IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. S-2010-540
	)	
STEVEN MATTHEW CAVNER,	)	
	)	
Appellee.	)	

SUMMARY OPINION

A. JOHNSON, PRESIDING JUDGE:

The State of Oklahoma charged Steven Matthew Cavner in the District Court of Oklahoma County, Case No. CM-2009-570, with Driving While Under the Influence of Alcohol.[1] Cavner filed a combined motion to suppress evidence and dismiss the case arguing that the traffic stop that resulted in the charge was unsupported by reasonable suspicion and therefore the stop was unlawful.[2] The District Court granted the motion and suppressed the evidence, but did not dismiss the case. The State appeals under 22 O.S.Supp.2009, § 1053 (5), claiming the district court erred by suppressing the evidence.

When reviewing a trial court's ruling on a motion to suppress evidence based on an allegation of an illegal search and seizure resulting from an unlawful detention, we defer to the trial court's factual findings about the circumstances of the detention unless those findings are clearly erroneous.

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[1] The record on appeal does not contain a copy of the charging Information. We assume that Cavner was charged with driving under the influence of alcohol. We further assume that he was charged for violating 47 O.S.Supp.2006, § 11-902.

[2] Nothing in the record on appeal shows what evidence was actually seized or developed during the traffic stop.

Seabolt v. State, 2006 OK CR 50, ¶ 5, 152 P.3d 235, 237. The ultimate conclusion drawn from those facts, however, is a question of law we review *de novo*. *Id.*

The essential facts of this case are not in dispute. At the time of the stop, Deputy Richard Yarber, the officer who conducted the stop, knew the following: (1) he saw an occupied vehicle in the dark parking lot of an abandoned grocery store at 1:00 a.m.; (2) the store's parking lot was only accessible via a road that ran past a fast food restaurant that was still open for business; (3) the suspicious vehicle departed the parking lot and drove away in a lawful manner as he and his partner Deputy Jason Yingling approached in their vehicle without police lights; and (4) Deputy Yingling had investigated possible juvenile drug activity at that location at some earlier time. Additionally, as the district court noted, Deputy Yarber did not describe any criminal activity that he believed might have been in progress, nor did he attempt to stop Cavner's vehicle as the two vehicles passed on the parking lot's access road. Also, the Police Chief for the town of Harrah testified at the suppression hearing that the area was not a high crime or trouble area.

An officer has a duty to investigate unusual or suspicious activity, *Atterberry v. State*, 1986 OK CR 147, ¶ 3, 726 P.2d 898, 899, and an occupied vehicle in the parking lot of an abandoned store at 1:00 in the morning certainly seems suspicious. The deputies' interest was therefore properly aroused for some further investigation. Under these circumstances, for example, the deputies would have been justified in approaching the stopped

vehicle to check on the welfare of its occupants or to question the occupants if they voluntarily agreed to remain and talk. *See United States v. Drayton*, 536 U.S. 194, 200, 122 S.Ct. 2105, 2110, 153 L.Ed.2d 242 (2002) ("[l]aw enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen"); *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 2386, 115 L.Ed.2d 389 (1991)("[A] seizure [for Fourth Amendment purposes] does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free "to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required"); *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 1879 n. 16, 20 L.Ed.2d 889 (1968)("[n]ot 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"); *United States v. Johnson*, 364 F.3d 1185, 1188-89(10th Cir. 2004)("[p]olice officers may approach citizens, ask them questions and ask to see identification without implicating the Fourth Amendment's prohibition against unreasonable searches and seizures"). In this case, however, Cavner's vehicle departed the parking lot as Deputy Yarber approached on the access road. This placed the situation in a significantly different posture. To make contact with the vehicle's occupants under these circumstances, Deputy Yarber had to turn around,

catch up to Cavner and initiate a traffic stop on a highway some distance from the abandoned store. A traffic stop, unlike a consensual face-to-face encounter, is a seizure under the Fourth Amendment. As such, it must be supported by reasonable suspicion that the person stopped has committed, is committing, or is about to commit a crime. *Seabolt v. State*, 2006 OK CR 50, ¶ 6, 152 P.3d 235, 237.

Reasonable suspicion is suspicion that would "'warrant a [person] of reasonable caution in the belief' that [a stop] was appropriate." *Terry*, 392 U.S. at 22, 88 S.Ct. at 1880. For suspicion to ripen sufficiently to permit an investigatory detention in which a person is seized by means of physical force or show of authority (e.g. a traffic stop via use of police lights), the level of suspicion must be more than a hunch. *See United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989) ("[t]he officer, of course, must be able to articulate something more than an 'inchoate and unparticularized suspicion or hunch'"); *Terry*, 392 U.S. at 27, 88 S.Ct. at 1883("in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience"). For such a seizure to be lawful, the level of suspicion must rise to that of a reasonable suspicion: i.e., a suspicion supported by articulable facts that criminal activity may be underway. *See e.g., Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989) (reiterating previous holdings that "police can stop and briefly detain a person for investigative

purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause"); *see also United States v. Arvizu*, 534 U.S. 266, 277-78, 122 S.Ct. 744, 151 L.Ed. 2d 740 (2002)(holding that an officer with reasonable suspicion need not "rule out the possibility of innocent conduct" as long as the totality of the circumstances is sufficient to form "a particularized and objective basis" for a traffic stop).

In this instance, Deputy Yarber was presented with circumstances that should have aroused some degree of suspicion in a trained law enforcement officer. In our view, however, at the time of the traffic stop, the circumstances were not sufficiently compelling to elevate this suspicion above the level of a hunch. As the district court noted, the situation in this case is like that in *Epker v. State*, 1988 OK CR 80, 753 P.2d 916, in which we found a traffic stop under similar circumstances not to be founded on the requisite reasonable suspicion of criminal activity. Specifically, in *Epker*, we explained:

> Deputy Morgan testified at the motion to suppress hearing that the only specific facts which he knew at the time of the investigatory stop was that a vehicle similar to the one appellants were driving had been seen leaving the parking lot of a club in an isolated area without its headlights on during the early morning hours. The officer did state that under those circumstances he was "suspicious" that something illegal such as a burglary might have occurred, however, he did not have a report of any criminal activity by any person around the club that night. He further testified that the circumstances leading to the investigatory stop "makes one wonder." We are of the opinion that these facts alone with inferences rationally drawn from such are not a sufficient basis

> for a reasonable suspicion that appellants are wanted for past criminal conduct.

1988 OK CR 80, ¶ 8, 753 P.2d at 918 (internal citations omitted).

In the instant case, Deputy Yarber, like Deputy Morgan in *Epker*, at the time of the stop knew only that the vehicle he stopped had left a business parking lot in an isolated area during the early morning hours. Also, Deputy Yarber, like Deputy Morgan in *Epker*, did not have a report of any criminal activity around the abandoned store that night. Nor did Deputy Yarber, like Deputy Morgan in *Epker*, articulate any reason that might have caused him to be suspicious that any particular type of criminal activity such as burglary or drug dealing might have occurred.

Based on the totality of these circumstances, and in light of our decision in *Epker*, we conclude, as did the district court, that the State failed to establish that Deputy Yarber possessed more than a hunch or generalized suspicion of criminal activity when he stopped Cavner's vehicle. The stop did not, therefore, conform to the dictates of the Fourth Amendment that such a detention be based on reasonable suspicion of criminal activity. The district court properly granted Cavner's motion to suppress.

DECISION

The order of the district court suppressing the evidence in this case is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE JAMES B. CROY, SPECIAL JUDGE

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OPINION BY: A. JOHNSON, P.J.
LEWIS, V.P.J.: Concur
LUMPKIN, J.: Concur in Result
C. JOHNSON, J.: Concur
SMITH, J.: Concur

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