

ORIGINAL

FILED

01/28/2020

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 19-0240

DA 19-0240

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 18N

CITY OF WHITEFISH,

Plaintiff and Appellee,

v.

JOHN H. PETTEY,

Defendant and Appellant.

FILED

JAN 28 2020

Bowen Greenwood
Clerk of Supreme Court
State of Montana

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DC-19-071(D)
Honorable Dan Wilson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Colin M. Stephens, Smith & Stephens, P.C., Missoula, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Hannah E. Tokerud, Assistant
Attorney General, Helena, Montana

Mary Leffers Barry, Whitefish City Attorney, Whitefish, Montana

Submitted on Briefs: October 9, 2019

Decided: January 28, 2020

Filed:


Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion, shall not be cited, and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 John H. Pettey appeals the Order of the Eleventh Judicial District Court, Flathead County, affirming the Whitefish Municipal Court's denial of his motion to suppress evidence leading to his arrest and conviction for driving under the influence (DUI), a violation of § 61-8-401, MCA. We affirm.

¶3 On December 28, 2017, Whitefish Police Department Officer Schuch responded to an incident near the Iron Horse Clubhouse in Whitefish, Montana involving a single vehicle crash. When he arrived on scene, Officer Schuch observed the vehicle had slid off the road and into an embankment near a damaged guardrail. Officer Schuch also observed snow-covered and icy road conditions and suspected the driver, who had not remained on scene, was traveling too fast which caused the vehicle to slide off the road. Officer Schuch spoke with an Iron Horse employee at the scene who reported that the driver, later identified as Pettey, was in the clubhouse. Officer Schuch made contact with Pettey in the clubhouse locker room. Pettey admitted he was the driver of the vehicle and informed Officer Schuch he was unhurt. During this encounter, Officer Schuch observed Pettey's speech was slow and slurred.

¶4 Shortly thereafter, Officer Schuch contacted Officer Boll, who had arrived at the scene of the incident while Officer Schuch spoke with Pettey in the clubhouse. Officer Boll also spoke with the Iron Horse employee who reported he observed Pettey hit a guardrail before sliding off the road. The employee informed Officer Boll that he observed Pettey consuming alcohol before the incident.

¶5 Based on his own observations of Pettey and the information gathered by Officer Boll, Officer Schuch suspected Pettey had been driving his vehicle while under the influence of alcohol. Officer Schuch asked Pettey to go outside the Iron Horse Clubhouse to continue the investigation. While walking to Officer Schuch's patrol vehicle, Pettey admitted he consumed alcohol before driving his vehicle. Pettey agreed to undergo field sobriety testing, which he performed poorly. Officer Schuch subsequently arrested Pettey on suspicion of DUI and transported him to the Flathead County Detention Center for further investigation. A blood draw revealed Pettey's blood alcohol concentration to be .114 percent.

¶6 On February 21, 2019, Pettey was convicted of DUI by a jury in the Whitefish Municipal Court. Pettey properly appealed his conviction to the Flathead County District Court. On April 17, 2019, the District Court affirmed Pettey's conviction.

¶7 On appeal to this Court, Pettey asserts (1) Officer Schuch lacked particularized suspicion to prolong his initial stop of Pettey, and (2) even if sufficient particularized suspicion existed for the initial stop, the information provided by the Iron Horse employee,

a citizen informant, was insufficient to escalate Officer Schuch's initial stop of Pettey into a DUI investigation.

¶8 On appeal from a lower court of record, the district court functions as an intermediate appellate court "with the scope of review 'confined to review of the record and questions of law.'" *City of Missoula v. Kroschel*, 2018 MT 142, ¶ 8, 391 Mont. 457, 419 P.3d 1208 (citing § 3-5-303, MCA; § 3-11-110(1), MCA; *State v. Luke*, 2014 MT 22, ¶ 9, 373 Mont. 398, 321 P.3d 70). Therefore, we review a district court's appellate review of a lower court of record's ruling as if the lower court ruling was appealed directly to this Court without district court review. *Kroschel*, ¶ 8 (citing *State v. Maile*, 2017 MT 154, ¶ 7, 388 Mont. 33, 396 P.3d 1270; *Stanley v. Lemire*, 2006 MT 304, ¶¶ 25-26, 334 Mont. 489, 148 P.3d 643). We undertake independent review of the lower court's denial of a motion to suppress evidence for whether the lower court's findings of fact are clearly erroneous, whether its conclusions of law are correct, and, as applicable, whether the lower court abused its discretion. *Kroschel*, ¶ 8 (citations omitted). A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the trial court misapprehended the effect of the evidence, or if this Court has a definite or firm conviction that the trial court committed a mistake. *Maile*, ¶ 8 (citations omitted).

¶9 Particularized suspicion is objective data from which an experienced law enforcement officer can make certain inferences and a resulting suspicion that the person to be stopped is or has been engaged in unlawful behavior. *See State v. Wilson*, 2018 MT 268, ¶ 28, 393 Mont. 238, 430 P.3d 77; *State v. Marcial*, 2013 MT 242, ¶ 18,

371 Mont. 348, 308 P.3d 69. Whether particularized suspicion exists is a factual inquiry determined by examining the totality of the circumstances confronting the officer at the time of the stop, including a consideration of “the quantity, substance, quality, and degree of reliability of information known to the officer.” *Wilson*, ¶ 28 (citations omitted). An officer’s training and experience are also relevant factors in a totality of the circumstances analysis to determine what reasonable inferences the officer is entitled to make from his objective observations. *State v. Wagner*, 2013 MT 159, ¶ 10, 370 Mont. 381, 303 P.3d 285 (citations omitted).

¶10 While the particularized suspicion standard requires an officer to have more than “mere generalized suspicion or an undeveloped hunch of criminal activity,” the officer does not need to “satisfy a checklist of factors” to justify the investigative stop, nor must the officer “be certain, or even ultimately correct, that a person is engaged in criminal activity.” *Wilson*, ¶ 28 (citations omitted); *State v. Rodriguez*, 2011 MT 36, ¶ 18, 359 Mont. 281, 248 P.3d 850 (citations omitted).

¶11 An officer’s particularized suspicion may also be based on a citizen informant’s report if the report contains “sufficient indicia of reliability.” *State v. Nelson*, 2017 MT 237, ¶¶ 11, 21, 389 Mont. 1, 402 P.3d 1239 (citations omitted). An informant’s report is generally considered reliable if: (1) the informant identified himself to law enforcement; (2) the report is based on the informant’s personal observations; and (3) the officer’s own observations corroborate the informant’s report. *Nelson*, ¶ 11 (citing *State v. Pratt*, 286 Mont. 156, 164-65, 951 P.2d 37, 42-43 (1997)). An informant that provides his

or her name and contact information “lends a ‘high indicia of reliability’ to his or her report.” *City of Missoula v. Moore*, 2011 MT 61, ¶ 18, 360 Mont. 22, 251 P.3d 679 (citations omitted). However, disclosure of this specific information is not required before an officer can rely on the report in forming particularized suspicion, particularly if the officer corroborates the informant’s report with his own observations. *See Pratt*, 286 Mont. at 165, 951 P.2d at 42 (“[A] tip *may* be considered more reliable if the informant provides his or her name to law enforcement authorities or delivers the information to the officer in person. . . . Corroboration of the tip occurs when the officer . . . finds the person, the vehicle, and the vehicle’s location substantially as described by the informant.”) (emphasis added).

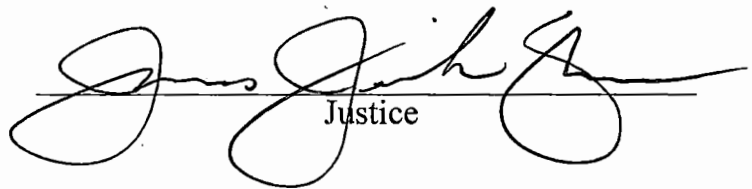
¶12 An officer who initiates an investigative stop may only detain an individual for as long as necessary to effectuate the purpose of the stop. *Wilson*, ¶ 25 (citing § 46-5-403, MCA). “However, a stop may be prolonged and the scope of the investigation broadened if the investigation remains within the limits created by the facts and the suspicions from which they arose.” *Wilson*, ¶ 25 (citations omitted). “The justification for a stop may change as officers acquire additional information.” *Wilson*, ¶ 25 (citations omitted).

¶13 Officer Schuch observed a vehicle off the road in an embankment near a damaged guardrail. From these observations, Officer Schuch developed sufficient particularized suspicion that the driver was operating the vehicle carelessly given the road conditions. Officer Schuch learned the driver of the vehicle was Pettey from the information provided by the Iron Horse employee who remained at the scene. Officer Schuch was justified in


stopping Pettey in the clubhouse and investigating him further after he corroborated the employee's information by admitting he was the driver of the vehicle.

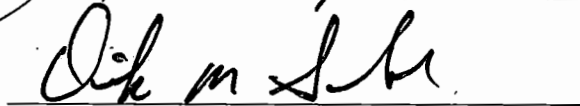
¶14 During his initial encounter with Pettey, Officer Schuch observed Pettey speaking slowly and slurring his speech. Officer Schuch's personal observations corroborated the Iron Horse employee's report that Pettey consumed alcohol prior to driving his vehicle into the guardrail and down the embankment. Based on the totality of this information, Officer Schuch was justified in expanding his investigation into a possible DUI. After Pettey admitted to consuming alcohol and subsequently failed several standardized field sobriety tests, Officer Schuch lawfully arrested Pettey on suspicion of DUI.

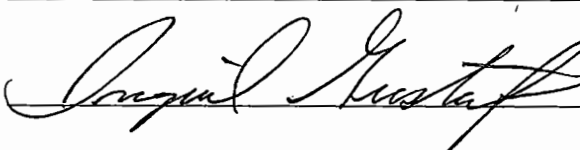
¶15 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. The lower court correctly denied the motion to suppress evidence.


Justice

We Concur:







Jan Rice
Justices
