

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 30, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2100-CR

Cir. Ct. No. 2008CT1302

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS G. HENNESSEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Thomas Hennessey appeals a judgment of conviction for third offense operating while intoxicated. Hennessey argues that the stop was unsupported by reasonable suspicion, and that the arrest was made

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

beyond the officer's territorial jurisdiction. We reject Hennessey's arguments and affirm.

BACKGROUND

¶2 Nathan Borman, an Outagamie County Sheriff's Deputy, overheard a radio dispatch involving an anonymous tip of a possible intoxicated driver. Borman responded after a subsequent transmission revealed the driver was nearing his location, heading eastbound on county highway KK / Calumet Street. Borman observed a vehicle matching the dispatch description and followed as it pulled into a gas station and parked in a stall next to the building. Borman observed no suspicious or illegal driving. Highway KK is a border road between Outagamie and Calumet Counties. The gas station was located in Calumet County.

¶3 Borman stated he parked far enough behind the vehicle that it could still back out. He then approached the vehicle and spoke to the driver seated inside. Hennessey initially denied drinking, but when he voluntarily exited his van, Borman observed a partially emptied six pack of beer on the driver-side floor. After administering field sobriety tests, Borman arrested Hennessey.

¶4 Hennessey moved, via several separate motions, to suppress the fruits of the arrest, alleging the stop and/or arrest was illegal. His written motions were not supported by any argument or separate brief. At the commencement of the motion hearing, Hennessey informed the court he was pursuing a motion to suppress based on a lack of reasonable suspicion for the stop. The State requested clarification in light of the several motions, indicating: "So it's my understanding there is not going to be a challenge to the probable cause for the arrest. That the issue is the legality of the traffic stop." Hennessey indicated that was correct.

¶5 Hennessey concluded his argument to the court as follows: “In this case there is no reasonable suspicion to stop and we have an officer making an arrest out in Calumet County from Outagamie County.” The State objected that the argument was “outside the scope of the pleadings, that was not raised.” The following discussion then took place:

[Hennessey]: Jurisdiction, Your Honor, jurisdiction is always a question. This arrest took place in Calumet County by the officer’s own admission.

[State]: Before this hearing he specifically said the arrest itself is not the subject of the hearing. It was the “stop”.

[Hennessey]: The stop took place in Calumet County. That’s all I have.

The State subsequently cited two cases involving extra-jurisdictional arrests and briefly argued police officers can conduct a citizen’s arrest beyond their territorial jurisdiction. Hennessey did not respond.

¶6 The circuit court concluded there was no “stop” and, therefore, no need for reasonable suspicion. The court further observed, “And there is no question in my mind that [the deputy] had authority on that southeast corner of that intersection, even though it was in Calumet County” Thus, the court denied the motion. Hennessey pled no contest and now appeals.

DISCUSSION

¶7 Hennessey renews his argument that he was illegally stopped because Borman lacked reasonable suspicion. An officer initiating an investigative stop must have reasonable suspicion that the driver or occupants of the vehicle have committed a crime or traffic violation. *State v. Rutzinski*, 2001 WI 22, ¶14, 241 Wis. 2d 729, 623 N.W.2d 516. But not all encounters with law

enforcement officers constitute “seizures” subject to the Fourth Amendment. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). 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 the liberty of a citizen.” *United States v. Mendenhall*, 446 U.S. 544, 552 (1980) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). “[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen” *Florida v. Royer*, 460 U.S. 491, 497 (1983).

¶8 Here, Hennessey parked his vehicle with no prompting from police. He was already stopped when Borman pulled behind him in the parking lot. Borman neither blocked Hennessey’s exit nor made any show of authority by activating his vehicle’s emergency lights. Under these circumstances, Borman was simply not required to possess reasonable suspicion of illegal activity.² Thus, Hennessey’s argument that there was no reasonable suspicion to initiate a stop is inapposite.

¶9 Hennessey also argues either that the State failed to prove jurisdiction and venue by proving he drove in Outagamie County, or that the arrest was illegal because Borman was acting beyond his territorial jurisdiction. Hennessey’s argument blends these distinct issues into one. Regardless, we conclude he failed to preserve these issues for review. *See State v. Huebner*, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727. Neither his suppression

² Hennessey does not challenge any detention that occurred after he voluntarily exited his vehicle.

motion nor his argument at the hearing cited any legal authority, much less applied any facts to that authority. The mere mention of an issue will not preserve the right of review.

¶10 In any event, we observe Borman testified the road he witnessed Hennessey traveling was a boundary highway. This would establish that Hennessey's intoxicated operation occurred, and could be prosecuted, in Outagamie County. *See* WIS. STAT. § 175.40(4) (authorizing police officers to enforce laws on the entire width of boundary highways). Further, WIS. STAT. § 349.03(4)—not cited by either party—authorizes law enforcement officers to enforce operating while intoxicated violations anywhere in the state if they occur in the officer's jurisdiction.

By the Court.—Judgment affirmed.

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

