

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 16, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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.

No. 99-2595-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY M. KRATOCHWILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
ROBERT P. VANDEHEY, Judge. *Affirmed.*

¶1 ROGGENSACK, J.¹ Gary M. Kratochwill appeals his conviction for operating a motor vehicle while intoxicated (OMVWI). He claims that the circuit court erred in denying his motion to suppress evidence obtained during an

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1997-98). Additionally, all further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

encounter between Kratochwill and a police officer because the officer unreasonably detained him without reasonable suspicion. Because the officer did not pull over Kratochwill's vehicle or exhibit physical force or a show of authority when he approached Kratochwill's vehicle that had stopped in the parking lot of a closed gas station before the officer arrived, we conclude that Kratochwill was not seized within the meaning of the Fourth Amendment, until after the officer had reasonable suspicion to do so. Therefore, the evidence obtained was properly admitted and accordingly, we affirm the judgment of the circuit court.

BACKGROUND

¶2 On November 1, 1998, Deputy Bruce Visser of the Grant County Sheriff's Department observed a slow moving pick-up truck pull into a gas station at approximately 3:30 a.m. The gas station was closed at the time. Visser went around the block, and on his return, he noticed a person standing outside of the truck who appeared to be digging for something on the truck's floorboard. Without turning on his blue and red emergency lights or his siren, Visser pulled into the gas station.

¶3 Visser got out of his squad and approached the driver's side of the vehicle where he saw Kratochwill, who was then sitting behind the wheel of the truck. Visser immediately noticed a strong odor of intoxicants coming from inside the vehicle. He also noticed a woman, later identified as Janet Conley, sitting on the passenger side. Conley had a cut above her left eye and had a lot of blood on her shirt. Visser asked Conley to step from the vehicle and took her toward the back of the truck to inquire about the cut. Visser then asked Kratochwill how Conley had been injured. In conversing with Kratochwill, Visser detected a strong odor of intoxicants coming from Kratochwill's breath, and observed that his

speech was slurred and his eyes were bloodshot and glassy. Visser asked Kratochwill to exit the vehicle and when he did, Visser observed that he was unsteady on his feet and that he staggered. After making these observations, Visser administered field sobriety tests to Kratochwill and subsequently arrested him for OMVWI.

¶4 Kratochwill filed a motion to suppress all evidence relating to the encounter claiming that Visser did not have reasonable suspicion that a crime had been committed when he approached Kratochwill's vehicle in the parking lot. The circuit court denied the motion, concluding that entering a parking lot that was open to the public was not a stop for Fourth Amendment purposes. Kratochwill appeals.

DISCUSSION

Standard of Review.

¶5 When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); *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. *See State v. Patricia A.P.*, 195 Wis. 2d 855, 862, 537 N.W.2d 47, 49-50 (Ct. App. 1995).

Moment of Fourth Amendment Seizure.

¶6 The Fourth Amendment prohibits unreasonable searches and seizures. *See* 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. See *Berkemer v. McCarty*, 468 U.S. 420, 436-37 (1984). Statements given and items seized during a period of illegal detention are inadmissible. See *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. See *Berkemer*, 468 U.S. at 439. 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.

¶7 Not every encounter between police officers and citizens involves a seizure requiring an objective justification. See *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. See *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.

¶8 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. See *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.

¶9 Kratochwill argues that he was seized when Visser pulled into the gas station and approached him. He contends that Visser did not have a reasonable suspicion that a crime had been or was about to be committed at that time; and therefore, all evidence relating to the encounter should be suppressed.

¶10 We disagree with Kratochwill that he was seized when Visser drove into the gas station. Kratochwill was not pulled over by Visser. Kratochwill voluntarily stopped his car in the gas station's parking lot. Visser did not turn on his squad's emergency lights, nor did he turn on the siren. Additionally, there is no evidence in the record to suggest that Visser blocked Kratochwill's vehicle to prevent him from leaving, nor is there evidence that Visser made any show of authority. Further, there is also no evidence in the record that Visser displayed a weapon, touched Kratochwill, or used language or a tone of voice that suggested compliance was required. The Fourth Amendment does not come into play when an officer approaches an individual in a public area, so long as the officer does not restrain the individual's liberty in any way.² We conclude that under the circumstances presented by the record, Kratochwill was not seized for Fourth Amendment purposes when Visser drove into the gas station and approached

² In fact, an officer might well have an obligation to check on stranded motorists. *See, e.g., State v. Goebel*, 103 Wis. 2d 203, 208, 307 N.W.2d 915, 917 (1981) (“[c]ontacts [with stranded motorists] are not only authorized, but constitute an important duty of law enforcement officers”).

Kratochwill's vehicle because a reasonable person in Kratochwill's position would not have believed that he was not free to leave.

¶11 Once Visser approached Kratochwill, he detected a strong odor of intoxicants on his breath; Kratochwill had slurred speech and bloodshot, glassy eyes. Further, when Visser asked him to exit the truck, Kratochwill was unsteady on his feet and staggered. Finally, Visser noticed that Conley, who was sitting in the passenger side of the vehicle, had a cut above her left eye and had a lot of blood on her shirt. At that point, Visser had reasonable suspicion to justify further investigation and detention of Kratochwill. *See, e.g., County of Dane v. Campshure*, 204 Wis. 2d 27, 32, 552 N.W.2d 876, 878 (Ct. App. 1996) (a police officer had a reasonable suspicion that a motorist had been driving while intoxicated where that motorist was asleep in his vehicle, had an odor of alcohol emanating from him, and bloodshot eyes); *State v. Krause*, 168 Wis. 2d 578, 587-88, 484 N.W.2d 347, 350 (Ct. App. 1992) (the police had reasonable suspicion of OMVWI where a motorist drove on the wrong side of the highway, had a strong odor of intoxicants on his breath, slurred his speech and had bloodshot eyes). Therefore, we conclude that the evidence that Kratochwill was driving under the influence was properly admitted.

CONCLUSION

¶12 Because the officer exhibited no physical force or show of authority when he approached Kratochwill's vehicle, which had voluntarily stopped in the parking lot of a closed gas station, we conclude that Kratochwill was not seized within the meaning of the Fourth Amendment, until after the officer had reasonable suspicion to do so. Therefore, the evidence obtained was properly admitted and accordingly, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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

