STATE OF MINNESOTA
IN COURT OF APPEALS
A09-645

State of Minnesota,
Respondent,

vs.

Kevin Timothy Bell,
Appellant.

Filed February 9, 2010
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CR-08-50069

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Kenneth N. Potts, Orono City Attorney, Minnetonka, Minnesota (for respondent)

David G. Roston, Marc S. Berris, Segal, Roston & Berris, PLLP, Minneapolis, Minnesota; and

Robert E. Oleisky, Oleisky & Oleisky, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Klaphake, Judge; and Halbrooks, Judge.

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

HALBROOKS, Judge

Appellant challenges his conviction of second-degree test refusal, claiming that his right to be free from an unreasonable seizure was violated when an officer pulled up to

appellant in a parking lot, turned on his flashing lights, and asked appellant to submit to sobriety tests. We conclude that because the officer had a reasonable suspicion that appellant was driving under the influence, the officer's seizure of appellant was permissible. We affirm.

FACTS

The facts in this case are not significantly disputed. At approximately 1:20 a.m. on September 17, 2008, Orono Police Officer Steven Sturm observed appellant Kevin Timothy Bell driving 23 miles per hour in a 35 mile-per-hour zone. About 15 minutes later, Officer Sturm observed appellant pull into a gas station, leave without getting gas, and go to a different gas station. As appellant was leaving the first gas station, appellant unexpectedly came to a complete stop, and Officer Sturm almost hit appellant's car. As appellant pulled up to the pump at the second gas station, Officer Sturm noticed that appellant's car was parked at an odd angle that made it difficult or impossible for the nozzle to reach the gas tank on appellant's car. At this point, Officer Sturm pulled up in his squad car and activated his emergency lights.

When Officer Sturm approached appellant, he smelled alcohol on appellant's breath and noticed that his eyes were wide and watery. Officer Sturm asked appellant to submit to a preliminary breath test and a field sobriety test, both of which appellant refused. Appellant also refused to take the Intoxilyzer breath test after being transported to the Orono police station and read the implied-consent advisory. Because of a prior driving-while-impaired (DWI) conviction in his record, appellant was charged with

second-degree test refusal in violation of Minn. Stat. §§ 169A.20, subd. 2, .25(b) (2008), and second-degree DWI in violation of Minn. Stat. §§ 169A.20, subd. 1(1), .25(a) (2008).

Appellant moved to suppress evidence stemming from the traffic stop and to dismiss the charges on the ground that Officer Sturm violated his constitutional rights. The district court denied the motion, determining that there was no seizure until Officer Sturm approached appellant, at which point Officer Sturm smelled alcohol and reasonably suspected that appellant had been drinking. Appellant then stipulated to the facts and was convicted of second-degree test refusal. This appeal follows.

D E C I S I O N

In reviewing pretrial orders to suppress or admit evidence, this court may independently review the facts and determine whether the district court erred as a matter of law. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). "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 of Pub. Safety*, 539 N.W.2d 420, 422 (Minn. App. 1995).

I.

Appellant argues that the district court erred in its determination of when he was "seized" by Officer Sturm, in constitutional terms. The United States and Minnesota Constitutions prohibit unreasonable searches and seizures by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10. 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). It is not a "seizure" for an officer to walk up to a person or an already-stopped

vehicle in a public place. *Cobb v. Comm'r of Pub. Safety*, 410 N.W.2d 902, 903 (Minn. App. 1987). "[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 he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980). For example, "it is likely to be a seizure if a person is ordered out of a vehicle, or the police engage in some other action or show of authority which one would not expect between two private citizens." *State v. Day*, 461 N.W.2d 404, 407 (Minn. App. 1990), *review denied* (Minn. Dec. 20, 1990).

Appellant argues that the district court erred by concluding that there was no seizure until Officer Sturm approached appellant. Appellant contends that a seizure actually occurred when Officer Sturm pulled up and activated his lights. The district court concluded that when Officer Sturm activated his lights, he was merely conducting a "health and welfare check." The state concedes that the district court erred in its interpretation of the officer's actions, and we agree.

It is possible for an officer to activate his or her emergency lights when pulling up behind an already-parked car without a seizure occurring. *State v. Hanson*, 504 N.W.2d 219, 220 (Minn. 1993). In *Hanson*, the supreme court concluded that an objectively reasonable interpretation of the officer's decision to use emergency lights was that he was warning passing motorists of the stopped car. *Id.* This court distinguished the facts in *Hanson*, where the stopped car was on the shoulder of a remote and dark highway, from a situation where an officer pulled in behind a car in a parking lot. *State v. Lopez*, 698 N.W.2d 18, 22 (Minn. App. 2005) (holding that the use of emergency lights when there

was no indication that the driver needed assistance and no need to warn passing motorists constituted a seizure). In this case, there was no reason to think that appellant was in need of assistance, and there was no need to warn passing motorists of a stopped car. Because the activation of Officer Sturm's emergency lights was a sufficient demonstration of authority that a reasonable person would have concluded that he was not free to leave, we conclude that this act constituted a "seizure." We must next determine if, at the point he activated his lights, Officer Sturm had a legal basis to seize appellant.

II.

Respondent State of Minnesota argues that Officer Sturm had a reasonable articulable suspicion that appellant was driving under the influence when Officer Sturm activated his lights. The district court determined that there was no reasonable articulable suspicion of criminal activity by appellant at that point in time. Appellant argues that the state cannot raise this issue because it failed to file a notice of review, or, alternatively, that the district court's determination was proper.

We first conclude that the issue of whether Officer Sturm had a legal basis for the seizure is properly before this court. As an initial matter, we note that the state does not have a right to file a notice of review in a criminal proceeding. "No . . . cross-appeal or notice of review is permitted the state when a defendant appeals from a conviction." *State v. Schanus*, 431 N.W.2d 151, 152 (Minn. App. 1988); *see also* Minn. R. Crim. P. 28.02 (outlining the procedure on appeal when a defendant appeals a conviction). In addition, the issue of whether Officer Sturm had a basis for the seizure was fully

developed at the suppression hearing, was decided by the district court, and was briefed and argued by the parties. *Cf. Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (holding that, generally, an appellate court will not consider matters not argued to and considered by the district court). Finally, we note that the scope of review when a defendant appeals a conviction includes "any pretrial or trial order or ruling." Minn. R. Crim. P. 28.02, subd. 11. Accordingly, the issue of whether there was a legal basis for Officer Sturm to activate his emergency lights and seize appellant is within the scope of review on appeal.

Officer Sturm seized appellant to perform a limited investigatory stop. Limited investigatory stops are subject to the prohibitions against unreasonable searches and seizures found in the Fourth Amendment to the United States Constitution and article I, section 10 of the Minnesota Constitution. *State v. Askerooth*, 681 N.W.2d 353, 359-60 (Minn. 2004). "A limited investigatory stop is lawful if there is a particularized and objective basis for suspecting the person stopped of criminal activity." *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002). Such a stop requires a showing of "reasonable suspicion" rather than probable cause. *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). We consider the totality of the circumstances when determining whether reasonable articulable suspicion exists. *Knapp v. Comm'r of Pub. Safety*, 610 N.W.2d 625, 628 (Minn. 2000).

The factual basis needed to justify an investigatory stop is minimal. *Id.* Although it is undisputed that appellant did not violate any traffic laws, "[a]n actual violation of [a traffic law] need not be detectable" to justify a stop. *Marben v. State, Dep't of Pub. Safety*, 294 N.W.2d 697, 699 (Minn. 1980) (quotation omitted). It follows that "innocent

activity might justify the suspicion of criminal activity." *State v. Johnson*, 444 N.W.2d 824, 826 (Minn. 1989). For example, a driver's decision to quickly exit a highway after making eye contact with a trooper, while "consistent with innocent behavior, . . . [could] reasonably cause[] the officer to suspect that defendant was deliberately trying to evade him," and therefore may result in a traffic stop. *Id.* at 827. Finally, "honest, reasonable mistakes of fact are unobjectionable under the Fourth Amendment." *State v. Licari*, 659 N.W.2d 243, 254 (Minn. 2003).

Here, an independent review of the facts reveals that appellant's actions, under a totality-of-the-circumstances review, created a reasonable articulable suspicion that appellant was driving under the influence. The following observations constitute the totality of the circumstances. First, Officer Sturm observed appellant driving 12 miles per hour below the speed limit at a time of day when drivers are more likely to be under the influence. Second, when Officer Sturm saw appellant drive by about 15 minutes later and pulled in behind him, appellant pulled into the first gas station. As Officer Sturm drove away, appellant left the first gas station, and Officer Sturm testified that he "thought that was extremely strange, and it's usually what a lot of people do to avoid me." Third, as appellant was moving from one gas station to another, Officer Sturm testified that "[h]e then completely stopped . . . and I almost hit him." Finally, when appellant entered the second gas station, Officer Sturm testified that

> he parked his car at an odd angle . . . . It's not something you usually see, unless a person is intoxicated when they're parking; which I have seen many times, when people pull up to houses to park, and they have been drinking and there is house parties going on.

Although the district court credited appellant's explanations for his behavior,[1] Officer Sturm did not have the benefit of appellant's explanations at the time of his observations. Officer Sturm reasonably concluded that, based on his experience, appellant's act of driving into a gas station and then leaving without getting gas was done to avoid contact with him. Although Officer Sturm did not testify that appellant's unexpected complete stop was indicative of driving while intoxicated, it contributed to the totality of the circumstances leading to the seizure. Appellant's final act of parking in a manner that, based on Officer Sturm's experience, was indicative of intoxication, led Officer Sturm to seize appellant.

We agree with the district court that any one of appellant's actions, standing alone, was insufficient to form the basis of a seizure based on a suspicion of DWI. But we conclude that the totality of the circumstances created a reasonable articulable suspicion that appellant may have been driving under the influence. Because Officer Sturm had a reasonable articulable suspicion that appellant was driving under the influence, the district court properly denied appellant's motion to suppress.

Affirmed.

[1] The district court found credible appellant's explanations that he was driving slowly because he was dropping off a friend and that he went to multiple gas stations because he was looking for cheaper gas.