COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1609 **Cir. Ct. No. 2013TR2395**

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

IN THE MATTER OF THE REFUSAL OF KEITH R. FRIEDERICK:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH R. FRIEDERICK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Grant County: CRAIG R. DAY, Judge. *Affirmed*.

¶1 KLOPPENBURG, J.[1] Keith Friederick appeals an order of the circuit court imposing a twelve-month revocation of his operating privileges based

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

on Friederick's refusal to submit to a chemical test of his breath to determine his blood alcohol concentration pursuant to WIS. STAT. § 343.305. Friederick argues that the circuit court erred in concluding that Friederick's refusal to submit to a chemical test of his breath was improper, because Friederick's refusal occurred subsequent to a seizure that was not supported by reasonable suspicion. For the reasons that follow I conclude that no seizure occurred, and therefore affirm the circuit court's order.

BACKGROUND

¶2 After the encounter at issue in this appeal, Grant County Sheriff's Deputy Matthew Small arrested Friederick for operating while intoxicated. After transporting Friederick to the county jail, Small read Friederick the "Informing the Accused" form and asked Friederick to submit to a breath test. Friederick refused the breath test. As a result, Small issued Friederick a Notice of Intent to Revoke Operating Privilege, which notified Friederick that his operating privileges could be revoked because Friederick refused to submit to the test. Friederick requested a hearing on the revocation.

¶3 The sole issue at the hearing was whether Small's initial encounter with Friederick constituted a seizure. Small and Friederick testified at the hearing, and what follows is a summary of the circuit court's factual findings based on their testimony.

¶4 Small was parked in his squad car around 1:30 a.m. when he observed an individual wearing blue athletic shorts and a Chicago Bulls shirt get onto a motorcycle. The individual drove past Small's location and turned into an alley. Small followed, and when he turned into the alley he saw that the motorcycle was parked, but he did not see the driver. Small continued through the

alley onto Maple Street. Small saw someone dressed similarly to the motorcycle driver walking on Maple Street.

¶5 Small, who was still in his squad car, caught up to the individual. Small did not activate his emergency lights or his siren. Small parked and exited his squad car. Upon approaching the individual, Small said, "Good evening, I'm Deputy Small, I'd like to talk to you," and asked the individual if he had been driving a motorcycle. Small asked the individual for his identification, and the man identified himself as Friederick. At this point, a second officer arrived.

¶6 There was no physical contact between Friederick and the officers. Small did not tell Friederick that he was free to leave, but he also did not tell Friederick that he could not leave. During the encounter, Friederick "made no explicit attempt to leave."

¶7 Following the taking of the testimony summarized above, the circuit court concluded that Friederick was not seized, explaining that the encounter between Friederick and Small was consensual, and that "[i]n this instance, there was nothing that would amount to an affirmative showing of authority."

DISCUSSION

¶8 Friederick contends that Small's actions amounted to a seizure, and that the seizure was not supported by reasonable suspicion. As explained below, I reject Friederick's arguments.

¶9 The Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution both protect against unreasonable seizures. However, not all police-citizen encounters are seizures subject to the protections of the United States and Wisconsin Constitutions. ***State***

v. Young, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729. A police-citizen encounter is elevated to the level of a seizure when the law enforcement officer "'by means of physical force or show of authority'" restrains the liberty of the citizen. ***United States v. Mendenhall***, 446 U.S. 544, 552 (1980) (quoted source omitted).

¶10 The United States Supreme Court has set forth the following test for determining whether a particular police-citizen encounter constitutes a seizure for purposes of the Fourth Amendment:

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he [or she] 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.

Mendenhall, 446 U.S. at 554-55 (citations and footnote omitted).

¶11 We apply an objective test to determine whether a seizure has occurred. ***State v. Williams***, 2002 WI 94, ¶4, 255 Wis. 2d 1, 646 N.W.2d 834. "[T]he crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he [or she] was not at liberty to ignore the police presence and go about his [or her] business.'" ***Florida v. Bostick***, 501 U.S. 429, 437 (1991) (quoted source omitted).

¶12 Whether a seizure has occurred is a question of constitutional fact. ***Young***, 249 Wis. 2d 1, ¶17. Accordingly, we uphold the circuit court's factual findings unless they are clearly erroneous. ***Id.*** However, we review independently whether a seizure has occurred based on those facts. ***Id.***

¶13 I understand Friederick's argument to be that he was seized when Small first made contact with him because Small "required ... Friederick to stop his course of travel and speak with him," which amounted to a "show of authority." For the reasons that follow, I conclude that Friederick was not seized when Small first made contact with him.

¶14 The Wisconsin Supreme Court has held that "an officer's mere posing of a question does not constitute a 'seizure'" despite the fact that "any time that a police officer requests information from an individual, the individual is likely to feel some pressure to respond." ***State v. Griffith***, 2000 WI 72, ¶53, 236 Wis. 2d 48, 613 N.W.2d 72. And the supreme court has explained, "While it is true that 'most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.'" ***State v. Williams***, 2002 WI 94, ¶23, 255 Wis. 2d 1, 646 N.W.2d 834 (quoting ***Immigration and Naturalization Servs. v. Delgado***, 466 U.S. 210, 216 (1984)). With this additional background, I turn to whether a seizure occurred in Friederick's case.

¶15 When Small first engaged Friederick in conversation, none of the circumstances indicating a seizure were present. Small approached Friederick without activating his squad car's emergency lights or siren. Small exited his squad car and walked toward Friederick. Small stated, "Good evening, I'm Deputy Small, I'd like to speak to you." Small's tone of voice was authoritative,

but not aggressive. Friederick, who was walking, stopped and responded to the questions that Small asked him. A second officer arrived. That officer did not activate his emergency lights or siren. Neither officer displayed a weapon, or physically contacted Friederick.

¶16 In sum, while Friederick stopped in response to Small's statement to him, the facts do not show that Small restrained Friederick's liberty "'by means of physical force or show of authority'" such that the encounter was elevated to the level of a seizure. ***Mendenhall***, 446 U.S. at 552 (quoted source omitted). I therefore conclude that Friederick was not seized. Because I conclude that Friederick was not seized, I do not reach the issue of whether Small had reasonable suspicion to seize Friederick. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).

CONCLUSION

¶17 For the reasons set forth above, I affirm the circuit court's order.

By the Court.—Order affirmed.

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