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December 19, 2023

Honorable Judge Blanchard
Court of Appeals, District IV
110 East Main Street, Suite 215
Post Office Box 1688
Madison, Wisconsin 53701-1688

RE: State v. Mr. Joshua L. Thering
Appeal No. 2023AP1253-CR
Circuit Court Case No. 2022CT30

Judge Blanchard,

A request was made for a supplemental letter brief on whether the pre-contact following conduct carries weight in whether Thering was seized at the time Officer Reithmeyer approached his vehicle and asked him to roll down his window.

Additional Facts

At the motion hearing, Officer Reithmeyer testified to the following information. Officer Reithmeyer was on duty for the Reedsburg Police Department on November 21, 2023. Mot. Hr'g. Tr. 9:2-4. At approximately 4:15am that day he observed a vehicle that caught his attention. Mot. Hr'g. Tr. 9:11-15. Officer Reithmeyer was driving westbound on East Main Street while the vehicle he observed was travelling eastbound. Mot. Hr'g. Tr. 9:17-19. Officer Reithmeyer suspected this vehicle was speeding, so he activated his radar and observed a reading of 37mph.¹ Mot. Hr'g. Tr. 9:22-25. Officer Reithmeyer waited for the vehicle to pass him. He then conducted a U-turn and began to follow the

¹ The Circuit Court found it unreasonable that Officer Reithmeyer was able to obtain this reading; however, the State includes this fact as context.

driver. Mot. Hr'g. Tr. 11:14-16. Both vehicles parked in the parking lot of the Walgreens at 1100 Main Street in Reedsburg. Mot. Hr'g. Tr. 11:17-23.

In a written Decision and Order the Circuit Court made the following findings of fact: 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. Decision and Order 2-3. The speed of Mr. Thering's vehicle caught Officer Reithmeyer's attention. Decision and Order 3. 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. *Id.* 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. *Id.* Officer Reithmeyer followed Mr. Thering in his squad into the Walgreens parking lot and along the northern side of the property. *Id.*

Argument

[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 U.S. at 439, 111 S. Ct. 2382. In resolving this question, courts have followed the standard set forth in *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L.Ed.2d 497 (1980) (plurality op.), asking "whether 'in view of all [of] the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *United States v. Gray*, 883 F.2d 320, 322 (4th Cir.1989) (quoting *Mendenhall*, 446 U.S. at 554, 100 S. Ct. 1870 (plurality op.)).

This "reasonable person" standard "is an objective one," thus "its proper application is a question of law." *Weaver*, 282 F.3d at 309 (quoting *United States v. Sullivan*, 138 F.3d 126, 133 (4th Cir.1998)). We review such questions of law de novo. *See Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (holding objective "determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal"); *Mendenhall*, 446 U.S. at 554-55, 100 S.Ct. 1870 (describing issue as "a matter of law").

A court considers a number of factors in determining whether an officer's conduct would convey to a reasonable person that he is not free to leave. These include, but are not limited to, the number of police officers present during the encounter, whether they were in uniform or displayed their weapons, whether they touched the defendant, whether they attempted to block his departure or restrain his movement, whether the officers' questioning was non-threatening, and whether they treated the defendant as though they suspected him of "illegal activity rather than treating the encounter as 'routine' in nature." *Gray*, 883 F.2d at 322-23.

The question asked is whether the officers' U-turn, and Thering's awareness of such conduct. This court is to consider the "totality of the circumstances" in this case to determine whether the initial encounter between the police officers and Thering was consensual. *See Lattimore*, 87 F.3d at 653. As analyzed in the State's response brief, the conditions in the Walgreens parking lot show that Thering was not seized at the time Officer Reithmeyer gestured for Thering to roll down his window.

Defendant relies heavily on *State v. Steele*, 277 N.C. App. 124, 858 S.E.2d 325 (2021) and argues that this case is similar. The facts here are entirely different than those in *Steele*, in several respects, but most importantly because Officer Reithmeyer did not stop a moving vehicle, but approached a parked vehicle.

In *Steele*, the officer observed the defendant's vehicle driving down a road and began following it. *Steele*, 277 N.C. App. at 125, 858 S.E.2d at 329. The officer continued following the vehicle when the

vehicle eventually pulled into an empty parking lot. *Id.*, at 125, 858 S.E.2d at 329. Once inside the parking lot, the officer observed the vehicle make a “U-turn”, and at that point, the officer, in his vehicle, rolled down his window, approached the defendant's vehicle and stuck his arm out the window and flagged the car down. *Id.*, at 125, 858 S.E.2d at 329.

The defendant in *Steele* contended that the officer “made a show of authority which compelled him to stop.” *Id.*, at 133, 858 S.E.2d at 333. The key difference between this case and *Steele* is the fact that, in *Steele*, the officer used a physical, authoritative gesture to hail down and stop the defendant’s vehicle. Here, the officer solely completed a U-turn. Mot. Hr’g. Tr. 11:15-16. There was no display of authority. The officer did not turn his lights on. The officer did not flash his headlights or make any other sort of gesture to garner Thering’s attention. Thering never testified to believing that the officers were following him. He testified to knowing the officers “made a U-turn and then came back behind him and stopped.”² Mot. Hr’g. Tr. 42:3-4. He never testified that he believed the officers were following him. Thering never testified to what he believed in the moments between the U-turn and the contact. The North Carolina Court of Appeals found it “evident that Defendant stopped his vehicle's motion in direct response to Officer Plummer's authoritative conduct and commanding gestures.” *Id.*, at 138, 858 S.E.2d at 336. Here, there’s no evidence that Thering stopped his vehicle in response to anything the officers did. Thus, this court should find that the U-turn was not an additional display of authority such that it would have bearing on whether Thering was seized.

Thering also relies briefly on *United States v. Jones*, 678 F.3d 293 (4th Cir. 2012), though that case can be distinguished from the case at hand. In *Jones*, two police officers, in a marked patrol cruiser, turned around and closely followed a car from a public road onto private property and then blocked the car’s exit. *Jones*, 678 F.3d 293, at 296. There was no traffic violation. *Id.* The officers followed the vehicle into private property. *Id.* The officers did not have their lights or sirens activated, and they stayed close to the vehicle. *Id.* The officers followed the defendant into a one lane driveway. *Id.*, at 297. The officer parked in a way to ensure that he would have the opportunity to make contact with the occupants, that is, in a way to block the occupants from driving away. *Id.*

Here, two police officers in a marked patrol cruiser, effectuated a U-turn, followed Thering’s vehicle at a distance standard for cars on the road. (Ex. 1.) The officers followed Thering into the Walgreens parking lot, which is a public parking lot. Decision and Order 3-4. The officers parked their vehicles such that Thering was able to move his vehicle Decision and Order 8-10. The officers did not have their lights and sirens activated. Order 4. Both Officer Reithmeyer and Sergeant Hoege testified that there was enough room for cars to pass between the Thering’s vehicle and the squad car.

Thering is asking the court to rely on Thering’s version of events and the circuit court’s factual findings. Thering conveniently ignores the testimony of both officers. Additionally, in comparing the two, the Court can see Thering’s version of events are quite different than the factual findings made, which shows the circuit court did not give any weight to his version of events, nor found them credible. This court should do the same.

Thering also argues that he was seized because he would have faced criminal consequences for failing to comply with Reithmeyer’s request. First, there is no evidence in the record for this argument. As noted above, there is no testimony from Thering on this point. Thering did not testify to fearing criminal penalties. Thering incorrectly cites 946.41(1), Resisting an Officer. The elements of that offense are (1) the defendant resisted an officer, (2) the officer was doing an act in an official capacity, (3) the officer was acting with lawful authority, and (4) the defendant knew the officer was an officer acting in an official capacity and with lawful authority and that the defendant knew his conduct would resist the officer. JI-1765. “Resist” is defined as “to oppose the officer by force or threat of force.” *Id.*

² While it’s not clear from the defendant’s testimony, the State assumes the “stop” the defendant is referring to is in the parking lot and not at the intersection. The State makes this assumption based on the defendant’s testimony directly following this statement which discusses how Officer Reithmeyer got out of the squad and approached the defendant’s vehicle.

Thering would not be charged with resisting an officer for failing to comply with the request to roll down the window.

Wisconsin Statute section 946.41(1) also includes Obstructing an Officer. The elements of that offense are (1) the defendant obstructed an officer, (2) the officer was doing an act in an official capacity, (3) the officer was acting with lawful authority, and (4) the defendant knew the officer was an officer acting in an official capacity and with lawful authority and that the defendant knew his conduct would resist the officer. JI-1766.³ “Obstruct” is defined as “to obstruct an officer means that the conduct of the defendant prevents or makes more difficult the performance of the officer’s duties.” *Id.* An important question that has not been completely answered is whether failure to cooperate with police can be “obstructing” if no physical resistance is offered. For example, is it “obstructing an officer” for a person to refuse to identify himself and answer questions during a lawful “stop and question” situation? The Wisconsin Supreme Court recognized this question but found it unnecessary to answer definitively in *State v. Hamilton*, 120 Wis.2d 532, 356 N.W.2d 169 (1984). The Jury Instruction Committee’s judgment is that a refusal to answer questions, by itself, should not be considered “obstructing an officer” in violation of § 946.41. This conclusion was approved in *Henes v. Morrissey*, 194 Wis.2d 339, 533 N.W.2d 802 (1995). *Henes* was a civil case against police officers who arrested Henes when he refused to identify himself during a *Terry* stop. The court held that

mere silence, standing alone, is insufficient to constitute obstruction under the statute. Here, all Henes did was remain silent. He did not affirmatively act to obstruct the deputies’ investigation: he did not give them false information, he did not flee from the deputies, nor did he act in any violent manner towards them. Without more than mere silence, there is no obstruction.

194 Wis.2d 339, 355.

Based on the above, it is unlikely that Thering would have faced criminal penalties for refusing to roll down his window in this situation. The Court should give this argument no weight.

“Determining 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 the U-turn was not an additional show of authority communicating to Thering that he was being followed by law enforcement. 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.

Respectfully submitted:

Date Signed: 12/19/23

Electronically Signed By:

Natalia J Gess

Assistant District Attorney

State Bar #: 1115667

³ Obstructing an Officer is also addressed in JI-1766A; however, that Instruction refers to providing false information to an officer, which would not be applicable to the circumstance at hand, so the State will not address that Instruction further.

