

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 23, 2010

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP591-CR

Cir. Ct. No. 2008CF223

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. SHEPARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Michael Shepard appeals a judgment of conviction for operating a motor vehicle with a prohibited alcohol concentration in violation

of WIS. STAT. § 346.63(1)(b).¹ Shepard argues the circuit court should have suppressed evidence collected following his questioning by a police officer on a public street. We conclude no Fourth Amendment seizure occurred when the officer approached Shepard's parked vehicle and inquired as to the nature of his activity in the area.

¶2 At the suppression hearing, Zachary Holschbach, a deputy with the Brown County Sheriff's Department, testified he was on patrol in the Village of Howard around 8:00 p.m. on March 6, 2007. Holschbach witnessed a vehicle traveling down a dead-end road in an area subject to frequent complaints of drug activity and lewd and lascivious behavior. The vehicle parked on an unlit portion of the road. Holschbach did not activate his emergency lights and did not observe anyone leave the vehicle.

¶3 After about two minutes, Holschbach approached the vehicle on foot. He discovered Shepard in the driver's seat with a female passenger. Holschbach identified himself and asked Shepard the reason for the couple's presence on the street. Upon making contact, Holschbach detected an "overwhelming smell of intoxicants coming from the interior of the vehicle along with the odor of marijuana."

¶4 Shepard argues his suppression motion should have been granted because Holschbach's approach and questioning "impliedly compels a response and constitutes a seizure" for which the officer lacked reasonable suspicion.² "In

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² Shepard does not raise any constitutional objection to events occurring after Holschbach's approach and questioning.

reviewing a denial of a suppression motion, we will uphold the trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence." *State v. Jackson*, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989). Whether those facts satisfy the constitutional requirement of reasonableness is a question of law we review independently of the circuit court but benefitting from its analysis. *Id.*

¶5 "[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16 (1968). Yet mere questioning by a police officer, unaccompanied by a suggestion that the individual is not free to go about his or her business, causes no interference with an individual's liberty. *United States v. Drayton*, 536 U.S. 194, 200-01 (2002); *Florida v. Bostick*, 501 U.S. 429, 434 (1991). "Thus, if an officer merely walks up to a person ... seated in a vehicle located in a public place ... and puts a question to him, this alone does not constitute a seizure." 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.4(a) (4th ed. 2004); see also *United States v. Hendricks*, 319 F.3d 993, 1001 (7th Cir. 2003) (no seizure where officer parked behind defendant's stationary vehicle without obstructing defendant's exit); *United States v. Encarnacion-Galvez*, 964 F.2d 402, 410 (5th Cir. 1992) (no seizure where police approached defendant's car only after it was parked and did not block the defendant's vehicle); Cf. *State v. Griffith*, 2000 WI 72, ¶39, 236 Wis. 2d 48, 613 N.W.2d 72 (no seizure where police merely ask questions, request identification, or ask for consent to search). Holschbach's approach and questioning did not have Fourth Amendment implications and need not be justified by reasonable suspicion.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

