If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MATTHEW SCOTT DUFF,

Defendant-Appellee.

UNPUBLISHED
November 23, 2021

No. 354406
Oakland Circuit Court
LC No. 2018-267140-FH

Before: SHAPIRO, P.J., and BORRELLO and O'BRIEN, JJ.

PER CURIAM.

The prosecution appeals as of right an order granting defendant's motion to dismiss the charges against defendant for operating a motor vehicle while intoxicated, third offense, MCL 257.625, following the court's order granting defendant's motion to suppress. On appeal, the prosecution argues that the trial court erred when ruling on defendant's motion to suppress by concluding that the deputy seized defendant for purposes of the Fourth Amendment when the deputy parked his patrol car 10 feet away from defendant's car at a 45-degree angle. Under the facts of this case, we agree with the prosecution, and therefore reverse.

On the evening of March 4, 2018, Oakland County Sheriff's Deputy Jason Pence was out on patrol in Pontiac, Michigan, when he saw a white Kia Forte vehicle parked in the parking lot of a closed elementary school. It was the only vehicle in the parking lot. The engine of the vehicle was running, and the interior overhead lights were on. Deputy Pence observed a single person sitting in the driver's seat of the vehicle. Deputy Pence proceeded to park his patrol car 10 feet away, at a 45-degree angle, behind the vehicle. For his safety, the deputy pointed his spotlight at the driver's side of the vehicle and turned it on. Deputy Pence did not activate his overhead lights or emergency siren. He proceeded to walk up to the driver's side of the vehicle to speak with the occupant of the vehicle—defendant. Upon initiating contact with defendant, Deputy Pence noticed that defendant's eyes were bloodshot and glossy, and that he was slurring his speech. Deputy Pence also detected the odor of alcohol. Later during the investigation, defendant said that he had been drinking that night.

On July 18, 2018, defendant filed a motion to suppress the result of his blood alcohol test, arguing that it must be suppressed because Deputy Pence lacked a reasonable, articulable suspicion, based on objective facts, that criminal activity was afoot when he seized defendant. On August 16, 2018, the prosecution responded, arguing that Deputy Pence was lawfully performing his duty when he approached defendant's vehicle and asked defendant to produce identification. The prosecution argued that initiating an encounter for the purpose of an inquiry does not constitute a seizure. An evidentiary hearing on defendant's motion to suppress was held on October 2, 2018. On November 9, 2018, the trial court entered an order denying defendant's motion to suppress, reasoning that Deputy Pence had a reasonable, articulable suspicion to seize defendant.

On February 13, 2019, defendant filed a delayed application for leave to appeal with this Court, arguing that all evidence obtained directly or indirectly as a result of Deputy Pence's encounter with defendant must be suppressed because Deputy Pence's act of parking his patrol vehicle behind defendant's vehicle and approaching defendant constituted a stop without reasonable suspicion of criminal activity in violation of defendant's Fourth Amendment rights. This Court denied defendant's delayed application for leave to appeal.[1] Defendant then filed an application for leave to appeal with our Supreme Court, and that Court entered an order remanding the case to the trial court to reconsider defendant's motion to suppress with instructions to "determine when the defendant was first seized for Fourth Amendment purposes." *People v Duff*, 504 Mich 995, 995 (2019). On March 4, 2020, the trial court held a status conference hearing. At the hearing, neither party presented additional evidence or testimony.

On July 15, 2020, the trial court entered an order granting defendant's motion to suppress. The trial court concluded that Deputy Pence seized defendant when the deputy parked behind him, reasoning:

> Deputy Pence proceeded to park his patrol car 10 feet away, at a 45-degree angle behind the defendant's vehicle and activated his spotlight pointing at the driver. The Deputy testified that if Mr. Duff were to back his vehicle straight out, he would have hit the officer's car. The defendant's only means to exit [was] driving over the grass in front of him. Under those circumstances, a reasonable person would have believed that he or she was not free to leave, thus constituting a seizure. [Citations omitted.]

The trial court explained that Deputy Pence did not have reasonable suspicion at the time of this seizure, so the seizure violated defendant's constitutional rights. On July 23, 2020, the trial court entered an order dismissing the case.

On appeal, the prosecution argues that the trial court erred by granting defendant's motion to suppress. We agree.

Constitutional questions are questions of law that are reviewed de novo. *People v Steele*, 283 Mich App 472, 487; 769 NW2d 256 (2009). This Court reviews "for clear error a trial court's

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[1] *People v Duff*, unpublished order of the Court of Appeals, entered March 27, 2019 (Docket No. 347603).

findings of fact in a suppression hearing," but reviews "de novo whether the Fourth Amendment was violated and whether an exclusionary rule applies." *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002).

For Fourth Amendment purposes, warrantless seizures are presumed unreasonable unless they fall under one of the exceptions to the warrant requirement. *Coolidge v New Hampshire*, 403 US 443, 454-455; 91 S Ct 2022; 29 L Ed 2d 564 (1971). However, not every interaction with law enforcement constitutes a seizure triggering the Fourth Amendment. An officer may approach a citizen "on the street or in other public places" and ask the citizen to voluntarily answer questions without violating the Fourth Amendment. *United States v Drayton*, 536 US 194, 200-201; 122 S Ct 2105; 153 L Ed 2d 242 (2002). "[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v Bostick*, 501 US 429, 439; 111 S Ct 2382, 2389; 115 L Ed 2d 389 (1991).

The trial court found that Deputy Pence parked his patrol vehicle behind defendant's vehicle, 10 feet away, at a 45-degree angle. This was supported by both Deputy Pence's testimony and the patrol-vehicle recording of the stop played for the trial court and included in the record. The trial court also found that, if defendant had reversed his vehicle straight back, he would have hit Deputy Pence's patrol vehicle. This was likewise supported by Deputy Pence's testimony, and arguably the video of the stop. Then the trial court found that "defendant's only means to exit [was] driving over the grass in front of him." The trial court cited this statement to "status conference 3/4/2020," which was the conference that the court held after the case was remanded from our Supreme Court. No evidence was presented at this hearing—only argument by the parties. It therefore appears that this finding by the trial court was based on defense counsel's argument at the hearing in which he asserted that defendant could only exit the parking lot by driving over the grass in front of him. This assertion was unsupported by any evidence, however. In fact, the evidence in the record only supports a contrary conclusion. Specifically, Deputy Pence testified, "If [defendant] would have turned his wheel as he was backing out, he would have cleared my vehicle." Moreover, being that the only vehicles in the parking lot were defendant's vehicle and Deputy Pence's patrol vehicle, and based on the court's finding that the deputy parked behind defendant's vehicle, 10 feet away and at a 45-degree angle, it seems common sense that defendant would have been able to have clear the deputy's vehicle if defendant "turned his wheel as he was backing out."[2] We are therefore left with a definite and firm conviction that the trial court made a mistake when it found that "defendant's only means to exit [was] driving over the grass in front of him."

The question then becomes whether Deputy Pence's conduct of partially obstructing defendant's ability to move his vehicle "would have communicated to a reasonable person that the

[2] Also, upon viewing the patrol-vehicle recording of the stop, it appears that defendant would have been able to safely reverse, albeit at an angle, out of the parking spot.

person was not free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 US at 439. In answering this question, we find instructive a portion of *United States v Carr*, 674 F3d 570 (CA 6, 2012), that this Court cited approving in *People v Anthony*, 327 Mich App 24, 39-40; 932 NW2d 202 (2019). In *Carr*, the Sixth Circuit Court of Appeals explained:

> As a threshold matter, the stop was consensual at the point where the officers parked their unmarked police car near Carr's Tahoe. A "consensual encounter" occurs when "a reasonable person would feel free to terminate the encounter." *United States v. Drayton*, 536 US 194, 201; 122 S Ct 2105; 153 L Ed 2d 242 (2002). This court has analyzed similar civilian-police encounters by determining whether the police vehicle blocked the defendant's egress. See, e.g., *United States v. See*, 574 F3d 309, 313 (6th Cir 2009); *United States v. Gross*, 662 F3d 393, 399-400 (6th Cir 2011). As the concurrence in *See* suggested, unless there is other coercive behavior, a police officer can initiate a consensual encounter by parking his police vehicle in a manner that allows the defendant to leave. *See*, 574 F3d at 315 (Gilman, J., concurring). Here, the police officers parked their unmarked, black Ford Explorer at an angle in front of Carr's Tahoe. The angle of the police vehicle gave Carr sufficient room to drive either forward or backward out of the carwash bay. Although pulling forward would have required "some maneuvering" for Carr to get around the Explorer, "there was enough room that [Carr] could have just merely steered around [the Explorer]." As one of the officers testified, Carr had "ample room to steer and maneuver around our vehicle." Because the police vehicle allowed Carr to exit the carwash, albeit with "some maneuvering," Carr's car was not blocked for Fourth Amendment purposes. To conclude otherwise would be an endorsement of a "simplistic, bright-line rule" that a detention occurs "any time the police approach a vehicle and park in a way that allows the driver to merely drive straight ahead in order to leave." [*Carr*, 674 F3d at 572-573.]

Like the defendant in *Carr*, defendant here could exit his parking space, "albeit with 'some maneuvering.' " Thus, the position of Deputy Pence's patrol vehicle alone did not turn this encounter into a seizure, and we must determine whether there was "other coercive behavior" by Deputy Pence that turned the encounter into a seizure for Fourth Amendment purposes. *Id*. at 573. On the record before us, there was no such coercive behavior. Accordingly, Deputy Pence did not seize defendant for Fourth Amendment purposes when he parked his patrol vehicle behind defendant's vehicle, 10 feet away and at a 45-degree angle. As such, defendant's Fourth Amendment rights were not implicated when the deputy parked behind him. See *Anthony*, 327 Mich App at 33 ("If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.") (Quotation marks and citation omitted.)

According to Deputy Pence, when he reached the vehicle, which was running, the window was already down, and he saw that defendant's eyes were bloodshot and glossy, which the deputy explained was consistent with someone who had been consuming alcohol. When the deputy spoke to defendant, he noticed that defendant's speech was slurred, which was also consistent with someone who had been consuming alcohol. The deputy could also smell alcohol coming out of the vehicle. On these facts, Deputy Pence had reasonable suspicion that defendant had operated a vehicle while intoxicated, and could briefly detain defendant for further investigation. See *People*

v Oliver, 464 Mich 184, 193; 627 NW2d 297 (2001) (explaining that an officer may "detain a person consistently with the Fourth Amendment on the basis of reasonable suspicion that criminal activity may be afoot").[3]

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien

[3] In light of our conclusion that the trial court erred by granting defendant's motion to suppress, we decline to address the prosecution's argument that the exclusionary rule should not apply under the facts of this case.

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SHAPIRO, P.J. (*dissenting*).

I respectfully dissent. The trial court did not err by determining that defendant was seized for purposes of the Fourth Amendment because under the circumstances of this case a reasonable person would not have believed he was free to leave.

It is well-settled that "[a] lone automobile idling in a darkened parking lot late at night does not, without more, support a reasonable suspicion of criminal activity." *People v Freeman*, 413 Mich 492, 496; 320 NW2d 878 (1982). Where reasonable suspicion cannot be demonstrated, the officers may not act in a fashion to significantly hinder the ability of the person stopped to leave the scene. If a reasonable person would believe that they were not free to leave, then the police action is a *Terry* stop, i.e., a seizure. See *People v Shankle*, 227 Mich App 690, 659-696; 577 NW2d 471 (1998).

In this case, defendant was parked at the edge of a parking lot such that he could not drive forward without leaving the paved parking area and driving over grass. The approaching officer parked his patrol car 10 feet behind defendant's vehicle with the headlights pointed at defendant's car. The officer also activated the patrol car's spotlight, and pointed it at the driver's side of defendant's car. The officer testified that he purposely positioned his patrol car behind defendant's vehicle so that if defendant attempted to back straight out of the parking spot he would strike the police car. And the officer testified that if defendant had attempted to drive away he would have activated his sirens and lights and forced defendant to stop his vehicle.

At the outset of this case, the prosecution argued that the officer had reasonable suspicion of criminal activity or that he was making a health and safety check of the driver. However, at the evidentiary hearing the deputy testified that his only basis for suspecting criminal activity was that the parking lot was in a high crime area and he conceded that he made no inquiry as to whether defendant needed assistance or medical treatment. Because there was no basis for a *Terry* stop and the stop was not for health and safety purposes, the prosecution was left only with the argument that what occurred was merely a "consensual encounter." The trial court conducted an evidentiary hearing and thereafter granted defendant's motion to suppress, finding that under the circumstances, "a reasonable person would have believed that he or she was not free to leave; thus constituting a seizure."

The majority concludes that this trial court finding was clearly erroneous because there was enough room behind defendant's vehicle for him to leave the scene by carefully maneuvering his vehicle in reverse around the police car. This reasoning, however, misconstrues the test for whether a seizure occurs within the meaning of the Fourth Amendment. The Fourth Amendment does not turn on a measuring tape or the existence of some demanding but conceivable means of departure; the question is not whether leaving was physically possible but whether a reasonable person would believe he was free to leave. The standard was clearly enunciated by the Supreme Court in *People v Jenkins*, 472 Mich 26, 32, 691 NW2d 759 (2005): "A 'seizure' within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave." Whether defendant's car could actually have been maneuvered past the police vehicle is a factor relevant to that inquiry, but it is not the inquiry itself.

Viewing the totality of the circumstances, the evidence was overwhelming that a reasonable person in defendant's shoes would conclude that they were not free to leave and I see no basis to find clear error by the trial court. The police car was parked behind defendant's car at night, obstructing his only straight path of egress. Further, it was dark and the police car's headlights and spotlight were shining on defendant's vehicle, undoubtedly affecting defendant's vision were he to drive in reverse and strongly suggesting that the police were not merely initiating a casual, consensual encounter.[1] Under these circumstances, the defendant could not leave the scene without risking striking a police car or a police officer, or at least finding himself arrested for fleeing and eluding or resisting and obstructing.[2] The conclusion that defendant should have believed he was free to leave is one that only lawyers and judges could reach given that it can exist only in argument and not in reality. No reasonable person, and likely few unreasonable persons, would conclude that they are free to leave when a police car parks behind them so as to block or significantly hinder their ability to drive away and directs the police vehicle's headlights and spotlight at the person's vehicle.

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[1] Although the spotlight shining on defendant was relied on by the trial court as a pertinent factor in this case, the majority declines to consider it in reversing the court.

[2] An officer's subjective intent not to let someone leave is not dispositive as to whether a seizure occurred, but it is relevant, particularly when the manner in which the officer behaves is consistent with that intent, e.g., physically hindering a person's ability to leave.

In reversing the trial court, the majority relies heavily on *United States v Carr*, 674 F3d 570 (CA 6, 2012), a nonbinding federal decision[3] that was quoted with approval in *People v Anthony*, 327 Mich App 24; 932 NW2d 202 (2019). Both cases are readily distinguishable on the facts. In *Carr*, the defendant's vehicle could have left either through the front of the carwash bay, where a police vehicle was parked at angle in front of the defendant's vehicle, or the rear of the bay where there was no police vehicle. See *Carr*, 674 F3d at 572-573. In contrast, defendant in this case could not drive forward and his only option would have been to maneuver past the police vehicle in reverse while looking back into headlights and a spotlight pointed toward him. And in *Anthony*, there was no question about the availability of egress as the officers parked parallel to the defendant's vehicle on the street. See *Anthony*, 327 Mich App at 39.

Moreover, to the extent that *Anthony*'s reliance on *Carr* can be read for the proposition that the position of the police vehicle is irrelevant as to whether a seizure occurred so long as it does not block every possible path of egress, I would conclude that it was wrongly decided and its holding should be overruled by the Michigan Supreme Court. *Anthony* is plainly at odds with the well-established standard that a seizure occurs if, "*in view of all the circumstances*, a reasonable person would have believed that he was not free to leave." *Jenkins*, 472 Mich at 32 (emphasis added). See also *United States v Drayton*, 536 US 194, 201; 122 S Ct 2105; 153 LEd2d 242 (2002) ("[F]or the most part *per se* rules are inappropriate in the Fourth Amendment context."). Each case must be decided on its own facts, and defendant's theoretical ability to maneuver past the police vehicle is not dispositive.

The trial court properly considered the totality of the circumstances and found that a reasonable person would not have believed he was free to leave. Because there was ample evidentiary support for this conclusion, I would affirm the trial court's ruling.

/s/ Douglas B. Shapiro

[3] *Carr* was a 2-1 decision.