COURT OF APPEALS
DECISION
DATED AND FILED

August 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP2137-CR
2012AP253-CR

Cir. Ct. No. 2010CM110

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL P. GREEN,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Kenosha County: CHAD G. KERKMAN, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] Michael P. Green appeals from judgments of conviction for resisting an officer, operating a motor vehicle after revocation

[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.

(OAR), and operating a motor vehicle while under the influence of intoxicants (OWI), fourth offense. Green contends that the arresting officer did not have the requisite reasonable suspicion to stop his vehicle and, therefore, the trial court erred in denying his pretrial motion to suppress evidence. Green also contends that there was insufficient evidence to support the jury's finding that he resisted arrest and that the trial court erred in denying his postconviction motion to dismiss that charge or grant a new trial. We reject Green's challenges. We affirm the judgments and order.

BACKGROUND

¶2 The facts surrounding Green's arrest were testified to at a hearing on his motion to suppress. Officer William Kohler of the Village of Pleasant Prairie Police Department testified that on January 7, 2010, at approximately 2:00 a.m., he received a dispatch to the PDQ gas station regarding a possible intoxicated driver. The dispatch indicated that an attendant at the gas station stated that the subject was male and also provided the make, model and license plate number of the vehicle. Kohler recognized the attendant, Kelley, as someone he had contact with in the past during the course of his employment as she had reported gas drive-offs, thefts, and suspicious activity in the area. Kohler testified that Kelley had proved to be a reliable source of information.

¶3 The recording of the 911 call indicates that Kelley also informed dispatch of the suspect individual's name and noted that the vehicle was turning into an apartment complex. Based on the information provided, Kohler began checking the area for the vehicle. Kohler turned into the apartment complex and located a vehicle matching the description and license plate number provided. The vehicle was parked with the engine running and headlights on. Kohler positioned

his squad car approximately twenty feet behind the vehicle and approached the driver's side. He observed a male sitting behind the driver's wheel who appeared to be sleeping. Kohler tapped on the window with his flashlight; the individual did not respond. After backup arrived on the scene, Kohler approached the vehicle again, tapped on the window and, receiving no response, opened the door. Green awoke startled. Kohler began speaking to Green, who quickly shut off the vehicle ignition and stepped out of the vehicle before being instructed to do so. Kohler noted that Green's balance was off when he exited the vehicle, stating that Green "kind of bobbled like a ball." Kohler noted that Green smelled of intoxicants and had bloodshot eyes. Kohler believed Green to be intoxicated.

¶4 After receiving conflicting answers to questions about where Green was coming from and why he was there, Kohler attempted to conduct field sobriety testing. Green essentially failed to follow instructions or to comply with the testing. Kohler testified that based on what he was able to observe of the testing and Green's bloodshot eyes and slurred speech, he placed Green under arrest for OWI. As Kohler attempted to place Green in handcuffs, Green jerked his hand away from Kohler and another officer who was attempting to help Kohler. Green was later charged with resisting an officer, OAR, OWI, fourth offense, and operating a motor vehicle with a prohibited alcohol content, fourth offense.

¶5 Green filed a motion to suppress evidence resulting from the stop of his vehicle, arguing that Kohler lacked the requisite probable cause or reasonable suspicion to justify the stop. Specifically, Green contended that the information provided by the PDQ employee did not adequately describe the behaviors that led her to believe that Green was possibly intoxicated. Following a hearing on April

22, 2010, the trial court denied Green's motion. The court found that Kohler had reasonable suspicion to justify an investigative stop of Green's vehicle.

¶6 The matter proceeded to trial. Green was found guilty on all counts. Green subsequently filed two postconviction motions. Green moved the court to dismiss the charge of resisting an officer or, in the alternative, to grant a new trial. Green argued that the evidence at trial was insufficient to support the jury's finding of guilt. Green also moved to reopen the motion to suppress evidence. Following a hearing, the trial court denied Green's motions. Green appeals.

DISCUSSION

The Officer Possessed Reasonable Suspicion to Justify the Investigatory Stop of Green's Vehicle.

¶7 We first address the issue of whether Kohler had the requisite reasonable suspicion to justify his stop of Green. The determination of reasonable suspicion for an investigatory stop is a question of constitutional fact. ***State v. Williams***, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. We apply a two-step standard of review to questions of constitutional fact. ***Id.*** First, we review the trial court's findings of historical fact and uphold them unless they are clearly erroneous. ***Id.*** Second, we review the determination of reasonable suspicion de novo. ***Id.***

¶8 Under the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution, "all searches and seizures [must] be objectively reasonable under the circumstances existing at the time of the search or seizure. Investigative traffic stops, regardless of how brief in duration, are governed by this constitutional reasonableness requirement." ***State v.***

Rutzinski, 2001 WI 22, ¶¶13-14, 241 Wis. 2d 729, 623 N.W.2d 516 (citations omitted). Subject to the constitutional reasonableness requirement, "a police officer may in appropriate circumstances temporarily stop an individual when, at the time of the stop, he or she possesses specific and articulable facts which would warrant a reasonable belief that criminal activity was afoot." ***State v. Waldner***, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996).

¶9 The State does not dispute that the informant's tip was the only basis for the initial stop. In some circumstances, information contained in an informant's tip may justify an investigative stop. ***Rutzinski***, 241 Wis. 2d 729, ¶17. Whether a particular tip provides legal grounds for an investigative stop depends on the tip's reliability and content. *See* ***id.***, ¶17. In assessing the reliability of a tip, due weight must be given to the informant's veracity and the informant's basis of knowledge. ***Id.***, ¶18. These considerations, veracity and basis of knowledge, should be viewed in light of the "totality of the circumstances," and not as discrete elements of a more rigid test: "[A] deficiency in one [consideration] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." ***Id.*** (alterations in original) (citation omitted).

¶10 This court has previously held that a tip shows sufficient indicia of reliability to justify an investigative stop when the informant identifies himself or herself to the dispatcher, and police independently verify the information provided by the informant before conducting the stop. ***State v. Sisk***, 2001 WI App 182, ¶¶10-11, 247 Wis. 2d 443, 634 N.W.2d 877. Here, the citizen informant provided her name (Kelley) and her place of employment (PDQ). Kohler was familiar with Kelley and knew that she had provided reliable information in the past. Kelley

also provided detailed information about the suspect individual and the vehicle, as well as contemporaneous observations as to what direction the vehicle was traveling. Further, the information provided by Kelley would suggest to a reasonable officer that Green was operating a motor vehicle while intoxicated. Guided by ***Rutzinski***, 241 Wis. 2d 729, ¶38, we conclude that the tip provided sufficient justification for the investigative stop of Green.

¶11 In so concluding, we reject Green's contention that the tip was not sufficient because it failed to detail Green's behaviors that suggested to Kelley that he was intoxicated. In ***State v. Powers***, 2004 WI App 143, ¶13, 275 Wis. 2d 456, 685 N.W.2d 869, this court observed that an officer can rely upon a citizen informant's assessment that an individual is drunk, noting that in Wisconsin, a layperson can give an opinion that he or she believes another person is intoxicated. The ***Powers*** court held that a citizen informant's tip was reliable even though the store clerk reported only that "an intoxicated man was in the Osco store." ***Id.***, ¶¶10-11.

¶12 In reaching its conclusion, the ***Powers*** court noted that the tip was based on firsthand observations made during face-to-face contact with the defendant that gave rise to a reasonable inference that the store clerk (1) observed indicia of intoxication such as the odor of alcohol, slurred speech or glassy eyes and (2) observed the defendant driving a motor vehicle. *See* ***id.***, ¶11. The ***Powers*** court rejected the contention that the citizen informant need actually observe the suspect operate a motor vehicle in an erratic manner. ***Id.***, ¶12 & n.2. The court noted the officer's independent verification of the informant's tip—observing the individual and the vehicle matching the description given by the store clerk. ***Id.***, ¶14.

¶13 Where, as here, "a tip has a high degree of reliability because the informant identified himself or herself and the police independently verify the information before conducting a stop, the resulting stop is supported by reasonable suspicion." ***Id.*** We therefore uphold the trial court's denial of Green's pretrial motion to suppress and his postconviction motion to reopen the motion to suppress.

The Jury's Finding of Guilt as to Resisting an Officer is Supported by Evidence in the Record.

¶14 We next address Green's challenge to the jury's finding of guilt on the charge of resisting arrest. In order to be found guilty of resisting arrest under WIS. STAT. § 946.41, the State must prove, among other things, that the defendant resisted an officer by opposing the officer by force or threat of force; the resistance must be directed at the office personally. *See* WIS JI—CRIMINAL 1765. Green contends that while the evidence demonstrated that Green pulled away from the officers, it failed to demonstrate that Green made any movements *toward* the police. We reject Green's argument.

¶15 "We will not upset a jury verdict if there is any credible evidence to support it." ***Radford v. J.J.B. Enters., Ltd.***, 163 Wis. 2d 534, 543, 472 N.W.2d 790 (Ct. App. 1991). The Wisconsin Supreme Court has held that:

> It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts....
>
> [A]n appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law....
>
> ….

> [O]nce the jury has been properly instructed on the principles it must apply to find the defendant guilty beyond a reasonable doubt, a court must assume on appeal that the jury has abided by those instructions.

State v. Poellinger, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990) (citations omitted).

¶16 Kohler testified at trial that after he told Green that he was going to be placed under arrest, he "advised Mr. Green to put his hands behind his back. I then reached for [Green's]—one of his hands. Upon doing that he jerked his hand away." The other officers "were able to restrain him." Another officer at the scene, Derek Andrews of the Village of Pleasant Prairie Police Department, confirmed that when Kohler went to "grab [Green's] hand, he pulled away." Andrews testified: "I was on Mr. Green's right-hand side so I put my hands on his right arm and right wrist and I felt him tense up and start pulling away from me." Two other officers were able to get ahold of Green and direct him to the ground. Andrews testified that, once Green was on the ground, "he stopped resisting and stopped struggling with us and [they] were able to get the handcuff on him."

¶17 Green argues that "[a]t no point throughout the struggle between Green and the Officers did Green ever make a move that was directed towards any of them as required in the elements of Resisting." Green's argument misses the mark. It is the resistance, not the physical movement, that must be directed toward the officer. Here, a jury could reasonably find that by pulling his hand away, Green was exerting force and that the exertion of force was directed toward the officer attempting to handcuff him. This court has noted that conduct that is "resisting" includes "pulling one's arm forcefully away from a warden's hold in an attempt to prevent handcuffing." ***State v. Dearborn***, 2008 WI App 131, ¶27, 313

Wis. 2d 767, 758 N.W.2d 463. We are satisfied that the officers' testimony in this case provided sufficient evidence to support a jury finding that Green resisted an officer. We therefore uphold the jury's verdict and the trial court's denial of Green's postconviction motion to dismiss the charge or order a new trial.

CONCLUSION

¶18 We conclude that the citizen informant tip provided Kohler with reasonable suspicion to justify an investigatory stop of Green's vehicle. We further conclude that the State presented sufficient evidence at trial to support a jury verdict finding Green guilty of resisting an officer. We therefore affirm the judgments of conviction as well as the postconviction order denying Green's requests for relief.

By the Court.—Judgments and order affirmed.

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