16, 241 Wis. 2d 729, 623 N.W.2d 516. He contended only that the officer did not have reasonable suspicion because the information was contained in a tip rather than personally observed by the officer. *Id.* Similarly, Skau does not contend that police would not have had reasonable suspicion to stop him had they observed the alleged driving, only that the tip was insufficient to provide that reasonable suspicion. Skau does argue that the alleged driving did not provide reasonable suspicion of driving while intoxicated. This will be addressed later.

court denied Rutzinski's motion to suppress the evidence, and Rutzinski appealed, arguing that the stop was unconstitutional because the tip did not provide reliable and credible grounds to justify the stop. *Id.*, ¶¶8-10.

¶9 The court recognized that “[i]n some circumstances, information contained in an informant’s tip may justify an investigative stop.” *Id.*, ¶17. However, “before an informant’s tip can give rise to grounds for an investigative stop, the police must consider its reliability and content.” *Id.* When police assess the reliability of a tip, they must consider both the informant’s veracity and the informant’s basis of knowledge. *Id.*, ¶18. This analysis requires an examination of the totality of the circumstances rather than providing “discrete elements of a more rigid test.” *Id.* Thus, if an informant is lacking in veracity, his or her tip may still support reasonable suspicion if there is a strong showing of his or her basis of knowledge, and vice versa. *See id.*

¶10 In determining that the tip provided reasonable suspicion under the facts of the case, the *Rutzinski* court distinguished the facts before it from the facts in *Florida v. J.L.*, 529 U.S. 266 (2000). *Rutzinski*, 241 Wis. 2d 729, ¶¶27-37. In *J.L.*, police received an anonymous call ““that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun.”” *Rutzinski*, 241 Wis. 2d 729, ¶27 (quoting *J.L.*, 529 U.S. at 268). The police did not have a recording of the call, knew nothing about the caller, and had not independently observed any suspicious behavior. *Id.* Police initiated an investigative stop of an individual matching the description in the call and discovered he was carrying a concealed weapon. *Id.* The United States Supreme Court held the stop unconstitutional, because all the police had was ““the bare report of an unknown, unaccountable informant who neither explained how he [or she] knew about the

gun nor supplied any basis for believing he [or she] had inside information about [the suspect].” *Id.*, ¶28 (quoting *J.L.*, 529 U.S. at 271) (alterations in original).

¶11 The *Rutzinski* court distinguished *J.L.* on three grounds: (1) the informant in *Rutzinski*, unlike the informant in *J.L.*, exposed him- or herself to being identified, by stating he or she was in the vehicle ahead of the truck; (2) the informant in *Rutzinski*, unlike the informant in *J.L.*, provided verifiable information of contemporaneous observations of Rutzinski’s actions, along with specific locations as they travelled toward the officer, that established his or her basis of knowledge; and (3) the tip in *Rutzinski* suggested an imminent threat to public safety by alleging erratic driving, a possible sign of driving while intoxicated. *Rutzinski*, 241 Wis. 2d 729, ¶¶32-34. Although the court did not “advocate a blanket rule excepting tips alleging drunk driving from the ... reliability requirement,” it “acknowledge[d] the Supreme Court’s caveat that extraordinary dangers sometimes justify unusual precautions.” *Id.*, ¶36 (citation omitted). The court concluded that “[u]nlike the tip in *J.L.*, the informant’s tip [in *Rutzinski*] ... contained sufficient indicia of reliability and alleged a potential imminent danger to public safety,” and the stop was thus constitutionally reasonable. *Id.*, ¶37.

¶12 Skau argues that *Rutzinski* identifies three elements that must be met in order to establish reasonable suspicion based on a tip from an unidentified caller: (1) the caller faces the potential threat of arrest; (2) the caller provides contemporaneous observations of the suspect beyond a description of the vehicle and the direction of travel; and (3) the caller reports erratic driving that poses an imminent threat to public safety. He contends that all three elements were not clearly met in this case, and therefore the stop was not supported by reasonable suspicion.

¶13 The problem with Skau's argument is that *Rutzinski* did not identify a three-element test for determining when a cell phone call reporting driving violations supports reasonable suspicion. Instead, *Rutzinski* provided the framework for a totality of the circumstances analysis that focused on the reliability and content of tips from unidentified motorists to determine whether the tip provides reasonable suspicion to support a traffic stop. We therefore analyze the facts in this case to see whether the tip from the unidentified motorist justified the stop.

¶14 We look first to the reliability of the tip, based on the veracity of the informant and the basis of his or her knowledge. The caller in this case did not provide his or her name but did provide a phone number. Skau argues that the caller did not face a serious threat of arrest because the number had not been verified before the officer performed the stop. We disagree.

¶15 In *State v. Sisk*, 2001 WI App 182, 247 Wis. 2d 443, 634 N.W.2d 877, we rejected Sisk's argument that identifying information must be verified before police may rely on the fact that the caller has exposed him- or herself to potential arrest. There, police obtained information from dispatch that an individual had called stating that he had seen two men enter a building in Milwaukee with guns. *Id.*, ¶3. The caller provided the address and described the men's race and clothing. *Id.* He also gave what he said was his own name. *Id.* Police went to the address and located two men matching the description given by the caller, one of whom was Sisk. *Id.*, ¶4. Police frisked Sisk and discovered a weapon. *Id.* The trial court granted Sisk's motion to suppress on grounds that the unverified caller was not reliable, and the State appealed. *Id.*, ¶1.

¶16 We reversed, explaining that “[w]hether the caller gave correct identifying information, or whether the police ultimately could have verified his identity, the fact remains that the police could have reasonably concluded that the caller, by providing self-identifying information, risked that his identity would be discovered.” *Id.*, ¶8 (citation omitted). The caller in this case, like the caller in *Sisk*, provided information that could have led to his or her identification: his or her phone number.⁴

¶17 Next, for the caller’s basis of knowledge, the caller stated that he or she was observing Skau as he passed in a no-passing zone and had tailgated. The caller stayed on the phone and dispatch was able to provide Gukich with updated information of the vehicles’ location. We disagree with Skau that this information was nothing more than a general description of the vehicle and its direction of travel that did not establish the caller’s basis of knowledge through contemporaneous observation. See *Rutzinski*, 241 Wis. 2d 729, ¶33. We agree with Skau that the information provided by the caller in *Rutzinski* was more detailed. See *id.* However, we do not view *Rutzinski* as setting a minimum threshold beneath which information will be insufficient to establish that the information was contemporaneously observed and thus establishes a basis for the caller’s knowledge. Here, the information provided by the caller was sufficient to

⁴ Skau distinguishes the caller here from the caller in *Rutzinski* because in *Rutzinski*, the caller actually pulled to the side of the road. However, the *Rutzinski* court expressly did not consider the fact that the caller pulled to the side of the road, because he or she was not instructed to do so and the officer could not have expected that result, and considered only that the caller had given his or her location in the vehicle ahead of *Rutzinski*. *Rutzinski*, 241 Wis. 2d 729, ¶32 & n.7. Regardless, we conclude that the fact that the caller here provided his or her phone number was sufficient to establish that the caller had given self-identifying information.

establish the caller's basis of knowledge, even if it was not as detailed as the information in *Rutzinski*.

¶18 Finally, we reject Skau's argument that the information that he had passed in a no-passing zone and had tailgated was insufficient to provide a basis to believe he was driving erratically. We recognize, as Skau points out, that the facts here are not identical to the facts in *Rutzinski*. However, while the driving described in *Rutzinski* may have been more clearly indicative of driving while intoxicated, it does not follow that the driving in this case cannot amount to "[e]rratic driving" so as to suggest an imminent threat to public safety that weighs in favor of supporting an investigative stop. *Rutzinski*, 241 Wis. 2d 729, ¶34. The combination of tailgating and passing in a no-passing zone suggests driving that could pose an imminent threat to public safety. *See Id.*, ¶35 ("[A]n anonymous report of an erratic *or* drunk driver on the highway presents a qualitatively different level of danger, and concomitantly greater urgency for prompt action.") (citation omitted, emphasis added).

¶19 Under the totality of the circumstances, we conclude that Gukich was justified in relying on the information from the caller in conducting an investigative stop of Skau's vehicle. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

