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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2022AP000500

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANNIKA S. CHRISTENSEN,

Defendant-Respondent.

ON APPEAL FROM AN ORDER OF THE TRIAL COURT SUPPRESSING EVIDENCE,
IN THE CIRCUIT COURT FOR JEFFERSON COUNTY, BRANCH 1, THE
HONORABLE WILLIAM V. GRUBER, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

Respectfully submitted,

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STATEMENT OF THE ISSUES

Was officers' encounter with Ms. Christensen on November 10, 2019 a consensual encounter or a traffic stop?

STATEMENT ON PUBLICATION

As a one-judge appeal, this decision is not eligible for publication.

STATEMENT ON ORAL ARGUMENT

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 THE CASE AND FACTS

On May 27, 2020, the State filed a Complaint in Jefferson County Case 2020CM000223 charging Annika S. Christensen with Possession of Tetrahydrocannabinols (THC), Possession of Drug Paraphernalia and two counts of Possession of a Controlled Substance. (R. 2:1-2, Pet-App. A:1-2) On November 13, 2020, Ms. Christensen filed a Motion to Suppress due to Unlawful Detention asking the court to suppress all evidence obtained and arguing that the evidence was obtained unlawfully because Ms. Christensen was detained without reasonable suspicion. (R. 22:1-2, Pet-App. B:1-2)

A Motion Hearing was held on April 16, 2021. At the hearing, Officer Pagliaro testified that it was dark when the investigation at the DNR parking lot occurred. (R. 40:9, Pet-App. C:11) Officer Pagliaro's attention was drawn to the lot because one of the vehicles was running, it was snowing outside, the windows were fogged and a dome light was on. (R. 40:10-11, Pet-App. C:12-13) As such, Officer Pagliaro and Sergeant Walters, who were in the same squad car, pulled into the parking lot, and Officer Pagliaro made contact with the passenger side of the vehicle. (R. 40:11, Pet-App. C:13)

Officer Pagliaro stated that Sergeant Walters turned on the side alley lights of the squad. (R. 40:12, Pet-App. C:14) Officer Pagliaro testified that the parking lot had one entrance, and that it was surrounded on one half by trees and on the other half by fields. (R. 40:12, Pet-App. C:14) Officer Pagliaro estimated that the squad was parked approximately 30 feet away from the suspect vehicle. (R. 40:13, Pet-App. C:15) Officer Pagliaro believed there was sufficient space for the parked vehicles to exit the parking lot. (R. 40:13, Pet-App. C:15) Officer Pagliaro made contact on the passenger side of the vehicle, knocked on the window and announced who he was. (R. 40:13, Pet-App. C:15) The passenger rolled down the window, and Officer Pagliaro could smell a strong odor of burnt cannabis coming from the vehicle. (R. 40:14, Pet-App. C:16)

On redirect examination, Officer Pagliaro testified that hunters are required to stop hunting 15 to 20 minutes before sunset. (R. 40:26, Pet-App. C:28) As such, it was not a usual occurrence to see vehicles in the DNR parking lot during nighttime hours. (R. 40:26-27, Pet-App. C:28-29)

Sergeant Walters testified that he believed the two vehicles parked in the lot were suspicious because there had been reported drug activity in the lot, and Sergeant Walters had arrested people in the lot for drugs in the past. (R. 40:34, Pet-App. C:36) Sergeant Walters pulled into the lot, activated his side alley light and parked inside the entrance behind the vehicles. (R. 40:35, Pet-App. C:37) Sergeant Walters parked approximately 10 feet behind the vehicles. (R. 40:36, Pet-App. C:38) Sergeant Walters testified that while it may have been tight for the other vehicles to leave, they would have been able to do so. (R. 40:36, Pet-App. C:38) Sergeant Walters testified that he did not have his emergency lights activated. (R. 40:36, Pet-App. C:38) Officer Pagliaro made contact on the passenger side and was questioning the passenger while Sergeant Walters made contact with the driver. (R. 40:36, Pet-App. C:38) When he made contact with the driver, Sergeant Walters could smell marijuana coming from inside the vehicle. (R. 40:38, Pet-App. C:40)

The State argued that while the officers did have reasonable suspicion to stop the vehicle, the entirety of the encounter up until the officers smelled marijuana coming from the vehicle was consensual. (R. 40:53-54, Pet-App. C:55-56) At the point they smelled the marijuana, the officers had probable cause to conduct an investigation. (R. 40:54, Pet-App. C:56)

The court declined to consider whether the encounter was consensual. (R. 40:58, Pet-App. C:60) Instead, the court denied Ms. Christensen's Motion finding that there was reasonable suspicion for the stop. (R. 40:58-60, Pet-App. C:60-62)

On August 9, 2021, Ms. Christensen filed a letter with the court asking the court to re-open evidence from the Motion Hearing. (R. 54:1, Pet-App. D:1) The basis of the request was the response of the Lake Mills Police Department to an open records request in which the Lake Mills Police Department reported there had been no

reported drug activity in the DNR parking lot where the officers arrested Ms. Christensen. (R. 54:2-3, Pet-App. D:2-3) The court agreed to re-open the evidence on August 19, 2021. (R. 56:1, Pet-App. E:1)

An evidentiary hearing was held on December 10, 2021. The focus of the testimony was on the officers' prior contacts due to drug activity in the area where the stop occurred. (R. 74:1-12, Pet-App. F:3-14). At the conclusion of testimony, the State reiterated that it took the position that the contact with Ms. Christensen was a consensual encounter. (R. 74:13-14, Pet-App. F:15-16)

The Court issued its Oral Ruling on February 28, 2022. With respect to the consensual contact analysis, the court focused on where the squad car was parked in relation to the parked vehicles. (R. 73:2, Pet-App. G:3) The court noted the discrepancy between the two officers' testimony. (R. 73:3, Pet-App. G:4) The court found Sergeant Walters' testimony that Ms. Christensen's vehicle was 10 feet away from the squad car more convincing. (R. 73:3, Pet-App. G:4) The court noted that Sergeant Walters testified that it would have been difficult for Ms. Christensen to just back out and that she would have had to make more than one driving maneuver to do so. (R. 73:3, Pet-App. G:4)

The court also considered the totality of the circumstances including that the officers were in a pick-up truck that said "Police" on the side, they had their take-down light on, there were two armed officers that approached the vehicle, Ms. Christensen's age and the fact that Ms. Christensen is female. (R. 73:4-5, Pet-App. G:5-6) However, the court was most concerned with the positioning of the vehicles and the inability or perceived inability to get out of the lot. (R. 73:5, Pet-App. G:6) The court also noted that there was only one way to exit the lot. (R. 73:5, Pet-App. G:6) As such, the court found that this was not a consensual contact. (R. 73:5, Pet-App. G:6) The court then analyzed the reasonable suspicion issue and ultimately concluded that there was no reasonable suspicion for the stop and granted Ms. Christensen's Motion to Suppress. (R. 73:5-8, Pet-App. G:6-9) The Court signed the

Order granting Ms. Christensen's Motion to Suppress on March 17, 2022. (R. 76:1, Pet-App. H:1)

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. LAW ENFORCEMENT’S ENCOUNTER WITH MS. CHRISTENSEN WAS NOT A SEIZURE UNDER THE FOURTH AMENEMENT.

The State maintains that the initial contact with Ms. Christensen 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). 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).

The Wisconsin Supreme Court considered similar circumstances in *County of Grant v. Vogt*. In *Vogt*, an officer in a small town observed a vehicle pull into an empty parking lot for a closed park on December 25, 2011 at 1:00 a.m. 2014 WI 76, ¶ 4. The officer did not observe any traffic or law violations; the activity simply struck the officer as suspicious. *Id.* The officer pulled his marked squad behind the defendant’s vehicle and parked without turning on his emergency lights. *Id.* at ¶ 6. The uniformed officer approached the driver’s side window, where the defendant was seated, rapped on the window and motioned for the defendant to roll the window down. *Id.* at ¶ 7. The defendant rolled down his window, and the officer asked the defendant what he was doing. *Id.* at ¶ 8. As the defendant answered, the officer observed signs of intoxication. *Id.* The officer then took the defendant’s driver’s license, turned on his squad lights, and conducted an operating while under the influence investigation. *Id.*

The defendant argued that a seizure took place because the deputy parked right behind the defendant’s vehicle, it was not easy for him to drive away from where he was parked, the deputy commanded that he roll down the window and the deputy rapped loudly on his window. *Id.* at ¶ 40.

The Wisconsin Supreme Court held these factors did not demonstrate the defendant was seized. *Id.* at ¶ 41. Specifically regarding the location of the vehicles, the court explained that even though there were obstacles on three sides of the defendant’s vehicle, he still could have driven away. *Id.* at ¶¶ 41-42. The court also found that even though it was not an exit, the defendant could have pulled forward to get out. *Id.* at ¶ 42. Therefore, the defendant was not seized simply because there was only one way out of the parking lot. *Id.* at ¶ 42.

Similarly, in the unpublished case *State v. Snyder*, cited herein as persuasive authority, a trooper observed the defendant drive into a parking lot. *State v. Snyder*, 2014 WL 4920605, ¶ 3, 2014 WI App 120, 358 Wis. 2d 709 (Pet-App. I:1-4). The Trooper entered the driveway of the parking lot where he stopped. *Id.* at ¶ 4. Meanwhile, the defendant turned around in the parking lot and was travelling towards the driveway where he stopped. *Id.* The trooper and the defendant's vehicles stopped at approximately the same time with the front ends of each vehicle facing the other. *Id.* The squad car was approximately a car to two car lengths away or approximately 12 feet away from the defendant's vehicle. *Id.* The driveway was the only point of exit and entry to the parking lot. *Id.* at ¶ 5. The Trooper testified that the driveway was approximately thirty feet wide, and that there was twenty feet of open driveway to the Trooper's left. *Id.*

The defendant argued, "a reasonable person could see a police officer approaching within 10 feet of the front of his or her vehicle and conclude he was not free to leave." *Id.* at ¶ 11. The defendant further argued that his only exit route was to "maneuver around a fully marked . . . squad car," which "no reasonable person would dare attempt." *Id.* at ¶ 19. The Court rejected the defendant's arguments and found the following:

In sum, the facts here are a close match to those in *Vogt*. A lone, uniformed officer stopped a marked vehicle close to the suspect's vehicle, but without activating emergency lights or siren, and approached on foot without drawing or displaying a weapon or using any commanding words or gestures, leaving room enough for the subject to drive away, even if, as the circuit court found, Snyder would have had to maneuver to make a safe exit. *Id.* at ¶ 24.

As such, the court reversed the circuit court's order granting the defendant's Motion to Suppress. *Id.* at ¶ 25.

The encounter in this case is similar to the encounters in *Vogt* and *Snyder*. In all cases, the officers parked their squad cars near the vehicle the defendant was in. In all cases, the defendants were parked in a lot where there was only one exit. In both *Vogt* and *Snyder*, the defendants faced some slight obstruction to reaching the exit yet still would have been able to exit the lot. Similarly, in this case, the Court did not find

that Ms. Christensen could not have driven away, just that it would have been difficult for her to do so. Like *Vogt* and *Snyder*, the officers in this matter did not park their squad car in such a way that the vehicle Ms. Christensen was in was prevented from leaving.

In addition, the other circumstances of the encounters in *Vogt* and *Snyder* are similar to this case. These encounters all occurred in the evening or early morning when it was dark outside. The defendants' vehicles were all stopped when the officers encountered them. In this case, like in *Vogt*, the vehicle the defendant was in was running, and the lights were on. None of the officers in the cases activated their red and blue emergency lights, but they did use some form of lighting such as a flashlight, headlights and side alley lights. The officers in all the cases approached the vehicles on foot. Like the deputy in *Vogt*, the officer in this case knocked on the window to get the defendant's attention.

The State acknowledges one distinction, which is that in *Vogt* and *Snyder*, the defendants were approached by only one officer. In this case, two officers were present at the encounter. However, Sergeant Walters did not make contact with either occupant until after Officer Pagliaro had already made contact with the defendant and smelled marijuana. (R. 40:37, Pet-App. C:39) The State does not believe two officers constitutes "several" nor does the State believe the officers in this matter could objectively be perceived as a threatening presence, especially because there was one other occupant in the vehicle besides the defendant. In addition, the officers arrived in the same squad car. (R. 40:11, Pet-App. C:13) Further, there is no indication that the officers displayed their weapons, touched the defendant in any manner or used language or a tone of voice that compelled the defendant's compliance with their requests.

The fact that the officers were in a pick-up truck marked "Police" should have no bearing on the analysis. As stated in *Vogt*:

To their credit, citizens and others may feel tethered by social norms to an officer's request and may consent in order to avoid the taboo of disrespecting an officer of the law. However, a person's consent is no less valid simply because an individual is

particularly susceptible to social or ethical pressures. Were it otherwise, officers would be hesitant to approach anyone for fear that the individual would feel “seized” and that any question asked, however innocuous, would lead to a violation of the Fourth Amendment. 2014 WI 76, ¶ 31.

CONCLUSION

Based on the totality of the circumstances, the State believes that the encounter in this matter was a consensual encounter. While it might have required some maneuvering, the defendant could still leave the parking lot. As such, pursuant to *Vogt*, the positioning of the officers’ squad car did not turn this encounter into a seizure under the 4th Amendment. Likewise, the other circumstances of this encounter evaluated with the positioning of the squad car were not so coercive or compelling that a reasonable person would not have felt free to leave. Therefore, the State respectfully requests that this court reverse the Order of the circuit court granting Ms. Christensen’s Motion to Suppress.

Dated this 23rd day of May, 2022 at Jefferson, Wisconsin.

Respectfully submitted,



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.50(1), Wis. Stats. for a brief produced with a proportional serif font. The length of this brief is 14 pages with 2,940 words.

In addition, I hereby certify that an electronic copy of this brief has been submitted pursuant to §809.19(12), Wis. Stats. and that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this 23rd day of May, 2022 at Jefferson, Wisconsin.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, 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; (3) a copy of any unpublished opinion cited under Wis. Stat. §§ 809.23(3)(a) or (b); and (4) 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 judgment 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 one or more initials or other appropriate pseudonym or designation 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 reference to the record.

Dated this 23rd day of May, 2022 at Jefferson, Wisconsin.

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