

Attorneys:

Jama S. Graves
Gina D. Nugent
Stephanie E. Zulkoski
Alex C. Orozco

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COURT OF APPEALS****Our Team:**

Annette Kaufman
Holly Sherman
Megan Frey
Dena Turner

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Wisconsin Court of Appeals
110 E. Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

**Re: State of Wisconsin v. Joshua Thering
Appeal No. 2023AP1253-CR
Circuit Court Case No. 2022CT30**

Dear Judge Blanchard:

A request has been made for a supplemental letter brief by both parties on what the court has referred to as “pre-contact following conduct” to assist the court in determining whether Thering was seized at the time the arresting officer gestured for him to roll down his window and he complied. Additional facts are set forth below, followed by an analysis of why the only reasonable conclusion is that, when the “pre-contact following conduct” is considered in conjunction with the other facts surrounding the officer’s interaction with Thering, Thering was unlawfully seized, and the circuit court erred in concluding otherwise.

I. Additional Pertinent Facts

Thering testified to the following at the suppression hearing. Around 4:00 a.m., before the sun had begun to rise, Thering was driving eastbound on Main Street in Reedsburg when he observed Officer Reithmeyer’s marked police vehicle turn eastbound onto Main Street from Dewey Street. [R.25:37-40] Reithmeyer’s vehicle drove past Thering’s vehicle heading westbound on Main Street and shortly thereafter executed a U-Turn and pulled his police vehicle up behind Thering’s vehicle, which was stopped at a red light at the intersection of Main Street

Prairie du Sac Office:

634 Water Street
P.O. Box 9
Prairie du Sac, WI 53578

Ph. (608) 643-2456

Fax (608) 643-4691

saukprairielaw.com

Waunakee Office:

1001 Arboretum Drive
Suite 1A
Waunakee, WI 53597

and Dewey Street. [R.25:38-41] After the light turned green, Thering's drove through the intersection and shortly thereafter turned right into the Walgreen's parking lot and he parked his vehicle in a marked stall which was bordered by hardscape to the front and passenger sides of the vehicle. [R.25:39-42; R.20] Reithmeyer followed Thering's vehicle into the Walgreen's parking lot and stopped his vehicle perpendicular to and behind Thering's vehicle. [R.28:4-5; R.20]

The circuit court found in pertinent part as follows:

2. 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 the defendant, Joshua Thering, driving eastbound on East Main Street. The speed of Mr. Thering's vehicle caught Officer Reithmeyer's attention. As Mr. 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 Mr. Thering's vehicle at the controlled intersection.

3. Mr. 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. Mr. 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. Once parked, there was a curb directly in front of Mr. Thering's vehicle, and another curb along the right (passenger) side of his vehicle. The curbing to the right of Mr. Thering's vehicle ran approximately the length of his vehicle, at which point the curbing angled to the northeast, bordering a landscaping feature positioned in the northwest corner of the Walgreens property.

4. Officer Reithmeyer followed Mr. Thering in his squad into the Walgreens parking lot and along the northern side of the property. When Mr. 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. [R.28:3-4]

The circuit court concluded that the above-described conduct by Office Reithmeyer “would have communicated in some manner that Mr. Thering’s actions were of interest to the officer, but did not transform Reithmeyer’s subsequent approach and invitation to engage in conversation into a sufficient display of authority to effect a seizure.” [R.28:10]

II. Analysis

The law is well established that not all interactions between law enforcement and citizens constitute a seizure under the Fourth Amendment. *See, e.g., Florida v. Bostick*, 501 U.S. 429, 434 (1991). While questioning alone does not convert an interaction into a seizure, *see id.*, a seizure does occur when an officer “by means of physical force or *show of authority*, has in some way restrained the liberty of a citizen.” *Terry v. Ohio*, 392 U.S. 1, 20 n.16 (1968) (emphasis added); *see also County of Grant v. Vogt*, 2014 WI 76, ¶20, 356 Wis. 2d 343, 850 N.W.2d 253.

In determining whether a show of authority has occurred, Wisconsin appellate courts have considered the following as relevant: whether the officer blocked the defendant’s path, the use of a spotlight, the officer’s words and tone of voice, the officer’s actions toward the defendant, the number of officers involved, and whether the officer was wearing a uniform. *See, e.g., Vogt*, 356 Wis. 2d 343, ¶3; *State v. Young*, 2006 WI 98, ¶42, 294 Wis. 2d 1, 717 N.W.2d 729; *State v. Evans*, unpublished slip op., case no. 2020AP286-CR (WI App., Jan. 28, 2021). A non-exhaustive search of Wisconsin appellate decisions reveals that no Wisconsin court has analyzed the impact, if any,

a defendant's awareness that he or she has been followed by an officer prior to the defendant's initial contact with the officer has on a seizure determination. However, as noted by this court in its November 21, 2023 order, other jurisdictions have.

In *State v. Steele*, 8558 S.E.2d 325 (N.C. App. 2021) (Carpenter, J., concurring) (Hampson, J. dissenting),¹ the North Carolina Court of Appeals considered in its seizure analysis the fact that a defendant's vehicle had been followed by the officer's vehicle prior to the initial contact between the defendant and officer. See *id.* at 334-35. The facts in *Steele* are substantially similar to those in the present case. During the early hours of the morning, the officer, who was driving a marked patrol car, followed Steele's vehicle, on an otherwise empty roadway, for a period of time in the same direction. *Id.* at 328. The officer proceeded to follow Steele's vehicle when it turned left onto a different road and then into an empty parking lot. *Id.* While in the parking lot, Steele executed a U-Turn and began driving in the direction of the officer's vehicle. *Id.* When Steele's and the officer's vehicles passed one another, the officer "waved [his] hand up and down." Steele then stopped his vehicle and the office began to question Steele. *Id.* at 328-29.

The majority decision in *Steele* concluded that a person in Steele's position would not have felt free to disregard the officer's request when the officer "waved" at Steele. Importantly, the court concluded: "[W]hen one examines all of the attendant circumstances surrounding the encounter, *the only reasonable conclusion* is that Defendant was seized by [the officer] – especially when one examines the encounter from Defendant's perspective." *Id.* at 336. Steele's perspective included the fact that it was pre-dawn, he was driving down an empty roadway, the officer pulled

¹ Judge Carpenter, who concurred, did not issue a separate decision.

up behind his vehicle and proceeded to his vehicle as he turned onto a different road and then into an empty parking lot. *Id.* The court further concluded: “Even at this early point in the encounter, after being tailed by a police car down empty streets into an empty parking lot, any reasonable person would have realized that they are the target of police suspicion and are likely to be imminently pulled over.” *Id.* The court determined that the “intimidating nature” of the police encounter was “amplified” when Steele attempted to leave the parking lot and the officer rolled down his window and “waved his hand” at Steele in a manner which indicated he wished Steele to stop. *Id.* The court further determined that Steele stopped in direct response to the officer’s authoritative conduct and gesture.

The facts in the present case are substantially similar to those in *Steele*. In the pre-dawn hours, Thering was driving on a roadway that was empty except for Thering’s vehicle and the marked squad car driven by Officer Reithmeyer. Reithmeyer passed Thering’s vehicle and then executed a U-Turn in the middle of the roadway and pulled the police vehicle up directly behind Thering’s vehicle. Reithmeyer then proceeded to follow Thering’s vehicle into an empty parking lot. In the words of the *Steele* court, any reasonable person would have realized at that time that they [were] the target of police suspicion and [were] likely to be imminently [stopped].” *Id.* Unlike *Steele*, Thering did not attempt to leave the parking lot before Reithmeyer approached his vehicle. However, the remaining encounter between Thering and Reithmeyer was equally, if not more intimidating than that in *Steele*. The defendant in *Steele* was not blocked by the officer from driving away. In contrast, Reithmeyer brought his police vehicle to a stop in such a manner that it would have required significant maneuvering by Thering to drive away. The officer then

approached the side of Thering's vehicle and "gestured" for him to roll down his window, which indicated to Thering that the officer wished Thering to converse with him.

The court in *Steele* made an astute comparison to illustrate why the police encounter in that case constituted a seizure. The court observed that "if a *non-police* vehicle had followed them down public street into an empty parking lot at 3 a.m. and then gestured for them to stop ... [n]o reasonable person would likely comply with such a request from a stranger – making it even more apparent that the only reason Defendant stopped here was due to [the officer's] display of authority." *Id.* The comparison is equally applicable in the present case. It belies belief that Thering would roll down his window for an unknown regular citizen at 4:00 a.m., while it was dark outside, and while he was parked in an empty parking lot.

In *Steele*, the dissent relied upon a prior North Carolina case in which the court had concluded that a seizure did not occur after the officer followed the defendant in his marked police vehicle. See *State v. Williams*, 686 S.E.2d 905 (N.C. App. 2009). However, as noted by the majority decision in *Steele*, *Williams* is factually distinct for at least the following reasons: the time and location of the police encounter and the lack of a gesture toward the defendant. In addition, it is unclear in *Williams* whether the defendant was aware that he had been followed by the officer. *Williams* is also factually distinct from the present case. Here, as in *Steele*, the police encounter occurred during the early hours of the morning on an empty roadway and parking lot. In addition, unlike *Williams*, Reithmeyer gestured toward Thering to roll down his window so the two could speak. And, Thering was aware that Reithmeyer had executed a U-Turn in the middle of the roadway had followed his vehicle for a period of time before on Main Street and then into

the Walgreen's parking lot.

The Fourth Circuit Court of appeals reached a result similar to that in *Steele*, in *U.S. Jones*, 678 F.3d 293 (4th Cir. 2012). In *Jones*, the court concluded that when an officer has followed a defendant, that officer has demonstrated “a greater show of authority than does an officer who just happens to be on the scene and engages a citizen in conversation.” *Id.* at 302. The court in *Jones* determined that while a citizen may believe that he or she is free to leave if he or she has not been the subject of law enforcement officer's attention prior to the officer's contact with the defendant, the same cannot be said when a defendant is cognizant that his or her vehicle has been followed by law enforcement prior to the officer making contact with the defendant. *See id.* The defendant is even less likely to feel that he or she can leave if the officer had blocked the defendant's ability to leave in any manner. *See id.* at 301-302. Again, this is precisely the situation at hand in the present case.

The question asked for purposes of this supplemental brief is what affect, if any, does Reithmeyer's conduct, and Thering's awareness of that conduct, prior to stopping his marked police car in the Walgreen's parking lot have on the issue of whether Thering was seized at the time he rolled down his vehicle's driver's side window. The short answer is that the conduct provides additional weight for the conclusion that Thering was seized at that time. The longer answer is that the intimidating nature of the police attention provided to Thering in advance to the parties coming to a stop in the Walgreen's parking lot, in conjunction with the attendant circumstances after Thering and Reithmeyer stopped their separate vehicles in the parking lot, was such that no reasonable person in Thering's position would have felt that he was free to disregard

Reithmeyer's gesture to roll down his window.

To summarize, the facts establish the following: it was pre-dawn, the roadway was empty except for Thering and Reithmeyer's vehicles, Reithmeyer was driving a marked squad car; Reithmeyer deliberately and suddenly changed the direction he was traveling in the middle of a roadway in order to bring his vehicle directly behind Thering; Reithmeyer proceeded to following Thering into an empty-parking lot; Reithmeyer parked his vehicle in such a manner that Thering would have been required to execute several driving maneuvers in order to drive away safely, and Reithmeyer approached Thering's vehicle and gestured for him to roll down his window while wearing a police issued uniform. In addition, like the defendant in *Steele*, Thering faced similar criminal consequences for failing to comply with Reithmeyer's request. Wisconsin makes it a criminal violation for any person to resist an officer while that officer is doing an act in his or her official capacity. See WIS. STAT. § 946.41(1) (2021-22); *Steele*, 858 S.E.2d at 335. The show of authority in this case far outweighs that showed in *Evans*, wherein the court of appeals concluded that a seizure had occurred. Thus, the court should conclude in this case that Thering was seized at least at the time that Reithmeyer gesture for him to roll down his vehicle's window and Thering did so.

Best regards,

KIRK GRAVES & NUGENT

Electronically signed by:

Stephanie Zulkoski

Stephanie Zulkoski

stephanie@saukprairielaw.com

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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) (2019-20) for a brief produced with a proportional serif font. The length of this supplemental letter is 9 pages and 2,330 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