STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2261

State of Minnesota,
Respondent,

vs.

Terry Virgil Erickson,
Appellant.

Filed February 24, 2009
Affirmed
Schellhas, Judge

Ramsey County District Court
File No. K5-06-2162

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Johnson, Presiding Judge; Schellhas, Judge; and Huspeni, 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

SCHELLHAS, Judge

Appellant challenges the denial of his motion to suppress evidence, arguing that he was unlawfully seized when an officer approached him in a parking lot and that evidence seized after the officer approached him should not have been admitted. We affirm.

FACTS

Appellant Terry Virgil Erickson was charged with third-degree controlled substance crime for possession of three grams or more of methamphetamine under Minn. Stat. § 152.023, subd. 2(1) (2006). The complaint alleged that: (1) St. Paul Police Officer Michael Schuck responded to a dispatch about "a slumper in a red and white Ford Bronco" that was located in the parking lot of a restaurant; (2) Officer Schuck pulled in behind the car and appellant got out of the car and approached him; and (3) a second officer, Dylan Flenniken, came to the scene, searched appellant's vehicle, and found a substance which was tested and found to be 6.88 grams of methamphetamine.

Appellant moved to suppress all evidence on the basis that, among other things, it was the fruit of a warrantless illegal arrest and an unlawful and warrantless search and seizure of his vehicle and person. Officer Flenniken was the only witness at the suppression hearing, and he testified that when he arrived at the parking lot, appellant was standing next to the driver's side of his vehicle speaking with Officer Schuck. Officer Flenniken's testimony included a detailed description of his observations of appellant's demeanor and conduct at the scene.

The district court denied appellant's motion to suppress in an order that contained findings consistent with Officer Flenniken's testimony. The findings were also based on Officer Schuck's police report in that the district court found that appellant stepped out of his vehicle and approached Officer Schuck. The district court concluded that Officer Schuck's approach of appellant's vehicle was a routine investigatory approach and was justified "to determine whether the [appellant] needed assistance, even when there was no indication of criminal activity especially given the call from dispatch." The district court also concluded that the search and seizure of appellant and his vehicle were justified.

After the suppression ruling, appellant waived his right to a jury trial and the parties proceeded with a stipulated-facts trial. The parties stipulated to the testimony received at the suppression hearing, the findings of fact from that hearing, and the information contained in the police and drug-lab reports. Appellant testified, primarily about his initial encounter with Officer Schuck. After the conclusion of the trial, the parties submitted their final arguments to the district court through memoranda. Based on his trial testimony, appellant argued, among other things, that he was seized without justification when Officer Schuck first approached him. The district court declined to reconsider appellant's motion to suppress and found appellant guilty. This appeal follows. On appeal, appellant pursues only his argument that he was seized when Officer Schuck first approached him.

D E C I S I O N

Appellant argues that he was seized when Officer Schuck stopped him as he was walking from his car into the restaurant and that Officer Schuck lacked justification to

stop him. The district court found that appellant was not stopped by Officer Schuck, but rather that appellant approached Officer Schuck. The district court also concluded that Officer Schuck did not need to suspect criminal activity to approach appellant and that the approach was justified.

"In reviewing a district court's determinations of the legality of a limited investigatory stop, [appellate courts] review questions of reasonable suspicion de novo." *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). "In doing so, we review findings of fact for clear error, giving due weight to the inferences drawn from those facts by the district court." *Id.* (quotation omitted). "A trial court's finding is erroneous if this court, after reviewing the record, reaches the firm conviction that a mistake was made." *State v. Kvam*, 336 N.W.2d 525, 529 (Minn. 1983).

Under *State ex. rel. Rasmussen v. Tahash*, when a defendant contests the admissibility of evidence on federal constitutional grounds, "a pretrial fact hearing on the admissibility of the evidence will be held" and the district court will rule on the admissibility of evidence "[u]pon the record of the evidence elicited at the time of such hearing." 272 Minn. 539, 554, 141 N.W.2d 3, 13 (1966). "The defendant in presenting his case in opposition to the claims of admissibility may testify without waiver of his constitutional privilege against self-incrimination." *Id.* at 554, 141 N.W.2d at 14. In this case, appellant chose not to testify at the suppression hearing and instead testified at trial after his suppression motion was denied. Appellant now seeks to use his trial testimony to attack the pretrial suppression ruling.

Because a suppression ruling must be made "[u]pon the record of the evidence elicited" at the suppression hearing, *Rasmussen*, 272 Minn. at 554, 141 N.W.2d at 13, it is inappropriate to attack a district court ruling with evidence not placed on the record at the time of the suppression hearing. *See also* Minn. R. Crim. P. 11.02, subd. 1 (stating that if defendant has demanded a hearing on the admissibility of evidence obtained as the result of a search or seizure "the court shall hear and determine [the issue] upon such evidence as may be offered by the prosecution or the defense"); *Cf. State v. Needham*, 488 N.W.2d 294, 296 (Minn. 1992) (noting that the state, if given inadequate notice of suppression issue to be resolved, may move to reopen omnibus hearing). Appellant's reliance on his trial testimony is inappropriate because he chose not to offer this testimony to the district court when it decided the suppression issue. We therefore review the district court's denial of appellant's motion to suppress on the record of evidence elicited at the suppression hearing.

A "brief seizure of a person for investigatory purposes" requires a "particular and objective basis for suspecting" criminal activity. *State v. Harris*, 590 N.W.2d 90, 99 (Minn. 1999). But, generally, a seizure does not occur when a police officer approaches a person in a public place and asks questions. *Id.* at 98; *see also Norman v. Comm'r of Pub. Safety*, 409 N.W.2d 544, 545 (Minn. App. 1987) ("It is not a seizure for an officer to walk up to and talk to a driver standing outside of his vehicle.").

Appellant argues that a seizure occurred under the *Mendenhall-Royer* standard used for evaluating whether a seizure has occurred under the Minnesota Constitution. *See Harris*, 590 N.W.2d at 98 (stating standard for judging totality of the circumstances

under the Minnesota Constitution and citing *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319 (1983) and *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870 (1980)). Under this standard, circumstances constituting a seizure can include the threatening presence of several officers, display of a weapon by an officer, and use of language or tone of voice indicating that compliance with the officer's request might be compelled. *Id.* Nothing in the record before the district court at the suppression hearing suggested that Officer Schuck engaged in a show of force or acted aggressively toward appellant, such that the circumstances constituted a seizure when appellant was initially approached by Officer Schuck. We therefore reject appellant's argument that he was seized without justification upon his initial encounter with Officer Schuck, and we affirm.

Affirmed.