COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1757-CR **Cir. Ct. No. 2002CT578**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRAIG D. WARREN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: GUY D. REYNOLDS, Judge. *Affirmed*.

¶1 DEININGER, P.J.[1] Craig Warren appeals a judgment convicting him of a third offense of operating a motor vehicle under the influence of an

[1] This opinion is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f)(2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

intoxicant (OMVWI) and a fourth-offense operating after revocation (OAR). Warren claims that the circuit court erred in denying his motion to suppress evidence because the record shows that he was stopped by a police officer on less than reasonable suspicion in violation of the Fourth Amendment. We conclude, however, that Warren was not stopped or seized by the arresting officer until the officer had made sufficient observations to establish a reasonable suspicion that Warren had committed OMVWI. We therefore affirm the appealed judgment.

BACKGROUND

¶2 The Sauk Prairie Police Department received an "anonymous" tip that a white male was driving a white construction van while intoxicated and that the van had left an apartment complex headed in a certain direction.[2] Dispatch notified patrol officers of the report, and an officer spotted a white van with a white male driver in the reported area. The officer followed the vehicle for a distance, observing no traffic violations or unsafe driving. The van pulled into a municipal parking lot and stopped. It was 10:25 p.m. and there were no open businesses in the vicinity. According to the officer, the van was legally parked and the driver, later identified as Warren, was smoking a cigarette with his window rolled down. The officer pulled into the lot, parked his squad car and approached the vehicle.

¶3 "As soon as [the officer] met with [Warren]," the officer observed that Warren's "eyes were extremely dilated … bloodshot and glassy." The officer

[2] There is some indication in the record that the caller gave a name to the dispatcher but that this information was later lost or destroyed. For purposes of this appeal, we will treat the tip as anonymous. Our disposition does not rely on any information provided by the caller to justify the arresting officer's actions prior to Warren's arrest.

told Warren that police had received "an anonymous tip that he was intoxicated" and asked him to get out of his car. Warren "stumbled" as he stepped out of the van, had "a hard time" walking and smelled of "intoxicants." The officer then asked Warren if he had consumed any alcoholic beverages that evening, and Warren responded that he had drunk "several beers." The officer administered field sobriety tests and subsequently arrested Warren for OMVWI and OAR.

¶4 Warren moved to suppress all evidence obtained after the police officer's initial contact, arguing that the officer lacked reasonable suspicion to stop and question him. At the conclusion of the suppression hearing, the circuit court denied the motion, concluding that when the officer initially approached Warren in the parking lot, there was no seizure or "stop" for Fourth Amendment purposes. The court also determined that the officer's observations thereafter provided reasonable suspicion to temporarily detain Warren to determine whether he had committed OMVWI.

¶5 Although the record is unclear on the matter, Warren apparently requested reconsideration of the court's bench decision because the court later issued a written decision and order confirming its initial ruling. In its written decision, the court analyzed what constitutes a seizure for Fourth Amendment purposes under U.S. Supreme Court precedents. The court noted that the officer had not made a display of authority or otherwise indicated to Warren that he was not free to leave or to refuse to answer the officer's questions. Warren then pled no contest to both offenses and now appeals the judgment of conviction, challenging only the denial of his suppression motion. *See* WIS. STAT. § 971.31(10).

ANALYSIS

¶6 Warren contends that, under the standard articulated in ***U.S. v. Mendenhall***, 446 U.S. 544, 554-55 (1980), the police officer seized him when the officer approached his van, informed him of the report that he was driving while intoxicated and asked him to get out of the van. Warren argues that, because the officer told him that he was the subject of a police investigation, a reasonable person would not have felt free to decline the officer's request to get out of the van. Consequently, in Warren's view, a seizure occurred that cannot be justified by a reasonable suspicion of criminal conduct, as required by the Fourth Amendment. We disagree and, like the circuit court, conclude that Warren was not seized until a later point in the officer's interaction with him, at which point, the officer's observations established a reasonable suspicion that Warren had committed OMVWI.

¶7 Whether or when the police officer seized Warren is an issue of constitutional fact, subject to a two-part standard of review. ***State v. Williams***, 2002 WI 94, ¶17, 255 Wis. 2d 1, 646 N.W.2d 834. We will uphold the circuit court's findings of historical fact unless they are clearly erroneous. ***Id***. We decide de novo, however, the legal question of whether the facts as found resulted in a constitutional violation. ***Id***.

¶8 Under the Fourth Amendment, seizures of persons, including even a brief detention that falls short of an arrest, must conform to objective standards of reasonableness. ***Mendenhall***, 446 U.S. at 551. Persons are seized for Fourth Amendment purposes when their freedom of movement is restrained by either physical force or a show of authority. ***Id***. at 553. The Court articulated in

Mendenhall a "totality-of-circumstances" standard for determining whether or when a seizure occurs:

> [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 that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Id. at 554-555 (footnote and citations omitted).

¶9 Applying the ***Mendenhall*** standard to the present facts, we note first that *none* of the examples of circumstances the Court cites as possibly giving rise to a seizure are present in this case. A single police officer approached Warren while he was seated in his parked van, and nothing in the record suggests that the officer displayed a weapon, touched Warren in any way or used a threatening or intimidating tone of voice during the initial encounter. Neither did the officer employ his squad car's siren or emergency lights prior to or during his approach to Warren. In short, nothing in the record establishes that the officer's approach to and initial contact with Warren was anything other than the type of "inoffensive contact between a member of the public and the police," which "cannot, as a matter of law, amount to a seizure of that person." ***Id***. at 555.

¶10 Warren, however, points to ***Florida v. Royer***, 460 U.S. 491 (1983), as support for his contention that, when police inform a person that the person is the subject of a police investigation, it amounts to a display of authority sufficient

to convince a reasonable person that he or she is not free to terminate the encounter or decline any police requests. The Supreme Court in ***Royer*** rejected the State's "consensual encounter" contention and concluded that narcotics agents had seized the defendant under the following circumstances:

> First, it is submitted that the entire encounter was consensual and hence Royer was not being held against his will at all. We find this submission untenable. Asking for and examining Royer's [airline] ticket and his driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment. These circumstances surely amount to a show of official authority such that "a reasonable person would have believed he was not free to leave."

Royer, 460 U.S. at 501-02 (citing ***Mendenhall***).

¶11 We conclude that this is not a ***Royer*** case because key elements of the circumstances present in ***Royer*** are absent here. The Court noted in ***Royer*** that the narcotics agents' initial approach of the defendant, and their asking for and examining his airline ticket and driver's license "were no doubt permissible." ***Id***. at 501. Here, there was plainly no seizure when the officer went up to the open driver's window of Warren's parked van and engaged him in conversation. The narcotics agents in ***Royer***, like the officer in this case, informed the defendant that he was suspected of criminal activity. ***Id***. The agents proceeded to ask the defendant to go with them from the public air terminal to a "police room," all the while retaining possession of the defendant's airline ticket and driver's license. ***Id***. This movement of the defendant to a secluded location and the retention of his identification and means of departure are simply not present in the facts before us.

The officer asked Warren simply to step out of his van, not to go to a different or secluded location, and the officer did not obtain or retain possession of any identification or of Warren's car keys at this point in the encounter.

¶12 We conclude that simply telling a defendant that he is suspected of criminal activity at the inception of an "otherwise inoffensive contact," *see* ***Mendenhall***, 446 U.S. at 555, does not convert a consensual encounter into a seizure. We suspect that, had the agents in ***Royer*** *not* informed the defendant that "he was suspected of transporting narcotics," ***Royer***, 460 U.S. at 501, but had asked him to go with them to the police room while holding his license and ticket, the Supreme Court would still have determined that a seizure occurred. Conversely, had the ***Royer*** agents disclosed their suspicion and continued their questioning in the public terminal after returning the defendant's ticket and license to him, instead of removing the defendant to the "police room" while retaining his license and ticket, we cannot conclude that the Court would have decided Royer had been seized. As the Court noted, there is no "litmus-paper test for distinguishing a consensual encounter from a seizure," there being "endless variations in the facts and circumstances" that will determine the conclusion. ***Id***. at 506.

¶13 In short, we conclude that the officer's disclosure to Warren that police had received a report that he was driving drunk, in the absence of additional circumstances like those in ***Royer***, did not convert the consensual encounter in this case into a seizure. We also note that, after ***Royer***, the Supreme Court held that encounters occurring between police and citizens under circumstances in which a person, as a practical matter, lacks the freedom to leave or otherwise avoid the encounter does not necessarily constitute a seizure. *See* ***Florida v. Bostick***, 501 U.S. 429, 436 (1991). In ***Bostick***, police officers entered a bus parked at a rest

stop as part of a drug interdiction program in which they randomly selected passengers for questioning, asking to see their tickets and identification and requesting permission to search their luggage. ***Id***. at 431-32. The officers picked the defendant and, after identifying themselves as "narcotics agents on the lookout for illegal drugs," asked his consent to search his luggage, which the defendant gave. ***Id***. at 431-32. The Court concluded that the described encounter did not "necessarily" constitute a seizure, and it remanded so that the Florida courts "may evaluate the seizure question under the correct legal standard." ***Id***. at 433, 437.

¶14 The Court reiterated in ***Bostick*** that "a seizure does not occur simply because a police officer approaches an individual and asks a few questions," and that it is only "'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.'" ***Id***. at 434 (citing ***Terry v. Ohio***, 392 U.S. 1, 19 n.16 (1968)). Specifically, with regard to the facts before it, the Court explained that "no seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search his or her luggage—so long as the officers do not convey a message that compliance with their requests is required." ***Id***. at 437.

¶15 Applied here, the reasoning in ***Bostick*** reinforces our conclusion that no seizure occurred at the point that the officer disclosed to Warren the report of his alleged drunk driving and asked him to step out of his van. The record provides no basis for us to conclude that a reasonable person in Warren's position would not have felt free to decline the request to step out of the van, a request that we deem no more intrusive or coercive than a request to search one's luggage. Under ***Bostick***, the disclosure of an official police purpose for the encounter followed by questioning or requests of the defendant do not equate to a "show of

authority" sufficient to convert a consensual encounter into a seizure. *See also* ***U.S. v. Drayton***, 536 U.S. 194 (2002) (concluding that no seizure occurred when police boarded a bus and questioned passengers despite the lack of an affirmative warning to passengers that they could refuse to cooperate; it being sufficient that the officers gave passengers no reason to believe they must answer, could not leave the bus or otherwise terminate the encounter).

¶16 The officer clearly seized Warren at some point during the encounter because the officer ultimately arrested Warren for OMVWI. The seizure did not occur, however, before the officer had observed Warren's "bloodshot" and "glassy" eyes, his stumbling exit from the van and his difficulty walking; detected the odor of intoxicants emanating from Warren; and learned that Warren had consumed "several beers." The officer observed or obtained these facts coincident with or immediately after Warren's compliance with the request to step out of the van. From that point forward, reasonable suspicion existed that Warren may have committed OMVWI, thus justifying the officer's detention of Warren for the performance of field sobriety tests.[3]

CONCLUSION

¶17 For the reasons discussed above, we affirm the appealed judgment.

By the Court.—Judgment affirmed.

[3] Warren did not contend in the trial court, nor does he attempt to do so on appeal, that the officer thereafter lacked probable cause to arrest him for OMVWI. Our analysis therefore need proceed no further.

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