IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DESMOND JERMAINE COOKS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12071 Trial Court No. 4FA-13-544 CR MEMORANDUM OPINION No. 6683 — August 15, 2018

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Douglas L. Blankenship, Judge.

Appearances: Paul E. Malin, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Michal Stryszak, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and James E. Cantor, Acting Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge SUDDOCK.

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

A Fairbanks police officer saw Desmond Jermaine Cooks briefly enter a residence that the officer believed to be a drug house. When Cooks departed, the officer followed closely behind Cooks's car for several blocks until Cooks stopped at an apartment building. The officer parked nearby and approached Cooks, who was standing beside his open driver's-side door.

The officer asked Cooks for his driver's license and ran a warrant check. After the officer spoke with Cooks for about two minutes, Cooks grabbed a baggie of cocaine from his car's center console, apparently intending to swallow it. Cooks was then arrested.

Following his indictment for fourth-degree controlled substance misconduct, Cooks moved to suppress the cocaine. Cooks argued that when the officer approached him, asked for his driver's license, and then conducted a warrant check, the officer was conducting an investigative stop rather than a consensual police contact. Alternatively, he argued that the cumulative effect of the warrant check and later actions by the officer robbed the encounter of its consensual nature.

Following an evidentiary hearing, Superior Court Judge Douglas L. Blankenship denied Cooks's suppression motion. Cooks appeals that denial. For the reasons expressed in this opinion, we conclude that the officer's actions did not give rise to a seizure of Cooks's person prior to the time that Cooks brought the cocaine into plain view, thereby providing probable cause for his arrest.

Background facts

One afternoon in March 2012, Fairbanks police officer Stewart Lewis was staking out a residence that he "knew from prior contacts [to be] pretty heavily involved in drug traffic." Officer Lewis saw Cooks drive to the house, enter it, and emerge about two minutes later. Officer Lewis decided to follow Cooks.

Cooks soon parked in a designated parking spot outside of a residential building (where he claimed that his sister-in-law lived). Lewis parked curbside, and approached Cooks while Cooks stood beside his car.

Officer Lewis asked to see Cooks's driver's licence, and Cooks provided it. Lewis called in a warrant check. After asking Cooks for additional contact information, Lewis returned the license to Cooks. This encounter lasted two minutes.

The officer then informed Cooks that he had observed Cooks leaving "one of our local drug houses." Cooks explained that he had gone to the residence to visit his old friend Julio, and that he decided to leave when nobody answered the door. Officer Lewis knew that this was not true, because he had just seen Cooks enter the suspected drug house and stay for about two minutes.

Lewis asked if Cooks had bought drugs at the house, and Cooks said that he had not. Cooks then gave Lewis permission to pat him down for drugs. After conducting a brief pat down, Lewis asked for Cooks's permission to search the car for drugs, and Cooks consented. Officer Lewis asked Cooks to "just bear with me here, I've got another officer responding. We always have another officer stand by ... when we do a quick check [on a car]."

As the two awaited the backup officer, Officer Lewis asked how much cash Cooks was carrying, and Cooks said that he had "a few bucks." Asked to be more specific, Cooks estimated that he had "[p]robably around $500." At the officer's request, Cooks displayed what was later counted to be $1507.

Seconds later, Cooks started to move toward the open car door. Officer Lewis suggested that the two stand together slightly away from the car to await the backup officer, "if you don't mind." Instead, Cooks leaned into the car and grabbed a bag of cocaine from the car's console. Officer Lewis (and the backup officer, who had just arrived) restrained and arrested Cooks.

Cooks was indicted for fourth-degree misconduct involving a controlled substance.[1] Cooks filed a pretrial motion to suppress the cocaine, arguing that his encounter with the police was either an investigative stop from its outset, or at some point developed into one. Citing case law that an investigative stop can only be justified based on a reasonable suspicion that a crime impacting public safety was afoot, Cooks argued that no public safety issue was posed.

The judge held an evidentiary hearing at which Officer Lewis and Cooks each testified. The judge agreed with Cooks that the facts did not support the existence of a threat to public safety, and thus that an investigative stop would not have been justified.[2] But the judge found that Officer Lewis had *not* conducted an investigative stop, because the officer's encounter with Cooks was consensual up to the point that Cooks grabbed the cocaine — thus providing probable cause for his arrest. Accordingly, the judge denied the motion to suppress.

Following a bench trial, Cooks was convicted of fourth-degree misconduct involving a controlled substance. He now appeals, arguing that the superior court erred when it denied his motion to suppress the cocaine.

Why we conclude that Cooks was not seized prior to his arrest

Contacts between police officers and private citizens typically fall into three categories: (1) a generalized request for information or "consent contact";[3] (2) an

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[1] Former AS 11.71.040(a)(3)(A) (2014).

[2] *See Coleman v. State*, 553 P.2d 40, 46 (Alaska 1976).

[3] *See Palmer v. State*, 604 P.2d 1106, 1112 (Alaska 1979) (Rabinowitz, C.J., concurring).

investigatory stop, sometimes called a *Terry* stop;[4] or (3) an arrest. Arrests and investigatory stops are Fourth Amendment seizures; an arrest must be supported by probable cause, and an investigative stop by reasonable suspicion.[5] The present case turns on whether the officer's initial consent contact with Cooks evolved into an investigatory stop before Cooks grabbed the cocaine.

The law is well-settled that "[a] police officer can approach a private citizen and direct questions to that person without turning the encounter into an investigative stop."[6] Alaska courts employ an objective, reasonable person standard in assessing whether a police contact with a citizen should be classified as a mere police-citizen contact that requires no reasonable suspicion, or instead a Fourth Amendment seizure.[7] A seizure occurs whenever a police officer engages in "a show of official authority such that a reasonable person would have believed that he [or she] was not free to leave."[8] Courts consider the "totality of the [objective] circumstances" when assessing whether a seizure occurred.[9]

Of course, as Professor LaFave points out, the "free to leave" standard is artificial to some degree because most citizens feel "inherent pressures" to cooperate when they are addressed by a uniformed police officer, and because they think they

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[4] *See Terry v. Ohio*, 392 U.S. 1 (1968); *Coleman*, 553 P.2d at 46.

[5] *Howard v. State*, 664 P.2d 603, 608 (Alaska App. 1983).

[6] *Adams v. State*, 103 P.3d 908, 910 (Alaska App. 2004).

[7] *Waring v. State*, 670 P.2d 357, 364 (Alaska 1983).

[8] *Rogers-Dwight v. State*, 899 P.2d 1389, 1390 (Alaska App. 1995) (quoting *Florida v. Royer*, 460 U.S. 491, 502 (1983)).

[9] *Brown v. State*, 182 P.3d 624, 628 (Alaska App. 2008); *see also Florida v. Bostick*, 501 U.S. 429, 437 (1991).

either should or must cooperate.[10] LaFave reasons that the police-citizen encounter only qualifies as a seizure if the officer adds an additional coercive component to the interaction "by engaging in conduct significantly beyond that accepted in social intercourse. The critical factor is whether the policeman, even if making inquiries a private citizen would not, has otherwise conducted himself in a manner which would be perceived as a nonoffensive contact if it occurred between two ordinary citizens."[11] Our supreme court adopted LaFave's analysis in *Waring v. State*.[12]

In general, the facts of this case are not in dispute; indeed, the entire transaction was recorded by Officer Lewis's voice recorder, and partially recorded by a video camera on his patrol car. Following the evidentiary hearing, the judge found that the encounter was brief and non-coercive in tone, and that Cooks displayed a consistent willingness to cooperate with the officer. Cooks does not challenge these findings on appeal.

The judge acknowledged the existence of potential red flags — occurrences or circumstances that could indicate that a seizure occurred. But he ultimately concluded that, given the officer's deferential demeanor and Cooks's ready acquiescence to the officer's requests, no seizure occurred.

Cooks now disputes the judge's legal conclusion, arguing that several factors present in this case, taken together, demonstrate that Cooks was seized. Cooks argues that the officer's demand for Cooks's license, the warrant check, the officer's request for a pat-down search of Cooks's clothing and a search of his car, the call for a

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[10] 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.4(a), at 581 (5th ed. 2012) (internal citations and quotations omitted).

[11] *Id.* at 582-83.

[12] *Waring*, 670 P.2d at 364.

backup officer, and the officer's request that the two stand together in a particular spot to await the backup officer, collectively gave rise to a seizure of Cook.

We review de novo the judge's legal conclusion that the encounter remained consensual and that Cooks was not seized prior to his arrest.

We acknowledge that the factors cited by Cooks could support the conclusion that a seizure occurred. But after carefully reviewing the video and audio recordings of the encounter, we agree with the trial judge that Cooks was not seized. As the judge found, throughout the encounter the officer punctuated his requests for cooperation with polite formulations such as "if you don't mind." We agree that, by using these phrases, the officer was offering Cooks a choice whether to acquiesce in a continuing interaction. And while the officer asked Cooks several pointed questions, he accepted Cooks's answers without accusing him of deception.

Moreover, the encounter was quite brief, lasting less than five minutes. During the first two minutes, the officer asked for Cooks's identity and address, and he called in a warrant check. A polite request to view a citizen's license does not amount to a seizure of the citizen.[13] And the officer did not unreasonably retain the license; rather, he returned it in less than ninety seconds. Then, the officer questioned Cooks for slightly over two minutes before Cooks attempted to destroy evidence and was arrested.

When the officer asked permission to pat Cooks down for drugs, Cooks agreed, and he subsequently agreed to the officer's request to search the car. But nothing the officer said or did compelled Cooks to cooperate or to prolong the encounter, rather than choosing to disengage.

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[13] *See, e.g.*, *United States v. Granillo*, 288 F.3d 1071, 1075 (8th Cir. 2002); *State v. Armenta*, 948 P.2d 1280, 1285 (Wash. 1997); *Keller v. State*, 169 P.3d 867, 870 (Wyo. 2007).

The judge identified two occurrences that were potentially suggestive of a seizure: (1) Officer Lewis requested a backup officer; and (2) Lewis requested that Cooks move away from the car door until the backup officer arrived. As to the former, the judge noted that, when Cooks "clearly" consented to a search of his car, the officer responded, "OK. Well just bear with me here, I've got another officer responding. We always have another officer stand by ... when we do a quick check to clear it out." The judge concluded that, given the low-key nature of the police encounter up to that point, and the officer's statement that calling a backup officer was a routine incident of a car search, a reasonable citizen would still at that point feel free to leave.

We agree with the judge's conclusion that the request for a backup officer was not, under the particular circumstances of this case, an escalating event. Whenever a suspect consents to a search of a car, that consent necessarily implies a willingness to accommodate the delay necessary to accomplish the search — a delay that Officer Lewis promised would be "quick." And the officer told Cooks that, in order to properly perform the search, routine practice called for the presence of a backup officer, who was already en route. Thus, the call for a backup officer did not signify that Cooks was in serious trouble, or that he would be delayed much beyond the search that he had already consented to. We thus agree with the judge's conclusion that the request for backup did not amount to an assertion of police authority significantly exceeding the authority implicit in any encounter with the police.

Soon thereafter, Officer Lewis asked Cooks, "Okay, well if you don't mind, why don't we stand back over here until the other officer gets here." The judge recognized that a directive by the police to wait in a particular place can significantly up the ante of a police-citizen encounter. But the judge found that the officer made this suggestion only after Cooks had started to move to the open car door, and that the

request must therefore be viewed in the light of Cooks's earlier consent to search the car, which he had not revoked.

Of course, if Cooks was actually free to leave, he was free to enter his car in order to do so. But given that Cooks had consented to a police search of his car, the officer obviously did not wish Cooks to enter the vehicle before the search could be accomplished. Accordingly, his request that Cooks join him to wait for the backup officer to arrive made sense at that moment — and would have made sense to a reasonable citizen under the circumstances. Cooks was free to withdraw his consent to a search of his car, but he did not do so. Therefore, the officer's implicit request that he not enter the car did not amount to the sort of escalating police assertion of authority that robs a police-citizen encounter of its consensual nature.

A careful comparison of the audio and the video tapes of the encounter reveals that Officer Lewis did not prolong the encounter by withholding Cooks's driver's license from him for an unreasonable time. And the pat-down search of Cooks, who was lightly clad in shorts and a t-shirt, lasted mere seconds.

In short, the officer's polite and low-key approach, coupled with Cooks's ready compliance, compels our conclusion that the officer did not exceed the bounds of ordinary social interaction between two citizens under the test announced in *Waring v. State*.[14] Accordingly, Cooks was not seized prior to his arrest, and so suppression of the cocaine was not required.

Conclusion

We AFFIRM the judgment of the superior court.

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[14] *Waring*, 670 P.2d at 364.