COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1383 **Cir. Ct. No. 2006CT573**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PEMBA L. BARBOFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed*.

¶1 KESSLER, J.[1] Pemba L. Barboff appeals from a judgment of conviction, entered after a jury trial, for operating under the influence of an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

intoxicant (3rd offense), contrary to WIS. STAT. § 346.63(1)(a) (2005-06).[2] She presents two arguments on appeal: (1) the evidence against her should have been suppressed because she was illegally seized by police; and (2) the evidence produced at trial was insufficient to prove she operated the vehicle. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 On January 26, 2006, Barboff was arrested and charged with operating a motor vehicle while under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration (PAC) of .08% or more.[3] She filed a motion to suppress evidence on grounds that the officer lacked reasonable suspicion to stop her, and lacked probable cause to arrest her.

¶3 At the hearing on the suppression motion, the State called a single witness: Officer Steve Anderson of the City of Oak Creek Police Department. He testified that at approximately 10 p.m. on January 26, 2006, he was informed that the police department dispatch center had received a call from a McDonald's employee "advising that they believed an operator of a vehicle was intoxicated, and they gave a description of the vehicle with a female driver and a license plate." The license plate was registered to Barboff, with whom Anderson was

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[3] Anderson was also subsequently charged with two counts of bail jumping. Those charges were dismissed without prejudice and are not at issue on appeal.

familiar. He drove to an apartment complex where he knew she sometimes stayed.[4]

¶4 Anderson said he observed the vehicle with the license plate he was looking for in the parking lot. He testified:

> As I was driving between the rows of cars, I noticed the vehicle with the taillights still on as it was pulled in head first. Upon driving up to that vehicle, I noticed it had the same license plate, it was a blue station wagon, and that the engine was running on the vehicle.

Anderson explained that he knew the engine was running because he approached the car with his window down, heard the engine running, and saw exhaust (which was made possible by the cold temperatures) coming from the tailpipe.

¶5 Anderson said he did not initially see a driver in the vehicle. However, after he was behind the vehicle for "a second or two," Anderson saw an individual "pop up" in the driver's seat. Anderson exited his squad, walked around to the passenger's side of the vehicle, and observed a woman in the driver's seat. He testified: "It appeared that she possibly was eating. There was McDonald's food on the front seat of the vehicle. At that point I walked around to the driver's side, and I used my flashlight to illuminate the inside of the car she was in."

¶6 Anderson said that once he turned his flashlight on, Barboff "shut the car off and exited the driver's door of the vehicle." He said that as she exited, "she stumbled a little bit and just caught herself, but then stood upright."

[4] Anderson testified that he did not know if the address of the apartment complex was the address associated with the license plate. However, based on his familiarity with Barboff and where she sometimes stayed, he went to that apartment complex.

Anderson said that he asked Barboff to step to the rear of the car, "so when asking her for identification there was a little bit more light back there, and she was able to see a little better."

¶7 Anderson observed Barboff as she retrieved her identification from her purse. He testified that "her eyes were glassy, a little bloodshot," and that he could smell an "odor of intoxicants coming from her person leading me to believe she had possibly been drinking." Anderson said another officer arrived on the scene and he then had Barboff perform some field tests so the officers could determine if she was intoxicated. She was asked to recite the alphabet without singing it and to count backwards. She was able to count, but was unable to recite the alphabet. Anderson said as Barboff spoke, he observed that her voice was slightly slurred.

¶8 Anderson said Barboff next attempted the "finger-to-nose test." He said she lost her balance and was unable to complete the test. When asked, Barboff declined to continue with additional field tests. Barboff was arrested for operating while intoxicated. The complaint indicates that she was then transported to a hospital where her blood was drawn. The test results indicated a blood alcohol content of .330%.

¶9 The trial court denied Barboff's suppression motion. First, the court noted that the defense had "essentially not taken issue with reasonable suspicion for the stop." It concluded that the officer had reasonable suspicion to stop behind Barboff and probable cause to arrest her. It specifically found Anderson's testimony to be credible, and implicitly adopted the officer's testimony as the court's findings of fact.

¶10 Prior to trial, the charge of operating with a PAC of .08% or more was dismissed when the State was unable to produce a witness from the State Crime Lab. At trial, the jury heard testimony from Anderson, a second officer and Barboff. Of significance to this appeal, Barboff testified that she had a fight with her boyfriend, left her apartment, sat in her car and used her cell phone to call her mother. She said she did not have her keys and did not put them in the ignition. She said she was in the car for about an hour and then the police arrived and approached her car.

¶11 The jury found Barboff guilty and she was convicted. After sentencing, this appeal followed.

DISCUSSION

¶12 Barboff presents two arguments: (1) the evidence against her should have been suppressed because she was illegally seized by police; and (2) the evidence produced at trial was insufficient to prove she operated the vehicle. We examine each in turn.

I. Illegal detention.

¶13 Barboff argues that she was detained when the officer parked his car behind her vehicle so she could not leave. In doing so, she is challenging whether the officer had reasonable suspicion to initially detain her, and she spends considerable time discussing whether the informant's tip was reliable. We reject her argument, for two reasons. First, as the State notes, there were no written arguments filed for the suppression hearing. Barboff's suppression motion simply alleged that she "was stopped without reasonable suspicion and further that [she] was arrested without probable or reasonable cause." At the suppression hearing,

Barboff's counsel offered no argument concerning reasonable suspicion, focusing instead on the argument that the officer lacked probable cause to arrest Barboff.[5] Counsel stated: "I would agree that there does appear to be reasonable suspicion to stop." The trial court acknowledged this when it observed that the defense had "essentially not taken issue with reasonable suspicion for the stop." We reject Barboff's attempt to raise this issue after not pursuing it (and, arguably conceding it) at the trial court. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) ("As a general rule, this court will not address issues for the first time on appeal.").

¶14 We also reject Barboff's argument because we conclude that she was not seized at the time of the initial encounter. Our supreme court has summarized the appropriate standard of review:

> Whether a person has been seized is a question of constitutional fact. As such, we accept the circuit court's findings of evidentiary or historical fact unless they are clearly erroneous, but we determine independently whether or when a seizure occurred. Similarly, in reviewing a motion to suppress, we employ a two-step analysis. We will uphold the circuit court's findings of fact unless clearly erroneous. Whether those facts constitute reasonable suspicion, however, is a question of law we review de novo.

State v. Young, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729 (citations omitted). Barboff does not challenge the trial court's findings of fact, and there is no indication that they are clearly erroneous.

[5] Barboff did not file a reply brief and, therefore, did not address the State's waiver argument. We conclude Barboff has, once again, waived this argument. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 ("An argument asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted.").

¶15 "'In order to effect a seizure, an officer must make a show of authority, and the citizen must actually yield to that show of authority.'" ***State v. Powers***, 2004 WI App 143, 275 Wis. 2d 456, 685 N.W.2d 869 (citation omitted). The show of authority must be sufficient to "give rise to a belief in a reasonable person that he was not free to leave." ***Young***, 294 Wis. 2d 1, ¶34.

¶16 Under the facts here, there was not a sufficient show of authority, when the encounter first began, to effect a seizure. The officer did not stop the vehicle; it was already parked when he came upon it. Further, as the State notes,

> before Ms. Barboff voluntarily got out of her car, the officer made no requests, whether verbal or otherwise. The officer barely made contact; Officer Anderson pulled in behind Ms. Barboff's car but in no way tried to restrain or prevent Ms. Barboff from getting out of her car which she then did voluntarily. Officer Anderson drew his flashlight, not a firearm.

¶17 These facts do not suggest that Barboff was "seized" at the time the officer first began to observe her. The officer's subsequent observations—including that Barboff stumbled as she got out of her car, smelled like intoxicants and had glassy, bloodshot eyes—led him to believe she might have been drinking, and he then conducted field tests to determine if she was intoxicated. Thus, the encounter gradually became a seizure and then an arrest.

II. Sufficiency of the evidence.

¶18 Barboff argues that her conviction should be reversed because the evidence was insufficient to establish that she operated the vehicle. Barboff does not challenge the jury's implicit finding that her car was running and that she turned off the ignition, noting that she "may be loathe to accept the contrary testimony of the officers that the engine was running," but recognizing that "on

appeal she must swallow this bitter pill." *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990) (This court may not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.").

¶19 Rather than challenge the jury's finding that she turned off the ignition, Barboff argues that she did not "operate" a motor vehicle as that term is used in WIS. STAT. § 346.63(3), which states: "'Operate' means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." This presents a question of law that we review de novo. *See* ***Village of Cross Plains v. Haanstad***, 2006 WI 16, ¶9, 288 Wis. 2d 573, 709 N.W.2d 447 (whether defendant was operating motor vehicle pursuant to WIS. STAT. § 346.63(1)(a) involves application of statute to undisputed facts and is therefore an issue reviewed de novo). When interpreting a statute, this court begins statutory interpretation with the language of the statute and "'[i]f the meaning of the statute is plain, we ordinarily stop the inquiry'" and give the language "its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted).

¶20 In ***Haanstad***, our supreme court concluded that the defendant was not "operating" the vehicle simply because she was sitting in the driver's seat of a parked vehicle with the engine running, where the uncontested evidence showed that the defendant was not the person who had left the engine running. ***Id.***, ¶23. Barboff argues that her case is similar, because "[t]here was no evidence,

circumstantial or otherwise, presented during [her] trial that it was she who turned on the ignition of the car and left it running."[6] Thus, she contends, the legal question presented is whether Barboff's act of turning off the ignition constituted operation of the motor vehicle. Barboff concedes that the ignition is a control necessary to put the vehicle in motion. However, she argues that she "manipulated [the ignition] in such a way as to prevent the vehicle from being put in motion" and that this "cannot possibly be 'operating'" under the statute.

¶21 Accepting for purposes of this appeal Barboff's assertion that there was no evidence presented that she had turned the vehicle *on*, we nonetheless reject her challenge to her conviction because we conclude that the act of turning *off* the car's ignition constituted operation of the vehicle under WIS. STAT. § 346.63(3). The statute requires "activation of any of the controls" necessary to put the vehicle in motion. ***Id.*** Barboff concedes the ignition is a control necessary to put the vehicle in motion, and that she turned it off. We conclude that under the plain language of the statute, Barboff activated the control when she turned it off. The statute does not differentiate between controls being turned on or off, and

[6] Barboff notes that evidence concerning the call from McDonald's was not presented at trial.

Barboff provides no authority that supports her interpretation of the statute.[7] For these reasons, we reject Barboff's challenge to the sufficiency of the evidence.[8]

By the Court.—Judgment affirmed.

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

[7] Barboff cites ***County of Milwaukee v. Proegler***, 95 Wis. 2d 614, 626, 291 N.W.2d 608 (Ct. App. 1980), and argues that her interpretation of the statute is not inconsistent with that case. We are unconvinced that ***Proegler*** dictates a different interpretation of WIS. STAT. § 346.63(3). Barboff has cited no Wisconsin case holding that turning off an ignition does not fall within the statute, and the plain meaning of the statute refutes this argument.

[8] We are unpersuaded by Barboff's final argument that it is unfair to penalize her simply for turning off the vehicle where doing so was "obviously safer for the officers" who were shining flashlights into the vehicle. She asserts that in doing so, she was "demonstrat[ing] due regard for the safety of the police officers." This assertion is without any support in the record, and directly contradicts Barboff's testimony that the car was never running and she never turned off the ignition.