COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2142-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JACOB J. DROESSLER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Reversed and cause remanded.*

ROGGENSACK, J.[1] The State of Wisconsin appeals an order of the circuit court granting Jacob Droessler's motion to suppress evidence obtained during an encounter between Droessler and a police officer on the grounds that the officer unreasonably detained Droessler without reasonable suspicion to do so.

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

Because the officer exhibited no physical force or show of authority when Droessler voluntarily stopped his car and voluntarily answered a few questions, we conclude that Droessler was not seized within the meaning of the Fourth Amendment, until after Officer Jeffrey Haas had reasonable suspicion to do so. Therefore, the evidence obtained should not have been suppressed and we reverse and remand for further proceedings.

BACKGROUND

On November 27, 1997 at approximately 3:50 a.m., Platteville Police Officer Jeffery Haas received a complaint that a deer was lying in the northbound lane of Highway 151. When Haas went to remove the deer, he saw a northbound car hit the dead deer. Haas believed that the car had probably sustained damage of one thousand dollars, or more, to its undercarriage. Haas observed that the car was light in color and he noted the pattern of its taillights.

At about 4:17 a.m., Haas saw a light-colored car with taillights similar to those on the car that struck the dead deer. The car was being operated at fifteen to twenty miles per hour in twenty-five and thirty-five mile per hour zones. As he followed, it entered a driveway. Haas did not turn on his red and blue lights, his siren or his flashers, or attempt to pull over the driver. Also, he did not block the driveway when he parked on the street, after the car had stopped. From his car, Haas saw the driver, Droessler, get out of the car, stagger, lose his footing, and grasp the car door to maintain his balance.

Haas exited his car and approached Droessler. Standing on the sidewalk approximately three to four feet from Droessler, Haas identified himself and asked if Droessler had hit a deer on Highway 151. Droessler said that he had not. Haas noticed that Droessler was unsteady on his feet, smelled of intoxicants,

had slurred speech, and had red, bloodshot, watery eyes. Haas asked Droessler if he had had anything to drink, and Droessler stated that he had.

Haas, and a backup officer that Haas had called, examined Droessler's car. They did not find any hair or skin from the deer. Haas returned to Droessler and asked him to step in front of his squad car to conduct field sobriety tests. Droessler was subsequently arrested and charged with driving a motor vehicle while under the influence of intoxicants as a second offense in violation of § 346.63(1)(a), STATS., and driving a motor vehicle with a prohibited alcohol concentration as a second offense in violation of § 346.63(1)(b).

On May 27, 1998, Droessler filed a motion to suppress his statements, information obtained as a consequence of determining his identity, Haas's observations, and the results of the field sobriety tests, on the grounds that Haas stopped him without specific articulable facts that Droessler had committed or was committing or was about to commit a crime. The circuit court granted the motion and ordered suppression of the evidence. This interlocutory appeal followed.

DISCUSSION

Standard of Review.

When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS.; ***State v. Eckert***, 203 Wis.2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). However, the application of constitutional principles to the facts as found is a question of law which we decide without deference to the circuit

court's decision. ***State v. Patricia A.P.***, 195 Wis.2d 855, 862, 537 N.W.2d 47, 49-50 (Ct. App. 1995).

The Fourth Amendment.

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. CONST. amend. IV. The detention of a motorist by a law enforcement officer constitutes a seizure within the meaning of the Fourth Amendment. ***Berkemer v. McCarty***, 468 U.S. 420, 436-37 (1984). Statements given and items seized during a period of illegal detention are inadmissible. ***Florida v. Royer***, 460 U.S. 491, 501 (1983). However, an investigative detention is not "unreasonable" if it is brief in nature, and justified by a reasonable suspicion that the motorist has committed, is committing or is about to commit a crime. ***Berkemer***, 468 U.S. at 439; *see also* § 968.24, STATS. Before determining whether an investigative detention was justified by reasonable suspicion, we must first determine whether there was a detention or seizure within the meaning of the Fourth Amendment.[2]

Not every encounter between police officers and citizens involves a seizure requiring an objective justification. ***United States v. Mendenhall***, 446 U.S. 544, 553 (1980); ***Terry v. Ohio***, 392 U.S. 1, 19 n.16 (1968). A person is seized only when his freedom of movement is restrained by means of physical force or a show of authority such that, in view of the circumstances surrounding the incident, a reasonable person would believe that he was not free to leave.

[2] When applying the facts to constitutional principles, the same standards which have been established for rights arising in the United States Constitution apply to rights derived from the Wisconsin Constitution. WIS. CONST. art. I, § 11; ***State v. Harris***, 206 Wis.2d 243, 259, 557 N.W.2d 245, 252 (1996).

Mendenhall, 446 U.S. at 553-54. "Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." ***Id.*** at 553.

The United States Supreme Court has also established that,

> law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Royer, 460 U.S. at 497. Police officers are free to address questions to anyone on the streets because police officers, like all other citizens, enjoy the liberty to address questions to others. ***Mendenhall***, 446 U.S. at 553. "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." ***Id.*** at 554.

Police questioning that occurs when the person addressed is free to leave is a necessary tool for the effective enforcement of criminal laws. ***Id.*** "The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" ***Id.*** at 553-54 (citation omitted). Therefore, "characterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices." ***Id.*** at 554.

In ***Mendenhall***, two Drug Enforcement Administration agents approached Mendenhall in a public airport concourse. The agents wore no uniforms and displayed no weapons. They identified themselves as DEA agents; asked Mendenhall if she would show them her ticket and identification; and posed a few questions. The Supreme Court concluded that their conduct did not amount to an intrusion upon a constitutionally protected interest because Mendenhall had no objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way. ***Id.*** at 555. In reaching this conclusion, the Court listed several examples of circumstances that might indicate a seizure: the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. ***Id.*** at 554. "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 555.

When Droessler stopped his car in the driveway, he was not seized within the meaning of the Fourth Amendment because he voluntarily chose to stop his car. Haas did not turn on his red and blue lights, his siren or his flashers, nor did he block the driveway after Droessler had stopped. Because Haas did not restrain Droessler's vehicle in any way or make any show of authority, a reasonable person would not have believed that he had been pulled over and was not free to leave.

Furthermore, when Haas approached Droessler, he left his squad car parked on the street with the engine running. He identified himself as a police officer; remained on the sidewalk three to four feet away from Droessler; and asked Droessler a few questions. There is no evidence in the record that Haas

displayed a weapon, touched Droessler, or used language or a tone of voice that suggested that compliance was required. Under these circumstances, Droessler was not seized when Haas approached him on the sidewalk because a reasonable person would have felt free to disregard Haas's questions and walk away. Because Droessler's statements and Haas's observations of Droessler were not preceded by a seizure which either caused Droessler to stop his car or to speak with Haas when Haas approached Droessler, Haas's observation and Droessler's statements should not have been suppressed. Additionally, once Haas smelled intoxicants; heard Droessler's slurred speech; and observed his watery, red eyes and unsteadiness on his feet, Haas had at least a reasonable suspicion that Droessler had been operating a motor vehicle while intoxicated. Therefore, we conclude that the results of the field sobriety tests and the alcohol concentration tests performed thereafter were not the result of an unlawful detention and the suppression of that evidence must be reversed as well.

CONCLUSION

Droessler was not seized when he voluntarily stopped his car in a driveway or when Haas approached him on the sidewalk. Haas did not restrain Droessler's movement with physical force or a show of authority such that a reasonable person would not have felt free to leave. Because the encounter between Haas and Droessler was not a seizure within the meaning of the Fourth Amendment, the evidence subsequently obtained was not infected by an unlawful detention and should not have been suppressed. Therefore, we reverse the decision of the circuit court and remand for further proceedings.

By the Court.—Order reversed and cause remanded.

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