COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2012

Diane M. Fremgen
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. 2012AP398-CR **Cir. Ct. No. 2011CF379**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL J. MAYEK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Affirmed*.

¶1 MANGERSON, J.[1] Paul Mayek appeals a judgment for third-offense operating while intoxicated. Mayek contends the circuit court should have

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

granted his motion to suppress evidence of intoxication. We conclude that Mayek has failed to produce any evidence that the State acted improperly or violated his rights. *See* ***State v. Jackson***, 229 Wis. 2d 328, 336, 600 N.W.2d 39 (Ct. App. 1999).

¶2 Mayek was observed driving eastbound at 12:52 a.m. on May 20, 2011. Officer Jason Rasmussen, who was the only witness at the suppression hearing, testified that Mayek was driving less than a mile ahead of him on the wrong side of the road.[2] This continued for approximately thirty seconds before Mayek pulled into a private driveway.

¶3 Rasmussen testified that he pulled into the driveway behind Mayek and ran a license plate check. After determining that Mayek's vehicle was not from the area, Rasmussen walked to Mayek's parked vehicle and made contact. Rasmussen ultimately ordered Mayek out of the car for field sobriety testing, which he failed. A preliminary breath test revealed a blood alcohol content of .205. In the subsequent prosecution, the circuit court denied Mayek's motion to suppress evidence of intoxication.

¶4 Whether reasonable suspicion exists to detain an individual is a question of constitutional fact. *See* ***State v. Popke***, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. The circuit court's factual findings will be upheld unless

[2] Mayek argues that he was lawfully driving in the westbound lane pursuant to WIS. STAT. § 346.05(3), which provides, in pertinent part, that any vehicle "proceeding upon a roadway at less than the normal speed of traffic … shall be driven in the right-hand lane then available for traffic … except … when preparing for … a left turn into a private road or driveway…." Because we conclude that Mayek has failed to produce any evidence that the State acted in violation of his rights, we have no need to address whether Mayek's driving, on its own, was sufficiently suspicious to warrant seizure.

they are clearly erroneous. ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). The application of constitutional principles to these historical facts is a question of law that we review de novo. ***Popke***, 317 Wis. 2d 118, ¶10.

¶5 The initial question we must answer is when the seizure occurred. *See* ***Terry v. Ohio***, 392 U.S. 1, 16 (1968). Identifying the moment of seizure is critical because the seizure can be justified only by reference to facts that preceded it. The circuit court appears to have assumed Mayek was seized when Rasmussen pulled in the private driveway behind his vehicle. This assumption warrants closer scrutiny.

¶6 Not all police-citizen encounters are seizures. ***State v. Kelsey C.R.***, 2001 WI 54, ¶30, 243 Wis. 2d 422, 626 N.W.2d 777. "A seizure occurs 'when an officer, by means of physical force or a show of authority, restrains a person's liberty.'" ***Id.*** (quoting ***State v. Harris***, 206 Wis. 2d 243, 253, 557 N.W.2d 245 (1996)); *see also* ***Terry***, 392 U.S. at 16 ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."). "If a reasonable person would have felt free to leave but the person at issue nonetheless remained in police presence, perhaps because of a desire to be cooperative, there is no seizure." ***State v. Young***, 2006 WI 98, ¶37, 294 Wis. 2d 1, 717 N.W.2d 729.

¶7 Applying these principles to the historical facts, it is plain that no seizure occurred until sometime after Rasmussen approached Mayek's vehicle on foot. Rasmussen did not activate his emergency lights or siren, verbally order

Mayek to stop, or display any weapons, nor did Rasmussen testify that the placement of his police cruiser prevented Mayek from leaving the driveway.[3] *See* ***id.***, ¶36 (citing ***Michigan v. Chesternut***, 486 U.S. 567, 575 (1988)); *see also* ***State v. Waldner***, 206 Wis. 2d 51, 61 n.2, 556 N.W.2d 681 (1996) (in assessing defendant's conduct, court emphasized that police officer had not used his flashing lights or siren). Rasmussen stated there was no need for him to do any of these things, as Mayek had already stopped of his own volition.

¶8 Although we have concluded Rasmussen did not seize Mayek until after he approached Mayek's vehicle, it is impossible to tell from Rasmussen's testimony precisely when the seizure occurred. Neither the parties, nor the circuit court, appear to have given serious consideration to the issue. Rasmussen was not questioned about what took place after he approached Mayek's vehicle. This is fatal to Mayek's claim. Although the State has the ultimate burden of proof on suppression issues, the defendant has an obligation to produce some evidence that the State acted illegally and in violation of his or her rights. ***Jackson***, 229 Wis. 2d at 336. Because Mayek has failed to establish facts necessary to address his claim, he has failed to satisfy this burden.

¶9 In any event, we note that the facts described in Rasmussen's police report,[4] if testified to, would have allowed us to determine the point of seizure and reject Mayek's assertion. Rasmussen's report describes what occurred after the

[3] It does not appear either party attempted to examine Rasmussen about his police cruiser's position relative to Mayek's vehicle. Specifically, there was no testimony that Rasmussen prevented Mayek from exiting the driveway or otherwise restricted his ability to maneuver. The circuit court simply determined that Rasmussen "came up behind [Mayek's] vehicle and ran a check."

[4] The police report is attached to the criminal complaint.

license plate check. Rasmussen approached Mayek's vehicle and could see Mayek alone in the truck. Mayek did not acknowledge Rasmussen's presence until Rasmussen knocked on the truck window. Rasmussen identified himself as a police officer and asked why Mayek had pulled into the driveway. Mayek responded, "I have no idea," and was not able to give a valid reason for being in the area. Rasmussen noted Mayek had "glazed eyes, a moderate odor of intoxicants coming from his person[,] and slurred speech." When asked for his license, Mayek handed Rasmussen a Visa card. Mayek said he was borrowing the truck without his mother's permission, and further stated that he was lost and wanted to go home. Mayek admitted to being at a few bars, and dispatch informed Rasmussen that Mayek had multiple convictions for operating while intoxicated. Rasmussen then ordered Mayek out of the vehicle for field sobriety testing, which Mayek failed.

¶10 The order to exit the vehicle was the point of seizure. This was the first "show of authority sufficient to give rise to a belief in a reasonable person that he was not free to leave." *See* ***Young***, 294 Wis. 2d 1, ¶33. By that point, there was ample evidence to believe Mayek had been driving while intoxicated. Rasmussen's conduct before that order did not constitute a seizure; "[i]n the absence of any reasonable, articulable suspicion, police may ask questions, request identification, and ask for consent to search, 'as long as the police do not convey a message that compliance with their requests is required.'" ***State v. Griffith***, 2000 WI 72, ¶39, 236 Wis. 2d 48, 613 N.W.2d 72 (quoting ***Florida v. Bostick***, 501 U.S. 429, 434-35 (1991)). Again, given the absence of testimony on this point, there is no basis to conclude that Rasmussen's overall conduct gave Mayek the impression that he was required to respond to Rasmussen's questioning.

By the Court.—Judgment and order affirmed.

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