IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff-Appellee,	)	
	)	
-vs-	)	
	)	
Robert Allen Schneider,	)	Supreme Ct. No. 20140153
	)	
Defendant-Appellant,	)	District Ct. No. 08-2013-CR-02947
.....	)	SA File No. M2337-13-11

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM JUDGMENT ENTERED UPON CONDITIONAL GUILTY PLEAS RESERVING THE RIGHT TO APPELLATE REVIEW OF THE DISTRICT COURT'S ORDER DENYING MOTION TO SUPPRESS, ENTERED ON APRIL 14, 2014

Burleigh County District Court
South Central Judicial District
The Honorable Bruce B. Haskell, Presiding

Christine H. McAllister
Burleigh County Assistant State's Attorney
Courthouse, 514 East Thayer Avenue
Bismarck, North Dakota 58501
Phone No: (701) 222-6672
BAR ID No: 07230
Attorney for Plaintiff-Appellee

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STATEMENT OF THE ISSUE

1. Whether the district court erred in denying Schneider's motion to suppress.

STATEMENT OF FACTS

On November 6, 2013, Deputy Vyska conducted a welfare check on the Schneider's parked vehicle. Schneider was parked alone on a dirt road at a late hour and it was completely dark outside. This is also a suspicious area due to drug violations. Officer Vyska pulled in behind Schneider but not blocking him, parked his car, and turned on his yellow lights to illuminate the area and make his vehicle visible to anyone else pulling into this area. Schneider's vehicle remained parked and stopped and made no attempt to move or leave when Deputy Vyska pulled in. Deputy Vyska did approach Schneider in a conversational manner and asked who he was and what was going on. During this encounter Deputy Vyska asked Schneider if he had anything illegal in his car and for permission to search, and Schneider voluntarily consented.

ARGUMENT

Schneider argues the district court erred in denying his Motion to Suppress because he believes Deputy Vyska's actions went beyond that of a welfare check, and there was no reasonable suspicion to seize him. The Record does not support his position.

It has been held that "the law distinguishes between approaching an already stopped vehicle and stopping a moving one." Rist v. N.D. Dep't of Transp., 2003 ND 113, ¶ 8, 665 N.W.2d 45 (citing State v. Franklin, 524 N.W.2d 603, 604 (N.D. 1994)). "No seizure within the context of the Fourth Amendment occurs when an officer approaches a parked vehicle 'if the officer inquires of the occupant in a conversational manner, does not order the person to do something, and does not demand a response.'" Rist, supra (citing State v. Langseth, 492 N.W.2d 298, 300 (N.D. 1992)).

Not all personal intercourse between policemen and citizens involves seizure, and there is a seizure only when an officer, by means of physical force or show of authority, has in some way restrained the citizen's liberty. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). A consensual encounter between an officer and a private citizen does not implicate the Fourth Amendment. United States v. Jones, 269 F.3d 919 (8th Cir. 2001). Forums that are readily accessible to the public and not generally thought of as a place normally used as a residence have a reduced expectation of privacy. United States v. Holleman, 12-CR-40-LRR, 2012 WL 6201748 (N.D. Iowa Dec. 12, 2012).

"[I]t is not a seizure for an officer to walk up to and talk to a person in a public place." City of Mandan v. Gerhardt, 2010 ND 112, ¶ 8, 783 N.W.2d 818. "The test of custody is formal arrest or restraint on freedom of movement to the degree associated with formal arrest." State v. Haibeck, 2004 ND 163, ¶ 25, 685 N.W.2d 512. The test is an objective evaluation and "does not depend on the arresting officers' subjective motive or thoughts." Id. "When evaluating whether a person is in custody the only relevant inquire is how a reasonable man in the suspect's position would have understood the situation." Id.

> Not every law enforcement contact with a citizen is a seizure, and law enforcement officers do not violate the Fourth Amendment merely by approaching individuals on the street or in other public places. United States v. Drayton, 536 U.S. 194, 200, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002). In Drayton, at 201, 122 S.Ct. 2105, the United States Supreme Court explained that as long as law enforcement officers do not induce cooperation by coercive means, they may pose questions and ask for consent to search even when they have no basis for suspecting criminal activity. A seizure does not occur simply because a law enforcement officer questions a person, and as long as reasonable persons would feel free to disregard the officer and go about their business, the encounter is consensual and a reasonable suspicion of criminal activity is not required. Florida v. Bostick, 501 U.S. 429, 434–35, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). If reasonable persons would feel free to terminate the encounter, they have not been seized under the Fourth Amendment. Drayton, at 201, 122 S.Ct. 2105. To constitute a seizure, an officer must in some way restrain an individual's liberty by physical force or show of authority. City of Fargo v. Ovind, 1998 ND 69, ¶ 7, 575 N.W.2d 901. In Fields, 2003 ND 81, ¶ 11, 662 N.W.2d 242, we have said a person has been seized within the meaning of the Fourth Amendment, if, in view of all the surrounding circumstances, a reasonable person would have believed he or she was not free to leave the scene.

State v. Guscette, 2004 ND 71, ¶ 8, 678 N.W.2d 126.

In the case at bar, Deputy Vyska pulled in behind Schneider but did not block him. He turned on his yellow lights, not his emergency lights, to illuminate the area and make his vehicle visible to anyone else pulling into this area to protect himself and others. Schneider's vehicle remained parked and stopped and made no attempt to move or leave when Deputy Vyska pulled in. Deputy Vyska did approach Schneider in a conversational manner and asked who he was and what was going on. During this encounter Deputy Vyska asked Schneider if he had anything illegal in his car and for permission to search, and Schneider voluntarily consented. Deputy Vyska did not order Schneider to do anything, he asked him who he was, what was going on, and if he could search his car. This was a consensual encounter and the Deputy showed no force or authority. Schneider could have easily said no to the Deputy's request and driven off.

Schneider's reliance on State v. Langseth is misplaced. 492 N.W.2d 298 (N.D. 1992). In Langseth, the officer pulled up behind a van stopped along a rural gravel road. Id. at 299. When the officer pulled in behind the van, he activated his warning lights. Id. The van drove ahead a few feet and then stopped. Id. The officer followed with the lights still on. Id. This Court stated:

> Ordinarily, amber lights are used for the "purpose of maintaining traffic flow," rather than "a visual ... signal to bring [a] vehicle to a stop." While at first Langseth may have intended to check on the stopped van to see if the driver needed assistance, Karlberg's "pursuit" with flashing lights as

> Langseth started to drive away converted the encounter into a seizure.

Id. at 301. Therefore, it was the fact that the vehicle drove forward and the officer followed that converted the encounter into a seizure, not the use of amber warning lights. The other two cases cited by Schneider, Oregon v. Walp, 672 P.2d 374 (Or. Ct. App. 1983) and Washington v. Stroud, 634 P.2d 316 (Wash. Ct. App. 1981) both involve situations where emergency lights were used, not warning lights as in the case at bar. Furthermore, they are from different jurisdictions and are not mandatory authority for district courts in North Dakota to follow. Therefore, they are also easily distinguishable from the case at bar. There was no showing of authority sufficient to convert the encounter to a seizure. Therefore, the encounter was correctly characterized in the district court as a consensual encounter.

It is true that Schneider was ultimately seized after contraband was located during a consent search. However:

> Of course, an officer may learn something during a caretaking or casual encounter that leads to a reasonable suspicion and that reasonably justifies further investigation, a seizure, or even an arrest. See Wibben (checking a car parked in a parking lot); State v. Ellenbecker, 159 Wis.2d 91, 464 N.W.2d 427 (App.1990) (Inquiry at a disabled car stopped on shoulder); Thompson v. State, 303 Ark. 407, 797 S.W.2d 450 (1990) (Check on a car parked on the street with lights on and motor running); Kozak v. Commissioner of Public Safety, 359 N.W.2d 625 (Minn.App.1984) (Check on a driver asleep in a car parked on highway shoulder); State v. Vohnoutka, 292 N.W.2d 756 (Minn.1980) (Check on a car that drove into and parked in a closed service-station's driveway at night). A caretaking encounter does not foreclose an officer from making observations that lead to a reasonable suspicion.

> If Deputy Karlberg's approach to Langseth's van was merely a caretaking encounter, the fact that it led to suspicion of a violation would not make the initial encounter a seizure or the charge unconstitutional. In this respect, the trial court correctly ruled that an officer "may not escalate" a consensual encounter into a seizure unless a valid reason arises for doing so.

Langseth, 492 N.W.2d at 300. In this case, the Deputy approached Schneider during a consensual encounter and the consensual encounter was only escalated into a seizure after a valid reason was discovered. Merely asking questions, including asking for consent to search, does not escalate the encounter. Responses to a police officer's questions may be consensual even though individual may feel compelled and may not have been informed of the right not to respond. I.N.S. v. Delgado, 466 U.S. 210, 216 (1984). Questioning does not result in Fourth Amendment detention unless the circumstances of the encounter are so intimidating that a reasonable person would have believed he was not free to leave if he had not responded. Id. "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." United States v. Mendenhall, 446 U.S. 544, 554 (1980). In this case, Deputy Vyska did not need reasonable suspicion to approach the vehicle or to ask conversational questions as Schneider was free to go and did not have to answer questions or consent to the search.

CONCLUSION

In consideration of the foregoing, the State requests this Court affirm the district court's denial of post-conviction relief in all respects.

Dated this 1 day of July, 2014.

Respectfully submitted,

Christine H. McAllister
Assistant State's Attorney
514 East Thayer Avenue
Bismarck, North Dakota 58501
(701) 222-6672
Bar ID No: 07230

Attorney for Appellee

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STATE OF NORTH DAKOTA	)	
	) ss	
COUNTY OF BURLEIGH	)	

Stacey Baskerville, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 1st day of July, 2014, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Plaintiff-Appellee
2. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

SAMUEL GERESZEK
ATTORNEY AT LAW
PO BOX 4
EAST GRAND FORKS, MN 56721-0004

which address is the last known address of the addressee.

Stacey Baskerville
Stacey Baskerville

Subscribed and sworn to before me this 1st day of July, 2014.

MEGAN KLYM
Notary Public
State of North Dakota
My Commission Expires August 26, 2019

Megan Klym, Notary Public
Burleigh County, North Dakota
My Commission Expires: 08/26/2019.