[Cite as *State v. Cabot*, 2010-Ohio-4064.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO	C. A. No. 09CA009725
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
ELIZABETH M. CABOT	OBERLIN MUNICIPAL COURT COUNTY OF LORAIN, OHIO
Appellant	CASE No. 09TRC02125

DECISION AND JOURNAL ENTRY

Dated: August 30, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Officer Devon Small, a patrolman for the Amherst police department, was on patrol around 4:00 a.m. when he saw Elizabeth Cabot pull into the parking lot of a fast-food restaurant that was closed for the night. He followed her into the lot and saw her enter the drive-through lane. He saw her stop for 30 to 60 seconds at the order box and then pull up to the pick-up window, where she waited for another brief period of time. He then saw her pull around the building and park in a parking spot on the opposite side. He pulled around the building also and parked behind her, but left enough room so that she could pull away. He got out of his cruiser and approached her car, asking her to roll down her window and advising her that he wanted to check on her welfare. When Ms. Cabot began talking to him, Officer Small observed that her speech was slurred and that her breath smelled of alcohol. He, therefore, asked her to perform some field sobriety tests. When she failed the tests, he arrested her on suspicion of operating a

vehicle while intoxicated. Ms. Cabot moved to suppress the evidence against her, arguing that Officer Small did not have reasonable and articulable suspicion to stop her. The municipal court denied her motion because it concluded that Officer Small's attempt to initiate a conversation with her did not implicate her Fourth Amendment rights. This Court affirms because Officer Small did not seize Ms. Cabot under the Fourth Amendment when he approached her parked vehicle.

STANDARD OF REVIEW

{¶2} Ms. Cabot's assignment of error is that the municipal court incorrectly denied her motion to suppress. A motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St. 3d 152, 2003-Ohio-5372, at ¶8. Generally, a reviewing court "must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id*. But see *State v. Metcalf*, 9th Dist. No. 23600, 2007-Ohio-4001, at ¶14 (Dickinson, J., concurring). The reviewing court "must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Burnside*, 2003-Ohio-5372, at ¶8. Ms. Cabot has only challenged the actions of Officer Small when he first approached her vehicle.

CONSENSUAL ENCOUNTER

{¶3} "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Florida v. Royer*, 460 U.S. 491, 497 (1983). "If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed." *Id*. at 498.

{¶4} Ms. Cabot has argued that Officer Small seized her because he, allegedly, "followed [her] around the . . . parking lot," "pulled [his car] in behind [her] when she parked," "positioned his car to block [her] car from fleeing with his overhead lights flashing," "ordered her to roll her window down," and "stated unequivocally that [she] was not free to go." "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that [s]he was not free to leave." *California v. Hodari D.*, 499 U.S. 621, 627-28 (1991) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)). "If a reasonable person would feel free to terminate the encounter, then he or she has not been seized." *United States v. Drayton*, 536 U.S. 194, 201 (2002); see also *Florida v. Bostick*, 501 U.S. 429, 439 (1991) ("[A] court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter."). Circumstances that might indicate a seizure, even when the person had not attempted to leave, include "threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.); *Terry v. Ohio*, 392 U.S. 1, 19, n.16 (1968) ("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.").

{¶5} Although Ms. Cabot was sitting in a parked vehicle at the time Officer Small approached her, the same Fourth Amendment principles apply. *State v. Brown*, 12th Dist. No. CA2001-04-047, 2001 WL 1567340 at *3 (Dec. 10, 2001). "Some encounters between police

officers and citizens in vehicles are purely consensual and do not implicate Fourth Amendment rights." *Id*. "Generally, an officer's approach and questioning of the occupants of a parked vehicle does not constitute a seizure and does not require reasonable, articulable suspicion of criminal activity." *Id*.; *State v. Boys*, 128 Ohio App. 3d 640, 642 (1998).

{¶6} Officer Small testified that, while Ms. Cabot was stopped at the drive-through order box, he "pulled in behind" her, but did not activate his overhead lights. He said that she pulled up to the pick-up window, stopped briefly, and then drove around the front of the building and parked in a parking space on the opposite side, perpendicular to the curb. He said that, after she parked, he parked his cruiser behind her and approached. As he approached, he identified himself and told her that he had pulled behind her to "check on her welfare and see what she was actually doing in the business that was closed at that time." He said that his vehicle was "directly behind" hers, such that, if she had backed up, she would have run into it. He said, however, that he did not block her in, claiming "[t]here was a great enough distance where she could have turned." The municipal court determined Officer Small credible on that issue, finding that, even though he "parked his vehicle behind [Ms. Cabot's], . . . [t]here was enough room between the cruiser and [Ms. Cabot's] vehicle that would have permitted [her] vehicle to drive away . . . ." Officer Small could not remember whether he turned the cruiser's overhead lights on before parking.

{¶7} Officer Small testified that, if Ms. Cabot had tried to drive away, he would have stopped her. According to him, she was not "free to leave." He did not tell that to her, however, so it is irrelevant. "A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable [person] in the suspect's position would have understood [her] situation." *Berkemer v. McCarty*,

468 U.S. 420, 442 (1984); *United States v. Mendenhall*, 446 U.S. 544, 555 n.6 (1980) ("[T]he subjective intention of [a law enforcement officer] to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent.").

{¶8} Although Ms. Cabot has argued that Officer Small "block[ed]" her in and "ordered" her to roll down her window, the evidence in the record does not establish a "show of authority" by Officer Small that would have communicated to a reasonable person that she was not free to leave. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). Ms. Cabot did not testify at the hearing. Officer Small testified that he left enough room behind her car that she "could have left," that he could not remember whether he turned on the cruiser's overhead lights, and that he only "tapped" on Ms. Cabot's window and "asked her to roll [it] down." Considering the totality of the circumstances, this Court concludes that Officer Small did not seize Ms. Cabot when he parked his cruiser behind her and approached her. Accordingly, because Officer Small did not detain Ms. Cabot, his actions did not have to be supported by a reasonable, articulable suspicion or probable cause. See *Florida v. Royer*, 460 U.S. 491, 497-98 (1983). Ms. Cabot's assignment of error is overruled.

CONCLUSION

{¶9} The municipal court correctly denied Ms. Cabot's motion to suppress. The judgment of the Oberlin Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Oberlin Municipal Court, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

BRANDON J. HENDERSON, attorney at law, for appellant.

FRANK S. CARLSON, attorney at law, for appellee.