No. 19-AP-1187

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

DONALD SIMON MULLEN,
Defendant-Appellant.

Appeal from the Circuit Court for Waukesha County
The Honorable Judge Michael P. Maxwell Presiding
Case No. 18-TR-1683

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT, DONALD S. MULLEN

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ISSUE PRESENTED

In the circuit court, the State stipulated that the officer lacked reasonable suspicion to initially seize Mr. Mullen. The State argued instead that Mr. Mullen was not seized until he spoke with the officer and until the officer noticed signs of impairment. Thus, the sole issue in this appeal is: under the Fourth Amendment, when was Mr. Mullen seized?

At 1:20 A.M., Mr. Mullen parked his car in the parking lot of a bar that happened to be closed. An officer saw Mr. Mullen pull into the lot and decided to investigate. The officer did not witness any impaired or concerning driving behavior. By the time the officer pulled into the lot, Mr. Mullen had learned the bar was closed and was re-approaching his vehicle. The officer drove his marked squad car into the lot and parked directly behind Mr. Mullen's vehicle. Next, the officer shined his squad's high-intensity spotlight directly at Mr. Mullen, impeding his sight. The officer did so even though Mr. Mullen was already standing in an illuminated area next to the bar. The officer made verbal contact with Mr. Mullen, then got out of his squad while wearing his Sheriff's uniform with his pistol displayed on his hip. He told Mr. Mullen that he worked for the Waukesha County Sheriff's Department during this face-to-face confrontation.

1. Under these circumstances would a reasonable person in Mr. Mullen's position feel free to leave—i.e., either walk away or return to their vehicle and ignore the officer?

The circuit court wrongly found that Mr. Mullen was not seized during this encounter. (R.50:51; App.51).

ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary. Because the matter involves a Fourth Amendment issue of great import, publication is warranted.

STATEMENT OF THE CASE

I. Factual Background.

Around 1:20 A.M. on March 17, 2018, Deputy Ollinger was stopped at an intersection as he observed Mr. Mullen proceed through a green light. (R.50:4-5; App.4-5). Even though Mr. Mullen did not commit a traffic violation, Deputy Ollinger ran Mr. Mullen's vehicle through his TIME system. (R.50:9; App.9). Deputy Ollinger noticed that Mullen's vehicle was properly registered. (*Id.*). With still no traffic violation, Deputy Ollinger followed Mr. Mullen northbound. (R.50:5; App.5). He then observed Mr. Mullen turn into the parking lot of Shooter's Pub and Grill. (*Id.*). When Mr. Mullen pulled into the parking lot, the pub's street sign and doorway were both illuminated. (R.50:19; App.19). Deputy Ollinger then drove past the pub, made a U-turn, and drove past the pub a second time. (R.50:21; App.21). He then made a second U-turn and drove into the pub's parking lot. (*Id.*). Upon seeing Mr. Mullen at the front of the pub, Deputy Ollinger advised Waukesha County Communications Center that he would conduct an investigatory stop on Mr. Mullen. (R.50:29; App.29).

When Deputy Ollinger entered the pub's parking lot, he parked his marked squad car directly behind Mr. Mullen's vehicle, which was parked facing the pub. (R.50:17, 24-26, 30; App.17, 24-26, 30). At this time, the pub was closed. (R.50:5-6; App.5-6). There were no other pedestrians or vehicles in sight. (R.50:5-6, 35-36; App.5-6, 35-36). Mr. Mullen was standing on the curb next to the front of the pub. (R.50:5-6; App.5-6). A light from the pub illuminated him. (R.50:7, App.7). The headlights from Deputy Ollinger's squad also illuminated Mr. Mullen. (R.50:30-31; App.30-31). Notwithstanding Mr. Mullen's visibility, Deputy Ollinger shined his squad's spotlight directly at Mr. Mullen, impeding his sight. (*Id.*). Deputy Ollinger testified that this spotlight serves a "disabling function," and that it is an "extremely high intensity spotlight." (*Id.*). During this time, Mr. Mullen either stood facing Deputy Ollinger or the side of his body was positioned facing Deputy Ollinger. (R.50:36; App.36). At no time did Mr. Mullen have his back faced toward Deputy Ollinger. (*Id.*).

Deputy Ollinger exited his squad and confronted Mr. Mullen. (R.50:31-33; App.31-33). Deputy Ollinger's squad car was equipped with emergency lights and marked with "Sheriff's Department" on it. (R.50:27-28; App.27-28). Deputy Ollinger wore his Sheriff's uniform with his badge on the front. (R.50:28-29; App.28-29). Visibly

displayed on his hip was his firearm. (*Id.*). Mr. Mullen did not initiate the conversation—Deputy Ollinger did. (R.50:31-34; App.31-34). Deputy Ollinger approached Mr. Mullen and informed him that he was a deputy with the Waukesha County Sheriff's Department. (*Id.*).

Deputy Ollinger then interrogated Mr. Mullen, asking him about the location from which he had driven and if he had consumed alcohol. (R.50:8; App.8). At this point, Mr. Mullen was clearly detained. Mr. Mullen informed Deputy Ollinger that he was not going to drive anymore and that he was going to get an Uber ride home. (*Id.*). Deputy Ollinger then attempted to subject Mr. Mullen to field sobriety tests, which Mr. Mullen declined. (R.50:10; App.10). Without administering a PBT, he arrested Mr. Mullen for OWI. (*Id.*). At no point during Deputy Ollinger's interaction with Mr. Mullen did he tell Mr. Mullen that he was free to leave. (R.50:35; App.35).

II. Procedural Background.

On March 16, 2018, the State cited Mr. Mullen with a refusal and the County cited Mr. Mullen with OWI (1st). (R.1:1). On April 12, 2018, the County cited Mr. Mullen with operating with a PAC (1st).

On August 22, 2018, Mr. Mullen filed a Motion to Suppress Fruits of Unreasonable Seizure. The State did not file a response to the suppression motion.

On December 7, 2018, the circuit court conducted an evidentiary hearing on Mr. Mullen's motion to suppress. (R.50; App.1). Deputy Ollinger was the State's only witness at the hearing. (R.50:3; App.3). Prior to any testimony, the State stipulated that Officer Ollinger lacked reasonable suspicion to initially seize Mr. Mullen for OWI. (R.50:2-3; App.2-3). The State argued instead that Mr. Mullen was not seized until he spoke with the officer and the officer noticed signs of impairment. (R.50:42-45; App.42-45). After the circuit court heard testimony, it denied Mr. Mullen's suppression motion. (R.50:50; R.22:1; App.50).

On January 3, 2019, Mr. Mullen filed his Motion for Reconsideration. (R.21:1-9). The circuit court denied that motion on January 4, 2019. (R.23:1; App.55).

On June 26, 2019, the circuit court held a trial finding Mr. Mullen guilty in 18-TR-1713, and finding that Mr. Mullen's refusal

was not reasonable in 18-TR-1683. (R.32:1-2). On that same day, the circuit court dismissed Mr. Mullen's citation for operating with a PAC in 18-TR-2263.

On June 27, 2019, Mr. Mullen timely filed his Notice of Appeal. (R.33:1; App.61). This appeal follows. (*Id.*).

STANDARD OF REVIEW

A circuit court's order granting or denying a suppression motion is reviewed as a question of constitutional fact. *State v. Dearborn*, 2010 WI 84, ¶13, 327 Wis.2d 252, 786 N.W.2d 97. While a circuit court's findings of fact are reviewed for clear error, "[t]he application of constitutional principles to those facts is a question of law" reviewed "*de novo*." *Id.* "The constitutional reasonableness of a search and seizure is a question of law" reviewed *de novo* and "without deference to the ruling of the circuit court." *State v. Nicholson,* 174 Wis.2d 542, 545 (Ct. App. 1993).

ARGUMENT

I. The Circuit Court Erred by Finding that Mr. Mullen was not Seized Until He Incriminated Himself.

"A seizure occurs if 'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Brendlin v. California*, 551 U.S. 249, 255 (2007) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). A key factor in determining whether someone is seized is how "intimidating" is the encounter? *County of Grant v. Vogt*, 2014 WI 76, ¶24, 356 Wis.2d 343 (citing *INS v. Delgado*, 466 U.S. 210, 216 (1984)).

Here, the seizure occurred around 1:20 A.M. (R.50:24; App.24). There were no other pedestrians in sight and the business was closed. (R.50:5-6, 35-36; App.5-6; App.5-6, 35-36). Deputy Ollinger parked his squad car directly behind Mullen's vehicle. (R.50:17, 24-26, 30; App.17, 24-26, 30). He then got out of his squad and confronted Mr. Mullen. (R.50:31-33; App.31-33). Deputy Ollinger wore his Sheriff's uniform and had his firearm displayed on his hip. (R.50:28-29; App.28-29). During this time, Deputy Ollinger used the high-intensity spotlight on the side of his marked squad car and shined it directly at Mr. Mullen, impeding his sight. (R.50:30-31; App.30-31). Deputy Ollinger told Mr. Mullen that he worked for the Waukesha County

Sheriff's Department. (R.50:31-34; App.31-34). He then interrogated Mr. Mullen, asking him about the location from which he had driven and if he had consumed alcohol. (R.50:8, App.8). No reasonable person in Mr. Mullen's position would think they were free to ignore the officer, get in their car, and flee the scene.

The circuit court relied heavily, if not exclusively, on *County of Grant v. Vogt*, 2014 WI 76, 356 Wis.2d 343. (R.50:48; App.48). The circuit court incorrectly reasoned that "[t]he facts of *Vogt* are very similar to this case." (*Id.*). A close reading of *Vogt* does not support the circuit court's conclusion, however. *Vogt* was a very limited holding, concluding that an officer's act of knocking on a car's closed window, without more, did not constitute a seizure. *Id.*, ¶3. However, once the driver rolled down his window, he was "seized." *See id.*, ¶¶3, 29, 39, 54 ("The facts in this case do not show a level of intimidation or exercise of authority sufficient to implicate the Fourth Amendment *until after Vogt rolled down his window* and exposed the grounds for a seizure.") (emphasis added). The court twice emphasized throughout the opinion that "this is a close case." *See id.*, ¶¶ 3, 54.

Vogt also dealt with an entirely different situation—a person in the safety of their vehicle (with another person), guarded by the car's window. *Id.*, ¶54. The window serves as a barrier to outsiders. The circuit court's comparison of this case to *Vogt* amounts to this: if there is a glass barrier between Mr. Mullen and Deputy Ollinger, then there is no seizure, but if that glass barrier is removed, then Deputy Ollinger seized Mr. Mullen. In this case, there was no glass barrier preventing any contact between Mr. Mullen and Deputy Ollinger. Instead, the contact involved a face-to-face confrontation. (R.50:31-34; App.31-34). The *Vogt* situation is significantly different because Vogt is inside his car and can elect not to roll down his window. Keeping his window rolled up would have allowed Vogt to avoid further conversation and interaction with the officer. Mr. Mullen's only options, however, were to either flee from an officer who had exited his vehicle and lit him up with a spotlight (Mr. Mullen was in an illuminated location to begin with) or submit to Deputy Ollinger's show of authority. He chose the latter and was surely seized for purposes of the Fourth Amendment. No reasonable person in these circumstances would feel free to leave.

A person is seized when there is "submission" to the "show of authority." *Brendlin*, 551 U.S. at 254 ("A police officer may make a seizure by a show of authority and without the use of physical force."); *California v. Hodari D.*, 499 U.S. 621, 626 (1991). "[W]hat may

amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away." *Brendlin*, 551 U.S. at 254 ("Here, Brendlin had no effective way to signal submission while the car was still moving on the roadway, but once it came to a stop he could, and apparently did, submit by staying inside."). Similarly, here, a person standing outside a closed bar submits to authority by not leaving the scene. *See id.* That is precisely what Mr. Mullen did. (R.50:25-26; App.25-26). Upon Deputy Ollinger's arrival, Mr. Mullen began to walk towards his vehicle to leave. (*Id.*). Before he could reach his vehicle, Deputy Ollinger shined his high-intensity squad spotlight directly at Mr. Mullen. (R.50:30-31; App.30-31). At that time, Mr. Mullen was already under the bar's bright floodlight immediately overhead and also illuminated by the squad's headlights. (R.50:7, 30-31; App.7, 30-31). This additional show of authority—considered with the full context and the circumstances—resulted in a seizure. As in *Brendlin*, Mr. Mullen's "attempt to leave the scene would so likely prompt an objection from the officer that no [person] would feel free to leave in the first place." *See id.* at 257.

Courts have found similar police-citizen confrontations to constitute seizures. In *People v. Garry*, the court found a seizure where the officer "bathed" the defendant in the patrol car's spotlight, exited his squad car while armed and in uniform, walked towards the defendant, and asked him if he was on probation or parole. 67 Cal.Rptr.3d 849, 858-59 (Cal. Ct. App. 2007). In *State v. Jestice*, the court found a seizure where a uniformed officer parked his marked patrol car late at night in a dark lot with no one else around, left the cruiser's headlights shining in the detained couple's faces as he approached them, and asked them what they were doing. 861 A.2d 1060, 1062-63 (Vt. 2004). In *Crain v. State*, the court found a seizure where the officer shined his patrol car's spotlight on the defendant and told him to "come over here and talk to me." 315 S.W.3d 43, 52 (Tex. Crim. App. 2010). In *State v. Garcia-Cantu*, the court found a seizure where the officer parked his squad car about ten feet behind and to the left of defendant's vehicle, shined his patrol car spotlight on defendant's truck, got out of his squad car and approached the defendant's truck with his flashlight, and asked the defendant, "[y]ou got an ID on you?" 253 S.W.3d 236, 244-49 (Tex. Crim App. 2008).

Mr. Mullen does not ask this Court for a bright-line rule that officers can never use a spotlight without seizing a suspect. Much like

any other on-duty decision (tone of voice, display of firearm, manner of approach), the use of a spotlight is a factor under the totality of the circumstances. As noted heavily by the Texas Court of Criminal Appeals, the "use of the spotlight is *a factor* to be considered in the totality-of-the-circumstances assessment and, 'combined with other circumstances, may well establish a Fourth Amendment detention.'" *Crain*, 315 S.W.3d at 51 (quoting *Garcia-Cantu*, 253 S.W.3d at 245). The test of whether a person is "seized" 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*." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (emphasis added).

Deputy Ollinger's use of the high-intensity spotlight must be considered with: (1) the time (1:20 A.M.) and place (outside a closed bar in a somewhat rural area) of the confrontation; (2) the lack of any pedestrians in sight; (3) Deputy Ollinger's marked squad car, full uniform, and pistol on his hip; (4) that Deputy Ollinger parked his squad car directly behind Mr. Mullen's vehicle; (5) that Deputy Ollinger initiated the confrontation and told Mr. Mullen that he worked for the Waukesha County Sheriff's Office; (6) Deputy Ollinger's OWI interrogation of Mr. Mullen about his drinking and the location from which he drove; and (7) that Deputy Ollinger followed Mr. Mullen while driving and circled back twice while driving to check on Mr. Mullen. (R.50:5-6, 8, 17, 21, 24-36; App.5-6, 8, 17, 21, 24-36).

These circumstances show a seizure. *See Riley v. State,* 892 A.2d 370, 374 (Del. 2006) (concluding that "when police approached [defendant's car] with their badges and flashlights, after having parked their police vehicle . . . so as to prevent [defendant] from driving away, a seizure had taken place"); *Jestice,* 861 A.2d at 1063 ("[W]hen a police cruiser completely blocks a motorist's car from leaving, courts generally find a seizure. . . . *[T]he fact that it was possible for the couple to back and maneuver their car past the patrol car and out of the trailhead parking lot does not convince us that this was a consensual encounter*") (emphasis added); *United States v. Jones*, 678 F.3d 293 (4th Cir. 2012) (concluding that the officers seized the defendant because "two police officers in uniform in a marked police patrol car *conspicuously followed Jones from a public street onto private property* and blocked Jones's car from leaving the scene.") (emphasis added); *Swift v. State,* 899 A.2d 867, 877 (Md. 2006) (noting that the "time of night of the encounter [3:13 a.m.], the officer's conduct before he approached petitioner [repeatedly driving past him as he was walking in a 'high crime area'], the blocking of petitioner's path with the police

cruiser, headlights shining on petitioner, the officer's testimony that he was conducting an investigatory field stop, and the warrants check, taken together, lead us to conclude that petitioner was seized"); *United States v. Jerez*, 108 F.3d 684, 690 (7th Cir. 1997) (noting that the trial court "failed to consider adequately two significant factors: the place and the time of the encounter.").

The seizure was unreasonable and all "fruits" should have been suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *State v. Harris*, 206 Wis.2d 243, 263 (1996); *State v. Schneidewind*, 47 Wis.2d 110, 118 (1970). Further, because Mr. Mullen's refusal (contrary to § 343.305(3)(a)) resulted from the unreasonable seizure, the circuit court should have dismissed the refusal. *See State v. Anagnos*, 2012 WI 64, ¶¶42-43, 341 Wis.2d 576 (concluding that if reasonable suspicion does not support a seizure or if probable cause does not support an arrest, the refusal must be dismissed).

CONCLUSION

This Court should reverse the circuit court's denial of Mr. Mullen's motion to suppress and order suppression of all fruits of the unreasonable seizure and also order dismissal of Mr. Mullen's refusal.

Dated at Waukesha, Wisconsin this 6th day of November, 2019.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,666 words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 at Waukesha, Wisconsin this 6th day of November, 2019.

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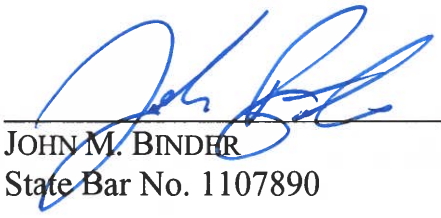

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CERTIFICATE OF APPENDIX CONTENT

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgement entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further 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.

Dated at Waukesha, Wisconsin this 6th day of November, 2019.

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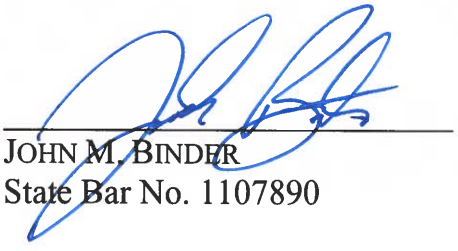

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