RECEIVED
06-26-2017
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2017AP331 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Michael A. Johnson,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

Appealed from a Judgment of Conviction Entered in the Circuit Court of Calumet County, Wisconsin,
the Honorable Judge Jeffrey S. Froehlich Presiding.
Trial Court Case No. 2016CM31

By: **Nathan F. Haberman**
District Attorney
Calumet County
State Bar No. 1073960

206 Court Street
Chilton, Wisconsin 53014
(920)849-1438

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases cited:

STATEMENT OF THE ISSUE

In light of the trial court's finding of facts, during the Badger stop, would a reasonable person conclude they are free to leave when the officer asked for consent to search?

Trial Court Answered: **Yes.**

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe that oral argument or publication is necessary in this case because the issues raised on appeal will be fully developed in the briefs submitted to the Court and the issue involves the application of well-settled rules of law to a recurring factual situation.

STATEMENT OF THE CASE

On December 19, 2015, Officer Robert Baldwin of the New Holstein Police Department conducted a traffic stop at approximately 2:38 am on Milwaukee Drive in the City of New Holstein, Calumet County, Wisconsin. (R. 3 at 1.) The driver and sole occupant of the vehicle was Michael A. Johnson, the defendant-appellant. (*Id.* at 2.) Officer Baldwin had previously observed this vehicle traveling towards the officer and pass the officer with the vehicle's bright lights activated. (*Id.*) Officer Baldwin

made contact with Mr. Johnson through the driver's side window, which had been opened only a couple of inches. (*Id*.) During this time Mr. Johnson was smoking a cigarette and blowing the smoke through the cracked window. (*Id*.)

Officer Baldwin ultimately issued written warnings to Mr. Johnson for failing to dim his headlights and for not having proof of insurance. (*Id*.) When Officer Baldwin returned to the vehicle to issue Mr. Johnson's warnings, Officer Baldwin had Mr. Johnson step outside of the vehicle. (*Id*.) After explaining the warnings, Officer Baldwin informed Mr. Johnson that he was free to leave. (*Id*.) After both had turned away from each other and after they began walking away, Officer Baldwin asked Mr. Johnson "Do you have any drugs, weapons, or alcohol in the vehicle?" (R. 33 at 34:9.) Mr. Johnson replied "No." (*Id*. at 34:10.) Officer Baldwin then asked "Can I do a search of the vehicle?" (*Id*. at 34:13.) Mr. Johnson replied "I'm not the owner of the vehicle." (*Id*. at 34:15.) Officer Baldwin then provided an explanation to Mr. Johnson that an operator of a vehicle can give consent. (*Id*. at 34:16-21.) At that point, Mr. Johnson either gave consent to search, or Officer Baldwin asked Mr. Johnson one more time if the officer could search the vehicle. (*Id*. at 34:21-35:1.) Mr. Johnson then gave consent to search the vehicle. (*Id*. at 26:2-7.)

After receiving consent to search, Officer Baldwin offered to Mr. Johnson the opportunity to sit inside the squad car to stay warm given the weather conditions. (*Id*.

at 26:22-27:5.) Prior to Mr. Johnson sitting in the squad car, Officer Baldwin conducted a pat down of Mr. Johnson, locating two bags of marijuana in Mr. Johnson's pants pocket. (R. 3 at 2.) Upon searching the vehicle, Officer Baldwin located flakes of marijuana. (*Id*.)

Mr. Johnson was subsequently charged with possession of tetrahydrocannabinols (THC) and possession of drug paraphernalia in Calumet County case 16CM31. (R. 3.) Based on these same facts, Mr. Johnson was also charged with operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood, contrary to Wis. Stat. § 346.63(1)(am), in Calumet County case 16CT47. (*See* R. 33 at 48:6-22.)

On June 1, 2016, a motion hearing was held in 16CM31 before the Honorable Judge Jeffrey Froehlich. (R. 33.) Mr. Johnson argued that he did not feel as if he was free to leave when he gave consent to the officer, and thus, there was an unlawful detention. (R. 33 at 39:22-40:3.) The Court, having received testimony from Officer Baldwin and Mr. Johnson, denied Mr. Johnson's motion, holding that a reasonable person in Mr. Johnson's position would have believed they were free to leave. (*Id*. at 47:6-21.)

The Court found the testimony of Officer Baldwin to be credible and found Mr. Johnson not credible. (*Id*. at 45:6-13.) The Court concluded that Mr. Johnson was not believable because Mr. Johnson did not have a clear recollection of what occurred. (*Id*. at 45:5.) The Court

explained that during the testimony Mr. Johnson did not remember the specific questions that were asked of him, Mr. Johnson could not remember the basis for the traffic stop, and Mr. Johnson was under the influence of a hallucinogen, marijuana. (*Id*. at 44:19-45:5.) The Court further observed Mr. Johnson's demeanor during the testimony. (*Id*. at 45:6-10.) The Court described Mr. Johnson as looking confused, was mumbling, very quiet and difficult to understand, and has a vested interest in the outcome. (*Id*.)

On the other hand, the Court recognized that Officer Baldwin was performing a standard investigatory technique, the classic Badger stop, which is trained to law enforcement. (*Id*. at 44:5-18.) With this backdrop, the Court concluded that Officer Baldwin's testimony was more credible than Mr. Johnson's testimony.

When considering the totality of the circumstances, the Court found that the conversation between Officer Baldwin and Mr. Johnson was brief, there was no raised voice or tone, no weapons were displayed, and there was no physical contact with Mr. Johnson. (*Id*. at 45:22-47:5.) Although a second officer was present during the traffic stop, the Court found that the second officer did not participate in any way. (*Id*. at 45:25-46:1.) The Court further found that Mr. Johnson did not provide an unequivocal answer to Officer Baldwin's request to search. (*Id*. at 45:14-21.) Thus, it was not improper for the officer to ask the question again and Mr. Johnson's consent was freely given. (*Id*. at 47:12-20.)

Mr. Johnson subsequently entered a no contest plea to the possession of the THC charge in Calumet County case 16CM31, while the possession of drug paraphernalia charge was dismissed and read-in. (R. 23.) Mr. Johnson was sentenced to thirty days jail, but that sentence was stayed pending this appeal. (*Id*.)

ARGUMENT

A reasonable person would have believed they were free to leave after the traffic stop concluded and when Officer Baldwin asked for consent to search the vehicle given the Honorable Judge Froehlich's findings of fact which are analogous to those found in *State v. Williams.*

This case involves the application of the *Mendenhall* test to determine whether a person was "seized" at the time the person consented to the search. *State v. Williams*, 2002 WI 94, ¶ 4, 255 Wis. 2d 1, 646 N.W.2d 834 (*citing United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)). Whether a defendant's constitutional rights have been violated is reviewed in a two-step process. *State v. Hogan*, 2015 WI 76, ¶ 32, 364 Wis. 2d 167, 868 N.W.2d 124. First, the circuit court's findings of fact are upheld unless clearly erroneous. *Id*. Second, the constitutional principles are then independently applied to those facts. *Id*.

The *Mendenhall* test was created with the United States Supreme Court to test whether a particular police contact constitutes a seizure for purposes of the Fourth

Amendment. *Williams*, 2002 WI 94, ¶ 21. Accordingly, "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 554-55.

The *Mendenhall* test "is necessarily imprecise because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Williams*, 2002 WI 94, ¶ 23 (*quoting Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988)). The test is objective, focusing on a reasonably innocent person. *Williams*, 2002 WI 94, ¶ 23.

The *Mendenhall* decision further provided examples of circumstances or factors that may support a conclusion that a reasonable person would have believed that he or she was not free to leave: (1) the threatening presence of several officers; (2) the display of a weapon by an officer; (3) some physical touching of the person by an officer; or (4) the use of language or tone of voice indicating compliance with the officer's request. *Mendenhall*, 446 U.S. at 554-55.

While these factors would not be exhaustive to the issue, the Court did indicated "[i]n the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of the person." *Id*.

As a general rule, police questioning alone is unlikely, by itself, to result in a Fourth Amendment violation. *INS v. Delgado*, 466 U.S. 210, 216, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984). The fact that a person may spontaneously and voluntarily respond to the officer's questions is not enough to transform an otherwise consensual exchange into an illegal seizure. *Williams*, 2002 WI 94, ¶ 28 (citing *Delgado*, 466 U.S. at 216; *United States v. Drayton*, 536 U.S. 194, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002)).

In *Williams*, the defendant was stopped for speeding by a state trooper. *Williams*, 2002 WI 94, ¶ 2. The trooper issued a warning citation and returned paperwork to the defendant, then said "[we]'ll let you get on your way then." *Id.* The trooper and the defendant shook hands. *Id.* After the trooper turned and took two steps towards his squad car, he abruptly turned around and asked the defendant if "he had any guns, knives, drugs, or large amounts of money in the car, and asked permission to search." *Id.* The defendant denied having any items and gave consent to search the vehicle. *Id.* Inside the vehicle, the trooper located heroin and a gun. *Id.*

In *Williams*, the trooper explained that "he had 'a Badger going,'" referring to a law enforcement interdiction technique to obtain consent to search the vehicle. *Id.* ¶ 7. During the traffic stop, an assisting county deputy arrived and was present at the vehicle during the traffic stop and also present when the defendant granted consent to search the vehicle. *Id.* ¶ 8.

The Wisconsin Supreme Court held that the traffic stop had concluded when the trooper told the defendant he was free to go and began walking away. *Id*. ¶ 26. The court held that a reasonable person would have felt free to decline to the officer's questions after this exchange and go on his way. *Id*. ¶ 28. "The officer did nothing, verbally or physically, to compel [the defendant] to stay." *Id*.

The court reasoned that although the trooper's questions were somewhat louder and more assertive in tone, they were not accusatory in nature and the exchange was largely non-confrontational. *Id*. ¶ 31. Further, the presence and behavior of the back-up officer was not so intimidating or "threatening" as the officers did not display their weapons or physically touch the defendant. *Id*. ¶ 32. Even though the emergency lights were activated they did not factor into a seizure as officers often leave their lights on for safety until everyone has left the scene. *Id*. ¶ 33. Finally, the location and time of night did not create a coercive atmosphere despite occurring on a rural section of the interstate at 2:30 am. *Id*. ¶ 34. Thus, a reasonable would have felt free to leave despite the questions posed by the officer.

In *State v. Jones*, the court reached the opposite conclusion as the Supreme Court did in *Williams*. *State v. Jones*, 2005 WI App 26, ¶ 23, 278 Wis. 2d 774, 693 N.W.2d 104. In *Jones*, however, the court recognized that there was a significant factual discrepancy between the "Badger stop" technique deployed in *Williams* and the

one deployed in *Jones*. *Id*. ¶ 22. The deputy in *Jones* failed to communicate, verbally or by actions, to the defendant that the traffic stop had concluded. *Id*. Unlike the facts of *Williams*, the deputy did not tell the defendant he was free to leave nor shook his hand. *Id*.

In the case at bar, here is no dispute that this scenario involves the "classic Badger stop" as described in *Williams*.

The Honorable Judge Froehlich made certain findings of fact relating to the series of events. While Mr. Johnson seems to gloss over this, the factual findings are significant as the law must be applied to ***those*** facts. *Hogan*, 2015 WI 76, ¶ 32. The appellate court must give deference to the trial court's findings of facts unless clearly erroneous. *Jones*, 2005 WI App 26, ¶ 8.

Judge Froehlich noted that "there's a difference in the testimony between Mr. Johnson and Officer Baldwin right off the bat concerning what the first question was." (R. 33 at 44:2-4.) According Mr. Johnson's testimony, the first question asked by Officer Baldwin was "can I search." (*Id*. at 44:5-6.) Yet, Officer Baldwin explained that his first question was "whether there was any drugs, weapons, or alcohol in the vehicle." (*Id*. at 44:6-10.)

Judge Froehlich, in reaching his conclusion that Mr. Johnson's testimony was not credible, outlined a series of observations and factors that the court considered. (*Id*. at 44:11-21.) Mr. Johnson had a poor recollection of questions that were asked of him, he did not identify the correct basis for the traffic, was under the influence of a

hallucinogen.[1] (*Id.*) The Court further observed during Mr. Johnson's testimony he looked confused and uncertain, and he had an interest in the outcome of the case. (*Id.*) The only reasonable conclusion here is that Judge Froehlich properly exercised his discretion as the fact finder in reaching his findings.

The significance of Judge Froehlich's findings of facts is the chronology of the exchange between Mr. Johnson and Officer Baldwin.

> [T]he [first] question was asked was about drugs, weapons, and alcohol. The answer was no. Officer Baldwin then asked for consent to search the vehicle, and the explanation from Mr. Johnson is, well, it's not my car, and I mean, it's not an unequivocal no, and the officer then explains that the operator can give permission or give consent to have the vehicle searched and then either asked one more time or Mr. Johnson just said, yeah, go ahead and search.

(*Id.* at 45:13-21.) This chronology of the exchange is different than the chronology according to Mr. Johnson's testimony (*Id.* at 7:8-9:14) and as argued in Mr. Johnson's brief (App. Br. at 6).

With Judge Froehlich's findings of facts in mind, pursuant to the *Mendenhall* analysis and applying *Williams*, a reasonable person would have felt free to leave.

---

[1] Officer Baldwin is also a certified Drug Recognition Expert (DRE). (R. 33 at 28:9-25.) He placed Mr. Johnson through a DRE evaluation after the search and arrest of Mr. Johnson. (*Id.*) This resulted in Mr. Johnson's subsequent conviction for operating with a detectable amount of a restricted controlled substance in his blood in Calumet County case 16CT47.

The facts here are analogous to those in *Williams*. In both cases the traffic stop concluded with a verbal indication that the driver was free to leave. In addition, there was a physical demonstration that the traffic stop had concluded. Here, Officer Baldwin took steps back towards his squad car. In both cases, there were two officers present yet there is nothing to suggest the officers were intimidating or threatening. There were no firearms used, nor physical actions by officers against the driver.

The one difference here, compared to *Williams*, further weighs in favor of a non-custodial interactions. Here, Officer Baldwin did not raise his voice or change his tone of voice. In *Williams*, the officer had a louder and more assertive tone. Although this is a minor distinction, the distinction is one that favors a consensual search.

Officer Baldwin's first question to Mr. Johnson after the conclusion of the traffic stop was whether Mr. Johnson had any drugs, weapons, or alcohol in the vehicle. This is identical to the interaction in *Williams*, and distinguishable from the facts in *Jones*, because the traffic stop here and in *Williams* has a clear ending marked by verbal and physical cues from the officer.

In response to this first question, Mr. Johnson voluntarily engaged in a conversation with Officer Baldwin. Mr. Johnson denied drugs, weapons, or alcohol were present. After that, Officer Baldwin asked to search the vehicle. As Judge Froehlich explained, Mr. Johnson did not provide an unequivocal response to Officer

Baldwin's request to search. Rather, he said "I'm not the owner of the vehicle." (R. 33 at 34:15.) Officer Baldwin also described this in his testimony: "I interpreted it as a I don't know if I can give consent or not." (*Id*. at 30:18-21.)

As a result, Officer Baldwin explained to Mr. Johnson that the operator of a car can give permission to search. Officer Baldwin testified:

> I don't recall if I had to ask him again or not, and the only reason that I would have asked again was to get clarification from him as to whether he was allowing for the consent or not, and at no time did he ever say no, so if I asked more than once, it was because I had not gotten a direct answer from him.

(*Id*. at 34:21-35:1.)

Judge Froehlich, upon concluding that a reasonable person would have felt free to leave, applied the *Mendenhall* factors, and put some weight on the very brief nature of the conversation between Mr. Johnson and Officer Baldwin (less than a minute). (*Id* at 45:11-47:11.)

Contrary to Mr. Johnson's argument in his brief, Officer Baldwin did not refuse to accept Mr. Johnson's repeat refusals to search the vehicle. Mr. Johnson argues that he refused Officer Baldwin's request three times before eventually agreeing to search upon being asked a fourth time. (App. Br. at 6.) This argument is clearly contrary to the findings of fact. Because the findings of fact are not clearly erroneous, Mr. Johnson's argument must logically fail.

The explanation provided by Officer Baldwin regarding Mr. Johnson's statement about not owing the car is similar to statements made by the defendant in *Mendenhall*. In that case, the defendant was told by the female policer that the search would require the removal of the defendant's clothing. *Mendenhall*, 446 U.S. 544 at 559. The defendant replied "she had a plane to catch." *Id*. This was not viewed as an equivocal refusal to permit a search. *Id*. This statement was viewed as "simply an expression of concern that the search be conducted quickly." *Id*. In response, the police officer stated "there would be no problem if nothing were turned up by the search." *Id*.

The assertion in *Mendenhall* is similar to the conversation that occurred in the case at bar. Mr. Johnson asserted an expression of concern regarding the legality of providing consent for a vehicle that was not owned by Mr. Johnson. Officer Baldwin, in turn, provided an explanation and a similar assurance as the one made in *Mendenhall*. In both cases, the consensual search followed.

Considering all the facts here, Judge Froehlich accurately observed that these facts are the "inoffensive contact discussed in the *Mendenhall* case." (R. 33 at 47:4-5.) A reasonably innocent person would have felt free to walk away and refuse the officer's request to search. This case mirrors the facts from *Williams*; therefore the conclusion should also mirror *Williams*.

CONCLUSION

Officer Baldwin's execution of a Badger stop and Mr. Johnson's subsequent consent to search was constitutionally permissible. Officer Baldwin properly signified the conclusion of the traffic stop both verbally and by walking away. Upon Officer Baldwin's request, Mr. Johnson granted consent to search the vehicle. Applying the *Mendenhall* factors to Judge Froehlich's findings of facts demonstrates that this case is analogous to *Williams*. Thus, a reasonable person would have felt free to leave and deny the request to search the vehicle.

This Court should affirm Judge Froehlich's order denying Mr. Johnson's motion.

Respectfully submitted, this _____ day of June, 2017.

_____

Nathan F. Haberman
District Attorney
State Bar No. 1073960
Attorney for Plaintiff-Respondent
206 Court Street
Chilton, Wisconsin 53014
Tel: (920)849-1438

CERTIFICATION

I certify that this Response Brief conforms to the rules contained in Wis. Stats., § 809.19(3) and (8). It uses proportional serif font with 13 point body text, 11 point text for quotes and footnotes, leading above the minimum of 2 points, maximum of 60 characters per full line of body text. The length of this brief is **3,129** words.

I also certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I further certify that the electronic copy of this Response Brief is identical to the paper copy of the brief which has been filed with the Wisconsin Court of Appeals.

Dated this _____ day of June, 2017.

_____

Nathan F. Haberman
District Attorney
State Bar No. 1073960
Attorney for Plaintiff-Respondent
206 Court Street
Chilton, Wisconsin 53014
Tel: (920)849-1438