STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2022AP001555 – CR

JUSTIN J. KAHLE,

Defendant-Appellant.

An Appeal From a Judgment of Conviction and Order Denying Defendant's Motion to Suppress Evidence Entered by the Honorable J. Arthur Melvin, III, Circuit Judge, Branch 5, Waukesha County

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BRIEF OF PLAINTIFF-RESPONDENT

Susan L. Opper
District Attorney
Waukesha County

Melissa J. Zilavy
Assistant District Attorney
State Bar No. 1097603
Attorneys for Plaintiff-Respondent

Waukesha County District Attorney Office's
515 W. Moreland Boulevard, CG-72
Waukesha, WI 53188
(262)548-7076
Melissa.Zilavy@da.wi.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Statutes

Wisconsin Cases

Federal Cases

Out of State Cases

STATEMENT OF THE ISSUES

Was the initial police encounter in the parking lot of a closed store where the officer illuminated his spotlight on his squad car, parked his squad in front of the defendant's vehicle, and then made contact with the defendant at his passenger side window, create an unreasonable seizure for purposes of the Fourth Amendment?

The trial court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent request neither oral argument or publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STATEMENT OF THE CASE

On May 31, 2021, around 12:15 a.m., Officer Aeriond Liu with the Village of Oconomowoc Lake Police Department, a veteran officer with over 15 years of experience in law enforcement, observed a vehicle in the Pick N Save parking lot. (Motion Hearing Transcript, 32: 4-6.) Officer Liu testified that Pick N Save was not open for customers, but there was a night stocking crew in the store at the time. (*Id.* at 6-7.) Officer Liu explained that the vehicle had its parking lights on, and was parked diagonally across several parking stalls in the middle of the parking lot, which was not what Officer Liu normally saw with the night stocking crew. (*Id.* at 7.) Officer Liu made contact with some of the workers at Pick N Save, and asked if they recognized the vehicle, which they did not. (*Id.* at 7-8.) The workers also told Officer Liu that the vehicle had been parked there a while. (*Id.* at 8.)

Officer Liu then parked his fully-marked squad car in front of the vehicle, and explained that he left about a car length between his squad and the other vehicle. (*Id.* at 8.) Officer Liu explained that the vehicle still had room to back up or go around his squad. (*Id.* at 9.) At the time, Officer Liu turned on his spotlight, but did not activate his emergency lights. (*Id.*) Officer Liu explained that he used his spotlight to illuminate the cabin of the vehicle for purposes of officer safety. (*Id.* at 10.) Officer Liu further explained that had he not turned on his spotlight, he would not have been able to see what was going on in the vehicle, as the lights in the parking lot did not illuminate well into the cabin of the vehicle. (*Id.* at 9-10.) Officer Liu made a passenger side approach, and observed that the vehicle was still running, and there was a driver and sole occupant inside. (*Id.*) Officer Liu then got the driver's attention by knocking, using a light tap, on the passenger side window, and made contact with an individual later identified as Justin Kahle, the defendant-appellant in this case. (*Id.* at 11.) Officer Liu did not have his gun drawn at this time and spoke with Kahle in a level, conversational tone. (*Id.* at 11-12.) There were no other officers present during this initial contact. (*Id.* at 13.)

During this initial contact, Officer Liu detected an odor of intoxicants coming from the vehicle; noted that Kahle had bloodshot eyes and a slur to his speech; and Kahle admitted to consuming six or seven beers at a bar. (*Id.* at 12.) Kahle also admitted to driving to the Pick N Save parking lot. (*Id.*) Based on these

observations during the initial encounter with Kahle, Officer Liu eventually asked him to step out of the vehicle to perform standardized field sobriety tests. (*Id.*)

Kahle was subsequently arrested and charged with Operating While Intoxicated-3rd Offense, contrary to Wisconsin Statutes Section 346.63(1)(a), and Operating with a Prohibited Alcohol Concentration-3rd Offense, contrary to Wisconsin Statutes Section 346.63(1)(b). (*See* Amended Criminal Complaint, 13.) The defense filed a motion to suppress evidence and argued that Kahle was seized without reasonable suspicion during Officer Liu's initial encounter with him. (*See* Defendant's Motion To Suppress Fruits of Unreasonable Search and Seizure, 15; Defendant's Brief in Support of Motion to Suppress, 17.) After the Court heard the testimony from the sole witness, Officer Liu, and argument, it issued a written decision and found that the illumination of the spotlight on the squad car and positioning of the squad vehicle did not constitute a detention in violation of the Fourth Amendment. (Circuit Court Decision and Order, 18:3.) The Court further found that the facts of this case were similar to those in *County of Grant v. Vogt*, 2014 WI 76, 356 Wis. 2d 343, 850 N.W.2d 253. (*Id.*)

Kahle then pled guilty to OWI-3rd, the PAC-3rd was dismissed by operation of law, and he was sentenced to 100 days jail, which was stayed pending this appeal. (Judgment of Conviction and Sentence to the County Jail/Fine/Forfeiture, 26.) Kahle now appeals to this Court and argues that Officer Liu seized the defendant in this case in violation of his Fourth Amendment right to be free from unreasonable searches and seizures.

ARGUMENT

I. Officer Liu's conduct, under the totality of circumstances, did not amount to a seizure of defendant-appellant Kahle.

a. Relevant Law

Whether someone has been seized is a two-part standard of review. This court will uphold the trial court's findings of fact unless they are clearly erroneous, but the application of constitutional principles to those facts is subject to de novo review. *County of Grant v. Vogt,* 2014 WI 76, ¶ 17, 356 Wis. 2d 343, 850 N.W.2d 253.

"The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and seizures." *State v. Young*, 2006 WI 98, ¶ 18, 294 Wis. 2d 1, 717 N.W.2d 729 (footnotes omitted). But, "not all police-citizen contacts constitute a seizure," so "many such contacts do not fall within the safeguards afforded by the Fourth Amendment." *Id.*

A seizure occurs when an officer by means of physical force or by a show of authority, has in some way restrained the liberty of a citizen. *United States v. Mendenhall,* 446 U.S. 544, 552 (1980). A person is seized within the meaning of the Fourth Amendment if under all the circumstances surrounding the contact a reasonable person would have believed that he is not free to leave. *Id* at 554. "[P]olice questioning, by itself, is unlikely to result in a Fourth Amendment violation. *INS v. Delgado,* 466 U.S. 210, 216 (1984). While most citizens respond to a police request, the fact that people do so, and without being told they are free not to respond, does not eliminate the consensual nature of the response. *Id.*; *see also State v. Williams,* 2002 WI 94, ¶ 23, 255 Wis. 2d 1, 646 N.W.2d 834. There is no seizure unless the encounter is "so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave." *Delgado*, 466 U.S. at 216.

In determining whether a person has been seized, the court must replace the individual person with the model of a reasonable person and focus on the officer's conduct under the totality of the circumstances. *Vogt,* 2014 WI 76, ¶ 31. In *United*

States v. Mendenhall, 446 U.S. 544, 554 (1980), the U.S. Supreme Court noted "[e]xamples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be 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." *Id.* at 554-55. "In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Id*. at 555.

The seizure/consensual encounter test is objective, but it is complicated by the fact that most people defer to a symbol of authority, no matter how it is manifested. *Vogt*, 2014 WI 76, ¶ 31. An officer's badge, however, does not by itself make a seizure. *Id.* A person's consent is no less valid because the person felt bound by ethical pressures not to disrespect an officer of the law. *Id.* The *Vogt* court, in supporting the conclusion that a uniformed police officer asking to speak to a citizen can be compatible with the definition of a consensual encounter, wrote:

> 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.

Id.

For example, In *County of Grant v. Vogt,* 2014 WI 76, ¶ 54, 356 Wis. 2d 343, 850 N.W.2d 253, an officer's contact with occupants of a parked car was not a seizure. In *Vogt*, an officer who was patrolling a small village during the early morning hours on Christmas saw a car pull into a parking lot next to a closed park. *Id*. at ¶ 4. The officer did not observe any traffic violations but thought the driver's (Vogt's) conduct was suspicious and "odd," given that it was Christmas and the park was closed. *Id*. at ¶ 5. The officer stopped his squad "behind Vogt's vehicle [and] a little off to the driver's side," leaving the headlights on and the engine running, but without activating the red and blue emergency lights. *Id*. at ¶ 6. Vogt's vehicle was still running, and the officer stated that he was not blocking Vogt's vehicle, though Vogt disagreed. *Id*. The officer, in full uniform and with his firearm holstered, approached the vehicle, and observed two occupants. *Id*. at ¶ 7. The officer rapped on the driver's window and motioned for Vogt to roll it down. *Id*. Vogt rolled down the window. *Id*. at ¶ 8. The officer asked Vogt what he was doing, and when Vogt answered, the officer observed that

Vogt's speech was slurred and that he could smell the odor of intoxicants coming from the vehicle. *Id*. From there, the officer investigated Vogt based on those observations, and ultimately arrested him for operating while intoxicated and operating with a prohibited alcohol concentration. *Id*. The Court held that an officer's parking near another person's vehicle, getting out, and knocking on the window is not necessarily a sufficient display of authority to cause a reasonable person to believe that he or she was not free to go. *Id*. at ¶ 38.

Additionally, the Wisconsin Supreme Court in *State v. Young*, 2006 WI 98, ¶ 65 294 Wis. 2d 1, 717 N.W.2d 729, noted that "[w]hen a marked squad car pulls up behind a car, activates emergency flashers, and points a spotlight at the car, it certainly presents indicia of police authority. Yet, not every display of police authority rises to a 'show of authority' that constitutes a seizure." The *Young* Court also recognized the longstanding principles of effective and safe law enforcement and how "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Id.* ¶ 67 (quoting *Terry v. Ohio*, 392 U.S. 1, 23 (1968)).

The Wisconsin Supreme Court in *Young* also explained "that many courts have concluded that the use of a spotlight is not a show of authority sufficient to effect a seizure. *See State of Idaho v. Baker*, 141 Idaho 163, 107 P.3d 1214, 1216–18 (2004) (use of spotlight is no seizure; collecting cases holding the same); *State of Washington v. Young*, 135 Wash.2d 498, 957 P.2d 681, 688–89 (1998) (finding that under the totality of the circumstances, illuminating the defendant with a spotlight does not a seizure make)." *Young*, 2006 WI 98, ¶ 65 n.18. The Court also acknowledged that "spotlights are likely to be used at night." *Id.*

Furthermore, this Court can also look to an unpublished decision by this Court, *State v. Mullen*, No. 2019AP1187-CR, 392 Wis. 2d 909 (Ct. App. 2020), unpublished slip opinion, for persuasive value as similar issues and arguments were presented by the appellant in that case like the present case. In *Mullen*, at 1:20 a.m., the deputy observed Mullen's vehicle parked in the parking lot of a closed bar where there were no other vehicles or people in the area. *Id.* ¶¶ 3-4. The deputy parked his marked squad car a fair amount away and behind Mullen's vehicle, which allowed Mullen to leave.

Id. The deputy's squad car headlights were on, and the deputy also activated the squad's spotlight at Mullen. *Id.* ¶ 4-5. The deputy approached Mullen as he was out of his vehicle and standing on the curb in front of the bar. *Id.* ¶ 4, 6. The deputy had on a full Waukesha County Sheriff's Department uniform and his firearm on his hip. *Id.* ¶ 6. The deputy spoke with Mullen in a conversational tone, and observed that Mullen had a strong odor of intoxicants, had slurred speech, was repeating himself, and stated that he was not going to drive anymore and would get an Uber. ¶ 7. The deputy asked Mullen to perform standardized field sobriety tests, and Mullen had a hard time with one of the tests, and eventually refused all further testing. ¶ 8. Mullen was eventually arrested and subsequently convicted of OWI. *Id.* ¶ 9.

As with the present case, the appellant argued in *Mullen* that when the deputy pulled behind Mullen's vehicle in his marked squad and shined his spotlight on Mullen, Mullen was seized under the Fourth Amendment. *Id.* ¶ 10. The Court of Appeals disagreed and looked to long-established case law in its reasoning. The Court relied on *County of Grant v. Vogt*, and found that under the totality of circumstances, Mullen was not seized at the time the deputy made his initial contact. *Id.* ¶ 18 The Court explained that the deputy did not stop Mullen; the deputy did not display his weapon; there was only one deputy present; the deputy did not use any forceful commands; and the deputy did not touch or attempt to touch Mullen. *Id.*

The Court also specifically discussed the issue of whether the combination of a spotlight and approach turned this into a seizure and emphasized the analysis employed by the Wisconsin Supreme Court in *State v. Young*, and how "many courts have concluded that the use of a spotlight is not a show of authority sufficient to effect a seizure." *Id.* ¶ 22 (quoting *Young*, 2006 WI at ¶ 65 n.18). The Court in *Mullen* explained the concern of "a rule that an officer's use of a spotlight creates a per se detention" as it "would discourage officers from using such lights when necessary for their safety or the safety of others." *Id*. ¶ 23. The Court's ultimate conclusion in *Mullen* was that "the use of a spotlight, where there was no effort to block Mullen's vehicle, no activation of emergency lights, and no verbal commands, does not amount to a seizure." *Id.* ¶ 25.

b. Applying Relevant Law to Kahle's Case

In this case, there is no reason to overturn long-established case law that permits these exact types of consensual contacts between police and citizens to investigate suspicious circumstances.

This Court must look at the totality of circumstances to determine if a reasonable person would have believed that Officer Liu's conduct was so intimidating that they were not free to leave. First, none of the examples of circumstances that might indicate a seizure enumerated by the U.S. Supreme Court in *Mendenhall* were present in this case. Officer Liu was the only officer on scene during the initial encounter. Officer Liu never physically touched Kahle. Officer Liu testified that his tone with Kahle during his initial contact was conversational, and his knock on Kahle's passenger side window was a light tap and not a forceful knock. Officer Liu had his weapon on his hip, but never displayed it or un-holstered it. Officer Liu did not activate his emergency lights on his marked police squad. Officer Liu was wearing his police uniform and easily identifiable as a police officer, but as noted in *Vogt*, an officer's badge by itself does not make a consensual encounter into a seizure.

Further, like the Court found in *Vogt* where the officer parked behind and to the side of the suspect vehicle, the positioning of Officer Liu's squad car did not transform this encounter into a seizure. The uncontroverted testimony presented at the motion hearing was that Officer Liu's squad car was parked in front of Kahle's vehicle, but there was about a car length in between them. Further, Kahle's vehicle was running and he would have been able to back up or go around Officer Liu's vehicle. This was not a situation where Kahle's vehicle was blocked in by Officer Liu's squad. There is no testimony on this record indicating that Kahle was unable to go around Officer Liu's squad car.

Additionally, like the Courts explained in *Young* and *Mullen*, Officer Liu using a spotlight on his squad to illuminate Kahle's car did not transform this encounter into a seizure. While Kahle makes an argument that this spotlight was blinding and shined directly in his face, that is not the testimony presented by Officer Liu or the facts presented before this

Court. It is important to remember that Kahle did not testify indicating that the light was directly in his face blinding him. Officer Liu explained that this was night time and had he not activated his spotlight, he would not have been able to see what was going on inside Kahle's vehicle. The lights in the parking lot did not illuminate the cabin well enough. Further, Officer Liu specifically explained that he wanted to illuminate the cabin of the vehicle for "[o]fficer safety, just to make sure if there's somebody in there that might be suffering a medical condition, might be ambushing me, it's just safer to see prior to approaching." (Motion Hearing Transcript, 32: 10.) Using the spotlight for the reason was acceptable and reasonable, and, as the Wisconsin Supreme Court explained in *Young* (quoting *Terry v. Ohio*), "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties."

Looking at the totality of circumstances, Officer Liu parking his squad car a car's length away from the front of Kahle's vehicle, turning on his spotlight, knocking on Kahle's passenger side window while in full police uniform, and speaking with Kahle in a conversational tone, was not so intimidating that it would make a reasonable person believe that they were not free to leave. The well-established case law in Wisconsin and the U.S. allows this kind of encounter to take place in order to investigate suspicious circumstances while also balancing the defendant's right to be free from unreasonable seizures and officer safety.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that this Court, like the Courts in *Vogt* and *Mullen*, find that Officer Liu's conduct did not constitute a seizure and affirm the trial court's decision denying Kahle's motion to suppress.

Dated this 24th day of February, 2023.

Respectfully,

Electronically Signed by Melissa J. Zilavy
Melissa J. Zilavy
Assistant District Attorney
Waukesha County
Attorney for Plaintiff-Respondent
State Bar No. 1097603

CERTIFICATION OF BRIEF AND APPENDIX

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c), for a brief produced with proportional serif font. The length of this brief is 3,745 words.

I further certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (3) a copy of cases cited from the states of Idaho and Washington.

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 references to the record.

Dated this 24th day of February, 2023.

Electronically Signed by Melissa J. Zilavy
Melissa J. Zilavy
Assistant District Attorney
Waukesha County
Attorney for Plaintiff-Respondent
State Bar No. 1097603

APPENDIX TABLE OF CONTENTS