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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP447-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HEATHER JAN VANBEEK,

Defendant-Appellant.

On Appeal from a Judgment of Conviction,
Entered in the Sheboygan County Circuit Court,
the Honorable Kent Hoffmann, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS

ARGUMENT

I. The officer seized Ms. VanBeek when he took her license to his squad.

A. Ms. VanBeek did not give the officer consent to take her license to his squad.

The State argues that Ms. VanBeek was not seized by Officer Oetzel when he took her license to his squad because she consented to it. (State's Response at 11-12). The State's arguments are unpersuasive.

The State first refers to a non-exhaustive list of factors that typically support the conclusion that a seizure occurred. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980). But a non-exhaustive list does not include all such factors. Indeed, this Court held in *State v. Floyd*, 2017 WI 78, ¶ 31, 377 Wis. 2d 394, 898 N.W.2d 560, that "[i]f an officer withholds a person's documents, there is good reason to believe the person was not free to leave at that time."

The State's five factors are equally unpersuasive. First, the State's argument that Ms. VanBeek could have objected to Officer Oetzel's request for her identification but chose not to is irrelevant. Ms. VanBeek does not argue that Officer Oetzel's request for her identification caused her to be seized.

Second, the State argues that Officer Oetzel did not restrict Ms. VanBeek's movements. However, the State contradicts its own argument when it later admits that "[t]rue, VanBeek could not legally drive away, or practically walk away, without her license during the record check…her movements were confined in a sense…." (State's Response at 16).

Furthermore, several of the cases cited by the State support Ms. VanBeek's position. In *United States v. Ford*, 548 F.3d 1, 2-3 (1st Cir. 2008), the officers did receive the defendant's identification and run a records check, but the officers never left the defendant's presence so he remained free to terminate the encounter at any time.

In *United States v. Lopez*, 443 F.3d 1280, 1282 (10th Cir. 2006), an officer saw 2 men standing by a car near a high crime area. A license plate check revealed the owner's address and that the car was not stolen. *Id.* The officer pulled up behind the car and illuminated it with his spotlight. *Id.* The defendant stated that the car was his and provided his identification when requested. *Id.* The defendant's address matched that of the vehicle's registered owner. *Id.* However, the officer took the license back to his squad for a records check and told the defendant to stay by the car. *Id.*

The government tried to distinguish their case from *United States v. Lambert*, 46 F.3d 1064 (10th Cir. 1995), arguing that the officer only retained the defendant's license for five minutes, less than the thirty minutes in *Lambert*. *Lopez*, 443 F.3d at 1285-

1286. The court noted that its decision in *Lambert* was not dependent on the thirty minute retention period. *Lopez*, 443 F.3d at 1286.

The court also rejected the government's argument that the encounter was consensual in its entirety just because the defendant voluntarily provided his identification. *Id.* at 1284. The court further noted that the officer's use of the spotlight weighed in favor of the seizure conclusion. *Id.* at 1285.

Critically, the court identified the moment of seizure as the point when the officer received the defendant's license, verified that his address was the same as the car's owner, and retained the license afterward. *Id.* Thus, the court considered the officer's statement to wait by the car, but it was not critical to its holding that the defendant was illegally seized.

Third, the State argues that a reasonable person in Ms. VanBeek's position would understand that she was consenting to Officer Oetzel taking the license to his squad. This is not true. Nothing about the exchange would indicate to a reasonable person that Officer Oetzel was going to take Ms. VanBeek's license to his squad. He asked her for her identifying information *for his report*. (20 at 01:13). Sitzberger asked if they could just give the information verbally while Officer Oetzel wrote it down, or if he needed an "ID." (20 at 01:18). Officer Oetzel stated that he wanted a "photo ID" *so that he could compare faces*. (20 at 01:20). Ms. VanBeek and Sitzberger then provided their licenses.

Officer Oetzel never said that he was going to take the licenses to his squad or run a records check, and he never asked them for permission to take the licenses away. (20 at 01:53). Instead, Officer Oetzel told them that he would be right back and walked away. (20 at 01:53). The fact that he added "okay" at the end of his statement "I'll be right back" was not a request for permission because he had already stated his intent to take the licenses away.

Remember that Sitzberger had already attempted to push back against Officer Oetzel's authority when he asked if they could just recite their identifying information instead of giving him their licenses. Officer Oetzel rebuked that challenge and stated that he wanted their licenses. Thus, after Officer Oetzel told her that he would be right back, Ms. VanBeek had no reason to think that she could now call him back and tell him that he could not do what he just told her he was going to do.

The State also argues that it would be unreasonable for a person to think that Officer Oetzel would memorize their information. But this argument overlooks the other options at Officer Oetzel's disposal. He could have written the information down from the licenses, as he did on his second contact with Ms. VanBeek. He also could have used his handheld radio to relay the information as he stood by Ms. VanBeek's window.

Fourth, the State argues that Ms. VanBeek was not seized because Officer Oetzel's retention of her license was not lengthy. But a person "may not be

detained even momentarily without reasonable, objective grounds for doing so." *Florida v. Royer*, 460 U.S. 491, 498 (1983). The length of the retention would be more important if Officer Oetzel had stayed in Ms. VanBeek's presence while he retained the license. Once he left her presence under the circumstances as they existed, she was no longer free to terminate the encounter.

Fifth, the State argues that Ms. VanBeek was not seized because Officer Oetzel returned to her car with her license and she did not seek to terminate the encounter. This is also irrelevant. Once Officer Oetzel took Ms. VanBeek's license back to his squad, a reasonable person would not have felt free to leave. Thus, it is only natural that Ms. VanBeek would not seek to leave after the second contact with Officer Oetzel.

Again, Officer Oetzel did not seize Ms. VanBeek by requesting her identification. However, the seizure did occur under the circumstances of this case when he took her license to his squad. Also, Ms. VanBeek did not consent to this. But even if she did consent, it is important to note that a person who gives their consent under the Fourth Amendment remains free to withdraw that consent at any time. *See State v. Randall*, 2019 WI 80, ¶ 10, 387 Wis. 2d 744, 930 N.W.2d 223. Once Officer Oetzel returned to his squad, she was unable to withdraw her consent and freely terminate the encounter. That is why some courts have concluded that it is important for the officer to stay in the person's presence while they possess the license. *United States v. Analla*, 975 F. 2d

119, 124 (4th Cir. 1992); *See also United States v. Drayton*, 536 U.S. 194, 204 (2002)(the fact that the officers left the aisle free so that the defendants could leave *anytime they wanted to* was important to the holding that they were not seized).

Finally, while admitting that Ms. VanBeek was confined by Officer Oetzel's decision to take her license to his squad, the State argues that this was the natural consequence of her decision to provide her license. The State cites *Florida v. Bostick*, 501 U.S. 429 (1991) and *INS v. Delgado*, 466 U.S. 210 (1984) for the proposition that just because someone is confined to an area does not mean that they are seized. But in *Bostick* and *Delgado*, the factor confining the defendants was not created by the police. In this case it was.

B. Ms. VanBeek is not asking this Court to create a bright-line rule.

To determine whether Ms. VanBeek was seized, this Court must consider the totality of the circumstances. *Drayton*, 536 U.S. at 201. Ms. VanBeek is not arguing for a bright-line rule that a person is seized whenever an officer takes their license away.

Consideration of all the circumstances supports the conclusion that Ms. VanBeek was seized: Officer Oetzel parked behind her and shined a spotlight on her vehicle; he asked for her identifying information and rejected an offer to receive it verbally and indicated only a physical license would be acceptable

to compare faces; after receiving the licenses the officer told them that he would be right back and walked away; Ms. VanBeek had no way to terminate the encounter once the officer left.

Of course, the primary factor supporting a seizure in this case is Officer Oetzel's taking of the license to his squad, but that does not mean that it would create a bright-line rule. Indeed, this Court and the U.S. Supreme Court have noted how important an officer's retention of identifying documents is to the seizure question. *Floyd*, 377 Wis. 2d 394, ¶ 31; *Royer*, 460 U.S. at 504.

With regard to *Royer*, the State is correct that it was a plurality opinion. (State's Response at 19).

> When a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.

Marks v. United States, 430 U.S. 188, 193 (1977).

In *Royer*, Justices White, Marshall, Powell and Stevens joined the plurality opinion. *Id.* at 493. Justice Brennan concurred in the result but believed that Royer was seized when the officers first asked him to produce his identification and airline ticket. *Id.* at 511. Therefore, because his concurrence would have gone farther than the plurality opinion, the holding in *Royer* has precedential value.

II. The officer did not have legal justification to seize Ms. VanBeek.

A. The seizure was not justified by reasonable suspicion.

The State argues any seizure was supported by reasonable suspicion. The State is wrong.

The State relies on *State v. Allen*, 226 Wis. 2d 66, 593 N.W.2d 504 (Ct. App. 1999), where a high-crime area had received numerous drug dealing complaints. *Id.* at 68. Police surveilled the neighborhood to address these complaints. *Id.* During that surveillance, an officer observed two men approach a car, one man briefly entered and exited, and the car drove away. *Id.* The men stayed in the area for five to ten more minutes before walking to a pay phone. *Id.* These observations took place during the evening. *Id.* Police stopped the men and discovered drugs. *Id.* at 69.

The court of appeals concluded that the stop was supported by reasonable suspicion because (1) it was a high-crime area with lots of drug-dealing complaints, (2) brief contact with a vehicle, and (3) the men hung around in the neighborhood for five to ten minutes after the contact. *Id.* at 75, 77.

But in this case, Ms. VanBeek was not in a high-crime area with lots of recent complaints of drug dealing. What Officer Oetzel knew was that she was sitting in a car with her friend at night for at least ten minutes. Even factoring in the claims of the

anonymous caller that she was there for an hour and that a person with a backpack had approached the truck and left, there is no reasonable suspicion. Rather, it is behavior that normal citizens engage in every day.

The State also argues that Officer Oetzel did not receive a satisfactory explanation for why Ms. VanBeek and Sitzberger were sitting in the car for several minutes. The most obvious reason for that is because Officer Oetzel did not ask. (20 at 00:00-02:00). No doubt he chose not to ask because he did not find it odd that Ms. VanBeek and Sitzberger were sitting in a car talking. Indeed, this is behavior that most Americans engage in regularly. That is why it "sound[ed] legit" to Officer Oetzel. (20 at 01:13).

Finally, the State argues that the facts from the anonymous tip support reasonable suspicion. But the State acknowledges that something more is required in cases of anonymous tips and that reasonable suspicion cannot rest solely on the tip. However, the State fails to point to factors, outside of the tip, that would support reasonable suspicion. Indeed, all Officer Oetzel knew when he walked away with Ms. VanBeek's license besides the information from the tip was that she was sitting in her car with her friend, at night, for ten minutes.

B. The seizure was not justified by the community caretaker doctrine.

The State also argues that Officer Oetzel's seizure of Ms. VanBeek was justified by the

community caretaker doctrine. (State's Response at 28). The State is wrong.

The State cites *State v. Ellenbecker*, 159 Wis. 2d 91, 464 N.W.2d 427 (Ct. App. 1990). But in *Ellenbecker* the defendant's car was actually disabled on the side of the road. *Id.* at 93-94. The community caretaker doctrine applies where a member of the public is in need of assistance. *State v. Kramer*, 2009 WI 14, ¶ 32, 315 Wis. 2d 414, 759 N.W.2d 598. In this case, there was no indication that Ms. VanBeek was in need of assistance. Most importantly, at the time that Officer Oetzel seized her by taking her license, he affirmatively knew that she was not in need of assistance.

III. The officer unlawfully extended the stop to allow time for a dog sniff.

The State argues that Ms. VanBeek was not seized when Officer Oetzel returned to her vehicle and continued to retain her license while he questioned her, and thus there was no stop to illegally extend. (State's Response at 32-33). But as already noted, when an officer retains a person's license, there is good reason to belief that they are not free to leave. *Floyd*, ¶ 31. Furthermore, Officer Oetzel was questioning Ms. VanBeek and Sitzberger in an interrogative fashion after he kept their licenses in his squad for over five minutes. A reasonable person would not feel free to leave under these circumstances.

A. The officer's questioning was not reasonable.

The State next argues that even if this Court concludes that Ms. VanBeek was seized during Officer Oetzel's second encounter with her, the officer's questions about her address were reasonable. This argument is unpersuasive.

During a traffic stop, the normal mission includes time to check a person's identification. *State v. Smith*, 2018 WI 2, ¶ 10, 379 Wis. 2d 86, 905 N.W.2d 353. However, that check must take no longer than is reasonable and the "officer must proceed diligently." *Id.*, ¶ 19. Here, Officer Oetzel did not proceed diligently. Instead he engaged in dilatory questioning with the intent of extending the stop to allow the dog to arrive.[1] This action unlawfully extended the stop.

The evidence supporting this conclusion includes the fact that Officer Oetzel called for a police dog to respond to the scene; when he exited his squad he asked another officer "do I have enough to just

[1] If the State argues that the circuit court made a factual finding that Officer Oetzel did not extend the stop to allow the dog to arrive, it is wrong. (Response at 36). The circuit court's "finding" was merely a legal conclusion that the stop was not extended because Officer Oetzel had reasonable suspicion to engage in questioning during the second contact. (107:69). Such a factual finding would be clearly erroneous given Officer Oetzel's testimony that he made contact the second time for the purpose of getting the dog on scene. (102:12-13).

hold them here till [the drug dog] gets here?" (20 at 07:05); Officer Oetzel testified that he made contact the second time "to get their information *because [he] wanted to get [the drug dog] on scene*." (102:12-13)(emphasis added); finally, Officer Oetzel required Ms. VanBeek to recite her address out loud while he wrote it down despite her confirming that the address on her license was current.

B. The officer did not have reasonable suspicion after the records check.

The State argues that Officer Oetzel had reasonable suspicion to extend the stop to conduct the dog sniff after he conducted the records check. The State is wrong.

The State points to the following factors to support its argument. First, Ms. VanBeek and Sitzberger had been sitting in her vehicle for some amount of time between ten minutes and one hour. Second, sometimes people use narcotics when they sit in cars. Third, someone with a backpack approached the car and left. Fourth, Ms. VanBeek had overdosed earlier in the year. Fifth, Sitzberger was on supervision.

These factors simply do not amount to reasonable suspicion to extend the stop for a dog sniff. *See State v. Gammons*, 2001 WI App 36, ¶¶ 21, 24, 241 Wis. 2d 296, 625 N.W.2d 623 (police did not have reasonable suspicion to extend a stop even though the officer in that case had knowledge of the defendants' prior drug activity). The factors

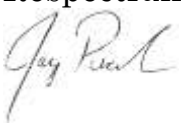
supporting reasonable suspicion in that case were far more persuasive and yet still not enough: (1) the defendants were stopped in a drug crime area, (2) it was 10:00 p.m., (3) the car was from Illinois, (4) the officer had knowledge of prior drug activity by each of the three defendants, and (5) defendant Gammons appeared to be nervous and uneasy. *Id.*

CONCLUSION

This Court should reverse the circuit court's decision, vacate Ms. VanBeek's conviction, and remand with instructions to suppress any evidence obtained pursuant to the unlawful seizure.

Dated this 23rd day of November, 2020.

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 3,000 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.

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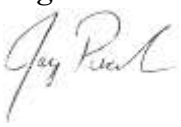
Dated this 23rd day of November, 2020.

Signed:



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