COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1831-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JO A. KAIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed.*

¶1 BROWN, P.J.[1] The first issue is whether the arresting officer in this OWI/BAC case had reasonable suspicion to stop Jo A. Kain. We conclude that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the officer had such reasonable suspicion based upon an anonymous tip from another driver that was corroborated by the officer's observations. The second issue is whether Kain should be granted a new trial on grounds that she uncovered newly discovered evidence undermining the officer's account of the incident. Since a newly discovered evidence motion will only be successful if all elements of a five-element test are met and since Kain does not meet three of them, the claim fails. We affirm the judgment and orders of the trial court.

¶2 The arresting officer was informed by dispatch to be on the lookout for a possible drunk or reckless driver in a black, two-door Buick traveling east on East Shady Lane near Irish Road in the Town of Menasha. The information was provided by an anonymous tipster who was following the driver and giving the dispatcher updates by a cellular phone. The tipster stated that the driver rolled through an intersection with a flashing red light and, at one point, forced cars coming from the opposite direction to drive on the shoulder of the road. The officer made visual contact with what turned out to be Kain's vehicle on Allison Drive. He had to speed to catch up with her and estimated that she was driving about fifteen miles an hour over the speed limit. When Kain pulled into a driveway, the officer observed that she pulled up too far and drove onto the grass. She proceeded to back up to straighten out her vehicle.

¶3 The officer stopped his vehicle behind Kain's vehicle, and the tipster, who was driving behind the officer, pulled up and told the officer that he stopped the correct vehicle. The officer smelled alcohol on Kain's breath. Subsequently, the officer issued citations to Kain for operating with a prohibited alcohol concentration and operating while under the influence of an intoxicant.

¶4 Before trial, Kain filed a motion to suppress evidence of her intoxication based on the allegation that the officer did not have reasonable suspicion to stop her. The court denied the motion to suppress. Kain then pled no contest to operating while under the influence of an intoxicant, second offense.

¶5 In a postconviction motion, Kain asked the court to reconsider the motion to suppress and consider the "newly discovered" evidence of Jack Whitcomb, who witnessed the stop and perceived some of the events differently than the officer. Specifically, Whitcomb disagreed with the officer's testimony that he approached Kain while she was still in her vehicle and that when he turned onto Allison Drive he turned on the emergency lights. Kain claimed that Whitcomb would have testified that the officer did not stop Kain until after she had parked her car, grabbed her groceries and was walking toward the house and that the officer did not have his emergency lights on during the incident. The court refused to consider Whitcomb's testimony and denied the postconviction motion. Kain appeals both the denial of the motion to suppress and the denial of the motion for a new trial based on newly discovered evidence.

¶6 Kain first argues that the officer did not have reasonable suspicion to stop her. In reviewing an order regarding suppression of evidence, we will sustain the trial court's findings unless they are against the great weight and clear preponderance of the evidence. *See* ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). However, whether a stop meets statutory and constitutional standards is a question of law that we review without deference to the trial court. *See* ***State v. Krier***, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

¶7 An anonymous tip, without more, seldom justifies an investigative stop. *See* ***Alabama v. White***, 496 U.S. 325, 329 (1990). However, when the details of the anonymous informant's predictions can be verified, there is reason to believe that the caller is honest and well informed about the illegal activity. *See* ***id***. at 331-32. Our supreme court has held that when significant aspects of an anonymous tip are independently corroborated by the police, the inference arises that the informant is telling the truth and an investigatory stop is justified. *See* ***Krier***, 165 Wis. 2d at 676; *see also* ***Richardson***, 156 Wis. 2d at 142.

¶8 Kain argues that the anonymous tip in this case was not sufficiently corroborated because the officer only corroborated the vehicle's description and location, and not Kain's alleged erratic driving. We disagree. First, the corroboration requirement does not require that police independently confirm a certain number of details. Rather, it requires that some corroboration of the tip take place. Here, the corroborated details of the tip are significant: the color and type of vehicle and its location. In situations such as this one, the officer has the right to temporarily freeze the situation so he or she may investigate further. *See* ***State v. Jackson***, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1989).

¶9 Moreover, we disagree with Kain that the officer was unable to identify evidence of erratic driving. First, the officer noticed that when Kain pulled into the driveway, she pulled up too far and her front tires were on the grassy portion of the property. She proceeded to back up to straighten her vehicle. While probably not the most extreme example of erratic driving, this testimony shows reasonable suspicion that Kain was not completely in control of her vehicle. Second, the officer testified that Kain was speeding. This illegal activity alone justified stopping Kain, regardless of how well corroborated the tip was. *See* WIS. STAT. § 968.24.

¶10 Kain next asserts that she should be granted a new trial because she uncovered newly discovered evidence of Whitcomb that would have contradicted the officer's testimony and undermined his credibility. "Due process requires a new trial if the defendant satisfies the following criteria: (1) the evidence was discovered after trial; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue; (4) the evidence is not merely cumulative to the evidence presented at trial; and (5) a reasonable probability exists of a different result in a new trial." ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). The defendant must establish his or her right to a new trial by clear and convincing evidence. *See* ***id***. at 395. Whether due process warrants retrial is a constitutional question that we review de novo. *See* ***id***. Kain fails to establish the first two elements and the final element.

¶11 First, Kain offers no proof that this evidence was discovered "after trial." Kain claims that the evidence was obtained after the *pretrial motion hearing*, but does not say whether she discovered it before deciding to plead no contest. Had she discovered this evidence prior to pleading out the case, she could easily have requested that the hearing be reopened. We hold that she has failed to prove the first element essential to the success of the newly discovered evidence motion.

¶12 Second, Kain does not adequately explain why she was not negligent in failing to discover this evidence before the pretrial hearing. She states that she did not discover it earlier because she was "surprised" by the officer's testimony at the pretrial motion hearing. She does not say what part of the officer's testimony "surprised" her, but we assume that it was the officer's statement detailing that he activated his lights as he turned onto Allison Drive and that he immediately confronted Kain as soon as she pulled into the driveway. Assuming that this is the

testimony which surprised her, the "surprise" claim falls flat. Kain had the responsibility to prepare for the hearing. This included the need to interview all witnesses who might be able to supply relevant information and have them available to testify at the hearing if needed. This court has never heard of a litigant being able to sit on her or his hands until the other side puts in its case and, at that point, claim that she or he then has the right to go out and find witnesses to dispute the other side's story. That is what Kain appears to be arguing for here. Kain should have known that the officer was going to testify in support of reasonable suspicion to stop her. She had the obligation to investigate any and all sources of information which would have any bearing on the subject of reasonable suspicion. She had the further obligation to have witnesses ready to testify should the officer's testimony appear to contradict the facts she had uncovered in her own independent investigation. She cannot blame the state for her own failure to properly prepare her case. Kain has failed to prove the second element in the newly discovered evidence calculus.

¶13 Finally, Kain fails to prove the fifth element—that it is reasonably probable that a different result would be reached at a new trial. Whitcomb's testimony would not have countered the officer's observations that Kain was speeding or that she drove her car onto the grass and had to back up and straighten out her car. The most that Whitcomb's testimony would have accomplished would have been to provide information attacking the officer's credibility. Evidence which would merely impeach the credibility of a witness is not, by itself, a basis for a new trial due to newly discovered evidence. *See* ***Simos v. State***, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972); ***State v. Kimpel***, 153 Wis. 2d 697, 700-01, 451 N.W.2d 790 (Ct. App. 1989).

¶14 It is the law of this state that if the newly discovered evidence fails to satisfy any one of the five required elements, it is not sufficient to warrant a new trial. *See* ***State v. Kaster***, 148 Wis. 2d 789, 436 N.W.2d 891 (Ct. App. 1989). Here, Kain has failed with regard to three of the five elements.

By the Court.—Judgment and orders affirmed.[2]

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

[2] While not important to the rationale of the opinion, we point out that the State spent a considerable amount of time in its brief justifying the stop on the basis of ***State v. Williams***, 225 Wis. 2d 159, 591 N.W.2d 823 (1999). The State should be aware that the judgment in ***Williams*** was vacated by the United States Supreme Court in ***Williams v. Wisconsin***, 120 S. Ct. 1552 (2000), and remanded to the Wisconsin Supreme Court for further consideration in light of ***Florida v. J.L.***, 529 U.S. 266 (2000). ***Williams*** was given no consideration by this court.