

DA 19-0421

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 270

STATE OF MONTANA,

Plaintiff and Appellee,

v.

HOANG VINH PHAM,

Defendant and Appellant.

APPEAL FROM: District Court of the Sixteenth Judicial District,
In and For the County of Custer, Cause No. DC 17-109
Honorable Michael B. Hayworth, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Deborah S. Smith, Assistant Appellate
Defender, Helena, Montana

For Appellee:

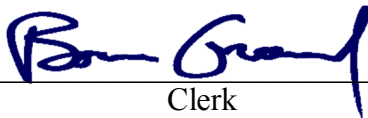
Austin Knudsen, Montana Attorney General, Mardell Ployhar, Assistant
Attorney General, Helena, Montana

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Attorney, Miles City, Montana

Submitted on Briefs: October 5, 2021

Decided: October 19, 2021

Filed:


Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Hoang Vinh Pham appeals an October 23, 2018 order from the Sixteenth Judicial District Court, Custer County, denying his motion to suppress. We reverse and restate the issue¹ on appeal as follows:

Whether the District Court erred when it denied Pham’s motion to suppress based on its determination that Pham had not been seized.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Pham, a Vietnamese immigrant who speaks English as a second language, drove to Butte from his home in Minnesota in August 2017 to check on a vehicle he had wrecked. Hungry and tired on the drive back to Minnesota, Pham stopped at a Conoco station in Miles City. Pham used the station’s restroom, paid \$20 for gas, and bought a bowl of noodles. While Pham was heating his noodles in the gas station’s microwave, Agent Richard Smith of the Montana Division of Criminal Investigations (DCI) walked into the Conoco to use the restroom and purchase some water.

¶3 Agent Smith was transporting approximately 960 pounds of marijuana for evidence storage in Billings. Agent Smith was dressed in civilian clothes and did not have any audio or video recording devices with him. He carried a gun in a leg holster and wore a necklace carrying his DCI badge. Agent Smith was traveling with two uniformed Montana Highway Patrol (MHP) troopers, Trooper Brandon Kelm and Trooper Barry Kilpela. The MHP troopers were driving a marked MHP crime scene van containing the marijuana, while

¹ Pham presents two additional issues concerning fines and costs imposed. Because we are remanding for a new trial, we need not address these issues.

Agent Smith was driving an unmarked gray pickup truck. Trooper Kilpela later testified that the van would be an abnormal sight to the average individual because it “was stuffed all the way full to the ceiling with bulk marijuana.”

¶4 Upon entering the Conoco, Agent Smith noticed Pham looking out the window at the van while he heated up his noodles. Based on the length of time that Agent Smith believed Pham was continuously staring at the van, he decided to approach Pham. Agent Smith later testified that he believed Pham was either lost or committing a crime. Agent Smith discussed his observations with Trooper Kelm and Trooper Kilpela, prompting Trooper Kilpela to assess Pham himself. Trooper Kilpela later testified that Pham’s behavior was out of the ordinary compared to other travelers and that he interpreted it as “overt nervousness.” Agent Smith denied that Pham’s ethnicity factored into his decision to approach Pham but acknowledged that DCI was aware of several arrests of Vietnamese people for drug trafficking traveling between Washington and Minnesota along I-94.² Upon Agent Smith’s approach, the parties’ accounts diverge.

Pham’s testimony

¶5 At the hearing on his motion to suppress, Pham testified that, since moving to the United States in 1983, he primarily speaks Vietnamese with friends and family. Pham’s struggles with English were apparent beginning with the following colloquies at his arraignment hearing:

² Agent Smith’s testimony referred to “the 90 corridor.” Miles City, however, lies along I-94, not I-90.

[District Court]: Are you suffering from any physical or mental condition that interferes with your ability to understand today's proceeding and make important decisions?

(Wherein, an off-the-record discussion was held between [counsel] and [Pham].)

[Pham]: Yes.

[District Court]: Excuse me?

[Pham]: Yes.

(Wherein, an off-the-record discussion was held between [counsel] and [Pham].)

[District Court]: Are you suffering from any physical or mental condition today?

[Pham]: No, Your Honor.

[District Court]: Have you read that charging Information document?

[Pham]: A bit of it.

[District Court]: Are you able to read the English language?

[Pham]: Not all of it.

Pham went through several substitutions of counsel, though the record is unclear whether that arose from his difficulties with English. After several months, Pham's counsel expressed concern over Pham testifying for fear that he may misspeak, leading the District Court to suggest an interpreter. Despite the appointment of an interpreter, the record contains several instances of the interpreter asking counsel and witnesses to slow down and repeat themselves so that the interpreter could relay the testimony to Pham.

During Pham's testimony at the motion to suppress hearing, the interpreter repeatedly indicated difficulties following Pham's testimony.

¶6 At the motion to suppress hearing, Pham testified that, after returning to his car to pump gas, an officer approached him, followed by two other officers. Pham testified that an officer in uniform "came close to [Pham] and asked [him], 'Well, you managed to run away[,]'" which confused Pham. Pham further provided the following testimony:

[Defense counsel]: Hoang, did you believe that you were free to leave?

[Pham]: They did not let me go anywhere. They kept me in there and they pulled me away even though I tried to pump the gas. So I did not do anything against them. I know I didn't do anything wrong. As a result I wasn't able to come get in and he went inside, got the money and give it back to me.

Pham testified that Vietnamese culture taught him "[n]ot to go against the police." He indicated that he was driving a friend's car that day but did not explain that to Agent Smith because "[h]e did not ask." Pham denied opening his car door or trunk to allow Agent Smith to search the vehicle and testified that Agent Smith "did not ask me and I did not consent and he kept me there and he did it by himself." Pham indicated that Agent Smith opened the trunk, but he was unaware whether Agent Smith used the key or button in the car to do so.

The State's testimony

¶7 Agent Smith testified that he approached Pham and identified himself while the MHP troopers waited about fifteen feet away. He asked Pham whether he could speak with him for a few minutes and ask some questions. Agent Smith testified that Pham voluntarily engaged in conversation and responded appropriately to the questions Agent

Smith asked. On cross-examination, Agent Smith testified that he realized English was not Pham's first language, but he did not clarify whether Pham understood what he was saying. Agent Smith was aware that Vietnamese culture teaches deference to police, but he believed his conversation with Pham was different than "a lot of ethnic conversations" because Pham looked Agent Smith in the eye and Agent Smith did not believe he needed to tell Pham he was free to leave. On cross-examination, Agent Smith testified that he did not believe the language barrier impacted Pham's understanding.

¶8 Agent Smith characterized the conversation as "very cordial" and testified that he asked Pham whether he was lost or all right and then engaged in small talk about Pham's family and the reason for his travel. He did not believe Pham felt compelled to stay, nor did he believe Pham was in custody. Pham indicated that he was traveling to Minnesota, which Agent Smith admitted ruled out the possibility that Pham was lost. Agent Smith asked Pham for his driver's license, which was issued in Washington. Pham's car had Minnesota license plates, prompting Agent Smith to inquire about the difference. Pham told Agent Smith that he was having a vehicle worked on in "Beauty." Agent Smith clarified with Pham whether he meant Butte, leading Pham to respond "Like my hat. Like my hat. Big Sky." Agent Smith testified "that didn't make sense to [him], that they have mechanics in Minnesota, [and Pham] didn't have an answer for that question." On cross-examination, Agent Smith further testified, for the first time, that he recalled "after looking at [Pham's] name on his driver's license . . . an accident in Butte where a [B]lack male and an Asian male had run from the scene . . . [and Pham's] name belonging on that registration in the Butte area[.]" Agent Smith testified that he asked Pham, "I think

I know you, don't I?"; but he otherwise did not mention this recollection to Pham, include this information in his report, or follow up on his suspicion. He did not testify what Pham's response was, nor did Pham testify that this exchange occurred.

¶9 Around that time, Trooper Kilpela joined Agent Smith and Pham by the vehicle. Trooper Kilpela later testified that the "only thing that there seemed confusion [about] at all was [Pham] stated that he was coming from . . . 'Beauty' and then 'Butt.'" Trooper Kilpela did not believe this was due to a language barrier, but rather that Pham was unfamiliar with how to pronounce Butte. He believed that Pham's answers "were not logical responses . . . because he was lying and he made them up." Agent Smith testified that he felt no need to contact the Miles City Police Department because he "didn't believe that more assistance was needed because [he] didn't know what the offense that [he was] looking at was." Ultimately, Agent Smith asked Pham whether he had any "guns, knives, any forms of drugs, [or] child pornography" in his vehicle. Agent Smith testified that Pham voluntarily opened his rear door and trunk and allowed Agent Smith to search the vehicle. Agent Smith found several boxes in the trunk and asked Pham's permission to open them. Pham indicated that the boxes were not his and allowed Agent Smith to search them. The boxes contained nineteen pounds of marijuana, leading to Pham's arrest.

¶10 The District Court's order denying Pham's motion to suppress (Order) indicated that Pham failed to expressly argue he was seized by Agent Smith, but that the issue naturally presented itself and required analysis. The Order found that, because Pham's testimony contrasted with the arguments raised by Pham's counsel, "[t]he contrast eroded the credibility of facts . . . and Mr. Pham's account of the events." The Order concluded

that Pham voluntarily engaged with Agent Smith and was not seized because a reasonable person would have felt free to disengage and leave. The Order further concluded that Pham validly consented to Agent Smith searching his vehicle. Before trial, Pham stipulated that the boxes contained marijuana and stipulated to the amount of marijuana seized. At trial, the State's opening argument characterized Agent Smith's observations as "a hunch by the State." Pham was found guilty of felony possession with intent to distribute and sentenced to fifteen years in Montana State Prison. The District Court also levied a fine of \$16,625 and imposed various surcharges and fees upon Pham. Pham appeals.

STANDARDS OF REVIEW

¶11 We review a district court's denial of a motion to suppress to determine whether the court's findings are clearly erroneous and whether those findings were applied correctly as a matter of law. *State v. Gill*, 2012 MT 36, ¶ 10, 364 Mont. 182, 272 P.3d 60. A district court's finding that particularized suspicion exists is a question of fact which we review for clear error. *Gill*, ¶ 10. A finding is clearly erroneous if it is not supported by substantial evidence, if the lower court misapprehended the effect of the evidence, or if our review of the record leaves us with the firm conviction a mistake has been made. *City of Missoula v. Metz*, 2019 MT 264, ¶ 12, 397 Mont. 467, 451 P.3d 530 (citations omitted).

DISCUSSION

¶12 *Whether the District Court erred when it denied Pham’s motion to suppress based on its determination that Pham had not been seized.*

¶13 Both the Fourth Amendment to the United States Constitution and Article II, Section 11, of the Montana Constitution protect persons from unreasonable searches and seizures. The fundamental purpose of the Fourth Amendment and Article II, Section 11, is to “protect the privacy and security of individuals” from unreasonable government intrusion or interference. *State v. Hoover*, 2017 MT 236, ¶ 14, 388 Mont. 533, 402 P.3d 1224 (citations omitted). Only when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude a seizure has occurred. *State v. Wilkins*, 2009 MT 99, ¶ 8, 350 Mont. 96, 205 P.3d 795 (citations and internal quotations omitted).

¶14 To determine whether a seizure has occurred, we apply the same test under both the United States and Montana Constitutions. *State v. Ballinger*, 2016 MT 30, ¶ 18, 382 Mont. 193, 366 P.3d 668. “[A] person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *Wilkins*, ¶ 9 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980)). Examples of circumstances indicating a person was seized include the following: “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.” *Wilkins*, ¶ 9 (quoting

Mendenhall, 446 U.S. at 554, 100 S. Ct. at 1877). The *Mendenhall* factors may be helpful in certain cases, but we have recognized they are not exhaustive. *State v. Strom*, 2014 MT 234, ¶ 10, 376 Mont. 277, 333 P.3d 218.

¶15 The State points to our holdings in *Wilkins*, *Ballinger*, *State v. Dupree*, 2015 MT 103, 378 Mont. 499, 346 P.3d 1114, and *State v. Questo*, 2019 MT 112, 395 Mont. 446, 443 P.3d 401, to argue Agent Smith’s interaction with Pham was a voluntary, routine police encounter and that Pham was not seized.³ We disagree and distinguish those cases.

¶16 In *Wilkins*, we held that Wilkins was not seized when a sole officer approached her in her vehicle and asked her questions. *Wilkins*, ¶ 15. Wilkins’s vehicle was already parked on a dark, remote street occupied by businesses which were closed at the time. *Wilkins*, ¶ 2. After noticing Wilkins’s vehicle was running, the officer approached without activating his emergency lights, displaying a weapon, or employing threatening tones. *Wilkins*, ¶ 12. However, the officer’s decision to stop Wilkins stemmed from his belief that “Wilkins’s vehicle was suspicious because it was unusual for a vehicle to be parked there with its lights on at [approximately 1:30 a.m.], and burglaries had recently been committed in the area.” *Wilkins*, ¶ 3. The officer was also concerned about the driver’s safety due to the cold weather. *Wilkins*, ¶ 3.

³ The State does not argue that Agent Smith, despite his initial concern Pham was lost, was acting under the community caretaker doctrine, which allows peace officers to take appropriate action when they believe a citizen needs assistance. *State v. Grmoljez*, 2019 MT 82, ¶ 9, 395 Mont. 279, 438 P.3d 802. Regardless, Agent Smith’s actions exceeded the scope of the community caretaker doctrine upon confirmation that Pham was neither lost nor in need of assistance.

¶17 In *Ballinger*, we held that Ballinger was not seized when an officer stopped him on a public street and asked where he was going. *Ballinger*, ¶ 19. The officer was investigating a suspicious call regarding a vacant house with an open door and wanted to know whether Ballinger was connected to the vacant house. *Ballinger*, ¶ 19. Based on their responses, the officer became suspicious that Ballinger and his companion were lying. *Ballinger*, ¶ 5. At that point, the officer had particularized suspicion justifying the officer's request for Ballinger's identification. *Ballinger*, ¶ 22.

¶18 *Dupree* involved officers approaching Dupree at a train station and asking her whether she would agree to a search of her luggage, which she consented to. *Dupree*, ¶ 5. The officers in *Dupree* approached Dupree after receiving a tip that she would be traveling with drugs in her possession. *Dupree*, ¶¶ 4-5. We held that the officers' initial approach to Dupree did not constitute a seizure because Dupree was in a public place of her choosing and no evidence indicated the officers restrained Dupree by physical force or show of authority. *Dupree*, ¶ 15. We further held that Dupree was only seized after she asked about the consequences of refusing consent and that particularized suspicion existed to justify seizing her based on the tip and the information the officers gathered during their interaction. *Dupree*, ¶¶ 16-17.

¶19 In *Questo*, we held that Questo was not seized when an officer approached Questo in a public location of Questo's choosing without activating his vehicle's lights or sirens and after parking a significant distance from Questo's truck. *Questo*, ¶ 15. We noted that the officer approached Questo alone and on foot, did not draw a weapon, and did not speak in harsh language or use a harsh tone. *Questo*, ¶ 15. The officer initially stopped Questo

because Questo's vehicle matched the description of a call received about an adult male who smelled of alcohol and was driving a muddy blue truck. *Questo*, ¶¶ 2-4. Questo matched the description of the call, and as the officer questioned him, the officer could smell alcohol. *Questo*, ¶ 5. The officer asked Questo to perform some field sobriety tests, which Questo consented to. *Questo*, ¶ 5. We noted that "police encounters may not constitute 'seizures' . . . despite an officer's inclination to investigate[,]” and that the officer's actions were “similar to those of the officers in *Wilkins*, *Ballinger*, and *Dupree*.” *Questo*, ¶¶ 17-18. We held that the officer's initial approach was a routine police encounter and particularized suspicion arose upon Questo's voluntary participation in questioning and when administering the field sobriety tests. *Questo*, ¶¶ 18-19.

¶20 *Wilkins*, *Ballinger*, *Dupree*, and *Questo* each prove distinguishable from the instant case. While it remains true that police encounters may not constitute seizures despite investigatory motives, in each case, law enforcement nonetheless possessed some valid initial reason to approach the individual. *See Wilkins*, ¶¶ 2-3; *Ballinger*, ¶¶ 3-6; *Dupree*, ¶¶ 4-5; and *Questo*, ¶¶ 2-4. Conversely, Agent Smith approached Pham in a public place, based solely on Pham staring at the abnormal sight of an MHP van full of marijuana. Agent Smith's initial concerns were that Pham was lost or committing an offense. Pham's responses immediately ruled out that he was lost, and Agent Smith testified that he elected not to call the Miles City Police Department because he “didn't know what the offense that [he was] looking at was.” After confirming Pham was not lost and that Pham was not committing an immediately apparent offense, we conclude Agent Smith seized Pham when he continued the conversation and asked to search Pham's vehicle. A reasonable person in

Pham's position would not have felt free to leave when faced with multiple law enforcement officers asking to search his vehicle. Two of the officers were armed and in uniform; Agent Smith was obviously law enforcement in plain clothes as he was armed and displaying visible law enforcement identification. It is inconceivable to say the continuous barrage of questions by Agent Smith and Trooper Kilpela was merely "cordial" and idle conversation, and that Pham was free to go. Who willingly would discuss their plans, their family, their travels, and whether they possessed any "guns, knives, . . . drugs, [or] child pornography" to three strangers unless they were police officers and they believed they were not free to go? The only credible interpretation of this "cordial" conversation was that Pham knew he had to answer the questions, knew he was being investigated, and knew that he was not free to just walk away.

¶21 Having determined Pham was seized, we move to whether Agent Smith had particularized suspicion to justify the seizure. We conclude he did not. Particularized suspicion for the investigative stop requires the peace officer be possessed of: "(1) objective data and articulable facts from which he or she can make certain reasonable inferences; and (2) a resulting suspicion that the person to be stopped has committed, is committing, or is about to commit an offense." *Strom*, ¶ 15. We consider the quantity, substance, quality, and degree of reliability of information known to the officer. *State v. Wilson*, 2018 MT 268, ¶ 28, 393 Mont. 238, 430 P.3d 77. The existence of particularized suspicion is determined by looking at the totality of the circumstances, but the related question of whether the circumstances indicated illegal activity is a question of law. *Wilson*, ¶ 28. This standard does not require that an officer be certain, or even

correct, that a person is engaged in criminal activity. *Hoover*, ¶ 18. However, particularized suspicion requires more than mere generalized suspicion or an undeveloped hunch of criminal activity. *Wilson*, ¶ 28.

¶22 Based on his testimony, at the time he approached Pham, Agent Smith was aware of at least the following three things: (1) Pham was Vietnamese and, by cultural teachings, deferential to police; (2) several Vietnamese individuals had been arrested for drug trafficking along the same route Pham was traveling; and (3) Pham was staring at an MHP van full of marijuana long enough to arouse Agent Smith and Trooper Kilpela's suspicions. Based on this scant information, we see no objective data or resulting suspicion justifying Agent Smith's seizure of Pham. Moreover, Agent Smith's conversation with Pham quickly dispelled the reasons Agent Smith gave for approaching Pham. The State's opening argument at trial referred to Agent Smith's interaction as "a hesitation by [Pham] and a hunch by the State." Particularized suspicion requires more than mere generalized suspicion or an undeveloped hunch. *See Wilson*, ¶ 28. Viewed in the totality of the circumstances, we are left with the fact that Agent Smith saw a Vietnamese person, traveling along a route where other Vietnamese individuals had been arrested for drug trafficking, and became suspicious that Pham was trafficking drugs. No objective data supports Agent Smith's assessment that Pham was suspicious, and his seizure of Pham was accordingly unconstitutional. Because we conclude that Agent Smith lacked authority to delay his interaction with Pham beyond inquiring whether Pham was lost or in need of assistance, we need not address the validity of Pham's consent.

CONCLUSION

¶23 Several lawful instruments exist for officers to investigate potential crimes. “When we condone officers’ use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens.” *Utah v. Strieff*, 136 S. Ct. 2056, 2069 (2016) (Sotomayor, J., dissenting). The District Court clearly erred when it concluded Pham was not seized. Pham’s conviction is reversed and remanded for proceedings consistent with this Opinion.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE