COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1024-FT **Cir. Ct. No. 2011CV2698**

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

VILLAGE OF MENOMONEE FALLS,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY E. ROTRUCK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: WILLIAM DOMINA, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] Timothy Rotruck received municipal citations for possession of a controlled substance and possession of drug paraphernalia

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

following a vehicle search. Rotruck moved to suppress evidence stemming from the search on grounds that the consent to the search was involuntary or coerced. The municipal court denied Rotruck's motion and found him guilty of the cited offenses. Rotruck now appeals from a circuit court order upholding the municipal court's decision. We affirm.

¶2 The facts underlying the search of the vehicle were testified to at a motion hearing before the municipal court. Both the driver of the vehicle, Jerimyah Petersen, and the officer who stopped Petersen's vehicle testified. The officer testified that on May 7, 2010, at approximately 11:59 p.m., he conducted a traffic stop for an equipment violation and expired registration. The officer testified that he first activated his lights on a city street but "unfortunately [the driver] decided to pull into [a] parking lot and into a parking space." The officer then positioned his squad car "a half a car length to the rear [of the stopped vehicle] and slightly off angle."

¶3 Once stopped, the officer requested identification from both Petersen and the passenger, Rotruck. While speaking with Petersen, the officer noticed that Petersen appeared nervous and was "stammering his speech." Rotruck "stared straight ahead the entire time while [the officer] had contact with the driver." The officer testified that, based on his training and experience, he felt that Petersen's behavior was suspicious and could be an indicator that he was concealing something. The officer asked both Petersen and Rotruck if there were any items of contraband inside the vehicle, including drugs, and both answered in the negative. The officer ran record checks, which came back negative. The officer's partner arrived and they both approached the vehicle. The officer issued citations to Petersen, returned his and Rotruck's driver's licenses, and advised Petersen at that time to "drive safe."

¶4 The officer testified that he and his partner then turned back toward his squad car. The officer took "several steps" before turning back to the stopped vehicle and reinitiating contact with Petersen. The officer "readdressed" Petersen, reminding Petersen that he had denied the presence of contraband in the vehicle and, at that time, specifically requested permission to search the vehicle to confirm that statement. Petersen told the officer to "go ahead and search." The search uncovered marijuana and drug paraphernalia, which Rotruck acknowledged was his.

¶5 Rotruck received municipal citations for both possession of a controlled substance and possession of drug paraphernalia. He filed a motion to suppress evidence challenging the legality of the vehicle search. The municipal court held a motion hearing on March 16, 2011, and thereafter filed a written decision denying Rotruck's motion to suppress. The parties proceeded to a trial on stipulated facts and Rotruck was found guilty of both citations and was issued forfeitures. Rotruck requested a transcript review before the circuit court under WIS. STAT. § 800.14(5). The circuit court upheld the municipal court's ruling, stating:

> The officer in the instant case stopped the defendant for an equipment violation. The officer then initiated contact with Petersen to obtain his information, went back to his squad, and then returned to the … vehicle to give [Petersen] his citation and driver's license before telling him to "drive safely." A reasonable person in Petersen's circumstances would have considered the traffic stop to be over at this point based on the officer's words and actions. While the court is to view the situation in light of all the surrounding circumstances, the position of the officer's squad car and the presence of a back-up officer are not significant enough to suggest mandatory compliance. Based on the factual circumstances surrounding the case at hand and the words and actions of the officer, a reasonable person would have considered the traffic stop to be over.

Rotruck appeals.

¶6 Rotruck does not challenge the officer's initial stop of the vehicle. Thus, the narrow issue on appeal is whether Petersen's subsequent consent to the search of the vehicle was valid. Although warrantless searches are per se unreasonable under the Fourth Amendment, exceptions to the warrant requirement exist, including an exception for searches conducted pursuant to voluntarily given consent. ***State v. Luebeck***, 2006 WI App 87, ¶7, 292 Wis. 2d 748, 715 N.W.2d 639. Consent searches are accepted investigative law enforcement devices and are not in any general sense constitutionally suspect. ***State v. Williams***, 2002 WI 94, ¶19, 255 Wis. 2d 1, 646 N.W.2d 834. However, a search authorized by consent is not valid if consent was given while the individual was illegally seized. ***Luebeck***, 292 Wis. 2d 748, ¶7.

¶7 We review a municipal court record under WIS. STAT. § 800.14(5) using the same standard of review as the circuit court. ***Village of Williams Bay v. Metzl***, 124 Wis. 2d 356, 362, 369 N.W.2d 186 (Ct. App. 1985). We do not review the record de novo, but rather search the record for evidence to support the municipal court's decision. ***Id.*** at 361-62. We uphold the municipal court's factual findings unless they are clearly erroneous and give due regard "to the opportunity of the municipal court to judge the credibility of the witnesses." ***Id.*** at 361. However, we determine questions of constitutional fact independently and, thus, whether an individual was seized within the meaning of the Fourth Amendment at the time he or she consented to a search is a question of constitutional fact that we review de novo. ***Williams***, 255 Wis. 2d 1, ¶17.

¶8 The evidence that Petersen consented to the search of his vehicle was undisputed. Based upon ***Williams***, we conclude that Petersen was not seized

when he gave his consent and that the consent was valid. Not every encounter with a law enforcement officer is a seizure within the meaning of the Fourth Amendment. ***Id.***, ¶20. The general rule is that a seizure has occurred when an officer, by means of physical force or show of authority, has in some way restrained a citizen's liberty. ***Id.*** Questioning by an officer does not alone effectuate a seizure. ***Id.***, ¶22. The test to determine whether a person is seized is whether, considering the totality of the circumstances, a reasonable person would have believed that he or she was free to leave or otherwise terminate the encounter. ***Luebeck***, 292 Wis. 2d 748, ¶7. The test is an objective one, focusing not on whether the defendant felt free to leave, but whether a reasonable person, under all of the circumstances, would have felt free to leave. ***Williams***, 255 Wis. 2d 1, ¶23.

¶9 In ***Williams***, an officer stopped the defendant for speeding. ***Id.***, ¶5. After asking the defendant to step out of the car, the officer issued a warning citation, obtained the defendant's signature on it, and returned the defendant's driver's license and vehicle rental papers to him. ***Id.***, ¶¶9-11. The officer then told the defendant: "Good, we'll let you get on your way then okay." ***Id.***, ¶11. The officer and the defendant then shook hands, exchanged parting pleasantries, and the officer turned around, taking a couple of steps toward his car. ***Id.***, ¶12. The officer then abruptly swiveled back around and in a louder but still conversational tone asked the defendant a rapid succession of questions about whether he had contraband or a large amount of money in the car. ***Id.*** Included in the questions, the officer asked the defendant whether he could search his car to be sure the mentioned items were not in it, and the defendant answered, "[Y]es," culminating in the discovery of a weapon and heroin. ***Id.***, ¶¶12-13. The encounter in ***Williams*** occurred at 2:30 a.m. on the shoulder of a rural section of the

interstate, but with "plenty of" traffic. ***Id.***, ¶34. A backup officer stood nearby on the passenger side of the defendant's vehicle. ***Id.***, ¶32.

¶10 The ***Williams*** court concluded that the totality of the circumstances established that a reasonable person would have felt free to decline the officer's questions and leave the scene or otherwise terminate the encounter. ***Id.***, ¶35. It stated that it was strongly influenced by the officer's statement that the defendant could "get on [his] way," concluding that the officer's words and actions, considered as a whole, communicated that the defendant had permission to leave because the traffic stop was over. ***Id.***, ¶29. The fact that the defendant stayed, answered questions, and gave consent to search did not establish that he was compelled to do so. ***Id.*** The court held that the defendant was free to leave when the officer returned his driver's license and paperwork, gave him the warning citation, and told him he could get on his way. ***Id.***, ¶35. It held that, under all of the circumstances and based on the objective, reasonable person standard, the subsequent questioning did not constitute a seizure and the defendant's consent was valid. ***Id.***

¶11 This case is similar to ***Williams***. The vehicle was stopped for an equipment violation. The officer issued the citations, returned the occupants' driver's licenses, and told Petersen to "drive safe." The officer then turned and took a few steps toward his squad car. As in ***Williams***, the traffic stop had ended before the officer asked the driver if he would consent to a search of his vehicle. Further, the stop occurred in a parking lot of a fast-food restaurant just before midnight, arguably less intimidating circumstances than those in ***Williams***, where the stop occurred on an interstate at 2:30 a.m. Under the totality of the circumstances, a reasonable person in Petersen's position would have felt free to leave the scene or otherwise terminate the encounter. Consequently, Petersen was

not seized when he consented to the search, and his consent was valid. *See* ***id.***, ¶35.

¶12 In reaching this conclusion, we reject Rotruck's contention that the officer did not demonstrate to Petersen that the traffic matter was concluded and, thus, this case is more closely aligned with ***State v. Jones***, 2005 WI App 26, 278 Wis. 2d 774, 693 N.W.2d 104. ***Jones*** is distinguishable. In ***Jones***, when the officer asked for consent to search the motorist's vehicle, the officer had already written out a warning citation and returned the identification cards of the motorist and passenger, and the traffic stop had ended. ***Jones***, 278 Wis. 2d 774, ¶¶2-4, 7. However, the officer did not communicate permission to leave by either word or action prior to asking to search the vehicle, and the motorist therefore remained seized, rendering his consent to the search invalid. ***Id.***, ¶¶21-23.

¶13 In this case, as in ***Williams***, permission to leave was clearly communicated to Petersen when the officer told him to "drive safe." Rotruck suggests that the officer should have terminated the stop by advising them that they were "free to go" or to "walk safe" as they had informed the officer that they were meeting friends at the fast-food restaurant. However, ***Williams*** does not require specific words or phrases. Rather, ***Williams*** requires "some verbal or physical demonstration by the officer, or some other equivalent facts, which clearly convey to the person that the traffic matter is concluded and that the person should be on his or her way." ***Jones***, 278 Wis. 2d 774, ¶17. We are satisfied that the officer's statement of "drive safe" is such a clear conveyance, especially when made after the issuance of citations and return of driver's licenses and followed by the officer's turn back toward his squad car.

¶14 Finally, Rotruck contends that because the officer's squad car was still parked behind Petersen's vehicle at the conclusion of the traffic stop, a reasonable person would not have believed that he or she was free to leave but rather would have felt compelled to stay and respond to the officer's follow-up request to search the vehicle.[2] However, the officer testified that the positioning of the squad car was due to the location of the traffic stop (a parking lot) and an effort to allow traffic to flow around the squad car. With the traffic stop concluded and the officer heading toward his vehicle, a reasonable person would expect that the officer would be moving the vehicle shortly. Like the circuit court, we conclude that the position of the squad car is not so significant as to suggest to Petersen that compliance was mandatory. We conclude that Petersen was not seized when his consent was given.

¶15 We conclude that the circuit court properly upheld the municipal court's decision denying Rotruck's motion to suppress evidence and finding him guilty of the cited offenses. We affirm the order.

By the Court.—Order affirmed.

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

[2] Rotruck additionally contends that the presence of the second officer and the activated emergency lights on the officer's squad car both "contributed to an environment in which a reasonable person would not have felt free to leave." However, both of these circumstances existed in ***State v. Williams***, 2002 WI 94, ¶¶30, 32-33, 255 Wis. 2d 1, 646 N.W.2d 834, and the court nevertheless concluded that the presence of a back-up officer and flashing emergency lights, without more, were not sufficient to convert a consensual exchange into a seizure such that a reasonable person would not have felt free to leave.