STATE OF WISCONSIN

COURT OF APPEALS
DISTRICT II

Appeal No. 2016AP000455

Circuit Court No. 2014CT001570

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No.

MARY G. ZINDA,

Defendant-Appellant.

An Appeal From a Judgment of Conviction and Order Denying Defendant's Motion to Suppress Evidence Entered by the Honorable Lloyd V. Carter, Circuit Judge, Branch 4, Waukesha County

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BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Was evidence of a 911 recording and police dispatch communication properly admitted in a pretrial motion to suppress hearing?

Circuit Court Answer: Yes.

2. Was the defendant seized prior to the time Chief Wallis asked her to perform standardized field sobriety tests?

Circuit Court Answer: No.

3. Was there reasonable suspicion to seize the defendant at that time?

Circuit Court Answer: Yes.

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

Given the nature of the arguments raised in the brief of defendant-appellant Mary G. Zinda, the State exercises its option not to present a statement of the case. *See* Wis. Stat. (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

I. STANDARD OF REVIEW

In determining whether the admission of and reliance upon certain evidence violates specific statutory or constitutional provisions is a question of law of which this court shall review de novo. State v. Doss, 2008 WI 93, ¶¶19-20, 312 Wis. 2d 570. Admission of evidence lies within the circuit court's discretion. State v. Ringer, 2010 WI 69, ¶ 24, 326 Wis. 2d 351. An appellate court will not disturb the circuit court's decision to admit evidence unless the court erroneously exercised its discretion. Id. The circuit court erroneously exercises its discretion if it applies the wrong legal standard or the facts of record fail to support its decision. Id.

This case requires the court to determine when the seizure of the Defendant occurred and if that seizure was supported by reasonable suspicion. "Whether a person has been seized is a question of constitutional fact." State v. Young, 2006 WI 98, ¶ 17, 294 Wis. 2d 1 (citing State v. Williams, 2002 WI 94, ¶ 17, 255 Wis. 2d 1). Whether reasonable suspicion exists is also a question of constitutional fact. State v. Walli, 2011 WI App 86, ¶ 10, 334 Wis. 2d 402 (citing State v. Powers, 2004 WI App 143, ¶ 6, 275 Wis. 2d 456). The Circuit Court's finding of fact will be upheld unless they

are clearly erroneous, but the application of constitutional principles to those facts presents a question of law subject to de novo review. Williams, 2002 WI 94, ¶17, 255 Wis. 2d 1. The same standard of review applies to a motion to suppress. See State v. Hess, 2010 WI 82, ¶19, 327 Wis. 2d 524.

II. THE CIRCUIT COURT PROPERLY CONSIDERED THE 9-1-1 AUDIO RECORDING AND PROPERLY ADMITTED THE RECORDING INTO EVIDENCE.

This Court should affirm the Circuit Court's decision denying the Defendant's Motion to Suppress. The Circuit Court properly considered the 911 audio recording and properly admitted the recording into evidence. The Circuit Court did not violate the Defendant's due process rights when it listened to the hearing outside the presence of the Defendant and after Chief Wallis's testimony had already been completed. Although in a criminal jury trial a defendant must have a meaningful right to cross-examine witnesses, State v. Thomas, 144 Wis. 2d 876, 425 N.W.2d 641 (1988), the same does not apply to criminal pretrial hearings. United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974). With the right to confrontation essentially being a trial right, the Defendant's contention that the Circuit Court erroneously admitted the audio recording into evidence is meritless.

A. Because the Confrontation Clause Does Not Apply to Pretrial Hearings, the Circuit Court Properly Considered the 911 Audio Recording and Properly Admitted It Into Evidence

"Preliminary questions concerning . . . the admissibility of evidence shall be determined by the judge." Wis. Stat. Sec. 901.04 (1). In making the determination "the judge is bound by the rules of evidence only with respect to privileges." Id. Courts have addressed the applicability of due process to Wis. Stat. Sec. 901.04(1) on several occasions.[1] There is no evidence that the Supreme Court intended the protection of the confrontation clause to be available to a defendant in . . . pretrial situations enumerated in sec. 901.04(1). State v. Frambs, 157 Wis. 2d 700, 704. 460 N.W.2d 811 (1990).

Further, the same rules of evidence governing criminal jury trials "are not generally thought to govern hearings before a judge to determine evidentiary questions…." Matlock, 415 U.S. at 168, 94 S.Ct. 988 (1974). "The right to confrontation is a trial right…." See Pennsylvania v. Ritchie, 480 U.S. 39, 52, 107 S.Ct. 989 (1987). The core values furthered by the Confrontation Clause are formed by the right to 'confront' a witness at the time of trial. California v. Green, 399 U.S. 149, 157, 90 S.Ct. 1930 (1970). "The right to confrontation

[1] United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974); Pennsylvania v. Ritchie, 480 U.S. 39, 52, 107 S.Ct. 989 (1987); California v. Green, 399 U.S. 149, 157, 90 S.Ct. 1930 (1970); Barber v. Page, 390 U.S. 719, 725, 88 S.Ct. 1318 (1968); State v. Frambs, 157 Wis. 2d 700, 704. 460 N.W.2d 811 (1990); State v. Zamrow, 366 Wis.2d 562, 874 N.W.2d 328 (2015)

is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." Barber v. Page, 390 U.S. 719, 725, 88 S.Ct. 1318 (1968). "The Confrontation Clause simply does not apply to pretrial hearings…." State v. Zamrow, 366 Wis.2d 562, 570, 874 N.W.2d 328 (2015).

In the present case, the Defendant filed a Motion to Suppress Evidence on March 16, 2015. The Court, presided over by Judge Lloyd V. Carter, conducted an evidentiary hearing on June 1, 2015 in which the Defendant engaged in cross-examination of Chief Wallis. After that hearing had concluded Judge Carter listened to the 911 audio recording outside the presence of the Defendant and the state. The Court issued an oral decision denying the Defendant's Motion on July 9, 2015. Under the substantial amount of both U.S. Supreme Court and Wisconsin Supreme Court precedent, the confrontation clause does not apply to pretrial hearings. Therefore, Judge Carter listening to the audio recording outside the presence of the Defendant and after testimony had concluded was appropriate and the audio recording was properly admitted into evidence.

The Defendant cites State v. Lenarchick, 74 Wis. 2d. 425, 247 N.W. 2d 80 (1976), in support of her motion to suppress. Zinda Brief at 2. The Supreme Court in Lenarchick held that there was

prejudicial error in respect to the denial of the Defendant's right to cross-examine a witness fully. Lenarchick, 74 Wis.2d at 425. What the Defendant fails to recognize is that in Lenarchick, the Defendant's right to cross-examine a witness fully was violated during the jury trial. Id. at 426. This is not the situation in the present case. In the present case, the officer was called as a witness at a pretrial suppression hearing. Therefore, under the abundance of Supreme Court precedent, the Defendant is not entitled to cross-examination of Chief Wallis after testimony had concluded.

III. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE DEFENDANT WAS NOT SEIZED UNTIL AFTER CHIEF WALLIS CONFRONTED HER AND SMELLED HER BREATH AND THAT THERE WAS REASONABLE SUSPICION TO SEIZE THE DEFENDANT.

This Court should affirm the Circuit Court's decision denying the Defendant's motion to suppress because the Defendant was not seized until after Chief Wallis smelled intoxicants on her breath and asked her to perform Standardized Field Sobriety Tests. The Circuit Court correctly found the Defendant was not seized upon Officer Parkhurst parking behind her vehicle in her driveway. Under the reasonable person standard presented in United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870 (1980), the Defendant was not seized until after Chief Wallis approached the

Defendant and smelled intoxicants on her breath. Before confronting the Defendant Chief Wallis did not show any form of authority or physical force that would make a reasonable person believe her liberties were being restrained.

Further, the officer did have reasonable suspicion to conduct a seizure of the Defendant based on the totality of the circumstances. Chief Wallis received sufficient information from dispatch regarding a 911 call that described the vehicle, the location of the vehicle, and the erratic driving behavior of the vehicle. That information is beyond enough for a police officer to have reasonable suspicion to conduct a stop on a vehicle. See Navarette v. California, 572 U.S. __, 134 S.Ct. 1683; See also State v. Rissley, 2012 WI App 112, 344 Wis.2d 422. Besides the information provided to Chief Wallis by dispatch, he further observed the smell of intoxicants upon contact with the Defendant, providing him enough information to legally seize her. Therefore, the Circuit Court properly determined that the Defendant was not seized until after Chief Wallis smelled intoxicants on her breath and asked her to perform Standardized Field Sobriety Tests and that Chief Wallis had reasonable suspicion to seize the Defendant.

A. Under the Reasonable Person Standard, the Defendant Was Not Seized Until After Chief Wallis Confronted Her and Smelled Her Breath.

Determining when a seizure occurred is governed by United States v. Mendenhall, 446 U.S. at 554 (1980). In Mendenhall, the Supreme Court concluded that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Mendenhall, 446 U.S. at 554. A seizure occurs "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of the citizen." Mendenhall, 446 U.S. at 552 (quoting Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868 (1968)).

Further, the Supreme Court noted that "examples of circumstances that might indicate a seizure . . . would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." Id. (citing Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968); Dunaway v. New York, 442 U.S. 200, 207 & n.6, 99 S.Ct. 2248 (1979)).

The Supreme Court provided more guidance in I.N.S. v. Delgado, 466 U.S. 210, 104 S.Ct. 1758 (1984), when it stated that "police questioning, by itself, is unlikely to result in a Fourth Amendment violation. I.N.S. v. Delgado, 466 U.S. 210, 216 (1984).

While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." Id. (citing Schneckloth v. Bustamonte, 412 U.S. 218, 231-34, 93 S.Ct. 2041 (1973)). The Court then adopted the Mendenhall standard and stated that there is no seizure "unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave." Id.

While generally "[t]he detention of a motorist by a law enforcement officer constitutes a 'seizure' of the person within the meaning of the Fourth Amendment," State v. Amos, 220 Wis. 2d 793, 798, 584 N.W.2d 170 (Ct. App. 1998), law enforcement action in approaching a stopped or parked vehicle does not implicate the Fourth Amendment in all cases. See, e.g., In re Kelsey C.R., 2001 WI 54, ¶ 30, 243 Wis. 2d 422 (citing Florida v. Bostick, 501 U.S. 429, 434, 111 S.Ct. 2382 (1991)); State v. Young, 2008 WI 98 ¶¶ 65-67, 294 Wis. 2d 1. Unlike a traditional traffic stop in which a vehicle physically yields to a show of police authority, there is no yield to authority when an officer simply approaches a parked vehicle. State v. Harris, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996).

Further, a person has a choice to refuse an officer's attempt to converse and thereby retain his privacy, or respond by talking to the officer and aiding the officer in his duty to protect the public. County of Grant v. Vogt, 2014 WI 76, ¶52, 356 Wis. 2d 343. A dutiful officer does not make a mistake by presenting a person with that choice. Id. Only when the officer forecloses the choice by the way in which he exercises his authority—absent reasonable suspicion or probable cause—does he violate the Fourth Amendment. Id.

In Vogt, a police officer approached a parked vehicle and tapped on the driver's car window. Id. ¶7. The Court held that a law enforcement officer's knock on a car window does 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. ¶53. The court reasoned that the objective of law enforcement is to protect and serve the community. Id. ¶52. Accordingly, an officer's interactions with people are not automatically adversarial. Id. The court further reasoned that a "seizure" inquiry into one of these interactions must examine the totality of the circumstances, seeking to identify the line between an officer's reasonable attempt to have a consensual conversation and a more consequential attempt to detain an individual. Id.

Similarly, in the present case, prior to Chief Wallis smelling intoxicants on the Defendant's breath and asking her to submit to Standardized Field Sobriety Tests, he did not show any form of authority. The Defendant drove home on her own volition. Chief Wallis was simply waiting at her residence, having already gone to the door, as anyone visiting the residence would do. The Defendant was never ordered to stop. The Defendant was never ordered out of her car. Chief Wallis never displayed his weapon, did not physically touch the Defendant, nor did he use language or a tone of voice indicating that compliance with his request might be compelled.

At the point where the Defendant had simply driven home, pulled into her driveway, got out of her car and said "No" to Chief Wallis, a reasonable person would believe they are free to leave. Chief Wallis was less authoritative in his interaction with the Defendant than the officer in Vogt. It is only after that, when Chief Wallis did not allow the Defendant to go into her house and asked her to do field sobriety tests, that she was, in fact, seized. However, at that point, Chief Wallis clearly had reasonable suspicion to do so, and, thus, no suppression of any evidence is warranted.

B. Under the Totality of the Circumstances, Chief Wallis Did Have Reasonable Suspicion to Seize the Defendant.

In order to stop and detain an individual for an investigation, a law enforcement officer must have specific, articulable facts, which would cause a reasonable person to believe the stop was appropriate. Terry v. Ohio, 392 U.S. 1, 21, 22 (1968). Reasonable suspicion is all that is required for a Terry stop which is "a particularized and objective basis for suspecting the person stopped of criminal activity." State v. Patton, 2006 WI App 325 ¶ 9, 297 Wis. 2d 415 (citing Ornelas v. United States, 517 U.S. 690, 696, 116 S.Ct. 1657 (1996)).

Additionally, if a known informant provides information indicating there is an imminent threat of danger to the public, a law enforcement official may stop a defendant for an investigation without corroborating the information. State v. Rutzinski, 2001 WI 22, ¶ 4, 241 Wis. 2d 729.

Further, where a driver's behavior is adequately described by a reliable citizen caller, a police officer may use that information in making a stop on the driver. For example, in Navarette v. California, 572 U.S. __, 134 S.Ct. 1683 (2014), the United States Supreme Court held a tip from an anonymous 911 caller provided enough information to amount to reasonable suspicion of drunk driving. Navarette v. California, 572 U.S. ___, 134 S.Ct. 1683 (2014). In Navarette, an anonymous 911 caller reported that a silver

Ford truck ran the caller off of the roadway. Id. at 1687. An officer was able to pull the driver over shortly after dispatch provided him with the description of the truck. Id. The officer did not observe the defendant driving erratically, but based his reasonable suspicion on the 911 call. Id. The Supreme Court held that the call was "sufficiently reliable to credit the caller's account" because by reporting a specific vehicle, including the license plate number, the caller claimed eyewitness knowledge of the alleged dangerous driving. Id. at 1691.

The Court also found that an anonymous caller is reliable because the 911 system provides specific safeguards that allow police to track the caller by number or location. Id. These circumstances taken together justify an officer's reliance on information reported in a 911 call. Id.

Similarly, in the present case, Chief Wallis was given substantial information by dispatch regarding a 911 caller reporting a possible drunk driver. The 911 caller indicated that there was a vehicle traveling down the roadway in a manner in which the caller believed the driver to be intoxicated. Analogous to Navarette, the 911 caller provided information regarding the color of the vehicle, the type of vehicle it was, the location of the vehicle, and the type of driving the citizen witness was observing. Further, the 911 caller continued to

follow the Defendant and continued to provide more information regarding the Defendant's driving. The 911 caller continually provided the Defendant's location as well as the driving behavior, including the fact that she almost hit a cement wall at one point. Considering the 911 caller in the present case, provided more information than did the caller in Navarette, the reasonable suspicion standard is satisfied.

In the Defendant's Brief, she incorrectly suggests that Chief Wallis did not have sufficient information regarding the Defendant's driving behavior. Zinda Brief at 5. Although Chief Wallis simply put in his report that dispatch advised him of an erratic driver, Chief Wallis explained that he simply used the term "erratic" as a short hand for what the dispatcher told him. Further, the dispatch tape, Exhibit 1, accurately reflects exactly what the dispatcher told him. From that exhibit we know that Wallis was informed by Oconomowoc dispatch that a 911 caller reported what the caller believed to be a possible drunk driver operating a cream colored Lincoln MKX westbound on Highway 16. Dispatch also informed Chief Wallis that the Lincoln was "all over the road, swerving, almost going off the road a couple times," as well as providing him with updates of the car's location.

Moreover, under the collective knowledge doctrine,"[t]he police force is considered as a unit and where there is police-channel communication to the arresting officer and he acts in good faith thereon, the arrest is based on probable cause when such facts exist within the police department." State v. Mabra, 61 Wis. 2d 613, 213 N.W.2d 545 (1974). The same reasoning applies to cases involving investigatory stops based on reasonable suspicion. See State v. Pickens, 2010 WI App 5, ¶¶ 11-12, 15-17, 323 Wis. 2d 226; see also United States v. Hensley 469 U.S. 221, 232, 105 S.Ct. 675 (1985).

Additionally, to determine if a law enforcement officer has a reasonable suspicion, it is not required that a single officer performing a search and seizure personally have a reasonable suspicion of criminal activity, but that the police department as a whole have the sufficient information to issue the search. See State v. Rissley, 2012 WI App 112, 344 Wis.2d 422 (citing Mabra, 61 Wis 2d at 613). For example, in Rissley, after a confrontation with the citizen witness the defendant fled in his vehicle. Id. ¶ 1. The citizen witness reported the incident to the police and provided a description of the defendant's vehicle, where the defendant was travelling, and what the defendant looked like. Id. ¶ 3. The defendant was stopped by police and arrested for operating while intoxicated. Id. ¶ 6. The arresting police officer testified that he did not witness any traffic

violations while following the defendant and pulled the vehicle over because it "matched the description and direction of travel" of the minivan he received from dispatch that was given by the citizen witness. Id. ¶ 16The defendant argued that the officer making the stop did not exercise independent discretion and instead merely followed the directions of the dispatcher when stopping him. Id. The Court disagreed and found that under the collective knowledge doctrine, the officer had reasonable suspicion to conduct the stop based on the information that both the dispatcher and the police officer who made the stop obtained. Id. ¶ 19

Similarly, in the present case, Chief Wallis did not personally witness any traffic violations but was provided information by dispatch from a citizen witness caller regarding a potential intoxicated driver. Chief Wallis was given more information regarding the Defendant than the officer in Rissley. Chief Wallis was told of the Defendant's erratic driving, was provided with a description of the vehicle, a license plate number, and continuous updates describing the Defendant's location. Upon the Defendant arriving to her residence, Chief Wallis approached her and smelled the odor of intoxicants coming from her person. Under the totality of the circumstances Chief Wallis had reasonable suspicion to detain the Defendant upon contact with her. Therefore, the Circuit Court

correctly decided that Chief Wallis did have reasonable suspicion to seize the Defendant at that time.

CONCLUSION

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

Dated this 15th day of July, 2016.

Respectfully,

/s/ Kevin M. Osborne_____
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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 monospaced font. The length of this brief is 3,516 words long.

Dated this 15th day of July, 2016.

__/s/ Kevin M. Osborne_____
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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 15th day of July, 2016.

_/s/ Kevin M. Osborne_____
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CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. § 809.80(4) that, on the 15th day of July, 2016, I mailed 10 copies of the Brief of the Plaintiff-Respondent, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

Dated this 15th day of July, 2016.

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