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STATE OF NORTH DAKOTA

Supreme Court No. 20160323
District Court No. 18-2016-CR-00657

NORTH DAKOTA SUPREME COURT

City of Grand Forks

Plaintiff/Appellee,

v.

Kevin Jason Reilly

Defendant/Appellant.

ON APPEAL FROM ORDER DENYING MOTION TO SUPPRESS AND DISMISS ISSUED AUGUST 4, 2016, BY THE HONORABLE DEBBIE G. KLEVEN OF THE GRAND FORKS COUNTY DISTRICT COURT FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT

BRIEF OF THE APPELLANT

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JURISDICTIONAL STATEMENT

[¶ 1] Jurisdiction in this matter is pursuant to *N.D.C.C. § 29-28-06*. Kevin Jason Reilly timely filed to appeal from an Order suppressing evidence issued by the Grand Forks County District Court on August 4, 2016.

ISSUE(S) PRESENTED FOR REVIEW

I. [¶ 2] WHETHER THE DISTRICT COURT ERRED IN RULING THAT THE STOP IN THE PRESENT CASE WAS A CASUAL ENCOUNTER AND, THEREFORE, DID NOT IMPLICATE THE FOURTH AMENDMENT.

STATEMENT OF THE CASE

[¶ 3] On March 5, 2016, Kevin Jason Reilly was charged with one count of Actual Physical Control pursuant to Grand Forks City Ordinance 8-0202 (Doc ID #1). On or about March 31, 2017, Mr. Reilly filed to transfer his case from Grand Forks Municipal Court to Grand Forks County District Court. (Doc ID #8). On April 29, 2016, Mr. Reilly filed a Rule 43 Waiver entering a not guilty plea. (Doc ID #15).

[¶ 4] On July 1, 2016, Mr. Reilly filed a Motion to Dismiss (Doc ID #20) and accompanying Brief in Support of Motion to Dismiss (Doc ID #19). On July 14, the City of Grand Forks (hereinafter "City") filed its Brief in response to Mr. Reilly's motion. (Doc ID #24). On July 22, 2016, a Motion Hearing was held at which each party presented oral argument in support of their briefs in front of the district court. On August 4, 2016, the Honorable Debbie Kleven issued an Order Denying Motion to Suppress and Dismiss. (Doc ID# 27).

[¶ 5] Subsequently, on August 10, 2016, the case was set for a Change of Plea hearing. (Doc ID #32). On August 29, 2016, Mr. Reilly entered a conditional guilty plea with the intent of appealing the district court's order. (Doc ID #37). On September 29, 2016, Mr. Reilly timely filed his notice of appeal to the North Dakota Supreme Court. (Doc ID #40).

STATEMENT OF THE FACTS

[¶ 6] On March 5, 2016, Officer Buelow (hereinafter "Ofc. Buelow") and Officer Essig (hereinafter "Ofc. Essig") were dispatched for a possible drunk driver at 32nd Avenue South and South Washington Street. The officers obtained a physical description of the truck, including the license plate number. (July 22, 2016, Hrg. Transcript p. 4: 16-19). PSAP then ran the plates and they came back under Mr. Reilly and had a certain address attached. The officers then found the truck in question at this address. The officers pulled into the parking lot for this address.

[¶ 7] After entering the parking lot, the officers pulled up near Mr. Reilly and parked their vehicle. When Mr. Reilly exited his truck, Ofc. Buelow attempted to get Mr. Reilly's attention by yelling 'excuse me, sir'. Mr. Reilly responded by turning and walking away from the officers, toward his apartment building. (July 22, 2016, Hrg. Transcript p. 7: 2-4). Mr. Reilly initially attempted to avoid the officers. (July 22, 2016, Hrg. Transcript p. 14: 25 – p. 15: 1). The two officers then ran after Mr. Reilly and stood in front of him. (July 22, 2016, Hrg. Transcript p. 7: 16-17 ;p. 26: 11-21). The officers next asked for his driver's license and physically took it when Mr. Reilly offered verbal resistance. (July 22, 2016, Hrg. Transcript p. 16: 16). It was at this point that the officers began talking to Mr. Reilly and gathered the facts necessary for probable cause to arrest Mr. Reilly for APC. Prior to talking to Mr. Reilly, the officers had not observed any indicia of intoxication except, possibly, a slight stumble as Mr. Reilly exited his vehicle.

[¶ 8] At the motion hearing, Ofc. Buelow testified that he approached Mr. Reilly on the basis of a community caretaker encounter. (July 22, 2016, Hrg. Transcript p. 7: 19). However, the district court ruled that the stop in the present case did not meet the requirements for a community caretaker encounter. (Doc ID #27, ¶¶ 7-8). Rather, it was ruled that the officers were present for an active criminal investigation (Doc ID #27, ¶7). Nevertheless, the district court ruled that Mr. Reilly's Fourth Amendment rights were not violated because the stop was simply a casual encounter. (Doc ID #27, ¶¶ 9-10). This ruling was based upon previous case law, namely *City of Jamestown v. Jerome,* 2002 ND 34, 639 N.W.2d 478 (N.D. 2002). (Doc ID #27, ¶9).

LAW AND ARGUMENT

[¶ 9] According to North Dakota case law, the standard of review used to review a district court's ruling on a motion to suppress has been well established. *State v. Genre*, 2006 ND 77, ¶ 12, 660 N.W.2d 575. The Court will defer to the lower court's findings of fact. *Id.* However, questions of law are fully reviewable under the de novo standard of review. *Id.* The determination of "[w]hether a question of fact meets a legal standard is a question of law." *State v. Boehm*, 2014 ND 154, ¶ 8, 849 N.W.2d 239 (quoting *State v. Graf*, 2006 ND 196, ¶ 7, 721 N.W.2d 381). Specifically, whether probable cause exists to arrest an individual is a question of law. *Boehm*, 2014 ND at ¶ 8. Furthermore, the de novo standard of review is applied to constitutional issues. *State v. Peterson*, 2016 ND 192, ¶ 8, 886 N.W.2d 71.

I. THE DISTRICT COURT ERRED IN RULING THAT THE STOP IN THE PRESENT CASE WAS A CASUAL ENCOUNTER AND, THEREFORE, DID NOT VIOLATE THE FOURTH AMENDMENT.

[¶ 10] The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV. The Fourth Amendment is applicable to the individual states through the Fourteenth Amendment. *State v. Guscette*, 2004 ND 71, ¶7, 678 N.W.2d 126. The North Dakota Constitution contains rights "[a]lmost identical" to those in the Fourth Amendment. *State v. Rydenberg*, 519 N.W.2d 306, 310 (N.D. 1994). Article I, Section 8 of the North Dakota Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[¶ 11] An individual asserting his rights have been violated under the Fourth Amendment carries the initial burden of establishing a prima facie case of illegal seizure. *Jerome*, 2002 ND at ¶ 6. A prima facie case does not require that one prove the assertion. *Lagro v. Lagro*, 2005 ND 151, ¶ 28, 703 N.W.2d 322. Rather, a prima facie case requires only enough evidence to allow a fact-trier to infer the fact at issue and rule in a party's favor. *Id.* "It is a bare minimum." *Id.* After the individual has established a prima facie case, the burden of persuasion shifts to the State, or City, to justify its actions. *Jerome*, 2002 ND at ¶ 6.

[¶ 12] A Fourth Amendment seizure occurs when an officer restrains the liberty of a citizen by means of physical force or a show of authority. *Jerome*, 2002 ND at ¶ 5. An arrest is a seizure implicating the Fourth Amendment and it must be supported by probable cause. *Id.* Probable cause for an arrest exists "[w]hen the facts and circumstances within police officers' knowledge and of which they have reasonably trustworthy information are sufficient to warrant a person of reasonable caution in believing an offense has been or is being committed." *State v. Berger*, 2004 ND 151, ¶ 11, 683 N.W.2d 897 (quoting *Fargo v. Eyeberg*, 2000 ND 159, ¶ 8, 615 N.W.2d 542.) An officer does not need knowledge of facts sufficient to prove guilty to establish probable cause. *Berger*, 2004 ND at ¶ 11. Rather, all that is required is knowledge that would provide a "[p]rudent person with reasonable grounds for believing a violation has occurred." *Id.*

[¶ 13] According to *Jerome*, however, not every personal interaction between an individual and a law enforcement officer amounts to a seizure implicating the Fourth Amendment. 2002 ND at ¶ 5. For instance, a community caretaking encounter is not a seizure protected by the Fourth Amendment. *Id.* Additionally, the Fourth Amendment is not implicated when an officer approaches a parked vehicle in a conversational manner, issues no orders to the occupant, and demands no responses from the occupant. *Id.* Moreover, it is also established that "[i]t is not a

seizure for an officer to *walk* up to and talk to an individual in a public place." *Id.* (emphasis added).

[¶ 14] However, even encounters that begin casually can become situations involving a seizure protected by the Fourth Amendment in various manners. *State v. Boyd*, 2002 ND 203, ¶ 7, 654 N.W.2d 392. A casual encounter becomes a seizure when a reasonable person would view an officer's actions, when committed by another private citizen, as offensive or threatening. *Id.* An encounter may also become a seizure if an officer begins issuing orders to the occupant of a vehicle. *Richter v. ND Dept. of Transp.*, 2010 ND 150, ¶ 11, 786 N.W.2d 716. Likewise, any other police action which an individual would not expect in an encounter between two private citizens can transform a casual encounter into a seizure. *Id.*

[¶ 15] The district court ruled the officers did not perform the community caretaker function in the present case. (Doc ID #27,¶7). Instead, the Court ruled that the officers were there for an active investigation of possible criminal activity of Driving Under the Influence or Actual Physical Control ("APC"). (Doc ID #27, ¶7). The court further ruled the officers did not enact a seizure protected by the Fourth Amendment. (Doc ID #27, ¶9). Rather, the officers gathered probable cause to arrest Mr. Reilly after initially making contact with him during a 'casual encounter', which have been explained in *Jerome*. (Doc ID # 27, ¶9).

[¶ 16] In *Jerome*, Jamestown police officer Russ Shahin (hereinafter "Shahin") received an anonymous tip that an intoxicated woman was driving her vehicle. See *Jerome*, 2002 ND 34 at ¶2. Shahin subsequently found the woman driving her vehicle. *Id.* Shahin followed the vehicle until it parked. *Id.* When the occupant of the vehicle exited her vehicle, Shahin asked to speak with her. *Id.* The occupant then turned toward Shahin and immediately agreed to voluntarily speak with him.

[¶ 17] The present case differs significantly from *Jerome.* Most importantly, when Buelow and Essig first attempted to make contact with Mr. Reilly by yelling 'excuse me, sir', Mr. Reilly turned and walked away from the officers without any verbal response. (July 22, 2016, Hrg. Transcript p. 7: 2-7). Thus, Mr. Reilly immediately declined voluntary contact with the officers. After Mr. Reilly declined response, the two officers decided to run after Mr. Reilly and chase him down. (July 22, 2016, Hrg. Transcript p. 8: 12-17; p. 29: 11-15). Ofc. Buelow ran down Mr. Reilly and stood directly in front of him. (July 22, 2016, Hrg. Transcript p. 7: 11-17; p. 8: 9-11). Ofc. Essig trailed shortly behind Ofc. Buelow. (July 22, 2016, Hrg. Transcript p. 29: 11-15).

[¶ 18] This is concerning in two aspects. First, the officers *ran* after Mr. Reilly. They did not casually walk up to Mr. Reilly. Running after an individual is entirely different than walking up to a person. It carries an entirely different tone. Additionally, there is a difference in how the target reacts. It is simply more threatening to run after an individual than it is to walk towards an individual. Case law, as discussed above, dictates that an encounter is no longer casual if a reasonable person would view the officer's actions as threatening. *Boyd*, 2002 ND 203 at ¶7. A reasonable person could view Ofc. Buelow and Ofc. Essig's action of *running* after Mr. Reilly as threatening. The situation transformed into a Fourth Amendment seizure as soon as the officer's ran after Mr. Reilly.

[¶ 19] The second troublesome aspect is two officers, not simply one, ran after Mr. Reilly. It is even more threatening for an individual to be chased by multiple officers. Only one officer approached the suspect in *Jerome*. It is a more restrictive situation when multiple officers are involved. Moreover, two officers chasing down one individual is an implicit show of authority. An individual will immediately feel restrained after being chased down and stopped by two

officers. Once Mr. Reilly was chased and stopped by multiple officers, Mr. Reilly was, in effect, seized. At this point, Mr. Reilly's Fourth Amendment rights had already been violated.

[¶ 20] Furthermore, Mr. Reilly did not even speak to the officers until after the officers had already chased him down and requested his ID, as testified to by Ofc. Buelow. (July 22, 2016, Hrg. Transcript p. 9: 2-10). Ofc. Buelow stated that the first words spoked by Mr. Reilly came after Ofc. Buelow requested his driver's license. (July 22, 2016, Hrg. Transcript p. 9: 8-10). The circumstances indicate Mr. Reilly was not voluntarily engaging in conversation with Ofc. Buelow. Ofc. Buelow was also standing in front of Mr. Reilly at this time, preventing Mr. Reilly from leaving. This is not the casual encounter envisioned in *Jerome* in which an individual immediately agrees to engage law enforcement officers. In fact, it is quite the opposite. Mr. Reilly actively attempted to avoid interacting with the officers; they forced an exchange upon him. Ofc. Buelow testified that he can walk up and talk to anybody. (July 22, 2016, Hrg. Transcript p. 16: 17). However, during a casual encounter, he cannot make the other individual respond or prevent the individual from leaving until he responds.

[¶ 21] Additionally, it is important to consider the intent of the officers when they approached Mr. Reilly. The officers believed they were using the community caretaker approach to make contact with Mr. Reilly. (July 22, 2016, Hrg. Transcript p. 7: 14-19; p. 26: 14-16). However, the officers actually approached Mr. Reilly for the purpose of investigating a criminal offense related to a DUI and/or APC. (Doc ID #27, ¶ 7). It was an investigatory stop, not supported by probable cause, used to gather probable cause. The officers prevented the suspect from leaving by running after him and standing in front of him. This was not a casual encounter. This was a seizure, both in action and intent.

[¶ 22] The officers should not be allowed to use one tool of law enforcement unlawfully to subsequently establish probable cause in a lawful manner. The officers effectively seized Mr. Reilly under the belief the community caretaker function provided an exception to Fourth Amendment protections. However, the officers were acting unlawfully under the community caretaker function. (Docket ID #27, ¶¶ 7-8). The officers should be held accountable for using the community caretaker function inappropriately. It should not logically follow that the officers can gain lawful probable cause during their unlawful use of the community caretaker function.

[¶ 23] One mechanism that can be used to bypass Fourth Amendment protections is consent. Consent is an exception to both the probable cause section and the warrant requirement of the Fourth Amendment. *State v. DeCoteau*, 1999 ND 77, ¶ 9, 592 N.W.2d 579. Thus, if Mr. Reilly had consented to speaking with the officers, then he would have engaged in a voluntary, casual encounter with the police. However, Mr. Reilly did not consent to contact with the officers until they stopped him. This Court has previously explained that the State, or City, must show evidence of "affirmative conduct" by a person alleged to have given consent. *Id.* at ¶ 11. It is not sufficient to show merely the lack of affirmative actions against the police. *Id.* Consent is not given simply because one is silent. See *DeCoteau*, at ¶ 11. While the Court in *DeCoteau* considered consent in the context of home searches, the same logic applies to the present case. Mr. Reilly's silence towards the officers cannot be interpreted as him consenting to a conversation with the officers. And the record is clear that Mr. Reilly did not engage in any affirmative conduct indicating consent. This is further evidence Mr. Reilly was not engaged in a casual conversation with Ofc. Buelow and Ofc. Essig.

[¶ 24] In the present case, Mr. Reilly's Fourth Amendment Rights were both implicated and violated. The evidence shows this was not a casual encounter but rather a seizure under the Fourth

Amendment. The officers had every right to attempt to make casual contact with Mr. Reilly. However, Mr. Reilly immediately declined such casual contact by walking away from the officers. The officers transformed the situation into a Fourth Amendment seizure by running and standing in front of Mr. Reilly to stop him. At this point, the officers had unlawfully seized Mr. Reilly. Mr. Reilly attempted to leave. He was prevented from doing so by the officers. This was not a casual encounter in which Mr. Reilly agreed to speak with the officers.

CONCLUSION

[¶ 25] Due to the afore-mentioned reasons, Mr. Reilly respectfully requests that this Court reverse the district court's Order.

DATED: February 21st, 2017.

/s/ Mathew V. Jensen

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-IN THE SUPREME COURT OF NORTH DAKOTA-

ON APPEAL OF ORDER DENYING MOTION TO SUPPRESS AND DISMISS, THE HONORABLE DEBBIE G. KLEVEN, DISTRICT JUDGE PRESIDING, NORTHEAST CENTRAL JUDICIAL DISTRICT, FILED AUGUST 4, 2016

State of North Dakota,	)	
	)	
Plaintiff/Appellee,	)	Case No. 20160323
-vs-	)	District Court No. 18-2016-CR-00657
	)	
Kevin Jason Reilly,	)	CERTIFICATE OF SERVICE
	)	BY E-MAIL
Defendant/Appellant.	)	

STATE OF NORTH DAKOTA)
)SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 21st day of February, 2017, served a true and correct copy of the following document(s):

1. Brief of Appellant
2. Appendix of Appellant

Electronically via email to:

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