[Cite as *Columbus v. Body*, 2012-Ohio-379.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-609 (M.C. No. 11 TRD 105389)
Charles E. Body,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 2, 2012

Richard C. Pfeiffer, *Jr.*, City Attorney, and *Melanie R. Tobias*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Municipal Court.

SADLER, J.

{¶1} Appellant, Charles E. Body, appeals from a judgment of the Franklin County Municipal Court following his plea of no contest to driving under suspension and driving without a valid operator's license. For the following reasons, we affirm.

{¶2} Appellant was charged with driving under suspension and driving without a valid operator's license. He filed a motion to suppress, asking the trial court to

"dismiss all charges against him as the fruits of an illegal seizure." The city filed a memorandum in opposition, and the trial court held a hearing on the motion. Therein, the following evidence was presented.

{¶3} Officer Benjamin Leppla, the only witness who testified at the hearing, testified that, on the evening of January 23, 2011, he was driving a marked police cruiser northbound in an alley between South Powell and South Hague Avenues when he saw appellant in an automobile stopped in the alley. Leppla testified that, as he drove closer to the vehicle, it "pulled up briefly" and then stopped. According to Leppla, appellant then "jumped out" of the vehicle and approached an apartment complex. (Tr. 7.) Leppla pulled his cruiser behind appellant's car, exited his cruiser, and, according to Leppla, "asked him to come over to where I was." Leppla could not recall his exact words, but said that he "asked" appellant to "come over here" but did not command him. (Tr. 8-9.)

{¶4} Leppla asked for appellant's identification, and appellant presented a state of Ohio ID card, which identified him as a "nondriver." (Tr. 9.) Leppla testified that he believed appellant did not have the ability to operate a motor vehicle the moment he saw appellant's state identification card. To investigate further, Leppla detained appellant in the back of the cruiser and verified his identification by performing a license check. The check confirmed that appellant's license had been suspended.

{¶5} The city argued that no "seizure" occurred under the Fourth Amendment because the initial encounter between appellant and Leppla was consensual. Accordingly, the city asserted that Leppla was not required to have reasonable suspicion in order to speak with appellant and ask for his identification. In response,

appellant argued that Leppla's statement, "come over here," by itself, created a "seizure" implicating the Fourth Amendment and requiring Leppla to have reasonable suspicion.

{¶6} The trial court issued an entry denying appellant's motion to suppress, reasoning that the initial meeting between Leppla and appellant was a consensual encounter rather than a Fourth Amendment "seizure." After the trial court rendered its decision, appellant pleaded no contest to both charges and was sentenced to a fine, court costs, and a suspended jail term.

{¶7} In a timely appeal, appellant now advances the following assignment of error for our consideration:

> The trial court erred in failing to suppress evidence taken in an unlawful seizure. This decision violated the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the Ohio Constitution.

{¶8} Appellant's sole assignment of error challenges the denial of his motion to suppress. Specifically, appellant argues that his initial encounter with Leppla was nonconsensual and constituted an unlawful "seizure" under the Fourth Amendment. Because he does not challenge Leppla's authority to detain him after discovering he did not have a driver's license, the sole issue before us is whether the initial encounter was a "seizure" implicating the Fourth Amendment.

{¶9} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. When considering a motion to suppress, the trial court assumes the role of fact finder and, accordingly, is in the best position to resolve factual questions and evaluate witness

credibility. Id., citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366. As such, an appellate court must accept the trial court's factual findings if they are supported by competent, credible evidence. *Burnside* at ¶8, citing *State v. Fanning* (1982), 1 Ohio St.3d 19. Accepting these facts as true, the reviewing court must then independently determine, without deference to the trial court's conclusion, whether the facts satisfy the applicable legal standard. Id., citing *State v. McNamara* (1997), 124 Ohio App.3d 706.

{¶10} The Fourth Amendment to the United States Constitution, as well as Section 14, Article I of the Ohio Constitution, prohibits unreasonable searches and seizures. *State v. Kinney*, 83 Ohio St.3d 85, 87, 1998-Ohio-425; *Katz v. United States* (1967), 389 U.S. 347, 351, 88 S.Ct. 507, 511. However, "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred" within the meaning of the Fourth Amendment. *Terry v. Ohio* (1968), 392 U.S. 1, 19, 88 S.Ct. 1868, 1879, fn.16.

{¶11} Accordingly, consensual encounters between police and citizens do not implicate the Fourth Amendment. *Florida v. Bostick* (1991), 501 U.S. 429, 434, 111 S.Ct. 2382, 2386; *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, ¶11. Police may, without reasonable suspicion or probable cause, approach an individual in a public location, "pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means." *United States v. Drayton* (2002), 536 U.S. 194, 201, 122 S.Ct. 2105, 2110, citing *Bostick*, 501 U.S. at 434-35, 111 S.Ct. at 2386.

{¶12} An encounter does not amount to a "seizure" under the Fourth Amendment "[u]nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded." *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 216, 104 S.Ct. 1758, 1763. "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." Id., 466 U.S. at 216, 104 S.Ct. at 1762; see also *O'Malley v. Flint* (C.A.6, 2011), 652 F.3d 662, 669, citing Wayne R. LaFave, 4 Search & Seizure § 9.4 (4th ed.2004) (recognizing that an officer may rely on "the moral and instinctive pressures" of citizens to cooperate so long as the officer does not add to "those inherent pressures by engaging in conduct significantly beyond that accepted in social intercourse"). Circumstances indicative of a "seizure" include the "threatening presence of several officers; the display of a weapon by an officer; some physical touching of the person; the use of language or tone of voice indicating that compliance with the officer's request might be compelled; approaching the person in a nonpublic place; and blocking the person's path." *State v. Swonger*, 10th Dist. No. 09AP-1166, 2010-Ohio-4995, ¶10, citing *United States v. Mendenhall* (1980), 446 U.S. 544, 554, 100 S.Ct. 1870, 1877.

{¶13} Appellant claims that he was effectively "seized" when Leppla stated, "come over here" as appellant was walking towards the building. Although Leppla testified that the statement was voiced as a request rather than a command, appellant asserts he did not feel free to disregard the officer because he had just committed a traffic offense and therefore had "no reason" to talk with Leppla. (Appellant's Brief, 16.)

He also contends that the statement was coercive because Leppla testified that, if the request were denied, he would have taken further action to pursue appellant.

{¶14} First, regarding appellant's claim that he complied only because he had committed a traffic offense, "[t]his argument cannot prevail because the 'reasonable person' test presupposes an *innocent* person." (Emphasis sic.) *Bostick*, 501 U.S. at 438, 111 S.Ct. at 2388. Contrary to appellant's assertion, the test "is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *California v. Hodari D.* (1991), 499 U.S. 621, 628, 111 S.Ct. 1547, 1551. This standard "ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached." *Michigan v. Chesternut* (1988), 486 U.S. 567, 574, 108 S.Ct. 1975, 1980. Therefore, even if appellant could present evidence showing that he did not feel free to leave given his traffic offense, this purely subjective rationale would play no role in our analysis.

{¶15} Nor do the *officer's* subjective motivations factor into the objective "reasonable person" standard. While appellant claims that Leppla would have "seized" him anyway, Leppla's subjective intention "is irrelevant except insofar as that may have been conveyed" to appellant. See *Mendenhall*, 446 U.S. at 554, 100 S.Ct. at 1877, fn.6; see also *State v. Cuffman*, 3d Dist. No. 3-11-01, 2011-Ohio-4324, ¶22, citing, inter alia, *Whren v. United States* (1996), 517 U.S. 806, 813-14, 116 S.Ct. 1769, 1774. The United States Supreme Court has "long taken the view that 'evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.' "

Kentucky v. King (2011), ___ U.S. ___, ___, 131 S.Ct. 1849, 1859, quoting *Horton v. California* (1990), 496 U.S. 128, 138, 110 S.Ct. 2301, 2308-09. Because there is no evidence that Leppla communicated his intent to pursue appellant if he chose not to comply, Leppla's subjective motivation is irrelevant.

{¶16} The pertinent inquiry is whether Leppla's statement, "come over here," along with his actions, was so intimidating as to convey to a reasonable person an order restricting that person's movement. *Hodari D.*, 499 U.S. at 628, 111 S.Ct. at 1551. In *State v. Smith* (1989), 45 Ohio St.3d 255, 258-59, reversed on other grounds, *Smith v. Ohio* (1990), 494 U.S. 541, 110 S.Ct. 1288, the Supreme Court of Ohio held that an officer's statement, "hey, come here a minute," did not constitute a "seizure" because the officers did not display any weapons, use a threatening tone of voice or block his exit from the parking lot. Id. at 259. Based on these circumstances, the court held that "a reasonable person in appellant's position would have believed he was free to leave at any time, prior to his actual arrest following the discovery of contraband." Id. at 258; *State v. Crossen*, 5th Dist. No. 2010-COA-027, 2011-Ohio-2509, ¶13 (following *Smith*).

{¶17} Similarly, in *State v. Duncan*, 9th Dist. No. 21155, 2003-Ohio-241, the court found no seizure where the officer initiated an encounter with the defendant by stating, "Hey, Michelle, come over here for a second." Id. at ¶15. The court found the encounter to be consensual because the officer "hailed [the defendant] in a public parking lot" and "did not display any physical force or order [the defendant] to do anything." Id. at ¶16. Although the officer used language that was nominally phrased in the form of a demand, the court found that a reasonable person would have felt free to terminate the encounter and walk away. Id.

{¶18} Federal courts have also recognized that "simply calling out to someone to come over to talk does not constitute a seizure." *United States v. Brown* (C.A.6, 2012), 2012 U.S. App. LEXIS 302, 2012 WL 29209, citing *United States v. Matthews* (C.A.6, 2002), 278 F.3d 560, 562. In *Brown*, the officer "holler[ed] for [the defendant] to come here," at which point the defendant turned his car around. The Sixth Circuit relied on its earlier decision in *Matthews* where it found that the statement, "Hey, buddy, come here," did not constitute a stop because the addressee could have "politely declined to do so, and walked away." Id., citing *Matthews*, 278 F.3d at 562; see also *United States v. Richardson* (C.A.8, 2008), 537 F.3d 951, 956 (no seizure where the officer states "[c]ome here" in a "[p]olice tone of voice").

{¶19} Appellant relies heavily on the Supreme Court of Ohio's decision in *State v. Robinette*, 80 Ohio St.3d 234, 1997-Ohio-343, for the proposition that the encounter was nonconsensual. However, the issue in *Robinette* was whether police may obtain valid consent from an individual during an unlawful detention. The court held that, "[o]nce an individual has been unlawfully detained by law enforcement, for his or her consent to be considered an independent act of free will, the totality of the circumstances must clearly demonstrate that a reasonable person would believe that he or she had the freedom to refuse to answer further questions and could in fact leave." *Robinette* at paragraph three of the syllabus. In this case, however, the encounter between appellant and Leppla was not preceded by any seizure, much less an unlawful seizure. Therefore, unlike *Robinette*, there is no presumption that the encounter was tainted by an illegal detention. See *State v. Jones*, 187 Ohio App.3d 478, 2010-Ohio-

1600, ¶32, quoting *State v. Bennett* (June 21, 2000), 4th Dist. No. 99 CA 2509 (distinguishing *Robinette* on similar grounds).

{¶20} When applying the above authority to the circumstances of this case, we find no evidence that the initial encounter in this case constituted a "seizure" under the Fourth Amendment. According to his testimony, Leppla encountered appellant in a public place and without the "threatening presence of several officers." See *Mendenhall*, 446 U.S. at 554, 100 S.Ct. at 1877. Leppla did not activate his siren or search light, he did not attempt to block appellant's vehicle or path, nor did he attempt to pursue appellant. Instead, he stood by the front of his cruiser and said words to the effect of "come over here." When asked whether he said "please come over here" or "come over here," Leppla could not recall his exact words but testified that he used language in the form of a request rather than a command. (Tr. 8-9, 17.) No evidence shows that Leppla yelled or screamed this statement to appellant or that he displayed a weapon or any other sign of force. Based on these facts, Leppla's conduct was not so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded. See *Bostick*, 501 U.S. at 434, 111 S.Ct. at 2386; see also *State v. Williams*, 11th Dist. No. 2008-L-182, 2009-Ohio-4098, ¶24 (no seizure where the police did not impede the defendant's travel, activate sirens or lights, draw any weapons during the encounter or touch the defendant).

{¶21} Because the initial encounter did not constitute a "seizure" under the facts of this case, Leppla needed neither reasonable suspicion nor probable cause to ask appellant for his identification. Therefore, the trial court properly denied appellant's motion to suppress.

{¶22} Accordingly, appellant's assignment of error is overruled. Having overruled appellant's sole assignment of error, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.

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