

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 24, 2008

David R. Schanker
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. 2007AP1886

Cir. Ct. No. 2006TR3557

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

COLUMBIA COUNTY,

PLAINTIFF-RESPONDENT,

v.

GARY T. BALLWEG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County:
ALAN J. WHITE, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Gary Ballweg appeals the circuit court's judgment finding him guilty of driving under the influence of an intoxicant. The police were

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

tipped off to Ballweg's impaired driving by another motorist. Ballweg argues that the arresting officer unlawfully stopped and arrested him. We disagree, and affirm the circuit court's judgment.

Background

¶2 Both the motorist who tipped off police and the officer who arrested Ballweg testified at a hearing on Ballweg's motion to suppress evidence. The motorist testified that, at about 10:00 p.m., he observed a vehicle approximately six or seven car lengths in front of him weaving across the white line on the right side of the road and across the center line. As the motorist attempted to pass the vehicle on the left, the vehicle came across the center line and nearly struck the motorist. The motorist pulled back in behind the vehicle, obtained its license plate number, and called 911 to report a possible drunk driver.

¶3 The motorist continued to follow the suspect vehicle while remaining on the phone with a dispatcher. The vehicle repeatedly crossed the center line, and at times touched the grass near the ditch line. It continued to weave and to cross the center line, and the motorist continued to relay information to dispatch about the vehicle's location and erratic driving. Eventually, the vehicle parked in front of a tavern.

¶4 The motorist parked across the street from the tavern and continued to observe the vehicle. After approximately five or six minutes, two men exited the vehicle. The two men stood outside the tavern for a minute or so before entering. A police officer arrived 30 seconds later.

¶5 The officer testified that he was dispatched at approximately 9:50 p.m. for a driving complaint. He received updates from the dispatcher about

where the suspect vehicle was headed. Dispatch also informed the officer that the vehicle was “all over the road” and crossing the center line. The dispatcher told the officer that the vehicle was a green Dodge Intrepid with a Wisconsin license plate, and explained to the officer that this information was provided by the motorist who was following it. When the vehicle parked in front of the tavern, the dispatcher relayed this information to the officer. When the officer arrived at the scene, he observed a green Dodge Intrepid parked at the tavern and verified that the license number was the one that the motorist had provided.

¶6 The officer entered the tavern to locate the driver and asked the bartender which patrons had just come in. After the bartender pointed out two men at the end of the bar, the officer asked the men if they owned the Dodge Intrepid. One of the men, Ballweg, stated that it was his vehicle, and agreed to accompany the officer outside. Ballweg admitted that he was driving the vehicle, was coming from a bachelor party, and had been consuming alcohol. The officer could smell the odor of intoxicants on Ballweg. Ballweg was swaying, and his eyes were bloodshot and glassy. After conducting a series of field sobriety tests, most of which Ballweg failed, the officer arrested Ballweg.

¶7 The circuit court concluded that the officer had reasonable suspicion to stop and probable cause to arrest Ballweg.

Discussion

¶8 At our request, the parties briefed a preliminary issue of whether Ballweg waived his right to appeal suppression issues in this case by pleading no contest to a non-criminal ordinance violation for operating a motor vehicle while intoxicated. See *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 275-76,

542 N.W.2d 196 (Ct. App. 1995); *County of Racine v. Smith*, 122 Wis. 2d 431, 434-38, 362 N.W.2d 439 (Ct. App. 1984). We begin with that issue.

¶9 The parties agree that we should consider four factors from *Quelle* to decide whether the waiver rule applies. Stated briefly, those factors are (1) the administrative efficiencies resulting from the plea; (2) whether an adequate record has been developed; (3) whether the appeal appears motivated by the severity of the sentence; and (4) whether the issue raised on appeal is addressed in published case law. *See Quelle*, 198 Wis. 2d at 275-76.²

¶10 We are now apprised that the parties agree that the first three factors favor Ballweg. The fourth factor is entwined with a dispositive issue on the merits, namely, whether this case is controlled by *State v. Rutzinski*, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516. Accordingly, we choose to ignore any possible waiver, and will simply address the merits. *See Smith*, 122 Wis. 2d at 434, 437 (application of the waiver rule is discretionary).

¶11 Before turning to *Rutzinski*, we note that the circuit court concluded that the officer initiated an investigatory stop, thereby seizing Ballweg, at some point while he was still in the tavern. The County does not concede that Ballweg was seized at that time, but it also does not provide argument to the contrary. Thus, we will assume without deciding that Ballweg was seized while still in the tavern.

² The supreme court recently withdrew language from *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995), in *Washburn County v. Smith*, 2008 WI 23, ¶64, ___ Wis. 2d ___, 746 N.W.2d 243. This partial overruling of *Quelle* pertains to an issue other than the waiver rule and does not affect our decision.

¶12 The remaining question is whether the officer had a reasonable suspicion to stop Ballweg in the tavern. We conclude that the officer had sufficient justification for the stop under *Rutzinski*.

¶13 In *Rutzinski*, an unidentified motorist informant reported from a cell phone 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.” *Rutzinski*, 241 Wis. 2d 729, ¶4. The dispatcher indicated to the responding officer that the motorist remained on the phone, and the officer determined based on additional information provided that the vehicles were heading toward the officer’s location. *Id.*, ¶5. Shortly thereafter, the vehicles passed the officer, and the officer pulled his squad behind the black pickup. *Id.*, ¶6. The motorist confirmed that the officer was following the correct truck. *Id.* Although the officer did not independently observe any signs of erratic driving, the officer initiated a traffic stop of the truck. *Id.*, ¶7. The motorist informant pulled over at the scene, and subsequent investigation by the officer led to drunk driving charges against Rutzinski.³ *Id.*, ¶¶7-8.

¶14 The court in *Rutzinski* upheld the stop as reasonable, concluding that the information in the motorist’s call provided sufficient justification for the stop. *Id.*, ¶¶3, 38. The *Rutzinski* court viewed three facts as particularly significant and as distinguishing the case from *Florida v. J.L.*, 529 U.S. 266, 268 (2000), where the United States Supreme Court concluded that an anonymous tip that a person is

³ The motorist spoke with the officer’s supervisor, but there was no record of the motorist’s name or other identification. *State v. Rutzinski*, 2001 WI 22, ¶7, 241 Wis. 2d 729, 623 N.W.2d 516.

carrying a gun is not, without more, sufficient to justify a stop and frisk of the person. See *Rutzinski*, 241 Wis. 2d 729, ¶¶31-34.

¶15 First, the motorist in *Rutzinski* risked exposure of his or her identity. *Id.*, ¶32. Second, the motorist provided police with verifiable information indicating the motorist's basis of knowledge, including the motorist's explanation that he or she was making real-time, firsthand observations of the suspect vehicle's progress. See *id.*, ¶33. Third, the motorist's information suggested that the suspect posed an imminent threat to public safety as a possibly intoxicated driver. *Id.*, ¶34; see also *id.*, ¶¶35-36.

¶16 The same three key facts are present here. First, there is no dispute that, like the motorist in *Rutzinski*, the motorist in this case exposed himself to identification. Second, as in *Rutzinski*, the motorist here provided police with real-time, firsthand observations indicating the motorist's basis of knowledge. In particular, the motorist provided dispatch with information about the suspect vehicle's progress and erratic driving behavior; this information and a precise vehicle description were relayed from dispatch to the officer; and the officer was able to verify the reliability of some of the information when he arrived at the scene, confirming the presence of a vehicle fitting the motorist's description and the fact that the men from the vehicle had just entered the tavern.

¶17 Ballweg's argument goes primarily to the third key fact in *Rutzinski*, the imminent threat to public safety posed by an intoxicated driver. Ballweg argues that the presence of an imminent danger posed by a drunk driver was pivotal in *Rutzinski* and that he presented no such danger because he had already parked his vehicle by the time the officer stopped him in the tavern.

¶18 We agree that the imminent threat to public safety by an intoxicated driver was an important fact in *Rutzinski*. We disagree, however, that this threat was absent here. Ballweg had just parked *at a tavern*, and the officer could have reasonably inferred at the time he stopped Ballweg that Ballweg would return to the road in an even more intoxicated state. Under these circumstances, there remained a sufficiently imminent threat to public safety, and the stop of Ballweg was reasonable under *Rutzinski*. If, as Ballweg suggests, the officer had waited to act until Ballweg got back behind the wheel and started the ignition, the officer would have both wasted time and created the risk that Ballweg would speed off before the officer could stop him.

¶19 Ballweg also argues that the officer implausibly testified that, when he approached Ballweg in the tavern, the officer asked Ballweg if Ballweg had a drink at the tavern and that Ballweg replied he had not. Ballweg notes that the police officer's report did not contain any reference to asking Ballweg this question. Ballweg's point is unclear. If he is arguing that this testimony casts doubt on the rest of the officer's testimony, that was an argument for the circuit court, not this court. The officer's credibility was a matter for that court, and it is apparent from the suppression hearing transcript that the court credited the officer's testimony. *See State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (“When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony.”).

¶20 If Ballweg is arguing that the circuit court should have found as a factual matter that the officer was lying and that Ballweg would have said that he did drink at the tavern, then the argument has two flaws. First, Ballweg is again arguing credibility. Second, Ballweg fails to develop any argument that the

reasonableness of the stop or arrest depended on whether Ballweg had a drink at the tavern by the time the officer approached him. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address arguments that are inadequately developed). Even if Ballweg had a drink at the tavern, there was ample information from which a reasonable officer could conclude that Ballweg was already intoxicated when he entered the tavern.

¶21 Finally, Ballweg states that one of the issues on appeal is whether, after the field sobriety tests, the officer had probable cause to arrest him. However, Ballweg does not present a developed probable cause argument distinct from his argument that the officer lacked sufficient justification for an investigatory stop. We thus consider the issue no further. *See id.*

By the Court.—Judgment affirmed.

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

