IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Appellant,	)	NOT FOR PUBLICATION
	)	
v.	)	Case No. S-2014-564
	)	
CHRISTOPHER D. KNIGHT,	)	
	)	
Appellee.	)	

OPINION

LEWIS, JUDGE:

Christopher Knight was charged with unlawful possession of a controlled dangerous substance (methamphetamine), in violation of 63 O.S.2011, § 2-402, in Carter County district court case number CF-2013-525. After hearings on defendant's motion to suppress, the Honorable Lee Card, Associate District Judge, granted the motion and suppressed evidence of drug possession.[1] The State now appeals pursuant to 22 O.S.2011, § 1053(5), and asserts that they "cannot proceed without the evidence and [the ruling] restricts its ability to prosecute . . . this case."

We find that the appeal is proper and, after thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits, and briefs, we have determined that the trial court's decision suppressing the evidence should be affirmed.

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[1] The trial court's order finds that the officers' lacked reasonable suspicion or probable cause for the stop, thus the evidence is suppressed. The order indicates a belief that the encounter was not consensual and reasonable suspicion or probable cause was necessary for the stop. This is evident, because the State's entire argument during the suppression hearing was that the encounter was consensual and no evidence was presented to show reasonable suspicion or probable cause.

This Court reviews a ruling on a motion to suppress for an abuse of discretion. *State v. Iven*, 2014 OK CR 8, ¶ 6, 335 P.3d 264, 267. "An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts." *Id.* This Court, however, will review the trial court's legal conclusions based on the facts *de novo*. *State v. Alba*, 2015 OK CR 2, ¶ 4, 341 P.3d 91, 92.

This Court's overriding duty is to be "mindful that as a reviewing court we 'should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.'" *Jackson v. State*, 2006 OK CR 45, ¶ 18, 146 P.3d 1149, 1157, *quoting Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996).

Christopher Knight was walking in the street in Ardmore, Oklahoma; in the unit block of 4th Southwest at about midnight on September 26, 2013. Officer Adam Goushas saw him walking in the street two blocks away and decided to try and talk to him. Knight was walking on an East/West Street and Goushas was on an adjoining North/South Street. Goushas pulled around the corner into the path of Knight's direction of travel. Goushas admitted to stopping in Knight's intended route.

Officer Goushas was in the first phase of his field training and had been told by his training officer that "anytime I saw someone out late at night, with it being late at night, just to stop and see what they were out doing, make contact

with them." Goushas and his supervising training officer got out of the patrol vehicle and walked toward Knight. Goushas asked, "Do you mind if I talk to you for a second." Goushas testified that Knight had no objection. During later testimony Goushas testified that he asked Knight if he could talk to him and Knight responded "yes." Knight continued on his route, which was toward Goushas. Goushas testified that both he and the training officer made contact at the same time. Goushas testified that he was polite and was not acting in an aggressive manner, and he never touched Knight.

Goushas asked Knight where he was heading, and Knight told him he was going to the convenience store, "Carry-out Corner." Goushas then asked Knight if he could search him. Goushas testified that Knight said "yes." Goushas found a folded piece of brown paper which contained methamphetamine in Knight's right front pocket.

Goushas admitted that Knight was not doing anything illegal, was not intoxicated, and was not injured or in distress, and the record indicates no violation of any city ordinance controlling pedestrian traffic.

The State argues, as it did at the trial court, that the encounter was consensual, thus the Fourth Amendment was not implicated and no probable cause or reasonable suspicion was necessary. Knight argues that he was seized pursuant to the Fourth Amendment, the seizure was neither based on reasonable suspicion nor probable cause, thus his subsequent consent to search was also involuntary.

The burden of proving that the encounter was consensual is upon the

State. *See State v. Kemp*, 2009 OK CR 25, ¶ 17, 217 P.3d 629, 632 (holding the burden to show consent to search was freely and voluntarily given is on the State); *State v. Goins*, 2004 OK CR 5, ¶ 19, 84 P.3d 767, 771 ("When the State claims that there is consent, the proof offered by the State must be 'clear and convincing that the waiver was a free and voluntary act.'" [*citing Case v. State*, 1974 OK CR 27, ¶ 7, 519 P.2d 523, 524]); *see also United States v. Jordan*, 635 F.3d 1181, 1186 (11th Cir. 2011) and *United States v. McRae*, 81 F.3d 1528, 1536–37 (10th Cir.1996). If Knight was illegally seized, then his subsequent consent to search is also invalid, unless the consent was "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *See Florida v. Royer*, 460 U.S. 491, 507-08, 103 S.Ct. 1319, 1329, 75 L.Ed.2d 229 (1983); *Wong Sun v. United States*, 371 U.S. 471, 486, 83 S.Ct. 407, 416-17, 9 L.Ed.2d 441 (1963).

The totality of the circumstances surrounding the encounter is examined to determine whether a reasonable person in the same circumstance would feel free to decline the conversation and avoid the encounter. *See Coffia v. State*, 2008 OK CR 24, ¶ 14, 191 P.3d 594, 598 ("To determine whether an encounter was consensual, courts consider if a reasonable person would have felt free to leave considering the totality of the circumstances. A consensual encounter is the voluntary cooperation of a private citizen in response to non-coercive questioning by a law enforcement officer") (internal quotation marks omitted). Conversely, a seizure occurs when a reasonable person would not feel free to leave. *See Skelly v. State*, 1994 OK CR 55, ¶ 12, 880 P.2d 401, 405 ("[s]eizure

of a person occurs within the meaning of the Fourth Amendment when, in light of all the attendant circumstances, a reasonable person would have believed he was not free to leave").

Consensual encounters are reasonable and do not implicate the Fourth Amendment. *See United States v. Drayton*, 536 U.S. 194, 200, 122 S.Ct. 2105, 2110, 153 L.Ed.2d 242 (2002) ("Law 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.") If a reasonable person would feel free to terminate the encounter, then he has not been seized. *Id.* at 201, 122 S.Ct. at 2110.

This case boils down to a simple determination of whether the State met its burden of showing that this was a situation where a reasonable person would feel free to leave. The ultimate issue is whether a reasonable person would believe that he either had to stop and converse with the officers or change his path to avoid the officers' presence, under the totality of the circumstances in this case.

The State, in arguing the consent theory, offered no indication that Knight could have simply walked on past the officers and their vehicle and continued on his merry way without suspiciously altering his route. In the absence of a simple path of avoidance, a reasonable person might believe that he risked the possibility that his actions might be interpreted as elusive and suspicious.

In reviewing the evidence presented by the State, we find that the trial court was correct in finding that the State did not meet its burden to show that a reasonable person, under the same circumstances, would believe they were free to avoid encounter and proceed on their way. In the absence of a consensual encounter, the State must show reasonable suspicion or probable cause, and the record is void any evidence of either. The order of the trial court suppressing the evidence was correct.

DECISION

The ruling of the trial court suppressing the evidence in this case is **AFFIRMED** and this case is **REMANDED** to the trial court for further proceedings not inconsistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CARTER COUNTY
HONORABLE LEE CARD, ASSOCIATE DISTRICT JUDGE

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OPINION BY: LEWIS, J.

SMITH, P.J.: Concurs in Results
LUMPKIN, V.P.J.: Concurs in Results
JOHNSON, J.: Concurs in Results
HUDSON, J.: Dissents

HUDSON, J., DISSENT

Although reciting the clearly-established Supreme Court law governing this case, the Opinion's holding does not apply the Supreme Court's mandate that the totality of the circumstances be considered in the consent inquiry. Instead, it relies entirely upon *one* factor in concluding that suppression is appropriate, i.e., that the officer in this case blocked the defendant's path with his patrol car. I therefore respectfully dissent.

Law enforcement officers do not violate the Fourth Amendment "by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen . . . they may pose questions, ask for identification, and request consent to search luggage---**provided they do not induce cooperation by coercive means.**" *United States v. Drayton*, 536 U.S. 194, 200-01 (2002) (emphasis added). "If a reasonable person would feel free to terminate the encounter, then he or she has not been seized." *Id.* at 201. *See also Florida v. Bostick*, 501 U.S. 429, 434 (1991) (an encounter between an individual and the police is consensual "[s]o long as a reasonable person would feel free 'to disregard the police and go about his business[.]'") (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)).

The Opinion at page 4 correctly notes that the totality of the circumstances surrounding the encounter are examined in the consent inquiry. In this context, the Supreme Court has "made clear that for the most part *per se* rules are inappropriate in the Fourth Amendment context." *Drayton*, 536 U.S. at 201. "The proper inquiry 'is whether a reasonable person would feel

free to decline the officers' requests or otherwise terminate the encounter.'" *Id.* at 202 (quoting *Bostick*, 501 U.S. at 436).

Notably, the Supreme Court has overturned lower court decisions which effectively implemented *per se* rules in this context which do not consider the totality of circumstances. *Drayton*, 536 U.S. at 203-04 (overruling Eleventh Circuit's rule that it would suppress any evidence obtained during suspicionless drug interdiction efforts aboard buses in the absence of a warning that passengers may refuse to cooperate); *Bostick*, 501 U.S. at 433-39 (overruling Florida Supreme Court's adoption of a *per se* rule that an impermissible seizure of bus passengers results when police mount a drug search on buses during scheduled stops and question passengers without reasonable suspicion, regardless of the other circumstances attendant to the encounter).

Taking a cue from the Supreme Court's cases, courts rely upon a variety of factors in conducting the consent analysis. *See United States v. Thompson*, 546 F.3d 1223, 1226 (10th Cir. 2008) (listing factors). However, the Tenth Circuit holds as part of its caselaw that "this list of factors is not exhaustive and . . . **'no one factor is dispositive.'"** *Id.* (quoting *United States v. Abdendi*, 361 F.3d 1282, 1291 (10th Cir. 2004)) (emphasis added). "Any analysis approaching a *per se* rule in this as in other Fourth Amendment contexts is prohibited." *United States v. Broomfield*, 201 F.3d 1270, 1274 (10th Cir. 2000) (citing *Bostick*, 501 U.S. at 439-40).

To be sure, that an officer blocks a pedestrian's path, or otherwise impedes his progress, are "facts . . . particularly worth noting." *Bostick*, 501 U.S. at 432. However, consideration of the *totality of the circumstances* is necessary in the Fourth Amendment context. The Opinion does not do this, instead ruling that a seizure occurred because Officer Goushas blocked the defendant's path.

In the present case, Officer Goushas gave the defendant no reason to believe that he was required to stop and answer the officer's questions. *See Bostick*, 501 U.S. at 435 ("When police attempt to question a person who is walking down the street or through an airport lobby, it makes sense to inquire whether a reasonable person would feel free to continue walking."). When Officer Goushas approached the defendant, he did not brandish a weapon or make any intimidating movements. There is no evidence he activated his emergency lights or otherwise projected a spotlight or headlights into the defendant's face. Nor is there evidence that Officer Goushas spoke in an aggressive or authoritative tone of voice. Nor did he touch the defendant. Instead, the record shows he politely inquired whether he could ask the defendant some questions. Indeed, the first question he asked the defendant---"[h]ey, can I talk to you for a second?"---alone suggests the defendant was free to disregard the officer and continue on his way.

The only real factor weighing in favor of finding a seizure is the officer's placement of his patrol unit in the path of the defendant's travel. Considering the totality of the circumstances, this factor is relatively innocuous. The

defendant continued walking towards the patrol unit, even after Officer Goushas parked and got out of the car. So, from the outset, the mere placement of the police car did not immediately impede the defendant's travel. That the defendant continued walking towards the officer *and* the patrol unit suggests the defendant felt no compulsion whatsoever to stop. Combined with the balance of additional factors mentioned above---not the least of which was Officer Goushas's question to the defendant suggesting he was free to disregard the officer---the defendant here was not seized in the Fourth Amendment sense.

Beyond the consent inquiry, there remains to be determined the related question of the voluntariness of the defendant's actual consent to search. *See Drayton*, 536 U.S. at 206 ("We turn now from the question whether respondents were seized to whether they were subjected to an unreasonable search, *i.e.*, whether their consent to the suspicionless search was involuntary."). The Supreme Court has held that "[v]oluntariness is a question of fact to be determined from all the circumstances . . . ." *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). This Court has adopted and applied this same rule. *See, e.g., Lyons v. State*, 1989 OK CR 86, ¶ 9, 787 P.2d 460, 464; *Davis v. State*, 1982 OK CR 14, ¶ 9, 640 P.2d 573, 575. Generally, this Court "will refuse to reverse a trial court's determination of voluntariness where there is competent evidence reasonably tending to support the judge's findings." *Sullivan v. State*, 1986 OK CR 39, ¶ 12, 716 P.2d 684, 687.

Here, as below, the defendant argues that because his seizure was unlawful, if follows that the subsequent search was unlawful and any evidence obtained therefrom should have been suppressed. The Supreme Court explicitly held in *Drayton* that "[i]n circumstances such as these, where the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts." *Drayton*, 536 U.S. at 206. "This Court uses the same test for the voluntariness of consent as is used in federal courts; the test for voluntariness is to be judged from a totality of the circumstances." *State v. Goins*, 2004 OK CR 5, ¶ 19, 84 P.3d 767, 771 (citing *Ohio v. Robinette*, 519 U.S. 33, 40 (1996); *Schenckloth v. Bustamonte*, 412 U.S. 218 (1973); *Van White v. State*, 1999 OK CR 10, ¶ 45, 990 P.2d 253, 267). Here, the State showed by clear and convincing evidence that the defendant's waiver was a free and voluntary act. *Goins*, 2004 OK CR 5, ¶ 19, 84 P.3d at 771 ("When the State claims that there is consent, the proof offered by the State must be 'clear and convincing that the waiver was a free and voluntary act.'"). Any finding to the contrary is wholly unsupported by the record.

Everything that took place between Officer Goushas and the defendant suggests it was cooperative. There is no evidence of coercion surrounding Officer Goushas's request to search and there was nothing confrontational about it. The record does not support that, under all the circumstances here, the defendant's consent was the product of threats or force, or that it was granted only in submission to a claim on lawful authority. *See Bustamonte*, 412 U.S. at 233 (identifying these factors in conducting the voluntariness

inquiry). Based on the totality of the circumstances, the defendant's consent was unquestionably voluntary. I would therefore reverse the district court's order suppressing the evidence in this case and remand for further trial proceedings.