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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1277**

State of Minnesota,
Respondent,

vs.

Edgar Gutierrez Tapia,
Appellant.

**Filed August 18, 2009
Affirmed
Shumaker, Judge**

Waseca County District Court
File No. 81-CO-07-208, 81-CV-07-1362

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Paul Dressler, Waseca County Attorney, Brenda Miller, Chief Deputy County Attorney, Waseca County Courthouse, 307 North State Street, Waseca, MN 56093 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks Presiding Judge; Lansing, Judge; and
Shumaker, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant argues that the district court erred by denying his motion to suppress evidence of a gun found on his person and evidence of marijuana found in a pickup truck that appellant had been driving, because he was unlawfully seized and the search of the truck exceeded the scope of consent. Because the district court did not err, we affirm.

FACTS

On August 9, 2007, a man identifying himself as A.L. called 911 to report that someone had pointed a gun at him in Waseca. A.L. described the perpetrator as being a Mexican or Hispanic male, driving a blue, four-door Dodge pickup truck with a silver bottom. He did not give a license-plate number for the truck or any further description of the perpetrator. But he tried to explain the truck's location and said that the perpetrator and gun could be found at the China Buffet in Waseca. Waseca police officers responded to the call but were unable to locate the gun, truck, or perpetrator.

On August 14, 2007, Waseca Police Detective Ronald Koble was on duty and driving in his unmarked vehicle when he spotted a truck matching the description of the truck from A.L.'s call. Detective Koble followed the truck and saw that a Hispanic male was driving and that a Hispanic woman was a passenger. He also checked the truck's registration and learned that it was registered to Gloria Contreras and Victor Contreras. Detective Koble did not stop the truck but continued to observe it. Eventually, the truck stopped at the China Buffet restaurant, and the man and woman got out and went inside

the restaurant. Detective Koble radioed to request another officer to assist. Waseca Police Officer Jared Chrz responded and arrived at the restaurant.

Officer Chrz, who was in his uniform and armed, and Detective Koble, who was wearing street clothes, went inside the restaurant to locate the man and woman from the truck. It was around lunchtime, and the restaurant was full of people. Detective Koble saw the occupants of the truck, later identified as appellant Edgar Gutierrez Tapia and his wife, Gloria Contreras, sitting in a booth.

Detective Koble and Officer Chrz approached Tapia and Contreras. Detective Koble identified himself and explained to Tapia that “there had been a report the previous week of a person driving a vehicle that matched the description of the one he was driving and it had been reported that it was a Hispanic male and [he] had pointed a gun at somebody in downtown Waseca.” Detective Koble told Tapia that he “just wished to talk to him about [this report].” Tapia indicated that he would talk to the detective, but asked that they speak inside the restaurant. Detective Koble said that they “really couldn’t have much privacy inside” the restaurant and stated that he “would prefer to talk outside, if [they] could.” Tapia agreed to speak outside the restaurant. Tapia then removed his wallet from his pocket and tried to pass it across the table to Contreras. Detective Koble stopped him and told Tapia that he was not under arrest but that he would want to see his identification outside. Tapia kept his wallet and stood up. During this time, Officer Chrz stood behind Detective Koble and did not speak to anyone. Neither Officer Chrz nor Detective Koble touched Tapia.

Detective Koble motioned for Tapia to lead the way, and the two officers followed him outside. As they left the restaurant, Detective Koble watched Tapia's hands closely because the underlying report involved the possession of a gun. He noticed that Tapia appeared nervous, was wearing an untucked T-shirt that fell several inches below his waistline, and kept his hands by his waist and continually touched his waist area as they left the restaurant.

Once outside the restaurant, Officer Chrz stood about two feet behind Tapia while Detective Koble stood in front of Tapia. The detective testified that he was "no more than two feet in front of" Tapia. Detective Koble asked Tapia for his identification. As Tapia handed him the identification, Detective Koble told Tapia about the August 9 complaint and asked, "Are you carrying a handgun?" Tapia did not respond. Detective Koble asked him again if he was carrying a gun. Tapia responded that he had a gun. Detective Koble reached forward to lift up Tapia's shirt and reached for and grasped the gun; at the same time, Officer Chrz restrained Tapia's hands. Officer Chrz then arrested Tapia for carrying a concealed weapon without a permit and transported him to jail.

In the meantime, Contreras had finished eating her meal and came outside as officers were arresting Tapia. Detective Koble asked permission to search the truck, and, according to him, Contreras, one of the truck's registered owners, gave him permission to "look in" the truck and unlocked it for him using her keyless entry.¹ When Detective

¹ At the omnibus hearing, Contreras testified that she never consented to a search of the vehicle. Instead, she said that when she unlocked the truck so that she could enter it, Detective Koble started searching without her permission. But the district court found Detective Koble's testimony credible, explaining that he had no reason to lie, whereas

Koble looked inside the truck, he saw a white plastic bag on the front-seat-passenger floor. Without opening the bag, he could see ammunition boxes and shooting earmuffs inside. Detective Koble pulled open the bag to see the rest of its contents. The bag contained other personal items and a second white plastic bag, which contained marijuana. Contreras said that the plastic bag and its contents belonged to Tapia.

The truck was taken into police custody. Relying on the gun found on Tapia's person and the marijuana inside the truck, Detective Koble obtained a warrant to search the truck. No further contraband was found.

Tapia was charged with one count of possession of a controlled substance and one count of carrying a pistol without a permit in a public place. At a contested omnibus hearing, Tapia moved to suppress the gun and marijuana. The district court denied his motion, concluding that Tapia was not seized before officers learned that he had a gun, that Contreras consented to a search of the truck, and that even if Contreras had not consented to a search of the truck, law enforcement would inevitably have found the marijuana inside the truck during the search conducted with the search warrant.

The parties agreed to submit the charge of possession of a controlled substance to the district court under *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). The remaining charge of carrying a pistol without a permit was dismissed. The district court found Tapia guilty of fifth-degree possession of a controlled substance, but stayed adjudication and placed Tapia on probation for up to five years. Tapia's appeal followed.

Contreras, though separated from Tapia, was still legally married to him and had an interest in the forfeiture of the truck.

DECISION

I

On appeal, Tapia first argues that he was seized when Detective Koble and Officer Chrz approached him in the restaurant and asked him to accompany them outside to discuss the August 9 complaint. “We review de novo a district court’s ruling on constitutional questions involving searches and seizures.” *State v. Anderson*, 733 N.W.2d 128, 136 (Minn. 2007). A reviewing court may independently review undisputed facts to determine, as a matter of law, whether evidence should have been suppressed. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). We will not reverse the district court’s factual findings unless clearly erroneous or contrary to law. *Anderson*, 733 N.W.2d at 136.

The United States Constitution and the Minnesota Constitution prohibit unreasonable searches and seizures. *State v. Burbach*, 706 N.W.2d 484, 487-88 (Minn. 2005). “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). The test of whether a seizure occurred is whether, under all the circumstances, “a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter.” *Id.* Some circumstances that can indicate that a seizure has occurred 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.”” *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 1877 (1980)). ““In the absence of some such evidence, 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 555, 100 S. Ct. at 1877).

Tapia argues that he was seized inside the restaurant. But not every contact between a police officer and a person amounts to a seizure. *Id.* A seizure does not occur when an “officer approaches [a person] in a public place or in a parked car and begins to ask questions.” *State v. Harris*, 590 N.W.2d 90, 98-99 (Minn. 1999). Here, Detective Koble did not stop or summon Tapia. Rather, he approached him in a restaurant and asked to speak with him. Although Officer Chrz accompanied Detective Koble, he did not speak to Tapia, touch Tapia, or otherwise engage in any show of authority. The record does not indicate that Detective Koble ordered Tapia to leave the restaurant. There is no indication that Detective Koble’s choice of language or tone of voice indicated that Tapia was required to comply with his request to talk to him either in the restaurant or outside. Detective Koble’s statement that he “preferred” to speak outside is not a “show of authority which one would not expect between two private citizens.” *State v. Day*, 461 N.W.2d 404, 407 (Minn. App. 1990), *review denied* (Minn. Dec. 20, 1990); *see also E.D.J.*, 502 N.W.2d at 782 (noting that a seizure occurs when an officer’s conduct exceeds “that accepted in social intercourse”).

Tapia also points out that Detective Koble directed his actions by telling him to take his wallet outside with him. But Detective Koble told Tapia that he needed his identification, but explained to Tapia, “You’re not under arrest, we are just going to go out and talk, but you’ll need your identification.” *See State v. Pfannenstein*, 525 N.W.2d 587, 588 (Minn. App. 1994) (explaining that “[n]ot every request for identification” is a seizure under the totality-of-the-circumstances test), *review denied* (Minn. Mar. 14, 1995). From these facts, we conclude that no seizure of Tapia occurred inside the restaurant.

Tapia next claims that he was seized when, once outside the restaurant, Detective Koble stood two feet in front of him and asked to see his identification, while Officer Chrz stood two feet behind him. In support of his claim, Tapia cites *State v. Johnson*, 645 N.W.2d 505, 510 (Minn. App. 2002) and *Day*, 461 N.W.2d at 407. But each of these cases involved a stop or some other show of authority before the officer demanded identification. *See Johnson*, 645 N.W.2d at 510 (concluding that a seizure occurred when an officer took the defendant’s identification, told him not to leave, took the identification to the squad car, and then ran a warrants check during a traffic stop); *Day*, 461 N.W.2d at 407 (concluding a seizure occurred when the officer summoned the defendant to approach the squad car and required the defendant to provide identification and respond to questioning).

Here, in contrast, Detective Koble did not stop Tapia, summon him to his squad car, or otherwise detain him. Rather, Detective Koble approached Tapia in a public place and asked to speak with him. When Tapia agreed, Detective Koble stated that he would

prefer to speak outside because the restaurant was crowded. Tapia agreed. Detective Koble then asked Tapia to bring his identification with him, explaining that he was not under arrest and that they were just going to talk. Tapia consented. Once outside the restaurant, Detective Koble spoke with Tapia in the public parking lot. The truck that Tapia had driven to the restaurant was in the same parking lot. They were not near Officer Chrz's squad car or Detective Koble's unmarked vehicle. The district court found that the first time that the officers touched Tapia was when he indicated that he had a gun. Thus, Tapia's movement was not restricted before he told the detective that he had a gun.

Applying the totality-of-the-circumstances test, we conclude that Tapia was not seized until he admitted that he had a gun, and at that point, the seizure was proper.

II

Tapia next challenges the search of the truck. The district court concluded that Contreras consented to a search of the truck. On appeal, Tapia does not challenge this determination. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (stating that issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997). Instead, he argues that Detective Koble's search of the truck exceeded the scope of Contreras's consent.

The district court did not address the scope of the consent or whether the search exceeded the scope of the consent. The record supports the state's claim that Tapia did not raise this issue before the district court. Because Tapia did not raise this issue below and because the district court did not address this issue, we decline to address it now.

See Roby v. State, 547 N.W.2d 354, 357 (Minn. 1996) (stating that issues not raised to the district court are generally not decided on appeal).

Affirmed.