IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28777-7-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
ERIC CHRISTOPHER GANTT,	)	**PUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, C.J. — Eric Gantt appeals his convictions for residential burglary, second degree possession of stolen property, and five counts of second degree identity theft. Mr. Gantt asserts (1) that he was unlawfully seized when an officer pulled behind his van, activated his emergency lights, and asked Mr. Gantt what he was doing, and (2) that the subsequent warrantless search of his vehicle was invalid.

Because these facts are similar to the facts in *State v. DeArman*, 54 Wn. App. 621, 774 P.2d 1247 (1989), we conclude that the activation of emergency lights and the questioning of Mr. Gantt constituted an unlawful seizure. Therefore, we reverse the denial of the motion to suppress and reverse the convictions.

FACTS

At approximately 9:50 p.m., on May 7, 2009, Officer Tony Valencia of the Selah Police Department was patrolling westbound on Goodlander Road. The officer saw a minivan stopped on the street a few yards north of Goodlander Road on Goodlander Drive. Officer Valencia saw two people standing on the passenger side of the van.

A few minutes later, Officer Valencia returned eastbound on Goodlander Road. He saw the same van moved to an area in front of a driveway at the corner of Crestview Drive and Goodlander Road. Officer Valencia saw a man walking toward a residence. Officer Valencia decided to make a social contact. He activated his emergency lights and pulled up behind the van. The man returned to his van.

A woman was sitting in the van. Officer Valencia contacted the man. Officer Valencia asked the man, later identified as Mr. Gantt, what he was doing there. Mr. Gantt appeared nervous and stated that he was looking for a friend. Officer Valencia asked the name of the friend, and Mr. Gantt provided a name similar to "Elaine." Clerk's Papers at 39. The officer told Mr. Gantt that he had just seen the van stopped on the next block over and that he did not believe what Mr. Gantt was telling him.

While talking to Mr. Gantt, Officer Valencia noticed that there was an expired trip

permit in the rear window of the van that had been altered from the original dates. Observing that Mr. Gantt was becoming increasingly nervous, Officer Valencia requested backup. Officer Rich Brumley contacted Officer Valencia while en route and told him that he was familiar with Mr. Gantt.

Shortly after his arrival, Officer Brumley walked over to the minivan and looked into the rear window of the cargo area. He observed mail, unused checkbooks, a video camera, an automobile stereo with a missing face plate, and a flashlight. Officer Brumley noticed a woman's name and a Yakima address on an item of mail.

When Officer Brumley looked through the van's side windows, he saw two large-sized duffle bags, a small ice chest, and a pearl necklace. When he looked in the open front windows, Officer Brumley saw a laptop computer between the two seats. He also noticed a small baggie, containing a green vegetable matter, lying on the passenger side.

Mr. Gantt denied the officers' request to search the van. Officer Brumley contacted the Yakima County Sheriff's Office to run a check on the name on the item of mail. The dispatch officer advised Officer Brumley that a woman with the same name had reported a burglary earlier that evening. Officer Brumley requested that a deputy respond to his location. When Deputy Jim Frye arrived, the officers gave Mr. Gantt *Miranda*[1] warnings and obtained a telephonic search warrant.

The State charged Mr. Gantt with one count of residential burglary, one count of possession of stolen property, and five counts of second degree identity theft.

A suppression hearing was held on stipulated facts contained in Officer Valencia's report. The parties also stipulated that Officer Valencia had activated his patrol car emergency lights.

No findings of fact were entered. The court issued an oral ruling finding that Officer Valencia initiated a social contact even though the circumstances were somewhat suspicious, that this contact was an exercise of the community caretaking function, that the activation of the patrol car lights at night did not change the contact into a detention or an illegal detention, that the expired trip permit allowed for further investigation, and from that point things moved forward in a fairly logical way. The court concluded that under these circumstances the officers acted appropriately, that Mr. Gantt was not seized until the officer noticed the traffic infraction, and that the evidence was sufficiently developed to warrant an arrest.

At a stipulated facts trial, Mr. Gantt was found guilty on all counts. This appeal follows.

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

ANALYSIS

Seizure. The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Washington Constitution article I, section 7 states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision provides greater protection than the Fourth Amendment because it focuses on the disturbance of private affairs rather than focusing on unreasonable searches and seizures. *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009).

Whether an encounter with police is permissive or a seizure is a mixed question of law and fact, but whether the facts may be characterized as a seizure is a legal question that the Court reviews de novo. *State v. Rankin*, 151 Wn.2d 689, 709, 92 P.3d 202 (2004). Mr. Gantt bears the burden of establishing that he was illegally seized. *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998). If a warrantless search or seizure occurred, the State has the burden of justifying it. *State v. Jackson*, 82 Wn. App. 594, 601-02, 918 P.2d 945 (1996).

"A seizure under article I, section 7 occurs when, due to an officer's use of physical force or display of authority, an individual's freedom of movement is restrained and the individual would not believe that he is free to leave or decline a request." *State v. Beito*, 147 Wn. App. 504, 508, 195 P.3d 1023 (2008). "'This determination is made by looking objectively at the actions of the law enforcement officer.'" *Id.* (quoting *State v. Mote*, 129 Wn. App. 276, 282-83, 120 P.3d 596 (2005)). A seizure does not necessarily occur where an officer has a subjective suspicion of a criminal activity, but lacks suspicion to justify an investigative detention. *State v. O'Neill*, 148 Wn.2d 564, 576-77, 62 P.3d 489 (2003).

Display of Authority. The first question here is whether Officer Valencia's display of his emergency lights constituted a display of police authority.

In *Young*, an officer was patrolling an area with a high incidence of drug activity when he observed Kevin Young standing on a street corner talking to a young woman. The officer saw nothing suspicious, but stopped his patrol car, got out, and asked Mr. Young how he was doing. The officer learned Mr. Young's name, then left the scene and radioed for Mr. Young's criminal history. Mr. Young had an extensive criminal history. While driving away, the officer saw Mr. Young walk out to the street, apparently watching where the officer was going. The officer turned around and drove back. When

Mr. Young started walking away, the officer shined his patrol car's spotlight on him. Mr. Young walked behind a tree, crouched down, and tossed a small package near the tree. The officer asked Mr. Young to stop and retrieved the package, which appeared to contain crack cocaine. *Young*, 135 Wn.2d at 503. Mr. Young argued that he was seized when the deputy illuminated him with the spotlight. *Id.* at 510.

The court determined that "[t]he illumination by the spotlight did not amount to such a show of authority a reasonable person would have believed he or she was not free to leave, not free simply to keep on walking or continue with whatever activity he or she was then engaged in." *Id.* at 513-14. Significantly, the court adopted a nonexclusive list of officer displays of authority that can amount to a seizure, including

> "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. . . . In the absence of some such evidence, otherwise inoffensive conduct between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person."

Id. at 512 (quoting *United States v. Mendenhall*, 466 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)).

In *DeArman*, the court concluded that a motorist was seized when a police officer pulled up behind his or her car and activated full emergency lights. *DeArman*, 54 Wn. App. at 624. In *DeArman*, an officer observed a vehicle stopped at a stop sign for 45 to

60 seconds. The officer became concerned that the vehicle might be disabled because he could not tell whether the vehicle was moving. *Id.* at 622. The officer pulled in behind Mr. DeArman's vehicle and activated his emergency lights. *Id.* Mr. DeArman then drove through the intersection and pulled over 50 feet beyond the intersection. *Id.* at 623. At this point, the officer became suspicious, contacted Mr. DeArman, and asked for his identification. *Id*. The officer arrested Mr. DeArman on an outstanding warrant and discovered cocaine during a search of Mr. DeArman. *Id.*

The court concluded that Mr. DeArman was seized when the officer pulled up behind him and activated his emergency lights. *Id.* at 624. The court explained that the seizure was unreasonable because the officer did not have a reason to stop the vehicle once Mr. DeArman pulled through the stop sign and it became apparent that the vehicle was not disabled. *Id.* at 625.

Similarly, in *State v. Stroud*, 30 Wn. App. 392, 396, 634 P.2d 316 (1981), the court determined that a legally parked car was seized when police pulled in behind the vehicle and activated their emergency lights *and* headlight high beams. The court concluded that the use of emergency and headlight high beams "constituted a show of authority sufficient to convey to any reasonable person that a voluntary departure from the scene was not a realistic alternative." *Id.*

Here, Officer Valencia saw a minivan on the street with two people standing on the passenger side. A few minutes later, Officer Valencia observed the same vehicle stopped in front of a driveway. The officer saw a man walking from the van to the residence. Officer Valencia decided to make a social contact. The officer stopped behind the van, activated his emergency lights, got out of the patrol car, and asked the man what he was doing there. Mr. Gantt, appearing nervous, answered that he was looking for a friend. When asked, Mr. Gantt provided a name. At this point, Officer Valencia told Mr. Gantt that he had just seen the van one block over and that he did not believe what Mr. Gantt was saying. The officer then noticed that the van had an expired permit that had been altered.

The activation of a patrol car's emergency lights constitutes a display of authority similar to that described in *DeArman.* We conclude that Mr. Gantt was seized when Officer Valencia activated his emergency lights and asked Mr. Gantt what he was doing.

Social Contact. The State argues that Officer Valencia's initial contact was not a seizure, but, rather, a social contact. The State relies on *Harrington* to support its argument that Officer Valencia was conducting a social contact when he approached Mr. Gantt. This argument is unpersuasive.

Social contact between a police officer and a citizen does not constitute a seizure.

Harrington, 167 Wn.2d at 664-65. Social contact "occupies an amorphous area . . . resting someplace between an officer's saying 'hello' to a stranger on the street and, at the other end of the spectrum, an investigative detention." *Id.* at 664. A social contact between a police officer and a citizen "does not suggest an investigative component." *Id.*

The circumstances here involved an investigative component. Officer Valencia activated his emergency lights and asked Mr. Gantt what he was doing there. Moreover, in *Harrington*, the *absence* of a police car and emergency lights was one reason why the Washington Supreme Court found that the contact by the officer was, initially, a social contact. *Id.* at 665.

When Officer Valencia contacted Mr. Gantt, both men were out of their vehicles. In fact, both men were so close to the van that Officer Valencia could read the expiration date on the trip permit. The State argues that *DeArman* is distinguishable because it involved a traffic stop. This distinction is not helpful. *Young* did not involve a traffic stop. The inquiry is the same—was the display of authority sufficient to constitute a seizure. Here, the use of emergency lights and the officer's conversation constituted a display of authority by the officer. A reasonable person standing next to his or her vehicle would not believe that he or she was free to leave. As we conclude above, Mr. Gantt was seized when Officer Valencia stopped behind the van, made a show of

authority by turning on the patrol car's emergency lights, and then questioned Mr. Gantt.

Community Caretaking. The State does not mention the term "community caretaking." Instead, the State contends: "While the circumstances may have been suspicious, the officer's social contact would have been independently justified in trying to determine whether [Mr.] Gantt was lost, or needed assistance." Resp't's Br. at 6. The State cites no authority to support this argument.

"The community caretaking function exception recognizes that a person may encounter police officers in situations involving . . . a routine check on health and safety." *State v. Kinzy*, 141 Wn.2d 373, 387, 5 P.3d 668 (2000). Whether an encounter based on a community caretaking purpose is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in the performance of the community caretaking function. *Id.* (quoting *Kalmas v. Wagner*, 133 Wn.2d 210, 216-17, 943 P.2d 1369 (1997)). If the person has been seized, balancing the two interests does not necessarily favor an encounter by police. *Id.* at 388. A court must cautiously apply the community caretaking exception because of the risk of abuse. *Id.* "Once the exception does apply, police officers may conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function." *Id.*

"[R]endering aid or assistance through a health and safety check is a hallmark of the community caretaking function exception." *Id.* at 389. It is in the public interest to allow police officers to approach citizens and permissively inquire as to whether they will answer questions. *Id.* at 388. When considering the applicability of the community caretaking provision, the proper inquiry is "whether totality of the circumstances indicate 'a reasonable person would have felt free to leave or otherwise decline the officer's requests and terminate the encounter.'" *Id.* (quoting *State v. Thorn*, 129 Wn.2d 347, 352, 917 P.2d 108 (1996), *overruled on other grounds by O'Neill*, 148 Wn.2d 564).

There is no objective evidence demonstrating that Officer Valencia was performing a community caretaking function when he stopped Mr. Gantt. Officer Valencia pulled behind Mr. Gantt's vehicle and activated his emergency lights even though the officer had not seen a traffic infraction or any criminal activity. Officer Valencia asked Mr. Gantt what he was doing there. The officer did not ask whether Mr. Gantt was lost or needed assistance or whether he would answer questions. Instead, Officer Valencia activated his emergency lights because he saw the van parked at two different locations and because he observed Mr. Gantt walking to a nearby residence.

Reasonableness. Assuming Mr. Gantt was seized, the next question is whether the seizure of Mr. Gantt was reasonable. If a contact constitutes a seizure, that seizure is

reasonable only if the officer had an objectively reasonable suspicion that the person was involved in criminal activity. *DeArman*, 54 Wn. App. at 624 (quoting *State v. Larson*, 93 Wn.2d 638, 644, 611 P.2d 771 (1980)). At the time Officer Valencia activated his emergency lights, he had no reason to suspect that Mr. Gantt was involved in criminal activity. The seizure was unreasonable.

Suppression. Mr. Gantt asserts that all of the evidence seized from the van must be suppressed.

If a person is seized in violation of the Fourth Amendment or article I, section 7, the evidence subsequently obtained must be suppressed under the exclusionary rule. *Harrington*, 167 Wn.2d at 664. Officer Valencia unlawfully seized Mr. Gantt by activating the patrol car's emergency lights. The evidence discovered as a result of this seizure must be suppressed including the "open view" evidence discovered by Officer Brumley. *See State v. Jesson*, 142 Wn. App. 852, 858, 177 P.3d 139 (2008). "Under the open view doctrine, when an officer is lawfully present in an area, his detection of items by using one or more of his senses does not constitute a search within the meaning of the Fourth Amendment." *Id.* Officer Brumley was present only because Officer Valencia had unlawfully seized Mr. Gantt.

Because we conclude that Mr. Gantt was unlawfully seized, we need not reach his

additional assertions of error.

We reverse the denial of the suppression motion and the convictions.

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Kulik, C.J.

I CONCUR:

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Siddoway, J.