

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 12, 2011

A. John Voelker
Acting 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. 2010AP3125-CR

Cir. Ct. No. 2010CF62

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

KAREN M. LAKE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Walworth County:
ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. The State appeals from an order granting Karen M. Lake's motion to suppress the evidence obtained as a result of a traffic stop prompted by a telephone tip. The State contends that the circuit court incorrectly

determined that the traffic stop was not based upon reasonable suspicion. We disagree and affirm.

¶2 The facts we recite are from the transcripts of the tipster's 911 call and the suppression hearing. At 9:53 p.m. on June 3, 2009, Walworth County Sheriff's Department dispatch received a telephone call from a person identifying himself as Michael Donahue. Donahue told dispatch (punctuation as in original):

... I've been hearing some stuff around town and I'm really concerned for my kids well being and I just got a call that my kids are 8 and 7 it's a school night and they're out at Hemingway's bar out there at ten o'clock at fricking night and I don't know what I should do about it I wanted to call somebody and its ridiculous and I think she's out there drinking and driving with my kids.

....

uh and yeah she's been drinking she's buckling the kids in right now my cousin spotted her out there and my—

....

She's getting ready to back out of there right now I guess my kids have been in there all night and she's been there drinking—

.....

And I've been hearing that she's been going out and stuff and leaving the kids home with a minor—huh? Turned towards Lake Geneva? Yeah she took a left going down towards Lake Geneva so she's probably going through Lake Geneva to get to Williams Bay. My cousin happened to be out there and spotted her and I freaking am furious that they're sitting in—that my young kids are sitting in a bar all night fricking on a school night.

¶3 Dispatch then radioed an announcement to law enforcement, advising officers to “attempt to locate a possible intoxicated driver with children in the car.” The bulletin gave the vehicle description Donahue had provided, its predicted route of travel and possible destination and Lake's full name and birth

date. It also advised that Lake's license was valid and that there "should be two children in the car."

¶4 Shortly after hearing the "attempt-to-locate" bulletin, City of Lake Geneva Police Officer Lucas Hansen saw a vehicle matching the description in the alert. He followed the vehicle for about a hundred feet and ran the license plate number, which confirmed the vehicle was registered to Lake. Hansen could not see the driver, but could see silhouettes of passengers in the back seat of the vehicle who, from his vantage point, he thought were adults. Hansen observed no erratic driving or equipment violations. He initiated a traffic stop based solely on the "attempt-to-locate" dispatch.

¶5 The stop resulted in evidence that Lake was driving while impaired in some way. The State ultimately filed an information charging Lake with one count of operating a motor vehicle with a detectable amount of a restricted controlled substance in her blood, third offense, with a minor in the vehicle.

¶6 Lake moved to suppress all evidence derived from the stop. After an evidentiary hearing, the court asked the parties to brief whether the facts available to Hansen justified an investigative stop, "and/or is it enough to justify a community caretaker stop."¹ Based on the hearing and the briefs, the court orally ruled that Hansen did not have reasonable suspicion to stop Lake, and granted her motion to suppress. The State appeals.

¹ Surprisingly, the State did not take up the court's invitation to address the stop in the context of an officer's community caretaker role. On appeal, the State says only that, whether or not Hansen himself believed there was probable cause, he "rightly believed he needed to check the welfare of the children based upon the father's concern." If this is the State's community caretaker argument, it is too undeveloped for us to address and we decline to do so. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶7 The State again limits its argument to whether the tip to dispatch was sufficiently reliable for Hansen to conduct an investigative stop. The relevant facts are undisputed, and the record indicates nothing to suggest the court’s factual findings are erroneous. Thus, our review is limited to whether the traffic stop was supported by reasonable suspicion, in light of the totality of the circumstances. *See State v. Rutzinski*, 2001 WI 22, ¶¶17-18, 241 Wis. 2d 729, 623 N.W.2d 516.

¶8 Whether a traffic stop is reasonable is a question of constitutional fact, which presents a mixed question of law and fact. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. We uphold the circuit court’s factual findings unless they are clearly erroneous but independently review the application of those facts to constitutional principles. *Id.* The necessary question is whether there exist “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the intrusion of the stop. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The State bears the burden of establishing that an investigative stop is reasonable. *Post*, 301 Wis. 2d 1, ¶12.

¶9 The State argues that, through dispatch, Hansen had reasonable and specific facts to support the initial stop: he received information from an identified tipster that a vehicle matching the description of Lake’s was in that vicinity and that the driver possibly was intoxicated and had young children in the car.

¶10 In determining whether a tip is reliable, a reviewing court should consider the informant’s veracity and basis of knowledge. *See Rutzinski*, 241 Wis. 2d 729, ¶18. The focus is less on a citizen informant’s “personal reliability” than on his or her “observational reliability.” *See State v. Kolk*, 2006 WI App 261, ¶13 298 Wis. 2d 99, 726 N.W.2d 337. Thus, Donahue’s reliability must be

evaluated “from the nature of his report, his opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation.” *Id.* (citation omitted).

¶11 That is where the circuit court got stuck. We agree. On close examination, the reliability of Donahue’s tip wanes. Donahue related only his own name and phone number and relatively insignificant details about his ex-wife and her vehicle, but provided no personal observations. Donahue’s tip may take on greater weight because he identified himself. See *Rutzinski*, 241 Wis. 2d 729, ¶32. Nothing in the record indicates that Donahue was known to the police such that they knew he was a reliable informant, however. Therefore, the State must establish the basis of his knowledge.

¶12 It is not clear from Donahue’s tip whether the unidentified caller was his also-unidentified cousin. Assuming they are the same person, the caller/cousin personally “spotted” Lake in a particular bar and, we may reasonably infer, followed Lake and relayed her path of travel to Donahue. Importantly, however, Donahue did not inform dispatch that the caller, his cousin or anyone else observed Lake behaving or driving in a manner that even suggested intoxication.

¶13 A *Terry* stop must be justified by evidence or observations known to the police officer prior to the detention. Here, in the hundred feet or so that he followed Lake, Hansen did not independently observe any suspicious behavior. His information came solely from a tip from an ex-husband who knew identifying particulars about his ex-wife, her vehicle and her address but related no personal observations of anything suspicious. Even the second-hand observations Donahue conveyed did not suggest that a crime was being or would be committed.

¶14 A tip is firmly within the reliability spectrum when a tipster provides his or her name and relays an eyewitness account. *State v. Sisk*, 2001 WI App 182, ¶¶3, 8-11, 247 Wis. 2d 443, 634 N.W.2d 877. Conversely, without veracity, basis of knowledge, or corroboration of *significant* details, a tip is not sufficiently reliable to support reasonable suspicion for an investigative stop. *See Rutzinski*, 241 Wis. 2d 729, ¶¶18-25.

¶15 Like the circuit court, we conclude that the caller, the father, dispatch and the officer all acted appropriately. We must conclude, however, that the State has failed to carry its burden of establishing that reasonable suspicion supported the investigative stop.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

