STATE OF MINNESOTA
IN COURT OF APPEALS
A09-169

State of Minnesota,
Respondent,

vs.

Michael Charles McCalip,
Appellant.

Filed November 17, 2009
Affirmed
Minge, Judge

Beltrami County District Court
File No. 04-CR-07-6191

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

Timothy R. Faver, Beltrami County Attorney, Randall R. Burg, Assistant County Attorney, 600 Minnesota Avenue Northwest, Suite 400, Bemidji, Minnesota 56601 (for respondent)

Blair W. Nelson, Blair W. Nelson, Ltd., 205 Seventh Street Northwest, Suite 3, Bemidji, MN 56601 (for appellant)

Considered and decided by Stauber, Presiding Judge; Klaphake, Judge; and Minge, Judge.

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

MINGE, Judge

Appellant challenges his conviction for driving while intoxicated, claiming that the officer unconstitutionally stopped and seized his vehicle and that all evidence resulting from the seizure was inadmissible. Because we conclude that appellant was not seized until after he talked to the officer, we affirm.

D E C I S I O N

Appellant Michael McCalip moved to suppress all the evidence of his intoxication, arguing that (1) he was seized when, after legally pulling over onto the shoulder of the road and completely stopping, a police officer pulled behind his car and activated his emergency lights; and (2) this seizure was not supported by a reasonable, articulable suspicion of criminal activity. Because the officer testified that he had no reason to suspect that McCalip was violating the law until he spoke to McCalip, the motion turned on whether a seizure occurred. *See In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993) (suppressing the evidence and reversing a conviction because the seizure was not supported by reasonable, articulable suspicion).

The district court denied McCalip's motion, holding that when McCalip stopped his vehicle the officer's conduct did not constitute a seizure under the Fourth Amendment. McCalip was tried and found guilty through the stipulated-case-and-waiver-of-rights procedure provided by Minnesota Rule of Criminal Procedure 26.01, subdivision 4 (2008). On appeal, McCalip challenges the district court's denial of his motion to suppress evidence.

The issue is whether the district court erred in determining that McCalip was not initially seized by the officer. This court reviews pretrial-suppression rulings de novo by independently reviewing the facts and determining whether suppression is warranted as a matter of law. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). This court upholds the district court's factual findings unless clearly erroneous. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997).

Both the United States Constitution (Fourth Amendment) and the Minnesota Constitution (Article 1, Section 10) protect against unreasonable searches and seizures. If the police conduct a seizure without having a reasonable, articulable suspicion of criminal activity, then any evidence obtained during the seizure is suppressed. *Harris*, 590 N.W.2d at 97; *E.D.J.*, 502 N.W.2d at 783.

The state does not contest McCalip's argument that the officer had no articulable basis to believe that McCalip was engaged in illegal activity or was in need of emergency assistance when the officer pulled behind McCalip's car and activated his emergency lights.[1] Moreover, the officer testified that he had no reason to suspect that McCalip was violating the law until he spoke to McCalip and observed signs of intoxication. Thus, this case turns on whether a seizure under the Fourth Amendment occurred when the

[1] Officers have a right and a duty to conduct welfare checks of vehicles parked along roadways to see if the occupants need assistance and to offer assistance if necessary. *Kozak v. Comm'r of Pub. Safety*, 359 N.W.2d 625, 628 (Minn. App. 1984). Because the state never argued that the officer's conduct was justified as a welfare check and did not dispute McCalip's contention that the officer had no basis to believe that McCalip was in need of assistance, we do not consider the welfare-check doctrine.

officer drove up behind McCalip's already-stopped car and then activated his emergency lights.

A *seizure* occurs when, under all the facts, the police conduct would communicate to a reasonable person in the defendant's physical circumstances that they are not free to leave. *State v. Hanson*, 504 N.W.2d 219, 220 (Minn. 1993). In *Hanson*, the officer observed a car stopped on the shoulder of a highway at night far from any town, activated his emergency lights, and pulled behind it. *Id*. at 220. The Minnesota Supreme Court reversed the court of appeals' decision and held that the officer's actions were not a seizure. *Id*. The supreme court stated that a reasonable person would think that the officer was merely stopping "to see what was going on and to offer help if needed." *Id*. The court concluded that because it was dark and because both cars were on the shoulder of the highway far from any town, a reasonable person would know that the emergency lights were simply to warn other drivers that parked cars and persons were on the shoulder of the road. *Id*. The holding in *Hanson* also underscored that the seizure test focuses on the mindset of a reasonable person in the defendant's position and not the officer's mindset.[2] There, the supreme court found no seizure, *id*., despite the officer's testimony that his purpose in activating his emergency lights was to tell the defendant that he could not leave, *State v. Hanson*, 501 N.W.2d 677, 678 (Minn. App. 1993).

[2] This legal standard marginalizes the arguments of both parties that depend on the officer's mindset. Respondent's argument is that the officer activated his emergency lights for safety purposes rather than to keep McCalip stopped. Appellant's argument is that the officer alternately claimed that (1) he activated his lights for safety purposes; and (2) he activated his lights to keep McCalip stopped because he suspected him of being a drunk driver.

Hanson is analogous to this case. All of the facts the supreme court mentioned in *Hanson* are present here: the officer pulled behind McCalip and activated his emergency lights only after McCalip had stopped his car on the shoulder of the road at night far from any town. *See Hanson*, 504 N.W.2d at 220. Here, the district court found at the suppression hearing that the "[o]fficer . . . did not use his siren or lights to stop Defendant's vehicle." The police-car-camera video recording supports this determination.

The record does not contain evidence supporting McCalip's main argument to distinguish *Hanson*: that he pulled over because of the officer's actions. The officer testified, and once the video in the squad car began recording, it shows that after McCalip passed the officer's car traveling the opposite direction, the squad car turned around and, within eight seconds, McCalip signaled, pulled over onto the shoulder, and stopped. Based on the short time between the officer turning around and McCalip pulling over, McCalip argues that his pulling over was in response to the officer turning around. But McCalip's own statement to the officer contradicts this implication. McCalip told the officer that because he saw emergency lights ahead and thought they were approaching him, he pulled over to allow that police car to pass. The emergency lights McCalip was referring to were from a stop made by another officer on the same road about a mile and a half ahead of McCalip. Because McCalip did not testify, we have no further information regarding his perceptions at the time he stopped.

Appellant's remaining attempts to distinguish *Hanson* are based on facts only mentioned in the court of appeals' opinion in *Hanson* and not the supreme court's. In

Hanson, the officer did not know whether the driver was experiencing car problems. *Hanson*, 501 N.W.2d at 678 (court of appeals' decision). The car was pulled over with its lights off and the driver was outside the car next to the tire when the officer first saw the car. *Id.* McCalip argues that reasonable persons in Hanson's position would realize that they appear to be in need of assistance. Therefore, they would understand the officer's emergency lights as a safety warning to other drivers while the officer helps them rather than signaling them to not leave and thus seizing them. On appeal, appellant argues that reasonable persons in his circumstances would believe that the officer saw their car working and not expect the officer to think their vehicle was disabled and in need of assistance and that, therefore, reasonable persons would understand the officer's flashing lights as a command not to leave—seizing them—rather than a safety warning to other drivers while the officer helps them.

Although appellant's argument is not without merit, it is based on facts that were not mentioned in the supreme court's *Hanson* opinion. *Hanson*, 504 N.W.2d at 219-20. Also, as previously noted, the only evidence in the record contradicts McCalip's argument that he pulled over in response to something that the officer did. Because all of the facts mentioned in the supreme court's opinion are also present in this case, we decline to distinguish *Hanson* and conclude that no seizure occurred when the officer pulled up behind McCalip's already-stopped car and activated his emergency lights.

Affirmed.

Dated: