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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,
Plaintiff-Respondent,

Appeal No.: 2023AP1253-CR

v.

Circuit Court Case No.: 2022CT30

JOSHUA L. THERING
Defendant-Appellant.

BRIEF OF THE DEFENDANT-APPELLANT JOSHUA L. THERING

On appeal from the Judgment of the Circuit Court for Sauk County, Case No.
2022CT000030, the Honorable Michael P. Srenock presiding.

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STATEMENT OF ORAL ARGUMENT AND PUBLICATION

The issue presented in this case is whether the defendant-appellant, Joshua Thering, was unlawfully seized requiring the suppression of all evidence obtained as a result of that unlawful seizure. The resolution of this issue requires the application of established legal principles to a very specific factual scenario. Given the nuisances in suppression cases, Thering believes that publication of the court of appeals' decision in this case is warranted because the decision is likely to provide guidance in future cases.

Thering also believes that all issues may be adequately addressed in the briefs submitted by the parties and, therefore, does not believe that oral argument is necessary.

STATEMENT OF ISSUES PRESENTED

Was Thering seized within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution when the arresting officer approached his vehicle and indicated to Thering that he should roll down the driver's side window of his vehicle?

The Circuit Court answered: No.

INTRODUCTION

This appeal concerns whether Thering was unlawfully seized by an officer with the City of Reedsburg Police Department. Thering asserted before the circuit court that he was unlawfully seized when the arresting officer approached his vehicle, which was parked in the corner of Walgreens parking lot, and, indicated to Thering that he should roll down the driver's side window of the vehicle. Thering filed a motion to suppress all evidence obtained thereafter; however, the circuit court denied that motion following an evidentiary hearing. [R.16; R. 28:11/Appx.11] The circuit court concluded that at the time the arresting officer approached Thering's vehicle, the officer did not have reasonable suspicion and/or probable cause to detain Thering.¹ [R. 28:7/Appx.7] However, the court further concluded that the officer's initial contact with Thering was consensual. [R.28:10/Appx.10] Stated another way, the circuit court concluded that Thering was not seized at the time of the officer's initial contact with Thering.

STATEMENT OF THE FACTS

At approximately 4:15 a.m. on November 22, 2021, Officer Andrew Reithmeyer, a police officer with the City of Reedsburg Police Department, observed a motor vehicle driven by Thering approaching from the east the intersection of East Main Street and Dewey Avenue in City of Reedsburg. [R.28:2/Appx.2] At the time, Reithmeyer was traveling westbound on East Main Street west of the intersection of East Main Street and Dewey Avenue in a marked police vehicle. After Reithmeyer's vehicle passed the vehicle

¹ This determination has not been challenged by the State on appeal.

driven by Thering, Reithmeyer executed a U-turn on East Main Street and positioned his squad car behind Thering's vehicle. [R.28:2-3/Appx.2-3]

Thereafter, Thering lawfully drove his vehicle through the intersection of East Main Street and Dewey Avenue and proceeded eastbound for approximately one-half of a city block before turning right into a Walgreens parking lot. [R.28:3/Appx.3] Thering proceeded to drive his vehicle through the parking lot, and around the Walgreens building before coming to a stop in the northernmost parking stall along the west side of the Walgreens parking lot, with his vehicle facing west. [R.28:3/Appx.3] The curbing of the parking lot was situated to the right and front of Thering's vehicle, and it bordered a landscaping feature on the northwest perimeter of the Walgreens' property. [R.28:3/Appx.3] Meaning, Thering was not able to navigate his vehicle forward or to the right.

Reithmeyer followed Thering's vehicle into the Walgreens parking lot and came to a stop with his squad vehicle facing north and perpendicular to and behind Thering's vehicle, "in close proximity to ... Thering's vehicle." [R.28:4-5/Appx.4-5] The emergency lights of the marked police car were not activated. [R.28:4/Appx.4] Thering testified at the suppression hearing that the orientation of Thering's vehicle in relation to where Reithmeyer's police car was parked made it impossible for Thering to safely back his vehicle out of his parking stall and drive away from Reithmeyer. [R. 25:43/Appx.17] However, the court found as follows:

[I]t would have been physically possible for Mr. Thering to exit the Walgreens [sic] property. To accomplish this feat, Mr. Thering could have driven in reverse, with his front wheels turned to the right in order to direct the rear of his vehicle in a northeasterly direction, somewhat parallel to the landscaping feature. He then would have had two options. First, once sufficiently clear of the curb directly in front (west) of his vehicle, Mr. Thering could have then pulled forward and turned south through multiple striped parking stalls, past ... Reithmeyer's squad and exited onto Dewey Avenue in the southwest corner of the Walgreens['] property. Mr. Thering's second option would have been to continue in reverse and effect a Y-turn utilizing the parking stalls along the northern side of the Walgreens['] property, and then drive east along the northern side of the property and exit onto Main Street using the same entrance he used to enter the property. [R.28:4-5/Appx4-5]

Importantly, although the court found that it was possible for Thering to have moved his vehicle, the court did not find that it would have been safe to do so under the circumstances.

After Reithmeyer's vehicle came to a stop "in close proximity to ... Thering's vehicle," he exited the patrol car and approached Thering's vehicle on foot. [R.28:5/Appx.5] Thering testified that, at that time, Reithmeyer was wearing his police issued uniform, and this testimony was not contradicted at the evidentiary hearing. [R.25:45/Appx.19] Reithmeyer approached Thering's driver's side window and, after "mak[ing] visual contact with ... Thering," he "gestured with his hand for ... Thering to roll down his window." [R.28:5/Appx.5] Thering did so. [R.28:5/Appx.5] Thering testified that, under the circumstances, did not feel that he was at liberty to disregard Officer Reithmeyer's directive [R.25:42/Appx.16]

After Thering rolled down his window, additional interactions took place between Reithmeyer and Thering which are not at issue in this case. [see R.28:5/Appx.5] Thering was subsequently arrested and charged with operating a motor vehicle while under the

influence of an intoxicant, second offense. [R.28:5/Appx.5] Thering moved the circuit court to suppress evidence obtained after Reithmeyer approached his vehicle window on the basis that Thering was unconstitutionally seized at that point in time and, therefore, any evidence obtained thereafter is inadmissible. [R.13] The circuit court denied Thering's motion following an evidentiary hearing. [R.28:11/Appx.11] The court concluded that at the time Reithmeyer approached Thering's driver's side window, he did not have a lawful basis to detain Thering. [R.28:7/Appx.7] However, the court further conclude that Thering was not seized at the time he rolled down the driver's side window of his vehicle and spoke with Reithmeyer. [R.28:7/Appx.7]

Following the denial of his motion to suppress, Thering was convicted of operating a motor vehicle while under the influence of an intoxicant, second offense. [R.39/Appx.20-21] Thering subsequently time filed the present appeal. [R.38; R.51]

STANDARD OF REVIEW

A Court's determination of a motion to suppress is one of constitutional fact, which requires the court to make factual findings and then apply constitutional principles to those findings. *State v. Howes*, 2017 WI 18, ¶17, 373 Wis. 2d 468, 893 N.W.2d 812; *State v. Anderson*, 2019 WI 97, ¶20, 389 Wis. 2d 106, 935 N.W.2d 285.

The Fourth Amendment to the United States Constitution provides protection against warrantless searches and seizures. *See State v. Brown*, 220 WI 63, ¶10, 392 Wis. 2d 454, 945 N.W.2d 584, *cert. denied*, 141 S.Ct. 181 (2020) (mem.). Short investigative stops, sometimes referred to as *Terry* stops, are an exception to the Fourth Amendment.

Id. Although *Terry* stops are a seizure, such stops require only reasonable suspicion of a legal violation to satisfy constitutional principles. *Id.* “Reasonable suspicion requires that ‘[t]he officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop.’” *State v. Floyd*, 2017 WI 78, ¶20, 377 Wis. 2d 394, 898 N.W.2d 560 (alteration in original) (quoted source omitted). “The question of what constitutes reasonable suspicion is a commonsense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience[?]” *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). The burden of proving that a seizure complied with the Fourth Amendment lies with the State. *State v. Blatterman*, 2015 WI 46, ¶17, 362 Wis. 2d 138, 864 N.W.2d 26.

When reviewing the grant or denial of a motion to suppress on appeal, the court of appeals applies a two-part standard of review. First, the court reviews the circuit court’s findings of fact and will uphold those findings unless they are clearly erroneous. *State v. Sloan*, 2007 WI App. 146, ¶ 7, 736 N.W.2d 189. However, the court “reviews the application of constitutional principles to those fact *de novo*.” *Id.*

ARGUMENT

The circuit court concluded that, at the time Reithmeyer approached Thering’s driver’s side window, Reithmeyer did not have a lawful basis to detain Thering. [R.28:7/Appx.7] The State has not challenged that determination on appeal. Thus, the issue before the court of appeals is whether Thering was seized at the time Reithmeyer

approached Thering's vehicle and "gestured" to Thering that he should roll down his driver's side window.

A seizure occurs when, under the totality the circumstances, a reasonable person would have believed that he or she was not free to leave. *Young*, 294 Wis. 2d. 1, ¶18 (citing *United States v. Mendenhall*, 466 U.S. 544, 554 (1980)). The test for whether a seizure has occurred focuses on whether the actions of the police "would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Kaupp v. Texas*, 538 U.S. 626, 629 (2003) (quoted sources omitted).

There can be no doubt that a seizure of Thering occurred when Reithmeyer approached Thering's vehicle and "gestured" to Thering that he should roll his driver's side window down.

Thering's vehicle was parked in a marked parking stall facing the landscaping that surrounds the Walgreens parking lot with the curb to the parking lot abutting the side of his vehicle. [R.28:4/Appx.4] The circuit court found that Thering could not drive his vehicle forward because the landscaping directly in front of the vehicle prevented him from doing so and Reithmeyer had situated his marked police car behind and perpendicular to Thering's vehicle and "in close proximity" to it. [R.28:4-5/Appx.4-5] The court found that Thering "could have" put his vehicle in reverse and, after he had backed up enough to clear the landscaping in front of his vehicle, turned the vehicle to away from the curb and proceeded south through the marked parking stalls. [R.28:4/Appx.4] The court *did not*

find that a reasonable person in Thering's situation would have believed doing so would have been safe, and Thering testified at the suppression hearing that he believed at the time that it was not possible for him move his vehicle safely given the "close proximity" of Reithmeyer's police vehicle and the fact that, at that time, Reithmeyer was standing near the driver's side door of Thering's vehicle. [R.42:43/Appx.17]

Regardless of whether Thering *could have* moved his vehicle and driven away, the question on appeal is whether a reasonable person in Thering's position would have believed that he was free to do so. The answer is no.

The facts establish that that at the time Reithmeyer approached Thering's driver's side window, Thering's vehicle was blocked in the front and to the side by landscaping and hardscape, and Reithmeyer's police vehicle was parked in "close proximity" to and behind Thering's vehicle. In addition, Reithmeyer was in full police issued uniform and he exerted an authoritative presence, not only by his appearance but also by his gesture to Thering that Thering roll down his driver's side window. No reasonable person in Thering's position would have believed that he or she was free to ignore Reithmeyer's directive to roll down the vehicle's window under the totality of the circumstances. And, the fact that Thering yielded to Reithmeyer's authority is consistent with a police seizure. *See State v. Kelsey C.R.*, 2001 WI 54, ¶30, 243 Wis. 2d 422, 626 N.W.2d 777 (stating that "[i]ncluded in this test for a seizure is the requirement that when a police officer makes a show of authority to a citizen, the citizen yields to that show of authority").

In *County of Grant v. Vogt*, 2014 WI 76, 356 Wis. 2d 343, 850 N.W.2d 253, the Supreme Court concluded that a law enforcement officer had not seized a defendant when the officer stopped a marked car *near* another vehicle without activating the emergency lights, got out of the marked squad car and approached the defendant's vehicle on foot, and knocked on the driver's side window of the defendant's vehicle, indicating that the defendant should lower his window. *Id.*, ¶¶2-3, 39-53. Critical to the Supreme Court's analysis in *Vogt* was the fact that, although the officer had parked his marked car behind Vogt's vehicle and there were obstacles on the sides of Vogt's vehicle, Vogt "could have driven away" by pulling forward and executing a U-turn. *Id.*, ¶¶41-42.

The present case is factually distinguishable from *Vogt* in a critical aspect. Unlike the defendant in *Vogt*, Thering could *not* have driven away safely by simply pulling forward as the defendant in *Vogt* was able to do. Thering was parked in such a manner that the only means of driving away was to back his car out of the parking stall and then maneuver his vehicle in such a manner that he could then move the vehicle forward and to the left without damaging Reithmeyer's police vehicle, which was in "close proximity" to Thering's own vehicle, or striking Reithmeyer who was standing in the vicinity of where Thering needed to turn his vehicle.

In the present case, we have an officer who was dressed in his police uniform and, while standing next to the driver's side window of Thering's vehicle, gestured to Thering that to roll down his vehicle's window. At that same time, the officer's vehicle was parked in "close proximity" to Thering's vehicle and Thering's vehicle was positioned in such a

way that significant maneuvering (far more than simply pulling his vehicle forward and executing a U-turn) would have been required for Thering to drive his vehicle away. Under the totality of the circumstances in this case, no reasonable person in Thering's position would have believed that he was free to leave. Accordingly, the court of appeals should conclude that Thering *was* seized when he rolled down his window at Reithmeyer's direction.

CONCLUSION

For the reasons discussed above, the court of appeals should conclude that Thering was unlawfully seized at the time Thering rolled down the driver's side window of his vehicle and, as a result, all evidence obtained thereafter must be suppressed. Accordingly, the court of appeals should reversed the decision of the circuit court denying Thering's motion to suppress and remand this case for further proceedings.

Dated this 20th day of September, 2023.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. Rule 809.19(8)(b), (bm), and (c) (2021-22) for a brief produced with a proportional serif font. The length of this brief is 14 pages and 2,487 words (exclusive of signatures and this certification).

Dated this 20th day of September, 2023.

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