

NOTICE

*Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JUSTINE L. DAVIS,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12393  
Trial Court No. 2KB-14-00589 CR

MEMORANDUM OPINION

No. 6811 — August 7, 2019

Appeal from the Superior Court, Second Judicial District,  
Kotzebue, Paul A. Roetman, Judge.

Appearances: Gavin Kentch, Law Office of Gavin Kentch,  
LLC, Anchorage, for the Appellant. RuthAnne B. Bergt,  
Assistant Attorney General, Office of Criminal Appeals,  
Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for  
the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and Mannheimer,  
Senior Judge.\*

Judge HARBISON.

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\* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Justine L. Davis was convicted of misconduct involving a controlled substance in the fourth degree and alcohol importation.<sup>1</sup> The evidence against Davis was discovered by a state trooper after he approached Davis at the Kotzebue airport and asked to search her luggage. In this appeal, we are asked to determine whether the superior court correctly denied a motion to suppress filed by Davis challenging the search. For the reasons explained here, we conclude that the trooper's contact with Davis was a lawful police-citizen contact, that Davis voluntarily consented to the search of her luggage, and that her luggage was not unlawfully seized. We therefore affirm Davis's conviction.

*Factual and procedural background*

On August 23, 2014, Trooper James Wilcox received an anonymous phone call informing him that Justine Davis soon would be departing from the Kotzebue airport to fly to Noorvik with alcohol and marijuana in her luggage.

After receiving the call, Wilcox went to the Kotzebue airport where he confirmed that Davis was booked on the morning Bering Air flight to Noorvik. Wilcox later testified that he located Davis's luggage with the help of a baggage handler. It was on the far wall of the hangar area, out of view of the waiting passengers and sitting in a pile with other luggage waiting to be loaded on the plane. The baggage handler pointed out Davis's name on her bags, and Wilcox asked the baggage handler not to load Davis's luggage onto the plane.

A Bering Air employee identified Davis for Wilcox. Wilcox, who was in uniform, then approached Davis, who was seated in the public waiting area of the

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<sup>1</sup> Former AS 11.71.040(a)(3)(F) (2014) and AS 04.11.499(a) & AS 04.16.200(e)(1), respectively.

terminal. Wilcox knelt down to speak with Davis, saying “Justine? [I am] Trooper Wilcox. I need to speak to you back there in the office real quick if you want. Okay?”

Wilcox led Davis into the office area of the building. Airline workers were walking around them, and other passengers could still see them. Wilcox later testified that his reason for moving to the office area was:

to keep [Davis] from having to be embarrassed by contact by law enforcement and for us to be able to hold a conversation, you know, in relative privacy so nobody else needs to know her business and what we’re dealing with.

Once in the office, Wilcox told Davis about the tip he had received, and he asked Davis if he could search her bags:

*Wilcox:* Yeah. We’ve got some problems with some of your bags that you have. Somebody is saying that you’re bringing in booze and marijuana. Okay? And so I’m sure you’re not, but I’d like permission to take a look in your bags and make sure you don’t have any booze or anything going in there.

*Davis:* I’m trying to save bags.

*Wilcox:* Huh?

*Davis:* I said I’m just trying to save bags.

*Wilcox:* Well, I don’t know. Do you have any problem with me looking through bags and making sure there’s not any booze or marijuana?

*Davis:* I don’t have anything.

*Wilcox:* Okay. That’s cool.

(Pause)

*Davis:* I don’t see how you — (indiscernible)?

*Wilcox:* I’m sorry?

*Davis:* I don't have anything in my bags.

*Wilcox:* I understand. You're welcome to stand right there if I go through it. Okay?

(Pause)

*Wilcox:* You don't have anything to hide, right?

*Davis:* No.

*Wilcox:* Okay. Do you mind if we go through your bags then? Just a quick check.

*Davis:* M-kay. You can go through 'em.

*Wilcox:* Okay. Come on with me.

Wilcox led Davis to where her bags were sitting in the hangar area. There, he asked, "Mind if I go through this one first?" Davis replied, "Yes," and Wilcox responded, "Okay." He then began to search Davis's bag. After finding a bottle of whiskey, he arrested Davis and seized her luggage. He did not seize the diapers that were in Davis's luggage, but instead allowed her to send those items on the flight to Noorvik as scheduled.

Wilcox searched the remainder of Davis's luggage and found four more 750-milliliter bottles of whiskey and about seven ounces of marijuana. Davis was subsequently indicted for misconduct involving a controlled substance in the fourth degree and alcohol importation.<sup>2</sup>

Prior to trial, Davis filed a motion to suppress the evidence found in her luggage. She argued that Wilcox unlawfully subjected her to an investigatory stop without reasonable suspicion, and that she did not voluntarily consent to the search of

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<sup>2</sup> Former AS 11.71.040(a)(3)(F) (2014) and AS 04.11.499(a) & AS 04.16.200(e)(1), respectively.

her bags. Davis also argued that her luggage had been seized. This claim was based on an affidavit in which Davis stated that after Wilcox led her out of the waiting area she watched her bags being removed from the plane.

The superior court held an evidentiary hearing. Based on the evidence presented at this hearing, the court denied the suppression motion, finding that the encounter between Wilcox and Davis was a lawful police-citizen contact, and that Davis voluntarily consented to the trooper's search of her luggage.

Based on the testimony at the evidentiary hearing, the superior court first found that Davis validly consented to the search, explaining as follows:

Through an exchange that I would describe as at times accusatorial, but in a conversational tone, the trooper was able to convince or have an exchange with Ms. Davis such that her response to the question "do you give me permission to look in your bag?" She says "m-kay." At that point, they leave that office and go to that separate area where the — where the bags are . . . And the court understands her say[ing] "m-kay" [as] providing consent to search her bag in response to the question "do you give me permission to look at your bag?"

The superior court described Wilcox as "speaking quietly" during this initial interaction. And the court found that Davis later reaffirmed her consent when she said "Yes" in response to the question "Do you mind if I go through this one first?"

The superior court additionally found that the contact between Wilcox and Davis was not an investigative stop but rather was a police-citizen contact. The court characterized the contact as "nondirective" and "not compulsory." Finding that Davis was able to decide for herself whether she would talk to Wilcox, the court concluded that the exchange did not ripen into a seizure when Wilcox and Davis moved to the Bering Air office.

Finally, the superior court rejected the argument that Davis’s luggage was seized. (This claim was based on Davis’s statement in her affidavit that she watched her bags being removed from the plane; Davis did not testify to this at the hearing, however.) The court found, “This was a bag that was not detained . . . It was still in the area of where it was ready to be loaded and nothing happened to the bag until after consent was given by Ms. Davis.”

Following the superior court’s ruling, Davis agreed to a bench trial on stipulated facts. She was convicted, and she now appeals her convictions.

*Why we conclude that Davis was not subjected to a investigative stop*

Alaska law draws a distinction between investigative stops (which constitute seizures for constitutional purposes) and police-citizen contacts in which the police merely seek information without engaging in a show of authority.<sup>3</sup> Before the police can subject a person to an investigative stop, they must have a reasonable suspicion of criminal activity that poses an imminent danger to the public, or that involved recent serious harm to persons or property.<sup>4</sup> In contrast, the police can engage in a citizen contact without special justification.<sup>5</sup>

Whether an encounter between a police officer and a citizen constitutes an investigative stop or merely a citizen contact ultimately depends on whether, under the

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<sup>3</sup> *Reichel v. State*, 101 P.3d 197, 199 (Alaska App. 2004); see *Howard v. State*, 664 P.2d 603, 608 (Alaska App. 1983).

<sup>4</sup> *Coleman v. State*, 553 P.2d 40, 46 (Alaska 1976).

<sup>5</sup> See *Waring v. State*, 670 P.2d 357, 363-64 (Alaska 1983).

totality of the circumstances, the officer's conduct would lead a reasonable person to believe that they were not free to leave.<sup>6</sup>

In the present case, Wilcox initially told Davis, "I need to speak to you back there in the office real quick if you want." Davis characterizes this language as a command that she submit to questioning. But Wilcox's choice of wording is not determinative.<sup>7</sup> The superior court found that Wilcox spoke quietly in a conversational tone while on bended knee. Although Wilcox was at times accusatorial, the superior court found that Davis's contact with Wilcox was not compelled and that Davis was able to decide for herself whether she would talk to Wilcox. Given this context, we agree with the superior court that Wilcox's statement to Davis that "I need to speak to you . . . if you want" did not convert the encounter into an investigative stop.

Davis also argues that when Wilcox asked that Davis's bags not be loaded onto the plane, this was a "show of authority" that made Davis believe that she was not free to leave. Her contention on appeal is that she had to either board the plane without her bags or continue talking to Wilcox.

The record does not support this argument. Wilcox's direction to the baggage handler took place outside of Davis's presence, in a location that the superior court described as "hidden" from the public area. There was no evidence that Wilcox told Davis that he had spoken to the baggage handler, or that Davis was otherwise aware of Wilcox's conversation with the baggage handler.

The superior court found that Davis "decide[d] for herself whether she want[ed] to talk" to Wilcox. The superior court noted that the contact initially took place

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<sup>6</sup> *Id.* at 364; *Ozhuwan v. State*, 786 P.2d 918, 920 (Alaska App. 1990).

<sup>7</sup> *See Horner v. State*, 2008 WL 314164, at \*5 (Alaska App. Feb. 6, 2008) (unpublished).

in a “public area where people sit when they’re waiting to get on the plane.” And although Wilcox led Davis into the office, a semi-private location, other passengers could still see Wilcox and Davis, and workers were in the office walking around them. During his contact with Davis, Wilcox did not handcuff her or control her movement in any way. Additionally, the contact between Wilcox and Davis was very brief. A review of the audio recording reveals that only about two minutes elapsed from Wilcox’s initial contact with Davis until Davis consented to have Wilcox search her luggage, and just under ten minutes elapsed between the initial contact and Davis’s arrest.

We therefore agree with the superior court that the encounter between Wilcox and Davis was a police-citizen contact rather than an investigative stop. This being so, Wilcox did not need a particularized suspicion of criminal activity before he approached and spoke with Davis.

*Davis validly consented to the search of her bags*

Consent to a police search is valid if two requirements are met. First, the person must, in fact, consent to the search. Second, the consent must be “voluntary, unequivocal, intelligently given, and not the product of duress or coercion.”<sup>8</sup>

On appeal, Davis argues that although she seemingly consented to Wilcox’s search of her luggage, under the totality of the circumstances, her consent was involuntary. She also argues that she subsequently revoked her consent when she answered “yes” to Wilcox’s question, “Mind if I go through this one first?”

In support of her argument, Davis makes many of the same arguments that she made in support of her claim that she was subjected to an investigative stop — that

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<sup>8</sup> *Baxter*, 77 P.3d at 23 (quoting *Shaffer v. State*, 988 P.2d 610, 613 (Alaska App. 1999)).

Wilcox’s use of the word “need” in the statement “I need to speak with you back there in the office real quick if you want” was a command, that she felt that she had no choice but to talk to Wilcox, and that she believed that she was going to miss her flight no matter what she said or did.

The superior court found that Wilcox’s use of “need” was “nondirective” and “not compulsory.” Additionally, the contact between Wilcox and Davis was brief, and it took place initially in an open, public location and later in a semi-private, noncoercive setting. Only two minutes elapsed between when Wilcox initially approached Davis and when she consented to the search. The record therefore supports the superior court’s finding that Davis “decide[d] for herself whether she want[ed] to talk” to Wilcox. Similarly, considering the totality of the circumstances, we agree with the superior court’s conclusion that Davis’s consent was voluntary and was not the product of duress or coercion.

Davis argues for the first time on appeal that although she consented to the search when she was talking to Wilcox in the office, she later revoked this consent when Wilcox asked her, “Mind if I go through this one first?” and she answered “yes.” She argues that this exchange — an exchange that the superior court determined to be a second manifestation of consent to the search — was actually a revocation of her previously-given consent.

The Alaska Supreme Court has explained:

[The exclusionary rule] is a prophylactic device to curb improper police conduct and to protect the integrity of the judicial process. Thus, justice does not generally require that it be applied on appeal where . . . new grounds for its invocation are presented on appeal.<sup>[9]</sup>

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<sup>9</sup> *Moreau v. State*, 588 P.2d 275, 280 (Alaska 1978).

Davis's failure to raise this argument in the trial court precludes her from seeking suppression of the evidence by raising it for the first time on appeal.

For the reasons we have explained, we find no error in the superior court's finding that Davis validly consented to the search of her luggage.

*Trooper Wilcox did not seize Davis's luggage prior to her arrest*

On appeal, Davis contends that Wilcox's actions constituted a seizure of her luggage that was not supported by probable cause or reasonable suspicion. The superior court found that Davis's luggage was not detained and that no seizure occurred. For reasons we now explain, we see no error in the superior court's decision.

For purposes of the Fourth Amendment, "a 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property."<sup>10</sup> With regard to whether a person's luggage has been seized, this Court previously has explained:

Luggage, unlike a person, has no fourth amendment rights. The fourth amendment, accordingly, is implicated only when a police seizure of an item impairs a person's possessory interest, or a search impairs a person's reasonable privacy interest in the item[.]<sup>[11]</sup>

This Court reviews the record in the light most favorable to the superior court's ruling on the suppression motion.<sup>12</sup>

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<sup>10</sup> *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

<sup>11</sup> *Pooley v. State*, 705 P.2d 1293, 1301 (Alaska App. 1985) (quoting *United States v. Puglisi*, 723 F.2d 779, 785-88 (11th Cir. 1984)).

<sup>12</sup> *Baxter v. State*, 77 P.3d 19, 23 (Alaska App. 2003).

Here, Davis stated in an affidavit, but not at the evidentiary hearing, that she watched her bags “being removed from the plane.” For his part, Wilcox testified at the evidentiary hearing that when he arrived at the Bering Air terminal, Davis’s luggage was in the hangar, in a pile with the other luggage, rather than on the plane. Within two minutes, Wilcox spoke to Davis, obtained her consent to the search, and returned to the hangar with her. The luggage was still there. Crediting Wilcox’s testimony, the superior court held, “This was a bag that was not detained . . . It was still in the area of where it was ready to be loaded and nothing happened to the bag until after consent was given by Ms. Davis.”

Additionally, since only two minutes elapsed between when Wilcox gave the instruction to the baggage handler and when he returned to the baggage area with Davis, the superior court could appropriately infer that the handler would not have loaded Davis’s bags into the plane during the intervening time even if Wilcox had not directed him to keep the baggage in its location. There was no evidence that any of the Noorvik-bound luggage was loaded onto the plane during the few minutes between when Wilcox spoke to the handler and when he returned to the baggage area with Davis. For these reasons, the superior court’s factual finding that “nothing happened to the bag until after consent was given” was not clearly erroneous.

Given the superior court’s findings, we conclude that no seizure occurred under either the state or federal constitution.

### *Conclusion*

The encounter between Davis and Wilcox was a lawful police-citizen contact, Davis’s consent to the search of the luggage was voluntary, and the trooper did not seize her luggage.

The judgment of the superior court is AFFIRMED.