STATE OF MINNESOTA
IN COURT OF APPEALS
A07-776

State of Minnesota,
Respondent,

vs.

Brian Jeffrey Cohen,
Appellant.

Filed April 15, 2008
Affirmed
Worke, Judge

Hennepin County District Court
File No. 06056039

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Desyl L. Peterson, Minnetonka City Attorney, Rolf A. Sponheim, Assistant City Attorney, 14600 Minnetonka Boulevard, Minnetonka, MN 55345 (for respondent)

Phillip S. Resnick, Phillip S. Resnick & Associates, 1925 Rand Tower, 527 Marquette Avenue South, Minneapolis, MN 55402; and

Reid Goldetsky, 701 Fourth Avenue South, Suite 500, Minneapolis, MN 55415 (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

On appeal from a conviction of fourth-degree driving while impaired, appellant argues that police seized him by approaching his parked vehicle and lacked reasonable suspicion to justify an investigative detention. Because we conclude that the officer's actions did not amount to a seizure and that, even if a seizure occurred, reasonable, articulable suspicion existed to investigate appellant for violating a city ordinance, we affirm.

D E C I S I O N

When a suppression order is challenged on appeal, this court independently reviews the facts and the law to determine whether the district court erred by suppression or refusing to suppress the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). The legality of a limited investigatory detention turns on whether the police officer's act constitutes a seizure and, if so, whether the state demonstrates a reasonable, articulable suspicion for the seizure. *Id*. at 98-99.

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. Amend. IV; Minn. Const. art. I, § 10. A seizure has occurred "'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.'" *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 1879 n.16 (1968)). To determine if there has been a seizure, this court examines whether, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he

or she was neither free to disregard the police questions nor free to terminate the encounter." *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). "The reasonable-person standard is an objective standard, ensuring that the scope of [the constitutional] protection does not vary with a particular person's subjective state of mind." *Id*.

Generally, a seizure does not occur when an officer simply walks up and talks to a person in a parked vehicle. *State v. Vohnoutka*, 292 N.W.2d 756, 757 (Minn. 1980); *State v. McKenzie*, 392 N.W.2d 345, 347 (Minn. App. 1986). Various acts indicating such a show of authority that a seizure has occurred include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the . . . citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *State v. Pfannenstein*, 525 N.W.2d 587, 588 (Minn. App. 1994), *review denied* (Minn. Mar. 14, 1995) (quotation omitted). Other such acts include "boxing the car in, approaching it on all sides by many officers or use of flashing lights." *State v. Sanger*, 420 N.W.2d 241, 243 (Minn. App. 1988) (quotation omitted).

The district court determined that no seizure occurred when a Minnetonka police officer initially approached appellant's sport-utility vehicle parked in a lot at a city park. The officer testified that he was on routine patrol in his squad car about an hour after sunset in August when he noticed a parked SUV with its doors open. Appellant and a woman were exiting the SUV. As the officer continued on and made a U-turn, he noticed that the couple had entered the back seat and the woman was on top of appellant, straddling him, with her top "partially coming off." After parking his squad car by the

side of the road at the park entrance, about 200 feet away from the SUV, the officer approached it on foot. When he reached the SUV, appellant and the woman were outside, about to reenter the front seat. The woman was making adjustments to her top, and the zipper on appellant's pants was down. When the officer began questioning appellant, he observed that appellant appeared intoxicated. He then performed field sobriety tests and arrested appellant for fourth-degree driving while impaired.

Appellant argues that the district court erred by determining that a seizure did not occur until after the officer began questioning appellant, when the officer observed indicia of intoxication. Appellant maintains that he was seized earlier, with the officer's approach to the SUV. But the officer did not block the exit road with his squad and did not use emergency lights or a spotlight as a show of authority. He approached the SUV walking at a normal pace. Although the officer testified he intended to warn appellant about a Minnetonka ordinance prohibiting sexual conduct in parks, he did not use a threatening tone of voice, display a weapon, or otherwise indicate that compliance might be compelled. Under these circumstances, the officer took no action that would indicate to a reasonable person in appellant's circumstances that he was not free to go, and no seizure occurred at that time. *See State v. Colosimo*, 669 N.W.2d 1, 4 (Minn. 2003) (holding that initial interaction when officer was conversing with appellant at boat launch was not a seizure); *Norman v. Comm'r of Pub. Safety*, 409 N.W.2d 544, 545 (Minn. App. 1987) (holding that officer did not seize appellant by walking up to him while he was standing outside his vehicle).

Although the district court did not reach the issue, we also conclude that, even if a seizure occurred with the officer's approach, appellant's investigatory detention was supported by a reasonable suspicion that he had violated a city ordinance. *See Marben v. Comm'r of Pub. Safety*, 294 N.W.2d 697, 699 (Minn. 1980) (stating that an investigatory stop is a permissible seizure if it is based on a reasonable, articulable suspicion of criminal activity). "[T]he reasonable suspicion showing is not high." *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006) (quotation omitted). It requires that police be able to articulate a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981). Police need not observe an actual violation of the law, as long as circumstances might properly arouse suspicion that a violation has occurred. *Engwer v. Comm'r of Pub. Safety*, 383 N.W.2d 418, 420 (Minn. App. 1986).

The record shows that the officer observed specific conduct that provided a particularized, objective basis for believing that appellant had violated the city ordinance prohibiting sexual conduct in parks. *See* Minnetonka, Minn., Code of Ordinances §1135.020 (17) (2003). Sexual conduct that violates the ordinance is defined as "any touching of the genitals, public areas or buttocks . . . or [female] breasts . . . in an act of apparent sexual stimulation or gratification." Minnetonka, Minn., Code of Ordinances §1135.010 (2003).

Appellant argues that the officer's testimony should be discredited because he had a limited time to observe the scene in poor lighting conditions and maintains that the officer was motivated solely by a personal dislike of appellant's conduct. But appellant

presented no witnesses at the omnibus hearing and no evidence to rebut the officer's testimony that the conduct occurred. And although the officer acknowledged that he was offended by the actions, which occurred a few blocks from his home, his personal beliefs are irrelevant because the record provides an objectively reasonable basis for his belief that an ordinance violation had occurred.

Affirmed.