COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2241-CR **Cir. Ct. No. 2010CT71**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL M. BUESGENS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Buffalo County: JAMES J. DUVALL, Judge. *Affirmed.*

¶1 MANGERSON, J.[1] Daniel Buesgens appeals a judgment of conviction for operating while intoxicated, second offense. On appeal, Buesgens argues the court erred by denying his suppression motion because he was

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

improperly seized when the officer asked him questions without reasonable suspicion. We affirm.

BACKGROUND

¶2 On August 28, 2010, at approximately 8:14 p.m., officer Jason Mork pulled two motorcycles over for speeding. The drivers were identified as Buesgens and his friend, Paul Stutelberg. Mork observed that both drivers had "a fixed stare, wide-eyed appearance[,]" which he explained is the definition for "glassy eyed." Mork did not smell alcohol or observe any other signs of impairment.

¶3 Mork collected Buesgens' and Stutelberg's driver's licenses, returned to his vehicle, checked the statuses of their licenses, and prepared written citations. He returned to the drivers and individually issued and explained the citations—first to Buesgens and then to Stutelberg. After Mork finished explaining the citation to Stutelberg, he told both drivers he would "help [them] get back out when [they] are ready."

¶4 Stutelberg then tried to open his saddlebag. Mork observed that Stutelberg was having a difficult time inserting his key into the saddlebag. Because it was dark, Mork assisted Stutelberg by shinning his flashlight on the saddlebag. After a moment, Stutelberg dropped the key and had a difficult time locating it on the ground, even with Mork's assistance.

¶5 Mork then asked Stutelberg, "[W]here they were coming from?" Buesgens responded that they were coming from a local tavern. Mork asked whether "they had anything to drink tonight[.]" Both drivers responded they had

one drink. To make sure he was getting a truthful answer, Mork repeated the question. This time, both drivers responded they had three drinks.

¶6 Mork then had both drivers participate in field sobriety tests. Buesgens indicated signs of impairment during his field sobriety tests. Mork administered a preliminary breath test, and arrested Buesgens for operating while intoxicated.

¶7 At the motion hearing, the State argued the initial stop was justified and Buesgens was free to go after Mork told him he would help him get back on the road. The State argued that, based on the glassy eyes and the untruthful admission of drinking, Mork reasonably extended the initial seizure to administer field sobriety tests.

¶8 Buesgens conceded the initial seizure was proper and that, after Mork issued the speeding citation and told him that he would help him get back on the road, he was "absolutely free to go." Buesgens contended he was reseized when Mork began asking whether he was drinking. Buesgens asserted Mork had no reasonable suspicion to ask those questions. Alternatively, Buesgens contended that if Mork did not reseize him by asking the questions, Buesgens was reseized without reasonable suspicion when Mork had Buesgens participate in the field sobriety tests.

¶9 The court determined Mork was permitted to ask Buesgens the questions. It found Buesgens was released and then reseized when Mork began administering the field sobriety tests. The court determined that, at that moment, Mork had reasonable suspicion to further investigate through the administration of the field sobriety tests.

DISCUSSION

¶10 Buesgens' appeal focuses on Mork's questions: "where are you coming from?" and "have you been drinking?" He contends these questions constituted an impermissible extension of the initial seizure. Specifically, Buesgens argues that before asking these questions, Mork needed, but did not have, reasonable suspicion that Buesgens was impaired. Buesgens asserts that because he was improperly seized by the questions, the court erred by denying his suppression motion.[2]

¶11 Buesgens' argument that the questions extended the initial seizure is misplaced. He conceded at the motion hearing that he was free to go when Mork told him he would help him get back on the road. Because he was free to go, Mork's subsequent questioning cannot constitute an extension of the initial seizure. Instead, we must determine whether Mork's questioning constituted a new seizure and, if so, whether that seizure was proper. *See* ***State v. Williams***, 2002 WI 94, ¶4, 255 Wis. 2d 1, 646 N.W.2d 834 (because defendant was free to go following traffic stop, focus is on whether subsequent questioning created new seizure); *see also* ***State v. Young***, 2006 WI 98, ¶20, 294 Wis. 2d 1, 717 N.W.2d 729 (Constitutionality of investigative stop depends on whether, at the time of seizure, "police have reasonable suspicion that a crime has been committed, is being committed, or is about to be committed.").

[2] Buesgens' appellate argument focuses only on whether the subsequent questioning constituted an improper seizure. He does not renew his alternative argument that he was seized without reasonable suspicion when Mork administered the field sobriety tests. We therefore deem this argument abandoned and do not address it. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

¶12 "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." ***Williams***, 255 Wis. 2d 1, ¶21 (quoting ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980)). Questioning by law enforcement officers does not by itself effectuate a seizure. ***Id.***, ¶22 (citing ***INS v. Delgado***, 466 U.S. 210, 216 (1984)). Although "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." ***Id.***, ¶23 (citation omitted). For police questioning to constitute a seizure, the surrounding conditions must be "so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded …." ***Id.***, ¶22 (citation omitted).

¶13 In ***Williams***, Williams was stopped for speeding. ***Id.***, ¶5. At the conclusion of the traffic stop, the officer told Williams he would "let [him] get on [his] way" and started to walk away. ***Id.***, ¶¶11-12. The officer then abruptly turned around and began questioning Williams about drugs and weapons, and asked if he could search Williams' car. ***Id.***, ¶12. Williams denied having any of those items and consented to the search. ***Id.*** The officer found a loaded handgun and heroin. ***Id.***, ¶13. Williams brought a suppression motion, and argued he was improperly seized when the officer questioned him and he consented to the search. ***Id.***, ¶4.

¶14 Our supreme court determined that, because Williams was unequivocally told he was free to leave, he was no longer under the initial seizure and the issue was whether the officer's subsequent questioning constituted a new seizure. ***Id.***, ¶27. Recognizing that "[q]uestioning alone does not [constitute] a seizure," the court observed that "the fact that this defendant—perhaps like most

people—spontaneously and voluntarily responded to the officer's questions is not enough to transform an otherwise consensual exchange into an illegal seizure." ***Id.***, ¶28. The court reasoned a reasonable person in these circumstances would not have felt compelled to stay and answer the officer's questions. ***Id.***, ¶¶28, 35. It concluded the officer's questioning did not constitute a new seizure. ***Id.***

¶15 Similar to ***Williams***, a reasonable person in Buesgens' position would have felt free to decline Mork's questions and terminate the encounter. *See* ***id.***, ¶35. The traffic stop had concluded and Buesgens was free to go. After assisting Stutelberg, Mork asked Buesgens three simple questions. Nothing in the record indicates Mork said or did anything while asking these questions that would have compelled Buesgens to stay. We conclude Mork's subsequent questioning did not constitute a seizure.

¶16 Buesgens, however, attempts to distinguish this situation from ***Williams*** by analogizing it to the situation in ***State v. Jones***, 2005 WI App 36, 278 Wis. 2d 774, 693 N.W.2d 104. In ***Jones***, we determined the defendant was improperly seized by the subsequent questioning because, unlike the officer in ***Williams***, the officer in ***Jones*** never gave the defendant any indication that he was free to go before he started questioning him. ***Id.***, ¶16. We concluded that without a cue from the officer that the traffic stop has concluded and the person is free to go, a reasonable person in the defendant's position would not believe he or she was free to decline the officer's questions and leave. ***Id.***, ¶¶17-18, 21-22.

¶17 ***Jones*** is clearly distinguishable. Here, unlike the officer in ***Jones***, Mork signified the conclusion of the traffic stop by telling Buesgens he would help him get back on the road when he was ready. Moreover, Buesgens conceded at the motion hearing that he was free to go when Mork made this statement.

By the Court.—Judgment affirmed.

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