STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0132

Janell Lynn Westerham, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed January 6, 2009
Affirmed
Stoneburner, Judge

Washington County District Court
File No. 82C407005354

Derek A. Patrin, Ethan P. Meaney, Meaney & Patrin, P.A., 6225 Ginger Drive, Eden Prairie, MN 55346 (for appellant)

Lori Swanson, Attorney General, Emerald A. Gratz, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Stoneburner, Judge; and Huspeni, Judge.*

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

STONEBURNER, Judge

Appellant challenges the district court's order sustaining the revocation of her driver's license, arguing that she was illegally seized when an officer parked his squad

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

car behind her car in the parking lot of a bar. Appellant also asserts that because she did not intend to drive her car, the officer lacked probable cause to believe that she was in physical control of her car. We affirm.

FACTS

Appellant Janell Lynn Westerham went to a bar to meet someone. The person did not arrive. Appellant consumed alcoholic beverages while she was waiting and eventually thought that she might be over the legal limit to drive. She went to her car to use her "Onstar" function to arrange a ride from a friend or a taxi. She put the keys in the ignition to activate "Onstar." Her initial attempts to use "Onstar" were unsuccessful, and she waited in the car for access to "Onstar."

Washington County Deputy Christopher Majeski received a dispatch at approximately 7:00 p.m. to investigate a "possible intoxicated" person parked in the bar's parking lot. The dispatch was based on a tip from an identified citizen who described the person as a white female with blond hair sitting in a parked black GMC Yukon. Deputy Majeski later testified that he thought that dispatch told him that the caller had left the area after making the call.

Deputy Majeski arrived at the parking lot within minutes of the dispatch and located the car with the described person sitting in the driver's seat. He pulled his marked squad car up behind Westerham's vehicle at an angle and walked to the driver's window. He saw the keys in the ignition and the clock on the dash illuminated, but the engine was not running. He spoke with Westerham and immediately noted indicia that she was "very intoxicated."

Based on his observations, conversations, and field sobriety tests, Deputy Majeski arrested Westerham for driving (being in physical control of a motor vehicle) while impaired (DWI). Westerham refused testing, and her license was revoked under the implied-consent law. She appealed, and the revocation was sustained by the district court. This appeal followed.

D E C I S I O N

I. Seizure

Westerham first argues that she was illegally seized when Deputy Majeski parked his squad car behind her car, making all of the subsequent evidence in this case inadmissible. "Where the facts are not significantly in dispute, this court determines as a matter of law if the officer's actions amounted to a seizure and if the officer had an adequate basis for the seizure." *Kranz v. Comm'r Pub. Safety*, 539 N.W.2d 420, 422 (Minn. App. 1995).

"A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that [s]he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980). The subjective intent of the officer is irrelevant except insofar as that may have been conveyed to the person involved. *Id.* at 555, 100 S. Ct. at 1877.

In this case, Deputy Majeski testified that the parking lot was narrow and Westerham's vehicle was parked in the very last spot on the south side, so he positioned his squad car in a way that would not block the vehicles of other customers in the parking

lot but would allow him close contact with Westerham's vehicle. He testified that he believed that she could have driven out of the parking lot despite the positioning of his squad car. The district court found that the position of the squad made it "very difficult though not impossible" for Westerham's car to be backed out of the parking spot. Deputy Majeski did not activate his lights or otherwise indicate intent to keep Westerham from leaving either in her car or on foot. The district court found that the positioning of the squad interfered with Westerham's ability to leave but resulted in less interference with the ability of other vehicles to exit the parking lot and found that Deputy Majeski's actions did not constitute a seizure. We agree.

Westerham cites cases in which this court has concluded that there was a seizure when an officer parked directly behind a vehicle. In *State v. Lopez*, 698 N.W.2d 18, 22 (Minn. App. 2005), we held that partially blocking a vehicle with a squad car, activating emergency lights, pounding on the window, and opening the driver's door of the vehicle constituted a seizure. In *State v. Sanger*, 420 N.W.2d 241, 243 (Minn. App. 1988), we held that boxing in a car with a squad car, activating the squad lights, and honking the horn of the squad car constituted a seizure. In *Klotz v. Comm'r Pub. Safety*, 437 N.W.2d 663, 665 (Minn. App. 1989), we held that partially blocking a car and calling out to the occupant who was walking away to stop and identify himself constituted a seizure.

Here, Deputy Majeski did not activate the lights of his squad car and explained that the placement of his squad was necessary to avoid interfering with the other patrons' vehicles. Additionally, Deputy Majeski did not honk his horn, call out to Westerham, or perform any acts associated with a show of authority indicating to a reasonable person

that he or she was not free to leave. *See State v. Pfannenstein*, 525 N.W.2d 587, 589 (Minn. App. 1994) (holding that driver was not seized where an officer approached a man on a motorcycle who was trying to start the motorcycle, activated his emergency lights, asked the driver who had gotten off of the motorcycle for identification), *review denied* (Minn. Mar. 14, 1995). These facts, supported by the record, distinguish this case from the cases that Westerham relies on and lead us to conclude that the district court did not err in holding that the deputy's actions did not constitute a seizure.

Additionally, even if the placement of the squad car constituted a seizure, we conclude that the "tip" was sufficiently reliable to justify a brief investigatory seizure in this case. Westerham argues that because the tipster did not indicate the basis of the report, the officer did not have a particular and objective basis for suspecting her of DWI. "Information from a private citizen is presumed reliable." *Playle v. Comm'r Pub. Safety*, 439 N.W.2d 747, 748 (Minn. App. 1989). In assessing the reliability of a tip, we examine the information identifying the informant and the basis of the informant's knowledge. *Id.*

Westerham argues that there is no evidence of the basis of the informant's knowledge in this case. We disagree. The informant, who was identified by name, described Westerham, her vehicle, and the location of her vehicle in a bar parking lot. The dispatcher told the deputy that the informant had left the area. Deputy Majeski arrived within minutes of the dispatch and found the vehicle and occupant as described. We conclude that it was reasonable for the officer to infer that the information came from personal observation. Westerham argues that because the dispatcher used the term

"possible intoxicated," the information was unreliable, citing *Magnuson v. Comm'r Pub. Safety*, 703 N.W.2d 557, 560 (Minn. App. 2005) (stating that an informant's description of Magnuson as "definitely drunk" indicated personal observation). The record in this case, however, does not clarify whether the word "possible" was used by the informant or only by the dispatcher. Under the totality of the circumstances, we conclude that Deputy Majeski had a reasonable basis for a limited investigatory seizure.

II. Physical control of vehicle

Westerham argues that because she did not intend to drive her vehicle, the officer lacked probable cause to believe that she was in physical control of the vehicle. We disagree.

When, as here, the facts are not in dispute, the issue of whether a person is in physical control of a motor vehicle is a question of law, reviewed de novo. *Snyder v. Comm'r Pub. Safety*, 744 N.W.2d 19, 21–22 (Minn. App. 2008). Westerham was in the driver's seat of her vehicle with the keys in the ignition. We have noted that "often, whether the motorist involved is seated in the motor vehicle is an important factor involved in the overall consideration of whether he or she is exercising physical dominion over a vehicle." *Id.* at 22. The fact that Westerham testified that she did not intend to drive does not negate the fact that she was in complete physical control of the vehicle. *Id.* (stating that intent to operate the vehicle does not have to be shown in order to find that an individual is in physical control).

Affirmed.