COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0254-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LAWRENCE J. GEGARE,

DEFENDANT-APPELLANT.

APPEAL from an order and a judgment of the circuit court for Brown County: PETER J. NAZE, Judge. *Reversed and cause remanded.*

MYSE, J. Lawrence Gegare appeals an order denying his motion to suppress evidence obtained as a result of an encounter with Officer James Veeser, and a judgment of conviction for operating after revocation. Gegare contends that the evidence should have been suppressed because he was seized by Veeser in the absence of any grounds to justify a reasonable suspicion. Because this court agrees, the order and judgment are reversed and the cause remanded.

The essential facts of this case began with Veeser's observation of a car containing two young occupants in the vicinity of a school. Veeser became suspicious of the car's occupants because they were both young, it was a school day, and the area in which they were driving had a history of vandalism. Veeser checked the license plates on the car, and learned that a warrant was outstanding for the female owner.

Shortly thereafter, Gegare, the twenty-two-year-old driver of the car, dropped off the eleven-year-old passenger at school. Gegare continued driving for a short distance, and then pulled over to feed his infant son in the backseat. As Gegare was stopped, Veeser approached in his marked squad car, flashed his emergency lights, and pulled in behind Gegare. Veeser testified that Gegare looked at least eighteen to him as he approached the car, but that he nonetheless continued the encounter and asked Gegare for his driver's license. Gegare acknowledged that his driver's license had been revoked.

Gegare moved to strike statements that he made to Veeser during the encounter because he claimed they were the products of an unlawful seizure under the Fourth Amendment. The trial court concluded that the contact between Veeser and Gegare was not a seizure but a voluntary consensual encounter, and denied the motion. The trial court specifically relied on the fact that Gegare was already stopped when Veeser approached, and apparently took judicial notice that an officer will flash his lights to warn other drivers of the existence of stopped vehicles without necessarily intending to communicate with the driver.[1]

[1] No evidence was introduced concerning the uses an officer has for flashing emergency lights. Indeed, Veeser testified that he had not turned on his lights at all.

In reviewing a suppression order, the trial court's findings of historical fact will be upheld unless they are against the great weight and clear preponderance of the evidence. ***State v. Krier***, 165 Wis.2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991). "However, whether a stop meets statutory and constitutional standards is a question of law subject to de novo review." ***Id***.

"No fourth amendment issue arises in a consensual encounter because no seizure has occurred." ***State v. Goyer***, 157 Wis.2d 532, 536, 460 N.W.2d 424, 425 (Ct. App. 1990). "A seizure occurs only 'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" ***Id***. (quoting ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980)).

Gegare first argues that the trial court erred by concluding that there was no seizure. Gegare contends that the facts surrounding the incident show that a reasonable person in his position would not have believed he was free to leave. Gegare focuses on the following facts: (1) Veeser was driving a marked squad car; (2) Veeser had put his squad car lights on; (3) Veeser approached Gegare in full uniform; and (4) Veeser continued to question Gegare after he had allayed his concerns about why Gegare was there.

While this court agrees with Gegare, it concludes that only the second fact is dispositive. All other facts, standing together, are insufficient to demonstrate a seizure. To conclude that any encounter involving a uniformed officer or a marked squad car creates a seizure would be equivalent to denying the constitutional validity of a consensual encounter. Virtually all consensual encounters with officers involve one or both of these elements. Further, to suggest that an officer cannot continue a consensual encounter after allaying his or her

initial concerns is inconsistent with the test as set out in ***Goyer*** and ***Mendenhall***. The only facts that are relevant in determining whether an encounter is consensual are those addressing whether a reasonable person would believe he or she is not free to leave the scene. As long as the encounter remains consensual, an officer is free to remain and ask additional questions.

The trial court also found, however, that Veeser momentarily activated his squad car lights. Although the trial court discounted this finding by taking judicial notice that police officers routinely activate their lights when pulling over, this court concludes that Veeser's flashing of his emergency lights is sufficient to demonstrate that a reasonable person in Gegare's position would not have felt free to leave. When a police officer flashes his or her squad car lights to an individual, the officer is commanding the person to stop, pull over to the side of the road, and remain stopped until the officer has arrived. *See* § 346.04, STATS. Because one of the commands is to remain stopped, it is irrelevant whether the motorist is already stopped when the emergency lights are flashed at him.[2] By utilizing this authority before approaching a motorist, the officer is acting inconsistently with a consensual encounter. *See* ***Berkemer v. McCarty***, 468 U.S. 420, 436 (1984) ("Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told to do so."); *see also* ***State v. Stroud***, 634 P.2d 316, 319 (Wash. App. 1981) (officers' attempt to summon occupants of parked car with emergency lights and high beam headlights "constituted a show of authority sufficient to convey to any reasonable person that voluntary departure from the scene was not a realistic alternative").

[2] There is no evidence that the officer flashed his lights to communicate with any person besides Gegare.

The State disagrees, primarily because it believes that it is a disputed fact whether Veeser flashed his lights. While it is true that this fact was disputed at the motion hearing, and while the court failed to specifically resolve the dispute at that time,[3] the court at a later conference and again at a hearing on the defendant's motion to reconsider ultimately did find that Veeser flashed his lights. Based on this finding, which the State does not contend is clearly erroneous, this court concludes that the encounter between Veeser and Gegare was a seizure, and thereby implicated Gegare's Fourth Amendment rights.

The State next argues that even if this was a seizure, the officer had a reasonable suspicion sufficient to justify a ***Terry***-type stop[4] of Gegare. Once again, this conclusion is reviewed as a constitutional fact. *See* ***Krier***, 165 Wis.2d at 676, 478 N.W.2d at 65. The test was reiterated by our Supreme Court in ***State v. Waldner***, 206 Wis.2d 51, 56, 556 N.W.2d 681, 684 (1996), as follows:

> The test is an objective one, focusing on the reasonableness of the officer's intrusion into the defendant's freedom of movement: "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 [or was committing or is about to commit] a crime. An 'inchoate and unparticularized suspicion or "hunch" … will not suffice.'" (Citations omitted.)

[3] When the defendant asked the court at the motion hearing what his finding was, the court responded, "I'll find, at most, the officer may have flashed his lights when he pulled up behind the vehicle …." In part, this ambiguity was due to the court's conclusion that "it doesn't make any difference" what finding it accepted.

[4] ***Terry v. Ohio***, 392 U.S.1 (1968).

The question of what constitutes reasonableness is a common sense test of "[w]hat would a reasonable police officer reasonably suspect in light of his or her training and experience." ***Id***.

The State briefly advances three arguments in an attempt to explain how Veeser reasonably could have stopped Gegare. First, the State claims an officer could reasonably have been suspicious of the young occupants of a car because they were driving in an area of reoccurring juvenile disturbances. This reason is insufficient. As this court noted in ***State v. Young***, 212 Wis.2d 417, 427, 569 N.W.2d 84, 89 (Ct. App. 1997), a person's presence in an area known for criminal activity "standing alone, does not provide the reasonable suspicion required for a lawful stop." While it is true that a defendant's presence in a high-crime area may be a factor to consider, ***id***. at 427, 569 N.W.2d at 89-90, there are no other factors that connect Gegare to the prior acts of vandalism. As the United States Supreme Court noted in a similar case, ***Brown v. Texas***, 443 U.S. 47, 52 (1979), "the appellant's activity was no different from the activity of other pedestrians in that neighborhood."

The State next argues that a reasonable officer could stop the motorist out of concern that there was a potential truancy. While under certain circumstances this might be a sufficient reason, this court cannot conclude that the stop was reasonable in this case. Gegare was a twenty-two-year-old man at the time the police officer flashed his emergency lights and approached the car. Even assuming that a police officer could reasonably believe that Gegare was of sufficiently youthful appearance to justify a temporary seizure—an assumption this court considers highly dubious—the police officer's limited justification for the stop ceased when he approached the car and concluded that Gegare was at

least eighteen. The officer could not constitutionally continue the seizure after this suspicion of criminal conduct was allayed.

Finally, the State argues a reasonable officer could have approached the vehicle in order "to check to see whether or not the owner of the vehicle was present in the vehicle based on the outstanding warrant." At the time the officer approached the vehicle, he knew that the driver was a male and the owner was a female. The officer, however, testified that he could not determine if the passenger he had seen initially was a male or female. While this court agrees that a police officer could reasonably have seized the vehicle in order to determine whether the subject of the outstanding warrant was inside, this justification cannot account for the officer's continuation of the encounter after he discovered that Gegare was the only adult occupant of the car. At that point, a reasonable officer would conclude that the female owner was not present, and could not prolong the seizure. Further, because the State does not argue that a reasonable officer could have continued the seizure to learn the whereabouts of the owner, this court will not consider that possible justification.

By the Court.—Order and judgment reversed and cause remanded.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.