OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

June 4, 2019

To:

Hon. Paul J. Lenz
Circuit Court Judge
Eau Claire County Courthouse
721 Oxford Ave.
Eau Claire, WI 54703-5496

Hon. Shaughnessy Murphy
Circuit Court Judge
721 Oxford Ave.
Eau Claire, WI 54703

Susan Schaffer
Clerk of Circuit Court
Eau Claire County Courthouse
721 Oxford Ave., Ste. 2220
Eau Claire, WI 54703-5496

Leonard D. Kachinsky
Kachinsky Law Offices
832 Neff Ct.
Neenah, WI 54956-0310

Gary King
District Attorney
721 Oxford Ave.
Eau Claire, WI 54703

Christine A. Remington
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

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

2018AP415-CR State of Wisconsin v. Kawane A. Weaver (L. C. No. 2015CF1267)

Before Stark, P.J., Hruz and Seidl, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kawane Weaver appeals a judgment, entered upon his no-contest pleas, convicting him of delivering three grams or less of methamphetamine and possession with intent to deliver

between ten and fifty grams of methamphetamine, both counts as a repeater.[1] Weaver also appeals the order denying his motion for postconviction relief. Weaver argues the circuit court erred by denying his pretrial motion to suppress evidence. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Weaver's arguments. Subject to the correction of clerical errors on the judgment, as described herein, we summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21 (2017-18).

The State charged Weaver with six counts of felony bail jumping; two counts of delivery of methamphetamine; one count of possession with intent to deliver methamphetamine; and one count of possession of methamphetamine paraphernalia—all ten counts as a repeater, and the latter four counts as second and subsequent offenses. Weaver moved to suppress evidence seized and statements made following his arrest, asserting there was an insufficient basis for law enforcement to detain and question him.[2] The circuit court denied Weaver's suppression motion after a hearing. Weaver subsequently agreed to enter no-contest pleas to one count of delivery of methamphetamine and one count of possession with intent to deliver methamphetamine, both counts as a repeater. In exchange for his no-contest pleas, the State agreed to move to dismiss and read in the remaining counts in this case, as well as charges in two other Eau Claire County

[1] The judgment of conviction also includes a "second and subsequent offense" penalty enhancer for both counts. The record, however, shows that Weaver pleaded no contest to the crimes without that enhancer. Because the inclusion of this enhancer on the judgment appears to be a clerical error, upon remittitur, the circuit court shall enter an amended judgment of conviction removing the "second and subsequent offense" enhancer for both crimes. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

[2] The two charges of delivery of methamphetamine were based on evidence collected during controlled buys and, therefore, were not part of the suppression motion.

cases. The State also agreed to recommend probation if the presentence investigation recommended probation, and to recommend that any sentence run concurrent with the remainder of Weaver's extended supervision in another Eau Claire County case.

The court imposed a twelve-year sentence on the possession with intent to deliver methamphetamine count, consisting of seven years' initial confinement and five years' extended supervision. The court withheld sentence on the delivery of methamphetamine count and placed Weaver on five years' probation, to run consecutive to the extended supervision on the other count.

Weaver filed a postconviction motion seeking plea withdrawal on the grounds that the State breached the plea agreement and that his trial counsel was ineffective by failing to object to the breach. Weaver alternatively sought resentencing on the same grounds. Weaver also moved the circuit court to reconsider its decision on his pretrial suppression motion. The court denied the motion after a hearing, and this appeal follows.

On appeal, Weaver argues the circuit court erred by denying his suppression motion because there was no reasonable suspicion to stop the vehicle in which Weaver was a passenger.[3] The Fourth Amendment to the United States Constitution protects against unreasonable seizures. ***State v. Young***, 2004 WI App 227, ¶13, 277 Wis. 2d 715, 690 N.W.2d 866. This constitutional provision, however, is not implicated "until a government agent 'seizes' a person." ***County of Grant v. Vogt***, 2014 WI 76, ¶19, 356 Wis. 2d 343, 850 N.W.2d 253. The test for whether a

seizure has occurred is an objective one, looking at the totality of the circumstances, and considering "whether an innocent reasonable person, rather than the specific defendant, would feel free to leave under the circumstances." ***Id.***, ¶¶30, 38. There is no seizure "[u]nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he [or she] was not free to leave." ***Immigration & Naturalization Serv. v. Delgado***, 466 U.S. 210, 216 (1984). When examining the totality of the circumstances, some considerations that may be relevant include whether more than one officer was present, whether the officers displayed their weapons, whether an officer made physical contact with the person, and whether an officer's language or tone suggested that compliance with the officer's request might have been required. *See* ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980).

At the suppression motion hearing, Brandon Dohms, an Eau Claire police detective assigned to the West Central Drug Task Force, testified that in October 2015, he organized two controlled drug buys utilizing a confidential informant and, on both occasions, the informant bought methamphetamine from Weaver. During the drug sales, the informant obtained video and audio evidence of Weaver selling the methamphetamine. Based on the controlled buys, Dohms requested that police arrest Weaver.

Eau Claire police officer Todd Johnson testified he was aware that officers were directed to take Weaver into custody for methamphetamine delivery if they were to come into contact with him. Johnson added that he was familiar with Weaver, having been involved in both law-

[3] Weaver concedes he is not renewing any argument on appeal regarding the State's alleged breach of the plea agreement; therefore, we deem this issue abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (issues raised before the circuit court but not raised on appeal are deemed abandoned).

enforcement and non-law-enforcement contacts with him dating back to 1991. Johnson testified that at approximately 3:00 a.m. on December 12, 2015, he and another officer, Wade Beardsley, were checking motel parking lots for "signs of suspicious activity," as there had been "a recent propensity [sic] of illegal drug activity"—both use and sales—occurring in local motel parking lots. Johnson observed a parked vehicle with its taillights illuminated in one of the motel parking lots. Because Johnson deemed this unusual at that time of the morning, the officers parked their squad car about fifty feet away and walked toward the parked vehicle. The officers did not activate their emergency lights or siren; they did not shine a spotlight on the car or make verbal commands as they approached; and the vehicle was not impeded or blocked by the squad car.

Officer Beardsley approached the driver's side of the vehicle and spoke to the woman seated in the driver's seat. Johnson approached the passenger side of the vehicle, and he immediately recognized Weaver sitting in the front passenger seat. Johnson got Weaver's attention by tapping on the window. The officers asked Weaver to step out of the vehicle, and he was taken into custody. During a search incident to Weaver's arrest, law enforcement found small empty plastic bags commonly used for packaging drugs, at least three small bags of what appeared to be methamphetamine, a loaded needle, a large sum of money, and a digital scale.

Weaver argues that by engaging the driver in a conversation, law enforcement seized not only the driver, but also Weaver. Weaver adds that but for his seizure, Johnson would not have recognized him and obtained evidence as part of the search incident to Weaver's arrest. Police questioning alone, however, is insufficient to result in a seizure. ***Vogt***, 356 Wis. 2d 343, ¶24. Further, a knock on the window of a parked car does not automatically constitute a seizure. ***Id.***, ¶¶53-54. Ultimately, none of the earmarks of a seizure were present before Johnson

recognized Weaver. There is no indication that law enforcement used force or made any show of authority that would have led a reasonable person in Weaver's position to believe he was not free to leave. Up until the moment that Johnson recognized Weaver and initiated the arrest, Weaver was not seized.

To the extent Weaver cites ***State v. Anderson***, 142 Wis. 2d 162, 417 N.W.2d 411 (Ct. App. 1987), and ***State v. Washington***, 2005 WI App 123, 284 Wis. 2d 456, 700 N.W.2d 305, to support his argument, those case are distinguishable on their facts. In ***Anderson***, rather than approaching a parked car, law enforcement stopped the car the defendant was in and, therefore, needed reasonable suspicion to do so. ***Anderson***, 142 Wis. 2d at 165-66. In ***Washington***, the court concluded the defendant had been seized, but that the stop was unlawful because there was no reasonable suspicion to believe the defendant had committed a crime. ***Washington***, 284 Wis. 2d 456, ¶¶17-18. Here, Weaver was not seized until Johnson recognized him, at which point Johnson had probable cause to arrest him.[4]

Upon the foregoing,

IT IS ORDERED that the judgment is modified and, as modified, summarily affirmed. The order is summarily affirmed. WIS. STAT. RULE 809.21 (2017-18).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

[4] "Probable cause exists where the totality of the circumstances within the officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Riddle***, 192 Wis. 2d 470, 476, 531 N.W.2d 408 (Ct. App. 1995). Weaver does not contest that there was probable cause to arrest him.