STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP314-CR & 2015AP315-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

TYLER Q. HAYES & TANNER J. CRISP,

Defendants-Respondents.

ON APPEAL FROM A DECISION AND ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE ENTERED IN THE KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE ANTHONY MILISAUSKAS, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

BRAD D. SCHIMEL
Attorney General

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118 (Phone), (608) 266-9594 (Fax)
burgundysl@doj.state.wi.us

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ISSUE PRESENTED

Under Wisconsin law, an officer does not necessarily "seize" occupants of a parked vehicle for Fourth Amendment purposes

by approaching the vehicle and knocking on a window.[1] Here, an officer parked his squad car behind an illegally parked car containing two occupants, did so without blocking the car or activating lights or a siren, and approached the driver's side window.

Was the officer's parking his car and approaching the vehicle a "seizure"?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because this court can resolve the issue in this case by applying established legal principles to the facts.

STATEMENT OF THE CASE AND FACTS

The State appeals from the circuit court's grant of Hayes' and Crisp's joint motion to suppress evidence, including drugs, drug paraphernalia, statements, and derivative evidence, which police had seized from Hayes, Crisp, and a parked vehicle in which they were sitting (13; 15; A-Ap. 189).[2] Based on that evidence, the State had charged Hayes and Crisp each with counts of possession with intent to deliver THC and other drugs and possession of drug paraphernalia (1; [315]1; A-Ap. 101-06).

After the State filed the criminal complaints, Crisp and Hayes each filed motions to suppress the evidence, arguing that law enforcement illegally seized them when an officer approached them without reasonable suspicion to do so while they sat in Crisp's parked car (9; [315]10; A-Ap. 107-12). They

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[1] *County of Grant v. Vogt*, 2014 WI 76, ¶38, 356 Wis. 2d 343, 850 N.W.2d 253.

[2] The records in these consolidated cases are nearly identical. The State cites to the record in Case No. 2015AP314-CR unless otherwise noted by the prefix "[315]" to designate the record in Case No. 2015AP315-CR.

asked the court to suppress any evidence obtained after that illegal seizure (*id.*).

To resolve the motions, the court held a hearing, at which Deputy William Soppe of the Kenosha County Sheriff's Department and Crisp testified (18; A-Ap. 113-69). The facts below are taken from their testimony.

Deputy Soppe testified that he was patrolling Bristol Woods Park in Kenosha at around 5:45 p.m. on March 1, 2013, when he saw a Chevy with two occupants parked in a lane adjacent to a designated parking area in the park (18:3-6; A-Ap. 115-18). Soppe was driving a marked squad toward the front of the Chevy (18:21; A-Ap. 133). He passed it, turned his squad around, and parked behind the Chevy without blocking it. As Soppe stated, "All[] they had to do if they wanted to, they could have just drove right off" (18:22; A-Ap. 134). Soppe did not activate his lights (*id.*).

Deputy Soppe believed that the Chevy was illegally parked and stated that it would have been blocking traffic if there was any (18:7-9, 21; A-Ap. 119-21, 133). He also stated that the car's positioning was "unusual" given that the parking area was otherwise empty (18:9; A-Ap. 121). At the suppression hearing, the ADA entered as an exhibit a copy of a Kenosha County ordinance prohibiting parking in county parks outside of designated areas (18:7; A-Ap. 119).

After stopping behind the Chevy, Soppe left his squad and approached the driver's side of the Chevy, where either the window was open or Crisp, who was in the driver's seat, opened the window (18:11-13, 23; A-Ap. 123-25, 135). At that point, Soppe smelled a "strong" odor of burnt marijuana (18:13, 15, 33; A-Ap. 125, 127, 145). Soppe asked Crisp and Hayes, who was in the passenger seat, what they were doing and asked for identification (18:11, 14; A-Ap. 123, 126). According to Soppe, Crisp provided an identification card while Hayes just gave his

name (18:23; A-Ap. 135). Soppe returned to his squad and ran the names through dispatch, where he learned that Hayes had an active warrant (18:14-15; A-Ap. 126-27).

Soppe called for backup and returned to the car (18:14; A-Ap. 126). Although the exact order of events is not clear, Soppe had Hayes exit the car and arrested him on the warrant (*id.*). He also asked Crisp to get out of the car, telling her that he smelled marijuana (18:15, 23; A-Ap. 127, 135). He asked her if there was "anything inside of the vehicle." Crisp told Soppe that she had a pipe and some marijuana in her purse (18:15, 25; A-Ap. 127, 137). Soppe or other officers searched the purse and car and found additional marijuana, pills, and paraphernalia (18:16; A-Ap. 128). At some point during the initial contact, Crisp told Soppe that she and Hayes were in the park to sell drugs to someone (18:15-16; A-Ap. 127-28).

Crisp stated that her car had been parked where it was for about 45 minutes before Soppe arrived (18:48; A-Ap. 160). She generally testified to the same series of events that Soppe did. But she testified that she could not park in the designated spaces because of snow,[3] and disagreed that her car was blocking traffic (18:42-43; A-Ap. 154-55). She said that Deputy Soppe's squad came straight toward her and parked at a diagonal behind her (18:42; A-Ap. 154).

After the hearing, the circuit court issued an oral decision denying the motions (19; A-Ap. 170-74). The court found that Deputy Soppe's testimony was credible, that Crisp and Hayes were parked in a traffic lane, that Soppe did not block them in by parking behind them, and that Soppe did not activate his squad lights (19:2-3; A-Ap. 171-72). It found that Soppe had

[3] Deputy Soppe stated that there was no snow and that the parking spaces were clear (18:20; A-Ap. 132). The court did not make specific findings of fact on that point, though it generally found Soppe to be credible (19:3; A-Ap. 172).

probable cause to stop Crisp and Hayes based on the observed parking violation, and that his smelling marijuana and obtaining identification from the two supported the rest of his investigation (*id.*).

Months later, Crisp and Hayes asked the court to reconsider its decision as to the legality of Soppe's initial approach of the vehicle in light of this court's unpublished decision in *State v. Chonsea King*, No. 2013AP1068-CR, slip op. (Wis. Ct. App. Dist. IV Feb. 13, 2014) (A-Ap. 190-98).[4]

On reconsideration, the circuit court reversed itself and granted the motions (22:12; A-Ap. 186). It first considered whether Deputy Soppe's approach of the car could have been supported under the community caretaker doctrine, but concluded that the facts here did not support application of the doctrine (22:10; A-Ap. 184). The court then went on to conclude that because the perceived violation was just a parking violation, not a moving violation, Soppe seized Crisp and Hayes when he parked behind the car (22:11; A-Ap. 185). The court stated that even if the car was illegally parked, Crisp and Hayes were not inconveniencing anyone (*id.*). Further, it held that the parking violation did not rise to "criminal activity" of which Soppe would have needed at least reasonable suspicion to approach the car (22:11-12; A-Ap. 185-86). Thus, in the circuit court's view, Deputy Soppe was not entitled to pull his squad up behind the Chevy and approach it without more facts to establish reasonable suspicion of criminal activity (*id.*). It memorialized its conclusion in a written decision and order (13; A-Ap. 189).

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[4] Hayes filed the motion to reconsider on April 21, 2014, and the court appeared to initially reject it on April 22 by writing "Decision Remains" on the motion (12). But at a status conference on April 23, the court asked the State for its position on the motion and, when the State told the court it had not reviewed the motion, set a new hearing date (21:3). At that point, Crisp's attorney indicated that Crisp was joining Hayes' motion (21:4).

The State appealed (15), and this court ordered the cases to be consolidated on appeal.

ARGUMENT

The circuit court based its decision on an erroneous interpretation of Fourth Amendment law, and hence, improperly suppressed the evidence.

The circuit court improperly granted Hayes' and Crisp's motions to suppress, because no Fourth Amendment violation occurred. First, under the circumstances, Soppe's approaching the vehicle was not a seizure of its two occupants, Crisp and Hayes, under the Fourth Amendment. Second, and alternatively, even if Soppe seized Crisp and Hayes before he smelled marijuana in the car, he had at least reasonable suspicion pursuant to *Terry* to approach the vehicle and ask questions based on the observed parking violation. Accordingly, Soppe's immediate detection of marijuana provided ample probable cause for Soppe's subsequent seizure of Crisp and Hayes and his search of the car.

An appellate court reviews a circuit court's ruling on a motion to suppress and whether a seizure triggering Fourth Amendment protections has occurred under a two-part standard of review. *County of Grant v. Vogt*, 2014 WI 76, ¶17, 356 Wis. 2d 343, 850 N.W.2d 253. It upholds the circuit court's factual findings unless they are clearly erroneous, but applies constitutional principles to those facts de novo. *Id.*

A. Not all citizen-police encounters are "seizures" under the Fourth Amendment.

The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution protect persons from unreasonable searches and seizures. U.S. Const. amend. IV; Wis. Const. art. 1, § 11.[5]

Those constitutional provisions are not implicated until a government agent "seizes" a person. *Vogt*, 356 Wis. 2d 343, ¶19 (citing *State v. Young*, 2006 WI 98, ¶23, 294 Wis. 2d 1, 717 N.W.2d 729). A seizure within the meaning of the Fourth Amendment "does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *see also Young*, 294 Wis. 2d 1, ¶18 ("[N]ot all police-citizen contacts constitute a seizure[.]").

Rather, law enforcement seizes a person within the meaning of the Fourth Amendment "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *United States v. Mendenhall*, 446 U.S. 544, 552 (1980) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). Examples of conduct by police that would support the conclusion that a seizure had occurred includes "the threatening presence of several officers," an officer's display of a weapon, an officer's physical touching of the citizen's person, or an officer's using language or a tone of voice indicating that compliance with the officer's request is required. *Mendenhall*, 446 U.S. at 554-55.

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[5] Because Wisconsin courts have historically interpreted article 1, section 11 protections as identical to those afforded under the Fourth Amendment, *see Vogt*, 356 Wis. 2d 343, ¶18 (citation omitted), the State does not engage in separate federal and state constitutional analyses.

In sum, the circumstances must be such that a reasonable person would have believed that she was not free to leave. *Id.* at 554. The test for determining whether a seizure has occurred is an objective one that focuses on whether a reasonable person, under all the circumstances, would have felt free to leave, not whether the specific defendant felt free to go. *Michigan v. Chesternut*, 486 U.S. 567, 573-74 (1988).

Courts have recognized two types of seizures. *Young*, 294 Wis. 2d 1, ¶20. First, an officer may make an investigatory—or *Terry*—stop based on the officer's "reasonable suspicion 'in light of his experience that criminal activity may be afoot.'" *Vogt,* 356 Wis. 2d 343, ¶27. Second, an officer may arrest a person he or she has probable cause to believe probably has committed or is committing a crime. *Id.*, ¶28.

B. In *Vogt*, an officer's similar approach to make contact with occupants of a parked car under "odd" circumstances was not a seizure.

In granting the motion, the circuit court concluded that Soppe seized Crisp and Hayes when he pulled his squad behind the parked car (22:11; A-Ap. 185). But controlling case law in *Vogt* and *Young* resoundingly demonstrates that that conclusion was incorrect.

Vogt presents markedly similar facts to this case.[6] In *Vogt*, an officer who was patrolling a small village during the early morning hours on Christmas saw a car pull into a parking lot next to a closed park and boat landing. 356 Wis. 2d 343, ¶4. The officer did not see any traffic violations but thought the driver's (i.e., Vogt's) conduct was suspicious and "odd," given that it was Christmas, the park was closed, and there were no boats at the landing. *Id.*, ¶5.

[6] The supreme court issued *Vogt* on July 18, 2014, less than a month after the circuit court made its decision on reconsideration in this case.

The officer stopped his squad "behind Vogt's vehicle [and] a little off to the driver's side," leaving the headlights on and the engine running, but without activating the red and blue emergency lights. *Id.*, ¶6. Vogt's vehicle was still running, and the officer stated that he was not blocking Vogt's vehicle, though Vogt disagreed. *Id.*

The officer, in full uniform and with his pistol holstered, approached the vehicle, where he saw two people inside. *Id.*, ¶7. He rapped on the driver's window and motioned for Vogt to roll it down. *Id.* The officer acknowledged that had Vogt ignored his request and driven away, he "would have let him go because he 'had nothing to stop him for.'" *Id.*

Instead, Vogt rolled down the window. *Id.*, ¶8. The officer asked Vogt what he was doing, and when Vogt answered, the officer observed that Vogt's speech was slurred and that he could smell the odor of intoxicants coming from the vehicle. *Id.* From there, the officer investigated Vogt based on those observations, and ultimately arrested him for operating while intoxicated and operating with a prohibited alcohol concentration. *Id.*

The supreme court held that an officer's parking near another person's vehicle, getting out, and knocking on the window is not necessarily a sufficient display of authority to cause a reasonable person to believe that he or she was not free to go. *Id.*, ¶38. It observed that the circuit court did not clearly err in finding that Vogt had ample room to drive away, that the officer did not "command" Vogt to open the window but rather simply tried to initiate contact, and that even if the officer's knock was "loud" as Vogt described it, that was not enough under the circumstances to elevate the officer's attempted contact into a seizure. *Id.*, ¶¶42-43. *See also Young*, 294 Wis. 2d 1, ¶69 (stating that it was "reluctant to conclude" that the officer's positioning his squad next to a parked vehicle in a problem area late at night and activating a spotlight and emergency red

and blue lights "necessarily involved such a show of authority that 'a reasonable person would have believed that he was not free to leave'") (quoting *Mendenhall*, 446 U.S. at 554).

In all, the officer in *Vogt* acted reasonably by trying to learn more about an unusual situation:

> Ultimately, what [the officer] did in this case is what any traffic officer might have done: investigate an unusual situation. As the circuit court noted, "what the officer did seems perfectly reasonable." [The officer] was acting as a conscientious officer. He saw what he thought was suspicious behavior and decided to take a closer look. Even though Vogt's conduct may not have been sufficiently suspect to raise reasonable suspicion that a crime was afoot, it was reasonable for [the officer] to try to learn more about the situation by engaging Vogt in a consensual conversation.

Vogt, 356 Wis. 2d 343, ¶51.

C. Deputy Soppe did not seize Crisp and Hayes by approaching their vehicle; even if he did, he had reasonable suspicion to conduct a *Terry* stop.

Like the officer in *Vogt*, Deputy Soppe's curiosity was reasonably piqued by a sole car and its two occupants parked in a traffic lane in a county park. Regardless of whether he observed a parking violation, Soppe approached the car to "learn more about the situation," and he did so without any overt show of authority to cause the occupants to believe they were not free to leave. He parked behind the car without blocking it, activated no lights or sirens, and issued no directives to Crisp and Hayes before he reached the driver's side window. As Soppe noted, they could have driven off if they wished. In all, just as the officer in *Vogt* justifiably approached a stopped car in unusual circumstances without reasonable suspicion, Deputy Soppe did not implicate the Fourth Amendment with his approach of Crisp's vehicle.

Moreover, this case is not "a close case" like *Vogt* was. *See* 356 Wis. 2d 343, ¶3. The record establishes that Deputy Soppe

had at least reasonable suspicion, if not probable cause, to seize the car and its occupants temporarily to investigate the observed parking violation, whereas in *Vogt*, there was no observed traffic or parking violation or suspected crime and therefore no reasonable suspicion to stop Vogt in the first instance.

Indeed, here, the circuit court found that Crisp's car was not parked in a designated spot in the park but rather in a traffic lane (19:2-3; A-Ap. 171-72). Kenosha County ordinance 7.03(1)(d) prohibits parking "[w]ithin any county park other than in designated parking areas" (26:Exh.1). Deputy Soppe saw how the car was parked, believed it was a violation, and approached Crisp's car to investigate further. His actions were reasonable under the circumstances and did not amount to a seizure because a reasonable person in Crisp's and Hayes' position would have felt free to leave or drive away.

The remainder of the encounter, to the extent it became a seizure, was supported by probable cause. When Soppe reached the car, Soppe smelled burnt marijuana coming from the vehicle, either through the already-open window or after Crisp opened her window to talk to Soppe. Under *State v. Secrist*, 224 Wis. 2d 201, 216, 589 N.W.2d 387 (1999), the odor of controlled substances provides probable cause to arrest. That case necessarily also provides that such an odor provides reasonable suspicion to continue an investigatory stop.

Deputy Soppe had five-and-a-half years of experience with marijuana cases and had made 75 to 100 marijuana-related arrests (18:4, 33; A-Ap. 116, 145). Based on his experience, Soppe could detect the smell of marijuana and could distinguish between burnt and fresh marijuana (18:34; A-Ap. 146). Thus, in addition to the observed parking violation, Soppe's detection of the burnt marijuana smell coming from the car justified his continued investigation, which began with his checking Crisp's and Hayes' names with dispatch. That check

produced an open warrant for Hayes, which then provided probable cause for Soppe's arrest of Hayes.

Once Hayes was arrested, Soppe still had probable cause to investigate Crisp regarding the marijuana odor. He asked Crisp whether she had any drugs in the car, Crisp acknowledged that she did, and the subsequent search of the car produced the evidence that Crisp and Hayes now seek to have suppressed.

In granting the motion to suppress, the circuit court found significant that the observed violation was not a moving violation, and that Crisp and Hayes were not harming or inconveniencing anyone by how they were parked (22:10-12; A-Ap. 184-86). But there is no case law requiring an officer to ignore a violation if it is minor or inconsequential.[7] Certainly, if Crisp's car was empty and parked where it was, Deputy Soppe could have approached it and issued a ticket. The fact that Crisp and Hayes were in the car did not immunize the car and them from law enforcement contact absent law enforcement's reasonable suspicion that they were committing a crime more serious than a parking violation.

And *King*, No. 2013AP1068-CR, slip op. (A-Ap. 190-98), upon which the circuit court relied, is unpublished and therefore is not controlling precedent. In any event, it does not offer Crisp and Hayes persuasive support because it is distinguishable from this case and from *Vogt*.

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[7] Indeed, Wisconsin courts have upheld stops based on minor violations. *See, e.g.*, *County of Jefferson v. Renz*, 231 Wis. 2d 293, 296, 603 N.W.2d 541 (1999) (motorist stopped for loud exhaust); *State v. Haynes*, 2001 WI App 266, ¶2, 248 Wis. 2d 724, 638 N.W.2d 82 (officer observed car go through red light); *State v. Betow*, 226 Wis. 2d 90, 92, 593 N.W.2d 499 (Ct. App. 1999) (officer observed motorist speeding); *County of Dane v. Campshure*, 204 Wis. 2d 27, 30, 552 N.W.2d 876 (Ct. App. 1996) (motorist stopped after failing to advance through a green light).

In *King*, this court held that an officer seized King when police, in full uniform, pulled a squad behind King's parked car, turned on the high beams, exited the squad, and told King—who had exited the car after police pulled up—to return to the car. Slip op. at 4-6 (A-Ap. 193-95). It further held that law enforcement lacked reasonable suspicion to make that seizure given that the car was otherwise legally parked, the officers had not seen anyone approach, get in, or leave the vehicle, and the officers had not seen its occupants doing anything other than turning the interior light on and off a few times. Slip op. at 8 (A-Ap. 197).

Unlike the illegally parked car here, King's car was legally parked in a lot. Other than the officers' general understanding that the lot was a drug-trafficking area, there was nothing unusual or suspicious about the situation to justify the officers' parking behind the car, turning on high beams, approaching the car, and ordering King back inside. Slip op. at 7-8 (A-Ap. 196-97). Moreover, officers seized King when they ordered him into the car without reasonable suspicion or probable cause to believe he was committing a crime, whereas here, Deputy Soppe did not seize Crisp and Hayes until he developed probable cause based on the strong odor of marijuana coming from the car (18:15, 23; A-Ap. 127, 135). *Cf. Vogt*, 356 Wis. 2d 343, ¶29 (at the point that the seizure occurred, the officer had reasonable suspicion based on Vogt's signs of intoxication).

In sum, Soppe did not seize Crisp and Hayes until he was at Crisp's window and asked for their identification. Until that point, he was justified in approaching them in the manner that he did, either to resolve what appeared to be an unusual situation or based on reasonable suspicion (if not probable cause) that the car was illegally parked. There was no Fourth Amendment violation, and the circuit court erred in granting the motions to suppress on that basis.

CONCLUSION

For the foregoing reasons, the State respectfully asks that this court reverse the decision and order of the circuit court granting Crisp's and Hayes' joint motion for reconsideration of their motions to suppress, and to remand the matter to the circuit court for further proceedings.

Dated this 11th day of August, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 266-9594 (Fax)
burgundysl@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3665 words.

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Sarah L. Burgundy
Assistant Attorney General

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I hereby certify that:

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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 11th day of August, 2015.

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Sarah L. Burgundy
Assistant Attorney General