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STATE OF NORTH DAKOTA

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STATEMENT OF THE ISSUE

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

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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.

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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).

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

12 Not every law enforcement contact with a citizen is a seizure,
13 and law enforcement officers do not violate the Fourth
14 Amendment merely by approaching individuals on the street or
15 in other public places. United States v. Drayton, 536 U.S. 194,
16 200, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002). In Drayton, at
17 201, 122 S.Ct. 2105, the United States Supreme Court
18 explained that as long as law enforcement officers do not
19 induce cooperation by coercive means, they may pose
20 questions and ask for consent to search even when they have
21 no basis for suspecting criminal activity. A seizure does not
22 occur simply because a law enforcement officer questions a
23 person, and as long as reasonable persons would feel free to
24 disregard the officer and go about their business, the encounter
25 is consensual and a reasonable suspicion of criminal activity is
26 not required. Florida v. Bostick, 501 U.S. 429, 434–35, 111
27 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.

1
2 State v. Guscette, 2004 ND 71, ¶ 8, 678 N.W.2d 126.

3 In the case at bar, Deputy Vyska pulled in behind Schneider but did
4 not block him. He turned on his yellow lights, not his emergency lights, to
5 illuminate the area and make his vehicle visible to anyone else pulling into
6 this area to protect himself and others. Schneider's vehicle remained parked
7 and stopped and made no attempt to move or leave when Deputy Vyska
8 pulled in. Deputy Vyska did approach Schneider in a conversational manner
9 and asked who he was and what was going on. During this encounter Deputy
10 Vyska asked Schneider if he had anything illegal in his car and for permission
11 to search, and Schneider voluntarily consented. Deputy Vyska did not order
12 Schneider to do anything, he asked him who he was, what was going on, and
13 if he could search his car. This was a consensual encounter and the Deputy
14 showed no force or authority. Schneider could have easily said no to the
15 Deputy's request and driven off.
16

17
18 Schneider's reliance on State v. Langseth is misplaced. 492 N.W.2d
19 298 (N.D. 1992). In Langseth, the officer pulled up behind a van stopped
20 along a rural gravel road. Id. at 299. When the officer pulled in behind the
21 van, he activated his warning lights. Id. The van drove ahead a few feet and
22 then stopped. Id. The officer followed with the lights still on. Id. This Court
23 stated:
24

25 Ordinarily, amber lights are used for the "purpose of
26 maintaining traffic flow," rather than "a visual ... signal to
27 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

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

3 Id. at 301. Therefore, it was the fact that the vehicle drove forward and the
4 officer followed that converted the encounter into a seizure, not the use of
5 amber warning lights. The other two cases cited by Schneider, Oregon v.
6 Walp, 672 P.2d 374 (Or. Ct. App. 1983) and Washington v. Stroud, 634 P.2d
7 316 (Wash. Ct. App. 1981) both involve situations where emergency lights
8 were used, not warning lights as in the case at bar. Furthermore, they are from
9 different jurisdictions and are not mandatory authority for district courts in
10 North Dakota to follow. Therefore, they are also easily distinguishable from
11 the case at bar. There was no showing of authority sufficient to convert the
12 encounter to a seizure. Therefore, the encounter was correctly characterized
13 in the district court as a consensual encounter.

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

16 Of course, an officer may learn something during a caretaking
17 or casual encounter that leads to a reasonable suspicion and
18 that reasonably justifies further investigation, a seizure, or even
19 an arrest. See Wibben (checking a car parked in a parking lot);
20 State v. Ellenbecker, 159 Wis.2d 91, 464 N.W.2d 427
21 (App.1990) (Inquiry at a disabled car stopped on shoulder);
22 Thompson v. State, 303 Ark. 407, 797 S.W.2d 450 (1990)
23 (Check on a car parked on the street with lights on and motor
24 running); Kozak v. Commissioner of Public Safety, 359
25 N.W.2d 625 (Minn.App.1984) (Check on a driver asleep in a
26 car parked on highway shoulder); State v. Vohnoutka, 292
27 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.

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

7 Langseth, 492 N.W.2d at 300. In this case, the Deputy approached Schneider
8 during a consensual encounter and the consensual encounter was only
9 escalated into a seizure after a valid reason was discovered. Merely asking
10 questions, including asking for consent to search, does not escalate the
11 encounter. Responses to a police officer's questions may be consensual even
12 though individual may feel compelled and may not have been informed of the
13 right not to respond. I.N.S. v. Delgado, 466 U.S. 210, 216 (1984).
14 Questioning does not result in Fourth Amendment detention unless the
15 circumstances of the encounter are so intimidating that a reasonable person
16 would have believed he was not free to leave if he had not responded. Id.
17 "As long as the person to whom questions are put remains free to disregard
18 the questions and walk away, there has been no intrusion upon that person's
19 liberty or privacy as would under the Constitution require some particularized
20 and objective justification." United States v. Mendenhall, 446 U.S. 544, 554
21 (1980). In this case, Deputy Vyska did not need reasonable suspicion to
22 approach the vehicle or to ask conversational questions as Schneider was free
23 to go and did not have to answer questions or consent to the search.
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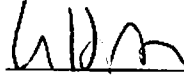
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CONCLUSION

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,



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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

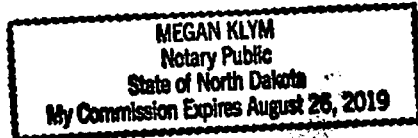
in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

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