

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 23, 2012

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 No. 2011AP1841-CR

Cir. Ct. No. 2010CT1381

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SUSAN C. MACHO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
PATRICK C. HAUGHNEY, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Susan Macho appeals from a judgment of conviction for operating while intoxicated (OWI), second offense. Macho argues

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

that the circuit court erred in denying her motion to suppress because the officer did not have reasonable suspicion to seize her.² We disagree and therefore affirm.

¶2 The facts surrounding Macho's arrest were testified to at the suppression hearing by Officer Ryan Edwards of the City of Waukesha Police Department. Macho was sitting in her car, across the street from her residence, with the engine running, at 3:24 a.m. on August 24, 2010. Edwards saw her car, pulled up behind her and shined his spotlight into her car. Edwards did not recall if he turned on his red and blue lights. He stated that he may have, as he generally turns them on whenever he makes a traffic stop. As soon as Edwards turned on his spotlight, Macho exited her car. Edwards exited his squad car and made contact with Macho between the two vehicles. Edwards smelled intoxicating beverages on Macho's breath and administered field sobriety tests, after which he arrested Macho for OWI. Macho moved to dismiss the action and suppress evidence on the grounds that Edwards did not have reasonable suspicion to detain her. The circuit court denied the motion, finding that Edwards had "sufficient grounds to stop behind the vehicle [and] conduct a temporary detention." Macho appeals the resulting judgment of conviction.

¶3 On appeal, Macho renews her argument that Edwards seized her without reasonable suspicion, in violation of the Fourth Amendment of the United States Constitution. Macho further argues that the community caretaker doctrine does not justify the stop. The State responds that Edwards' initial encounter with

² Macho's motion in the circuit court was a motion to dismiss, which also asked that the circuit court suppress "any admissions obtained by the illegal detention of the defendant." On appeal, Macho refers to the motion as one to suppress evidence and does not renew her other arguments below.

Macho was consensual and therefore did not trigger Fourth Amendment protection. Alternatively, the State contends that there was reasonable suspicion for Edwards to seize Macho for investigation. Finally, the State argues that the community caretaker doctrine justified Edwards' stop of Macho.

¶4 The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect the people from unreasonable searches and seizures. *State v. Young*, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729. Not every police-citizen contact is a seizure subject to the prohibition of the Fourth Amendment. *Id.* "As long as a reasonable person would have believed he [or she] was free to disregard the police presence and go about his [or her] business, there is no seizure and the Fourth Amendment does not apply." *Id.* A police-citizen contact becomes a seizure when the police officer, by means of physical force or show of authority, restrains the liberty of the citizen. *Id.*

¶5 Whether a person has been seized is a question of constitutional fact. *Id.*, ¶17. We accept the circuit court's findings of fact, but determine independently whether or when a seizure occurred. *Id.* On a motion to suppress, when the fact or timing of seizure is at issue, the defendant has the initial burden to establish that a seizure subject to Fourth Amendment protection occurred. *Gray v. State*, 243 Wis. 57, 63, 9 N.W.2d 68 (1943) (on a motion to suppress evidence because of an unlawful seizure, the party asserting the transgression has the burden of proving it occurred); *see also* 79 C.J.S. *Searches* § 309 (West 2012) (where a claim of an illegal seizure rests on the contention that a warrantless seizure occurred, the defendant must prove that it did); 6 WAYNE R. LAFAYE, *SEARCH AND SEIZURE*, § 11.2(b) at 41, 48-49 (4th ed. 2004) (at a hearing on a

motion to suppress, the defendant has the burden of proving whether a seizure occurred).³

¶6 Macho does not contest the validity of Edwards’ administration of field sobriety tests and subsequent arrest after she exited her vehicle and initiated a conversation with him. Rather, she challenges the validity of the seizure she claims occurred when Edwards pulled up behind her car and illuminated it with his spotlight. Thus, we consider whether Edwards’ conduct in pulling up behind Macho’s car and illuminating it with his spotlight constituted a seizure to which the Fourth Amendment protections apply.

¶7 *Young*, 294 Wis. 2d 1, is instructive on the moment of seizure. Young was parked in his car with four other people, in a “problem area” of Kenosha, at about 11:49 p.m. *Id.*, ¶¶6, 9. Kenosha police Officer Alfredson stopped his squad car in the middle of the street next to a car parked behind Young’s car, illuminated Young’s car with his spotlight and turned on his flashing emergency lights to warn other drivers of his stopped vehicle. *Id.*, ¶10. Before Alfredson could get out of his squad car, Young exited his vehicle. *Id.* Alfredson got out of his squad and told Young to get back in the car. *Id.* Young ran away, and Alfredson ultimately subdued him on a nearby porch. *Id.*, ¶11. In its decision, the *Young* court discussed the issue of when a seizure occurred.

When a marked squad car pulls up behind a car, activates emergency flashers, and points a spotlight at the car, it certainly presents indicia of police authority. Yet, not every display of police authority rises to a “show of authority” that constitutes a seizure.

³ Once a defendant makes an initial showing that a warrantless seizure occurred, the burden shifts to the government to show that the seizure was in compliance with the Fourth Amendment. *See* 79 C.J.S. *Searches* § 309 (West 2012).

Id., ¶65. In a footnote, the court went on:

Although a police officer's use of a spotlight in conjunction with emergency flashers may constitute a show of authority, we note that many courts have concluded that the use of a spotlight is not a show of authority sufficient to effect a seizure.

Id., ¶65 n.18 (citing *State v. Baker*, 107 P.3d 1214, 1216-18 (Idaho 2004) (collecting cases holding use of spotlight is not seizure); *State v. Young*, 957 P.2d 681, 688-89 (Wash. 1998) (under totality of circumstances, illumination with spotlight did not constitute seizure)). The court noted that in *Young*'s case "the officer did not stop a moving vehicle or a vehicle about to move." *Young*, 294 Wis. 2d 1, ¶66. Without determining whether a seizure occurred under these circumstances, the court stated: "[W]e are reluctant to conclude that the positioning of the officer's car, together with the lighting he employed, necessarily involved such a show of authority that 'a reasonable person would have believed that he was not free to leave.'" *Id.*, ¶69 (quoting *United States v. Mendenhall*, 446 U.S. 544 at 554 (1980)).

¶8 In this case, Edwards' actions in pulling up behind Macho and shining his spotlight into her car did not amount to a "show of authority sufficient to effect a seizure." *Young*, 294 Wis. 2d 1, ¶65 n.18. Edwards did not pull Macho over in traffic, but rather pulled up behind her already parked car. Once behind the vehicle, he illuminated the vehicle with his spotlight. While Macho contends that Edwards did in fact turn on his squad's red and blue lights, she has no evidence to support this assertion. Edwards' testimony was that he could not recall if he had turned on the red and blues. In fact, Edwards was asked no less than six times if he turned on the red and blues, and six times he said that he did not recall. Additionally, Edwards testified that his report did not indicate that the

red and blues were illuminated, that he did not document turning them on, and that he was “not going to say for sure [they] were on.” Furthermore, Edwards testified that the video of the stop would show if the red and blues had been activated, because the video camera turns on automatically when the red and blues are illuminated. No one produced the video tape, even though Macho did produce the police report and the audio recording of the dispatch communications to Edwards around the time of Macho’s arrest. Edwards’ repeated testimony that he could not recall turning on his red and blues stands in stark contrast to his clear testimony that he illuminated Macho’s car with his spotlight. Macho chose not to testify and she did not present any evidence, other than Edwards’ inconclusive testimony, to establish that a reasonable person would not have felt at liberty to disregard the officer and go about his or her business.

¶9 Because we decide that the evidence presented does not establish a seizure subject to Fourth Amendment protection, we need not address Macho’s contention that the seizure violated her constitutional rights so as to require suppression of the evidence. Macho voluntarily exited her car and approached Edwards. This consensual encounter allowed him to smell intoxicating beverages on her breath, which gave him reasonable suspicion that she had been driving while intoxicated. The results of the subsequent field sobriety tests were properly admitted and Macho’s conviction stands.

By the Court.—Judgment affirmed.

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

