COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP974-CR **Cir. Ct. No. 2014CF5431**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JESSIE LAMAR WEATHERSBY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: J.D. WATTS, Judge. *Reversed and cause remanded*.

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. The State of Wisconsin appeals from an order of the circuit court that granted Jessie Lamar Weathersby's motion to suppress evidence. The circuit court concluded that a police officer had seized Weathersby when the officer activated the emergency lights on his unmarked squad car, but the

officer lacked reasonable suspicion to detain Weathersby at that time, so any evidence seized during the stop should be suppressed. We conclude that a seizure did not occur when the officer activated his lights and, when it did occur, it was supported by reasonable suspicion. We therefore reverse the suppression order and remand this matter for further proceedings not inconsistent with this opinion.

BACKGROUND

¶2 For purposes of this appeal, the facts are undisputed and come from the suppression hearing testimony of Milwaukee police officer Zebdee Wilson. Wilson was investigating a string of armed robberies of pharmacies. As part of this investigation, at around 11:45 a.m. on December 5, 2014, Wilson was in the parking lot of a Walgreens, where he observed a red Ford Taurus. There was a white female driver and a white male passenger. The male was on the phone, looking around. It appeared to Wilson that the male was waiting for someone, and Wilson knew this particular location to be a "meet spot" for drug transactions.

¶3 Wilson had other duties, and he left the Walgreens parking lot to investigate the robbery of a different pharmacy. However, Wilson returned to the Walgreens parking lot twenty to thirty minutes later. The red Ford Taurus and its occupants were still there. Wilson decided he would make contact to see if everything was okay or if the occupants "needed directions or anything."

¶4 Meanwhile, a blue Chrysler pulled in next to the Taurus. The male passenger exited the Taurus and got into the front passenger seat of the Chrysler. The Taurus remained parked. Wilson believed this series of events indicated a drug buy was about to occur. Thus, as Wilson drove into the parking lot, he parked his unmarked squad car behind the Chrysler and activated his emergency lights. Wilson was in plain clothes but had a police vest on, with his badge and

identification around his neck and exposed. The driver of the Chrysler did not notice Wilson as the officer got out of the squad car.

¶5 Walking to the driver's door of the Chrysler, Wilson observed the passenger give what appeared to be currency to the driver. It was not until after that exchange that the occupants noticed Wilson approaching. The driver, eventually identified as Weathersby, put the currency in or near the center console and put something either on the floor or in his driver's door compartment.

¶6 When Wilson reached the driver's door, he asked Weathersby to put the window down. Weathersby complied, but was still moving his hands between the driver's seat and center console. When he was asked to put his hands on the steering wheel, Weathersby did not comply. Wilson asked him to step out of the car. As Weathersby did so, Wilson observed a plastic baggie with a rock-like substance, which Wilson suspected was cocaine base, in the driver's door. The vehicle was eventually searched, and Weathersby was charged with one count of possession with intent to deliver cocaine.

¶7 Weathersby moved to suppress the evidence obtained during this stop. He asserted there was no reasonable suspicion for the seizure, the vehicle was searched without probable cause, and he was arrested without probable cause. The circuit court held a hearing on the motion, then requested supplemental briefing.

¶8 After the supplemental briefing, the circuit court issued its ruling. It explained that there was overwhelming reasonable suspicion if the court considered Wilson's observations made after activating the emergency lights. However, the circuit court determined that Wilson had seized Weathersby when he activated the squad's lights, and there was insufficient reasonable suspicion at that

time because Wilson had not yet observed anything outside of "typical, every day behavior." The circuit court granted the suppression motion. The State appeals.

DISCUSSION

¶9 A motion to suppress is reviewed in two steps. *See* ***State v. Dubose***, 2005 WI 126, ¶16, 285 Wis. 2d 143, 699 N.W.2d 582. First, we review the circuit court's findings of fact and uphold them unless clearly erroneous. *See* ***id.*** We then review *de novo* the application of constitutional principles to those facts. *See* ***id.*** The applicable constitutional principle here is whether and when Weathersby was seized by Wilson. This presents a question of constitutional fact, which, like the motion to suppress, is reviewed in two parts. *See* ***State v. Young***, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729. We uphold the circuit court's findings of historical fact unless clearly erroneous, but we independently determine whether a seizure occurred. *See* ***id.***

¶10 As noted, the facts in this case are undisputed. This leaves us with only a question of law: whether Wilson seized Weathersby at the moment the officer activated the emergency lights on his squad car. We conclude there was no seizure at that moment.

¶11 The United States and Wisconsin constitutions protect people from unreasonable searches and seizures. *See* ***id.***, ¶18. "A seizure occurs 'when an officer, by means of physical force or show of authority, restrains a person's liberty.'" ***State v. Kelsey C.R.***, 2001 WI 54, ¶30, 243 Wis. 2d 422, 626 N.W.2d 777 (citations omitted). However, "not all police-citizen contacts constitute a seizure[.]" ***Young***, 294 Wis. 2d 1, ¶18. Someone "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). That is, "[a]s long as a reasonable person would have believed he was free to disregard the police response and go about his business, there is no seizure[.]" ***Young***, 294 Wis. 2d 1, ¶18. ***Mendenhall*** is the correct test "for situations whether the question is whether a person submitted to a police show of authority because … a reasonable person would not have felt free to leave." *See* ***Young***, 294 Wis. 2d 1, ¶37.

¶12 Relying on ***State v. Truax***, 2009 WI App 60, 318 Wis. 2d 113, 767 N.W.2d 369, the circuit court determined that the seizure in this case occurred when Wilson "activated his emergency red and blue lights." It also found, "based on the totality of the circumstances, that a reasonable person would not feel free to disregard police presence and leave."

¶13 ***Truax*** is distinguishable. In that case, neither party disputed whether or when a seizure had occurred. *See* ***id.***, ¶11. Rather, this court was called upon to evaluate the reasonableness of a police stop within the framework of the community-caretaker analysis. *See* ***id.***, ¶9. There are three parts to that analysis. *See* ***id.***, ¶10 (quoting ***State v. Anderson***, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987)). The third step of the ***Anderson*** test requires evaluating "whether the public need and interest outweighs the intrusion upon the privacy of the individual," and one of the four factors in that balancing test is the circumstances of the seizure. *See* ***Truax***, 318 Wis. 2d 113, ¶17.

¶14 In considering the circumstances of Lance's seizure, this court noted that the police officer had pulled up behind an already-stopped vehicle and activated his emergency lights. *See* ***id.***, ¶19. However, we also noted that the "degree of authority displayed … was minimal." *See* ***id.*** We did not hold that

activation of the lights defined the moment of seizure. Thus, ***Truax*** is not instructive here.

¶15 Relying on ***Truax*** also overlooks an argument the State made in its response to the suppression motion: that there could not have been a seizure when Wilson activated his lights because Weathersby was not aware he had done so.[1] We agree with the State.

¶16 The ***Mendenhall*** test requires consideration whether, "*in view of all of the circumstances surrounding the incident*, a reasonable person would have believed that he was not free to leave." ***Id.***, 446 U.S. at 554 (emphasis added). A reasonable person unaware of any police presence would have absolutely no reason to believe he was not free to leave. Stated another way, a person cannot submit to a police show of authority he has not somehow observed. *See, e.g.*, ***Tate v. Colorado***, 290 P.3d 1268, 1270 (if a person claiming he was subject to an investigative stop was unaware of police conduct constituting a show of authority, there has been no seizure; "a person must be aware of police presence before a seizure can occur"); ***G.M. v. Florida***, 19 So. 3d 973, 981-82 (Fla. 2009) ("There can be no seizure where the subject is unaware that he is 'seized.'") (quoting ***Yam Sang Kwai v. INS***, 411 F.2d 683, 684 (D.C. Cir.), *cert. denied*, 396 U.S. 877 (1969) (emphasis omitted)).

[1] We reject Weathersby's assertion that this argument was waived or forfeited. The State pointed out, in its response to the rather vague motion to suppress, that "it wasn't until the officer was out of the car" that Weathersby even noticed him. After the motion hearing, the circuit court called for supplemental briefing, which it expressly limited to the issue of reasonable suspicion, not the timing of the seizure, as the court also indicated that it had already determined the seizure occurred with the activation of the lights.

¶17 It is undisputed that Weathersby did not know Wilson had parked his car and activated his lights until after Wilson had exited his car and observed an apparent exchange of cash. While the State goes on to discuss the existence of reasonable suspicion both before and after Wilson activated his lights, it appears undisputed that if the seizure occurred after the activation of the lights, it was supported by adequate reasonable suspicion. Thus, our determination that the seizure did not occur at the moment of the activation of the emergency lights appears dispositive, and we need not address the question of reasonable suspicion. *See* ***State v. Manuel***, 2005 WI 75, ¶25 n.4, 281 Wis. 2d 554, 697 N.W.2d 811 (only dispositive issues need be addressed). The order granting suppression is therefore reversed, and the cause is remanded for further proceedings not inconsistent 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)5.