

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-3641

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CITY OF RIVER FALLS,

PLAINTIFF-APPELLANT,

V.

JAMIE T. KJOS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Pierce County:
ROBERT W. WING, Judge. *Affirmed.*

HOOVER, J. The City of River Falls appeals an order affirming dismissal of operating a motor vehicle while under the influence of intoxicants and with a prohibited alcohol concentration charges against Jamie Kjos. The court dismissed the charges because the officer “stopped” Kjos without cause.¹ On

¹ The appropriate remedy is suppression of the evidence obtained as a result of the unlawful seizure, not dismissal of the charges. See *State v. Smith*, 131 Wis.2d 220, 235-36, 338 N.W.2d 601, 608 (1986). The City did not object to dismissal as the remedy.

appeal, the City contends that Kjos was not stopped, that the encounter was voluntary and that the court erred by dismissing the charges. This court disagrees and concludes that, under the circumstances, the officer “seized” Kjos without any legal basis. The order dismissing the charges is accordingly affirmed.

The facts are undisputed. At 2:10 a.m., River Falls police officer Jeffrey Sather received a dispatch regarding a suspicious vehicle parked on Lake Street. There was no description of the model, vehicle, or license plate; the only information was that it was dark colored and had been parked along the road for fifteen to twenty minutes. Sather received no information regarding the complainant.

Sather responded and drove to Lake Street. He noticed a car moving ahead of him. Because of darkness, he could not determine the vehicle’s color. Although he did not notice anything suspicious about the vehicle, he followed it for several blocks before observing that the vehicle was “dark in color.”

As Sather continued to follow the vehicle, he noticed that the driver followed all traffic laws. Sather did not activate his emergency lights, siren, spotlight or loud speaker. Eventually the vehicle parked legally along the curb. Sather did not know if the driver was a resident of the neighborhood. He parked his patrol car behind the vehicle and ran the license plate number through dispatch.

Before anyone exited either vehicle, Sather illuminated the vehicle with his spotlight, shining it into the passenger compartment to determine the number of people inside. He then exited his patrol car, and Kjos also exited his vehicle. Both men walked toward each other. At that point, Sather first observed evidence that Kjos was potentially under the influence of intoxicants. Sather ultimately cited Kjos for operating while intoxicated.

Kjos filed a motion to dismiss, arguing that the police had no reason to stop him and that this detention violated his constitutional rights. At the motion hearing, Sather testified that he intended to detain the driver to determine who he was and what he was doing. Sather admitted that he parked his car behind Kjos' vehicle as a part of his investigation. The River Falls Municipal Court granted the motion to dismiss, and the City appealed to the circuit court, which affirmed. This appeal ensued.

The City does not contend that Sather had a reasonable basis for conducting an investigatory stop. It in effect concedes that point because it has never raised it. The issue before this court is therefore limited to whether Sather "seized" Kjos. The City asserts that the encounter between Kjos and Sather was consensual and raises no constitutional issues. It contends that there was no seizure because there was no physical contact with the officer, no display of weapons, no interference with Kjos' freedom of movement, and the officer never activated his lights, siren or loudspeaker.

Kjos' constitutional right to be free from unreasonable searches and seizures flows from the Fourth Amendment to the United States Constitution and art. I, § 11, of the Wisconsin Constitution. *See* U.S. CONST. amend. IV; WIS. CONST. art. I, § 11; *State v. Morgan*, 197 Wis.2d 200, 207, 539 N.W.2d 887, 890-91 (1995). The protection afforded individuals under the state constitution follows the United States Supreme Court's interpretation of the federal constitution. *See id.* at 207-08, 539 N.W.2d at 890-91.

A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave. *See United*

States v. Mendenhall, 446 U.S. 544, 554 (1980). This seizure can occur by means of physical force or a show of authority. See *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). This is a constitutional fact this court reviews de novo. See *State v. Krier*, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991).

This court determines that a reasonable person in Kjos' circumstances would not have believed he was free to leave the scene. Sather, driving a patrol car, followed Kjos' vehicle for four blocks and pulled up behind it once Kjos parked. Then, after calling dispatch, he illuminated Kjos' vehicle with his spotlight. Sather subsequently exited his vehicle and approached Kjos' vehicle. Reasonable persons would conclude that these circumstances constitute an adequate show of authority and that they are not free to leave.² See *Mendenhall*, 446 U.S. at 554. Rather, they would conclude that a police officer wanted to speak with them and would take action to stop them if they attempted to leave.

Illuminating the interior of Kjos' vehicle was at once an order to remain stopped while the officer approached *and* an investigatory act. Sather's show of authority before approaching the stopped vehicle was inconsistent with the City's claim of a consensual encounter. See *Berkemer v. McCarty*, 468 U.S. 420, 436 (1984) ("Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so."); see also *State v. Stroud*, 634 P.2d 316, 319 (Wash. App. 1981) (officers' attempt to summon occupants of parked car with emergency lights and

² Although Sather's subjective intent is irrelevant to this determination, he did indicate that he intended to detain the driver long enough to talk with him to find out what he was doing. The determination that a similarly situated reasonable person would have believed they were "seized" is vindicated by Sather's subjective purpose.

high beam headlights "constituted a show of authority sufficient to convey to any reasonable person that voluntary departure from the scene was not a realistic alternative."). This court holds that Kjos was seized for Fourth Amendment purposes, and therefore the trial court's suppression order is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

