

FILED
07-07-2022
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 22 AP 500 CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

ANNIKA S. CHRISTENSEN,

Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT

ON APPEAL FROM A FINAL ORDER
ENTERED ON MARCH 17, 2022, BY THE
JEFFERSON COUNTY CIRCUIT COURT,
THE HONORABLE WILLIAM GRUBER PRESIDING.

Respectfully submitted,

ANNIKA S. CHRISTENSEN,
Defendant-Respondent

TRACEY WOOD & ASSOCIATES
Attorneys for the Defendant
6605 University Avenue, Suite 101
Middleton, Wisconsin 53562
(608) 661-6300

BY: TEUTA JONUZI
State Bar No. 1098168

TRACEY A. WOOD
State Bar No. 1020766

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	4
Statement of the Issues	5
Statement on Publication	6
Statement on Oral Argument	6
Statement of the Case and Facts	7
<u>Argument</u>	13
I. POLICE DID NOT HAVE A CONSENSUAL ENCOUNTER WITH CHRISTENSEN.	13
A. Standard of Review	13
B. The circuit court properly concluded that the reasonable person would not have felt free to leave.	13
II. REASONABLE SUSPICION DID NOT EXIST TO DETAIN CHRISTENSEN.	15
A. Standard of Review	15
B. A mere hunch of illegal activity may not justify detaining a person.	15
Conclusion	19
Certifications	21

<u>Appendix</u>	24
Appendix Table of Contents	24
<i>Fond du Lac County v. Dahlke</i> , 2018 WI App 39, 382 Wis. 2d 832, 917 N.W.2d 237 (unpublished but citable).	A-1
<i>State v. Snyder</i> , 2014 WI App 120, 358 Wis. 2d 709, 856 N.W.2d 345 (unpublished but citable).	A-6
Trial Court's Decision from February 28, 2022	A-12

TABLE OF AUTHORITIES

Cases

<i>Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.</i> , 90 Wis. 2d 97, 109, 279 N.W.2d 493	15
<i>County of Grant v. Vogt</i> , 2014 WI 76, 356 Wis. 2d 343, 850 N.W.2d 253.....	13, 14
<i>Fond du Lac County v. Dahlke</i> , 2018 WI App 39, 382 Wis. 2d 832, 917 N.W.2d 237	10
<i>Roy v. St. Lukes Med. Ctr.</i> , 2007 WI App 218, 305 Wis.2d 658, 741 N.W.2d 256.....	14, 15
<i>State v. Floyd</i> , 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560.....	14
<i>State v. Guzy</i> , 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987).....	16
<i>State v. Johnson</i> , 2007 WI 32, 299 Wis.2d 675, 729 N.W.2d 182	13, 17
<i>State v. McMorris</i> , 2007 WI App 231, 306 Wis. 2d 79, 742 N.W.2d 322.....	15
<i>State v. Morgan</i> , 197 Wis. 2d 200, 539 N.W.2d 887 (1995);	10, 16
<i>State v. Snyder</i> , 2014 WI App 120, 358 Wis. 2d 709, 856 N.W.2d 709.....	15
<i>State v. Young</i> , 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App. 1997)	10
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968).....	16
<i>United States v. Mendenhall</i> , 446 U.S. 544 (1980)	13

STATEMENT OF THE ISSUES

- I. WHETHER POLICE HAD REASONABLE SUSPICION TO DETAIN CHRISTENSEN.

CIRCUIT COURT HELD:
NO.

- II. ASSUMING THERE WAS NO REASONABLE SUSPICION TO DETAIN CHRISTENSEN, WHETHER THE ENCOUNTER WITH POLICE WAS CONSENSUAL.

CIRCUIT COURT HELD:
NO.

STATEMENT ON PUBLICATION

Defendant-respondent does not request publication of the opinion in this appeal.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

This is an appeal by the prosecution from the trial court order granting Christensen's motion for reconsideration, in which she moved to suppress evidence derived from her unlawful detention.

On November 10, 2019, Sergeant Ryan Walters and Officer Vincent Pagliaro observed Christensen's vehicle in a DNR parking lot with the vehicle running and the windows of her vehicle fogged up.¹ Walters and Pagliaro made contact with Christensen and the other occupant.² Ultimately, police arrested Christensen for possession of a controlled substance and possession of drug paraphernalia.³

On May 27, 2020, the Jefferson County District Attorney's Office charged Christensen with possession of tetrahydrocannabinols and possession of drug paraphernalia.⁴ On November 13, 2020, Christensen moved to suppress her unlawful detention.⁵

On April 16, 2021, the Honorable William Gruber presided over an evidentiary hearing on the unlawful detention motion. At the hearing, Officer Pagliaro testified. Pagliaro noted that he observed Christensen's vehicle at approximately 6:40 p.m. parked in a DNR parking lot.⁶ There was another vehicle

¹ R.1.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ R.22.

⁶ R.40 at 18.

next to Christensen's.⁷ The other vehicle was not running.⁸ Christensen's vehicle drew his attention because it was parked while there was snow falling, it was running, its windows were fogged, and it was sitting in the dark.⁹ He also noted the vehicle drew his attention because no other vehicles were in the vicinity, but acknowledged that there were other individuals walking through the parking lot at the time he initiated contact with Christensen.¹⁰ Pagliaro acknowledged that it would not be uncommon for fogging of windows to occur when it is cold outside and the heat is turned on in the vehicle.¹¹

Per Pagliaro, "something...was going on in the vehicle."¹² Pagliaro noted the vehicle had a dome light on.¹³ Pagliaro noted Officer Walters entered the lot, parked, and Pagliaro approached the passenger side of the vehicle.¹⁴

Pagliaro could not recall if Walters initiated his emergency lights, though he noted Walters turned on his side alley lights.¹⁵ Pagliaro testified it was a square-shaped lot with one entrance, and half of the lot was bordered by trees with the other half bordered by fields.¹⁶ Pagliaro noted Christensen's vehicle was parked in the area bordered by trees.¹⁷ Pagliaro noted Walters parked with maybe 30 feet between

⁷ *Id.* at 21.

⁸ *Id.*

⁹ R.40 at 9-11.

¹⁰ *Id.* at 17.

¹¹ *Id.* at 20.

¹² *Id.* at 11.

¹³ *Id.*

¹⁴ *Id.* at 11-12.

¹⁵ *Id.* at 12.

¹⁶ *Id.*

¹⁷ *Id.*

his vehicle and that of Christensen's.¹⁸ Pagliaro also testified that Christensen would have had enough room to maneuver out of the parking lot, given the manner in which the squad vehicle parked.¹⁹ Pagliaro noted that the vehicle's windows were already rolled down when he made contact with Christensen.²⁰ Pagliaro noted an odor of marijuana emanating from the vehicle after he walked to the passenger side.²¹

Walters also testified.²² He noted Christensen's vehicle was suspicious because it was parked in the dark, with its dome light activated, with another vehicle parked next to it.²³ Walters noted that the neighbors to the DNR lot reported drug activity there in the past.²⁴ Walters also noted he arrested individuals in the lot for drug activity in the past.²⁵ Walters noted he parked approximately 10 feet behind Christensen's vehicle.²⁶ Walters noted it would have been difficult for Christensen to extricate her vehicle, given the manner in which he parked the squad vehicle.²⁷ Per Walters, he did not note the window fogging until he approached Christensen's vehicle, and it was not part of his decision-making process in electing to make contact with Christensen's vehicle.²⁸ Similarly, he did not note any signs of drug

¹⁸ *Id.* at 13.

¹⁹ *Id.*

²⁰ *Id.* at 24.

²¹ *Id.* at 27.

²² R.40 at 34.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 36.

²⁷ *Id.*

²⁸ *Id.* at 48.

activity with the vehicle before he made contact with Christensen.²⁹ Per Walters, had Christensen attempted to drive her vehicle away, she would not have been free to do so.³⁰

That same day, the court issued its ruling denying Christensen's motion.³¹ The court ruled that there was reasonable suspicion to detain Christensen and declined to address the consensual encounter.³²

On May 28, 2021, Christensen filed a motion for reconsideration on the motion to suppress.³³ She cited to *State v. Morgan* and *State v. Young* for the proposition that being in a high-crime or drug trafficking area does not constitute reasonable suspicion to detain an individual.³⁴ She also cited to an unpublished case, *Fond du Lac County v. Dahlke*, for the proposition that being in an area known for illicit activity was not in itself sufficient grounds for detaining an individual.³⁵ Counsel also moved to reopen evidence based on an open records request from the Lake Mills Police Department, which indicated that only one drug activity arrest occurred in the DNR lot in question.³⁶ On August 16, 2021, the court noted it would take the issue of reopening evidence under advisement.³⁷

²⁹ *Id.* at 49.

³⁰ *Id.* at 52-53.

³¹ *Id.* at 58.

³² *Id.*

³³ R.41.

³⁴ *Id.* at 4-5; *Morgan*, 197 Wis. 2d 200, 539 N.W.2d 887 (1995); *Young*, 212 Wis. 2d 417, 569 N.W.2d 84 (Ct. App. 1997).

³⁵ *Id.* at 5; *Fond du Lac County v. Dahlke*, 2018 WI App 39, 382 Wis. 2d 832, 917 N.W.2d 237 (unpublished but citable).

³⁶ R.41; R.53.

³⁷ R.75 at 5.

On December 10, 2021, the court presided over a motion hearing based on it granting the defense's motion to reopen evidence.³⁸ Walters testified again.³⁹ Walters noted he arrested three juvenile offenders in the DNR lot in 2014.⁴⁰ Walters testified that besides Christensen, the juvenile offenders were the only other group of individuals he had detained for drug activity in the DNR lot.⁴¹ There were no other contacts with individuals suspected of drug activity in that lot.⁴² The court stated it would issue a written decision on the motion.⁴³

On February 28, 2022, the court presided over a decision hearing. At the hearing, the court ruled that the officers did not make a consensual encounter with Christensen.⁴⁴ The court relied upon Walters's testimony, stating that Walters had more experience, he drove the squad vehicle, and his tone was more decisive than Pagliaro's during the hearing when describing the distance of 10 feet between the squad vehicle and Christensen's vehicle.⁴⁵ The court found Walters more credible than Pagliaro, and adopted Walters's testimony that the squad vehicle's parking made it so Christensen would not be able to maneuver out of the parking lot without some difficulty.⁴⁶

³⁸ R.74 at 1.

³⁹ *Id.* at 2.

⁴⁰ *Id.*

⁴¹ *Id.* at 6.

⁴² *Id.* at 7.

⁴³ *Id.* at 23.

⁴⁴ R.73 at 6.

⁴⁵ *Id.* at 3.

⁴⁶ *Id.*

On the reasonable suspicion analysis, the court ruled that no reasonable suspicion existed to contact Christensen.⁴⁷ The court declared that the 2014 arrest for drug activity in the DNR did not support the decision to make contact with Christensen, particularly given the other factors including the time of night, the DNR lot remaining open, other individuals passing through the lot, the dome light of the vehicle illuminated, and the windows fogged.⁴⁸

On March 17, 2022, the Court entered an order granting Christensen's motion on the unlawful detention. On March 28, 2022, the State appealed to this Court. On May 23, 2022, the State filed its initial brief to this Court. Christensen now responds.

⁴⁷ *Id.* at 8.

⁴⁸ *Id.* at 7-8.

ARGUMENT

Christensen respectfully requests that this Court uphold the circuit court's granting of her motion for reconsideration on the motion to suppress based on unlawful detention.

I. POLICE DID NOT HAVE A CONSENSUAL ENCOUNTER WITH CHRISTENSEN.

A. Standard of Review

An appellate court upholds a circuit court's findings of facts unless they are clearly erroneous.⁴⁹ The appellate court independently reviews whether those facts meet the constitutional standard.⁵⁰

B. The circuit court properly concluded that the reasonable person would not have felt free to leave.

In *United States v. Mendenhall*, the United State Supreme Court ruled that as long as a person stopped by police may disregard the questions and walk away, no seizure occurs under the Fourth Amendment.⁵¹ When a police officer "restrains [a person's] freedom to walk away, he has 'seized' that person."⁵² If a reasonable person would not have believed that he was free to leave, he has been seized.⁵³

⁴⁹ *State v. Johnson*, 2007 WI 32, ¶ 13, 299 Wis.2d 675, 729 N.W.2d 182.

⁵⁰ *Id.*

⁵¹ *Mendenhall*, 446 U.S. 544, 553-54 (1980).

⁵² *Id.*

⁵³ *Id.*

The State cites to *County of Grant v. Vogt* to support its position that the officers made a consensual contact with Christensen.⁵⁴ In *Vogt*, the Wisconsin Supreme Court held that the appellant had a consensual encounter with the arresting officer.⁵⁵ The Court ruled that a mere tap on the window of a vehicle could not render the encounter a seizure for purposes of the Fourth Amendment.⁵⁶

Christensen's case is distinguishable from *Vogt*. To begin with, Walters testified that he would not have allowed Christensen to leave, had she attempted to do so.⁵⁷ In *Vogt*, the officer's testimony was that he would have allowed the appellant to leave the scene, which weighed in favor of a consensual encounter.⁵⁸ Consequently, the testimony adduced at the second evidentiary hearing makes it clear *Vogt* does not apply to the factual scenario here. In addition, unlike the petitioner in *Vogt*, the court found that Christensen did not have room to maneuver out of the parking lot, given Walters's testimony that there was 10 feet between the squad vehicle and Christensen's vehicle.⁵⁹ The State does not argue that the court's findings were clearly erroneous, and any such argument would be forfeited in a reply brief.⁶⁰

The State cites to *State v. Snyder* to support its position that "the encounter in this case is similar to the encounter[] in . . . *Snyder*."⁶¹ But *Snyder* is an unpublished

⁵⁴ State's Brief at 10; *Vogt*, 2014 WI 76, 356 Wis. 2d 343, 850 N.W.2d 253.

⁵⁵ *Vogt*, 2014 WI 76.

⁵⁶ *Id.*

⁵⁷ R.40 at 52-53.

⁵⁸ *Vogt*, 2014 WI 76.

⁵⁹ *Vogt*, 2014 WI 76, ¶ 41.

⁶⁰ *Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶ 30 n.6, 305 Wis.2d 658, 741 N.W.2d 256.

⁶¹ State's Brief at 12; *Snyder*, 2014 WI App 120, 358 Wis. 2d 709, 856 N.W.2d 709.

case and is not binding authority. Moreover, the State ignores the deferential standard accorded to findings made by the circuit court. Lastly, addressing the merits of *Snyder*, the vehicle there parked 20 feet from the appellant's vehicle. Here, the distance between the vehicles was 10 feet. The circuit court found that the distance between Christensen's vehicle and that of the squad vehicle made maneuvering out of the parking lot difficult. There is no requirement under *Snyder* or any other case that it be impossible to maneuver out of a parking lot in order to constitute a seizure under the Fourth Amendment. The State does not argue at any point that the circuit court's findings were clearly erroneous on the issue of it being difficult to extricate the vehicle at the distance of 10 feet (or that the court's finding that Walters was more credible than Pagliaro on the issue of distance was clearly erroneous). Any such arguments in a reply brief would be forfeited.⁶²

II. REASONABLE SUSPICION DID NOT EXIST TO DETAIN CHRISTENSEN.

A. Standard of Review

A circuit court's findings are subject to a clearly erroneous standard of review.⁶³ An appellate court reviews application of historical facts to constitutional claims independently of the circuit court's analysis.⁶⁴

B. A mere hunch of illegal activity may not justify detaining a person.

⁶² *Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶ 30 n.6, 305 Wis.2d 658, 741 N.W.2d 256.

⁶³ *State v. Floyd*, 2017 WI 78, ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560.

⁶⁴ *Id.*

Under the Fourth Amendment to the United States Constitution, an investigatory detention must be supported by reasonable suspicion that a person is or was violating the law.⁶⁵ Reasonable suspicion of criminal activity must be “grounded in specific articulable facts and reasonable inferences from those facts[.]”⁶⁶

In its initial brief, the State does not address whether the officers had reasonable suspicion to detain Christensen. In fact, the State’s position is that police did not seize Christensen.⁶⁷ The State takes an inconsistent stance with its position in circuit court, which was that officers had reasonable suspicion to detain Christensen.⁶⁸ Any further argument by the State is abandoned.⁶⁹ Should the Court not deem the State’s argument abandoned, the State failed to develop its argument on reasonable suspicion. This Court need not assess underdeveloped claims.⁷⁰

As a preliminary matter, neither the State nor the officers could state which criminal offense Christensen may have committed or was in the process of committing to justify the initial approach. Walters did not note a traffic or other

⁶⁵ *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

⁶⁶ *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987).

⁶⁷ State’s Brief at 10.

⁶⁸ R.40 at 53-54 (“To the extent that the Court wants there to be reasonable suspicion, all there needs to be is suspicion that is reasonable and I think both officers have outlined a reasonable suspicion of why they pulled in that parking lot.”)

⁶⁹ See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (“Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute.”).

⁷⁰ *State v. McMorris*, 2007 WI App 231, ¶ 30, 306 Wis. 2d 79, 742 N.W.2d 322.

equipment violation which would justify the detention.⁷¹ At the first evidentiary hearing, the testimony indicated that the officers detained Christensen for being in the DNR lot at night, while it snowed, with her dome light activated, in an area where Walters previously arrested a subject for drug activity.⁷² The fogging of the windows did not factor into the officers' decision to initiate contact with the occupants of Christensen's vehicle.⁷³ Though being in a high-crime or drug consuming area may help justify a *Terry* stop, it may not be the sole factor.⁷⁴ Examining the time of night, there is nothing about 6:45 p.m. that would support detaining an individual.⁷⁵

Further, the court found that it was not significant that Christensen's vehicle was parked in the dark in the lot, as it was an area through which another group of people passed through.⁷⁶ Christensen's vehicle was parked during hours of operation.⁷⁷ One officer testified it was during hunting season, a group of hunters were in the DNR lot at one point, and it was possible hunters finished hunting and were cutting through the DNR lot.⁷⁸ Similarly, the court found it was not significant that it had begun to snow at the time officers decided to make contact with

⁷¹ R.40 at 49.

⁷² R.40 at 47.

⁷³ R.40 at 47-48.

⁷⁴ *State v. Morgan*, 197 Wis. 2d 200, 212, 539 N.W.2d 887 (1995).

⁷⁵ *Id.* at 213-14 ("We hold that the time of night—four a.m.—may be considered in determining the legality of the pat-down search.").

⁷⁶ R.73 at 6.

⁷⁷ *Id.*

⁷⁸ R.40 at 17.

Christensen's vehicle.⁷⁹ The court's findings may not be disturbed unless clearly erroneous.⁸⁰

It is evident that officers initiated a stop based upon a hunch of operating while impaired. Based on the limited facts, there was no reasonable inference that Christensen committed or was in the process of committing a crime. Consequently, the detention was unreasonable and violated the Fourth Amendment.

⁷⁹ *Id.* at 6.

⁸⁰ *Johnson*, 2007 WI 32, ¶ 13.

CONCLUSION

For the reasons stated above, Christensen respectfully requests that this Court uphold the circuit court's order granting her suppression motion.

Dated at Middleton, Wisconsin, July 6, 2022.

Respectfully submitted,

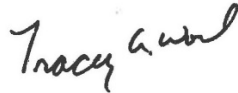
ANNIKA S. CHRISTENSEN,
Defendant-Respondent

TRACEY WOOD & ASSOCIATES
6605 University Avenue, Suite 101
Middleton, Wisconsin 53562
(608) 661-6300

BY:



TEUTA JONUZI
State Bar No.: 1098168
teuta@traceywood.com



TRACEY A. WOOD
State Bar No.: 1020766
tracey@traceywood.com

CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 points for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,997 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix. I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated: July 6, 2022.

Signed,

BY: /s/ electronically signed by Teuta Jonuzi
TEUTA JONUZI
State Bar No.: 1098168
teuta@traceywood.com

CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 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 s. 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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: July 6, 2022.

Signed,

BY: /s/ electronically signed by Teuta Jonuzi
TEUTA JONUZI
State Bar No.: 1098168
teuta@traceywood.com

CERTIFICATION

I certify that this appendix conforms to the rules contained in s. 809.19(b) and s. 809.19(bm) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated: July 6, 2022.

Signed,

BY: /s/ electronically signed by Teuta Jonuzi
TEUTA JONUZI
State Bar No.: 1098168
teuta@traceywood.com

APPENDIX TABLE OF CONTENTS

	<u>PAGE</u>
<i>Fond du Lac County v. Dahlke</i> , 2018 WI App 39, 382 Wis. 2d 832, 917 N.W.2d 237 (unpublished but citable).	A-1
<i>State v. Snyder</i> , 2014 WI App 120, 358 Wis. 2d 709, 856 N.W.2d 345 (unpublished but citable).	A-6
Trial Court's Decision from February 28, 2022	A-12