IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1639-15

JOSEPH TIMOTHY SHIMKO, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD COURT OF APPEALS TRAVIS COUNTY

RICHARDSON, J., delivered the opinion of the Court in which KEASLER, ALCALA, YEARY, and NEWELL, JJ., joined. KELLER, P.J. filed a dissenting opinion in which HERVEY, KEEL, and WALKER, JJ., joined.

O P I N I O N

Following the denial of his motion to suppress, Appellant, Joseph Shimko, pled nolo contendere to the offense of driving while intoxicated. He was sentenced to three days in the county jail, and his driver's license was suspended for 90 days. He appealed the denial of his motion to suppress, claiming that the evidence of his intoxication was obtained as a result of an unlawful detention. The Third Court of Appeals affirmed the trial court's denial of the

motion to suppress, holding that Appellant failed to show that the initial encounter between Appellant and the officer was anything other than a consensual encounter. We agree and hold that Appellant failed to carry his burden of demonstrating that the initial encounter with police was a "seizure" under the Fourth Amendment. We affirm the judgment of the court of appeals.

BACKGROUND

Appellant did not testify at the hearing on his motion to suppress. The only witnesses to testify were Deputy Jeff Ford of the Travis County Sheriff's Office and his trainee, Deputy Jeremy Turner. On September 12, 2012, at around 2:30 a.m., Deputy Ford and Deputy Turner were outside of Little Woodrow's, a sports bar, assisting another officer with impounding an intoxicated person's vehicle. Deputy Ford and Deputy Turner had arrived in one police vehicle; the other officer had been in another police vehicle, and a fourth officer, a sergeant, had come in a vehicle marked with only decals not readily visible at night and with no overhead lights. Neither of the two police vehicles had the overhead lights turned on—only the headlights. No traffic was blocked or being redirected.

Deputy Ford observed a man, Scott Williamson, staggering and almost falling down in the parking lot. Because Williamson said that he was waiting for a ride, Deputy Ford decided not to arrest him for public intoxication. Deputy Ford said he noticed a vehicle circling the parking lot. Williamson indicated to Deputy Ford that the vehicle, which was

being driven by Appellant, was his ride home. After Appellant's vehicle passed by them a second time, Deputy Ford, who was standing about 50 feet behind the vehicle, raised his hand and waved for Appellant to stop. The other three officers were not involved in the initial encounter with Appellant or even observed Deputy Ford gesturing to Appellant. Deputy Ford described the encounter as follows:

> We were outside of Little Woodrow's Pub there at 6301 W. Parmer Lane. We were there on a prior call, a call we were there to assist another deputy on. And we came into contact with another gentleman by the name of Mr. Williamson, I believe, in my report, Scott Williamson, who we determined to be very intoxicated. Had him waiting for a ride. We chose not to place him under arrest because he said he had a sober ride coming for him. So we had him sit on the curb. He had been making a phone call to get that ride there. And I had noticed that Mr. Shimko circled the parking lot a couple of times. And at one point, Mr. Williamson pointed out that that was his ride. And I said, oh, maybe he didn't see you because he's—we had Mr. Williamson sitting on the curb. So I said let me flag him down. And I kind of waved and asked Mr. Shimko to stop. And I made contact with him to ascertain whether or not he was, in fact, Mr. Williamson's ride.

Deputy Ford said that if Appellant had not stopped, he would not have gone after him because he "had no reason to."

Deputy Ford testified that after Appellant stopped his car, he approached Appellant's vehicle to confirm that he was there to pick up Williamson. He thought that Appellant's window was already rolled down. Deputy Ford said that, as Appellant spoke, "he detected the odor of an alcoholic beverage." Deputy Ford then motioned for Deputy Turner to come over and investigate whether Appellant was intoxicated. Deputy Turner testified that

Appellant told him he was "there to give his friend a ride home." Based on Deputy Turner's investigation, Appellant was arrested for driving while intoxicated.

Appellant sought to suppress all evidence gathered after Deputy Ford signaled for him to stop. Deputies Ford and Turner were the only two witnesses to testify at the suppression hearing. Appellant did not testify or present any other evidence to support his motion. The trial court denied Appellant's motion to suppress because it concluded that Deputy Ford's initial interaction with Appellant was a consensual encounter rather than an investigative detention. The trial court added that, even if the interaction amounted to a detention, Deputy Ford was acting in a community caretaking function.[1] Following the denial of the motion to suppress, Appellant pleaded no contest to driving while intoxicated.

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[1] A community caretaking exception requires that there first be a seizure. *See Gonzales v State*, 369 S.W.3d 851, 857 (Tex. Crim. App. 2012) (holding that the officer "reasonably exercised his community caretaking function in seizing Gonzales because, under the totality of the circumstances, it was reasonable to believe Gonzales was in need of help"); *Corbin v. State*, 85 S.W.3d 272, 276 (Tex. Crim. App. 2002) (holding that "a police officer may reasonably seize an individual through the exercise of his community caretaking function"). The community caretaking exception allows police officers, as part of their duty to "serve and protect," to stop or temporarily detain an individual whom a reasonable person would believe, given the totality of circumstances, is in need of help. *Wright v. State*, 7 S.W.3d 148, 151 (Tex. Crim. App. 1999); *see also Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). *Cf Byram v. State*, No. PD-1480-15 (Tex. Crim. App. January 25, 2017) (upholding a traffic stop where the officer was concerned that the passenger in the vehicle defendant was driving was in need of medical assistance). The community caretaking exception is to be narrowly applied. *Wright*, 7 S.W.3d at 152. To invoke the exception, an officer's primary motive must be out of concern for the individual's well-being. *Corbin*, 85 S.W.3d at 277. Determining whether an officer has properly invoked his community caretaking function is a two-step process—(1) was the officer primarily motivated by a community caretaking purpose, and (2) was the officer's belief that his assistance was required reasonable. Since we agree with the court of appeals that the initial encounter was a consensual encounter, and not a seizure, there is no need for us to address whether the community caretaking exception applies under these facts.

On direct appeal to the Third Court of Appeals, Appellant argued that the trial court erred in denying his motion to suppress because his interaction with Deputy Ford was an investigative detention from the moment Deputy Ford signaled for Appellant to stop. The court of appeals held that, based on the record, it could not conclude that Deputy Ford's words or actions amounted to a display of official authority.[2] Accordingly, said the court of appeals, Appellant failed to carry his initial burden of establishing a Fourth Amendment claim, and thus the trial court did not abuse its discretion in denying Appellant's motion to suppress. We agree with the court of appeals and affirm its decision.

ANALYSIS

A. Burden of Proof and Standard of Review

There are three distinct categories of interactions between police officers and citizens: (1) consensual encounters, (2) investigative detentions, and (3) arrests.[3] The Fourth Amendment protects against unreasonable searches and seizures.[4] A consensual encounter does not constitute a seizure and therefore does not implicate the Fourth Amendment. On the other hand, a temporary investigative detention does constitute a seizure for Fourth Amendment purposes.[5]

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[2] *Shimko v. State*, No. 03-13-00403-CR, 2015 WL 7721962 (Tex. App.–Austin 2015).

[3] *Crain v. State*, 315 S.W.3d 43, 49 (Tex. Crim. App. 2010).

[4] U.S. CONST. AMEND. IV.

[5] *See Terry v. Ohio*, 392 U.S. 1 (1968).

A defendant who brings a motion to suppress bears the initial burden of producing evidence that rebuts the presumption of proper police conduct.[6] A defendant can satisfy this burden by establishing that (1) a search or seizure occurred (2) without a warrant.[7] The burden then shifts to the State to establish that the warrantless search or seizure was reasonable.[8]

Although we give almost total deference to the trial court's determination of historical facts, we review *de novo* the question of whether a given set of historical facts amount to a consensual encounter or an investigative detention under the Fourth Amendment, which is an issue of law.[9] In this case, Deputies Ford and Turner were the only two witnesses to testify during Appellant's motion to suppress hearing. The historical facts elicited from their testimony were not disputed and thus are not at issue. The issue is whether these uncontroverted facts establish that a seizure took place.

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[6] *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005) (citing *Russell v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App. 1986)).

[7] *See id.* (citing *Bishop v. State*, 85 S.W.3d 819, 822 (Tex. Crim. App. 2002)).

[8] *Id.*

[9] *Johnson v. State*, 414 S.W.3d 184, 192 (Tex. Crim. App. 2013) (quoting *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008)).

B. Consensual Encounters and Investigative Detentions

Not every encounter between a civilian and a police officer implicates the Fourth Amendment.[10] "Each citizen-police encounter must be factually evaluated on its own terms; there are no *per se* rules."[11] A consensual encounter does not implicate the Fourth Amendment because it is a consensual interaction, and the citizen is free to terminate the encounter at any time.[12] A consensual encounter "takes place when an officer approaches a citizen in a public place to ask questions, and the citizen is willing to listen and voluntarily answers."[13] So long as the person remains free to disregard the officer's questions and go about his business, the encounter is consensual and merits no further constitutional analysis.[14] Law enforcement officers are permitted to approach individuals without probable cause or reasonable suspicion to ask questions or even to request a search.[15] These types of

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[10] *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

[11] *Garcia-Cantu*, 253 S.W.3d at 243.

[12] *State v. Woodard*, 341 S.W.3d 404, 411 (Tex. Crim. App. 2011); *see also Florida v. Royer*, 460 U.S. 491, 498 (1983) (highlighting that in consensual encounters, individuals "may decline to listen to the questions at all and may go on [their] way").

[13] *Crain*, 315 S.W.3d at 49 (first citing *State v. Perez*, 85 S.W.3d 817, 819 (Tex. Crim. App. 2002); and then citing *Corbin v. State*, 85 S.W.3d 272, 276 (Tex. Crim. App. 2002)).

[14] *Johnson*, 912 S.W.2d 227, 235 (Tex. Crim. App. 1995).

[15] *See Florida v. Royer*, 460 U.S. at 497-98 (holding that police officers "do not violate the Fourth Amendment by merely approaching an individual" and asking questions); *State v. Velasquez*, 994 S.W.2d 676, 678 (Tex. Crim. App. 1999) (explaining that probable cause "does not apply to a police officer's approaching a citizen to engage in conversation").

encounters do not require any justification on the officer's part.[16] Despite any inconvenience or embarrassment caused by these encounters, there is no official coercion.[17] Even if the officer did not tell the citizen that his request could be ignored, "the fact that the citizen complied with the request does not negate the consensual nature of the encounter."[18]

Only when the implication arises that an officer's authority cannot be ignored, avoided, or ended, does a Fourth Amendment seizure occur.[19] A person is "seized" when an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen."[20] "The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but to 'prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'"[21]

What constitutes a restraint on one's liberty, "prompting a person to conclude that he is not free to 'leave', will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs."[22] "The officer's conduct is the primary focus,

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[16] *United States v. Mendenhall*, 446 U.S. 544, 553 (1980).

[17] *Garcia-Cantu*, 253 S.W.3d at 243.

[18] *State v. Castleberry*, 332 S.W.3d 460, 466 (Tex. Crim. App. 2011).

[19] *Id.* at 466-67.

[20] *Mendenhall*, 446 U.S. at 552 (quoting *Terry v. Ohio*, 392 U.S. at 19 n.16).

[21] *Id.* at 553-54 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 544 (1976)).

[22] *Garcia-Cantu*, 253 S.W.3d at 244 (citing *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988)).

but time, place, and attendant circumstances matter as well. 'A court must step into the shoes of the defendant and determine from a common, objective perspective whether the defendant would have felt free to leave.'"[23]

Instances where a person's interaction with police amounts to a seizure—rather than a consensual encounter—include the threatening presence of several officers, the officer's display of a weapon, physical touching of the citizen by the officer, the officer's words or tone of voice indicating that compliance with the officer's request might be compelled, or flashing lights or blocking a suspect's vehicle.[24] Absent this type of evidence, otherwise inoffensive conduct between a citizen and a police officer cannot, as a matter of law, amount to a seizure of that person.[25]

An investigative detention is a Fourth Amendment seizure of limited scope and duration that must be supported by a reasonable suspicion of criminal activity. An investigative detention is the result of a person surrendering to the police officer's show of authority coupled with a reasonable belief that he is not free to leave.[26] "The test to determine whether a person has been detained is objective and does not rely on the subjective

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[23] *Id.* (quoting *United States v. Steele*, 782 F. Supp. 1301, 1309 (S.D. Ind. 1992)).

[24] *See, e.g.*, *Mendenhall*, 446 U.S. at 554; *Garcia-Cantu*, 253 S.W.3d at 243.

[25] *Id.* at 555.

[26] *Crain*, 315 S.W.3d at 49 (citing *Johnson*, 912 S.W.2d at 235).

belief of the detainee or the police."[27] A police officer has reasonable suspicion to detain a person when that police officer has "specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that the person detained is, has been, or soon will be engaged in criminal activity."[28] A warrantless detention of a person is permitted under the Fourth Amendment if the detention is justified by reasonable suspicion.[29] Thus, Fourth Amendment scrutiny is necessary when a seizure takes the form of an investigative detention. In such circumstance, the detaining officer must have reasonable suspicion that the citizen is, has been, or is about to be engaged in criminal activity.[30]

C. A Reasonable Person In Appellant's Shoes

In this case, we must examine the totality of the circumstances to determine whether a reasonable person in Appellant's position would have felt free to ignore Deputy Ford's request or to terminate the consensual encounter.[31] Even though Deputy Ford's subjective intent does not control, we must still take into account "the time, place, and attendant

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[27] *Furr v. State*, 499 S.W.3d 872, 878 (Tex. Crim. App. 2016) (citing *Wade v. State*, 422 S.W.3d 661, 668 (Tex. Crim. App. 2013)).

[28] *Id*. (quoting *Wade*, 522 S.W.3d at 668).

[29] *Johnson v. State*, 414 S.W.3d 184, 191 (Tex. Crim. App. 2013) (quoting *State v. Kerwick*, 393 S.W.3d 270, 273 (Tex. Crim. App. 2013)).

[30] *Id.* at 192 (citing *Castleberry*, 332 S.W.3d at 466).

[31] *Castleberry*, 332 S.W.3d at 467.

circumstances"[32] surrounding the incident, and look at what a reasonable person *in Appellant's shoes* would have believed. "If ignoring the request or terminating the encounter was an option, then no Fourth Amendment seizure has occurred."[33]

We recognize that, as a general rule, a "traffic stop entails a seizure."[34] In fact, we would agree that, under most circumstances, an officer's "stopping" of a car constitutes a seizure.[35] However, in this case, we cannot ignore "the setting in which the conduct occurs" or the "attendant circumstances."[36] This was not an investigative stop. This was not a typical traffic stop. In fact, this was not a traffic stop at all. And, although Appellant's car was moving at the time Deputy Ford waved at him to get his attention (as opposed to being parked), under the specific facts of this case, that is a distinction without a difference. Whether Appellant's car was moving or parked should not be the deciding factor here. Nor should the presence of other officers be the deciding factor. There is no evidence that there

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[32] *Garcia-Cantu*, 253 S.W.3d at 244.

[33] *Castleberry*, 332 S.W.3d at 467.

[34] *Brendlin v. California*, 551 U.S. 249, 255 (2007); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) ("The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of those Amendments . . . .").

[35] *Id.; Whren v. United States*, 517 U.S. 806, 809-10 (1996).

[36] *Garcia-Cantu*, 253 S.W.3d at 244 (citing *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988)).

was a "threatening presence of several officers."[37] The three other officers that were present in the parking lot were busy impounding another person's vehicle. There is no evidence that anyone other than Deputy Ford was involved in the attempt to stop Appellant.

What separates this encounter from being one that involves a private citizen helping Mr. Williamson find his ride home is that Deputy Ford was in a uniform. As noted above, Deputy Ford testified that he "kind of waved and asked Mr. Shimko to stop." If we were to hold that such action on the part of Deputy Ford constituted a seizure, we would effectively be creating the "*per se* rule" that we have held does not (or at least should not) exist[38]—that every gesture to stop a moving vehicle by a uniformed officer constitutes a seizure, regardless of the circumstances involved or the speed of the vehicle, regardless of where that vehicle is at the time of the stop, and regardless of Appellant's attendant circumstances. We decline to create that bright line rule. But, by the same token, our holding is not meant to suggest that a police officer can simply stand in a parking lot and wave someone down who is driving by and then call that a consensual encounter. We must decide this case, as we decide all cases involving police/citizen encounters, under its specific set of facts and circumstances. Our holding is not intended to create a new rule involving police/citizen encounters. The facts and circumstances of this case are unique, and that necessitates a fact-

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[37] *Mendenhall*, 446 U.S. at 554.

[38] *Garcia-Cantu*, 253 S.W.3d at 243 ("Each citizen-police encounter must be factually evaluated on its own terms; there are no *per se* rules.")

specific ruling.

In *Sibron v. New York*,[39] a police officer approached Sibron in a restaurant and told him to come outside, which Sibron did. In that case, the Supreme Court held that there was no occasion to decide whether there was a "seizure" of Sibron inside the restaurant because the record was "barren of any indication whether Sibron accompanied [the officer] outside in submission to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of apparent cooperation with the officer's investigation."[40] Similarly, in this case, there is nothing in the record to indicate that Appellant submitted to a show of force or authority by Deputy Ford which left him no choice but to stop. Deputy Ford never placed himself in front of Appellant's vehicle, and there is no evidence that he waved his arms back and forth.[41] The fact that Deputy Ford waved to Appellant after he had already

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[39] 392 U.S. 40 (1968).

[40] *Id.* at 63.

[41] The dissenting opinion cites to *State v. Wilson*, 793 S.E.2d 737 (N.C.App. 2016). In that case, as Wilson's vehicle was driving down the street approaching the house where the officer was standing, the officer "waved his hands back and forth just above shoulder level to tell Wilson to stop the vehicle." *Id.* at 738. The majority of the court held that the stop was not a seizure because Wilson's movement was not restricted; the officer was on foot and not blocking the road; the officer was alone on the scene; he did not draw his weapon; and his lights and sirens were off. However, the dissent in this case agrees with the position of the dissenting judge in *Wilson*, who opined that "any reasonable motorist in Defendant's position—seeing a uniformed officer standing next to a marked patrol car waving his arms, gesturing to the motorist to stop—would feel compelled to stop, as Defendant did here." *Id*. at 743 (Dillon, J., dissenting). This case presents a stronger example of a consensual encounter than in *Wilson*. Here, Appellant was already in and circling the parking lot looking for Williamson; no police lights or sirens were on; and at no time did Deputy Ford ever block Appellant's car or display a show of authority. Deputy Ford was not standing in front of Appellant's car waving his hands back and forth. And, although in this case there were other officers present in

passed them means that Appellant had to have been looking in his rearview mirror to observe Deputy Ford's gesture to stop. However, there was no evidence of that. Deputy Ford could not confirm that Appellant saw him in his rearview mirror. In fact, there was no evidence at all that Appellant even saw Deputy Ford wave at him. It is possible that Appellant stopped of his own accord because he saw Williamson sitting on the curb waiting for him.[42] Appellant has failed to meet his burden to prove there was a seizure.

In *State v. Garcia-Cantu*,[43] Garcia-Cantu was sitting in his parked truck at the dead-end portion of a street. The officer approached the truck in his patrol car, turned on his spotlight to light up Garcia-Cantu's truck, and activated his dashboard camera. He parked his patrol car in such a way that Garcia-Cantu's truck was blocked from leaving. The officer got out of his patrol car, holding a large flashlight in both hands at shoulder-level and approached the driver's side of Garcia-Cantu's truck. He asked Garcia-Cantu what he was doing there and asked for identification. The trial court found that the officer displayed an authoritative demeanor and tone of voice. This Court agreed with the trial court that a reasonable person in Garcia-Cantu's position would not have felt free to leave or terminate

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the parking lot, they were tending to another matter, and none of them were involved in stopping Appellant's vehicle.

[42] Appellant admitted to Deputy Turner that he was there voluntarily to pick up his friend, and a reasonable person circling the parking lot at 2:30 a.m. would indeed be driving very slowly and would appear to be looking for someone or some thing.

[43] 253 S.W.3d 236 (Tex. Crim. App. 2008).

the encounter with the officer. In this case, it is undisputed that Appellant was Williamson's ride home, so we can presume that Appellant drove into the Little Woodrow's parking lot of his own volition and was circling the parking lot looking for Williamson. There is no evidence that Deputy Ford used flashing lights, a spotlight, or even a flashlight to stop Appellant's vehicle. There is no evidence that Deputy Ford used any type of authoritative signal, vocal tone, or gesture in an effort to detain Appellant. There is no evidence that more than one officer motioned Appellant to pull over and stop. There was no display of a weapon, no physical touching, and no evidence that, once stopped, Deputy Ford blocked Appellant's vehicle from leaving the parking lot of Little Woodrow's. There is no evidence indicating that Deputy Ford's flagging down of Appellant interfered with Appellant's freedom of movement, or caused him any inconvenience or loss of time. Prior to Deputy Ford smelling alcohol on Appellant's breath, there was no manifestation of an intent to formally detain Appellant. These uncontroverted historical facts support the conclusion that the initial encounter between Appellant and Deputy Ford was a consensual encounter.[44]

To hold otherwise would create an absurd situation for police officers under similar

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[44] Appellant argued that, under Texas Transportation Code § 542.501, he would have committed an offense if he had not obeyed Deputy Ford's show of authority, and therefore, it was a seizure, not a consensual encounter. According to § 542.501, "a person may not willfully fail or refuse to comply with a lawful order or direction of a police officer." This, however, presupposes that Deputy Ford was issuing an "order or direction." As we have stated repeatedly herein, Deputy Ford's gesture to Appellant was not communicated as an order or direction within the contemplation of this statute. It was a request for a consensual encounter. Therefore, § 542.501 does not apply here.

circumstances. If we were to hold that Deputy Ford's actions under these facts was a "seizure," then we would severely narrow the category of permissible consensual encounters and hamper an officer's ability to initiate contact with an individual. Deputy Ford was acting as a good Samaritan, assisting Williamson in finding his ride, and Appellant was voluntarily circling around the parking lot looking for Williamson. Had Deputy Ford believed that he would be making an illegal stop under these circumstances, his only other option would have been to arrest Williamson for public intoxication, or force Williamson (in his inebriated and stumbling state) to get up off of the curb and flag down Appellant's car himself. We will not require an officer to jump through such hoops or place such a limit on a police officer's ability to initiate contact with another individual under these circumstances.

As noted herein, it is true that we could hold that Deputy Ford was exercising his community caretaking function.[45] But to do so we would first have to declare that this was a seizure. We hold instead that finding a consensual encounter under these facts comports with existing legal precedent. For the reasons discussed herein, we agree with the court of appeals that Appellant did not meet his initial burden to show that there had been a seizure.

CONCLUSION

We hold that Deputy Ford's wave and request of Applicant to stop did not trigger Fourth Amendment protection under these circumstances. His encounter with Appellant did

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[45] *Supra,* note 1.

not constitute an investigative detention, but was, instead, a consensual encounter. The consensual encounter did not transition into a detention until the officers developed a reasonable suspicion that Appellant had been driving while intoxicated. We affirm the judgment of the Third Court of Appeals.

DELIVERED: February 15, 2017

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