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 I, THE HONORABLE WILLIAM V. GRUBER, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

Respectfully submitted,

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I. THE STATE AGREES WITH THE CIRCUIT COURT'S FINDING THAT LAW ENFORCEMENT DID NOT HAVE REASONABLE SUSPICION TO STOP THE VEHICLE OF WHICH MS. CHRISTENSEN WAS A PASSENGER.

The State purposely did not argue that there was reasonable suspicion in its brief, so Ms. Christensen's concern that the argument might be made in this Reply Brief is unfounded. As far is the State is aware, it is not required to maintain arguments made at the circuit court level throughout the appeals process. The State has had the opportunity to further think through this issue and agrees with the court's finding that this encounter is not supported by reasonable suspicion. As such, the State did not pursue this argument in its Appeals brief.

That is not to say the State agrees that law enforcement had no reason to be suspicious of the vehicle. Of course law enforcement became suspicious when they saw two vehicles parked in the middle of nowhere after hours with fogged up windows. Had this not aroused suspicion, it is likely law enforcement would not have made contact. However, the State agrees that while suspicious, the conduct did not rise to the level of reasonable suspicion. The Court in *Vogt* noted similar circumstances:

> Ultimately, what Deputy Small did in this case is what any traffic officer might have done: investigate an unusual situation. As the circuit court noted, "what the officer did seems perfectly reasonable." Deputy Small was acting as a conscientious officer. He saw what he thought was suspicious behavior and decided to take a closer look. Even though Vogt's conduct may not have been sufficiently suspect to raise reasonable suspicion that a crime was afoot, it was reasonable for Deputy Small to try to learn more about the situation by engaging Vogt in a consensual conversation. *County of Grant v. Vogt*, 2014 WI 76, ¶ 51, 356 Wis. 2d 343, 850 N.W.2d 253.

Similarly, the officers in this matter were investigating what they thought was an unusual situation. As such, it was reasonable for them to try to learn more by engaging the driver and his passenger, Ms. Christensen, in a consensual conversation.

II. AN OFFICER'S TESTIMONY REGARDING WHETHER HE OR SHE WOULD HAVE CONDUCTED A TRAFFIC STOP HAD THE INDIVIDUAL TRIED TO LEAVE SHOULD HAVE NO BEARING ON THE ANALYSIS OF WHETHER A SEIZURE OCCURRED.

In her brief, Ms. Christensen states, "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." Brief of Defendant-Respondent, p. 14. The State disagrees that the court in *Vogt* relied on the officer's testimony as support for its decision that the encounter was consensual. In fact, the court stressed the objective nature of the *Mendenhall* test for determining whether a seizure took place, which considers "whether an innocent reasonable person . . . would feel free to leave under the circumstances." *Vogt*, 2014 WI 76, ¶ 30 (citing *State v. Williams*, 2002 WI 94, ¶ 23, 255 Wis. 2d 1, 646 N.W.2d 834). The court in *Vogt* considered several things in determining that the encounter was consensual including whether Vogt could have driven away from the encounter, whether the officer's act of motioning Vogt to roll down the window was so intimidating as to constitute a seizure and the volume of the knock on the window and whether that was similarly intimidating. *Id.* at ¶¶ 29-35. Because these factors did not "show a level of

intimidation or exercise of authority sufficient to implicate the Fourth Amendment", the court found the encounter to be consensual. *Id.* at ¶ 54.

Similarly, Officer Walter's testimony that he would have stopped the vehicle had the driver tried to leave should have no bearing on the analysis in this case. Rather, the analysis is whether, under a totality of the circumstances, an innocent reasonable person in Ms. Christensen's position would feel free to leave under the circumstances.

The State maintains that an innocent reasonable person in Ms. Christensen's position would have felt free to leave. While it might have been difficult for the driver to do so, there still would have been room for her to leave. Further, the officers used no intimidating commands or show of authority other than to illuminate the scene with the lights of their vehicle and to knock on the car window. The minimal display of authority combined with the ability to leave militates in favor of finding this to be a consensual encounter. As such, the State requests that this court reverse the circuit court's decision to grant Ms. Christensen's Motion to Suppress.

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

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 4 pages and 769 words.

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

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