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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-503 / 93-1754

STATE OF IOWA,

Appellee,

vs.

DOUGLAS MANNA,

Appellant.

Appeal from the Iowa District Court for Story County, Steve Van Marel, District Associate Judge.

Defendant appeals his conviction and sentence for driving while intoxicated, second offense, in violation of Iowa Code section 321J.2 (1993). **REVERSED AND REMANDED.**

Richard A. Bartolomei of Bartolomei & Lange, P.C., Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, and Mary E. Richards, County Attorney, for appellee.

Heard by Hayden, P.J., and Habhab and Huitink, JJ., but decided en banc.

HUITINK, J.

Douglas Manna appeals his conviction of driving while intoxicated, second offense. We reverse and remand.

On April 29, 1993, Manna was stopped and cited for speeding. The officer who cited Manna testified his only reason for stopping Manna was excessive speed and his decision to stop Manna did not include any alcohol indicators such as swerving or errant driving. He also testified that he did not observe any signs, odors, or behaviors suggesting Manna was intoxicated at the time he was stopped or during their initial conversation in the officer's patrol car.

After issuing Manna a speeding citation, the officer noticed Manna was chewing sunflower seeds, and he asked Manna to spit them out. After Manna complied, the officer noticed Manna's breath smelled of an alcoholic beverage. He then asked Manna if he had been drinking. When Manna answered that he had, the officer administered field sobriety tests and a preliminary breath test. Manna was arrested for O.W.I. after failing the sobriety test, and his preliminary breath test indicated his blood alcohol level exceeded .10.

Manna moved to suppress all evidence seized as a result of this encounter. At the hearing on this motion, the arresting officer testified that he had no reason to suspect Manna was under the influence or had committed any public offense other than speeding when he asked Manna to

spit out the sunflower seeds. The officer's only stated reason for his request was the special emphasis placed on enforcement of alcohol-related offenses during the VIESHA celebration at Iowa State University that weekend. The district court concluded that any intrusion resulting from this encounter was too minimal to raise any Fourth-Amendment implications and overruled the motion.

On appeal Manna contends he was illegally seized when he was asked to spit out the sunflower seeds and there was no reasonable cause to invoke implied consent procedures. The State contends no seizure occurred and Manna's voluntary response to the officer's request furnished reasonable cause to invoke implied consent procedures.

The motion to suppress raises a Fourth-Amendment challenge to the evidence obtained during this encounter. Our review on this constitutional issue is therefore de novo. State v. Riley, 501 N.W.2d 487, 488 (Iowa 1993).

The Fourth Amendment's protections against unreasonable intrusions on a person's liberty arise when a police officer seizes a person. Terry v. Ohio, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889, 903 (1968). A seizure occurs when an officer by means of physical force or show of authority has in some way restrained the liberty of a citizen. State v. Harlan, 301 N.W.2d 717, 719-20 (Iowa 1981) (citations omitted). Examples of a seizure include taking hold of a suspect, the threatening presence of

several officers, or the use of language or tone of voice indicating that compliance might be compelled. Id. An automobile stop is a seizure within the meaning of the Fourth Amendment. Berkemer v. McCarthy, 468 U.S. 420, 436-37, 104 S. Ct. 3138, 3148-49, 82 L. Ed. 2d 332-33 (citation omitted) (1984). However, a seizure under these circumstances is not a custodial environment implicating the protections guaranteed by the Fifth Amendment. Id. 468 U.S. at 440-41, 104 S. Ct. at 3150-51, 82 L. Ed. 2d at 334-35.

Once a seizure has occurred, it must be supported by an objective justification. Id. The State must tender specific and articulable facts supporting the officer's belief that a crime may have been committed. State v. Lamp, 322 N.W.2d 48, 51 (Iowa 1982).

"Not all personal intercourse between the police and citizens involves a seizure of the person." Terry, 392 U.S. at 19 n.16, 88 S. Ct. at 1879 n.16, 20 L. Ed. 2d at 905 n.16. A seizure does not occur simply because an officer approaches an individual and asks a few questions as long as a reasonable person would feel free to disregard the officer's request and go about his or her business. California v. Hodari D., 499 U.S. 621, 627, 111 S. Ct. 1547, 1551, 113 L. Ed. 2d 690, 698 (1991). In Michigan v. Chesternut, the Court noted:

> The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation.

> Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to "leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.

486 U.S. 567, 573, 108 S. Ct. 1975, 1979, 100 L. Ed. 2d 565, 572 (1988).

The appropriate question is whether a reasonable person would feel free to decline the officer's request or otherwise terminate the encounter. Florida v. Bostick, 501 U.S. 429, 431, 111 S. Ct. 2382, 2384, 115 L. Ed. 2d 389, 396 (1991).

In our application of this test we consider the arresting officer's conduct as a whole and the setting in which it occurred. Manna was in the officer's patrol car as the result of his earlier seizure for speeding. The request to spit out the sunflower seeds and questioning about Manna's drinking occurred immediately after the citation was issued. Although the officer testified Manna was free to leave after the citation was issued, he did not tell Manna he was free to leave, nor do we find any circumstances in the record from which Manna could make that inference.

We do not believe a reasonable person, in the absence of clear indications to the contrary, would feel free to refuse the officer's inquiries or terminate the encounter by leaving the patrol car. See Berkemer, 468 U.S. at 436, 104 S. Ct. at 3148, 82 L. Ed. 2d at 332 ("[c]ertainly few motorists would feel free either to disobey a directive to

pull over or to leave the scene of a traffic stop without being told they might do so.") The circumstances of this encounter include sufficient coercive indications supporting our conclusion that Manna was seized at the time the officer made the subject inquiries. The State concedes, and we accept for purposes of this decision, that the officer lacked reasonable suspicion to support Manna's continued detention.[1] Since we find no objective justification for Manna's seizure, all of the evidence obtained as a result should have been suppressed.

The State earnestly contends the rule announced in Florida v. Bostick should control our disposition of this case. In Bostick the Court held that the mere fact a defendant does not feel free to leave does not mean he has been seized. Bostick, 501 U.S. at 435-36, 111 S. Ct. at 2386, 115 L. Ed. 2d at 399. We, however, find this case distinguishable from Bostick because there were factors other than police conduct that made the defendants in Bostick feel they were not free to leave. There are no factors in this case other than police conduct that could similarly influence a person in Manna's circumstances. Bostick is therefore not controlling under the facts of this case.

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1. The State does not argue that the officer's inquiry was a legitimately expanded (search) based on suspicions after the initial determination to seize the defendant. See State v. Scott, 518 N.W.2d 347, 350 (Iowa 1993) (citing United States v. Barahona, 990 F.2d 412, 416-17 (8th Cir. 1993)).

Manna next argues the officer did not have reasonable grounds to invoke implied consent procedures under Iowa Code section 321(j)6 (1991). We agree.

Iowa Code section 321(j)6 requires a showing of some articulable circumstance which led the officer to conclude Manna was operating while intoxicated. Westendorf v. D.O.T., 400 N.W.2d 553, 555 (Iowa 1987). We have already determined the only evidence satisfying this requirement must be suppressed. Any evidence obtained through this procedure must likewise be suppressed.

The judgment is therefore reversed, and this case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.