COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2009AP1053
2009AP1054
2009AP1055
2009AP1056

Cir. Ct. Nos. 2008CM1798
2008TR8369
2008TR6775
2008TR6776

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL J. HOLM,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed in part; dismissed in part.*

¶1 SNYDER, J.[1] Daniel J. Holm appeals from judgments convicting him of possession of marijuana and operating a motor vehicle while under the influence of an intoxicant. He contends that the circuit court erred when it denied his motion to suppress evidence obtained during the investigative stop. He argues that the police officer did not articulate with specificity the facts prompting the traffic stop and that he did not voluntarily give his consent to the subsequent search of his vehicle. We affirm the judgments.[2]

¶2 On May 14, 2008, State Trooper Kyle Amlong observed a vehicle come to a "screeching halt" at an intersection. Amlong also took note that the vehicle had an obstruction in the front window. Amlong initiated a traffic stop because of the obstruction and to make sure the driver, Holm, was okay. Holm explained that he had been talking on his cell phone and was not paying attention.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) and (c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Holm was charged with possession of marijuana, operating while under the influence of an intoxicant, operating while under the influence of a controlled substance, and failure to wear a seat belt. The State dismissed the criminal marijuana possession charge under WIS. STAT. § 961.41(3g)(e) and instead charged Holm under KENOSHA CO., WIS., CODE § 9.961.41(3g)(e) (2007), an ordinance that imposes a forfeiture penalty. *See* WIS. STAT. § 66.0107 (power of municipalities to prohibit criminal conduct). Holm then pled guilty to a first-offense OWI and the municipal possession charge, both involving civil forfeitures, and the prosecutor moved to dismiss the two remaining charges.

Although there are four appeals consolidated from the four circuit court cases, we understand Holm to be appealing only from the two judgments against him. We do not address the two judgments of dismissal and therefore dismiss Appeal Nos. 2009AP1054 and 2009AP1056. *See* ***Wyandotte Chemicals Corp. v. Royal Elec. Mfg. Co., Inc.***, 66 Wis. 2d 577, 592-93, 225 N.W.2d 648 (1975) (when a party has received a favorable judgment, that party generally has no right to appeal from it); *see also* ***Estreen v. Bluhm***, 79 Wis. 2d 142, 150-51, 255 N.W.2d 473 (1977) (a party who benefits from a judgment waives the right to appeal from that part of the judgment under which the benefit was received).

While talking with Holm, Amlong noticed that Holm appeared nervous and had slurred speech. When he returned to his squad car, Amlong called for a back up officer.

¶3 Amlong issued a citation to Holm for not wearing a seatbelt and gave a warning about the obstructed view through the front window. The backup officer remained positioned at the back of Holm's vehicle, on the passenger side. Amlong gave Holm the relevant paperwork and then asked if he could search the vehicle. Holm said yes. During the search, Amlong discovered marijuana in the center console.

¶4 Amlong then asked Holm to perform field sobriety tests. He began with the horizontal gaze nystagmus test and observed two clues indicating impairment. Next, Amlong asked Holm to do the walk-and-turn test and observed three clues. Finally, Amlong asked Holm to stand on one leg and Holm was unable to maintain his balance. Amlong then placed Holm under arrest.

¶5 Holm moved to suppress the evidence obtained during the traffic stop. He argued that the object hanging from his rearview mirror did not break any law and therefore Amlong's belief that a violation supported an investigatory stop was mistaken. He also argues that Holm's consent to search the vehicle was invalid because he was seized for Fourth Amendment purposes at the time Amlong requested consent. The circuit court held a hearing on the motion and denied it in its entirety. Holm then pled guilty to noncriminal possession of marijuana and OWI. He now appeals.

¶6 Holm renews the arguments he made in the circuit court. When reviewing a circuit court's ruling on a motion to suppress, we employ a two-step

analysis. ***State v. Dubose***, 2005 WI 126, ¶16, 285 Wis. 2d 143, 699 N.W.2d 582. We will uphold the circuit court's findings of fact unless clearly erroneous. ***Id.*** Whether those facts constitute reasonable suspicion, however, is a question of law we review de novo. *See* ***id.***

¶7 Holm first asserts that the investigative stop of his vehicle violated his Fourth Amendment right to be free from an unreasonable seizure. The stop was illegal, he contends, because Amlong did not have reasonable suspicion to believe that Holm was engaged in criminal activity.

¶8 Certain investigative stops, prompted by an officer's suspicion that the individual may have committed a crime, are constitutionally permissible even though the officer lacks probable cause to arrest. *See* ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). "The test is an objective test." ***Id.*** "Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime." ***Id.*** An "inchoate and unparticularized suspicion or 'hunch'" will not suffice. ***Terry v. Ohio***, 392 U.S. 1, 27 (1968). "The focus is on reasonableness.... It is impossible to write a black letter rule that governs law enforcement officers' conduct under such circumstances. It is a rule of reasonableness: was the action of law enforcement officers reasonable under all the facts and circumstances present?" ***Guzy***, 139 Wis. 2d at 679.

¶9 In particular, Holm argues that because Amlong could not recall or describe the item obstructing Holm's view, there were not specific articulable facts to support the stop. At the motion hearing, Amlong testified in relevant part:

> [Defense counsel]: [W]hen you say you saw an obstruction in the car … what do you remember seeing?
>
> [Amlong]: A violation of the Wisconsin State Statute that prohibits a view obstruction[].
>
> [Defense counsel]: So, you don't know what you saw?
>
> [Amlong]: At this point, no, I don't recall.
>
> [Defense counsel]: Okay. All you know is that you saw an obstruction?
>
> [Amlong]: Correct.
>
> [Defense counsel]: So, you can't describe … any possibilities of what it may have been that was obstructing?
>
> [Amlong]: No.

¶10 The State responds that Holm is arguing for a requirement that officers remember the exact item obstructing a view so that a description can be provided at subsequent proceedings. It asserts that there is no law to support Holm's proposition. We agree. The law requires "specific, articulable facts" to support reasonable suspicion for an investigative stop. *See* ***id.*** at 675. To decide whether circumstances demonstrate reasonable suspicion, we look at all of the information available to the officer at the time the stop was made. *See* ***id.*** at 679.

¶11 Here, Amlong's belief that an obstruction was present in the front window arose after he observed Holm come to a screeching halt at a stop sign. Amlong testified that he made the stop "both for the view obstruction and to make sure [Holm] was okay." It was not necessary for Amlong to be able to articulate exactly what item might be dangling from the rearview mirror when he made that observation. The fact that his attention was drawn because of Holm's screeching brakes and that he then saw an obstruction in the front window is sufficiently specific for purposes of an investigative stop. *See* ***State v. Waldner***, 206 Wis. 2d

51, 60, 556 N.W.2d 681 (1996) ("Suspicious conduct by its very nature is ambiguous, and the principal function of the investigative stop is to quickly resolve that ambiguity.").

¶12 Holm next argues that although he gave Amlong consent to search his vehicle, that consent was not voluntary. He contends that he was seized for purposes of the Fourth Amendment at the time he gave his consent. A seizure under the Fourth Amendment occurs "when an officer, by means of physical force or a show of authority, restrains a person's liberty." ***State v. Harris***, 206 Wis.2d 243, 253, 557 N.W.2d 245 (1996) (citation omitted). A consensual encounter occurs when "the person to whom questions are put remains free to disregard the questions and walk away ...." ***United States v. Mendenhall***, 446 U.S. 544, 553-54 (1980). Whether a person has been seized is a question of constitutional fact. ***State v. Young***, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729. As such, we accept the circuit court's findings of evidentiary or historical fact unless they are clearly erroneous, but we determine independently whether or when a seizure occurred. *See* ***id.***

¶13 Not all police-citizen contacts constitute a seizure. As long as a reasonable person would have believed he or she was free to disregard the police presence and go about his business, there is no seizure and the Fourth Amendment does not apply. ***Florida v. Bostick***, 501 U.S. 429, 434 (1991); *see also* ***State v. Williams***, 2002 WI 94, ¶4, 255 Wis. 2d 1, 646 N.W. 2d 834. The test for determining whether a seizure has occurred "is necessarily imprecise because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." ***Michigan v. Chesternut***, 486 U.S. 567, 573 (1988). It is an objective test, focusing not on

whether the defendant himself felt free to leave but whether a reasonable person, under all the circumstances, would have felt free to leave. ***Id.*** at 574.

¶14 Amlong testified that after the traffic stop, he gave the citation and the warning to Holm. He testified that at that point, Holm was free to leave. Only after he had given Holm the paperwork did Amlong ask for permission to search the vehicle. On cross-examination, Amlong explained that he had "released [Holm] from the stop," and then within a matter of seconds he asked for consent to search. Holm likens this to the facts in ***State v. Jones***, 2005 WI App 26, 278 Wis. 2d 774, 693 N.W.2d 104, where the officer had issued a traffic citation, returned identification cards to the driver and passenger, and "[l]ess than a few seconds later" asked if there was anything illegal in the vehicle. *See* ***id.***, ¶4. The officer then asked to search the vehicle, and the question on appeal was whether the driver was seized when he gave consent. ***Id.***, ¶7. We held that he was because a reasonable person would not have felt free to leave. ***Id.***, ¶23. We noted that the officer did not make it clear the traffic stop had ended, and that his questions were accusatory in nature. ***Id.***, ¶18.

¶15 The State directs us to ***Williams*** to demonstrate that Holm's consent was valid. In ***Williams***, the officer made the traffic stop after observing Willliams' vehicle speeding. ***Williams***, 255 Wis. 2d 1, ¶5. After issuing the citation and returning Williams' license, the officer told Williams he would get him on his way. ***Id.***, ¶26. The supreme court determined that, based on the totality of the circumstances, Williams was free to leave. ***Id.***, ¶35. The officer's subsequent questioning, considered in the context of all the circumstances and against the "reasonable person" standard, did not constitute a seizure for purposes of the Fourth Amendment. ***Id.***, ¶35.

¶16 Each of the cases addressing the question of consent in a similar context turns on the specific facts of the case. The clarity of the demarcation between the traffic stop and the subsequent inquiry, the tone of the officer, the stance and posture of the officer, the phrasing of the request to search, and other isolated factors all coalesce to demonstrate the presence or absence of coercion. After reviewing the record facts, we conclude that a reasonable person in Holm's situation would have felt free to deny permission for Amlong's search. The traffic citation had been issued, nothing was stopping Holm from going on his way. There is no evidence that Amlong used a threatening posture or tone when he requested permission to search the car, or that the back up officer who had come to the scene made for a threatening presence.

¶17 We understand that Holm may have spontaneously provided consent without thinking that refusal was possible; however, this is not enough to transform an otherwise consensual exchange into an illegal search. *See* ***United States v. Drayton***, 536 U.S. 194, 206-07 (2002) (knowledge of the right to refuse is only one factor, it is not determinative). In ***Drayton***, the Supreme Court noted that the officer had phrased the desire to conduct a search as a question:

> Although Officer Lang did not inform respondents of their right to refuse the search, he did request permission to search, and the totality of the circumstances indicates that their consent was voluntary, so the searches were reasonable.
>
> In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

Id. at 207.

¶18 Based upon the foregoing analyses, we hold that the circuit court properly denied Holm's motion to suppress. The investigative stop was supported by specific, articulated facts giving rise to reasonable suspicion. Further, no violation of Holm's constitutional right to be free from unreasonable search and seizure occurred. Holm's consent to the search was not coerced. Accordingly, we affirm the judgments of conviction.

By the Court.—Judgments affirmed in part; appeal dismissed in part.

This opinion will not be published. *See* WIS. STAT. RULE 809. 23(1)(b)4.