COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2217-CR **Cir. Ct. No. 2009CT31**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

GARY WIECZOREK,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Buffalo County: THOMAS E. LISTER, Judge. *Reversed and cause remanded with directions*.

¶1 STARK, J.[1] The State appeals a circuit court order suppressing evidence. The court concluded an officer unlawfully seized Gary Wieczorek and improperly conducted a showup. The State argues the circuit court violated the

[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.

law of the case doctrine by concluding Wieczorek was unlawfully seized because we determined the seizure was lawful in ***State v. Wieczorek***, No. 2011AP1184-CR, unpublished slip op. (Nov. 8, 2011) (***Wieczorek I***). The State also argues the circuit court erroneously exercised its discretion by sua sponte determining the showup was unlawful and by failing to give the State an opportunity to establish the showup was proper. We agree and reverse and remand with directions.

BACKGROUND

¶2 This is the second time this case is before this court. In ***Wieczorek I***, the State appealed a circuit court order that suppressed evidence because the court determined officer Jason Mork unlawfully seized Wieczorek. The court concluded the seizure was unlawful because it occurred on Wieczorek's front porch, which the court stated was curtilage. ***Id.***, ¶8.

¶3 On appeal, we first determined the circuit court erred in its curtilage determination. ***Id.***, ¶12. We noted the court determined the front porch was curtilage simply because our supreme court determined in another case that a fenced-in backyard was curtilage. ***Id.***, ¶¶11-12. We stated curtilage determinations must be made on a case-by-case basis and, in this case, the circuit court did not make or rely on factual findings to determine whether Wieczorek had a reasonable expectation of privacy in the porch. ***Id.***, ¶12.

¶4 However, we determined that, even if the front porch was curtilage and, therefore, subject to Fourth Amendment protection, Mork lawfully seized Wieczorek on the porch. ***Id.***, ¶¶14-15, 17. We concluded Mork lawfully entered the front porch during the course of a legitimate police investigation, Wieczorek subsequently consented to Mork's presence—the uncontested evidence from the

suppression hearing showed Wieczorek exited his home, came on the porch to talk to Mork, and then invited Mork inside—and, at the moment Mork seized Wieczorek, Mork had probable cause to arrest Wieczorek for operating while intoxicated. ***Id.*** Because Mork had consent and probable cause to arrest, we concluded Mork's seizure of Wieczorek was lawful. ***Id.***, ¶¶15, 17. We therefore reversed the court's suppression order and remanded for further proceedings.

¶5 No evidence was taken at the single hearing on remand. Wieczorek's counsel alleged that, contrary to Mork's testimony from the suppression hearing, Wieczorek did not willingly invite Mork into his house. Counsel stated Wieczorek told Mork he urgently needed to use the restroom and that Mork could come inside with him. Counsel advised the court that the first thing it needed to determine was whether Mork unconstitutionally seized Wieczorek because "if that seizure was unconstitutional, then we don't have to go any further." Counsel also told the court that, assuming Wieczorek did not prevail on the seizure issue, there were other motions counsel still needed to file—specifically, that there were no exigent circumstances and that the showup conducted after Wieczorek was arrested was unlawful.

¶6 The court asked the State what exigent circumstances existed when Mork seized Wieczorek. The State told the court Mork did not need exigent circumstances.

¶7 The circuit court then determined:

> Based upon all of the facts and circumstances in this case, it is my opinion that Mr. Wieczorek was unconstitutionally seized because there were not exigent circumstances present at the time that the seizure was made and that any evidence subsequent to his unconstitutional seizure of Mr. Wieczorek with respect to Officer Mork's conduct is suppressed.

> With respect to Officer Brunner, any evidence from him with respect to observing the altercation between Mork and Mr. Wieczorek is suppressed.
>
> Officer Brunner may testify from the point in time that he arrived to his observations of Mr. Wieczorek, the vehicle, and other evidence. He is not permitted to testify to an illegal and unconstitutional show-up that he conducted at the 4-Mile Club. That is suppressed. All other evidence that I could see that Officer Brunner would tender in this case is admissible.

DISCUSSION

I. Seizure

¶8 On appeal, the State first argues the circuit court violated the law of the case doctrine by determining Wieczorek was unconstitutionally seized and suppressing evidence related to Wieczorek's conduct. Whether a decision establishes the law of the case is a question of law that we review independently. ***State v. Stuart***, 2003 WI 73, ¶20, 262 Wis. 2d 620, 664 N.W.2d 82.

¶9 "The law of the case doctrine is a 'longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal.'" ***Id.***, ¶23 (quoted source omitted). "However, the rule is not absolute." ***Id.***, ¶24. There are "certain circumstances, when 'cogent, substantial, and proper reasons exist,' under which a court may disregard the doctrine and reconsider prior rulings in a case." ***Id.*** Our supreme court has stated a court should adhere to the law of the case unless the evidence in a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to the issues, or the interests of justice require the court to disregard the law of the case. ***Id.***

¶10 Here, we agree with the State that the circuit court violated the law of the case. At the hearing on remand, the circuit court failed to acknowledge that we had determined Wieczorek was lawfully seized. The record does not reflect that the court considered any "cogent, substantial or proper reasons" why that decision should be disregarded. Instead, the court determined Wieczorek was unlawfully seized because there were no exigent circumstances. However, even assuming the front porch is subject to Fourth Amendment protection, we already determined Wieczorek consented to Mork's presence. Therefore, Mork did not need any exigent circumstances. *See* ***State v. Lathan***, 2011 WI App 104, ¶19, 335 Wis. 2d 234, 801 N.W.2d 772 (To make a warrantless arrest in an area protected by the Fourth Amendment, "the police must have probable cause to make the arrest, and … there must be an exception to the warrant requirement, such as exigent circumstances *or consent*[.]" (emphasis added)).

¶11 Wieczorek agrees that the "law of the case doctrine is applicable," but he contends it is "insufficient to resolve Mr. Wieczorek's suppression motion." He asserts that, because the "law of the case" doctrine applies only to *legal* issues, nothing prevents the court from taking additional evidence to determine whether Wieczorek was unlawfully seized. Wieczorek asks us to reverse and remand with directions that the circuit court make factual findings regarding: (1) whether he consented to Mork's presence on his front porch, and (2) if he did not consent, whether the front porch is curtilage.

¶12 However, an argument similar to the one advanced by Wieczorek was made in ***Stuart***. There, the defendant argued that, on remand, the circuit court was not bound by the supreme court's determination that certain evidence was admissible. ***Stuart***, 262 Wis. 2d 620, ¶22. The defendant argued the admission of evidence is a "discretionary decision rather than a rule of law[.]" ***Id.*** Our supreme

court rejected that argument, concluding, if an appellate court *reverses* a lower court, as opposed to affirming an exercise of the court's discretion, the appellate court has inherently decided an issue of law and therefore its decision becomes law of the case. ***Id.***, ¶27. The ***Stuart*** court then determined it would not revisit its previous determination because no circumstances such as substantially different evidence, new case law, or a miscarriage of justice existed to depart from its prior ruling. ***Id.***, ¶¶29, 43.

¶13 In this case, Mork's testimony at the hearing on Wieczorek's unlawful seizure motion was uncontroverted. Mork testified unequivocally that Wieczorek invited him into the house. Although it appears Wieczorek wishes to present evidence that he only invited Mork into his house because Wieczorek had to use the restroom, we have already independently reviewed the facts from the original suppression hearing and determined, as a matter of law, that Wieczorek was not unlawfully seized. No substantially different evidence, new case law or miscarriage of justice was presented for the circuit court's consideration during the single, nonevidentiary hearing on remand, and therefore, we perceive no reason to depart from our previous determination. As a result, we again conclude Mork lawfully seized Wieczorek and reverse the circuit court's suppression order.

II. Showup

¶14 The State next argues the circuit court erroneously exercised its discretion by sua sponte determining evidence derived from the showup was inadmissible. "A 'showup' is an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes." ***State v. Dubose***, 2005 WI 126, ¶1 n.1, 285 Wis. 2d 143, 699 N.W.2d 582 (quoted source omitted). "A circuit court's decision to admit or exclude evidence is

reviewed under an erroneous exercise of discretion standard." ***State v. Ford***, 2007 WI 138, ¶30, 306 Wis. 2d 1, 742 N.W.2d 61. We determine whether the circuit court "exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record, [and] whether appropriate discretion was in fact exercised." ***Id.*** (quoted source omitted).

¶15 The State asserts the court's showup determination constituted an erroneous exercise of discretion because Wieczorek never filed a motion in limine regarding the showup and the court never gave the State an opportunity to establish the showup was lawful. The State also argues that contrary to the court's decision, showups are not per se unlawful.[2]

¶16 Wieczorek does not respond to the State's showup argument. Therefore, he has conceded the court's sua sponte determination was erroneous. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). In any event, we agree with the State that the circuit court erroneously exercised its discretion by sua sponte determining the showup was unlawful. *See* ***State v. Jiles***, 2003 WI 66, ¶39, 262 Wis. 2d 457, 663 N.W.2d 798 ("The court must not permit itself to become a witness or an advocate for one party."). We therefore reverse the circuit court's showup determination with directions that, if Wieczorek wishes to challenge the showup on remand, he must file an appropriate motion in limine.

[2] Although out-of-court showups are inherently suggestive, evidence derived from showups is not per se inadmissible. ***State v. Dubose***, 2005 WI 126, ¶33, 285 Wis. 2d 143, 699 N.W.2d 582. Evidence obtained from a showup will not be admissible unless, based on the totality of the circumstances, the showup was necessary. ***Id.*** "A showup will not be necessary, however, unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array." ***Id.***

Further, assuming the court permits Wieczorek to file a motion in limine regarding the showup, *see* WIS. STAT. § 971.31(5)(a),[3] the court must give the State an opportunity to respond to Wieczorek's motion and establish the showup was necessary, *see* ***Dubose***, 285 Wis. 2d 143, ¶33 (State must prove showup was "necessary").

By the Court.—Order reversed and cause remanded with directions.

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

[3] WISCONSIN STAT. § 971.31(5)(a) provides that "[m]otions before trial shall be served and filed within 10 days after the initial appearance of the defendant in a misdemeanor action … unless the court otherwise permits."