

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 2, 2009

David R. Schanker
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. 2008AP2820-CR

Cir. Ct. No. 2006CT1401

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROD J. VANDINTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Reversed and cause remanded with directions.*

¶1 HOOVER, P.J.¹ Rod VanDinter appeals a judgment of conviction for operating while intoxicated, third offense. VanDinter argues the circuit court

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

erroneously denied his motion to suppress. We conclude VanDinter was seized without reasonable suspicion, and we therefore reverse the judgment and remand for the circuit court to grant the suppression motion.

BACKGROUND

¶2 Officer Daniel Running was patrolling in a marked vehicle on Kimberly Avenue in Kimberly at approximately 1:35 a.m. when he passed VanDinter's vehicle traveling in the opposite direction. Running looked in his rear-view mirror and observed VanDinter's vehicle veer sharply, but slightly, within its lane of traffic when it was about a half block away. Running immediately turned around at a cross street to follow VanDinter. VanDinter turned onto Patrick Street, the third cross street he encountered after passing Running, when Running was about one and a half blocks behind him.

¶3 When Running turned onto Patrick Street, he observed VanDinter had stopped his vehicle on the side of the street in front of a residence. VanDinter was outside of the vehicle, leaning in through the open driver's door. Running pulled behind VanDinter, activating his overhead red and blue emergency lights.²

² At the suppression motion hearing, officer Running denied activating his overhead emergency lights. The judge later stated, "I suppose we could augment our consideration of the police action here by saying that the greater weight of the evidence is that [Running] put his lights on after he stopped behind the vehicle" However, the court subsequently stated "maybe" the lights were activated, but concluded the issue did not affect the outcome. VanDinter moved to reopen the hearing and for reconsideration and submitted a videotape of the traffic stop that was entered into evidence. VanDinter also represented in an offer of proof that the videotape showed Running did activate his overhead lights. In one of two written decisions denying the motion for reconsideration, the court stated, "The videotape permits some greater specificity in describing the circumstances" However, the court denied the motion because it had already considered the possibility that the lights were activated and concluded the issue was not determinative. While the videotape is not in the record on appeal, we conclude the circuit court implicitly found that Running activated his vehicle's emergency lights. On appeal, the State also represents that Running activated the overhead lights as he pulled behind VanDinter.

Running estimated he pulled behind VanDinter about fifteen to twenty seconds after VanDinter braked to turn onto Patrick Street. When Running stopped, VanDinter got back into his vehicle, closed the door, and turned off the engine. Running testified he then reported a suspicious vehicle to dispatch and approached VanDinter. Subsequent observations lead to VanDinter's arrest for operating while intoxicated.

¶4 VanDinter moved to suppress all evidence from the stop, arguing Running did not have reasonable suspicion to detain him. The circuit court denied the motion, concluding there was no stop. The court alternatively reasoned that, even if there was a stop, the temporary detention was not unreasonable because VanDinter did not have to wait very long for Running to approach the vehicle. VanDinter subsequently pled no contest.

DISCUSSION

¶5 VanDinter argues he was seized when he turned off his vehicle and remained stopped after Running activated his car's overhead emergency lights. A person is seized when, under the totality of the circumstances, a reasonable innocent person would not feel free to leave. *State v. Williams*, 2002 WI 94, ¶¶4, 23, 255 Wis. 2d 1, 646 N.W.2d 834. VanDinter contends the activation of the police vehicle's red and blue lights when it pulled behind VanDinter's vehicle constituted a show of authority that would lead a reasonable person to believe they were not free to leave. We agree.

¶6 It is difficult to imagine a situation where a person in a stopped vehicle would feel free to leave when an officer activates a squad's overhead emergency lights. Indeed, in a recent, factually similar case where an officer pulled behind a just-stopped vehicle and activated the emergency lights, it was

undisputed there had been a seizure. *See State v. Truax*, 2009 WI App 60, ¶¶5, 11. In *State v. Young*, 2006 WI 98, ¶¶68-69, 294 Wis. 2d 1, 717 N.W.2d 729, the court did not actually determine whether there was a seizure when an officer activated the vehicle’s flashers and shined a spotlight into a parked car. However, the court stated it was “reluctant to conclude” there had been a seizure, emphasizing that the officer “never turned on his red-and-blue rolling lights.” *Id.*

¶7 The State cites four cases from other states where courts concluded an officer’s activation of the vehicle’s red and blue emergency lights was not, as a matter of law, always sufficient to constitute a seizure. We first observe that such a holding is quite another thing from concluding the act would never result in a seizure. Thus, the cases provide little guidance. We also note the primary case relied on by the State is distinguished from the facts here because it involved a car parked “on the shoulder of the highway far from any town.” *See State v. Hanson*, 504 N.W.2d 219, 220 (Minn. 1993). VanDinter was stopped on a residential side street.

¶8 More importantly, we find the reasoning of the State’s persuasive authorities unpersuasive. Generally, the cases conclude a reasonable person would understand that use of the overhead emergency lights might merely be a safety precaution. While a person might know that was a possibility, he or she could only speculate as to the officer’s subjective intent. It is simply a fiction too bold to indulge that any ordinary person would feel free to leave in such a situation. That reasoning also runs contrary to our supreme court’s observation in *Young*, regarding the use of flashers rather than the red and blue lights: “We believe the [flashers] are the same lighting the officer would have used if he had stopped to aid a motorist.” *Young*, 294 Wis. 2d 1, ¶68. Further, to the extent the foreign

cases address the officers' intent to stop and render assistance, that is a separate issue to be addressed under Wisconsin's community caretaker analysis.

¶19 On appeal, VanDinter argues not only that he was seized, but that Running did not have reasonable suspicion to effect a seizure and was not acting in his community caretaker role. The State's sole argument on appeal is that VanDinter was not seized. We take the State's silence as a concession. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis.2d 97, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). We also note the circuit court did not find reasonable suspicion and explicitly stated it was not relying on a community caretaker analysis.

By the Court.—Judgment reversed and cause remanded with directions.

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

