COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1837-CR **Cir. Ct. No. 99-CM-843**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

BRANDY C. ARNESON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County: JAMES MILLER, Judge. *Reversed.*

¶1 DYKMAN, J.[1] The State of Wisconsin appeals from an order granting Brandy Arneson's motion to suppress evidence discovered after she

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

consented to a search of her car. The issue is whether Arneson gave her consent voluntarily. Although we agree with Arneson that the holding in ***State v. Williams***, 2001 WI App 249, __Wis. 2d__, 635 N.W.2d 869, would require the evidence to be suppressed, we conclude that ***Williams*** cannot be reconciled with our previous decision, ***State v. Gaulrapp***, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996). Further, because the court of appeals does not have the power to overrule or modify its own published opinions, ***Gaulrapp*** is controlling. Under ***Gaulrapp***, the arresting officer did not "seize" Arneson when he asked for consent to search her car, and therefore, he did not violate Arneson's right against unreasonable searches and seizures. We therefore reverse.

Background

¶2 The historical facts in this case are not disputed. After dark on October 22, Deputy Sheriff Daniel Garrigan stopped Brandy Arneson while she was driving on Highway 16. Garrigan approached the driver's side window, identified himself as a deputy sheriff and informed Arneson that he had pulled her over because her passenger side taillight was not functioning. Arneson provided her driver's license upon request and Garrigan returned to his squad car. A few minutes later, Garrigan again approached the driver's side window and asked Arneson to step out of her vehicle. He asked her to stand in between her vehicle and the squad car, and then issued Arneson a five-day written warning to have the taillight fixed. The emergency lights on Garrigan's squad car were activated at this time, as were the lights on Detective Brad Anderson's squad car, who was also at the scene.

¶3 After issuing the warning, Garrison asked Arneson if she had any "weapons, contraband, drugs, alcohol" or "anything that's illegal" in her car.

Arneson said, "No." Garrison then asked Arneson for consent to search the vehicle and she stated he could. He found a pipe that he believed was used for smoking marijuana, which contained a green leafy substance. Garrigan also found a film canister containing the same substance, and rolling papers.

¶4 The State charged Arneson with possessing a controlled substance under WIS. STAT. § 961.41(3g)(e), and possessing drug paraphernalia under WIS. STAT. § 961.573. Arneson moved to suppress the evidence obtained by searching her vehicle, arguing that the search violated her right against unreasonable searches and seizures under the Fourth Amendment of the U.S. Constitution and article I, § 11 of the Wisconsin Constitution. After a hearing, the circuit court granted the motion to suppress. The court concluded that although "the initial question asked of Ms. Arneson as to whether there was any illegal activity within the car was appropriate, once Ms. Arneson entered a denial, without any further suspicion, the detainer became improper." The State appeals.

Opinion

¶5 Both the Fourth Amendment to the United States Constitution and article I, § 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. Whether a stop constituted an unreasonable seizure is a question of law that we review de novo. *See* ***State v. Stankus***, 220 Wis. 2d 232, 238, 582 N.W.2d 468 (Ct. App. 1998).

¶6 Arneson does not dispute that Officer Garrison had a lawful basis to stop her. Rather, she argues that Garrison unreasonably detained her when he continued asking her questions even after he issued a written warning. We agree with Arneson that the lawful basis for the stop ended when the warning was issued and Garrison was no longer entitled to detain her. *See* ***Florida v. Royer***, 460 U.S.

491, 494-500 (1983) ("[A suspect] may not be detained even momentarily without reasonable objective grounds for doing so … [A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."). The purpose of the stop related to Arneson's broken taillight and this purpose was effectuated when the officer gave her the written warning. Further, the State does not allege, nor is there any evidence that Garrison had a reasonable suspicion that Arneson had any illegal items in her car. The issue is whether Arneson was still being detained while being questioned by Garrison, or, more precisely, whether she was still "seized" within the meaning of the Fourth Amendment. If not, then there was no Fourth Amendment violation.

¶7 An officer is not required to inform a suspect that he or she is free to leave upon the conclusion of a lawful stop. ***Ohio v. Robinette***, 519 U.S. 33, 39 (1996); ***State v. Gaulrapp***, 207 Wis. 2d 600, 607-08, 558 N.W.2d 696 (Ct. App. 1996). The test used to determine whether a person is being seized is whether in view of all the circumstances surrounding the incident, a reasonable person would have believed he or she was free to leave. ***State v. Griffith***, 2000 WI 72, ¶39, 236 Wis. 2d 48, 613 N.W.2d 72. In her concurring opinion in ***Robinette***, Justice Ginsburg noted the view that *all* questioning by a police officer at the conclusion of a stop could communicate the message to a reasonable person that he or she was not free:

> "The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred ….
>
> ....
>
> "Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most

> citizens, and a reasonable person would not feel free to walk away as the officer continues to address him."

519 U.S. at 41 (GINSBURG, J., concurring) (quoting ***State v. Robinette***, 653 N.E.2d 695, 698-99) (Ohio 1996).

¶8 Although we agree that this view has merit, as Justice Ginsburg recognized, the Supreme Court has repeatedly declined to hold that all questioning of citizens by police officers constitutes a seizure. *See* ***Florida v. Bostick***, 501 U.S. 429, 434 (1991). Justice Ginsburg emphasized that state courts are free under their own constitutions to impose greater restrictions on the police than the federal constitution requires. ***Robinette***, 519 U.S. at 42 (GINSBURG, J., concurring). But the Wisconsin Supreme Court has declined to do so. *See* ***Griffith***, 2000 WI 72, at ¶53 ("[A]ny time that a police officer requests information from an individual, the individual is likely to feel some pressure to respond. Nonetheless, an officer's mere posing of a question does not constitute a 'seizure.'") Even in the absence of reasonable suspicion, "police may ask questions, request identification, and ask for consent to search, 'as long as the police do not convey a message that compliance with their requests is required.'" ***Id.*** at ¶39 (quoting ***Bostick***, 501 U.S. at 434-35 (1991)).

¶9 In arguing that a reasonable person would not have believed he or she was free to leave, Arneson relies on ***State v. Williams***, 2001 WI 249, __Wis. 2d__, 635 N.W.2d 869. In ***Williams***, police officers stopped Williams for speeding while driving on Interstate 94 at 2:30 a.m. ***Id.*** at ¶2. After several minutes a second squad car arrived with its emergency lights on. ***Id.*** at ¶3. An officer told Williams to exit the car and to move to the car's rear. ***Id.*** at ¶4. The officer issued Williams a warning for speeding. ***Id.*** at ¶4. The officer then told Williams, "We'll let you get on your way then. Take care. We'll see ya." ***Id.*** at

¶5. Immediately after, however, the officer asked, "Hey Lawrence, there's no guns in the car is there?" Williams replied there was not. The officer then asked if there were any knives, drugs, or large amounts of money in the car. ***Id.*** at ¶6. Williams again said, "No." ***Id.*** Finally, the officer asked, "May I search your car to be sure any of those items I mentioned are not in there?" ***Id.*** Williams said he could. The officer searched Williams's car and found a gun and heroin. ***Id.*** at ¶7.

¶10 Williams moved to suppress the evidence found in his car. ***Id.*** at ¶¶7-8. The circuit court granted his motion. ***Id.*** at ¶8. We affirmed, concluding that "a reasonable person in Williams' position would have believed that he or she was not free to ignore Fetherson's questioning and to leave." ***Id.*** at ¶14. We further explained, "Our holding is not based on any one factor. We are persuaded by the totality of circumstances: time of night; isolated and rural location; standing outside the vehicle; flashing emergency lights; initial detention; questions starting almost immediately after the initial detention; tone, volume and nature of the questions; and presence and stance of the second law enforcement officer." ***Id.*** at ¶19.

¶11 The facts in ***Williams*** are almost identical to those in the present case. Arneson was stopped at night and was asked to step out of the vehicle. The squad cars' emergency lights were flashing and the deputy sheriff was in full uniform. And like ***Williams***, the officer began his questioning almost immediately after issuing the warning. Although the tone and volume of Garrigan's voice is not part of the record, we believe it would be safe to assume that, like the officer in ***Williams***, it was "civil but commanding." ***Id.*** at ¶6. Even without this factor, ***Williams*** cannot be rationally distinguished on a principled basis from the case at hand.

¶12 The State does not attempt to distinguish ***Williams*** or explain why its holding should not apply here. In fact, the State failed to file a reply brief. Generally, we view a failure to refute a proposition as a concession of its correctness. ***Charolais Breeding Ranches, Ltd FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). And we considered stopping here for that reason, and affirming the circuit court's order. But we cannot in good conscience follow ***Williams*** because we are unable to reconcile it with our previous decision in ***State v. Gaulrapp***, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996).

¶13 In ***Gaulrapp***, the defendant was stopped by the police because he had "a loud muffler that was almost dragging on the roadway." ***Id.*** at 603. When the officer approached Gaulrapp's vehicle, Gaulrapp told the officer that he knew his muffler was loud. ***Id.*** The officer asked Gaulrapp where he was coming from and Gaulrapp said he was coming from a landscaping job. ***Id.*** The officer then asked Gaulrapp if he had any drugs or weapons in his car and Gaulrapp said, "No." ***Id.*** Next, the officer asked Gaulrapp if she could search his vehicle and he said she could. ***Id.*** The officer found a white powdery substance that she believed to be cocaine and a bag of what she thought was marijuana. ***Id.*** at 603-04.

¶14 The circuit court denied Gaulrapp's motion to suppress this evidence. ***Id.*** at 604. On appeal, Gaulrapp argued that police violated his Fourth Amendment rights "by asking him about drugs and weapons and for permission to search his person and vehicle." ***Id.*** at 606. Relying on ***Robinette***, we rejected Gaulrapp's argument that the officer was required to tell him that he was free to leave after being questioned about the muffler and instead concluded that "we must consider all the circumstances in deciding whether Gaulrapp freely and voluntarily consented to the search." ***Id.*** at 607-08.

¶15 In concluding that Gaulrapp did give his voluntary consent, we again relied on ***Robinette***. We said:

> The Court in ***Robinette*** did not expressly decide whether the asking of this question [whether the driver had anything illegal in his car] and asking permission to search violated the Fourth Amendment. However, we have difficulty in reconciling its conclusion—that Robinette's consent to search, if voluntary based on all the circumstances, is valid —with Gaulrapp's proposition that the consent is invalid solely because the officers could not legally ask to search in the first place.

Gaulrapp, 207 Wis. 2d at 608. ***Gaulrapp*** thus concluded that officers were entitled to ask drivers during a stop if they had illegal items in their car and if they could search the vehicle, *even if* there was no reason to suspect that anything illegal would be found. ***Id.*** at 609. Further, a driver's consent to such a search can be voluntary.

¶16 ***Gaulrapp*** did not consider many of the factors addressed in ***Williams***. For instance, ***Gaulrapp*** did not consider the time of day the stop took place, whether emergency lights were on, the presence or stature of the officer, whether the driver was standing outside the vehicle, or whether the officer used "a civil but commanding" voice. Rather ***Gaulrapp*** noted that:

> the detention was of a short duration and the request to search was made within a reasonable time. The court found that Gaulrapp was not under the influence of intoxicants, he appeared to understand the requests, no handcuffs were used, no threats or promises were made, he did not object at any time during the search of his person or vehicle, and the scope of the searches did not exceed the consent.

Id. at 607. The reason, therefore, that ***Gaulrapp*** did not consider the same factors as ***Williams*** is most likely that the court did not consider them to be important. A great many stops occur at night, in rural settings, with emergency lights on, where

the driver is asked to step outside the vehicle, and where a fully uniformed officer uses a commanding voice. As ***Gaulrapp*** suggests, these factors do not necessarily make a driver's consent to search any less voluntary. In both ***Williams*** and the case before us, a consideration of the factors listed in ***Gaulrapp*** would indicate that the driver's consent was voluntary: both stops were of a short duration, no handcuffs or other force were used, no threats or promises were made, and there was no indication that either Williams or Arneson did not understand the request. Further, neither party objected during the search. *See also* ***State v. Stankus***, 220 Wis. 2d 232, 241, 582 N.W.2d 468 (Ct. App. 1998) (concluding that consent was voluntary because stop was not unreasonably long, officers' weapons were not drawn, and officers had not made any promises or threats or subjected driver to "repeated intimidating questions").

¶17 We do not believe that the facts of either this case or ***Williams*** can be reasonably distinguished from those in ***Gaulrapp***. In fact, ***Williams*** did not attempt to distinguish or even mention ***Gaulrapp***, although the State relied on ***Gaulrapp*** for support in its brief. *See* Brief for the State of Wisconsin, at 15 n.3 in ***State v. Williams.*** Arneson, however, argues that ***Gaulrapp*** can be distinguished because the officer in ***Gaulrapp*** questioned the defendant "about drugs and weapons without having first issued him a citation or a written warning." Arneson is correct that the questioning in ***Gaulrapp*** occurred *during* the stop while her questioning and the questioning in ***Williams*** occurred *after* the stop had concluded. But this is a distinction of no significance. The ultimate question in either case is whether a reasonable person would feel free to decline to answer the question. This is shown by the fact that ***Gaulrapp*** relied on ***Robinette***, even though ***Robinette*** involved questioning after the stop rather than during it. If anything, a driver would feel *more* pressure to answer a question in the midst of a

detention than immediately after one. Regardless, there is no reason to believe that Arneson or Williams should have felt any more obligated to consent to a search than did Gaulrapp.

¶18 Arneson points to no other distinctions between ***Gaulrapp*** and ***Arneson*** and we cannot perceive any. We therefore conclude that the only difference between ***Gaulrapp*** and ***Williams*** is that the police questioning in ***Gaulrapp*** occurred during a stop while the questioning in ***Williams*** occurred after the stop terminated. Although we would much prefer to distinguish ***Williams*** from ***Gaulrapp***, there is no rational principle justifying a different result in the two cases. *See* ***Garfoot v. Fireman's Fund, Ins. Co.***, 228 Wis. 2d 707, 723, 599 N.W.2d 411 (Ct. App. 1994) ("[W]hen we are presented with a published decision of our court that arguably overrules, modifies, or withdraws language from a prior published decision of this court, we must first attempt to harmonize the two cases. That is, if there is a *reasonable* reading of the two cases that avoids the second case overruling, modifying or withdrawing language from the first, that is the reading we must adopt."). (Emphasis added.) We therefore reluctantly conclude that ***Williams*** has, without directly saying so, overruled ***Gaulrapp***. But under Wisconsin precedent, this is not possible.

¶19 In ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997), the supreme court held that the court of appeals lacks the "power" to overrule, modify or withdraw language from a published opinion of the court of appeals. The "power" of a court to hear and decide a particular case or controversy has been described as its subject matter jurisdiction. ***In Interest of A.E.H.***, 161 Wis. 2d 277, 297, 468 N.W.2d 190 (1991). When a court acts in excess of its jurisdiction, its orders or judgments are void. ***Kohler Co. v. ILHR***, 81 Wis. 2d 11, 25, 259 N.W.2d 695 (1977). Thus, because we had no power to overrule

Gaulrapp when deciding ***Williams***, when we did so, we acted in excess of our jurisdiction.

¶20 We have had to face this unpleasant situation before. In ***State v. Kuehl***, 199 Wis. 2d 143, 149, 545 N.W.2d 840 (Ct. App. 1995), we concluded that ***State v. Jackson***, 187 Wis. 2d 431, 523 N.W.2d 126 (Ct. App. 1994), and ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), came to opposing conclusions on an issue. We determined that when this occurred, the court of appeals was free to follow the decision it concluded was correct. While this decision solved the problem in ***Kuehl***, it provided little guidance for litigants in future cases in which court of appeals published opinions conflicted. More importantly, ***Kuehl*** was decided before ***Cook***. ***Kuehl***'s holding is therefore altered by the holding in ***Cook***, which explicitly holds that we may not overrule, modify or withdraw language from a published court of appeals opinion. It is beyond question that if a supreme court opinion and a court of appeals opinion conflict, that we are to follow the supreme court opinion. ***State v. Veach***, 2001 WI App 143, ¶27, 246 Wis. 2d 395, 630 N.W.2d 256. Thus, though at one time we could follow ***Kuehl***'s "pick the one you like" method of solving conflicts between court of appeals opinions, we conclude that ***Cook*** precludes us from doing so now.

¶21 Regardless whether ***Williams*** is the better rule, we must follow ***Gaulrapp***.[2] If ***Gaulrapp*** is to be overruled, it is the supreme court, and not the

[2] We recognize that there are reasons why ***Williams*** may have been reluctant to follow ***Gaulrapp***. First, ***Gaulrapp*** appears to conflate the issue of whether a person is being seized with whether a seizure has been unreasonably extended. *Compare* 207 Wis. 2d at 602 ("We conclude that the police did not illegally extend the detention") *with* 207 Wis. 2d at 607 ("[W]e must reject Gaulrapp's argument that the officers had to tell ***Gaulrapp*** he was free to leave after they questioned him about the muffler.") However, those issues require separate analyses. *Compare* ***Florida v. Bostick***, 501 U.S. 429, 437 (1991) *with* ***Florida v. Royer***, 461 U.S. 491, 500 (1983).

(continued)

court of appeals, that must do so. Under ***Gaulrapp***, Arneson's consent to search her car was voluntary, and therefore, the evidence found there should not have been suppressed. Accordingly, we reverse the circuit court's order.

By the Court.—Order reversed.

Not recommended for publication in the official reports. *See* WIS. STAT. § 809.23(1)(b)4.

Second, other cases decided after ***Gaulrapp*** have appeared to depart from its holding. *See, e.g.,* ***State v. Gammons***, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623 (concluding that driver's consent to search car was not voluntary when driver had refused consent once before); ***State v. Betow***, 226 Wis. 2d 90, 98, 593 N.W.2d 499 (Ct. App. 1999) (concluding that officer did not have reasonable suspicion to ask drug-related questions and therefore, because questions were not related to initial justification for stop, officer could not ask them).

Third, ***Gaulrapp*** may have interpreted the Supreme Court's decision in ***Robinette I*** too broadly. ***Robinette I*** concluded only that consent given to search a vehicle after the conclusion of a stop is not per se involuntary when the officer has failed to inform the driver that he or she was free to decline to answer and leave. 519 U.S. at 35. ***Robinette I***, however, did not address the issue of whether a reasonable person questioned during a stop would generally feel free to disregard an officer's question. Common sense tells us that most persons would not. If this is correct, then police officers would be limited to asking questions that are "reasonably related in scope to the circumstances which justified the interference in the first place." ***Terry v. Ohio***, 392 U.S. 1, 20 (1968). *See also* ***Florida v. Royer***, 460 U.S. 491, 500 ("The scope of the detention must be carefully tailored to its underlying justification."). This would not include questions regarding weapons or contraband during a routine traffic stop.

Similarly, common sense also tells us that a reasonable person would generally not feel free to disregard an officer's question and leave when the officer's question immediately follows the conclusion of the stop. This was emphasized by the Ohio Supreme Court in ***State v. Robinette***, 685 N.E.2d 762 (Ohio 1997) (***Robinette II***), on remand from the Supreme Court. In concluding that a reasonable person in Robinette's situation would not have felt free to leave, the court noted that there was an "immediate transition" from giving Robinette the warning for speeding into questioning regarding contraband. Under the rationale of ***Robinette II***, both Williams and Arneson would have been "seized" within the meaning of the Fourth Amendment as both were asked for consent to search their vehicles almost instantly after the warnings were issued. But we cannot rely on the reasoning of ***Robinette II***, as it is directly inconsistent with ***Gaulrapp***.