COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2120-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BARRY A. SCHUH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Barry Schuh appeals his judgment of conviction for operating a motor vehicle while under the influence of an intoxicant, second offense, contrary to WIS. STAT. § 346.63(1)(a). Schuh argues that the initial

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

contact with the officer constituted an illegal stop because the officer lacked reasonable suspicion. We conclude that the initial contact did not constitute a stop and affirm the conviction.

BACKGROUND

¶2 Outagamie County Sheriff's Deputy Scott Dontje was on patrol in the area of Spencer Street and Kools Court in Grand Chute at approximately 2:30 a.m. on June 26, 1999. He observed a vehicle driven by Schuh coming out of Kools Court. Because of recent auto thefts in the area, Dontje approached the vehicle.

¶3 Without turning on his siren or lights, Dontje pulled his squad car next to Schuh's vehicle, rolled down the window, and began a conversation with Schuh. Dontje asked him what was going on that evening. Schuh became aggravated and was evasive in his answers. Schuh told Dontje that he was just out for a drive and that he did not know anyone in the area. Schuh asked Dontje if it was illegal to drive around. Dontje told him that it was not.

¶4 During the conversation, Dontje noticed that Schuh had glossy eyes and was slurring his speech. Dontje also noticed a slight odor of intoxicants coming from Schuh. Dontje then told Schuh to remain where he was while Dontje parked his squad car behind Schuh's vehicle.

¶5 Dontje got out of his squad car and then checked Schuh's license. He then noticed a strong odor of alcohol. Dontje asked Schuh to get out of the vehicle. Field sobriety tests were administered. Dontje placed Schuh under arrest and transported him to a local hospital.

¶6 At the hospital, Dontje informed Schuh of his rights pursuant to WIS. STAT. § 343.305(3). A test revealed a blood alcohol content of .168%. Schuh was charged with operating a vehicle while under the influence of an intoxicant, second offense.

¶7 Schuh moved the circuit court to suppress all evidence. The circuit court denied the motion and Schuh pled guilty to the charge. This appeal follows.

STANDARD OF REVIEW

¶8 When we review a circuit court's denial of a suppression motion, we will uphold the circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See* ***State v. Andrews***, 201 Wis. 2d 383, 388, 549 N.W.2d 210 (1996). However, whether the facts satisfy constitutional guarantees is a question of law we review independently. *See* ***id.*** at 388-89.

DISCUSSION

¶9 The sole issue on appeal is whether Dontje's initial contact with Schuh constituted a stop. We conclude that it did not.

¶10 To justify a warrantless stop of a defendant, an officer is required to have a reasonable suspicion based upon specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted the intrusion. *See* ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). It is a common sense question that strikes a balance between the interests of society to be free from unreasonable intrusions. *See* ***State v. Jackson***, 147 Wis. 2d 824, 831, 434 N.W.2d 386 (1989).

¶11 However, not all contacts between police and citizens constitute a seizure of a citizen. A person is seized only when his or her 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* ***United States v. Mendenhall***, 446 U.S. 544, 553-54 (1980). "Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." ***Id.*** at 553.

¶12 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.

See ***Florida v. Royer***, 460 U.S. 491, 501 (1983). 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.

¶13 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.

¶14 The State contends that the initial contact between Dontje and Schuh was merely discussion between an officer and a citizen and that the initial contact did not constitute a stop. We agree.

¶15 The record reveals that Schuh's freedom of movement was not restrained in any way by means of physical force or by a show of authority during the initial contact. Dontje was driving a fully marked police car, but at no time did he activate the emergency lights or siren. Dontje merely approached Schuh and asked him some questions. When he stopped the squad car next to Schuh's vehicle, Dontje rolled down his window and Schuh did the same. Schuh voluntarily responded to Dontje's questions and was free to leave at any time during the initial contact.

¶16 To prohibit police questioning under these circumstances would interfere with the effective enforcement of criminal laws. As a result, we conclude that a warrantless stop did not occur until Dontje told Schuh to remain where he was.[2]

[2] Schuh's only argument on appeal is whether the initial contact was a stop and whether reasonable suspicion existed at that moment. The State argues and Schuh does not contest that reasonable suspicion existed later when Dontje told Schuh to stay where he was.

By the Court.—Judgment and order affirmed.

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