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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **CITY OF SANTA FE,**

3 Plaintiff-Appellee,

4 v.

NO. 35,718

5 **GURUSIMRAN SCHIRMER,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

8 **T. Glenn Ellington, District Judge**

9 R. Alfred Walker, Assistant City Attorney

10 Santa Fe, NM

11 for Appellee

12 Bennett J. Baur, Chief Public Defender

13 Allison H. Jaramillo, Assistant Public Defender

14 Santa Fe, NM

15 for Appellant

16 **MEMORANDUM OPINION**

17 **GARCIA, Judge.**

18 {1} Defendant appeals from the district court's denial of her motion to suppress

1 following a conditional plea in municipal court. On appeal, Defendant asserts that the
2 district court erred in determining that the officer was acting in a community care
3 taking capacity. This Court issued a calendar notice proposing to affirm on the basis
4 that “there was an insufficient show of force by the sergeant to constitute a seizure.”
5 [CN 4] The City of Santa Fe has filed a memorandum in support of this Court’s
6 proposed disposition, and Defendant has filed a memorandum in opposition. Having
7 considered the arguments of the parties, we affirm.

8 {2} In this Court’s notice of proposed disposition, we noted that “[t]he test for
9 determining if a police-citizen encounter is consensual depends on whether, under the
10 totality of the circumstances surrounding the encounter, the police conduct would
11 have communicated to a reasonable person that the person was not free to decline the
12 officers’ requests or otherwise terminate the encounter.” *State v. Walters*, 1997-
13 NMCA-013, ¶ 12, 123 N.M. 88, 934 P.2d 282 (internal quotation marks and citation
14 omitted). We further noted that it is “[o]nly when the officer, by means of physical
15 force or show of authority, has in some way restrained the liberty of a citizen [that]
16 we may conclude that a seizure has occurred.” *Id.*(internal quotation marks and
17 citation omitted). We pointed out that, in the present case, the sergeant happened to
18 be behind Defendant on the roadway when she began her attempts at parallel parking;
19 the sergeant activated only his *rear* lights to let traffic know he was stopping; and the

1 sergeant approached Defendant’s vehicle and asked if everything was okay. [CN 4
2 (citing DS 2; RP 87)] Based on these facts, we therefore proposed to conclude that
3 there was an insufficient show of force to constitute a seizure. [CN 4]

4 {3} In response, Defendant agrees that “it is well-established that the police do not
5 need justification to approach a person and ask that person questions, so long as the
6 actions of the officers do not ‘convey a message that compliance with their requests
7 is required.’” [MIO 7 (citing *State v. Murry*, 2014-NMCA-021, ¶ 13, 318 P.3d 180)]
8 However, Defendant disagrees with this Court’s proposed holding that the show of
9 force was insufficient to constitute a seizure. [MIO 9] Defendant points out that this
10 Court “should consider three factors in determining whether ‘a reasonable person
11 would have believed that he was not free to leave.’” [MIO 9 (citing *State v. Jason L.*,
12 2000-NMSC-018, ¶¶ 14-16, 129 N.M. 119, 2 P.3d 856)] Further, Defendant directs
13 this Court to *Murry*, for circumstances that might indicate a seizure, which include:
14 “the threatening presence of several officers, the display of a weapon by an officer,
15 some physical touching of the person of the citizen, or the use of language or tone of
16 voice indicating that compliance with the officer’s request might be compelled.”
17 2014-NMCA-021, ¶ 20 (internal quotation marks and citation omitted).

18 {4} While we agree with Defendant’s position on the analysis this Court should
19 undertake, for the reasons discussed in this Court’s notice of proposed disposition we

1 conclude that none of the circumstances this Court indicated might indicate a seizure
2 in *Murry* exist in the present case. Specifically, the officer turned on only his rear
3 emergency lights, approached Defendant on foot while she was attempting to parallel
4 park, and asked her if she was okay. To the extent Defendant directs this Court to the
5 factual circumstances of prior cases to argue that a seizure occurred, we suggest that
6 the cases cited by Defendant does not support that conclusion. For instance, Defendant
7 relies on *State v. Soto*, 2008-NMCA-032, 143 N.M. 631, 179 P.3d 1239. However, in
8 *Soto*, the district court found that “while the officers did not engage their lights, they
9 pulled up next to the [d]efendant in their patrol car, at which time the [d]efendant
10 stopped his bicycle. The officers immediately began to question him and requested his
11 driver’s license.” *Id.* ¶ 8 (alteration, internal quotation marks, and citation omitted).
12 This Court considered all of these circumstances in determining that a seizure
13 occurred under the facts of that case. *See id.* ¶ 13 (“In addition to the assertion of
14 authority evidenced by the patrol car pulling up next to [the d]efendant, the officers
15 then began questioning [the d]efendant about his activities, asked [the d]efendant for
16 identification, and retained [the d]efendant’s driver’s license in order to run a warrant
17 check, all of which, in combination with the lateness of the hour and [the d]efendant’s
18 isolation on the road, conveyed to [the d]efendant that the officers expected [the
19 d]efendant to comply with their requests.”).

1 {5} Similarly, Defendant relies on *State v. Baldonado*, 1992-NMCA-140, 115 N.M.
2 106, 847 P.2d 751, to argue that “when an officer is investigating a suspicious
3 situation, turns on emergency lights, and asks accusatory questions ‘that this [is] a
4 show of authority sufficient to convey to a reasonable person that departure [is] not
5 a realistic alternative.’” [MIO 12-13 (quoting *Baldonado*, 1992-NMCA-140, ¶ 16)]
6 *Baldonado*, however, does not stand for the proposition that any time emergency
7 lights are engaged that a stop or seizure has occurred. *See id.* ¶ 1 (“These consolidated
8 cases raise the question of whether there is a seizure, as a matter of law, whenever the
9 police pull up behind a stopped car and turn on their flashing lights. We hold that
10 there is not[.]”). Rather, in *Baldonado* this Court held:

11 [W]e believe that a trial court should ordinarily find a stop that must be
12 justified by reasonable suspicion whenever officers pull up behind a
13 stopped car, activate their lights, and approach the car in an accusatory
14 manner, asking for license and registration and an account of the
15 occupants’ activities. On the other hand, a trial court should ordinarily
16 find no stop whenever officers pull up behind a stopped car, activate
17 their lights, and approach the car in a deferential manner asking first
18 whether the occupants need help.

19 *Id.* ¶ 18. Thus, because the facts of this case fall in line with the second example,
20 rather than the first, *Baldonado* does not support the conclusion that a seizure
21 occurred.

22 {6} Finally, to the extent Defendant relies on *State v. Garcia*, 2009-NMSC-046, 147
23 N.M. 134, 217 P.3d 1032, and *Murry*, we note that the officers in each of those cases

1 ordered the defendant to comply. *See Garcia*, 2009-NMSC-046, ¶ 41 (noting that the
2 circumstances surrounding the seizure involved an officer stopping his vehicle near
3 the defendant, shining a spotlight on him, and “t[elling], order[ing], or yell[ing] at [the
4 d]efendant to stop”); *Murry*, 2014-NMCA-021, ¶¶ 4-5 (noting that, under the facts
5 of that case, the officers “ordered” the driver to open the door and then ordered
6 everyone out of the vehicle). No such show of authority or indication that compliance
7 was required occurred in the present case. Accordingly, we remain unpersuaded that
8 a seizure occurred under the facts of this case.

9 {7} Thus, for the reasons stated above and in our notice of proposed disposition, we
10 affirm.

11 {8} **IT IS SO ORDERED.**

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13

TIMOTHY L. GARCIA, Judge

14 **WE CONCUR:**

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JULIE J. VARGAS, Judge

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STEPHEN G. FRENCH, Judge