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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR12-542

TAYLOR LARRICK WARD APPELLANT	**Opinion Delivered** November 14, 2012 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT, [NO. CR-2011-787]
V.	HONORABLE GEORGE C. MASON, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Taylor Ward appeals from his conditional guilty pleas in the Washington County Circuit Court to charges of driving while intoxicated, driving on a suspended driver's license, careless and prohibited driving, and violation of implied consent. Appellant argues that (1) the officer's conduct constituted a seizure, and (2) there was no reasonable suspicion for the initial stop. We affirm.

On September 13, 2010, at about 1:11 a.m., Corporal Matthew Sutley was in the area of Gregg and Douglas Streets in Fayetteville, Arkansas. He pulled a vehicle over on North Gregg Street for "bright-lighting" other vehicles on Dickson Street. After giving the driver of the stopped vehicle a verbal warning, Corporal Sutley heard yelling nearby and noticed a half-undressed woman lying in a brushy area a short distance away along the side of Gregg Street. Because they were not intoxicated, Corporal Sutley let the occupants of the car initially stopped leave the scene.

Corporal Sutley parked his patrol vehicle in the southbound lane of traffic, facing north, and got out to investigate the yelling. He discovered a female individual, intoxicated and naked from the waist up, in a grown-up-brush area near a parking lot. Corporal Sutley called for backup. Four more patrol vehicles arrived, two from the Fayetteville Police Department and two from the University of Arkansas Police Department, and they also parked along Gregg Street in such a way as to create an obstruction in traffic flow.

While the officers were attempting to deal with the intoxicated female, two vehicles slowly passed between the police vehicles in the road, a Jeep Grand Cherokee heading north and a BMW sedan heading south. During this time, there were no officers in the roadway directing traffic, none of the officers were wearing vests, there were no cones, and none of the police vehicles had their blue lights on. Essentially, there was nothing to let people know about the upcoming obstruction.

At approximately 1:20 a.m., appellant turned onto Gregg Street traveling north. As appellant approached the obstruction, Corporal Sutley called out to him with a raised voice that he was not going to fit. However, at that point, appellant's window was barely cracked.

The patrol-car video that was introduced into evidence indicates that appellant pulled forward slightly going north on Gregg Street, toward the patrol vehicles, but almost immediately stopped and began backing up the truck. At that time, Corporal Sutley effectuated the stop by taking one or two steps and knocking on appellant's back window. Appellant rolled down his window, and Corporal Sutley asked, "At what point did you think you were going to fit?"

As he began speaking with appellant, Corporal Sutley smelled the odor of intoxicants, and he stated that appellant looked intoxicated. Corporal Sutley ordered appellant to stop the truck and get out. He conducted field sobriety tests, after which appellant was arrested.

At a suppression hearing on March 9, 2012, the Washington County Circuit Court denied appellant's motion to suppress the evidence obtained on September 13, 2010. On April 16, 2012, appellant pled guilty, reserving an appeal of the denial of his suppression motion under Rule 24.3 to charges of driving while intoxicated ("DWI"), driving on a suspended drivers' license, violation of implied consent, and careless and prohibited driving. On May 9, 2012, a sentencing order was filed, and appellant filed his timely notice of appeal on May 10, 2012.

The Arkansas Supreme Court has clearly stated the appropriate standard for review of a suppression ruling:

> In reviewing the denial of a motion to suppress evidence, this court conducts a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. A finding is clearly erroneous, even if there is evidence to support it, when the appellate court, after review of the entire evidence, is left with the definite and firm conviction that a mistake has been made. We defer to the superiority of the circuit judge to evaluate the credibility of witnesses who testify at a suppression hearing.

Cockrell v. State, 2010 Ark. 258, at 9–10, 370 S.W.3d 197, 203 (internal citations omitted).

Appellant argues that Corporal Sutley's conduct in stopping and talking to him constituted a seizure in the context of the Arkansas Supreme Court's categorization of police-citizen encounters as explained in *Frette v. City of Springdale*, 331 Ark. 103, 108, 959

S.W.2d 734, 736 (1998). In the present case, Corporal Sutley testified that it was the patrol cars of the officers on the scene, rather than civilian vehicles, that had the lanes of traffic on Gregg Street obstructed. Corporal Sutley acknowledged that appellant had committed no crime when he knocked on appellant's back window, and that if the police vehicles had not been creating an obstruction, appellant would have passed through the road.

Corporal Sutley testified that it was not his intention to create a seizure at that time. However, as spelled out by our supreme court in *Frette*, *supra*, a consensual encounter is transformed into a seizure when a reasonable person would believe that he is not free to leave. Appellant submits that he was blocked from leaving on three sides by the obstruction caused by the police vehicles, and to the back by Corporal Sutley. Appellant claims that in this situation, a reasonable person would believe that leaving was not an option. As such, appellant asserts that Corporal Sutley's conduct constituted a seizure within the context of the Arkansas Supreme Court's categorization of police-civilian encounters. He argues that the particular circumstances surrounding the stop and subsequent seizure do not provide specific, particularized, and articulable facts leading to a reasonable suspicion that appellant was engaging in criminal activity that justify Corporal Sutley's actions. As such, he claims that the motion to suppress evidence was improperly denied.

Fourth Amendment protection against unreasonable searches and seizures extends to persons driving down the street. *Roark v. State*, 46 Ark. App. 49, 876 S.W.2d 596 (1994). However, not all personal exchanges between police officers and citizens involve "seizures" of persons under the Fourth Amendment. *E.g.*, *Thompson v. State*, 303 Ark. 407, 797 S.W.2d

450 (1990). Under Arkansas law, no person shall willfully fail or refuse to comply with any lawful order or direction of any police officer invested by law with authority to direct, control, or regulate traffic. Ark. Code Ann. § 27-49-107 (Repl. 2010).

A law-enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person whom he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger or forcible injury to person or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. Ark. R. Crim. P. 3.1.

The State analogizes this to a vehicle accident or other roadway obstruction that drivers often and unexpectedly happen upon and where police often require the drivers to stop and turn around or wait, unable to proceed, until the way is cleared. Corporal Sutley indicated that, in the ordinary performance of police duties, he found himself needing to direct appellant's vehicle because, in backing up toward the officers attending to the woman in the ongoing incident, appellant placed the officers in harm's way.

Appellant stopped his truck after Corporal Sutley got his attention by knocking on the window. In *Thompson*, *supra*, a police officer had observed Thompson's vehicle parked with its light on and motor running in the same parking space twice over a ten-minute period, and approached to investigate, stating that the reasons were that something might be wrong with the driver or that something might be going on that should not be. *See Thompson*, 303 Ark. at 408, 797 S.W.2d at 451. Here, Corporal Sutley testified that he

wanted the truck to stop backing up in order to protect his fellow officers. Appellant rolled down his window and Corporal Sutley approached. At that time, Sutley noticed the strong odor of intoxicants coming from the truck cab, that appellant's eyes were "bloodshot, glassy, watery," and that appellant looked intoxicated.

The trial court believed Corporal Sutley's testimony that the encounter was nothing more than a police officer attempting to direct traffic, specifically appellant's vehicle, on a dark, congested street amidst a crime scene where other officers were present and their safety was at issue. Our standard of review compels us to defer to the trial court's credibility determination. *Cockrell*, *supra*. While protecting the officers was a specific, particularized, and articulable explanation for knocking on appellant's back window to get his attention, we hold that the odor of intoxicants and appellant's appearance provided Corporal Sutley with the requisite suspicion to investigate appellant for the possible offense of DWI. Pursuant to Arkansas Rule of Criminal Procedure 3.1, Corporal Sutley then had a duty to investigate further because it is unlawful for any person who is intoxicated to operate or be in actual physical control of a motor vehicle. *See* Ark. Code Ann. § 5-65-103(a) (Repl. 2005). Additionally, after seeing appellant and smelling the intoxicants, Corporal Sutley also had the authority to arrest appellant for DWI. *See King v. State*, 42 Ark. App. 97, 854 S.W.2d 362 (1993).

Even assuming that the investigatory stop began the moment Corporal Sutley knocked on appellant's window, Corporal Sutley had a reasonable suspicion, based on his experiences as a police officer, that appellant was endangering the police officers on the street

behind him, and accordingly, he was within his authority to require appellant to stop the vehicle. When appellant rolled down his window and the odor of alcohol became apparent, Corporal Sutley then had reasonable suspicion to have him step out of the truck. Had this been a traffic-accident scene where appellant was being told to turn around, the same odor of alcohol would cause an officer directing traffic in that scenario to order appellant aside to investigate for the same reason. We hold that there was no investigatory stop as contemplated by the Fourth Amendment until after appellant rolled down his window, and the odor of intoxicants and appellant's appearance gave rise to reasonable suspicion to investigate and provided cause to arrest. Accordingly, we hold that the trial court did not err in denying appellant's motion to suppress.

Affirmed.

GRUBER and GLOVER, JJ., agree.

Taylor Law Partners, LLP, by: *John Mikesch*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Nicana C. Sherman*, Ass't Att'y Gen., for appellee.