STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSHUA L. THERING

Defendant-Appellant.

Appeal No.: 2023AP1253-CR

Circuit Court Case No.: 2022CT30

REPLY 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. Screnock presiding.

Attorney Stephanie Zulkoski
Kirk Graves & Nugent
634 Water Street
Prairie du Sac, WI 53578
Ph: (608) 643-2456

Attorneys for Defendant-Appellant Joshua L. Thering

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ARGUMENT

The State of Wisconsin does not dispute that the issue before the court of appeals in this matter is whether Thering was seized when the arresting office, Andrew Reithmeyer, gestured for the defendant-appellant, Joshua Thering, to roll down the driver's side window of his vehicle. The State also does not dispute that, if Thering *was* seized at that time, the seizure was unlawful and all evidence obtained thereafter should be suppressed.

There is also no dispute between the parties on appeal that whether Thering was seized depends on whether a reasonable person in Thering's position would have believed himself or herself free to leave at the time Reithmeyer gestured to Thering to roll down the window of his vehicle. *See* ***United States v. Mendenhall,*** 446 U.S. 544, 554 (1980); ***County of Grant v. Vogt***, 2014 WI 76, ¶24, 356 Wid. 2d 343, 850 N.W.2d 253. Whether a reasonable person in Thering's position would or would not have felt free to leave is a fact intensive inquiry in which the court considers the totality of the circumstances surrounding the incident. *See* ***Mendenhall***, 446 U.S. at 554; ***State v. Alexander***, 2005 WI App 231, ¶8, 287 Wis. 2d 645, 706 N.W.2d 191. The court of appeals' determination as to whether a seizure occurred is independent of that of the circuit court. ***State v. Nash***, 123 Wis. 2d 154, 161-62, 366 N.W.2d 146 (Ct. App. 1985).

In its response brief on appeal, the State makes much of the fact that controlling case law provides that the mere questioning of a defendant by law enforcement is insufficient to rise to the level of a seizure. *See* Brief of Respondent at 12-13. *See also* ***Florida v. Bostick***, 501 U.S. 429, 434 (1991). The State correctly points out that the United States Supreme Court held in ***Bostick*** that "as long as the police do not convey a message that compliance with their request is required," police contact alone does not

constitute a seizure. ***Bostick***, 501 U.S. at 434; *see* Brief of Respondent at 13. And, Wisconsin appellate court decisions have reached a similar decision. *See, e.g.,* ***Vogt***, 356 Wis. 2d 343; ***State v. Snyder*****,** unpublished slip. op. No. 2013AP299–CR (Ct. App. Oct. 2, 2014).

In ***Vogt***, the Wisconsin Supreme Court concluded that the defendant in that case was not seized at the time the arresting officer initially made contact with the defendant. Relevant to the present case, at the time of the police contact: the defendant's vehicle was stopped in the parking lot of a closed boat dock; the officer had parked his fully marked squad car behind the defendant's vehicle; the squad car's emergency lights were not activated; the uniformed officer rapped on the driver's side window of the vehicle and motioned from the defendant to roll down the window; and there was approximately 50 feet of open pavement in front of the defendant's vehicle over which the defendant could safely driven away from the officer. ***Vogt***, 356 Wis. 2d 343, ¶¶4, 6-7, 11-12, 43

In ***Snyder***, an unpublished one-judge opinion, Judge Blanchard concluded that, similar to ***Vogt***, the defendant was not seized when the officer approached his vehicle. ***Snyder*****,** unpublished slip. op. No. 2013AP299–CR, ¶24. In ***Snyder,*** the defendant's vehicle came to a stop facing the officer's marked squad vehicle, there "was at least twenty feet of open driveway" to the left of the officer's vehicle for the defendant to drive past the officer's vehicle to the open roadway; and when the officer approached the driver's side of the defendant's vehicle on foot, the window was already down. ***Id.***, ¶¶4-5, 7. Judge Blanchard concluded: "The facts here are a close match to those in ***Vogt***. A lone, uniformed officer stopped a marked vehicle close to the subject's vehicle, but without activating emergency lights or siren, and approached on foot without drawing or displaying a weapon

or using any commanding words or gestures, leaving room enough for the subject to drive away, even if, as the circuit court found, Snyder would have had to maneuver to make a safe exit." ***Id.***, ¶24.

Admittedly, many of the facts in the present case are not distinguishable from those described in ***Vogt*** and ***Snyder***. As described in more detail in Thering's brief-in-chief, similar to the police encounter in ***Vogt***, at the time Reithmeyer came into contact with Thering, he was wearing his police uniform, was driving a marked squad car whose emergency lights had not been activated, and he motioned for Thering to roll down the driver's side window of his vehicle. [R.23:3-5, 45/App.Appx.3-5, 19] However, unlike ***Snyder***, there are facts in the present case that *are* distinguishable from those in ***Vogt***, and those facts give rise to the necessary conclusion that Thering *was* seized when Reithmeyer gestured for him to roll down his window.

Unlike the situation described in ***Vogt***, Thering was not in a position where he could easily have moved his vehicle away from Reithmeyer. Reithmeyer's marked squad car came to a stop in close proximity to Thering's vehicle which was parked adjacent to a curb on the passenger side of the vehicle and facing the curb and landscaping at the front of the vehicle. [R.28:3-5/App.Appx.3-5] The circuit court found that Thering could have driven his vehicle out of the parking by undertaking various maneuvers including putting the vehicle in reverse, turning the vehicle away from the curb, and then proceeding forward across marked parking stalls. [R.28:4/App.Appx.4] However, Thering could not have driven away easily and safely without risk of harm to the officer. This is distinguishable from the factual scenarios ***Vogt*** and ***Snyder*** where the defendants had twenty feet and more

for the defendants' vehicles to traverse if the defendants had attempted to drive away from the officers in those cases.

In addition, unlike the situations in ***Vogt*** and ***Snyder***, Thering was aware that Reithmeyer had pursued him to the location where Thering came to a stop in the parking lot. Reithmeyer's squad car, which was traveling west, passed Thering's vehicle, which was traveling east. [R.28:2-3/App.Appx.2-3] After Reithmeyer's vehicle passed Thering's vehicle, Reithmeyer executed a U-turn and positioned the squad car behind Thering's vehicle. [R.28:2-3/App.Appx.2-3] Reithmeyer then followed Thering's vehicle through the intersection of East Main Street and Dewey Avenue in Reedsburg and another approximately ½ city block before following Thering's vehicle into the Walgreen's parking lot where the vehicle came to a stop in close proximity to Thering's vehicle. [R.28:3-5/Appx.Appx.3-5]

In contrast, there is no indication in ***Vogt*** that the officer had followed the defendant's vehicle for any period of time before following the vehicle into the boat dock. At most, the facts set forth in ***Vogt*** suggest that the officer observed the defendant's vehicle pull into the parking lot near the closed boat landing and *then* followed the defendant's vehicle. ***Vogt***, 356 Wis. 2d 343, ¶4. Similarly, there is no indication in ***Snyder*** that the officer had followed the defendant's vehicle before following the defendant's vehicle into the parking lot. *See* ***Snyder***, unpublished slip. op. ¶3. It belies belief that a defendant would believe that he was free to disregard the officer's gesture to roll down his vehicle's window after having been followed into a parking lot by the officer's marked squad car, which executed a U-turn in order to follow the defendant's vehicle, and after the squad car

parked in such close proximity to the defendant's vehicle that the defendant would have had to undertake significant maneuvering to drive away.

The question on appeal is whether a reasonable person in Thering's position would have felt free to leave. The clear answer is no, not under the circumstances of this case which are distinguishable enough from those in ***Vogt*** and ***Snyder*** that this court must be compelled to conclude that a seizure occurred.

CONCLUSION

For the reasons discussed above, the court of appeals should conclude that the circuit court erred when it determined that Thering was not unlawfully seized when Reithmeyer gestured to Thering to roll down the driver's side window of his vehicle, and the court should reverse the circuit court's denial of Thering's motion to suppress.

Dated this 5th of November, 2023.

Kirk Graves & Nugent
Attorneys for the Defendant-Appellant
Electronically signed by:

Stephanie Zulkoski
Stephanie Zulkoski
State Bar No. 1079211

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. Rule 809.19(8)(b), (bm), and (c) (2019-20) for a brief produced with a proportional serif font. The length of this brief is 9 pages and 1,349 words (exclusive of signatures and this certification).

Dated this 5th day of December, 2023.

Kirk Graves & Nugent
Attorneys for the Defendant-Appellant
Electronically signed by:

Stephanie Zulkoski
Stephanie Zulkoski
State Bar No. 1079211