STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0781

State of Minnesota,
Respondent,

vs.

Ethan Malcolm Shepherd,
Appellant.

Filed December 3, 2018
Affirmed
Johnson, Judge

Freeborn County District Court
File No. 24-CR-16-1112

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

David J. Walker, Freeborn County Attorney, Karyn D. Sackis Lunn, Assistant County Attorney, Albert Lea, Minnesota (for respondent)

Robert M. Christenson, Robert M. Christensen, P.L.C., Minneapolis, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Tracy M. Smith, Judge.

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

JOHNSON, Judge

Ethan Malcolm Shepherd was found guilty of driving while impaired. Before trial, he moved to suppress evidence arising from an encounter with a deputy sheriff along the

side of a rural highway, but the district court denied the motion. We conclude that the deputy sheriff did not unlawfully seize Shepherd when he approached him and spoke to him while Shepherd was walking on the shoulder of a rural highway near a crashed vehicle. We also conclude that Shepherd was not entitled to a *Miranda* warning before the deputy sheriff asked him a few questions. Therefore, we affirm.

FACTS

On July 9, 2016, at 5:17 a.m., Deputy McKane received a report that a vehicle had crashed into the ditch of U.S. Highway 69 in a rural part of Freeborn County approximately two miles south of Albert Lea. In addition, Deputy McKane learned from the dispatcher that a man wearing a plaid shirt and khaki pants was walking along the highway near the crashed vehicle.

Deputy McKane first inspected the vehicle in the ditch, which was unoccupied. Deputy McKane believed that the vehicle had been traveling in the southbound lane before it veered across the northbound lane and entered the ditch on the east side of the highway. Deputy McKane saw damage to the front of the vehicle and a "spider-webbed crack" in the vehicle's windshield.

Deputy McKane then drove south and, after approximately two miles, saw a man wearing a plaid shirt and khaki pants walking on the shoulder of the highway in a southerly direction. Deputy McKane turned on his squad car's overhead emergency lights, pulled up behind the man, stopped his squad car on the shoulder, and exited the squad car. Deputy McKane approached the man, later identified as Shepherd, and had a brief conversation with him. Deputy McKane first asked Shepherd whether he had crashed the vehicle that

was in the ditch; Shepherd responded that he had. Deputy McKane then asked Shepherd why he had crashed. Shepherd said that he had consumed "a couple drinks" a few hours earlier. Deputy McKane could smell alcohol on Shepherd's breath and saw that he had bloodshot and watery eyes. Deputy McKane also observed that Shepherd was confused about where he was going because he pointed south when saying that he was walking to Albert Lea when, in fact, he should have pointed north. Deputy McKane administered field sobriety tests, which Shepherd failed, and administered a preliminary breath test, which indicated that Shepherd was intoxicated.

Deputy McKane arrested Shepherd for driving while impaired and transported him to the Freeborn County jail, where Shepherd was read the implied-consent advisory. Shepherd indicated that he understood the advisory and that he wished to speak with an attorney. After speaking with an attorney, Shepherd agreed to a breath test. The breath test showed an alcohol concentration of 0.20.

Two days later, the state charged Shepherd with one count of second-degree driving while impaired, in violation of Minn. Stat. § 169A.20, subd. 1(1) (2016), and one count of second-degree driving while impaired with an alcohol concentration of 0.08 or more, in violation of Minn. Stat. § 169A.20, subd. 1(5).

In August 2016, Shepherd petitioned for the rescission of the revocation of his driver's license. In November 2016, an implied-consent hearing was held. Shepherd argued, in part, that the revocation of his license should be rescinded on the grounds that Deputy McKane unlawfully seized him when he approached him and spoke to him on the shoulder of the highway and that Deputy McKane failed to give him a *Miranda* warning

before obtaining incriminating statements. The commissioner of public safety presented the testimony of Deputy McKane and the law-enforcement officer who administered the breath test. In January 2017, the district court issued a six-page order in which it rejected Shepherd's arguments and denied his petition.

In April 2017, Shepherd filed a motion in the pending criminal case to suppress the evidence arising from Deputy McKane's road-side investigation. The motion was assigned to a different district court judge. Neither party presented any testimony. The evidentiary record consisted of three exhibits: two police reports and the transcript of the implied-consent hearing. In June 2017, the district court issued a three-page order in which it denied Shepherd's motion. The district court adopted and incorporated by reference the findings of fact and conclusions of law in the January 2017 order in the implied-consent case.

In October 2017, Shepherd waived his right to a jury trial and agreed to a court trial on stipulated facts. *See* Minn. R. Crim. P. 26.01, subd. 3. The district court found Shepherd guilty of both charges. Shepherd appeals.

D E C I S I O N

Shepherd argues that, for two reasons, the district court erred by denying his motion to suppress evidence.

I. Seizure

Shepherd first argues that the district court erred by concluding that Deputy McKane did not unlawfully seize him by approaching him and speaking to him while he was walking on the shoulder of the highway.

The Fourth Amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; *see also* Minn. Const. art. I, § 10. As a general rule, a law-enforcement officer may not seize a person without probable cause. *See State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). A law-enforcement officer may, however, conduct a brief investigatory stop of a pedestrian if the officer has a reasonable, articulable suspicion that the person might be engaged in criminal activity. *State v. Munson*, 594 N.W.2d 128, 136 (Minn. 1999) (citing *Terry v. Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868, 1880 (1968)). A reasonable, articulable suspicion exists if "the police officer [is] able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880. Reasonable suspicion requires "something more than an unarticulated hunch"; "the officer must be able to point to something that objectively supports the suspicion at issue." *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (quotation omitted); *see also Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880.

Although a law-enforcement officer may seize a person based on a reasonable suspicion of criminal activity, "[n]ot all encounters between the police and citizens constitute seizures." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). An officer does not conduct a seizure merely because the officer approaches a person in a public place and asks the person a few questions. *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781-82 (Minn. 1993); *State v. Houston*, 654 N.W.2d 727, 731-32 (Minn. App. 2003), *review denied* (Minn. Mar. 26, 2003). Rather, under Minnesota law, a person is seized only if, given the

totality of the circumstances, a reasonable person in that situation would not feel free to terminate the encounter. *Harris*, 590 N.W.2d at 98. Circumstances that tend to indicate a seizure include the threatening presence of several officers, an officer's display of a weapon, an officer's physical touching of the person, or the officer's use of language or tone of voice indicating that compliance might be compelled. *E.D.J.*, 502 N.W.2d at 781 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 1877 (1980)). In the absence of some affirmative display of authority, "otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Id.* (quoting *Mendenhall*, 446 U.S. at 554-55, 100 S. Ct. at 1877).[1]

This court applies a clear-error standard of review to a district court's findings of fact concerning an alleged seizure. *State v. Diede*, 795 N.W.2d 836, 843 (Minn. 2011). If the relevant facts are undisputed or are resolved by the district court, this court applies a *de novo* standard of review to the question whether, given such facts, a seizure occurred. *See Harris*, 590 N.W.2d at 98.

[1]The United States Supreme Court modified the *Mendenhall* test in *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547 (1991), in which it held that a seizure occurs "only when police use physical force to restrain a person or, absent that, when a person physically submits to a show of authority by the police." *Id.* at 626-29, 111 S. Ct. at 1550-52; *see also E.D.J.*, 502 N.W.2d at 780. The Minnesota Supreme Court has held that *Hodari D.* does not apply to article I, section 10, of the Minnesota Constitution. *E.D.J.*, 502 N.W.2d at 783. Shepherd has invoked both his federal and his state constitutional rights. To the extent that we look to federal caselaw to guide our analysis of state constitutional law, we look only to the pre-*Hodari D.* caselaw.

In this case, Deputy McKane approached Shepherd in a public place and asked him a few simple and obvious questions arising from the fact that Shepherd was walking on the shoulder of a U.S. highway at an early morning hour near a vehicle that had crashed into the ditch. The district court found that it was "extremely unusual" for Shepherd to be walking there at that time. The district court also found that the circumstances "clearly suggest[ed] a connection between the person walking and the abandoned vehicle." The district court further found that Deputy McKane approached Shepherd for the purpose of "inquiring as to the well-being of a citizen who appeared in need of assistance."

To resolve Shepherd's argument, we look to the factors that typically indicate that a law-enforcement officer has seized a person by making a brief investigatory stop. *See Mendenhall*, 446 U.S. at 554, 100 S. Ct. at 1877; *E.D.J.*, 502 N.W.2d at 781. In this case, none of those factors are present. First, the encounter between Shepherd and Deputy McKane did not involve the threatening presence of several officers. Rather, Deputy McKane was the only uniformed officer present. Second, Deputy McKane did not display his weapon. He was carrying a service weapon in a holster, but he never removed it, and there is no evidence that Shepherd saw it. Third, there is no evidence that Deputy McKane physically touched Shepherd. When Deputy McKane initially approached Shepherd, he interacted with him only verbally. Fourth, Deputy McKane testified that he spoke to Shepherd in a conversational, non-accusatory way. There is no evidence that Deputy McKane used language or a tone of voice that might indicate that Shepherd was compelled to answer the deputy's questions. Thus, the totality of circumstances supports the district

court's conclusion that Deputy McKane did not seize Shepherd when he first approached him as he was walking on the shoulder of the highway.

At oral argument, Shepherd emphasized Deputy McKane's use of his squad car's overhead emergency lights. That fact does not make the encounter a seizure. In *State v. Hanson*, a deputy sheriff saw a stopped car on the shoulder of a highway, parked his squad car behind it, and activated his flashing red lights. 501 N.W.2d 677, 678 (Minn. App. 1993) (*Hanson I*), *rev'd*, 504 N.W.2d 219 (Minn. 1993) (*Hanson II*). This court concluded that the driver of the stopped car had been seized, reasoning that "based upon the flashing red lights alone, a reasonable person would not feel free to leave." *Id.* at 680. But the supreme court summarily reversed this court's opinion, reasoning that the use of flashing red lights does not necessarily indicate a seizure and, in that particular case, "would not have communicated to a reasonable person in these physical circumstances that the officer was attempting to seize the person." *Hanson II*, 504 N.W.2d at 220. The supreme court explained further as follows:

> A reasonable person would have assumed that the officer was not doing anything other than checking to see what was going on and to offer help if needed. A reasonable person in such a situation would not be surprised at the use of the flashing lights. It was dark out and the cars were on the shoulder of the highway far from any town. A reasonable person would know that while flashing lights may be used as a show of authority, they also serve other purposes, including warning oncoming motorists in such a situation to be careful.

Id. Likewise, this court has noted that "an officer's use of a squad car's flashing red lights, when pulling up and stopping behind a car parked on the shoulder of a highway at night, does not turn the encounter into a Fourth Amendment seizure." *State v. Klamar*, 823

N.W.2d 687, 692 (Minn. App. 2012). For the same reasons, Shepherd was not seized merely because Deputy McKane used his emergency lights in the pre-dawn darkness.[2]

Thus, the district court did not err by concluding that Deputy McKane did not seize Shepherd when he first approached him while he was walking on the shoulder of the highway.[3]

II. *Miranda* Warning

Shepherd also argues that the district court erred by concluding that Deputy McKane was not required to give him a *Miranda* warning before asking him a few questions on the shoulder of the highway.

A person who is subjected to a custodial interrogation has a right to be informed of certain constitutional rights, including the Fifth Amendment right against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444, 467-79, 86 S. Ct. 1602, 1612, 1624-30 (1966). A "custodial interrogation" exists if "questioning [is] initiated by law

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[2]We note that the evidentiary record is unclear as to whether Deputy McKane's emergency lights are of a type that flash in a forward direction or in all directions as opposed to the type that flash only in a backward direction. *See Hoekstra v. Commissioner of Pub. Safety*, 839 N.W.2d 536, 537 (Minn. App. 2013) (noting that officer "activated his rear emergency lights" after stopping behind truck stopped on shoulder of highway, "believing that the truck's driver could not see them"). In any event, our analysis does not depend on that particular fact.

[3]Even if we were to conclude that Deputy McKane seized Shepherd, the circumstances likely would be sufficient to support a reasonable, articulable suspicion of criminal activity. A vehicle had crashed into a ditch at a pre-dawn hour after crossing the oncoming lane of traffic. A man apparently was walking away from the crashed vehicle. In such circumstances, a law-enforcement officer would be justified in suspecting that the pedestrian was the driver of the crashed vehicle and in suspecting that the driver was driving while impaired. But we need not consider that issue because the state has not made such an argument.

enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444, 86 S. Ct. at 1612; *see also State v. Heden*, 719 N.W.2d 689, 694-95 (Minn. 2006). A person is in custody if there has been a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Minnesota v. Murphy*, 465 U.S. 420, 430, 104 S. Ct. 1136, 1144 (1984) (quotations omitted); *see also State v. Thompson*, 788 N.W.2d 485, 491 (Minn. 2010). A person typically is in custody if he is interviewed at the police station, if he is told that he is the prime suspect, if his freedom of movement is restrained, if he makes a significantly incriminating statement, if multiple officers are present, or if officers point a gun at him. *State v. Horst*, 880 N.W.2d 24, 31 (Minn. 2016). A person typically is *not* in custody if he is questioned only briefly, if he is free to leave at any time, or if an interview occurs in a non-threatening environment. *Id.* at 31. If a person makes a statement in a custodial interrogation without having received a *Miranda* warning, the person's statement is inadmissible. *See Miranda*, 384 U.S. at 471-72, 86 S. Ct. at 1626; *State v. Tibiatowski*, 590 N.W.2d 305, 308 (Minn. 1999).

In this case, Shepherd contends that he was "in custody" for *Miranda* purposes "when [Deputy McKane] turned on his overhead lights and aggressively forced him to stop from walking down the side of the road." As an initial matter, we note that, because Shepherd is unable to show that he was seized when Deputy McKane first approached him, he cannot show that he was in custody for *Miranda* purposes. That is so because a person is in custody for *Miranda* purposes only if there has been a "formal arrest or restraint on freedom of movement *of the degree associated with a formal arrest*." *Murphy*, 465 U.S.

at 430, 104 S. Ct. at 1144 (emphasis added) (quotation omitted); *see also Thompson*, 788 N.W.2d at 491. If a person has not been seized, the person certainly has not been arrested or subjected to a restraint that is equivalent to a formal arrest because that determination is subject to a more stringent test. *See Florida v. Royer*, 460 U.S. 491, 497-98, 103 S. Ct. 1319, 1324 (1983); *State v. Beckman*, 354 N.W.2d 432, 436 (Minn. 1984). Because Shepherd is unable to show that he was seized when Deputy McKane first approached him, he also is unable to show that he was in custody for *Miranda* purposes.

Furthermore, the factors that typically indicate a custodial interrogation for *Miranda* purposes are mostly absent. *See Horst*, 880 N.W.2d at 31. Shepherd was not interviewed at a police station, was not told that he was a suspect, was not restrained in his freedom of movement, was not approached by multiple officers, and did not have a gun pointed at him. *See id*. To the contrary, Deputy McKane asked him only a few questions for a very brief period of time in a non-threatening environment without ever indicating that Shepherd was not free to leave. *See id*. Because Shepherd was not subjected to a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest," *Murphy*, 465 U.S. at 430, 104 S. Ct. at 1144, he was not in custody for *Miranda* purposes.

Moreover, Shepherd's argument is inconsistent with caselaw concerning the applicability of *Miranda* during road-side investigations. In *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138 (1984), the United States Supreme Court stated that the concerns underlying the *Miranda* doctrine are not present in an "ordinary" or "typical" traffic stop. *Id.* at 435-42, 104 S. Ct. at 3147-52. The Court reasoned that, in such a stop, an officer who has a reasonable suspicion that a person has engaged in criminal activity "may detain

that person briefly in order to investigate the circumstances that provoke suspicion." *Id.* at 439, 104 S. Ct. at 3150 (quotation omitted). In doing so, "the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Id.* The Court further reasoned that the "noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*." *Id.* at 440, 104 S. Ct. at 3150. The Court concluded in *Berkemer* that the facts of that case did not present any reason to depart from the general rule that routine traffic stops do not give rise to a custodial interrogation. *See id.* at 441-42, 104 S. Ct. at 3151-52.[4] Granted, Shepherd was not stopped while driving his vehicle, and the district court made no finding of a reasonable suspicion of criminal activity. But if we were to assume (contrary to our conclusion in part I) that Shepherd was seized when Deputy McKane approached him and

[4]The appellate courts of this state have issued similar opinions, both before and after *Berkemer*. In *In re Welfare of M.A.*, 310 N.W.2d 699 (Minn. 1981), the supreme court concluded that a juvenile was not subjected to a custodial interrogation when state troopers "questioned him on the highway near the stopped car" and, thus, "a *Miranda* warning was not then required." *Id.* at 700. In *State v. Herem*, 384 N.W.2d 880 (Minn. 1986), a deputy sheriff stopped a motorcyclist and asked him several questions, such as whether he knew that he was speeding, whether he had seen the patrol car, and whether he had been drinking. *Id.* at 881. The supreme court reasoned that the stop was not "the functional equivalent of formal arrest" because it "involved only a short period of time, and it was not until defendant failed the preliminary breath test that he was informed that his detention would not be temporary." *Id.* at 883. Similarly, in *State v. Kline*, 351 N.W.2d 388 (Minn. App. 1984), a deputy sheriff found a vehicle "stuck in the ditch" and engaged in "general on-site questioning" of the vehicle's driver, asking questions such as, "'Are you the driver?', 'Have you been drinking?', 'How much?'" *Id.* at 389-90. This court concluded, "The deputy violated no rights of the defendant by not giving him a *Miranda* warning." *Id.* at 390.

asked him a few questions, Shepherd's second argument would be contrary to the caselaw providing that a *Miranda* warning is not required upon such a seizure.

Thus, the district court did not err by concluding that a *Miranda* warning was not required when Deputy McKane approached Shepherd and asked him a few questions while he was walking on the shoulder of the highway.

In sum, the district court did not err by denying Shepherd's motion to suppress evidence.

Affirmed.