

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 22, 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. 2014AP1122-CR

Cir. Ct. No. 2013CT328

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID C. MARKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: LLOYD CARTER, Judge. *Affirmed.*

¶1 BROWN, C.J.¹ David C. Marker appeals from his conviction of operating his vehicle while intoxicated with children under age sixteen as

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

passengers. Marker contends that the circuit court erred in denying his motion to suppress evidence on grounds that the community caretaker function justified stopping his vehicle when his former wife called police to report her fear that he was driving while intoxicated with their children in the vehicle. We affirm on different grounds, namely, that the tip created reasonable suspicion that justified the stop.

Facts

¶2 The relevant facts are undisputed. A little after 6 p.m. on February 22, 2013, Marker's former wife called police to report that she had just met with Marker to exchange custody of their children and that he appeared to be intoxicated when he drove away with the children. His former wife identified herself and gave Marker's full name and date of birth, as well as the children's names and dates of birth. She stated that Marker was driving a Chevy pickup truck, traveling north on Barker Road to Capitol Drive and then to Brown Deer Road. She told the dispatchers that she believed Marker was intoxicated because his speech was slurred and his eyes were bloodshot.

¶3 This call was relayed to an officer, who was told to "be on the lookout for a possible intoxicated driver operating a Chevy pickup truck." Specifically, the dispatcher told the officer that "there was an exchange of children at a park and ride," and that Marker's "ex-wife ... was calling indicating that she believed, based on her observations, that the ex-husband was intoxicated at that time." The dispatch did not describe the specific observations (slurred speech and bloodshot eyes) that the former wife had mentioned during her call to the police, but did give Marker's full name.

¶4 After receiving the dispatch, the officer monitored traffic going eastbound on Capitol Drive and soon saw a male driving a Chevy pickup truck. The officer followed the vehicle for about a half a mile, confirming that the license plate number and the vehicle description matched a vehicle registered to Marker. The officer then stopped the vehicle. When he spoke to Marker, the officer observed Marker's bloodshot eyes and slurred speech, and smelled the odor of intoxicants. After failing a sobriety test and a preliminary breath test, and admitting to drinking alcohol, Marker was placed under arrest for driving while under the influence.

¶5 Later Marker was charged with operating while intoxicated and with a prohibited blood alcohol concentration, and with a minor child as passenger, which triggered enhanced penalties. WIS. STAT. § 346.63(1)(a) and (b); WIS. STAT. § 343.30(1q)(b)4m. Marker moved to suppress evidence on the grounds that the arresting officer lacked reasonable suspicion to stop Marker's truck.

¶6 The circuit court denied the motion. The court disputed Marker's argument that the tip was unreliable due to the fact that it was offered by a former spouse. The court stated that because of the fact that children were in the car, the stop was a reasonable exercise of the officer's "community caretaker function," in order to "preserve the status quo" and investigate the children's safety.

¶7 Marker pled guilty to operating while intoxicated with minor children in the vehicle. He filed a postconviction motion arguing that the court erred in concluding that the community caretaker doctrine justified the stop. The circuit court denied the motion and Marker appeals.

Discussion

¶8 On review of a motion to suppress evidence, the appellate court defers to the circuit court’s findings of fact unless they are clearly erroneous and reviews the constitutionality of a search or seizure de novo. *State v. Richardson*, 156 Wis. 2d 128, 137-38, 456 N.W.2d 830 (1990). The constitutional reasonableness of an investigatory stop is based on the totality of the circumstances. *State v. Post*, 2007 WI 60, ¶¶12-13, 301 Wis. 2d 1, 733 N.W.2d 634. The arresting officer must have reasonable suspicion to justify an investigatory stop. WIS. STAT. § 968.24. On review, we may affirm the circuit court’s decision on different grounds. *State v. Sharp*, 180 Wis. 2d 640, 650, 511 N.W.2d 316 (Ct. App. 1993) (“When a trial court’s holding is correct, this court may affirm the trial court on grounds not utilized by that court.”)

¶9 Although the circuit court based its decision on the community caretaker doctrine, we conclude this stop was reasonable based on the reasonable suspicion created by the informant’s tip. “In some circumstances, information contained in an informant’s tip may justify an investigatory stop.” *State v. Rutzinski*, 2001 WI 22, ¶17, 241 Wis. 2d 729, 623 N.W.2d 516. Even an anonymous tip may justify a stop, if there are sufficient indications of the tip’s reliability. *Florida v. J.L.*, 529 U.S. 266, 270 (2000). Both the content and the reliability of the informant’s tip must be considered in determining whether the tip justifies an investigatory stop. *Rutzinski*, 241 Wis. 2d 729, ¶17. Reliability is measured by the informant’s (1) veracity and (2) basis of knowledge, under the totality of the circumstances. *Id.*, ¶18. Veracity and basis of knowledge are not strict elements, and strong indicia of one may compensate for weak indicia of the

other. *Id.*, ¶21. Additionally, exigent circumstances may supplement reliability of the tip when considering whether an investigatory stop was justified. *Id.*, ¶26.

¶10 With respect to the officer's reasonable suspicion to stop Marker's truck, Marker chiefly argues that there were insufficient indicia of the tip's reliability, since dispatchers did not tell the officer about the precise observations (bloodshot eyes and slurred speech) that the former wife described, and since the officer made no independent observations of erratic driving before stopping the truck. This argument fails to recognize that a police officer may rely on the collective information of the police department when investigating. *See State v. Mabra*, 61 Wis. 2d 613, 625, 213 N.W.2d 545 (1974). The police force is a unit, and an arresting officer may in good faith rely on the information conveyed by a dispatcher. *Id.* at 625-26. So the officer who stopped Marker could rely upon the dispatcher's representation that the former wife believed "based on her observations, that the ex-husband was intoxicated."

¶11 Marker also errs when he suggests that the officer was required to corroborate the former wife's tip with independent observations of bad driving before initiating the stop. An officer following up on an identified informant's personal observations of drunk driving is not required to wait and observe dangerous driving himself before conducting a traffic stop. *See Rutzinski*, 241 Wis. 2d 729, ¶¶34-35. To the contrary, in *Rutzinski*, a tip was sufficient to justify an investigatory stop even though the officer who stopped the vehicle did not observe the suspicious indications that led the informant to suspect drunk driving, where the tip was based on firsthand observations and the informant's identity could have been determined. *See id.*, ¶¶31-34. Here, as in *Rutzinski*, the former wife's tip exhibited ample indicia of reliability. The former wife identified herself, Marker, and their children by name; she explained that her suspicion that

Marker was driving while intoxicated was based on recent, firsthand observations of Marker, observations that she described to the dispatcher; and she provided detailed information about Marker's vehicle, passengers, and future route of travel. What is more, the officer confirmed some of those predictions—the vehicle and its route of travel—when he saw the truck pass just where the former wife predicted it would. Marker's characterization of the former wife's tip as a conclusory allegation is untrue.

¶12 For the same reasons, we reject Marker's claim that approving this stop is tantamount to a blanket exception for stops based on drunk driving tips. Marker attempts to liken his former wife to an anonymous informant because "complaints made by ex-significant others ... at times ... are fabricated." The comparison is ludicrous. The tip about Marker's drunk driving was nothing like the tip in *J.L.*, 529 U.S. at 271, which was completely anonymous and offered no predictive information. Here, the former wife identified herself, thus exposing herself to potential legal consequences had she been lying to the authorities about her observations. See *Rutzinski*, 241 Wis. 2d 729, ¶32. While it may be true that former spouses sometimes fabricate claims against one another, fabrication as opposed to veracity is determined on a case-by-case basis, not on a pretentious generalization about the character traits of former spouses. The facts in this very case demonstrate how readily the veracity of such a tip may be determined.

¶13 In view of the totality of the circumstances, the investigatory stop was justified here, where the identified informant's tip exhibited strong indicia of reliability and was partly corroborated by the officer's observation of the vehicle's route of travel.

By the Court.—Judgment and order affirmed.

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

