

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2009

David R. Schanker
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 No. 2009AP198-CR

Cir. Ct. No. 2006CT179

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KALEB D. KUHN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: JAMES MILLER, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Kaleb Kuhn appeals the circuit court's judgment convicting him of operating while under the influence of an intoxicant as a third

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

offense and operating with a revoked driver's license as a second offense. Kuhn also appeals the circuit court's order denying his motion for postconviction relief. He argues that the circuit court erred in concluding that a police officer had reasonable suspicion to stop his car. I affirm the judgment and order.

Background

¶2 At approximately 6:11 a.m., a Columbia County deputy sheriff received a dispatch regarding a citizen complaint about a car squealing its tires, leaving black marks, and producing smoke while accelerating out of a driveway. This occurred at an address on County Highway A in the Town of Cortland. The car was described by the complainant as a black, late 1970s model Grand Prix or Oldsmobile. The complainant believed that the car had parked at a residence just east of the complainant's residence.

¶3 The officer was some distance away from the scene and began traveling toward that location. It took him about twenty or twenty-five minutes of driving to reach the area. When he got to the vicinity, he observed a black, older vehicle that he believed matched the complainant's description heading in his direction. He stopped the vehicle, a black 1987 Pontiac. The officer described the area of the stop as a "lightly traveled" stretch of road, approximately one mile from the location of the complained-of conduct.

¶4 The stop led to the charges against Kuhn. Kuhn moved to suppress all evidence derived from the stop, arguing that the officer's information at the time of the stop provided nothing more than a hunch that Kuhn's car might be involved in illegal activity. The court denied the motion, concluding that the officer was justified in stopping Kuhn. The court acknowledged that Kuhn's vehicle was not a late 1970s model, as described by the citizen complainant. The

court concluded, however, that a black, older model General Motors vehicle was sufficiently similar given the other circumstances. Those circumstances included that it was early in the morning, that the stop occurred in a rural area, that the car was coming from the same direction as the location of the complained-of conduct, and that the officer stopped the car within a mile of that location.

¶5 In a postconviction motion, Kuhn argued that the stop was invalid because the citizen complainant had described activity that was not criminal in nature. Kuhn also argued that, when the court decided the issue of reasonable suspicion, it failed to consider certain relevant factors from the case law. The circuit court denied Kuhn's motion, concluding that the described activity could constitute disorderly conduct and that the court had, in effect, applied the relevant factors even if it had not cited the case law by name.

Discussion

¶6 Kuhn makes two arguments that are similar to those he made in his postconviction motion. He first argues that his conduct at most constituted a non-criminal traffic violation and that, under *State v. Krier*, 165 Wis. 2d 673, 478 N.W.2d 63 (Ct. App. 1991), there must be a possibility that the conduct complained of is criminal before police may stop a vehicle based on a citizen complaint. Kuhn asserts that “[t]here is no legal mechanism or legal support for” allowing police to stop a vehicle based on a citizen complaint of a non-criminal traffic violation.

¶7 I reject this argument for two reasons. First, *Krier* does not set forth a clear holding that a police stop based on a citizen complaint must always involve conduct that could be criminal. Second, even if it did, Kuhn's argument fails to acknowledge more recent cases that have clarified that, as a general matter, police

may stop a vehicle based on reasonable suspicion of a non-criminal traffic violation. See *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999) (“[A]n officer may make an investigative stop if the officer ‘reasonably suspects’ that a person has committed or is about to commit a crime, *or reasonably suspects that a person is violating the non-criminal traffic laws.*” (emphasis added; footnote and citations omitted)); *State v. Colstad*, 2003 WI App 25, ¶¶11-13, 260 Wis. 2d 406, 659 N.W.2d 394. Although police in those cases may not have been relying on citizen complaints, nothing about Kuhn’s argument persuades me that this difference should be dispositive, so long as the information provided to the police is otherwise reasonably relied upon.²

¶8 This brings me to Kuhn’s second argument. Kuhn argues that, under six factors set forth in *State v. King*, 175 Wis. 2d 146, 499 N.W.2d 190 (Ct. App. 1993), the officer in this case could not have relied on the citizen complaint to form a reasonable suspicion that Kuhn was engaging in illegal activity. Those six factors are:

(1) the particularity of the description of the offender or the vehicle in which he fled;

(2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the unlawful activity occurred;

(3) the number of persons about in the area;

² As already indicated, the circuit court concluded that Kuhn’s conduct might constitute disorderly conduct, potentially a criminal offense. I do not address whether the circuit court could be affirmed on this ground. This court may affirm on a ground different than that relied on by the circuit court. *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995).

- (4) the known or probable direction of the offender's flight;
- (5) observed activities of the person stopped;
- (6) reason to believe that the person or vehicle stopped has been previously involved in illegal activity of the type presently under investigation.

See id. at 153; *see also State v. Guzy*, 139 Wis. 2d 663, 676-78, 407 N.W.2d 548 (1987).

¶9 The State agrees with Kuhn that I should apply the *King* factors. The State argues, however, that the factors, on balance, favor the State. I agree.

¶10 The first and third factors strongly weigh in the State's favor. The complainant's description of the car, although not including a license plate number and imprecise as to the model year, was particular in the sense that the car described was a relatively uncommon vehicle. There was a low probability that a different black, twenty-year-old General Motors sedan just happened to be in the vicinity, heading away from the scene, on a lightly traveled rural stretch of road at around 6:00 a.m. Indeed, Kuhn concedes that the third factor weighs in favor of the State because traffic was "thin" at the time in question.

¶11 The second factor also favors the State because Kuhn was spotted in a location and driving in a direction consistent with the reported behavior. Kuhn disputes this, pointing to the fact that the complainant reported that the offending car had parked. But cars are highly mobile. Here, given that twenty or twenty-five minutes had passed since the car was thought to be parked, the low probability that two vehicles like the one described would be in the vicinity, and the direction in which Kuhn's car was traveling (away from the location of the

complained-of conduct), the officer could reasonably infer that the car he spotted could be the offending car and had only temporarily parked.

¶12 I acknowledge that the fourth, fifth, and sixth factors do not add to the State's case. There was no known or probable direction of flight (as indicated, the complainant reported that the car was parked), no evidence that the officer observed additional suspicious activity before stopping Kuhn, and no evidence that the officer knew that Kuhn was previously involved in any tire squealing or similar activity. Nonetheless, the strength of the first three factors is enough to persuade me that the factors, on balance, favor the State.

¶13 *King* notes four additional factors that courts may consider. *See King*, 175 Wis. 2d at 153. Those factors are:

(1) alternative means available to the officer to investigate short of making the stop;

(2) the opportunity for further investigation, if action was not taken immediately;

(3) whether the description of the individual known to the officer would allow him to quickly identify the individual so that there would be minimal intrusion; and

(4) the severity or inherently dangerous nature of the illegal activity reported.

See id.

¶14 All but one of these factors bolsters the State’s position. Squealing tires, leaving black marks, and producing smoke while accelerating out of a driveway in a vehicle may not be “severe” illegal activity or inherently dangerous. However, the record suggests no realistic alternative means of investigation. Had the officer proceeded to the complainant’s residence and not stopped Kuhn’s car, the officer would likely have lost the opportunity to conduct a brief, minimally intrusive investigative stop to explore the possibility that Kuhn was the offender.

By the Court.—Judgment and order affirmed.

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

