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STATE OF WISCONSIN

COURT OF APPEALS DISTRICT II

Case No. 2015AP315-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

TANNER J. CRISP,

Defendant-Respondent.

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

BRIEF OF DEFENDANT-RESPONDENT TANNER J. CRISP

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ISSUE PRESENTED

Whether a valid *Terry* stop has occurred when a police officer parks his fully marked squad car behind a parked vehicle, gets out, orders the occupants to roll down the windows and begins to question them without any reasonable suspicion that criminal activity is afoot.

STATEMENT ON PUBLICATION AND ORAL ARUGMENT

Crisp does not request publication or oral argument. This case involves the application of well settled principles of law and the parties briefing with adequately address all issues.

STATEMENT OF FACTS AND THE CASE

Respondents Tanner Crisp and Tyler Hayes were charged each with counts of possession with intent to deliver THC and possession of drug paraphernalia. (R.1:1). Crisp and Hayes filed a motion to suppress any evidence obtained because of the stop and seizure of the Crisp and Hayes.(R.10). After a motion hearing, the Court issued an oral ruling denying the motion to suppress. (R.19). The charges arose out of after Deputy William Soppe stopped the Respondent's car in Bristol Woods Park located in Kenosha County. (R.18). The following facts are taken from the parties testimony at the evidentiary hearing on the motion to suppress. *Id*.

On March 1, 2013 Kenosha County Sheriff's Deputy Soppe was patrolling Bristol Woods park as part of his duties as a Kenosha County Sheriff's deputy. *Id*. at 4. As he was patrolling the park, Deputy Soppe drove by a car that was stopped inside the park. *Id*. at 5. There is a dispute about where the car was parked. Deputy Soppe testified that the car was stopped in the middle of a lane of traffic. *Id*. at 6. Crisp testified that she was parked on the side of a parking lot because the designated parking lot was full of snow. *Id*. at 41. Crisp testified that she was not blocking traffic. *Id.* at 42.

Deputy Soppe approached the vehicle, turned his car around and pulled behind the vehicle. *Id*. at 22. Deputy Soppe then exited his vehicle and approached the vehicle from the driver's side. (R.18:22) There was a driver and a

front passenger in the car. *Id*. The driver was identified as Tanner Crisp, the passenger as Tyler Hayes. *Id*. Deputy Soppe asked the occupants for identification and what they were doing in the park. *Id*. As this conversation was happening, Deputy Soppe said he smelled marijuana. *Id*.

On cross-examination, Deputy Soppe admitted he had no formal training on the smell of marijuana, on the difference between marijuana and incense. *Id*. at 28. He also testified on cross-examination that he smelled burnt, not fresh, marijuana. *Id.* at 32.

Deputy Soppe then returned to his squad car and ran the names of the occupants (R.18:13-4). Hayes had an outstanding warrant and was taken into custody. *Id*. Deputy Soppe asked Crisp to set out of the car. *Id*. He told her he was going to search the car because he smelled marijuana. *Id*. He also asked Crisp if there was anything illegal in the car and she replied that she had a marijuana pipe in a pink Victoria's Secret bag. *Id*. at 15.

Deputy Soppe then searched the vehicle and found various drug paraphernalia type items. *Id*. A field test was performed on the suspected marijuana and it tested positive for THC. *Id*.

ARGUMENT

I. The Circuit Court properly exercised its discretion when it interpreted the Fourth Amendment and suppressed the evidence.

The seizure of Crisp was unreasonable and violated the Fourth Amendment to the United States Constitution and Article I Section 11 of the Wisconsin Constitution. All evidence obtained after the seizure should be suppressed. When a search or seizure is deemed unconstitutional the appropriate remedy is to suppress the evidence found because

of the seizure and subsequent search. *See State v. Felix*, 2012 WI 36, ¶30, 339 Wis.2d 670, 690, 811 N.W.2d 775. The circuit court properly suppressed the evidence in this case.

The State makes two arguments in its brief. First, it argues that Crisp and Hayes were never "seized" under the Fourth Amendment. (App. Br. 8-10). Second, it argues that even if Crisp and Hayes were seized the officer had probable cause under *Terry v. Ohio*, to do so. (App. Br. 10-2).

A police officer's seizure of a person is covered by the Fourth Amendment to the United States Constitution and article I, Section 11 of the Wisconsin Constitution. *State v. Pugh*, 2013 WI App. 12, ¶8, 345 Wis.2d 832, 826 N.W.2d 418 (*citing State v. Phillips*, 218 Wis.2d 180, 195, 577 N.W.2d 794, 801 (1998)). These provisions are construed congruently. *Id.*

An inquiry into whether a criminal defendant's right against unreasonable searches and seizures was violated is one of constitutional fact. *State v. Griffith*, 2000 WI 72, ¶23, 236 Wis.2d 48, 613 N.W.2d 72. On appeal, issues of constitutional fact must be reviewed within a bifurcated framework, "on one hand giving deference to the circuit court's findings of evidentiary fact, and on the other reviewing independently the circuit court's application of those facts to constitutional standards." *State v. Pallone*, 2000 WI 77, ¶27, 236 Wis. 2d 162, 613 N.W.2d 568 (*citing State v. Martwick*, 2000 WI 5, ¶¶16-18, 231 Wis. 2d 801, 604 N.W.2d 552; *State v. Richardson,* 156 Wis.2d 128, 137-38, 456 N.W.2d 830 (1990)).

A. Crisp was "seized" under the Fourth Amendment.

The Fourth Amendment applies when a police officer "seizes" a person. *State v. Young*, 2006 WI 98, ¶23, 294

Wis.2d 1, 717 N.W.2d 729. When a police officer by means of force or show of authority has restrained the liberty of a citizen a seizure has occurred. *Terry v. Ohio,* 392 U.S. 1, 19, 88 S. Ct. 1868 (1968). The temporary detention of individuals during a stop of an automobile by the police constitutes a seizure for Fourth Amendment purposes. *State v. Malone*, 2004 WI 108, ¶23, 274 Wis.2d 540, 683 N.W.2d 1.

A seizure occurs when the police, by show of force or show or authority restrains the liberty of a citizen. *United States v. Mendenhall*, 446 U.S. 544, 552, 100 S. Ct. 1870 (1980). Moreover, a person is "seized" within the meaning of the Fourth Amendment when in light of all of the circumstances a reasonable person would have believed he was not free to leave. *Id* at 554. The Wisconsin Supreme Court has adopted the test set forth in *Mendenhall* for determining whether a seizure has occurred. *County of Grant v. Vogt*, 2014 WI 76, ¶30, 356 Wis.2d 343, 850 N.W.2d 253.

The appellant relies on the Wisconsin Supreme Court's decision in *Vogt*, for its argument that Crisp and Hayes were not seized for Fourth Amendment purposes. (App. Br. 8-9). In *Vogt*, a police officer pulled behind a vehicle in a public parking lot. The officer got out of his squad car and approached the parked car. *Id* at. ¶7. The officer then "rapped" on the window. *Id*. Vogt then opened the window. *Id*. at ¶8. The officer could smell intoxicants in the car. *Id*. The officer then performed field sobriety tests and ultimately arrested Vogt for operating while intoxicated. *Id*.

The Court in *Vogt* held that the officer's knock on the defendant's window did not by itself "constitute a show of authority sufficient to give rise to the belief in a reasonable person that the person is not free to leave." *Id*. at 54.

The appellant argues that this case is "not even a close call" because the stop of the vehicle was for an ordinance violation. (App. Br. 10-11).

The appellant seems to ignore the fact that circuit court ruled the stop was not for an ordinance violation. In its reconsideration, the circuit court ruled that the stop went beyond an investigation of a simple parking violation when Deputy Soppe asked Crisp and Hayes to roll down the window and began questioning them. (R.22:12). At this point, it seems the circuit court ruled that the stop was then transformed into a *Terry* stop. *Id*.

When questioning began there is no doubt that a seizure had occurred for Fourth Amendment purposes. Deputy Soppe made sufficient acts of authority for a reasonable person to believe that he or she as not free to leave. It is a little unclear whether the Court ruled that Deputy Soppe ordered Crisp to roll down the window. However, on appeal when a circuit court's factual ruling is unclear an appellate court can assume that the circuit court determined that fact in a manner that supports its ultimate ruling. *See State v. Martwick,* 2000 WI 5, ¶31, 231 Wis.2d 801, 604 N.W.2d 552 (*citing Sohns v. Jensen*, 11 Wis.2d 449, 453, 105 N.W.2d 818 (1960)). While the circuit court does not explicitly mention an order to roll down the window, it does mention the window "comes down" during its reconsideration ruling. Thus, it is safe to assume the circuit court ruled that Deputy Soppe ordered the window to come down.

Additionally, Deputy Soppe was in uniform and in a fully marked police squad parked behind Crisp and Hayes. These facts demonstrate that Deputy Soppe made sufficient acts of authority to demonstrate to any reasonable person that he or she would not be free to leave.

B. Deputy Soppe did not have sufficient reasonable suspicion to conduct a *Terry* stop.

At the point when the window was rolled down and questioning had commenced, the circuit court ruled that a *Terry* stop had commenced. The next inquiry is whether Deputy Soppe had sufficient reasonable suspicion that criminal activity was afoot to justify the *Terry* stop.

Deputy Soppe had already given an order to roll down the window. When asked whether she felt free to leave during this question, Crisp testified that she felt "pushed."(R.18:44). While "pushed" may not definitely demonstrate whether Crisp felt free to leave it certainly indicates she felt she had to comply with the Deputy's commands. Additionally, Crisp testified that the Deputy told her "no matter what, he was going to search [the car]." (R.18:45). Thus, given the totality of the circumstances, there was definitely a sufficient show of authority to make a reasonable person believe that he or she was not free to leave.

Investigatory stops are governed by *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), and its progeny. In *Terry*, the United States Supreme Court recognized that "a police officer may in appropriate circumstances and in appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause for arrest." *Terry*, 392 U.S. at 22. Consequently, "the police can stop and briefly detain a person for investigative purposes if the officer had reasonable suspicion supported by articulable facts that criminal activity 'may be afoot' even if the officer lacks probable cause." *Pugh*, 2013 WI App. 12, ¶9 (*quoting United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581 (1989); (*quoting Terry*, 392 U.S. at 30)).

"It is not necessary, however, that the officer suspect that the unlawful activity is a *crime* in the technical sense of

that word; it is enough that the officer have a 'reasonable suspicion that something unlawful might well be afoot.'" *Pugh*, 2013 WI App. 12, ¶9 (*quoting State v. Waldner*, 206 Wis.2d 51, 58-60, 556 N.W.2d 681, 685-686 (1996)).

It is necessary, however, that there be some "individualized suspicion" to justify a constitutional search or seizure. *State v. Gordon*, 2014 WI App 44, ¶12, 353 Wis.2d 468, 846 N.W.2d 483 (*citing United States v. Martinez-Fuerte,* 428 U.S. 543, 560, 96 S. Ct. 3074 (1976)). The Court is to look to the totality of the circumstances when determining the reasonableness of the stop. *See State v. Malone,* 2004 WI 108, ¶17, 274 Wis.2d 540, 683 N.W.2d 1.

Contrary to the appellant's analysis, the unpublished case *State v. King*, 2014 WI App. 38, 353 WIs2d 305, 844 N.W.2d 666, does support the circuit court's ruling. While unpublished cases do not have precedential value, Crisp is allowed the cite *King* for persuasive value. *See Wis. Stat.* § 809.23(3)(b).

The issues in *King* are very similar to the issues in this case. In *King*, a police officer observed a car in a parking lot for five minutes. *King*, 2014 WI App. at ¶3. The officer testified that this area was known for drug dealing. *Id*. After five minutes, the officer pulled his car behind the car in the parking lot, put on his hazard lights (not red and blue emergency lights) and began to walk toward the car. *Id* at ¶4. As the officer was walking toward the car, King attempted to exit the car. *Id*. at ¶4. The officer then told King to get back into the car. *Id*.

As the officer approached the car he saw one plastic sandwich baggie with a corner missing on the ground underneath King's foot. *Id*. at ¶5. This officer said this was indicative of drug dealing. *Id*. A subsequent search of King's car revealed heroin. *Id*.

The Court of Appeals found that this *Terry* stop was not justified under the circumstances. *Id.* at ¶19. The Court held that the mere presence of King in a parking lot that was known for drug dealing did not justify a *Terry* stop. *Id*. Moreover, the Court found that there were no other individualized facts to demonstrate criminal activity was afoot. *Id*.

The appellant argues that *King* is different because the car was parked legally in King. (App. Br. 13). However, there was nothing in the *King* opinion regarding the legality of the car's parking. *King* does not discuss whether the car was legally parked. Thus, the appellant's assumption is misplaced.

The current case is very similar to *King*. Here we have two people stopped in a parked car. An officer approaches them and attempts to begin an investigation into why they are parked in the park. Deputy Soppe was in a marked squad car. (R.18:5). It was only after Deputy Soppe orders Crisp to lower the window and speak with him that he smelled the marijuana.

Before the point where Deputy Soppe smelled marijuana, there were no facts to indicate that any criminal activity was afoot. There was no testimony about any prior drug dealing in the area, Deputy Soppe could not point to any individualized factor that made him suspicious that the occupants in the car were engaging in criminal activity. Thus, the stop was not a constitutionally permissible *Terry* stop.

CONCLUSION

The seizure and search of Crisp was unreasonable and unconstitutional. This Court should affirm the ruling of the circuit court.

Dated this 29th day of October, 2015

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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 2,411 words.

Dated this 29th day of October, 2015.

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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 29th day of Oct, 2015.

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