IN THE COURT OF APPEALS OF THE STATE OF ALASKA

STATE OF ALASKA, Appellant, v. MICHELE HELEN ADAMS, Appellee.	Court of Appeals No. A-13079 Trial Court No. 2NO-17-00372 CR MEMORANDUM OPINION No. 6932 — March 31, 2021

Appeal from the Superior Court, Second Judicial District, Nome, Romano D. DiBenedetto, Judge.

Appearances: Michal Stryszak, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellant. Megan R. Webb, Assistant Public Defender, and Beth Goldstein, Acting Public Defender, Anchorage, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

Judge ALLARD.

Michele Helen Adams was charged with third-degree misconduct involving a controlled substance after a trooper discovered 3.8 ounces of marijuana in her luggage

at an airport.[1] Adams moved to suppress the marijuana, arguing that her interaction with the trooper was an investigative stop for which the trooper lacked reasonable suspicion. The superior court agreed with Adams and suppressed the marijuana, ultimately dismissing the case. The State filed this appeal.

On appeal, the State argues that the superior court erred when it concluded that the initial interaction between Adams and the trooper constituted an investigative stop for which reasonable suspicion was required. For the reasons explained here, we agree with the State that the superior court's ruling is inconsistent with its findings and our current case law.

Background facts

The superior court held an evidentiary hearing to resolve Adams's motion to suppress. As established at the hearing, in April 2017, an airline employee at the Nome airport reported to Alaska State Trooper Jonnathon Stroebele that luggage belonging to Adams smelled strongly of marijuana. Trooper Stroebele, who was in uniform, approached Adams in the airport lobby as she waited for her connecting flight. Stroebele asked Adams if he could "talk to her for just a minute . . . or a couple of minutes." Adams agreed to speak with Stroebele and she suggested that they talk outside.

After a few preliminary questions to confirm that the luggage in question belonged to Adams, Stroebele told Adams that there was "a lot of marijuana smell coming out of it," and he then asked her, "How much marijuana is in there?" Adams responded that she was "just helping out [a] friend" and that she "didn't even know how much [was] in there." Stroebele asked Adams who the friend was, but Adams would

[1] Former AS 11.71.040(a)(2) (2016).

only say that it was her cousin. At this point (approximately a minute and a half into the encounter), Stroebele asked if he could take the marijuana out and weigh it, and Adams agreed.

In its order granting Adams's motion to suppress, the superior court found that Stroebele "never threatened Adams and that Adams [was] willing to speak with him." The superior court also found that "Adams was casual and polite and never seemed afraid of Trooper Stroebele," and that Stroebele "did not prevent Adams from missing her flight[;] he never put a hand on her or raised his voice." Lastly, the superior court found that Adams voluntarily consented to the search of her luggage.

The superior court nevertheless concluded that Adams was subject to an investigative stop for which reasonable suspicion was required. In its order, the superior court stated that "the contact between Trooper Stroebele and Adams constituted an investigatory stop at least from the time when the trooper began asking Adams to describe her luggage and certainly by the time he asked for consent to search." According to the superior court, "by the time a police officer asks a question about the narcotics in a person's luggage, the officer must already possess the articulable suspicion that a crime is being committed."

After determining that Stroebele subjected Adams to an investigative stop when he asked Adams about the marijuana in her bag, the superior court then ruled that Stroebele lacked reasonable suspicion for this stop. Noting that possession of one ounce of marijuana is legal under Alaska law, the court ruled that the smell of marijuana does not, on its own, give rise to "a reasonable suspicion that imminent public danger exists or serious harm to persons or property has recently occurred."[2]

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[2] *Coleman v. State*, 553 P.2d 40, 46 (Alaska 1976); *see also* AS 17.38.020(1) (providing that it is lawful for a person twenty-one years or older to possess, use, display, purchase, or (continued...)

Based on this reasoning, the superior court granted Adams's motion to suppress the marijuana found in her luggage and ultimately dismissed the case.

The State now appeals.

Did the initial interaction between Adams and the trooper constitute an investigative stop?

The Fourth Amendment to the United States Constitution and Article I, Section 14 of the Alaska Constitution guarantee the right of citizens to be free from unreasonable searches and seizures. Not every contact between a police officer and a private citizen involves a "seizure" that triggers these protections.[3] A seizure exists when an officer "by means of physical force or show of authority" restrains an individual's liberty.[4] This does not require "some specific act of 'overt control.'"[5] Instead, the court must look to the totality of the circumstances and consider whether "the challenged police conduct would lead a reasonable person to believe that the person was not free to leave."[6]

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[2] (...continued)
transport one ounce or less of marijuana); *cf. Commonwealth v. Overmyer*, 11 N.E.3d 1054, 1058-59 (Mass. 2014) (holding that the odor of unburnt marijuana is not a reliable predictor of "the presence of a criminal amount of [marijuana]").

[3] *Waring v. State*, 670 P.2d 357, 364 (Alaska 1983).

[4] *Id.* at 363 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1983)).

[5] *Ozhuwan v. State*, 786 P.2d 918, 920 (Alaska App. 1990).

[6] *Id.* (citing *Waring*, 670 P.2d at 364; *Romo v. Anchorage*, 697 P.2d 1065, 1068 (Alaska App. 1985)); *see also Florida v. Bostick*, 501 U.S. 429, 436 (1991) (describing the standard as "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter").

Under this standard, "an officer has not made a seizure if, for example, the officer interrogated the person in a conversational manner, did not order the defendant to do something or demand that he do it, did not ask questions overbearing or harassing in nature, and did not make any threats or draw a weapon."[7] A request for consent to search does not automatically convert a consensual encounter into a seizure "as long as the police do not convey a message that compliance with their request is required."[8] Likewise, "a seizure does not occur simply because a police officer approaches an individual and asks a few questions."[9]

On the other hand, an encounter becomes a seizure if the officer engages in conduct a reasonable person would view as threatening or offensive even if performed by another private citizen.[10] According to Professor LaFave, this would include such tactics as "pursuing a person who has attempted to terminate the contact," "continuing to interrogate a person who has clearly expressed a desire not to cooperate," "holding a person's identification papers or other property," "intercepting a phone call for the suspect, blocking the path of the suspect, physically grabbing and moving the suspect,

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[7] 4 Wayne R. LaFave, *Search and Seizure* § 9.4(a), at 598-99 (6th ed. 2020) (internal quotations omitted); *see also Barrows v. State*, 814 P.2d 1376, 1379 (Alaska App. 1991) (no seizure where the officer approached a parked car in a public place and spoke with the occupants in a conversational manner).

[8] *Bostick*, 501 U.S. at 435; *accord Wright v. State*, 795 P.2d 812, 815 (Alaska App. 1990) (reaching same conclusion in applying Alaska's constitutional protections); *LeMense v. State*, 754 P.2d 268, 273 (Alaska App. 1988) (same); *Pooley v. State*, 705 P.2d 1293, 1306 (Alaska App. 1985) (same).

[9] *Bostick*, 501 U.S. at 434.

[10] *Waring*, 670 P.2d at 364.

[or] drawing a weapon."[11] Circumstances that can also contribute to a finding of a seizure include "offensive statements" such as "unsupported outright accusations of criminal activity."[12]

Whether a person's encounter with the police constitutes an investigative stop is a mixed question of fact and law.[13] This Court reviews the trial court's findings of fact under the clearly erroneous standard of review, and we review whether the trial court's findings support the legal conclusion *de novo*.[14]

In the current case, the superior court made various findings that suggested that no seizure had occurred. The court found that the interaction was "casual and polite," and that the trooper "never threatened Adams." The court also found that Adams was willing to speak with the trooper and that she voluntarily gave her consent to search her bag. We have reviewed the recording of the interaction, and these findings are well supported by the record. We note that the interaction between Adams and the officer was friendly, and Adams voluntarily gave her consent to search her bag less than two minutes after the interaction began.

The superior court nevertheless found that the officer's initial question about the marijuana in Adams's bag automatically converted the encounter into a seizure. According to the superior court, "by the time a police officer asks a question about the

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[11] 4 Wayne R. LaFave, *Search and Seizure* § 9.4(a), at 601-05 (6th ed. 2020) (citations omitted); *see also State v. Wagar*, 79 P.3d 644, 648-49 (Alaska 2003) (noting this treatise is "the leading text on search and seizure"); *Hart v. State*, 397 P.3d 342, 345 (Alaska App. 2017) (same); *Joseph v. State*, 145 P.3d 595, 601 (Alaska App. 2006) (relying on this treatise).

[12] 4 Wayne R. LaFave, *Search and Seizure* § 9.4(a), at 607 (6th ed. 2020).

[13] *Meyer v. State*, 368 P.3d 613, 615 (Alaska App. 2016).

[14] *Id.*

narcotics in a person's luggage, the officer must already possess the articulable suspicion that a crime is being committed." The superior court cited no authority for this proposition of law.

On appeal, the State argues that the superior court erred in treating this single question as though it were dispositive of the legal question of whether a seizure occurred. The State also argues that the superior court's ruling is inconsistent with our established case law.

We agree with the State that the superior court's ruling is inconsistent with our established case law. In *LeMense v. State*, for example, we held that a trooper was entitled to approach LeMense in an airport and inquire whether he would produce identification and answer questions without converting the consensual encounter into an investigative stop.[15] We recognized that the "harder question [was] whether the trooper could ask LeMense whether he could look inside his suitcase to see if the suitcase contained drugs."[16] We concluded that the trooper's inquiry about drugs and request to search did not, on its own, convert the encounter into an investigative stop.[17]

We reached a similar conclusion in *Wright v. State*, when a police officer stopped a man in an airport, asked him if his luggage contained marijuana, and then asked if he could search the man's luggage.[18] Noting that "an individual can consent to an officer's request to search luggage without turning the encounter into an investigative

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[15] *LeMense v. State*, 754 P.2d 268, 273 (Alaska App. 1988).

[16] *Id.*

[17] *Id.*

[18] *Wright v. State*, 795 P.2d 812, 815 (Alaska App. 1990).

stop," we affirmed the trial court's ruling of a consensual encounter.[19] The State also cites to numerous unpublished cases in which we likewise affirmed rulings that no seizure occurred even though the law enforcement officers inquired about drugs or other illegal activity.[20]

This is not to say that an officer's accusatory questions have no relevance to the legal question of whether a seizure has occurred. Whether a seizure occurred is determined based on the totality of the circumstances.[21] And the nature and scope of an officer's questions can be an important factor in that analysis, as various state and federal courts have recognized. In *State v. Pitts*, for example, the Vermont Supreme Court held that,

> while "mere questioning" may not constitute a seizure per se, pointed questions about drug possession or other illegal activity in circumstances indicating that the individual is the subject of a particularized investigation may convert a consensual encounter into a *Terry* stop requiring objective and articulable suspicion under the Fourth Amendment.[22]

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[19] *Id.* at 815-16 (citing *LeMense*, 754 P.2d at 273); *see also Pooley v. State*, 705 P.2d 1293, 1306 (Alaska App. 1985) (concluding that an encounter in an airport parking lot where officers stopped Pooley and explained that they suspected him of transporting drugs was a consensual encounter until officers asked Pooley to return to the airport terminal with them).

[20] *See Horner v. State*, 2008 WL 314164, at *4-6 (Alaska App. Feb. 6, 2008) (unpublished); *Gonzalez v. State*, 2001 WL 1448751, at *1 (Alaska App. Nov. 14, 2001) (unpublished); *Abdou v. State*, 1994 WL 16196151, at *4 (Alaska App. Jan. 19, 1994) (unpublished); *see also Davis v. State*, 2019 WL 3714831, at *3-4 (Alaska App. Aug. 7, 2019) (unpublished).

[21] *Ozhuwan v. State*, 786 P.2d 918, 920 (Alaska App. 1990).

[22] *State v. Pitts*, 978 A.2d 14, 19 (Vt. 2009).

Likewise, in *State v. Alverez*, the Utah Supreme Court held that the officer's questions accusing the defendant of illegal acts "exceeded 'mere questioning' and created a confrontational encounter," which a reasonable person would not have felt free to disregard or simply leave.[23] Various federal courts have also recognized the potentially coercive nature of an officer's accusatory questions.[24]

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[23] *State v. Alverez*, 147 P.3d 425, 431-32 (Utah 2006); *see also State v. Rodriguez*, 796 A.2d 857, 863 (N.J. 2002) (accusatory questions "contribute[d]" to finding that defendant's encounter with the police was a seizure); *State v. Jason L.*, 2 P.3d 856, 862 (N.M. 2000) (holding that officers asking the defendant if he had weapons "changed the tenor" of the encounter from consensual to a seizure); *cf. State v. Quino*, 840 P.2d 358, 363-64 (Haw. 1992) (relying on state constitution to hold that, although no physical force was used, defendant was effectively seized when "general" questioning by narcotics detectives turned to "inquisitory" questions about possession of drugs).

[24] *See, e.g.*, *United States v. Berry*, 670 F.2d 583, 597 (5th Cir. 1982) ("Statements which intimate that an investigation has focused on a specific individual easily could induce a reasonable person to believe that failure to cooperate would lead only to formal detention."); *United States v. Williams*, 615 F.3d 657, 664 (6th Cir. 2010) (concluding that a reasonable person would not have felt free to walk away in the face of the officer's accusations); *United States v. Tyler*, 512 F.3d 405, 410 (7th Cir. 2008) (including "whether the police informed the person that he was suspected of a crime or the target of an investigation" in list of factors to be considered by the court in determining whether seizure occurred); *United States v. Villa-Gonzalez*, 623 F.3d 526, 533 (8th Cir. 2010) (noting that "inquisitorial statements" about drugs "are not present in the vast run of consensual encounters between police and individuals, and certainly make any encounter more coercive"); *United States v. Drinkard*, 900 F.2d 140, 142 (8th Cir. 1990) (considering fact that agents asked the defendant if he had drugs in his luggage as a factor indicating seizure occurred); *United States v. Nunley*, 873 F.2d 182, 184-85 (8th Cir. 1989) (holding that consensual encounter turned into a seizure when the agent told the defendant he was there to stop the flow of drugs through the airport); *United States v. Sadosky*, 732 F.2d 1388, 1392-93 (8th Cir. 1984) (concluding that consensual encounter became a seizure when DEA agent revealed he was investigating narcotics violations and indicated he wanted to question the defendant because of his unusual behavior); *United States v. Glass*, 128 F.3d 1398, 1407 (10th Cir. 1997) (declining to adopt per se rule that accusatory questioning automatically

(continued...)

Here, however, the officer only asked one accusatory question, and the question did not necessarily imply illegal activity because possession of one ounce of marijuana is legal under Alaska law.[25] More importantly, all of the other indicia of a seizure were not present, as the superior court's factual findings make clear. Indeed, the interaction is particularly notable for how polite and friendly it was and how quickly and willingly Adams answered the officer's questions and then consented to the search.

Thus, given the totality of the circumstances presented here — and the superior court's own factual findings — we conclude that the superior court erred when it ruled that the officer's question automatically converted this encounter into a seizure.

Conclusion

The judgment of the superior court is REVERSED and this case is REMANDED for further proceedings consistent with this decision. We do not retain jurisdiction.

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[24] (...continued)
converts encounter into a seizure but recognizing that such questioning is "certainly a factor to be considered").

[25] *See* AS 17.38.020(1).