STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 13 AP 299 CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

MICAH J. SNYDER,

Defendant-Respondent.

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT

ON APPEAL FROM THE CIRCUIT COURT
FOR COLUMBIA COUNTY, BRANCH I,
THE HONORABLE DANIEL S. GEORGE PRESIDING.

Respectfully submitted,

MICAH J. SNYDER,
Defendant-Respondent

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STATEMENT ON PUBLICATION

Defendant-appellant does not request publication of the opinion in this appeal.

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 issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

As respondent, Snyder exercises his option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2. Snyder will present additional facts in the "Argument" portion of his brief.

ARGUMENT

I. Standard of Review.

"The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect the people from unreasonable searches and seizures." *State v. Young*, 2006 WI 98, ¶ 18, 294 Wis. 2d 1, 717 N.W.2d 729. "Whether a person has been seized is a question of constitutional fact." *Id.*, ¶ 17. The reviewing Court will uphold the trial court's findings of fact unless they are clearly erroneous, but will determine independently whether a seizure occurred." *Id.* Police citizen contact generally becomes a seizure within the meaning of the Fourth Amendment when an officer by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Id.*, ¶ 18.

II. The Trial Court's findings of fact were not clearly erroneous.

The State argues that the trial court made the clearly erroneous finding that the driveway was two car lengths in width after Trooper Larson's car was parked along the edge. State Br. at 7. Trooper Larson testified that the driveway was 30 feet wide. R. 28, p. 5. He testified that his car was six feet wide from mirror to mirror. R. 28, p. 6. He estimated that his car was about 12 feet in length.

R. 28, p. 5. If Trooper Larson's car occupied six feet on the side of the driveway there were 24 feet remaining, which is precisely two 12 foot car lengths in width. The trial court's "two car lengths in width" finding of fact is consistent with Trooper Larson's testimony that the driveway was 30 feet wide. The squad vehicle was not even parked all the way to the right side of the driveway, so there was even less footage. The officer estimated 20 feet.

The State also argues that the trial court erred when it found that the officer intended to exercise control over the defendant and had effectuated a seizure. State Br. at 9. Although the State identifies these as findings of fact, they are legal conclusions of the court. *See infra*.

III. The Trial Court correctly found that a seizure occurred.

A seizure occurs "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." *Young*, 2006 WI 98, ¶¶ 3, 29, *citing United States v. Mendenhall*, 446 U.S. 544, 554 (1980). The trial court considered the totality of the circumstances including the relative position of the two cars, that Trooper Larson was uniformed, that his car was marked, and the fact that Snyder would have had to drive around both Trooper Larson and his car, and that Snyder was

identified by the officer. R. 29, p. 6. Trooper Larson's car was as little as twelve feet away from Snyder's car, parked "headlight to headlight." *Id.* Trooper Larson approached across that intervening space towards the front of Snyder's car. A reasonable person could see a police officer approaching within 10 feet of the front of his or her vehicle and conclude that he was not free to leave. The parking lot was lit, and the squad was a fully marked squad car. Not only would Snyder have to drive around the officer and his car, he might reasonably be concerned that Trooper Larson could interpret the car moving forward as a threat of physical harm.

The officer drove his car into the only driveway to the parking lot directly facing Snyder's vehicle. Snyder would have had to maneuver his car around the officer's to get out of the parking lot. The officer was driving a fully marked squad and was in uniform. The officer could not remember if the window was down but believed it was. There was no testimony indicating he did not ask Snyder to roll down his window. The officer admits to asking Snyder what he was doing there. R. 28, p. 7. Whenever a police officer shows his authority by requesting an answer or acquiescence of some nature (such as the showing of identification or answering of questions), an investigatory detention ensues. See: *Hiibel v. Sixth*

Judicial District Court of Nevada, 542 U.S. 177 (2004). That detention needs to be supported by reasonable suspicion to be lawful.

In *California v. Hodari*, 499 U.S. 621 (1991), the United States Supreme Court held that an individual's acquiescence to police authority constitutes a seizure. Here, Snyder answered the officer's questions willingly. The *Hodari* court noted also as follows:

> While the concept of a 'seizure' of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the 'seizure' of a person within the meaning of the Fourth Amendment—meaningful interference, however brief, with an individual's freedom of movement. See *Michigan v. Summers*, 452 U.S. 692, 696 [101 S.Ct. 2587, 2590, 69 L.Ed.2d 340] (1981).

This was a brief but meaningful interference with Snyder's freedom. Clearly, blocking a car even a bit from leaving, walking up to the car, possibly having the suspect roll down the window, demanding an explanation of what he is doing there, and identifying him is a show of authority. That show of authority must be justified by reasonable suspicion of a crime or some other exception to the warrant requirement.

Trooper Larson could not recall details about the lowering of the window, and there was no testimony as to whether or not it was at his behest. He did approach in full uniform with a flashlight

illuminated. The first thing he did was make Snyder tell him what he was doing. The State does not challenge the trial court's finding that the officer asked for identification, and the officer did so testify. R. 28, p. 3, 7.

In *County of Grant v. Vogt*, the Court found that a seizure had occurred when a police officer approached a parked car, knocked on the window, and instructed the driver to roll down the window. 2013 WI App 55, ¶ 13, 347 Wis. 2d 551, 830 N.W.2d 723 (unpublished but cited for persuasive authority pursuant to Wis. Stat. § 809.23(3)). The court found a seizure despite the fact that the officer had not activated his emergency lights, did not display a weapon, and did not use "strong language or an inordinate tone of voice." *Id.*, ¶ 12. In this case we also have a police officer approaching a parked car, possibly directing the driver to roll down the window, and then requiring the driver to tell him what he was doing, as in *Vogt*, in addition to parking his car in a way that restricted or appeared to restrict the driver's ability to simply drive away from the encounter. A reasonable person in these circumstances could conclude he was not free to leave.

The State argues that the judge applied the wrong legal standard when it found that Trooper Larson intended to exercise

some degree of control over the defendant. R. 29, p. 6. It is true that the officer's subjective intent is not relevant for determining whether a seizure has occurred. *Whren v. United States*, 517 U.S. 806, 813-14, 116 S.Ct. 1769 (1996). However, the officer's subjective intent is relevant to whether Trooper Larson was approaching Snyder in his community caretaker role, an issue that was very much in contention at the trial court level.[1] The State does not argue that community caretaker justified this seizure. The court's finding that a seizure occurred does not rest on Trooper Larson's subjective intent, but on the totality of the circumstances created by the aforementioned objective facts relating to Trooper Larson wearing a uniform, having a marked squad car, and the relative positions of the vehicles and

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1 "[W]hen a community caretaker function is asserted as justification for the seizure of a person, the trial court must determine: (1) that a seizure within the meaning of the fourth amendment has occurred; (2) if so, whether the police conduct was a bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual." *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987), *rev'd on other grounds*, 155 Wis. 2d 77, 454 N.W.2d 763 (1990).

When evaluating whether the police conduct was a "bona fide" community caretaker activity, the Supreme Court has held that "when a search is not supported by probable cause or reasonable suspicion and it is contended that the reasonableness of police conduct stands on other footing, an officer's subjective motivation is a factor that may warrant consideration." *Id.*, ¶ 30.

Because the trial court was called on to consider the community caretaker rationale for the stop, it was not erroneous for the court to make a finding about the officer's subjective intent. The State has not argued the community caretaker argument on appeal. Arguments not raised on appeal are waived. *See Reiman Assocs., Inc. v. R/A Advertisting*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (an issue not briefed or argued is deemed abandoned).

people. Additionally, as noted in *Mendenhall*, *supra*, the subjective intent of the officer is relevant to the extent that intent was conveyed to Snyder. The trial court found that this officer intended to exercise authority and control, and his actions conveyed that intent.

Although the State cites several cases from other jurisdictions, none of the cited cases involve the same or a similar fact pattern. In each of these out of state cases, courts found that shining headlights or spotlights into a parked car did not constitute a seizure. *State v. Baker*, 107 P.3d 1214, 1216 (Idaho 2005) (officer's use of spotlight to illuminate a parked vehicle does not constitute a show of authority); *People v. Perez*, 211 Cal.App.3d 1492 (Cal. Ct. App., 1989) (spotlights did not constitute a show of authority; officer was only justified in approaching vehicle on foot because passengers were unresponsive); *State v. Calhoun*, 792 P.2d 1223, 1225 (Or. Ct. App. 1990) (headlights and spotlight from patrol car 30 feet behind defendant's car were not show of authority); *State v. Halfmann*, 518 N.W.2d 729, 730 (N.D. 1994) (headlights did not constitute show of authority; police action upheld under community caretaker role). Snyder does not argue that Trooper Larson used the lights on his police cruiser to effect a stop nor that the use of his flashlight, in and

of itself, would induce a reasonable person to believe he or she was not free to go.

There is persuasive authority from other jurisdictions that more closely hews to the facts of this case. The Superior Court of Pennsylvania suppressed an arrest in a case factually similar to the case at bar. *Commonwealth v. Mulholland*, 794 A.2d 398, 402 (Pa. Super. Ct. 2002). In *Mulholland*, the officer observed a parked car with its running lights on and went to investigate, positioning his patrol car to make it difficult for the defendant to drive away. *Id.* When the officer spoke to the driver, the driver provided a reasonable explanation for why he was parked, after which the officer noticed the scent of marijuana and ultimately made an arrest. *Id.*

The case at bar is more analogous to *Mulholland* than the cases cited by the State based on the totality of the facts in the record. Trooper Larson parked his patrol car in the only driveway to the parking area, 12 to 24 feet directly in front of Snyder's car. The lot was also illuminated, so there was no evidence Snyder did not know Larson was an officer. R. 28, p. 4. He, in full uniform and shining his flashlight, walked from his driver side door (which would be on Snyder's passenger side) across the intervening distance to

Snyder's driver side door, placing him for most of the walk directly in the path where Snyder would need to turn to drive around the patrol car. He could not remember if Snyder lowered the window in acquiescence to police authority, and it was the State's burden to establish any facts that did not establish the officer's show of authority. The State's evidence was vague. It is most reasonable to assume the window was down at the officer's request, as there was a very detailed conversation between the officer and defendant, and the officer claimed to smell intoxicants. He then demanded an explanation from Snyder as to what he was doing there. A reasonable person would not believe he was free to leave under these circumstances.

IV. Even if Trooper Larson's initial conduct did not qualify as a seizure, he lacked reasonable suspicion to expand his contact with Snyder into an OWI investigation.

Police officers are not permitted to make Fourth Amendment seizures, including traffic stops, on the basis of a hunch. A hunch is not reasonable suspicion, and it does not authorize any level of police seizure whatsoever – not even a *Terry* stop. *State v. Guy*, 172 Wis. 2d 86, 95, 492 N.W.2d 311. After Trooper Larson approached Snyder's car and demanded to know what he was doing, he asked Snyder to step out of the car and perform field sobriety tests based

only on "some" slurred speech, bloodshot eyes, and the scent of alcohol. R. 28, p. 9. He observed no traffic violations. R. 28, p. 12. He did not ask Snyder if he had been drinking. R. 28, p. 15. There was no testimony indicating if he had even heard Snyder speak before or what relevance "some" slurred speech or bloodshot eyes had. The officer admitted that nothing about the conversation lead him to believe Snyder was intoxicated. He said he got him out of the car to ask about his drinking. A reasonable officer would have done that while still in the car.

The odor of intoxicants is not enough to give rise to a reasonable suspicion of OWI. To be guilty of OWI, a driver must have a blood alcohol concentration over the legal limits. *See* Wis. Stat. § 340.01(46m); Wis. Stat. § 346.63. Because operating a vehicle with a blood alcohol concentration below the prescribed limits is legal the odor of intoxicants alone is insufficient to constitute reasonable suspicion for OWI, because such a holding would permit involuntary detention of persons engaging in a legal activity with nothing more.

In *State v. Swanson*, the Supreme Court found that police had reasonable suspicion for OWI and for reckless endangerment where the defendant, at bar time, drove his vehicle on to the sidewalk,

nearly hitting a pedestrian. 164 Wis. 2d 437, 475 N.W.2d 148, 155, fn. 6 (1991), *abrogated on other grounds by State v. Sykes*, 279 Wis. 2d 742, 695 N.W.2d 277 (2005). When the police confronted the driver, they detected the odor of alcohol. The court held that the erratic driving, the odor of alcohol, and the time of the incident added up to reasonable suspicion but fell short of probable cause. Similarly, in *State v. Seibel*, the police officer had reasonable suspicion but not probable cause. 163 Wis. 2d 164, 471 N.W.2d 226 (1991). *Seibel* involved a fatal motorcycle accident where the motorcyclist crossed the center line and struck a car head on. At the hospital, the officer observed the smell of intoxicants on the motorcyclist's breath and on the breath of the other bikers. The motorcyclist was belligerent at the hospital. *Swanson* and *Seibel* both concern incidents where the police only had reasonable suspicion, despite reckless or fatal behavior by the defendants. Even with Swanson's driving on the sidewalk and Seibel's fatal crossing of the center line, both of which are the type of behavior that tend to show that the driver's ability to operate a vehicle was impaired, their conduct did not give rise to probable cause for OWI, only reasonable suspicion; and what this officer noted here was far less than in those

cases at the point he started investigating for operating a motor vehicle while under the influence of an intoxicant.

Trooper Larson did not ask Snyder if he had been drinking or how much he had been drinking before making him get out of the vehicle and asking him to submit to field sobriety tests. Although he twice witnessed Snyder driving by him, he observed no traffic violations or other erratic driving behavior that might tend to suggest impairment. Trooper Larson observed only the odor of intoxicants, red eyes, and "some" slurred speech. There are many possible causes for red eyes, and they are not a reliable indicator of intoxication. [2]

There was simply not enough to justify the investigation into operating a motor vehicle while under the influence of an intoxicant. At a bare minimum, the officer should have at least inquired as to whether Snyder was drinking and how much.

[2] A National Highway Traffic Safety Administration (NHTSA) study regarding the validity of various clues of intoxication excluded bloodshot eyes from consideration because of the subjectivity of that supposed clue and the many other causes for it besides the consumption of alcohol. Jack Stuster, U.S. Department of Transportation, NHTSA Final Report, *The Detection of DWI at BACS below 0.10*, DOT HS-808-654 (Sept. 1997) at 14 and E-10.

CONCLUSION

For the reasons stated in this Brief, the judgment in this case should be affirmed.

Dated at Madison, Wisconsin, _____ 2013.

Respectfully submitted,

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Defendant-Respondent

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 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 2,868 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: _____, 2013.

Signed,

_____
TRACEY A. WOOD
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CERTIFICATION

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;
(3) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b) and;
(4) 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 notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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