COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP493-CR **Cir. Ct. No. 2013CM49**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JOSEPH S. CALI,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County: MARY KAY WAGNER, Judge. *Reversed and cause remanded for further proceedings.*

¶1 NEUBAUER, P.J.[1] In this operating a motor vehicle while intoxicated (OWI) case, the State appeals the circuit court's suppression of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

evidence gathered subsequent to a police encounter with Joseph S. Cali. We conclude that Cali was not seized for the purposes of the Fourth Amendment when the police officer approached him and talked to him. We reverse.

¶2 The following facts are from testimony at the hearings on the motion to suppress. Officer Derrick Andrews of the Village of Pleasant Prairie Police Department testified that he was stopped in the median area of the road, observing traffic, at about 1:30 a.m. Andrews pulled out behind Cali's truck and followed it down a cross street. Andrews followed Cali's truck as it turned onto another street and then when it entered the empty parking lot of the J.C. Penney and Target stores. At that time the stores were closed and it was unusual for any vehicles to be there. Andrews continued to follow Cali's truck through the parking lot and out onto the street, then into the parking lot for St. Catherine's Hospital. Cali parked on the north side of the building, "in an area that's not really used at that time of night." Andrews watched as Cali got out of the truck and walked into the vestibule of a hospital entrance. After a couple minutes, Cali left the vestibule and started walking alongside the building.

¶3 Andrews pulled his squad car "near" Cali, got out and approached him, and asked him "what was going on, if I could help him with anything." Andrews was several feet, "normal talking distance," from Cali when he spoke to him. Andrews had on his uniform, but had not activated his red and blue emergency lights. Andrews testified that he thought, from Cali's driving through the parking lots and going into an unused hospital entrance, that Cali might be lost. Cali told Andrews that he was trying to get into the building to visit a friend. Andrews asked him who the friend was, and he gave a first name. When Andrews asked for a last name, Cali said he did not know. Cali said he was coming from playing horseshoes in Illinois and was on his way home to Kenosha.

¶4 While Andrews was speaking with Cali, he noticed that Cali was severely slurring his speech, there was an odor of intoxicants on his breath, and his eyes were red and glassy. When Andrews asked Cali how much he had had to drink, Cali denied drinking at all. Further, Cali denied driving, even though Andrews had seen him traveling on the road and had continued to watch him as he exited his vehicle. Andrews asked Cali to do field sobriety tests and ended up arresting him for OWI.

¶5 Cali moved to suppress the evidence, arguing that he was seized when Andrews approached him in uniform, from a marked squad car, and initiated conversation. Cali further argued that Andrews did not have reasonable suspicion to stop him. The State responded that there was no seizure until Andrews asked Cali to perform field sobriety tests, and, even if there was, such seizure was justified by the community caretaker doctrine. The court suppressed the evidence, stating that Andrews had "no reason to approach [Cali], and therefore the stop … was not valid," and determining that there was no evidence of community caretaking. The State appeals.

¶6 The State argues that there was no seizure when Andrews approached Cali and that Andrews did not stop Cali in the constitutional sense until, at the earliest, he asked him to perform field sobriety tests, at which point Andrews had reasonable suspicion to believe that Cali had committed OWI. Further, the State argues, even if Andrews' approach of Cali was a stop, it was justified by the community caretaker doctrine. Cali responds that he was seized

when Andrews approached him and that the stop was not justified by reasonable suspicion or the community caretaker doctrine.[2]

¶7 The core question in this case is whether Andrews stopping, getting out of his squad, approaching Cali, and asking him some questions constituted a seizure for Fourth Amendment purposes. Review of a decision whether someone has been seized is mixed. ***County of Grant v. Vogt***, 2014 WI 76, ¶17, 356 Wis. 2d 343, 850 N.W.2d 253. We uphold the circuit court's findings of fact unless they are clearly erroneous, but the application of constitutional principles to those facts is a question of law we review de novo. ***Id.***

¶8 The circuit court's conclusion that Andrews' encounter with Cali was a constitutionally invalid stop was made without the benefit of our supreme court's recent decision in ***Vogt***, which we find instructive in the present case. Deputy Small saw Vogt turn and pull into an empty parking lot at about 1:00 a.m. on Christmas morning. ***Id.***, ¶4. Small did not observe any traffic violations, but given the time, day and location, he thought it was odd for someone to park there. ***Id.***, ¶¶4-5. Small parked his squad car behind Vogt; his headlights were on but his red and blue emergency lights were not. ***Id.***, ¶6. Small got out of his squad car, walked up to Vogt's window, and rapped on the window for Vogt to roll it down. ***Id.***, ¶7. When Vogt rolled down the window, Small asked him what he was doing, and he said he was trying to figure out his radio. ***Id.***, ¶8. Small noted that Vogt's speech was slurred and that the smell of intoxicants emanated from the vehicle.

[2] Cali suggests that the consensual nature of the encounter with Andrews is undermined by the fact that Andrews followed him for some time without any reason, that is to say, without Cali committing any traffic violations. Cali points to no authority, legal or factual, to demonstrate how Andrews following him is relevant to whether the consensual encounter amounted to a seizure.

Id. Ultimately, Small arrested Vogt for OWI. ***Id.***, ¶9. The question on appeal was whether Small's approach of Vogt's car and rap on the window constituted a seizure under the Fourth Amendment for which Small would have needed reasonable suspicion that Vogt had committed, was committing, or was about to commit a crime.

¶9 As the ***Vogt*** court explained, the state and federal constitutional protections against unreasonable seizures do not come into play until a government agent "seizes" a person. ***Id.***, ¶19. A seizure occurs when the officer has restrained the liberty of an individual "by means of physical force or show of authority." ***Id.***, ¶20 (citation omitted). "[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 that he was not free to leave." ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980). Behaviors that might suggest a seizure include: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." ***Id.*** Without similar evidence that the officer conducted himself such that a reasonable person would not feel free to leave, there is no seizure as a matter of law. ***Vogt***, 356 Wis. 2d 343, ¶23.

¶10 As we see from the example behaviors listed, police questioning alone is unlikely to constitute a violation of the Fourth Amendment. ***Id.***, ¶24. "[T]here are countless interactions or encounters among police and members of the community. Not all encounters are seizures, and these non-seizure encounters are not governed by the Fourth Amendment." ***Id.***, ¶26. "[I]f an officer merely walks up to a person standing or sitting in a public place … and puts a question to

him [or her], this alone does not constitute a seizure." 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.4(a), at 574-77 (5th ed. 2012), *quoted in* ***Vogt***, 356 Wis. 2d 343, ¶38 n.17. Indeed, case law indicates that an officer may question a moving pedestrian, without making a seizure, not only while continuing to walk but even when the officer overtakes the pedestrian and asks him or her to stop. ***Id.*** § 9.4(a), at 577.

¶11 There was no seizure when Small approached Vogt's car and rapped on the window for him to roll it down. ***Vogt***, 356 Wis. 2d 343, ¶39. The ***Vogt*** trial court found that Small was not commanding Vogt, but merely trying to make contact. ***Id.***, ¶43. Indeed, he was investigating an unusual situation. ***Id.***, ¶51.

> Deputy Small was acting as a conscientious officer. He saw what he thought was suspicious behavior and decided to take a closer look. Even though Vogt's conduct may not have been sufficiently suspect to raise reasonable suspicion that a crime was afoot, it was reasonable for Deputy Small to try to learn more about the situation by engaging Vogt in consensual conversation.

Id. None of the ***Mendenhall*** examples of behavior demonstrating a seizure was present. ***Vogt***, 356 Wis. 2d 343, ¶53. There were not multiple officers, Small did not brandish a weapon, Small did not touch Vogt and Small did not speak in a way to make Vogt think he was compelled to roll down the window. ***Id.*** "The circumstances attendant to the knock … are not so intimidating as to transform the knock into a seizure." ***Id.***

¶12 Comparing ***Vogt*** to Cali's case, we see that Andrews' behavior was even less intimidating. Andrews exited his vehicle, walked near Cali, but still within "normal speaking distance," and asked him if he needed help. When Cali responded that he was visiting a friend, Andrews asked the friend's name. Cali further told Andrews that he was on his way home to Kenosha. Andrews did not

even ask, much less direct, Cali to do anything. There were no multiple officers, Andrews did not show his weapon, Andrews did not touch Cali, and there is nothing to suggest that Andrews spoke to Cali in a commanding tone. Cali could have walked away. There was no seizure until, at the earliest, Andrews asked Cali to perform field sobriety tests, at which point there is no question that Andrews had reasonable suspicion.[3]

¶13 The State argues in the alternative that Andrews was acting as a community caretaker when he approached Cali, such that any seizure was justified by that doctrine. The circuit court considered and rejected this theory. We do not address it, as we have decided that there was no seizure when Andrews approached Cali and engaged him in conversation. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (we need not address all issues when deciding a case on other grounds).

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

By the Court.—Order reversed and cause remanded for further proceedings.

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

[3] Cali's challenge is limited to whether the consensual encounter was a seizure, and he does not develop any argument challenging reasonable suspicion after Andrews spoke with him and noticed his slurred speech, glassy eyes, and the odor of intoxicants on his breath.