STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case Nos. 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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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I. The facts here are indistinguishable from *Vogt*.

As explained in the State's brief-in-chief, Deputy Soppe's parking behind Crisp's vehicle and approaching it was not a seizure under the Fourth Amendment. *See County of Grant v. Vogt*, 2014 WI 76, 356 Wis. 2d 343, 850 N.W.2d 253 (no seizure where officer stopped behind a sole vehicle parked in a park

parking lot, approached it, and knocked on the window). The seizure occurred when Deputy Soppe asked Crisp and Hayes for their identification, by which point he had smelled marijuana through Crisp's open window and, hence, had reasonable suspicion to investigate a drug crime. Accordingly, Soppe's approach of Crisp's vehicle, under the circumstances, was not a Fourth Amendment seizure based on *Vogt*.

Hayes claims that Soppe's approach was a stop based on Crisp's testimony that Soppe drove his vehicle right at hers and turned it around to get behind her. He claims that those actions were a signal that Crisp was not free to leave, and had she tried, Crisp would have violated Wis. Stat. § 346.04, for obstructing by failing to comply with a lawful signal by a traffic officer. Hayes attempts to distinguish *Vogt* by arguing that Vogt's car was in a parking lot, not a "highway," and thus was not subject to the traffic code in chapter 346, whereas Crisp's car was in a traffic lane (Hayes' br. at 1-2). That argument fails for two reasons.

First, assuming that the distinction is valid, Hayes points to nothing in law or logic that supports a conclusion that a police car that drives past a stopped or parked vehicle, turns around, and parks behind it is a "signal" to stay put under § 346.04 requiring compliance. Certainly, had Deputy Soppe intended to signal Crisp that she was not permitted to leave, he could have used one of the many means available to him such as the marked squad's lights or sirens, or his own voice. He could have blocked her car with the squad. Rather, he simply parked the squad behind Crisp's car. That is no more a "signal" to stop under § 346.04, than it is a show of authority under *Terry* that a reasonable person would understand to mean that he or she was not free to go.

Second, Hayes' distinction, i.e., that Vogt was somehow in a better legal position than Crisp based on where he was parked, is not valid. Even though Vogt may not have been subject to

§ 346.04 specifically, a person not on a "highway" may be likewise charged with resisting or obstructing if he knowingly flees an officer acting in his or her official capacity and with lawful authority. Wis. Stat. § 946.41; *State v. Grobstick*, 200 Wis. 2d 242, 546 N.W.2d 187 (1996). Thus, Vogt and Crisp were in essentially the same legal position when the respective officers approached their cars. And even though fleeing an officer can create reasonable suspicion to justify a later *Terry* stop for resisting and obstructing, *see State v. Young*, 2006 WI 98, ¶¶76-77, 294 Wis. 2d 1, 717 N.W.2d 729, that does not change the analysis whether, under the circumstances, an officer initially seized a subject through a show of authority leading an objectively reasonable person to believe that he or she was not free to leave.

Crisp, in attempting to distinguish *Vogt*, takes a different tack and argues that Deputy Soppe's command Crisp to roll down her window before he smelled the marijuana was, combined with his other acts, a seizure without reasonable suspicion (Crisp's br. at 6). Unfortunately for Crisp, that "fact" is made up out of whole cloth. She writes that "[i]t is a little unclear whether the Court ruled that Deputy Soppe ordered Crisp to roll down the window," but asks this court to assume that the circuit court so found when it remarked that the window "come[s] down" when Soppe approached the vehicle (*id.*).[1]

Nothing in the record would even remotely support such a finding. Deputy Soppe, whom the court found to be credible

[1] While it is eminently clear that the court made no findings as to whether Deputy Soppe ordered the window down, its decision is unclear as to when it believed that the stop occurred. The court initially remarked that the stop occurred "right when [Soppe] parked behind them" (22:11; A-Ap. 185), but when the prosecutor asked the court for confirmation that it believed the stop began with Soppe's parking, the court denied making that determination and declined to elaborate further (22:12; A-Ap. 186).

(19:2-3; A-Ap. 171-72), said that either Crisp's window was down or she rolled it down (18:13, 23; A-Ap. 125, 135). He did not remember if he asked her to roll it down (18:13; A-Ap. 125). Crisp did not offer any testimony as to whether her window was down, whether she independently rolled it down when Soppe approached, or whether Soppe asked her to roll it down. Given that, for the circuit court to have implicitly found that Soppe asked, let alone ordered, Crisp to roll down her window would have been a clear error devoid of evidentiary support.

Again, *Vogt* controls: Deputy Soppe stopped his squad car behind Crisp's parked car. He did not block her her car, turn on his lights, or activate a siren. He approached her car and when he reached the driver's side, he immediately smelled marijuana through the open window. Before reaching that open window, there is no evidence that he issued any requests or commands that would lead Crisp or Hayes, at that point, to reasonably believe that they were not free to leave. Like the officer's approaching the car in *Vogt*, Soppe's actions did not constitute a seizure and did not implicate the Fourth Amendment.

II. Alternatively, Deputy Soppe had reasonable suspicion to approach Crisp's vehicle based on the observed parking violation.

Even if Soppe somehow stopped Crisp and Hayes before he was at the driver's side window smelling marijuana, he had reasonable suspicion to park his squad and approach Crisp's vehicle regarding the observed parking violation. Hayes disagrees, arguing that *Terry* requires reasonable suspicion of criminal activity, not a parking violation (Hayes' br. at 2-3).

But as the State noted in its opening brief (State's br. at 12 n.7), Wisconsin courts have recognized that law enforcement may conduct a stop to investigate behavior that may constitute a non-criminal violation. *See also State v. Krier*, 165 Wis. 2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991) (holding that an officer may conduct a traffic stop based on suspicion of behavior that could

amount to either criminal activity or a mere forfeiture violation).

Further, an officer has authority under Wis. Stat. § 800.02(6) to arrest for a violation of a municipal ordinance. *See City of Milwaukee v. Nelson*, 149 Wis. 2d 434, 460, 439 N.W.2d 562 (1989) (recognizing authority to arrest for ordinances). Because officers have authority to arrest for ordinance violations, it necessarily follows that they have the right to investigate potential ordinance violations based on reasonable suspicion.[2]

Crisp argues that this court's unpublished decision in *King* provides persuasive support for the circuit court's decision (Crisp's br. at 8-9). For the reasons set forth in the State's brief-in-chief (State's br. at 12-13), *King* is not persuasive. Crisp further attempts to align the facts here with *King* by arguing that there was no evidence in that the car in *King* was parked legally (Crisp's br. at 9). But that is beside the point: the officers in *King* only approached King's car based on suspicion of drug activity, not based on any apparent parking or other ordinance violation. Further, Crisp's assertion that "[i]t was only after Deputy Soppe orders Crisp to lower the window and speak with him that he smelled the marijuana" (Crisp's br. at 9), as noted above, is false, not part of the circuit court's findings, and unsupported by the record.

In sum, even if Deputy Soppe somehow seized Crisp and Hayes before he reached Crisp's window and smelled marijuana, he had reasonable suspicion to do so based on the observed parking violation.

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[2] Consistently with that reasoning, in *State v. Iverson*, the Wisconsin Supreme Court recently determined that an officer's observations of a non-traffic forfeiture offense formed the basis for a traffic stop. *State v. Daniel S. Iverson*, 2015 WI 101, Case No. 2014AP515-FT, slip op. at ¶¶44-55 (Wis. Sup. Ct. Nov. 25, 2014).

CONCLUSION

The State respectfully requests that this court reverse the circuit court's decision and order granting the motion to suppress and remand for further proceedings.

Dated this 30th day of November, 2015.

Respectfully submitted,

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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 1423 words.

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Sarah L. Burgundy
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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 30th day of November, 2015.

_____

Sarah L. Burgundy
Assistant Attorney General