**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A19-1742**

State of Minnesota,
Respondent,

vs.

Daniel James Deschene,
Appellant.

**Filed November 30, 2020**
**Affirmed**
**Gaïtas, Judge**

Hennepin County District Court
File No. 27-CR-18-28207

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Hooten, Judge; and Gaïtas, Judge.

**U N P U B L I S H E D  O P I N I O N**

**GAÏTAS**, Judge

Appellant Daniel Deschene challenges his conviction of first-degree sale of methamphetamine, arguing that the district court erred in denying his pretrial motion to suppress the evidence. He alleges that the arresting police officer violated his federal and

state constitutional rights by seizing him without reasonable suspicion, requiring suppression of all evidence underlying his conviction. We conclude that the officer had an objectively reasonable suspicion that Deschene was involved in criminal activity, and therefore the seizure was constitutionally valid. We affirm.

## FACTS

Around 11:00 p.m. one night in May 2018, a New Hope Police Officer on routine patrol noticed a red sedan parked outside of a commercial warehouse. The business, and all of the other businesses in the area—also commercial warehouses—were closed at that hour. The sedan was the only car in the parking lot. Its engine and lights were turned off and the front windows were rolled down. The officer decided to investigate. He pulled his squad car into the parking lot and parked at an angle about ten to 15 feet behind the sedan. The parking lot was poorly lit, so the officer turned on his squad car's spotlight to better illuminate the area for safety reasons.

Once parked, the officer got out of his squad car and approached the driver's-side window on foot with his flashlight in hand. He observed two males seated in the front of the sedan and one female in the rear. The officer asked, "What's going on?" The driver, who was noticeably "sweaty" and had "glossed over" eyes, told the officer they were picking a friend up from work. In the officer's experience, the driver's appearance suggested possible alcohol or narcotics use. The driver's response was also suspicious because the businesses were closed.

The officer requested everyone's identification, and the front passenger identified himself as Daniel James Deschene. Deschene used his phone to call the friend, but no one came out of the business.

While the officer spoke with the driver, he observed Deschene fidgeting in his seat, reaching around the passenger seat near the seatbelt buckle and between his feet on the floor. The officer worried that Deschene was either reaching for a weapon or concealing contraband. He walked around the sedan to Deschene's open window. From that position, the officer saw a small plastic bag on the floor near Deschene's feet. Deschene, who was also "sweaty" with "glossed over" eyes, closed his legs to obstruct the officer's view of the bag. The officer asked about the contents of the plastic bag. Deschene picked up the bag and brought it to his knees. He told the officer it was a "sandwich baggie," and threw it back to the floor. But the officer could see that the bag contained a white crystal residue, which he believed to be narcotics.

Deschene continued to shift around in his seat reaching near the seatbelt buckle and the car's center console. The officer saw Deschene drop something behind him. At this point, the officer opened Deschene's door. He told Deschene to stop reaching around and to get out of the car. Once Deschene was out of the car, the officer handcuffed him. Other officers arrived on the scene and removed the driver and female passenger from the sedan.

A canine detection officer eventually arrived at the scene and the dog alerted to the presence of drugs in the sedan. Officers searched the car and found one small safe, one larger safe, and the plastic bag first observed at Deschene's feet. After obtaining search warrants, police searched both safes and found suspected drugs. Subsequent testing

confirmed that the safes contained about 325 grams of methamphetamine combined and the plastic bag seen at Deschene's feet contained about 28.2 grams of methamphetamine. Additionally, the officer who transported Deschene to jail found a small amount of marijuana and 2.2 grams of suspected crack cocaine in the back seat of the squad car where Deschene had been seated. Finally, police found $2,270 in cash on Deschene's person.

Following Deschene's arrest, the state charged him with first-degree sale of 17 or more grams of methamphetamine, Minn. Stat. § 152.021, subd. 1(1) (2016) (count one), first-degree possession of 50 or more grams of methamphetamine, Minn. Stat. § 152.021, subd. 2(a)(1) (2016) (count two), and second-degree possession of 25 or more grams of methamphetamine, Minn. Stat. § 152.022, subd. 2(a)(1) (2016) (count three). Deschene moved to suppress all evidence seized from his person and the car. During the suppression hearing, the district court took testimony from the arresting officer and received two exhibits into evidence—a video recording of the incident from the officer's dashboard camera and an aerial map of the parking lot and surrounding area. The district court then denied Deschene's motion, reasoning that the officer justifiably seized Deschene when he ordered Deschene out of the sedan.

A jury later found Deschene guilty of counts one and three and acquitted him of count two. The district court entered a conviction on count one—sale of 17 grams or more of methamphetamine—and sentenced Deschene to prison for 95 months.[1] Deschene appeals.

[1] The district court withheld adjudication on count three because it arose "from the same occurrence." *See* Minn. Stat. § 609.035, subd. 1 (2018) (prohibiting duplicative convictions for conduct that constitutes more than one offense).

## D E C I S I O N

When a district court's suppression order is challenged on appeal, the appellate court reviews factual findings for clear error and legal determinations de novo. *State v. Leonard*, 943 N.W.2d 149, 155 (Minn. 2020) (citation omitted). Ultimately, we are tasked with "independently determin[ing], as a matter of law, whether the evidence against appellant must be suppressed." *State v. Marsh*, 931 N.W.2d 825, 829 (Minn. App. 2019). Because the facts in this case are largely undisputed, we focus on the two legal questions. First, we must decide when Deschene was seized. And second, we must determine whether the officer had a lawful basis for seizing Deschene at that time.

"The United States and Minnesota Constitutions protect the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011) (quotation omitted) (citing U.S. Const. amend. IV; Minn. Const. art. I, § 10). Police may nonetheless stop and briefly detain a citizen, without a warrant, so long as the officer can "identify specific and articulable facts that create a reasonable suspicion of illegal activity." *State v. Davis*, 910 N.W.2d 50, 53-54 (Minn. App. 2018) (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968)).

**1. Deschene was seized when he was ordered to get out of the car.**

To determine whether a seizure was lawful, we must first consider when the seizure occurred. Not all exchanges between people in vehicles and the police are seizures. *State v. Cripps*, 533 N.W.2d 388, 390 (Minn. 1995); *State v. Klamar*, 823 N.W.2d 687, 692 (Minn. App. 2012). For example, when an officer walks up to a parked car and speaks

with the driver, there is no seizure. *State v. Vohnoutka*, 292 N.W.2d 756, 757 (Minn. 1980). "[A] seizure occurs when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Cripps*, 533 N.W.2d at 391 (quotation omitted).

In considering whether there was a seizure, Minnesota courts use the *Mendenhall-Royer* test: "a person has been seized if in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter."[2] *Id.*; *see Florida v. Royer*, 460 U.S. 491, 497-98, 103 S. Ct. 1319, 1323-24 (1983); *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980). Circumstances suggesting there was a seizure typically include an officer's threatening presence, the brandishing of a weapon, physical touch, or the issuance of commands. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). "In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Id.* (quoting *Mendenhall*, 446 U.S. at 554-55, 100 S. Ct. at 1877)).

Deschene argues that the officer seized him by parking behind the sedan in the parking lot and shining his spotlight toward the vehicle. He alleges that a reasonable person inside the vehicle would not have believed he was free to leave under these circumstances.

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[2] In *California v. Hodari D.*, 499 U.S. 621, 626, 111 S. Ct. 1547, 1551 (1991), the United States Supreme Court held that a seizure occurs under the Fourth Amendment when the police use physical force or a person submits to a police show of authority. Following the *Hodari* decision, our supreme court declined to follow this holding, concluding that the Minnesota Constitution affords more protection than the federal constitution. *In re E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993).

In support of this argument, Deschene cites *Illi v. Comm'r of Pub. Safety*, 873 N.W.2d 149, 152-53 (Minn. App. 2015), where we observed that a seizure may occur when the police "box in" a parked car. But in *Illi*, we stated that "blocking in a car so as to execute a seizure occurs only when the officer actually positions his squad car so as to prevent the other vehicle from leaving." *Id.* at 152. Here, the district court specifically found that the sedan was not blocked in because the officer left ample room for the driver to back out and exit the parking lot. The record supports this finding, and therefore it is not clearly erroneous. *See State v. Roberts*, 876 N.W.2d 863, 868 (Minn. 2016) ("A factual finding is clearly erroneous if it does not have evidentiary support in the record or if it was induced by an erroneous view of the law."). The officer testified that he parked his squad car 10 to 15 feet from the rear passenger-side bumper of the sedan. Based on the position of his squad car, he believed the sedan "could have backed straight out and went to the east or to the west if it goes through the parking spaces." Because the officer did not prevent the sedan from leaving with his squad car, the officer's positioning of his car near the sedan did not alone amount to a seizure.

Moreover, the officer's use of a spotlight to illuminate the sedan did not transform the encounter into a seizure. The district court found, with record support, that the officer used the spotlight to illuminate an otherwise dark scene for safety and efficiency reasons. And this court held in *Illi* that the use of a spotlight for illumination is not a seizure. *Illi*, 873 N.W.2d at 152-53. Notably, the officer did not use his emergency lights, which are commonly understood to require compliance. *See also State v. Bergerson*, 659 N.W.2d

791, 795 (Minn. App. 2003) (explaining that emergency lights frequently communicate a seizure because persons usually feel "duty bound to submit to this show of authority").

Deschene argues in the alternative that even if there was no seizure at the very outset of the encounter, a seizure occurred when the officer approached the sedan, flashlight in hand, and spoke with the occupants. But as previously noted, a police officer does not seize an individual in a parked car by approaching the vehicle to speak with the driver, *see Vohnoutka*, 292 N.W.2d at 757, and Deschene's argument is unsupported by any contrary authority.

We acknowledge that any encounter with the police may be uncomfortable for many. And we recognize that in the presence of a law enforcement officer, a person may feel a "moral or instinctive pressure to cooperate." *See Harris*, 590 N.W.2d at 99. But under Minnesota law, these feelings do not automatically transform an encounter into a seizure. *Id.* Under the circumstances here, where the officer merely parked his squad car, illuminated the area with his spotlight, and approached the driver, there was no seizure.

We agree with the district court that Deschene was seized later in the encounter—when the officer ordered him to get out of the vehicle. This conclusion guides the next step in our analysis. We must next determine whether the officer had a valid constitutional basis for ordering Deschene out of the car.

**2. The officer had a valid constitutional basis to seize Deschene.**

Consistent with the United States and Minnesota Constitutions, a police officer may temporarily detain an individual if the officer has a reasonable and articulable suspicion of criminal activity. *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (citing *Terry*,

392 U.S. at 21, 88 S. Ct. at 1880). "[T]he reasonable suspicion standard 'is not high.'" *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006) (quoting *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S. Ct. 1416 (1997)). But it does "require[ ] at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 676 (2000). The justification must be more than an "inchoate and unparticularized suspicion or hunch" that criminal activity may occur. *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883. An officer cannot rely on "whim, caprice, or idle curiosity" as grounds for a seizure. *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996) (citing *Terry*, 392 U.S. at 21). Moreover, an officer must have objective support for the belief that an individual is involved in criminal activity. *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880.

In determining whether an officer's suspicion was reasonable, the question is not whether there was genuine suspicion; rather, the question is whether that suspicion was objectively reasonable. *State v. Britton*, 604 N.W.2d 84, 88 (Minn. 2000). A court should consider the totality of the circumstances in this inquiry, including the fact that trained officers may make inferences and deductions that might be beyond the competence of a lay person. *State v. Richardson*, 622 N.W.2d 823, 825 (Minn. 2001). The reasonable suspicion standard is met when an officer "observes unusual conduct that leads the officer to reasonably conclude in light of his or her experience that criminal activity may be afoot." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quoting *In re Welfare of G.M.*, 560 N.W.2d 687, 691 (Minn. 1997)).

Although Deschene argues that the officer did not have a reasonable and articulable suspicion of criminal activity when the officer parked his squad car and approached the

sedan, he does not challenge the officer's basis for ordering him out of the vehicle later in the encounter. Given the totality of the circumstances at that point—when the officer seized Deschene by ordering him out of the car—we agree with the district court that the seizure was valid. At that point, the officer reasonably believed that Deschene was involved in criminal activity where (1) the sedan was parked outside a closed commercial warehouse at 11 p.m.; (2) Deschene claimed his group was there to pick up a friend, but no friend ever came out of the building; (3) both the driver and Deschene appeared sweaty and had "glossed over" eyes, indicative of alcohol or drug impairment; (4) Deschene engaged in fidgety and evasive behavior; and (5) the officer observed a plastic bag containing suspected narcotics at Deschene's feet, which Deschene attempted to conceal from view. Because the officer had a reasonable and articulable suspicion of criminal activity based on these observations, the seizure did not violate the federal or state constitutions.[3] Thus, we affirm the district court's denial of Deschene's motion to suppress the evidence.

**Affirmed.**

[3] Deschene argues that the district court's decision rests on a clearly erroneous factual finding: "In [the officer]'s experience, vehicles are generally not parked in this area during the nighttime unless the occupants of the vehicle are having sex or engaging in criminal drug activity such as burglarizing a business." But as previously noted, a factual finding is only clearly erroneous if it lacks evidentiary support in the record. *See Roberts*, 876 N.W.2d at 868. We interpret the district court's finding as a reasonable inference from the officer's testimony, and therefore conclude it is not clearly erroneous. And in any event, this finding is not critical to the determination that the officer had a valid basis for seizing Deschene by ordering him out of the car.