STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP2199-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JUAN FRANCISCO ROSAS VIVAR,

Defendant-Appellant.

On Appeal From the Denial of a Pretrial Motion to Suppress Evidence and the Judgment of Conviction Entered in the Jefferson County Circuit Court, the Honorable Jennifer L. Weston, Presiding

---

REPLY BRIEF OF DEFENDANT-APPELLANT

MICHELLE L. VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355

Office of the State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202
(414) 227-4300
velasquezm@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ARGUMENT

I. Officer Rupprecht Seized Mr. Rosas-Vivar Within the Meaning of the Fourth Amendment, and Neither the Community Caretaker Exception, or Reasonable Suspicion, Justify His Action.

A. Officer Rupprecht seized Mr. Rosas-Vivar within the meaning of the Fourth Amendment.

The parties agree that the test for determining whether one has been seized for purposes of the Fourth Amendment is whether, in light of the totality of the circumstances surrounding the incident, a reasonable person would not have believed he was free to leave. ***United States v. Meddenhall***, 446, U.S. 544 (1980). ***Meddenhall*** establishes that the test for the existence of a "show of authority" is an objective one, based on whether the officer's words and actions would have conveyed to a reasonable person that he or she was not free to leave. ***California v. Hodari D.***, 499 U.S. 621, 628 (1991). For example, a show of authority could be the threatening presence of several police officers, an officer displaying a weapon, some physical toughing of the person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. ***Meddenhall***, 446, U.S. at 554. The ***Meddenall*** test applies when the subject, like Mr. Rosas-Vivar, submits to the show of authority. ***State v. Young***, 2006 WI 98, ¶ 39, 294 Wis. 2d 1, 717 N.W.2d 729.

The state argues that there was no show of authority because under the circumstances a reasonable person would have believed that he was free to leave. (State's Br. at 13, 20, 28). It first argues that the facts of the case at hand are distinguishable from the facts in ***State v. Washington***, 2005

WI App 123, 284 Wis.2d 456, 700 N.W.2d 305, in which this Court found that a seizure occurred when the defendant yielded to a plain-clothes officer's order to stop. ***Id***. ¶¶ 14-15. The first distinction the state draws between the cases is that the source of the complaint in ***Washington*** was an anonymous tip, while here it was Mr. Rosas-Vivar's ex-wife who made the complaint in person. (State's Br. at 14). This distinction is inconsequential to the analysis of whether there was a show of authority the test involves police actions and whether or not a reasonable person felt free to leave. *See* ***Meddenhall***, 446, U.S. 544.

In ***Washington***, this Court determined that the moment the officer commanded the defendant to stop, and the defendant yielded, there was a seizure. ***Id***. ¶ ¶ 14-15. Therefore, the important comparison between that case and the instant one, are the facts from the time the encounter began, until the time Mr. Rosas-Vivar yielded to the officer's order by approaching the open squad window. In ***Washington***, the defendant was walking to the store when a plain-clothed officer, in an unmarked car, called out and ordered him to stop, and that him he wanted to talk to him. ***Id***. ¶ ¶ 2, 7. The officer then got out of the car and approached the defendant, who had stopped going on his way. ***Id***. at ¶¶ 14.

Here, the officer was in a marked vehicle and uniform when he pulled next to the entrance of Mr. Rosas-Vivar's apartment. (34:12-13). Mr. Rosas-Vivar stopped walking toward the entrance of his home and complied with the officer's instruction to come and talk to him. Officer Rupprecht testified that he "told [Mr. Rosas-Vivar] to come to [his] squad car," and that he asked, "Juan, can you come talk to me?"(34:26). Regardless of whether it was in the form of a question, importantly, the officer here used an

authoritative tone, which would signal that Mr. Rosas-Vivar had to comply. The trial court found that this authoritative tone perhaps indicated to Mr. Rosas-Vivar that he would not have been free to leave. (34:44). The officer here did not need to approach Mr. Rosas-Vivar, because he compelled Mr. Rosas-Vivar to stop going in the direction he was going, and to come over the officer's squad car.

Next, the state argues that there are no parallel's that can be drawn between ***In re Kelsey C.R.***, 2001 WI 54, 243 Wis. 2d 422, 626 N.W.2d 777 and the case at hand because "that case does not address whether the command given in that case led to a seizure." (State's Br. at 15). It also presumes that the Court did not examine the initial encounter between the girl and the police because it was a consensual encounter. (State's Br. at 16).

The Court, however, did address whether the command in ***Kelsey C.R.***, case led to a seizure. ***Id***. ¶29. In its analysis, the Court stated in the "test for a seizure [there] is the requirement that when a police officer makes a show of authority to a citizen, the citizen yields to that show of authority." ***Id***. ¶ 30 (citing ***California v. Hodari D***., 499 U.S. 621, 626 (1991)). The Court determined that at the time the officer commanded the girl to "stay put" no seizure took place because she failed to yield to the officer's show of authority. ***Id***. ¶ 33. The important take away from ***Kelsey C.R.*** is that the court considered the officer's command to "stay put" a show of authority, similar to telling someone to "stop in the name of the law." ***Id***. Likewise, the officer in this case told Mr. Rosas-Vivar to stop and come over to talk to him in an authoritative tone, which would suggest to a reasonable person that compliance was not optional. (34:26). The officer here called to Mr. Rosas-Vivar from his car, just as the officer in ***Kelsey C.R.*** told the girl to "stay put" from across the street

in an unmarked squad. ***Id***. ¶ 5. The difference is that Mr. Rosas-Vivar yielded to the officer's show of authority, thereby making it a seizure, subject to reasonableness under the constitution.

The state argues that this case is similar to ***County of Grant v. Vogt***, 2014 WI 76, 356 Wis. 2d 343, 850 N.W.2d 253. (State's Br. at 16). However, in that case, the officer parked behind a car that was already parked, while here, he stopped Mr. Rosas-Vivar from going into his home to talk to him. ***Vogt***, 356 Wis. 2d ¶ 4; (34:26). The circuit court there found that there was no showing that the officer raised his voice, and no indication the officer commanded anything. ***Id***. ¶ 10. Here, the officer used an authoritative tone and told Mr. Rosas-Vivar to come over to the squad. (34:26).

The state contends that Mr. Rosas-Vivar's movements were not restrained because unlike the defendant in ***Vogt***, Mr. Rosas-Vivar was not in his car. (State's Br. at 18). It argues that the officer did not block the entrance to his home and he "only had to walk into his home." (State's Br. at 18). However, the defendant in ***Washington*** was on a public sidewalk and could have kept walking as there was nothing obstructing him. ***Washington***, 284 Wis.2d 456 ¶ 5. Nonetheless, the officer's order to stop was a show of authority. ***Id***. ¶ 15. Therefore, having some way to leave does is not, by itself, indicative of whether a seizure occurred, but rather is one of many factors to consider.

Here, the officer parked "right by the entrance of the apartments above the bar" and at that point made contact with Mr. Rosas-Vivar. (34:20). An officer that parks at the entrance of one's home, addresses a person by name, and uses an authoritative tone to get the person to come and talk to him, is making a show of authority. A reasonable person

would not have felt free to ignore an authoritative command from an officer and walk past the squad to get into the apartment building. Finally, the fact that Mr. Rosas-Vivar complied does not factor into the determination of whether the encounter was consensual. His compliance was yielding to the show of authority.

B. The community care-taker exception does not apply.

The parties agree that when determining whether a police action is a bona fide community caretaker activity, the inquiry is whether the actions are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." ***Kelsey C.R.***, 243 Wis. 2d 422, ¶ 34; (State's Br. at 20-21). Moreover, they agree that an officer's subjective motivation does not determine whether he or she performed a community caretaker activity; rather, a bona fide community caretaker is determined objectively from the totality of the circumstances. ***State v. Kramer***, 2009 WI 14 ¶ 30, 315 Wis. 2d 414, 759 N.W.2d 598; (State's Br. at 21).

However, the state begins its analysis by indicating what the officer's intention was in making contact with Mr. Rosas-Vivar. (State's Br. at 21). It asserts that the officer's intention was to tell Mr. Rosas-Vivar that his ex-wife did not want him at the home and to check if their son was in the car with the "intoxicated defendant," and that under the totality of the circumstances the officer's conduct had nothing to do with the investigation of criminal activity. (State's Br. at 21). Driving with a minor while intoxicated is a criminal offense. Wis. Stat. § 346.65(2)(f). Believing that the son's welfare was in danger was directly connected to a belief that Mr. Rosas-Vivar was driving intoxicated. Therefore, the officer would have needed reasonable suspicion to stop on that basis

because his concern for the minor was not "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. *See* ***Kelsey C.R.,*** ¶ 34. Moreover, the record indicates that the son was age 14 and that the officer, who made an independent observation of Mr. Rosas-Vivar's driving, did not see any other person in the vehicle. (Envelope, Defense Exhibit, 1; 34:8). Therefore, checking to see if the minor was in the vehicle with "the intoxicated defendant" is not a bona fide community caretaker activity.

The totality of the circumstances, likewise, do not support a bona fide community caretaker activity in relation to telling Mr. Rosas-Vivar that his wife did not want him at the home. Mr. Rosas-Vivar left when his ex-wife requested he do so. (34:17). Therefore, there was no peacekeeping that was necessary, nor was there any indication that Mr. Rosas-Vivar was in any type of distress. There is no indication that she was fearful of him, or that he had not left willingly. Mr. Rosas-Vivar maintains that there was no bona fide community care taker activity, and thus, the remaining test is unnecessary. Nontheless, he addresses the state's arguments.

The state contends that there was a public interest in the officer's actions to "avoid potential future conflict that evening and to protect a child." (State's Br. at 22). The state's argument that the officer talking to Mr. Rosas-Vivar would be more of a deterrent than the ex-wife's request is speculative about the need for some future event and does not support a showing that there was some need the officer was responding to. Furthermore, the record demonstrates that Mr. Rosas-Vivar respected his ex-wife's request, and no indication that he acted in a way to suggest that he would not comply with his ex-wife's wishes, as he did not become loud or belligerent

or threatening. (34:17). Thus, the officer had no objective basis for believing assistance was needed.

Contrary to the state's contention, an officer pulling up at the entrance of one's home and essentially ordering him to come over to the squad is intimidating, particularly considering that Mr. Rosas-Vivar left his ex-wife's residence when requested to do so, and without incident of any kind. There is no public interest in an officer responding to an ex-wife's complaint that her ex-husband came over too late, but he left when she asked.

Lastly, the officer had a feasible and effective alternative way to tell Mr. Rosas-Vivar that his ex-wife did not want him to stop by so late at night. Mr. Rosa-Vivar's ex-wife provided the officer with his phone number. (34:12, 18-19; App. 112, 118-119). Because there was no exigency, it was unnecessary for the officer to pull his squad up to the entrance of Mr. Rosas-Vivar's apartment and order him to come and talk. Rather, the officer could have called him on the phone to relay the information. The seizure of Mr. Rosas-Vivar was unreasonable under the function of community caretaker.

C. The officer lacked reasonable suspicion to stop Mr. Rosas-Vivar.

The state contends that there was reasonable suspicion to stop Mr. Rosas-Vivar because a reliable citizen witness "observed signs that the defendant had been consuming alcohol and observed the defendant driving," and the officer "corroborated some of the information from that informant." (State's Br. at 28). If these two facts are enough to support reasonable suspicion, then anyone ever seen having a drink at a party or restaurant or sporting event, and then driving,

would be susceptible to a stop. In its argument, the state relies on ***State v. Powers***, 2004 WI App 143, 275 Wis. 2d 456, 685 N.W.2d 869. (State's Br. at 24).

That case is distinguishable from the instant one. There, a store clerk reported that an intoxicated man had come into the store. ***Id***. ¶ 2. An officer responded and observed the man walk out of the store unsteadily, and carrying a case of beer. ***Id***. ¶ 3. The clerk also observed one or more indicia of intoxication from her face to face contact with the defendant and was able to give an opinion about intoxication. ***Id***. ¶ 11, 13.

A known citizen informant and corroboration of some details do not automatically give rise to reasonable suspicion. The only details the officer corroborated here were the vehicle and type of clothing worn by the defendant; neither of which indicate anything about intoxicated driving. The information from the ex-wife was that she smelled alcohol and that she thought perhaps her son was in the car. (34:9-10). Unlike the clerk in ***Powers,*** she did not describe Mr. Rosas-Vivar as intoxicated. Unlike the officer in ***Powers***, who saw the defendant walking unsteadily, the officer here, independently observed Mr. Rosas-Vivar driving, and saw nothing unusual, erratic, or dangerous. (34:17). The officer was also able to see well enough into the car to determine that Mr. Rosas-Vivar was alone, thereby dispelling any concern that the fourteen-year old son was in the car. (34:8).

Finally, Mr. Rosas-Vivar did not "pound" on the door. The record indicates he knocked. (34:6,9). Knocking on a door at 11:30 at night and then leaving when asked does not give rise to reasonable suspicion of intoxicated driving. Under the totality of the circumstances, the officer lacked reasonable suspicion to justify the stop.

CONCLUSION

For the reasons stated here and in his brief-in-chief, Mr. Rosas-Vivar respectfully requests that the court reverse the circuit court's decision denying his motion to suppress the evidence resulting from an illegal stop of his person. He asks that this court find that there was a stop within the meaning of the Fourth Amendment and that it was not supported by either community caretaker or reasonable suspicion. If this court determines that there was a stop, and that it was supported by reasonable suspicion, then he respectfully requests that this court remand to the circuit court with instructions for a factual finding regarding the smell of alcohol.

Dated this 11th day of March, 2015.

Respectfully submitted,

MICHELLE L.VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355

Office of the State Public Defender
735 N. Water St. Ste., 912
Milwaukee, WI 53202
(414) 227-4300
velasquezm@opd.wi.gov

Attorney for Defendant-Appellant

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 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,550 words.

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.

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 11th day of March, 2015.

Signed:

MICHELLE L. VELASQUEZ
Assistant State Public Defender
State Bar No. 1079355
Office of State Public Defender
735 N. Water St., Ste. 912
(414) 227-4300
velasquezm@opd.wi.gov

Attorney for Defendant-Appellant