

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 2013

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. 2012AP1812
STATE OF WISCONSIN

Cir. Ct. Nos. 2012TR459
2012TR460
**IN COURT OF APPEALS
DISTRICT IV**

COUNTY OF GRANT,

PLAINTIFF-RESPONDENT,

V.

DANIEL A. VOGT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Grant County: ROBERT P. VANDEHEY, Judge. *Reversed.*

¶1 SHERMAN, J.¹ Daniel A. Vogt appeals a judgment of conviction for driving under the influence of an intoxicant (OWI), first offense, contrary to WIS. STAT. § 346.63(1)(a), and an order denying his motion to suppress evidence.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c)(2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Vogt challenges the denial of his motion to suppress, arguing that any evidence obtained from his detention was obtained as a result of an illegal seizure. Because I conclude that the police officer's contact with Vogt constituted a seizure, I reverse.

BACKGROUND

¶2 On December 25, 2011, at approximately 1:00 a.m., a Grant County Deputy Sheriff observed a vehicle pull into the Cassville public boat landing and stop with its lights on. The officer testified at trial that because of the time of year, the time of night, and the fact that the park closes at 11:00 p.m. (though not necessarily the parking lot itself), he called the vehicle in as suspicious and pulled his squad car into the boat landing where he parked behind the vehicle. The officer testified that when he parked behind the vehicle, he did not activate his emergency lights. The officer testified that he approached the driver's side window of the vehicle, where he observed Vogt in the driver's seat of the vehicle and an unidentified woman in the passenger seat. The officer testified that he knocked on the driver's side window of the vehicle and motioned for the driver to roll the window down. The officer further testified that once the window was rolled down, he smelled the odor of intoxicants and observed that Vogt's speech was slurred.

¶3 Vogt was charged with OWI. He filed a motion to suppress, challenging the lawfulness of his detention. The circuit court denied Vogt's motion following an evidentiary hearing at which only Small testified. The court observed that "this is a close case," but found that Small's initial contact with Vogt did not amount to a seizure.

¶4 Following the denial of Vogt's motion to suppress, the case was tried before the court. At trial, the officer testified that while on patrol, he observed Vogt's vehicle pull into the boat landing and park in the public parking lot. The officer "wonder[ed] what [Vogt] was doing there at that time of the night or morning," and drove his police vehicle into the landing where he stopped behind Vogt's vehicle, slightly offset toward the driver's side of Vogt's vehicle. The officer did not activate his emergency lights at that time. The officer testified that he approached the driver's side window of Vogt's vehicle and motioned for Vogt to roll his window down. The officer testified that he had rapped on Vogt's window, but was unable to recall whether he rapped in a hard or soft manner. The officer testified that he "basically" asked Vogt what he was doing and that Vogt stated "he was trying to figure out the radio," which Small found to be "odd." The officer testified that he also asked Vogt for his driver's license. The officer testified that while he was talking with Vogt, he noticed that Vogt's speech was slurred and he observed the odor of intoxicants coming from the vehicle.

¶5 Vogt also testified at trial. He testified that after Small approached his vehicle, the officer "rapped on the window very loud" using his knuckles and told Vogt to "[r]oll down your window." Vogt described the officer's voice as "[c]ommanding" and "pretty forceful" and testified that Small's request that he roll down his window was not prefaced by the words "[p]lease" or "[w]ould you." Vogt testified that he did not believe that he had any alternative to rolling down his window. Vogt further testified that had he wanted to leave, he could not have because "virtually all [of his] exit paths were blocked." Vogt testified that to the right of his vehicle was a pop machine, in front of his vehicle was the Mississippi River, and he was unable to turn left because Small was standing there. On cross-examination, however, he acknowledged that nothing was preventing him from

pulling his vehicle forward and turning left and that his vehicle was parked approximately fifty feet from the Mississippi River.

¶6 In addition, Vogt's sole passenger in the vehicle also testified at trial. The passenger testified that after Vogt pulled into the boat landing, Small's vehicle pulled up behind them and the officer "came to the window and rapped on the window and told [Vogt] to give him his driver's license." The passenger described the officer's rap on the window as "hard" and testified that he then "demanded" in a "forceful" manner that Vogt give the officer his driver's license. The passenger further testified that in her opinion, Vogt could not have left in his vehicle "[b]ecause there was nowhere for [him] to go." The passenger testified that to the right of Vogt's vehicle was a pop machine and the park area, behind the vehicle and slightly toward the driver's side was the officer's police cruiser, in front of the vehicle was the Mississippi River, and to the left of the vehicle was Small.

¶7 Following the presentation of evidence, Vogt renewed his motion to suppress. The court denied Vogt's motion to suppress and found Vogt guilty of OWI. Judgment was entered accordingly. Vogt appeals.

DISCUSSION

¶8 Vogt contends that a seizure occurred when the officer approached his vehicle, knocked loudly on the window and "commanded" Vogt to roll his window down. Vogt argues that because the officer lacked reasonable suspicion to conduct an investigatory stop, his seizure was unlawful and, therefore, any evidence obtained as a result should have been excluded. The County contends that the officer's contact with Vogt did not constitute a seizure and therefore any evidence obtained from the officer's contact with Vogt was admissible.

¶9 Our review of a circuit court’s denial of a motion to suppress presents a mixed question of fact and law. *State v. Knapp*, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899. We review the court’s findings of historical fact under the clearly erroneous standard. *State v. Johnson*, 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182. The application of the historical facts to constitutional principles presents a question of law, which we review de novo. *Id.*, ¶13.

¶10 The Fourth Amendment of the United States Constitution and Article I, Section II of the Wisconsin Constitution protect an individual’s right to be free from unreasonable searches and seizures. *State v. Young*, 2006 WI 98, ¶18, 294 Wis. 2d 1, 717 N.W.2d 729. Not every encounter between police and a private citizen is a seizure subject to the prohibition of the Fourth Amendment. *Id.* The general rule is that 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.* (quoted source omitted).

¶11 The test for determining whether a seizure has occurred is an objective one, presupposing that the person is innocent and “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.” *State v. Williams*, 2002 WI 94, ¶23, 255 Wis. 2d 1, 646 N.W.2d 834. The United States Supreme Court explained the test in *United States v. Mendenhall*, 446 U.S. 544, 554-55 (1980) (citations and footnote omitted):

We conclude that a person has been “seized” within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt

to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

¶12 The County argues that no seizure occurred because the officer did not activate his emergency lights, made no show of authority, used no force, did not display his weapon, and did not use strong language or an inordinate tone of voice. The County argues that nothing prohibits an officer from walking up to a vehicle in a public parking lot, talking to the driver, and asking to see the driver's license. However, here it is not the officer's approach or request to see Vogt's license that represents the seizure. Rather, it is the officer's actions indicating that Vogt should comply with the officer's directive to roll down his window and speak with him.²

¶13 It is undisputed that the officer "rapped"³ on Vogt's window and indicated that he wanted Vogt to roll his window down. Vogt and the County dispute whether the officer "commanded" Vogt to roll his window down, or whether the officer motioned for Vogt to do so. However, those distinctions are not determinative in this case because without clarification, we must assume that the officer directed Vogt to roll down his window, rather than asking him if he would do so. A request might not be viewed as a seizure under these

² In reaching this decision, I have found persuasive, and adopted, the reasoning reached by this court in *State v. Disch*, 2002AP1544, unpublished (WI App Dec. 12, 2002).

³ The parties devote substantial argument regarding the strength upon which the officer "rapped" on Vogt's window. I do not address those arguments because the determining factor here is not how forcefully Vogt rapped on the window.

circumstances. However, when a uniformed officer approaches a vehicle at night and directs the driver to roll down his or her window, a reasonable driver would not feel free to ignore the officer. Accordingly, I conclude that a seizure took place.

¶14 It is undisputed that the officer did not otherwise have reasonable suspicion to conduct an investigatory stop. Accordingly, I reverse the judgment of conviction and the order denying Vogt's motion to suppress.

By the Court.—Judgment and order reversed.

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

