STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1442

State of Minnesota,
Respondent,

vs.

Antoine Paynes,
Appellant.

Filed September 30, 2008
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 06063830

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, Minneapolis, Minnesota 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Melvin R. Welch, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Stoneburner, Judge; and Muehlberg, 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

HUDSON, Judge

Following his conviction of fifth-degree controlled-substance crime, appellant challenges the district court's denial of his suppression motion, arguing that the district court erred by holding that he was not seized when police officers followed him in a squad car near an intersection that was the subject of a narcotics complaint and called out, asking if they could speak with him. Because the district court did not err in holding that no seizure occurred, we affirm.

FACTS

Two Minneapolis police officers were dispatched to investigate a report that "three black males, black shirts, black pants" and "three white males, wearing white shirts, black pants" were dealing narcotics near the intersection of 19th Street and Portland Avenue in Minneapolis, an area of prevalent narcotics activity. As the officers drove slowly near that intersection in a marked squad, they saw a person place his hand on his hat, tip his head, and walk quickly past the squad, indicating a possible signal that police were coming. They then saw a group of three black males huddled together near the intersection. An officer noticed that one person in the group stared at the squad, and the other two broke away and walked south. The officer looked past the intersection and saw appellant, who is black and was wearing a white shirt, walking quickly away eastbound on the north sidewalk. Appellant was located 10–15 feet away from the squad, separated by a parked car and a traffic lane.

The officers saw appellant look back several times in their direction. They noticed that appellant looked nervous and saw him "flex[] his left hand" as if concealing something. The officer who was driving then pulled the squad alongside appellant, rolled down the window, and called out to appellant, asking if they could speak with him.

Appellant responded by putting his hand in his left front pants pocket, walking to the front of a nearby parked car, and placing his hands on the front of that car. When an officer asked appellant why he was placing his hands on the car, appellant put his hands in the air. The officers then saw that appellant's left palm was covered with white residue, which they suspected to be cocaine, and they arrested appellant for possession of cocaine. In a search incident to the arrest, they recovered from appellant's pocket additional amounts of a material that later tested positive for cocaine.

The state charged appellant with fifth-degree possession of a controlled substance. The defense moved to suppress the evidence derived from the arrest and search, arguing that the officers seized appellant by calling out to him and that the seizure was not supported by a reasonable articulable suspicion of criminal activity. The district court denied the motion to suppress, concluding that appellant was not seized, and that even if a seizure occurred, there was reasonable suspicion of criminal activity sufficient to justify a stop. Appellant was convicted following a stipulated-facts trial, and this appeal follows.

D E C I S I O N

When an order determining whether to suppress evidence is challenged on appeal, this court independently reviews the facts and the law to determine whether the district

court erred by suppressing or refusing to suppress the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

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)). In determining whether a seizure has occurred under Minnesota law, this court examines whether, "in view of all of 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 specific person's state of mind. *Id*.

Some circumstances that may indicate a seizure include "'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.'" *E.D.J.*, 502 N.W.2d at 781 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554–55, 100 S. Ct. 1870, 1877 (1980)). Thus, this court has held that a seizure occurred when an officer stopped his squad next to the defendant's vehicle at a gas station and summoned the defendant to the squad. *State v. Day*, 461 N.W.2d 404, 407 (Minn. App. 1990), *review denied* (Minn. Dec. 20, 1990);

see also Cripps, 533 N.W.2d at 391 (holding that a seizure occurred when an officer approached the defendant in a bar and asked her to produce identification because the officer was focused on determining whether she was of legal age). But moral pressure to cooperate with a police officer does not amount to a seizure if the officer, even though making inquiries that a private citizen would not make, has acted in a way that would be perceived as nonoffensive if the encounter had been between two private citizens. *E.D.J.*, 502 N.W.2d at 782. In general, if police approach a person in a public place and merely ask questions without indicating that compliance with a request is compelled, a reasonable person would not believe that he or she had been seized. *Cripps*, 533 N.W.2d at 391; *see also State v. Pfannenstein*, 525 N.W.2d 587, 589 (Minn. App. 1994) (holding that a request for identification does not amount to a seizure unless, considering the totality of the circumstances, a reasonable person would have believed that he or she was not free to leave or otherwise decline the request), *review denied* (Minn. Mar. 14, 1995).

Appellant argues that this case is similar to *E.D.J.*, in which the Minnesota Supreme Court held that a seizure occurred when officers spotted three men in an area known for heavy drug trafficking, the men began to walk away, and the officers pulled their squad behind the men, ordering them to stop. *E.D.J.*, 502 N.W.2d at 780. But unlike *E.D.J.*, the record here does not establish that the officers "ordered" appellant to stop. Both officers testified at the suppression hearing that one officer "asked" appellant if he would speak with police. Appellant did not testify or present witnesses to dispute this version of events.

Appellant maintains that his behavior of placing his hands on a parked car when the police request was made shows that a seizure occurred. But whether a seizure occurs does not depend on a defendant's subjective belief, but rather on whether police engage in conduct that would lead a reasonable person to believe that he or she is not free to terminate the encounter. *State v. Harris*, 572 N.W.2d 333, 336 (Minn. App. 1997) (citing *Florida v. Bostick*, 501 U.S. 429, 435–36, 111 S. Ct. 2382, 2386 (1991)), *review denied* (Minn. Feb. 19, 1998). Although the record does not reflect the officer's tone of voice in making the request, it is uncontested that the police did not display weapons, show handcuffs or other restraints, activate the squad's emergency lights, or block appellant's exit in any direction. They did not request appellant's identification or ask him to place his hands on the car. We acknowledge that the police act of driving alongside appellant in the squad and requesting that he speak with them may have placed some moral pressure on appellant. But the officers' actions, without more, did not "convey a message that compliance with their request [was] required." *Harris*, 590 N.W.2d at 98 (quotation omitted). Therefore, the district court did not err in determining that no seizure occurred and in refusing to suppress the evidence.

Because we conclude that no seizure occurred, we need not address the additional issue of whether reasonable, articulable suspicion existed to justify a seizure.

Affirmed.