

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 13, 2006**

Cornelia G. Clark  
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. 2004AP2728-CR**

**Cir. Ct. No. 2003CF677**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JUSTIN J. PALERMO,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Racine County:  
RICHARD J. KREUL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Justin Palermo appeals from the judgment of conviction entered against him. He argues that the circuit court erred when it concluded that he had not been seized when a police officer approached the car in

which he was sitting. Because we conclude that Palermo had not been seized under *United States v. Mendenhall*, 446 U.S. 544, 554 (1980), we affirm.

¶2 Palermo was charged with one count of operating a motor vehicle while intoxicated, fifth or greater offense, and one count of operating with a prohibited alcohol concentration, fifth or greater offense. Prior to trial, he moved to suppress the evidence against him arguing that he had been illegally seized by the police officer. The court held a hearing on the matter and denied the motion.

¶3 The court found that the officer was on patrol at about 11:30 at night when he noticed Palermo sitting in his car in a parking lot. The officer did not believe that Palermo had committed or was about to commit a crime, but rather stopped to investigate because he thought it was unusual for the car to be parked there. The officer pulled up behind Palermo's car, turned on his overhead lights, and shone a spotlight on Palermo's car. The officer then went to the car and asked Palermo what he was doing. Palermo said he was looking for his identification. He later stated that he had been looking for his cell phone. The police officer at this point smelled alcohol, saw that Palermo's eyes were red and glassy, and noticed that his speech was slurred. When the officer asked Palermo for identification, Palermo at first gave him someone else's name. He eventually said who he was, was given some field sobriety tests, refused others, and was arrested.

¶4 The court denied the motion to suppress. The court concluded, applying *California v. Hodari D.*, 499 U.S. 621 (1991), that there had not been a seizure because the officer did not apply any physical force and Palermo did not submit to the officer's show of authority. Palermo then pled guilty to one count of operating while intoxicated, fifth or greater offense. The court sentenced him to two years of initial confinement and four years of extended supervision. Palermo

appealed to this court. We placed the appeal on hold pending the Wisconsin Supreme Court's decision in *State v. Young*, 2006 WI 98, \_\_\_ Wis. 2d \_\_\_, 717 N.W.2d 729. That case has been decided, and now we affirm the decision of the circuit court, but on different grounds. See *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985).

¶5 We conclude that Palermo was not seized within the meaning of *Mendenhall*, 446 U.S. at 554, at the time the officer approached the car. Under that test, a person is seized “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.” *Id.* The facts adduced at the suppression hearing established that Palermo was already stopped and looking for his identification at the time the officer approached. A reasonable inference from these facts is that he did not leave because he had not completed his task. The question of whether there was a show of authority, therefore, is not at issue. Under the *Mendenhall* test, Palermo was not seized.

¶6 The State also argues that Palermo has the burden of proof on the issue of whether a seizure occurred. We need not decide the issue in this case, however, because no matter who had the burden of proof, the evidence showed that a seizure did not occur. Consequently, we affirm the decision of the circuit court.

*By the Court.*—Judgment affirmed.

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

