ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
BRIAN S. MILLER, JUDGE

DIVISION II

CACR07-647

January 30, 2008

DAVID LEE DANIELS
APPELLANT
v.
STATE OF ARKANSAS
APPELLEE

AN APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT
[CR 2005-2864-2]

HONORABLE KIM M. SMITH, JUDGE

AFFIRMED

Appellant David Lee Daniels was arrested on November 5, 2005, and charged with possession of cocaine and possession of drug paraphernalia. He moved to suppress the evidence seized from him during his arrest, and the court denied his motion after conducting a suppression hearing on December 20, 2006. He was found guilty on February 6, 2007, by a Washington County jury and sentenced to 360 months' imprisonment. On appeal, he asserts that the trial court erred in denying his motion to suppress evidence because his detention was a seizure and the arresting officers lacked reasonable suspicion or probable cause to seize him. We disagree and affirm.

When reviewing the denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances. *Davis v. State*, 99 Ark. App. 173, ___

S.W.3d ___ (2007); *Benitez v. State*, 99 Ark. App. 140, ___ S.W.3d ___ (2007). We review findings of historical facts for clear error and determine whether those facts give rise to reasonable suspicion or probable cause. *Id.* In doing so, we give due weight to inferences drawn by the trial court. *Id.*

The evidence taken at the suppression hearing on December 20, 2006, established that at approximately 1:45 a.m., on November 5, 2005, four Fayetteville police officers on foot patrol along Dickson Street noticed several people loitering in the parking lot of a local restaurant. Upon entering the parking lot, one of the officers pointed out a silver Cougar that was occupied by three men. The car's engine was turned off and it did not appear that the men had just gotten there or were preparing to leave. The officers decided to approach the car. As Officer Jason Bailey approached the driver's side window, he noticed Daniels trying to hide an orange pill bottle and a clear plastic baggie containing a white substance underneath a magazine and towel in Daniels's lap. The officer suspected the items were contraband, and when he made contact with Daniels, he asked to see Daniels's hands. Daniels ignored the officer and continued reaching under the towel. Based on Daniels's conduct, Officer Bailey suspected a weapon and drew his weapon. A second officer performed a "felony takedown" on Daniels, and Daniels was taken into custody.

Officer Bailey testified that the area where they made contact with Daniels was a high crime area. He said that the local bars closed around 1:30 a.m., so it was not unusual for Daniels to be parked in one of the parking lots. He, however, stated that the parking lot where Daniels was parked was private and usually closed somewhere between 10 p.m. and

12 a.m. Officer Bailey said that he and his fellow officers found Daniels's vehicle suspicious because: (1) it was 1:30 a.m; (2) the car's engine was turned off; (3) the car was in a parking lot where people normally did not loiter; and (4) it did not appear that the car had recently arrived or was preparing to leave. He said that, because of these reasons, they decided to check on the welfare of the vehicle's occupants.

Officer Frederic Gisler also testified that the officers approached the vehicle in order to check on the welfare of the occupants. He said they were not attempting to make any type of felony or misdemeanor stop. He asserted that the vehicle's occupants were only detained after Officer Bailey said that he had observed contraband and suspicious movements.

On appeal, Daniels argues that Rules 2.1, 2.2, and 3.1 of the Arkansas Rules of Criminal Procedure failed to justify the officers' actions. There are three categories of police-citizen encounters. *Anderson v. State*, 79 Ark. App. 286, 86 S.W.3d 403 (2002); *Lamb v. State*, 77 Ark. App. 54, 70 S.W.3d 397 (2002). The first and least intrusive category is when an officer merely approaches an individual on a street and asks if he is willing to answer some questions. *Anderson*, *supra*; *Lamb*, *supra*. Because the encounter is in a public place and is consensual, it does not constitute a seizure within the meaning of the Fourth Amendment. *Anderson*, *supra*; *Lamb*, *supra*. The second permissible police-citizen encounter involves one where an officer justifiably restrains an individual who he or she has an articulable suspicion has committed or is about to commit a crime. *Anderson*, *supra*; *Lamb*, *supra*. The final category is the full-scale arrest, which must be based on probable cause. *Anderson*, *supra*; *Lamb*, *supra*.

Rule 3.1 provides that a police officer lawfully present in any place may stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit a felony, or a misdemeanor involving danger of forcible injury to any person or property. Reasonable suspicion is defined as any facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion. Ark. R. Crim. P. 2.1. The justification for the investigative stop depends on whether, under the totality of the circumstances, the police officers had specific, particularized, and articulable reasons that indicated that the person may be involved in criminal activity. *Jackson v. State*, 86 Ark. App. 39, 158 S.W.3d 715 (2004). Furthermore, only actions observed before the stop can be used as justification for the stop. *Id*.

Rule 2.2 provides that law enforcement officers may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. Under Rule 2.2, an officer may approach a citizen much in the same way a citizen may approach another citizen and request aid or information. *Wilson v. State*, 364 Ark. 550, 222 S.W.3d 171 (2006). It has been consistently held that Rule 2.2 authorizes an officer to request information or cooperation from citizens where the approach of the citizen does not rise to the level of being a seizure and where the information or cooperation sought is in aid of an investigation or the prevention of crime. *See id*. An encounter under Rule 2.2 is permissible, however, only if the information or cooperation is sought in the aid of an investigation or prevention of a particular crime. *Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998).

The State asserts that this case is analogous to *Thompson v. State*, 303 Ark. 407, 797 S.W.2d 450 (1990), while Daniels argues that it is more analogous to *Stevens v. State*, 91 Ark. App. 114, 208 S.W.3d 843 (2005). We agree with the State.

In *Thompson*, an officer was on patrol at 1:30 a.m. when he noticed a car lawfully parked with its lights on and the motor running. The officer continued on with his patrol. However, when he saw the car again at 1:40 a.m. parked in the same spot, the officer decided to stop. The officer stopped to see if there was something wrong with the driver or if something was going on that should not be going on. When the officer approached the car, he noticed that the defendant smelled of alcohol. The officer had the defendant submit to a sobriety test which the defendant failed. The officer placed the defendant under arrest for DWI.

On appeal the defendant argued that the officer had no reason to suspect that the defendant had committed or was about to commit a crime. The supreme court disagreed, holding that the officer's approach fell under the first category of police-citizen encounters and that Rule 2.2 recognized an officer's authority to act in this type of non-seizure encounter. *Id*. at 409-10, 797 S.W.2d at 452. The court further held that upon smelling the alcohol, the officer developed a reasonable suspicion that the defendant had committed or was about to commit a DWI. *Id*. at 410, 797 S.W.3d at 452.

In *Stevens*, an officer was on patrol at 2:45 a.m, when he observed a car enter and stop in a car-wash stall that was adjacent to an Exxon station. There had been complaints by the Exxon clerk about people loitering in the parking lot. Because there were ample parking

spaces closer to the store, the officer became suspicious and decided to watch the vehicle. After watching the vehicle for about eight minutes and observing no activity, the officer made contact with the driver. The officer activated his blue lights and pulled up to the stall. Upon approaching the vehicle, the officer smelled a strong odor of marijuana.

This court held that neither Rule 3.1 nor 2.2 justified the encounter in *Stevens*. In doing so, we pointed to the officer's testimony which indicated that he neither suspected the defendant was engaged in criminal activity nor did he seek the defendant's cooperation in the investigation or prevention of a particular crime. We distinguished *Thompson*, holding that the key difference between the two cases was that the officer in *Stevens* activated his blue light before initiating contact. We held that the activation of the blue light was a sufficient show of authority to compel a reasonable person to believe that he or she was not free to disregard the officer and go on about their business or leave.

In the present case, Officer Bailey approached Daniels's vehicle and noticed the contraband in Daniels's lap. The contraband was in plain view of Officer Bailey before he made contact with Daniels. Further, all of the officers testified that they approached Daniels's vehicle to inquire as to the welfare of the vehicle's occupants. In light of these facts, we hold that this case is analogous to *Thompson*, and that under the totality of the circumstances, the trial court's denial of Daniels's motion to suppress was correct.

Affirmed.

HART and HEFFLEY, JJ., agree.