STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2018AP000320-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM J. SMITH,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in Milwaukee County Circuit Court, the Honorable David C. Swanson, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mr. Smith was subjected to a constitutionally cognizable seizure when he yielded to Detective Martinez's repeated requests that he enter an enclosed space for further questioning.[1]

As a starting point, Mr. Smith takes exception with the State's claim that Mr. Smith was contacted "[i]n the course of pursuing a fugitive." (State's Br. at 1). While the two detectives were out and about that day in order to hopefully track and capture a fugitive from justice, there was no arguable "pursuit" at the time they chose to contact Mr. Smith. Instead, as Mr. Smith has argued in the opening brief, law enforcement's only information was that Mr. Smith was tangentially connected to a car that, in turn, *may* have been connected to a fugitive. (Opening Br. at 16-17). In fact, in this case police actually made the decision to disregard the car and to instead pursue a relatively open-ended investigation involving two unidentified men, neither of whom they had any reason to believe were involved in actual criminality. (25:35).

Moving to the issue of whether Mr. Smith was seized, the State argues that a reasonable person would have felt free to terminate this encounter. (State's Br. at 4-5). They therefore suggest that there was no constitutional violation as "[p]olice 'do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals

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[1] The State observes that Mr. Smith has not concretely alleged the moment of seizure in his opening brief. (State's Br. at 6). The State is correct that the seizure was totally effectuated once Mr. Smith yielded to the actions of law enforcement—the moment he agreed to accompany the officer to the vestibule.

on the street or in other public places and putting questions to them if they are willing to listen." (State's Br. at 5, quoting ***United States v. Drayton***, 536 U.S. 194, 201 (2002)). However, this encounter far exceeded the benign consensual encounter contemplated in the quote language.

Rather, as Mr. Smith has argued at length in the opening brief, the police clearly used their tone, body language, and actual words to communicate that Mr. Smith was not free to terminate this encounter and go about his business. That is sufficient proof, under well-settled authorities, to show that a seizure has occurred. *See* ***United States v. Richardson***, 385 F.3d 625, 629 (6th Cir. 2004) ("[W]ords alone may be enough to make a reasonable person feel that he would not be free to leave"); ***United States v. Mendenhall,*** 446 U.S. 544, 554-55 ("use of language or tone" factor in determining whether a seizure has occurred). Thus, contrary to the State's suggestion, the totality of the circumstances test does not require Mr. Smith to meet the extra requirements imposed in the State's brief. (State's Br. at 5) ("Martinez did not have his gun or handcuffs out, he did not touch Smith, and he did not yell or even raise his voice.").

The State then makes several arguments in support of their conclusion that the present appeal is "without merit." (State's Br. at 7). First, the State criticizes Mr. Smith's use of argumentative language in the argument section of his brief. (State's Br. at 7). Mr. Smith has labeled law enforcement's entry into the store as "dramatic." (State's Br. at 7). The State disagrees that there is any support for that contention and, even if there was, that it is irrelevant to the totality of the circumstances analysis. (State's Br. at 7). Mr. Smith stands by his original characterization, which he believes is supported by record evidence. In this case, the record shows that two "geared up" officers walked into a very small and sparsely

occupied store, during morning business hours and announced their presence by identifying themselves as law enforcement. (25:32; 25:76; 25:6; 25:16; 25:41) (While there was no explicit testimony as to how many individuals were in the store, the testimony only ever discussed two men as being present—Mr. Smith and his companion). Undersigned counsel feels comfortable calling this a "dramatic" entrance. The sudden intrusion of law enforcement into the routines of daily life is *always* "dramatic." While not an essential point, Mr. Smith nevertheless wishes to emphasize the context underlying this encounter, as that context—which is useful in evaluating the "tone" of the encounter—is relevant under this Court's "totality of the circumstances" analysis.

The State also quibbles over whether Mr. Smith was "asked" to stop or whether he was "told" to stop. (State's Br. at 7). Respectfully, this is a distinction without a difference. The fact that an express command—stop—is embedded in an interrogative form does not change the fundamental contextual understanding of the content conveyed, especially when the utterance is made in response to Mr. Smith beginning to walk away. In any case, while Mr. Smith did use the word "asked" instead of told, he also testified that the detective "came in the store and he told me, what are you doing, he is a sheriff." (25:63). The State's semantic arguments should not obscure the fundamental point: Mr. Smith tried to walk away and he received an unambiguous communication from an armed officer to do otherwise.

Third, the State takes issue with Mr. Smith's arguments about the physical space and how the detectives used that space to convey to Mr. Smith that he was not free to leave. (State's Br. at 7). The State is correct that Mr. Smith testified that he would have to walk past one of the officers to exit the store. (25:74). The record is clear that Detective

Martinez was positioned directly in front of the door. (25:75-76). However, Detective Wall also testified that, in order for Mr. Smith to go into the vestibule (leading to the exit) he had to walk "behind" the detective. (25:24). Thus, Mr. Smith would not only have to "brush up against" Detective Martinez, he would have also had to walk towards and behind Detective Wall. (25:75). The spatial dynamics support Mr. Smith's argument.

Fourth, the State argues that the officers being armed is a "non-starter." (State's Br. at 7). However, Mr. Smith has not argued that this fact alone establishes the coerciveness of the encounter, rather, he has consistently pointed this fact out in order to give context and detail to the actions of the detectives—an important task considering the totality of the circumstances inquiry at play.

Fifth, the State disagrees that the request from Detective Martinez that Mr. Smith remove his hand from his pocket is at all significant. (State's Br. at 7). However, Mr. Smith persists in his argument that a reasonable person would take this "request" into consideration when determining whether they were free to leave. Citizens in our society are not yet accustomed to receiving arbitrary requests from armed agents of the State as to where and how one places one's hands on one's own person. A request to show the hands is thus more commonly associated with a coercive police encounter.

Finally, the State asserts that "Smith's testimony that Martinez's tone, affect and approach led him to feel seized is not supported by the evidence." (State's Br. at 7). The State argues that Mr. Smith was "tepid" in his testimony. (State's Br. at 7). However, Mr. Smith testified at length about his interaction with law enforcement. He was consistent and clear

about the facts. While the circuit court did not make extensive findings of fact, it did not find Mr. Smith incredible and actually stated that his testimony was "pretty consistent" with that of the State's witness. (25:86). It is therefore unclear why the State believes Detective Martinez's account—which leaves out considerable detail—should be privileged in the course of this appeal. (State's Br. at 8).

The State concludes and concedes that Mr. Smith may have felt nervous or uncomfortable, but denies that a reasonable person would not have felt free to walk away. (State's Br. at 8). That assertion ignores the basic reality of this interaction, in which a police officer refused to honor Mr. Smith's assertions that he did not want to talk while also using assertive verbal and non-verbal communication to compel Mr. Smith's "cooperation."

Here, Mr. Smith tried numerous times to assert the right at issue—the right to walk away. His assertions were not respected. Instead, the testimony shows that the officer instead approached Mr. Smith in an aggressive matter, adopting a tone and demeanor that signaled to Mr. Smith that he was not free to leave. Rather than holding that Mr. Smith ought to have tried to literally push his way past this officer—actions which may have ended tragically for Mr. Smith—this Court should endorse the commonsense reading urged by Mr. Smith and find that a constitutionally cognizable seizure occurred.

II. Reasonable Suspicion.

The State does not address whether reasonable suspicion existed at the time law enforcement seized Mr. Smith. (State's Br. at 1). Because they have failed to respond, that issue is conceded in Mr. Smith's favor. "'Respondents on appeal cannot complain if propositions of appellants are taken

as confessed which they do not undertake to refute.'" ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493, (Ct. App. 1979) (quoting ***State ex rel. Blank v. Gramling***, 219 Wis. 196, 199, 262 N.W.2d 614 (1935).

CONCLUSION

Mr. Smith therefore asks this Court to reverse the circuit court's order denying the defense motion and to remand for further proceedings.

Dated this 24th day of July, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,572 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 24th day of July, 2018.

Signed:

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