COURT OF APPEALS
DECISION
DATED AND FILED

August 5, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2597 **Cir. Ct. No. 2012TR4115**

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

CITY OF BLOOMER,

PLAINTIFF-RESPONDENT,

V.

JAMES S. FRANK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed*.

¶1 CANE, THOMAS, Reserve Judge.[1] James Frank appeals a forfeiture judgment for operating while intoxicated, first offense. Frank argues that the circuit court erroneously exercised its discretion by reopening the case for

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

additional evidence and that the officer unlawfully stopped his vehicle. This court rejects Frank's arguments and affirms.

BACKGROUND

¶2 The City of Bloomer issued Frank a forfeiture citation for operating while intoxicated, first offense. Frank filed a motion to dismiss, challenging, in part, the lawfulness of the initial traffic stop.

¶3 At the motion hearing on January 9, 2013, officer John Beyer testified that on June 9, 2012, at approximately 11:44 p.m., he received a dispatch regarding an "anonymous complaint of a possible intoxicated driver." Dispatch advised Beyer that the complainant reported the vehicle was in a Hardee's restaurant parking lot and a male was driving. Dispatch also told Beyer the complainant "indicated that [the driver's] speech was slurred and there was an open intoxicant inside the vehicle." Dispatch gave Beyer a description of the vehicle and a license plate number. Beyer and another officer found the vehicle in the Hardee's parking lot and stopped the vehicle. Ultimately, Frank, who was driving, was arrested for operating while intoxicated.

¶4 Frank argued the stop was unlawful because the City failed to establish the anonymous complainant's credibility. The City responded that Beyer's reliance on the complainant's tip as a basis for the stop was proper based on ***State v. Rutzinski***, 2001 WI 22, 241 Wis. 2d 729, 623 N.W.2d 516. The court ordered briefing.

¶5 When the City filed its brief in opposition to Frank's motion, it also wrote a letter to the court, advising it that the City had attempted to get the dispatch recordings before the suppression hearing, and that the sheriff, as

custodian of the police records, would not release them without a court order because the caller "provided information during the phone call that could give away his/her identity." The City asked the court, "if this is a close matter," to conduct an in camera review of the dispatch recordings.

¶6 On January 25, 2013, the circuit court granted Frank's motion to dismiss, concluding Beyer did not know the informant's veracity or basis of knowledge and, as a result, Beyer could not rely on the tip as a basis for the stop.

¶7 On February 6, the City moved for reconsideration, asking the court to consider the dispatch recordings. It explained that on February 4 the sheriff agreed to release the dispatch recordings. The City also provided an affidavit from the sheriff, indicating that the City made its request for the dispatch recordings before the January 9 motion hearing and that the sheriff denied its request. The City argued the dispatch recordings established Beyer lawfully stopped Frank's vehicle based on the tip.

¶8 Frank objected to the court's consideration of the dispatch recordings. He argued the recordings were not newly discovered evidence and would not change the result.

¶9 The circuit court granted the City's motion for reconsideration. It determined it would consider the dispatch recordings because the "City of Bloomer acted in good faith and with reasonable diligence in preparing for the motion hearing," and the dispatch recordings were "not available at the time of the motion hearing despite reasonable efforts made by the Bloomer City Attorney." The court also emphasized the City's request occurred after a motion hearing, not a trial, and, as a result, the court stated the "newly discovered evidence" standard for a new trial did not apply.

¶10 The dispatch recordings indicate that the Hardee's night shift leader called 911 to report her contemporaneous observations of a male as he ordered food at the drive-through. She reported to dispatch that the male's speech was slurred, he smelled of alcohol, and he had a beer in a beer cozy in his lap. The shift leader also reported the vehicle was silver and she gave dispatch the license plate number. The leader told dispatch the male was currently waiting for his food. She asked to be "anonymous" because this was only her fifth or sixth time closing and she did not want the police at Hardee's. She also asked if the officers could wait to stop the male until after he left the Hardee's parking lot.

¶11 Dispatch, in turn, relayed to Beyer that it received an anonymous complaint that an individual with slurred speech just went through the Hardee's drive-through, that he was currently waiting for his food, that he had an open intoxicant in his vehicle, and that the complainant requested that the officers wait to stop the vehicle until after he leaves the Hardee's parking lot.

¶12 The circuit court found "the 911 transcript showed that the anonymous informant personally observed Frank driving the vehicle and his apparent intoxication. Furthermore, the informant provided sufficient information for the Bloomer Police Department to identify the informant." Accordingly, the circuit court concluded that, based on ***Rutzinski***, Beyer was permitted to rely on the shift leader's information as a basis for the stop. The court vacated its order dismissing the forfeiture citation.

¶13 Following a court trial, the court found Frank guilty of operating while intoxicated. He appeals.

DISCUSSION

¶14 Frank first argues the circuit court erred by granting the City's motion for reconsideration because the dispatch recordings were not "newly discovered evidence." In support of his assertion, Frank emphasizes the amount of time the City had to obtain the recordings before the motion hearing and he argues "the notion that a recording of a 911 call to a county dispatch is not available to another law enforcement agency for the same county is simply inconceivable and not believable." He also argues it is against public policy to vacate an order dismissing his citation on the basis of evidence that was "easily available to the City Attorney at the time of the original [m]otion hearing."

¶15 Frank's argument is undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments). He cites no legal authority in his primary brief in support of his assertion that the recordings are not "newly discovered evidence." Additionally, his argument that it is "inconceivable" the sheriff would not release the recordings to the City is an attack on the circuit court's factual finding. Frank, however, does not cite any legal authority or develop any argument in support of his assertion that the circuit court's factual determination was clearly erroneous. *See* ***id.***

¶16 In his reply brief, Frank argues the recordings were not newly discovered evidence because the recordings do not meet the standards required for a new trial. *See* WIS. STAT. § 805.15(3).[2] In response, the City wrote a letter,

[2] WISCONSIN STAT. § 805.15(3) provides:

> [A] new trial shall be ordered on the grounds of newly-discovered evidence if the court finds that:

(continued)

asking this court not to consider Frank's new argument because the City is unable to respond and because "all [of Frank's] cases relate to newly discovered evidence after a trial or conviction. In the present case, we are talking about newly discovered evidence before a trial."

¶17 We generally do not consider arguments raised for the first time in a reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. In any event, we agree with the City that there is a distinction between a pretrial motion asking the court to consider additional evidence and a posttrial motion for a new trial based on newly discovered evidence.

¶18 In ***State v. Vodnik***, 35 Wis. 2d 741, 745, 151 N.W.2d 721 (1967), the State argued the circuit court erroneously exercised its discretion by reopening the case for additional testimony because the grounds for such a request did not comply with the requirements for granting a new trial. The ***Vodnik*** court, however, first concluded the rehearing was not a "new trial" because there was no resubmission of evidence and only additional proof was adduced. ***Id.*** The court then concluded a motion to reopen a case for additional testimony lies in the discretion of the circuit court and that "the limitations upon the exercise of this power are not the same as those limiting the power to grant a new trial." ***Id.*** at

---

> (a) The evidence has come to the moving party's notice after trial; and
>
> (b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and
>
> (c) The evidence is material and not cumulative; and
>
> (d) The new evidence would probably change the result.

746. It noted that it had not formulated "certain or mechanical rules" for a circuit court's exercise of a motion to consider additional evidence. ***Id.***

> [A] litigant has no strict right to reopen a case for the purpose of introducing additional evidence, but the discretion of the trial court seems to rest upon general principles of equity and justice including whether the opposing party is prejudiced in the trial or proof of his contentions.

Id. The court stated the result of a hearing is not considered an element of prejudice. ***Id.*** at 747.

¶19 We will sustain a discretionary determination if the circuit court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). In the present case, the circuit court explicitly found that the City was diligent in trying to obtain the dispatch recordings before the motion hearing and that the sheriff would not release the recordings to the City. These factual determinations are supported by the record and therefore not clearly erroneous. *See* ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). Based on the record, we conclude the circuit court did not erroneously exercise its discretion in granting the City's motion and deciding to consider the additional evidence.

¶20 Frank next argues Beyer unlawfully stopped his vehicle because he "acted solely on an unidentified and anonymous tip." A police officer may conduct a traffic stop if the officer has reasonable suspicion, based on specific and articulable facts, that a crime or traffic violation has been or will be committed. ***State v. Popke***, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. Whether

reasonable suspicion exists is a question of constitutional fact. ***Id.***, ¶10. We uphold the circuit court's factual findings unless they are clearly erroneous; however, we independently apply those facts to constitutional principles. ***Id.*** The information provided by an informant's tip may provide a reasonable basis for a traffic stop, depending upon the reliability and content of the tip. ***Rutzinski***, 241 Wis. 2d 729, ¶17.

¶21 When assessing the reliability of an informant's tip, we consider the informant's veracity and basis of knowledge. ***Id.***, ¶18. In ***Rutzinski***, our supreme court determined that an officer lawfully stopped a vehicle based solely on a caller's tip and without any independent observations of the reported driving because: (1) the tip exposed the caller to possible identification and therefore possible arrest if the tip proved to be false; (2) the tip reported contemporaneous observations of the driving and vehicle location; and (3) the tip suggested the driver was intoxicated. ***Id.***, ¶¶31-32, 38.

¶22 Here, in terms of veracity, the Hardee's night shift leader provided dispatch with identifying information and exposed herself to possible arrest if the tip proved to be false. *See* ***id.***, ¶32. Additionally, she gave dispatch a description of the vehicle, the vehicle's license plate number, and the vehicle's location at Hardee's. Her contemporaneous observations, which were corroborated by Beyer when he arrived at Hardee's, demonstrate sufficient indicia of the shift leader's basis of knowledge. *See* ***id.***, ¶¶22-23, 33.

¶23 Finally, regarding the content of the tip, the Hardee's shift leader reported that a driver at the drive-through smelled of alcohol, had slurred speech, and had an open intoxicant in the vehicle. The tip therefore alleged a potential imminent danger to public safety. *See* ***id.***, ¶¶34, 37 (Informant's allegation of

erratic driving suggested an impaired driver, which posed an imminent threat to public safety.). Based on the reliability of and allegations contained in the shift leader's tip, we conclude Beyer was justified in conducting an investigative stop.[3] *See* ***State v. Rissley***, 2012 WI App 112, ¶19, 344 Wis. 2d 422, 824 N.W.2d 853 (When deciding whether a stop was justified by reasonable suspicion, the court considers the information available to both the dispatcher and the officer making the stop; "[t]he fact that [the officer] made the stop based on information from dispatch and dispatch had information amounting to reasonable suspicion is enough.").

By the Court.—Judgment affirmed.

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

[3] The City devotes a portion of its brief to whether the circuit court properly denied Frank's request for a jury trial. The City notes that Frank raised this issue in his docketing statement and that the issue is not addressed in his brief. We deem the issue abandoned and do not consider it. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) ("In order for a party to have an issue considered by this court, it must be raised and argued within its brief.").