IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Plaintiff and Appellee, v. Matthew Alvey, Defendant and Appellant.	MEMORANDUM DECISION (For Official Publication) Case No. 20060462-CA F I L E D (May 10, 2007) 2007 UT App 161

Fourth District, Provo Department, 051401304
The Honorable Lynn W. Davis

Attorneys: Aaron Dodd, Provo, for Appellant
Mark L. Shurtleff and Joanne C. Slotnik, Salt Lake City, for Appellee

---

Before Judges Greenwood, McHugh, and Orme.

McHUGH, Judge:

¶1 Defendant Matthew Alvey appeals the district court's denial of his motion to suppress evidence of drugs and drug paraphernalia found on his person during a search. Alvey argues that he was unlawfully seized in violation of his Fourth Amendment rights and therefore all evidence obtained during his seizure should be excluded. See U.S. Const. amend. IV. We agree and reverse.

¶2 "The legal analysis of search and seizure cases is highly fact dependent. We therefore begin with a full narration of the facts." State v. Brake, 2004 UT 95,¶2, 103 P.3d 699 (citation omitted). Around 2:30 a.m. on March 21, 2005, while on patrol, Spanish Fork police officer Chris Sheriff noticed an individual walking in circles in a bank parking lot. After stopping his car and getting out, Officer Sheriff recognized the individual as Alvey, whom he had previously arrested on an outstanding warrant. Sheriff engaged in conversation with Alvey and directed Alvey to stand in front of the patrol car, illuminated by its headlights. On several occasions while Alvey was standing in front of the cruiser, Sheriff instructed Alvey to remove his hands from his pockets, and at one point, told Alvey to "hold on one second"

while he answered a call on his radio. While Alvey continued to stand in front of the police car, Sheriff ran a warrants check and discovered that Alvey had outstanding warrants. Sheriff subsequently arrested Alvey and conducted a search of his person, which revealed drugs and drug paraphernalia. Alvey was convicted on one count of possession of a controlled substance in a drug-free zone, see Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 2006), and unlawful possession or use of drug paraphernalia, see id. § 58-37a-5 (Supp. 2002).

¶3 Alvey moved to suppress evidence of the drugs and paraphernalia on the basis that the evidence was the fruit of an unlawful level two detention. The trial court denied his motion, ruling that Alvey's encounter with Sheriff was at all times a level one encounter that did not implicate Alvey's Fourth Amendment rights. Alvey challenges this legal conclusion.

¶4 Our inquiry focuses first on whether Alvey was seized for purposes of the Fourth Amendment. Under Utah case law, there are three permissible levels of police stops:

> (1) An officer may approach a citizen at any time and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an articulable suspicion that the person has committed or is about to commit a crime; [and] (3) an officer may arrest a suspect if the officer has probable cause to believe an offense had been committed or is being committed.

State v. Markland, 2005 UT 26,¶10 n.1, 112 P.3d 507 (alteration and quotations omitted). A level one encounter is a voluntary encounter during which a citizen may choose to answer a police officer's questions but is free to leave at any time during the questioning. See Salt Lake City v. Ray, 2000 UT App 55,¶11, 998 P.2d 274. In contrast, "a level two seizure, which involves an investigative detention that is usually characterized as brief and non-intrusive, is a Fourth Amendment seizure and thus requires that police have a reasonable suspicion." State v. Alverez, 2006 UT 61,¶10, 147 P.3d 425 (quotations omitted). "[A] level one encounter becomes a level two stop, and a seizure under the [F]ourth [A]mendment occurs when a reasonable person, in view of all the circumstances, would believe he or she is not free to leave. This is true even if the purpose of the stop is limited and the resulting detention brief." Ray, 2000 UT App 55 at ¶11 (citation and quotations omitted). Circumstances that might indicate that a seizure has occurred include "the use of language

or tone of voice indicating that compliance with the officer's request might be compelled." Id. (quotations omitted).

¶5 This court has found that circumstances where a level two stop occurs include those where an officer steps away with a defendant's identification card while running a warrants check because a person would not feel free to walk away and abandon his identification. See id. at ¶14. In the context of routine traffic stops, we have held that a level two stop occurs when an officer takes the name and birth date of an occupant of a vehicle and expects that individual to wait in the car while the officer conducts a warrants check. See State v. Johnson, 805 P.2d 761, 764 (Utah 1991). Although it is a close question, we conclude that based on the totality of the circumstances, the encounter here escalated to a level two seizure when Sheriff instructed Alvey to stand in front of the police cruiser. While we respect the analysis of the dissent, we simply do not believe a reasonable person would feel free to leave once a police officer ordered him to move to a different location from where he was standing. Furthermore, Sheriff continued to question Alvey while Alvey stood in the cruiser's headlights, instructed Alvey to remove his hands from his pockets, and left Alvey standing in front of the vehicle for over two minutes while he ran a warrants check. Based on the totality of the circumstances, including Sheriff's use of authoritative language to instruct Alvey to move from where he originally encountered Sheriff and instead stand in front of the vehicle during the encounter, we conclude that a reasonable person in Alvey's situation would not feel that he was free to leave. Therefore, the encounter escalated to a level two stop.

¶6 The trial court determined that the encounter between Sheriff and Alvey never escalated past a level one encounter because Sheriff was justified in instructing Alvey to move in front of the cruiser for safety purposes. Specifically, the trial court determined that there was no difference between Sheriff telling Alvey to stand in front of the cruiser and an officer asking a citizen to step away from a busy street. We disagree. The encounter occurred in an empty parking lot and Sheriff's request was not aimed at protecting Alvey from dangerous traffic. Further, while we have held in the past that an officer is justified, for safety purposes, in illuminating a defendant with his take-down lights during a police-citizen encounter, see State v. Justesen, 2002 UT App 165,¶8, 47 P.3d 936, the instant case is distinguishable. Here, Sheriff did not simply illuminate the area in which Alvey already stood. He directed Alvey to move to the front of the cruiser and then ordered Alvey to take his hands from his pockets each time Alvey took a more natural and relaxed stance, which included placing his hands in his pockets. The instructions to stand where

ordered and keep his hands in plain view were not the type of instructions that a reasonable person would feel free to ignore.

¶7 Like the dissent, we recognize the need to allow men and women who serve as police officers to take reasonable safety precautions. The record, however, does not indicate that Sheriff identified heightened risks to his own safety that might justify detaining Alvey. There was no evidence in the record suggesting that Sheriff suspected Alvey was armed or dangerous,[1] or that Sheriff was concerned for his own safety when he decided to initiate contact with Alvey. Sheriff did not call for backup upon recognizing Alvey, nor did he conduct a Terry frisk to protect himself from any weapons Alvey may have been carrying. To the contrary, Sheriff testified that he recognized Alvey early on in the encounter and that prior to running the warrants check he "had a little small talk with him." Sheriff expressed no fear for his own safety. Accordingly, we decline to justify Alvey's detention as necessary for officer safety and conclude instead that Alvey was illegally detained.[2]

---

[1]The dissent refers to Alvey's criminal history but none of that history shows that Alvey had ever been armed, or that he was armed on this occasion. See generally State v. Chapman, 921 P.2d 446, 454 (Utah 1995) (finding that the State cannot justify a weapons search when "[n]othing about the nature of the underlying offense being investigated prompted a concern for safety" (quotations omitted)).

[2]The very notion that an officer may restrict or direct the movements of a citizen suspected of no criminal wrongdoing, in the context of a purely voluntary encounter, is itself problematic. One of the hallmarks of a level two encounter is that an officer, having stopped a suspect to inquire about his identity and actions, may take modest actions to assure officer safety if the officer has a reasonable basis to be concerned about his safety. See Terry v. Ohio, 392 U.S. 1, 27 (1968) ("[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."). As the dissent concedes, no authority exists for the proposition that an officer may take similar measures in the course of a level one encounter, which by definition is not a detention. The reason is obvious: A level one encounter is purely voluntary--voluntary on the part of the officer as well as on the part of the citizen. While an officer has a duty to investigate crime and to detain suspects he reasonably believes may have committed a crime, he has no duty to engage a non-suspect citizen in conversation. If doing so might compromise his safety, he need only forego the conversation.

¶8 Alvey next argues that the trial court erred in finding that, even if Alvey were illegally detained, his detention was harmless. Despite the fact that the State did not argue the doctrine of inevitable discovery, the trial court relied upon it as an alternative ground for its order denying Alvey's motion to suppress. We agree with Alvey that this was error.

¶9 The doctrine of inevitable discovery dictates that

> evidence obtained by virtue of illegal police activity must be suppressed at trial. The exception provides that evidence that would have been obtained regardless of illegal police activity will not be suppressed because to do so would violate the underlying policy of the exclusionary rule--which is to place the police in a position that is neither better nor worse than it would have been absent the illegal activity.

State v. James, 2000 UT 80,¶14, 13 P.3d 576. However, under the inevitable discovery doctrine, the State has the burden to "establish by a preponderance of the evidence that the information ultimately would have been discovered by lawful means." Id. at ¶16 (quotations omitted); see also State v. Topanotes, 2003 UT 30,¶16, 76 P.3d 1159 ("For courts confidently to predict what would have occurred, but did not actually occur, there must be persuasive evidence of events or circumstances apart from those resulting in illegal police activity that would have inevitably led to discovery.").

¶10 The State did not argue inevitable discovery, much less attempt to meet that burden at the suppression hearing.[3] The trial court based its independent determination that discovery of the contraband was inevitable on the fact that Sheriff recognized Alvey at the beginning of the encounter and thus would have ultimately run a warrants check and discovered his outstanding warrant. The record does not support this conclusion. No testimony established that Sheriff was following a set procedure whereby he would have been required to run a warrants check at a particular point in the encounter. See Topanotes, 2003 UT 30 at ¶17 ("Routine or standard police procedures are often a compelling and reliable foundation for inevitable discovery, ..."). Further, had Sheriff run the check after Alvey walked away, there is nothing in the record to support the conclusion that Sheriff would have been able to then locate Alvey in the

---

[3]Likewise, the State does not rely on the inevitable discovery doctrine in this appeal.

dark or, if located, that Alvey would still have had the contraband on his person. See State v. Warren, 2001 UT App 346,¶20, 37 P.3d 270 (finding that the State failed to prove inevitable discovery where no evidence suggested officers could have located defendant or that the defendant still would have had contraband if he had freely walked away from the encounter), aff'd, 2003 UT 36, 98 P.3d 590; see also Topanotes, 2003 UT 30 at ¶19 (noting that asking the court to "find that the chain of events that did occur would have occurred in exactly the same manner had [defendant] not been unlawfully detained" is a seriously flawed position). Moreover, at trial Sheriff testified that he probably would not have chased Alvey had Alvey fled from the encounter. Accordingly, we reject the trial court's sua sponte reliance on the inevitable discovery doctrine.

¶11 The encounter between Sheriff and Alvey escalated to a level two encounter upon Sheriff's instruction that Alvey stand in front of the police cruiser because a reasonable person in Alvey's position would not have felt free to leave. The State does not dispute that Sheriff did not have probable cause to detain Alvey at that time. Therefore, the trial court should have granted Alvey's motion to suppress.

¶12 We reverse.

_____
Carolyn B. McHugh, Judge

¶13 I CONCUR:

_____
Gregory K. Orme, Judge

GREENWOOD, Associate Presiding Judge (dissenting):

¶14 I respectfully dissent. In my view, the encounter between Alvey and Officer Sheriff was a level one stop until Sheriff arrested Alvey on the basis of the outstanding arrest warrants.[1]

[1]I agree with the majority, however, that the doctrine of (continued...)

It is true, as pointed out by the majority, that analysis in search and seizure cases is highly fact dependent. See State v. Brake, 2004 UT 95,¶12, 103 P.3d 699. However, once the facts are determined, we apply a non-deferential standard of review to the application of the law to the facts in search and seizure cases. See id. at ¶15. In Brake, the court noted that it had previously declared that a non-deferential standard of review applied to determining the voluntariness of consent to a search or the "reasonableness of a traffic stop and protective search." Id. (citing State v. Hansen, 2002 UT 125,¶48, 63 P.3d 650; State v. Warren, 2003 UT 36,¶1, 78 P.3d 36). The court clarified that this non-deferential standard applies generally in reviewing "application of law to the underlying factual findings in [all] search and seizure cases." Id. The non-deferential standard is employed "'because there must be state-wide standards that guide law enforcement and prosecutorial officials.'" Hansen, 2000 UT 125 at ¶26 (quoting State v. Thurman, 846 P.2d 1256, 1271 (Utah 1993)). Furthermore, use of this standard will "help ensure different trial judges reach the same legal conclusion in cases that have little factual difference." Id.

¶15 The majority correctly notes that a level two stop occurs when "'in view of all of the circumstances . . . a reasonable person would have believed that he was not free to leave.'" State v. Alvarez, 2006 UT 61,¶11, 147 P.3d 425 (omission in original) (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)). However, "mere police questioning does not constitute a seizure, . . . the manner of questioning, the content of the questions, and the context in which the questions are being asked," id. at ¶12 (quotations and citation omitted), are all relevant in determining if a detention has occurred.

¶16 In ascertaining the underlying facts, we examine the trial court's findings of fact and accept those that are supported by substantial evidence. See State v. Gordon, 2004 UT 2,¶6, 84 P.3d 1167 (reciting facts supported by ample evidence in the record). Most of the facts in this case are undisputed and included in the trial court's Ruling. In brief, Sheriff, alone in his police cruiser, observed Alvey walking in small circles in a darkened parking lot late at night. Sheriff recognized Alvey and knew he had prior criminal convictions. Sheriff motioned Alvey over and asked him to stand in front of the cruiser where Alvey was illuminated by the vehicle's headlights. Sheriff exited the cruiser and asked Alvey several times to take his hands out of his pockets. The two then engaged in small talk about what Alvey was doing, where he was living, and other such mundane matters.

---

[1](...continued)
inevitable discovery is not applicable to the facts of this case.

Alvey explained he was looking for coins on the ground. Dispatch then called Sheriff and he went to his car to answer the call. Before doing so, Sheriff said to Alvey, "Hold on one second." During or immediately after the phone call, Sheriff ran a warrants check on Alvey and discovered that he had three or four outstanding arrest warrants. Sheriff then arrested Alvey.

¶17 There are other fact findings by the trial court, not wholly contained in the Facts section of its Ruling, that affect the trial court's and our ability to assess the totality of the circumstances, including the tone and tenor of the encounter between Alvey and Sheriff. According to the trial court, Sheriff's statement to "[h]old on one second" should be assessed using common sense. See Mendenhall, 446 U.S. at 554-55 (listing factors relevant to a determination of whether an individual has been seized). The trial court stated that the phrase was a "common colloquialism that is used in everyday conversation," and constituted only "a pause in the Defendant's and the officer's conversation." The trial court said that Alvey's position that the phrase was coercive was "simply not believable." The trial court heard testimony and viewed the tape of the incident, and concluded that there was nothing in the conversation between Alvey and Sheriff that escalated the encounter to a level two stop. Implicitly, the trial court found that the words and tone were not such that a reasonable person would interpret them as compulsory. In addition, there were no other indications of detention such as overhead police lights, the presence of several officers, or a drawn gun. I agree that the words spoken themselves were not coercive and defer to the trial court's determination regarding their tone. Given these facts, the trial court did not err in concluding that the encounter did not escalate to a level two stop.

¶18 The trial court and the majority also address Sheriff's directions that Alvey stand in front of the cruiser, illuminated by the headlights, and take his hands out of his pockets--with contrary results. The trial court concluded that the directions were reasonable and not indicative of a detention. The majority, however, concludes that the directions were not necessary for officer safety and that "a reasonable person would not feel free to ignore" the instructions.

¶19 I have not found any opinions addressing officer safety in a level one encounter, but believe that there are common considerations between the factors used to evaluate a level two stop and those that should be applied to a level one stop. Opinions of the Utah Supreme Court address steps taken to assure officer safety in the context of protective searches or frisks in situations where a person has been detained but not arrested--i.e., level two encounters. See generally State v. Peterson,

2005 UT 17, 110 P.3d 699; State v. Warren, 2003 UT 36, 78 P.3d 590. In Peterson, the Utah Supreme Court referred to United States Supreme Court case law, "[r]ecognizing that it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties . . . [and seeking] to create a rule that would allow police officers to take necessary measures to protect themselves against harms presented by individuals." 2005 UT 17 at ¶9 (quotations and citation omitted). Thus, appellate courts review "whether an officer acted reasonably . . . by looking . . . to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience." Id. at ¶11 (quotations and citation omitted).

¶20 In the context of a level one stop, necessarily lacking reasonable suspicion, I believe we should apply a similar approach that identifies both the risks to the officer and the steps taken by the officer to determine if the officer acted reasonably. In this case, as the trial court described the encounter, there was "bizarre activity of walking in circles, in the parking lot of a credit union, at 2:30 in the morning [that] justifiably [gave] rise to additional concern." In addition, Sheriff knew of Alvey's past criminal activity. Sheriff's reaction to these circumstances was mild; he asked Alvey to stand where he could be seen in the cruiser's lights, and he asked Alvey to take his hands out of his pockets. In my view, these requests were absolutely reasonable and justifiable. Furthermore, they were so innocuous and minimal that a reasonable person would not have felt that they were not free to leave. As a matter of common sense, police officers should be able to take minimal steps motivated by safety concerns, even in a non-coercive level one stop. Such an approach allows law enforcement officers to fulfill their duties without unduly jeopardizing theirs or others' lives or safety.

¶21 In sum, I would hold that the trial court correctly applied the facts to the law in concluding that the encounter between Alvey and Sheriff remained a level one stop because the tone and tenor were not compulsory and steps taken by Sheriff to ensure his safety were reasonable. Additionally, this result provides a viable "state-wide standard [to] guide law enforcement and prosecutorial officials." Warren, 2003 at ¶12.

_____

Pamela T. Greenwood,
Associate Presiding Judge