COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1938-CR **Cir. Ct. No. 2006CF1390**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DEAN A. BROWN,

RESPONDENT -RESPONDENT.

APPEAL from an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 SNYDER, J. The State appeals from an order granting Dean Brown's motion to suppress evidence seized in a traffic stop. The State argues that based solely on information provided by the citizen informant, the officer had

reasonable suspicion to stop Brown's vehicle. We disagree and affirm the order of the circuit court.

FACTS AND PROCEDURAL BACKGROUND

¶2 On October 13, 2006, Racine County Sheriff's Department dispatch received a call from a citizen informant, who stated, "I noticed that there's a white SUV that was moving around … and now there's a white SUV … off the road like in a cornfield area and it looks suspicious to me." The caller also provided a license plate number; however, he did not see anyone in the car, nor could he definitively say whether the SUV seen driving around earlier was the same vehicle parked in the cornfield. The caller, who identified himself as Patrick Karr, gave a Milwaukee address and provided his phone number. Immediately after the call, Deputy Greg Roscizewski of the Racine County Sheriff's Department was dispatched to the area of Dover Line Road and County Highway S, in which the cornfield was located.

¶3 While traveling westbound en route to the vicinity, Roscizewski saw the vehicle with the license plate described by Karr drive eastbound on Highway S. Roscizewski then turned his squad car around, followed the vehicle, and stopped it "almost immediately." Roscizewski's decision to pull the vehicle over was based solely on the call made by Karr and was not made in response to any traffic law violation or any other observations by Roscizewski.

¶4 Shortly after approaching the vehicle and demanding to see Brown's license and registration, Roscizewski noticed an odor of marijuana plants coming from inside the vehicle. Brown repeatedly refused to consent to a search of his vehicle, prompting Roscizewski to inquire from his superior whether smelling marijuana plants constituted probable cause to search the vehicle. After further

contact with dispatch and his supervisor, Roscizewski determined that he had probable cause for an exigent circumstances search of Brown's vehicle.

¶5 Roscizewski's eventual search discovered illegal contraband located within Brown's vehicle. Also, a GPS unit found with Brown led authorities to the discovery of other contraband in various locations outside the area of the stop. Brown was subsequently charged with possession with intent to deliver THC, possession of drug paraphernalia, and four counts of manufacture of THC. Brown moved to suppress all evidence seized as a result of the stop. The court granted the motions and the State now appeals.[1]

DISCUSSION

¶6 The State contends that evidence obtained from the stop is admissible because Roscizewski's investigative stop of Brown's car was based on reasonable suspicion.[2] Investigative stops are considered seizures within the meaning of the Fourth Amendment; therefore, the stop must be based on a reasonable suspicion in order to pass constitutional muster. ***State v. Harris***, 206 Wis. 2d 243, 258-59, 557 N.W.2d 245 (1996).

¶7 Whether evidence obtained following an investigative stop should be suppressed is a question of constitutional fact. *See* ***State v. Alexander***, 2008

[1] The State failed to include in the appendix "the findings or opinion of the trial court ... including oral or written rulings or decisions showing the trial court's reasoning regarding those issues," as required by WIS. STAT. RULE 809.19(2)(a) (2005-06). Certification that the appendix complies with RULE 809.19(2)(a) is not a mere formality, but should be executed only when the appendix is in compliance. Counsel shall be required to comply with RULE 809.19(2)(a) in the future. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] Brown concedes that the subsequent search and discovery of the marijuana plants within the vehicle would be legal, provided that the initial stop is found to be lawful.

WI App 9, ¶7, ___ Wis. 2d ___, 744 N.W.2d 909. In reviewing questions of constitutional fact, we will uphold a circuit court's factual findings unless they are clearly erroneous, but we will independently decide whether those facts meet the constitutional standard. ***Id.*** The State concedes and we accept that the circuit court's factual findings are not clearly erroneous. Thus, our review is limited to whether the traffic stop was supported by reasonable suspicion, in light of the totality of the circumstances. *See, e.g.*, ***State v. Williams***, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106; ***State v. Rutzinski***, 2001 WI 22, ¶¶17-18, 241 Wis. 2d 729, 623 N.W.2d 516.

¶8 The right to be free from unreasonable searches and seizures is expressly stated in both the Fourth Amendment to the United States Constitution and within article I, section 11 of the Wisconsin Constitution, which states:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause . . . .

WIS. CONST. art. I, § 11. In addition, WIS. STAT. § 968.24 specifies the authority given to police in respect to temporary questioning without arrest:

> After having identified himself or herself as a law enforcement officer, a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such a person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct.

The burden of establishing reasonable suspicion falls upon the State. ***State v. Taylor***, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973). Determination of reasonableness is guided by a commonsense test that asks whether the facts known to the officer at the time of the stop would warrant that officer, given his or her

training, to suspect that a crime has occurred or is about to occur. *See* ***State v. Anderson***, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990).

¶9 Wisconsin courts have consistently followed the United States Supreme Court's decisions regarding the constitutionality of investigatory searches and seizures. ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Police may, in appropriate circumstances, approach a person for purposes of investigating possible criminal behavior without probable cause to make an arrest. ***Id.*** at 138 (citing ***Terry v. Ohio***, 392 U.S. 1, 22 (1968)). However, in justifying the intrusion, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Terry,*** 392 U.S. at 21. Furthermore, on the part of the investigating officer, "[a]n inchoate and unparticularized suspicion or hunch will not suffice." ***State v. Fields***, 2000 WI App 218, ¶10, 239 Wis. 2d 38, 619 N.W.2d 279; ***Brinegar v. United States***, 338 U.S. 160, 174-176 (1949); ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). Underscoring the importance of requiring specificity in the facts relied upon by the officer, the Supreme Court of the United States has long held that "'good faith on the part of the arresting officers is not enough….' If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate." ***Beck v. Ohio***, 379 U.S. 89, 96-97 (1964) (citation omitted).

¶10 Police often rely on citizen informants for effective law enforcement, and when officers receive a tip from an informant that they are reasonably justified in believing to be truthful, officers may rely solely on the tip to provide reasonable suspicion. *See, e.g.*, ***Rutzinski***, 241 Wis. 2d 729, ¶17; ***State v. Patton***, 2006 WI App 235, ¶10, 297 Wis. 2d 415, 724 N.W.2d 347. However, "[t]he reliability of [the informant] should be evaluated from the nature of his [or

her] report, his [or her] opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation." ***State v. Kolk***, 2006 WI App 261, ¶13, 298 Wis. 2d 99, 726 N.W.2d 337 (citing ***State v. Doyle***, 96 Wis. 2d 272, 287, 291 N.W.2d 545 (1980)). Relevant factors include (1) the informant's veracity and (2) the informant's basis of knowledge, viewed in light of the totality of the circumstances. ***Rutzinski***, 241 Wis. 2d 729, ¶¶17-18, (citing ***Illinois v. Gates***, 462 U.S. 213, 230, 233 (1983)).

¶11 The State contends that Karr had directly observed a trespassing violation, thus Roscizewski's subsequent reliance on that information constitutes reasonable suspicion to justify the traffic stop. However, the circuit court noted that Karr was "from Milwaukee, not familiar with the area, and not familiar with who belongs on this property or who doesn't belong on this property." The court characterized the information Karr provided as "very limited" in nature and observed that "neither the citizen nor the deputy knows if the vehicle [was] supposed to be in that cornfield or not."

¶12 The State directs us to Karr's assertion that the vehicle "looks suspicious to me" as a valid reason for the stop. It invites us to equate a citizen informant's suspicions with those of the investigating officer.[3] We decline. Although officers may rely on information from informants to establish reasonable suspicion, the police must consider the content of the tip. *See* ***Patton***, 297 Wis. 2d 415, ¶10. Here, the record indicates that Karr was doing nothing more than articulating a belief that the SUV should not be parked in the cornfield. The fact

[3] The State cites ***Terry v. Ohio***, 392 U.S. 1 (1968), and ***State v. Waldner***, 206 Wis. 2d 51, 556 N.W.2d 681 (1996), in support of upholding ambiguous behavior as reasonable suspicion. In both cases, the court upheld an investigative stop based on the officer's specific and articulable suspicion, not on a vague suspicion conveyed by a citizen informant.

that Karr admitted he "hesitated to call" underscores the lack of certainty he had that something was amiss.

¶13 The circuit court described the deputy's suspicion, which in turn was solely based on Karr's suspicion, as rising "to the level of a hunch and not to actual reasonable articulable suspicion for this stop." We agree. "Reasonable suspicion" is defined as "[a] particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity." BLACK'S LAW DICTIONARY 1487 (8th ed. 2004). Conversely, a "hunch" is "a strong intuitive feeling as to how something (as a course of action) will turn out." WEBSTER'S THIRD NEW INT'L DICTIONARY 1102 (1998). A hunch amounts to no more than a subjective good faith guess. Wisconsin case law teaches that a hunch is not enough to justify an investigative stop. *See* ***Fields***, 239 Wis. 2d 38, ¶10.

¶14 The State stresses that Karr was not anonymous, which reflects on his veracity and the reliability of his report. The State relies on ***State v. Sisk***, 2001 WI App 182, 247 Wis. 2d 443, 634 N.W.2d 877, and ***State v. Fry***, 131 Wis. 2d 153, 388 N.W.2d 565 (1986), for the proposition that a named informant may provide the sole basis for investigatory stops. Neither ***Sisk*** nor ***Fry*** are directly on point. Both cases involve clear and specific indications that criminal activity was afoot. In ***Sisk***, the named citizen informant "gave information about the suspects and their location, which the police verified before stopping them." ***Sisk***, 247 Wis. 2d 443, ¶10. Similarly, in ***Fry***, the named informant provided information that was independently verified by the detective, who was in a position to know whether the vehicle in his driveway should have been there. ***Fry***, 131 Wis. 2d at 157. Conversely, the information provided to Roscizewski was not based on any personal knowledge of the property, the vehicle, or the driver and did not describe any conduct or condition that indicated possible criminal activity.

¶15 Based on the totality of the circumstances gleaned from the record facts, we conclude that Karr's phone call did not offer to the officer "specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *See* ***State v. Young***, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729. Like the circuit court, we conclude that Roscizewski was acting on a mere hunch when he stopped Brown's vehicle.[4]

CONCLUSION

¶16 We conclude that Roscizewski did not have a reasonable suspicion that criminal activity was afoot before he made the traffic stop of Brown's vehicle. Accordingly, we affirm the order of the circuit court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[4] We commend circuit court Judge Emily Mueller for her extensive analysis of the facts and the documentation of her rationale in deciding the suppression motion.