COURT OF APPEALS DECISION DATED AND FILED

March 12, 2013

Diane M. Fremgen
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. 2012AP2351-CR **Cir. Ct. No. 2012CT134**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN A. GOTTSCHALK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Reversed and cause remanded for further proceedings*.

¶1 HOOVER, P.J.[1] Brian Gottschalk appeals a judgment of conviction for operating while intoxicated, second offense. Gottschalk argues the circuit

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

court erred by denying his suppression motion on the basis that Gottschalk was not seized. We agree and reverse and remand for further proceedings.

BACKGROUND

¶2 The State charged Gottschalk with operating while intoxicated and operating with a prohibited alcohol concentration, both as second offenses. Gottschalk moved to suppress evidence, arguing the officer seized him without reasonable suspicion. Instead of an evidentiary motion hearing, the parties stipulated to the following facts:

> Gottschalk was operating a vehicle in the City of Green Bay on December 12th. The vehicle was stopped. The vehicle was running. This appeared to be in the area of South Ashland and Ninth Street. The officer became suspicious because this area has been defined by the police as a known drug area.
>
> The officer activated emergency lights,[[2]] and it is at the point where the activation of the emergency lights occurs that the defendant takes the position that that constitutes a seizure.
>
> The State says no.

¶3 Following briefing, the circuit court determined "a seizure of the defendant did not occur" when the officer activated his emergency lights. It reasoned, "Due to this finding … the court need not address the issue of whether or not there was reasonable suspicion …." The court denied Gottschalk's

[2] It was also undisputed that the "emergency lights" were the officer's "red-and-blue" lights.

suppression motion, and Gottschalk subsequently pleaded no contest to operating while intoxicated, second offense.[3]

DISCUSSION

¶4 On appeal, Gottschalk argues he was seized when the officer pulled behind his parked vehicle and activated the squad car's red-and-blue emergency lights. Gottschalk asserts the activation of the officer's red-and-blue emergency lights constituted a show of authority that would lead a reasonable person to believe he or she was not free to leave. *See* ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980).

¶5 The State responds that no seizure occurred, and it analogizes this situation to the one in ***State v. Young***, 2006 WI 98, 294 Wis. 2d 1, 717 N.W.2d 729. In ***Young***, an officer observed multiple occupants sitting in a parked vehicle for an extended period of time. ***Id.***, ¶¶7, 9. The officer stopped his car in the middle of the street, next to the vehicle parked behind the suspect vehicle, and turned on his flashers and spotlight—he did not activate his red-and-blue rolling lights. ***Id.***, ¶10. The defendant immediately exited the vehicle and, despite the officer's commands, ran from the officer. ***Id.***, ¶11. The officer eventually caught the defendant and arrested him. ***Id.***

¶6 On appeal, the parties disputed when the seizure occurred. The defendant argued he was seized when the officer turned on his flashers and spotlight because, under ***Mendenhall***, a seizure occurs "if, in view of all the

[3] On Gottschalk's no contest plea, the State moved to dismiss the operating with a prohibited alcohol concentration charge, and the court granted the State's motion.

circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." ***Young***, 294 Wis. 2d 1, ¶¶3, 28, 32 (quoting ***Mendenhall***, 446 U.S. at 554). The State argued the defendant was not seized until he was apprehended by the officer because, under ***Hodari D.***, a defendant is seized when "an officer applies physical force, however slight, to restrain the person's movement or when the person submits to a show of authority." ***Young***, 294 Wis. 2d 1, ¶¶3, 29 (citing ***California v. Hodari D.***, 499 U.S. 621, 626 (1991)).

¶7 Our supreme court determined "***Mendenhall*** is the appropriate test for situations where the question is whether a person submitted to a police show of authority because, under all the circumstances surrounding the incident, a reasonable person would not have felt free to leave." ***Young***, 294 Wis. 2d 1, ¶37. It determined ***Hodari D.*** "supplements the ***Mendenhall*** test to address situations where a person flees in response to a police show of authority." ***Young***, 294 Wis. 2d 1, ¶38. It concluded that, because Young fled in response to a show of authority, ***Hodari D.*** governed, and the defendant was not seized until the officer physically apprehended him. ***Young***, 294 Wis. 2d 1, ¶52.

¶8 Because the defendant was not seized until the officer apprehended him, the ***Young*** court did not actually determine whether there was a seizure when the officer activated his squad car's flashers and shined a spotlight into the vehicle. ***Id.***, ¶¶68-69. However, the court stated it was "reluctant to conclude" there had been a seizure, emphasizing that the officer "never turned on his red-and-blue rolling lights." ***Id.***

¶9 In this case, unlike ***Young***, Gottschalk never fled from the officer; therefore, the ***Mendenhall*** test governs. *See* ***Young***, 294 Wis. 2d 1, ¶52. Under ***Mendenhall***, Gottschalk was seized "if, in view of all the circumstances

surrounding the incident, a reasonable person would have believed that he was not free to leave." ***Mendenhall***, 446 U.S. at 554. It is difficult to imagine a situation where a reasonable person would feel free to leave in response to an officer stopping and activating red-and-blue emergency lights behind the person's vehicle. Indeed, in ***State v. Kramer***, 2008 WI App 62, ¶22, 311 Wis. 2d 468, 750 N.W.2d 941, we agreed with the defendant that an officer's activation of his red-and-blue emergency lights constituted a display of authority. Further, in ***State v. Truax***, 2009 WI App 60, ¶¶5, 11, 318 Wis. 2d 113, 767 N.W.2d 369, it was undisputed that an officer, who pulled behind a just-stopped vehicle and activated the emergency lights, had seized the vehicle within the meaning of the Fourth Amendment.

¶10 We conclude that the officer in this case seized Gottschalk when he pulled behind him and activated his red-and-blue emergency lights. Because neither party addresses whether the seizure was lawful, we therefore reverse and remand to the circuit court to determine whether the officer lawfully seized Gottschalk.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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