STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE of WISCONSIN,
Plaintiff-Respondent,

v.

COURTNEY L. CARNEY,
Defendant-Appellant.

Court of Appeals case no.: 2016AP000175

In the matter of the refusal of Courtney L. Carney:

STATE of WISCONSIN,
Plaintiff-Respondent,

v.

COURTNEY L. CARNEY,
Defendant-Appellant.

Court of Appeals case no.: 2016AP000176

An Appeal From a Judgment of Conviction and Order Denying Defendant's Motion to Suppress Evidence Entered by the Honorable Michael P. Maxwell, Circuit Judge, Branch 8, Waukesha County

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE ISSUES..... 1

BRIEF ANSWER..... 1

POSITION ON ORAL ARGUMENT AND PUBLICATION.. 2

STATEMENT OF THE CASE AND FACTS..... 3

ARGUMENT..... 7

THE CIRCUIT COURT PROPERLY DENIED MR. CARNEY'S MOTION TO SUPPRESS..... 7

I. **OFFICER GOODNATURE'S INITIAL CONTACT WITH MR. CARNEY WAS CONSENSUAL AND A REASONABLE MEANS TO DISPEL OFFICER SAFETY CONCERNS.**

II. **UPON CONTACT WITH MR. CARNEY, OFFICER GOODNATURE GAINED REASONABLE SUSPICION THAT MR. CARNEY WAS DRIVING WHILE INTOXICATED.**

III. **MR. CARNEY WAS NOT SEIZED UNTIL OFFICER GOODNATURE REQUESTED HE REMAIN AT THE SCENE, AND THIS SEIZURE WAS THE LEAST INTRUSIVE MEANS UNDER THE CIRCUMSTANCES.**

CONCLUSION..... 18

CERTIFICATION OF BRIEF..... 19

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12) 20

CERTIFICATION OF MAILING 21

TABLE OF CONTENTS OF APPENDIX..... i

CERTIFICATION OF APPENDIX ..... App 6 – App 7

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(13) ..... App 8

TABLE OF AUTHORITIES

Wisconsin Statutes

Wis. Stat. §346.63(1)(a) 3

Wis. Stat. §343.305(9)..... 3

Wisconsin Cases

County of Grant v. Vogt, 2014 WI 76, 356 Wis. 2d 343, 850 N.W.2d 253. ..... 8, 9

State v. Betow, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999)..... 11

State v. Post, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634. ... 7, 11

State v. Stout, 2002 WI App 41, 250 Wis. 2d 768, 641 N.W.2d 474. 7

State v. Young, 2006 WI 98, 294 Wis. 2d 1, 717 N.W.2d 729..... 11

State v. Washington, 284 Wis.2d 456, 700 N.W.2d 305 (Ct. App. 2005)..... 12

Federal Cases

Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) ..... .15, 16

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) 11

United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)..... 14, 15

Unpublished Case

State v. Resch, 334 Wis.2d 147, 799 N.W.2d 929
(Ct. App. 2011)..... 12

STATEMENT OF THE ISSUES

Did the trial court err in denying the Defendant-Appellant Courtney L. Carney's motion to suppress evidence from an unlawful seizure and detention?

BRIEF ANSWER

No, the trial court properly denied the motion and allowed evidence derived from the seizure and detention of the defendant; the court found that the seizure and detention was lawful because the officer had the requisite reasonable suspicion to seize and detain the defendant, and seized the defendant in the least intrusive manner under the circumstances.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent ("State") submits that oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STATEMENT OF THE CASE AND FACTS

On August 4th, 2015, the Honorable Neal Nettesheim, presiding over the Waukesha County Court, denied the Defendant-Appellant Courtney L. Carney's motion to suppress evidence based upon an alleged unlawful detention. Mr. Carney was subsequently tried to a jury, Judge Michael Maxwell presiding, and was convicted of operating a motor vehicle under the influence of an intoxicant (OWI), second offense, contrary to Wis. Stat. §346.63(1)(a). Mr. Carney was also convicted of wrongfully refusing a chemical test of his blood, contrary to Wis. Stat. §343.305(9) by Judge Michael Maxwell.

At approximately 3:00 a.m. on February 14, 2015, Officer Roosevelt Mullins performed an initial traffic stop on a vehicle due to a defective registration light. R. 43, p.4-5. When Officer Mullins performed this stop, the Defendant-Appellant Courtney L. Carney, driving ahead of the aforementioned vehicle, also pulled over and stopped his vehicle on the side of the road. R. 43, p.5. Mr. Carney did not exit his vehicle, nor did he leave the scene as Officer Mullins made contact with the driver of the other vehicle. R. 43, p. 5-6.

Officer Brenna Goodnature arrived on the scene to facilitate the traffic stop on the vehicle not driven by Mr. Carney. R. 45, p. 6. Officer Mullins had noticed Mr. Carney's vehicle had pulled over and stopped at the same time as the vehicle upon which he made a traffic stop. R. 45, p.5. Because this is unusual behavior and posed a possible officer safety concern, Officer Mullins asked Officer Goodnature to investigate Mr. Carney's reason for stopping. R. 45, p.4-7, 26-27.

Officer Goodnature made contact with Mr. Carney and asked him routine, investigatory questions. R. 43, p.10-13. For purposes of identification, Officer Goodnature requested Mr. Carney's identification card. R.43, p. 12. During their conversation, Officer Goodnature smelled the odor of intoxicants on Mr. Carney's breath. R. 43, p.11. Officer Goodnature inquired about the odor of intoxicants, asking from where Mr. Carney was traveling. R. 43, p.11-12. Mr. Carney responded by stating that he and the driver of the other vehicle were at a downtown Waukesha bar, where he had been drinking. R. 43, p.11-12. Mr. Carney stated he had one drink at

said bar. R. 43, p.12. Mr. Carney could not recall the name of the bar. R. 43, p.12.

Based on the odor of intoxicants on Mr. Carney's breath and Mr. Carney's statement that he had been drinking at a bar, Officer Goodnature believed he may be under the influence of intoxicants, and she planned to conduct field sobriety tests to make sure Mr. Carney was safe to operate his vehicle. R. 43, p.13-14. Officer Goodnature informed Mr. Carney that she needed to briefly aid Officer Mullins in performing the other traffic stop. R. 43, p.13. She requested that Mr. Carney wait in his vehicle until she and Officer Mullins completed the stop so she could speak with Mr. Carney further. R. 43, p.13.

Officer Goodnature returned to the other vehicle to aid Officer Mullins in conducting field sobriety tests. R. 43, p.6, 14. After completion of field sobriety tests with the driver of the first vehicle, Officer Goodnature performed field sobriety tests with Mr. Carney. R. 43, p.14. Based upon Mr. Carney's performance on these tests, Officer Goodnature arrested Mr. Carney for operating a motor vehicle while under the influence of an intoxicant. R. 43, p.14-15.

At the subsequent evidentiary hearing, having heard testimony from Officers Mullins and Goodnature, Judge Nettesheim denied Mr. Carney's motion to suppress stating:

> [H]ere we have a stop at a nighttime hour, three a.m. in the morning. The defendant himself has admitted that he's been in a bar. An odor of intoxicants is observed and detected, and I'm satisfied in this admittedly close case that those circumstances confronting the officers to pursue the investigation to determine whether they have an innocent event at hand such that the defendant should be permitted to go on his way or such that they may uncover additional evidence which might warrant his being taken into custody. The latter is what occurred here[.]

R. 43, p. 30. Mr. Carney now appeals that decision.

ARGUMENT

A. THE CIRCUIT COURT PROPERLY DENIED MR. CARNEY'S MOTION TO SUPPRESS.

Mr. Carney appeals from the judgment of conviction, asserting that the circuit court erred in denying his pre-conviction motion to suppress evidence based on an alleged unlawful detention. Mr. Carney argues that Officer Goodnature lacked reasonable suspicion for Mr. Carney's initial detention, and did not conduct the detention in the least intrusive manner. Further, Mr. Carney argues that Officer Goodnature lacked reasonable suspicion to expand his detention.

When reviewing a circuit court's denial of a motion to suppress evidence, this court should uphold the circuit court's factual findings unless clearly erroneous, but should review the circuit court's application of the facts to constitutional principles de novo. *State v. Stout*, 2002 WI App 41, ¶9, 250 Wis. 2d 768, 641 N.W.2d 474. The existence of reasonable suspicion is a question of both law and fact. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. Therefore, this court should uphold the factual findings concerning the existence of reasonable suspicion unless clearly

erroneous, and review de novo the application of these factual findings to constitutional principles.

Here, Mr. Carney's arguments fail because they are based upon an incorrect application of the pertinent constitutional principles and law. The circuit court properly denied Mr. Carney's motion to suppress, and this court should affirm the judgment of conviction.

I. OFFICER GOODNATURE'S INITIAL CONTACT WITH MR. CARNEY WAS CONSENSUAL AND A REASONABLE MEANS TO DISPEL OFFICER SAFETY CONCERNS.

Officer Mullins requested Officer Goodnature make contact with Mr. Carney to dispel officer safety concerns. Officer Goodnature's initial contact with Mr. Carney was consensual in nature. A consensual encounter involves only minimal police contact; during a consensual encounter a citizen may either voluntarily comply with a police officer's requests or choose to ignore them. *See County of Grant v. Vogt*, 2014 WI 76, 356 Wis. 2d 343,850 N.W.2d 253. Additionally, a consensual encounter does not require reasonable suspicion of criminal activity. *See id*. Therefore, a citizen is free to leave during a consensual encounter, and constitutional safeguards are not invoked. *See id.*

Wisconsin courts have found consensual contact was reasonable in similar circumstances such as these. For example, in *County of Grant v. Vogt*, the court held that it was reasonable for an officer to investigate a vehicle that was parked at a closed boat launch at 1:00 a.m.; after the consensual initial contact, the officer gained reasonable suspicion to detain the defendant, and the officer lawfully arrested the driver of the vehicle for driving while intoxicated. *Id.*

Here, Mr. Carney pulled over his vehicle at the same time as the other vehicle which Officer Mullins intended on stopping. A reasonable driver may pull over upon seeing an officer's lights activated. However, once it is clear the driver's vehicle is not the vehicle the officer was stopping, a reasonable person would feel free to drive away.

Mr. Carney did not drive away when Officer Mullins began to perform the traffic stop on the other vehicle. This stop occurred in early morning hours, and Officer Mullins was alone until Officer Goodnature arrived as his backup. Mr. Carney's behavior was not illegal; however, as Judge Nettesheim explained, Mr. Carney's behavior was unusual, and occurred under circumstances in which

Officer Mullins and Goodnature could have reasonably believed their safety was at risk (occurring during the early morning and only two officers were present at the scene).

Thus, in accordance with the holding in *Vogt*, it was reasonable for Officer Mullins and Officer Goodnature to make consensual contact to determine Mr. Carney's reason for stopping, initially to alleviate concerns of officer safety. Making initial contact and temporarily questioning the defendant to determine if he was a threat to officer safety was a reasonable means to alleviate those concerns.

This contact was consensual, because Mr. Carney was still stopped through his own volition and was free to leave at any time. At that point in time, Officer Goodnature did not yet gain reasonable suspicion of intoxicated driving, and Mr. Carney had not committed any traffic violations that would require a traffic stop. Officer Goodnature did not demonstrate her authority, nor command anything of Mr. Carney during the initial contact, and therefore constitutional safeguards were not invoked. Thus, Mr. Carney could have ignored Officer Goodnature's questions or driven away, but instead made the voluntary decision to remain at the scene and

answer Officer Goodnature's questions. This voluntary decision ultimately led to Officer Goodnature's reasonable suspicion that Mr. Carney was driving while intoxicated.

II. UPON CONTACT WITH MR. CARNEY, OFFICER GOODNATURE GAINED REASONABLE SUSPICION THAT MR. CARNEY WAS DRIVING WHILE INTOXICATED.

An officer must have reasonable suspicion that a person is driving while impaired to seize and detain a person for the purposes of conducting an investigation into impaired driving. *State v. Betow*, 226 Wis. 2d 90, 94, 98, 594 N.W.2d 499 (Ct. App. 1999). Reasonable suspicion consists of "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" a detention. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Reasonable suspicion, under the standard, is more than a "hunch." *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634. However, the level of suspicion required for this standard is less than the level of suspicion required for probable cause. *State v. Young*, 2006 WI 98, 294 Wis. 2d. 1, 717 N.W.2d 729. The standard of reasonable suspicion only requires

some minimal level of objective justification for detention. *State v. Washington*, 284 Wis.2d 456, 700 N.W.2d 305 (Ct. App. 2005).

Wisconsin appellate courts have determined a police officer gained reasonable suspicion to seize and detain an individual after observing specific facts similar to those in this case. For example, in *State v. Resch*, 334 Wis.2d, 147, 799 N.W.2d 929 (Ct. App. 2011), an unpublished opinion, a police officer made consensual contact with the driver of a vehicle who was parked in a parking lot during early morning hours. The vehicle was running and the driver had turned off the vehicle's headlights. *Id*. In its unpublished decision, the Court held that the officer gained reasonable suspicion to seize and detain the driver based upon articulable facts including the odor of intoxicants, the driver's concession that he consumed at least "a little" alcohol, the driver was sitting by himself in a vehicle, the driver had lost the friends whom he allegedly had been following, and the driver was stopped in early morning hours. *Id*.

During Officer Goodnature's initial contact with Mr. Carney, she noticed the smell of intoxicants on Mr. Carney's breath. This was the first suspicious factor which led Officer Goodnature to believe Mr.

Carney was driving while intoxicated. Officer Goodnature asked Mr. Carney routine, investigatory questions, such as "why did you pull over" and "where are you coming from." The defendant not only stated he was driving from a bar, but also admitted to drinking at the bar. Additionally, the defendant could not remember the name of the bar. The contact occurred in early morning hours, after bars commonly close.

From these specific and articulable facts, Officer Goodnature gained the requisite reasonable suspicion to seize and detain the defendant for the purposes of investigating possible intoxicated driving. Officer Goodnature was not required to have probable cause to seize and detain the defendant, but only to observe specific and articulable facts that would lead to a mere reasonable suspicion that Mr. Carney was driving while intoxicated. The smell of intoxicants on his breath, his admission to drinking at a bar, his inability to recall the name of the bar, and the early morning time of the contact all led to Officer Goodnature's reasonable suspicion that Mr. Carney was driving while intoxicated.

As noted by Judge Nettesheim, this is a close case. However, as Judge Nettesheim clarified and in accordance with his holding, only a minimal level of objective justification is needed to satisfy the standard of reasonable suspicion, and the circumstances confronting Officer Goodnature warranted a seizure and detention of Mr. Carney for the purposes of investigating whether he was driving while intoxicated.

III. MR. CARNEY WAS NOT SEIZED UNTIL OFFICER GOODNATURE REQUESTED HE REMAIN AT THE SCENE, AND THIS SEIZURE WAS THE LEAST INTRUSIVE MEANS UNDER THE CIRCUMSTANCES.

Courtney L. Carney was not seized until Officer Goodnature requested Mr. Carney remain at the scene until she was finished aiding in the traffic stop of the other vehicle. For Fourth Amendment purposes, a person is considered seized when their freedom of movement is restrained by a show of authority or physical force. *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). All seizures must be objectively reasonable and the least intrusive means reasonably available to verify or dispel

an officer's suspicion. *Id*. at 550; *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

The seizure of Mr. Carney occurred subsequent to his consensual contact with Officer Goodnature. During the initial contact, Officer Goodnature asked Mr. Carney investigatory questions in an attempt to dispel officer safety concerns. For the purposes of identifying Mr. Carney, Officer Goodnature asked for Mr. Carney's identification card. During this time, Mr. Carney was stopped and answered Officer Goodnature's questions through his own volition. Officer Goodnature did not demonstrate her authority, nor command anything of Mr. Carney before her request that he stay at the scene.

During this initial contact, Officer Goodnature observed specific and articulable factors from which Officer Goodnature gained reasonable suspicion that Mr. Carney was driving while intoxicated. Officer Goodnature was originally called to the scene to aid in performing the traffic stop on the other vehicle. It was reasonable for Officer Goodnature to request Mr. Carney to remain at the scene until she had performed the duty for which she was

called to the scene, because at that time she had reasonable suspicion Mr. Carney was driving while intoxicated. Furthermore, it would have been irresponsible and unsafe for Officer Goodnature to allow Mr. Carney to leave the scene and potentially continue to drive while intoxicated after she had reasonable suspicion of this behavior.

Mr. Carney argues this seizure was not the least intrusive means. Further, Mr. Carney argues that his driver's license should have been returned and he should have been told he was free to go. According to *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), where a driver's license is confiscated in an initial contact, it should be returned and the person told they are free to go as soon as possible.

However, this rule does not apply to this situation. Officer Goodnature did ask for Mr. Carney's identification card during the initial contact for purposes of identifying Mr. Carney. During this initial contact, Officer Goodnature gained reasonable suspicion of intoxicated driving. Officer Goodnature thus seized and detained Mr. Carney by requesting he remain at the scene and carrying away his license. The carrying away of his license occurred subsequent to

Officer Goodnature gaining reasonable suspicion of intoxicated driving. Thus, it would not have been reasonable for Officer Goodnature to return Mr. Carney's license and tell him he was free to go, because she believed he may be driving while intoxicated.

There were only two officers on the scene and two vehicles to investigate. Officer Goodnature was initially called to aid in the traffic stop of the first vehicle. Officer Goodnature requested Mr. Carney remain at the scene while she performed this duty, and diligently returned to his vehicle upon finishing the other traffic stop. Thus, under the circumstances, this seizure was the least intrusive means reasonably available to detain Mr. Carney for the purpose of investigating Officer Goodnature's suspicion that Mr. Carney was driving while intoxicated.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that this Court affirm the circuit court's decision and deny the motion to suppress.

Dated this 1st day of July, 2016.

Respectfully,

__/s/_____
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CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief and appendix produced with proportional serif font. The length of this brief is 3,862 words.

Dated this 1st day of July, 2016.

/s/

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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. § 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 certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of July, 2016.

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CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. §809.80(4) that, on the 1st day of July, 2016, I mailed 10 copies of the Brief and Appendix of Plaintiff-Respondent, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, 110 East Main Street, Suite 215, P.O. Box 1688, Madison, Wisconsin 53701-1688.

Dated this 1st day of July, 2016.

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