STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1735

Christopher Munyiri Mwangi, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed April 22, 2008
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CV-06-1271

James R. Loraas, Loraas & Loraas, 8400 Normandale Lake Blvd., Suite 920, Bloomington, MN 55437 (for appellant)

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Considered and decided by Halbrooks, Presiding Judge; Klaphake, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges the district court's order sustaining the revocation of his driver's license following an implied-consent hearing, arguing that the Fourth Judicial

District's (Hennepin County) procedures violated his right to due process and arguing that the district court erred when it determined that appellant was not subjected to an unlawful seizure by the arresting officer. Because we conclude that appellant's due-process rights were not violated and that the district court did not err, we affirm.

FACTS

The district court made findings of fact based on the testimony presented. On January 15, 2006, Officer Todd Severson of the Bloomington Police Department was patrolling a municipal parking lot when he noticed appellant Christopher Mwangi's vehicle parked in the lot. Officer Severson stopped his squad car for a period of 15-20 seconds behind appellant's vehicle to run a routine check on the vehicle's license plate. Appellant was in the vehicle. Officer Severson did not activate his emergency lights, use his siren, use his spotlight, or block the vehicle from moving forward. Officer Severson then drove from this position and checked the license plate of another vehicle in the parking lot. In the meantime, Officer Severson learned that an arrest warrant was outstanding for the registered owner of appellant's vehicle. So he returned to appellant's vehicle, parked behind it, activated his emergency lights, and called for backup. Once backup arrived, Officer Severson arrested appellant based on the warrant.

During this process, the officer noticed an odor of alcohol on appellant's breath, administered a preliminary breath test to check for alcohol consumption, and informed appellant that he was also under arrest for driving while impaired (DWI). Appellant was issued a notice that his license would be revoked and that the revocation would take effect seven days later.

On January 24, 2006, appellant petitioned for judicial review of his license revocation and, by letter, requested a "judicial stay of the balance of the revocation period pursuant to Minn. Stat. 169A.53 [subd. 2(c)], and petitioner's driving privileges be reinstated pending resolution of the criminal matter and implied consent hearing." Pursuant to the Hennepin County Fast Track DWI Program, on January 25, 2006, the district court stayed appellant's implied-consent revocation pending resolution of the criminal and implied-consent hearings. Following the implied-consent hearing on June 9, 2006, the district court rejected appellant's challenge to the validity of his seizure and his challenge to Hennepin County's implied-consent procedures and sustained the revocation of his driver's license. This appeal follows.

D E C I S I O N

As a preliminary matter, we address respondent's claim that appellant lacks standing to challenge Hennepin County's Fast Track DWI Program. We hold that appellant has standing to challenge the Fast Track program as an alleged violation of his right to due process. *See Riehm v. Comm'r of Pub. Safety*, 745 N.W.2d 869, 873 (Minn. App. 2008), *pet. for review filed* (Minn. Apr. 4, 2008) (holding that a driver has standing to challenge the district court's policy because he asserted that he suffered "direct and personal harm" when his driver's license was revoked and his implied-consent hearing was not held within 60 days of the filing of his petition for review).

I.

Appellant argues that the officer's initial positioning of his patrol car behind appellant's car, while checking appellant's license plate, constituted an unlawful seizure of him. We review a district court's determination of the legality of a limited investigatory stop de novo and "determine whether the police articulated an adequate basis for the search or seizure at issue." *State v. Timberlake,* 744 N.W.2d 390, 393 (Minn. 2008) (quoting *State v. Flowers*, 734 N.W.2d 239, 247-48 (Minn. 2007)); *see also Berge v. Comm'r of Pub. Safety,* 374 N.W.2d 730, 732 (Minn. 1985). "In doing so, we review findings of fact for clear error, giving due weight to the inferences drawn from those facts by the district court." *State v. Britton,* 604 N.W.2d 84, 87 (Minn. 2000) (quoting *State v. Lee,* 585 N.W.2d 378, 383 (Minn. 1998) (quotation omitted)). We will not reverse the district court's findings of fact unless they are clearly erroneous. *Thompson v. Comm'r of Pub. Safety*, 567 N.W.2d 280, 281 (Minn. App. 1997), *review denied* (Minn. Sept. 26, 1997); *see also* Minn. R. Civ. P. 52.01.

The United States and Minnesota constitutions protect against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. "To determine whether this constitutional prohibition has been violated, we examine the specific police conduct at issue." *Timberlake,* 744 N.W.2d at 393. An investigatory stop does not violate the prohibition against unreasonable search and seizure if the officer has a reasonable articulable suspicion of criminal activity. *Terry v. Ohio,* 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968). A seizure has occurred if, in view of the circumstances surrounding the incident, "a reasonable person would have believed that he or she was

neither free to disregard the police questions nor free to terminate the encounter." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999) (quoting *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995)). "[C]ourts generally have held that it does not by itself constitute a seizure for an officer to simply walk up and talk to a person standing in a public place or to a driver sitting in an already stopped car." *State v. Vohnoutka*, 292 N.W.2d 756, 757 (Minn. 1980) (citing 3 W. LaFave, *Search and Seizure* § 9.2(g) (1978)); *see also State v. Alesso*, 328 N.W.2d 685, 687 (Minn. 1983) (relying on LaFave and *Vohnoutka*); *Overvig v. Comm'r of Pub. Safety*, 730 N.W.2d 789, 792 (Minn. App. 2007) (stating that ordinarily the mere act of approaching someone in a parked car and asking questions is not a seizure), *review denied* (Minn. Aug. 7, 2007); *Crawford v. Comm'r of Pub. Safety*, 441 N.W.2d 837, 839 (Minn. App. 1989) (stating that it is not a seizure for an officer to walk up and talk to someone in a stopped car). The encounter becomes a seizure under the Fourth Amendment if an officer orders a person out of a car or some other police action occurs which one would not expect if the encounter was between two private citizens, for example, boxing in a car, approaching a car on all sides by many officers, or using flashing lights as a show of authority. *State v. Sanger*, 420 N.W.2d 241, 243 (Minn. App. 1988).

Appellant argues that *Sanger* supports a conclusion that he was seized when Officer Severson initially positioned his patrol car behind his car. But *Sanger* is inapposite because the facts are easily distinguished. In *Sanger*, the officer parked behind a car, activated his red emergency lights, and honked his horn when the car attempted to leave. *Id.* at 242. In the case before us, the district court made credibility

determinations and findings of fact based on conflicting testimony offered at the implied-consent hearing. Based upon the district court's findings, Officer Severson did not activate his spotlight when reading appellant's license-plate number, did not block in appellant's car when positioning his patrol car behind appellant's car, and did not engage in any outward show of authority. Only after Officer Severson was notified by dispatch that an arrest warrant had issued for the registered owner of appellant's car did the officer actually initiate an investigatory stop. We give deference to the district court's credibility determinations and findings of fact and will not reverse them unless they are clearly erroneous. Minn. R. Civ. P. 52.01. The district court's findings are not clearly erroneous. In the absence of a demonstration of authority by the officer, a reasonable person would not have concluded he was subject to a seizure under the circumstances in this case and we conclude that appellant was not unlawfully seized.

II.

Relying on *Fedziuk v. Comm'r of Pub. Safety,* 696 N.W.2d 340, 348 (Minn. 2005), appellant argues that because of the Hennepin County Fast Track DWI Program, he was not provided an implied-consent hearing within the 60-day time frame set forth in Minn. Stat. § 169.53, subd. 3(a) (Supp. 2005), in violation of his right to due process, and that the district court's stay of the revocation of his license is not an adequate remedy. Our review of this constitutional question involves the application of law to undisputed facts; thus, our review is de novo. *State v. Wiltgen*, 737 N.W.2d 561, 566 (Minn. 2007); *Fedziuk*, 696 N.W.2d at 344.

In *Fedziuk*, the Minnesota Supreme Court

> concluded that the statutory elimination of the requirement for a prompt postrevocation review violated due process and [the supreme court] revived the version of the statute that existed before the 2003 amendments and contained the requirement that the implied consent hearing be "held at the earliest practicable date, and in any event no later than 60 days following the filing of the petition for review."

Wiltgen, 737 N.W.2d at 568 (discussing *Fedziuk*).

In *Wiltgen*, the supreme court considered the Hennepin County Fast Track DWI Program in light of its decision in *Fedziuk*. The *Wiltgen* court said:

> [T]he adverse effect on the private interest considered in *Fedziuk*, the loss of the driving privilege, could be reduced by the prompt restoration of the driving privilege. The Standing Order would not violate due process with respect to the driving privilege if the district court stayed the balance of the revocation period and reinstated the driving privilege. Thus, the combination of the Standing Order and the stay of the balance of the revocation period satisfied the concerns in *Fedziuk* about the driver's private interest in the driving privilege.

737 N.W.2d at 569.

In *Riehm v. Comm'r of Pub. Safety,* we held that the 60-day time frame set forth in Minn. Stat. § 169A.53 (2006) is directory, and not mandatory, because no sanction or consequence is imposed upon the district court for failing to meet the 60-day limit. 745 N.W.2d at 876 (citing *Szczech v. Comm'r of Pub. Safety*, 343 N.W.2d 305, 309 (Minn. App. 1984)); s*ee also Bendorf v. Comm'r Pub. Safety*, 727 N.W.2d 410, 415 (Minn. 2007) ("We did not, however, discuss, much less overrule, *Szczech* or hold that the 60-day time frame in Minn. Stat. § 169A.53, subd. 3 is mandatory."). In a case involving a

claim of due-process violation, "the issue is not whether the statutory language is directory or mandatory. The appropriate inquiry is . . . what level of prejudice has the driver suffered?" *Bendorf*, 727 N.W.2d at 415. "The prejudice inquiry is necessary because the Supreme Court has said so often as not to require citation that due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* (quotation omitted).

Based on *Riehm* and *Bendorf*, we reject appellant's argument that he has demonstrated prejudice. Noncompliance with the 60-day time frame in Minn. Stat. § 169A.53, subd. 3(a), does not warrant rescission of a license revocation absent a showing of prejudice. *Riehm*, 745 N.W.2d at 878.

Affirmed.