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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1305**

State of Minnesota,  
Respondent,

vs.

Walter David Draack,  
Appellant.

**Filed May 14, 2012  
Affirmed  
Stoneburner, Judge**

Becker County District Court  
File No. 03CR092849

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

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

Peter J. Timmons, Minneapolis, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Cleary, Judge; and  
Toussaint, Judge.\*

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**STONEBURNER**, Judge

Appellant challenges his conviction of felon in possession of a firearm, arguing that the district court erred by denying his motion to suppress the firearm as the fruit of an illegal seizure and dismissing the charge. In the alternative, appellant asserts that the district court abused its discretion by denying his motion for a downward durational departure from the presumptive 60-month sentence imposed. We affirm.

### FACTS

Because of past violations, appellant Walter David Draack was, at times relevant to this appeal, barred from fishing, hunting, or trapping. As a convicted felon, Draack was also prohibited from possessing any firearms.

Prior to the opening day of rifle deer hunting season on November 7, 2009, Conservation Officer Joseph Stattelmann had limited personal contacts with Draack . But Stattelmann was familiar with Draack because of numerous hunting, trapping, and fishing complaints he had received from anonymous citizens since the spring of 2006 when he was first stationed in Detroit Lakes.

At 6:30 a.m. on November 7, 2009, Stattelmann, who was traveling east on U.S. Highway 10, observed a black pickup truck that he recognized as belonging to Draack parked on the south side of the highway in an area that is popular for fishing, trapping, and hunting. Stattelmann pulled up behind the parked truck and activated the patrol car's rear hazard lights to alert approaching traffic. Stattelmann exited the patrol car and approached the driver's side of Draack's truck.

Stattelman and Draack gave conflicting testimony about what occurred next. The district court found Stattelman's testimony to be more credible. Stattelman testified that he noticed that Draack was holding a cell phone to his ear but did not appear to be talking. Stattelman told Draack to end his conversation and to put down the phone. Stattelman identified himself and asked Draack questions, including whether Draack had been hunting or fishing at that location. Draack said, "[N]o." Stattelman could see a box of rifle ammunition on top of a jacket on the passenger seat of Draack's truck. He asked Draack for identification. As Draack shifted his body to retrieve his driver's license, Stattelman saw a partially unzipped gun case with the stock of a rifle protruding from under the jacket. Stattelman asked Draack if there was anything in the truck that he should know about, and Draack said, "[N]o." Draack exited the truck at Stattelman's request and, after several requests, consented to a search of his truck. Stattelman searched the truck and found a live round in the chamber of the rifle. Stattelman placed Draack in handcuffs just as Conservation Officer Chris Vinton, whom Stattelman had called when he pulled up behind Draack's truck, arrived at the scene.

Draack testified that it was completely dark when Stattelman pulled up behind his truck and that when Stattelman got to the truck he told Draack to put down the phone, then reached into the truck, turned off the ignition, and took Draack's keys. Draack asserts that it was only after this seizure that Stattelman noticed the partially uncased rifle stock.

Draack was charged with one count of possession of a firearm by a felon, in violation of Minn. Stat. § 609.165, subd. 1b (a) (2008). Draack moved to suppress the

evidence of the firearm as the fruit of an illegal seizure. After a contested omnibus hearing, the district court denied the motion.

A jury found Draack guilty as charged. Prior to sentencing, Draack moved for a downward dispositional and/or durational departure from the sentencing guidelines. The district court denied the motion and sentenced Draack to the presumptive 60-month sentence. This appeal followed.

## D E C I S I O N

### I. Motion to suppress

“When reviewing pretrial orders on motions to suppress evidence, we review the facts to determine whether, as a matter of law, the [district] court erred when it failed to suppress the evidence.” *State v. Flowers*, 734 N.W.2d 239, 247 (Minn. 2007).

The weight and believability of witness testimony is an issue for the district court. *State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003). Making credibility determinations is the role of the fact-finder. *State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004). Appellate courts accord great deference to the district court’s credibility determinations. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992). We review a district court’s findings of fact for clear error. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009).

Draack argues that, even under the district court’s findings of fact, he was seized *before* Stattelmann noticed a rifle in Draack’s vehicle. Draack argues that he was seized when Stattelmann told him to end his phone call, had a conversation about fishing, hunting, and trapping at that location, and asked for his identification.

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. *State v. Davis*, 732 N.W.2d 173, 176 (Minn. 2007). Not all contact between police officers and individuals constitutes a seizure. *State v. Cripps*, 533 N.W.2d 388, 390 (Minn. 1995). A seizure “occurs only ‘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 a person is free to disregard the officer and terminate the encounter, there is no intrusion upon the person’s liberty or privacy, and therefore no seizure. *Cripps*, 533 N.W.2d at 391. A person has been seized when, “under the totality of circumstances, a reasonable person would believe that, because of the conduct of the police, he or she was not free to leave.” *State v. Bergerson*, 659 N.W.2d 791, 795 (Minn. App. 2003). Circumstances when a reasonable person would not feel free to leave may include “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.” *State v. Pfannenstein*, 525 N.W.2d 587, 588 (Minn. App. 1994) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980)), *review denied* (Minn. Mar. 14, 1995).

Ordinarily, the mere act of a police officer approaching a person sitting in a parked car and asking questions is not a seizure. *E.D.J.*, 502 N.W.2d at 782; *State v. Vohnoutka*,

292 N.W.2d 756, 757 (Minn. 1980); *Overvig v. Comm'r of Pub. Safety*, 730 N.W.2d 789, 792 (Minn. App. 2007), *review denied* (Minn. Aug. 7, 2007); *State v. Colosimo*, 669 N.W.2d 1, 4 (Minn. 2003) (holding that there was no seizure when a conservation officer walked up to a boat being trailered by a truck that was parked, conversed with the owner of the boat, and asked the owner if he had caught any fish, if so how many, and how the fish were packaged). But such an encounter may become a seizure if there is a demonstration of authority that exceeds the behavior to be expected by a private citizen, such as blocking in a person's vehicle, activating emergency lights, or sounding the horn. *State v. Sanger*, 420 N.W.2d 241, 243 (Minn. App. 1988). This court examines all of the facts to determine whether "the conduct of the police would communicate to a reasonable person in the defendant's physical circumstances an attempt by the police to capture or seize or otherwise to significantly intrude on the person's freedom of movement." *State v. Hanson*, 504 N.W.2d 219, 220 (Minn. 1993).

We conclude that Stattelmann's request that Draack end any telephone conversation and put down the phone so that Stattelmann could talk to him did not constitute a seizure. Stattelmann did not stop Draack's truck, did not block the truck, activated the emergency lights only for safety purposes, did not display a weapon or other show of force, did not touch Draack, and did not create any other circumstance that would lead Draack to believe that he was not free to leave. The district court credited Stattelmann's testimony that Draack was not talking on his cell phone when Stattelmann approached the truck, and the district court did not credit Draack's testimony that Stattelmann reached in, turned off the ignition, and took his keys. And we conclude that neither Stattelmann's brief

conversation asking Draack if he had been hunting, fishing, or trapping, nor the request for identification, constituted a seizure.

A request for identification is not always a seizure. *Pfannenstein*, 525 N.W.2d at 588 (holding that the defendant was not subjected to a seizure when the police officer asked for his license after the defendant first told the officer that he was having problems with his motorcycle, the officer did not prevent the defendant from leaving, and the officer made only a single request for the license). Under the “totality of the circumstances” test, the more intrusive a request for identification is, the more likely that it will be considered an investigative stop and, thus, a seizure. But all the circumstances of the encounter must be considered. *Id.* at 589. “[I]t is likely to be a seizure if a person is ordered out of a vehicle, or the police engage in some other action or show of authority which one would not expect between two private citizens.” *State v. Day*, 461 N.W.2d 404, 407 (Minn. App. 1990), *review denied* (Minn. Dec. 20, 1990). In this case, Stattelman was already conversing with Draack, who was in a vehicle that was parked in a public place, when Stattelman asked to see Draack’s identification. There was no evidence that Stattelman displayed any kind of authority or exercised intimidating conduct over Draack at the time of this request.

And, even if the request for identification could be construed as a seizure in this case, Officer Stattelman had observed a box of ammunition lying on top of a jacket on the passenger side of the vehicle before he asked Draack for identification. This observation, together with the circumstances of the location of Draack’s vehicle at dawn on the opening day of rifle deer hunting season and Stattelman’s knowledge that Draack

was prohibited from hunting, constituted reasonable, articulable suspicion that Draack was involved in, or about to be involved in, criminal activity, justifying any possible seizure that could be said to result from the officer's verification that the individual he was talking to was, in fact, Draack. We conclude that the district court did not err by denying Draack's motion to suppress evidence of the firearm.

## **II. Sentencing**

Draack sought a downward departure from the presumptive guidelines sentence of 60 months in prison, arguing that (1) the statutes concerning possession of a firearm by a felon did not contemplate prosecution of this kind of defendant for this kind of violation and (2) the district court failed to take into account the existence of mitigating factors.

At sentencing, the district court must impose the presumptive guidelines sentence unless "substantial and compelling circumstances" warrant departure. *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008); *see* Minn. Sent. Guidelines II.D. The district court's sentencing decision is discretionary, and this court will reverse only for a clear abuse of discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Even when reasons for departing downward from the presumptive guidelines exist, this court ordinarily will not alter the district court's sentencing decision. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). Only in a rare case will an appellate court reverse the imposition of a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Draack's argument that the prohibition-on-felons-possessing-firearms statutes do not contemplate his circumstances is based on Draack's assertion that he did not know

the gun was in the truck. But the jury found that Draack knowingly transported, possessed, or received a firearm, and the evidence in the record is sufficient to support this finding. Draack does not dispute that he is prohibited from possessing, receiving, or transporting a firearm, including a hunting rifle, under Minn. Stat. § 609.165, subd. 1b (a) (“Any person who has been convicted of a crime of violence, as defined in section 624.712, subdivision. 5, and who . . . possesses, or receives a firearm, commits a felony and may be sentenced to imprisonment for not more than 15 years . . .”). Draack was convicted of a crime specifically identified in the statute as a crime of violence. The legislature plainly contemplated the statute’s application to persons in Draack’s circumstances.

Draack presented the district court with evidence of mitigating factors, including stable employment and family support, but the existence of mitigating factors does not mandate a downward sentencing departure or that we substitute our discretion for that of the sentencing court. When evaluating a district court’s decision not to depart from the sentencing guidelines, “[a] reviewing court may not interfere with the sentencing court’s exercise of discretion, as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination.” *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011) (quoting *Van Ruler*, 378 N.W.2d 77, 80-81 (Minn. App. 1985)). If the district court considers reasons asserted for departure and chooses not to depart, it need not explain itself further. *Van Ruler*, 378 N.W.2d at 80. It is not enough for an appellant simply to point out that reasons for a downward departure exist. *Bertsch*, 707 N.W.2d at 668.

Here, in denying Draack’s motion for a departure, the district court reasoned that, “in order to depart there has to be substantial and compelling reasons to do something different than the legislature has directed that we do, and I don’t find any of those here.” The district court further iterated that the types of situations that might provide a basis for a departure—remorse, amenability to probation or where involvement in the crime is “something less than intentional”—were not present. Specifically, the district court found that Draack’s history on probation demonstrated an “inability to participate in probation successfully.” The district court considered Draack as an individual, weighed the reasons for departure against the reasons for nondeparture, and we are unable to say that the district court abused its discretion by declining to depart.

**Affirmed.**