

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 15, 2013

Diane M. Fremgen
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. 2011AP2935-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2011CF22

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID M. KAMMEYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Chippewa County:
RODERICK A. CAMERON, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. David Kammeyer appeals a judgment convicting him of second offense possession of THC as a repeater. Kammeyer pled no contest after the circuit court denied his motion to suppress evidence. Pursuant to

WIS. STAT. § 971.31(10) (2009-10),¹ Kammeyer challenges the suppression order. Because we conclude the police lacked sufficient reason to stop Kammeyer's vehicle, we reverse the judgment and remand the cause for further proceedings.

BACKGROUND

¶2 Ryan Douglas, an investigator with the West Central Drug Task Force, was the only witness to testify at the suppression hearing. He stopped Kammeyer's vehicle based solely on a tip from a confidential informant. His search of Kammeyer and his vehicle resulted in the police seizing a small amount of marijuana, a scale, a glass pipe, hashish, and three pink pills.

¶3 The informant, who had provided truthful and reliable information several times in the past, told Douglas he had overheard another unidentified person talking on the telephone with Kammeyer. In that conversation, the unidentified person "made mention of picking up 5,000 ecstasy tablets in the Twin Cities area." The confidential informant also indicated he heard that Kammeyer possessed a gun. The confidential informant indicated that Kammeyer would be driving a Jeep Grand Cherokee, and was always carrying a red and black Nike shoulder bag or knapsack. The informant indicated that Kammeyer was going to split the pills with another individual who would be at North High School at the end of the school day and Kammeyer would be near the Chi-Hi High School to sell the drugs. When another officer spotted Kammeyer's Jeep in the downtown area of Chippewa Falls, Ryan went to the scene and stopped the vehicle. Police

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

found the red and black bag on the floor, but the police did not find 5,000 ecstasy pills or a gun.

¶4 On cross-examination, Douglas conceded that the confidential informant did not have any direct conversation with Kammeyer. Rather, he overheard someone having a conversation on the telephone with someone the informant thought was Kammeyer. The informant did not give a time of day when the transaction was to take place and the police conducted no surveillance of Kammeyer to determine whether he traveled to the Twin Cities. At the time Douglas stopped Kammeyer's vehicle, Douglas had not been told that Kammeyer was in the vicinity of either school and did not see the shoulder bag or knapsack.

DISCUSSION

¶5 A determination of reasonable suspicion for an investigatory stop and subsequent protective search is a question of constitutional fact. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. This court will uphold the circuit court's findings of historical fact unless they are clearly erroneous. However, we review de novo whether those facts constitute reasonable suspicion for the investigatory stop. *Id.*

¶6 The law regarding stopping a vehicle based on an informant's tip was summarized in *State v. Rutzinski*, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516. An informant's tip may justify an investigative stop. However, informants' tips vary greatly in reliability. Therefore, before an informant's tip can give rise to grounds for an investigative stop, police must consider its reliability and content. *Id.*, ¶17. Tips should exhibit "reasonable indicia of reliability" in light of the totality of the circumstances. *Id.*, ¶18. In assessing the reliability of a tip, due weight must be given to: (1) the informant's veracity; and (2) the informant's

basis of knowledge. *Id.* A deficiency in one consideration may be compensated for in determining overall reliability of the tip by a strong showing as to the other or by some other indicia of reliability. *Id.*

¶7 Veracity can be established when the officer knows the informant who provided reliable information in the past, if at least some of the information is immediately verifiable at the scene. *Id.*, ¶20. In this case, nothing was immediately verifiable. In addition, although Douglas testified that the confidential informant had provided reliable information several times in the past, he did not indicate how many times, how it was determined to be accurate or whether the informant ever gave inaccurate information. Veracity can also be established when the tipster could be arrested if he or she gave a false tip. *Id.* In this case, the confidential informant claimed no first-hand knowledge. He could not be prosecuted for giving a false police report because he merely reported what he surmised from overhearing half a phone conversation. To the extent the confidential informant's information came from the unidentified person ostensibly talking to Kammeyer, the record discloses no basis for judging that person's veracity.

¶8 Regarding the basis of the confidential informant's knowledge, Douglas provided no detail as to how the informant knew the unidentified person was talking to Kammeyer or what specific things were said on the unidentified person's half of the phone conversation that led the informant to believe he knew the details of a drug transaction. The basis for the informant's knowledge can be enhanced by corroborating details, especially predictive behavior. *Id.*, ¶28. Here, the confidential informant accurately predicted only that Kammeyer would be driving his own car in his hometown. Douglas had no other corroborating details at the time he stopped Kammeyer's vehicle.

¶9 Finally, the State argues that the informant's statement that Kammeyer was known to carry a gun provided a justification for the stop because there was an imminent threat to public safety. However, the confidential informant never saw Kammeyer with a gun and was merely repeating a rumor. In *Florida v. J.L.*, 529 U.S. 266, 272 (2000), the Court rejected the State's argument that a tip alleging a suspect possesses a firearm necessarily entails such exigency that it warrants an exception to the general rule that tips must exhibit indicia of reliability. The court reasoned that a firearms exception would create a rule under which any person seeking to harass another individual could simply allege that the individual possessed a gun. *Id.* The Court concluded that the Fourth Amendment is not so easily satisfied. *Id.* at 273.

¶10 The State bears the burden of proving a detention was reasonable. *State v. Pickens*, 2010 WI App 5, ¶14, 323 Wis. 2d 226, 779 N.W.2d 1. The State did not present evidence that the confidential informant's tip was immediately verifiable at the scene or that the informant could have been arrested for making a false report. It presented no detail establishing how the informant knew it was Kammeyer on the phone or how the informant surmised that a drug transaction would take place. The police did not corroborate any significant detail before stopping Kammeyer's vehicle. Thus, we conclude the State failed to meet its burden of proof.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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

