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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2015AP000162 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EMILIANO CALZADAS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Jefferson County Circuit Court,
the Honorable Jennifer L. Weston, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution

Wisconsin Constitution

ARGUMENT

I. The Circuit Court Correctly Held That Mr. Calzadas Was Seized When the Deputy Parked His Squad Car Angled in Front of Calzadas' Car and Shined a Spotlight on Him.

The circuit court correctly concluded that Mr. Calzadas was seized when Deputy Klemke pulled his squad car at an angle in front of Mr. Calzadas' vehicle, making it unlikely that Calzadas would drive away, and then shined a spotlight on Calzadas and his car. Consistent with the lower court's ruling, this court should reject the state's contention that what occurred here was nothing more than a "consensual encounter." (State's brief at 4).

The state correctly recites the standard for determining whether a person was seized for purposes of the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution. (*Id*. at 5). A person has been seized when, considering all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. ***County of Grant v. Vogt***, 2014 WI 76, ¶¶20 & 30, 356 Wis. 2d 343, 850 N.W.2d 253, *citing* ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980). The state's application of that standard to the facts of this case should be rejected because: (1) it fails to give appropriate deference to the circuit court's factual findings; and (2) the three cases it relies upon to argue that Mr. Calzadas was not seized are readily distinguishable.

Although the reviewing court determines independently whether a seizure has occurred, it makes that determination based upon the evidentiary or historical facts as found by the trial court unless the findings are clearly erroneous. ***State v. Young***, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729. Moreover, it is well established that the court of appeals shows "great deference" to the circuit court's factual findings. ***State v. Dull***, 211 Wis. 2d 652, 655, 565 N.W.2d 575 (Ct. App. 1997). This court will affirm the circuit court's findings of fact, and inferences drawn from those facts, unless they are clearly erroneous. ***State v. Gralinski***, 2007 WI App 233, ¶13, 306 Wis. 2d 101, 743 N.W.2d 448.

The state does not challenge any of the circuit court's findings as clearly erroneous, and any such challenge would be unsupported by the record. Nevertheless, the state complains about the amount of weight the court gave to the placement of the vehicles and that the court may not have considered "that the Defendant-Appellant had the opportunity to simply walk away when Deputy Klemke requested his identification." (State's brief at 11). Ms. Calzadas' response is two-fold.

First, the placement of the vehicles is critical in assessing whether a reasonable person would have felt that he was free to leave. Where, as in ***Vogt***, the deputy parked his squad car *behind* the defendant's vehicle, the driver could leave by driving forward. *See* ***Vogt***, 356 Wis. 2d 343, ¶42. But where, as in this case, the officer parked in *front* of the defendant's vehicle, the potential for driving off and ending the "consensual encounter" is far less clear. *See*, *e.g.*, ***United States v. Packer***, 15 F.3d 654, 655 (7th Cir. 1994) (in addition to a police van parked behind the Cadillac,

another officer "pulled his police car in front of and facing the Cadillac such that the Cadillac could not quickly exit from the parked position.").

Relevant to this point, the circuit court found: (1) Mr. Calzadas drove into the Kwik Trip parking lot, backed his car into a parking stall and stopped his car; (2) Deputy Klemke followed Calzadas into the parking lot and "pulled his squad car in a position angled toward the front of defendant's car" (12:1); and (3) the deputy's squad "was placed in such a position that defendant could drive away although would be less likely to do so given the proximity of the vehicle and the angle at which it was stopped." (*Id*. at 1-2).

The court's finding that the deputy positioned his squad in a manner that made it "less likely" the driver would drive off is significant and supported by the record. After all, Mr. Calzadas could not back up and exit because the officer testified that given the location of the stall, there was "no way" the deputy could have pulled behind Calzadas' vehicle. (24:13). And driving forward, though not impossible, would require sufficient maneuvering so as to discourage such an attempt. The court's finding as to how the deputy positioned his squad supports the court's conclusion that a reasonable person would not have felt free to leave. Moreover, that conclusion was also supported by the court's finding that Deputy Klemke shined a spotlight on Calzadas. "The court finds that Officer Klemke's actions in parking the car in such a way as described above and shining the spot light on defendant constituted a stop." (12:2).

Second, this court should reject the state's contention that the circuit court failed to consider whether Calzadas could have simply walked away. As a practical matter the argument makes little sense because walking away would have required Mr. Calzadas to leave his car at the Kwik Trip parking lot at 3:00 a.m. and wander somewhere in Johnson Creek. This is not a circumstance where a pedestrian who encounters an officer in his neighborhood could retreat to his home. As a legal matter the deputy's testimony that the encounter would have ended if Calzadas had walked away is not relevant. (24:25). The supreme court has said a defendant "cannot speculate about what might have happened if he had tried to leave." ***Vogt***, 356 Wis. 2d 343, ¶49. Similarly, the state cannot speculate about what might have happened if Mr. Calzadas tried to leave, either on foot or somehow by driving away.

The state builds it argument on three cases, none of which involved the two key facts here: a squad car parked in front of the defendant's vehicle and a spotlight shining on the defendant and his car.

In ***Vogt***, which the supreme court described as "a close case" (***id***. at ¶3), the officer pulled behind Vogt's parked car "a little off to the driver's side." ***Id***. at ¶6. The officer did not activate the squad's emergency lights or a spotlight before knocking on the driver's window. Significantly, the supreme court assumed from the circuit court's findings that Vogt had room to leave. ***Id***. at ¶¶41-42.

Likewise, in both ***United States v. Hendricks***, 319 F.3d 993 (7th Cir. 2003) and ***United States v. Clements***, 522 F.3d 790 (7th Cir. 2008), the patrol car was not only behind the suspect's vehicle but was at a considerable distance. *See* ***Hendricks***, 319 F.3d at 997 (fifteen feet

behind); ***Clements***, 522 F.3d at 792 (fifteen to twenty feet behind). As noted in ***Hendricks***, "There was nothing in front of the white car to prevent its exit." ***Id***. Further, the officer in ***Hendricks*** did not shine a spotlight, ***id***. at 1001, and by the time the officer stopped his patrol car, the driver was out of her car "and was rapidly approaching [the officer's] patrol car." ***Id***. at 997. Indeed, in ***Hendricks***, the driver initiated the conversation with the officer. ***Id***. Contrast ***Hendricks*** to this case where: (1) the deputy pulled at an angle in front of Mr. Calzadas' car, making it less likely that he would try to leave; (2) the deputy shined a spotlight on Mr. Calzadas; and (3) the deputy walked up to Calzadas as he stood outside his car.

A reasonable person in Mr. Calzadas' position would have felt trapped, with a bright light in his eyes, an officer approaching and his car at least partially blocked by the squad car parked at an angle in front of his car. He had no easy exit. The circuit court was right. This was not a consensual encounter.

II. Where the Legal Justification for the Seizure Ended Even Before the Deputy Spoke with Mr. Calzadas, The Deputy Had No Authority to Request and Run His Identification.

The state writes that Deputy Klemke did not discover the driver was male "until he made contact with the Defendant-Appellant, in person, outside his car." (State's brief at 14). To clarify, however, the record shows that the deputy knew the driver was male and, therefore, not the registered owner, before he had any communication with Mr. Calzadas. The deputy testified he knew the driver was male as he "was walking up to the vehicle" and saw the driver, who had gotten out of the car. (24:16). Thus, the

record shows that the deputy knew the driver was not the registered owner before the deputy had any personal contact with the driver and before he had any communication with the driver.

The detail on that point is important because the seizure was reasonable until the moment that the deputy knew the driver was male and not the registered owner. As recognized in ***State v. Newer***, 2007 WI App 236, ¶8, 306 Wis. 2d 193, 742 N.W.2d 923, reasonable suspicion based upon an assumption that a vehicle is being driven by the unlicensed registered owner dissipates once the officer "comes upon information suggesting that the assumption is not valid in a particular case …." Here, Deputy Klemke had more than "information suggesting" that the driver was not the registered owner. Upon seeing that the driver was male, the deputy had conclusive information that the driver was not the unlicensed registered owner. At that moment, the legal justification for the stop – reasonable suspicion that the driver was the unlicensed registered owner – was gone.

The fact that the legal justification for the seizure evaporated before the officer had any personal contact or communication with the driver is among the factual distinctions between this case and the two cases upon which the state relies. In his brief-in-chief, Mr. Calzadas identified various factual differences between his case and ***State v. Ellenbecker***, 159 Wis. 2d 91, 464 N.W.2d 427 (Ct. App. 1990) and ***State v. Williams***, 2002 WI App 306, 258 Wis. 2d 395, 655 N.W.2d 462. (Brief-in-chief at 7-9).

Most significant, however, may be that the request for identification was made in those cases during an ongoing conversation between the driver and police. In ***Ellenbecker***, 159 Wis. 2d at 93-94, the request was made during an

encounter where the officer acting in his capacity as community caretaker was assisting the occupants of a disabled vehicle. In ***Williams***, 258 Wis. 2d 395, ¶¶2-4, the stop was based upon reasonable suspicion that the driver was an armed suspect in a domestic incident, and the request for identification was made during a rather protracted effort to determine if the driver was indeed the suspect. Neither case involved a circumstance as presented in this case, where the request for identification is made after the reasonable suspicion evaporated and before any communication of any sort with the driver.

The state contends that when Mr. Calzadas "could not produce a driver's license, Deputy Klemke was then justified in running a status check because he had a reasonable suspicion that the Defendant-Appellant was not authorized to drive or at least authorized to drive that particular vehicle." (State's brief at 21). The state's argument ignores the fact that the deputy did not ask for Mr. Calzadas' driver's license. Rather, the deputy asked for his identification and Mr. Calzadas complied by handing over his Wisconsin identification card. (24:8, 9-10, 14-15). This is yet another factual distinction from ***Williams***, where the driver "did not have a driver's license or any other identification to prove his identity." ***Williams***, 258 Wis. 2d 395, ¶3.

As argued in his brief-in-chief, there is no published case in this state that allows an officer to continue a seizure for the purpose of obtaining and running a driver's identification when the reasonable suspicion that justified the stop terminated even before the officer had any personal contact with the driver. The state has not cited such a case, nor did the state address the authority from other jurisdictions that were cited in Mr. Calzadas' brief showing that such a

continued detention violates the Fourth Amendment. (Brief-in-chief at 11-14).

The United Supreme Court recently reiterated that "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." ***Rodriguez v. United States***, __ U.S. __, 135 S. Ct. 1609, 1612 (2015). During a traffic stop supported by reasonable suspicion or probable cause the officer may ask for the driver's license and check for warrants, registration status and proof of insurance. ***Id***. at 1615. But the officer has no such authority when, as here, the legal justification for the stop has ended even before the officer has had any personal contact or communication with the driver. Once the officer saw that the driver was male, the time needed to handle the matter for which the stop was made had ended, and the officer's continued seizure of Mr. Calzadas violated not only the limitations of ***Newer*** but the guarantees of the Fourth Amendment and Article I, § 11.

CONCLUSION

For the reasons set forth above and in his brief-in-chief, Mr. Calzadas respectfully requests that the court reverse the judgment of conviction and remand to the circuit court with directions that all evidence derived from the stop be suppressed.

Dated this 6th day of July, 2015.

Respectfully submitted,

_____

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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 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,216 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 6th day of July, 2015.

Signed:

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