2016 IL App (2d) 150706-U
No. 2-15-0706
Order filed March 24, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CITY OF NORTH CHICAGO,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 15-DT-503
	)	
CRAIG V. DUNCAN,	)	Honorable
	)	Veronica M. O'Malley,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting defendant's motion to suppress and petition to rescind, as the arresting officer did not initially seize defendant: the officer did not restrain defendant in his parked car by physical force or a show of authority; instead he merely approached defendant and questioned him.

¶ 2 The City of North Chicago (City) appeals from an order of the circuit court of Lake County that granted defendant Craig V. Duncan's motion to suppress evidence and petition to rescind his summary suspension, contending, in part, that the trial court erred in ruling that the initial encounter between defendant and the police was a seizure. Because the initial encounter was not a seizure, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by complaint with driving under the influence (DUI) (625 ILCS 5/11-501(a)(1), (a)(2) (West 2014)). He filed a motion to suppress (motion) and a petition to rescind his summary suspension (petition).

¶ 5 The following facts are taken from the proceedings on the motion and the petition. At the combined hearing, defendant and the City agreed that the only issues were whether the initial encounter between defendant and the arresting officer was a seizure and, if so, whether there was reasonable suspicion for such a seizure.

¶ 6 On March 15, 2015, at approximately 2 a.m., Officer Christopher Johnson of the North Chicago police department was parked at the intersection of Martin Luther King Jr. Drive and Lewis Avenue. A Marathon gas station was located on the northwest corner of the intersection. He was there because, after the bars close, people "often travel to the Marathon gas station" and there had been recent incidents involving "vandalism, reports of shots fired, stuff like that." While there, he saw several boisterous people at the Marathon station.

¶ 7 Officer Johnson then observed a Lincoln parked in front of a towing business located on the southwest corner of the intersection. Its engine was running and it was emitting loud music. According to Officer Johnson, he circled the area, keeping an eye on the Marathon station and the towing business, and he could hear the music "well over two blocks away."

¶ 8 Officer Johnson described the towing business as a 24-hour service in that the employees are "on call" and "respond from their homes." He acknowledged that there "might be cars coming in and out of that lot 24/7" but that they would be towed vehicles.

¶ 9 Officer Johnson observed the Lincoln for approximately three to five minutes. Defendant was the driver and only occupant. Officer Johnson possessed neither an arrest nor a search

warrant for defendant. Nor had he received any calls about the Lincoln. He admitted that he did not know whether the driver of the Lincoln was there to pick someone up or otherwise had permission to park there.

¶ 10 Officer Johnson decided to "effectuate a suspicious vehicle stop." He explained that, although he described it "as a stop" in his written report, he "should have worded it as an investigation." He explained that defendant's car "was already in a stopped position" and that he did not actually stop it.

¶ 11 Officer Johnson parked parallel to defendant's vehicle. He did not block defendant's car or otherwise impede defendant's egress. Nor did he activate his emergency lights. As the only officer present, he exited his vehicle and approached defendant's vehicle from its rear driver's-side door. He did not draw his weapon. Defendant's driver's-side windows were down. According to Officer Johnson, the music was "real loud" and he could not "communicate well" with defendant. He smelled a strong odor of an alcoholic beverage coming from the car's interior, and defendant had "reddish, glossy eyes."

¶ 12 When Officer Johnson was asked if "[he] ask[ed] [defendant] to lower the music," he answered, "I did, several times." Because defendant did not turn down the music, Officer Johnson believed that, when he asked defendant what he was doing at the towing business, defendant could not hear him. Therefore, he "asked [defendant] to lower the music." Defendant failed to do so. According to Officer Johnson, as he was trying to communicate with defendant, he did not ask defendant to exit his car, tell him that he could not leave, or tell him that he was under arrest.

¶ 13 When the prosecutor asked Officer Johnson what happened next, defense counsel objected and stated that "[w]e're done with the stop." The trial court responded that it had not "heard a stop yet" and that "[s]o far [it] just had an approach."

¶ 14 The prosecutor then stated that, if defense counsel wanted to argue whether there was a stop, that would be fine. Defense counsel responded that "that's [defendant's] issue, as outlined in the motion." The trial court interjected that "you have to have a stop and so far we haven't had a stop. An officer can approach a person on the street."

¶ 15 The trial court stated that it was confused because, based on the evidence up to that point, a stop had not been established and all Officer Johnson had done was approach an already parked vehicle, walk up to an open window, and talk to defendant. The court added that there was no "order of commanding" and that Officer Johnson had only "asked [defendant] to turn the music down." Therefore, the court found that there was "not a stop yet."

¶ 16 The prosecutor agreed, but added that "there's an ongoing story here, but if counsel is looking to stop and argue this is the stop, then we don't need to go on to the rest of it." When the trial court asked defense counsel if he wanted to elicit more facts to establish a stop, he said no. The court responded, "[o]kay. I'll let you argue it, if that's what you want to do."

¶ 17 After both sides argued whether Officer Johnson's conduct in approaching defendant constituted a seizure, the trial court found that a seizure had occurred and that there was no reasonable suspicion for the seizure. In finding that there was a seizure, the court relied on the fact that Officer Johnson described the encounter as a stop in both his written report and his testimony. According to the court, once the officer said that he stopped defendant without a warrant, the burden shifted to the prosecution to "flesh it all out" and the prosecution had failed to do so. Therefore, the court granted defendant's motion.

¶ 18 As for the petition, the trial court found that, because defendant chose to challenge only the initial stop, he had not met his burden. Therefore, the court denied the petition.

¶ 19 At the hearing on the City's motion to reconsider, the trial court, in ruling that defendant was not free to leave, found that Officer Johnson "approached and started ordering commands to the defendant." It added that Officer Johnson "even admitted" that he should have said investigation as opposed to stop. The court denied the motion to reconsider. It further ruled that, because the stop was invalid, it was *sua sponte* reversing its earlier ruling and granting the petition. The City filed a timely appeal.[1]

¶ 20 II. ANALYSIS

¶ 21 On appeal, the City contends, in part, that the trial court erred in finding that defendant was seized when Officer Johnson approached defendant's vehicle. Defendant responds that the court's finding that the initial encounter was a seizure is not against the manifest weight of the evidence.

¶ 22 We defer to the trial court's findings and will reverse those findings only if they are against the manifest weight of the evidence. *City of Highland Park v. Kane*, 2013 IL App (2d)

[1] Pertinent to our jurisdiction to consider the ruling on the motion, the City's jurisdictional statement does not state that the prosecution was brought pursuant to the Illinois Vehicle Code (Code) (625 ILCS 5/1-100 *et seq.* (West 2014)) or that the City's attorney had written authorization from the Lake County State's Attorney to bring such a prosecution. See *Village of Mundelien v. Thompson*, 341 Ill. App. 3d 842, 846-47 (2003). Nonetheless, because the record shows that the prosecution was under the Code and the City has included a copy of its written authorization in the appendix to its brief, we have jurisdiction over the appeal regarding the ruling on the motion.

120788, ¶ 11. Factual findings are against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Kane*, 2013 IL App (2d) 120788, ¶ 11. We review the ultimate legal ruling *de novo*. *Kane*, 2013 IL App (2d) 120788, ¶ 11.

¶ 23 It is well established that there are three tiers of police-citizen encounters. *People v. Luedemann*, 222 Ill. 2d 530, 543 (2006). The trilogy consists of: (1) arrests, which must be supported by probable cause; (2) brief investigative detentions, or "*Terry* stops," which must be supported by reasonable, articulable suspicion; and (3) encounters that involve no coercion or detention and thus do not require any evidentiary justification. *Luedemann*, 222 Ill. 2d at 543.

¶ 24 For purposes of the fourth amendment, an individual is seized when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. *Luedemann*, 222 Ill. 2d at 550. In the situation of a person whose freedom of movement is restrained by some means unrelated to police conduct, such as a person sitting in a parked car, the question is whether a reasonable person in the defendant's position would have believed that he was free to decline an officer's requests or otherwise terminate the encounter. *Luedemann*, 222 Ill. 2d at 550-51. That test presupposes a reasonable, innocent person. *Luedemann*, 222 Ill. 2d at 551.

¶ 25 It is well settled that a seizure does not occur simply because an officer approaches an individual and puts questions to him if he is willing to listen. *Luedemann*, 222 Ill. 2d at 551. Consistent with that proposition, the general rule is that the police may approach and question someone sitting in a parked vehicle without the encounter being labeled a seizure. *Luedemann*, 222 Ill. 2d at 552. Such an encounter becomes a seizure only if the officer, through physical force or show of authority, restrains the liberty of the vehicle's occupant. *Luedemann*, 222 Ill. 2d at 552-53. Moreover, the analysis requires an objective evaluation of the police conduct and

does not hinge upon the subjective perceptions of the person involved (*Luedemann*, 222 Ill. 2d at 551) or the subjective suspicions of the police (*Luedemann*, 222 Ill. 2d at 549 (in most cases regarding consensual encounters the police approach individuals because they have suspicions about them)).

¶ 26 There are four factors that are relevant to whether there has been a seizure: (1) the threatening presence of several officers; (2) the display of a weapon by an officer; (3) some physical touching of the citizen; and (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *Luedemann*, 222 Ill. 2d at 553 (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). More importantly, although those factors might establish that a seizure occurred, in their absence, otherwise inoffensive contact between a citizen and the police cannot, as a matter of law, amount to a seizure. *Luedemann*, 222 Ill. 2d at 553.

¶ 27 Those factors, however, are not exclusive, and a seizure can be found on the basis of other coercive police behavior that is similar to those factors. *Luedemann*, 222 Ill. 2d at 557. For example, in the context of an officer approaching a parked vehicle, the courts have developed additional rules as to whether a seizure occurred. *Luedemann*, 222 Ill. 2d at 557. To that end, the mere approach and questioning of someone in a parked car does not constitute a seizure. *Luedemann*, 222 Ill. 2d at 557. Nor does an officer commit a seizure by using some generally accepted means of getting the occupant's attention or encouraging him to eliminate any barrier to a conversation. *Luedemann*, 222 Ill. 2d at 557. Thus, a request to open a door or roll down the window, as opposed to an order to do so, is not a seizure. *Luedemann*, 222 Ill. 2d at 557. On the other hand, factors that courts have found to indicate a seizure of the occupant of a parked car are boxing the car in, many officers approaching it on all sides, pointing a gun at an

occupant and ordering him to put his hands on the steering wheel, or using emergency lights as a show of authority. *Luedemann*, 222 Ill. 2d at 557.

¶ 28 In this case, we begin with the *Mendenhall* factors. First, there was only one officer. Second, the officer never displayed a weapon. Third, the officer never touched defendant. The absence of those factors supports a conclusion that defendant was not seized during the initial encounter.

¶ 29 That leaves the factor of whether the officer used any language or tone of voice that indicated that compliance with his requests might be compelled. Although the trial court ultimately found that the officer ordered defendant to lower the music's volume, that finding is against the manifest weight of the evidence.[2]

¶ 30 Here, the record clearly establishes that Officer Johnson "asked" defendant to lower the music's volume. The record does not show that Officer Johnson ordered defendant to do so or that he otherwise indicated, by his words, that defendant might be compelled to turn the music down. Although Officer Johnson testified that he asked defendant "several times," that alone does not support the finding that he ordered defendant to do so. Nor does the record indicate that Officer Johnson used a tone of voice reflecting a degree of command or compulsion. Defendant contends that the trial court had the "benefit of the officer's live testimony" and was therefore able to "evaluate the officer's tone as he described how he effectuated" the stop. However, Officer Johnson was never asked to imitate or describe his tone. He simply testified that, to

[2] We note that the trial court originally found that Officer Johnson did not order or command defendant to turn down the music. However, in ruling on the motion to reconsider, the court found that Officer Johnson had "approached and started ordering commands to the defendant." Thus, the court ultimately found in favor of defendant on that point.

enable communication, he asked defendant to turn down the music. Based on the foregoing, the finding that Officer Johnson ordered defendant to lower the music is against the manifest weight of the evidence. Thus, the fourth factor was not present. The absence of any of the *Mendenhall* factors is, at the very least, highly instructive that no seizure occurred. See *Luedemann*, 222 Ill. 2d at 554.

¶ 31 Not only are none of the *Mendenhall* factors present, neither do any of the additional factors related to parked vehicles indicate that, when Officer Johnson approached defendant and spoke to him, he seized him. See *Luedemann*, 222 Ill. 2d at 557. Officer Johnson did not box in defendant's car, point a gun at defendant and order him to place his hands on the steering wheel, or use his emergency lights. Nor did multiple officers approach the car on all sides. Indeed, the officer approached defendant alone. Further, Officer Johnson merely encouraged defendant to eliminate a barrier to communication by asking him to lower the loud music. See *Luedemann*, 222 Ill. 2d at 557. Based on those additional factors, Officer Johnson did not seize defendant when he approached his parked car and attempted to have a conversation with him.[3]

¶ 32 Alternatively, we note that a person is not seized until he submits to an assertion of police authority. *People v. Thomas*, 198 Ill. 2d 103, 112 (2001) (citing *California v. Hodari D.*, 499 U.S. 621, 626 (1991)). Here, despite Officer Johnson asking him several times to do so, defendant did not lower the music's volume. Therefore, even if we were to agree that Officer

[3] Although Officer Johnson testified that he asked defendant what he was doing at the towing business, he believed that defendant did not hear him, because of the loud music. Therefore, we do not consider Officer Johnson's question in that regard as having any bearing on whether there was a seizure. Even if defendant heard the question, a mere questioning of someone in a parked car does not constitute a seizure. See *Luedemann*, 222 Ill. 2d at 557.

Johnson commanded defendant to lower the volume, defendant never submitted to that assertion of police authority. Thus, no seizure occurred.

¶ 33 Defendant points to Officer Johnson's characterization of the encounter as a stop as evidence that a seizure occurred. We initially note that Officer Johnson qualified his characterization by testifying that the vehicle was parked and that he did not actually stop it. Nonetheless, even if Officer Johnson considered the encounter to be a stop, that does not alter our conclusion that the initial encounter was not a seizure.[4] That is so because the question of whether a seizure occurred is objective and does not depend upon the subjective mind of the police. See *Luedemann*, 222 Ill. 2d at 549.

¶ 34 Because the sole basis for granting the motion was the challenge to the validity of the initial encounter, and we have held that the encounter was not a seizure, we reverse the trial court's ruling on the motion. Likewise, the only basis for granting rescission was the invalidity of the initial encounter. Therefore, we also reverse the court's ruling granting the petition.

¶ 35 Having reversed the trial court's judgment because the initial encounter did not constitute a seizure, we need not address the City's additional contentions.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we reverse the judgment of the circuit court of Lake County as to both the motion and the petition and remand for further proceedings.

¶ 38 Reversed and remanded.

[4] Because no seizure occurred during the initial encounter, there was no need for any legal justification. See *Luedemann*, 222 Ill. 2d at 543.