STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MATTHEW SCOTT DUFF,

Defendant-Appellee.

UNPUBLISHED
November 23, 2021

No. 354406
Oakland Circuit Court
LC No. 2018-267140-FH

Before: SHAPIRO, P.J., and BORRELLO and O'BRIEN, JJ.

PER CURIAM.

The prosecution appeals as of right an order granting defendant's motion to dismiss the charges against defendant for operating a motor vehicle while intoxicated, third offense, MCL 257.625, following the court's order granting defendant's motion to suppress. On appeal, the prosecution argues that the trial court erred when ruling on defendant's motion to suppress by concluding that the deputy seized defendant for purposes of the Fourth Amendment when the deputy parked his patrol car 10 feet away from defendant's car at a 45-degree angle. Under the facts of this case, we agree with the prosecution, and therefore reverse.

On the evening of March 4, 2018, Oakland County Sheriff's Deputy Jason Pence was out on patrol in Pontiac, Michigan, when he saw a white Kia Forte vehicle parked in the parking lot of a closed elementary school. It was the only vehicle in the parking lot. The engine of the vehicle was running, and the interior overhead lights were on. Deputy Pence observed a single person sitting in the driver's seat of the vehicle. Deputy Pence proceeded to park his patrol car 10 feet away, at a 45-degree angle, behind the vehicle. For his safety, the deputy pointed his spotlight at the driver's side of the vehicle and turned it on. Deputy Pence did not activate his overhead lights or emergency siren. He proceeded to walk up to the driver's side of the vehicle to speak with the occupant of the vehicle—defendant. Upon initiating contact with defendant, Deputy Pence noticed that defendant's eyes were bloodshot and glossy, and that he was slurring his speech. Deputy Pence also detected the odor of alcohol. Later during the investigation, defendant said that he had been drinking that night.

On July 18, 2018, defendant filed a motion to suppress the result of his blood alcohol test, arguing that it must be suppressed because Deputy Pence lacked a reasonable, articulable suspicion, based on objective facts, that criminal activity was afoot when he seized defendant. On August 16, 2018, the prosecution responded, arguing that Deputy Pence was lawfully performing his duty when he approached defendant's vehicle and asked defendant to produce identification. The prosecution argued that initiating an encounter for the purpose of an inquiry does not constitute a seizure. An evidentiary hearing on defendant's motion to suppress was held on October 2, 2018. On November 9, 2018, the trial court entered an order denying defendant's motion to suppress, reasoning that Deputy Pence had a reasonable, articulable suspicion to seize defendant.

On February 13, 2019, defendant filed a delayed application for leave to appeal with this Court, arguing that all evidence obtained directly or indirectly as a result of Deputy Pence's encounter with defendant must be suppressed because Deputy Pence's act of parking his patrol vehicle behind defendant's vehicle and approaching defendant constituted a stop without reasonable suspicion of criminal activity in violation of defendant's Fourth Amendment rights. This Court denied defendant's delayed application for leave to appeal.[1] Defendant then filed an application for leave to appeal with our Supreme Court, and that Court entered an order remanding the case to the trial court to reconsider defendant's motion to suppress with instructions to "determine when the defendant was first seized for Fourth Amendment purposes." *People v Duff*, 504 Mich 995, 995 (2019). On March 4, 2020, the trial court held a status conference hearing. At the hearing, neither party presented additional evidence or testimony.

On July 15, 2020, the trial court entered an order granting defendant's motion to suppress. The trial court concluded that Deputy Pence seized defendant when the deputy parked behind him, reasoning:

> Deputy Pence proceeded to park his patrol car 10 feet away, at a 45-degree angle behind the defendant's vehicle and activated his spotlight pointing at the driver. The Deputy testified that if Mr. Duff were to back his vehicle straight out, he would have hit the officer's car. The defendant's only means to exit [was] driving over the grass in front of him. Under those circumstances, a reasonable person would have believed that he or she was not free to leave, thus constituting a seizure. [Citations omitted.]

The trial court explained that Deputy Pence did not have reasonable suspicion at the time of this seizure, so the seizure violated defendant's constitutional rights. On July 23, 2020, the trial court entered an order dismissing the case.

On appeal, the prosecution argues that the trial court erred by granting defendant's motion to suppress. We agree.

Constitutional questions are questions of law that are reviewed de novo. *People v Steele*, 283 Mich App 472, 487; 769 NW2d 256 (2009). This Court reviews "for clear error a trial court's

[1] *People v Duff*, unpublished order of the Court of Appeals, entered March 27, 2019 (Docket No. 347603).

findings of fact in a suppression hearing," but reviews "de novo whether the Fourth Amendment was violated and whether an exclusionary rule applies." *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002).

For Fourth Amendment purposes, warrantless seizures are presumed unreasonable unless they fall under one of the exceptions to the warrant requirement. *Coolidge v New Hampshire*, 403 US 443, 454-455; 91 S Ct 2022; 29 L Ed 2d 564 (1971). However, not every interaction with law enforcement constitutes a seizure triggering the Fourth Amendment. An officer may approach a citizen "on the street or in other public places" and ask the citizen to voluntarily answer questions without violating the Fourth Amendment. *United States v Drayton*, 536 US 194, 200-201; 122 S Ct 2105; 153 L Ed 2d 242 (2002). "[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v Bostick*, 501 US 429, 439; 111 S Ct 2382, 2389; 115 L Ed 2d 389 (1991).

The trial court found that Deputy Pence parked his patrol vehicle behind defendant's vehicle, 10 feet away, at a 45-degree angle. This was supported by both Deputy Pence's testimony and the patrol-vehicle recording of the stop played for the trial court and included in the record. The trial court also found that, if defendant had reversed his vehicle straight back, he would have hit Deputy Pence's patrol vehicle. This was likewise supported by Deputy Pence's testimony, and arguably the video of the stop. Then the trial court found that "defendant's only means to exit [was] driving over the grass in front of him." The trial court cited this statement to "status conference 3/4/2020," which was the conference that the court held after the case was remanded from our Supreme Court. No evidence was presented at this hearing—only argument by the parties. It therefore appears that this finding by the trial court was based on defense counsel's argument at the hearing in which he asserted that defendant could only exit the parking lot by driving over the grass in front of him. This assertion was unsupported by any evidence, however. In fact, the evidence in the record only supports a contrary conclusion. Specifically, Deputy Pence testified, "If [defendant] would have turned his wheel as he was backing out, he would have cleared my vehicle." Moreover, being that the only vehicles in the parking lot were defendant's vehicle and Deputy Pence's patrol vehicle, and based on the court's finding that the deputy parked behind defendant's vehicle, 10 feet away and at a 45-degree angle, it seems common sense that defendant would have been able to have clear the deputy's vehicle if defendant "turned his wheel as he was backing out."[2] We are therefore left with a definite and firm conviction that the trial court made a mistake when it found that "defendant's only means to exit [was] driving over the grass in front of him."

The question then becomes whether Deputy Pence's conduct of partially obstructing defendant's ability to move his vehicle "would have communicated to a reasonable person that the

[2] Also, upon viewing the patrol-vehicle recording of the stop, it appears that defendant would have been able to safely reverse, albeit at an angle, out of the parking spot.

person was not free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 US at 439. In answering this question, we find instructive a portion of *United States v Carr*, 674 F3d 570 (CA 6, 2012), that this Court cited approving in *People v Anthony*, 327 Mich App 24, 39-40; 932 NW2d 202 (2019). In *Carr*, the Sixth Circuit Court of Appeals explained:

> As a threshold matter, the stop was consensual at the point where the officers parked their unmarked police car near Carr's Tahoe. A "consensual encounter" occurs when "a reasonable person would feel free to terminate the encounter." *United States v. Drayton*, 536 US 194, 201; 122 S Ct 2105; 153 L Ed 2d 242 (2002). This court has analyzed similar civilian-police encounters by determining whether the police vehicle blocked the defendant's egress. See, e.g., *United States v. See*, 574 F3d 309, 313 (6th Cir 2009); *United States v. Gross*, 662 F3d 393, 399-400 (6th Cir 2011). As the concurrence in *See* suggested, unless there is other coercive behavior, a police officer can initiate a consensual encounter by parking his police vehicle in a manner that allows the defendant to leave. *See*, 574 F3d at 315 (Gilman, J., concurring). Here, the police officers parked their unmarked, black Ford Explorer at an angle in front of Carr's Tahoe. The angle of the police vehicle gave Carr sufficient room to drive either forward or backward out of the carwash bay. Although pulling forward would have required "some maneuvering" for Carr to get around the Explorer, "there was enough room that [Carr] could have just merely steered around [the Explorer]." As one of the officers testified, Carr had "ample room to steer and maneuver around our vehicle." Because the police vehicle allowed Carr to exit the carwash, albeit with "some maneuvering," Carr's car was not blocked for Fourth Amendment purposes. To conclude otherwise would be an endorsement of a "simplistic, bright-line rule" that a detention occurs "any time the police approach a vehicle and park in a way that allows the driver to merely drive straight ahead in order to leave." [*Carr*, 674 F3d at 572-573.]

Like the defendant in *Carr*, defendant here could exit his parking space, "albeit with 'some maneuvering.' " Thus, the position of Deputy Pence's patrol vehicle alone did not turn this encounter into a seizure, and we must determine whether there was "other coercive behavior" by Deputy Pence that turned the encounter into a seizure for Fourth Amendment purposes. *Id*. at 573. On the record before us, there was no such coercive behavior. Accordingly, Deputy Pence did not seize defendant for Fourth Amendment purposes when he parked his patrol vehicle behind defendant's vehicle, 10 feet away and at a 45-degree angle. As such, defendant's Fourth Amendment rights were not implicated when the deputy parked behind him. See *Anthony*, 327 Mich App at 33 ("If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.") (Quotation marks and citation omitted.)

According to Deputy Pence, when he reached the vehicle, which was running, the window was already down, and he saw that defendant's eyes were bloodshot and glossy, which the deputy explained was consistent with someone who had been consuming alcohol. When the deputy spoke to defendant, he noticed that defendant's speech was slurred, which was also consistent with someone who had been consuming alcohol. The deputy could also smell alcohol coming out of the vehicle. On these facts, Deputy Pence had reasonable suspicion that defendant had operated a vehicle while intoxicated, and could briefly detain defendant for further investigation. See *People*

v Oliver, 464 Mich 184, 193; 627 NW2d 297 (2001) (explaining that an officer may "detain a person consistently with the Fourth Amendment on the basis of reasonable suspicion that criminal activity may be afoot").[3]

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien

[3] In light of our conclusion that the trial court erred by granting defendant's motion to suppress, we decline to address the prosecution's argument that the exclusionary rule should not apply under the facts of this case.