COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP622 **Cir. Ct. No. 2010TR4539**

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

IN THE MATTER OF THE REFUSAL OF WILLIAM R. HARTMAN:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM R. HARTMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: TODD P. WOLF, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] William Hartman appeals the circuit court's judgment revoking his operating privileges for one year on the ground that he refused to submit to a chemical test of his blood after being placed under arrest for operating a vehicle while intoxicated in violation of WIS. STAT. § 346.63(1)(a). Hartman contends that he had the right to refuse to submit to the chemical test because the deputy sheriff who questioned him did not have a reasonable suspicion that he was involved in criminal activity and therefore unlawfully placed him under arrest.

¶2 We do not reach the issue of reasonable suspicion because we conclude the deputy did not "seize" Hartman within the meaning of the Fourth Amendment. Rather, we conclude that the deputy engaged in a consensual encounter with Hartman from which a reasonable person in Hartman's position would have felt free to leave and terminate the encounter. Accordingly, we conclude that Hartman was lawfully placed under arrest and therefore his operating privileges were properly revoked. We affirm.

BACKGROUND

¶3 The following facts are undisputed and are taken from the refusal hearing transcript. On October 14, 2010, Wood County Deputy Sheriff Bren Derringer was dispatched to investigate a suspicious person who was attempting to hide behind a sign at the entrance to a park. On the drive to the park, the deputy also received information about an individual who drove a damaged vehicle into a

[1] This appeal is decided by a one judge pursuant to WIS. STAT. § 752.31(2)(c) and (3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Kwik Trip parking lot and left the scene. Dispatch described to the deputy the individual at the park entrance but did not describe the individual at the Kwik Trip parking lot. The deputy did not know at the time whether the two reports were related and went to the park only to investigate the report of a suspicious man.

¶4 At approximately 7:50 p.m., the deputy arrived at the park and noticed an individual who matched the description given by the dispatcher. The deputy observed that Hartman was walking further into the park and appeared to be talking on his cell phone. Without activating the lights on his squad car, the deputy pulled up behind Hartman and asked him whether he would be willing to speak. The deputy asked Hartman to identify himself and explain what he was doing in the area. Hartman identified himself but provided evasive answers as to why he was in the park. As he spoke, Hartman swayed back and forth and slurred his speech. During the encounter, the deputy detected the odor of intoxicants on Hartman's breath.

¶5 Two to five minutes after questioning, the deputy asked Hartman whether he knew about an abandoned vehicle at the Kwik Trip. At first, Hartman denied having knowledge about the abandoned vehicle. However, when the deputy persisted in his questioning, Hartman admitted that he crashed the vehicle. In addition, Hartman admitted that he had consumed alcohol before crashing the vehicle, including mixed drinks and shots. Hartman further noted that he had not consumed alcohol since the crash.

¶6 Based on this information, the deputy gave Hartman a preliminary breath test, which showed that Hartman had a blood alcohol content of .198. The deputy proceeded to read Hartman an Informing the Accused form, which notified Hartman that if he refused to consent to chemical testing, his operating privileges

would be revoked. Hartman refused to submit to a chemical test of his blood. Therefore, the deputy filed a notice of intent to revoke Hartman's operating privileges.

¶7 Following his arrest, Hartman retained counsel and requested a hearing regarding his refusal to submit to the chemical test. The sole witness to testify at the hearing was the deputy. At the hearing, Hartman did not contest that the deputy had probable cause to arrest him after learning that he operated the abandoned vehicle while intoxicated. In addition, Hartman did not contest that, after being read the Informing the Accused form, he refused to take the chemical test. Instead, Hartman challenged whether the deputy had reasonable suspicion to stop him based on the report the deputy received from dispatch. Hartman argued that the deputy did not have reasonable suspicion because the deputy had no reason to believe that Hartman was engaged in criminal activity.

¶8 Based on the deputy's testimony, the court determined, under the totality of the circumstances, that the deputy had reasonable suspicion to conduct an investigatory stop. The court further determined that the deputy had probable cause to arrest Hartman after observing signs of intoxication and upon learning that Hartman had crashed the abandoned vehicle after consuming alcohol. Therefore, the court revoked Hartman's operating privileges for one year in accordance with WIS. STAT. § 343.305(10)(b)2.

DISCUSSION

¶9 There are two issues on appeal: (1) whether a defendant may contest whether an investigatory stop is justified by reasonable suspicion at a refusal hearing; and (2) whether the deputy violated Hartman's right under the Fourth Amendment to be free from unreasonable searches and seizures. We conclude

that, at the refusal hearing, Hartman had the right to challenge whether the deputy's questioning was justified by reasonable suspicion. However, we conclude that the deputy did not need reasonable suspicion to question Hartman because Hartman was not "seized" within the meaning of the Fourth Amendment.

A. THE LAWFULNESS OF AN INVESTIGATORY STOP IS AN APPROPRIATE ISSUE FOR A REFUSAL HEARING

¶10 The State argues that Hartman is prohibited from challenging the lawfulness of an investigatory stop because WIS. STAT. § 303.305(9)(a)5. specifies the issues that may be raised at a refusal hearing and does not explicitly state that a defendant may challenge at a refusal hearing whether an investigatory stop was justified by reasonable suspicion. In addition, the State argues that Hartman is precluded from raising the issue of reasonable suspicion because Hartman gave the State no notice prior to the refusal hearing that he intended to raise the issue.

¶11 Hartman responds that whether the deputy had reasonable suspicion to conduct an investigatory stop is an issue which may be challenged at a refusal hearing because, if the deputy lacked reasonable suspicion, the arrest was unlawful. In addition, Hartman contends that he was not required to notify the State before the refusal hearing that he intended to raise the issue of reasonable suspicion because the State had the burden to show that Hartman was lawfully placed under arrest.

¶12 At the hearing, the court asked defense counsel whether it needed to determine that the deputy had reasonable suspicion to conduct an investigatory stop as part of a refusal hearing. The court initially expressed its belief that it only needed to consider whether the deputy had probable cause to arrest Hartman. However, the court ultimately determined that the deputy had reasonable suspicion

to conduct an investigatory stop and that, based on the deputy's questioning during the investigatory stop, the deputy obtained probable cause to arrest Hartman. Accordingly, the court revoked Hartman's operating privileges for refusing to submit to a chemical test following his arrest.

¶13 The Wisconsin Supreme Court recently concluded that under a proper construction of WIS. STAT. § 343.305(9)(a)5.,[2] a defendant may contest at a refusal hearing whether an officer had reasonable suspicion or probable cause to conduct a traffic stop. *See* ***State v. Anagnos***, 2012 WI 64, ¶42, 341 Wis. 2d 576, 815 N.W.2d 675. In ***Anagnos***, the circuit court refused to revoke the defendant's operating privileges because the officer conducted a traffic stop without first observing the defendant commit a traffic violation. ***Id.***, ¶16. On appeal, we concluded that it was proper for the court to inquire into whether the officer had reasonable suspicion to stop the defendant because without reasonable suspicion the defendant could not have been *lawfully* placed under arrest. *See* ***State v. Anagnos***, 2011 WI App 118, ¶15, 337 Wis. 2d 57, 805 N.W.2d 722, *review granted*, 2012 WI 64, 341 Wis. 2d 576, 815 N.W.2d 675. On review, the Wisconsin Supreme Court agreed, construing the phrase "lawfully placed under

[2] WISCONSIN STAT. § 343.305(9)(a)5. limits a court to considering the following issues:

> a. Whether the officer had probable cause to believe the person was driving or operating a motor vehicle while under the influence of alcohol … *and whether the person was lawfully placed under arrest* for violation of [an OWI-related statute] ….
>
> b. Whether the officer complied with sub. (4) [by reading the proper information to the defendant].
>
> c. Whether the [defendant] refused to permit the [chemical] test….

(Emphasis added.)

arrest" in WIS. STAT. § 343.305(9)(a)5.a. to mean that "[a] circuit court may entertain an argument that the arrest was unlawful because the traffic stop that preceded it was not justified by probable cause or reasonable suspicion." ***Anagnos***, 341 Wis. 2d 576, ¶42.

¶14 Accordingly, we reject the State's contention that Hartman improperly raised the issue of reasonable suspicion at the refusal hearing. Under the plain meaning of WIS. STAT. § 343.305(9)(a)5., as interpreted by the Wisconsin Supreme Court in ***Anagnos***, we conclude that Hartman had the right at the refusal hearing to contest whether the deputy had reasonable suspicion. We also reject the State's contention that Hartman was required to provide notice that he intended to raise the issue of reasonable suspicion at the hearing. Pursuant to WIS. STAT. § 343.305(9)(a), "[n]either party is entitled to pretrial discovery in any refusal hearing" except that the court may order, upon a timely request and a showing of cause, that the defendant be allowed certain discovery. Moreover, the State cites to no legal authority in support of its contention that Hartman waived the issue by failing to provide notice to the State. Thus, we conclude that Hartman properly raised the issue at the refusal hearing.

B. THE DEPUTY ENGAGED IN A CONSENSUAL ENCOUNTER

¶15 Having determined that Hartman was entitled to contest the lawfulness of his arrest at the refusal hearing, we turn to whether the deputy's questioning was lawful. Hartman argues that the initial two to five minutes of questioning were unlawful because the deputy had no reason to believe criminal activity was afoot based on a report of a "suspicious" person hiding behind a sign

near a park entrance.[3] Thus, Hartman argues that he was "seized" within the meaning of the Fourth Amendment and that the seizure was unreasonable because the deputy did not have a reasonable suspicion that criminal activity was afoot.

¶16 The State contends that the deputy did not need a reasonable suspicion that criminal activity was afoot because the encounter was consensual. The State points out that the deputy asked Hartman whether he would be willing to speak and Hartman volunteered answers. Hartman responds that the State waived this issue by failing to raise it at the refusal hearing.

¶17 We agree with Hartman that the State did not explicitly argue to the court that the deputy's questioning constituted a consensual encounter. However, we conclude that, because there is a sufficient record of the evidentiary facts and no material fact is in dispute, we may address whether Hartman was "seized" under the Fourth Amendment. *See* ***State v. Griffith***, 2000 WI 72, ¶24, 236 Wis. 2d 48, 613 N.W.2d 72 (determining that even though the Fourth Amendment issue was not raised at the circuit court level, it was appropriate to address it where there was a sufficient record of the evidentiary facts and no factual dispute). Accordingly, we determine de novo whether, under the undisputed facts, the deputy's questioning constitutes a "seizure" within the meaning of the Fourth Amendment. ***Id.***; ***State v. Young***, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729 (stating that whether a defendant was "seized" is a question of constitutional fact subject to de novo review).

[3] Hartman also contends that an anonymous tip about a suspicious person is insufficient to justify an investigatory stop when there is no known information about the informant's veracity, reliability and basis of knowledge. *See* ***Alabama v. White***, 496 U.S. 325, 328 (1990). Because we conclude that Hartman was not "seized" within the meaning of the Fourth Amendment, we need not address this argument.

¶18 As noted above, the Fourth Amendment of the United States Constitution protects an individual's right to be free from unreasonable searches and seizures. U.S. CONST. amend IV. However, a police officer may, under appropriate circumstances, "seize" a person to investigate potential criminal behavior without violating that person's Fourth Amendment right. *See* ***State v. Waldner***, 206 Wis. 2d 51, 54-55, 556 N.W.2d 681 (1996) (citing ***Terry v. Ohio***, 392 U.S. 1, 22 (1968)). Nonetheless, "[n]ot all police-citizen encounters are seizures." ***State v. Kelsey C.R.***, 2001 WI 54, ¶30, 243 Wis. 2d 422, 626 N.W.2d 777. A person is "seized" within the meaning of the Fourth Amendment "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980); ***State v. Williams***, 2002 WI 94, ¶22, 255 Wis. 2d 1, 646 N.W.2d 834. Notably, "[w]hile most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." ***Immigration and Naturalization Serv. v. Delgado***, 466 U.S. 210, 216 (1984).

¶19 It is well established that a reasonable person would not feel free to leave when his liberty is restrained by means of physical force or a show of authority. ***State v. Harris***, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996). A non-exhaustive list of factors indicating a reasonable person would not feel free to leave include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." ***State v. Jones***, 2005 WI App 26, ¶10, 278 Wis. 2d 774, 693 N.W.2d 104 (quoting ***Mendenhall***, 466 U.S. at 554-55); *see also* ***Michigan v. Chesternut***, 486 U.S. 567, 575 (1988) (concluding that a police officer had not

made a sufficient showing of authority when he slowly followed the defendant in his police car but did not activate a siren or flashers, order the defendant to stop, display weapons, or maneuver the police car to block the defendant or control his movement).

¶20 Hartman argues that he was "seized" by the deputy "[a]s soon as the deputy showed his authority by introducing himself and asking Hartman to provide identification." Hartman asserts that at that point he had no choice but to answer the deputy's questions. We disagree and conclude that, under an objective test, Hartman answered the questions put to him voluntarily and therefore was not "seized" under the Fourth Amendment.

¶21 The following facts in the record support our conclusion. The deputy did not activate his squad car lights when he pulled up behind Hartman. The deputy asked Hartman whether he would be willing to speak and Hartman agreed by answering questions. There is no indication in the record that the deputy was accompanied by other officers or displayed a weapon. There is also no indication that the deputy physically touched Hartman or used threatening language or a tone of voice to indicate to Hartman that he could not refuse.

¶22 Based upon the totality of the circumstances, a reasonable person would have felt free to leave because the deputy did not use physical force or make a sufficient showing of authority to demonstrate otherwise. We note that the only factor suggesting that Hartman would not have felt free to leave is that the deputy parked his squad car in a way to make it difficult for Hartman to leave the park. However, that factor alone does not turn a consensual encounter into a seizure. *See* ***Mendenhall***, 466 U.S. at 554 (concluding that courts must consider "all of the circumstances surrounding the incident"). Although this factor weighs

in favor of concluding that Hartman was "seized," we do not weigh this factor so heavily as to outweigh all the other factors relevant to our analysis.

¶23 Accordingly, we conclude that Hartman was not "seized" within the meaning of the Fourth Amendment. We emphasize that the deputy's testimony regarding his subjective intent to detain Hartman is wholly irrelevant to the question of whether the encounter was consensual. ***State v. Reichl***, 114 Wis. 2d 511, 515, 339 N.W.2d 127 (Ct. App. 1983) (noting that a deputy's subjective intent is relevant "only to the extent it was conveyed" to the defendant). There is no indication in the record that the deputy conveyed to Hartman that had Hartman tried to walk away from him, he "probably would have continued to try to speak to [Hartman]" and would not have allowed Hartman to leave the park. Accordingly, we disregard the deputy's subjective intent and instead make our decision based on the objective fact that the deputy approached Hartman to ask whether he would be willing to talk and a reasonable person would have felt free to decline.

¶24 In light of the above facts, we also conclude that the deputy had probable cause to arrest Hartman. Probable cause for arrest is defined as "proof that would lead a reasonable police officer to believe that a person probably committed a crime." ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 302, 603 N.W.2d 541 (1999). Here, the deputy had probable cause because Hartman's admission is proof that would lead a reasonable officer to believe Hartman had probably operated a vehicle while intoxicated in violation of WIS. STAT. § 346.63(1)(a). Indeed, Hartman concedes that, if the initial questioning was lawful, then the deputy had probable cause to arrest him based on his later admission. Because Hartman refused to submit to a chemical test following his lawful arrest, the court correctly revoked his operating privileges for one year. Therefore, we affirm.

By the Court.—Judgment affirmed.

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