COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP859-CR **Cir. Ct. No. 2008CF93**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PETER DAVID SEAMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Bayfield County: JOHN P. ANDERSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Peter Seaman appeals from a judgment of conviction for possession of a firearm by a felon, possession of an electric weapon, possession of a switchblade knife, possession of THC, and possession of

drug paraphernalia. Seaman challenges the circuit court's denial of his suppression motion. We affirm.

¶2 On November 27, 2008, Conservation Warden Jill Schartner was driving her squad truck while enforcing hunting laws during gun deer season. Her duties included checking deer hunters to "make sure they are licensed hunters; to make sure people are tagging their deer as required, … meeting the public, speaking with the public, finding out what's going on in the areas and doing general deer gun enforcement."

¶3 After driving a short distance down a forest service road in Bayfield County, Schartner observed a white Dodge pickup traveling approximately five miles per hour. Schartner noticed the driver's side window was down and the occupant was "looking back and forth." Based on twenty years' experience as a warden, these activities led Schartner to believe that the individual was "looking for deer as he drove down the road."

¶4 Seaman did not initially appear to notice Schartner's vehicle behind him, but he eventually pulled into a roadside pull-off area. Schartner had not made any indications to Seaman that he pull over. Schartner noticed that Seaman shifted his truck into park, and she was unsure whether he was simply pulling over to allow her to pass or if he was going to hunt in the area. Schartner stopped her vehicle next to, and slightly behind, Seaman's so that the front of her truck was behind Seaman's driver's side door. Schartner's vehicle did not block Seaman's vehicle in any way.

¶5 Schartner exited her vehicle quickly and approached Seaman's window, which she explained was her standard practice based on safety concerns and the prevalence of loaded guns within reach in hunting areas. She did not

activate the vehicle's emergency lights, place her hand on her weapon, or ask Seaman to turn off his engine or remain in the vehicle. Other than a small black badge pinned to her chest, Schartner's warden uniform was not visible. Over her uniform she was wearing a camouflage jacket, a blaze orange vest, and blaze orange pants.

¶6 After identifying herself as a local conservation warden, Schartner asked Seaman "if he was seeing anything?" Seaman acknowledged that he was hunting but indicated he had not seen any tracks all day. Seaman also explained he was "just getting into muzzleloader hunting." As Schartner walked up to the vehicle, she noticed he was "trying to hide something from [her] view" by pushing his left hand against the driver's side door so Schartner could not see down into that area. Schartner was immediately concerned that Seaman was hiding a weapon in his left hand. As she talked with him, Schartner could see a blue lighter in his left hand, but she did not observe any cigarettes in the vehicle. Based on these observations, Schartner began to suspect that he was attempting to hide marijuana.

¶7 Schartner also noticed Seaman's back tag on his jacket in the passenger seat and asked if she could inspect it. Seaman reached for the jacket while keeping his left arm positioned against the driver's door. Schartner asked, "Can I see your hand, please?" Seaman initially ignored her request and continued to reach for his jacket. Schartner stated, "I need to see your hand, please bring your hand up." As he lifted his arm, Schartner "heard something hard hit the side of the door," that sounded like it fell into the door pocket. Schartner looked into the door pocket and observed a gold and black marijuana pipe. She asked Seaman if he had been smoking marijuana, and he acknowledged that he had. Schartner confiscated the pipe, which was still hot and asked Seaman "for the marijuana that

went along with the pipe." Seaman took two baggies out of the center console, and Schartner contacted the sheriff's department. Schartner was advised that Seaman's driver's license was expired. A deputy arrived and a search of the vehicle produced a taser, a switchblade, and two loaded muzzleloader guns. During that search, dispatch advised that Seaman had a felony conviction on his record.

¶8 Seaman was charged with possession of a firearm by a felon, possession of an electric weapon, possession of a switchblade knife, possession of THC, and possession of drug paraphernalia. Seaman's motion to suppress was denied.

¶9 The court made its determination in two parts. First, the circuit court concluded the initial portion of the encounter, from the point Schartner first observed Seaman's vehicle to the point she approached and began talking with him, was not a seizure within the meaning of the Fourth Amendment. The court stated:

> Here, it's broad daylight. The officer pulled up parallel to the car – a little behind, walked around; walked up to the driver's door; had some incidental contact and questions and – I'm afraid under the present state of the law, those – those probably going to be recognized by – by the higher courts as being not a stop or a seizure at that point, and just incidental police contact.

¶10 Second, the court concluded that a seizure occurred after Schartner approached the vehicle and observed Seaman's behavior. However, the court determined that reasonable suspicion justified the seizure. *See* WIS. STAT. § 968.24 (2007-08); ***Terry v. Ohio***, 392 U.S. 1, 21 (1968).

¶11 Seaman subsequently entered ***Alford*** pleas[1] to the switchblade and taser charges and no contest pleas to the remaining charges. The circuit court withheld sentence and imposed probation. Seaman now appeals.

¶12 On appeal, Seaman challenges the circuit court's first determination regarding the initial encounter with Schartner. He argues it was an improper seizure, tainting the entire encounter and requiring suppression of the evidence. Seaman does not challenge the circuit court's second determination that a valid seizure occurred within the meaning of the Fourth Amendment after Schartner approached the vehicle and observed Seaman's behavior.[2] We therefore will not address the second portion of the court's decision.

¶13 Upon review of the denial of a motion to suppress, we will uphold the circuit court's findings of fact unless they are clearly erroneous. Whether the facts found by the trial court and the undisputed facts satisfy the constitutional requirements of reasonableness presents a question of law that we review de novo. ***State v. Jackson***, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989).

¶14 A seizure within the meaning of the Fourth Amendment "does not occur simply because a police officer approaches an individual and asks a few questions." ***Florida v. Bostick***, 501 U.S. 429, 434 (1991). 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

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

[2] Seaman did not file a reply brief. He therefore concedes the State's argument regarding his lack of a challenge on appeal to the circuit court's second determination. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

believed that he or she was not free to leave. ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980). The test for determining whether a seizure has occurred is "necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." ***Michigan v. Chesternut***, 486 U.S. 567, 573 (1988). The test is an objective one that focuses on whether a reasonable person, under all the circumstances, would have felt free to leave, not whether the defendant himself felt free to go. ***Id.*** at 573-74.

¶15 Schartner's initial contact with Seaman, from the point that she first observed his truck to the point she approached and began talking to him, was not a seizure. Schartner was a warden working deer gun enforcement on public land in the context of deer hunting season. She observed a vehicle traveling at a very slow rate of speed on a rural forest service road, with an occupant who reasonably appeared to be "looking for deer as he drove down the road." After the vehicle pulled off the road, Schartner pulled up next to the vehicle, but did not activate her emergency lights or impede the vehicle's ability to leave. She did not display or make any movement toward a weapon. She did not instruct Seaman to turn off his engine or remain in the vehicle. She did not use intimidating or commanding language, and other than a small badge, she was dressed in standard hunting clothing. Schartner asked about hunting conditions, and Seaman talked about his recent introduction to muzzleloader hunting. In short, her conduct and the impression it objectively conveyed was consistent with that of any warden during the gun deer season initiating a consensual encounter with a citizen.

¶16 Seaman improperly focuses on particular details in isolation to argue otherwise. *See* ***id.*** at 573. For example, Seaman suggests that Schartner engaged in a "prolonged pursuit" of his slow moving vehicle to effectuate a pretextual stop.

He also claims she took advantage of his compliance with road rules requiring him to pull over for faster vehicles, thus giving her the opportunity to approach without appearing to effectuate the stop herself. These suggestions are speculative and unsupported by the record. Seaman also suggests that Schartner should have pulled up behind him instead of stopping next to his vehicle, but he fails to explain why such positioning of the vehicle would have been more benign in the view of a reasonable person. Seaman also fails to explain how Schartner's brisk approach to the vehicle, her questions, the time of day, or the road conditions would indicate to a reasonable person that he was not free to leave under the circumstances.

¶17 The circuit court properly concluded under the totality of the circumstances that Schartner's initial contact with Seaman was not a seizure within the meaning of the Fourth Amendment. Because the initial contact did not implicate the Fourth Amendment, we need not reach Seaman's alternative argument regarding community caretaker analysis.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2007-08).