

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1183**

State of Minnesota,
Appellant,

vs.

Nicholas Gage Carr,
Respondent.

**Filed May 17, 2021
Affirmed
Bryan, Judge**

Hennepin County District Court
File No. 27-CR-20-2205

Keith Ellison, Attorney General, St. Paul, Minnesota; and

James R. Rowader, Jr., Minneapolis City Attorney, Amy J. Tripp-Steiner, Assistant City Attorney, Minneapolis, Minnesota (for appellant)

Coley J. Grostyan, Minneapolis, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Bryan, Judge; and Halbrooks, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this pretrial appeal, appellant challenges the district court's order suppressing evidence. Because we conclude that the officer's verbal and nonverbal directives amounted to an unreasonable investigative seizure of respondent, we affirm the district court's decision granting respondent's motion to suppress evidence.

FACTS

Appellant State of Minnesota charged respondent Nicholas Gage Carr with possessing a pistol without a permit in violation of Minnesota Statutes section 624.714, subdivision 1a (2018), and carrying a pistol while under the influence of alcohol in violation of Minnesota Statutes section 624.7142, subdivision 1(4) (2018). Carr moved to suppress evidence, arguing that the state obtained this evidence—namely, the firearm—after an unlawful investigative seizure of his person. The district court held a hearing, admitted testimony from Carr and the arresting officer, and received the officer's squad car video recording of the encounter into evidence.

The district court granted Carr's motion to suppress and made the following findings of fact. In the early morning hours of January 24, 2020, Officer Matthew Williams was on duty and standing outside of his squad car near the Hennepin County Medical Center. At approximately 2:52 a.m., Carr approached Williams. Carr explained that he was on his way back to his hotel and wanted directions because his cell phone was dead. Williams smelled alcohol coming from Carr and observed a wet spot on Carr's pants. Williams used his cell phone to determine the address of Carr's hotel. Carr confirmed that the address

was correct. After seeing the information on Williams's cell phone, Carr now knew where he was going. Carr intended to walk the nine blocks back to his hotel.¹ At this point in the encounter, Williams made a nonverbal gesture and a verbal declaration: "Williams made the motion to open the door of the squad car for Mr. Carr, and told Mr. Carr that he was going to search him."² Carr felt compelled to do as Williams directed: "Mr. Carr did not feel that he had a choice about getting into the squad car. . . . Officer Williams never informed Mr. Carr whether he had a choice about getting into the squad car, or whether Mr. Carr had a choice about a pat search." Williams asked Carr if he had a weapon, and Carr said that he was carrying a firearm in his waistband. Williams called two passing officers over for assistance, placed Carr in handcuffs, removed the gun, and arrested Carr.

The district court concluded that the officer unlawfully seized Carr without reasonable suspicion of criminal activity when Williams "motioned toward his squad car, indicating that Mr. Carr should get inside, and simultaneously told Mr. Carr that he was going to pat search him." The district court noted that, like Carr, "a reasonable person would not have felt free to ignore [the officer] or to walk away." The district court also

¹ The district court found that Carr "credibly testified that, after seeing . . . [the officer's] cell phone, he knew where he was going and he intended to walk the nine blocks to his hotel." Neither party challenges the district court's credibility determinations.

² The state characterizes Williams's nonverbal communication as a "silent gesture," but does not dispute that Williams simultaneously made verbal comments. The video recording shows the following: Williams snapped his fingers as he walked by Carr, motioned for Carr to follow him, and declared "Before you get in, I'm just gonna pat you down quick, make sure you don't got any weapons on you." In response, Carr stated, "I do got a weapon on me." Williams put Carr's hands on top of his head, interlocking his fingers, and asked, "You got a knife?" Carr responded, "I got a gun." Neither party challenges the factual findings, and given the actions and statements captured on the video recording, we discern no error in the district court's findings.

determined that “there was no reason to believe that Mr. Carr was in need of medical assistance, or that there was an emergency situation” because although Carr smelled of alcohol, he exhibited no other signs of intoxication, had no difficulty communicating, and did not ask for a ride. Accordingly, the district court suppressed the evidence. The state appeals.³

DECISION

The state argues that the district court erred when it suppressed the evidence of the firearm. Because Williams’s gesture and simultaneous statement indicated that compliance was required, and because the state concedes it lacked a sufficient basis for an investigatory seizure at that point in the encounter, we conclude that Carr was unlawfully seized.

The Fourth Amendment to the United States Constitution and article I of the Minnesota Constitution protect citizens from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. “Under the Minnesota Constitution, ‘a person has been seized if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter.’”⁴ *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999)

³ As a threshold matter, we agree with the parties that the state has satisfied the requirements for review of the pretrial order. See Minn. R. Crim. P. 28.04, subd. 2(2)(b) (requiring showing of critical impact); *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987) (defining the critical impact threshold).

⁴ The Minnesota Supreme Court has interpreted article I of the Minnesota Constitution to offer more protection than the Fourth Amendment to the United States Constitution. For example, although *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547 (1991) held that a seizure occurs when police use physical force or when a person submits to a show of

(quoting *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995)). Examples of circumstances that indicate a seizure has occurred include: “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” *Id.* (quotations omitted). “In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.” *E.D.J.*, 502 N.W.2d at 791, 783 (concluding that a seizure occurred once the police officer directed E.D.J. to stop (quoting *United States v. Mendenhall*, 446 U.S. 544, 555, 100 S. Ct. 1870, 1877 (1980))). “Further, when a person is seized, courts must suppress evidence gathered as a result of that seizure only when the seizure was unreasonable.” *Harris*, 590 N.W.2d at 99.

The state argues that the district court erred in determining that an investigatory seizure occurred when Williams made the verbal and nonverbal directives to Carr. According to the state, *Harris* established four factors that district courts must apply in order to determine whether and when a seizure occurred. The state then argues that the district court did not balance or specifically weigh each of these factors. Given that the state does not assign error to any of the factual findings of the district court, the state’s

authority, the Minnesota Supreme Court determined that under the Minnesota Constitution, a person could be seized even in the absence of force, if a reasonable person would not feel free to leave under the totality of the circumstances. *In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993) (“[W]e are not persuaded by the majority opinion in *Hodari*, and we are persuaded that there is no need to depart from the pre-*Hodari* approach.” (emphasis omitted)); see also *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004) (declining to adopt the holding in *Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S. Ct. 1536 (2001), and instead applying *Terry v. Ohio*, 392 U.S. 1, 19-21, 88 S. Ct. 1868, 1879-80 (1968)).

argument raises a question of law that we review de novo. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quotation omitted) (“When reviewing a district court’s pretrial order on a motion to suppress evidence, we review the district court’s factual findings under a clearly erroneous standard and the district court’s legal determinations de novo.”); *Harris*, 590 N.W.2d at 98 (“Specifically, when the facts are not in dispute, a reviewing court must determine whether a police officer’s actions constitute a seizure and if the officer articulated an adequate basis for the seizure.”).

We disagree with the state’s argument for two reasons. First, contrary to the state’s argument, *Harris* lists examples that may or may not be present in a given case, not a list of factors for the district court to individually weigh in every case. 590 N.W.2d at 98. Under *Harris*, a district court determines whether the conduct present, like the conduct in the listed examples, indicates that a seizure has occurred. *Id.* The circumstances of this case most closely resemble the fourth *Harris* example: “the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” *Id.* (quotation omitted). Here, the district court did not misapply the law, but properly considered whether the totality of Williams’s actions, statements, language, and tone of voice indicated that Williams would compel Carr to comply with his directives.

Second, the state’s argument overlooks the compulsory nature of Williams’s actions and statements. The initial encounter began when Carr asked the uniformed police officer for help locating his hotel. Carr did not request a ride. After Williams explained to Carr the hotel’s location, the purpose for initiating contact was complete. At this point Carr was no longer lost, and he intended to walk the nine blocks back to the hotel. Before Carr could

walk away, however, Williams directed Carr to the back seat of the squad car. At the same time, the officer declared that he was now going to search Carr. We agree with the district court that a reasonable person would not respond to Williams's verbal and nonverbal directives by disregarding them and walking away. In addition, Williams did not ask Carr any questions, present Carr with any options, or communicate that Carr had the opportunity to make a choice or otherwise walk away from Williams.⁵ By directing Carr into the back seat of the squad car, declaring that Carr would be searched, and not indicating that Carr had any other options, Williams commenced an investigative seizure.

Having concluded that an investigative seizure occurred prior to Carr's statement that he had a weapon, we next address whether that seizure was reasonable. "A police officer may stop and temporarily seize a person to investigate that person for criminal wrongdoing if the officer reasonably suspects that person of criminal activity." *Cripps*, 533 N.W.2d at 391; *Terry*, 392 U.S. at 19-21, 88 S. Ct. at 1879-80. The state acknowledges that Williams did not have reasonable suspicion that Carr was engaged in criminal activity when he gestured to the back seat of the squad car and told Carr that he was going to search him. The state however argues that the investigative seizure was reasonable because the officer had a valid safety concern for both Carr and himself.⁶

⁵ The state cites a nonprecedential case for the proposition that offering a citizen a ride is not a seizure. *State v. Stigen*, No. A11-0452, 2012 WL 686079, at *6 (Minn. App. Mar. 5, 2012), *review denied* (Minn. May 30, 2012). We are not persuaded that this case supports reversal. In *Stigen*, the officer offered the choice of a ride or walking into town. *Id.* at *2. Here, the officer did not offer Carr any choices or give any indication that compliance with the verbal and nonverbal directives was optional.

⁶ The state also alludes to the community-caretaker and emergency-aid exceptions to the warrant requirement, but does not cite any legal authority regarding either theory. We

The state cites three cases to support its position that officer safety concerns permit a search in the absence of reasonable suspicion: *State v. Lemert*, 843 N.W.2d 227, 230 (Minn. 2014); *State v. Varnado*, 582 N.W.2d 886, 891 (Minn. 1998); *State v. Curtis*, 190 N.W.2d 631, 636 (Minn. 1971). These authorities, however, do not support the state’s argument because each holding applies after a *lawful* investigative seizure has occurred and none allows a search in the absence of reasonable suspicion of criminal activity. *See Lemert*, 843 N.W.2d at 231-32 (noting that “our task is to determine whether, under the totality of the circumstances at the inception of the pat search, the officers had a reasonable, articulable suspicion that Lemert might have been armed and dangerous” and concluding that “the officers had a reasonable, articulable suspicion that Lemert might have been armed and dangerous”); *Varnado*, 582 N.W.2d at 890-91 (rejecting the state’s requested exception to *Terry*, declining to adopt “a blanket rule allowing officers . . . to frisk . . . citizens before they enter a squad car,” and instead holding that “when an officer has a valid reasonable basis for placing a lawfully stopped citizen in a squad car, a frisk will often be appropriate without additional individual articulable suspicion”); *Curtis*, 190 N.W.2d at 636 (holding that police may, under limited circumstances for their own protection, “search a person before placing him in a squad car if there is a valid reason for requiring him to enter the vehicle and it is not merely an excuse for an otherwise improper search”).

decline to address these exceptions in the absence of adequate briefing. *State, Dep’t of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997).

Because the state agrees that Williams had no basis to suspect Carr of criminal activity at the time that Williams made the verbal and nonverbal directives to Carr, none of these cases justifies a search out of a concern for officer safety, and we conclude that Carr was unlawfully seized.

Affirmed.