

FILED
10-20-2023
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2023AP1253-CR
Circuit Court Case No. 22CT30

JOSHUA L. THERING,

Defendant-Appellant.

**ON APPEAL FROM THE FINAL ORDER DENYING MOTION TO
SUPPRESS EVIDENCE DUE TO LACK OF REASONABLE
SUSPICION TO SEIZE JOSHUA THERING, THE HONORABLE
MICHAEL P. SCRENOCK, PRESIDING.**

BRIEF OF PLAINTIFF-RESPONDENT

Natalia J. Gess
Assistant District Attorney
Sauk County District Attorney's
Office
515 Oak Street
Baraboo, WI 53913
(608) 355-3280
State Bar No. 1115667

TABLE OF CONTENTS

ISSUE PRESENTED5

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 5

STATEMENT OF FACTS5

STANDARD OF REVIEW..... 10

ARGUMENT 11

**I. Thering Was Not Seized at the Moment Officer Reithmeyer
 Approached His Vehicle and Asked Him to Roll Down His
 Window..... 11**

CONCLUSION 19

CERTIFICATION20

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)21

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(3)(b)22

TABLE OF AUTHORITIES

Cases

<i>Florida v. Bostick</i> , 501 U.S. 429 (1991).....	11, 12, 13
<i>INS v. Delgado</i> , 466 U.S. 210 (1984).....	11, 12, 18
<i>United States v. Mendenhall</i> , 446 U.S. 544 (1980).....	11, 12, 13, 18
<i>United States v. Drayton</i> , 536 U.S. 194 (2002).....	18
<i>United States v. Taylor</i> , 512 F.3d 405 (7th Cir. 2008).....	18
<i>United States v. Tyler</i> , 512 F.3d 405 (7th Cir. 2008).....	11
<i>County of Grant v. Vogt</i> , 2014 WI 76, 356 Wis. 2d 343, 850 N.W.2d 253.....	11, 12, 13, 14, 15, 16, 17, 18
<i>State v. Conner</i> , 2012 WI App 105, 344 Wis. 2d 233, 821 N.W.2d 267, 271.....	10
<i>State v. Eckert</i> , 203 Wis. 2d 497, 553 N.W.2d 529 (Ct. App. 1996).....	10
<i>State v. Hampton</i> , 2010 WI App 169, 330 Wis. 2d 531, 793 N.W.2d 901.....	10
<i>State v. VanBeek</i> , 2021 WI 51, 397 Wis. 2d 311, 960 N.W.2d 32.....	18
<i>State v. Williams</i> ,	

2002 WI 94, 255 Wis. 2d 1, 646 N.W.2d 834.....18

State v. Young,

2006 WI 98, 294 Wis. 2d 1, 717 N.W.2d 729.....17, 18

Statutes

Wis. Stat. § 805.17(2).....10

ISSUE PRESENTED

Was Thering seized within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution when Officer Reithmeyer 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."

This Court should answer, "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is not requesting publication or oral argument.

STATEMENT OF FACTS

On November 21, 2021, Officer Reithmeyer made consensual contact with Joshua Thering after Thering's vehicle caught Officer Reithmeyer's attention. Mot. Hr'g. Tr. 13:23-14:20; App. 27-28; Mot. Hr'g. Tr. 26:7-10. This contact occurred in the parking lot of the Walgreens in Reedsburg, Sauk County, Wisconsin, and Thering was in the driver's seat of his vehicle. Mot. Hr'g. Tr. 11:20-23; App. 25; Mot. Hr'g. Tr. 14:1-17; App. 28; Mot. Hr'g. Tr. 30:17-20; App. 44. Following their interactions, Thering was arrested for Operating a Motor Vehicle Under the Influence of an Intoxicant. Decision and Order 5; App. 76. Thering was subsequently charged with Operating a Motor Vehicle Under the Influence of an Intoxicant – 2nd Offense on February 23, 2022. Complaint 1; App. 1. On May 12, 2022, Thering, through his attorney, moved to suppress "any and all evidence obtained by law enforcement officers during and after the unlawful seizure of Thering." Motion to Suppress; App. 4-14. The circuit court held an evidentiary hearing on

August 17, 2022, at which Officer Andrew Reithmeyer, Sergeant Josh Hoege, and Thering all testified. Mot. Hr'g. Tr.; App. 15-69. On January 9, 2023, the circuit court filed a written Decision and Order denying Thering's motion to suppress. Decision and Order; App. 72-82. Thering now appeals.

At the Motion Hearing, Officer Reithmeyer testified to the following information. On November 21, 2021, Officer Reithmeyer was working as a police officer for the City of Reedsburg, and at approximately 4:15am was driving westbound on East Main Street near the intersection of Dewey Avenue. This is in Sauk County, Wisconsin. Mot. Hr'g. Tr. 9:5-12; App. 23 Officer Reithmeyer observed a vehicle that caught his attention. Mot. Hr'g. Tr. 9:13-15; App. 23 Specifically, he observed a SUV driving eastbound on East Main Street going down a hill that begins at Myrtle Street and ends near South Willow Street. The vehicle appeared to be going faster than the posted 25 mile per hour speed limit. Mot. Hr'g. Tr. 9:19-10:3; App. 23-24 Officer Reithmeyer completed a U-Turn and began to follow the vehicle. Both vehicles parked in the parking lot of the Walgreens at 1100 Main Street in Reedsburg, and at no point did Officer Reithmeyer activate the squad's emergency lights or sire. Decision and Order 3-4; App. 74-75. He made consensual contact with the vehicle in the parking lot. Mot. Hr'g. Tr. 11:12-11-23; App. 25. The suspect vehicle was parked in the northwest corner of the parking lot in one of the stalls closest to the corner. There were no other cars in the parking lot other than the suspect vehicle and Officer Reithmeyer's squad car Mot Hr'g. Tr. 12:1-12:13; App. 26. See also, Exhibit 1; App. 70. Officer Reithmeyer's vehicle was located along the west side of the building, facing northbound, approximately two or

three parking stalls away from the suspect vehicle. Mot. Hr'g. Tr. 12:15-19; App. 26. The emergency lights on Officer Reithmeyer's squad were turned off. Mot; Hr'g. Tr. 13:21-22; App. 27 Officer Reithmeyer approached the vehicle and identified the driver as Joshua Thering, Thering. Mot. Hr'g. Tr. 13:23-14:20; App. 27-28. Thering rolled down his window approximately half way. Officer Reithmeyer did not ask him to do so, nor did Officer Reithmeyer tell him to do so or knock on the window. Mot. Hr'g. Tr. 14:23-15:8; App. 28-29.

At the Motion Hearing, Sergeant Josh Hoege testified to the following information. On November 21, 2021, Sergeant Hoege was field training Officer Reithmeyer, and they were riding in the same vehicle. Mot. Hr'g. Tr. 30:7-13; App. 44. Sergeant Hoege was present for the interactions between Officer Reithmeyer and Thering. Mot. Hr'g. Tr. 30:14-16; App. 44. This contact occurred in the Walgreens Parking lot in Reedsburg, Sauk County, Wisconsin. Mot. Hr'g. Tr. 30:17-20; App. 44. Although he did not remember the exact stall number, Mot. Hr'g. Tr. 35:4-5; App. 49, Sergeant Hoege testified that Thering's vehicle was located on the northwest corner of the parking lot, facing directly west. Mot. Hr'g. Tr. 30:21-25; App. 44; Exhibit 2; App. 71. The officers' vehicle was on the east side lane of the west side of the parking lot, closer to the building. The squad was facing north. Mot. Hr'g. Tr. 31:1-6; App. 45; Exhibit 2; App. 71. The squad car and Thering's vehicle were separated by five parking stalls and a driving lane. Mot. Hr'g. Tr. 31:7-11; App. 45; Exhibit 2; App. 72. Sergeant Hoege approached Thering's vehicle, standing behind Officer Reithmeyer on the driver's side of the vehicle. Mot. Hr'g. Tr. 32:8-15; App. 46. Sergeant Hoege and Officer Reithmeyer discussed various ways to make contact with people, and the officers

decided to make consensual contact with Thering. Mot. Hr'g Tr. 32:22-33:10; App. 46.

In a written Decision and Order the Circuit Court made the following findings of fact: Officer Andrew Reithmeyer of the City of Reedsburg Police Department was on duty in the early morning hours of November 22, 2021. Decision and Order 2; App. 73. Officer Reithmeyer was undergoing his field training with the Department and he was accompanied by Sergeant Josh Hoege. *Id.* Officer Reithmeyer was driving a fully-marked squad car on routine traffic patrol; Sergeant Hoege was in the squad's passenger seat. *Id.* Around 4:15 a.m., Officer Reithmeyer was traveling westbound on East Main Street just west of the intersection of Dewey Avenue and East Main Street in the City of Reedsburg when he observed a vehicle being driven by Thering, Joshua Thering, driving eastbound on East Main Street. Order 2-3; App. 73-74. The speed of Thering's vehicle caught Officer Reithmeyer's attention. *Id.* As Thering's vehicle approached the red light at the Dewey Avenue intersection, Officer Reithmeyer performed a U-turn within the Main Street right-of-way and positioned his squad behind Thering's vehicle at the controlled intersection. *Id.* Thering lawfully proceeded eastbound through the intersection for approximately one-half of a city block and then turned right (south) into a Walgreens drug store parking lot. Order 3; App. 74. Thering drove westbound across the entire northern side of the Walgreens property and parked his vehicle in the northernmost parking stall along the west side of the Walgreens property, with his vehicle facing west. *Id.* Once parked, there was a curb directly in front of Thering's vehicle, and another curb along the right (passenger) side of his vehicle. *Id.* The curb to the right of Thering's vehicle ran

approximately the length of his vehicle, at which point the curb angled to the northeast, bordering a landscaping feature positioned in the northwest corner of the Walgreens property. *Id.* Officer Reithmeyer followed Thering in his squad into the Walgreens parking lot and along the northern side of the property. Order 3-4; App. 74-75. When Thering parked his vehicle, Officer Reithmeyer proceeded south along the western side of the Walgreens property, performed another U-turn, drove north along the western side of the Walgreens property, and parked his squad facing north in the driving lane of the parking lot. *Id.* At no point in time did Officer Reithmeyer activate the squad's emergency lights or siren. Order 4; App. 75. After both vehicles were parked on the Walgreens property, Officer Reithmeyer's squad was positioned perpendicular to Thering's vehicle in a location that was both east and south of the rear, driver's side corner of Thering's vehicle. *Id.* There were no other vehicles in the Walgreens parking lot at that time. *Id.* After both vehicles were parked on the Walgreens property, it would have been physically possible for Thering to exit the Walgreens property. Order 4-5; App. 75-76. To accomplish this feat, 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. *Id.* He then would have had two options. *Id.* First, once sufficiently clear of the curb directly in front (west) of his vehicle, Thering could have then pulled forward and turned south through multiple striped parking stalls, past Officer Reithmeyer's squad, and exited onto Dewey Avenue in the southwest corner of the Walgreens property. *Id.* 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. *Id.* Thering did not attempt to drive away from the scene. *Id.* After Officer Reithmeyer parked his squad in close proximity to Thering's vehicle, Officer Reithmeyer got out of his squad and approached the front, driver's side of Thering's vehicle. Order 5; App. 76. Officer Reithmeyer made visual contact with Thering and gestured with his hand for Thering to roll down his window. *Id.* At that moment, Thering's only means of exiting his parking stall without placing Officer Reithmeyer in danger would have been to drive in reverse into the north parking area and exit onto Main Street. *Id.* At some point, Sergeant Hoege also exited the squad and stood behind Officer Reithmeyer. *Id.* Sergeant Hoege's movements did not alter Thering's options for exiting the parking lot. *Id.* Thering did roll down his window and he and Officer Reithmeyer commenced a conversation. *Id.* Following their conversation and other interactions, Thering was arrested for operating a motor vehicle while under the influence of an intoxicant. *Id.*

STANDARD OF REVIEW

When reviewing the denial of a motion to suppress evidence, the Court of Appeals upholds the circuit court findings unless they are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 529 (Ct. App. 1996); Wis. Stat. § 805.17(2). Whether those facts warrant suppression is a question of law that is reviewed de novo. *State v. Conner*, 2012 WI App 105, ¶ 15, 344 Wis. 2d 233, 243, 821 N.W.2d 267, 271 (citing *State v. Hampton*, 2010 WI App 169, ¶ 23, 330 Wis. 2d 531, 793 N.W.2d 901).

ARGUMENT

I. Thering Was Not Seized at the Moment Officer Reithmeyer Approached His Vehicle and Asked Him to Roll Down His Window.

The Fourth and Fourteenth Amendments of the United States Constitution, and article I, section 11 of the Wisconsin Constitution, protect citizens from unreasonable searches and seizures. A seizure occurs if, under the totality of the circumstances, the “police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ request or otherwise terminate the encounter.” *Florida v. Bostick*, 501 U.S. 429, 429 (1991). Stated otherwise, a seizure occurs “when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” *United States v. Mendenhall*, 446 U.S. 544, 552 (1980). “There is no seizure [u]nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave.” *County of Grant v. Vogt*, 2014 WI 76, ¶ 24, 356 Wis. 2d 343, 850 N.W.2d 253 (quoting *INS v. Delgado*, 466 U.S. 210, 215-17 (1984)). This reasonable-person test “is objective and calls for consistent application from one police encounter to the next, regardless of the particular individual’s response to the actions of the police.” *Vogt* at ¶ 25. “Determining whether a seizure has occurred is a highly fact-bound inquiry.” *United States v. Tyler*, 512 F.3d 405, 410 (7th Cir. 2008).

Under the reasonable-person test, “there is no seizure unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave.” *Delgado*, 466 U.S. 210 at 216. Moreover, courts are to be mindful that “[w]hile most citizens will respond to a police request, the fact that people

do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.” *Id.* at 216. “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.” *Vogt*, 2014 WI 76, ¶ 31. The law “does not forestall an officer’s reasonable attempt at” engaging in a conversation with a citizen, provided that the “person has the choice to refuse [the] officer’s attempt to converse and thereby retain his privacy, or respond by talking to the officer and aiding the officer in his duty to protect the public.” *Id.*, ¶ 52. “A dutiful officer does not make a mistake by presenting a person with that choice. Only when the officer forecloses the choice by the way in which he exercises his authority . . . does he violate the Fourth Amendment.” *Id.* As a matter of law, “inoffensive contact between a member of the public and the police cannot . . . amount to a seizure of that person.” *Mendenhall*, 446 U.S. 555.

Law enforcement officers may approach citizens on the street, put questions to them, and ask for identification without implicating the Fourth Amendment “as long as the police do not convey a message that compliance with their request is required.” *Bostick*, 501 U.S. at 434; see also *Delgado*, 466 U.S. at 216 (“[P]olice questioning, by itself, is unlikely to result in a Fourth Amendment violation. While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.”). Absent law enforcement conduct that indicates required compliance, these types of interactions are consensual

encounters and generally do not receive Fourth Amendment scrutiny. *Bostick*, 501 U.S. at 434. “As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person’s liberty or privacy as would under the Constitution require some particularized and objective justification.” *Id.* (quoting *Mendenhall*, 446 U.S. at 553–54).

Reviewing courts have identified circumstances that might suggest a seizure, including: “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.” *Vogt*, 2014 WI 76, ¶ 23 (quoting *Mendenhall*, 446 U.S. at 554). In contrast, “when an officer parks near a person’s vehicle, gets out, and knocks on the person’s window, the officer has not necessarily displayed sufficient authority to cause a reasonable person to feel that he or she was not free to leave.” *Id.* ¶ 38. “[T]he seizure inquiry looks at the totality of the circumstances to determine whether the officer has effected a detention.” *Id.*

As noted by the Circuit Court, none of the circumstances suggested by the *Mendenhall* Court were present in Officer Reithmeyer’s encounter with Thering. Two police officers were present outside Thering’s vehicle during the encounter; however, the presence of the second officer was not threatening, and the encounter involved only a single squad car. The officers did not display any weapons. No officer physically touched Thering or his vehicle. Officer Reithmeyer did not use a commanding tone of voice or commanding language to compel Thering to roll down his window. Neither Officer Reithmeyer nor Sergeant Hoege cut off or

blocked Thering's exit path. Officer Reithmeyer and Sergeant Hoege simply parked near Thering's vehicle, got out of their vehicle, and approached Thering's vehicle. Reithmeyer solely gestured for Thering to roll down the window.

Thering argues that he was seized when Officer Reithmeyer approached his vehicle and gestured to Thering that he should roll his driver's side window down. Thering Brief 10; App. 92. In support of this argument, Thering conveniently only cites to the factual findings in the circuit court's order and Thering's testimony. Thering ignores all information testified to by the two officers, including the two maps the officers drew to show where their vehicle was parked in relation to Thering. Both maps were entered as exhibits, and the Circuit Court relied on Exhibit 1 in its Decision and Order. This Court is to review the whole record, and not the selective portions put forth by Thering. When reviewing the whole record, this court should agree with the findings of the Circuit Court.

Thering relies heavily, and solely, on the facts in *County of Grant v. Vogt*, 2014 WI 76, ¶¶2-3, 356 Wis. 2d 343, 850 N.W.2d 253, in its argument that Thering was seized as he could not have driven away by safely pulling forward as Thering in *Vogt* was able to do. Thering Brief 12-13; App. 94-95. First, this argument ignores the Circuit Court's finding that:

Thering would have had two options. First, once sufficiently clear of the curb directly in front (west) of his vehicle, Thering could have then pulled forward and turned south through multiple striped parking stalls, past Officer Reithmeyer's squad, and exited onto Dewey Avenue in the southwest corner of the Walgreens property. 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.

Decision and Order 4-5; App. 75-76. Despite Thering's speculation, there is no indication (and no finding by the circuit court) that the squad car blocked Thering's exit in any meaningful way. (*Compare* Thering's Br. 11; App. 93 *with* Decision and Order 3-5-; App. 74-76.)

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. *Vogt*, 2014 WI 76, ¶ 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.* ¶ 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.* ¶ 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.* ¶ 7. The officer rapped on the driver's window and motioned for *Vogt* to roll it down. *Id.* *Vogt* rolled down the window. *Id.* ¶ 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.*

In that case, the Wisconsin Supreme Court found that no seizure occurred when an officer pulled up behind a vehicle in a parking lot, got out, and knocked on the window of the defendant's car because *Vogt*

could have “pulled forward and turned around.” *Vogt*, 2014 WI 76, ¶¶2–3. The Court concluded that an officer parking behind a vehicle, approaching and knocking on the window to question the occupant, did not amount to a seizure. *Id.* ¶ 43. The *Vogt* court noted that the circuit court had recognized that “[t]here is no evidence that [the officer] ‘commanded’ Mr. Vogt to roll down his window by tapping on the window and motioning that he roll down his window.” *Id.* And absent evidence of “the threatening presence of multiple officers,” the brandishing of a weapon, touching the suspect, or “speak[ing] in a way that would suggest [the suspect] was compelled to roll down the window,” the facts were “not sufficient to demonstrate that a reasonable person would not feel free to leave.” *Id.* ¶ 53.

The same is true in this case. While the Circuit Court found that Officer Reithmeyer made visual contact with Thering and gestured with his hand for Thering to roll down his window, Order 5; App. 76, there is no evidence that Officer Reithmeyer commanded Thering to open the window. Only Officer Reithmeyer made contact with Thering, while Sergeant Hoege stood by. There was no brandishing of a weapon or touching of Thering, and no evidence that Officer Reithmeyer spoke in a threatening manner. Thering, therefore, has not shown that he was seized when he rolled down the car’s window and Officer Reithmeyer spoke to him.

Further, both Officer Reithmeyer and Sergeant Hoege testified that the suspect vehicle was parked in the northwest corner of the parking lot in one of the stalls closest to the corner, and there were no other cars in the parking lot other than the suspect vehicle and Officer Reithmeyer’s squad car Mot. Hr’g. Tr. 12:1-12:13; App. 26; Mot. Hr’g. Tr.

30:22-25; App. 44. *See also*, Exhibit 1, App. 70; Exhibit 2; App. 71. The officers testified that Officer Reithmeyer's vehicle was located along the west side of the building, facing northbound, approximately a few parking stalls away from the suspect vehicle. Mot. Hr'g. Tr. 12:15-19; App. 26; Mot. Hr'g. 31:1-11; App. 45. This would have made the two vehicles perpendicular to each other with space available in between for a vehicle to travel. Officer Reithmeyer's emergency lights were not activated. Mot. Hr'g. Tr. 13-21:22; App. 27.¹ An officer parking a squad car behind a parked vehicle is not a seizure, because the vehicle is parked. *Vogt*, ¶ 32. And it is not a seizure when the squad car's emergency lights are not activated. *Id.* (citing *State v. Young*, 2006 WI 98, ¶¶ 66, 68–69, 294 Wis. 2d 1, 717 N.W.2d 729).

Second, Thering's argument relies solely on Thering's subjective perception of whether he could move his vehicle. Determining whether a person would have felt free to leave or otherwise terminate the encounter is based on an objective view of the specific facts presented. That analysis employs the "innocent reasonable person, rather than the specific defendant." *Vogt*, 2014 WI 76, ¶ 30. "If a reasonable person would have felt free to leave but the person at issue nonetheless remained in police presence, perhaps because of a desire to be cooperative, there is no seizure." *Young*, 2006 WI 98, ¶ 37. Thering's actual belief at the time of his interaction with law enforcement is not the standard. Rather, the Court is required to "replace the individual with the paradigmatic reasonable person and focus on the officer's conduct under the totality of the circumstances." *Vogt*, 2014 WI 76, ¶ 31.

¹ Thering does not dispute this fact. Thering Brief 6; App. 88.

Thering implores this Court to conclude that “Thering was unlawfully seized at the time Thering rolled down the driver’s side window of his vehicle.” (Thering’s Br. 13.) Thering’s proffered conclusion flies in the face of decades of precedent holding to the contrary. *See Mendenhall*, 446 U.S. at 553–54; *Delgado*, 466 U.S. at 215–16; *Bostick*, 501 U.S. at 434; *United States v. Drayton*, 536 U.S. 194, 203–204 (2002); *State v. Williams*, 2002 WI 94, ¶ 28, 255 Wis. 2d 1, 646 N.W.2d 834; *Young*, 2006 WI 98, ¶ 37; *Vogt*, 2014 WI 76, ¶ 53. If this court accepts Thering’s argument, it would be difficult to imagine police conduct that would not amount to a show of authority. To accept Thering’s argument would be to establish that every contact law enforcement has with a citizen is a seizure. If something so small as a gesture constitutes a seizure, there cannot be a scenario where law enforcement could effectuate their duties without implicating the Fourth Amendment. Thering’s argument is simply not supported by case law and is unworkable because it “would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices.” *Mendenhall*, 446 U.S. at 554.

At bottom, “[d]etermining whether a seizure has occurred is a highly fact-bound inquiry.” *State v. VanBeek*, 2021 WI 51, ¶ 29, 397 Wis. 2d 311, 960 N.W.2d 32 (quoting *United States v. Taylor*, 512 F.3d 405, 410 (7th Cir. 2008)). The facts here reveal absolutely no show of authority, let alone one that would have communicated to Thering that he was not free to leave or otherwise terminate the encounter. Accordingly, this Court should conclude that no seizure occurred when Officer Reithmeyer and Sergeant Hoege parked next to and approached Thering’s vehicle. Upon review of the whole record, this Court should

agree with the Circuit Court, and find Thering was not seized at the time Officer Reithmeyer approached his vehicle and gestured to Thering that he should roll his driver's side window down.

CONCLUSION

For the reasons as outlined above, the State respectfully requests that the Court of Appeals find that Thering was not seized at the time Officer Reithmeyer approached his vehicle and uphold the decision of the Circuit Court.



Natalia J. Gess
Assistant District Attorney
Sauk County District Attorney's Office
515 Oak Street
Baraboo, WI 53913
(608) 355-3280
State Bar No. 1115667

CERTIFICATION

I hereby certify that this brief confirms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,179 words.

Signed:

A handwritten signature in cursive script, reading "Natalia J. Gess", written over a horizontal line.

Natalia J. Gess
Assistant District Attorney
Sauk County District Attorney's Office
515 Oak Street
Baraboo, WI 53913
(608) 355-3280
State Bar No. 1115667

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I certify that an electronic copy of this brief complies with the requirement of Wis. Stat. §§ 809.19(12). The electronic brief is identical in content and format to the printed brief filed this date. A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

Signed:



Natalia J. Gess
Assistant District Attorney
Sauk County District Attorney's Office
515 Oak Street
Baraboo, WI 53913
(608) 355-3280
State Bar No. 1115667

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(3)(b)

I hereby certify that filed with this brief, in a separate document, 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 references to the record.

Signed:



Natalia J. Gess
Assistant District Attorney
Sauk County District Attorney's Office
515 Oak Street
Baraboo, WI 53913
(608) 355-3280
State Bar No. 1115667