IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1639-15

JOSEPH TIMOTHY SHIMKO, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD COURT OF APPEALS TRAVIS COUNTY

KELLER, P.J., filed a dissenting opinion in which HERVEY, KEEL and WALKER, JJ., joined.

A "seizure" occurs, for Fourth Amendment purposes, when a person is restrained by physical force or submits to a show of authority.[1] If the actions of the police do not show "an unambiguous intent to restrain," police conduct constitutes a show of authority when, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave, to decline the officer's requests, or to otherwise terminate the encounter.[2]

[1] *Brendlin v. California*, 551 U.S. 249, 254 (2007).

[2] *Id.* at 255.

Here, the uniformed police officer “flagged down” or “waved” at appellant’s truck in order to get him to stop.[3] There were three other officers at the scene and at least three police vehicles (two marked vehicles and one with less-visible decals). I think a reasonable person in that situation would not feel free to leave the scene or to decline the officer’s request to stop. It may be that the police officer in this case subjectively intended his act of flagging down the truck to be a mere request, but that subjective intent is irrelevant: “The intent that counts under the Fourth Amendment is the intent [that] has been conveyed to the person confronted, and the criterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized.”[4]

I find myself in agreement with Judge Dillon’s dissent in *State v. Wilson*,[5] a case with facts similar to those in our case. There, the uniformed officer waved his hands back and forth just above shoulder level to get the vehicle to stop.[6] Once the vehicle stopped, the officer immediately smelled the odor of alcohol.[7] A majority of the Court of Appeals of North Carolina held that these circumstances did not constitute a stop,[8] but I believe that Judge Dillon’s dissent is more persuasive:

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[3] The specific acts that the officer engaged in are described in various ways that include flagging down, raising his hand, waving, and asking appellant to stop. The officer said he “wasn’t real clear” on whether he yelled or made some type of gesture. Most of the questions refer to “flagging down” appellant, and the officer never disputed that characterization.

[4] *Id.* at 260-61 (citations omitted).

[5] 793 S.E.2d 737, 743 (N.C. App. 2016) (Dillon, J., dissenting) (December 6).

[6] *Id.* at 738.

[7] *Id.*

[8] *Id.* at 739-42.

"And here, I believe that any reasonable motorist in Defendant's position—seeing a uniformed officer standing next to a marked patrol car waving his arms, gesturing the motorist to stop—would feel compelled to stop as Defendant did here. The *subjective* intent of the officer is irrelevant in this analysis."[9] Judge Dillon suggested that, had the officer communicated to the defendant after the stop that he just wanted to ask questions about the neighborhood, then the seizure might have become a consensual encounter and evidence detected after that point would likely have been admissible.[10] But because the odor of alcohol was detected immediately, it was the fruit of a seizure.[11]

This case differs from *Wilson* in that appellant could have had reason to think that the officer was flagging him down to help him find the person that appellant was intending to pick up. But appellant could not know that that was the officer's intent, and even if he thought it was, he could not know that the officer's direction to stop was a mere request. Under those circumstances, a reasonable person would not feel free to leave, to decline the request, or to otherwise terminate the encounter.

To hold that a stop did not occur because there was reason to believe that the officer's direction to stop *might* have been a request would allow a person to ignore a police directive when the person does not have a full understanding of the circumstances. Such a rule potentially endangers police officers and others whom an officer's directive might be designed to protect. For example, an officer might direct an individual to stop because of a car accident or an injured pedestrian, or for crowd control or to allow pedestrians to cross an area freely.

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[9] *Id.* at 743 (Dillon, J., dissenting) (emphasis in original).

[10] *Id.*

[11] *Id.*

And finally, the evidence might be admissible under another theory. The trial court found that the officer had satisfied the community caretaking doctrine, and the propriety of that holding could be reviewed by the court of appeals on remand.[12]

I respectfully dissent.

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[12] *See id.* (contending that the case should be remanded to determine whether the stop was reasonable).