COURT OF APPEALS
DECISION
DATED AND FILED

April 5, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP2159-CR **Cir. Ct. No. 2005CM419**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LISA M. KLANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

¶1 LUNDSTEN, P.J.[1] Lisa Klang appeals a circuit court judgment convicting her of possession of THC, contrary to WIS. STAT. § 961.41(3g)(e). She

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

challenges the circuit court's decision denying her motion to suppress. Klang argues that the investigating police officer unlawfully detained the vehicle in which Klang was a passenger. We disagree and affirm the circuit court's judgment.

Background

¶2 In the early morning hours of April 10, 2005, an officer with the Sauk County Sheriff's Department was dispatched to investigate a report of "possible parties" at a boat landing.[2] On his way to the boat landing, the officer noticed a car sitting at a stop sign at an intersection that led to another boat landing on the same lake. The vehicle at the stop sign was driven by a woman named Blaha and we will refer to it as the Blaha car.

¶3 The officer pulled his marked squad car up alongside the Blaha car at the stop sign such that the two vehicles were facing in opposite directions. The officer rolled down his window, and the driver, Blaha, rolled down her window. The officer asked Blaha what she was doing at the boat landing, and Blaha responded that she was there to see whether there were ice shanties or ice on the lake. The officer noticed that Blaha's speech was somewhat slurred, and he asked her if she had been drinking. Blaha responded that she had one drink earlier.

¶4 At that point, the officer told Blaha to stay where she was, turned his vehicle around, activated his emergency lights, and pulled in behind Blaha's car. After further investigation, the officer arrested Blaha for operating a vehicle while

[2] The officer testified that the date was April 9, but the complaint against Klang shows the date was April 10. Whether the date was April 9 or April 10 is not important.

under the influence of an intoxicant. In a search of the vehicle, the officer discovered what he believed to be marijuana and cocaine, along with possible drug paraphernalia. Klang, who was a passenger in the vehicle, was subsequently convicted of possession of THC.

Discussion

¶5 The parties' dispute centers on the officer's initial contact with the Blaha car. That is, the dispute centers on what happened *before* the officer told Blaha to stay where she was, just prior to turning his vehicle around and pulling in behind the Blaha car.

¶6 The circuit court concluded that, although the officer did not possess reasonable suspicion at the time he pulled his squad car up alongside the Blaha car, this action was nonetheless justified by his community caretaker function.

¶7 Klang argues that when the officer pulled his squad car up alongside the Blaha car and asked Blaha a question, a seizure occurred. She also asserts that the circuit court erred in relying on the officer's community caretaker function and that the officer lacked reasonable suspicion to support this alleged seizure. Klang does *not* argue that the officer lacked reasonable suspicion to detain the Blaha car once the officer observed Blaha's speech and Blaha admitted to drinking.

¶8 The State agrees with Klang that the circuit court erred in relying on the officer's community caretaker function. The State explains that it did not argue in the circuit court, and does not argue now, that the officer's initial contact with the vehicle was justified by the community caretaker function. Additionally, the State does not argue that the officer possessed reasonable suspicion at the time

of his initial contact with the vehicle. Rather, the State's argument is that the officer's initial contact with the vehicle did not rise to the level of a seizure.

¶9 Whether a seizure has occurred is a question of law, subject to *de novo* review. ***State v. Garcia***, 195 Wis. 2d 68, 73, 535 N.W.2d 124 (Ct. App. 1995). We agree with the State that the officer's initial contact with the vehicle was not a seizure under the Fourth Amendment.

¶10 The supreme court has summarized the principles that guide our analysis:

> Not all encounters with law enforcement officers are "seizures" within the meaning of the Fourth Amendment. The general rule is that a seizure has occurred when an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen …."
>
> ….
>
> Questioning by law enforcement officers does not alone effectuate a seizure. "[P]olice questioning, by itself, is unlikely to result in a Fourth Amendment violation." Unless the surrounding conditions "are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment." "As long as the person to whom the questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particular and objective justification."

State v. Williams, 2002 WI 94, ¶¶20, 22, 255 Wis. 2d 1, 646 N.W.2d 834 (citations and footnote omitted).

¶11 Thus, "an officer's mere posing of a question does not constitute a 'seizure'" despite the fact that "any time that a police officer requests information from an individual, the individual is likely to feel some pressure to respond."

State v. Griffith, 2000 WI 72, ¶53, 236 Wis. 2d 48, 613 N.W.2d 72. "While it is true that 'most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.'" ***Williams***, 255 Wis. 2d 1, ¶23 (quoting ***INS v. Delgado***, 466 U.S. 210, 216 (1984)).

¶12 Here, the most relevant circumstances are these: the officer pulled alongside the Blaha car so that the two vehicles were facing in opposite directions; the Blaha car was sitting at a stop sign; the officer rolled down his window, and the vehicle's driver rolled down her window; the officer asked the driver what she was doing at the boat landing and whether she had been drinking; the officer was driving a marked squad car, and made contact with the vehicle during the early morning hours; and the officer did not turn on his emergency lights, did not signal the vehicle to stop in any way, and did not make any further show of authority during this initial contact with the vehicle. Considering all of the circumstances in this case, we conclude that the officer's initial contact with the Blaha car was not a seizure. The officer's initial contact did not create a situation in which either Klang or Blaha would have reasonably believed they were not free to terminate the encounter.

¶13 We recognize that a routine traffic stop of a vehicle is a seizure. *See*, *e.g.*, ***State v. Malone***, 2004 WI 108, ¶24, 274 Wis. 2d 540, 683 N.W.2d 1. However, Klang discusses no authority and develops no argument as to why her particular situation is materially analogous. For example, Klang does not discuss how the vehicle here might be compared to or contrasted with a vehicle that is traveling down the highway. Rather, Klang seems to largely assume that, because she was in a vehicle, the officer's initial contact with the vehicle was a seizure and required reasonable suspicion. Klang does not develop a legal argument

supporting this assumption, and we decline to develop this line of argument for her. *See* ***Murphy v. Droessler***, 188 Wis. 2d 420, 432, 525 N.W.2d 117 (Ct. App. 1994). Moreover, we doubt any such authority exists.

¶14 Klang argues that an officer cannot "delay" a citizen, even momentarily, without reasonable suspicion. That is incorrect. Police/citizen encounters that do not rise to the level of a seizure will often delay a citizen in some sense. The relevant inquiry is not limited to whether a person is delayed, but rather whether a reasonable person would have felt free to terminate the encounter and go about her business. *See* ***Williams***, 255 Wis. 2d 1, ¶22.

¶15 Klang also argues that the nature of the officer's questions was significant in this case. She asserts that the officer was asking the vehicle's driver to account for its occupants' "recent conduct" and that the intrusive nature of this type of questioning necessarily implicates the Fourth Amendment. We know of no case law, and Klang provides none, in which a police/citizen encounter is transformed into a Fourth Amendment seizure simply because the officer's questions pertain to information about the citizens involved in the encounter. Such information is precisely what officers may, and often do, seek during such encounters.[3]

[3] We note that Klang may lack standing to the extent her argument depends on a challenge to the nature of the questions posed to Blaha, the vehicle's driver. *See* ***State v. Malone***, 2004 WI 108, ¶¶27-28, 274 Wis. 2d 540, 683 N.W.2d 1. The State does not make this argument, however, and we need say no more about standing because we reject Klang's Fourth Amendment challenge on its merits. We also note that Klang characterizes the police questioning here as a search as well as a seizure, but she cites no authority to support this characterization, so we address it no further. *See* ***Murphy v. Droessler***, 188 Wis. 2d 420, 432, 525 N.W.2d 117 (Ct. App. 1994).

¶16 Klang also argues that the "free to leave" test does not apply to passengers in automobiles. She cites ***State v. Harris***, 206 Wis. 2d 243, 557 N.W.2d 245 (1996), and ***Florida v. Bostick***, 501 U.S. 429 (1991). If the "free to leave" test does not apply to Klang because she is a passenger, what test does apply to determine whether she was seized? Klang does not clearly answer this question. In any event, neither ***Harris*** nor ***Bostick*** supports her assertion that the "free to leave" test, or its functional equivalent, does not apply.

¶17 ***Harris*** holds that, when police make a temporary seizure of a vehicle, all of the occupants of that vehicle are seized and, therefore, have standing to object to the seizure. *See* ***Harris***, 206 Wis. 2d at 246, 257-58. ***Harris*** was not concerned, as we are here, with what is a seizure in the first place.

¶18 ***Bostick*** involved drug interdiction efforts, including police questioning of passengers, on a bus that was waiting to depart. ***Bostick***, 501 U.S. at 431-32. The Court in ***Bostick*** held that such police/citizen encounters do not necessarily constitute a seizure. ***Id.*** at 433-34, 437. ***Bostick*** did not apply the "free to leave" standard because it made little sense to apply the "leave" concept to a passenger on a bus whose freedom to "leave" is restricted for reasons unrelated to police activity. The passenger was not going to "leave," regardless what the police did. *See* ***id.*** at 436. Still, in such cases, the same essential inquiry applies, namely, whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." ***Id.*** The Court explained that the "crucial test" remains "whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" ***Id.*** at 437 (citation omitted). That is the test we have applied here.

¶19 Finally, to the extent that Klang's argument is that she, like the passengers in ***Bostick***, was not free to terminate the encounter because she was not in control of the vehicle, ***Bostick*** undermines that argument.

By the Court.—Judgment affirmed.

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