STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

State of Wisconsin,
Plaintiff-Appellant,

v. Appeal No. 2015 AP 314-CR

Tyler Hayes,
Defendant-Respondent.

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 OF DEFENDANT-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary because the briefs should present the issues on appeal and develop the theories and legal authorities so that oral argument would be of little or no value.

Publication is also not necessary as the principles discussed herein are well established and have been properly applied in this case at the trial level.

ARGUMENT

The circuit court based its decision on a proper interpretation of Fourth Amendment law and properly suppressed the evidence.

A. This encounter was a "stop and seizure" as contemplated by the Fourth Amendment.

Kenosha County Sheriff's Deputy William Soppe was patrolling the Bristol Woods County Park at 5:45 PM on March 1, 2013. Tanner Crisp was the operator of a Chevy automobile and Tyler Hayes was a passenger in that vehicle, parked in a lane adjacent to a designated parking area in the park. Crisp's vehicle was the only car in the area and there was no traffic. Soppe drove his squad towards the front of the Chevy, passed it and turned the squad around and parked behind Crisp. Soppe approached the driver's side and smelled a strong odor of burnt marijuana. However, up until that point, Soppe stated, "All they had to do if they wanted to, they could have just drove right off." The smell of the burnt marijuana led to further investigation resulting in the Possession of Marijuana with Intent to Deliver charges against Crisp and Hayes.

A stop and seizure has occurred. Crisp was the only vehicle in an otherwise deserted parking lot. She observes the deputy's squad come right at her and turn around to get behind her. Whether a seizure has occurred is an objective test that evaluates

whether a reasonable person would have felt free to leave. In this case, the officer's actions have sent a clear signal that he wanted to confront this vehicle. Therefore, it is a stop, as contemplated by the protections of the Fourth Amendment.

Had Crisp driven off, as Deputy Sobbe suggested she could have done, she would have been charged with a violation of s.346.04, obstructing, for failing to comply with any lawful order, *signal*, or direction of a traffic officer; to conclude otherwise simply is not reasonable. This proposition was addressed in the recent case put forth by the state, *County of Grant v. Vogt*, 356 Wis.2d 343, 370 (2014), but was not decided, as Vogt was in a public parking lot where the traffic code (chapter 346) does not apply. That is not the case here. Crisp, the testimony relates, was parked in a *lane adjacent* to the designated parking area and there was an implication that her positioning could have obstructed traffic. Thus, she was on a driving surface or "highway" as contemplated by the traffic code.

The necessary conclusion then, is that this was a "stop." To rule otherwise in these particular circumstances, allows the state to have it both ways. If you stay put, it is not a "stop" and the Fourth Amendment does not apply. If you leave, the state stops you under 346.04, and proceeds from there. Our constitutional rights should not be so easily compromised.

B. There was no reasonable suspicion of past, present or probable future *criminal activity* to justify the stop and seizure in this case pursuant to Terry v. Ohio, 392 U.S. 1 (1968)

In the opening to its brief's Argument, the state writes that "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." This proposition is simply not the law. A law enforcement officer may stop an individual if, based on the officer's experience, he or she suspects that ***criminal*** activity is afoot. *Terry v. Ohio*, 392 U.S. 1 (1968) This requirement was then codified in the Wisconsin statutes at 968.24.

That said, the trial court was completely correct in concluding that because the perceived violation was just a parking ticket, it did not rise to "criminal activity" of which Soppe would have needed at least reasonable suspicion of, to approach and seize the car. Most certainly, he did not have that level of reasonable suspicion.

CONCLUSION

For the foregoing reasons, the respondent respectfully asks that this court affirm the decision of the trial court granting defendant Hayes' motion to suppress and to remand the case back to the circuit court for further proceedings.

Respectfully submitted this _____ day of October, 2015.

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_____
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CERTIFICATION

I, Donald J. Bielski, attorney for the Defendant-Respondent, I hereby 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 pages in length.

Dated this ____ day of October, 2015.

_____
Donald J. Bielski
State Bar No. 1005756

CERTIFICATION OF COMPLIANCE WITH RULES 809.19(12) and 809.19(13)

I hereby certify that I have submitted an electronic copy of this brief, including the appendix, which complies with the requirements of s.809.19(12) and s.809.19(13). I further certify that this 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.

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