

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 14, 2014

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. 2013AP1128

Cir. Ct. No. 2012TR16882

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN THE MATTER OF THE REFUSAL OF DAVID ADAMS:

VILLAGE OF HALES CORNERS,

PLAINTIFF-RESPONDENT,

v.

DAVID E. ADAMS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
CAROLINA MARIA STARK, Judge. *Affirmed.*

¶1 BRENNAN, J.¹ David E. Adams appeals from a circuit court order, finding that Adams refused to submit to chemical testing to determine his

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31 (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

blood alcohol level, in violation of WIS. STAT. § 343.305(9)(a), and revoking his driving privileges for one year or more as determined by the Wisconsin Department of Transportation. Adams contends that the police lacked reasonable suspicion to stop him for drunk driving, and therefore, he was not required to submit to the police request for chemical testing. Because we conclude that the police had reasonable suspicion to stop Adams, we affirm.

BACKGROUND

¶2 On August 27, 2011, at approximately 10:06 p.m., Village of Hales Corners Police Officer Douglas Sayeg received a police dispatch regarding a citizen report of a possible drunk driver. The citizen caller told dispatch that the suspected drunk driver was heading westbound on Forest Home Avenue near Highway 100 in a red and gray van with Wisconsin license plate number 157817. The citizen caller continued to follow the van while speaking to dispatch and told dispatch that the van was “all over the road.”

¶3 Officer Sayeg was in the area and was also heading westbound on Forest Home Avenue. As he travelled towards the Highway 100 intersection, dispatch informed him that the citizen caller saw the suspected drunk driver pull into the parking lot of the China Inn Restaurant. Officer Sayeg was given the description of the van provided to dispatch by the citizen caller. Shortly thereafter, Officer Sayeg pulled into the parking lot of the China Inn Restaurant

and observed a van matching the citizen caller's description.² The van was properly parked, and Adams was the sole occupant in the van. Officer Sayeg never saw the van in motion.

¶4 Officer Sayeg parked his squad car behind the van. As Officer Sayeg was pulling behind the van, he personally observed Adams exit the van's driver's seat, using the vehicle to steady himself, and generally observed that Adams had difficulty maintaining his balance. Officer Sayeg then activated his overhead emergency lights.

¶5 Officer Sayeg then asked Adams to perform three different field sobriety tests. The parties stipulated before the circuit court that Officer Sayeg had probable cause to arrest Adams for operating a motor vehicle while intoxicated after Adams performed the tests.

¶6 During the stop and arrest, the citizen caller remained on the phone with dispatch. He told dispatch his name, the make and model of the vehicle he was driving, his cell phone number, and his location. Officer Sayeg did not have this information at the time of the stop.

¶7 Officer Sayeg arrested Adams and took him back to the police station. Once there, Adams refused to take a chemical breath test, citing his Fifth Amendment rights.

² Adams states in his brief, without any citation to the record, that "[t]he record strongly suggests Officer Sayeg ... never cross-confirmed the respective license plate numbers" upon approaching the van in the parking lot. However, Adams does not otherwise challenge the circuit court's finding that "Officer Sayeg pulled into the parking lot of the China Inn Restaurant and saw a van matching the description and license plate reported by the citizen caller." Because Adams does not meaningfully challenge the circuit court's finding with citations to the record, we accept the circuit court's finding as true.

¶8 Adams was issued a Notice of Intent to Revoke Operating Privileges for declining to submit to an evidentiary chemical test of his breath.³ A refusal hearing was held in the Village of Hales Corners Municipal Court. The municipal court found Adams guilty.

¶9 Adams filed a timely *de novo* appeal to the Milwaukee County Circuit Court. The circuit court conducted an evidentiary hearing at which the parties stipulated that the sole issue before the court was whether the police had reasonable suspicion to stop Adams. Following the hearing, the circuit court found that reasonable suspicion for the stop existed and that Adams had refused to submit to the chemical breath test. Adams appeals.

DISCUSSION

¶10 The sole issue before us on appeal is whether the police had reasonable suspicion to stop Adams. Adams complains that Officer Sayeg lacked probable cause or reasonable suspicion because he had only “a vague” and unverified report from “an unidentified tipster.” Because we conclude Officer Sayeg had reasonable suspicion to stop Adams, we affirm.

¶11 A defendant may raise the constitutionality of a traffic stop as a defense at a refusal hearing. *State v. Anagnos*, 2012 WI 64, ¶42, 341 Wis. 2d 576, 815 N.W.2d 675. A stop is unconstitutional if it was not based on probable cause or reasonable suspicion. *Id.*, ¶20. A police officer may initiate an investigatory stop if he or she “reasonably suspect[s] ... that some kind of criminal activity has

³ Adams was also charged with operating a motor vehicle while under the influence of an intoxicant. That case is currently pending and, according to CCAP, is stayed pending resolution of this appeal. *See* Milwaukee County Circuit Court Case Number 2012TR23405.

taken or is taking place.” *State v. Allen*, 226 Wis. 2d 66, 71, 593 N.W.2d 504 (Ct. App. 1999). An inchoate and unparticularized hunch will not suffice. *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634. “Rather, the officer ‘must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ the intrusion of the stop.” *Id.* (citation omitted). Reasonable suspicion is a common sense test based on the totality of the circumstances. *Id.*, ¶13.

¶12 Whether police had reasonable suspicion to conduct a stop presents a question of constitutional fact, that is, a mixed question of law and fact to which we apply a two-step standard of review. *Anagnos*, 341 Wis. 2d 576, ¶21. “First, we review the circuit court’s findings of historical fact under the clearly erroneous standard.” *Id.* “Second, we review the application of those historical facts to the constitutional principles independent of the determinations rendered by the circuit court.” *Id.*

¶13 It is well-established that reasonable suspicion can be based on an informant’s tip, provided the tip is sufficiently reliable. *See State v. Williams*, 2001 WI 21, ¶36, 241 Wis. 2d 631, 623 N.W.2d 106. The reliability of a tip is measured by viewing the totality of the circumstances with regard to: “(1) the informant’s veracity; and (2) the informant’s basis of knowledge.” *State v. Rutzinski*, 2001 WI 22, ¶18, 241 Wis. 2d 729, 623 N.W.2d 516. “[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.* (citation omitted; brackets in *Rutzinski*). Thus, where less is known about an informant, the tip may nonetheless be sufficiently reliable under the totality of the circumstances if more is known about the informant’s basis of knowledge, and vice versa. *See id.* For example, in the case of an anonymous tip,

police corroboration of details provided by the informant further bolsters the tip's reliability. *Williams*, 241 Wis. 2d 631, ¶39. Ultimately, reliability is a question of the reasonableness of the officer's action under the totality of the circumstances. *See id.*, ¶23.

¶14 Looking at the totality of the circumstances in this case, we conclude that Officer Sayeg had reasonable suspicion to stop Adams when he pulled behind Adams's van in the parking lot based on the reliability of the citizen caller's tip and Officer Sayeg's independent observations.⁴

¶15 First, the citizen caller provided detailed information to dispatch regarding his observations of a possible drunk driver, including the make and model of the vehicle Adams was driving, the color of the vehicle, and the license plate number. Officer Sayeg was able to corroborate all of these factual details when he pulled into the China Inn Restaurant parking lot and observed Adams's vehicle. *See id.*, ¶39 ("police corroboration of innocent, although significant, details of the tip" can bolster the tip's reliability).

¶16 Second, the citizen caller told dispatch that he was observing Adams's vehicle in real time and was able to update Adams's location accordingly. The citizen caller first told dispatch that Adams was driving

⁴ Adams argues in his brief that Officer Sayeg initiated a *Terry* stop when he stopped his vehicle behind Adams's vehicle in the parking lot, thereby prohibiting Adams from moving his vehicle. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991) (A stop occurs when an officer in some way restrains the liberty of a citizen by means of physical force or show of authority.); *see also Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). The State does not challenge Adams's assertion in this regard or otherwise argue that the stop occurred at some other time. As such, for purposes of this appeal, we presume that the stop occurred when Officer Sayeg pulled his squad car up behind Adams's vehicle. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed admitted).

westbound on Forest Home Avenue near Highway 100 and then told dispatch that Adams pulled into the China Inn Restaurant parking lot. Officer Sayeg corroborated the accuracy of the information when he pulled into the parking lot and observed Adams's vehicle where the citizen caller said it would be. *See Rutzinski*, 241 Wis. 2d 729, ¶33 (an anonymous informant "provide[s] the police with verifiable information indicating his or her basis of knowledge ... [when t]he informant explain[s] that he or she [is] making personal observations of [a suspect's] contemporaneous actions").

¶17 Third, the citizen caller's tip also suggested that Adams posed an imminent threat to public safety. While Officer Sayeg did not know that the citizen caller had reported that Adams was "all over the road," he did know that the citizen caller was reporting a possible drunk driver, suggesting that Adams's actions prior to the stop posed a hazard to other vehicles on the road. While Adams was parked in a parking lot at the time of the stop, there was nothing, other than Officer Sayeg, to stop him from re-entering his vehicle and proceeding back to the roadway. *See id.*, ¶26 ("exigency can in some circumstances supplement the reliability of an informant's tip in order to form the basis for an investigative stop").

¶18 Fourth, the citizen caller remained on the phone with dispatch, potentially exposing himself to being identified. *See id.*, ¶32 (an informant is considered more reliable when he or she "expose[s] him- or herself to being identified"). While the defense argues that the record shows that at the time Officer Sayeg stopped Adams the citizen caller had not yet revealed his identity and location to dispatch, and that even if he had, this information was not known to Officer Sayeg, it is undisputed that, at the very least, the citizen caller remained on the line with dispatch at the time of the stop. *See State v. Rissley*, 2012 WI

App 112, ¶19, 344 Wis. 2d 422, 824 N.W.2d 853 (“under the collective knowledge doctrine, ‘[t]he police force is considered as a unit and where there is police-channel communication to the arresting officer and he acts in good faith thereon, the arrest is based on probable cause when such facts exist within the police department’”) (citation omitted; brackets in *Rissley*).

¶19 Fifth, Officer Sayeg personally observed signs that Adams may have been intoxicated before initiating the stop when he observed Adams exit the driver’s seat of his vehicle, using the van to maintain his balance.⁵ While Adams attributes his poor balance upon exiting the vehicle to his age (seventy-seven) and a medical condition (his legs were bandaged at the time of the stop), Officer Sayeg’s suspicion that Adams was intoxicated was not unreasonable based upon the citizen caller’s tip and Officer Sayeg’s observation that Adams was unsteady on his feet while exiting the driver’s seat of the van.

¶20 In sum, the citizen caller’s tip was detailed and made to dispatch contemporaneous to its occurrence while the caller remained on the phone; furthermore, Officer Sayeg corroborated the facts relayed to him by dispatch and independently observed Adams stumbling from the driver’s seat of his vehicle. Because we conclude that those facts form reasonable suspicion for the stop, we affirm.⁶ See *Allen*, 226 Wis. 2d at 71 (A police officer may initiate an

⁵ Officer Sayeg testified at the evidentiary hearing before the circuit court that “as I was pulling behind the vehicle, the driver did exit the vehicle ... I noticed that he had a hard time maintaining his balance and kind of us[ed] the car for leverage.”

⁶ Given our holding in this case, we need not address a slew of other issues addressed by the parties in their respective briefs, including Adams’s assertion that the circuit court incorrectly concluded that dispatch told Officer Sayeg that Adams was “all over the road” and the State’s assertion that the collective knowledge doctrine is applicable. See *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (We decide cases on the narrowest possible grounds.).

investigatory stop if he or she “reasonable suspect[s] ... that some kind of criminal activity has taken or is taking place.”)⁷

By the Court.—Order affirmed.

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

⁷ In his brief, Adams attempts to compare and contrast the facts of this case to those set forth in *State v. Rutzinski*, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516. However, not only do we disagree with some of his comparisons for the reasons set forth above, but we also reiterate that whether the police have reasonable suspicion to make a stop is based on the totality of the circumstances; the absence of one or more factors will not necessarily lead to a conclusion that a stop was unconstitutional. See *id.*, ¶14.

