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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2352**

Merwin Leroy Odenbaugh, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed November 25, 2008
Affirmed
Lansing, Judge**

Washington County District Court
File No. 82-C6-06-003160

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Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Minge, Judge.

UNPUBLISHED OPINION

LANSING, Judge

Merwin Odenbaugh appeals the district court's order sustaining the revocation of his driver's license under the implied-consent law. Odenbaugh argues that the investigating officer obtained evidence of alcohol impairment in violation of the United States and Minnesota Constitutions. We conclude that the officer was constitutionally justified in taking the limited, investigative actions that resulted in obtaining the evidence of impairment, and we affirm.

FACTS

Woodbury police received a report in the afternoon of April 29, 2006, that a mini-van had just struck another vehicle in a Home Depot parking lot and then drove away. An eyewitness provided the license number of the departing mini-van. Using the license-plate information to obtain the name and address of the registered owner, a Woodbury police officer drove directly to that address and arrived as the mini-van was proceeding up the driveway and into the middle bay of a three-car garage. The officer watched as the driver, Merwin Odenbaugh, got out of the mini-van as the garage door closed. The officer did not try to prevent the garage door from closing but, instead, crossed the driveway to where he had noticed a window in an enclosed area that connected the garage to the house. He stood where he could see in the window.

When Odenbaugh passed through that enclosed area on his way from the garage, the officer waved and gestured to him. The officer's gestures consisted of pointing and making an upward motion, indicating that he wanted Odenbaugh to return to the garage

and open the garage door. Odenbaugh complied, opening the door to the first bay of the garage, and met the officer there. It was raining, and the officer asked if he could step inside to speak with Odenbaugh. This interaction between the officer and Odenbaugh was cordial and “very cooperative.”

During the ensuing conversation and examination of Odenbaugh’s mini-van, the officer noticed that Odenbaugh was having difficulty balancing and speaking clearly. He performed a preliminary breath test on Odenbaugh and then called another officer who took over the investigation and performed field sobriety tests. Odenbaugh was arrested for driving while impaired.

At an implied-consent hearing, Odenbaugh challenged the revocation of his license, saying that the officer’s actions summoning Odenbaugh back to the garage amounted to a seizure that was not reasonably based on an adequate degree of suspicion. Odenbaugh argued that the remaining events in the garage culminating in his arrest were the fruit of the illegal entry. The district court sustained the revocation on written findings that the officer, when he gestured to Odenbaugh, was in an area “impliedly open” to the public. The district court found that Odenbaugh voluntarily consented to contact by reentering the garage, opening the garage door, and speaking with the officer. Odenbaugh now appeals.

D E C I S I O N

The two questions presented in this appeal are whether the police officer’s actions resulted in a seizure within the meaning of the Fourth Amendment and, if so, whether the officer possessed the degree of suspicion constitutionally required for the degree of

seizure involved. The reasonableness of a search and seizure is a question of law, which we review de novo. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005). We review the district court’s underlying findings of fact for clear error. *Id.*

I

The United States Constitution and the Minnesota Constitution protect against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Not every interaction between people and police amounts to a seizure. *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993). To be reasonable, a limited, investigatory seizure requires a “particularized and objective” suspicion, while a seizure amounting to an arrest generally requires probable cause. *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). And an arrest of a person inside the home requires a warrant in addition to probable cause, unless some exception to the warrant requirement applies. *State v. Perkins*, 582 N.W.2d 876, 878 (Minn. 1998).

To determine which legal standard applies, we must first analyze whether the police officer’s actions resulted in an investigatory seizure or an arrest. *State v. O’Neill*, 299 Minn. 60, 68, 216 N.W.2d 822, 827 (1974). A person has been arrested when circumstances exist that would cause a reasonable person to conclude that he was “under arrest” and not free to leave. *State v. Beckman*, 354 N.W.2d 432, 436 (Minn. 1984). A reasonable person would typically conclude that he was under arrest if his freedom of movement is directly restrained by handcuffs, *State v. Moorman*, 505 N.W.2d 593, 599 (Minn. 1993); the person has been detained in the back of a squad car for an extended period, *State v. Lohnes*, 344 N.W.2d 605, 610 (Minn. 1984); or the person is otherwise

restricted beyond what is necessary for the purpose of an investigatory stop. *See State v. Blacksten*, 507 N.W.2d 842, 847 (Minn. 1993) (concluding that continuing to hold suspect while seeking search warrant was “not a reasonable pre-arrest investigatory stop”). In some circumstances, actions by police outside a home can amount to an arrest of a person inside the home. *See State v. Riley*, 568 N.W.2d 518, 523 (Minn. 1997) (holding that forty-five armed members of Emergency Response Unit surrounding home was arrest because these circumstances “would communicate to a reasonable person . . . an attempt by the police to capture or seize or otherwise to significantly intrude on the person’s freedom of movement”).

In other circumstances, actions that result in direct physical restraint may not rise to the level of arrest. *See State v. Herem*, 384 N.W.2d 880, 883 (Minn. 1986) (concluding that suspect was not in custody when required to sit briefly in back of police car); *State v. Nading*, 320 N.W.2d 82, 84 (Minn. 1982) (concluding that no arrest occurred when suspect was ordered to lie on ground); *O’Neill*, 299 Minn. at 67-68, 216 N.W.2d at 828 (same, suspects held at gun-point). Similarly, arrest does not necessarily occur when an officer outside a home merely summons a person inside to come to the door. *State v. Patricelli*, 324 N.W.2d 351, 354 (Minn. 1982); *see United States v. Gori*, 230 F.3d 44, 53 (2d Cir. 2000) (holding that neither warrant nor probable cause was required for seizure that occurred after occupants opened door for delivery person and police then asked them to step outside). In *Patricelli*, arrest inside the suspect’s home would have been illegal, but the supreme court determined that the arrest was constitutional because it did not take place until *after* the suspect voluntarily came to the

door's threshold. 324 N.W.2d at 352, 354; *see also* 3 W. LaFave, *Search and Seizure* § 6.1(e), at 307 (4th ed. 2004) ("It has been deemed unobjectionable that [a suspect] came outside at the request of police . . .").

Based on the record presented, we conclude that the police officer did not arrest Odenbaugh by summoning him to his garage door and asking to speak with him. This "gesturing" summons cannot reasonably be analogous to the forty-five-member Emergency Response Unit descending on a home in *Riley*; it is more comparable to the *Patricelli* circumstance of summoning the occupant to come to the door. Testimony at the hearing unequivocally established that the officer was the only officer present when he looked through the window into Odenbaugh's mudroom, that he had not activated the squad car's flashing lights, that he did not display a weapon, that he said nothing at all while gesturing, and that the interaction was cordial and cooperative when the officer asked Odenbaugh for permission to step in out of the rain.

The officer's gesturing consisted of waving to get Odenbaugh's attention, pointing to the garage door, and then making an upward motion to indicate he wanted Odenbaugh to open the garage door. The officer was not pressing up against the window or otherwise taking aggressive or intimidating actions. The district court specifically found that, at the time of gesturing, the officer remained in a place "impliedly open to the public." The photos offered in evidence by Odenbaugh clearly show that the officer could see into the room simply by standing at the edge of the driveway.

Taken as a whole, these actions cannot be said to have effected an arrest of Odenbaugh. Motioning for Odenbaugh to come to the door did not impose any physical

restraint and cannot reasonably be understood as an attempt “to capture or . . . significantly intrude” on his physical liberty. *Riley* 568 N.W.2d at 523. From where Odenbaugh stood, he was open to public view, and a reasonable person seeing an officer gesture at him would not conclude, based on this action alone, that he was under arrest. *See, e.g., United States v. Laboy*, 979 F.2d 795, 799 (10th Cir. 1992) (“[M]erely motioning a person to approach a police officer, unaccompanied by verbal communication or show of force, is not inherently coercive.”). Nor does an interaction become coercive simply because a person feels “moral and instinctive pressure to cooperate” with a police officer. *State v. Hanson*, 501 N.W.2d 677, 680 (Minn. App. 1993) (citing 3 W. LaFare, *Search and Seizure* § 9.2(h), at 411-12 (2d ed. 1987)), *rev’d on other grounds*, 504 N.W.2d 219 (Minn. 1993).

Having decided that the officer’s actions, even if they resulted in a seizure, did not amount to an arrest requiring probable cause, we turn to the question of whether the officer’s actions were supported by a reasonable, articulable suspicion.

II

Constitutional protections against unreasonable seizures do not forbid a limited, investigatory seizure if it is based on a reasonable, articulable suspicion of criminal activity. *State v. Richardson*, 622 N.W.2d 823, 825 (Minn. 2001). To establish this level of suspicion, an officer must show “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968)). Whether reasonable suspicion justifies an investigatory stop is

evaluated on the totality of the circumstances. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

When considering the source of the officer's suspicion, we presume that a disinterested private citizen is a reliable reporter of information. *State v. Jones*, 678 N.W.2d 1, 11 (Minn. 2004). If an officer does not personally observe the behavior that gives rise to his suspicion and relies solely on an anonymous tip, that tip must have provided "at least some specific and articulable facts to support the bare allegation of criminal activity." *Olson v. Comm'r of Pub. Safety*, 371 N.W.2d 552, 556 (Minn. 1985) (concluding that tip failed as sole basis for reasonable suspicion). The tipster does not need to provide extensive information. *Id.* The officer only needs to show that the investigatory seizure was not based on "mere whim, caprice, or idle curiosity," nor on the "mere whim" of the tipster. *Id.*

The district court made no specific findings on the source of the police officer's information, other than to say that the officer "obtained the license plate number and description" of Odenbaugh's vehicle. But the testimony relating to the chain of communication is not disputed. A customer at Home Depot witnessed the accident firsthand and wrote down the license number of Odenbaugh's mini-van. The customer reported the accident to store personnel who then contacted police. The police, in turn, located the owner of the damaged vehicle. The name of the witness was unknown, but the officer ran the license-plate number to get Odenbaugh's name and address and arrived at Odenbaugh's house in time to see the vehicle being driven up the driveway and into the garage.

Because the officer did not personally see any driving behavior that would lead him to suspect that Odenbaugh committed a traffic offense, the witness's account is the only source for the officer's suspicion. The information provided is adequate, however, and sufficiently distinct from the inadequate tip in *Olson*. The eyewitness account in *Olson* had not described any of the driver's conduct, but merely indicated that an observed driver was "possibly" drunk. The supreme court could find no assurance that the report was other than a caller's whim. *Id.* But the Woodbury officer knew that the customer who provided the information had been in the Home Depot parking lot and had witnessed the accident. The witness reported sufficient details for Home Depot to locate the driver whose vehicle had been struck and to report the incident to the police. These facts reflect the disinterested report of a private citizen, not whim or caprice. The tip had sufficient detail and reliability, even without police corroboration of illegal driving behavior.

The basis of the officer's suspicion was sufficient to reasonably justify a minor intrusion on the liberty interests of the suspect vehicle's driver. Stopping Odenbaugh for questioning by gesturing to him through a window in an enclosed area between his garage and his home and then speaking to him in his garage was justified. We affirm the district court's decision to uphold the revocation of Odenbaugh's license.

Affirmed.