STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0878

State of Minnesota,
Respondent,

vs.

Craig Edward Dauffenbach,
Appellant.

Filed March 6, 2017
Affirmed
Rodenberg, Judge

Scott County District Court
File No. 70-CR-15-51

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

John L. Lucas, Valentini Law, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Stauber, Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Appellant Craig Dauffenbach challenges his conviction of third-degree DWI. He argues that he was unconstitutionally seized the moment the police officer approached

where he was being detained by private security because the police officer did not then have a reasonable and articulable suspicion of criminal activity. We affirm.

FACTS

On January 1, 2015, police were dispatched to a casino parking lot after a call from a casino reporting an impaired driver. A private security officer employed by the casino had observed appellant driving or about to drive a motor vehicle while apparently influenced by alcohol. The security officer informed J.R., the security supervisor, that the driver was unsteady on his feet, and had red, watery eyes and slurred speech. J.R. observed appellant drive out of the parking lot. J.R. was informed that appellant then parked near the casino's main doors. When appellant again left his vehicle to walk to the casino, J.R. approached him and observed that appellant smelled of alcohol, had watery eyes, and was unsteady on his feet. J.R. informed appellant that the police had been called and that he should stay by his vehicle.

Police officers responded to the casino parking lot. An officer spoke with J.R., who told him that appellant had been observed drinking alcohol, smelled of alcohol, and had been observed driving. After speaking with J.R., the officer approached appellant. The officer noticed that appellant's speech was slurred, his eyes were bloodshot and watery, and he smelled of alcohol. Appellant confirmed that he had consumed alcohol that evening. The officer had appellant perform three field sobriety tests and a preliminary breath test (PBT). Appellant failed the field sobriety tests and had a PBT result of 0.184.

Appellant was placed under arrest and was later read the implied-consent advisory. Appellant agreed to provide a breath test. The breath test revealed an alcohol concentration

of 0.16. He was charged with driving both while impaired and with an alcohol concentration of 0.08 or more.

Pretrial, appellant moved the district court to suppress the evidence flowing from his arrest on the basis that the police officer did not have a reasonable suspicion to justify the initial seizure of appellant. At the hearing on the motion to suppress, the officer testified that appellant had not been free to leave when the officer approached the area where appellant was being held by casino security. The district court denied the motion. At a later stipulated-evidence trial, appellant was found guilty of driving while impaired.

This appeal followed.

D E C I S I O N

Although appellant identifies two issues on appeal—namely, at what point was he seized by the police and whether the police then had sufficient suspicion to justify the seizure—the only real issue in dispute is whether the private seizure by casino security was instantaneously transformed into a law-enforcement seizure by a police officer arriving at the casino. It is only by arguing this instantaneous transformation of a private detention into a law-enforcement seizure that appellant can argue that the officer did not possess a reasonable suspicion to justify the seizure at the moment he was seized.

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures by governmental actors. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A search or seizure conducted without a warrant is per se unreasonable unless it falls under one of the few established exceptions to the warrant requirement. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009). An investigatory stop is one exception to the warrant

requirement. *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968)).

> [A] police officer may temporarily detain a suspect without probable cause if (1) the stop was justified at its inception by reasonable articulable suspicion, and (2) the actions of the police during the stop were reasonably related to and justified by the circumstances that gave rise to the stop in the first place.

Id. (quotations omitted).

A seizure occurs when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). "[A] person has been seized if in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter." *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). A seizure or search by private actors will not trigger suppression under the Fourth Amendment unless the private actor can be regarded as an instrument or agent of the state. *State v. Buswell*, 460 N.W.2d 614, 618 (Minn. 1990).

When reviewing a district court's pretrial order denying a motion to suppress evidence, we review the district court's factual findings under a clearly erroneous standard; we review the district court's legal conclusions de novo. *State v. Eichers*, 853 N.W.2d 114, 118 (Minn. 2014). Whether a search or seizure is justified by reasonable suspicion is a legal determination that we review de novo. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005).

Appellant agrees that the casino security personnel were not acting as instruments or agents of the state and their actions do not implicate appellant's Fourth Amendment

rights. Although appellant was informed by casino security that the police were on their way, and a police officer subsequently arrived, there had been no action by law enforcement to detain, question, or intimidate appellant before the police officer arrived and directly interacted with appellant. *See In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993) (providing examples of conduct by police that may indicate a seizure, including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled" (citation omitted)). But appellant argues he was seized when the officer arrived at the scene. He argues that the totality of the circumstances indicate that he was not free to leave at that time and that the seizure instantaneously became state action when the officer arrived.

Appellant emphasizes that the police officer testified that appellant was not free to leave when the officer arrived at the scene. But the question is whether a reasonable person in the circumstances would believe he was free to leave, not whether a police officer would allow the defendant to leave. *State v. Johnson*, 645 N.W.2d 505, 509 (Minn. App. 2002). Absent any conduct or communication directed at appellant by the police officer, we decline to accept appellant's contention that he was seized before the police officer directly interacted with him.

Taken to its logical conclusion, appellant's argument would lead to absurd results. At oral argument, we posited a situation where a private security guard at a shopping mall detains a person for engaging in unpopular speech protected by the First Amendment, and police respond to the scene to investigate without knowing any details. Counsel for

appellant argued that, in those circumstances, the person would be seized by police the moment the officer arrives. But if a seizure by law enforcement immediately and necessarily occurs whenever an officer arrives after a report of suspected criminal activity where the suspect is being held by a private actor, a reporting officer would potentially be subject to liability for an unconstitutional seizure even if, upon questioning those present, the officer determines that no crime had occurred and the officer's arrival to investigate results in termination of the private detention. That makes no sense.

It is not necessary here that we determine the precise point at which appellant was seized. By the time the police officer approached appellant, the police officer already had sufficient information from J.R. to justify a seizure. And as the police officer testified, he determined appellant's intoxication immediately by observing him. The seizure was justified by reasonable suspicion.

Appellant also argues that the officer did not have reasonable suspicion justifying the seizure because he came to the casino based on the unreliable tip of an informant. Appellant cites *Olson v. Comm'r of Pub. Safety*, 371 N.W.2d 552 (Minn. 1985), and *Rose v. Comm'r of Pub. Safety*, 637 N.W.2d 326 (Minn. App. 2001), *review denied* (Minn. Mar. 19, 2002), in support of his argument that an anonymous tip of a *suspected* impaired driver is insufficient to create reasonable suspicion, and insufficient for the police even to have come to the casino. But appellant's argument that the police officer did not have reasonable suspicion because of the security officer's tip depends on his argument that the seizure occurred as soon as the police officer arrived at the scene. Having concluded that

appellant was not seized at that moment, the reliability of the telephone tip is not at issue.[1] Rather, the issue is whether the officer formed reasonable suspicion before he seized appellant. He did.

The police officer was informed by J.R. that appellant smelled of alcohol, had been observed drinking alcohol, and was seen driving a vehicle. The odor of alcohol is an indicator of intoxication, and only one objective indicator is necessary to support an arrest for DWI. *State v. Kier*, 678 N.W.2d 672, 678 (Minn. 2004). The officer then approached appellant and perceived for himself that appellant had bloodshot and watery eyes, slurred speech, and an odor of alcohol. The police officer seized appellant after approaching and speaking with him, and after having developed a reasonable articulable suspicion that appellant had been driving while impaired. The seizure of appellant was supported by reasonable and articulable suspicion.

Affirmed.

[1] The call from the casino to the police dispatcher was recorded on the casino's surveillance video from the incident and admitted as evidence. In the audio of the exhibit, the tipster identifies herself, reports an "impaired driver," provides her contact information and the details of appellant's vehicle, and indicates that the caller knows that appellant is intoxicated because a security agent spoke with appellant. This specific identifying information satisfies the requirements of *Olson* in any event. 371 N.W.2d at 556. But because the police officer plainly did not seize appellant solely on the basis of the telephone call, we do not rest our decision on this ground.