COURT OF APPEALS
DECISION
DATED AND FILED

January 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2283-CR **Cir. Ct. No. 00-CT-900**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEOFFREY CHAPMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed.*

¶1 BROWN, J.[1] Geoffrey Chapman appeals his conviction for operating a vehicle while intoxicated, third offense. He argues that his motion to suppress the evidence of intoxication should have been granted because he was seized without reasonable suspicion. We reject the argument and affirm.

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

¶2 We will recite the applicable law first and then apply the facts in this case to the law. Not all police-citizen encounters constitute a seizure. "Given th[e] diversity in police-citizen contacts, it is apparent that not every such encounter is subject to Fourth Amendment restrictions. The Fourth Amendment comes into play only if the police have made a 'seizure.'" 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 9.3 at 86 (3d ed. 1996). The United States Supreme Court "has repeatedly emphasized that not all personal intercourse between the police and citizens rises to the level of a stop or seizure." ***United States v. Young***, 105 F. 3d 1, 5 (1st Cir. 1997) (citing ***Florida v. Bostick***, 501 U.S. 429, 434 (1991)). Thus, law enforcement "may approach citizens in public spaces and ask them questions without triggering the protections of the Fourth Amendment." ***Id***. at 6. Police officers are at liberty to address questions to anyone on the streets because police officers, like all other citizens, enjoy the liberty to address questions to others. ***United States v. Mendenhall***, 446 U.S. 544, 553 (1980). "As long as the person to whom 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." ***Id***. at 554.

¶3 It is only when a person justifiably believes that he or she is not free to leave that a seizure occurs and the Fourth Amendment protections ensue. A seizure occurs "when an officer, by means of physical force or show of authority, restrains a person's liberty." ***State v. Kelsey C.R.***, 2001 WI 54, ¶30, 243 Wis. 2d 422, 626 N.W.2d 777 (2001). In order to effect a seizure, an officer must make a show of authority, and the citizen must actually yield to that show of authority. ***Id***.

¶4 Now, we apply the facts to the law. A city of Oshkosh police officer, on routine patrol, observed two individuals seated in a parked car in the

parking lot of a tavern. Ten minutes later, the officer drove past the same location and noticed the two individuals still seated in the car. Prior to this occasion, the police department had received complaints of underage drinking and the consumption of controlled substances in that parking lot. The officer parked across the street and approached the car on foot. The officer's purpose was "[j]ust to see what they were doing sitting in the parking lot." As he approached, the vehicle began backing out of the parking spot. It had backed up about five feet when the officer walked up to the driver's side and knocked on the window. After the officer knocked on the window, the driver, who had been looking over his right shoulder, turned and looked at the officer. He appeared confused and his eyes were bloodshot and appeared to be dazed. He looked at his passenger and then looked back at the officer. He looked back and forth at his passenger and back and forth at the officer a couple of times and said something to his passenger. The officer knocked on the window again and asked him if he could roll down his window. The driver opened the driver's side door just a crack. After he did that, the officer could smell what was obviously marijuana. The driver was identified as Chapman. Further investigation eventually led to a criminal complaint alleging that Chapman was driving while intoxicated, his third such offense. A motion to suppress was denied and Chapman appeals that denial on the same grounds he presented to the trial court.

¶5 Chapman's main theme is that he did not feel free to disobey the officer's directive to roll down his window while his vehicle was in operation. Thus, in Chapman's view, the officer was using his position of authority to require compliance. Chapman asserts that a reasonable person in his position would believe that, had the request not been heeded, the officer "surely would have pursued the vehicle on foot or by squad" because he was not free to leave.

Chapman cites ***Mendenhall*** for the proposition that a seizure occurs if freedom of movement is restrained either by physical force or "by show of authority" where, in light of the circumstances, a reasonable person would believe that he or she was not free to leave. Chapman further contends that there was no reasonable suspicion that he was committing a crime. Therefore, there was no basis to even approach the vehicle.

¶6 We agree that there was no reasonable suspicion, based on specific and articulable facts, or any reasonable inferences deriving therefrom, that Chapman was committing a crime. We further agree that the officer was acting on a hunch. Thus, the officer's actions in stopping his squad across the street and approaching Chapman's vehicle would not pass muster as a ***Terry***[2] stop.

¶7 But the legality of the officer's actions here does not rest on a ***Terry*** stop. The officer, just like any citizen, has a right to walk up to an occupied, parked vehicle. ***Mendenhall*** so teaches. The officer, just like any citizen, has the right to rap on a window and ask the occupant to roll down his or her window. The occupant is under no duty to roll down the window to talk to a citizen. The question is whether the occupant would feel that if a uniformed officer made the request rather than a citizen, would the officer's uniform present such a show of authority that the occupant would feel he or she was not free to refuse the request.

¶8 ***Mendenhall*** provides some guidance. That court sanctioned what it referred to as "inoffensive contact." ***Mendenhall***, 446 U.S. at 555. The plurality of that court gave examples of circumstances that might indicate a seizure even where the person did not attempt to leave. Those examples would be: the

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

threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen, or use of language or tone of voice indicating that compliance with the officer's request might be compelled. ***Id.*** at 554. Absent such evidence, an otherwise inoffensive contact between a member of the public and police cannot, as a matter of law, amount to a seizure of that person. ***Id***. at 555.

¶9 None of these circumstances are present here. The officer did not draw his gun. His squad lights were not in operation. There is no showing that he raised his voice. There is no evidence that he physically attempted to impede the progress of the automobile. There was no evidence that the officer "commanded" Chapman to roll down his window. In fact, Chapman did not roll down his window. Instead, he opened his car door just a crack. Consequently, there was no show of authority causing Chapman to roll down his window. And his action in opening his car door was not pursuant to a show of authority either. Thus, there was no seizure within the meaning of Fourth Amendment jurisprudence.

¶10 Since the officer had the right to be where he was when the car door was opened, he had the right to take action once he smelled marijuana coming from the car. This, coupled with the dazed look of Chapman, gave the officer reasonable suspicion to act further in the belief that a crime was in the process of being committed or had just been committed.

¶11 We affirm the trial court's denial of the suppression motion. Accordingly, the judgment for operating while intoxicated stands as is.

By the Court.—Judgment affirmed.

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