DA 18-0109

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 7N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SCOTT ALAN MAHLEN,

Defendant and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DC-17-018C
Honorable Heidi J. Ulbricht, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Thane Johnson, Johnson, Berg & Saxby, PLLP, Kalispell, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Mardell Ployhar, Assistant Attorney General, Victoria Nickol, Student Intern, Helena, Montana

Ed Corrigan, Flathead County Attorney, Andrew C. Clegg, Deputy County Attorney, Kalispell, Montana

Submitted on Briefs: October 17, 2018

Decided: January 8, 2019

Filed:

/S/ BOWEN GREENWOOD
Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion, shall not be cited, and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Scott Alan Mahlen appeals the Order of the Eleventh Judicial District Court, Flathead County, denying his Motion to Suppress. We affirm.

¶3 On the evening of August 11, 2016, Sheridan Fishe called police to report a road rage incident involving two individuals driving black and chrome Harley-Davidson motorcycles. Fishe identified himself, told officers the two individuals threatened to kill him, and reported that he saw them traveling toward the Scoreboard Pub. Police dispatch contacted Deputy Cody Shields and notified him about the incident and the suspects' potential whereabouts. Deputy Shields and two other officers, Deputy McKeag Johns and Corporal Nick Fister, arrived at the Scoreboard Pub within minutes of the alleged incident. Deputy Shields testified he observed two men—ultimately identified as Mahlen and another man—at the Scoreboard Pub standing near a couple of motorcycles that generally matched Fishe's description.

¶4 Deputy Shields testified that he "walked up to [two motorcycles] and observed a couple individuals near the bikes, started talking to them about the motorcycles, and then proceeded to identify who they were from there." After initially providing officers with a fake name, Mahlen then provided Deputy Shields with his real name. Deputy Shields

looked up Mahlen's information, discovered he had an outstanding arrest warrant, and arrested Mahlen. Deputy Shields conducted a search incident to arrest and recovered $932 and a plastic baggie containing twenty-seven grams of cocaine in Mahlen's left front pants pocket.

¶5 The State charged Mahlen with possession with intent to distribute, a felony, in violation of § 45-9-103, MCA. Mahlen moved to suppress all evidence gathered from the stop on the basis that Deputy Shields lacked particularized suspicion to make contact with him. On August 28, 2017, the District Court held a hearing on Mahlen's Motion to Suppress. On September 6, 2017, the District Court denied the Motion. On September 13, 2017, pursuant to a plea agreement, Mahlen pled guilty to criminal possession of dangerous drugs, a felony, in violation of § 45-9-102, MCA, reserving his right to appeal the Order denying his Motion to Suppress.

¶6 We review a district court's denial of a motion to suppress to determine whether the district court's findings are clearly erroneous and whether those findings were applied correctly as a matter of law. *State v. Gill*, 2012 MT 36, ¶ 10, 364 Mont. 182, 272 P.3d 60. A district court's finding that particularized suspicion exists is a question of law, which is reviewed for clear error. *City of Missoula v. Moore*, 2011 MT 61, ¶ 10, 360 Mont. 22, 251 P.3d 679. A finding is clearly erroneous if it is "not supported by substantial evidence, if the court has misapprehended the effect of the evidence, or if this Court's review of the record leaves us with the firm conviction that a mistake has been made." *State v. Roberts*, 1999 MT 59, ¶ 11, 293 Mont. 476, 977 P.2d 974 (citations omitted).

¶7 The Fourth Amendment of the United States Constitution and Article II, Sections 10 and 11 of the Montana Constitution afford all individuals freedom from unreasonable searches and seizures. A constitutional seizure occurs when an officer restrains a person's liberty by means of physical force or show of authority that, under the totality of the circumstances, would cause an objectively reasonable person to believe he was not free to leave. *City of Missoula v. Kroschel*, 2018 MT 142, ¶ 10, 391 Mont. 457, 419 P.3d 1208; *Roberts*, ¶ 16 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980)). Courts look to whether an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen" to determine whether a "seizure" has occurred. *State v. Wilkins*, 2009 MT 99, ¶ 8, 350 Mont. 96, 205 P.3d 795 (quoting *Terry v. Ohio*, 392 U.S. 1, 19-20 n. 16, 88 S. Ct. 1868, 1879 n. 16 (1968)). However, not all interactions between police officers and citizens constitute a "seizure." *Wilkins*, ¶¶ 8, 12-15 (citing *Terry*, 392 U.S. at 19-20 n. 16, 88 S. Ct. at 1879 n. 16). Merely approaching a person who is standing or sitting in a public place and conducting a welfare check or asking a question does not, by itself, constitute a seizure. *Wilkins*, ¶ 10 (citing Wayne LaFave, *Search and Seizure*, vol. 4 § 9.4(a) 419-21 (4th ed. West 2004)).

¶8 Generally, for government searches and seizures to be reasonable they must occur pursuant to a judicial warrant issued on probable cause. U.S. Const. amend. IV; Mont. Const. art II, § 11. A valid warrant "is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions."

United States v. Leon, 468 U.S. 897, 920 n. 21, 104 S. Ct. 3405, 3419 n. 21 (1984) (internal citations omitted).

¶9 One exception to the warrant requirement is the temporary investigative stop. *Terry*, 392 U.S. at 15-16, 29-31, 88 S. Ct. at 1877, 1884-85; §§ 46-5-401, -403, MCA. During a temporary investigative stop, police officers may briefly stop and detain a person for an investigative purpose without a warrant or probable cause for arrest if, "based on *specific and articulable facts known to the officer*," the officer has an objectively reasonable particularized suspicion that the person is engaged in, or about to engage in, criminal activity. *Kroschel*, ¶ 11 (emphasis in original); *Roberts*, ¶¶ 12-13, 25; §§ 46-5-401, -403, MCA. The question of whether particularized suspicion of wrongdoing exists "is a factually driven inquiry dependent upon the totality of circumstances giving rise to the investigative stop." *Roberts*, ¶ 13 (citing *State v. Reynolds*, 272 Mont. 46, 50, 899 P.2d 540, 542-43 (1995)).

¶10 Police officers "may rely on information conveyed by a reliable third person . . . in forming the basis for a particularized suspicion to justify an investigative stop." *State v. Pratt*, 286 Mont. 156, 162, 951 P.2d 37, 41 (1997). To determine whether an informant's tip contains sufficient indicia of reliability for purposes of creating particularized suspicion, courts examine (1) whether the citizen informant identifies himself to law enforcement and thus exposes himself to criminal and civil liability if the report is false; (2) whether the report is based on the personal observations of the informant; and (3) whether the officer's

own observations corroborated the information. *Pratt*, 286 Mont. at 165, 951 P.3d at 42-43; *State v. Dupree*, 2015 MT 103, ¶ 11, 378 Mont. 499, 346 P.3d 1114.

¶11 Another exception to the warrant requirement is a search conducted incident to a lawful arrest. Section 46-5-102, MCA; *State v. Cooney*, 2006 MT 318, ¶ 11, 335 Mont. 55, 149 P.3d 554; *Chimel v. California*, 395 U.S. 752, 762-64, 89 S. Ct. 2034, 2040-41 (1969). A police officer may search a person lawfully arrested and the area within the person's immediate presence. Section 46-5-102, MCA; *State v. Roberts*, 284 Mont. 54, 56, 943 P.2d 1249, 1250 (1997) (we have long recognized searches incident to a valid outstanding arrest warrant are reasonable, legal, and necessary to ensure officer safety); *see also Utah v. Strieff*, 579 U.S. __, __,136 S. Ct. 2056, 2062-63 (2016) (when an arrest is made pursuant to a valid outstanding warrant, the arrest is merely "a ministerial act that was independently compelled by the pre-existing warrant. . . .").

¶12 In this case, the District Court determined that Fishe's report, in which he identified himself and gave a description of the motorcycles, the number of riders, their location and possible destination, along with the short period of time between the report and when the officers arrived at the Scoreboard Pub to find Mahlen and another rider next to their motorcycles, satisfied the *Pratt* reliability factors. The District Court concluded that the totality of the circumstances gave officers particularized suspicion to question Mahlen.

¶13 Mahlen argues the District Court's finding that the officers possessed the requisite particularized suspicion to make contact with Mahlen was clearly erroneous. Mahlen argues the record indicates that the totality of the circumstances did not justify Deputy

Shields's contact with him. Mahlen contends the officers' contact was solely based on a vague physical description of motorcycles and Fishe's guess of where the riders were headed, and Fishe's tip was not ultimately corroborated by the officers. Thus, Mahlen argues the officers' seizure was illegal, violated Mahlen's constitutional rights, and evidence discovered as a result is inadmissible.

¶14 The State counters that Mahlen was not seized during the conversation with Deputy Shields. The State acknowledges it failed to raise this argument before the District Court but contends Mahlen's substantial rights were not violated by the denial of his Motion to Suppress if he was not illegally seized.

¶15 Generally, this Court will not review arguments raised for the first time on appeal, unless the alleged error affects the substantial rights of a party. *E.g.*, *State v. Carter*, 2005 MT 87, ¶ 13, 326 Mont. 427, 114 P.3d 1001; *State v. Johnson*, 2008 MT 227, ¶ 26, 344 Mont. 313, 187 P.3d 662. However, we need not reach the issue of whether Mahlen was seized during the conversation with Deputy Shields because, even if a seizure occurred, the District Court's finding that there was particularized suspicion for Deputy Shields and the other officers to approach Mahlen and his companion was not clearly erroneous. *See Moore*, ¶ 10. Based on the totality of the circumstances and the *Pratt* reliability factors, Deputy Shields had particularized suspicion to make contact with Mahlen. *See Dupree*, ¶ 11; *Pratt*, 286 Mont. at 165, 951 P.3d at 42-43. Accordingly, the District Court did not err when it dismissed Mahlen's Motion to Suppress. *See Gill*, ¶ 10; *Roberts*, ¶ 11.

¶16 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. We affirm.

/S/ JAMES JEREMIAH SHEA

We concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ BETH BAKER
/S/ LAURIE McKINNON