STATE OF MINNESOTA
IN COURT OF APPEALS
A11-184

State of Minnesota,
Respondent,

vs.

Kevin James Schulz,
Appellant.

Filed December 27, 2011
Affirmed
Johnson, Chief Judge

Clay County District Court
File No. 14-CR-10-1421

Lori Swanson, Attorney General, Joan M. Eichhorst, Assistant Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Heidi Margaret Fisher Davies, Assistant County Attorney, Moorhead, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Johnson, Chief Judge; and Bjorkman, Judge.

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

JOHNSON, Chief Judge

A Clay County jury found Kevin James Schulz guilty of first-degree driving while impaired and refusal to submit to chemical testing. On appeal, Schulz challenges the district court's denial of his motion to suppress evidence. The evidence that Schulz sought to suppress was obtained by a police officer who found Schulz, on foot, near his damaged vehicle, in an industrial park, at midnight, in an intoxicated state. We conclude that Schulz was not seized when the officer approached him, without any force, threat of force, or display of authority, and asked him to produce an identification card. Therefore, we affirm.

FACTS

Schulz's conviction arises from two reports to the Moorhead Police Department on the evening of April 20, 2010. The first report was received shortly before midnight. The caller said that a person was trying to kick down a door to her residence. The caller described the person as a white male wearing a black T-shirt and blue jeans, with a blue two-door Oldsmobile. Officer Cassandra Lynn Guck responded to the call but was unable to locate the man.

Less than a half-hour later, Officer Guck responded to a report of a suspicious vehicle that was parked outside a residence for approximately 15 minutes. The second residence was located approximately 20 blocks away from the first residence. Officer Guck found the vehicle, determined that it matched the description of the Oldsmobile in

the first report, and observed that the vehicle likely had been in an accident and then abandoned.

Officer Cameron Scott Cordes also responded to the second report. He found the Oldsmobile at approximately the same time as Officer Guck and then proceeded to look for the driver. As Officer Cordes was driving through an industrial park approximately two blocks from the Oldsmobile, he observed a white male wearing a dark T-shirt, a dark jacket, and blue jeans. He noticed that the man was leaning against a large utility box and appeared not to be aware of Officer Cordes's squad car.

Officer Cordes approached the man and had a short conversation with him that proceeded in three stages. First, Officer Cordes asked the man for identification. The man produced his driver's license, which allowed Officer Cordes to identify him as Schulz. Second, Officer Cordes asked Schulz what he was doing. Schulz responded that he was "walking." Third, Officer Cordes asked Schulz where his car was located. In response, Schulz pointed in the direction of the abandoned Oldsmobile. While talking to Schulz, Officer Cordes detected a strong odor of alcohol on Schulz's breath.

In April 2010, the state charged Schulz with one count of first-degree driving while impaired (DWI), a violation of Minn. Stat. §§ 169A.20, subd. 1(1) (Supp. 2009), .24, subd. 1(2) (2008), and one count of DWI with an alcohol concentration of 0.08 or more, a violation of Minn. Stat. §§ 169A.20, subd. 1(5) (Supp. 2009), .24, subd. 1(2) (2008). In June 2010, the state amended the complaint to allege in the second count a charge of refusal to submit to chemical testing, a violation of Minn. Stat. §§ 169A.20,

subd. 2, .24, subd. 1(2) (2008), and to add a third count of driving without a valid license, a violation of Minn. Stat. § 171.02, subd. 1 (2008).

In May 2010, Schulz moved to suppress the evidence obtained by Officer Cordes at the industrial park. At an evidentiary hearing, the state introduced the testimony of Officer Guck and Officer Cordes. As Officer Cordes was describing his conversation with Schulz in detail, defense counsel objected on the ground that the prosecutor's direct examination exceeded the scope of Schulz's motion to suppress. Schulz's attorney acknowledged to the district court that Officer Cordes was permitted to approach Schulz and ask for identification and further stated that "[o]nce he asked for his ID, he was stopped." But Schulz's attorney also asserted that Schulz was challenging only the stop. Schulz's attorney cross-examined Officer Cordes briefly, limiting her questions to Officer Cordes's approach of Schulz and request for identification. Schulz did not offer any evidence at the hearing.

The district court denied Schulz's motion to suppress. The district court reasoned that Schulz was not seized when Officer Cordes approached him and asked him for identification. The district court further reasoned that Schulz *was* seized when Officer Cordes asked him about the location of his vehicle but that, at that time, Officer Cordes had reasonable, articulable suspicion to justify the seizure.

A jury subsequently found Schulz guilty of first-degree DWI and refusal to submit to chemical testing. The district court imposed a sentence of 54 months of imprisonment. Schulz appeals.

D E C I S I O N

Schulz argues that the district court erred by denying his motion to suppress evidence. Specifically, Schulz argues that Officer Cordes seized him by approaching him and asking for identification without reasonable, articulable suspicion of criminal activity. In the alternative, Schulz argues that, even if a seizure did not occur until a few moments later, when he was questioned about the location of his vehicle, Officer Cordes still did not have reasonable, articulable suspicion of criminal activity. We apply a *de novo* standard of review to a district court's determination as to whether a law enforcement officer seized a person and whether the officer had reasonable, articulable suspicion for the seizure. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

The Fourth Amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A similar right is contained in the Minnesota Constitution. *See* Minn. Const. art. I, § 10. Schulz relies primarily on the Minnesota Constitution.

As a general rule, a law enforcement officer may not seize a person without probable cause. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). A law enforcement officer may, however, conduct a brief investigatory stop of a pedestrian if the officer has a reasonable, articulable suspicion that the person might be engaged in criminal activity. *See State v. Houston*, 654 N.W.2d 727, 731-33 (Minn. App. 2003), *review denied* (Minn. Mar. 26, 2003); *see also Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880 (1968). A reasonable, articulable suspicion exists if "the police officer [is]

able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880. Reasonable suspicion requires "something more than an unarticulated hunch"; "the officer must be able to point to something that objectively supports the suspicion at issue." *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (quotation omitted); *see also Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880.

To resolve Schulz's argument, we must determine whether and when Officer Cordes seized Schulz for purposes of an investigatory stop. "Not all encounters between the police and citizens constitute seizures." *Harris*, 590 N.W.2d at 98. An officer does not conduct a seizure merely because the officer approaches a person who is standing on a public street and asks the person a few questions. *In re Welfare of E.D.J.*, 502 N.W.2d 779, 782 (Minn. 1993); *Houston*, 654 N.W.2d at 731-32. Rather, under Minnesota law, a person is seized only if, given the totality of the circumstances, a reasonable person in the same situation would not feel free to terminate the encounter. *Houston*, 654 N.W.2d at 732 (quoting *Harris*, 590 N.W.2d at 98). Circumstances that might indicate a seizure include the threatening presence of several officers, an officer's display of a weapon, an officer's physical touching of the person, or the officer's use of language or tone of voice indicating that compliance might be compelled. *E.D.J.*, 502 N.W.2d at 781 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 1877 (1980)). In the absence of some affirmative display of authority, "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." *Id.* (quoting *Mendenhall*, 446 U.S. at 554-55, 100 S. Ct. at 1877).[1]

In this case, Officer Cordes approached Schulz in a public place and engaged him in a short conversation. Initially, Officer Cordes asked Schulz for identification. The evidence in this case does not indicate that Officer Cordes's request for identification was accompanied by any display of authority that would have caused a reasonable person in Schulz's position to believe that he was not free to terminate the conversation. *See Harris*, 590 N.W.2d at 98-99; *Houston*, 654 N.W.2d at 732. More specifically, there is no evidence of any of the key indicators of authority that have been recognized by the United States Supreme Court and the Minnesota Supreme Court: there is no evidence of the threatening presence of multiple officers at the industrial park, no evidence that Officer Cordes displayed a weapon while asking Schulz for identification, no evidence that Officer Cordes physically touched Schulz while asking him for identification, and no evidence that Officer Cordes used language or a tone of voice that would indicate that Schulz's compliance with the request was compelled. *See E.D.J.*, 502 N.W.2d at 781 (quoting *Mendenhall*, 446 U.S. at 554-55, 100 S. Ct. at 1877). Thus, the record does not

[1]The United States Supreme Court may have modified the *Mendenhall* test in *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547 (1991), in which it held that a seizure occurs "only when police use physical force to restrain a person or, absent that, when a person physically submits to a show of authority by the police." *E.D.J.*, 502 N.W.2d at 780; *see also Hodari D.*, 499 U.S. at 626-29, 111 S. Ct. at 1550-52. The Minnesota Supreme Court has held that *Hodari D.* does not apply to article I, section 10, of the Minnesota Constitution. *E.D.J.*, 502 N.W.2d at 781-83. Thus, to the extent that we look to federal caselaw to guide our analysis, we look only to pre-*Hodari D.* caselaw.

support Schulz's argument that he was seized when Officer Cordes asked him for identification.

This conclusion is consistent with the relevant caselaw. A request for identification is not a seizure *per se*. *See Mendenhall*, 446 U.S. at 555, 100 S. Ct. at 1877-78; *Florida v. Royer*, 460 U.S. 491, 501, 103 S. Ct. 1319, 1326 (1983) (plurality opinion). If a law-enforcement officer requests identification without a showing of authority, no seizure occurs. *See, e.g.*, *United States v. Archer*, 840 F.2d 567, 572 (8th Cir. 1988) (holding that officer did not seize appellant in airport terminal by requesting identification without force, coercion, or threat of force); *State v. Pfannenstein*, 525 N.W.2d 587, 588-89 (Minn. App. 1994) (holding that officer did not seize appellant by requesting identification without showing of authority or indication that request could not be declined), *review denied* (Minn. Mar. 14, 1995). On the other hand, if an officer requests identification while making an affirmative display of authority, or if the circumstances otherwise show that the person is not free to terminate the encounter, a seizure may occur. *See, e.g.*, *State v. Day*, 461 N.W.2d 404, 407 (Minn. App. 1990) (holding that uniformed, armed police officer seized appellant by requiring him to approach squad car to provide identification and respond to questions), *review denied* (Minn. Dec. 20, 1990). In addition, an officer's request for identification may be a seizure if the officer requests identification for the purpose of investigating a specific criminal offense and if the request for identification is essentially a request that a person prove his or her innocence of the offense. *See State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995) (holding that officer seized appellant, who was drinking alcoholic beverage

in bar, by requesting identification to determine whether she was of legal age); *see also State v. Colosimo*, 669 N.W.2d 1, 4 (Minn. 2003) (holding that DNR officer seized appellant, who was in fishing boat transporting fish, by requesting to inspect fish). The facts of this case place it squarely in the category of cases in which a request for identification does not amount to a seizure.

Schulz cites *State v. Holmes*, 569 N.W.2d 181 (Minn. 1997), for the proposition that a seizure occurs when a law-enforcement officer requests and obtains a person's identification card. The *Holmes* opinion does not hold that a seizure necessarily occurs merely because an officer requests and obtains identification. In *Holmes*, the state conceded that an investigatory seizure had occurred when the officer asked for, received, and retained the appellant's identification card. *Id.* at 185 n.3. The supreme court conspicuously noted that the state's concession in that case was atypical, thereby indicating that the supreme court did not intend to endorse the premise that the officer's request for identification constituted a seizure. *See id.* at 185 n.3. Thus, the supreme court's opinion in *Holmes* does not alter the fact-specific analysis described above, which is based on the *Mendenhall-Royer* factors, which are incorporated into Minnesota caselaw interpreting article I, section 10, of the Minnesota Constitution. *See E.D.J.*, 502 N.W.2d at 782-83.

Schulz also contends that he was seized because Officer Cordes retained his identification card, thereby effectively preventing him from terminating the conversation. An officer's retention of an identification card or other important document may support a finding that a seizure has occurred. *See Royer*, 460 U.S. at 501, 103 S. Ct. at 1326

(plurality opinion); *United States v. Campbell*, 843 F.2d 1089, 1093 n.4 (8th Cir. 1988); *State v. Johnson*, 645 N.W.2d 505, 509-10 (Minn. App. 2002). But Schulz's argument is without any support in the evidentiary record of this case. There was no testimony whatsoever that Officer Cordes retained Schulz's identification after Schulz produced it. Furthermore, Schulz's attorney objected to the prosecutor's direct examination of Officer Cordes as to what occurred after he approached Schulz and requested identification. Thus, Schulz may not establish that a seizure occurred based on the theory that Officer Cordes retained his identification card.

For the foregoing reasons, we conclude that Officer Cordes did not seize Schulz when he approached him and asked him for identification. Having reached that conclusion, it is unnecessary to analyze the matter further. We note that Schulz's appellate attorney argues, in the alternative, that even if Schulz was not seized at the time of Officer Cordes's initial contact with him, he nonetheless was seized at a later point in time, without a reasonable, articulable suspicion of criminal activity. But this argument goes beyond the scope of the argument that Schulz made in the district court, when his attorney expressly confined her argument to the issue whether Schulz was seized upon Officer Cordes's initial contact and successfully urged the district court to limit the state's evidence accordingly. In these circumstances, it would be inappropriate for this court to consider an argument that was not presented to the district court and for which the state did not have a full opportunity to introduce evidence. *See State v. Sorenson*, 441 N.W.2d 455, 458-59 (Minn. 1989).

In sum, Officer Cordes did not seize Schulz, for purposes of article I, section 10, of the Minnesota Constitution, when Officer Cordes approached Schulz and asked him for identification. Thus, the district court did not err by denying Schulz's motion to suppress evidence.

Affirmed.