COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

Nos. 00-1126-CR
00-1127

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

NO. 00-1126-CR

STATE OF WISCONSIN,

PLAINITIFF-APPELLANT,

V.

DAVID M. MEZA,

DEFENDANT-RESPONDENT.

NO. 00-1127

COUNTY OF WINNEBAGO,

PLAINTIFF-APPELLANT,

V.

DAVID M. MEZA,

DEFENDANT-RESPONDENT.

APPEALS from orders of the circuit court for Winnebago County: BRUCE K. SCHMIDT, Judge. *Affirmed.*

¶1 BROWN, P.J.[1] The issue in this case is whether a consensual encounter or a ***Terry***[2] stop took place between a conservation warden and David M. Meza. A Wisconsin Department of Natural Resources warden approached Meza on public property, ordered that Meza's children get back into Meza's vehicle and asked Meza a number of questions regarding what he was doing. During this interaction, the warden smelled intoxicants on Meza's breath. Meza was subsequently arrested and charged with operating while under the influence with a minor passenger under sixteen years of age (OWI), second offense and operating a motor vehicle after suspension, first offense.

¶2 Both parties agree that at the time the warden approached Meza, no reasonable suspicion existed to justify a ***Terry*** stop. Meza claims that a ***Terry*** stop occurred and seeks to suppress the evidence supporting the charges. The State[3] responds that the encounter was consensual. We agree with the trial court that a ***Terry*** stop occurred because the warden asserted his authority and no reasonable person would have believed he or she would have been free to go. Consequently, we agree with the trial court that the evidence supporting the charges must be suppressed.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version.

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

[3] This case is a consolidated appeal. The State brought charges for OWI and Winnebago County brought charges for operating a vehicle after suspension. For ease of discussion, we refer to the appellant as the State.

¶3 The facts of this case are not in dispute. On October 26, 1999, at about 7:00 p.m., the warden observed Meza drive into a public parking area on public hunting grounds. The warden, in uniform with a flashlight in hand, approached Meza and his children, who were standing outside the vehicle. He identified himself as a conservation warden and ordered the children to get back inside the vehicle. He proceeded to ask Meza a number of questions, including: what he was doing on public hunting grounds, what he was going to do and why he had parked at that location. The warden smelled the odor of intoxicants on Meza's breath and contacted the Winnebago County Sheriff's Department. Meza was subsequently charged with the crimes listed above.

¶4 The United States Constitution and the Wisconsin Constitution protect an individual's right to be free from unreasonable searches and seizures. *See* U.S. CONST. amend. IV; WIS. CONST. art. 1, § 11. In Wisconsin, a law enforcement officer may stop a person if the officer reasonably suspects that such a person is committing, is about to commit or has committed a crime. *See* WIS. STAT. § 968.24. Even if no reasonable suspicion exists to stop a person, police may still engage in consensual conversations with persons which do not amount to ***Terry*** stops. *See* ***Florida v. Bostick***, 501 U.S. 429, 434 (1991) ("[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions."). A ***Terry*** stop occurs when an officer in some way restrains the liberty of a citizen by means of physical force or show of authority. *See* ***Bostick***, 501 U.S. at 434. 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, 554 (1980). If an illegal stop occurs, evidence obtained during the stop must be suppressed. *See* ***State v. Longcore***, 226

Wis. 2d 1, 6, 594 N.W.2d 412 (Ct. App. 1999), *aff'd*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620.

¶5 Whether a stop meets statutory and constitutional standards are questions of law which this court reviews de novo. *See* ***State v. Krier***, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991). Even though our review is de novo, we agree with the trial court that the warden performed a ***Terry*** stop because the warden showed authority and a reasonable person in Meza's position would not have felt free to leave. The warden approached Meza in an official capacity, wearing a uniform and shining a flashlight. He asserted authority over Meza's children by detaining them in Meza's vehicle, which amounted to asserting authority over Meza as he could no longer control his children. Furthermore, the detaining of young children, who in this case were not likely involved in wrongdoing, would lead a reasonable person in Meza's position to believe he or she too was not free to go or ignore the warden.

¶6 The warden also asserted authority over Meza by immediately demanding that Meza explain what he was doing, what he was going to do and why he stopped where he did. This litany of questions was not merely a request for information; rather, it was a demand that a reasonable person would not feel free to ignore. Finally, the tone of the warden's testimony at the motion hearing regarding his interactions with Meza indicates that he was asserting authority over Meza. "Well, I advised [Meza] who I was so that it would be *obvious* why I was questioning what he was doing on public hunting grounds." (Emphasis added.) In summary, the totality of the circumstances, including the appearance of the warden, his detainment of Meza's children, his demands for answers to his questions and the tone of his testimony, indicates the warden was asserting

authority over Meza and no reasonable person in Meza's position would have felt free to go.

¶7 The State notes that police can use information gathered during a consensual encounter to justify a ***Terry*** stop if they gather sufficient information to develop reasonable suspicion. In ***State v. Goyer***, 157 Wis. 2d 532, 460 N.W.2d 424 (Ct. App. 1990), Goyer initiated a consensual conversation with the police in which police gathered enough information to reasonably suspect that Goyer had committed a crime. This court held that by the time Goyer terminated the consensual encounter, the police had a legitimate basis to justify a ***Terry*** stop. *See* ***id***. at 537. The State argues that in ***Goyer***, as in this case, the legitimate basis to justify the stop occurred when the warden formed the opinion that Meza was operating while intoxicated. According to the State, all prior interactions were consensual, and during the consensual conversation, the warden gathered sufficient information to justify the ***Terry*** stop.

¶8 The State is correct that in some instances the information gathered in a consensual encounter could justify a ***Terry*** stop. *See* ***Goyer***, 157 Wis. 2d at 537. However, in this case, unlike ***Goyer***, the interactions between Meza and the warden were *not* consensual up until the point the warden informed Meza he was suspected of OWI for the reasons described above and because Meza, unlike Goyer, did not approach the warden. Therefore, the ***Terry*** stop occurred before the warden told Meza he was suspected of OWI, and ***Goyer*** is not relevant to this case.

¶9 The State cites additional cases to support its argument that the encounter between Meza and the warden was consensual. None of these cases help the State's position. In ***Mendenhall***, for example, the United States Supreme

Court held that a consensual conversation took place when Drug Enforcement Administration agents "requested" to see the defendant's identification and plane ticket. *See* ***Mendenhall***, 446 U.S. at 557-58. The Supreme Court discussed a number of factors which, had they been present, might have yielded a contrary result. These factors include the threatening presence of several officers, the display of a weapon by an officer, physical touching by an officer and language or tone of voice indicating that compliance might be compelled. *See* ***id***. at 554.

¶10 The State posits that because these factors were likewise absent in this case, the encounter must be consensual. We disagree. Even if these factors are not present in this case, the list of factors is not all-inclusive. As discussed above, other shows of authority were present in this case, indicating that the encounter was not consensual. Specifically, this case is distinguishable from ***Mendenhall*** because the warden's questions, unlike the questions posed by the DEA agents in ***Mendenhall***, were demands, not requests for information.

¶11 In ***Michigan v. Chesternut***, 486 U.S. 567, 576 (1988), the United States Supreme Court held that the defendant, who was on foot, was not seized by police who were following him in a squad car. The Supreme Court noted that a number of factors may indicate whether there was a showing of authority, such as the use of flashers or sirens, a command to stop, a display of weapons or use of the vehicle to prevent the defendant's movement. *See* ***id***. at 575. The State notes that none of the factors listed in ***Chesternut*** are present in this case and concludes that the encounter must have been consensual. Again, ***Chesternut*** does not help the State's position because the warden displayed authority in numerous other ways in this case. Logically, the possible displays of authority relevant to a car "chase" are different than the possible displays of authority relevant to a face-to-face encounter. We are satisfied that ***Chesternut*** is easily distinguishable on its facts.

By the Court.—Orders affirmed.

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