STATE OF WISCONSIN

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

Appeal No. 2013AP299-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

MICAH J. SNYDER,

Defendant-Respondent,

BRIEF OF PLAINTIFF-- APPELLANT

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

Respectfully submitted,

The State of Wisconsin,
Plaintiff-Appellant
Columbia County District Attorney
Attorney for the Plaintiff
400 Dewitt Street
Portage, WI 53901
(608) 742-9650

BY: TROY D. CROSS
Assistant District Attorney
State Bar No. 1026116

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STATEMENT OF THE ISSUES

The issue on appeal in this case is whether when Trooper Larson pulled into the parking lot of the closed town hall, stopped his vehicle without activating his emergency lights or siren, and walked up to the defendant's vehicle, did Trooper Larson seize the defendant?

TRIAL COURT'S ANSWER

The Trial Court answered this question, yes, this was a seizure. (R. 29, page 6, lines 4-11).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State would request the opportunity to present oral argument in this case, if the Court would feel that it would be appropriate, to help further define the issues and to clear up any questions that the Court may have.

The State does not request that this case be published since it is apparent that this is a one-judge review, therefore, publication would not be available.

I. FACTS

The Facts in the case are contained in the transcript of the motion to suppress hearing that was held on December 3, 2012. (R. 28). Trooper Larson saw the defendant's vehicle drive past his location on Hwy. 188 in Columbia County around 11:30 at night. (R. 28, pages 3-4). Trooper Larson had seen this same vehicle going the other way about 10 minutes earlier. (R. 28, page 8, line 10). The second time that Trooper Larson saw this vehicle, the vehicle pulled into the West Point town hall and parked. (R. 28, page 4).

The defendant had parked in the parking area of the town hall. Trooper Larson pulled into the driveway of the town hall and stopped in an area that was 30 feet wide, where the driveway meets the parking lot. (R. 28, page 5). Trooper Larson estimated that he was one to two car lengths in front of the defendant's vehicle when he parked, which was 12-24 feet away. (R. 28, page 5). Trooper Larson sat in his car for a short time before he got out and approached the defendant's vehicle. (R. 28, page 6, lines 5-6). Trooper Larson did not activate his emergency lights or his siren before he walked up to the defendant's vehicle. (R. 28, page 6). Trooper Larson also agreed that there was conservatively 20 feet beside his car on the driveway where the defendant could have driven past him. (R. 28, page 7).

II. QUESTION PRESENTED

The question presented in this appeal is whether when Trooper Larson pulled into the parking lot of the closed town hall, stopped his vehicle without activating his emergency lights or siren, and walked up to the defendant's vehicle, did Trooper Larson seize the defendant? The standard of review for this type of case was stated in the *Williams* case.

> "'Whether evidence should be suppressed is a question of constitutional fact.'" *State v. Knapp*, 2005 WI 127, para. 19, 285 Wis.2d 86, 700 N.W.2d 899 (citation omitted). A finding of constitutional fact consists of the circuit court's findings of historical fact, and its application of those historical facts to constitutional principles. *See State v. Turner*, 136 Wis.2d 333, 343-44, 401 N.W.2d 827 (1987). We review the former under the clearly erroneous standard and the latter *de novo. See id.*[1]

The trial court, in this case, held that the officer's actions did rise to the level of a seizure.

> The court considers that the actions of the officer did constitute a seizure in this case. He pulled up in such a fashion that for the defendant to have left, he would have had to make a significant effort to go around the vehicle of the officer. The driveway was approximately two car lengths in width I believe was the testimony.
>
> But given the positioning of the officer's vehicle, the marked squad status, the uniformed officer approaching the defendant parked in this position, there is absolutely no question in the court's opinion that the officer was intending to exercise some degree of control over the defendant and had effectuated a seizure. (R. 29, page 6, lines 4-19).

[1] *State v. Williams*, 323 Wis.2d 460, 467; 781 N.W.2d 495, 498-99 (Wis. Ct. App. 2010).

III. TRIAL COURT'S FINDINGS ARE CLEARLY ERRONEOUS

The appellant disagrees with the trial court's findings of fact in this case and would argue that some of them are clearly erroneous. The trial court stated that "the driveway was approximately two car lengths in width I believe was the testimony." (R. 29, page 6, lines 9-11). The appellant was not able to find that the driveway was two car lengths in width, anywhere in the transcript of the motion hearing, which is number 28 of the record.

The appellant did find references to how wide the driveway was in the record. Trooper Larson testified that he had measured the driveway the day before the motion hearing and that it was 30 feet wide at the point where the driveway meets the main parking lot. (R. 28, page 5, lines 7-8). Trooper Larson testified that he was on the right side of the driveway when he parked. (R. 28, page 5, line 12). Trooper Larson estimated that his car width, from mirror tip to mirror tip was probably 6 feet. (R. 28, page 6, lines 16-17). And Trooper Larson agreed that conservatively, there would have been easily 20 feet of space that the defendant could have passed him in. (R. 28, page 7, lines 1-4).

On cross examination, during the motion hearing, defense counsel asked if the driveway narrowed from the 30 foot measurement, as it met the street and

Trooper Larson disagreed stating that he thought that it widened. (R. 28, page 10, lines 19-25).

The only reference to two car lengths, that the appellant was able to find in the record, was when Trooper Larson testified that he parked his vehicle facing the defendant's vehicle, and he estimated that there was one to two car lengths between the two vehicles. (R. 28, page 5). Trooper Larson went on to state that he estimated that a car length was about 12 feet so that he would have been parked between 12 – 24 feet in front of the defendant's vehicle. (R. 28, page 5).

The trial court also stated that the defendant would have had to make a significant effort to go around the vehicle of the officer. (R. 29, page 6, lines 7-9). The appellant disagrees with this. Trooper Larson was the only witness to testify at the motion hearing. His testimony is uncontroverted. With Trooper Larson's vehicle being parked between 12-24 feet in front of the defendant's vehicle, with at least 20 feet, or three plus car widths, the defendant could have easily driven around and past Trooper Larson, if he had chosen to do so. The defendant would not have even had to back up as they were facing each other, with the defendant's vehicle facing out toward the road. (R. 28, page 4, lines 17-19).

Finally, the court's opinion that the, "officer was intending to exercise some degree of control over the

defendant and had effectuated a seizure" (R. 29, page 6), is not the proper legal standard to apply. The Supreme Court of Colorado stated the appropriate standard in the *Walters* case which cited to the U.S. Supreme Court's decision in *Whren*.

> In this case, the record facts show that the encounter between Officer Portillo and the defendant, including the request to search the defendant's vehicle, was not an investigatory stop but a consensual encounter.
>
> Officer Portillo did not pull over the defendant's vehicle but initiated contact after the defendant had already parked, exited the vehicle, and raised its hood. Therefore, the contact between Officer Portillo and the defendant did not automatically rise to the level of an investigatory stop, and, hence, we must determine whether the encounter was "so intimidating as to demonstrate that a reasonable person would believe he was not free to leave." *Hill*, 929 P.2d at 739.
>
> Although Officer Portillo initiated contact with the defendant because he suspected him of having drugs in his vehicle, **the subjective intent of the officer in initiating the contact is not relevant for Fourth Amendment purposes**. *Marujo*, 192 P.3d at 1006 (citing *Whren*, 517 U.S. at 813-14, 116 S.Ct. 1769).[2] (Emphasis added).

IV. CASE LAW

The United States Supreme Court, in the *Mendenhall* case set out what is required before a seizure takes place. The Supreme Court held:

> We adhere to the view that a person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth

[2] *People v. Walters*, 249 P.3d 805, 810 (Colo. 2011).

Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon the person's liberty or privacy as would under the Constitution require some particularized and objective justification..

Moreover, characterizing every street encounter between a citizen and the police as a "seizure," while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. The Court has on other occasions referred to the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws. "Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. *Haynes v. Washington*, 373 U.S. 503, 515, [83 S.Ct. 1336, 1344, 10 L.Ed. 513]." *Schneckloth v. Bustamonte*, 412 U.S., at 225, 93 S.Ct., at 2046.

We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in the view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. (fn6) Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. …

In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

FN6 We agree with the District Court that the subjective intention of the DEA agent in this case to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent.

On the facts of this case, no "seizure" of the respondent occurred. The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official. …

In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure.

Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses doe not depend upon her having been so informed. See *Schneckloth v. Bustamonte, supra*. We also reject the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agents' questions. It may happen that a person makes statements to law enforcement officials that he later regrets, but the issue in such cases is not whether the statement was self-protective, but rather whether it was made voluntarily. (*Mendenhall* 446 U.S. 544 at 553-56; 100 S.Ct. 1870 at 1877-78 (1980).

The Wisconsin Supreme Court has agreed, that the *Mendenhall* case is the one to use in situations where a person does not run away from an officer who requests to speak with the person. The Wisconsin Supreme Court stated in *State v. Young*:

> *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. 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. As this court noted in *Williams*, "most citizens will respond to a police request," and "the fact that people do so, and do so without being told they are fee not to respond, hardly eliminates the consensual nature of the response." *Williams*, 255 Wis.2d 1, para. 23, 646 N.W.2d 834 (quoting *Delgado*, 466 U.S. at 216, 104 S.Ct. 1758). *State v. Young*, 294 Wis.2d 1 at 25; 717 N.W.2d 729 at 741 (2006).

In addition to the above cited case law from the United States Supreme Court and from the Wisconsin Supreme Court on the issue of when someone is seized per the 4th amendment, there are numerous cases from other jurisdictions, which are persuasive in this area.

One example from the State of Idaho occurred in the *Baker* case. In this case, Officer Marshall followed a vehicle at 2:00 in the morning.[3] Officer Marshall followed the vehicle for about a quarter of a mile before the vehicle pulled into a cul-de-sac and parked in front of another car after it had briefly stopped next to the

[3] *State v. Baker*, 141 Idaho 163; 107 P.3d 1214 (Idaho 2005).

car.[4] Officer Marshall had not observed any law violations up to this point.[5] Officer Marshall pulled in behind the car, did not activate his overhead lights, but did activate his spot light briefly into the driver's side of the car and then into the rear window of the car, before he made contact with the occupants of the vehicle.[6]

In this case, the trial court ruled that the use of the spotlight to illuminate the car was a display of authority, "sufficient to create a detention under the Fourth Amendment."[7] The trial court then suppressed the evidence because the detention was not supported by reasonable suspicion.[8]

The Idaho Court of Appeal overturned this decision and held that the officer's use of the spotlight did not make this a seizure.[9] The Idaho Supreme Court agreed and held that this was not a seizure.[10]

Another example, from the State of California, is the *Perez* case. In this case, a San Jose police officer was on patrol in the evening, when he saw two people parked, in an unlit vehicle, in a motel parking lot.[11] The officer positioned his car head on with the defendant's vehicle, but he left enough room for the defendant to drive away.[12] The officer did not activate his emergency lights, but he did activated his high beam lights and spot

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[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] 141 Idaho 163, 164; 107 P.3d 1214, 1215 (2005).
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *People v. Perez*, 211 Cal.App.3d 1492 (Cal. Ct. App., 1989).

lights on both sides of the car so that he could see into the vehicle better.[13] The Court of Appeals in California ruled that there was no detention that took place in this case.[14]

An example from the State of Oregon is from the *Calhoun* case. In this case, an officer saw a vehicle go by him in a park at about 3 a.m..[15] About ten minutes later, the officer saw the same vehicle, parked in a parking area with one person in it.[16] The officer stopped about 30 feet behind the vehicle and left his headlights and spot light on, but he did not activate his emergency lights.[17] Both the trial court and the court of appeals held that this was not a stop.[18]

An example from the State of North Dakota is from the *Halfmann* case. In this case, an officer saw a vehicle driving on a gravel road at about 1:00 a.m., that was weaving, but he chose not to stop the vehicle because some degree of weaving was normal when driving on a gravel road.[19] The vehicle subsequently pulled over to the shoulder of the road and stopped.[20] The officer also stopped, waited a few seconds, and then pulled in behind the defendant's vehicle.[21] The officer activated his amber lights, got out of his vehicle,

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *State v. Calhoun*, 101 Or.App. 622; 792 P.2d 1223 (Or. Ct. App. 1990).
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *State v. Halfmann*, 518 N.W.2d 729, 730 (N.D. 1994).
[20] *Id.*
[21] *Id.*

walked up to the defendant's vehicle, and made contact with the defendant.[22] In this case, the Supreme Court of North Dakota held, "We agree with the trial court's finding that a Fourth Amendment 'stop' did not occur, thereby negating the 'reasonable and articulable suspicion' requirement."[23]

V. CONCLUSION

Given the uncontroverted facts that Trooper Larson testified to in this case; that he did not activate any emergency lights or siren, that the defendant never attempted to leave, that Trooper Larson was the only officer present, that Trooper Larson did not draw or display a weapon, that Trooper Larson did not touch the defendant, and that Trooper Larson did not use any language or tone of voice that was compelling (R. 28), this Court should rule that the defendant was not seized under these facts and overrule the trial court's decision in this case.

The trial court in this case put too much emphasis on Trooper Larson's subjective intent. Trooper Larson's subjective intent was irrelevant unless it was conveyed to the defendant, which in this case did not happen. When Trooper Larson pulled into the parking lot, we do not even know for sure that the defendant knew that this was a police officer's car, since the defendant never did

[22] *Id.*
[23] *Id.*

testify at the motion hearing. We cannot infer that he knew this because it was dark out and the area was not really well illuminated as there were only a couple of overhead lights and there was no testimony as to where these lights were located. (R. 28, pages 4-5).

Trooper Larson stopped his vehicle between 12-24 feet in front of the defendant's vehicle with at least 20 feet beside him to pass him. (R. 28). Trooper Larson waited for a few seconds before he got out of his vehicle. (R. 28). If the defendant had wanted to leave, he could have done so at that point. Trooper Larson then walked up to the defendant's vehicle and the defendant was still free to leave if he had chosen to do so. Any person in this situation would have or should have felt that he or she was free to leave because the officer[24] had not done anything to indicate that the person was not free to leave.

> Not every encounter between police and citizens implicates Fourth Amendment concerns because a "seizure" does not occur until a police officer has restrained the liberty of the citizen. *People v. Marujo*, 192 P.3d 1003, 1005 (Colo.2008). …
>
> While an investigatory stop constitutes a seizure implicating the Fourth Amendment's safeguards, and therefore must be justified by reasonable suspicion, a consensual encounter does not. *Id.* A consensual encounter is one "in which no restraint of the liberty of the citizen is elicited through non-coercive questioning." *People v. Johnson*, 865 P.2d 836, 842 (Colo.1994). The test for determining if the encounter is a consensual one is "whether a reasonable person under the circumstances would believe he or she was free to leave and/or to disregard the official's

[24] This assumes that a reasonable person in this situation would have even been able to see that the person approaching was a police officer.

> request for information." *People v. Thomas*, 839 P.2d 1174, 1177-78 (Colo.1992). This test "'presupposes an innocent person.'" *Johnson*, 865 P.2d at 842 (quoting *Florida v. Bostick*, 501 U.S. 429, 438, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991)).[25]

For all of the above mentioned reasons, the State asks that this Court overrule the trial court's decision. The State asks that this Court send this case back to the trial court for further proceedings not inconsistent with the Court's holding.

Dated at Portage, Wisconsin, May _____, 2013

Respectfully submitted,

_____

TROY D. CROSS
Assistant District Attorney
Columbia County, Wisconsin
State Bar No. 1026116
Attorney for Plaintiff-Appellant

Columbia County
District Attorney's Office
P.O. Box 638
Portage, WI 53901
(608) 742-9650

[25] *People v. Walters*, 249 P.3d 805, 808-09 (Colo. 2011).

CERTIFICATION
I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a Proportional Serif Font. The length of this brief is 3,958 words which includes the Table of Contents for the Appendix.

Dated this _____ day of May, 2013.

Signed,

_____
Troy D. Cross
Attorney

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 s. 809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 May, 2013.

Signed,

_____
Troy D. Cross
Attorney

VI. TABLE OF CONTENTS FOR APPENDIX

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(2)
ELECTRONIC E-FILING

I hereby certify that:

I have submitted an electronic copy of the brief in case 2013AP299-CR, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

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

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

Dated this 10th day of May, 2013.

Signed:

_____

TROY D. CROSS
Assistant District Attorney
Columbia County, Wisconsin
State Bar No. 1026116
Attorney for Plaintiff-Appellant