

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SUSAN WELLS,

Defendant and Appellant.

F043125

(Super. Ct. No. BF101553A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John L. Fielder and Stephen P. Gildner, Judges.†

Elizabeth Campbell, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Kathleen A. McKenna and Robert P. Whitlock, Deputy Attorneys General, for Plaintiff and Respondent.

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Pursuant to a plea agreement, appellant Susan Wells pled no contest to possession of heroin (count 1) and misdemeanor driving under the influence of a controlled substance (count 2). (Health & Saf. Code, § 11350, subd. (a); Veh. Code, § 23152, subd.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II and III.

† Judge Fielder heard the suppression motion; and Judge Gildner imposed sentence.

(a.) The court imposed the negotiated low term of 16 months in state prison on count 1 and a concurrent 6-month term on count 2.

Appellant contends the court (1) erred in denying her motion to suppress evidence because she was detained without reasonable suspicion; and (2) imposed an unauthorized sentence in violation of Penal Code section 1210.1, subdivision (a)¹ (Proposition 36), which requires probation and treatment rather than incarceration for those convicted of nonviolent drug offenses. We find both contentions meritless. Appellant also submits, and respondent agrees, that a clerical error on the abstract of judgment must be corrected to reflect the sentence imposed. We will order the abstract of judgment corrected and affirm the judgment.

I.

Reasonable Suspicion to Detain

(A) Facts

On February 14, 2003, at 1:43 a.m., California Highway Patrol traffic officer Julian Irigoyen was engaged in traffic enforcement on Highway 99 in Kern County north of Bakersfield. He received a dispatch report of a possible under-the-influence driver “weaving all over the roadway.” The offending vehicle was described as an ‘80s model blue van northbound on Highway 99 at Airport Drive. Officer Irigoyen was traveling southbound three to four miles north of that location. There was only one off and on ramp between his position and the location of the van. Upon receiving the dispatch, he positioned himself on the shoulder of northbound Highway 99 and watched for the described vehicle. Two or three minutes later, when he saw a blue van he activated his patrol car lights and stopped it to investigate whether the driver was impaired. The van,

¹ Further statutory references are to the Penal Code.

which was traveling approximately 50 miles per hour, did not weave, speed, or otherwise violate any traffic laws in his presence. Appellant was the driver of the van.

At the suppression hearing, defense counsel argued that the evidence should be suppressed because although the officer had reasonable suspicion, he lacked probable cause to stop the van. The court denied the motion. It found the officer had adequate grounds to stop the vehicle based on the sufficiently distinct description of the van coupled with its traveling direction and position a short time later.

(B) Standard of review

In reviewing the trial court's ruling on a suppression motion, we uphold any factual finding, express or implied, that is supported by substantial evidence, but we independently assess, as a matter of law, whether the challenged search or seizure conforms to constitutional standards of reasonableness. (*People v. Hughes* (2002) 27 Cal.4th 287, 327.)

(C) Analysis

Appellant contends Officer Irigoyen lacked reasonable suspicion to stop her van for two reasons: (1) there was no information provided about the source of the erratic driver report or its reliability; and (2) the officer provided no articulable facts to support his conclusion that the van he stopped was the van noted in the dispatch report and he did not corroborate the erratic driving himself.

A police officer can legally stop a motorist only if the facts and circumstances known to the officer support a reasonable suspicion that the driver has violated the Vehicle Code or some other law. (*People v. Miranda* (1993) 17 Cal.App.4th 917, 926.) The officer's suspicion must be objectively reasonable and cannot be based on curiosity, rumor, or hunch, even though the officer is acting in good faith. (*In re Tony C.* (1978) 21 Cal.3d 888, 893; *United States v. Hensley* (1985) 469 U.S. 221, 226.) The guiding principle is “the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.” (*In re Tony C., supra*, 21 Cal.3d at p. 892.)

When an officer sees a vehicle being driven in an erratic manner, the officer has reasonable suspicion to stop the vehicle to investigate whether the driver is under the influence of drugs or alcohol. (See *People v. Bracken* (2000) 83 Cal.App.4th Supp. 1, 4.) In addition, a citizen's report of erratic driving may create an officer's suspicion and trigger an obligation to investigate. (*People v. Superior Court (Meyer)* (1981) 118 Cal.App.3d 579, 584; *People v. Rios* (1983) 140 Cal.App.3d 616, 621.) Private citizens who are witnesses to a crime, absent some circumstance that would cast doubt upon their information, may be considered reliable. (*People v. Ramey* (1976) 16 Cal.3d 263, 269.) Further, the exigency of the situation described by the citizen's tip may justify action on information of less than ideal quality. (*People v. Superior Court (Meyer)*, *supra*, 118 Cal.App.3d at p. 585 [citizen's report of vehicle driven erratically on freeway by a man pointing a gun at other cars].)

In *Florida v. J.L.* (2000) 529 U.S. 266 (*J.L.*), a decision neither party cites, the court considered whether an anonymous tip that a person is carrying a gun is sufficient to justify a stop and frisk. An anonymous telephone caller reported to the police that a young Black man, wearing a plaid shirt and standing at a particular bus stop, was carrying a gun. Officers went to the bus stop and saw three young Black men, one wearing a plaid shirt. One of the officers ordered J.L. to put his hands up, conducted a pat-down search and found a gun in his pocket. (*Id.* at p. 266.)

The unanimous court held that the search was invalid because the anonymous tip did not contain the indicia of reliability required to provide the officer with reasonable suspicion that J.L. was carrying a gun. (*J.L.*, *supra*, 529 U.S. at pp. 272-274.) The unknown informer never explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L. (*Id.* at p. 271.) The officers' suspicion that J.L. was carrying a gun arose not from anything they observed on their own but solely from a call made from an unknown location by an unknown caller. (*Id.* at p. 270.) The court rejected the argument that the prompt verification of the description of a

particular person at a particular location rendered the tip sufficiently reliable. The reasonable suspicion standard “requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.” (*Id.* at p. 272.) Finally, the court suggested that there may be circumstances, such as a report of a person carrying a bomb, in which the danger alleged in the anonymous tip might be so great as to justify a search even without a showing of reliability. But the court was unwilling to apply a laxer standard to anonymous reports that an individual was carrying a firearm. (*Id.* at pp. 272-273.)

While a few California courts have applied the principles set forth in *J.L.*, *supra*, to anonymous tip cases involving the possession of drugs or guns (see *People v. Coulombe* (2000) 86 Cal.App.4th 52; *People v. Saldana* (2002) 101 Cal.App.4th 170, *People v. Bulter* (2003) 111 Cal.App.4th 150), none have applied the principles to an anonymous tip regarding an apparently drunk or reckless driver. A number of out-of-state courts, however, have held that law enforcement officers may pull over a vehicle for an investigatory stop based on a contemporaneous tip of erratic driving that accurately described a given vehicle, even where the officer did not personally witness any moving violations. (See *U.S. v. Wheat* (2001) 278 F.3d 722, 727-728 and cases cited therein; but see cases to the contrary at pp. 730-731.)

In general, those courts have concluded that *J.L.*, *supra*, does not prevent an anonymous tip concerning erratic driving from acquiring sufficient indicia of reliability to justify a detention, even when the investigating officer is unable to corroborate that the driver is operating the vehicle recklessly and therefore unlawfully. For example, in *State v. Boyea* (2000) 171 Vt. 401 [765 A.2d 862], cert. denied, *Boyea v. Vermont* (2001) 533 U.S. 917, the Supreme Court of Vermont upheld a detention where the investigating officer’s sole basis for detaining the motorist was an anonymous tip relayed by a police dispatcher describing a “blue-purple Volkswagen Jetta with New York plates, traveling south on I-89 in between Exits 10 and 11, operating erratically.” (*Id.* at pp. 863, 868.)

Although the court found the case to be close, it held that the informant's accurate description of the vehicle and correct prediction of its location, just minutes before the stop, gave the tip greater reliability than the bare-bones tip in *J.L.* The court also noted that in contrast to a report of an individual in possession of a gun, an anonymous report of an erratic or drunk driver on the highway presents a qualitatively different level of danger, and concomitantly greater need for prompt action. (*Id.* at p. 867.) A drunk driver was not unlike the "bomb" for which, as the Supreme Court suggested in *J.L.*, a laxer standard of reliability may apply. (*Id.* at p. 867.) Finally, the court reasoned that the intrusion on privacy interests in a vehicle stop is slight as compared to the pat-down on a public street that occurred in *J.L.* (*Id.* at p. 868.)

In *U.S. v. Wheat, supra*, 278 F.3d 722, the court discussed the factors that justify an investigative stop based on an anonymous report of erratic driving. First, the anonymous tip must provide a sufficient quantity of information, such as the make and model of the vehicle, its license plate numbers, its location and bearing, and similar innocent details, so that the officer and the court may be certain that the vehicle stopped is the same as the one identified by the caller. The time interval between receipt of the tip and location of the suspect vehicle may also be a factor. (*Id.* at p. 731.) In *Wheat*, the caller identified the color and general make of the vehicle, named the first three letters of its license plate, and gave its location and direction. Further, the officer effected a stop within minutes of the 911 call. Under the circumstances, the court concluded the information in the tip was "sufficiently copious and precise" to justify the stop. (*Id.* at p. 732.)

Second, the tip must contain a sufficient quantity of information to support an inference that the tipster has witnessed a traffic violation that compels an immediate stop. The rationale for allowing less rigorous corroboration of tips alleging erratic driving is that the imminent danger present is substantially greater and more difficult to thwart by less intrusive means than the danger posed by a person carrying a concealed handgun.

Therefore, the violation reported must suggest real exigency. A report of erratic driving will generally be sufficient because it strongly suggests that the driver is operating under the influence of alcohol or drugs and is unable to control his vehicle. Further, the more extensive the description of the alleged offense, the greater the likelihood that the tip will give rise to reasonable suspicion. (*U.S. v. Wheat, supra*, 278 F.3d at p. 732 & fn. 8.)

Third, regarding the necessary degree of reliability of an anonymous tip of erratic driving, the court found the traditional emphasis on the predictive aspects of the tip to be less applicable. The Supreme Court has emphasized that a primary determinant of a tipster's reliability is the basis of his knowledge. Unlike with clandestine crimes such as possession of drugs or guns where corroboration of the predictive elements of a tip may be the only means of ascertaining the informant's basis of knowledge, in erratic driving cases, the basis of the tipster's knowledge is likely to be apparent. Almost always, it comes from the tipster's eyewitness observations and there is no need to verify that the tipster possesses inside information. The caller simply reported a contemporaneous observation of criminal activity taking place in his sight. (*U.S. v. Wheat, supra*, 278 F.3d at p. 734; accord *State v. Walshire* (Iowa 2001) 634 N.W. 2d 625, 627-628 [because a report of erratic driving described illegality open to public observation, it demonstrated the tipster's basis of knowledge and its reliability could be demonstrated through corroboration of innocent details].) The *Wheat* court concluded that an anonymous tip conveying a contemporaneous observation of criminal activity whose innocent details were corroborated was at least as credible as the tip in *Alabama v. White* (1990) 496 U.S. 325, 328, where future criminal activity was predicted, but only innocent details were corroborated. (*U.S. v. Wheat, supra*, 278 F.3d at p. 735.)

The *Wheat* court recognized the danger that an anonymous report of erratic driving can be a malicious prank designed to cause trouble for another motorist. But, the court concluded that the risk of false tips is slight compared to the risk of not allowing the police immediately to conduct an investigatory stop. (*U.S. v. Wheat, supra*, 278 F.3d at

p. 735.) The governmental interest in immediately stopping an erratic driver to investigate whether he or she is driving under the influence of drugs or alcohol is very strong; and the intrusion upon the constitutionally protected interests of the private citizen, although also significant, is comparatively less. An erratic and possibly drunk driver poses an imminent threat to public safety and there is a substantial government interest in stopping the driver as quickly as possible. (*Id.* at pp. 736, 737.)

Applying its delineated factors to defendant Wheat, the court found as follows. Given the “extensive description” of the erratically driven vehicle – “tan and cream colored Nissan Stanza or ‘something like that,’ whose license plate began with the letters W-O-C, was being driven erratically in the northbound lane of Highway 169, eight miles south of Fort Dodge, Iowa” (*U.S. v. Wheat, supra*, 278 F.3d at p. 724) – based on contemporaneous eyewitness observations of apparent moving violations – passing on the wrong side of the road, cutting off other cars, and being driven as if by a “complete maniac,” the court concluded the officer had reasonable suspicion to stop Wheat’s vehicle when he caught up with it a few minutes later and corroborated the innocent details. (*U.S. v. Wheat, supra*, 278 F.3d at p. 737.)

We find *Wheat’s* analysis persuasive and apply the factors to appellant’s case. Initially, we note that appellant’s case is closer than it need be because the prosecutor elicited only minimal testimony regarding the citizen’s report on which the stop was based. We endorse efforts by law enforcement to gather more information to assess the reliability of 911 calls reporting criminal activity. (See *J.L., supra*, 529 U.S. at pp. 275-276, conc. opn. Kennedy, J.) Factors that enhance the reliability of such a tip would include: the identity of the caller; multiple tips regarding the same erratic driver; the dispatcher’s notation as to the source of the call, for example, a cell phone caller on the highway who is observing the erratic driving; and evidence that the dispatch office documents phone calls by voice recording, has caller identification or the ability to trace the call to a telephone number, or utilizes any other mechanism that enables the

authorities to identify the informant and hold him or her accountable for false information. In the same vein, we urge prosecutors to provide the trial court with such evidence, and thus the reviewing court with an adequate record, to assess the reliability of the telephone tip that supports an officer's reasonable suspicion to stop a driver.

The paucity of details regarding the reckless driving tip renders appellant's case close. Nevertheless, we conclude that under the totality of the circumstances the anonymous tip, as corroborated, was sufficiently reliable to justify the investigatory stop of appellant's van. First, the quantity of information included in the tip – '80's model blue van traveling northbound in Highway 99 at Airport Drive – coupled with Officer Irigoyen's stopping of the van within two or three minutes at the location it would be expected to be based on the tip was sufficiently precise. Second, the driving violation reported, a possibly under the influence driver, "weaving all over the roadway," was the sort of traffic violation that compels an immediate stop to protect both the driver and the public. Third, the information provided to dispatch indicated, by inference, that the tipster was reporting a contemporaneous eyewitness observation and Officer Irigoyen was able to corroborate its innocent details – somewhat uncommon vehicle type, age, color, location and direction of travel – within minutes of the report. For all of these reasons, we conclude that Officer Irigoyen acted reasonably under the Fourth Amendment by briefly stopping the van to investigate whether appellant was impaired.

II.**

Ineligibility for probation pursuant to Proposition 36

Appellant contends that because her driving under the influence of drugs conviction was a misdemeanor related to the use of drugs, the court was obligated under section 1210.1, subdivision (a), to place her on probation and order her to undergo drug

** See footnote, *ante*, page 1.

treatment. Further, defense counsel's failure to object to the "unauthorized" prison term imposed constituted ineffective assistance.

In *People v. Canty* (2004) 32 Cal.4th 1266, decided while appellant's appeal was pending, the California Supreme Court considered whether Canty, who was convicted of felony transporting methamphetamine together with misdemeanor driving a vehicle while under the influence of a controlled substance was "convicted in the same proceeding of a misdemeanor not related to the use of drugs," within the meaning of section 1210.1, subdivision (b)(2) and section 1210, subdivision (d). The court concluded that driving a vehicle while under the influence of a controlled substance is "a misdemeanor not related to the use of drugs" within the meaning of those provisions. Therefore, section 1210.1, subdivision (a) was inapplicable to Canty and she was not entitled to probation and drug treatment diversion under Proposition 36. (*People v. Canty, supra*, 32 Cal.4th at p. 1285.)

Canty is dispositive of appellant's claim. Under *Canty*, the trial court did not err in ruling that appellant was not eligible for drug treatment diversion under Proposition 36. It follows then that counsel was not required to object to the prison term imposed where there was no legal basis for the objection.

III.**

Correction of Abstract of Judgment

The trial court imposed a 16-month sentence on Count 1. The abstract of judgment shows a term of one year six months. A court has the inherent power to correct clerical errors so that its records reflect the true facts. (*In re Sheena K.* (2004) 116 Cal.App.4th 436, 451.) We shall direct the trial court to correct the abstract of judgment to reflect the 16 month term imposed.

** See footnote, *ante*, page 1.

Disposition

The judgment is affirmed. The trial court is directed to correct the abstract of judgment and to forward a certified copy to the Department of Corrections.

Ardaiz, P. J.

WE CONCUR:

Harris, J.

Levy, J.