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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0784**

State of Minnesota,
Respondent,

vs.

Jerel Edward Bellanger,
Appellant.

**Filed March 11, 2013
Affirmed
Kalitowski, Judge**

Becker County District Court
File No. 03-CR-11-456

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Michael Fritz, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

On appeal from his conviction of first-degree driving while impaired (DWI), test refusal, appellant Jerel Bellanger argues that the district court (1) erred in denying his

motion to dismiss because he was unlawfully seized when the arresting police officer followed his vehicle and partially blocked his vehicle in a private driveway, and (2) abused its discretion by denying his motion for a downward dispositional departure. We affirm.

DECISION

I.

“When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence.” *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). When there is no factual dispute, we “must determine whether a police officer’s actions constitute a seizure.” *Id.* “The district court’s factual findings are reviewed under the clearly erroneous standard, but we review the district court’s legal determinations de novo.” *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006). We give deference to the district court’s credibility determinations. *State v. Klamar*, 823 N.W.2d 687, 691 (Minn. App. 2012) (citing *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989)).

Bellanger moved to dismiss the charges against him on the basis that he was unlawfully seized when a police officer followed Bellanger’s vehicle in a marked squad car and parked behind Bellanger’s vehicle in a private driveway, partially blocking his vehicle. At a contested omnibus hearing, respondent State of Minnesota presented testimony of the officer and a video taken from the officer’s squad car. In a thorough and well-reasoned memorandum, the district court found that the officer was a credible

witness whose testimony comported with the video, and supported the district court's conclusion that the officer did not seize Bellanger. The district court denied Bellanger's motion to dismiss the complaint, and the parties submitted the case to the district court on stipulated facts under *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). The district court found Bellanger guilty of first-degree DWI, test refusal. Bellanger argues that the district court erred by denying his motion to dismiss. We disagree.

Both the Minnesota and United States Constitutions protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A seizure occurs “when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 1879 n.16, (1968)). When determining whether a seizure has occurred, a reviewing court determines whether a police officer's actions would lead a reasonable person under the same circumstances to believe that he was not free to leave. *State v. Hanson*, 504 N.W.2d 219, 220 (Minn. 1993). Whether a seizure has occurred depends on the totality of the circumstances, as applied to a reasonable person. *Harris*, 590 N.W.2d at 98. Circumstances that may indicate a seizure took place include the threatening presence of several officers, an officer's display of a weapon, physical touching of the person, or language or tone of voice indicating that compliance with an officer's request might be compelled. *Id.*

There is no seizure for constitutional purposes when an officer walks up to an already-stopped car and converses with the driver. *State v. Vohnoutka*, 292 N.W.2d 756,

757 (Minn. 1980); *Crawford v. Comm'r of Pub. Safety*, 441 N.W.2d 837, 839 (Minn. App. 1989). But a seizure may occur if the police order a suspect out of a vehicle or “engage in some other action which one would not expect between two private citizens, such as boxing a car in.” *Klotz v. Comm'r of Pub. Safety*, 437 N.W.2d 663, 665 (Minn. App. 1989), *review denied* (Minn. May 24, 1989).

Here, the officer testified that while on patrol duty in Becker County, he observed a vehicle make a wide turn into the oncoming lane of traffic when turning from a county highway onto a dirt road. The officer observed the vehicle stop at an intersection and make one more turn before turning into a private driveway. The vehicle pulled up in front of the house next to another vehicle, and the officer pulled into the driveway behind the vehicle, but left sufficient space for a vehicle to exit or enter the driveway around his squad car. The driver and a passenger exited the vehicle and walked toward the officer’s vehicle. The officer did not request, command, or physically indicate that the individuals remain still or approach his squad. And at no point did the officer activate his emergency lights or siren. After the individuals approached the squad car, the officer identified the driver as Bellanger. As the district court found, the squad video comports with the officer’s testimony.

Bellanger relies on three cases to support his argument that he was seized. We conclude that all three cases are distinguishable. In *State v. Sanger*, 420 N.W.2d 241, 242-43 (Minn. App. 1988), this court concluded that a seizure occurred when an officer parked his squad car so that a vehicle could not drive away, did not move his squad car to permit the vehicle to leave when it attempted to do so, and then activated the squad’s

flashing red lights and honked the horn. In *Klotz*, this court held that an officer's show of authority constituted a seizure where the officer pulled his squad car behind a vehicle, partially blocking it, and called out to the driver, who had exited his vehicle and was walking away, to identify himself. 437 N.W.2d at 665. And in *State v. Bergerson*, 659 N.W.2d 791, 795-96 (Minn. App. 2003), this court held that an officer's activation of his squad car's flashing red lights after immediately following behind a vehicle for "some time" was a show of authority that amounted to a seizure.

Here, on the other hand, while the vehicles were in motion the officer did not drive directly behind Bellanger's vehicle or activate the squad's flashing red lights. Nor did the officer block in Bellanger's vehicle or, at any time after the vehicles were parked, activate the squad car's emergency lights or horn. And the officer did not call out to Bellanger, request that Bellanger speak with him, or approach Bellanger's vehicle. Instead, Bellanger parked his vehicle, exited, and approached the officer's squad car. Because we conclude that on these facts Bellanger was not seized, the district court did not err in denying Bellanger's motion to dismiss the complaint.

II.

We review sentences for an abuse of discretion. *State v. Ford*, 539 N.W.2d 214, 229 (Minn. 1995). Generally, we will not interfere with a sentencing court's decision to decline to depart from the presumptive sentence. *State v. Brusven*, 327 N.W.2d 591, 593 (Minn. 1982). It is a "rare case" that warrants reversal of a district court's refusal to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

The sentencing court denied Bellanger's motion for a downward dispositional sentencing departure and sentenced him to the presumptive sentence of 60 months' imprisonment. Bellanger argues that the sentencing court abused its discretion because he offered "considerable evidence" that he was particularly amenable to treatment and probation and that he would not be a danger to public safety. We disagree.

When considering a downward dispositional departure, the sentencing judge may focus "on the defendant as an individual and on whether the presumptive sentence would be best for [the defendant] and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). A significant consideration in determining whether to grant a dispositional departure is a defendant's amenability to probation. *State v. Wright*, 310 N.W.2d 461, 462-63 (Minn. 1981). A defendant's amenability to probation, in turn, depends on a number of factors, which may include "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

Here, the record indicates that the sentencing court considered all of the information that Bellanger presents on appeal. The court acknowledged Bellanger's successful history on probation and the probation agent's report that in the past Bellanger was easy to supervise and was a successful probationer. And the court recognized that Bellanger has many obligations and many people who count on him, including his four children. But the court also considered the significance of the fact that Bellanger reoffended less than one year after the conclusion of his previous probationary period, and that Bellanger had previously been convicted of criminal vehicular homicide. The

court also noted that the current offense involved a preliminary breath test that indicated Bellanger had an alcohol concentration in excess of .20, Bellanger was unreasonable and violent with police when arrested, and that Bellanger violated the conditions of his release. Moreover, although the probation officer reported that Bellanger had been compliant in the past while on probation, he recommended the presumptive sentence.

The sentencing court concluded that Bellanger was not amenable to probation and was a danger to public safety. The court's findings are not clearly erroneous. Because it appropriately considered and rejected the reasons presented in support of departure, we conclude that the court did not abuse its discretion by refusing to depart from the guidelines.

Affirmed.