

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 29, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 03-0112
03-0232-CR**

**Cir. Ct. Nos. 01TR000851
01CM000331**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

No. 03-0112

COUNTY OF GREEN LAKE,

PLAINTIFF-RESPONDENT,

v.

CLINTON L. DUHM,

DEFENDANT-APPELLANT.

No. 03-0232-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CLINTON L. DUHM,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Green Lake County: ANDREW P. BISSONNETTE, Judge. *Affirmed.*

¶1 NETTESHEIM, J.¹ Clinton L. Duhm appeals from judgments of conviction for operating a motor vehicle with a prohibited blood alcohol concentration (PAC) contrary to WIS. STAT. § 346.63(1)(b) and possession of drug paraphernalia contrary to WIS. STAT. § 961.573(1). Duhm argues that the trial court erred in denying his motions to suppress evidence on grounds that an anonymous tip, which led to his arrest, was insufficient to justify a *Terry*² stop of his vehicle and that the officer's detention of his vehicle exceeded the scope of the stop. We reject Duhm's arguments and affirm the judgment.

FACTS

¶2 On May 8, 2001, the County of Green Lake cited Duhm for PAC contrary to WIS. STAT. § 346.63(1)(b). Later, on November 14, 2001, the State filed a criminal complaint against Duhm alleging possession of drug paraphernalia contrary to WIS. STAT. § 961.573(1). The incident underlying both the citation and complaint occurred on April 22, 2001.

¶3 Duhm responded to both the citation and complaint with motions to suppress evidence arguing (1) lack of reasonable suspicion to stop his vehicle, (2)

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version.

² *Terry v. Ohio*, 392 U.S. 1 (1968).

the scope of the detention exceeded the reason for the stop, and (3) lack of probable cause to arrest.

¶4 The hearing on the motions to suppress established the following facts. On April 22, 2001, Mark Putzke of the Green Lake County Sheriff's Department was working as a patrol officer. At approximately 5:20 a.m., Putzke received a call from dispatch reporting an incident at a residence west of Berlin where an intoxicated individual had spun gravel with his vehicle, damaged a lawn area and threatened a female resident. The caller reported that the driver was named Ryan Quinn, approximately eighteen years of age, and that Quinn was driving a "maroon-colored vehicle." Putzke knew where Quinn lived, so he traveled to that area to check Quinn's residence "to see if he had made it home by that time." Putzke did not observe any vehicles at Quinn's residence so he continued to the area of the call. Putzke was familiar with Quinn's name based on a prior contact, but he was not sure whether he would have recognized Quinn that night.

¶5 Upon approaching the call area, Putzke observed an "older maroon-colored vehicle" that matched the description provided by dispatch. The vehicle was driven by a "younger 18-year-oldish looking white male." Putzke turned to follow the car, which "turned off on one street and then turned off on another and turned off again." Putzke attempted to get the license plate number and called dispatch but received no response. When the car turned another time, Putzke initiated a traffic stop. Although noting that there "was no general direction" to the driver's turns, Putzke did not observe any traffic violations prior to the stop.

¶6 When Putzke made contact with the driver of the vehicle, he requested identification and noted an odor of intoxicants. The driver's license

identified the operator as Duhm. Putzke asked whether Duhm had been drinking and Duhm indicated that he had not. Putzke returned to his patrol car, called in Duhm's driver's license information and learned that Duhm's operating privileges were suspended and that he was not of legal drinking age.

¶7 Putzke reapproached Duhm's vehicle and asked him to step out of the vehicle. At this time, Duhm admitted to having consumed alcohol. After administering field sobriety testing, Putzke placed Duhm under arrest for operating with a suspended license and a violation of the absolute sobriety law. During an ensuing search of Duhm's vehicle, Putzke discovered drug paraphernalia. Based upon a blood test later administered at a hospital, Duhm was cited for PAC.

¶8 In addressing Duhm's motions to suppress, the trial court found that Putzke had reasonable suspicion to stop Duhm's vehicle based on the information in the dispatch call. As for the expansion of the stop, the trial court found:

Once the window comes down and there's a person who's apparently under the age for the purposes of drinking ... driving with the odor of alcohol coming out the window, the investigation has been expanded....

[T]here's now a basis for investigating whether this is someone who is violating absolute sobriety because the driver's license shows that he's under age and there is the odor of alcohol.

Duhm subsequently pled guilty to the PAC and drug paraphernalia possession charges. He appeals, challenging the trial court's denial of his motions to suppress.

DISCUSSION

¶9 When reviewing a motion to suppress evidence, the appellate court upholds the circuit court’s findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). However, the application of constitutional principles to the facts is a question of law that we decide de novo without deference to the circuit court’s decision. *State v. Fields*, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W. 2d 279.

¶10 The parties dispute whether the tip information was sufficiently corroborated or verified pursuant to *Illinois v. Gates*, 462 U.S. 213 (1983). Duhm argues that Putzke did not have reasonable suspicion to conduct a *Terry* stop based on the information provided by the anonymous tip. He contends that Putzke did not observe behavior that corroborated “significant aspects” of the anonymous tip pursuant to standards set in *State v. Richardson*, 156 Wis. 2d 128, 142, 456 N.W.2d 830 (1990). The State responds that the facts of this case justified the stop pursuant to *State v. Rutzinski*, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516. The State argues that Putzke had reasonable suspicion based on the tip information matching the description and location of Duhm’s vehicle and further based on Duhm’s unusual and suspicious driving pattern. The State also argues that *Rutzinski* further justifies Putzke’s investigatory stop because the driver was reported to be intoxicated.

¶11 WISCONSIN STAT. § 968.24 codifies the rule announced by the United States Supreme Court in *Terry*. The statute states, “[A] law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit, or has committed a crime.” Sec. 968.24. In reviewing the validity of a *Terry* stop,

the court considers the totality of the circumstances. *State v. Williams*, 2001 WI 21, ¶¶22, 241 Wis.2d 631, 623 N.W.2d 106. “Reasonable suspicion ... is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the ‘totality of the circumstances—the whole picture.’” *Id.* (citation omitted).

¶12 In this case, the tipster was anonymous. While anonymous tips are generally less reliable than tips from known informants, they can nonetheless form the basis for reasonable suspicion if, suitably corroborated, they exhibit “sufficient indicia of reliability.” *Florida v. J.L.*, 529 U.S. 266, 270 (2000); *Williams*, 241 Wis. 2d 631, ¶¶31; *Rutzinski*, 241 Wis. 2d 729, ¶¶23. “In assessing the reliability of a tip due weight must be given to: (1) the informant’s veracity; and (2) the informant’s basis of knowledge.” *Rutzinski*, 241 Wis. 2d 729, ¶¶18; *Gates*, 462 U.S. at 230.

¶13 In *J.L.*, the police responded to an anonymous tip that a young black male, standing at a particular bus stop and wearing a plaid shirt, was carrying a gun. *J.L.*, 529 U.S. at 268. The Court held that since the police did not see any actual suspicious behavior, nor was there any detail as to who the informant was or how the informant had knowledge of the reported facts, the anonymous tip lacked sufficient indicia of reliability to provide a reasonable suspicion to make a *Terry* stop. *J.L.*, 529 U.S. at 271.

¶14 In *Rutzinski*, a person called on a cell phone reporting the location of a vehicle that was being operated in an erratic manner. *Rutzinski*, 241 Wis. 2d 729, ¶4. The caller stayed on the phone and verified with the dispatcher that the officer had followed the correct truck. *Id.*, ¶6. The officer pulled the truck over

and cited Rutzinski for OWI after he failed an Intoxilizer test. *Id.*, ¶7-8. The tipster also pulled over, but the officer never spoke with the informant. *Id.*

¶15 Rutzinski attempted to compare his case to *J.L.* in that (1) the officer did not observe suspicious behavior, (2) the unidentified informant did not provide predictions for Rutzinski’s future conduct, and (3) “this court cannot create a constitutional ‘drunk driving’ exception” to the reliability test. *Rutzinski*, 241 Wis. 2d 729, ¶30. However, the *Rutzinski* court rejected these arguments, noting that the informant had indicated the vehicle’s location thereby creating an opportunity for the officer to discover his or her identity, and the informant had stopped at the same time as the officer. *Id.*, ¶32. The court also noted that the informant had provided the police with “verifiable information indicating his or her basis of knowledge” based on “personal observations.” *Id.*, ¶33. Finally, the court noted the “imminent threat to the public’s safety” posed by a possible drunk driver. *Id.*, ¶34.

¶16 In concluding that the tip contained sufficient indicia of the informant’s reliability, the supreme court additionally stated: “the information in the tip exposed the informant to possible identification and, therefore, to possible arrest if the tip proved false; the tip reported contemporaneous and verifiable observations regarding Rutzinski’s alleged erratic driving, location, and vehicle’s description; and Officer Sardina verified many of the details in the informant’s tip.” *Id.*, ¶38.

¶17 Duhm argues that the anonymous tip in this case did not provide Putzke with enough unique details about the suspected vehicle to validate the stop. He contends that a vehicle that is both “older” and “maroon” is too vague a description that does not satisfy the standards of the case law. We disagree for a

variety of reasons. First, the anonymous tip was reasonably reliable. Like the caller in *Rutzinski*, the informant here created an opportunity for the police to learn his or her identity. *Id.*, ¶32. The informant called from a residence in Berlin stating that Ryan Quinn was intoxicated, and had spun gravel with his vehicle, damaged a lawn area and threatened a female resident. This information reasonably suggested that the informant had personal knowledge of the events reported and would be in the area of the reported activity when the police responded to the location. In fact, a police officer was dispatched to the location of the reported incident. It was also reasonable to believe that the informant knew that he or she could be arrested for a false report. Moreover, the tipster provided specific information by identifying the suspect by name and reporting that he was intoxicated.

¶18 Second, Putzke’s observations jibed with certain of the information provided in the tip. Duhm’s vehicle generally matched the description provided by the tipster and Duhm’s appearance (“younger 18-year-oldish looking white male”) was generally consistent with the age and appearance of Ryan Quinn. Duhm argues that numerous innocent drivers could have been pulled over based on the general description of the vehicle. If we were to limit the facts to just that information, we might agree with Duhm. But he overlooks other important and relevant circumstances. Putzke made his observations between 5:20 and 5:30 a.m. when there were few vehicles on the road and Duhm’s vehicle matched the description from the tip. Furthermore, Putzke observed Duhm’s vehicle in the vicinity of the location reported by the tipster.

¶19 Third, the tipster reported that the operator of the vehicle was intoxicated. As noted above, *Rutzinski* has recognized a police officer’s need to act when a “tip suggest[s] an imminent threat to the public safety.” *Id.*, ¶26:

[T]he Fourth Amendment and Article I, Section 11 do not require the police to idly stand by in hopes that their observations reveal suspicious behavior before the imminent threat comes to its fruition. Rather, it may be reasonable for an officer in such a situation to conclude that the potential for danger caused by a delay in immediate action justifies stopping the suspect without any further observation.

Id. Thus, the potential danger of a suspected drunk driver gave Putzke additional reason to investigate this vehicle. Although unrelated to the tip, we also take note that Putzke observed the Duhm vehicle traveling in a haphazard route suggesting no apparent destination.

¶20 Finally, Duhm argues that Putzke should not have detained him after learning he was not the suspect. Putzke testified that he did not learn that Duhm was not Ryan Quinn until after asking Duhm to produce some identification.³ It was during this phase of the encounter that Putzke detected an odor of intoxicants and noted that Duhm appeared to be under twenty-one years old. Although the purpose of the stop was to learn if the operator of the suspect vehicle was Ryan Quinn, Putzke was entitled to detain Duhm once he suspected underage drinking.

¶21 For these collective reasons, we hold that the information provided by the anonymous tipster was sufficiently corroborated. That information, coupled with Putzke's additional observations of the vehicle, constituted reasonable suspicion pursuant to WIS. STAT. § 968.24 and authorized Putzke to stop Duhm's vehicle.

CONCLUSION

³ Duhm's brief contradicts the record by stating that Putzke immediately observed that Duhm was not Ryan Quinn.

¶22 We conclude that Putzke had sufficient corroboration of the information provided in the anonymous tip. That information, coupled with Putzke's observations of the operation of the vehicle, constituted reasonable suspicion to stop Duhm's vehicle. We further conclude that the odor of intoxicants emanating from Duhm's vehicle provided justification for Putzke's further detention of Duhm once Putzke learned that Duhm was not Ryan Quinn. We uphold the trial court order denying Duhm's motions to suppress and we affirm the judgments.

By the Court.—Judgments affirmed.

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

