

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 2004AP1847-CR

Cir. Ct. No. 2003CF531

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANGELO J. CAPRIOTTI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
BARBARA A. KLUKA, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Angelo J. Capriotti appeals from the judgment of conviction entered against him. He argues on appeal that the circuit court erred when it denied his motion to suppress certain evidence. Because we conclude that this decision was correct under established Wisconsin law, we affirm.

¶2 Capriotti was charged with one count of possession of heroin, as a second or subsequent offense, and one count of possession of drug paraphernalia, both as a repeater. He moved to suppress the evidence discovered by the police when they searched his car. The circuit court denied the motion to suppress, and Capriotti then entered a guilty plea to one count of possession of heroin.

¶3 Capriotti argues that the circuit court should have granted his motion to suppress the evidence because he was illegally seized by the police and therefore his consent to the search was not valid. At the suppression hearing, the officer who searched Capriotti testified that he was on patrol the night of the stop when he saw Capriotti sitting in a parked car in the parking lot of a tavern. The officer knew that Capriotti was on parole for a drug conviction.¹ The officer approached Capriotti and asked if he had anything illegal in the car. Capriotti said no. The officer then asked Capriotti if he could search the car, and Capriotti agreed. During the search, the officer found heroin and drug paraphernalia in a backpack. The police officer also testified that when he approached the car to talk to Capriotti, he knew that the car was legally parked.

¶4 Capriotti argued that the police had “stopped” him as defined by *Terry v. Ohio*, 392 U.S. 1 (1968), without probable cause or a reasonable suspicion of criminal activity, and therefore any evidence obtained must be suppressed. The circuit court concluded that the police officer’s actions did not amount to a *Terry* stop, and that Capriotti had consented to the search of his car. The court denied the motion, finding that the officer did not have either probable

¹ Capriotti was actually on probation and not parole.

cause or a reasonable suspicion, but that Capriotti had not been seized by the police under Wisconsin law.

¶5 We conclude that under established Wisconsin law, we must affirm. Questioning by law enforcement officers does not, by itself, constitute a seizure. *State v. Williams*, 2002 WI 94, ¶22, 255 Wis. 2d 1, 646 N.W.2d 834. For a seizure to have occurred within the meaning of the Fourth Amendment, the surrounding conditions must be “so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded.” *Id.* (citation omitted). The test is an objective one focusing on whether a reasonable person, under all the circumstances, would have felt free to leave. *Id.*, ¶23 (citing *California v. Hodari D.*, 499 U.S. 621, 628 (1991)). And in *Hodari D.*, the United States Supreme Court held that a seizure requires either the application of physical force or a show of authority to which the defendant yields. *Hodari D.*, 499 U.S. at 626. In this case, there was neither.

¶6 We agree with the circuit court’s conclusion that Capriotti was not seized within the meaning of these cases. Since the circumstances did not constitute a seizure by Fourth Amendment standards, then the consent was valid and the evidence should not have been suppressed. *See Williams*, 255 Wis. 2d 1, ¶35. For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

