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STATE OF WISCONSIN

06-25-2019

C O U R T O F A P P E A L S

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT IV

CASE NO. 2019AP000350

COUNTY OF WOOD,

Plaintiff-Appellant,

v.

TREVOR J. KRIZAN,

Defendant-Respondent.

ON APPEAL FROM AN ORDER OF THE WOOD COUNTY CIRCUIT
COURT, THE HONORABLE NICHOLAS J. BRAZEAU, JR.,
PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

Submitted by:

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STATEMENT OF THE ISSUE

**DID DEPUTY DEAN LAWFULLY MAKE CONTACT WITH KRIZAN
BASED ON THE TOTALITY OF THE CIRCUMSTANCES?**

The Trial Court Answered: No.

Plaintiff-Appellant asks this

Court to Answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. It is believed that the briefs of the parties will adequately present the issue. Publication is not requested. The law on the issue presented is well settled.

STATEMENT OF FACTS AND OF THE CASE

On April 26, 2018, at approximately 1:59 a.m., Deputy Dean of the Wood County Sheriff's Department was on routine patrol and was checking the Jim Freeman Memorial Boat Landing in the City of Nekoosa, Wood County, Wisconsin. (Transcript pg. 4, lines 5-19.) As Deputy Dean pulled into the parking lot, he observed a vehicle in a truck and trailer "stall". (Trans. pg. 4, lines 19-22.) A salt shed was present at the location and shielded the vehicle from view from the road. Upon observing the vehicle, Deputy Dean pulled behind the vehicle and activated the spotlight and takedown lights on his marked squad car. (Trans. pg. 4, lines 23-25 - pg. 5, line 1.) Deputy Dean observed two people inside the vehicle. (Trans. pg. 5, line 3.)

Deputy Dean testified that part of his concern upon seeing that vehicle was the fact that it was in a parking lot/boat landing and the vehicle did not have a trailer leading him to believe the vehicle was not there for purposes of launching a boat. (Trans. pg. 5, lines 8-13.) The other concern he expressed was the fact the vehicle was parked very close to the building such that it was shielded from view from the road and

the vehicle did not have any lights on at that time.
(Trans. pg. 5, lines 19-23.)

Deputy Dean approached the vehicle on the driver's side and asked for identification. The driver was identified as Trevor Krizan. (Trans. pg. 6, lines 5-6, 11-13 and 18-20.) Deputy Dean spoke with the occupants about why they were at that location. They advised him they had been at a bar and there had been a fight. They left the bar and drove to their present location in order to talk. (Trans. pg. 7, lines 11-13.) Upon speaking with Krizan, Deputy Dean observed that his eyes were glassy and his speech was slurred. (Trans. pg. 7, lines 18-19.) Deputy Dean returned to his squad car to run a record check on the occupants and returned to their vehicle to make contact with Krizan in order to further investigate the slurred speech and glassy eyes. (Trans. pg. 7, line 21 - pg. 8, line 1.)

Deputy Dean stated that the parking lot/boat landing is open to the public and is open 24/7. (Trans. pg. 13, lines 6-8; pg. 14, lines 23-24.) Deputy Dean also agreed that there were no restrictions that only vehicles with boats could be in the parking lot/boat landing. (Trans. pg. 13, lines 9-11.) Deputy

Dean said that at the point in time when he observed the occupants in the vehicle it did not appear that they were doing anything illegal. (Trans. pg. 13, lines 12-20.)

When asked why he was at that parking lot during his shift, Deputy Dean said he was just on normal patrol and that he likes to check parking lots and parks to make sure no one's there, make sure everything is safe and check on buildings in the area. (Trans. pg. 15, line 21 - pg. 16, line 7.)

Deputy Dean was asked what his thought process was when he observed the vehicle. Deputy Dean said the things that stood out in this thoughts were: it was 2:00 a.m., the vehicle did not have a trailer and did not appear to be there for the intended purpose of that lot (launching a boat), it's a large parking lot and they could have parked anywhere to talk but they parked close to the building and in a manner that their vehicle was obstructed from view from the road and their lights were not on. Deputy Dean said the vehicle was also obviously occupied and he wanted to make sure everyone was okay. (Trans. pg. 16, lines 11-25.) Deputy Dean also said that he was asking himself, "Why

are you parked here?" and is there something more I should be looking for. (Trans. pg. 16, line 23 - pg. 17, line 1.)

Deputy Dean said he also had to be concerned with whether or not there might be more people out there that he was not able to see. (Trans. pg. 17, lines 6-12.) Deputy Dean said he also recognized that the people in the vehicle might need assistance, they could be lost or there might be a medical reason they were there. Deputy Dean said he also made contact with the vehicle to see if any of those concerns were present. (Trans. pg. 17, lines 13-19.) Deputy Dean said when he entered the parking lot he was not looking for a vehicle and was not aware one was there until he looped around to start leaving. Deputy Dean said when he observed the vehicle it surprised him and caught his attention. (Trans. pg. 18, line 25 - pg. 19, line 2.)

After arguments from counsel, the trial court analyzed the facts and summarized, "nothing illegal is happening, so there can't be any . . . there is no reasonable suspicion for anything because everyone here agrees that there's nothing going on. So it's got to be community caretaker, but if it's community

caretaker, what exactly are we allowing here?" (Trans. pg. 33, lines 10-14.) In conclusion the trial court said, "so what's the reason you're making that contact then? To determine what they're doing? I don't think you get to determine what they're doing." (Trans. pg. 37, lines 3-5.)

The trial court granted Krizan's motion to suppress the evidence of the field sobriety tests and the blood test results. With that evidence suppressed, the State dismissed the case and pursued this appeal.

ARGUMENT

DEPUTY DEAN LAWFULLY MADE CONTACT WITH KRIZAN BASED ON THE TOTALITY OF THE CIRCUMSTANCES.

In reviewing a motion to suppress, the Court will uphold the circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence. Whether those facts satisfy the constitutional requirement of reasonableness is a question of law and this Court is not bound by the lower court's decision on that issue. State v. Waldner, 206 Wis.2d 51, 54, 556 N.W.2d 681 (1996).

In State v. Waldner, the Court held that under certain circumstances police may detain an individual upon less than probable cause for arrest.

Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity. Anderson, 155 Wis.2d at 84. Thus, when a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, **police officers have the right to temporarily detain the individual for the purpose of inquiry.** Police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop. If a reasonable inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, **the officers have the right to temporarily detain the individual for the purpose of inquiry.** Waldner, pg. 60. (Emphasis added.)

In State v. Williams, 2001 WI 21, 241 Wis. 2d 631, 623 N.W.2d 106, the court held that the validity of a stop is based upon reasonable suspicion which is determined by the totality of the facts and circumstances. The Waldner Court also relied on the totality of the circumstances.

The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts. That is what we have here. These facts gave rise to a reasonable suspicion that something unlawful **might well be afoot.** Pg. 58. (Emphasis added.)

The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his or her shoulders and thus possibly allow a crime to occur or a criminal to escape. The law of investigative stops allow police officers to stop a person when they have less than probable cause. Moreover, **police officers are not required to rule out the possibility of innocent behavior before initiating a brief stop.** Pg. 59. (Emphasis added.)

See also, State v. Young, 2006 WI 98, ¶21, 294 Wis.2d 1, 17, 717 N.W.2d 729.

Although many innocent explanations could be hypothesized as the reason for Waldner's actions, a reasonable police officer charged with enforcing the law **cannot ignore the reasonable inference that they might also stem from unlawful behavior.** Waldner, supra pg. 61. (Emphasis added.)

Deputy Dean testified as to a number of factors that came into play, leading to him making contact with the vehicle and Krizan. Defense counsel argued and the trial court found that Krizan could have been involved in any number of legal activities, therefore, Deputy Dean's contact was illegal and without lawful authority. As Waldner and Young stated, if a reasonable officer makes a reasonable inference from the totality of the facts before him, that criminal activity might be afoot, that officer is **not** required to ignore that inference and rely on the fact that it may very well be innocent conduct taking place. As

Waldner held, *supra*, police officers have the right to temporarily detain an individual for the purpose of inquiring why they are at the location where law enforcement contacts them.

In order for Krizan's argument for suppression to have any merit, he has to show that he was seized by Deputy Dean at the point in time when he approached their vehicle. If Krizan was not seized, the Fourth Amendment protections do not come into play. Deputy Dean testified that upon noticing the vehicle in the parking lot he activated his spot light and take-down lights. He did not activate his squad car emergency lights. That is not the type of display of authority that would suggest to a person that they are not free to leave. The Wisconsin Supreme Court, in State v. Young, 2006 WI 98, 294 Wis.2d 1, 717 N.W.2d 729, stated, "We are reluctant to conclude that the positioning of the officer's car, together with the lighting he employed, necessarily involved such a show of authority that 'a reasonable person would have believed that he was not free to leave.'" ¶69 (quoting United States v. Mendenhall, 446 U.S. 544 at 554, 100 S.Ct. 1870 (1980)).

Also illustrative is State v. Macho, 2012 WI App 73, 342 Wis.2d 251, 816 N.W.2d 352. An unpublished one judge decision, the Court can give that decision whatever weight the Court feels it deserves.

Similar to our case, the officer in Macho pulled up behind the defendant's car, which was running and parked on the street across from her residence, and shined his spotlight on her vehicle. The officer could not remember if his emergency lights were activated or not. The Court of Appeals was asked to decide if the officer's conduct in pulling behind the defendant's car and shining his spotlight on her constituted a seizure to which the 4th Amendment protections applied. The Court, relying on Young, supra, held that the officer's actions did not amount to a seizure of the defendant. Macho, ¶8.

The facts in Macho are illustrative in relationship to the facts of our case. Young provides the basis for this Court to find that Deputy Dean's actions were reasonable and lawful and did not amount to the type of police conduct where reasonable suspicion was necessary to make contact with a citizen.

Similarly, the Court of Appeals in State v. Chapman, 2002 WI App 56, 251 Wis.2d 483, 640 N.W.2d 566, another unpublished one-judge decision, held that "law enforcement 'may approach citizens in public spaces and ask them questions without triggering the protections of the Fourth Amendment.'" ¶2. (Quoting United States v. Young, 105 F.3d 1, 5 (1st Cir.1997, which cited Florida v. Bostick, 501 U.S. 429, 434, 111 S.Ct. 2382 (1991).)

The facts in Chapman are illustrative in light of the facts of our case. In Chapman an officer sees a vehicle parked in the parking lot of a tavern and two people are sitting inside. Ten minutes later the officer drives by and the vehicle is still there and still occupied. The officer parked his car, walked across the street and approached the subject vehicle "just to see what they were doing". ¶4. As the officer was approaching the vehicle it started backing out. The officer knocked on the driver's window and, after some hesitation, the driver stopped and the officer was able to make contact with them.

The Court in Chapman quotes from United States v. Mendenhall, supra. The Mendenhall Court listed several

examples of conduct by law enforcement that would amount to a seizure of a person. "[T]he threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen, or use of language or tone of voice indicating that compliance with the officers' request might be compelled." Mendenhall, pg. 554. "Absent such evidence, an otherwise inoffensive contact between a member of the public and police cannot, as a matter of law, amount to a seizure of that person." Id. at 555.

Chapman is illustrative based on the facts of that case and how it relates to the facts of our case. Mendenhall provides this Court the basis to find that Deputy Dean's conduct in this case did not invoke the protections of the Fourth Amendment, his conduct was lawful and led to him discovery facts that did raise reasonable suspicion that a crime was being committed or had been committed and overrule the trial court's decision to suppress the evidence related to intoxication.

The trial court in this case concluded, "so what's the reason you're making contact with them? To determine what they're doing? I don't think you get to

determine what they're doing. They get - they have the freedom to do what they want to do at that stage." The Mendenhall Court disagrees with the trial court here. "Police officers are at liberty to address questions to anyone on the street because police officers, like all other citizens, enjoy the liberty to address questions to others." Supra, pg. 553.

Also on point with our case is County of Grant v. Vogt, 2014 WI 76, 356 Wis.2d 343, 850 N.W.2d 253. The facts in Vogt are very similar to the facts in this case.

The officer in Vogt observed a vehicle pulled into a boat landing parking lot during the early morning hours of December 25, 2011. Given the time of year and the fact the park was closed, the officer thought the conduct suspicious even though the boat landing/parking lot is always open. ¶5. The officer parked his squad car behind the defendant's car a little off to the driver's side. The officer did not have the emergency lights of his squad car activated but his headlights were on. ¶6. The officer approached the vehicle, which was running, observed two people inside and knocked on the window and motioned for the defendant to

roll down the window. ¶7. The defendant rolled down the window, the officer asked him what they were doing and during that exchange the officer noticed the defendant's speech was slurred and he could smell an odor of intoxicants coming from inside the vehicle. ¶8.

The Court in Vogt found that the officer did not have reasonable suspicion to believe a crime was being committed at the point the officer had contact with the defendant. So the Court had to decide whether the defendant was seized by the officer prior to rolling down the window. The Court held that the defendant was not seized by the officer knocking on the window. ¶39.

That is almost exactly what happened in our case. Deputy Dean may not have had a reasonable suspicion that a crime was being committed, had been committed or was about to be committed. But Deputy Dean, like the officer in Vogt had concerns about the fact there was a vehicle parked in this boat landing, in the early morning hours, parked in a manner where the vehicle was hidden from view from the roadway and was occupied by two people. Like the officer in Vogt, Deputy Dean approached the vehicle to find out why they were there.

Like the officer in Vogt, upon making contact with Krizan Deputy Dean made observations that gave rise to reasonable suspicion Krizan was committing, had committed or was about to commit a crime of operating while intoxicated.

The Court in Vogt said,

Ultimately, what Deputy Small did in this case is what any traffic officer might have done: investigate an unusual situation. . . . Deputy Small was acting as a conscientious officer. He saw what he thought was suspicious behavior and decided to take a closer look. Even though Vogt's conduct may not have been sufficiently suspect to raise reasonable suspicion that a crime was afoot, it was reasonable for Deputy Small to try to learn more about the situation by engaging Vogt in a consensual conversation. ¶51.

[W]hile the law applicable to the facts of this case does not condone a seizure, it does not forestall an officer's reasonable attempt at further inquiry. In similar circumstances, a person has the 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. A dutiful officer does not make a mistake by presenting a person with that choice. 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. ¶52.

That is exactly what happened in this case. Deputy Dean was acting as any conscientious officer would have acted under the same or similar circumstances. Deputy Dean may not have had reasonable

suspicion a crime was being committed at the time he made his initial contact with Krizan, but he took reasonable steps to attempt further inquiry to learn more about the situation by engaging Krizan in a consensual conversation. During that contact, Deputy Dean discovered facts that did create reasonable suspicion. That does not negate the voluntary interaction between Krizan and Deputy Dean prior to those facts being discovered.

The other aspect of Deputy Dean's contact with Krizan that the trial court did not give any consideration to was the community caretaker component of why he made contact with the vehicle. Deputy Dean testified about a number of factors that he took into consideration upon contacting Krizan's vehicle in the early morning hours in question.

Deputy Dean testified that his contact with Krizan was at approximately 2:00 a.m., there was no trailer so there was nothing to suggest they were at the boat landing for that purpose, their lights were not on. Deputy Dean testified that the driver could be lost, maybe tired and he wanted to make sure that everyone

was okay. Those are all reasonable considerations under the community caretaker function.

The facts of our case are quite similar to State v. Truax, 2009 WI App 60, 318 Wis.2d 113, 767 N.W.2d 369. In Truax the officer observed a vehicle pass him and then pull to the side of the road at approximately 12:30 a.m. The officer indicated at a suppression hearing that he found that behavior to be "unusual behavior". ¶3. The officer testified that he continued to monitor the vehicle in his rearview and side mirrors and no one exited the vehicle. The officer testified that he became concerned the driver may have a medical condition or a mechanical problem, might be lost or may be using a cell phone. ¶4. The officer made a u-turn, pulled in behind the suspect vehicle, activated the emergency lights on his squad car to alert approaching vehicles and approached the driver's side of the vehicle. The officer made contact with the driver and asked him if he needed assistance. ¶5. During that contact with the driver, the officer became aware of things that suggested the driver might be impaired. ¶6.

The Court in Truax found that the officer's conduct did satisfy the community caretaker function, even though there were no actual signs of distress, injury or mechanical problems. ¶16. Those facts are important in the analysis of this case because both defense counsel and, more importantly, the trial court talked about the fact that there were no actual signs of distress, injury or mechanical problems in this case. Trans. pg. 33, line 13 - pg. 34, line 3; pg. 36, lines 6 - 10. Because there were no signs of actual injury, distress or mechanical problems the trial court found that community caretaker did not apply to the facts of this case.

The State's position is that the facts of this case are not significantly different from Truax and therefore Deputy Dean was acting within the community caretaker function when he approached Krizan's vehicle and made contact with the occupants to find out why they were there and to see if everyone was okay. There is nothing in the law that requires that an officer has to see actual distress, actual injury or actual mechanical problems before the community caretaker function can come into play. All that is required is

that a law enforcement officer comes upon a scene and the totality of the circumstances aware to that officer justify making contact with a citizen to make sure that everything is okay and whether they need officer assistance or not.

As the Court stated in Truax, "the public has a substantial interest in police offering assistance to motorists who **may** need assistance, especially after dark and in less urban areas. (cite omitted) It was after midnight when Hansen noticed Truax's vehicle, therefore, it was after dark and at a time of night when people would be less likely to stop and offer assistance. The public interest in police attending to persons who **may** need roadside assistance and **the potential exigency** of any medical concern" weighed in favor of finding a high degree of public interest in law enforcement making contact with citizens in those situations. Truax, supra, ¶18. (Emphasis added.) The same is true of Deputy Dean's actions in this case. Deputy Dean described the possible reasons why Krizan's vehicle was in that boat landing parking lot. Reasons where the public would expect an officer to stop and render assistance. Exactly the same as the officer in

Truax described. The State believes this Court should hold accordingly that Deputy Dean was acting within the community caretaker function at the time he contacted Krizan's vehicle and its occupants.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court overrule the trial court's decision and send the matter back for further proceedings.

Dated this 18th day of June, 2019.

Respectfully submitted:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this brief is 19 pages.

Dated this 18th day of June, 2019.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, and attached, either as a separate document or as a part of this brief, is an appendix that 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 18th day of June, 2019.

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