STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal Case No. 19-AP-1187

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

DONALD SIMON MULLEN,

Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE MICHAEL P. MAXWELL PRESIDING
Case No. 18-TR-1683

# BRIEF OF PLAINTIFF-RESPONDENT

Sue Opper
District Attorney
Waukesha County

Shawn N. Woller
Assistant District Attorney
State Bar No. 1084308
Attorneys for Plaintiff-Respondent

District Attorney's Office
515 West Moreland Blvd. G-72
Waukesha, WI 53188
(262) 548-7076

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## ISSUE PRESENTED

Was the police encounter in the parking lot of a bar and grill, after hours of operation, where the deputy illuminated the defendant with his spot light, but did not activate his emergency lights, make any verbal commands compelling the defendant to stay on scene, or block the defendant's vehicle, a seizure for purposes of the 4th ?

The trial court answered, no.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

## STATEMENT OF THE CASE

The State will supplement Appellant Mullen's statement of the case and facts as appropriate in its argument.

## STANDARD OF REVIEW

"Whether a person has been seized is a question of constitutional fact." *State v. Young*, 2006 WI 98, ¶ 17, 294 Wis. 2d 1, 717 N.W.2d 729. This Court "accept[s] the circuit court's findings of evidentiary or historical fact unless they are clearly erroneous." *Id*. And it "determine[s] independently whether or when a seizure occurred." *Id*.

## ARGUMENT

### I. Deputy Ollinger's Conduct, under the Totality of the Circumstances, Did Not Amount to a Seizure of Appellant Mullen.

"The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and seizures." *State v. Young*, 2006 WI 98, ¶ 18, 294 Wis. 2d 1, 717 N.W.2d 729 (footnotes omitted). But "not all police-citizen contacts constitute a seizure," so "many such contacts do not fall within the safeguards afforded by the Fourth Amendment." *Id*.

The United States Supreme Court has stated that "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). It has noted "[e]xamples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 554. "In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Id*. at 555.

The seizure test asks whether "a reasonable person would have believed he was free to disregard the police presence and go about his business." *Young*, 294 Wis. 2d 1, ¶ 18. It is an objective test that "presupposes an innocent person." *Florida v. Bostick*, 501 U.S. 429, 438 (1991). While most citizens respond to a police request, the fact that people do so, and without being told they are free not to respond, does not eliminate the consensual nature of the response. *INS v. Delgado*, 466 U.S. 210, 216 (1984); *State v. Williams*, 2002 WI 94, ¶ 23, 255 Wis. 2d 1, 646 N.W.2d 834. In determining whether a person has been seized, the court must replace the individual person with the model of a reasonable person and

focus on the officer's conduct under the totality of the circumstances. *County of Grant v. Vogt*, 2014 WI 76, ¶ 31, 356 Wis. 2d 343, 850 N.W.2d 253.

The question before the Court is whether Appellant Mullen was seized by Deputy Ollinger when he made contact with Appellant Mullen in the parking lot of a closed bar and grill, where the deputy illuminated Appellant Mullen with his spotlight, but did not activate his emergency lights, make any verbal commands compelling Appellant Mullen to stay on scene, or block Appellant Mullen's vehicle. As in *County of Grant v. Vogt*, 2014 WI 76, ¶ 54, 356 Wis. 2d 343, 374, 850 N.W.2d 253, 268, the totality of the circumstances in this case "do not show a level of intimidation or exercise of authority sufficient to implicate the Fourth Amendment" until after Appellant Mullen spoke to Deputy Ollinger, repeating himself, swearing, with slurred speech, and emitting the odor of intoxicants, then exposing the grounds for a seizure. (Appellant App. 9).

In *Vogt*, an officer's contact with occupants of a parked car was not a seizure. 2014 WI 76, ¶ 54. An officer who was patrolling a small village during the early morning hours on Christmas saw a car pull into a parking lot next to a closed park. *Id*. at ¶4. The officer did not observe any traffic violations but thought the driver's (Vogt's) conduct was suspicious and "odd," given that it was Christmas and the park was closed. *Id*. at ¶5. The officer stopped his squad "behind Vogt's vehicle [and] a little off to the driver's side," leaving the headlights on and the engine running, but without activating the red and blue emergency lights. *Id*. at ¶6. Vogt's vehicle was still running, and the officer stated that he was not blocking Vogt's vehicle, though Vogt disagreed. *Id*. The officer, in full uniform and with his firearm holstered, approached the vehicle, and observed two occupants. *Id*. at ¶7. The officer rapped on the driver's window and motioned for Vogt to roll it down. *Id*. Vogt rolled down the window. *Id*. at ¶8. The officer asked Vogt what he was doing, and when Vogt answered, the officer observed that Vogt's speech was slurred and that he could smell the odor of intoxicants coming from the vehicle. *Id*. From there, the officer investigated Vogt based on those observations, and ultimately arrested him for operating while intoxicated and operating with a prohibited alcohol concentration. *Id*. The Court held that an

officer's parking near another person's vehicle, getting out, and knocking on the window is not necessarily a sufficient display of authority to cause a reasonable person to believe that he or she was not free to go. *Id*. at ¶38.

Deputy Ollinger acted similarly to the officer in *Vogt.* He checked on a parked vehicle in a parking lot of a closed location. (Appellant App. 5-6). Deputy Ollinger did not activate his red and blue emergency lights. (Appellant App. 6). Deputy Ollinger was also in full uniform, with his firearm holstered. (Appellant App. 28). While Deputy Ollinger utilized a spotlight, whereas the officer in *Vogt* did not, that fact does not appear consequential, particularly because Deputy Ollinger neither pulled over Appellant Mullen's car, nor activated his emergency lights. Appellant Mullen has cited to cases from other jurisdictions where use of a spotlight contributed to a seizure, (Appellant Br. 6), however, the Wisconsin Supreme Court in *Young* noted "that many courts have concluded that the use of a spotlight is not a show of authority sufficient to effect a seizure. *See State v. Baker*, 141 Idaho 163, 107 P.3d 1214, 1216–18 (2004) (use of spotlight is no seizure; collecting cases holding the same); *State v. Young*, 135 Wash.2d 498, 957 P.2d 681, 688–89 (1998) (finding that under the totality of the circumstances, illuminating the defendant with a spotlight does not a seizure make)." *Young*, 294 Wis. 2d 1, ¶65 n.18. The Court also acknowledged that "spotlights are likely to be used at night." *Id.* Deputy Ollinger utilized his spotlight, as he is trained to do, in the interests of officer safety, which as the trial court held, was reasonable (Appellant App. 7, 50-51). The fact that Deputy Ollinger used his spotlight, while not activating his emergency lights, blocking Appellant Mullen's vehicle, or any other overt demonstration of authority or control, does not amount to a seizure.

Like the defendant in *Vogt*, Appellant Mullen appears to argue that the proximity of the deputy's squad to his own contributed to a seizure. (Appellant Br. 7-8). Deputy Ollinger described the position of his squad to be parked behind Appellant Mullen but offset to the left. (Appellant App. 7). Deputy Ollinger did not know the exact distance but testified he was a "fair amount away from [Appellant Mullen]'s vehicle." *Id.* Deputy Ollinger further testified that Appellant Mullen had enough room to back up and "would have been

able to leave the driveway of the establishment without any problem." (Appellant App. 13). On cross-examination, Appellant Mullen's witness, Mr. Janisch, agreed that it was possible Appellant Mullen could have left by driving straight and turning around. (Appellant App. 41). The Court in *Vogt* stated that "[a]lthough [the officer] parked directly behind Vogt and allegedly there were obstacles on three sides of Vogt's vehicle, these facts do not demonstrate that Vogt was seized because he still could have driven away." *Vogt*, 356 Wis. 2d 343, ¶41. Similarly here, the position of Deputy Ollinger's squad relative to Appellant Mullen's vehicle does not demonstrate a seizure because Appellant Mullen, too, could have driven away.

Appellant Mullen attempts to distinguish *Vogt* from the present case by arguing that the glass window of Vogt's vehicle acted as a barrier preventing contact and therefore a seizure. (Appellant Br. 5). However, the United States Supreme Court has held that "law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *United States v. Drayton*, 536 U.S. 194, 200 (2002); *Bostick*, 501 U.S. at 434 ("we have held repeatedly that mere police questioning does not constitute a seizure."). "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *Drayton*, 536 U.S. at 205 (citation omitted). "The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." *Bostick*, 501 U.S. at 434. Even a request for identification may not constitute a seizure: "no seizure occurs when police . . . ask to examine the individual's identification . . . so long as the officers do not convey a message that compliance with their requests is required." *Id.* at 437. The absence of a "glass barrier" between Deputy Ollinger and Appellant Mullen does not meaningfully change the calculous of whether the encounter amounted to a seizure. Arguably, because Appellant Mullen was already outside his vehicle, without the appearance or prompting of law enforcement, and was not compelled to permit the deputy to bypass any barrier against intrusion, the imposition into his autonomy was likely diminished.

Additionally, the absence of any examples of the circumstances listed in *Mendenhall* weighs in favor of a consensual encounter rather than a seizure in the present case. *Mendenhall*, 446 U.S. at 555; *See also Vogt*, 356 Wis. 2d 343, ¶ 53. Only one officer, Deputy Ollinger, was present. (Appellant App. 27). Deputy Ollinger never brandished or displayed his firearm. (Appellant App. 10). When Deputy Ollinger started interacting with Appellant Mullen, he maintained some distance and did not physically touch Appellant Mullen. Deputy Ollinger did not use language or tone of voice that would have indicated that compliance with the deputy was compelled. (Appellant App. 8-9) Deputy Ollinger testified that he advised Appellant Mullen who he was, who he worked for, and asked him why he was out at the bar as it appeared to be closed. (Appellant App. 8). Deputy Olliger's tone of voice was the same as when he testified in court. *Id.* Given the absence of evidence of these *Mendenhall* factors, or any other sufficient excercise of authority, Deputy Ollinger's otherwise inoffensive contact with Appellant Mullen does not amount to a seizure.

## CONCLUSION

For all of the forgoing reasons, the State respectfully requests that the trial court be affirmed.

Dated this 30th day of January, 2019,

Respectfully submitted,

SUE OPPER
District Attorney
Waukesha County

__/s/_____
Shawn N. Woller
Assistant District Attorney
State Bar No. 1084308

## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 1974 words.

Date: January 30, 2020

_/s/_____
Shawn N. Woller
Assistant District Attorney
State Bar No. 1084308

**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 s. 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.

_____ _____

Date: January 30, 2020 __/s/_____
Shawn N. Woller
Assistant District Attorney
State Bar No. 1084308

P.O. Address:
District Attorney's Office
515 West Moreland Blvd. G-72
Waukesha, WI 53188
(262) 548-7076
Attorneys for Plaintiff-Respondent.