STATE OF WISCONSIN

COURT OF APPEALS

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 DEFENDANT-RESPONDENT

Submitted by:

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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 OF THE CASE

On April 26, 2018 at approximately 1:49 a.m., Deputy Dean of the Wood County Sheriff's Department while on routine patrol pulled into the Jim Freeman Memorial Boat Landing parking lot in the City of Nekoosa, Wisconsin. The parking lot was open to the public (Trans. Pg.13, lines 6 and 7). The park is open 24/7 (Trans. Pg. 14, lines 23 and 24). The parking stalls are long enough that a car with a boat trailer could park in a stall (Trans. Pg. 14, line 1-7). However, there is no limit on people who don't have a trailer going there (Trans. Pg. 13, lines 9-11). There is no sign that says that only cars with trailers are allowed to park there (Trans. Pg. 14, lines 11-22). There is no sign stating what you can do when you've parked there (Trans. Pg 14, line 25 and Pg. 15, lines 1-3).

The officer stated when he pulled into the parking lot that night he noticed a vehicle parked in a truck and trailer stall relatively close to a salt shed which made it hard to see the car from the roadway (Trans. Pg. 4, lines 17-23). This caused him two concerns. First, that the vehicle was parked in a parking space big enough for a truck and boat trailer and second, the vehicle was parked very close to a building (the salt shed) (Trans. Pg. 5, lines 4-13).

The officer stated that by parking in this lot without a trailer that the defendant was using the parking lot for a purpose it wasn't designed for (Trans. Pg. 16, lines 11-14 and Pg. 17, lines 9-12). However, the only reason the officer says that the

defendant was using the lot for a purpose it wasn't designed for is that it is a landing area for boats (Trans. Pg. 18, lines 11-14). The officer acknowledges that there is no sign limiting the use of the parking lot to people with boats (Trans. Pg. 18, line 15-18). The officer was not aware of any ordinance barring people from parking there (Trans. Pg. 13, lines 21-23). The officer marked with a circle on Exhibits 1 and 2 the location where the defendant's car was parked (Trans. Pg. 10, lines 18-19). The exhibits demonstrate that there aren't any short parking stalls that would be set aside for cars without trailers.

In regard to the car being parked close to the salt shed, the officer said that he didn't pull into the parking lot because of the vehicle (Trans. Pg. 19, lines 4-5). When he pulled into the parking lot he saw the defendant's vehicle (Trans. Pg. 18, lines 23-25 and Pg. 19, lines 1-2). The parking lot was dark but it was easy to see the car when he lit up the area with his spotlight (Trans. Pg. 19, lines 3-17).

The officer acknowledges that he didn't see the vehicle doing anything illegal (Trans. Pt. 13, lines 12-16) and didn't see the defendant doing anything illegal (Trans. Pg. 13, lines 17-20). There were no lights on in the car and the car was not running. The lights are off in most parked cars (Trans. Pg. 15, lines 4-10).

There was no indication that the people in the car were in distress. When the officer turned on his lights, he could see two people in the car (Trans. Pg. 15, lines 11-14). The engine hood was closed (Trans. Pg. 17, lines 24-25). There was no

handkerchief on the window to signal distress. There was no one standing outside the vehicle waving for help. The officer made no observation that anyone was in distress (Trans. Pg. 18, lines 1-10).

The officer noticed the vehicle in the parking lot, he accosted the defendant by pulling in behind his vehicle and activated not only his spotlight to see the vehicle but also his "take down" lights (Trans. Pg. 4, lines 19-25 and Pg. 5 lines 1-3 and Pg. 6, lines 2-7). "Take down lights" are defined as extremely bright lights intended to blind a person looking at the cruiser. He then approached the vehicle and made contact with the individuals inside (Trans. Pg. 6, lines 2-9).

ARGUMENT

REASONABLE SUSPICION

In Terry v. Ohio, 392 U.S. 1, 22, 88 S.Ct. 1868, 20 L.Ed 2d 889 (1968) the U.S. Supreme Court allowed that, although investigative stops are seizures within the meaning of the Fourth Amendment, in some circumstances police officers may conduct such stops even where there is no probable cause to make an arrest.. Such a stop must be based on more than an officer's "inchoate and unparticularized suspicion or 'hunch'." id at 27, 88S.Ct. 1868. Rather, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, "reasonably warrant" the intrusion of the stop. Id at 21, 88 S.Ct. 1868. State vs. Post 301 Wis. 2d 1, 7 and 8, 733 N.W. 2d 634, 637.

¶12 Investigative traffic stops are subject to the constitutional reasonableness requirement. The burden of establishing that an investigative stop is reasonable falls on the state. State v. Post at ¶12, Wis. 2d, p. 9, N.W. 2d p. 638.

¶13 The determination of reasonableness is a common sense test. Id at ¶13, Wis 2d, p. 09, NW 2d, p. 638.

The reasonableness of a stop is determined based on the totality of the facts and circumstances. Id at ¶13, Wis. 2d, p. 9, N.W. 2d p. 638, State vs. Williams, 2001 WI 21, ¶22, 241 Wis. 2d 631 N.W. 2d 106: Guzy, 139 Wis. 2d at 679, 407 N.W. 2d 548.

¶8 In this case we examine whether a traffic stop violated Post's constitutional rights because it was not based on reasonable suspicion. The question of whether a traffic stop is reasonable is a question of constitutional fact. Id at ¶8, Wis. 2d, p. 6, N.W. 2d p. 636, 637. State vs. Knapp, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W. 2d 899. A question of constitutional fact is a mixed question of law and fact to which we apply a two step standard of review. State vs. Martwick, 2000 WI 5, ¶ 16, 231 Wis. 2d, 801, 604 N.W. 2d 552. We review the circuit court's findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles. id., State vs. Payano-Roman, 2006 WI 47, ¶ 16, 290 Wis. 2d 380, 714 N.W. 2d 548. Wis. 2d 6 and 7, N.W. 2d p. 636-637.

The trial court in this case reviewed the evidence and found that there was absolutely nothing in the evidence to provide a reasonable suspicion that any offense was afoot. The court stated:

"Authority exists under Wisconsin Stats 968.24 as well as a lot of case laws getting back to Terry versus Ohio, which is involved in numerous Wisconsin cases. In such a so-called Terry stop, which is not exactly what Mr. Knaapen's talking about here, but that's the kind of stop that we had here allows an officer to stop and detain a person if they have a reasonable suspicion grounded in specific articulable facts that an individual has committed or was committing or is about to commit a crime or a traffic civil forfeiture. I look at the totality of the circumstances." (Trans p. 32, lines 7-16)

"Here, the thing that bothers me in going forward with this case is that when the officer comes in and he sees the car and okay and now he pulls in, 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," (Trans p. 33, lines 8-12)

"...he sees two people are sitting in the car. They're not doing anything to each other. They don't appear to be in any distress. They don't appear to be doing anything illegal. I mean, there's nothing there. They're just two people sitting there in the parking lot." (Trans p. 33, line 23 - p. 34, line 3.)

"...if the reason that he's investigating these people is that they're in the long parking stall and they're just in a car without a trailer, "I'm not getting it." (Trans p. 34, lines 7-9)

"But here there is really no reason to go over and investigate what's going on in that car..."

(Trans p. 34, lines 17-18)

The judge found that considering the totality of the circumstances, there were simply no articulable facts that indicated that an offence has been, was being or was about to be committed.

COMMUNITY CARE

Even if there is no evidence that an offence has been or will be committed, the officer does have a right to involve himself with the defendant if he reasonably believes that the defendant is in some fashion in distress. This is the community caretaker doctrine. The state has the burden of proving that a police officer's conduct falls within the scope of a reasonable community caretaker function. State v. Kramer, 315 Wis. 2d 414, 424, 759 N.W. 2d 598, 603. The community care doctrine applies in situations "totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute". In the Interest of C.R. Kelsey, 243 Wis. 2d 422, 444, 626 N.W. 2d 777, 787. Cody v. Dombrowski, 413, U.S. 433, 441, 93 S.Ct 2523, 2528, 27 L.Ed

In this case, there was no evidence that anyone needed help. The officer acknowledged that the engine hood of the vehicle was closed (Trans. Pg. 17, line 24-25). There was no handkerchief on the window to signal distress. There was no one standing by the vehicle waving for help, and, the officer admitted that he made no observation before he went to the car and questioned the occupants that somebody

was in distress.

The trial court pointed out that there was no evidence to support a community care contact. The court stated that this can't be a community care contact "because he [the deputy] can't give me any fact that would support the community care contact... I don't have any distress (Trans. Pg. 33, line 19-21). The court noes that when the officer pulls up and turns his lights on he sees two people sitting in the car. They're not doing anything to each other. They don't appear to be in any distress. They don't appear to be doing anything illegal. I mean, there's nothing there (Trans. Pg. 33, lines 22-25 and Pg. 34, lines 1-3). The court is correct in finding that there is no evidence that a community caretaker function applied.

SEIZURE

A seizure occurs 'when an officer, by means of physical force or a show of authority, restrains a person's liberty State v. Kelsey S.R. 2001 WI 54, ¶30, 243 Wis. 2d 422, 626, N.W. 2d 777, State vs. Harris, 206 Wis. 2d 243, 253, 557 N.W. 2d 254 (1996). It must be recognized that whenever a police officer accosts an individual and restrains his liberty to walk away, he has 'seized' that person Terry v. Ohio, 392 U.S. 1, 16, 885. Ct 1868, 20 L.Ed 2d 889 (1968).

In this case, the officer drove into the almost empty parking lot and noticed Trevor Krizan's vehicle parked in a parking stall. So he decided to pull his vehicle in behind Trevor's car which Exhibits 1 and 2 demonstrates blocks Trevor in place.

He then activates not only his spot light but his take down lights on his squad car. Take down lights are understood to be extremely bright lights intended to blind a person looking at the cruiser. Having blocked the defendant in place he approached the vehicle and made contact with the individuals inside (Trans p. 6, lines 2-9).

Trevor submitted to being so accosted by the officer by remaining in place and giving the officer identification from both himself and his female passenger (Trans p. 6, lines 5-17). A seizure occurs 'when an officer, by means of physical force or a show of authority, restrains a person's liberty. (Citations) Included in this test for a seizure is the requirement that when a police officer makes a show of authority to a citizen, the citizen yields to that show of authority (citation) Kelsey C.R., 243, Wis. 2d 422 ¶30.

Under the circumstances, the trial court perceived the actions of this officer to be a stop (seizure). He points out that the officer has pulled up behind the vehicle and turned his lights on and they don't do anything (Trans p. 36, line 25 and p. 37, line 1). They can't. Judge Brazeau states "I don't find that there are reasonable grounds for there to be that kind of stop" (Trans p. 34, line 11-12).

Judge Brazeau points out that this occurrence is a Terry stop (p. 32, line 7-9). In Terry v. Ohio, 293 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed 2d, 889 (1968) the Supreme Court stated whenever a police officer accosts an individual and restrains his liberty to walk away, he has seized that person. Judge Brazeau states that that's the kind of

stop (Trans p. 32, lines 11-12). The court notes that it looked at the totality of the circumstances (Trans p. 32, lines 15-16).

CONCLUSION

The trial court concluded that in consideration of the totality of the circumstances, the officer in this case performed a seizure and he had no reasonable suspicion that an offense had been or was being committed, nor was there any basis that the officer was performing a community caretaker function. Therefore, he ordered that the evidence obtained in this seizure must be suppressed. His decision should be upheld.

Dated this 24th day of July, 2019.

Respectfully submitted:

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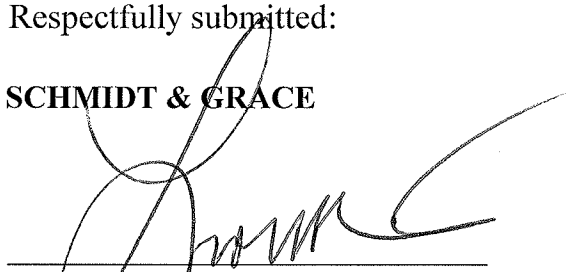
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,319 words.

Dated this 24th day of July, 2019

Respectfully submitted:

SCHMIDT & GRACE



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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an eletronic 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 24th day of July, 2019.

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