STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2012AP002351 – CR

STATE OF WISCONSIN,

Plaintiff – respondent,

vs.

BRIAN A. GOTTSCHALK,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE ENTERED IN THE BROWN COUNTY CIRCUIT COURT, THE HON. MARK A. WARPINSKI, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

Respectfully submitted,

BRIAN A. GOTTSCHALK
Defendant-Appellant

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STATEMENT OF THE ISSUES

DID LAW ENFORCEMENT'S ACTION OF PULLING UP BEHIND THE APPELLANT-DEFENDANT'S PARKED VEHICLE WITH RED AND BLUE EMERGENCY LIGHTS ILLUMINATED AND PUTTING THE FULLY MARKED SQUAD CAR'S SPOT LIGHT ON THE APPELLANT-DEFENDANT'S VEHICLE RISE TO THE LEVEL OF A STOP?

TRIAL COURT ANSWERED: NO

STATEMENT ON PUBLICATION

Defendant-appellant recognizes that this appeal, as a one-judge appeal, does not qualify under this Court's operating procedure for publication. Hence, publication is not sought.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issue on appeal.

STATEMENT OF THE CASE

I. Procedural Background

The defendant-appellant, Brian Gottschalk, was charged with Operating a Motor Vehicle While Intoxicated – 2nd Offense, contrary to §§ 346.63(1)(a), and 346.65(2)(am)2 and Operating with a Prohibited Blood Alcohol Concentration – 2nd Offense, contrary to §§ 346.63(1)(b) and 346.65(2)(am)2 pursuant to a criminal complaint which was filed on January 19, 2012. R. 2.

On February 8, 2012 Gottschalk then filed a pretrial motion seeking to suppress all evidence seized by police after the initial stop of his vehicle for the reason that the police lacked the requisite reasonable suspicion necessary to effectuate a stop upon Gottschalk's vehicle and its occupants and therefore violated Gottschalk's Fourth Amendment Constitutional right to be free from unreasonable searches and seizures. R. 15 at 1-7.

On April 30, 2012 the parties appeared before Judge Mark Warpinski for a Status Conference. At

this hearing Judge Warpinski denied the defendant's motion, finding that the defendant was not seized by Officer Conley on December 12, 2011, and therefore the defendant's right to be free from unreasonable searches and seizures was not violated because Gottschalk had not been seized. R. 59 at 3; App. 108.

On July 23, 2012 Gottschalk entered a no-contest plea to the charge of Operating a Motor Vehicle While Intoxicated – 2nd Offense. On that same date the court sentenced Mr. Gottschalk to serve 10 days in the Brown County Jail, to pay fines, and that his driver's license be revoked. R. 1.

Gottschalk timely fined a notice of appeal.

II. Factual Background

The pertinent facts surrounding the stop of the defendant-appellant's vehicle were stipulated to by the parties at a motion hearing held on March 16, 2012, and are as follows: Mr. Gottschalk's vehicle was stopped and running in the area of South Ashland and Ninth Street in the City of Green Bay on December 12, 2011. Officer Conley became suspicious because this

area has been defined by the police as a known drug area. The officer activated his emergency lights and it is at that point that the defendant-appellant asserts that he was seized by police. R. 66 at 1-3. App. 102-103.

The trial court found as follows:

> I'm denying your motion. I'm satisfied that this was not a stop. I've read your brief. I afforded the parties an opportunity to submit authorities for their positions, I believe, and find that the officer had the right when he saw a car parked on a street running with two occupants in it at this time of the night to stop and inquire.
>
> When the window is open, he smelled the alcohol, observed all of these other characteristics. I don't think a stop occurred the minute that the officer pulled behind the squad car – or your client's vehicle, as you've argued in your brief. I understand your position, but I don't think it's the law.

R. 59 at 3. App. 108.

ARGUMENT

I. THE OFFICER DID SEIZE THE DEFENDANT-APPELLANT UPON PULLING HIS SQUAD CAR BEHIND GOTTSCHALK'S PARKED AND RUNNING VEHICLE AND TURNING ON THE SQUAD'S RED AND BLUE EMERGENCY LIGHTS BECAUSE NO REASONABLE PERSON IN GOTTSCHALK'S CIRCUMSTANCES WOULD BELIEVE THAT THEY WOULD BE FREE TO DRIVE AWAY.

The Wisconsin Supreme Court case of State v. Young, 2006 WI 98, 717 N.W.2d 729 (2006) confronts the issue of when a seizure occurs, while taking into

consideration two separate U.S. Supreme Court Cases which have decided this issue, namely U.S. v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed. 2d 497 (1980), and California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed. 2d 690 (1991).

In the Young case, on the evening of October 26, 2002 Officer Alfredson was patrolling an area of Kenosha which had become a problem area for the police due to fights, loud music and littering. When Officer Alfredson would patrol this area of Kenosha he would look for occupied cars and when he found one he would continue on his patrol and double back some time later to check if the car was still occupied. If so, he would stop and investigate. On the evening of October 26th at about 11:40 p.m. Officer Alfredson reports that he saw a car parked on the street with five occupants in it. Upon doubling back some time later he saw the same vehicle with five people still inside of it. Alfredson decided to stop and investigate. Because another car was parked directly behind the car in which Young was seated, Alfredson stopped his squad in the middle of the street next to the car behind

Young's car. He illuminated Young's car with his spotlight, and turned on his flashing emergency lights to alert other vehicles that his squad had stopped. He did not activate his red-and-blue rolling lights. Before Alfredson could get out of his squad car, Young got out of the rear passenger seat of his car. Alfredson ordered Young back into the car and Young began walking away. Upon ordering Young into the car again, Young then started running. Alfredson was able to catch Young and handcuffed him. Marijuana was found inside Alfredson's coat. Young argued that the evidence should be suppressed because he was seized by Alfredson the moment that Alfredson stopped behind Young's car, turned on his flashing emergency lights and shined a spotlight on his car. The State argued that Young was not seized until he was apprehended by police. The Wisconsin Supreme Court concluded that because Young did not comply with any of Officer Alfredson's orders he was not seized, and therefore the evidence was not suppressed, determining that the Hodari D. seizure analysis

applied, which states that an uncomplied-with show of authority cannot constitute a seizure.

In the Young case, one question that the court dealt with was, "when was Young seized?" The court reasoned that under Hodari D., an uncomplied-with show of authority cannot constitute a seizure. Hodari D., 499 U.S. at 629, 111 S.Ct. 1547. Therefore, under Hodari D, Young was not seized when Alfredson illuminated Young's car with his spotlight, or when Alfredson ordered him to return to the car, or when Alfredson chased him. If any or all of these actions constituted a show of authority, they did not effect a seizure because Young did not comply with any of them. Hodari D. compels the conclusion that Young was not seized until Alfredson physically apprehended him on the porch of the house. Young, 717 N.W.2d at 739. Young maintained that a person is seized "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," which is the test first articulated in Mendenhall. Young, 717 N.W.2d at 734. The State took the position that a person is seized

when an officer applies physical force, however slight, to restrain the person's movement or when the person submits to a show of authority, which is the test found in Hodari D. Id. After considering the relative merits of the Mendenhall and Hodari D. tests, the court found that that the two tests can coexist and that the Hodari D. test applies when a suspect refused to submit to a show of authority. *Id.*

Mendenhall is the appropriate test for situations where the question is whether a person submitted to a police show of authority because, under all the circumstances surrounding the incident, a reasonable person would not have felt free to leave. Id at 741. If a reasonable person would have felt free to leave but the person at issue nonetheless remained in police presence, perhaps because of a desire to be cooperative, there is no seizure. Id. Hodari D., which was foreshadowed by Justice Kennedy's concurrence in Michigan v. Chesternut, 486 U.S. 567, 108 S.Ct. 1975 (1988), supplements the Mendenhall test to address situations where a person flees in response to a

police show of authority. See Hodari D., 499 U.S. at 628, 111 S.Ct. 1547.

Mendenhall establishes that the test for existence of a "show of authority" is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person. Young, 717 N.W.2d at 742. Finally, the Wisconsin Supreme Court in Young states that the Mendenall test applies when the subject of police attention is either subdued by force or submits to a show of authority. Id. Where, however, a person flees in response to a show of authority, Hodari D. governs when the seizure occurs. Id. Therefore, the Hodari D. test does not supersede the Mendenhall test, it supplements the Mendenhall test.

In the Wisconsin Court of Appeals case of Michigan v. Chesternut, 486 U.S. 567, 108 S.Ct. 1975 (1988) State v. Kramer, 2008 WI App. 62, 750 N.W.2d 941 (WI App. 2008), the court determined that the act of a law enforcement officer turning on his red and blue flashing lights is an act of authority. This case also

deals with whether or not a seizure took place. Kramer notes that the officer made a display of authority by activating his red and blue emergency lights. We agree that this is a display of authority… Id at 946.

In our case, Officer Conley did turn on his red and blue emergency lights when he stopped his fully marked squad car behind the defendant's vehicle. According to Kramer this is a display of authority. We must now turn our attention to Young. In our case we have a situation where the occupants of the defendant's vehicle did not flee and did not get out of the vehicle. Therefore, in this case we are not dealing with an uncomplied-with show of authority, quite opposite of what occurred in *Young* which is why the court in that case applied the Hodari D. analysis. The defendant here and the other occupant complied with Officer Conley's show of authority by remaining inside the vehicle. Therefore, we turn our attention to the Mendenhall test. We do so because Young determined that both Hodari D. and Mendenhall can and do co-exist because they deal with different scenarios. Mendenhall tells us that the test for when a

seizure occurs is when, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave. Mendenhall goes on to tell us that either physical force or a show of authority sufficient to give rise to a belief in a reasonable person that he was not free to leave, is necessary for a seizure. When Officer Conley turned on his red and blue flashing light this was a show of authority which would give rise to a belief in a reasonable person that he was not free to leave. Therefore, it was at that moment that the defendant and his passenger were seized by Officer Conley.

CONCLUSION

For these reasons it is respectfully requested that the Court of Appeals reverse the order of the trial court denying Gottschalk's motion to suppress evidence, and remand the matter for further proceedings to determine if the seizure was reasonable.

Dated at Green Bay, Wisconsin this _ day of

_____, 2012.

Respectfully submitted,

BRIAN A. GOTTSCHALK,

Defendant

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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,266 words.

Dated: November 27, 2012.

Signed,

_____

TODD G. SIMON
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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

_____

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AFFIDAVIT OF MAILING

I certify that a copy of this brief and appendix was deposited in the United States mail for first class delivery on November 28, 2012, to the following:

Wisconsin Court of Appeals
PO Box 1688
Madison, WI 53701-1688

Wisconsin Department of Justice
P.O. Box 7857
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Brown County District Attorney's Office
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Dated this _____ day of November, 2012.

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APPENDIX

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INDEX TO
APPENDIX

Transcript of Final Pretrial.
Conference/Motion Hearing.....App. 101-5

Transcript of Status Conference.....App. 106-12

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings
of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of November, 2012.

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