No. 13-109679-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Plaintiff/Appellee

v.

MICHAEL D. PLUMMER,
Defendant/Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Pottawatomie County, Kansas
Honorable Jeff Elder, Judge
District Court Case No. 12 TR 383

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Oral argument requested: 15 Minutes

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NATURE OF THE CASE

Mr. Plummer was convicted, by bench trial on stipulated facts, of a first offense misdemeanor Driving Under the Influence charge. He now appeals the district court's decision to deny his motion to suppress. Said motion was based upon the police officer's

lack of a reasonable and articulable suspicion that Mr. Plummer was engaged in criminal activity, upon which the officer based his detention.

ISSUE ON APPEAL

WHETHER THE DISTRICT COURT ERRED IN DENYING MR. PLUMMER'S MOTION TO SUPPRESS BECAUSE DEPUTY RICE UNLAWFULLY SEIZED AND DETAINED MR. PLUMMER WITHOUT REASONABLE SUSPICION.

FACTS

Officers of the Pottawatomie County Sheriff's Office were dispatched to a rural location based on reports of a "pasture party" where underage drinking was alleged to be occurring. (ROA. vol. II, p. 5) Upon arriving at the scene Deputy Dale Rice observed a pickup truck driving in the field in question. (ROA. vol. II, p. 6) Seeing this the deputy parked his car and turned off his headlights, apparently to lie in wait for the pickup. (ROA. vol. II, p. 6) The pickup approached the gate to exit the field. No driving problems or errors indicating possible impairment were observed. Deputy Rice turned on his headlights, and possibly his rear directional flashers. (ROA. vol. II, pp. 6-7) The driver of the pickup (Mr. Plummer) got out of his truck and approached the gate. Deputy Rice did the same, but from the opposite side of the gate. (ROA. vol. II, p. 6) A conversation ensued wherein the deputy questioned Mr. Plummer about his activities and reason for being in the area. (ROA. vol. II, pp. 7-8) It should be noted that the defendant is in his mid-40s and there was no reasonable suspicion that he was involved in any

illegal activity at the alleged underage party. The deputy observed that the defendant had bloodshot eyes, but he did not observe an odor of intoxicants or any other indications of impairment. (ROA. vol. II, p. 9) There is no evidence on the record that Mr. Plummer had slurred speech. He showed no difficulties getting out of his truck, walking, or any other problems with his balance or coordination. The deputy demanded the defendant's license. (ROA. vol. II, p. 6) He asked the defendant if he had been drinking. The defendant denied drinking. (ROA. vol. II, p. 7)

After seizing the defendant's license another individual approached the gate from the pasture side. (ROA. vol. II, p. 8) Deputy Rice engaged in a brief conversation with this person. (ROA. vol. II, p. 9) At some point another officer arrived and joined the conversation at the gate. (ROA. vol. II, p. 9) The deputy had the defendant's license and was physically blocking the defendant's exit from the pasture to the roadway. (ROA. vol. II, pp. 25-26) The second officer noticed an odor of intoxicants coming from the defendant and relayed this to Deputy Rice. (ROA. vol. II, p. 9) Deputy Rice then noticed the odor as well and asked the defendant to perform some field sobriety tests. (ROA. vol. II, pp. 9-10) The initial encounter, from the time Deputy Rice met the defendant at the gate to the time he began evaluating him for Driving Under the Influence (hereafter "DUI") lasted approximately ten minutes. (ROA. vol. II, p. 20)

The defendant could not perform physical tests due to a medical issue with his back. (ROA. vol. II, p. 41) He did not complete two mental coordination tests to the deputy's satisfaction. (ROA. vol. II, p. 42) He submitted to a preliminary breath test, which resulted in a reading of .121. (ROA. vol. II, p. 58) He was arrested and taken to

the jail where he submitted to a blood test. The results of the KBI testing of the defendant's blood were .15. (ROA. vol. I, p. 31)

ARGUMENTS AND AUTHORITIES

Scope of Review: When reviewing a motion to suppress evidence, the appellate court reviews the facts underlying the district court's suppression decision by a substantial competent evidence standard and the ultimate legal conclusion drawn from those facts by a de novo standard. The ultimate determination of the suppression of evidence is a legal question requiring the reviewing court's independent determination. *State v. Gray*, 270 Kan. 793, 796, 18 P.3d 962 (2001). Furthermore, "when the facts material to a decision of the court on a motion to suppress evidence are not in dispute, the question of whether to suppress is a question of law over which this court has unlimited review." *State v. Jones*, 270 Kan. 526 ,527, 17 P.3d 359 (2001).

Kansas law recognizes four categories of police-citizen encounters: voluntary encounters, investigatory detentions, public safety stops, and arrests. *State v. Hill*, 281 Kan. 136, 141, 139 P.3d 1 (2006). This was not a traditional traffic stop, thus the question to be answered is: at what point did this encounter become an investigatory detention. Once that is determined, we must decide whether or not Deputy Rice possessed the reasonable and articulable suspicion needed to justify that detention.

A seizure does not occur simply because a police officer approaches an individual and asks a few questions. *State v. McGinnis*, 290 Kan. 547, 552, 233 P.3d 246, 252 (2010). The United States Supreme Court has developed a "totality of the circumstances" test to determine if there is a seizure, or instead a consensual encounter. See *State v. Thompson,* 284 Kan. 763, 775, 166 P.3d 1015 (2007). "[U]nder the test, law enforcement

interaction with a person is consensual, not a seizure if, under the totality of the circumstances, the law enforcement officer's conduct conveys to a reasonable person that he or she was free to refuse the requests or otherwise end the encounter." 284 Kan. at 775, 166 P.3d 1015. Stated another way, " '[s]o long as a reasonable person would feel free to "disregard the police and go about his business," [citation omitted], the encounter is consensual and no reasonable suspicion is required.' " *State v. Reason,* 263 Kan. 405, 410, 951 P.2d 538 (1997) (quoting *Florida v. Bostick,* 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 [1991]).

Over the years the Kansas courts have recognized several objective factors to help determine whether or not an encounter between a police officer and a citizen is classified as either voluntary or a seizure. "This nonexhaustive and nonexclusive list includes: the presence of more than one officer, the display of a weapon, physical contact by the officer, use of a commanding tone of voice, activation of sirens or flashers, a command to halt or to approach, and an attempt to control the ability to flee." See *State v. Lee,* 283 Kan. 771, 775, 156 P.3d 1284 (2007); *State v. Morris,* 276 Kan. 11, 19–20, 72 P.3d 570 (2003); *State v. Gross,* 39 Kan.App.2d 788, 798–800, 184 P.3d 978 (2008). (Quoting *State v. McGinnis*, 290 Kan. 547, 553, 233 P.3d 246, 252 (2010)).

This last factor has been addressed a number of times by the Kansas appellate courts, and it is certainly a factor present in this case. In *State v. Reason,* 263 Kan. 405, 410, 951 P.2d 538 (1997), the defendant argued that he was seized when the officer used his cruiser to block the defendant's car and prevent him from leaving. The defendants also relied heavily on this factor in *State v. Baacke,* 261 Kan. 422, 932 P.2d 396 (1997) and *State v. McGinnis*, cited above. In each of these cases the appellate court ruled that

the police-citizen encounters were voluntary. However, in each of these cases the Courts also noted that the records contained evidence that the defendants' vehicles actually did have room to maneuver and could have been driven away.

In this case Mr. Plummer's exit from the pasture was blocked by the officer. While the officer tried to take care not to block the entrance with his police cruiser, he stood directly in front of the gate throughout the encounter with Mr. Plummer. The undisputed testimony was that the gate opened outwards, in the direction of the officer. (ROA, vol. II, p. 25) Mr. Plummer could not have ignored the officer's requests and simply gone on his way. Had he opened the gate to exit the pasture he would have struck Deputy Rice. (ROA, vol. II, p. 25) While their conversation was taking place, another officer arrived and parked near the entrance. Thus there were two officers blocking the gate. Mr. Plummer testified that had he attempted to open the gate and leave, the gate would have struck one of the two police cars. (ROA, vol. II, pp. 25-26) This evidence was not disputed. Both officers were present at the hearing and available to present opposing testimony to these facts. In addition, in order to carry its burden at the hearing the State could have presented testimony that there were other means of egress from the pasture. No such evidence was presented.

Clearly the officers controlled Mr. Plummer's ability to flee. As noted above, there is no one controlling factor the court examines when determining whether or not a seizure occurred. There were two officers present, which is also a factor tending to indicate a seizure occurred. There were pointed questions directed at Mr. Plummer. Deputy Rice informed him he was looking into possible illegal activity (the pasture party), and he asked Mr. Plummer if he knew anything about it. He asked Mr. Plummer

if he had been drinking that night. He demanded identification from Mr. Plummer early in the encounter and never returned Mr. Plummer's license.

The State has argued that a seizure did not occur until Deputy Rice ordered Mr. Plummer to exit the pasture to perform field sobriety testing. Again, this evaluation began approximately ten minutes after the initial contact between Mr. Plummer and Deputy Rice. (ROA, vol. II, p. 20) Mr. Plummer testified that he did not feel free to leave the area. (ROA, vol. II, pp. 26, 27) The question is, would a reasonable person feel free to leave? To answer this question, let us review the facts.

The reasonable person is driving his pickup through a pasture. He approaches the gate to exit the pasture. He gets out of his truck to open the gate. As he walks up to the gate he sees a police car parked outside the gate and an officer approaching the gate from the opposite side. The reasonable person is asked for his license. He is asked a number of questions, including whether or not he has been drinking. The officer is standing in front of the gate, so it cannot be opened without striking the officer. During this time another citizen arrives and is briefly questioned by the officer. However this citizen is not asked to produce identification and is allowed to leave the area. (ROA, vol. II, pp. 8-9) Questioning of the reasonable person continues. A second officer arrives. Now the gate is blocked by two officers and at least one police car. The questioning continues. It has been nearly ten minutes since the reasonable person first encountered the deputy.

Time is relative. To an appellate attorney, ten minutes is not nearly enough time to effectively present oral argument to the Court of Appeals. To the panel, that same ten minutes might seem an eternity. Being questioned by the police out in a field for ten

minutes is a long, long time. Under the circumstances present in this case, it is inconceivable that a reasonable person would feel free to simply leave the scene.

The stopping of a suspect requires that a police officer must have a reasonable and articulable suspicion, based upon objective facts, that person to be stopped has committed, is committing, or is about to commit a crime. K.S.A. 22-2402; *State v. Campbell,* 948 P.2d 684 (Kan. App. 1997).

Something more than an unparticularized suspicion or hunch must be articulated. *United States v. Sokolow,* 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989); *State v. DeMarco,* 263 Kan. 727, 952 P2d 1276 (1998).

The State has argued in this case that the seizure did not occur until Deputy Rice ordered Mr. Plummer to step out of the pasture to perform field sobriety testing. Again, this occurred nearly ten minutes into their contact when the deputy noticed the odor of intoxicants. Even at this point the detention is not supported by the facts or the law. Bloodshot eyes, even when combined with an odor of intoxicants, do not constitute the requisite level of evidence needed to support the stop and seizure of an individual. *City of Hutchinson v. Davenport*, 30 Kan. App. 2d 1097; 54 P.3d 532 (2002).

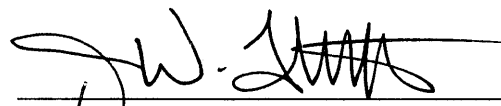
Mr. Plummer was unlawfully seized by Deputy Rice. All the evidence obtained as a result of this seizure must be suppressed as fruit of the poisonous tree. See *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

CONCLUSION

The district court erred in its determination as to when the initial encounter became a detention. Thus it erred in denying Mr. Plummer's motion to suppress. Deputy

Rice effectively seized and detained Mr. Plummer without reasonable and articulable suspicion.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2014, I personally served the original and fifteen (15) true and correct copies of the foregoing Appellant's Brief upon:

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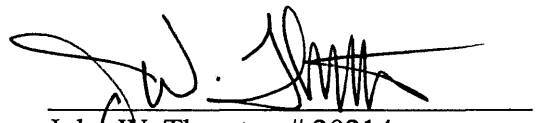

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