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 PLAINTIFF-RESPONDENT

Respectfully Submitted,

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ISSUE FOR REVIEW

WAS THE APPELLANT-DEFENDANT UNLAWFULLY SEIZED AS A RESULT OF LAW ENFORCEMENT PARKING A SQUAD CAR BEHIND DEFENDANT'S CAR ON A PUBLIC ROADWAY IN AN AREA KNOWN FOR DRUG ACTIVITY AND ACTIVATING EMERGENCY LIGHTS?

THE TRIAL COURT RULED THERE WAS NOT A SEIZURE AND DENIED DEFENDANT'S MOTION TO SUPPRESS.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent requests neither oral argument nor publication because it is unnecessary. Plaintiff-Respondent believes that the brief of the parties will fully set forth the facts and issues, and will fully develop the theories and legal authorities on both sides of the issue.

The Plaintiff-Respondent requests that the opinion of the Court not be published because the issues raided on appeal are controlled by existing precedent.

STATEMENT OF FACTS AND CASE

The following facts were described in the probable cause section of the criminal complaint provided to the Circuit Court prior to the Court's order: On December 12, 2011, at approximately 1:50 a.m. Law Enforcement came upon the defendant-appellant's running vehicle facing Eastbound on 9th Street near Ashland Avenue in the City of Green Bay, Brown County, Wisconsin. The Officer was aware that this area was that in which drug activity was known to take place as well as

recent home break-ins. The Officer pulled behind the defendant's vehicle, put his emergency lights on for safety and made contact with the defendant. The Officer initially asked the defendant where he was coming from and where he was going and the defendant indicated he was lost and trying to find his hotel. Only then did the Officer detect the smell of intoxicants, observed bloodshot and glossy eyes and slurred speech. When asked if he had been drinking, the defendant stated "Three beers or so; nothing like during the Packer Game." At that point the Officer requested the defendant perform Standardized Field Sobriety Tests.[1]

ARGUMENT

THE TRIAL COURT DID NOT ERR WHEN IT FOUND THAT THE DEFENDANT-APPELLANT WAS NOT UNLAWFULLY SEIZED AS A RESULT OF LAW ENFORCEMENT ACTIVIATING EMERGENCY LIGHTS BEHIND THE DEFENDANT'S VEHICLE

The Circuit Court's evidentiary or historical findings of fact will be upheld unless clearly erroneous. Whether those facts constitute an unlawful seizure invoking a constitutional challenge is a question of law that the court reviews de novo. *State v. Dubose*, 2005 WI 126, ¶ 16, 285 Wis.2d 143, 699 N.W.2d 582 (2005).

Pursuant to *Terry v. Ohio,* 392 U.S. 1, 22, 88 S.Ct. 1868, 20 L.Ed. 889 (1968), a police officer may, in appropriate circumstances, detain for purposes of investigation of possible criminal behavior even though there is no probable cause to make an arrest. In *State v. Waldner,* 206 Wis.2d 51, 556 N.W.2d 681 (1996), the Wisconsin Supreme Court held that a violation of the traffic code or criminal code is not a condition precedent to a legal investigatory stop and expressly rejected the argument that lawful conduct cannot form the basis for reasonable suspicion holding that, if that be

[1] Plaintiff-respondent intended to attach for convenience as part of an appendix the original signed and notarized criminal complaint for State of Wisconsin v. Brian Gottschalk, Brown County Case No. 2012CT134, but said document is now part of the Appeal Record previously submitted to the Court and plaintiff-respondent was unable to obtain a signed certified copy.

true, there would never be a stop made without an arrest. *Id.* at 59, 685.

The defendant-appellant incorrectly asserts that the Wisconsin Court of Appeals in *State v. Kramer*, 311 Wis.2d 468, 750 N.W.2d 941 (Ct.App.2008) makes a finding that the activation of red and blue emergency lights is a display of authority constituting a seizure. The Court of Appeals is clear in *Kramer*, that they are not deciding whether a seizure took place, but instead

> "We will assume, *without deciding*, that the officer lacked reasonable suspicion or probable cause when he seized Kramer by activating his red and blue emergency lights, pulling his squad car in behind Kramer's truck and approaching the truck on foot."

Id. at 472-473 (emphasis added).

Upon review of the Court of Appeals decision in *Kramer*, the Wisconsin Supreme Court confirmed that whether or not the officer's actions constituted a seizure was not being decided and stated

> "While it is entirely possible that upon analysis this conduct *may* not constitute a seizure, see *State v. Young*, 2006 WI 98 ¶¶ 65-67, 294 Wis.2d 1, 717 N.W.2d 729, we do not decide this issue."

State v. Kramer, 315 Wis.2d 414 ¶428, 759 N.W.2d 598 (2009).[2]

Defendant-appellant also points to *State v. Young*, 294 Wis.2d 1, 717 N.W.2d 729 (2006), and the Wisconsin Supreme Court's analysis of *U.S. v. Mendenhall*, 446 U.S.544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) and

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[2] The defendant-appellant also points to a portion of the Court of Appeals decision in *Kramer* which discusses display of authority in regards to the community caretaker analysis. (defendant-respondent's brief at page 14). The full citation states "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, but also agree with the State that it was a reasonable caretaker measure. In particular, the red and blue emergency lights minimize the danger created by passing motorists who may not be attentive, a danger inherent in roadside stops along the highways." *Kramer*, 311 N.W.2d at 478.

California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), as support for his position that seizure took place. The plaintiff-respondent disagrees and argues that *Young* supports the finding that there was no seizure under the present facts. *Young* is significant because the Court found that only after Mr. Young failed to follow officer commands, fled on foot and was physically apprehended by the officer did a seizure take place. The Court held that seizure had not taken place before that physical apprehension when the Officer parked alongside the vehicle, shown a spotlight into the car and turned on the flashing emergency lights.

CONCLUSION

For the reasons stated in this brief, the State of Wisconsin respectfully requests this court to affirm the decision of Brown County Circuit Court Judge Mark A.Warpinski regarding seizure in this case.

Respectfully submitted this 23rd day of January, 2013.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum points and maximum of 60 characters per line of body text. The length of the brief is 1297 words

Dated this 23rd day of January, 2013

Signed:

_____

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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that:

I have submitted to 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.

A copy of this certificate has been served with the paper copies of this brief filed with the court and serve on all opposing parties.

Dated this 23rd day of January, 2013

Signed:

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