STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2092

State of Minnesota,
Respondent,

vs.

Greg Alan Darling,
Appellant.

Filed September 19, 2011
Affirmed
Wright, Judge

Clay County District Court
File No. 14-CR-10-2088

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Matthew D. Greenley, Assistant Clay County Attorney, Moorhead, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Wright, Judge; and Schellhas, Judge.

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

WRIGHT, Judge

On appeal from his conviction of second-degree driving while impaired by alcohol, appellant challenges the district court's denial of his motion to suppress

evidence, arguing that his encounter with the police was an unconstitutional seizure that is unsupported by a reasonable, articulable suspicion of criminal activity. Appellant also argues that the district court erred by ordering him to pay a public-defender fee without finding that appellant has the ability to make the payment. We affirm.

FACTS

At approximately 12:15 a.m. on June 8, 2010, Moorhead Police Officer Nick Wiedenmeyer observed a vehicle parked in front of a locked gate at the entrance to a compost site in Moorhead. Although the vehicle was parked legally, Officer Wiedenmeyer believed the vehicle's presence was suspicious because the compost site had been closed for several hours and he knew that there had been criminal activity at the compost site the previous summer. Officer Wiedenmeyer pulled his squad car behind the vehicle and, for his own safety, turned on his spotlight and directed it at the rear of the vehicle. He left his squad car and approached the parked vehicle, where he discovered a man in the driver's seat. Because the man was unconscious and sweating and the man's sunglasses were askew, Officer Wiedenmeyer became concerned for the man's safety. Officer Wiedenmeyer believed that the occupant of the vehicle might be experiencing a medical problem.

Officer Wiedenmeyer pounded on the window in an effort to wake the occupant. After a sustained effort by the officer, the man awakened fully and identified himself as appellant Greg Alan Darling. When Officer Wiedenmeyer asked why Darling was at that location, Darling stated that he "lived upstairs." But there were no residences near the compost site. After Officer Wiedenmeyer inquired further, Darling stated that he lived in

Fargo, North Dakota. Officer Wiedenmeyer detected a strong odor of an alcoholic beverage coming from Darling, and he observed that Darling's eyes were bloodshot and watery. He then asked Darling to exit the car. After Darling performed poorly on field sobriety tests and a preliminary breath test revealed an alcohol concentration of .18, Officer Wiedenmeyer arrested Darling. Darling subsequently was charged with second-degree driving or having physical control of a motor vehicle while under the influence of alcohol, a violation of Minn. Stat. §§ 169A.20, subd. 1(1), 169A.25, subd. 2 (2008 & Supp. 2009); and having an alcohol concentration of .08 or more within two hours of driving or being in physical control of a motor vehicle, a violation of Minn. Stat. §§ 169A.20, subd. 1(5), 169A.25, subd. 2 (2008 & Supp. 2009).

Darling moved to suppress the evidence and dismiss the complaint for lack of probable cause. He argued that his encounter with Officer Wiedenmeyer constituted an unconstitutional seizure because Officer Wiedenmeyer lacked a reasonable, articulable suspicion of criminal activity. Following a hearing, the district court denied Darling's motion, finding that a seizure did not occur when Officer Wiedenmeyer approached Darling's vehicle and that probable cause supports the complaint.

Darling agreed to submit the case to the district court on stipulated facts pursuant to Minn. R. Crim. P. 26.01, subd. 3. The district court found Darling guilty of both counts, imposed a sentence of 365 days' imprisonment for driving under the influence of alcohol, and dismissed the charge of having an alcohol concentration of .08 or more within two hours of driving. The district court also ordered Darling to pay several fees, including a "$75 fee to the public defender." This appeal followed.

D E C I S I O N

I.

Darling argues that the district court erroneously denied his motion to suppress the evidence because his encounter with Officer Wiedenmeyer was an unconstitutional seizure that is unsupported by a reasonable, articulable suspicion of criminal activity. When reviewing a pretrial order denying a motion to suppress evidence, we review the facts for clear error and determine as a matter of law whether the evidence must be suppressed. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). When, as here, the facts are not in dispute, we determine whether the police officer's actions constitute a seizure and, if so, whether the officer articulated an adequate basis for the seizure. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

The Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution protect against unreasonable searches and seizures. A seizure occurs when an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995) (quotation omitted). A person has been seized when, under the totality of circumstances, a reasonable person would believe that, because of the conduct of the police, "he or she was neither free to disregard the police questions nor free to terminate the encounter." *Id.* If a seizure has occurred, "the police must be able to articulate reasonable suspicion justifying the seizure." *In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993). Reasonable, articulable suspicion must be present at the moment a

person is seized. *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880 (1968); *see also Cripps*, 533 N.W.2d at 391.

Ordinarily, the mere act of a police officer approaching a person sitting in a parked car and asking questions is not a seizure. *State v. Vohnoutka*, 292 N.W.2d 756, 757 (Minn. 1980); *Overvig v. Comm'r of Pub. Safety*, 730 N.W.2d 789, 792 (Minn. App. 2007), *review denied* (Minn. Aug. 7, 2007). But such an encounter may become a seizure if there is a demonstration of authority that exceeds the behavior to be expected by a private citizen, such as blocking in a person's vehicle, activating emergency lights, or sounding the horn. *State v. Sanger*, 420 N.W.2d 241, 243 (Minn. App. 1988).

Darling argues that the position in which Officer Wiedenmeyer parked his squad car and Officer Wiedenmeyer's use of the spotlight transformed the encounter into a seizure. Minnesota courts have held that the use of a police spotlight is not a display of police authority and does not constitute a seizure. *See, e.g.*, *Vohnoutka*, 292 N.W.2d at 757 (concluding that no seizure occurred when officer approached vehicle and shined flashlight into passenger compartment after observing driver shut lights off, drive into closed service station, and stop); *Crawford v. Comm'r of Pub. Safety*, 441 N.W.2d 837, 838-39 (Minn. App. 1989) (concluding that no seizure occurred when officer followed vehicle into residential cul-de-sac and activated spotlight to locate parked vehicle); *State v. Reese*, 388 N.W.2d 421, 422-23 (Minn. App. 1986) (concluding that no seizure occurred when police observed two vehicles stopped in adjacent lanes with engines running, positioned squad car so headlights illuminated one vehicle, approached vehicle,

requested driver identification, and observed indicia of intoxication), *review denied* (Minn. Aug. 13, 1986).

The use of a squad car to block or partially block a parked vehicle may be a circumstance contributing to a seizure. *See, e.g.*, *State v. Lopez*, 698 N.W.2d 18, 21-22 (Minn. App. 2005) (concluding that seizure occurred when officer partially blocked defendant's vehicle and activated emergency lights); *Klotz v. Comm'r of Pub. Safety*, 437 N.W.2d 663, 665 (Minn. App. 1989) (concluding that seizure occurred when officer partially blocked vehicle with squad car and instructed defendant to stop walking away from vehicle and identify himself), *review denied* (Minn. May 24, 1989); *Sanger*, 420 N.W.2d at 243 (concluding that seizure occurred when officer parked squad car in manner that prevented defendant's exit from vehicle, activated emergency lights, and sounded horn when defendant attempted to back up). In these cases, circumstances in addition to the position of the squad car supported the conclusion that a seizure occurred. Here, Officer Wiedenmeyer did not activate his emergency lights, sound his horn, or make any verbal commands when he initially approached Darling's vehicle. Darling fails to cite any legal authority in which a police officer's actions of partially blocking a vehicle combined with the use of a spotlight formed the basis for concluding that a seizure occurred.

We examine all of the facts to determine whether "the conduct of the police would communicate to a reasonable person in the defendant's physical circumstances an attempt by the police to capture or seize or otherwise to significantly intrude on the person's freedom of movement." *State v. Hanson*, 504 N.W.2d 219, 220 (Minn. 1993); *accord*

Cripps, 533 N.W.2d at 391. Darling's vehicle was parked when Officer Wiedenmeyer approached it. Officer Wiedenmeyer testified that he parked his squad car behind Darling's vehicle at an angle such that Darling's vehicle was not "fully blocked in" and Darling "could have easily backed up and been able to clear [the] squad car by turning." Officer Wiedenmeyer also testified that, for his safety, he activated his spotlight and trained it on Darling's vehicle, which was lit only by the vehicle's stereo lights.

Officer Wiedenmeyer's use of the spotlight in these circumstances was not a display of authority sufficient to communicate to Darling that he was not free to terminate the encounter by leaving. And because the uncontested evidence establishes that there was sufficient space for Darling to terminate the encounter by driving away, the location of Officer Wiedenmeyer's vehicle would not have communicated to a reasonable person in Darling's circumstances an attempt to seize Darling or intrude on his freedom of movement. Accordingly, a seizure did not occur when Officer Wiedenmeyer parked his squad car and turned on his spotlight.

Likewise, Officer Wiedenmeyer's pounding on Darling's window was not a display of authority sufficient to transform the encounter into a seizure. Darling appeared to be unconscious in the driver's seat of the vehicle. In such circumstances, Officer Wiedenmeyer's conduct would communicate to a reasonable person an attempt to awaken and communicate with the driver, not an attempt to intrude on that person's freedom of movement.

Moreover, even if a seizure occurred, Officer Wiedenmeyer had a reasonable, articulable suspicion that Darling was engaged in criminal activity. A police officer has

an obligation "to make a reasonable investigation of vehicles parked along roadways to offer such assistance as might be needed and to inquire into the physical condition of persons in vehicles." *Kozak v. Comm'r of Pub. Safety*, 359 N.W.2d 625, 628 (Minn. App. 1984); *see also Overvig*, 730 N.W.2d at 792-93 (concluding that officer who observed a vehicle running in an otherwise empty parking lot late at night was justified in investigating based on a concern about possible criminal activity or the driver's welfare). In *Thomeczek v. Comm'r of Pub. Safety*, we held that an officer had a sufficient factual basis to suspect unlawful activity when, at 11:18 p.m., the officer observed an occupied vehicle legally parked with its lights on and its motor running on the street near a vacant lot in an area undergoing construction. 364 N.W.2d 471, 472 (Minn. App. 1985). Similarly, here, the location of Darling's vehicle, the late hour, and the history of criminal activity at the location provided Officer Wiedenmeyer with a sufficient factual basis to suspect that the vehicle's occupant was engaged in unlawful activity. Officer Wiedenmeyer had a reasonable suspicion of criminal activity to justify his initial investigation of Darling's parked car.

Once Officer Wiedenmeyer approached Darling's vehicle on foot and observed Darling to be unconscious, Officer Wiedenmeyer was justified in continuing his investigation to determine Darling's welfare or possible criminal activity. *See Kozak*, 359 N.W.2d at 628 (concluding that investigating parked vehicle is within a responsible police officer's duty to render assistance to public because occupant of already parked car may be intoxicated, suffering from sudden illness, or asleep). Accordingly, the district court did not err by denying Darling's motion to suppress.

II.

Darling asserts that the district court erred by ordering him to pay $75 to the public defender without first determining whether he has the financial ability to pay.[1] "Upon disposition of the case, an individual who has received public defender services shall pay to the court a $75 co-payment for representation provided by a public defender" unless the district court waives the copayment. Minn. Stat. § 611.17(c) (2010). The $75 copayment is mandatory unless it is waived by the district court. Section 611.17(c) does not require the district court to determine the defendant's ability to pay the copayment before imposing it. *See id.*

At the sentencing hearing, the district court reviewed the fees and fines that Darling would be ordered to pay, stating: "He's going to pay [a] $75 fee to the public defender as well." The warrant of commitment issued after sentencing states: "Public Defender fees imposed. This will result in an additional amount due." The district court did not identify the authority under which it ordered the $75 fee. But the district court's order that Darling pay a $75 fee to the public defender reflects the mandate of Minn. Stat. § 611.17(c). The district court ordered payment of a fee in an amount equal to the public-defender copayment amount without an express determination as to Darling's ability to pay. Because Minn. Stat. § 611.17(c) does not require a determination of Darling's

[1] Generally we will not consider matters that were not argued before or considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But we briefly address Darling's argument here in the interests of justice. *See* Minn. R. Crim. P. 28.02, subd. 11 (permitting review in interests of justice).

ability to pay the $75 copayment, the district court did not err by making no such determination.

Darling argues that the $75 fee was ordered by the district court as a partial payment for public-defender services under Minn. Stat. § 611.20, subd. 2 (2010), which provides: "If the [district] court determines that the defendant is able to make partial payment [for counsel], the court shall direct partial payments to the state general fund." *See also* Minn. R. Crim. P. 5.02, subd. 5 ("The court, if after previously finding that the defendant is eligible for public defender services, determines that the defendant now has the ability to pay part of the costs, may require a defendant, to the extent able, to compensate the governmental unit charged with paying the expense of the appointed public defender."). But the record does not reflect that the district court ordered payment under Minn. Stat. § 611.20, subd. 2, and the lack of any finding of ability to pay indicates that the district court was not proceeding under that provision. Therefore, the district court was not required to determine Darling's ability to pay before ordering the $75 copayment.

Affirmed.