COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP299-CR **Cir. Ct. No. 2012CT184**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MICAH J. SNYDER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County: DANIEL GEORGE, Judge. *Reversed.*

¶1 BLANCHARD, P.J.[1] The State of Wisconsin appeals a circuit court order granting Micah Snyder's motion to suppress evidence of intoxication

[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.

on the grounds that it was derived from an unlawful seizure. The State argues that the circuit court erred in concluding that a Wisconsin State Patrol trooper seized Snyder when the trooper stopped his squad car facing Snyder's stopped vehicle and then approached Snyder's vehicle on foot to speak with him. Applying controlling Wisconsin Supreme Court precedent, I agree with the State that the trooper's actions did not constitute a seizure and, therefore, I reverse the order of the circuit court granting Snyder's motion to suppress.

BACKGROUND

¶2 The sole witness at the suppression hearing was the trooper, who testified to facts that included the following.

¶3 One Saturday night, at approximately 11:30 p.m., the trooper noticed a Cadillac stop briefly at a stop sign, then proceed to turn into the parking lot of a town hall. The trooper later determined that the car was operated by Snyder.

¶4 Driving a fully marked squad car, the trooper turned into the driveway leading into the same parking lot that Snyder had entered. The trooper watched Snyder turn the Cadillac around in the parking lot. At about the same time that the trooper's squad car came to a stop in the driveway of the parking lot, Snyder's car came to a stop in the parking lot in front of the squad car, so that the front ends of the two vehicles squarely faced each other. The trooper stopped on the right side of the driveway, as one faces the parking lot from the adjoining roadway, with the squad car headlights lined up with the headlights of Snyder's car. The trooper testified that Snyder's car "was in the main parking area. My car was in the driveway." The squad car was approximately "a car length to two car lengths away" from Snyder's car, or "at least" twelve to twenty-four feet away, when one considers average car length to be about twelve feet.

¶5 The driveway was the only point of entry and exit between the parking lot and the adjoining roadway. At the point where the driveway meets the parking lot, the driveway is approximately thirty feet wide (as measured by the trooper the day before the suppression hearing). In addition, the trooper testified that he thought that the driveway widens further toward the adjoining roadway. Estimated "conservatively," there was at least twenty feet of open driveway to the trooper's left.

¶6 The parking lot was illuminated by three or more standing lamp posts, although the lights were "a little ways away" from where the two cars were stopped.

¶7 The trooper waited in his squad car for "a short time," "[t]hirty seconds or more," to see whether Snyder was "going to leave," apparently meaning to see whether Snyder was going to drive out of the parking lot. After this "short time," the trooper, who was in uniform, got out of his squad car, carrying a flashlight, and approached the driver's side of Snyder's car on foot. The trooper had not activated the squad car's emergency lights or siren at any time in connection with his interactions with Snyder. The trooper testified that he believed Snyder's driver side window was already lowered when the trooper approached, but that he was "not 100 percent sure" of this.

¶8 The trooper asked Snyder why he was in the parking lot. Upon speaking with Snyder, the trooper observed that Snyder's eyes were bloodshot, his speech was slurred, and the trooper could smell intoxicants coming from Snyder's car. After administering field sobriety tests, the trooper arrested Snyder and eventually obtained a chemical breath test. Snyder was charged with operating a motor vehicle while intoxicated and with a prohibited alcohol concentration, as

well as operating with a revoked license. Snyder filed a motion to suppress this evidence on the ground that it was obtained as a result of an unlawful seizure.

¶9 In an oral decision, the circuit court made findings that generally credited the testimony of the trooper. Most relevant to the issue raised on appeal, the court explicitly found that Snyder could have driven out of the lot after the two vehicles were stopped, face to face, although Snyder "would have had to make a significant effort to go around the vehicle of the officer."[2]

¶10 The court concluded that, due to the position of the trooper's fully marked squad car relative to Snyder's car, the trooper seized Snyder when he approached Snyder's car, and on this basis granted Snyder's motion to suppress. The State now appeals.

DISCUSSION

¶11 The only issue on appeal is whether the trooper seized Snyder when the trooper stopped his squad car in the driveway, one car length or a little more than one car length directly in front of Snyder's vehicle, and then walked to the driver's side of Snyder's vehicle to speak with him.[3] Snyder argues that a

[2] The State argues that the circuit court erroneously found that the driveway on which the trooper stopped was two car lengths (24 feet) wide, rather than 30 feet wide, but I conclude that it would not matter whether the driveway were 24 or 30 feet wide under ***County of Grant v. Vogt***, 2014 WI 76, __ Wis. 2d __, 850 N.W.2d 253.

[3] The State does not argue that, assuming a seizure at any time prior to the moment when the trooper began speaking with Snyder and noticed signs of intoxication, the trooper had the requisite reasonable suspicion or probable cause to justify a seizure.

Separately, I do not address Snyder's argument that, putting aside the seizure question, the State failed to justify the intrusion of conducting a field sobriety test by showing that the trooper had reasonable suspicion that Snyder was impaired when the trooper requested the field sobriety test. While Snyder raised the issue before the circuit court, the court determined that it did not need to reach it after deciding the seizure question against the State. Regarding the (continued)

"reasonable person could see a police officer approaching within 10 feet of the front of his or her vehicle and conclude that he was not free to leave." The State argues that a reasonable person in Snyder's position would have felt free to leave. Under recent precedent from our supreme court, I conclude that the State's argument must prevail.[4]

¶12 As has been long established,

> not all personal interactions between law enforcement officers and people constitute a seizure.
>
> A seizure "[o]nly occurs when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." … "[A] person has been '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 he was not free to leave."

County of Grant v. Vogt, 2014 WI 76, ¶¶19-20, __ Wis. 2d __, 850 N.W.2d 253 (quoted source omitted).

¶13 Whether someone has been seized is reviewed under a two-part standard of review. ***Id.***, ¶17. The circuit court's findings of fact are reviewed under the clearly erroneous standard, but the application of those facts to constitutional principles is subject to de novo review. ***Id.***

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reasonable suspicion issue, it would be for the circuit court in the first instance to find facts and apply the appropriate legal standards.

[4] The ***Vogt*** opinion reversing an unpublished opinion of the court of appeals was issued in July 2014, well after the circuit court issued its order granting Snyder's motion to suppress in January 2013. The State in this case had the benefit of the ***Vogt*** opinion by the time it filed its reply brief on appeal, and I allowed Snyder an opportunity to submit supplemental briefing, addressing ***Vogt***.

¶14 In ***Vogt***, the court concluded that a law enforcement officer did not seize the defendant when an officer stopped a marked vehicle near another vehicle, got out and approached the second vehicle on foot, and knocked on the driver's side window of the defendant's vehicle, while indicating that the defendant should lower his window. ***Id.***, ¶¶2-3, 39-53. I conclude that Snyder fails to distinguish any fact that matters from the pertinent facts in ***Vogt***, which I now summarize in more detail.

¶15 Vogt had stopped in the parking lot of a closed boat dock when an officer pulled his fully marked squad car in behind Vogt's vehicle and stopped. ***Id.***, ¶¶4, 6. The officer's vehicle had its headlights on, but its emergency lights were not activated. ***Id.***, ¶6. A river was about fifty feet in front of the Vogt's vehicle and a vending machine was close to the right side of the vehicle. ***Id.***, ¶¶11-12. The officer, in full uniform and carrying a pistol in his holster, approached the driver's side of the vehicle, "rapped" on the window, and motioned for Vogt to lower the window. ***Id.***, ¶¶7, 43. After Vogt lowered the window and the officer began speaking with him, the officer noticed Vogt's speech was slurred and could smell intoxicants coming from inside the vehicle. ***Id.***, ¶¶8-9.

¶16 Vogt argued that the facts supported the following inferences and, based on these inferences, he was seized: (1) the officer "parked right behind" Vogt's vehicle; (2) "the location of … Vogt's vehicle in the parking lot was not conducive to [Vogt] simply driving away [from the officer];" (3) the officer "commanded" Vogt to lower his window. ***Id.***, ¶40. As to the first two arguments, the court explained that, although the officer had parked "directly behind" Vogt and there were obstacles on three sides of Vogt's vehicle, he was not seized "because he still could have driven away" by pulling forward and executing a U-

turn. ***Id.***, ¶¶41-42. As to the last argument, the court explained that the finding of the circuit court was that the officer "wasn't commanding" Vogt to do anything, and concluded that the officer's "conduct was not so intimidating as to constitute a seizure." ***Id.***, ¶43.

¶17 Here, as summarized above, the trooper stopped facing Snyder's vehicle, at approximately the same time as Snyder stopped in the parking lot, and after a span of approximately thirty seconds, approached the driver's side window. The trooper was in uniform and driving a fully marked squad car, but he did not activate his squad car's emergency lights or siren. The manner in which the vehicles were positioned allowed Snyder to drive out of the parking lot.[5] There was no testimony that the officer asked or commanded Snyder to lower his window or exit the vehicle prior to observing signs that Snyder was intoxicated.

¶18 Snyder attempts to distinguish ***Vogt*** on three grounds: (1) the positioning of the trooper's car was such that Snyder would have had to "maneuver *around*" the squad car, while Vogt "would have merely had to drive *away* from the sheriff's deputy behind him" (emphasis in original); (2) the fact that the trooper's car was facing Snyder's car, rather than behind it, made the situation "more adversarial" than in ***Vogt***; and (3) given the circuit court's finding that the trooper "was intending to exercise some degree of control over" Snyder and the court's ultimate conclusion that Snyder was seized, the court made at least an implicit finding that the trooper commanded Snyder to lower his window prior

[5] Even in his argument on appeal, Snyder does not argue that the circuit court found or that the record conclusively demonstrates that the trooper's squad car prevented an exit by Snyder.

to speaking with him, and there is no basis for me to conclude that this implicit finding was clearly erroneous.

¶19 First, Snyder contends that unlike Vogt, his only exit route was to "maneuver *around* a fully marked … squad car," which "no reasonable person would dare attempt." However, even assuming without deciding that the ability to drive in the opposite direction from an officer who has expressed interest in the driver, as opposed to having to drive toward the area of the officer, should weigh in favor of establishing a seizure, the facts in ***Vogt*** are not as Snyder suggests. As I read ***Vogt***, while Vogt had fifty feet in which to pull forward, still, in order to leave the area Vogt would have needed to make a U-turn and then pass the deputy.

¶20 Second, Snyder argues that, because the trooper's squad car was facing Snyder's vehicle rather than in a "nonconfrontational position" behind it, the scenario was "more adversarial" than in ***Vogt***. However, Snyder fails to explain why I should conclude that the fact that the squad car was close to and facing Snyder's vehicle, rather than close to and behind it, matters, given that Snyder "still could have driven away," using the terms of ***Vogt***. If anything, a squad car stopped behind a subject vehicle might, depending on all facts, be considered to more closely resemble a conventional "police stop" to the average person than does a squad car stopped facing a stopped subject vehicle in the area of a parking lot, especially as here in the absence of the use of red and blue lights, a siren or horn, a gesture, or any other signal by an officer indicating an attempt to exercise control over the subject driver. One dynamic that cuts against a finding of seizure is that, in facing the trooper, Snyder would have been able to observe any suggestion from the trooper that Snyder had misread the trooper's intentions, by watching him as Snyder drove around the squad car.

¶21 Snyder appears to contend that courts in other jurisdictions have decided, on generally similar facts, that no seizure occurred because in each of those cases the officer's vehicle was stopped *behind* the defendant's vehicle, not in front of it.[6] However, none of these cases were decided based on the fact that the officer's vehicle was behind the defendant's vehicle, as opposed to being in a different relative position. Rather, in each case, the court's conclusion that a seizure did not occur rested largely on the fact that the defendant had the ability to drive away.

¶22 Third, Snyder asserts that I should assume that Snyder lowered his window due to a command from the trooper, unlike in ***Vogt***, in which the supreme court relied on findings that the officer had not commanded the defendant to lower his window. *See* ***id.***, ¶43 & n.18. Snyder points to the fact that the circuit court here did not make a specific finding regarding why Snyder's window was lowered when the trooper first spoke with him, and argues that "[i]t is most reasonable to assume [that Snyder's] window was down at [the trooper's] command." Snyder cites to ***State v. Berggren***, 2009 WI App 82, ¶18, 320 Wis. 2d 209, 769 N.W.2d 110, for the proposition that "since the [circuit] court made no findings on this material fact, it should be construed on appeal in a light most favorable to [Snyder]." As part of this argument, Snyder points to the court's explicit finding that the trooper "was intending to exercise some degree of control over" Snyder.

¶23 Appellate courts make frequent use of the rule that "when the record does not include a specific finding on an issue, this court will assume that the issue

[6] *See* ***United States v. Griffith***, 533 F.3d 979 (8th Cir. 2008); ***United States v. Taylor***, 511 F.3d 87 (1st Cir. 2007); ***State v. Wilkes***, 756 N.W.2d 838 (Iowa 2008).

was resolved by the [circuit court] in a manner which supports the final judgment." ***Id.*** However, this doctrine allows appellate courts to make that assumption "'only when evidence exists in the record to support the "assumed fact."'" *See* ***Vogt***, 2014 WI 76, ¶41 (quoted source omitted). Here, the circuit court did not make a specific finding about whether the trooper did anything—made a gesture or a request, or issued a command—that prompted or compelled Snyder to lower the window of the car, or whether, as the trooper testified he believed was the case, the window was already open. There is no evidence in the record to support a finding that the trooper asked, let alone commanded, Snyder to lower his window. The only evidence presented was that the trooper believed that Snyder's window was already down when he approached Snyder's vehicle. Furthermore, there is no suggestion in the record that the trooper issued any command that might have transformed what was, under the reasoning of ***Vogt***, a non-seizure into a seizure.

¶24 In sum, the facts here are a close match to those in ***Vogt***. A lone, uniformed officer stopped a marked vehicle close to the subject's vehicle, but without activating emergency lights or siren, and approached on foot without drawing or displaying a weapon or using any commanding words or gestures, leaving room enough for the subject to drive away, even if, as the circuit court found, Snyder would have had to maneuver to make a safe exit.

CONCLUSION

¶25 For these reasons, I reverse the order of the circuit court, and the case is remanded for further proceedings consistent with this opinion.

By the Court.—Order reversed.

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