STATE OF MINNESOTA
IN COURT OF APPEALS
A11-995

State of Minnesota,
Appellant,

vs.

Derek Wayne Johnson,
Respondent.

Filed October 11, 2011
Reversed and remanded
Connolly, Judge

St. Louis County District Court
File No. 69HI-CR-11-273

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

Andy Borland, Sellman Law Office, Hibbing, Minnesota (for appellant)

David W. Merchant, Chief Appellate Public Defender, St. Paul, Minnesota; and

Sharon E. Jacks, Assistant Public Defender, Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and Minge, Judge.

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

CONNOLLY, Judge

Appellant challenges the district court's grant of a motion to suppress evidence based on the conclusion that respondent had been unlawfully seized. Because the district court erred in concluding that respondent had been unlawfully seized, we reverse and remand.

FACTS

Shortly after 6 a.m. on April 8, 2011, the Hibbing police department received a report that headlights had been seen on a mine dump. A police officer was dispatched to follow up on the call. To reach the location of the headlights, he drove his marked squad car down 13th Street and, later, an all-terrain vehicle (ATV) trail. He testified that the headlights were located on a hill on an ATV trail leading into the mine dump and that, because there was a large puddle at the end of the trail, he pulled his squad car past the trail to park. The record indicates that the officer used his headlights while driving toward the suspect's headlights.

After parking his squad car, the officer continued 75-100 yards up the trail on foot. As he approached the vehicle, he realized it was a side-by-side ATV with two individuals on it, facing down the trail toward him. The driver was later determined to be respondent Derek Johnson; a friend of his was in the passenger seat. The officer walked near the side of the trail and testified that there was brush on both sides of the trail, so that an ATV could not turn right or left. He testified that to leave, respondent could have either put the ATV in reverse and backed up the hill, or driven forward, past the officer. He

also testified that the ATV was not running, but that the key was in the ignition and the ATV's headlights were on. As he approached the ATV, the officer observed no indicia of criminal activity.

The officer announced, "Police Department," so that the individuals on the ATV would know that the person approaching was a law-enforcement officer. When he reached the ATV, the officer began a conversation. The individuals reported that they were out for a drive because one of them had just left work. The officer testified that he found this suspicious due to the early hour, that he could smell alcohol, and that the individuals had watery eyes. When he asked how much they had had to drink, respondent said he had consumed a few beers. The officer then asked respondent to step off the ATV so that he could administer field sobriety tests. He performed the Horizontal Gaze Nystagmus Test, the Vertical Nystagmus Test, and the One Leg Stand Test, all of which respondent failed.

The officer arrested respondent for driving while intoxicated (DWI). Respondent was read the Off Road Motor Vehicle Implied Consent Advisory and agreed to submit to the Intoxilyzer 5000 Test. At 7:08 a.m., the results of the test showed a blood alcohol concentration of .22. A review of respondent's driving record revealed a previous DWI conviction in December 2009. He was charged with gross-misdemeanor second-degree driving while intoxicated, a violation of Minn. Stat. §§ 169A.20, subd. 1b(1), .25, subds. 1(a) & 2 (2010).

Respondent moved to suppress the evidence and dismiss the complaint, arguing that the evidence was discovered after an officer seized him in violation of the state and

federal constitutions. The district court granted respondent's motion, finding that, under the totality of the circumstances,

> including the location of the ATV, the distance traveled by [the officer] both in his squad and on foot, and the limited options available to the defendant upon being approached by [the officer] . . . once [the officer] announced, "Police Department[,"] any reasonable person utilizing common sense would have believed that they were not free to leave and that any attempt to leave could subject them to criminal charges of fleeing a police officer.

This appeal follows.

D E C I S I O N

Where, as here, the state appeals pretrial suppression orders, the state "must clearly and unequivocally show both that the [district] court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998) (quotations omitted). Respondent concedes that there is critical impact.

When reviewing pretrial orders on motions to suppress evidence where the facts are undisputed and the decision is a question of law, the reviewing court independently reviews the facts and determines whether the evidence should be suppressed as a matter of law. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). Specifically, where the facts are undisputed, a reviewing court must determine whether a police officer's actions constitute a seizure and whether the officer articulated an adequate basis for the seizure. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). Here, it is undisputed that the officer did not have a reasonable, articulable suspicion of criminal activity at the time that he

announced himself as a law-enforcement officer, so the only issue is whether his actions constituted a seizure.

Both the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution protect against unreasonable searches and seizures. But "[n]ot all encounters between the police and citizens constitute seizures." *Id.* 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. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995) (quotation omitted). A person has been seized when, under the totality of circumstances, a reasonable person would believe that, because of the conduct of the police, "he or she was neither free to disregard the police questions nor free to terminate the encounter." *Id.* The reasonable-person standard is an objective one. *Id.*

Minnesota has adopted the *Mendenhall-Royer* standard for judging the totality of the circumstances. *In re E.D.J.*, 502 N.W.2d 779, 781-82 (Minn. 1993) (citing *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 1877 (1980); *Florida v. Royer*, 460 U.S. 491, 501, 103 S. Ct. 1319, 1326 (1983)). Under that standard, circumstances that may indicate a seizure include: "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." *Harris*, 590 N.W.2d at 98 (quotation omitted).

Generally, the mere act of approaching a person sitting in a parked car and asking questions is not a seizure. *State v. Vohnoutka*, 292 N.W.2d 756, 757 (Minn. 1980); *Overvig v. Comm'r of Pub. Safety*, 730 N.W.2d 789, 792 (Minn. App. 2007), *review*

denied (Minn. Aug. 7, 2007). An encounter may become a seizure, however, if an officer displays some show of authority that exceeds the behavior to be expected from a private citizen, such as boxing in a person's vehicle, activating emergency lights, or sounding the horn. *State v. Sanger*, 420 N.W.2d 241, 243 (Minn. App. 1988).

Respondent argues that, because the officer parked his squad car at the bottom of the trail with his headlights pointed up toward respondent, and because respondent could have left only by reversing his ATV and backing up the trail or driving forward around the officer, when the officer announced himself as a police officer a reasonable person in respondent's position would not have felt free to leave.

The officer testified that he drove toward respondent's ATV with his headlights on. Although respondent repeatedly claims that, "When [the officer] got out of the squad, he left on the headlights pointing up the trail toward the suspect vehicle," nothing in the record supports this claim. The officer used neither his emergency lights nor his spotlight. Even if he did point his headlights up the hill, however, directing headlights at a vehicle is not a display of police authority and does not constitute a seizure. *See, e.g.*, *Vohnoutka*, 292 N.W.2d at 757 (concluding no seizure occurred when officer approached vehicle and shined flashlight into passenger compartment after observing driver shut lights off, drive into closed service station, and stop); *Crawford v. Comm'r of Pub. Safety*, 441 N.W.2d 837, 838-39 (Minn. App. 1989) (concluding no seizure occurred when officer followed vehicle into residential cul-de-sac and activated spotlight to locate parked vehicle); *State v. Reese*, 388 N.W.2d 421, 422-23 (Minn. App. 1986) (concluding no seizure occurred when police observed two vehicles stopped in adjacent lanes with

engines running, positioned squad car so headlights illuminated one vehicle, approached vehicle, requested driver identification, and observed indicia of intoxication), *review denied* (Minn. Aug. 13, 1986).

The district court found that the officer parked his squad car so that it was "slightly in front of the entrance" to the ATV trail on which respondent's ATV was parked. The use of a squad car to block or partially block a parked vehicle may be one circumstance indicating a seizure. *See e.g.*, *Klotz v. Comm'r of Pub. Safety*, 437 N.W.2d 663, 665 (Minn. App. 1989) (concluding seizure occurred when officer partially blocked vehicle with squad car and instructed defendant to stop walking away from vehicle and identify himself), *review denied* (Minn. May 24, 1989); *State v. Sanger*, 420 N.W.2d at 242-43 (concluding seizure occurred when officer parked squad car in a way preventing defendant's exit, activated emergency lights, and sounded horn when defendant attempted to reverse); *State v. Lopez*, 698 N.W.2d 18, 22 (Minn. App. 2005) (concluding seizure occurred when officer partially blocked defendant's vehicle and activated emergency lights).

Unlike the officers in these cases, the officer here did not activate his emergency lights, sound his horn, or make any verbal commands while approaching the vehicle. While he did announce "Police Department," the mere fact of an officer identifying oneself as law-enforcement is not enough of a display of authority to constitute a seizure. *See Mendenhall*, 446 U.S. 544 at 555, 100 S. Ct. at 1877 (concluding no seizure occurred where law-enforcement approached defendant and identified themselves as federal agents); *Harris*, 590 N.W.2d at 99 (concluding no seizure occurred where police officers

boarded bus and announced their intent to search for drugs). Moreover, respondent had placed himself in a location with limited access. Unlike a person parking or stopping a vehicle in a more conventional location, a reasonable person in respondent's situation would not have believed a police officer taking the only available approach to his position was limiting his freedom of movement such as to constitute a seizure.

Finally, unlike cases where an officer parks a squad car in order to block or partially block a defendant's vehicle, there was no finding here that the squad car blocked the ATV trail—only that it was parked "slightly in front of the entrance to [the] trail." Instead, respondent argued, and the district court found, that the officer himself somehow blocked the trail by walking on it, so that, to end the encounter, the ATV "driver's only options would be to put the ATV in reverse and attempt to maneuver up the hill in reverse or to proceed forward and attempt to drive around him." Respondent offers no support for the proposition that a police officer seizes a vehicle or its driver by standing or walking along the vehicle's path.

The officer parked his squad car so that it was not blocking the ATV trail. Neither his use of headlights while driving to the ATV's location nor his announcement of himself as a member of the "Police Department" displayed the level of authority necessary to constitute a seizure in violation of the Fourth Amendment to the United States Constitution or Article I, § 10 of the Minnesota Constitution. Accordingly, the district court erred by granting respondent's motion to suppress.

Reversed and remanded.