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DISTRICT IV

March 6, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2013AP2041-CR State of Wisconsin v. Eric A. Calkins (L.C. #2012CF2694)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Eric A. Calkins appeals a judgment, entered after a guilty plea, convicting him of operating while under the influence of an intoxicant (OWI) as a fourth offense within five years, contrary to WIS. STAT. § 346.63(1)(a) (2011-12).[1] On appeal, Calkins argues that the circuit court erred when it denied his motion to suppress evidence after an evidentiary hearing. Based

[1] All further references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

This case arises from events that took place on February 25, 2012. At approximately 2:30 a.m., a marked Rock County police car was positioned on a road, with lights flashing, blocking the southbound lane. The police had been called to respond to a report of shots fired. Sergeant Karl Weberg testified that he had blocked the southbound lane of traffic with the squad car so that he could preserve, as evidence, shell casings that were on the road.

Calkins, who was driving in the southbound lane, came up to the squad car and stopped behind it. Weberg approached Calkins' vehicle. Weberg testified that he approached Calkins because he did not want Calkins to proceed past that point until all of the evidence had been preserved. Calkins asked Weberg what was going on, and Weberg explained what he was doing. As Weberg was talking with Calkins, he smelled a strong odor of intoxicants coming from Calkins' vehicle. Weberg asked Calkins if he had been drinking, and Calkins admitted that he had been. Weberg then had Calkins get out of the car. Calkins performed field sobriety tests and submitted to a preliminary breath test, which indicated a breath alcohol concentration above the legal limit. Calkins was then placed under arrest for OWI.

Calkins filed a motion to suppress his statements and all other evidence obtained from his interaction with police, which he argued was an unlawful search in violation of his rights under the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution. Calkins also argued that, by blocking the road with a squad car, Rock County police created an illegal "traffic checkpoint," as prohibited under ***City of Indianapolis v. Edmond***, 531 U.S. 32 (2000). The circuit court denied the motion after an evidentiary hearing.

Calkins then pled guilty and was convicted of OWI as a fourth offense within five years. Calkins now appeals, renewing the arguments made in support of his suppression motion.

A person is seized for Fourth Amendment purposes when, considering all of the circumstances, a reasonable person would believe that his or her freedom of movement was restrained, either by physical force or show of authority, and that he or she is not free to leave. ***State v. Washington***, 2005 WI App 123, ¶13, 284 Wis. 2d 456, 700 N.W.2d 305 (citing and quoting ***United States v. Mendenhall***, 446 U.S. 544, 553-54 (1980)). Applying this standard, we agree with the State that Calkins was not seized at the time he stopped his car.

When Calkins observed a squad car blocking the southbound lane of traffic, and when he spoke with Weberg about what was going on, it would have been reasonable for Calkins to believe that he was not free to continue his direction of travel on the road, at least until the police finished collecting evidence. However, a reasonable person in Calkins' position would have understood that he or she could turn around and leave. Nothing in the facts conveyed to Calkins by Weberg suggested that Calkins was being stopped for the purpose of investigating him or that Calkins was not free to leave the scene. All of this was true up until the point when Weberg smelled alcohol and Calkins admitted that he had been drinking. Calkins does not dispute that, after that point, the police were justified in asking him to exit his vehicle and perform field sobriety tests.

We turn next to Calkins' argument that the police maintained an illegal traffic checkpoint for the purpose of stopping every vehicle that came by as part of their investigation of the shots fired. The State asserts that there is no evidence in the record to suggest that Weberg stopped even a single car for the purpose of investigating the shots, or that Weberg asked Calkins any

questions about the shots. Calkins failed to file a reply brief responding to these assertions. A proposition asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). Thus, we take as admitted the State's assertion that Calkins' "traffic checkpoint" argument is unsupported by the record, and we reject the argument on that basis.

IT IS ORDERED that the judgment is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals