

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
JOSE ALEJANDRO CABALLERO,
Respondent.

No. 42340

FILED

DEC 21 2004

ORDER OF REVERSAL AND REMAND

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court granting a motion to suppress evidence. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On September 3, 2003, City of Reno Police Officer Ty Sceirini conducted a welfare check on respondent Jose Caballero, who was unconscious and seated in a parked vehicle. Officer Sceirini parked his patrol vehicle behind Caballero's vehicle, blocking the exit for Caballero's vehicle. Officer Sceirini knocked on the vehicle's window and woke Caballero. Officer Sceirini asked Caballero to exit his vehicle. Upon exiting, Caballero exhibited poor muscle coordination and restlessness.

Suspecting that Caballero had been using methamphetamine, officer Sceirini asked him how long it had been since he had a good night's sleep and Caballero indicated that it had been over two days. Officer Sceirini asked Caballero how long he had been using methamphetamine and Caballero responded, "[a]pproximately five to six years." Next, officer Sceirini asked Caballero if he had any methamphetamine in his possession, and Caballero responded no. When Officer Sceirini asked if he could search Caballero's clothing, Caballero said "Oh, sure," never telling officer Sceirini to stop. During the search, officer Sceirini found methamphetamine in Caballero's pocket.

The State charged Caballero, via criminal information, with one count of trafficking in a controlled substance. Caballero filed a motion to suppress the evidence obtained during the search, which the district court granted. The district court found that, once officer Sceirini determined that Caballero was all right, continuing the encounter was a seizure without legal cause and that Caballero's consent was not voluntary.

On appeal, the State argues that the district court erred in granting respondent's motion to suppress. The State argues that the welfare check evolved into a reasonable and legally justified drug investigation when officer Sceirini asked Caballero for his consent to search. The State bases this argument on Caballero's behavior and drug use history statements. Furthermore, the State contends that, under the totality of the circumstances, Caballero did not submit to a show of authority; therefore, his consent to the search was voluntary.

In response, Caballero contends that substantial evidence supports the district court's findings. He argues that the State failed to identify any particular fact or event that would have given officer Sceirini probable cause or a reasonable suspicion that Caballero was under the influence or in possession of narcotics. He contends that officer Sceirini's hunch that Caballero had been using methamphetamine is not an adequate basis for a legal seizure and that a self-described drug use history, restlessness, and/or poor muscle coordination does not lead to the conclusion of present drug use and/or possession.

“Suppression issues present mixed questions of law and fact. While this court reviews the legal questions de novo, it reviews the district court’s factual determinations for sufficient evidence.”¹

“Pursuant to the Fourth and Fourteenth Amendments of the United States Constitution, the ‘seizure’ of a person without probable cause or a warrant is ‘per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.’”² 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.”³ “Mere police questioning does not constitute a seizure.”⁴

One exception to the requirement of probable cause or a warrant is a search that is conducted pursuant to consent.⁵ “To establish a lawful search based on consent, the State must demonstrate that consent was voluntary and not the result of duress or coercion.”⁶ “Voluntariness is a question of fact to be determined from the totality of the circumstances.”⁷ So long as a reasonable person would feel free “to

¹Johnson v. State, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002).

²State v. Burkholder, 112 Nev. 535, 538, 915 P.2d 886, 888 (1996) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

³Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

⁴Burkholder, 112 Nev. at 538, 915 P.2d at 888 (indicating that not all interactions between police officers and our citizenry involve the “seizure” of persons).

⁵Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

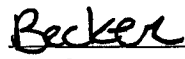
⁶Burkholder, 112 Nev. at 539, 915 P.2d at 888.

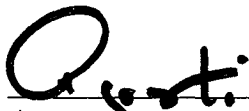
⁷Stevenson v. State, 114 Nev. 674, 679, 961 P.2d 137, 140 (1998).


disregard the police and go about his business,” an encounter is consensual.⁸

While acknowledging the totality of the circumstances test for voluntariness in its order, the district court appeared to find that, once officer’s Sceirini’s welfare check was completed, his continuing encounter with Caballero was an illegal seizure that automatically rendered Caballero’s subsequent consent involuntary. However, an illegal seizure would be only one factor in determining whether Caballero’s consent to a search was voluntary. An illegal seizure does not automatically render Caballero’s consent involuntary. Instead, a “waiver and consent, freely and intelligently given, converts a search and seizure which otherwise would be unlawful into a lawful search and seizure.”⁹ The question of whether consent is voluntary must be determined from the totality of the circumstances. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for application of the correct standard.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

⁸California v. Hodari D., 499 U.S. 621, 628 (1991).

⁹Peck v. State, 116 Nev. 840, 846, 7 P.3d 470, 474 (2000) (quoting State v. Plas, 80 Nev. 251, 254, 391 P.2d 867, 868 (1964)).

cc: Hon. Jerome Polaha, District Judge
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe County Public Defender
Washoe District Court Clerk