COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2199-CR **Cir. Ct. No. 2013CT367**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUAN FRANCISCO ROSAS VIVAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JENNIFER L. WESTON, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] Juan Vivar appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant (OWI), second offense. Vivar contends that he was illegally seized, and that all evidence

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

obtained following his detention and arrest should have been suppressed. For the reasons discussed below, I affirm.

BACKGROUND

¶2 Vivar was charged with OWI, second offense, operating a motor vehicle with a prohibited alcohol concentration, second offense, and operating a motor vehicle while his operating privileges had been revoked. Vivar moved the circuit court to suppress all evidence obtained as a result of his seizure and arrest.

¶3 At the hearing on Vivar's motion, City of Waterloo police officer Joseph Rupprecht testified that on October 11, 2013, at approximately 11:20 p.m., he was dispatched to a residence in Waterloo to investigate a report by a caller that an individual, later identified as Vivar, was knocking on her door. Officer Rupprecht testified that when he turned onto the road upon which the residence was located, he observed a red Pontiac with a black hood being driven by a male, who appeared to be the sole occupant of the vehicle. Officer Rupprecht testified that he made contact with the caller, who informed him that Vivar, her former spouse, had been to her residence, that she had smelled alcohol on Vivar's breath, and that she was concerned that her son might have been in the vehicle driven by her former spouse, which she described as a red Pontiac with a black hood. Officer Rupprecht testified that he understood the caller to be telling him that she believed that Vivar was too drunk to drive and that after learning where Vivar lived, he drove to that residence "to advise him that [the caller] wished not to have him at her door at that time of night."

¶4 Officer Rupprecht testified that when he pulled his marked squad vehicle into the parking area near where Vivar lived, he observed the red Pontiac he had seen earlier and a male walking away from it. Officer Rupprecht testified

that he "called out" to Vivar by name in an "[a]uthoritative" tone "[l]oud enough that [Vivar] could hear [him]" and said to Juan: "Juan, can you come talk to me?" Officer Rupprecht testified that Vivar "came up to the passenger side window of [his] squad car and leaned in to talk to [him]." Officer Rupprecht testified when Vivar leaned into the passenger side window of his squad vehicle, he smelled the odor of intoxicants on Vivar and after shining his flashlight in Vivar's direction, observed that Vivar's eyes were bloodshot.

¶5 Vivar testified that Officer Rupprecht called out to him, "would [Vivar] come over to [Officer Rupprecht's] car," and that he did not believe he was free to ignore Officer Rupprecht.

¶6 The circuit court denied Vivar's motion to suppress. The court rejected an argument by Vivar that he was seized the moment Officer Rupprecht said Vivar's name, concluding instead that Vivar was seized sometime after Vivar put his head inside the passenger side of Officer Rupprecht's vehicle. The court found that although Vivar may have felt he did not have a choice, he voluntarily approached Officer Rupprecht's vehicle and there was no evidence to suggest that Vivar was not free to ignore Officer Rupprecht. The court found that Officer Rupprecht's testimony was credible.

¶7 Following the denial of his motion to suppress, Vivar plead guilty to OWI, second offense. Vivar appeals.

DISCUSSION

¶8 Vivar contends that the circuit court erred in denying his motion to suppress. Vivar argues that he was seized when Officer Rupprecht called his name and asked/commanded him to come over to his squad car, and that at that

point, Officer Rupprecht did not have reasonable suspicion to detain him. The State contends that Vivar was not seized until some point after Vivar put his head inside the passenger window of Officer Rupprecht's vehicle and that even if Vivar was seized prior to then, Officer Rupprecht had reasonable suspicion to detain Vivar. For the reasons I explain below, I conclude that Vivar was not detained until after he put his head into the vehicle and that at that point, Officer Rupprecht had reasonable suspicion to stop Vivar. Accordingly, I affirm the circuit court's denial of Vivar's motion to suppress.

¶9 When reviewing a circuit court's ruling on a motion to suppress evidence, this court upholds the court's factual findings unless they are clearly erroneous, however, the application of constitutional principles to those facts presents a question of law subject to de novo review. ***County of Grant v. Vogt***, 2014 WI 76, ¶17, 356 Wis. 2d 343, 850 N.W.2d 253. The same standard of review applies to the issue of whether someone has been seized. ***Id.***

¶10 "Whether someone has been seized presents a two-part standard of review." ***Vogt***, 356 Wis. 2d 343, ¶17. We will uphold the circuit court's factual findings unless those findings are clearly erroneous; however, the application of constitutional principles to those facts presents a question of law subject to our de novo review. ***Id.*** The same standard of review applies to our review of a circuit court's decision on a motion to suppress. ***Id.***

¶11 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution protect an individual's right to be free from unreasonable seizures. ***State v. Young***, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729. In order for these constitutional protections to come into play, an individual must be "seize[d]" by a governmental agent. ***Vogt***, 356 Wis. 2d 343,

¶19. The Wisconsin Supreme Court explained in ***Vogt*** that "there are countless interactions or encounters among police and members of the community," but not all encounters will constitute seizures and be afforded Constitutional protection. ***Id.***, ¶26. "A seizure occurs '[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen'" and a reasonable person would not have believed that he or she was free to leave. ***Id.***, ¶20 (quoted source omitted). Although most citizens will respond to a police request, the fact that a citizen does so does not necessarily mean that the citizen has been seized. *See* ***id.***, ¶24. Instead, we must look at the totality of the circumstances and determine whether a reasonable person would have felt free to leave. ***Id.***, ¶¶30-31.

¶12 Vivar contends that his seizure occurred when Officer Rupprecht called his name and asked him to come over to his vehicle. Vivar focuses on the following: When Officer Rupprecht called out to him, he used Vivar's first name; Officer Rupprecht used an "authoritative tone," and Officer Rupprecht "ordered him" to come to Officer Rupprecht's squad car. Vivar argues that a reasonable person would not believe he or she was "free to leave or to ignore a direct order from a uniformed officer who was calling him by name in an authoritative tone." In support of his position, Vivar cites ***State v. Washington***, 2005 WI App 123, 284 Wis. 2d 456, 700 N.W.2d 305, and ***State v. Kelsey C.R.***, 2001 WI 54, 243 Wis. 2d 422, 626 N.W.2d 777.

¶13 In ***Washington***, patrol officers in plain clothes "ordered" the defendant to stop, the defendant took a few steps backwards, threw his hands in the air and was pushed to the ground by the officer. ***Washington,*** 284 Wis. 2d 456, ¶2. One of the officers testified that after the defendant had stopped, the defendant appeared nervous and the officer "told him not to run; stand there." ***Id.***,

¶3. The seizure issue we addressed in ***Washington*** was whether the defendant had failed to yield to police authority and was therefore not seized until he was subdued by the officers. ***Id.***, ¶14. We stated in ***Washington*** that we could not conclude under the facts at hand that the defendant "did not yield until after he threw his hands in the air" and, therefore, we determined that the defendant was seized when he initially stopped after the police commanded him to do so. ***Id.***, ¶14-15.

¶14 In ***Kelsey C.R.***, we addressed whether the police seized the defendant when she was told to "'stay put'" by uniformed officers in an unmarked patrol car, but instead ran away. ***Kelsey C.R.***, 243 Wis. 2d 422, ¶29. The Wisconsin Supreme Court concluded that when the officer told the defendant to "'stay put,'" the officer made a show of authority similar to telling a citizen "'stop, in the name of the law.'" ***Id.***, ¶33. The court concluded, however, that because the defendant ran away, a seizure did not occur until the officers caught the defendant after a brief chase and applied physical force. ***Id.***, ¶¶6, 30.

¶15 Vivar asserts that Officer Rupprecht "authoritatively instructing [Vivar] to come talk to him" is analogous to the situations in ***Washington*** and ***Kelsey C.R.*** where the police told the defendants to stop, and therefore, constitutes a seizure entitled to constitutional protections. I need not decide whether such "authoritatively instructing" would constitute a seizure. The court did not find, and the evidence does not support, Vivar's assertion that Officer Rupprecht "authoritatively instruct[ed]" Vivar to come over to him. Officer Rupprecht testified that he stated: "Juan, *can* you come talk to me?" and Vivar testified that Officer Rupprecht stated "*would* [Vivar] come over to [Officer Rupprecht's] car." (Emphasis added.) Neither Officer Rupprecht's nor Vivar's description of what Officer Rupprecht said to Vivar rises to the level of an instruction. Instead, both

describe Officer Rupprecht as asking Vivar a question—"can" Vivar do something or "would" he do something.

¶16 In ***Vogt***, the Wisconsin Supreme Court held that a defendant was not seized where an officer parked his marked patrol vehicle behind the defendant's vehicle, approached the driver's side window of the defendant's vehicle, rapped on the driver's side window and motioned for the defendant to roll the window down. ***Vogt***, 356 Wis. 2d 343, ¶¶5-7, 41. The court explained that these facts did not rise to the level of a seizure because the defendant could have ignored the officer's request and driven away, and the circuit court had found that the evidence did not suggest that the officer "commanded" the defendant to roll down his window. ***Id.***, ¶43.

¶17 In the present case, Vivar was similarly free to ignore Officer Rupprecht's request that Vivar come over to the vehicle and nothing in the records suggest that Officer Rupprecht commanded Vivar to do so. I, thus, conclude that Vivar was not seized prior to approaching Officer Rupprecht's vehicle and putting his head inside the passenger side window.

¶18 Vivar does not contend that Officer Rupprecht lacked reasonable suspicion to detain him after putting his head inside the vehicle. Accordingly, I affirm the circuit court's denial of Vivar's motion to suppress.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.