WISCONSIN LEGISLATIVE COUNCIL

IssueBrief

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Search and Seizure Under a Totality of the Circumstances Analysis

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This issue brief summarizes *State v. VanBeek*, 2021 WI 51, in which the Wisconsin Supreme Court applied a totality of circumstances analysis to determine whether, and when, an initially consensual encounter between law enforcement and the defendant was transformed into a seizure that required reasonable suspicion, and whether the law enforcement officer did not have sufficient reasonable suspicion to justify the seizure. Citations and quotes used in the decision are omitted, but the decision may be read in its entirety here.

FREEDOM FROM UNREASONABLE SEARCHES AND SEIZURES

The Fourth Amendment to the U.S. Constitution states: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated." The Wisconsin Constitution contains nearly identical protections, which the Wisconsin Supreme Court has interpreted consistent with the federal counterpart.[1] In determining whether an encounter with a police officer constitutes a "seizure" of a person subject to a "reasonableness" analysis, courts have generally held that unless the conduct of the officer indicates to a reasonable person that he or she must comply with the officer's demands, the Court will consider that encounter consensual and generally not subject it to Fourth Amendment scrutiny.

However, a police-citizen interaction can rise to the level of a temporary, investigative detention, commonly referred to as a "*Terry* stop."[2] A Terry stop is a seizure, and must be supported by reasonable suspicion that a crime has been committed, is being committed, or is about to be committed. In both the *VanBeek* decision and in another decision from the same term, *State v. Genous*, 2021 WI 50,[3] the Wisconsin Supreme Court held that it is appropriate for a court to consider the "totality of circumstances," rather than a single fact or a series of isolated facts, to determine whether a person has been seized by law enforcement, and whether that seizure was constitutionally permissible.

Background

In the *VanBeek* case, a police officer responded to an anonymous phone tip that two persons had been seated in their parked car for some time and that an individual had approached the vehicle with a backpack and left a short time later without a backpack. The officer approached the vehicle, questioned defendant VanBeek and her passenger about their business, took their drivers' licenses back to his vehicle to run a records check, then withheld the licenses for some time while he continued to question the couple to allow time for a drug-sniffing dog to arrive at the scene. The Court agreed to hear the case to address "whether a consensual encounter becomes an unconstitutional seizure under the Fourth Amendment when an officer requests and takes an individual's driver's license to the officer's squad car without reasonable suspicion."

Majority/Lead Opinion

The Court, in its Majority/Lead Opinion,[4] declined to impose a bright-line rule that a person is "seized" for the purpose of Fourth Amendment analysis whenever an officer takes his or her driver's license. Instead, the Court determined that, under the totality of the circumstances, the defendant's encounter with the police officer was consensual at the point she handed her driver's license to the officer, but the encounter was transformed into a seizure when the officer prolonged the encounter and retained the driver's license in order to allow time for the drug-sniffing dog to arrive.

Noting that "[d]etermining whether a seizure has occurred is a highly fact-bound inquiry," the Court stated that its task was to "determine whether a person would have felt free to leave or otherwise terminate the encounter based on an objective view of the specific facts presented. That analysis employs an objective 'innocent reasonable person, rather than the specific defendant'." In other words, 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."

Applying that analysis to the facts at hand, the Court noted that other jurisdictions have placed significant, if not dispositive, weight on whether a police officer retains a person's identification. The Court determined that, while the defendant had consented to the officer's taking her license in the first instance to run a background check, the officer's acts of "extended questioning while retaining her driver's license" would lead a reasonable person to believe that she was not free to leave or otherwise terminate the encounter. The Court held that the defendant had, for the purpose of Fourth Amendment analysis, been "seized" by the officer at that time.

Accordingly, the Court turned next to the question of whether the seizure was supported by reasonable suspicion. Again, the Court applied a "totality of the circumstances" analysis and found that it was not. The Court considered that the encounter between the defendant and the police officer was initiated by an anonymous complaint, and in this case "the dearth of significant facts enunciated by the anonymous caller . . . substantially lowers the weight that we place on the call in the totality of the circumstances." Aside from the call, the police officer only knew that the defendant had overdosed earlier in the year and that her passenger was on some form of supervision. The officer observed no suspicious behavior, nor did the officer detect any drug use during the encounter. Accordingly, the Court held that the officer lacked sufficient reasonable suspicion to justify seizing the defendant.

Concurrence

Three concurring justices also declined to create a bright line rule regarding whether an officer seizes a person whenever the officer takes a person's driver's license back to a squad car. Looking to the totality of the circumstances, the concurring justices opined that the encounter between the defendant and the police officer began as voluntary, but the defendant was effectively seized when the officer walked away from her car with her driver's license. The concurrence noted that "no reasonable person would think she could drive away when an officer walks off with her driver's license," and that doing so would violate state law. The concurrence pointed out that, while the driver may have given consent to having the officer take her license, consent is merely a factor in whether the seizure was reasonable, and not determinative of whether the seizure occurred in the first place.

Dissent

Three dissenting justices[5] also considered the totality of circumstances and concluded that the defendant had never been seized during the encounter. The dissent opined that a reasonable person would conclude that the defendant was free, at any time, to request her driver's license back from the police officer and to go about her business. Noting that the defendant voluntarily handed her license to the police officer, the dissent stated that the defendant was thereafter free to disregard the police and that her business, which was sitting in her car with her passenger, was not disrupted. The dissent declined to find that the police officer's continued questioning constituted a seizure, noting that the Fourth Amendment requires a minimal level of justification only when a "person refuses to answer and the police take additional steps to obtain an answer," or when the circumstances are "so intimidating as to demonstrate that a reasonable person would have believed [she] was not free to leave if [she] had not responded." Looking at the totality of the circumstances, the dissent did not believe that the encounter transformed into a seizure at any time and, therefore, no particular justification was necessary.

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[1] Wis. Const. art. I, s. 11.
[2] "Terry stop" derives its name from the seminal U.S. Supreme Court decision in *Terry v. Ohio*, 392 U.S. 1 (1968). The Terry standard is codified in s. 968.24, Stats.
[3] A Legislative Council Issue Brief on the *Genous* case can be found here.
[4] Justice Roggensack's opinion was joined by Justices Walsh Bradley, Dallet, and Karofsky as to ¶¶ 22-35 and ¶¶ 46-65.
[5] Justice Ziegler wrote the dissenting opinion, joined by Justices Grassl Bradley and Hagedorn.