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UNPUBLISHED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.

SHAPIRO, P.J. (*dissenting*).

I respectfully dissent. The trial court did not err by determining that defendant was seized for purposes of the Fourth Amendment because under the circumstances of this case a reasonable person would not have believed he was free to leave.

It is well-settled that "[a] lone automobile idling in a darkened parking lot late at night does not, without more, support a reasonable suspicion of criminal activity." *People v Freeman*, 413 Mich 492, 496; 320 NW2d 878 (1982). Where reasonable suspicion cannot be demonstrated, the officers may not act in a fashion to significantly hinder the ability of the person stopped to leave the scene. If a reasonable person would believe that they were not free to leave, then the police action is a *Terry* stop, i.e., a seizure. See *People v Shankle*, 227 Mich App 690, 659-696; 577 NW2d 471 (1998).

In this case, defendant was parked at the edge of a parking lot such that he could not drive forward without leaving the paved parking area and driving over grass. The approaching officer parked his patrol car 10 feet behind defendant's vehicle with the headlights pointed at defendant's car. The officer also activated the patrol car's spotlight, and pointed it at the driver's side of defendant's car. The officer testified that he purposely positioned his patrol car behind defendant's vehicle so that if defendant attempted to back straight out of the parking spot he would strike the police car. And the officer testified that if defendant had attempted to drive away he would have activated his sirens and lights and forced defendant to stop his vehicle.

At the outset of this case, the prosecution argued that the officer had reasonable suspicion of criminal activity or that he was making a health and safety check of the driver. However, at the evidentiary hearing the deputy testified that his only basis for suspecting criminal activity was that the parking lot was in a high crime area and he conceded that he made no inquiry as to whether defendant needed assistance or medical treatment. Because there was no basis for a *Terry* stop and the stop was not for health and safety purposes, the prosecution was left only with the argument that what occurred was merely a "consensual encounter." The trial court conducted an evidentiary hearing and thereafter granted defendant's motion to suppress, finding that under the circumstances, "a reasonable person would have believed that he or she was not free to leave; thus constituting a seizure."

The majority concludes that this trial court finding was clearly erroneous because there was enough room behind defendant's vehicle for him to leave the scene by carefully maneuvering his vehicle in reverse around the police car. This reasoning, however, misconstrues the test for whether a seizure occurs within the meaning of the Fourth Amendment. The Fourth Amendment does not turn on a measuring tape or the existence of some demanding but conceivable means of departure; the question is not whether leaving was physically possible but whether a reasonable person would believe he was free to leave. The standard was clearly enunciated by the Supreme Court in *People v Jenkins*, 472 Mich 26, 32, 691 NW2d 759 (2005): "A 'seizure' within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave." Whether defendant's car could actually have been maneuvered past the police vehicle is a factor relevant to that inquiry, but it is not the inquiry itself.

Viewing the totality of the circumstances, the evidence was overwhelming that a reasonable person in defendant's shoes would conclude that they were not free to leave and I see no basis to find clear error by the trial court. The police car was parked behind defendant's car at night, obstructing his only straight path of egress. Further, it was dark and the police car's headlights and spotlight were shining on defendant's vehicle, undoubtedly affecting defendant's vision were he to drive in reverse and strongly suggesting that the police were not merely initiating a casual, consensual encounter.[1] Under these circumstances, the defendant could not leave the scene without risking striking a police car or a police officer, or at least finding himself arrested for fleeing and eluding or resisting and obstructing.[2] The conclusion that defendant should have believed he was free to leave is one that only lawyers and judges could reach given that it can exist only in argument and not in reality. No reasonable person, and likely few unreasonable persons, would conclude that they are free to leave when a police car parks behind them so as to block or significantly hinder their ability to drive away and directs the police vehicle's headlights and spotlight at the person's vehicle.

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[1] Although the spotlight shining on defendant was relied on by the trial court as a pertinent factor in this case, the majority declines to consider it in reversing the court.

[2] An officer's subjective intent not to let someone leave is not dispositive as to whether a seizure occurred, but it is relevant, particularly when the manner in which the officer behaves is consistent with that intent, e.g., physically hindering a person's ability to leave.

In reversing the trial court, the majority relies heavily on *United States v Carr*, 674 F3d 570 (CA 6, 2012), a nonbinding federal decision[3] that was quoted with approval in *People v Anthony*, 327 Mich App 24; 932 NW2d 202 (2019). Both cases are readily distinguishable on the facts. In *Carr*, the defendant's vehicle could have left either through the front of the carwash bay, where a police vehicle was parked at angle in front of the defendant's vehicle, or the rear of the bay where there was no police vehicle. See *Carr*, 674 F3d at 572-573. In contrast, defendant in this case could not drive forward and his only option would have been to maneuver past the police vehicle in reverse while looking back into headlights and a spotlight pointed toward him. And in *Anthony*, there was no question about the availability of egress as the officers parked parallel to the defendant's vehicle on the street. See *Anthony*, 327 Mich App at 39.

Moreover, to the extent that *Anthony*'s reliance on *Carr* can be read for the proposition that the position of the police vehicle is irrelevant as to whether a seizure occurred so long as it does not block every possible path of egress, I would conclude that it was wrongly decided and its holding should be overruled by the Michigan Supreme Court. *Anthony* is plainly at odds with the well-established standard that a seizure occurs if, "*in view of all the circumstances*, a reasonable person would have believed that he was not free to leave." *Jenkins*, 472 Mich at 32 (emphasis added). See also *United States v Drayton*, 536 US 194, 201; 122 S Ct 2105; 153 LEd2d 242 (2002) ("[F]or the most part *per se* rules are inappropriate in the Fourth Amendment context."). Each case must be decided on its own facts, and defendant's theoretical ability to maneuver past the police vehicle is not dispositive.

The trial court properly considered the totality of the circumstances and found that a reasonable person would not have believed he was free to leave. Because there was ample evidentiary support for this conclusion, I would affirm the trial court's ruling.

/s/ Douglas B. Shapiro

[3] *Carr* was a 2-1 decision.