COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2833-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SCOTT G. WADDELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed in part and reversed in part.*

¶1 DYKMAN, P.J.[1] Scott G. Waddell appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant. Waddell contends that his motion to suppress evidence should have

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98).

been granted because the officer who arrested him did not personally have reasonable suspicion to stop his vehicle. We disagree and affirm. Waddell also asserts he should not have been ordered to pay restitution to Emily Parmer because she was not the victim of his crime, nor of any crime read in at sentencing. We agree and reverse.

BACKGROUND

¶2 On the evening of November 22, 1997, Emily Parmer called the police to report that Scott Waddell had struck her car with his car. She gave the police a detailed description of Waddell's vehicle, including its license plate number. It is unclear whether Parmer told the police at this time that she believed Waddell was intoxicated, or whether she later told this to Officers Green and Dunphy, who were sent to investigate.

¶3 Officer Hammel received a call from police dispatch, indicating that a possible intoxicated driver had been involved in an accident and had last been seen traveling on 20th Avenue. Hammel also received a description of the vehicle. Hammel soon found the vehicle in question, observed it for one or two minutes, and then stopped it. Waddell was the driver. Hammel did not see any signs of intoxication during his brief observation of Waddell's driving, but noticed that Waddell had watery eyes and slurred speech. Hammel questioned Waddell about the accident, and Waddell denied involvement. Hammel inspected the outside of the vehicle and noticed no damage.

¶4 Hammel then performed field sobriety tests on Waddell. Waddell failed these tests, and Hammel arrested him for operating a motor vehicle while

intoxicated, contrary to WIS. STAT. § 346.63(1)(a) (1997-98).[2] The trial court denied Waddell's motion to suppress the blood alcohol test evidence, and a jury found Waddell guilty of operating a motor vehicle while intoxicated. The court also directed Waddell to pay Parmer restitution for the damage to her car under WIS. STAT. §§ 346.65(2r)(a)[3] and 973.20.[4]

ANALYSIS

¶5 When reviewing a trial court's determination regarding the suppression of evidence, we will uphold the trial court's findings of fact unless those findings are clearly erroneous. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Whether an investigatory stop meets constitutional and statutory standards is a question of law that we review de novo. *See* ***State v.***

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[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted. WISCONSIN STAT. § 346.63(1) states in relevant part:

> No person may drive or operate a motor vehicle while:
>
> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving.

[3] WISCONSIN STAT. § 346.65(2r)(a) states: "In addition to the other penalties provided for violation of s. 346.63, a judge may order a defendant to pay restitution under s. 973.20."

[4] WISCONSIN STAT. § 973.20(5) states in relevant part:

> In any case, the restitution order may require that the defendant do one or more of the following:
>
> (a) Pay all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing.

Krier, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991). In the case at hand, the trial court's findings of fact were not clearly erroneous. Therefore, we must only review, as a question of law, whether the investigatory stop by Hammel met constitutional and statutory standards.

¶6 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches and seizures. *See* ***Richardson***, 156 Wis. 2d at 137. When interpreting the state constitution, Wisconsin courts rely on the Supreme Court's interpretations of the search and seizure provisions under the federal constitution. *See* ***State v. Fry***, 131 Wis. 2d 153, 171-72, 388 N.W.2d 565 (1986). The Supreme Court has held that, in determining whether an intrusion was reasonable, the court must look at whether the officer's actions were justified at their inception, and whether they were reasonably related in scope to the circumstances which justified the interference in the first place. *See* ***Terry v. Ohio***, 392 U.S. 1, 19-20 (1968). The intrusion by the officer, who is promoting legitimate government interests, must be balanced against the individual's Fourth Amendment rights. *See* ***Delaware v. Prouse***, 440 U.S. 648, 654 (1979).

¶7 When police make an investigatory stop of a person, it is not an arrest, and the standard for the stop is less than probable cause. *See* ***State v. Allen***, 226 Wis. 2d 66, 70-71, 593 N.W.2d 504 (Ct. App. 1999). The standard is reasonable suspicion, "a particularized and objective basis" for suspecting the person stopped of criminal activity. ***Ornelas v. United States***, 517 U.S. 690, 696 (1996). When determining if the standard of reasonable suspicion was met, those facts known to the officer must be considered together, as a totality of circumstances. *See* ***Richardson***, 156 Wis. 2d at 139.

¶8 Waddell argues that the facts which caused the officer to reasonably suspect him were given in the tip by Parmer, and were not enough to meet the standard of reasonable suspicion, since the tip was insufficient. The veracity and the basis of knowledge in a tip are relevant considerations in the analysis of the totality of circumstances on which an officer determines reasonable suspicion. *See* ***Alabama v. White***, 496 U.S. 325, 328-29 (1990). Waddell relies upon ***Florida v. J.L.***, in which the Supreme Court held that an anonymous tip was insufficient to justify a stop and frisk when it lacked a moderate indicia of reliability. ***Florida v. J.L.***, 529 U.S. 266, 120 S. Ct. 1375, 1379 (2000). A tip lacks a moderate indicia of reliability when it fails to enable the police to test the informant's knowledge or credibility. *See* ***id.*** In ***J.L.***, the police were unable to test an anonymous tip for knowledge or credibility since, in addition to being anonymous, it failed to offer predictive information. ***Id.***

¶9 While it has long been true that police must be able to verify some of the details in the tip in order to rely on it, *see* ***State v. Paszek***, 50 Wis. 2d 619, 631-32, 184 N.W.2d 836 (1971), ***J.L.*** is distinguishable. ***J.L.*** involved whether the police had reasonable suspicion to frisk the defendant for a gun, not just to stop and question him. ***J.L.***, 120 S. Ct. at 1377. The Court concluded, "we hold that an anonymous tip lacking indicia of reliability of the kind contemplated in ***Adams*** and ***White*** does not justify a stop *and frisk* whenever and however it alleges *the illegal possession of a firearm*." ***Id.*** at 1380 (emphasis added). A frisk requires that police have a reasonable suspicion that the suspect is armed and dangerous. *See* ***State v. Williamson***, 113 Wis. 2d 389, 403, 335 N.W.2d 814 (1983). An investigatory stop requires reasonable suspicion that criminal activity is afoot. *See* ***State v. Waldner***, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996). While possession of a weapon may often constitute criminal activity, the amount of information

necessary to justify a stop is not always equivalent to that necessary to justify a frisk of the person. A stop may be justified even where a frisk is not. *See* ***Williamson***, 113 Wis. 2d at 403. Unlike the officer in ***J.L.***, Hammel did not frisk Waddell for weapons or otherwise search his person until he had obtained additional grounds to do so. We conclude that this case is distinguishable from ***J.L.*** in that only an investigatory stop of a vehicle was initially involved.

¶10 Waddell asserts that Hammel could not have had reasonable suspicion because he was not aware that Parmer was a citizen informant, rather than an anonymous tipster. Information given by citizen witnesses is usually based on personal observation, and this has been recognized as being inherently reliable. *See* ***State v. Marshall***, 92 Wis. 2d 101, 114, 284 N.W.2d 592 (1979). Therefore, a lesser degree of verification of the details in the tip is required in evaluating the information given by a citizen informant. *See* ***Paszek***, 50 Wis. 2d at 631-32.

¶11 Waddell relies on ***State v. Friday***, in which we said:

> There are many cases upholding a police officer's probable cause determination when the officer relied on the collective information within the police department relayed through police channels. However, none of them hold that the on-the-scene officer's determination may be based on *uncommunicated* information reposing in other officers elsewhere in the department.

State v. Friday, 140 Wis. 2d 701, 713-14, 412 N.W.2d 540 (Ct. App. 1987), *reversed on other grounds*, 147 Wis. 2d 359, 434 N.W.2d 85 (1989) (footnote omitted). In essence, Waddell is arguing that, under ***Friday***, Hammel could not be considered to have known that Parmer was a citizen informant, and that her tip

must be subject to the more rigorous verification and reliability requirements for anonymous tips.

¶12 While Waddell may be correct about the holding of ***Friday***, his reliance on ***Friday*** is misplaced. We are not convinced that Hammel needed to know Parmer was a citizen informant in order to form a reasonable suspicion relying on her tip. ***Friday*** was a probable cause case. ***Friday***, 140 Wis. 2d at 708. Here, the question is whether Hammel had a reasonable suspicion that Waddell was the hit-and-run driver that Parmer described, and thus whether Hammel lawfully stopped Waddell in his car. "[R]easonable suspicion can arise from information that is less reliable than that required to show probable cause." ***White***, 496 U.S. at 330. As with any seizure, the ultimate test of whether a stop is permissible under the Fourth Amendment is one of reasonableness given the facts and circumstances. *See* ***State v. Whitrock***, 161 Wis. 2d 960, 981, 468 N.W.2d 696 (1991).

¶13 "To determine whether a search or seizure is 'unreasonable,' the court first determines whether the initial interference with an individual's liberty was justified, and then considers whether subsequent police conduct was reasonably related in scope to the circumstances that justified the initial interference." ***State v. Griffith***, 2000 WI 72, ¶26, 236 Wis. 2d 48, 613 N.W.2d 72. Reasonableness of the police intrusion initially depends on whether a person had a reasonable expectation of privacy that was invaded by the intrusion. *See* ***State v. Milashoski***, 163 Wis. 2d 72, 85, 471 N.W.2d 42 (1991). Individuals frequently have a reduced expectation of privacy while in an automobile. *See* ***State v. Paterson***, 220 Wis. 2d 526, 536, 583 N.W.2d 190 (Ct. App. 1998).

¶14 Given this reduced expectation of privacy and the fact that Hammel only needed reasonable suspicion, not probable cause, we conclude that Hammel did not need to know that Parmer was a citizen informant in order to form a reasonable suspicion that it was Waddell's car that was involved in the hit-and-run accident Parmer described. Hammel was able to test the basis for Parmer's information through verifying the make and model of the vehicle, as well as its license plate number. A tip corroborated by evidence is considerably more reliable than an uncorroborated tip. *See* ***White***, 496 U.S. at 329. The information Parmer provided about the car was specific, and none of it had proved incorrect at the time Hammel made the stop. Hammel also located the car as it turned off of 20th Avenue, just where dispatch had informed him it would be. Considering these facts and circumstances, Hammel's stop of the car was a reasonable level of interference with Waddell's liberty.

¶15 Waddell next contends that, once the officers failed to observe damage to his vehicle, they should have released him, for they no longer had reasonable suspicion that he was involved in an accident, nor that he was intoxicated. In order for a detention to be reasonable, an officer's initial questions must relate to the purpose of the stop. *See* ***United States v. Barahona***, 990 F.2d 412, 416 (8th Cir. 1993). But, if the responses of a traffic detainee and the circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden his inquiry and satisfy those suspicions. *See* ***United States v. Finke***, 85 F.3d 1275, 1280 (7th Cir. 1996) (citing ***Barahona***, 990 F.2d at 416). Hammel observed Waddell while questioning him and noticed that his eyes were watery and his speech was slurred. This observation plus the dispatch report of possible intoxication gave Hammel reason to be suspicious that Waddell was intoxicated. Hammel was justified in broadening his inquiry to include field sobriety tests.

¶16 We next consider the restitution order. Whether a circuit court has authority to order restitution, given a particular set of facts, is a question of law that we review de novo. *See* ***State v. Walters***, 224 Wis. 2d 897, 901, 591 N.W.2d 874 (Ct. App. 1999). If the court has that authority, we then review the terms of the restitution order to determine whether the circuit court erroneously exercised its discretion. *See* ***id.***

¶17 In the case at hand, the circuit court did not have authority to order restitution. The appellant was charged and convicted under WIS. STAT. § 346.63(1)(a), the drunk-driving statute. WISCONSIN STAT. § 346.65(2r)(a) provides that "[i]n addition to the other penalties provided for violation of s. 346.63, a judge may order a defendant to pay restitution under s. 973.20." WISCONSIN STAT. § 973.20(5)(a) states that a restitution order, in any case, may require the defendant to "pay all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing." WISCONSIN. STAT. § 973.20(1g)(a) states that a "'[c]rime considered at sentencing' means any crime for which the defendant was convicted and any read-in crime." "Read-in crime" is defined in § 973.20(1g)(b) as "any crime that is uncharged or that is dismissed as part of a plea agreement, that the defendant agrees to be considered by the court at the time of sentencing and that the court considers at the time of sentencing the defendant for the crime for which the defendant was convicted."

¶18 Victims of crimes for which the defendant was not convicted or for which the defendant did not agree to have read into the record at the time of sentencing should not recover restitution, even if restitution is part of the pre-sentence report which is referred to at trial. *See* ***State v. Szarkowitz***, 157 Wis. 2d

740, 753, 756, 460 N.W.2d 819 (Ct. App. 1990). Victims other than the victim of the charged crime who testified as to "other acts" at trial also should not recover restitution, as they were not victims of the charged crime, nor of any crimes agreed to be read in at sentencing. ***State v. Mattes***, 175 Wis. 2d 572, 582, 499 N.W.2d 711 (Ct. App. 1993).

¶19 Waddell was convicted of operating a motor vehicle while intoxicated, a violation of WIS. STAT. § 346.63(1)(a). He was not charged with, nor was he convicted of, anything connected with the damage to Parmer's vehicle. He did not have any charges in connection with the damage dismissed as part of a plea agreement, nor did he agree to have any crime connected with the damage read in at sentencing. Therefore, Parmer is not the victim of a crime charged or considered at sentencing, and the circuit court erroneously awarded her restitution. We therefore reverse the part of the judgment ordering restitution.

By the Court.—Judgment affirmed in part and reversed in part.

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