NO. COA01-1030

NORTH CAROLINA COURT OF APPEALS

Filed: 2 July 2002

STATE OF NORTH CAROLINA

v. Beaufort County
No. 00 CRS 4663

BRIAN ETHANIEL ANGE

Appeal by defendant from order entered 12 February 2001 by Judge Steve A. Balog in Beaufort County Superior Court. Heard in the Court of Appeals 23 May 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Isaac T. Avery, III, and Assistant Attorney General Patricia A. Duffy, for the State.

Rodman, Holscher, Francisco & Peck, P.A., by Franz F. Holscher, for defendant-appellant.

MARTIN, Judge.

Defendant was convicted of driving while impaired in Beaufort County District Court. He appealed his conviction to the Beaufort County Superior Court, and filed a motion to suppress evidence upon grounds that the evidence was obtained after an unconstitutional stop of the vehicle which he was operating. Evidence at the suppression hearing tended to show that on the evening of 18 June 2000, Beaufort County Sheriff Alan Jordan was patrolling in the county in an unmarked vehicle equipped with blue lights, strobe markers, sirens, and alternating headlights. About 8:20 p.m.,

Sheriff Jordan noticed a moped being driven in a circle in the parking lot of Chocowinity High School. Sheriff Jordan testified that the parking area in which he saw the moped was surrounded by a gate, which was open to permit incoming traffic off Highway 17. Sheriff Jordan stated that he thought it unusual that anyone would be in that parking area at that time of the evening, and he thereupon activated the lights in his patrol car and turned into the entrance of the parking lot. At that time, the operator of the moped had pulled up to the entrance such that he faced Highway 17; Sheriff Jordan, who had pulled up alongside, faced the parking area. Sheriff Jordan identified defendant as the driver of the moped. Sheriff Jordan approached defendant and introduced himself. "Almost immediately," Sheriff Jordan "noticed a [sic] what in my opinion was a strong odor of alcohol coming from his person. I noticed his eyes appeared red and glassy." Sheriff Jordan called for assistance from the North Carolina State Highway Patrol, and an officer arrived less than five minutes later. During this time defendant did not ask to leave and Sheriff Jordan did not place defendant under arrest. Following a brief conversation with the highway patrol officer, defendant was taken into custody.

The trial court denied defendant's motion to suppress. In its order denying the motion, the trial court made findings of fact consistent with the foregoing summary and concluded as a matter of law:

> (1) that the defendant was not stopped by Sheriff Jordan at the time Sheriff Jordan stopped his patrol vehicle and approached the defendant; (2) the defendant voluntarily

> engaged in conversation with Sheriff Jordan at a time when he was free to leave; and (3) the defendant was lawfully detained after Sheriff Jordan detected a strong odor of alcoholic beverage about the defendant's person and observed the red and glassy eyes of the defendant.

Following the trial court's order, defendant entered a plea of guilty to the charge of driving while impaired, expressly reserving the right to appeal the trial court's denial of his motion to suppress. Defendant appeals.

Defendant argues that the trial court erred in denying his motion to suppress the evidence gathered by Sheriff Jordan because Jordan's stop was an unconstitutional seizure. Review of the trial court's denial of a motion to suppress is limited to determining whether the findings of fact are supported by competent evidence, and whether those findings support the trial court's conclusions of law. *State v. Bone*, 354 N.C. 1, 550 S.E.2d 482 (2001).

The Fourth Amendment guarantees that individuals will not be subjected to "unreasonable searches and seizures." U.S. Const. amend. IV. A seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *State v. Foreman,* 133 N.C. App. 292, 296, 515 S.E.2d 488, 492 (1999), *affirmed as modified,* 351 N.C. 627, 527 S.E.2d 921 (2000) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 20 L. Ed. 2d 889, 905 n. 16 (1968)). Citizens, however, are not protected by the Constitution from the mere approach of police officers in a public place. *State v. Brooks*, 337 N.C. 132, 446

S.E.2d 579 (1994). Law enforcement officers, in fact,

> may approach individuals in public to ask them questions and even request consent to search their belongings, so long as a reasonable person would understand that he or she could refuse to cooperate. "A seizure does not occur simply because a police officer approaches an individual and asks a few questions."

Id. at 142, 446 S.E.2d at 585-86 (citations omitted). In *Brooks*, our Supreme Court held that it was neither an investigatory stop nor a seizure for an officer to approach the defendant, offer a greeting, then shine his flashlight inside the vehicle, while the defendant was sitting in the driver's seat of his parked car outside a nightclub. *Id.* Under those circumstances, no reasonable suspicion was required for the officer to approach and question the defendant in his vehicle. *Id.* This Court recently held:

> Police conduct does not constitute a seizure unless, in view of all of the circumstances, "'a reasonable person would not feel free to decline the officer's request or otherwise terminate the encounter.' In other words, a seizure does not occur until there is a physical application of force or submission to a show of authority."

Foreman, 133 N.C. App. at 296, 515 S.E.2d at 492 (citations omitted).

In the present case, there is no evidence that Sheriff Jordan applied physical force or that defendant submitted to a show of authority. Rather, the evidence showed, and the trial court found, that Sheriff Jordan noticed defendant driving a moped in a circle in the parking lot of the Chocowinity High School late on a summer

evening at a time when it was unusual for a person to be at that location. Sheriff Jordan engaged his vehicle's emergency lights and pulled the car into the parking area where defendant had been observed driving in a circle. At this point defendant had stopped the moped, facing Highway 17, as if preparing to exit the parking lot. Sheriff Jordan approached defendant and introduced himself, after which the two had a brief conversation. Sheriff Jordan testified that defendant was "very pleasant and very cooperative." According to Sheriff Jordan, defendant told him that he was "test-riding a friend's moped," and that he had recently "left a bar located a short distance south on Highway 17 and simply ridden up to the school to test-ride the moped." This encounter cannot be characterized as a seizure such that a reasonable person would not have believed himself "free to decline the officer's request or otherwise terminate the encounter." *Foreman,* 133 N.C. App. at 296, 515 S.E.2d at 492. The evidence supports the trial court's findings and conclusion that Sheriff Jordan did not "stop" defendant on the evening of 18 June 2000, and further that defendant voluntarily communicated with Sheriff Jordan after the officer approached him. Because this encounter cannot be characterized as either an investigatory stop or a seizure of defendant, a reasonable suspicion of criminal activity was not required for Sheriff Jordan to approach defendant. Defendant's motion to suppress the evidence of his intoxication was properly denied.

Affirmed.

Judges TIMMONS-GOODSON and CAMPBELL concur.

Report per Rule 30(e).