IN THE COURT OF APPEALS OF THE STATE OF ALASKA

NICHOLAS JOSEPH DINNIS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11469 Trial Court No. 3PA-11-1439 CR MEMORANDUM OPINION No. 6290 — February 24, 2016

Appeal from the Superior Court, Third Judicial District, Palmer, Gregory Heath, Judge.

Appearances: David T. McGee, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Donald Soderstrom, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.[*]

Judge MANNHEIMER.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Nicholas Joseph Dinnis appeals his conviction for fourth-degree controlled substance misconduct (possession of hydromorphone). [1]

Dinnis argues that the State's evidence pertaining to the hydromorphone was the result of an illegal investigative stop. The superior court concluded that Dinnis had not been subjected to an investigative stop. Having reached this conclusion, the superior court decided that it did not need to reach the question of whether the police had reasonable suspicion to justify the stop.

We conclude that Dinnis *was* subjected to an investigative stop. This means that the admissibility of the State's evidence hinges on whether the police had reasonable suspicion to justify the stop. Because the superior court never reached this question, we must remand Dinnis's case to the superior court for further proceedings.

Dinnis raises one other claim on appeal: he argues that the evidence presented at his trial was legally insufficient to support his conviction, in that no witness made an express in-court identification of Dinnis as the person who possessed the hydromorphone. For the reasons explained in this opinion, we conclude that the evidence was sufficient, even without an express in-court identification, to support a reasonable conclusion that Dinnis was the person the witnesses were talking about.

The facts relating to Dinnis's suppression motion

On June 1, 2011, an off-duty Palmer police officer contacted the state troopers to report two vehicles parked at a pullout on the Old Glenn Highway, near the Matanuska River Bridge. The police officer told the troopers that, based on the actions of the people in the two vehicles, she suspected that a drug transaction was occurring.

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[1] AS 11.71.040(a)(3)(A).

Trooper Joshua Varys received the report and drove to the location. At the highway pullout, Varys saw two Cadillacs, parked one behind the other. Trooper Varys parked in the pullout, but he did not activate his overhead lights, nor did he block the exit.

Less than a minute after he arrived in the pullout, Varys got out of his patrol car and walked toward one of the vehicles. This vehicle had three occupants: the driver, a passenger in the front seat (Dinnis), and another passenger in the back seat. As Varys approached the vehicle, he observed all three occupants making "furtive movements [and] moving around."

Trooper Varys made contact with the occupants by saying, "Hey guys. How are ya? How's everything going?" He then immediately told the occupants: "Let me see your hands. Why [are] you reaching around? Keep your hands where I can see [them]." A very short time later, Varys told the driver and Dinnis to "put [their] hands on the dash", and he told the passenger in the back seat to "put [his] hands up front." Approximately two minutes later, Varys again told Dinnis to keep his hands on the dashboard. Varys later testified that he repeated this order because the occupants of the vehicle "weren't listening [to him, and] they kept moving around."

The occupants of the vehicle told Trooper Varys that they were there to make a music video, but Varys did not believe them. He then collected identification from all three occupants.

The driver of the vehicle told Trooper Varys that he was on felony probation for second-degree theft. Varys ordered the driver to shut off the engine and put the keys on the dashboard. Varys then contacted the driver's probation officer and explained the situation. The probation officer directed Varys to search the vehicle.

But when Varys told the driver to get out of the vehicle, the driver initially refused to comply — until Varys threatened to use pepper spray on him.[2] After the driver emerged from the vehicle, Trooper Varys handcuffed him and arrested him for disorderly conduct.

Trooper Varys then turned his attention to Dinnis (who was still seated in the car). He told Dinnis to get out of the vehicle, turn around, and keep his hands where Trooper Varys could see them. Varys asked Dinnis, "Are you going to cooperate with us, unlike [the driver] did? Do you need to go in handcuffs?"

Trooper Varys then conducted a pat-down search of Dinnis's outer clothing, and he asked if Dinnis had anything on him that Varys should know about. Dinnis told Varys that he had pills in his pocket, and that he didn't have a prescription for the pills. Trooper Varys told Dinnis to open the pill container, and Dinnis complied. When Varys asked Dinnis what the pills were, Dinnis replied that they were "Dilaudid, ... a type of morphine."

Varys arrested Dinnis, and Dinnis was charged with fourth-degree controlled substance misconduct after a laboratory analysis of the pills showed that they were hydromorphone, a schedule IA controlled substance.[3]

Following his indictment, Dinnis asked the superior court to suppress the pills, arguing that they were the fruit of an unlawful stop. The superior court held an evidentiary hearing, at which Trooper Varys was questioned about his interactions with the occupants of the vehicle. The superior court also listened to Varys's audio recording of the contact.

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[2] At the evidentiary hearing, Trooper Varys testified that he threatened to use pepper spray on the driver if he refused to cooperate. The audio recording of the encounter does not appear to support that testimony, but this discrepancy is not material to our decision.

[3] AS 11.71.140(b)(1)(K).

Ultimately, the superior court denied Dinnis's motion because the court concluded that Trooper Varys's contact with Dinnis did not constitute a seizure. In particular, the superior court ruled that when Varys instructed the driver and Dinnis to keep their hands on the dashboard, this did not constitute a "show of authority" because the driver and Dinnis "were [already] in a parked car", and thus Varys's command "in no way prohibited [the driver and Dinnis] from going about their business". The court also concluded that Varys was justified in instructing the two men to keep their hands on the dashboard because the occupants of the car were "moving around as if they were trying to hide something", and that these movements reasonably caused Varys to be concerned for his safety.

Why we conclude that Dinnis was subjected to an investigative stop, and why we must therefore remand this case to the superior court for further proceedings

Under the Alaska constitution, a police officer may briefly detain a person — *i.e.*, seize them temporarily — for the purpose of investigating a potential crime, even though the officer does not have probable cause to make an arrest. This type of brief investigative seizure is lawful only if the police officer has reasonable suspicion "that imminent public danger exists" or that "serious harm to persons or property has recently occurred".[4]

Not all investigative interactions between a police officer and a citizen amount to a seizure. The interaction will constitute a seizure only if the officer engages in a "show of authority" — *i.e.*, engages in conduct which, given the surrounding

[4] *See Coleman v. State*, 553 P.2d 40, 46 (Alaska 1976); *Ebona v. State*, 577 P.2d 698, 700 (Alaska 1978).

circumstances, would cause a reasonable person to believe that they were not free to leave.[5] This determination is an objective one: it hinges on how a reasonable person would perceive the situation, rather than on the officer's intentions or motives.[6]

Because the test is an objective one, the question of whether a given interaction between a police officer and a citizen constitutes a "seizure" is a question of law. This means that, although an appellate court defers to the trial court's findings of historical fact, an appellate court does not defer to the trial court's legal characterization of those facts — *i.e.*, the trial court's characterization of the encounter as either a seizure or not a seizure.[7]

A law enforcement officer can approach a stopped vehicle and ask questions in a conversational manner without the contact rising to the level of a seizure.[8] But the contact may constitute a seizure if the officer engages in conduct that a reasonable person would not expect from another citizen — conduct such as using flashing lights to get the person to stop the vehicle (or to stay in place), or boxing the car

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[5] *Romo v. Anchorage*, 697 P.2d 1065, 1068 (Alaska App. 1985) (citing *Waring v. State*, 670 P.2d 357, 363-64 (Alaska 1983)). A seizure could also occur if the police restrain the liberty of a person "by means of physical force". *Id.* However, those circumstances are not present in this case.

[6] *See, e.g.*, *Waring v. State*, 670 P.2d 357, 364 (Alaska 1983); *Romo v. Anchorage*, 697 P.2d 1065, 1068 (Alaska App. 1985); *Ozhuwan v. State*, 786 P.2d 918, 920-21 (Alaska App. 1990).

[7] *Meyer v. State* (opinion on rehearing), __ P.3d __, Alaska App. Opinion No. 2486 (January 22, 2016), 2016 WL 275306; *Reichel v. State*, 101 P.3d 197, 199 (Alaska App. 2004).

[8] *Barrows v. State*, 814 P.2d 1376, 1379 (Alaska App. 1991); *Horsley v. State*, unpublished, 2008 WL 2312376 at *3 (Alaska App. 2008); *see also* Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed. 2004), § 9.4(a), Vol. 4, p. 433 (cited by *Horsley*, 2008 WL 2312376 at *3).

in, or having many officers approach the vehicle on all sides, or pointing a gun and ordering the suspect to place their hands on the steering wheel. [9]

We note that this Court's recent unpublished decision in *Geisler v. State*, 2014 WL 7345577 (Alaska App. 2014), deals with a situation comparable to Dinnis's. In *Geisler*, two police officers approached the two occupants of a parked car because the officers suspected that the two were involved in a drug transaction. [10] One of the officers asked the two occupants for identification, and then he took the identifying documents back to his patrol vehicle to conduct a records check.

In the meantime, the other officer stood by the car and kept the occupants under surveillance. Because the two occupants were "fidgety", and because they kept moving their hands underneath their legs and around the seating area, this second officer repeatedly told the two occupants to stop moving and "to place [their hands] on top of their legs so he could see them." [11]

We concluded that this interaction constituted a seizure:

> After reviewing the totality of the circumstances, we conclude that a reasonable person in Geisler's position would view the positioning of the officers and the repeated commands to stop moving as a show of authority[,] and that a reasonable person would not have felt free to walk away. Instead, a reasonable person would interpret the presence and

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[9] *Horsley v. State*, unpublished, 2008 WL 2312376 at *3 (Alaska App. 2008) (citing Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed. 2004), § 9.4(a), Vol. 4, pp. 434-35); *Ozhuwan v. State*, 786 P.2d 918, 920-21 (Alaska App. 1990) (holding that a reasonable person would not have felt free to leave when the officer parked his patrol vehicle in a place that partially blocked the person's access to the only exit, and when the officer activated his high-beam lights and his overhead red lights).

[10] *Geisler*, 2014 WL 7345577 at *1.

[11] *Ibid.*

> location of the officers and [the] orders to stop moving as just that — a command to not move, including to not get out of the car. Thus, the officers' conduct constituted a seizure[.]

Geisler, 2014 WL 7345577 at *3.

Turning to the facts of Dinnis's case, we likewise conclude that a reasonable person in Dinnis's situation would not have felt free to leave, given the fact that Trooper Varys repeatedly ordered Dinnis to keep his hands on the dashboard, and given the fact that Varys threatened to handcuff Dinnis if he did not cooperate. The trooper's behavior was a "show of authority" that converted the contact into a seizure.

The next question is whether this investigative seizure was justified by a reasonable suspicion of criminal activity. The superior court never ruled on this issue, nor did the court make factual findings on this issue. Given the lack of findings, we must remand Dinnis's case to the superior court for further proceedings to determine whether the investigative stop was lawful.

(See *Majaev v. State*, 223 P.3d 629, 634 (Alaska 2010), where, under analogous circumstances, our supreme court remanded the case to the trial court for further findings as to whether an investigative stop was justified.)

Why we conclude that the superior court correctly denied Dinnis's motion for a judgement of acquittal

Our remaining task is to resolve Dinnis's claim that the evidence presented at his trial was legally insufficient to support his conviction.

At Dinnis's trial, after the close of the evidence, Dinnis's attorney moved for a judgement of acquittal on the ground that no witness had made an express in-court identification of Dinnis as the man who possessed the hydromorphone pills. The trial

judge denied this motion, ruling that even though Trooper Varys did not expressly point to Dinnis (as he sat in the courtroom) as the man who possessed the pills, the jury could reasonably conclude that Dinnis was the man in question because Varys testified that he identified Dinnis at the time of his arrest by examining his driver's license.

As the State points out, under the Alaska rules of court, there are situations where a defendant need not even be present at their trial. Alaska Criminal Rule 38(c)(2) allows defendants to choose to be absent from misdemeanor trials. (See also *Flood v. State*, 304 P.3d 1083, 1085 (Alaska App. 2013), where this Court assumed without deciding that a trial judge has the discretion to allow a defendant to be absent from a felony trial.) Criminal Rule 38.1(a) allows a defendant to waive the right to be physically present and to participate by telephone. And Criminal Rule 38(b)(1) allows any criminal trial to continue without the defendant when, after initially being present, the defendant "is absent voluntarily after the trial has commenced."

Obviously, in these situations, the State must still prove that the defendant is the person who committed the criminal actions described in the State's case. But just as obviously, the required proof will not be made via a live, in-court identification. We therefore infer that Alaska law does not require a live, in-court identification of the defendant as the person who perpetrated the charged crime(s).

Indeed, we addressed this very issue in our unpublished opinion in *Dwyer v. State*, 1997 WL 216816 (Alaska App. 1997). In *Dwyer*, the eyewitness to a weapons offense identified Dwyer in a photographic lineup before trial, and both the witness and the officer who conducted the photographic lineup testified at trial concerning the witness's identification of Dwyer. [12] In addition, the witness testified at trial about seeing

[12] *Dwyer*, 1997 WL 216816 at *1-2.

Dwyer with the gun.[13] But the witness did not make a live, in-court identification of Dwyer.[14]

Dwyer argued that he was entitled to a judgement of acquittal because the witness failed to expressly point out Dwyer in the courtroom as the person whose actions he was describing. But this Court held that the evidence was sufficient to support Dwyer's conviction. We concluded that, even without a live, in-court identification, the evidence of the witness's prior identification of Dwyer in the photographic lineup was legally sufficient, if believed, to prove that Dwyer was the man who committed the crime.[15]

See also *Garrett v. State*, unpublished, 1997 WL 1865 at *1 (Alaska App. 1997), where we held that, even in the absence of a live, in-court identification of the defendant, the videotape made of the defendant at the police station following his arrest was sufficient to allow the jury to conclude that Garrett was the person who committed the charged offense of driving under the influence.

In the present case, Trooper Varys testified at trial that he "identified Mr. Dinnis here by ... [his] Alaska driver's license". We do not know whether Varys gestured toward Dinnis when he said the words, "Mr. Dinnis here". But even assuming that Trooper Varys did not gesture toward Dinnis, Varys's language ("Mr. Dinnis *here*") was sufficient to support a reasonable inference that Varys was talking about the man seated at the defense table in the courtroom.

Additionally, as the State points out, no one contested Dinnis's identity as the person who possessed the hydromorphone pills. Throughout the trial (including jury

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[13] *Id.* at *2.

[14] *Ibid.*

[15] *Id.* at *3.

selection), the defense attorney usually referred to Dinnis as "Nick". In addition, the two attorneys, the trial judge, and Trooper Varys referred to Dinnis as (variously) "Nicholas", "Nicholas Dinnis", "Nicholas J. Dinnis", and "Mr. Dinnis". These repeated and varied references to Dinnis as the defendant could also reasonably lead the jury to infer that the person at the defense table was the same person that Trooper Varys was testifying about.

We thus conclude that the evidence was sufficient to support Dinnis's conviction.

Conclusion

We hold that the evidence presented at Dinnis's trial was sufficient to support his conviction, but we reverse the superior court's ruling regarding the investigative stop. We hold that, under the facts found by the superior court, Dinnis *was* subjected to an investigative stop. The superior court must therefore decide whether this stop was supported by reasonable suspicion. If it was not, then the evidence arising from that investigative stop must be suppressed.

We do not retain jurisdiction of this case.