

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 21, 2002

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. 01-2367-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01-CT-596

**IN COURT OF APPEALS
DISTRICT IV**

**STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER B. COOK,

DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Dane County:
STEVEN D. EBERT, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Christopher B. Cook appeals a judgment of the circuit court finding him guilty of operating a motor vehicle while intoxicated,

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.

second offense. More specifically, Cook contends the court erred in denying his motion to suppress evidence, which he alleged was the result of an illegal stop. For the following reasons, we affirm.

Background

¶2 In reviewing an order suppressing evidence, we will uphold a circuit court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *State v. Richardson*, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). Furthermore, this court will follow its normal practice of assuming facts, reasonably inferable from the record, in a manner that supports the circuit court's decision. *See State v. Wilks*, 117 Wis. 2d 495, 503, 345 N.W.2d 498 (Ct. App.), *aff'd*, 121 Wis. 2d 93, 358 N.W.2d 273 (1984).

¶3 It is apparent from the court's order denying Cook's motion to suppress that the court found credible the testimony of Officer Brian Pitt, the sole testifying witness at the suppression hearing. That testimony is as follows.

¶4 On February 22, 2001, at 2:05 a.m., Officer Pitt was on general patrol duty in the City of Verona. Officer Pitt was traveling southbound on North Main Street when he noticed a vehicle ahead of him, a bluish-gray Ford sport utility vehicle, turn westbound onto West Harriet Street. Officer Pitt testified that he continued southbound on North Main Street and then turned westbound onto West Verona Avenue. At that time, Officer Pitt noticed the same bluish-gray vehicle in front of him again. The vehicle immediately turned northbound onto North Marietta Street.

¶5 Officer Pitt testified he thought it odd that the vehicle would exit a neighborhood onto West Verona Avenue and immediately turn back into the same

neighborhood. Officer Pitt believed that the driver of the vehicle was either lost or trying to avoid the police. Officer Pitt turned northbound at the next street, into the same neighborhood as the vehicle had entered. Because Officer Pitt could not locate the vehicle, he radioed his partner and described the vehicle to him. Shortly thereafter, Officer Pitt's partner located the vehicle and told Officer Pitt where to find it. As Officer Pitt was traveling westbound on Plymton Street, he passed the vehicle traveling eastbound.

¶6 Officer Pitt testified that he made a U-turn to follow the vehicle. At that time, the driver of the vehicle pulled into a residential driveway. As Officer Pitt neared the vehicle, he noticed that the lights were still on and the motor was running. Officer Pitt decided to make contact with the driver. He pulled his squad car to the side of the street opposite the vehicle and parked.

¶7 Officer Pitt testified that he did not activate his lights or siren. As Officer Pitt approached the vehicle on foot, the driver turned the car off and exited. At that point, the officer introduced himself as Officer Brian Pitt of the Verona Police Department. Officer Pitt testified that he told the driver he had seen his vehicle driving back and forth through the residential neighborhood and he (Officer Pitt) wanted to make sure everything was all right. The driver responded that everything was fine and he was out looking at houses, pointing out a "For Sale" sign in the front yard of the house at which they were stopped. The driver also indicated that he lived a few houses away on a nearby street.

¶8 Officer Pitt testified that as he was speaking with the driver, he noticed an odor of intoxicants. Officer Pitt also noticed that the driver was swaying back and forth slightly and that his eyes were bloodshot and glassy. Officer Pitt asked the driver if he had anything to drink that evening and the driver

responded that he had drunk two beers. Officer Pitt asked the driver for his license and identified him as Cook.

¶9 Officer Pitt testified that based on the odor of intoxicants, the swaying, and the bloodshot and glassy eyes, he asked Cook to perform field sobriety tests. Officer Pitt ultimately issued Cook two citations, one for operating a motor vehicle while intoxicated, second offense, contrary to WIS. STAT. § 346.63(1)(a), and the other for operating with a prohibited blood alcohol content, contrary to § 346.63(1)(b).

¶10 On cross-examination, Officer Pitt acknowledged that he never saw Cook traveling on the same road twice, nor commit any traffic violations. Officer Pitt also testified that he had on his full uniform, he stood approximately five feet from Cook when speaking with him, and he did not have his hand on his weapon. Officer Pitt stated that he would have been suspicious if Cook said he did not want to talk and that he was leaving; however, Officer Pitt admitted that until he noticed the odor of intoxicants, the swaying, and the bloodshot and glassy eyes, he did not have a reason to hold Cook in custody or detain him.

Discussion

¶11 On appeal, Cook argues that a constitutional seizure occurred at the moment that Officer Pitt made contact with Cook and, at that time, Officer Pitt did not have reasonable suspicion to stop Cook. We agree with the State's analysis, however, and conclude that a seizure did not occur at the moment of contact.

Thus, we need not address Cook’s argument that Officer Pitt did not have reasonable suspicion.²

¶12 Pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), a police officer may temporarily detain a person for the purpose of investigating possible criminal activity even though there is no probable cause to arrest. *See id.* at 22. Such “seizures” are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime. *Florida v. Royer*, 460 U.S. 491, 498 (1983).

¶13 Not every encounter between a police officer and a citizen amounts to a constitutional seizure, however. In *Royer*, the Supreme Court noted that “law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place [and] asking him if he is willing to answer some questions.” *Id.* at 497. “If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.” *Id.* at 498.

¶14 The purpose of the Fourth Amendment is “to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.” *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976). Thus, a person is “seized” within the meaning of the Fourth Amendment only if, in light of the totality of the circumstances, “a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall*, 446

² Cook does not argue on appeal that Officer Pitt had no reasonable suspicion to detain him for field sobriety tests once Officer Pitt noticed the odor of intoxicants, the swaying, and the bloodshot and glassy eyes. Accordingly, we address only whether Officer Pitt seized Cook upon contact.

U.S. 544, 554 (1980). The Supreme Court has suggested that this entails some “physical force or a show of authority,” designed to restrain an individual’s freedom of movement. *Id.* at 553. The Court further suggested:

Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.

Id. at 554. Additionally, the Court has stated that the fact that a police officer identifies himself as such, by itself, does not convert the encounter into a seizure. *Royer*, 460 U.S. at 497.

¶15 Here, Officer Pitt testified that he parked on the opposite side of the street. As such, he was not in any way blocking Cook’s exit from the driveway. He did not use a siren or emergency lights to force Cook to stop; rather, Cook stopped in the driveway before Officer Pitt approached him on foot. Officer Pitt identified himself and merely asked Cook if everything was all right. Nothing in the language used by Officer Pitt would have suggested to Cook that Cook was not free to leave or to refuse to speak with the officer. Finally, Officer Pitt was the only officer on the scene, he stood five feet from Cook, and he did not display a weapon or in any way touch Cook.

¶16 In light of the totality of the circumstances, we cannot conclude that a reasonable person would have believed that he was not free to leave when Officer Pitt initially contacted Cook. Thus, it was not necessary that Officer Pitt have reasonable suspicion to believe that Cook had committed or was about to commit a crime before making contact. We conclude that the circuit court

properly denied Cook's motion to suppress and, accordingly, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

