COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2306 **Cir. Ct. No. 2011TR480**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. FRANK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Michael Frank appeals a judgment of conviction, entered on a jury verdict, for operating while intoxicated as a first offense. He

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

argues the officer lacked reasonable suspicion or probable cause to effectuate a traffic stop and, as a result, the circuit court erred by denying his suppression motion. We affirm.

BACKGROUND

¶2 The State cited Frank for operating while intoxicated and operating with a prohibited blood alcohol concentration, both as first offenses. Frank brought a suppression motion, arguing the officer's traffic stop was unlawful.

¶3 At the suppression hearing, officer Lewis Judge testified that on December 5, 2010, at approximately 5:31 p.m., he was patrolling Highway 41 when the Outagamie County 911 Center radioed him that a caller reported a reckless driver on Highway 41. The caller believed the driver was impaired and provided dispatch with a vehicle description, the license plate number, and the vehicle's approximate location.

¶4 Judge pulled into the median and attempted to locate the vehicle. When he observed a truck matching the vehicle's description drive past him, Judge pulled into traffic and tried to catch up to the vehicle. Judge explained that, as he observed the vehicle begin to exit the highway at Ballard Road, dispatch informed him that the caller was also reporting the vehicle was exiting at Ballard.

¶5 As Judge was exiting the highway, he observed that the truck's cargo lamp was illuminated and emitting a white light. The cargo lamp was mounted on the rear of the truck cab between two high-mounted stop lamps.[2]

[2] At the suppression hearing, Frank testified that this lamp is used to illuminate the truck box. It is operated by an independent button located near the passenger cup holder. Frank surmised his passenger turned the light on.

Judge explained that WIS. STAT. § 347.07(2)(b) prohibits drivers from displaying white lights on the rear of their vehicles while operating on a highway.

¶6 Judge caught up to the vehicle as it pulled into a drugstore parking lot. He pulled behind the truck and made contact with the driver, who was subsequently identified as Frank.

¶7 The State argued that Judge was justified in stopping Frank based on the WIS. STAT. § 347.07(2)(b) violation. That statute provides, in relevant part: "Except as otherwise expressly authorized or required by this chapter, no person shall operate any vehicle or equipment on a highway which has displayed thereon: … (b) Any color of light other than red on the rear; …." The State asserted that Judge's observation of the illuminated white light on the rear of the vehicle provided a proper basis for the stop.

¶8 Frank argued the lamp was not "on the rear" of the vehicle for purposes of WIS. STAT. § 347.07(2)(b). He contended "on the rear" only referred to a vehicle's tailgate, not the rear of a truck cab.

¶9 The court determined that "on the rear," as used in WIS. STAT. § 347.07(2)(b), encompassed the entire back of the vehicle, not just the tailgate. The court reasoned that because Judge had observed a white illuminated light on the rear of Frank's truck while it was operating on a highway, Judge was justified in stopping Frank for a § 347.07(2)(b) violation. The court also noted that, although there was some evidence presented about a dispatch and a caller's observation of Frank's driving, the State did not rely on that information in support of the stop and, in any event, the evidence "[a]s it's reported here" would not have justified a stop. The court denied Frank's suppression motion.

¶10 At trial, the State's first witness was Evan Shatzer. Shatzer was the individual who called 911 to report Frank's driving. He testified he was a passenger in a vehicle that was driving south on Highway 41, when he observed a truck that was "all over the road, swerving really bad." Shatzer explained the vehicle was drifting back and forth between Highway 41's two southbound lanes. Specifically, Shatzer explained that the vehicle would be driving in the left lane, drift over to the right lane, drift over to the right shoulder, drive on the gravel, and then swerve back into the left lane. He explained that as other vehicles approached the truck, they would slow down, wait to see what the truck was going to do, and then speed around the truck as fast as possible. At one point, when the truck was overcorrecting from the right shoulder and swerving back into the left lane, it almost hit a car traveling in the left lane.

¶11 Shatzer called 911. He told the operator that he was traveling south on Highway 41 behind an "erratically driving truck." He described the truck's driving to dispatch and gave dispatch the license plate number and a description of the truck. Shatzer explained that he remained on the phone with dispatch and followed the truck to a drugstore parking lot. After Shatzer reported to dispatch that he saw the police in the parking lot, Shatzer gave dispatch his identifying information and left.

¶12 An Intoximeter breath test revealed Frank had a breath alcohol concentration of .13 grams of alcohol per 210 liters of breath. Frank requested an alternative test, and a blood test revealed his blood alcohol concentration was .151 grams of alcohol per 100 milliliters of blood. The jury convicted Frank of operating while intoxicated and operating with a prohibited alcohol concentration.

DISCUSSION

¶13 On appeal, Frank argues the circuit court erred by denying his suppression motion. Specifically, he asserts the officer improperly stopped him because a cargo lamp located on the rear of a truck cab is not "on the rear" for purposes of WIS. STAT. § 347.07(2)(b). He asserts a determination that a cargo lamp is "on the rear" of a vehicle conflicts with the federal motor vehicle safety standards and the Wisconsin Administrative Code.

¶14 The State argues that the rear of a truck cab is "on the rear" for purposes of WIS. STAT. § 347.07(2)(b), and that Judge lawfully stopped Frank for the equipment violation. The State contends § 347.07(2)(b) does not conflict with the federal motor vehicle safety standards or the Wisconsin Administrative Code. As an alternative basis, the State argues that Judge lawfully stopped Frank based on Shatzer's tip.

¶15 Frank responds that the State is judicially estopped from relying on Shatzer's tip as a proper basis for the stop because: (1) the State did not rely on that basis at the suppression hearing; and (2) at the suppression hearing, the court determined that, based on the evidence presented at that hearing, the dispatch Judge received did not justify the stop.

¶16 When reviewing a circuit court's decision on a motion to suppress, we may take into account the evidence at trial, as well as the evidence at the suppression hearing. ***State v. Griffin***, 126 Wis. 2d 183, 198, 376 N.W.2d 62 (Ct. App. 1985). We need not base our affirmance on the reasons relied upon by the circuit court. *See* ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985) ("An appellate court may sustain a lower court's holding on a theory or on

reasoning not presented to the lower court."), *superseded by statute on other grounds*.

¶17 In this case, we conclude that Judge lawfully stopped Frank based on Shatzer's tip.[3] A police officer may conduct a traffic stop if the officer has probable cause to believe a traffic violation has occurred or if the officer has reasonable suspicion, based on specific and articulable facts, that a crime or traffic violation has been or will be committed. ***State v. Popke***, 2009 WI 37, ¶¶11, 23, 317 Wis. 2d 118, 765 N.W.2d 569. Information provided by an informant's tip may provide a reasonable basis for a traffic stop, depending upon the reliability and content of the tip. ***State v. Rutzinski***, 2001 WI 22, ¶17, 241 Wis. 2d 729, 623 N.W.2d 516.

¶18 When assessing the reliability of an informant's tip, we consider the informant's veracity and basis of knowledge. ***Id.***, ¶18. Here, in terms of veracity, Shatzer provided dispatch with identifying information. Our supreme court has recognized that a tip from a person who identifies himself or herself shows greater indicia of reliability because that person exposes himself or herself to the threat of prosecution for making false statements. ***Id.***, ¶32. Moreover, "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." ***State v. Williams***, 2001 WI 21, ¶36, 241 Wis. 2d 631, 623 N.W.2d 106.

[3] Because we determine Judge lawfully stopped Frank's vehicle based on Shatzer's tip, we need not address Frank's arguments regarding the WIS. STAT. § 347.07(2)(b) equipment violation. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (cases should be decided on the narrowest possible ground).

¶19 Additionally, Shatzer provided dispatch with details demonstrating he had a reliable basis of knowledge. He gave dispatch a description of the vehicle, the vehicle's license plate number, the vehicle's location, and the direction that the vehicle was traveling. He kept dispatch appraised of the vehicle's location—notifying it when the vehicle exited the highway and confirming that police had arrived on the scene. Shatzer's reported contemporaneous observations, which were corroborated by Judge, demonstrate sufficient indicia of Shatzer's basis of knowledge. *See* ***Rutzinski***, 241 Wis. 2d 729, ¶¶22-23, 33.

¶20 Next, regarding the content of Shatzer's tip, Shatzer reported to dispatch that he observed an erratic driver. As our supreme court explained in ***Rutzinski***, "Erratic driving is one possible sign of intoxicated use of a motor vehicle." ***Id.***, ¶34 (citation omitted). Shatzer's tip therefore alleged a potential imminent danger to public safety. *See* ***id.***, ¶¶34, 37 (Informant's allegation of erratic driving suggested an impaired driver, which posed an imminent threat to public safety.). Based on the reliability of and allegations contained in Shatzer's tip, we conclude Judge was justified in conducting an investigative stop.

¶21 Finally, we reject Frank's argument that the State is judicially estopped from relying on Shatzer's tip as a basis for the stop. The doctrine of judicial estoppel protects against "a litigant playing 'fast and loose with the courts' by asserting inconsistent positions" in different legal proceedings. ***State v. Ryan***, 2012 WI 16, ¶32, 338 Wis. 2d 695, 809 N.W.2d 37 (citation omitted). It is used to prevent a litigant from asserting a position in a legal proceeding that is clearly inconsistent with an earlier position. ***Id.***, ¶¶32-33. "For judicial estoppel to be available, three elements must be satisfied: (1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in

both cases; and (3) the party to be estopped must have convinced the first court to adopt its position." ***Id.***, ¶33 (citation omitted).

¶22 Here, the State's alternative basis for the stop—Shatzer's tip—is not "clearly inconsistent" with the position the State took at the suppression hearing—that the stop was justified based on the equipment violation. The traffic stop may be considered lawful under either, or both, of these theories. Because Frank has failed to prove the first element of judicial estoppel, we decline to apply the doctrine against the State.

By the Court.—Judgment affirmed.

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