FILED
United States Court of Appeals
Tenth Circuit

July 27, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TEVITA FINAU TAFUNA,

Defendant - Appellant.

No. 20-4078

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:19-CR-00112-JNP-1)

Jessica Stengel, Assistant Federal Public Defender (Scott Keith Wilson, Federal Public Defender, with her on the briefs), Salt Lake City, Utah, for Defendant–Appellant.

Jennifer P. Williams, Assistant United States Attorney (John W. Huber, United States Attorney, with her on the brief), Salt Lake City, Utah, for Plaintiff–Appellee.

Before **HOLMES**, **BALDOCK**, and **MATHESON**, Circuit Judges.

BALDOCK, Circuit Judge.

Utah police officers discovered Defendant Tevita Tafuna sitting in a parked car with a gun he admitted to possessing. Because Defendant had a prior felony conviction, the Government charged him with unlawful possession of a firearm under 18 U.S.C. § 922(g)(1). He moved to suppress the firearm and his confession, arguing

that he was detained in violation of his Fourth Amendment rights and that his detention led to the incriminating evidence used against him. The district court denied the motion, and Defendant now challenges that decision.

This appeal presents a single question: Did officers unconstitutionally seize Defendant before they found the firearm or obtained his confession? The answer is no. So, exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

Around 1:00 a.m. on January 25, 2019, Defendant was sitting in the passenger seat of a car parked in the corner of a large apartment complex. The car was backed into an uncovered parking space. Defendant's friend, who owned the car, was in the driver's seat. Two other individuals were sitting in the back seat.

While patrolling the apartment complex, Officer Jeffrey Nelson noticed the parked car and its occupants. Officer Nelson pulled up to the car at an angle, with the front of his police vehicle pointed toward the driver's side door. He did not block in the parked car with his police vehicle or otherwise obstruct its path of egress. The police vehicle's "takedown lights"—bright lights arranged across the top of a police vehicle designed to illuminate the area in front of the vehicle—were activated, but the vehicle's flashing red and blue lights were not.

Officer Nelson exited his vehicle and, with his weapon holstered, approached the driver's side of the parked car in a way that did not impede the car's path of exit. He asked the individuals sitting in the car what they were doing and also asked for their names and birth dates. Meanwhile, Officer Nelson noticed an open beer can in

the center console next to Defendant. The occupants of the car said they were just hanging out and talking. Defendant identified himself, said he was on parole, and stated that he had a knife on him. Officer Nelson told the four individuals he was going to run their names and then returned to his vehicle.

During his records search, Officer Nelson discovered that Defendant was listed as having a gang affiliation and as potentially armed and violent. After retrieving the records, Officer Nelson requested backup, which took 10 to 15 minutes to arrive.

When Officer Austin Schmidt got to the scene, he looked up Defendant's parole agreement. That agreement contains a search provision and a standard weapons clause, under which Defendant agreed to not "purchase, possess, own, use, or have under [his] control, any explosive, firearm, ammunition, or dangerous weapon, including archery or crossbows." The parole agreement also has a special condition that prohibited Defendant from using, possessing, consuming, or having access to alcoholic beverages.

With this newfound knowledge, Officer Nelson reapproached the parked car and asked Defendant to step out of the vehicle. Officer Nelson conducted a pat down and discovered that Defendant was carrying a pocketknife. Defendant said he used the pocketknife to open boxes at his job. Officer Nelson then searched the car and found a firearm underneath the passenger seat. At that point, officers arrested all of the car's occupants. Officer Nelson gave Defendant his *Miranda* warnings and questioned him at the scene. Defendant admitted to possessing the firearm.

A grand jury indicted Defendant for possession of a firearm after a felony conviction, in violation of 18 U.S.C. § 922(g)(1). Defendant filed a motion to suppress the firearm and his confession. The district court granted the motion on the ground that Officer Nelson did not have probable cause to search the car Defendant had occupied during the encounter. Shortly after the district court issued its order, the Government moved for reconsideration. It argued that Defendant lacked standing to challenge the search of the car and that he was not unconstitutionally detained. This time, the district court agreed with the Government.

The district court first determined Defendant lacked standing to challenge the search of the car he had occupied because he did not own or have a possessory interest in the vehicle. That determination is not at issue here. Next, the district court found the officers did not seize Defendant at any time during their encounter with him before they had developed reasonable suspicion to do so. The district court therefore granted the Government's motion for reconsideration and vacated its prior order suppressing the firearm and Defendant's confession.

Defendant then entered a conditional guilty plea in which he reserved the right to appeal the district court's denial of his motion to suppress. This is his appeal.

II.

When reviewing a district court's decision on a motion to suppress, we review de novo whether and at what point a seizure occurred. *United States v. Salazar*, 609 F.3d 1059, 1063–64 (10th Cir. 2010). And when, like here, a district court denies

such a motion, we accept its factual findings unless they are clearly erroneous and view the evidence in the light most favorable to the Government. *Id.* at 1063.

III.

Not all encounters with law enforcement officers implicate the Fourth Amendment; rather, different police-citizen interactions trigger different standards. *United States v. Madden*, 682 F.3d 920, 925 (10th Cir. 2012). Consensual encounters fall entirely outside the scope of the Amendment. *Id.* Investigative detentions—seizures of limited scope and duration that are commonly known as *Terry* stops—must be supported by reasonable suspicion of criminal activity. *Id.* And custodial arrests, the most intrusive of Fourth Amendment seizures, require probable cause. *Id.*

Our task here is to determine whether officers detained Defendant without reasonable suspicion in violation of the Fourth Amendment. Importantly for our purposes, Defendant concedes that Officer Nelson had reasonable suspicion to detain him after he told the officer he was on parole and had a knife. The pivotal question, then, is whether Officer Nelson's interaction with Defendant before that point rose to the level of a seizure for which reasonable suspicion is required. If the answer is no, Defendant has no valid Fourth Amendment challenge.[1]

An investigative detention has occurred only when an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). To determine whether an officer

[1] Defendant does not argue his detention was unreasonable in either scope or duration. So we need not and do not reach those issues. *Madden*, 682 F.3d at 926 n.2.

has made such a show of authority, we sometimes ask whether "a reasonable person would have believed that he was not free to leave." *Brendlin v. California*, 551 U.S. 249, 255 (2007) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J., concurring)). But "when a person 'has no desire to leave' for reasons unrelated to the police presence," the better question is "whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'" *Id.* (quoting *Florida v. Bostick*, 501 U.S. 429, 435–36 (1991)). Under either formulation, we consider all the circumstances surrounding the encounter. *Id.*; *United States v. Hernandez*, 847 F.3d 1257, 1263–64 (10th Cir. 2017).

To be clear, the test is not what the defendant himself thought, but what a reasonable, law-abiding person would have thought had he been in the defendant's shoes. *United States v. Sanchez*, 89 F.3d 715, 717–18 (10th Cir. 1996). Factors that help courts measure the coercive effect of a police-citizen encounter include: (1) the location of the encounter, particularly whether it occurred in an open place within the view of people other than officers or a small, enclosed space without other members of the public nearby; (2) the number of officers involved; (3) whether an officer touched the defendant or physically restrained the defendant's movements; (4) the officer's attire; (5) whether the officer displayed or brandished a weapon; (6) whether the officer used aggressive language or tone of voice that indicated compliance with a request might be compelled; (7) whether and for how long the officer retained the defendant's personal effects, such as identification; and (8) whether the officer advised the defendant that he had the right to terminate the encounter. *United States*

v. Lopez, 443 F.3d 1280, 1284 (10th Cir. 2006). The defendant has the burden of showing he was detained. *Hernandez*, 847 F.3d at 1263.

Here, Defendant argues he was detained without reasonable suspicion at two specific junctures during his initial encounter with Officer Nelson. Defendant first contends that Officer Nelson detained him the moment he parked his police vehicle at an angle to the parked car and activated the vehicle's takedown lights. Second, Defendant says he was detained when Officer Nelson approached the parked car on foot and asked the occupants for their names and birth dates. We disagree with Defendant that he was detained at either point in time.

As for Officer Nelson's initial approach, nothing in the record indicates he drove his vehicle aggressively when he pulled up near the parked car in which Defendant sat. True, Officer Nelson was driving a marked police vehicle, the very presence of which might be "somewhat intimidating." *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988). But Officer Nelson did not activate a siren, turn on his vehicle's flashing red and blue lights, or issue any commands to the occupants of the parked car. *See id.* at 574–76 (acknowledging four officers in marked police cruiser targeted the defendant, but concluding no seizure occurred because other indicia of coercion was lacking). And while Officer Nelson's police vehicle was parked at an angle so that it faced the driver's side of the car, it did not obstruct the car's path of exit or otherwise impede Defendant's movement. *See Sanchez*, 89 F.3d at 718 (holding no seizure occurred when an officer "pulled his patrol car up to [the defendant's] vehicle" but "did not obstruct or block [the defendant's] vehicle or

prevent [him] from leaving the parking lot had he chosen to do so"). These circumstances would not have made a reasonable person feel unable to ignore the police presence and go about his business. *See Bostick*, 501 U.S. at 437.

Officer Nelson's use of his police vehicle's takedown lights to illuminate the parked car—as opposed to turning on flashing emergency lights—does not change that conclusion. Other circuits have agreed that shining a bright light into a vehicle is not inherently coercive. *See, e.g.*, *United States v. Tanguay*, 918 F.3d 1, 7–8 (1st Cir. 2019) (no seizure when an officer used "a flashlight and floodlight to illuminate the interior of the SUV"); *United States v. Mabery*, 686 F.3d 591, 597 (8th Cir. 2012) (no seizure when an officer shined a spotlight on the defendant's vehicle); *United States v. Clements*, 522 F.3d 790, 792, 794–95 (7th Cir. 2008) (no seizure when officers directed their cruiser's spotlight on a parked car and then approached); *United States v. Washington*, 490 F.3d 765, 770 (9th Cir. 2007) (no seizure when an officer approached and used flashlight to illuminate the interior of the defendant's car). That's "because to rule otherwise would be to prevent officers from safely visiting parked vehicles at night." *Tanguay*, 918 F.3d at 7–8.

Of course, whether takedown lights (or other lights similarly designed to illuminate an area) are used is one factor to consider when examining all the circumstances surrounding a police-citizen encounter. And when the use of takedown lights is accompanied by other coercive behavior—such as blocking a car in its parking space or issuing verbal commands—a detention is more likely to have occurred. *See United States v. Delaney*, 955 F.3d 1077, 1082–84 (D.C. Cir. 2020)

(finding show of authority when officers used takedown lights; encounter occurred in a dimly lit and narrow parking lot; gunshots were sounding all around; and, "most importantly," officers parked their cruiser in a way that impeded the defendant's movement); *United States v. Packer*, 15 F.3d 654, 657 (7th Cir. 1994) (seizure found when officers' vehicles were in front of and behind the defendant's vehicle and had their takedown lights shining, and one officer approached with a flashlight shining and told the vehicle's occupants to put their hands in the air).

But unlike those cases on which Defendant relies, no other coercive behavior or circumstances accompanied Officer Nelson's use of his vehicle's takedown lights. The encounter did not take place in a narrow parking lot while gunshots were sounding all around. *See Delaney*, 955 F.3d at 1082–84. Officer Nelson did not issue any verbal commands. *See Brown v. City of Oneonta*, 221 F.3d 329, 340 (2d Cir. 2000) (seizure when an officer shined a spotlight and issued a verbal command). And, as we noted above, he did not obstruct the parked car's path of egress. *See Delaney*, 955 F.3d at 1083; *Packer*, 15 F.3d at 657. Officer Nelson, instead, merely parked his vehicle in a way that allowed him to use the takedown lights to illuminate the car Defendant occupied—conduct incident to an officer's performance of his job after dark. This police conduct and the setting in which it occurred would not have caused a reasonable, law-abiding person in Defendant's position to feel that his liberty was restrained. So up to this point, Defendant was not detained.

Nor did the consensual encounter morph into a detention when Officer Nelson exited his vehicle, approached the parked car on foot, and asked the car's occupants

for their names and birth dates. Officers—without any basis for suspecting criminal activity is afoot—may "approach an individual, ask a few questions, [and] ask to examine the individual's identification." *Madden*, 682 F.3d at 925 (holding no seizure occurred when an officer approached the defendant, who was sitting in his parked car, asked what he was doing, and requested his driver's license). Such inquiries are part and parcel of a consensual encounter unless officers "convey a message that compliance with their requests is required." *Bostick*, 501 U.S. at 437.

Officer Nelson conveyed no message of mandatory compliance here. It is true that he exited his vehicle in full uniform, with a visible firearm, and did not advise Defendant he had the right to terminate the encounter. But these factors, while relevant, are hardly determinative when viewed in the totality of the circumstances. *Sanchez*, 89 F.3d at 718 (finding encounter consensual when an armed officer did not inform the defendant that their interaction was voluntary).

That officers generally wear uniforms and sidearms is a well-known fact. *United States v. Drayton*, 536 U.S. 194, 204–05 (2002). And like the wearing of a police uniform, the mere "presence of a holstered firearm . . . is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon." *Id.* at 205. Defendant makes no claim that Officer Nelson touched, let alone brandished, his firearm or any other weapon during the initial encounter. That Officer Nelson was uniformed and armed, therefore, has "little weight in the analysis." *Id.* at 204.

Several other factors support a conclusion that the initial encounter between Defendant and Officer Nelson was consensual. First, when Officer Nelson

approached on foot, he did not prevent the parked car from pulling out had the driver so desired or otherwise physically restrain Defendant's freedom of movement. *See Sanchez*, 89 F.3d at 718. Second, Officer Nelson was the only officer on the scene, *see Lopez*, 443 F.3d at 1285, and nothing in the record indicates his presence was threatening, *see United States v. Jones*, 701 F.3d 1300, 1314 (10th Cir. 2012) (acknowledging three officers were on the scene, but finding their non-threatening presence supported the conclusion that the encounter was consensual). Third, Officer Nelson did not touch Defendant or any of his companions. *See id.*

Fourth, Defendant offers no credible evidence that, at this time, Officer Nelson used intimidating language, spoke with an aggressive tone, or issued any verbal commands. *See Sanchez*, 89 F.3d at 718; *Lopez*, 443 F.3d at 1286 (finding detention when officer "specifically instructed [the defendant] to remain by his vehicle while he ran the warrants check and then took [the defendant's] license back to his patrol car"). Fifth, Officer Nelson *asked*—he did not order—the car's occupants to state their names and birth dates. *See Bostick*, 501 U.S. at 434 ("Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions."). And finally, Officer Nelson did not obtain or retain any of Defendant's personal effects during the initial encounter. *Compare Sanchez*, 89 F.3d at 718, *with United States v. Lambert*, 46 F.3d 1064, 1068 (10th Cir. 1995) (holding that the encounter between the defendant and the narcotics agents "became an investigative detention once the agents received [the defendant's] driver's license and did not return it to him").

Considering all the circumstances described above, Officer Nelson's conduct—parking his police vehicle at an angle to the car Defendant occupied, activating the takedown lights, approaching the car on foot, and asking for the car's occupants' names and birth dates—would not have communicated to a reasonable person that he was unfree to "decline Officer [Nelson's] requests or otherwise terminate the encounter." *See Madden*, 682 F.3d at 925. In other words, Defendant was not seized during his initial encounter with Officer Nelson.

Resisting this conclusion, Defendant attempts to equate Officer Nelson's request for his birth date with the physical taking and retention of a driver's license or identification card. We are not persuaded.

When an officer "retain[s] an individual's driver's license in the course of questioning him, that individual, as a general rule, will not reasonably feel free to terminate the encounter." *Lambert*, 46 F.3d at 1068. But Defendant does not cite any authority suggesting that simply asking an individual to state his or her date of birth, as opposed to retaining an individual's personal property, has such a coercive effect. And we are aware of no authority for such a proposition. To the contrary, Officer Nelson's request for identifying information is the type of de minimis intrusion courts have long tolerated as a necessary part of policing. *See I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984) (holding that "interrogation relating to one's identity *or* a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure" (emphasis added)); *see also, e.g.*, *United States v. Campbell*, 486 F.3d 949, 952, 956–57 (6th Cir. 2007) (concluding no seizure

occurred when an officer first asked the defendant for identification and then asked for his name, date of birth, and social security number); *United States v. Tuttle*, No. CR-14-08015-001-PCT-DGC, 2015 WL 5736905, at *2 (D. Ariz. Oct. 1, 2015) ("The officer asked to see Defendant's identification, and then asked for his name and date of birth. This did not convert an otherwise consensual encounter into a seizure."); *United States v. Cardenas*, No. 07cr2231 JAH, 2009 WL 10680614, at *2, *4 (S.D. Cal. May 21, 2009) (finding no seizure when an agent approached two individuals sitting in a stopped car and "questioned defendant as to his citizenship, date of birth and where he was born").

We also fail to see how asking for a birth date is more intrusive to a reasonable person than requesting a government-issued form of identification that contains the same information. If anything, the opposite is true. A standard identification card, such as a driver's license, not only contains a birth date but typically provides additional information about a person—height, weight, eye color, hair color, home address, etc. And, more importantly here, Officer Nelson's asking for a birth date is less suggestive of a seizure than asking for identification because the latter would involve Officer Nelson's retention of Defendant's personal effects. *See Sanchez*, 89 F.3d at 718 (noting that the "prolonged retention of a person's personal effects such as identification and plane or bus tickets" is indicative of a seizure). Because an officer's request for identification does not amount to a seizure, it was no more a seizure when Officer Nelson asked Defendant for his date of birth. *See Delaware v. Prouse*, 440 U.S. 648, 654 (1979) ("[T]he permissibility of a particular law

enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.").

All told, considering the totality of the circumstances surrounding the encounter, we conclude that Officer Nelson's conduct did not amount to a show of authority sufficient to trigger the Fourth Amendment at any point before Defendant stated he was on parole and had a knife. And because Defendant concedes that Officer Nelson had reasonable suspicion of criminal activity at that time, we cannot say the district court erred when it found no Fourth Amendment violation.

IV.

For all the reasons we have given, the district court's judgment is AFFIRMED.