COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1544 **Cir. Ct. No. 01-TR-895N**

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

IN THE MATTER OF THE REFUSAL OF LOU ANN DISCH:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LOU ANN DISCH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Lou Ann Disch appeals an order of the circuit court revoking her driver's license for failure to submit to a test for intoxication.

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

Disch argues that the arresting officer lacked reasonable suspicion to conduct an investigatory stop. We disagree and affirm the order of the circuit court.

Background

¶2 The parties stipulated to the following facts obtained from the arresting officer's deposition regarding the events occurring at approximately 2:00 a.m. on April 6, 2001. The officer, in a marked police car, observed Disch's vehicle stopped in the road in the traffic lane. The vehicle was facing west in front of an auto garage and a private residence on the north side of the street with no other traffic around. The residence was located immediately to the west of the auto garage, and had a driveway adjacent to the west side of the residence. The officer drove toward the vehicle, reaching a stop sign about a half block away from the vehicle. At that time, the vehicle drove forward in a normal fashion. The vehicle drove around the block and returned to the same area it had stopped previously, stopping this time for "several seconds." The officer also circled, but traveled an additional block west, taking the officer on a longer route and out of eyesight of the vehicle for a time, before the officer returned to observe the vehicle from a street intersecting the street where the vehicle was stopped. The vehicle then pulled into the driveway adjacent to the residence and turned its lights off.

¶3 The officer pulled up to the curb in front of the residence, radioed dispatch, exited his squad car, and walked up to the driver's side of the vehicle while Disch remained in her vehicle. The driver's side window was rolled up. In response to the officer "knocking or somehow indicating that [the officer] wanted [Disch] to roll the window down," Disch lowered the window. The officer noticed a strong odor of alcohol coming from the driver's breath and identified the driver as Disch. Disch's speech was slurred, her eyes were glassy, and she had an open

can of beer in the car. Disch failed several field sobriety tests and was arrested for operating a motor vehicle while under the influence of an intoxicant. Disch refused to take a breath test for intoxication.

¶4 Disch filed a motion to dismiss, alleging that the officer did not have reasonable suspicion to detain her. It is apparent from the circuit court's comments that it concluded there was reasonable suspicion Disch was planning to commit a burglary or theft. The court entered an order of revocation based on Disch's refusal to submit to a test for intoxication.

Argument

¶5 The parties disagree on (1) whether the officer seized Disch, and (2) whether the officer had reasonable suspicion justifying the temporary investigative seizure. "When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. However, the application of constitutional principles to the facts is a question of law we decide without deference to the circuit court's decision." ***State v. Fields***, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279 (citations omitted).

I. Whether There was a Seizure

¶6 The State argues that the officer did not seize Disch when the officer indicated that Disch should roll down her window. We disagree. "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 ....'" ***State v. Williams***, 2002 WI 94, ¶20, 255 Wis. 2d 1, 646 N.W.2d 834 (quoting ***United States v. Mendenhall***, 446 U.S.

544, 552 (1980)) (citations omitted). "The test is an objective one, focusing not on whether the defendant himself felt free to leave but whether a reasonable person, under all the circumstances, would have felt free to leave." ***Williams***, 2002 WI 94 at ¶23. The ***Mendenhall*** Court explained the test:

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment 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. 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. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Mendenhall, 446 U.S. at 554-55 (citations and footnote omitted).

¶7 The State argues that no seizure occurred because the officer made no show of authority, used no force, and did not restrain Disch's freedom of movement and, therefore, a reasonable person would have felt free to leave. The State contends that Disch voluntarily stopped her vehicle in a public place, and the officer had the right to ask innocuous questions regarding her presence there.

¶8 The State suggests that this situation is similar to that where an officer patrolling on foot simply walks up to a vehicle to ask a question or chat. However, it is not the approach or the innocuous question that represents the seizure in this case. Rather, it is the officer's actions indicating that Disch should comply with his directive to roll down her window and speak with him. Had the officer requested Disch's compliance in the form of a question, depending on the circumstances there may have been no seizure.

¶9 A subtle but important distinction must be made. The stipulated testimony states that Disch responded by rolling down her window when the officer "knock[ed] or somehow indicat[ed] that [the officer] wanted her to roll the window down." In the absence of clarification, we must assume this is a statement that the officer directed Disch to roll down her window, rather than asking her if she would do so. We might not view a *request* under these circumstances to be a seizure. However, when a uniformed officer approaches a car at night and directs the driver to roll down his or her car window, we do not think the driver would feel free to ignore the officer. This may not have been a very intrusive seizure, but it was a seizure nonetheless.

II. Whether There was Reasonable Suspicion

¶10 A law enforcement officer may lawfully conduct an investigatory stop if, based upon the officer's experience, he or she reasonably suspects "'that criminal activity may be afoot.'" ***State v. Williams***, 2001 WI 21, ¶21, 241 Wis. 2d 631, 623 N.W.2d 106 (quoting ***Terry v. Ohio***, 392 U.S. 1, 30 (1968)). Reasonable suspicion is dependent on whether the officer's suspicion was grounded in specific, articulable facts, and reasonable inferences from those facts, that an individual was committing a crime. ***State v. Waldner***, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996). "The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). An officer is not required to rule out the possibility of innocent behavior. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

¶11 Disch compares this case to ***Waldner***, 206 Wis. 2d 51. In ***Waldner***, at 12:30 a.m., a car drove slowly and stopped at an intersection where there was no stop sign or traffic signal. ***Id***. at 53. The car turned onto a side street and accelerated at a high rate of speed without breaking any traffic laws. ***Id***. The car legally parked on the street and the driver emptied a mixture of liquid and ice from a plastic glass onto the roadway. ***Id***. The driver got out of the car and, when an officer approached the driver and identified himself, the driver began walking away. ***Id***. The ***Waldner*** court concluded that "[t]hese facts gave rise to a reasonable suspicion that something unlawful might well be afoot." ***Id***. at 58. Disch argues that the facts in her case "coalesce to much less" than in ***Waldner***, without explaining how her case differs from ***Waldner***. We believe that ***Waldner*** is an instructive example of how a number of seemingly innocent acts can accumulate into reasonable suspicion.

¶12 Here, Disch stopped in the roadway and drove away when the marked police car approached. There are a number of innocent explanations for Disch's conduct, but one reasonable inference is that Disch left the area in response to the presence of a police car. Once the police car was out of view, Disch returned to her position in front of the garage and the residence, waited several seconds, and pulled into the driveway. Again, a number of inferences could be drawn from Disch's behavior, but one reasonable inference is that Disch did not see the police car, which from testimony and a diagram in evidence was in her "blind spot," and believing the "coast was clear," pulled into the driveway to continue a nefarious activity. After pulling into the driveway, Disch did not exit the vehicle as a visitor might, but remained in her car long enough for the officer to pull up, radio dispatch, and walk to the vehicle. The totality of these circumstances—specifically the late hour, Disch's peculiar driving, her possible

evasion of the police, and the fact that she sat in a parked vehicle in someone's driveway—gave rise to a reasonable suspicion that crime was afoot. We affirm the order of the trial court.

By the Court.—Order affirmed.

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