

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 14, 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. 2011AP1518-CR

Cir. Ct. No. 2010CT527

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN S. WOLD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed.*

¶1 NETTESHEIM J.¹ Brian S. Wold appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI), third offense. Wold argues that the arresting officer did not have reasonable suspicion to stop his vehicle. In the alternative, he argues that even if

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

reasonable suspicion existed at one point, it dissipated by the time of the stop. We reject both arguments. Wold's conviction is affirmed.

FACTS

¶2 At the suppression hearing, Manitowoc Police Officer Adam Sohlden testified to the facts underlying the stop. Just after midnight on July 3, 2010, police dispatch advised Sohlden that a "named complainant" (tipster) had called in a complaint of a "possible intoxicated driver" driving "all over the roadway"; that the tipster had provided the make, license plate number and location of the driver's vehicle; and reported that the vehicle was "[w]eaving in the roadway, [not] staying in its proper lane [and] going slower than the speed limit." Upon arrival at the scene, Sohlden spotted a vehicle matching the tipster's description and also observed "the caller's vehicle," which he indicated had been following the suspect vehicle. Before pulling over the suspect vehicle, Sohlden followed it for approximately one mile. Sohlden did not observe a traffic violation during this time. Wold was identified as the driver of the vehicle and was subsequently arrested for OWI.

¶3 After his arrest, Wold moved to suppress the evidence obtained from the stop on the grounds that he was stopped without reasonable suspicion because the tipster was unreliable and the arresting officer did not independently observe illegal driving before pulling him over. The circuit court denied the motion. In finding that reasonable suspicion existed, it noted "the jury instruction in this case for intoxicated driving specifies that the impaired ability to operate need not be demonstrated by particular acts of unsafe driving." The court explained that intoxicated drivers "don't necessarily constantly display indications of impairment" and here "the observations of the citizen witness and the observations

of the officer are not necessarily inconsistent with each other.” The court also explained its public policy reasoning:

[O]n balance we want the officers to make the most thorough investigation they can, consistent with the needs of public safety as recognized in [*State v.*] *Rutzinski*, [2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516,] and I don’t think that once you have reasonable suspicion it can be lost based on the failure of the officer in this case to observe any other violations.

¶4 Thereafter, Wold pled no contest and was convicted of driving while intoxicated. He appeals.

¶5 An officer may perform an investigatory stop of a vehicle for a noncriminal traffic violation if the officer has reasonable suspicion that a violation occurred. *State v. Colstad*, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 659 N.W.2d 394. To decide whether circumstances demonstrate reasonable suspicion, we look at all of the information available to the officer at the time the stop was made. *See State v. Guzy*, 139 Wis. 2d 663, 679, 407 N.W.2d 548 (1987).

¶6 Whether there is reasonable suspicion to conduct a traffic stop is a question of constitutional fact. *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. We apply a two-step standard of review to questions of constitutional fact. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. First, we review the circuit court’s findings of fact and uphold them unless they are clearly erroneous. *Id.* Second, we review the determination of reasonable suspicion de novo. *Id.* Reasonable suspicion should be analyzed in light of the totality of the circumstances. *See Popke*, 317 Wis. 2d 118, ¶27.

¶7 On appeal, Wold essentially argues that the traffic stop was not supported by reasonable suspicion because it was based on an unreliable

complainant's tip. Acknowledging that Sohlden was told by dispatch that a "named complainant" called in a tip of a possible intoxicated driver, Wold opines that "[t]here is virtually nothing further in the record which provides any information that the caller's identity can be ascertained." Wold contends that *Rutzinski* "pointed out either of two circumstances to support identification": where the police could discover the caller's identity (1) by tracing the caller's vehicle license plates or (2) by directing the caller's vehicle to the side of the road. Wold's depiction of what *Rutzinski* teaches for assessing tipster reliability is too limited.

¶8 *Rutzinski* specifically informs "there is no per se rule of reliability." *Rutzinski*, 241 Wis. 2d 729, ¶18. Instead, reliability considerations "should be viewed in light of the 'totality of the circumstances,' and not as discrete elements of a more rigid test." *Id.* That said, we agree with Wold that *Rutzinski* gave great weight to indicia of reliability when an informant "expose[s] him- or herself to being identified," and thus, exposes him- or herself to arrest if the tip proves to be fabricated. *See id.*, ¶32.

¶9 Here, Sohlden's uncontroverted testimony belies Wold's claim that "the record is devoid" of facts to show the tipster was capable of being identified. Sohlden testified that when he arrived on the scene he not only observed a vehicle matching the description of the suspected intoxicated driver, he observed the tipster's vehicle. Because this exposed the tipster to being identified and arrested if the tip proved to be false, this "threat of arrest could lead a reasonable police officer to conclude that the informant is being truthful." *See id.* Thus, it was not clearly erroneous for the circuit court to find that under *Rutzinski* the tipster was reliable.

¶10 Having addressed Wold’s unreliable tipster argument, we turn to whether reasonable suspicion existed. At the time of the stop—not insignificantly, just after midnight²—Sohlden was acting on a reliable tip that a “possible intoxicated driver” was in a vehicle weaving in the roadway and going slower than the speed limit. Upon arriving at the scene, he spotted a vehicle matching the make and license plate number of this possible intoxicated driver and he also observed the tipster’s vehicle. We conclude that, given these facts, Sohlden had reasonable suspicion to stop Wold.

¶11 We further conclude that reasonable suspicion did not dissipate when Sohlden did not independently observe Wold commit a traffic violation before making the stop. Wold argues that the one-mile distance and the time it took to travel that distance dissipated any reasonable suspicion that may have existed. He bases this argument on “common sense and everyday experience.” We are not persuaded that Sohlden’s brief follow time dissipated his reasonable suspicion. Rather, we recognize, as the circuit court did, that the impaired ability to operate a vehicle does not require the continual commission of erratic driving, nor does it require commission of even one traffic violation. We also agree with the court’s consideration of public safety. “Indeed, a drunk driver is not at all unlike a ‘bomb,’ and a mobile one at that.” *Id.*, ¶35 (citation omitted). In light of the potential for imminent danger that intoxicated drivers present, the tipster’s allegations indicating that Wold may have been intoxicated supplemented the reliability of the tip and further justified Sohlden’s investigative stop. *See id.*

² The time of day is an important factor in determining whether a law enforcement officer had a reasonable suspicion. *See State v. Allen*, 226 Wis. 2d 66, 74-75, 593 N.W.2d 504 (Ct. App. 1999) (“[T]he time of day is another factor in the totality of the circumstances equation.”).

Given all the facts including the brief follow time, reasonable suspicion did not dissipate at the time of the stop.

CONCLUSION

¶12 Under the totality of the circumstances, Sohlden had reasonable suspicion to stop Wold's vehicle. And, reasonable suspicion did not dissipate at the time of the stop. We therefore affirm Wold's conviction.

By the Court.—Judgment affirmed.

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