

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SHAUN DAVID BARBARICH,

Defendant-Appellee.

FOR PUBLICATION

February 1, 2011

9:15 a.m.

No. 290772

Wayne Circuit Court

LC No. 08-012609-AR

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

K. F. KELLY, J.

This prosecutor's appeal requires us to decide what amount of information supplied by an in-person unnamed citizen informant, who provides a contemporaneous tip of potentially dangerous or erratic driving, is sufficient to justify an investigative stop of a moving vehicle. On defendant's motion to suppress, the circuit court dismissed defendant's charge of operating a motor vehicle while intoxicated (OWI), MCL 257.625, finding the police officer lacked a reasonable articulable suspicion that defendant was involved in criminal activity. We disagree and reverse.

I. BASIC FACTS

On March 17, 2008, defendant was issued a citation for OUIL. Defendant moved to dismiss the charge, on the basis that the stop of his vehicle was unreasonable and unconstitutional and that the evidence of his intoxication should be suppressed.

The district court held an evidentiary hearing on July 11, 2008. The only witness to testify was Michigan State Trooper Christopher Bommarito, who stopped defendant's vehicle and issued defendant the citation. Bommarito testified that on the evening of March 17, 2008, which was Saint Patrick's Day, he was on regular patrol, driving a fully marked police car. As part of his assignment that evening, he was conducting a property inspection at Malarkey's bar. Bommarito indicated that the bar's parking lot was full of patrons, a "big party tent" was set up in the parking lot, and he was there to look for problems, such as people urinating outside or being outside their vehicle. After his inspection, Bommarito left Malarkey's parking lot and headed south on Dix Road. Immediately after exiting the parking lot, a red pickup truck passed Bommarito's vehicle, heading northbound on Dix Road. Another vehicle, defendant's, was traveling in front of the red pickup. As Bommarito passed the red pickup, the woman driver of that vehicle made eye contact with Bommarito, pointed directly to defendant's vehicle in front of

her, and mouthed the words, “Almost hit me.” Bommarito immediately made a u-turn, turned on his emergency lights and sirens, and followed defendant’s vehicle into Malarkey’s parking lot. Bommarito approached defendant’s vehicle and it was discovered that defendant was intoxicated. During the evidentiary hearing, Bommarito admitted that he made no attempts to speak to the woman in the red pickup before stopping defendant and that he did not personally observe defendant driving in a manner that would have justified a stop. In other words, Bommarito stopped defendant’s vehicle solely on the basis of the woman driver’s action of pointing to defendant’s vehicle and mouthing the words “Almost hit me.”

The district court denied defendant’s motion to suppress without explanation. Before the matter could proceed to trial, defendant appealed the district court’s decision to the circuit court arguing that Bommarito lacked a reasonable suspicion to stop his vehicle. The circuit court reversed on the basis that Bommarito had no reasonable articulable suspicion that a crime was afoot, but merely had a hunch, and therefore the stop violated defendant’s Fourth Amendment rights. It dismissed the charges against defendant.

Plaintiff then filed leave to appeal with this Court. Initially, this Court denied leave to appeal, *People v Barbarich*, unpublished order of the Court of Appeals, entered June 3, 2009 (Docket No. 290772), and the matter was appealed to our Supreme Court. In lieu of granting leave to appeal, the Court remanded the case to this Court “for consideration as on leave granted.” *People v Barbarich*, 485 Mich 1059; 777 NW2d 155 (2010). We now consider whether the circuit court erred by granting defendant’s motion to suppress.

II. STANDARD OF REVIEW

We review de novo the circuit court’s ultimate ruling on a motion to suppress. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). However, we review its factual findings for clear error. *Id.* “A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.” *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008) (citation and quotation marks omitted). “We overstep our review function if we substitute our judgment for that of the trial court and make independent findings.” *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004).

III. GENERALLY APPLICABLE LAW

The Fourth Amendment of the United States Constitution and article 1, section 11 of the Michigan Constitution protect against *unreasonable* searches and seizures. US Const, Am IV; Const 1963, Art 1 Sec 11.¹ Searches or seizures conducted without a warrant are presumptively

¹ The Michigan Constitution is construed to provide the same protection as that provided by the Fourth Amendment. *People v Levine*, 461 Mich 172, 178; 600 NW2d 622 (1999). And, “[w]ith regard to the issue whether an anonymous tip supports a reasonable suspicion to stop a suspect, Michigan case law tracks federal precedent.” *People v Faucett*, 442 Mich 153, 163; 499 NW2d 764 (1993).

unreasonable and, therefore, unconstitutional. *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). This does not mean that all searches and seizures conducted without a warrant are forbidden; only those that are unreasonable. The United States Supreme Court has carved out numerous exceptions to this general rule using a test that “balances the governmental interest that justifies the intrusion against an individual’s right to be free of arbitrary police interference.” *People v Faucett*, 442 Mich 153, 158; 499 NW2d 764 (1993). Thus, the higher the government interest the more likely a warrantless search or seizure is to be reasonable, especially if the implicated individual interest is low.

As subjective as this test may be, several categories of permissible warrantless searches and seizures are well-established in Fourth Amendment jurisprudence, including: “exigent circumstance, searches incident to a lawful arrest, stop and frisk, consent, and plain view.” *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000) citing *In re Forfeiture of \$176,598*, 443 Mich. 261, 265; 505 N.W.2d 201 (1993); *People v Jordan*, 187 Mich. App. 582, 586; 468 N.W.2d 294 (1991). Each of these exceptions, however, still requires reasonableness and probable cause. *Brzezinski*, 243 Mich App at 433 While in each of these instances the search or seizure is considered reasonable based on the balancing of the relevant interests, the ultimate determination whether a search is reasonable is fact-intensive and must be measured by examining the total circumstances of each case. See *Mullen*, 282 Mich App at 21. Generally, if evidence is seized in violation of the constitutional prohibition against unreasonable searches and seizures, it must be excluded from trial. *People v Chowdhury*, 285 Mich App 509, 516; 775 NW2d 845 (2009).

The only exception applicable in the present case is the investigative stop, also known as a *Terry* stop. Under this doctrine, if a police officer has a reasonable, articulable suspicion to believe a person has committed or is committing a crime, given the totality of the circumstances, he may briefly stop that person for further investigation. *People v Christie (On Remand)*, 206 Mich App 304, 308; 520 NW2d 647 (1994); *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Moreover, under *Terry*, a police officer may approach and temporarily detain a person for the purpose of investigating possible criminal behavior even if probable cause does not exist to arrest the person. *Terry*, 392 US at 22; *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). The scope of any search or seizure must be limited to that which is necessary to quickly confirm or dispel the officer’s suspicion. *People v Yeoman*, 218 Mich App 406, 411; 554 NW2d 577 (1996).

When a court is called upon to determine whether a defendant’s Fourth Amendment rights have been violated in the context of a *Terry* stop, it should view the totality of the circumstances in light of common sense judgments and inferences of human behavior, *People v Horton*, 283 Mich App 105, 109; 767 NW2d 672 (2009), and should be careful not to apply overly technical reviews of a police officer’s assessment of whether criminal activity is afoot, *Faucett*, 442 Mich at 168. Further, when the circumstances involve an informant’s tip, courts must examine whether the tipster’s information contained sufficient indicia of reliability to provide law enforcement with a reasonable suspicion that would justify the stop. *Id.* In assessing the reliability of a tip, the Michigan Supreme Court has mandated that courts consider, in light of the totality of the circumstances: “(1) the reliability of the particular informant, (2) the nature of the particular information given to the police, and (3) the reasonableness of the suspicion in light of the above factors.” *People v Tooks*, 403 Mich 568, 577; 271 NW2d 503 (1978).

A. FEDERAL JURISPRUDENCE: *UNITED STATES v WHEAT*

No precedentially binding Michigan case has addressed the exact factual scenario before this Court, i.e., investigative stops of a moving automobile based solely on a citizen informant's face-to-face tip of driving that potentially poses a danger to persons or property. However, the United States Court of Appeals for the Eighth Circuit has considered a factual scenario similar to the one at issue. In *United States v Wheat*, 278 F 3d 722 (CA 8 2001) a citizen driving on the highway called 911 and reported that a tan colored Nissan, with a license plate beginning with W-O-C, was driving erratically in the northbound lane of the highway. *Id.* at 724. Officers effectuated a stop of the vehicle shortly thereafter, without first observing any erratic behavior of the vehicle. *Id.*

After extensively reviewing caselaw on the matter, the court determined that the amount of information necessary to justify an investigatory stop based on an anonymous tipster's report of erratic driving is less than that required for other types of criminal activity that pose less immediate danger. *Id.* at 729-730, 733-734. The court indicated that a tip can provide reasonable suspicion for a stop if (1) "the anonymous tipster . . . provide[s] a sufficient quantity of information," *id.* at 731-732, and (2) the quality, or reliability, of the information conveyed need only be corroborated in its innocent details. *Id.* at 733. With regard to the former, the quantity of information must include sufficient detail to ensure that the car identified by the police is the same as the one identified by the informant, and may include such information as "the make and model of the vehicle, its license plate numbers, its location and bearing, and similar innocent details[;]" the information must also "support an inference that the tipster has witnessed an actual traffic violation that compels an immediate stop." *Id.* at 731-732. The court reasoned that less is required as to predictive elements of reliability because of the imminent danger that erratic, and possibly drunk, driving poses and because of the tipster's obvious basis of knowledge, i.e., first-hand contemporaneous observations. *Id.* at 734-737.

Applying this test to the circumstances before it, the court ruled that reasonable articulable suspicion justified the officer's investigatory stop:

An anonymous caller provided an extensive description of a vehicle that, based on his contemporaneous eyewitness observations, he believed was being operated dangerously, and cited specific examples of moving violations. When Officer Samuelson caught up with the vehicle minutes later while it was stopped at an intersection, he corroborated all its innocent details, confirming that it was the one identified by the tipster. Within seconds after the vehicle resumed motion, Officer Samuelson effected an immediate investigatory stop, rather than allow it to proceed and potentially endanger other vehicles. Under the totality of the circumstances, he had reasonable suspicion to do so, and the stop was valid under the Fourth and Fourteenth Amendments. [*Id.* at 737.]

B. MICHIGAN LAW: INVESTIGATORY STOPS OF MOVING VEHICLES BASED ON CITIZENS' TIPS OF ERRATIC DRIVING

While no Michigan case has applied the less rigorous test adopted in *Wheat*, this Court addressed a similar factual scenario involving a tip of an automobile accident in *People v Estabrooks*, 175 Mich App 532; 438 NW2d 327 (1989),² which pre-dated *Wheat*. The *Estabrooks* Court applied *People v Tooks*, 403 Mich at 568, to conclude that the officer had a sufficient suspicion that criminal activity had occurred based on a citizen informant's tip to justify her investigative stop of the defendant. *Estabrooks*, 175 Mich App at 536. In *Estabrooks*, the officer was investigating the scene of an accident when a citizen approached the officer and indicated that defendant's vehicle, a Lincoln Continental, had rear-ended his motorcycle multiple times. *Id.* at 534. The citizen pointed to the defendant's vehicle, which was stopped in nearby traffic. *Id.* The Court found that it was reasonable for the officer to suspect that an accident may have occurred based on the informant's tip. *Id.* at 537. The Court stated:

[T]he fact that the motorcyclist was actually present and accusing defendant immediately after the rear-endings indicated reliability on the part of the informant. Second, the fact that the informant actually pointed out defendant's car to Officer Summers provided her with precise and easily verifiable information, which also indicated that the information was reliable. [*Id.* at 536-537.]

The Court rejected the defendant's argument that because the informant indicated no criminal activity, the police officer could not have stopped him without some personal observation of the traffic violation. The Court reasoned that based on the information provided, the officer could have reasonably concluded that a crime had occurred, including leaving the scene of a motor vehicle accident, felonious assault, or operating under the influence. *Id.* at 538. The Court noted, "It is not vital that [the officer] knew exactly what crime was being committed or would be charged when [the officer] decided to stop defendant, only that the circumstances justified the stop." *Id.* at 538-539. Consequently, this Court reversed the circuit court's ruling that had dismissed the defendant's OUIL conviction. *Id.* 539.

Although *Estabrooks* applied *Tooks* to conclude that the tip contained sufficient indicia of reliability to justify the stop, the rule adopted in *Tooks* was decided in a different context and does not adequately take into account the relevant interests that must be balanced in determining whether a vehicle stop is reasonable based on a citizen tip of erratic driving. In *Tooks*, an in-person anonymous tipster, who was on foot, informed police that he had seen the defendant show a gun to two other men. *Tooks*, 403 Mich at 573-574. The Court concluded that the information provided to the police, including a detailed physical description of the defendant and his companions, justified the stop and subsequent search. *Id.* at 574-575. In reaching this

² Published cases issued before November 1, 1990 are not precedentially binding on this Court, although they may be persuasive authority. MCR 7.215(J)(1).

conclusion, the Court recognized the strong interest in police safety, which presents a stronger case justifying a stop and frisk, especially in light of the tip's detail, than had the tip involved narcotics or other contraband. *Id.* at 581-582. Accordingly, the interest at stake in *Tooks*, police safety, is different than the present matter.

The exigency here, and the one that existed in *Estabrooks*, is heightened in comparison to a tip informing a police officer of a concealed weapon or other clandestine contraband. In the latter instance, police have the opportunity to observe the suspect from afar to possibly confirm or dispel any suspicions or to corroborate the tip and may have the opportunity to initiate a consensual encounter; in other words, the threat of imminent danger is not necessarily as high as in the present case where an erratic driver threatens the lives of fellow drivers. See *Wheat*, 278 F 3d at 736. In contradistinction,

where an anonymous tip alleges erratic and possibly drunk driving, a responding officer faces a stark choice. . . . [H]e can intercept the vehicle immediately and ascertain whether its driver is operating under the influence of drugs or alcohol. Or he can follow and observe, with three possible outcomes: the suspect drives without incident for several miles; the suspect drifts harmlessly onto the shoulder, providing corroboration of the tip and probable cause for an arrest; or the suspect veers into oncoming traffic, or fails to stop at a light, or otherwise causes a sudden and potentially devastating accident. [*Id.* at 736-737 (citation omitted).]

See also *Christie (On Remand)*, 206 Mich App at 309 (recognizing that erratic driving poses a potential danger to the public).

The *Estabrooks* Court did not explicitly recognize the heightened interest at stake. Indeed, there was no need for it to do so because the exact question that is now before this Court was not at issue in *Estabrooks*. Rather, as noted, the defendant in *Estabrooks* simply argued that the informant had to provide information pertaining to a specific crime, not merely a traffic violation. Thus, while we do not disagree with the outcome in *Estabrooks* or its analysis, we must make clear that less information is required of citizen informants reporting contemporaneous incidents of erratic, or potentially dangerous, driving to justify an investigative stop, than a strict application of *Tooks* would suggest. The *Estabrooks* Court appears to have implicitly recognized this principle, but did not articulate it, in holding that an investigatory stop may be justified on the totality of the circumstances even if the informant's tip does not designate a crime.

Certainly, the courts of this state have already recognized, albeit not in cases involving citizen tips, that fewer foundational facts are necessary to justify a stop of a moving vehicle, than would be required with regard to a home or with regard to both a stop and search of that same vehicle. *People v Whalen*, 390 Mich 672, 682; 213 NW2d 116 (1973); *Faucett*, 442 Mich at 164 n 11 (citing *Whalen* for the proposition that *Whalen* sets “forth the reasonableness standard for all automobile searches, including those based on informant's tips, using the totality of the circumstances test”); *Christie (On Remand)*, 206 Mich App at 308-309. As noted, such investigatory stops of automobiles are deemed reasonable on the basis of lesser information because the public's interest in safety of the roadways is high compared to the minimally invasive nature of the investigation. Accordingly, we hold, consistent with *Whalen* and *Wheat*, that fewer foundational facts are necessary to justify an investigative stop of a moving vehicle

based on a citizen tip of erratic driving. Specifically, like in *Wheat*, while the quantity of the tip's information must be sufficient to identify the vehicle and to support an inference of a traffic violation, less is required as to a tip's reliability; as to the latter, it will suffice if law enforcement corroborates the tip's innocent details.

IV. ANALYSIS

Here, on Saint Patrick's Day in 2008, a female citizen was driving north on Dix Road and she passed state trooper Bommarito, who had just exited the parking lot of Malarkey's bar and was driving south on Dix Road. As she passed, she made eye contact with Bommarito, pointed to defendant's vehicle directly in front of her, and mouthed the words, "Almost hit me." Bommarito immediately made a u-turn, turned on his sirens and emergency lights, and followed defendant's vehicle into the parking lot of Malarkey's. He did not observe defendant drive in an erratic manner.

The woman's action of pointing to the vehicle in front of her was sufficient to accurately identify defendant's vehicle and provided precise and verifiable information to the officer, which also strongly suggests that the information was reliable. The basis of the informant's knowledge was obvious—it can be inferred from her statement, "Almost hit me," and action of pointing to the vehicle traveling immediately in front of her, that defendant's vehicle had recently almost come into contact with the woman's vehicle; her tip was clearly based on first-hand and nearly contemporaneous observations, which further strengthens the veracity of the information. Moreover, had Bommarito wished to obtain the informant's personal information he could have, by copying down her license plate number. Thus, the fact that the tipster was actually face-to-face with Bommarito when she relayed the tip, and thus likely knew that she could be subject to police questioning, further indicates that she was credible and that the information she provided was reliable. In addition, her statement, "Almost hit me," is sufficient to support an inference that an actual traffic violation occurred. While it is true that the statement could be consistent with legal behavior, it is also enough to create an inference that defendant had been driving erratically in contravention of MCL 257.626 (reckless driving, a misdemeanor), MCL 257.626b (negligent operation of a motor vehicle, a civil infraction), or MCL 257.625 (operating a motor vehicle while intoxicated). See also *Christie (On Remand)*, 206 Mich App at 309 (acknowledging that "erratic driving can give rise to a reasonable suspicion of unlawful intoxication so as to justify an investigatory stop by a police officer."). "It is not vital that [the officer] knew exactly what crime was being committed or would be charged when [the officer] decided to stop defendant, only that the circumstances justified the stop." *Estabrooks*, 175 Mich App at 538-539. The circumstances here, together with the citizen's statement, certainly justified the stop. Bommarito was on regular patrol and had just finished a property inspection at the bar and surrounding area. The purpose of the inspection was to look for potential problems such as people urinating in public and people outside their vehicles. As previously noted, it was St. Patrick's day, the parking lot was full of patrons and a large party tent had been set up.

Certainly more facts could have strengthened the officer's suspicion, but in cases involving tips of erratic driving of a motor vehicle, fewer facts are necessary to justify the investigatory stop. *Wheat*, F 3d at 730-737; *Whalen*, 390 Mich at 682. "[T]he Fourth Amendment does not require a policeman to simply shrug his shoulders and allow a crime to occur or a criminal escape." *Whalen*, 390 Mich at 682. Had the officer waited to personally observe defendant engage in dangerous and erratic driving, his suspicion would have surpassed a

reasonable articulable suspicion and become a probable cause to seize defendant and issue an appropriate citation. “Thus, police would lose the intermediate step of investigatory stops based on reasonable suspicion.” *Wheat*, 278 F 3d at 733. Here, sufficient indicia of reliability supported the citizen’s tip and Bommarito was justified in conducting the investigatory stop. The tip provided sufficient information to accurately identify the vehicle and to create an inference that a crime or civil infraction had occurred; and, the tip was also sufficiently reliable, based on the woman’s contemporaneous observations. Under the totality of the circumstances, Bommarito had a reasonable articulable suspicion that justified an investigatory stop of defendant’s vehicle. The circuit court erred by concluding otherwise.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly