COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP490 **Cir. Ct. No. 2010TR852**

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

COUNTY OF CALUMET,

PLAINTIFF-RESPONDENT,

V.

DANIEL A. RYAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] Daniel A. Ryan appeals from a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

(OWI), first offense. Ryan contends that he was unlawfully seized on private property without reasonable suspicion or probable cause and, therefore, the circuit court erred in denying his motion to suppress evidence. Based on the totality of the circumstances, we conclude that Ryan was not unlawfully seized prior to his arrest. We uphold the circuit court's denial of Ryan's motion to suppress. We affirm the judgment.

FACTS

¶2 The facts underlying Ryan's conviction for OWI were testified to at a suppression hearing by the two officers involved and Ryan. Calumet County Sheriff's Deputy Daniel Kucharski testified that on August 20, 2010, he was on patrol duty in Calumet County. At approximately 9:40 p.m., Kucharski was dispatched to Fairy Springs Road "for a vehicle in the ditch." The vehicle was approximately a hundred feet from the Shanty Bar, with its nose down into the ditch and the rear of the vehicle at the edge of the roadway in the ditch. There were no occupants in the vehicle and no indication that anyone had been injured. Kucharski ran the license plate information and the owner was listed as Daniel Ryan with an address in Appleton. Kucharski then made contact with the complainant who had reported the vehicle in the ditch. The complainant lived next door to the Shanty Bar. He told Kucharski that approximately fifteen minutes before calling the sheriff's department, he had seen his neighbor stuck in the ditch and trying to get his vehicle out. Kucharski observed that there was "mud spun up" and "tire marks in the ditch" indicating that someone had tried to remove the vehicle from the ditch. When asked by Kucharski, the complainant identified Ryan's house by pointing to the residence next door.

¶3 Kucharski walked to Ryan's house and followed a trail to the back door because the front door did not appear accessible. The front of the property had a dumpster in the driveway and was overgrown with weeds. Kucharski attempted to make contact by knocking on the back door. Shortly after Kucharski began knocking, Officer Kenneth Matuszak arrived on the scene and maintained a position ten feet behind Kucharski. Kucharski knocked "several times" when "[f]inally there was an answer from inside." Kucharski testified that the following exchange took place: "'Mr. Ryan?' 'Yeah.' 'Did you put your car in the ditch?' 'Yeah.' Come on out so we can talk about this.'" After several minutes of "back and forth," Ryan came out of his residence. Ryan testified that he did so voluntarily.

¶4 All parties involved testified that, during the back and forth, there were not any threats or promises made to induce Ryan to leave his residence. Ryan did not object to leaving his residence or indicate that he did not want to come outside. Kucharski testified that there was not much conversation at the back door while Ryan was inside the residence:

> I asked him to come out of the residence several times. He was doing whatever he was doing, whether he was getting dressed or whatever. He came down the hallway. That's the first time that I saw him. It was a short hallway there. He walked to the door and walked right outside. The conversation then was outside.

¶5 After Ryan exited his residence and spoke face-to-face with Kucharski, Kucharski noted that Ryan's speech was slurred, his breath had an odor of intoxicants and his eyes were red and glassy. Ryan followed Kucharski to his vehicle while Matuszak walked behind him. Ryan's vehicle was located in a ditch outside of Ryan's yard, in the town's right-of-way, next to the road. When Ryan and the officers were by the vehicle, Kucharski asked Ryan questions about what

happened throughout the evening and how the vehicle ended up in the ditch. Ryan told Kucharski that he had consumed between eight to ten beers that evening. Kucharski testified that Ryan attempted to drive his car "about a hundred feet" before going into the ditch. Kucharski asked Ryan if he felt intoxicated and Ryan responded that he did not. Kucharski then performed standardized field sobriety testing, followed by a preliminary breath test. After Ryan failed the tests, he was placed under arrest for OWI.

¶6 Ryan filed a motion to suppress all evidence based upon a violation of his Fourth Amendment rights. The circuit court denied Ryan's motion. The circuit court found that the encounter with Kucharski was a voluntary "knock and talk" interview and that Ryan exited his house without any threats from the officers to compel him. *See* ***City of Sheboygan v. Cesar***, 2010 WI App 170, ¶¶9 n.5, 13, 330 Wis. 2d 760, 796 N.W.2d 429 (a consensual "knock and talk" interview at a private residence is not considered a seizure). The circuit court further found that a reasonable person would have understood that he was not obligated to exit his residence and that Ryan voluntarily made his statements to the police before he was placed in custody. Ryan appeals.

DISCUSSION

¶7 The issue on appeal is whether Ryan was unlawfully seized within his home or on his private property and, if so, whether Kucharski possessed the reasonable suspicion and probable cause to justify the seizure. Whether a person has been seized is a question of constitutional fact. ***State v. Young***, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729. Thus, we accept the circuit court's findings of evidentiary or historical fact unless clearly erroneous; however, we determine de novo whether or when a seizure occurred. ***Id.***

¶8 Both the Fourth Amendment of the United States Constitution and article I, § 11, of the Wisconsin Constitution guarantee to all citizens the right to be free from unreasonable searches and seizures. However, not all police-citizen contacts constitute a seizure and, therefore, any analysis as to whether Fourth Amendment protections have been breached must begin with whether a search and seizure occurred. ***Cesar***, 330 Wis. 2d 760, ¶¶11-12. That inquiry involves determining whether an officer, by means of physical force or show of authority, has in some way restrained a citizen's liberty such that a reasonable person would not feel free to leave or terminate the encounter. ***State v. Williams***, 2002 WI 94, ¶¶20, 22, 255 Wis. 2d 1, 646 N.W.2d 834; *see also* ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980) ("only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he [or she] was not free to leave"). "Questioning by law enforcement officers does not alone effectuate a seizure." ***Williams***, 255 Wis. 2d 1, ¶22.

¶9 Here, the circuit court found that one officer knocked on the door and addressed the occupant—shouted or used a loud tone of voice—for four to five minutes. It was "about 10:00 at night," and Ryan was in bed sleeping. Kucharski "merely asked [Ryan] to come out" so they "could talk about the incident, about why the car was in the ditch." The officers did not request to enter and they did not threaten to obtain a warrant. There was no indication that Ryan ever indicated an unwillingness to come out. There was "no record that there were any commands, either express or implicit, made by the officers"; rather, Kucharski "made a request of Mr. Ryan with which he promptly complied." There was no indication that Ryan did not wish to speak to the officers, he did not leave the door and go away; "he came to the door and exited." Based on our review of the record, the circuit court's findings are not clearly erroneous.

¶10 Applying the law to the circuit court's findings of fact, we conclude that Ryan was not unlawfully seized in his home or on his property prior to his arrest for OWI. While Ryan contends that he was seized "at the moment he opened the door and recognized the police officers' presence," Kucharski testified that after a verbal exchange during which he could not see Ryan, Ryan "walked to the door and walked right outside." There is no indication that there was any exchange of words between the moment Ryan opened the door and recognized the police presence and the moment he walked outside.

¶11 Both parties cite to this court's recent decision in ***Cesar*** for guidance as to whether the officers' conduct prior to Ryan's exiting the residence resulted in Ryan being constructively seized within his home or on its curtilage. In ***Cesar***, three officers approached the defendant's home shortly after he was reportedly involved in a hit-and-run accident. ***Cesar***, 330 Wis. 2d 760, ¶¶3-4. Although three officers were on the scene, only two officers were actively attempting to make contact with the defendant by shouting and also knocking on the door and ringing the doorbell numerous times over a five- to ten-minute period. ***Id.***, ¶¶4, 17. The defendant finally came to the window and, when asked to speak with the officers about the accident, the defendant indicated that he was not coming out of his house and that he did not wish to speak to the officers. ***Id.***, ¶5. The defendant pointed to these statements in support of his contention that he was constructively seized within his home. ***Id.***, ¶18. This court disagreed.

¶12 In concluding that the defendant had not been unlawfully seized within his home, the ***Cesar*** court noted that, while the officers knocked persistently at the outset, once they made contact with the defendant, they "informed [him] of his options and requested his cooperation." ***Id.***, ¶17. The court reasoned that "the police were not overly intrusive or coercive in attempting

to gain contact with [the defendant]. We conclude that once informed of his or her options, a reasonable person would have understood that he or she was free to terminate the encounter." ***Id.***, ¶19.

¶13 Relying on ***Cesar***, Ryan suggests that the officer's failure to inform him of his options necessitates a finding that a reasonable person would not feel free to disregard the officer's request or otherwise terminate the encounter. Again, we disagree. The facts of ***Cesar*** are readily distinguished. There, the defendant indicated that he was not willing to exit his residence and that he did not want to talk to the police; here, Ryan never objected or refused to comply with the officer's request nor did he attempt to discontinue the discussion with the police. Once Ryan acknowledged his identity, Kucharski asked Ryan to exit his house to discuss his vehicle; Ryan voluntarily complied and engaged in conversation with Kucharski. In response to questioning by the State, Ryan testified:

> Q. So you went outside voluntarily?
>
> A. Oh, yes, yeah.
>
> Q. [D]id the officers make any threats to you to get you to come out of the house?
>
> A. No.
>
> Q. Did they make any promises to you to get you to come out of the house?
>
> A. No.
>
> Q. Once you came out of the house, they asked you to walk over by the car?
>
> A. Yes.
>
> Q. And did they threaten you in any manner to get you to go over there?
>
> A. No.
>
> ….
>
> Q. Did you understand what the officers were saying? You could understand the discussion?
>
> A. Yes.

Q. Did you ever object and say, no, I don't want to go?

A. No. I figured I didn't have a choice.

Q. Did you ask the officer if you had a choice?

A. No, I didn't ask the officer. When I saw the uniform, I didn't think I had a choice.

Q. So there wasn't anything overtly that the officer did to coerce you into going over there?

A. No.

Q. It was just your perception of the situation?

A. Right.

We see nothing in Ryan's testimony to indicate that his actions were anything but voluntary.[2] As the State points out, "most citizens will respond to a police request, [however] the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." ***Immigration and Naturalization Serv. v. Delgado***, 466 U.S. 210, 216 (1984) (citing ***Schneckloth v. Bustamonte***, 412 U.S. 218, 231-34 (1973)). We conclude, as did the circuit court, that Ryan was not constructively seized prior to his arrest.

CONCLUSION

¶14 Ryan asserts that in determining whether a particular encounter constitutes a seizure "[t]he precise test is to consider the totality of the circumstances, not a factual divide and conquer approach." We agree. We

[2] We reject Ryan's reliance on ***United States v. Jerez***, 108 F.3d 684 (7th Cir. 1997), in support of his contention that the encounter was especially intrusive because he was in a deep sleep when Kucharski began knocking. In reviewing the record, the complainant observed Ryan in his vehicle (trying to get the vehicle out of the ditch), fifteen minutes before calling the police. Kucharski arrived on the scene within five to ten minutes of the dispatch. That Kucharski knocked on Ryan's door and called out to Ryan for four to five minutes is not unreasonable given that only twenty to twenty-five minutes had passed since Ryan was seen trying to get his vehicle out of the ditch. Further, Ryan testified that he understood what the officers were saying and exited his home voluntarily.

conclude under the totality of circumstances that Ryan voluntarily exited his residence, accompanied the officers to his vehicle and answered questions. We therefore uphold the circuit court's denial of his suppression motion and affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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