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

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

ANTHONY D. COTTON
State Bar No. 1055106

JOHN M. BINDER
State Bar No. 1107890

Attorneys for Defendant-Appellant

KUCHLER & COTTON, S.C.
1535 E. Racine Ave.
Waukesha, WI 53186
T: (262) 542-4218
F: (262) 542-1993

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

WISCONSIN CASES

OTHER STATE CASES

ARGUMENT

I. No Reasonable Person in Mr. Mullen's Position Would Feel Free to Leave.

Under the circumstances of this case, "a reasonable person" in Mr. Mullen's position "would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). When Deputy Ollinger first arrived at the scene, Mr. Mullen was outside of a closed bar. (R.43:5-6; App.5-6). He was under the bar's lights, and then illuminated also by the squad car's front lights. (R.43:7, 30-31; App.7, 30-31). He was walking toward his vehicle to leave the closed bar. (R.43:25-26; App.25-26). However, before he could get to his car, Deputy Ollinger shined his squad car's high-intensity spotlight directly at Mr. Mullen, impeding his sight. (R.43:30-31; App.30-31). At that moment, Mr. Mullen stopped walking and froze.[1] (R.43:25-26; App.25-26). He was seized. *Compare State v. Dixon*, 2016 WI App 88, 372 Wis.2d 458, 2016 WL 5820611, ¶15 (finding defendant "seized" when, in response to officers' squad car's red and blue lights illuminating and officer pulling up next to defendant on the sidewalk, defendant "just stood there.") (Supp. App.2-3); *see also Mendenhall*, 446 U.S. at 554. As stated in *Brendlin*, "what may amount to submission depends on what a person was doing before the show of authority." *Brendlin v. California*, 551 U.S. 249, 254 (2007). Here, as did Mr. Mullen, a person who walks toward their car to leave a bar, and then stops once an officer shines his high-intensity spotlight at him, is seized. *See id.* at 254 ("A police officer may make a seizure by a show of authority and without the use of physical force.").

Even if Mr. Mullen was not seized at that point, he was definitely seized when Deputy Ollinger parked his squad car directly behind Mr. Mullen's car, got out, and confronted Mr. Mullen, stating that he was a deputy with the Waukesha County Sherriff's Office. Deputy Ollinger then proceeded to interrogate Mr. Mullen. It was only after this sequence of events—and thus after the seizure—that Mr. Mullen incriminated himself.

Further, this is not the typical case where a person is questioned by an officer on a sidewalk of a busy city or while inside a busy airport.[2]

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[1] *See* Shooter's Pub and Grill video surveillance, available at, https://www.youtube.com/watch?v=04EHV0eFsfk&feature=youtu.be

[2] *See Mendenhall*, 446 U.S. at 555 (finding no seizure in airport where "[t]he events took place in the public concourse. The agents wore no uniforms and

Here, during the face-to-face confrontation between Mr. Mullen and Deputy Ollinger, there were no other pedestrians or vehicles in sight, and the bar was closed. (R.50:5-6, 35-36; App.5-6, 35-36). Mr. Mullen was completely alone in a rural area at 1:20 A.M. when with an armed deputy got out of his vehicle and approached Mr. Mullen, initiating conversation. (R.43:24, 31-33; App.24, 31-33). No reasonable person in Mr. Mullen's position would think he was free to ignore the officer, get in his car, and flee the scene. Any "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 Brendlin*, 551 U.S. at 257.

The State and County incorrectly argue that Deputy Ollinger's use of his high-intensity spotlight did not constitute a seizure. The flaw in the State's and County's argument is that they fail to consider the additional circumstances of this case, which further show that no reasonable person in Mr. Mullen's position would feel free to leave. Specifically, 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.43:5-6, 8, 17, 21, 24-36; App.5-6, 8, 17, 21, 24-36).

Courts have found similar police-citizen confrontations to be seizures. *See People v. Garry*, 67 Cal.Rptr.3d 849, 858-59 (Cal. Ct. App. 2007) (finding seizure where the officer "bathed" 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); *State v. Jestice*, 861 A.2d 1060, 1062-63 (Vt. 2004) (finding seizure where 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); *State v. Garcia-Cantu*, 253 S.W.3d 236, 244-49 (Tex. Crim App. 2008) (finding seizure where officer parked

displayed no weapons."); *INS v. Delgado*, 466 U.S. 210, 220-21 (1984) (finding no seizure where individuals were questioned at their workplace, a factory).

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 defendant's truck with his flashlight, and asked defendant, "[y]ou got an ID on you?").

Lastly, the State's and County's comparison of this case to *County of Grant v. Vogt* is fatally flawed. 2014 WI 76, ¶24, 356 Wis.2d 343. *Vogt* 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. *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. This case does not deal with a person inside of their vehicle. Here, there was no glass barrier preventing any contact between Mr. Mullen and Deputy Ollinger. Instead, the contact involved a face-to-face confrontation. (R.43:31-34; App.31-34). Therefore, the State's and County's reliance on *Vogt* is misplaced.

The seizure was unreasonable and all "fruits" should have been suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

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 in this case.

Dated at Waukesha, Wisconsin this 10th day of February, 2020.

Respectfully Submitted,
KUCHLER & COTTON, S.C.

_____
ANTHONY D. COTTON
State Bar No. 1055106

_____
JOHN M. BINDER
State Bar No. 1107890

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 1,142 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 10th day of February, 2020.

Respectfully submitted,
KUCHLER & COTTON, S.C.

_____
ANTHONY D. COTTON
State Bar No. 1055106

_____
JOHN M. BINDER
State Bar No. 1107890

SUPPLEMENTAL APPENDIX TABLE OF CONTENTS