COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2363-CR **Cir. Ct. No. 2014CT500**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW P. ELLIOTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: MICHAEL J. APRAHAMIAN, Judge. *Affirmed.*

¶1 REILLY, P.J.[1] Matthew P. Elliott appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI), second offense.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Elliott argues that he was illegally seized. We affirm as Elliott's encounter with the officer was consensual and, therefore, no seizure under the Fourth Amendment occurred.

¶2 During the early morning hours of April 6, 2014, Sergeant Rob Wiercyski was on duty in the Town of Oconomowoc when he observed a vehicle exit a local bar. Wiercyski followed the vehicle for a short time until it pulled into the parking lot of a closed restaurant. Wiercyski suspected that the vehicle was attempting to avoid him, but he admits that he did not observe any unsafe driving or other conduct that would give him reasonable suspicion to stop the vehicle.

¶3 A couple minutes later, Wiercyski returned to the area of the closed restaurant and observed that the car was still running, the lights were still on, but the driver's head was tilted back and to the left as if the driver was passed out. Wiercyski pulled his squad car into the parking lot, but he did not block the vehicle from being able to leave and did not activate his squad lights or illuminate his spot light.[2] While Wiercyski was running the vehicle's license plate, the driver exited his car and approached Wiercyski, who exited his squad. Elliott was identified by his driver's license.[3]

¶4 Elliott moved to suppress all evidence obtained, arguing he was illegally seized under the Fourth Amendment. The circuit court denied the

[2] Wiercyski testified that "[a]n experienced driver would have been able to back out to the right, turn the car to the left and pull straight out" to get around Wiercyski's vehicle.

[3] Elliott does not contest or discuss what occurred after Wiercyski asked for his driver's license. The criminal complaint indicates that Wiercyski noted signs of intoxication and conducted field sobriety tests on Elliott. Elliott failed the tests, registered a .185 on the preliminary breath test, and was then arrested.

motion. Elliott pled guilty to OWI, second offense. On appeal, Elliott claims that he was illegally seized as Wiercyski did not have reasonable suspicion to stop his vehicle and "no rational individual in this situation would have thought they could just back up a couple of times and leave."

¶5 Not all encounters between citizens and the police are seizures. ***United States v. Mendenhall***, 446 U.S. 544, 552 (1980). The United States Supreme Court explained that a person is "'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." ***Id.***; *see also* ***Terry v. Ohio***, 392 U.S. 1, 19 n.16 (1968). "The test is objective and considers whether an innocent reasonable person, rather than the specific defendant, would feel free to leave under the circumstances." ***County of Grant v. Vogt***, 2014 WI 76, ¶30, 356 Wis. 2d 343, 850 N.W.2d 253.

¶6 In ***Vogt***, our supreme court held that a defendant was not seized where a police officer parked his squad car behind the defendant's vehicle, approached the driver's side window, knocked on the glass and motioned for the defendant to roll down the window. ***Id.***, ¶¶5-7, 41. Similar to Elliott, the defendant in ***Vogt*** had pulled his vehicle into the parking lot of a closed park and boat landing in the early morning hours. ***Id.***, ¶4-5. The court concluded that these facts did not rise to a seizure as the defendant could have ignored the officer's request and driven away and that the officer's knock and motion to roll down the window was not a command, just an attempt to make contact. ***Id.***, ¶¶41-43. The Fourth Amendment was implicated only upon Vogt rolling down his window and exposing grounds for his seizure, i.e., odor of intoxicants and slurred speech. ***Id.***, ¶¶2-3.

¶7 In the present case, we agree with the State that Elliott's contact with Wiercyski was a consensual encounter and fits easily within ***Vogt***. Elliott's car was parked in a parking lot of a closed establishment in the early morning hours, Wiercyski did not activate his squad lights or spot light, and Wiercyski did not block the exit of the parking lot. Unlike in ***Vogt***, Wiercyski did not even approach Elliott's vehicle or make any requests before Elliott voluntarily made contact with Wiercyski. As the court in ***Vogt*** explained, Wiercyski

> was acting as a conscientious officer. He saw what he thought was suspicious behavior and decided to take a closer look. Even though [Elliott's] conduct may not have been sufficiently suspect to raise reasonable suspicion that a crime was afoot, it was reasonable for [Wiercyski] to try to learn more about the situation by engaging [Elliott] in a consensual conversation.

Id., ¶51. Under these facts, Elliott was given a "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." ***Id.***, ¶52. That choice in and of itself does not violate the Fourth Amendment. ***Id.*** While it was Elliott's "social instinct" to engage Wiercyski as he assumed that Wiercyski wanted to talk to him, the facts indicate that Elliott would have felt free to leave and, thus, the encounter was entirely consensual and the Fourth Amendment was not implicated. *See* ***id.***, ¶53.

By the Court.—Judgment affirmed.

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