**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-2347**

State of Minnesota,
Respondent,

vs.

Thomas Edward Pracht,
Appellant.

**Filed January 13, 2009**
**Affirmed**
**Larkin, Judge**

Washington County District Court
File No. K9-06-3797

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

Doug Johnson, Washington County Attorney, John W. Fristik, Assistant County Attorney, 14949 62nd Street North, P.O. Box 6, Stillwater, MN 55082-0006 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

* Retired judge of the Minnesota Court of Appeals, serving 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

**LARKIN,** Judge

This appeal follows appellant's conviction and sentencing for second-degree possession of a controlled substance in violation of Minn. Stat. § 152.022, subd. 2(1) (2004). Appellant claims that the district court erred by denying his motion to suppress methamphetamine found during a search of his person, arguing that the search was not a valid search incident to arrest. Because the district court properly applied the law, we affirm.

## FACTS

On May 25, 2006, Officer Scofield of the Woodbury Police Department was dispatched to Media Exchange in the Valley Creek Shopping Center to investigate a tip provided in an anonymous phone call. Media Exchange is a store that buys and resells electronics, DVDs, CDs, and other merchandise. The caller reported that a male and female had entered Media Exchange and were attempting to sell large quantities of new electronic equipment and other items to the store. The male was described as Caucasian, wearing a blue and white striped shirt and a ball cap. Officer Scofield entered Media Exchange and observed a man standing beside the store counter, later identified as appellant Thomas Pracht, who matched the description given by the caller.

Officer Scofield approached appellant and stood within six feet of him. Officer Scofield identified himself and asked appellant for identification. Appellant provided Officer Scofield with appellant's Minnesota identification. Officer Scofield asked

appellant general questions regarding his activities at Media Exchange. Appellant replied that he was "trying to sell some items."

Officer Scofield observed numerous new, unopened copies of two DVDs on the countertop beside appellant. There were at least five copies each of *Hill Street Blues* and *Wrestle Mania*. Officer Scofield did not see any price tags or identifying information on the DVDs. Appellant said that he had received multiple copies of the same DVDs as gifts. Officer Scofield asked a store clerk if appellant was selling any other items, and the clerk pointed to a tote bin and a shopping cart filled with apparently new merchandise, including at least five graphing calculators, between five and ten memory cards, and various items of electronic equipment all in original packaging.

Appellant thereafter declined to answer additional questions. Appellant seemed "very nervous" and kept looking past Officer Scofield to the store entrance. Officer Scofield believed that appellant's merchandise might be stolen and feared that appellant might flee. Officer Scofield handcuffed appellant and escorted him and his merchandise outside of the store.

Officer Scofield met Officer Tillery outside of the shopping center and asked her to put appellant in the back of Officer Scofield's squad car. Officer Scofield told Officer Tillery that appellant should be searched for officer safety. Officer Tillery searched appellant and found a glass pipe of the type used to smoke methamphetamine and a pouch containing a white, crystalline substance, which appeared to be crystal methamphetamine based on Officer Scofield's training and experience. Appellant was placed under arrest for possession of controlled substances.

Appellant moved to suppress the methamphetamine as the fruit of an unlawful seizure and search. Appellant argued that he was seized when Officer Scofield requested his identification and arrested when Officer Scofield handcuffed him. Appellant contended that his seizure was not supported by reasonable articulable suspicion and that his arrest was not supported by probable cause. The state argued that the search of appellant's person was incident to a lawful arrest because Officer Scofield had probable cause to arrest appellant for possession of stolen property based on Officer Scofield's observations in the store. The district court denied appellant's motion, concluding that appellant was not seized until Officer Scofield handcuffed appellant and that there was probable cause to believe appellant was in possession of stolen property at that time. The district court further concluded that the search of appellant was incident to a lawful arrest.

Appellant waived his right to a jury trial and submitted his case to the district court on a stipulated record for a determination of guilt. The district court found appellant guilty. This appeal follows.

**D E C I S I O N**

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We review the district court's findings of fact under a clearly erroneous standard, but legal determinations are reviewed de novo. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006).

***Appellant's Seizure***

The United States and Minnesota Constitutions prohibit unreasonable search and seizure by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A police officer may initiate a limited investigative stop if the officer has reasonable, articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883 (1968); *State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003); *see also State v. Pike*, 551 N.W.2d 919, 921-22 (Minn. 1996) (noting that an investigative stop is lawful if the state can show that the officer had a "particularized and objective basis" for suspecting criminal activity (quotation omitted)). Whether police have reasonable suspicion to conduct an investigatory stop depends on the totality of the circumstances, and a stop is not justified if it is "the product of mere whim, caprice, or idle curiosity." *In re Welfare of M.D.R.*, 693 N.W.2d 444, 448 (Minn. App. 2005) (quotation omitted), *review denied* (Minn. June 28, 2005).

Not all contact between citizens and police officers constitutes a seizure. *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993). A seizure occurs "'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.'" *Id*. (quoting *Terry*, 392 U.S. at 19 n.16, 88 S. Ct. at 1879 n.16). A person has been seized if 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. *See United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980); *Florida v. Royer*, 460 U.S. 491, 497-98, 103 S. Ct. 1319, 1324 (1983); *E.D.J.*, 502 N.W.2d at 781-82. Generally, "a reasonable

person would not believe that he or she has been seized when an officer merely approaches that person in a public place and begins to ask questions." *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). And the United States Supreme Court has stated that "even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, [and] ask to examine the individual's identification," as long as the police do not convey a message that compliance is mandatory. *Florida v. Bostick*, 501 U.S. 429, 434-35, 111 S. Ct. 2382, 2386 (1991) (citations omitted).

Circumstances that might indicate that a seizure has taken place 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 *Mendenhall*, 446 U.S. at 554-55, 100 S. Ct. at 1877); *see also Cripps*, 533 N.W.2d at 391 (Minn. 1995) (identifying similar considerations). "'In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.'" *E.D.J.*, 502 N.W.2d at 781 (quoting *Mendenhall*, 446 U.S. at 554-55, 100 S. Ct. at 1877).

The district court concluded that appellant was not seized prior to the point at which Officer Scofield handcuffed appellant. Appellant argues that he was seized when Officer Scofield obtained and retained appellant's identification. Appellant contends that no reasonable person in appellant's position would have felt free to leave or to terminate the encounter, citing *Cripps*, 533 N.W.2d 388.

In *Cripps*, defendant was drinking alcohol in a bar when police officers approached her and asked for identification. *Id.* at 389. The defendant supplied the officers with identification. *Id.* at 390. After further investigation the officers determined that defendant's identification did not belong to her and that defendant was not of legal drinking age. *Id.* The supreme court held that defendant was seized when the officers first asked her to produce identification because: "By asking [defendant] to produce identification, [the officer] was asking [defendant] to prove that she was of legal age to consume alcohol. [The officer's] request, therefore, involved more than a simple inquiry into [defendant's] identity." *Id.* at 391. Under the totality of the circumstances, where a defendant was asked to prove her innocence of the crime of underage consumption of alcohol by producing identification, an objectively reasonable person would not have felt free to terminate the encounter. *Id.*

But *Cripps* is distinguishable from the present case. *Cripps* did not hold that a seizure occurs whenever a police officer asks a citizen for identification. Instead, the supreme court carefully limited its holding to the facts of the case before it. *Id.* Because defendant's identification proved whether defendant was of legal drinking age, the request for identification was essentially a request for proof that defendant was not violating the law. *Id.* In the present case, the request for appellant's identification was a simple inquiry into appellant's identity.

The retention of a person's driver's license or identification card can be a significant factor in determining whether the person has been seized. But in those cases in which the retention of a person's identification was a significant factor, there was also

a stop or other show of authority by law enforcement. *See State v. Johnson*, 645 N.W.2d 505, 510 (Minn. App. 2002) (holding defendant was seized when the officer seized his identification, told defendant not to leave, took defendant's identification to the squad, and ran a warrants check during a traffic stop); *State v. Day*, 461 N.W.2d 404, 407 (Minn. App. 1990) (holding that "summoning by the police officer, who was in uniform and armed, requiring [defendant] to approach the officer's squad car to provide identification and to respond to questioning, constitutes a restraint and seizure under the fourth amendment"), *review denied* (Minn. Dec. 20, 1990). The analysis must consider the totality of the circumstances. *E.D.J.*, 502 N.W.2d at 783.

We now turn our analysis to the facts of this case. Officer Scofield approached appellant in a public place, requested appellant's identification, and asked appellant general questions regarding his activities at Media Exchange.[1] The officer did not "stop" or "summon" appellant. Appellant's identification was neither demanded nor forcibly taken. Officer Scofield stood at a socially acceptable distance, within six feet of appellant. Officer Scofield was alone, did not touch appellant, and did not use language or a tone of voice indicating that compliance was required. Officer Scofield did not retain appellant's identification for a prolonged period of time or leave appellant's presence with the identification. Under the totality of the circumstances, Officer Scofield's request for appellant's identification and brief questioning did not result in a

[1] Appellant concedes that Officer Scofield was justified in approaching appellant and talking to him.

seizure. The district court did not err by concluding that appellant was not seized until Officer Scofield handcuffed appellant.

***Appellant's Arrest***

A police officer may arrest "a suspect without an arrest warrant when a felony has occurred, and [the officer] has reasonable cause for believing that the suspect committed it." *State v. Sorenson*, 270 Minn. 186, 196, 134 N.W.2d 115, 122 (1965) (noting that "reasonable cause" is synonymous with "probable cause"). "Probable cause for an arrest has been defined to be a 'reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.'" *Id.* at 196, 134 N.W.2d at 122-23 (quoting *Garske v. United States*, 1 F.2d 620, 623 (8th Cir. 1924)). Police officers are entitled to assess probable cause in light of their experience. *State v. Anderson*, 439 N.W.2d 422, 426 (Minn. App. 1989), *review denied* (Minn. June 21, 1989); *see also State v. Olson*, 634 N.W.2d 224, 228 (Minn. App. 2001) ("The facts must justify more than mere suspicion but less than a conviction."), *review denied* (Minn. Dec. 11, 2001). "The probable-cause standard is an objective one that considers the totality of the circumstances." *Id.*

The district court concluded that there was probable cause to believe appellant was in possession of stolen property when Officer Scofield handcuffed appellant. Appellant contends that probable cause was lacking. We conclude that there was sufficient probable cause to arrest appellant for possession of stolen property at the time he was handcuffed.

It is a crime for "any person [to] receive[], possess[], transfer[], buy[] or conceal[] any stolen property or property obtained by robbery, knowing or having reason to know the property was stolen or obtained by robbery." Minn. Stat. § 609.53 (2006).

> [I]n determining whether the stolen nature of . . . property observed in plain sight is immediately apparent, the police may consider such things as any background information they have which casts light on the nature of the property and whether the items are unusual in number or are strangely stored or located.

*State v. Dewald*, 463 N.W.2d 741, 747 (Minn. 1990) (quoting *State v. Smith*, 261 N.W.2d 349, 352 n.2 (Minn. 1977). Appellant's nervous demeanor, suspicious explanation for his duplicative DVDs, and the large amount of unopened, duplicative merchandise in appellant's possession provided probable cause for Officer Scofield to arrest appellant for possession of stolen property.[2]

***Search of Appellant***

Warrantless searches are per se unreasonable, subject to limited exceptions. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992) (citing *Katz v. U.S.*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)). The state bears the burden of establishing the existence of an exception to the warrant requirement. *State v. Ture*, 632 N.W.2d 621, 627 (Minn. 2001). "One exemption from the warrant requirement is that a person's body and the area within his or her immediate control may be searched incident to a lawful arrest." *State v. Robb*, 605 N.W.2d 96, 100 (Minn. 2000).

[2] Officer Scofield personally observed every fact that formed the basis for probable cause and therefore did not need to rely upon the anonymous caller's statements to support his probable cause determination.

Because there was probable cause to arrest appellant for possession of stolen property, the search of appellant's person was permissible incident to a lawful arrest.

**Affirmed.**

Dated: _____

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The Honorable Michelle A. Larkin
Minnesota Court of Appeals