

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 1, 2011**

A. John Voelker  
Acting 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. 2010AP2838-CR**

**Cir. Ct. No. 2010CF16**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ROBERT JOSEPH ZAKOVEC,**

**DEFENDANT-APPELLANT.**

---

APPEAL from judgments of the circuit court for Douglas County:  
GEORGE L. GLONEK, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Robert Zakovec appeals judgments convicting him of resisting or obstructing an officer and possession of methamphetamine with intent to deliver. Zakovec pled guilty to these offenses after the court denied his motion to suppress evidence. He argues that officer William Lear lacked

reasonable suspicion to stop him, used unreasonable force, and lacked probable cause to arrest him for obstructing an officer, invalidating the search incident to arrest. We reject these arguments and affirm the judgments.

### **BACKGROUND**

¶2 Lear was on duty monitoring the Spur convenience store and gas station when he observed a car pull up between two rows of gas pumps, approximately forty feet from the store. The passenger, later identified as Zakovec, walked into the store with his baseball cap pulled low and his head tilted down, making it appear that he was deliberately trying to conceal his identity. The driver of the car did not exit the car or pull closer to the store. Lear ran the license plate and found that the car was registered to Thomas and Ashley Cerys. Lear then pulled up behind the car and observed the driver on his cell phone and saw Zakovec in the store on his cell phone. Lear suspected that the driver was communicating with Zakovec and the two had possibly changed plans to rob the store when the driver saw Lear. Shortly thereafter, the car left without Zakovec.

¶3 When Zakovec left the store, Lear intercepted him and asked for identification. Zakovec indicated he did not have any. When Lear asked his name, Zakovec only offered his first name, Robert, and when asked for his last name, hesitated before responding, “Uh, Klein.” Because of the hesitation, Lear suspected that Zakovec gave a false identification. Lear asked the dispatcher to look up Klein in the Wisconsin driver records. He then asked Zakovec whether he had anything with his name on it, which Zakovec denied. Lear asked the name of the driver of the car, to which Zakovec again hesitated and answered, “Uh, that was um, Matt.” He indicated he did not know whether Matt’s last name was Batterton or Patterton.

¶4 Lear told Zakovec that it appeared he had been trying to cover his face when walking into the store. Zakovec responded that it was due to the cold, lifted his hands in a helpless gesture and began pacing. Zakovec conceded that it was “totally understandable” that Lear would think Zakovec was attempting to hide his identity. Lear asked Zakovec his age and Zakovec responded, “Uh, twenty-nine, thirty,” explaining that he “just turned thirty,” although he gave a birth date of September 4, 1979, more than four months before this encounter.

¶5 Dispatch responded to Lear’s inquiry, stating that it did not have a Robert Klein on file. Zakovec indicated that he was going to get an identification card in Minnesota, as he had been living there. Noting that Zakovec’s pockets were “bulky” Lear asked what the square-shaped object was in Zakovec’s front pocket. Zakovec told him it was cigarettes and agreed to show Lear, but it took Zakovec ten to fifteen seconds to pull out the pack, suggesting to Lear that Zakovec was manipulating something in his pocket before producing the cigarettes. In the meantime, dispatch ran a check on Minnesota records and came back with a description of Robert Klein at six feet two inches, one hundred eighty-five pounds, born in 1983. That description did not match Zakovec. When confronted with that information, Zakovec “kind of looked like he was resigned to the fact that I [Lear] knew he was lying.”

¶6 Lear then decided it was necessary to detain Zakovec to determine his true identity. Lear said “why don’t you do me a favor” and reached over to grab Zakovec’s arm, intending to escort him to the squad car to further investigate his identity. Zakovec pulled away from Lear who then grabbed Zakovec to keep him from pulling away. Lear told Zakovec to “quit resisting,” but Zakovec continued to resist. At that point, Lear placed Zakovec under arrest for resisting

and obstructing. A subsequent search incident to the arrest recovered drugs that Zakovec was carrying.

### DISCUSSION

¶7 Whether an individual has been seized is a question of constitutional fact. *State v. Williams*, 2002 WI 94, ¶17, 255 Wis. 2d 1, 646 N.W.2d 834. This court must sustain the circuit court's findings of historical and evidentiary fact unless they are clearly erroneous. *Id.* However, we independently review the question of whether a seizure occurred. We also independently review whether the facts available to the officer constituted reasonable suspicion. *State v. Young*, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729.

¶8 The test for whether a seizure has taken place 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 US 567, 573 (1988). A seizure occurs when, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). A seizure occurs 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.

¶9 The seizure of Zakovec did not occur until Lear took hold of Zakovec's arm. Until then, there was no indication or suggestion that Zakovec was not free to leave. The encounter lasted approximately five minutes. Lear did not show force, threaten Zakovec, or tell him that he had to stay. Zakovec's presence was not required for Lear to complete the search for his identity in

Wisconsin and Minnesota. A reasonable person would have believed he or she was free to leave.

¶10 Lear's initial stop and questioning of Zakovec was justified by sufficient articulable facts. Zakovec's apparent attempt to conceal his face, the car stopping forty feet from the door on a cold night, pulling alongside the gas pumps without any attempt to get out of the vehicle and pump gas, the apparent cell phone conversation and the vehicle leaving with Zakovec still in the store made Lear reasonably suspicious. Zakovec's hesitation giving his own name, the fact that the name did not produce matching results in either the Wisconsin or Minnesota databases and Zakovec's statement that he just turned thirty when he provided a date of birth four months before the encounter constituted articulable reasons for Lear to suspect that Zakovec provided a false name. Zakovec's identification of the driver did not match the name of the car's owners. Under the totality of the circumstances, Lear had reasonable suspicion to believe that Zakovec was committing the crime of obstructing an officer by providing a false name. *See* WIS. STAT. § 946.41 (2009-10).

¶11 After Lear grasped Zakovec's arm, a seizure occurred. That seizure was supported by Lear's reasonable belief that Zakovec provided a false name. Lear was not required to eliminate possible innocent inferences that could be drawn from Zakovec's conduct before detaining him. *See Young*, 294 Wis. 2d 1, ¶21.

¶12 Zakovec's argument that Lear lacked justification for the forcefulness and intrusiveness he employed by grasping Zakovec's arm was not the basis for his motion to suppress. Therefore, the issue is not properly preserved for appeal. *See State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

The allegation that evidence was seized in violation of Zakovec's Fourth and Fourteenth Amendment rights was not sufficient to put the State or the circuit court on notice that Zakovec claimed unreasonable force.

¶13 After Zakovec pulled away and resisted Lear to the point that Lear had to threaten to use a taser on him, Lear had probable cause to support Zakovec's arrest for obstruction. Cases cited by Zakovec describe other ways in which a defendant might commit the crimes of resisting or obstructing an officer. The fact that Zakovec's actions do not match the acts committed by other defendants does not support his argument that his acts did not constitute probable cause that he resisted and obstructed Lear.

*By the Court.*—Judgments affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2009-10).

