COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP455-CR **Cir. Ct. No. 2014CT1570**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARY G. ZINDA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: LLOYD CARTER, Judge. *Affirmed.*

¶1 GUNDRUM, J.[1] Mary Zinda appeals from the order denying her motion to suppress evidence and a judgment of conviction for operating a motor

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

vehicle while intoxicated, third offense. Zinda argues the arresting officer unlawfully seized her prior to detecting intoxicants on her breath, which led to further investigation for OWI. We conclude that Zinda was not seized at the time the officer smelled the intoxicants, and thus there was no Fourth Amendment violation in his procurement of that or subsequent evidence. We additionally conclude that even if the officer had seized her prior to smelling the intoxicants, such seizure would have been lawful in that the officer had reasonable suspicion to do so. We affirm.[2]

[2] Zinda also intimates in her brief-in-chief that the Confrontation Clause may have been violated because the circuit court listened to a 911 recording, which had been introduced by the State at the suppression hearing, outside of the hearing. Because she fails to cite to case law or develop legal arguments to show how the court's actions violated the Confrontation Clause, she has failed to sufficiently develop this issue, so we will not consider it. ***Clean Wis., Inc. v. PSC***, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 ("We will not address undeveloped arguments."); *see also* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("[W]e will not abandon our neutrality to develop arguments [for a party]."). In her reply brief, Zinda responds to arguments in the State's response brief by attempting to distinguish this case from ***State v. Zamzow***, 2016 WI App 7, ¶¶10-11, 366 Wis. 2d 562, 570, 874 N.W.2d 328 (2015), in which we stated the Confrontation Clause does not apply to pretrial suppression hearings—like the suppression hearing in this case—but she still fails to develop any legal argument for how and why the circuit court erred in listening to the 911 audio as it did. Zinda has the burden on appeal of demonstrating the circuit court erred. *See* ***Seltrecht v. Bremer***, 214 Wis. 2d 110, 125, 571 N.W.2d 686 (Ct. App. 1997). Because she has not developed an argument on this issue, she has failed to meet her burden.

In addition, on appeal, Zinda only objects to the circuit court's consideration of the recording on Confrontation Clause grounds. At the hearing, however, the court informed the parties it would listen to the recording outside of the hearing and their presence. Zinda raised no Confrontation Clause objection to the court's plan of action, but only earlier objected on authentication and collective knowledge doctrine grounds to receipt of the 911 call into evidence. Thus, in addition to not developing the Confrontation Clause issue, she also forfeited it by failing to raise it before the circuit court. ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) ("The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal.").

Background

¶2 The circuit court held an evidentiary hearing on Zinda's suppression motion at which the State and Zinda each called one witness to testify. The State called Town of Oconomowoc Police Chief James Wallis and Zinda called Oconomowoc Police Officer Adam Parkhurst. Their relevant undisputed testimony is as follows.

¶3 Wallis testified that around 2:50 p.m. on October 14, 2014, dispatch advised him a 911 caller, who identified herself,[3] was reporting "a possible drunk driver and erratic driving." Dispatch informed Wallis the caller was following the suspect vehicle and reported that the vehicle "had either gone off the road or nearly gone off the road, and that basically the driving was erratic." Wallis was provided a license plate number and informed of the make and model of the vehicle and that the caller and the vehicle were "on Highway 16, in the area of Brown Street." Wallis ran the license plate number and learned of the address associated with the vehicle. After trying unsuccessfully to locate it, Wallis went to the residence.

¶4 Wallis pulled into the suspect driver's driveway and backed into a parking stall on the side of the driveway. The suspect vehicle subsequently pulled into the driveway. As Wallis exited his vehicle, the driver of the vehicle "looked somewhat confused." Wallis approached and, from prior contacts, recognized the driver as Zinda.

[3] Wallis also testified that the caller provided a statement to the Town of Oconomowoc the next day.

¶5 Zinda exited her vehicle. Wallis confirmed he did not order her to exit, instruct her to do anything before exiting, make any commands, point a weapon at her, or "do anything towards her at all" prior to her exiting her vehicle. The emergency lights on Wallis' vehicle were not activated.

¶6 Wallis walked up to Zinda and advised her he was there "in reference to an erratic driving." Zinda responded, "[N]o," and appeared "a little bit confused." Wallis detected the odor of intoxicants emitting from Zinda and then had her perform field sobriety tests, which ultimately led to her arrest. Adam Parkhurst, a City of Oconomowoc police officer, who had followed Zinda to her residence, also had exited his squad and walked up next to Zinda's vehicle.

¶7 On cross-examination, Wallis testified that his report on the case reflected information dispatch had relayed to him, and it indicated dispatch had informed him the suspect vehicle had exited Highway 16, made a U-turn, and got back onto Highway 16. Wallis testified that he stood on the driver's side of Zinda's vehicle "towards the rear tire area, side door area." Zinda's home was on the opposite side, the passenger's side, of the vehicle, and to get to it, Zinda would have had to pass by Wallis; however, Wallis "did not block her route." Parkhurst also was standing on the driver's side of the vehicle, more towards the front. Both officers were wearing their uniforms.

¶8 On redirect examination, Wallis explained that he was standing "out away from" Zinda's vehicle, confirming there was room for Zinda to walk past him, and further confirming there was also room for her to "have gone forward and around the vehicle." When Zinda began to walk past Wallis, Wallis could smell intoxicants coming from her breath; following that observance, he asked her to perform the field sobriety tests.

¶9 Zinda called Parkhurst to the stand. He testified that before Zinda had reached her home, he had followed her for approximately thirty to forty-five seconds and did not observe any concerns with her driving. He testified that although he was not certain, he believed he parked his vehicle in the driveway and did not believe Zinda would have been able to back her car out of the driveway. He did not have the emergency lights activated on his squad.

¶10 The circuit court denied Zinda's suppression motion, and Zinda was eventually convicted and sentenced. She appeals.

Discussion

¶11 Zinda claims the circuit court erred in concluding she was not seized until Wallis requested that she perform field sobriety tests, which was after Wallis detected intoxicants on her breath. She asserts she was seized "after [she] exited her vehicle, when Chief Wallis told her that he wanted to talk to her," and that the seizure was unlawful because at that time Wallis did not have reasonable suspicion to believe she had violated the law. We conclude the court did not err in denying Zinda's suppression motion because Wallis had reasonable suspicion to temporarily detain/seize Zinda at the time he did so. We affirm.

Zinda was not seized until Wallis requested that she perform field sobriety tests

¶12 We apply the same standard in reviewing the denial of a motion to suppress and a determination as to whether a seizure occurred. ***County of Grant v. Vogt***, 2014 WI 76, ¶17, 356 Wis. 2d 343, 850 N.W.2d 253. We will uphold the factual findings of the circuit court unless they are clearly erroneous, but we independently review the application of those facts to constitutional principles. ***Id.***

¶13 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution protect citizens against unreasonable seizures.[4] These constitutional provisions, however, "are not implicated until a government agent 'seizes' a person." ***Vogt***, 356 Wis. 2d 343, ¶19 (citation omitted). The test for whether a seizure has occurred is an objective one, looking at the totality of the circumstances, ***id.***, ¶¶30, 38, and considering "whether an innocent reasonable person, rather than the specific defendant, would feel free to leave under the circumstances," ***id.***, ¶30. There is no seizure "[u]nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave." ***Immigration & Naturalization Serv. v. Delgado***, 466 U.S. 210, 216 (1984).

¶14 Our supreme court's decision in ***Vogt*** is instructive. Around 1:00 a.m., a law enforcement officer observed Vogt's vehicle pull into a public parking lot next to a park and boat landing on the Mississippi River, both of which were closed. ***Vogt***, 356 Wis. 2d 343, ¶4. Curious, the officer also pulled into the lot and parked his marked squad car behind Vogt's vehicle. ***Id.***, ¶6. The headlights of the squad car were on, but not the red and blue emergency lights. ***Id.*** The officer approached the vehicle, knocked on the driver's side window and motioned for the driver, Vogt, to roll down the window. ***Id.***, ¶¶7, 43. Vogt rolled it down, and the officer asked him what he was doing. ***Id.***, ¶8. When Vogt responded, the officer noticed the smell of intoxicants and that Vogt's speech was slurred, ultimately leading to Vogt's arrest and prosecution for OWI. ***Id.***, ¶¶8-9. As the

[4] Because our supreme court "interprets the Wisconsin Constitution to be coterminous with the United States Constitution in this area," our analysis applies to both constitutions. *See* ***County of Grant v. Vogt***, 2014 WI 76, ¶18 n.9, 356 Wis. 2d 343, 850 N.W.2d 253.

Vogt court described the testimony of the officer, the officer stated if Vogt "had ignored him and driven away, [the officer] would have let him go because he 'had nothing to stop him for.'" ***Id.***, ¶7.

¶15 The circuit court denied Vogt's suppression motion related to his arrest, and subsequently held a court trial. ***Id.***, ¶¶10-11. At that trial, Vogt and his passenger testified the officer "rapped" hard on the driver's side window and verbally commanded Vogt to roll it down. ***Id.***, ¶¶11-12. Vogt renewed his suppression motion, which the court denied. ***Id.***, ¶13. The court ultimately found Vogt guilty, ***id.***, ¶¶13-14, we reversed, and the County of Grant petitioned the supreme court for review, which petition the court granted. ***Id.***, ¶¶15-16.

¶16 Before the supreme court, Vogt argued he had been unlawfully seized when the officer knocked on his window and "commanded" him to roll it down. ***Id.***, ¶40. Vogt highlighted the following: "(1) [the officer] parked right behind Vogt's vehicle; (2) 'the location of Mr. Vogt's vehicle in the parking lot was not conducive to simply driving away'; (3) [the officer] commanded Vogt to roll down the window; and (4) [the officer] rapped loudly on the window." ***Id.*** Reversing the decision of this court, the supreme court concluded that "[e]ven taken together, these facts do not demonstrate that Vogt was seized." ***Id.***, ¶41.

¶17 The ***Vogt*** court stated that "[a]lthough [the officer] parked directly behind Vogt and allegedly there were obstacles on three sides of Vogt's vehicle, these facts do not demonstrate that Vogt was seized because" the evidence supported the conclusion that Vogt had enough room in front of his vehicle to be able to pull it forward and turn around. ***Id.***, ¶¶41-42. "[T]here was an avenue by which Vogt could have actually left…. Vogt was not seized simply because there was only one way out of the parking lot." ***Id.***, ¶42. The court found unpersuasive

Vogt's assertion that he was seized as a result of a verbal "command" from the officer to roll down the window, noting the circuit court found that the officer had "tapp[ed]" on Vogt's window and motioned for Vogt to roll it down, but that the officer "wasn't commanding [Vogt] to do anything, ... he was simply trying to make contact." ***Id.***, ¶43. The ***Vogt*** court further noted the circuit court's determination that the officer's conduct was, as the ***Vogt*** court stated it, "not so intimidating as to constitute a seizure." ***Id.*** In response to Vogt emphasizing on appeal the loudness of the knock on the window, the ***Vogt*** court stated, "A knock might sound loud to an unsuspecting vehicle occupant, but that alone does not mean the occupant has been seized." ***Id.***, ¶44. Looking at the totality of the circumstances, the court stated:

> In similar circumstances, a person has the choice to refuse an officer's attempt to converse and thereby retain his privacy, or respond by talking to the officer and aiding the officer in his duty to protect the public. A dutiful officer does not make a mistake by presenting a person with that choice. Only when the officer forecloses the choice by the way in which he exercises his authority—absent reasonable suspicion or probable cause—does he violate the Fourth Amendment.
>
> Although it may have been Vogt's social instinct to open his window in response to [the officer's] knock, a reasonable person in Vogt's situation would have felt free to leave.... The circumstances attendant to the knock in the present case are not so intimidating as to transform the knock into a seizure....
>
> …. The facts in this case do not show a level of intimidation or exercise of authority sufficient to implicate the Fourth Amendment until after Vogt rolled down his window and exposed the grounds for a seizure.

Id., ¶¶52-54.

¶18 Here, the encounter with Wallis occurred in the middle of the day, a less intimidating time to be approached by police than 1:00 a.m., as in ***Vogt***.

Zinda cites the fact the interaction took place on her private property instead of on public property as support for her position that she was seized immediately upon Wallis' initial contact with her; however, we have no reason to view this fact in the manner she does, especially since she does not develop an explanation of this point. Based upon case law, however, the position seems stronger that a reasonable person in Zinda's position would have felt more comfortable, and less intimidated, on her home turf. *See* ***State v. Kilgore***, 2016 WI App 47, ¶25, 370 Wis. 2d 198, ___ N.W.2d ___ ("[W]hen 'a person is questioned on his [or her] own turf ... the surroundings are not indicative of the type of inherently coercive setting that normally accompanies a custodial interrogation.'" (citations omitted)).[5]

¶19 Furthermore, the undisputed testimony is that Wallis did not order Zinda to exit her vehicle, instruct her to do anything before exiting, make any commands, point a weapon at her, or "do anything towards her at all," and neither Wallis nor Parkhurst had their emergency lights activated. When Wallis approached Zinda, who had exited her vehicle, he stood far enough off the side of the vehicle so that Zinda would be able to pass by. Parkhurst also approached the vehicle and stood near the front on the driver's side, but Wallis' testimony established that there was room for Zinda to "have gone forward around the vehicle." When Zinda did begin to walk past Wallis, he detected the odor of intoxicants and thereafter temporarily detained—seized—Zinda for the purpose of performing field sobriety tests. Considering ***Vogt***, we conclude she was not seized until this temporary detention, and thus the Fourth Amendment was not implicated

[5] While ***Kilgore*** addressed the Fifth Amendment and the case before us deals with the Fourth Amendment, we nonetheless believe the principle expressed in Kilgore is equally applicable in this Fourth Amendment context. ***State v. Kilgore***, 2016 WI App 47, 370 Wis. 2d 198, ___ N.W.2d ___.

until this point. Zinda does not dispute that Wallis had reasonable suspicion to temporarily detain her once he detected the odor of intoxicants.

¶20 Zinda attempts to distinguish ***Vogt*** by pointing out that she "would not have been able to drive away and to get to her front door she would have had to squeeze between her car and the garage door in order to avoid speaking with Chief Wallis." To begin, Zinda's "squeeze" characterization is not supported by the undisputed testimony. Wallis' testimony was that she could pass unimpeded by way of either the front or back of the vehicle. Additionally, the fact that Parkhurst's squad was behind her vehicle in the driveway does not mean Zinda was seized. Zinda had just driven home of her own free will and exited her vehicle in the driveway. The question for us is whether "a reasonable person would have believed he[/she] was not free to leave" under the circumstances. Under the totality of the circumstances, a reasonable person would have believed he/she was free to walk around either the front or back of the vehicle and enter the home or otherwise depart the area on foot without being restrained.

¶21 We find the circumstances Zinda faced quite similar to those faced by Vogt, with the only significant difference being that Zinda could not have driven away in her vehicle due to Parkhurst's vehicle being parked behind it. But that fact does not change our analysis. In ***Vogt***, the officer tapped right on Vogt's window, ***Vogt***, 356 Wis. 2d 343, ¶7, so presumably the officer's body position would have impeded Vogt's ready departure from the area on foot; yet he still could have turned his vehicle around and driven away. Similarly, although her vehicle may have been blocked by Parkhurst's, Zinda's pathways to walk away from the officers were unimpeded. Furthermore, Vogt had argued that "the location of [his] vehicle in the parking lot was not conducive to simply driving away." ***Id.***, ¶40. Nonetheless, the ***Vogt*** court stated that even taking that fact

together with the other facts argued by Vogt, Vogt failed to demonstrate he had been seized. ***Id.***, ¶41. Significantly, as with the situation in ***Vogt***, here "there was an avenue by which [Zinda] could have actually left." *See* ***id.***, ¶42.

¶22 The circumstances, including the officers' conduct, here were "not so intimidating as to constitute a seizure." *See* ***id.***, ¶43. Zinda was not seized until Wallis requested that she perform field sobriety tests, and, again, Zinda does not dispute he had reasonable suspicion to lawfully seize her at that time.

Wallis had reasonable suspicion to detain Zinda when she exited her vehicle

¶23 Even if Wallis had seized Zinda when she exited her vehicle and he made contact with her, such a seizure would have been lawful. Dispatch informed Wallis that a 911 caller, who identified herself to dispatch[6] and was following Zinda, reported that Zinda "had either gone off the road or nearly gone off the road, and that basically the driving was erratic." Dispatch also informed Wallis the suspect vehicle had exited Highway 16, made a U-turn, and got back onto Highway 16. Further, as Wallis exited his vehicle after Zinda pulled into the driveway, Zinda, whom he recognized from prior contacts, "looked somewhat confused." Based upon this evidence, we believe Wallis had reasonable suspicion to temporarily freeze the situation to investigate.

¶24 Wallis was informed Zinda was driving erratically, and a basis for that conclusion was provided—going, or nearly going, off the road. Further, Zinda lived in the area and Wallis knew her from prior contacts. Although Wallis

[6] Zinda does not challenge the reliability of the information which came from the 911 caller.

did not specifically articulate a suspicion related to Zinda's exit off of and immediate re-entry onto Highway 16, the fact that someone who has lived in the area for some time (as we reasonably infer since the police chief knew her from prior contacts) is reported to be driving erratically and then gets off of the highway and makes a U-turn to get back on the same highway supports suspicion that something may be amiss with the driver. In addition, the fact Zinda "looked somewhat confused" adds, though only slightly, to our conclusion that Wallis had reasonable suspicion to investigate Zinda as soon as she exited her vehicle.

¶25 While we believe the foregoing provided Wallis with reasonable suspicion to approach Zinda when she exited her vehicle, additional evidence, which can be imputed to Wallis through the collective knowledge doctrine, supports the conclusion he had reasonable suspicion when he approached her. *See* ***State v. Rissley***, 2012 WI App 112, ¶19, 344 Wis. 2d 422, 824 N.W.2d 853 ("[U]nder the collective knowledge doctrine, '[t]he police force is considered as a unit and where there is police-channel communication to the arresting officer and he acts in good faith thereon, the arrest is based on probable cause when such facts exist within the police department.' The same reasoning applies to cases involving investigatory stops based on reasonable suspicion." (citations omitted)).[7] The circuit court listened to the 911 recording and found that the caller indicated to dispatch that Zinda's vehicle, as the circuit court stated it, "has been all over the

[7] In its response brief, the State references the collective knowledge doctrine, and cites ***State v. Rissley***, 2012 WI App 112, ¶19, 344 Wis. 2d 422, 824 N.W.2d 853, as one of the cases in support of the applicability of that doctrine to this case. In its reply brief, Zinda does not dispute the applicability of the collective knowledge doctrine to this case.

road swerving and almost going off the road a couple of times."[8] This adds even greater suspicion regarding Zinda's condition in that being "all over the road swerving" and "almost going off the road *a couple of times*" suggests a sustained problem, such as continued impairment, as opposed to a one-time episode of almost going off the road, perhaps due to an animal darting out in the road or some other event. Thus, this additional evidence adds further to the reasonable suspicion law enforcement had at the time Wallis approached Zinda in the driveway.

¶26 For the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

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

[8] Our review of the recording indicates dispatch relayed this specific information directly to Wallis; however, it is unclear from the circuit court's order if it found dispatch had done so. Whether dispatch alone had this specific knowledge (from the caller) or whether that knowledge additionally was conveyed by dispatch to Wallis makes no difference. In either case, the knowledge that Zinda "has been all over the road swerving and almost going off the road a couple of times" was collectively within the police department, and dispatch and Wallis had ongoing open communications regarding Zinda's driving.