STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2021AP1100CR

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COUNTY OF JEFFERSON,

Plaintiff-Respondent,

v.

JULIANNE WEDL,

Defendant-Appellant.

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On Appeal from a Docketed Judgement Entered on February 24, 2022, in The Circuit Court of Jefferson County, The Honorable Dennis Moroney, Reserve Judge, Presiding, Trial Court Case No. 2019TR008850

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# BRIEF OF PLAINTIFF-RESPONDENT

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Respectfully submitted,

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Supreme Court Cases



## Wisconsin Cases

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As a one-judge appeal, this decision is not eligible for publication. The State believes the briefs submitted in this matter fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigants.

## STATEMENT OF FACTS

Deputy Williams of the Jefferson County Sheriff's Office responded to a report of a vehicle on fire at approximately 12:15 a.m. on November 28, 2019. (R.17:7-8) Upon arrival, Deputy Williams made contact with two individuals on scene. (R.17:9) One of those individuals was Ms. Wedl. (R.17:9) The other individual was an off-duty officer from another agency. (R.17:9-10) Deputy Williams testified that he could detect an odor of intoxicants on Ms. Wedl's breath and asked that a deputy respond to the location for a possible OWI investigation. (R.17:10) At the Motion Hearing on March 13, 2020, Deputy Williams was asked if he did anything to detain the defendant or asked or her remain on scene, and Deputy Williams testified that he told the defendant that someone would be with her shortly to get a statement in regards to the vehicle fire. (R.17:11) Because it was cold outside, Deputy Williams suggested that the defendant wait in the car. (R.17:11) He could not recall whether she did so. (R.17:11) Deputy Williams testified that it took Deputy Johnson approximately 5-10 minutes to arrive at the scene. (R.17:12-13)

Deputy Johnson testified that it took him 5-10 minutes from the time he heard Deputy Williams's dispatch to arrive at the scene. (R.17:20) When he arrived, Deputy Johnson made contact with Ms. Wedl. (R.17:20) Deputy Johnson began to speak with Ms. Wedl about the burning car. (R.17:22) As he spoke with Ms. Wedl, Deputy Johnson could smell an odor of intoxicants coming from Ms.

Wedl's breath. (R.17:23) He also observed that Ms. Wedl's eyes were glossy and bloodshot. (R.17:23) Because of this, Deputy Johnson asked Ms. Wedl if she had been drinking. (R.17:23-24) Ms. Wedl admitted to having a few glasses of wine at a friend's house. (R.17:24) Deputy Johnson then informed Ms. Wedl that he would be administering Standard Field Sobriety tests. (R.17: 24).

The court did not really examine whether Ms. Wedl was detained after Deputy Williams asked her to remain on scene and before Deputy Johnson arrived. However, the court did determine that law enforcement had reasonable suspicion to extend the stop to administer Standard Field Sobriety tests. (R.17:36-37) The court based this ruling on the testimony that Deputy Johnson could smell an odor of intoxicants that he later characterized as strong. (R.17:35) The court also considered that Ms. Wedl admitted to having a couple glasses of wine and that she had glossy and bloodshot eyes. (R.17:35) The court considered, "This was after midnight, what the deputies called 'typical bar time,' which is the time that there's a higher event of or probability of drunk drivers." (R.17:36) Based on the totality of the circumstances, the court found there was reasonable suspicion to conclude that Ms. Wedl had been driving while intoxicated. (R.17:36-37)

## STANDARD OF REVIEW

Review of an Order granting or denying a motion to suppress evidence presents a question of constitutional fact. *State v. Iverson*, 2015 WI 101, ¶ 17, 365 Wis. 2d 302, 871 N.W.2d 661 (quoting *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463). The circuit court's findings of historical fact must be reviewed with deference unless clearly erroneous. *Id.* The reviewing court must then independently apply constitutional principles to those facts. *Id.* at ¶ 18 (citation omitted).

## ARGUMENT

### I. MS. WEDL'S ENCOUNTER WITH LAW ENFORCEMENT WAS A CONSENSUAL ENCOUNTER UNTIL SHE WAS ASKED TO PERFORM STANDARD FIELD SOBRIETY TESTS.

The State asserts that Ms. Wedl's contact with law enforcement up until the time she was asked to perform field sobriety tests was a consensual encounter and not a stop for which the protections of the Fourth Amendment apply. *See State v. Young*, 2006 WI 98, ¶ 18, 294 Wis. 2d 1, 717 N.W.2d 729 (citing *Terry v. Ohio*, 392 U.S. 1, 13, 88 S.Ct. 1868 (1968), *State v. Williams*, 2002 WI 94, ¶¶ 4, 20, 255 Wis. 2d 1, 646 N.W.2d 834 and *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382 (1991)). One is only entitled to the protection of the Fourth Amendment if he or she is "seized" within the meaning of the Fourth Amendment. *County of Grant v. Vogt*, 2014 WI 76, ¶ 26, 356 Wis. 2d 343, 850 N.W.2d 253. However, not all encounters between law enforcement and the public are considered "seizures" under the Fourth Amendment. *Id.* An individual is not "seized" for Fourth Amendment purposes when a law enforcement officer simply approaches an individual on the street and asks questions. *United States. v. Drayton*, 536 U.S. 194, 122 S.Ct. 2105, 2110 (2002) (citations omitted). Even when law enforcement does not suspect an individual of committing a crime, "they may pose questions, ask for identification, and request consent to search luggage – provided they do not induce cooperation by coercive means." *Id.* (citation omitted).

A seizure under the Fourth Amendment occurs when "in view of all the circumstances surrounding an incident, a reasonable person would have believed he was not free to leave." *See Young*, 2006 WI 98, ¶¶ 39-40 (finding that the standard for a seizure put forth in *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 1877 (1980) applies when a subject submits to an officer's show of authority). However, this is an objective test, "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, 108 S.Ct. 1975 (1988). Circumstances that might indicate a Fourth Amendment seizure include: "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." *Williams*, 2002 WI 94, ¶ 21 (quoting *Mendenhall*, 446 U.S. at 554-55).

An encounter between a law enforcement officer and a citizen only becomes a seizure, "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen," so that, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Vogt*, 2014 WI 76, ¶ 20, *citing Mendenhall*, 466 U.S. at 552 (quoting *Terry*, 392 U.S. at 19). "[P]olice questioning, by itself, is unlikely to result in a Fourth Amendment violation. 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." *I.N.S. v. Delgado*, 466 U.S. 210, 216, 104 S.Ct. 1758 (1984) (citation omitted).

The initial contact Deputy Williams had with Ms. Wedl was not the result of a traffic stop. Rather, it was to respond to a report of a vehicle that was on fire. (R.17:7-8) At no point was Ms. Wedl restrained by law enforcement. Nor does it appear from the record that there was any point prior to Deputy Johnson's arrival that Ms. Wedl was made aware that she was suspected of any criminal activity. No weapons were displayed.

Deputy Williams asked Ms. Wedl to remain on scene to provide a witness statement, and she did so. (R.17:11) Deputy Williams told Ms. Wedl she could wait in her car because it was cold outside, not because he was detaining her. (R.17:11) Deputy Williams used no physical force, nor did he exercise his authority in a manner that would have made Ms. Wedl feel she was not free to leave. As such, the encounter was not a seizure for which Fourth Amendment protections apply.

## II. DURING HIS CONTACT WITH MS. WEDL, DEPUTY JOHNSON OBSERVED ENOUGH INDICATORS TO PROVIDE REASONABLE SUSPICION THAT MS. WEDL HAD DRIVEN WHILE IMPAIRED, WHICH MADE IT LAWFUL TO EXTEND THE CONTACT WITH MS. WEDL TO ADMINISTER STANDARD FIELD SOBRIETY TESTS.

The temporary detention of a person constitutes an unlawful seizure under the Fourth Amendment when, under the totality of the circumstances, it is not

supported by reasonable suspicion. *State v. VanBeek*, 2021 WI 51, ¶ 51, 397 Wis. 2d 311, 960 N.W.2d 32 (citation omitted). Reasonable suspicion is "a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime." *Id.* (quoting *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). "An 'inchoate and unparticularized suspicion or hunch' will not suffice" *Id.* (citing *Terry*, 392 U.S. 1, 27). If, during a valid investigatory stop for OWI, an officer has reasonable suspicion to believe the driver was operating while impaired but does not yet have probable cause, the officer may request that the driver perform field sobriety tests. *See County of Jefferson v. Renz*, 231 Wis. 2d 293, ¶ 36, 603 N.W.2d 541, 549 (1999).

The Fourth Amendment requires that any detention be temporary and last no longer than necessary to effectuate the purposes of the stop. *State v. Quartana*, 213 Wis. 2d 440, 448, 570 N.W.2d 618 (1997) (citing *Florida v. Royer*, 460 U.S. 491, 499, 103 S.Ct. 1319 (1983)). To determine whether the length of a seizure was reasonable, a court "must determine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the person." *Quartana*, 213 Wis. 2d at 448 (citing *United States v. Sharpe*, 470 U.S. 675, 686, 103 S.Ct. 1568 (1985)).

Once he made contact with Ms. Wedl, Deputy Johnson had a short conversation with Ms. Wedl about how she discovered the engulfed vehicle. (R.17:22) While he spoke with Ms. Wedl, Deputy Johnson observed that he could

also smell an odor of intoxicants coming from Ms. Wedl. (R.17:23) He also observed that her eyes were bloodshot and glassy. (R.17:23) Further, Ms. Wedl admitted she had a few drinks. (R.17:23)

While Ms. Wedl claims her glossy and bloodshot eyes can be explained by being exposed to the fire, it also could be an indicator of intoxication. Ms. Wedl also challenges the circuit court's determination that she was driving at bar time. (R.17:36) Admittedly it was not around 2 a.m. when most bars close. It was, however, after midnight when the few establishments that are open are bars.

After speaking with Ms. Wedl, Deputy Johnson did not have probable cause to believe Ms. Wedl had been driving while intoxicated. He did, however, have enough reasonable suspicion to believe Ms. Wedl was driving while intoxicated such that under *Renz*, he was allowed to extend the contact in order to administer standard field sobriety tests. Deputy Johnson smelled alcohol on Ms. Wedl, observed that her eyes were glossy and bloodshot, knew that she was driving and that she consumed alcohol. These factors provided the reasonable suspicion necessary to extend Deputy Johnson's contact with Ms. Wedl to administer standard field sobriety tests. As such, this was not an illegal seizure that violated Ms. Wedl's Fourth Amendment rights.

## CONCLUSION

Ms. Wedl was not "seized" for Fourth Amendment purposes until Deputy Johnson asked that she perform standard field sobriety tests because at that point, any reasonable person would not feel they were free to leave. Because there was

no seizure up until that point, there can be no Fourth Amendment violation. Further, when Deputy Johnson arrived and spoke with Ms. Wedl, he quickly developed reasonable suspicion through questioning and observation that Ms. Wedl had been driving while intoxicated. As such, he was allowed to extend his contact with Ms. Wedl to administer Standard Field Sobriety tests. Based on the foregoing, the State respectfully requests that this court affirm the circuit court's decision.

Dated this 20th day of June, 2022 at Jefferson, Wisconsin.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8(b), (bm) and (c), Wis. Stats. for a brief. The length of the brief is 13 pages with 2,013 words.

Dated this 20th day of June, 2022 at Jefferson, Wisconsin

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