COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1092-CR **Cir. Ct. No. 2009CM493**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN J. NEFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed*.

¶1 ANDERSON, J.[1] John J. Neff appeals from a judgment of the circuit court. Specifically, he challenges an order denying his motion to suppress

[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.

physical evidence obtained after he was stopped by a city of Mequon police officer. Neff contends that the tip provided by a citizen informant was not sufficiently detailed to constitute reasonable suspicion to conduct an investigatory stop. We disagree and affirm the judgment.

¶2 After a criminal complaint charging Neff with operating a motor vehicle while intoxicated, third offense, and operating a motor vehicle with a prohibited blood alcohol concentration, third offense, was filed, Neff filed a motion to suppress, asserting that the police officers had neither reasonable suspicion nor probable cause to support an investigatory stop of his vehicle. After a short evidentiary hearing, the circuit court denied the motion.

¶3 The only witness at the suppression hearing was Officer Mandy Rudolph of the City of Mequon Police Department. She testified that, based on a call, she and Officer Moertl were dispatched to the Sybaris Pool Suites in the city of Mequon:

> The call type was a disorderly conduct. And the information I received was that one of the hotel clerks from the Sybaris called because two subjects were intoxicated and one of them had urinated outside in the parking lot.
>
> ….
>
> The clerk had advised our dispatch that the subjects refused to leave the property.

¶4 According to Rudolph, she arrived first at the Sybaris, parked her squad car and got out to talk to a female standing in the parking lot. The female, whom Rudolph did not identify, acknowledged she made the phone call and pointed out a pickup truck and SUV exiting the parking lot as being driven by the two individuals she had complained about. By this time, Moertl had arrived. It

was decided that Moertl would stop the pickup and Rudolph the SUV. Rudolph identified Neff as the driver of the SUV.

¶5 Based upon this terse testimony, the circuit court ruled:

> Okay. Well, in this case the officers were dispatched because of a report from the Sybaris, the clerk at the Sybaris, the two people in the parking lot causing a problem. One of the people in the parking lot was seen urinating. Officers responded. They saw the vehicles leaving the parking lot.
>
> ….
>
> Based upon that report I don't necessarily believe that she had the name of the individual, but they were identified—the person was identified as being associated with the Sybaris. She saw this person standing outside. Briefly spoke to her before authorizing the stop. It certainly isn't an absolute, but I'm satisfied under the circumstances that the officers had a reasonable suspicion to stop both of these vehicles including the one being driven by Mr. Neff. Based upon the information that she had received plus reasonable inferences therefrom. So I'm going to deny the motion to suppress.

¶6 Neff appeals, asserting that "the information possessed by [Rudolph] … was not sufficient to give rise to probable cause for arrest or reasonable suspicion to conduct a further investigation."

¶7 Both Neff and the State agree that whether the physical evidence should be suppressed depends upon the application of ***Florida v. J.L.***, 529 U.S. 266 (2000), and ***State v. Williams***, 2001 WI 21, 241 Wis. 2d 631, 623 N.W.2d 106, to the undisputed facts. Predictably, they disagree on the result. This appeal involves the application of constitutional standards to undisputed facts, a question of law which we review de novo. ***State v. VanLaarhoven***, 2001 WI App 275, ¶5, 248 Wis. 2d 881, 637 N.W.2d 411.

¶8 The temporary detention of a citizen constitutes a seizure within the meaning of the Fourth Amendment and triggers Fourth Amendment protections. ***State v. Harris***, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996). A police officer may, in the appropriate circumstances, detain a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. *See* ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). When police make an investigative stop of a person, it is not an arrest, and the standard for the stop is less than probable cause. ***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) (citation omitted). 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* ***State v. Richardson***, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990). Here, part of the circumstances we must evaluate includes an anonymous tip. Both ***J.L.*** and ***Williams*** address the examination of the reliability of the anonymous tip and whether the police are justified in acting on the anonymous tip.

¶9 In ***J.L.***, the United States Supreme Court was skeptical that an anonymous tip could create the necessary reasonable suspicion to support a ***Terry*** stop, noting that "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." ***J.L.***, 529 U.S. at 270 (quoting ***Alabama v. White***, 496 U.S. 325, 329 (1990)). The court ultimately recognized that "there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.'" ***J.L.***, 529 U.S. at 270 (quoting ***White***, 496 U.S. at 327).

¶10 In ***Williams***, the Wisconsin Supreme Court applied ***J.L.*** to determine whether "an anonymous tip containing a contemporaneous report of drug trafficking, combined with independent observations and corroboration of details from the tip justified the investigatory stop."[2] ***Williams***, 241 Wis. 2d 631, ¶2. The majority applied a "totality of the circumstances" approach and found that the anonymous tip contained a number of components indicating its reliability. ***Id.***, ¶22. The court found "myriad distinctions" between the anonymous tip before it and the tip in ***J.L.*** ***Williams***, 241 Wis. 2d 631, ¶31. The supreme court concluded that the anonymous tip in ***Williams*** was much more than the "bare-boned" tip in ***J.L.*** ***Williams***, 241 Wis. 2d 631, ¶47. The court found that the tip was substantial in both quality and quantity. ***Id.*** In considering the totality of the circumstances, the court was compelled to reach the conclusion that cumulative details of the tip and the officers' independent corroboration provided reasonable suspicion that crime was afoot. ***Id.***

¶11 The Wisconsin Supreme Court also examined ***J.L.*** in ***State v. Rutzinski***, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516. ***Rutzinski*** makes clear that ***J.L.*** requires the police to corroborate an anonymous tip:

> [T]o corroborate a tip, the [United States Supreme] Court explained, the police must do more than verify easily obtainable information that tends to identify the suspect; they must verify information that tends to indicate the informant's basis of knowledge about the suspect's alleged illegal activity. Hence, a totally anonymous tip must contain not only a bald assertion that the suspect is engaged in illegal activity (*e.g.*, that the suspect illegally possesses a

[2] ***Williams*** was before the court for a second time. The first decision of the court was vacated by the United States Supreme Court and remanded for further consideration in light of ***Florida v. J.L.***, 529 U.S. 266 (2000). ***State v. Williams***, 2001 WI 21, ¶1, 241 Wis. 2d 631, 623 N.W.2d 106.

> gun), but also verifiable information indicating how the tipster came to know of the alleged illegal activity (i.e., the informant's basis of knowledge). In [***J.L.***] … the anonymous tip did not contain any information such as a prediction regarding the suspect's future behavior which, if corroborated, would indicate the informant's basis of knowledge.

Rutzinski, 241 Wis. 2d 729, ¶28 (citations omitted).

¶12 We now turn to the anonymous tip in this case. The tip was that two individuals were possibly intoxicated in the Sybaris parking lot, one of them had urinated on the property and they refused to leave. The tip contains an assertion of criminal activity: urinating in public could be a violation of the city of Mequon's municipal ordinances.[3] The tip was more than a bare-boned tip. *See* ***Williams***, 241 Wis. 2d 631, ¶32. It contained more than information readily observable by a passerby. *See* ***id.***, ¶30. (1) There is a reasonable inference that the tipster observed the parties from inside of the Sybaris; (2) Another reasonable inference is that the tipster talked to the parties because she reported that they refused to

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[3] CITY OF MEQUON, WIS., ORDINANCE § 46-130:

> No person shall within the limits of the City of Mequon:
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> **(1)** In any public or private place engage in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct which tends to cause or provoke an immediate disturbance of public order or tends to disturb any other person or persons.
>
> **(2)** Intentionally cause, provoke or engage in any fight, brawl, riot or noisy altercation.
>
> **(3)** Operate a vehicle in such a manner on any public street, private property, or parking lot that causes unnecessary noise.

http://library.municode.com/index.aspx?clientId=13876&stateId=49&stateName=Wisconsin (last visited Oct. 8, 2010).

leave; (3) The tipster put her identity at risk by reporting the activity in a telephone call to the City of Mequon Police Department. *See* ***id.***, ¶34; (4) The tipster further identified herself by waiting outside of the Sybaris and talking face-to-face with Rudolph. This is significant because "more likely than not, the informant is a genuinely concerned citizen as opposed to a fallacious prankster." *See* ***id.***, ¶35; (5) The tipster pointed out the vehicles being driven by the parties as they exited the parking lot of the Sybaris; (6) The parties exiting the parking lot shortly after Rudolph arrived creates the reasonable inference of their consciousness of guilt. *See* ***State v. Winston***, 120 Wis. 2d 500, 505, 355 N.W.2d 553 (Ct. App. 1984).

¶13 Like ***Williams*** and ***Rutzinski***, there is information that the tipster put her identity at stake. It was known the tipster was calling from the Sybaris after observing the parties and talking to them, and the tipster was outside, waiting for police officers, when Rudolph arrived. *See* ***Williams***, 241 Wis. 2d 631, ¶¶34-35. Like ***Williams,*** the responding officer observed the two parties leave the parking lot shortly after her arrival; while she did not observe suspicious activity—such as furtive movements or no license plate—under the totality of the circumstances, she could reasonably infer they were exhibiting a consciousness of guilt. *See* ***id.***, ¶¶43-45.

¶14 The conclusion reached in ***Williams*** is applicable to this case:

> The information upon which the police proceeded was substantial in both quality and quantity. The anonymous tip was supported by a wide array of indicia of reliability—contemporaneous eyewitness account accompanied by details promptly verified by the police. A reliable tip, such as this one, provided information of substantial quality. Added to that was information of not insignificant quantity—[two vehicles leaving the parking lot shortly after] the police's arrival. Accordingly, consideration of the totality of circumstances compels the conclusion that [Rudolph] acted reasonably in deciding to detain [Neff]. We have here the necessary "cumulative detail, along with

> reasonable inferences and deductions which a reasonable officer could glean therefrom, [that] is sufficient to supply the reasonable suspicion that crime is afoot and to justify the stop." We therefore conclude that the State has met its burden of showing that the investigatory stop of [Neff] was justified—that there was reasonable suspicion.

Id., ¶47 (citations omitted).

By the Court.—Judgment affirmed.

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