COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP257-CR **Cir. Ct. No. 2007CT2820**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY MARTIN LOHMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN F. FOLEY and RUSSELL W. STAMPER, Reserve Judges.[1] *Affirmed.*

[1] The Honorable John F. Foley presided over the suppression motion and decided the postconviction motion. The Honorable Russell W. Stamper presided over the guilty plea and sentencing.

¶1 CURLEY, P.J.[2] Gary M. Lohman appeals the judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (second offense), contrary to WIS. STAT. §§ 346.63(1)(a) and 346.65(2) (2005-06).[3] He argues that the trial court erred in denying his motion to suppress evidence obtained by the police after the police stopped his car as a result of a citizen 9-1-1 call. Because the 9-1-1 call from a citizen who identified himself and told the police he thought Lohman was drunk gave the police reasonable suspicion to stop Lohman, the trial court properly denied the motion to suppress. Consequently, this court affirms the judgment of conviction.

I. BACKGROUND.

¶2 On May 4, 2007, John McGivern was driving in downtown Milwaukee on his way home when he saw Lohman, then a complete stranger, step off the curb and stagger across the street. McGivern watched as Lohman fumbled with his car keys, eventually entered his car, and drove away. Believing that Lohman was drunk, McGivern turned around and followed him for several blocks. During this time, McGivern called 9-1-1 and reported what he had seen. After he obtained the make and license plate number of Lohman's vehicle and conveyed this information to the 9-1-1 operator, he stopped following Lohman and continued on his way. He later testified at a motion hearing that besides witnessing Lohman stagger across the street and have difficulty opening his car door, he never heard Lohman say anything that would indicate he was intoxicated,

[2] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06).

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

and, in the few blocks that he followed him, he did not witness Lohman driving erratically.

¶3 According to the testimony at the motion hearing, shortly after McGivern called 9-1-1, a Milwaukee police officer received a dispatch of a "possible intoxicated driver" driving a white Ford Windstar van with a specific license plate number. Shortly thereafter, he spotted a van that matched the description given by the dispatcher, based on McGivern's call, and stopped it approximately two blocks after sighting it. In the short amount of time the police officer saw the van before stopping it, he did not observe any erratic driving. However, upon exiting his marked police car and approaching the van, the officer recounted how he could smell the strong odor of alcoholic beverages and noticed that Lohman had "slight slurred speech." After asking him to do some "in-vehicle" tests, which Lohman was "having trouble doing," he asked him to step out of the vehicle and the officer conducted standard field sobriety tests. An Intoximeter test revealed a level of alcohol concentration over the legal limit. After Lohman's arrest, the police officer obtained information from the Department of Transportation that Lohman had one previous conviction for a similar offense within the last ten years.

¶4 Lohman was charged with operating a motor vehicle while under the influence of an intoxicant, second offense, as well as operating a motor vehicle with a prohibited alcohol concentration of 0.08% or more. He brought a motion seeking to suppress any evidence obtained by the police, claiming that the arresting officer did not have reasonable suspicion to temporarily detain him. The trial court denied the motion after a hearing. After the trial court denied Lohman's request for a date to reconsider the motion, Lohman pled guilty to operating a motor vehicle while under the influence of an intoxicant (second offense), and the

other charge was dismissed. The trial court sentenced Lohman to serve thirty days in the House of Correction and fined him $350 plus costs. However, the sentence was stayed pending appeal. Lohman brought a postconviction motion which was denied, and this appeal followed.

II. ANALYSIS.

¶5 Lohman argues that the trial court erroneously exercised its discretion in denying his motion to suppress. Relying on the seminal case of ***Terry v. Ohio***, 392 U.S. 1 (1968), he contends that the officer did not have a reasonable suspicion that some kind of criminal activity had taken or was taking place prior to effectuating the investigative stop. Lohman acknowledges that, based on the holding in ***State v. Richardson***, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990), the totality of the circumstances must be considered in determining whether reasonable suspicion exists to stop a vehicle. He submits that the totality of the circumstances did not support a reasonable suspicion. He points to the fact that the officer never witnessed any traffic violations while following him, and he argues that the "tip" from McGivern was not enough to support such a finding. With regard to the information supplied by McGivern to the police dispatcher, Lohman maintains, relying on ***State v. Doyle***, 96 Wis. 2d 272, 287, 291 N.W.2d 545 (1980), *overruled on other grounds by* ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), that there must be "some type of evaluation of the reliability of victim and witness informants, although the standard to be applied is much less stringent" for a citizen witness, and here, McGivern's tip did not supply enough information because "[o]ther than the observation of staggering, the record is devoid of how Mr. McGivern came to the conclusion that [Lohman] was intoxicated."

Standard of Review

¶6 Whether reasonable suspicion existed for an investigatory stop is a question of constitutional fact, to which we apply a two-part standard of review. ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. We will uphold a trial court's findings of historical fact unless they are clearly erroneous. ***Id.*** Whether those facts constitute reasonable suspicion such that the stop was constitutional is a question we review *de novo*. ***Id.***

¶7 For an investigatory stop to be constitutional, a law enforcement officer must reasonably suspect "that a crime has been committed, is being committed, or is about to be committed." ***State v. Young***, 2006 WI 98, ¶20, 294 Wis. 2d 1, 717 N.W.2d 729 (citing ***State v. Waldner***, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996)); ***Richardson***, 156 Wis. 2d at 139. This court must consider whether all the specific and articulable facts, known to the officer at the time of the encounter, together with the rational inferences from those facts, amount to reasonable suspicion. *See* ***State v. Dunn***, 158 Wis. 2d 138, 146, 462 N.W.2d 538 (Ct. App. 1990). "[I]f any reasonable inference of wrongful conduct can be objectively discerned ... officers have the right to temporarily detain the individual for the purpose of inquiry." ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

¶8 Lohman contends that the information the officer received from McGivern was insufficient to create a reasonable suspicion that Lohman was operating a motor vehicle while intoxicated. This court disagrees. "[T]here is a difference between 'citizen-informers' and 'police contacts or informers who usually themselves are criminals.'" ***Doyle***, 96 Wis. 2d at 286-87 (citation omitted). The distinction that can be drawn "is that a confidential informant is a

person, often with a criminal past him- or herself, who assists the police in identifying and catching criminals, while a citizen informant is someone who happens upon a crime or suspicious activity and reports it to police." ***State v. Kolk***, 2006 WI App 261, ¶12, 298 Wis. 2d 99, 726 N.W.2d 337. The difference between the two types of informants calls for different means of assessing credibility; in particular, a confidential informant may be trustworthy where he or she has previously provided truthful information, ***State v. Paszek***, 50 Wis. 2d 619, 630, 184 N.W.2d 836 (1971), while a citizen informant's reliability is subject to a much less stringent standard, ***Doyle***, 96 Wis. 2d at 287.

¶9 When McGivern called 9-1-1, he was acting as a citizen informant, as distinguished from a confidential informant. Thus, the standard is lower. This is so because our courts "recognize[] the importance of citizen informants, and, accordingly, apply a relaxed test of reliability, that 'shifts from a question of personal reliability to one of observational reliability.'" ***Williams***, 241 Wis. 2d 631, ¶36 (citations and one set of internal quotation marks omitted). However, "there must be some type of evaluation of the reliability of victim and witness informants, although the standard to be applied is much less stringent." ***Doyle***, 96 Wis. 2d at 287. "[T]he reliability of such a person should be evaluated from the nature of his report, his opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation." ***Id.*** (citation and internal quotation marks omitted); *see also* ***State v. Kerr***, 181 Wis. 2d 372, 381, 511 N.W.2d 586 (1994) ("'[W]hen 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.'") (citation and one set of internal quotation marks omitted). As our supreme court declared, "we view citizens who purport to have

witnessed a crime as reliable, and allow the police to act accordingly, even though other indicia of reliability have not yet been established." ***Williams***, 241 Wis. 2d 631, ¶36; ***Doyle***, 96 Wis. 2d at 287 ("'A citizen who purports ... to have witnessed a crime is a reliable informant even though his reliability has not theretofore been proved or tested.'") (citation omitted).

¶10 Here, McGivern identified himself by giving his name and telephone number to the 9-1-1 operator. In addition, the information he conveyed came through first-hand observations. He personally witnessed Lohman's odd behavior, which suggested that Lohman was intoxicated, and he observed Lohman driving a van. He also gave the police a description of the type of vehicle Lohman was driving and the license plate number. The police were entitled to rely on McGivern's observations and his observations provided reasonable suspicion. The fact that shortly after the call the police observed Lohman driving a vehicle that matched the make and license plate number further established McGivern's reliability. As a result, the officer had a reasonable suspicion to believe a crime was occurring and the officer could effect a ***Terry*** stop.[4]

¶11 While neither McGivern nor the police officer saw Lohman drive erratically, this absence is not fatal to the reasonable suspicion determination. Although no Wisconsin case is directly on point, numerous cases from other jurisdictions have concluded that a tip to police from a citizen who observes a driver thought to be drunk rises to the level of a reasonable suspicion.

[4] *See also* WIS. STAT. § 968.24 (codifying the standard for an investigate stop).

¶12 In ***State v. Riefenstahl***, 779 A.2d 675, 676 (Vt. 2001), an employee of a gas station called law enforcement, gave his name and reported a male motor vehicle operator "'was possibly intoxicated and driving'"; the caller provided a description of the vehicle and a license plate number. The Vermont Supreme Court held that "[t]he named informant's tip contained sufficient indicia of reliability to justify the stop." ***Id.*** at 677. Another similar case from Colorado is ***Peterson v. Tipton***, 833 P.2d 830 (Colo. Ct. App. 1992). The Colorado Court of Appeals upheld a stop based on the tip from a clerk at a gas station who reported seeing an intoxicated male getting into a car. ***Id.*** at 831-32. A slightly different situation arose in the Connecticut case of ***State v. Bolanos***, 753 A.2d 943 (Conn. App. Ct. 2000). In Connecticut, the appellate court upheld a traffic stop initiated by a call from a nightclub employee who said that a patron was intoxicated and leaving the club. ***Id.*** at 944-45. In a case dealing with an anonymous tip, the Kansas Supreme Court concluded that a reasonable suspicion of criminal activity existed after police corroborated a tip from an anonymous caller who reported a possible drunk driver and gave a description of the vehicle and license plate number. ***State v. Slater***, 986 P.2d 1038, 1044 (Kan. 1999). Finally, a case from our sister state, Minnesota, upheld a traffic stop based upon an initial call from a Burger King employee reporting a drunk driver at a Burger King restaurant. ***Playle v. Commissioner of Pub. Safety***, 439 N.W.2d 747, 748 (Minn. Ct. App. 1989).

¶13 Similar Wisconsin cases have upheld searches based upon tips from citizens. In ***State v. Rutzinski***, 2001 WI 22, ¶4-6, 38, 241 Wis. 2d 729, 623 N.W.2d 516, our supreme court found that an anonymous tipster who had followed the suspected drunk driver for some distance before calling the police was sufficient for the officer to stop the erratic driver. In another Wisconsin case,

State v. Powers, 2004 WI App 143, ¶¶2, 15, 275 Wis. 2d 456, 685 N.W.2d 869, this court approved the stop of a car as it left a parking lot based upon a drug store clerk's observation that "'an intoxicated man had come in to make purchases at the store buying beer, a little outfit, and something else.'" This court finds these cases persuasive, and consequently, finds that the tip from McGivern concerning Lohman's conduct gave reasonable suspicion to the police to stop Lohman's car.

¶14 Finally, this court notes that if the argument put forth by Lohman was the law, it would prevent police from ever stopping a car based upon a citizen report of drunk driving until the police personally observed the car being driven in a manner that suggested drunk driving. Such a ruling would place the public in grave danger of a drunk driver and require an officer to wait until the driver actually imperils other drivers and their passengers before a stop could be made. This is an unreasonable proposition.

¶15 For the reasons stated, the trial court's ruling denying the motion to suppress is affirmed.

By the Court.—Judgment affirmed.

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