COURT OF APPEALS
DECISION
DATED AND FILED

April 6, 2016

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 Nos. 2015AP314-CR
2015AP315-CR

Cir. Ct. Nos. 2013CF236
2013CF237

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

NO. 2015AP314-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

TYLER Q. HAYES,

DEFENDANT-RESPONDENT.

NO. 2015AP315-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

TANNER J. CRISP,

DEFENDANT-RESPONDENT.

APPEALS from orders of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Reversed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 GUNDRUM, J. The State appeals the circuit court's orders granting motions to suppress filed by Tyler Hayes and Tanner Crisp.[1] For the following reasons, we reverse.

Background

¶2 The following relevant testimony was presented at the hearing on Hayes' and Crisp's motions to suppress.

¶3 A Kenosha county sheriff's deputy testified that while patrolling a county park around 5:44 p.m. on March 1, 2013, he observed in a parking lot a vehicle with two persons in it that was parked "in the lane of traffic," outside of lines designating parking spaces. The deputy confirmed that the location of the vehicle in the otherwise empty parking lot was unusual because "people usually don't park where they were parked." Feeling it was his role as a deputy "to see if everything's okay," the deputy drove toward the vehicle from the front but "to the side of them," and then turned around and stopped his squad car behind the vehicle. The deputy did not believe he activated his "lights," and stated he "[a]bsolutely" did not block the vehicle, adding, "they could have just drove right off."

[1] Pursuant to this court's order dated April 1, 2015, these appeals are consolidated. *See* WIS. STAT. RULE 809.10(3) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶4 The deputy walked up to the driver's side door and asked the occupants what they were doing. When the deputy "first made contact," the driver's window was "either rolled down or down," and the deputy smelled burnt marijuana. He did not remember whether or not he asked the driver, Crisp, to roll the window down. The marijuana odor ultimately led to further investigation, the discovery of illegal drugs and drug paraphernalia, and the arrest and charging of Hayes and Crisp.

¶5 Crisp also testified. She stated she was "not blocking traffic" by where she was parked, the deputy drove his vehicle straight towards hers but then passed her vehicle and ultimately parked diagonally behind her vehicle, and when the deputy walked up to her window, "[h]e asked me what I was doing."

¶6 The circuit court found the deputy's testimony credible and initially denied Hayes' and Crisp's suppression motions, concluding the deputy had probable cause to "stop" them.[2] The court found that the vehicle had been "parked outside of a parking area … in a lane of traffic," no other vehicles were parked in the parking lot at that time, and the deputy parked behind the vehicle, did not block it, "did not activate the lights of the squad car," and "basically came out and asked the defendants what they were doing." The court further found that after the deputy smelled marijuana, he asked for Hayes' and Crisp's identification and located the incriminating evidence.

¶7 Relying on an unpublished case, ***State v. King***, No. 2013AP1068-CR, unpublished slip op. (WI App Feb. 13, 2014), issued after the

[2] Although the record is not entirely clear, it appears the circuit court concluded the deputy had probable cause to "stop" Crisp based upon her parking in "a lane of traffic."

circuit court's decision, Hayes and Crisp requested the court reconsider its denial of their suppression motions.[3] The court reversed its decision and granted their motions to suppress based upon the court's conclusion that the deputy conducted a "***Terry***[4] stop" and its belief there was no criminal activity occurring when the deputy approached the vehicle. The State appeals.

Discussion

¶8 Several weeks after the circuit court's reconsideration decision, our supreme court decided ***County of Grant v. Vogt***, 2014 WI 76, 356 Wis. 2d 343, 850 N.W.2d 253. Relying on ***Vogt***, the State argues the deputy did not seize Hayes and Crisp until after he smelled the marijuana, and thus the Fourth Amendment was not implicated prior to that point. We agree.

¶9 We apply the same standard in reviewing the denial of a motion to suppress and a determination as to whether a seizure occurred. ***Id.***, ¶17. We will uphold the factual findings of the circuit court unless they are clearly erroneous, but we independently review the application of those facts to constitutional principles. ***Id.***

¶10 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution protect citizens against unreasonable

[3] While only Hayes' counsel filed the request for reconsideration, counsel for Crisp appeared and argued at the hearing in support of reconsideration.

[4] ***Terry v. Ohio***, 392 U.S. 1 (1968).

seizures.[5] These constitutional provisions, however, "are not implicated until a government agent 'seizes' a person." ***Vogt***, 356 Wis. 2d 343, ¶19 (citation omitted). The test for whether a seizure has occurred is an objective one, looking at the totality of the circumstances, ***id.***, ¶¶30, 38, and considering "whether an innocent reasonable person, rather than the specific defendant, would feel free to leave under the circumstances," ***id.***, ¶30. There is no seizure "[u]nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave." ***Immigration & Naturalization Serv. v. Delgado***, 466 U.S. 210, 216 (1984). We reverse because we conclude Hayes and Crisp were not seized until after the deputy smelled marijuana.

¶11 ***Vogt*** is most instructive. Around 1 a.m., a law enforcement officer observed Vogt's vehicle pull into a parking lot open to the public, which lot was next to a boat landing on the Mississippi River. ***Vogt***, 356 Wis. 2d 343, ¶4. Curious, the officer also pulled into the lot and parked his marked squad car "behind Vogt's vehicle a little off to the driver's side." ***Id.***, ¶6. The headlights of the squad car were on, but not the red and blue emergency lights. ***Id.*** The officer approached the vehicle, knocked on the driver's side window and motioned for the driver, Vogt, to roll down the window. ***Id.***, ¶¶7, 43. Vogt rolled it down, and the officer asked him what he was doing. ***Id.***, ¶8. When Vogt responded, the officer noticed the smell of intoxicants and that Vogt's speech was slurred, ultimately leading to Vogt's arrest and prosecution for OWI. ***Id.***, ¶¶8-9. As the ***Vogt*** court

[5] Because our supreme court "interprets the Wisconsin Constitution to be coterminous with the United States Constitution in this area," our analysis applies to both constitutions. *See* ***County of Grant v. Vogt***, 2014 WI 76, ¶18 n.9, 356 Wis. 2d 343, 850 N.W.2d 253.

described the testimony of the officer, the officer stated if Vogt "had ignored him and driven away, [the officer] would have let him go because he 'had nothing to stop him for.'" ***Id.***, ¶7.

¶12 The circuit court denied Vogt's suppression motion related to his arrest, and a court trial was subsequently held. ***Id.***, ¶¶10-11. At that trial, Vogt and his passenger testified the officer "rapped" hard on the driver's side window and verbally commanded Vogt to roll down the window. ***Id.***, ¶¶11-12. Vogt renewed his suppression motion, which was denied, and the court ultimately found Vogt guilty. ***Id.***, ¶¶13-14. We reversed, and the supreme court subsequently reversed us. ***Id.***, ¶¶15, 54.

¶13 Before the supreme court, Vogt argued he had been unlawfully seized when the officer knocked on his window and "commanded" him to roll it down. ***Id.***, ¶40. Vogt highlighted the following facts: "(1) [the officer] parked right behind Vogt's vehicle; (2) 'the location of Mr. Vogt's vehicle in the parking lot was not conducive to simply driving away'; (3) [the officer] commanded Vogt to roll down the window; and (4) [the officer] rapped loudly on the window." ***Id.*** The ***Vogt*** court concluded that "[e]ven taken together, these facts do not demonstrate that Vogt was seized." ***Id.***, ¶41.

¶14 The ***Vogt*** court stated that "[a]lthough [the officer] parked directly behind Vogt and allegedly there were obstacles on three sides of Vogt's vehicle, these facts do not demonstrate that Vogt was seized because he still could have driven away." ***Id.*** The court found unpersuasive Vogt's assertion that he was seized as a result of a verbal "command" from the officer to roll down the window, noting the circuit court found that the officer had "tapp[ed]" on Vogt's window and motioned for Vogt to roll it down, but that the officer "wasn't

commanding [Vogt] to do anything, … that he was simply trying to make contact." ***Id.***, ¶43. The ***Vogt*** court further noted the circuit court's determination that the officer's conduct was, as the ***Vogt*** court stated it, "not so intimidating as to constitute a seizure." ***Id.*** In response to Vogt emphasizing on appeal the loudness of the knock on the window, the ***Vogt*** court stated, "A knock might sound loud to an unsuspecting vehicle occupant, but that alone does not mean the occupant has been seized." ***Id.***, ¶44. Looking at the totality of the circumstances, the court stated:

> In similar circumstances, a person has the choice to refuse an officer's attempt to converse and thereby retain his privacy, or respond by talking to the officer and aiding the officer in his duty to protect the public. A dutiful officer does not make a mistake by presenting a person with that choice. Only when the officer forecloses the choice by the way in which he exercises his authority—absent reasonable suspicion or probable cause—does he violate the Fourth Amendment.
>
> Although it may have been Vogt's social instinct to open his window in response to [the officer's] knock, a reasonable person in Vogt's situation would have felt free to leave.… The circumstances attendant to the knock in the present case are not so intimidating as to transform the knock into a seizure….
>
> The facts in this case do not show a level of intimidation or exercise of authority sufficient to implicate the Fourth Amendment until after Vogt rolled down his window and exposed the grounds for a seizure.

Id., ¶¶52-54.

¶15 The circumstances facing Crisp and Hayes here were even less intimidating than those in ***Vogt***. Similar to ***Vogt***, the deputy here pulled his squad car behind Crisp's vehicle, which was already parked in an open public parking lot. As the circuit court found here, the deputy's squad car in no way blocked

Crisp and Hayes from departing the area, and based upon the undisputed testimony and a diagram exhibit admitted at the suppression hearing, it would have been easy for them to depart. The deputy approached the driver's side door and asked Crisp and Hayes what they were doing, just as the officer in ***Vogt*** asked Vogt. In ***Vogt***, the officer had his headlights on and his interaction with Vogt occurred at 1:00 a.m.; here, however, it was 5:44 p.m. and the deputy had on neither his headlights nor his emergency lights. Unlike ***Vogt***, there was no evidence even presented here that the deputy "rapped" on Crisp's window or "commanded" Crisp to roll it down. While Crisp asserts on appeal that the deputy "ordered" her to roll down the window, the testimony, including Crisp's own, does not support this conclusion, and the circuit court made neither an explicit nor implicit finding to this effect.[6] Even if the deputy had asked Crisp to roll down the window, however, under the totality of the circumstances here, as in ***Vogt***, Crisp and Hayes were not seized until after the deputy smelled marijuana. There is simply no evidence of the deputy acting in an intimidating fashion or exerting

[6] Crisp argues "it is safe to assume the circuit court ruled that [the deputy] ordered the window to come down" because in its reconsideration ruling the court "mention[s]" that the window "comes down." On this point, the circuit court stated in that ruling: "The officer parks right behind them and he starts talking to them and that's when the window comes down and the smell of marijuana is smelled by the officer." This statement by the court provides no basis for concluding the officer "ordered" Crisp to roll down the window.

authority prior to smelling marijuana.[7] Although it may have been Crisp's "social instinct to open [her] window in response" to the deputy's approach and communication, a reasonable person in Crisp's situation "would have felt free to leave." *See* ***id.***, ¶53. The deputy here did not seize Hayes and Crisp until after he smelled marijuana, and with that smell he had, at a minimum, reasonable suspicion to detain them for further investigation. *See* ***State v. Betow***, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999) (an officer's initial investigation may be extended if the officer develops reasonable suspicion of an offense "separate and distinct from the acts that prompted the officer's intervention in the first place"); *see also* ***State v. Secrist***, 224 Wis. 2d 201, 216-19, 589 N.W.2d 387 (1999) (unmistakable odor of marijuana "linked to a specific person or persons" may provide probable cause to arrest).

By the Court.—Orders reversed.

Not recommended for publication in the official reports.

[7] Hayes argues on appeal that "[h]ad Crisp driven off, as [the deputy] suggested she could have done, she would have been charged with a violation of [WIS. STAT. §] 346.04, obstructing." We cannot, however, base our decision upon "speculat[ion] about what might have happened if [Crisp and Hayes] had tried to leave." *See* ***Vogt***, 356 Wis. 2d 343, ¶49 (responding to a similar § 346.04 argument, the court stated "Vogt cannot speculate about what might have happened if he had tried to leave" and quoted from ***Immigration and Naturalization Service v. Delgado***, 466 U.S. 210, 220-21 (1984), that "defendants 'may only litigate what happened to them.'"). Furthermore, the ***Vogt*** court noted that WIS. STAT. ch. 346 "applies exclusively upon highways" (except with certain exceptions that do not apply here), and "[t]he term, 'highways,' does not include public parking lots." ***Vogt***, 356 Wis. 2d 343, ¶46, citing WIS. STAT. § 346.02(1) and 65 Wis. Op. Att'y Gen. 45 (1976) (OAG 45-47). The undisputed testimony was that Crisp's and Hayes' interaction with the deputy took place in a parking lot in a "county park."