

DA 21-0581

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 277

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

CATHERINE MARIE RYMAL,

Defendant and Appellant.

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APPEAL FROM: District Court of the Fourth Judicial District,  
In and For the County of Missoula, Cause No. DC-19-36-IN  
Honorable Leslie Halligan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Tammy Hinderman, Appellate Defender, Gregory Hood, Assistant  
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For Appellee:

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Submitted on Briefs: November 1, 2023

Decided: November 26, 2024

Filed:

  
Clerk

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Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 Catherin Marie Rymal appeals the August 2020 judgment of the Montana Fourth Judicial District Court, Missoula County, denying her motion to suppress drug evidence obtained as a result of an allegedly unlawful police seizure of her person. We address the following restated issue:

*Whether the District Court erroneously concluded that Rymal’s disclosure to police of a possible active warrant for her arrest was not the tainted result of an unlawful warrantless investigative stop without probable cause for an arrest?*

We affirm.

### **PROCEDURAL AND FACTUAL BACKGROUND**

¶2 The following record facts are manifest in the suppression hearing testimony of City of Missoula Police Officer John Griffith, his accompanying patrol car dash and body cam videos, and related video captured by the body cam worn by Missoula Police Officer Chea Hollis.<sup>1</sup> On the evening of January 1, 2019, Missoula police were involved in the surveillance of suspected illegal drug activity outside of a Montana Lil’s Casino on Brooks Street in Missoula. At approximately 9 p.m., police Detective Randall Long reported to patrol Officers Griffith and Hollis that two of the surveilled vehicles, a silver Honda sedan with expired license plates and a Volkswagen Jetta, just left the casino parking lot together headed toward the Missoula Fresh Market across the street. He said the two cars immediately drove off together after the Volkswagen had pulled-up and briefly stopped

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<sup>1</sup> The related police incident reports of Officers Griffith and Hollis, and Detective Randall Long, were also submitted in support of Rymal’s suppression motion without State objection.

next to the Honda outside the casino. In response, Officer Hollis located the two cars, and began following them in her marked patrol car without activated top lights or siren. The uniformed Officer Griffith accordingly parked his marked patrol car in an adjacent gas station lot facing the Fresh Market to surveil further. A few seconds later, as captured by his patrol car dash cam video, Officer Griffith saw the two cars drive into the Fresh Market parking lot, with Officer Hollis's patrol car trailing behind. The Fresh Market was still open for business, but the spacious lighted parking lot was largely empty with only a few other vehicles parked about.

¶3 The Honda stopped and parked in a marked space a short distance from the store, while the Volkswagen continued on before stopping and parking in another marked space closer to the Fresh Market entrance. Still running without activated top lights or siren, the trailing Officer Hollis followed the Volkswagen, and then stopped and parked at a slight angle in the through-lane directly behind it. She immediately got out without activated top lights or siren, walked up, and began speaking with the Volkswagen driver, who by then was standing outside next to her car.

¶4 Meanwhile, as captured by his dash cam video, Officer Griffith pulled forward into the Fresh Market lot toward the parked Honda. As he approached, the male driver exited, calmly walked forward, and into the store, leaving an adult female (Rymal) waiting in the passenger seat. Without activating his patrol car top lights or siren, Officer Griffith continued forward, and then stopped and parked at a slight angle about one car-length behind the Honda. There were no cars parked in front of, or immediately adjacent to the

Honda in the large open lot. Griffith then got out, and calmly walked toward the Honda. By the time he was close to the driver's side rear end, Rymal had got out, and was then standing outside between the open passenger door and car interior. As she started leaning back down toward the passenger doorway, Rymal glanced at the approaching police officer, and then continued down and reached into the car. Upon activation as he neared the driver's side rear end of the Honda, Griffith's body cam picked-up the following colloquy:

Officer: *Don't dig around in the car.*<sup>[2]</sup>

Rymal: *What was that?*

Officer: [While shining his flashlight into rear driver side and driver side windows, and seeing Rymal reaching inside the car,] *I said, please, don't dig around in the car.*

Rymal: Oh, no, I was trying to get my dog's leash. [Dog visible moving around inside the car.]

Officer: Oh, okay.

Rymal: [Laughing] Sorry.

Officer: [Walking around to passenger side of car,] [*c*] *an I talk to you for a little bit?*

Rymal: [Inaudible or no response.]

Officer: One thing, the car's got expired tabs on it.

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<sup>2</sup> The State asserts that Griffith immediately identified himself as a police officer, and that Rymal responded, "Hello." If so, Griffith did not testify to any such exchange at the suppression hearing, and it is not audible on his dash cam recording. His body cam did not activate and begin recording until he said, "[d]on't dig around in the car."

Rymal: [Closing the passenger door, stepping toward the officer, and placing her hands in her pockets,] [i]t's not my car.

Officer: Alright. *What are you guys doing over at the casino?*

Rymal: What do you mean?

Officer: There's a casino—

Rymal: Gambling.

Officer: Okay. *I just want to talk to you, okay*, because . . . you guys were parked out there for a long time?

Rymal: Oh well, we were waiting for our friend to show up. She was in, uh, a meeting, like a AA meeting, you know? And so we were just waiting for her, because uh, yeh.

Officer: Alright. So you know, people can sit around and wait, but casinos are a place that we have a lot of issues with.

Rymal: Well, I went in and I gambled plenty as well while I was there. I wasn't loitering—

Officer: —*You win anything?*

Rymal: I what?

Officer: *Did you win anything?*

Rymal: [Laughing] No, I wish. I came out 30 dollars short.

Officer: *Ah, that's no good.*

Rymal: No, definitely not.

Officer: *Who are you—are you waiting for her?* [Gesturing toward where the Volkswagen driver and Officer Hollis were standing and speaking a short distance away.]

Rymal: [Turning to look,] [m]hmm.

Officer: *Okay. Do you have an ID or anything I could take a look at?*

Rymal: *I don't have one, at all.*

Officer: You don't have one issued to you, or just don't have one with you?

Rymal: I don't have—well, I don't have one at all. It got stolen from me a long time ago and I just haven't gone in to get a new one. I can give you my name, my social.

Officer: *Okay.*

Rymal: There's a *good chance I might have a warrant* in Hamilton for failure to appear.

Officer: Oh, on what?

Rymal: Uh, a speeding ticket.

Officer: Oh, that's no big deal.

(Emphasis added.)

¶5 Rymal then gave her name and date of birth. While waiting on a requested dispatch warrants check, Griffith and Rymal briefly conversed about Rymal's speeding ticket, the Honda driver, and how she came to be riding with him. Meanwhile, the plain-clothed Detective Long drove into the Fresh Market lot in an unmarked car, and parked a short distance from the store entrance near where Officer Hollis was speaking with the Volkswagen driver. Within a few seconds, Officer Hollis walked over to the Honda, and then similarly questioned Rymal as to what she and her companion were doing earlier at the casino. While they were speaking, Officer Griffith's warrant check on Rymal came back positive for an active Ravalli County arrest warrant. He then formally arrested,

handcuffed, and transported Rymal to the Missoula County Detention Center for processing.

¶6 Officer Hollis then went into the open grocery store, found the Honda driver, identified him as Matthew McCormack, and returned with him to the parking lot where Detective Long was waiting. After a warrants check came back positive for an active arrest warrant, Hollis arrested McCormack. Upon post-arrest questioning in the parking lot, McCormack told the police that he and Rymal had earlier noticed someone watching them in an unmarked car in the casino parking lot. He then disclosed that Rymal had thus immediately inserted a one-ounce illegal drug packet into her vagina as a precaution to avoid potential police detection. Upon immediate notification of McCormack's disclosure, Officer Griffith applied for and obtained a corresponding body search warrant, and then took Rymal to a hospital emergency room for the search. The subsequent vaginal search conducted by hospital medical staff yielded a condom containing 1.23 ounces of suspected methamphetamine.

¶7 In January 2019, the State formally charged Rymal by Information with felony criminal possession of dangerous drugs with intent to distribute, felony evidence tampering, and misdemeanor obstruction regarding her physical resistance to the body search. After appearing with counsel and pleading "not guilty," Rymal moved for suppression of the illegal drug evidence as the tainted result of an allegedly unlawful investigative police seizure, and resulting questioning of her by Officer Griffith in the grocery store parking lot, without particularized suspicion of criminal activity. The State

countered that Rymal's parking lot interaction with Officer Griffith was a consensual police-citizen encounter that did not ripen into a constitutional seizure until after Rymal voluntarily disclosed that there was "a good chance" that she was the subject of an active arrest warrant. The State asserted that Rymal's voluntary statement in that consensual context then gave rise to a reasonable particularized suspicion of criminal activity, thus justifying her subsequent detention pending confirmation of the suspected warrant. Following an evidentiary hearing, the District Court agreed with the State, and denied the motion.

¶8 In July 2021, Rymal pled guilty to the charged offenses under a written plea agreement which in pertinent part called for the State to recommend particular probationary sentences on each offense, allowed Rymal to argue for lesser sentences on those offenses, and reserved her right to appeal the adverse suppression ruling. The District Court ultimately imposed a combination of probationary sentences on the charged offenses, with related fines, fees, and probation conditions. Rymal timely appeals.

### **STANDARD OF REVIEW**

¶9 The standard of review of a lower court denial of a motion to suppress evidence in a criminal case is whether the court's pertinent findings of fact are clearly erroneous and whether it correctly interpreted and applied the applicable law to those facts. *State v. Hoover*, 2017 MT 236, ¶ 12, 388 Mont. 533, 402 P.3d 1224. Lower court findings of fact are clearly erroneous if not supported by substantial evidence, the court misapprehended the effect of the evidence, or, upon our independent record review, we are firmly convinced

that the court was otherwise mistaken. *Hoover*, ¶ 12. Whether a lower court correctly interpreted and applied the pertinent law to the facts at issue is a question of law subject to de novo review. *Hoover*, ¶ 12.

## DISCUSSION

¶10 *Whether the District Court erroneously concluded that Rymal’s disclosure to police of a possible active warrant for her arrest was not the tainted result of an unlawful warrantless investigative stop without probable cause for an arrest?*

¶11 The Fourth Amendment to the United States Constitution, and Montana Constitution Article II, Section 11, similarly guarantee people the right to be free from “unreasonable searches and seizures” of their “persons, houses, papers, and effects.” U.S. Const. amend. IV;<sup>3</sup> Mont. Const. art. II, § 11. In regard to liberty of movement, as in other contexts where implicated, the fundamental purpose of the Fourth Amendment, and Mont. Const. art. II, § 11, is to “protect the privacy and security” of people from “unreasonable government intrusion or interference.” *Hoover*, ¶ 14 (citation omitted); *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S. Ct. 3074, 3081 (1976); *Terry v. Ohio*, 392 U.S. 1, 9, 88 S. Ct. 1868, 1873 (1968) (citing *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 511 (1967) (Fourth Amendment protects people not just places)).<sup>4</sup> Thus, as pertinent here, “[n]o right is . . . more sacred” or “more carefully guarded . . . than

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<sup>3</sup> The Fourth Amendment applies to the States through the Fourteenth Amendment Due Process Clause. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691 (1961).

<sup>4</sup> *Accord State v. Bailey*, 2021 MT 157, ¶ 20, 404 Mont. 384, 489 P.3d 889 (citing *United States v. Mendenhall*, 446 U.S. 544, 553-54, 100 S. Ct. 1870, 1877 (1980)); *Schmerber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834 (1966).

the right of every individual to the possession and control of” his or her “person[] free from [government] restraint or interference” except under “clear and unquestionable authority of law.” *Terry*, 392 U.S. at 9, 88 S. Ct. at 1873 (citation omitted). “Unquestionably,” people are “entitled to the protection” from unreasonable government searches and seizures as they traverse “down the street.” *Terry*, 392 U.S. at 9, 88 S. Ct. at 1873.

¶12 As a function of the procedural warrant and probable cause requirements of the Fourth Amendment and Mont. Const. art. II, § 11,<sup>5</sup> warrantless government searches and seizures are per se unreasonable except to the extent “conducted in strict accordance with” a recognized narrowly-delineated exception to those express requirements. *State v. Zeimer*, 2022 MT 96, ¶¶ 25-26 and 32, 408 Mont. 433, 510 P.3d 100; *Hoover*, ¶ 14; *State v. Ballinger*, 2016 MT 30, ¶ 16, 382 Mont. 193, 366 P.3d 668; *State v. Hardaway*, 2001 MT 252, ¶ 36, 307 Mont. 139, 36 P.3d 900; *Katz*, 389 U.S. at 357, 88 S. Ct. at 514.<sup>6</sup> Under the investigative *Terry* stop exception, police may briefly stop and detain people without a

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<sup>5</sup> See U.S. Const. amend. IV (“no Warrants” for search or seizure “shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”) and Mont. Const. art. II, § 11 (“[n]o warrant to search any place, or seize any person or thing shall issue . . . without probable cause”).

<sup>6</sup> Conversely, government searches and seizures conducted “in accordance with a judicial warrant . . . issued upon a showing of probable cause of illegal activity[,] and particularly describing the person, area, or item to be searched or seized,” are presumed constitutionally “reasonable.” *Zeimer*, ¶ 25. The presumption is rebuttable, however, under the “over-arching” reasonableness requirement of the Fourth Amendment and Mont. Const. art. II, § 11, upon a showing that the manner in which the otherwise permissible search or seizure was conducted was nonetheless unreasonable under the circumstances. See *State v. Peoples*, 2022 MT 4, ¶ 24, 407 Mont. 84, 502 P.3d 129; *Terry*, 392 U.S. at 28, 88 S. Ct. at 1883 (“[t]he manner in which [a] seizure and search were conducted is, of course, as vital a part of the [Fourth Amendment reasonableness] inquiry as whether they were warranted at all”).

warrant, or probable cause for an arrest, to investigate a reasonable particularized suspicion that a person is immediately involved in, or about to be involved in, criminal activity. *Hoover*, ¶ 17 (citations omitted); *United States v. Cortez*, 449 U.S. 411, 417-18 and 421-22, 101 S. Ct. 690, 694-95 and 697 (1981); *Terry*, 392 U.S. at 16-20, 88 S. Ct. at 1877-79.<sup>7</sup>

1. Threshold “Seizure” Requirement for Fourth Amendment and Mont. Const. Art. II, § 11, Protection Against Unreasonable Police Investigative Stops Without Warrant or Probable Cause for Arrest.

¶13 The Fourth Amendment and Mont. Const. art. II, § 11, protection against unreasonable searches and seizures applies only if and when a government “search” or “seizure” actually occurs. *See, e.g., Zeimer*, ¶ 24 (*inter alia* citing *United States v. Mendenhall*, 446 U.S. 544, 551-56, 100 S. Ct. 1870, 1875-78 (1980));<sup>8</sup> *State v. Strom*, 2014

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<sup>7</sup> *See also State v. Farabee*, 2000 MT 265, ¶ 14, 302 Mont. 29, 22 P.3d 175 (applying *Terry* stop exception with express reference to Mont. Const. art. II, § 11); *State v. Gopher*, 193 Mont. 189, 192-94, 631 P.2d 293, 295-96 (1981) (recognizing and applying temporary investigative stop exception as enunciated in *Terry* and further developed in *Cortez*). In pertinent essence, § 46-5-401(1)-(2), MCA (1991-2019), is an intended codification of the *Terry* investigative stop exception to the warrant and probable cause requirements of the Fourth Amendment and Mont. Const. art. II, § 11. *See State v. Anderson*, 258 Mont. 510, 514-15, 853 P.2d 1245, 1247-48 (1993) (noting 1991 amendment of § 46-5-401, MCA, “to reflect the particularized suspicion standard set forth in [*State v.*] *Gopher*”); *State v. Reynolds*, 272 Mont. 46, 49, 899 P.2d 540, 542 (1995) (noting 1991 amendment to § 46-5-401, MCA, “to be consistent with United States Supreme Court and Montana case law”); Commission Comments to § 46-5-401(1), MCA (1991) (noting that the 1991 amendments more closely “reflect” our holding in *Gopher*, 193 Mont. at 192-94, 631 P.2d at 295-96 (recognizing temporary investigative stop exception enunciated in *Terry* and further elaborated in *Cortez*)). *See also State v. Graves*, 191 Mont. 81, 87, 622 P.2d 203, 206-07 (1981) (noting that pre-1991 §§ 46-5-401 and -402, MCA (1979), formerly § 95-719, RCM (1947) (1973), like “similar statutes in other jurisdictions,” were “enacted to codify the rule announced in the landmark ‘stop and frisk’ case of *Terry v. Ohio*”).

<sup>8</sup> In *State v. Stanley*, 2024 MT 271, ¶ 19 n.14, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_, we noted our prior inaccurate citation in *Zeimer*, ¶ 24, to *California v. Hodari D.*, 499 U.S. 621, 625-29, 111 S. Ct. 1547, 1550-52 (1991), and *State v. Clayton*, 2002 MT 67, ¶¶ 13-27, 309 Mont. 215, 45 P.3d 30

MT 234, ¶ 10, 376 Mont. 277, 333 P.3d 218 (citing *Mendenhall*); *State v. Roberts*, 1999 MT 59, ¶ 16, 293 Mont. 476, 977 P.2d 974 (citing *Mendenhall*, 446 U.S. at 554, 100 S. Ct. at 1877); *State v. Jenkins*, 192 Mont. 539, 543-45, 629 P.2d 761, 764 (1981) (citing *Mendenhall* and *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880); *Mendenhall*, 446 U.S. at 551-54, 100 S. Ct. at 1875-77; *Terry*, 392 U.S. at 16 and 19 n.16, 88 S. Ct. at 1877 and 1879.<sup>9</sup>

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(citing *Hodari D.*), in support of the independently correct proposition that the protections of the Fourth Amendment and Mont. Const. art. II, § 11, apply only if and when a government “search” or “seizure” actually occurs. In pertinent part, however, *Hodari D.* more narrowly involved the Supreme Court’s grafting of a subjective element onto the otherwise purely objective Fourth Amendment *Mendenhall* standard or test for non-physical police seizures by show of force, i.e., even if an objectively reasonable person would *not* feel free to leave under the circumstances no seizure occurs *unless the subject actually yields, capitulates, or submits* to that police show of force. *Hodari D.*, 499 U.S. at 626 and 628-29, 111 S. Ct. at 1550-52. *Zeimer* thus overlooked that we had previously rejected that aspect of *Hodari D.* without analysis as inconsistent with the “broader protection” against unreasonable searches and seizures otherwise similarly provided by Mont. Const. art. II, § 11. *Clayton*, ¶¶ 13-15 and 21-22. *Accord State v. Merrill*, 2004 MT 169, ¶ 11, 322 Mont. 47, 93 P.3d 1227 (noting *Clayton* rejection of that aspect of *Hodari D.* under Mont. Const. art. II, § 11). *Stanley*, ¶ 19 n.14, has thus since repudiated our inaccurate *Zeimer*, ¶ 24, citations to *Hodari D.* and *Clayton* (citing *Hodari D.*).

<sup>9</sup> Rymal generally asserts that she was seized by police without particularized suspicion of criminal activity in violation of the Fourth Amendment, Mont. Const. art. II, § 11, *and* Mont. Const. art. II, § 10. When personal privacy is more broadly implicated in a particular case, we have recognized that Mont. Const. art. II, § 10 (protection of “individual privacy” from government intrusion absent “showing of a compelling state interest”), may provide somewhat “broader” privacy protection than the more particular Fourth Amendment and Mont. Const. art. II, § 11. *See, e.g., Noli*, ¶ 28; *Peoples*, ¶ 13 (“threshold privacy test” under Article II, § 10, and “search” test under Fourth Amendment and Article II, § 11, are same but in application we have recognized “broader range of reasonable expectations of privacy under Article II, § 10 in certain regards” resulting in “correspondingly narrower range” of recognized “exceptions” to the Article II, § 11, warrant requirement than recognized under Fourth Amendment warrant requirement); *State v. Nelson*, 283 Mont. 231, 241-43, 941 P.2d 441, 448-49 (1997) (noting Article II, § 10, protection of “informational privacy” and “autonomy privacy” in the making of “intimate personal decisions” and the “conduct[] [of] personal activities without” government “observation, intrusion, or interference”—citation omitted); *State v. Goetz*, 2008 MT 296, ¶¶ 13-14, 345 Mont. 421, 191 P.3d 489 (citing *State v. Hardaway*, 2001 MT 252, ¶¶ 32 and 35, 307 Mont. 139, 36 P.3d 900); *State v. Solis*, 214 Mont. 310, 316-20, 693 P.2d 518, 521-23 (1984). Here, however, Rymal has neither demonstrated, nor even asserted, that Mont. Const. art. II, § 10, is particularly implicated apart from the more particular protection against unreasonable interference with physical liberty

A person is “seized” for purposes of the Fourth Amendment, and Mont. Const. art. II, § 11, only if “a government officer in some way restrains” or interferes with the person’s liberty, however briefly, by use of physical force or assertion or show of authority which under the totality of the circumstances “would cause an objectively reasonable person to feel *not* free to leave.” *Hoover*, ¶ 15 (citation omitted—emphasis added); *Mendenhall*, 446 U.S. at 552-54, 100 S. Ct. at 1876-77; *Terry*, 392 U.S. at 16 and 19 n.16, 88 S. Ct. at 1877 and 1879 (person is seized “whenever a police officer accosts” the person “and restrains his [or her] freedom to walk away”).<sup>10</sup> Consequently, regardless of purpose and however brief, police restraint or interference with a person’s freedom of movement, whether by force or assertion or show of authority, is a “seizure” as referenced in the Fourth Amendment and Mont. Const. art. II, § 11. *Hoover*, ¶ 15; *State v. Massey*, 2016 MT 316, ¶ 9, 385 Mont. 460, 385 P.3d 544; *State v. Jarman*, 1998 MT 277, ¶ 9, 291 Mont. 391, 967 P.2d 1099; *State v. Martinez*, 2003 MT 65, ¶ 20, 314 Mont. 434, 67 P.3d 207; *State v. Reynolds*, 272 Mont. 46, 49, 899 P.2d 540, 542 (1995); *Cortez*, 449 U.S. at 417, 101 S. Ct. at 694-95; *Terry*, 392 U.S. at 16-17, 88 S. Ct. at 1877.

¶14 Implicit, a fortiori, in the threshold *Mendenhall/Terry* standard for determining when a constitutional “seizure” of a person occurs is that not every police-citizen encounter

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provided by Mont. Const. art. II, § 11, and similar Fourth Amendment language. We thus confine our focus here to the proper application of the Fourth Amendment and Mont. Const. art. II, § 11.

<sup>10</sup> See *State v. Loh*, 275 Mont. 460, 468, 914 P.2d 592, 597 (1996) (constitutional “seizure” is government action that “deprives [an] individual of dominion over his or her person or property”—quoting *Horton v. California*, 496 U.S. 128, 133, 110 S. Ct. 2301, 2306 (1990)).

or interaction necessarily is or results in a constitutional “seizure.” See *State v. Wilkins*, 2009 MT 99, ¶¶ 8 and 10-11, 350 Mont. 96, 205 P.3d 795 (quoting *Terry*, 392 U.S. at 19 n.16, 88 S. Ct. at 1879); *State v. Merrill*, 2004 MT 169, ¶ 17, 322 Mont. 47, 93 P.3d 1227 (“no precept of law prevents an officer from engaging a citizen” in a “voluntary conversation[.]”); *State v. Wagner*, 2003 MT 120, ¶ 19, 315 Mont. 498, 68 P.3d 840 (citing *Mendenhall*, 446 U.S. at 552, 100 S. Ct. at 1876); *State v. Lovegren*, 2002 MT 153, ¶¶ 13-17 and 25, 310 Mont. 358, 51 P.3d 471 (applying *Terry* standards in community caretaker context); *Mendenhall*, 446 U.S. at 552, 100 S. Ct. at 1876 (citing *Terry*, 392 U.S. at 19 n.16, 88 S. Ct. at 1879). A constitutional “seizure” of a person occurs only when police “in some way restrain” the person’s “liberty,” i.e., freedom of movement, whether “by means of physical force or show of authority.” *Terry*, 392 U.S. at 17-19 n.16, 88 S. Ct. at 1878-79; see also, e.g., *Mendenhall*, 446 U.S. at 551-56, 100 S. Ct. at 1875-78 (citing *Terry*, 392 U.S. at 19 n.16, 88 S. Ct. at 1879). Within that framework, the analytical line between police-citizen encounters or interactions that are or ripen into constitutional “seizures,” and those that are merely coincidental or consensual, is whether or at what point under the totality of the circumstances the subject police conduct and posture would have caused an objectively “reasonable person” to not feel free to ignore or refuse to answer or otherwise cooperate with the police, or disengage from any further interaction with them and move away. *Mendenhall*, 446 U.S. at 551-55, 100 S. Ct. at 1875-77 (citations omitted); *Terry*, 392 U.S. at 19 n.16, 88 S. Ct. at 1879. Accord *State v. Clayton*, 2002 MT 67, ¶¶ 12 and 21-23, 309 Mont. 215, 45 P.3d 30 (reaffirming application of *Mendenhall* objective

reasonable-belief-not-free-to-leave test for warrantless “seizure” of person without probable cause for arrest under Fourth Amendment and Mont. Const. art. II, § 11—citations omitted); *Roberts*, ¶ 16 (recognizing and applying *Mendenhall* reasonable-belief-not-free-to-leave test for constitutional “seizure” of person); *Florida v. Bostick*, 501 U.S. 429, 434-37, 111 S. Ct. 2382, 2386-88 (1991) (citations omitted); *Florida v. Rodriguez*, 469 U.S. 1, 5-6, 105 S. Ct. 308, 311 (1984) (citations omitted); *Immigration & Nat. Serv. v. Delgado*, 466 U.S. 210, 215-17, 104 S. Ct. 1758, 1762-63 (1984) (citations omitted); *Florida v. Royer*, 460 U.S. 491, 497-98, 103 S. Ct. 1319, 1324 (1983) (citations omitted).

¶15 It thus follows that an initially coincidental or consensual police-citizen encounter may later ripen into a constitutional seizure at the point under the totality of the circumstances when the subject police conduct and posture would have caused an objectively “reasonable person” to feel not free to ignore or refuse to answer or otherwise cooperate with the police, or disengage from any further interaction with them and move away. See *Clayton*, ¶¶ 21-22; *Bostick*, 501 U.S. at 434-35, 111 S. Ct. at 2386; *Mendenhall*, 446 U.S. at 551-55, 100 S. Ct. at 1875-77; *Rodriguez*, 469 U.S. at 5-6, 105 S. Ct. at 311; *Delgado*, 466 U.S. at 216, 104 S. Ct. at 1762-63; *Terry*, 392 U.S. at 19 n.16, 88 S. Ct. at 1879. Whether a particular police-citizen encounter or interaction constituted or effected a “seizure” of a person as referenced in the Fourth Amendment and Mont. Const. art. II, § 11, is a mixed question of law and fact ultimately subject to de novo review, but with any predicate lower court findings of historical fact subject to deferential review only for clear error. See *United States v. Ramirez*, 976 F.3d 946, 951 (9th Cir. 2020) (citing *United States*

*v. Washington*, 490 F.3d 765, 769 (9th Cir. 2007)); *United States v. Chan-Jimenez*, 125 F.3d 1324, 1326 (9th Cir. 1997); *see similarly Zeimer*, ¶ 32 (re similar standard of review for whether requisite particularized suspicion existed for investigative *Terry* stops—citing *State v. Kaufman*, 2002 MT 294, ¶¶ 10-12, 313 Mont. 1, 59 P.3d 1166; *Ornelas v. United States*, 517 U.S. 690, 694-99, 116 S. Ct. 1657, 1660-63 (1996)).<sup>11</sup>

¶16 For example, a sampling of our cases illustrates a few of the myriad fact-specific types of police-citizen encounters held insufficient to rise to the level of a constitutional “seizure” under the objective *Mendenhall/Terry* standard, even when initiated by police with an acknowledged or clearly evident investigative motive. In *State v. Questo*, 2019 MT 112, ¶¶ 13 and 15-19, 395 Mont. 446, 443 P.3d 401, we held that no constitutional seizure occurred where a uniformed officer investigating a DUI-related criminal endangerment tip later located the suspect pumping gas at a store, parked his marked patrol car away from the pumps without top lights or siren, and walked over and began questioning him regarding the tip. While the officer questioned the man in detail regarding his prior whereabouts, passengers, the alcoholic odor about him, empty beer cans visible in his pickup bed, his assertion that he had not been drinking, and whether he would be willing to perform field sobriety tests, we noted the non-commanding and permissive manner in which the officer posed the questions, and that there was no objective record

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<sup>11</sup> *See similarly, United States v. Rabbia*, 699 F.3d 85, 91 (1st Cir. 2012); *People v. Zamudio*, 181 P.3d 105, 119 (Cal. 2008) (citing *Thompson v. Keohane*, 516 U.S. 99, 102, 116 S. Ct. 457, 460 (1995) (whether person is “in custody” for Fifth Amendment purposes is a mixed question of law and fact subject to de novo review)); *State v. Harrington*, 222 P.3d 92, 94-95 (Wash. 2009).

indication that he did anything suggesting or implying that the man was either required to answer those questions, or not otherwise free to disengage or leave. *Questo*, ¶¶ 2-4, 13, and 15-19. In *Ballinger*, ¶¶ 3-6, 16, and 19-23, we held that no constitutional seizure occurred when a flashlight-guided police patrol officer engaged in the investigation of an open door into an unoccupied lit-up home, walked up to two people at the curb who appeared to be crossing the residential Billings street “straight toward” the home, and then asked what they were doing and where they were going.<sup>12</sup> Similarly, in *State v. Dupree*, 2015 MT 103, ¶¶ 4-5 and 15-17, 378 Mont. 499, 346 P.3d 1114, we held that no seizure occurred where a police officer and a federal agent calmly approached a suspected drug courier in an Amtrak train depot, identified themselves as drug investigators, told her she was the subject of an illegal drug activity tip, asked “in permissive terms” if she would sign a written consent for a luggage search, and then asked her to accompany them to another room for the search. We again noted the non-commanding and permissive manner in which the officers approached and engaged the female subject, and the lack of any objective record indication that her consent and cooperation was coerced or otherwise involuntary. *See Dupree*, ¶¶ 4-5 and 15-17.

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<sup>12</sup> Due to a preliminary State concession, we did not rule on whether, or at what point, the encounter subsequently ripened into a constitutional seizure upon the officer’s subsequent requests for identification. *See Ballinger*, ¶¶ 6, 17, 19-20, and 22 (focusing instead on whether the conceded warrantless investigative seizure was nonetheless lawful based on particularized suspicion of criminal activity).

¶17 In *Wilkins*, ¶¶ 2-3, 11, and 14-15, we held that no constitutional seizure occurred where a uniformed police officer in a marked patrol car stopped without top lights or siren near a “suspicious” running vehicle lawfully parked on an industrial area Billings street at 1:30 a.m., and then walked up and asked “why” the female driver “was parked on a dark remote street late at night in [the] cold.” In *Merrill*, ¶¶ 3-4, as the lead officer turned away from the female driver to return to his still-flashing patrol car upon completion of a nighttime traffic stop, his uniformed partner, who suspected that the visibly nervous woman may be involved in illegal drug activity, stepped toward her while she was putting away her paperwork, permissively asked “if he could talk to her for a minute,” and, on affirmative answer, asked whether she would consent to a search of her car and person. We held that the officers neither unlawfully extended the preceding traffic violation stop, nor re-seized the woman after disposing of the moving violation, based on the facts that the lead officer had already told her she was free to go, neither of the officers impeded her from leaving, and there was no objective record indication that she did not voluntarily consent at each step of the way. *Merrill*, ¶¶ 14-15 and 17.

¶18 In *Wagner*, three uniformed highway troopers investigating a DUI tip went into an off-interstate gas station/C-store where the lead officer located and approached a “sway[ing]” man on a payphone, and then requested that the apparently intoxicated man “accompany” and “speak with them outside” “for further questioning.” *Wagner*, ¶¶ 3-5 and 31. We held that no constitutional seizure occurred because there was no objective record indication that the troopers: (1) compelled the man to agree to speak with them, or

to go outside for further questioning, whether by demand, threat, show of force, or other coercive means; (2) restrained his liberty “by means of physical force or show of authority”; or (3) acted in any other manner that would have caused an objectively reasonable person to feel not free to decline and leave. *Wagner*, ¶ 31. Likewise, in *Clayton*, a pair of uniformed police officers in a marked patrol car followed a vehicle from a bar at night, and then down a two-way residential side street upon which the vehicle then lawfully parked along the curb behind another parked car. *Clayton*, ¶¶ 3-5 and 26-27. Without top lights or siren, the police slowly approached, and then pulled their patrol car in behind “to the left” of the vehicle. *Clayton*, ¶¶ 26-27. Neither of the officers exited the patrol car and approached on foot. *Clayton*, ¶ 27. Instead, they shined a bright spotlight into the vehicle from behind to illuminate its occupants and interior. *Clayton*, ¶ 27. Even under those somewhat daunting circumstances, we held that no constitutional seizure occurred because police “did not initiate the stop,” merely “shined [a] spotlight” into the car on a public street without top lights or siren, and, despite nearly blocking it in, did not get out or otherwise approach the occupants. *Clayton*, ¶ 27.

¶19 Finally, in *Jenkins*, 192 Mont. at 541-45, 629 P.2d at 763-64, two police detectives approached man in a bar, told him he matched a witness description of a robbery suspect, asked if he would “mind going” with them to a confirmatory show-up with the eyewitness, and then, upon affirmative answer, drove him to the show-up in the back of a two-door unmarked police car without restraint. We held that no constitutional seizure occurred because, when asked on the way to the show-up, the detectives told the man he was not

under arrest, and there was no objective record indication of any overt police coercion, or that he was not otherwise free to decline or withdraw his apparent consent. *Jenkins*, 192 Mont. at 543-45, 629 P.2d at 764. A sampling of United States Supreme Court cases are similarly illustrative of such investigatory non-seizure police-citizen encounters. See *United States v. Drayton*, 536 U.S. 194, 197-207, 122 S. Ct. 2105, 2109-14 (2002) (no seizure when driver allowed multiple plain-clothes police with conspicuous badges onboard upon scheduled interstate bus trip disembarkation stop for random questioning of passengers regarding travel plans, whether they possessed weapons or illegal drugs, and for consent for pat-down and luggage possession searches where police did not block exit aisle for any who declined, did not suggest or imply that people were not free to decline and temporarily disembark, did not brandish weapons or make other overt show of force, approached and politely questioned passengers individually in non-commanding, -authoritative, and -coercive manner, and similarly asked each for consent to search—noting that an affirmative answer when police “ask citizens for consent” generally “dispels” any “inference of coercion”); *Bostick*, 501 U.S. at 431-32, 111 S. Ct. at 2384-85 (noting “some doubt” for remand as to whether a constitutional seizure occurred where conspicuously identified police boarded and randomly approached individuals on public bus; announced they were searching for illegal drug activity; advised that subjects were free to refuse; and then permissively asked to see identification, bus tickets, and for consent to search luggage); *Delgado*, 466 U.S. at 212-13 and 218-21, 104 S. Ct. at 1760-61 and 1763-65 (factory workers not seized by federal agents posted at doors

and walking about in factories questioning workers regarding identity and citizenship/immigration status where agents did not restrict workers' freedom of movement in the factories, say or otherwise indicate that workers were not free to decline to answer/cooperate, and workers were independently required to be/remain on premises pursuant to terms of employment rather than police conduct); *Royer*, 460 U.S. at 493-95, 497-98, and 501-02, 103 S. Ct. at 1321-22, 1324, and 1326 (no constitutional seizure where detectives merely approached suspected drug courier on Miami airport concourse, identified themselves as police, permissively asked if he "had a 'moment' to speak with them," and then permissively asked if they could see his airline ticket and identification); *Mendenhall*, 446 U.S. at 547-48 and 555, 100 S. Ct. at 1873-74 and 1877 (no constitutional seizure where federal drug agents approached suspected drug courier in airport concourse, asked to see identification and plane ticket, asked about her itinerary and ticket information discrepancy, asked if she would accompany them to airport DEA office for further questioning, and then asked for consent to handbag and intrusive body searches where there was no objective record indication other than subjective nervousness that she was not free to decline and move-on in concourse).

¶20 In contrast, a sampling of Montana and Supreme Court cases illustrate a few of the myriad fact-specific types of police conduct and posture that could cause an objectively reasonable person to feel not free under the totality of the circumstances to ignore or refuse to speak with police, disengage from any further interaction with them, or move away. In *State v. Pham*, 2021 MT 270, ¶¶ 2, 4, 6, 8-9, and 20, 406 Mont. 109, 497 P.3d 217, three

armed police officers, including two uniformed officers, encountered a man oddly observing a police van packed with previously seized marijuana at a gas station/C-store, approached him inside the store, and then subjected him to a “continuous barrage of questions” regarding his identity, family, travel origin, travel destination, and whether he was in possession of weapons, illegal drugs, or child pornography. We held that a constitutional seizure by show of force occurred under the totality of the circumstances because an objectively reasonable person would not have felt free to disengage or leave in the face of the significant police presence, duration and intrusive nature of the staccato questioning, and the resulting particularized indication to the man that he was the subject of a criminal investigation. *See Pham*, ¶¶ 2, 4, 6, 8-9, and 20. In *Dupree*, a police officer and a federal agent who were jointly investigating an illegal drug activity tip approached a suspected female drug courier in a public train station area, disclosed that she was the subject of the tip, and then asked if she would consent to a search of her luggage for illegal drugs. *Dupree*, ¶¶ 4-5 and 15-17. We held that the initially consensual interaction, including the police requests for consent to a luggage search and for her to accompany them to a more secluded anteroom for the search, later ripened into a constitutional seizure when the suspect asked what would happen if she withdrew her initial consent, and the police responded that they would then detain her for a canine sniff-search. *Dupree*, ¶¶ 15-17. Similarly, in *Strom*, ¶¶ 4-5, 10, 13, and 16-17, we held that a uniformed police officer in a marked patrol car constitutionally seized the driver and passenger of a vehicle legally parked in an open city park lot after 9:00 a.m. when he pulled

into the lot without lights or siren, stopped and parked behind the vehicle in the open lot, exited and approached on foot, demanded the driver's license and proof of identification from both, told them to wait until he returned, and then walked back to his patrol car with their IDs. In contrast to the circumstances at issue in *Clayton, supra*, we held in *Roberts*, ¶¶ 6-7 and 16-17, that a constitutional seizure occurred when a uniformed officer pulled into and parked behind the subject vehicle on an off-street residential driveway, thereby blocking its exit, and then exited the patrol car and approached the driver on foot.

¶21 In *Royer*, 460 U.S. at 493-95, 497-98, and 501-03, 103 S. Ct. at 1321-22, 1324, and 1326-27, the Supreme Court held that an initial non-seizure police approach of a suspected illegal drug courier on a Miami airport concourse, request to speak with him, and subsequent request for identification and airline ticket checks ripened into a constitutional seizure when police further identified themselves as narcotics agents and then told the suspect to accompany them to an anteroom without returning his airline ticket and proof of identification. Finally, in *Brown v. Texas*, 443 U.S. 47, 49-52, 99 S. Ct. 2637, 2639-41 (1979), the Supreme Court held that an unlawful police seizure occurred where, after approaching a "suspicious" man in an alley in a high crime area without particularized suspicion of criminal activity, police questioned him regarding his presence there, and then continued to detain him as they repeatedly pressed for identification after he refused to self-identify.

2. Whether Rymal was Constitutionally Seized by Police Before She Disclosed Her Apparent Active Arrest Warrant Status.

¶22 Here, after unremarkably driving his marked patrol car into the large, open, and largely empty Fresh Market grocery store parking lot, Officer Griffith stopped and parked without top lights or siren approximately one car-length behind the already parked Honda in which Rymal arrived and was then waiting in the passenger seat. There were no cars parked in front of, or adjacent to, the Honda. Griffith's patrol car at no time blocked or impeded Rymal's ability to get out and follow her companion into the store, walk her dog in the parking lot, or even completely walk away from her companion's car in any direction. While another patrol car (driven by Officer Hollis) followed the Volkswagen behind the Honda into the parking lot without top lights or siren, the other patrol car continued on with the Volkswagen to a different location in the lot. Under those circumstances, nothing in the appearance, trajectories, positioning, or final parking locations of either of the patrol cars would have given an objectively reasonable person any objective indication that the occupants of the Honda were not free to continue on out of the lot, or to get out and walk into the store, about the parking lot, or completely away, just as Rymal's companion driver was doing on his way into the store as Griffith's patrol car rolled to a stop behind.

¶23 Similarly unremarkable in a sparsely populated grocery store parking lot was Griffith's approach on foot. After approaching in his patrol car and parking a short distance behind the Honda with no top lights or siren, he simply got out and calmly walked up with a flashlight from behind toward the driver's side rear end of the Honda. As he approached, he saw Rymal glance at him as she was standing next to the passenger door, before leaning

back down and reaching into the car. In the only manner that was remotely authoritative throughout the entire encounter, Officer Griffith, concerned about his safety, said “don’t dig around in the car.” Rymal immediately asked, “what was that?” He then politely restated, “I said, please, don’t dig around in the car.” Upon shining his flashlight into the car from the driver’s side rear to see what she was reaching for, Griffith saw a dog moving around inside, at which point Rymal simultaneously explained, “I was trying to get my dog’s leash.” He immediately replied, “oh, okay.” Manifesting the relatively relaxed, non-intimidating tone of the exchange, Rymal laughingly said, “sorry.”

¶24 With the safety concern resolved, Griffith calmly stepped around to the passenger side of the car and politely asked, “can I talk to you for a little bit?” While his body cam audio is briefly inaudible thereafter, the video manifests that Rymal then consensually walked towards him to hear what he had to say. Griffith started by advising that the Honda had expired license plates. Seemingly unconcerned, Rymal replied, “it’s not my car.” Accepting her answer, he said, “alright,” and then calmly asked, “what were you guys doing over at the casino?” After a momentary pause, she answered, “gambling.” He asked, “I just want to talk to you, okay, because . . . you guys were parked out there for a long time?” Rymal explained that they “were waiting for [their] friend to show up.” Again accepting her answer, he responded “alright, people can” do that, “but casinos are a place that we have a lot of issues with.” She then further explained that she was also “gambl[ing] plenty” in the casino “as well,” and was thus not “loitering.” He politely asked whether

she won “anything.” In response to her laughing reply that she “came out 30 dollars short,” the officer commiserated, “ah, that’s no good.”

¶25 Gesturing over to where Officer Hollis was then out speaking with the Volkswagen driver in the parking lot, Griffith asked, “are you waiting for her?” Rymal looked over and responded, “mmhmm.” He then politely asked, “do you have an ID or anything I could take a look at?” She responded that she did not “have one, at all.” In response to his question as to whether she did not “have one issued to” her or just did not “have one with” her, she explained not “at all” because her prior ID was “stolen.” Unprompted, she then volunteered, “I can give you my name [and] my social [security number].” Griffith replied, “okay.” Rymal then further volunteered non-sequitur, “there’s a good chance I might have a warrant in Hamilton for failure to appear.” He replied, “oh, on what?” She answered, “uh, a speeding ticket.” He replied, “oh, that’s no big deal.” The body cam time-stamp indicates that a total of 90 seconds had elapsed from the time that Griffith pulled up and stopped his patrol car to the time that Rymal volunteered that she may be the subject of an active failure to appear arrest warrant.

¶26 As evident in his body cam video, Officer Griffith then asked for Rymal’s name and date of birth, which she immediately provided, and even spelled-out her last name without prompting. Griffith then requested a dispatch wants/warrants check, which then confirmed that she was the subject of an active arrest warrant, resulting in her arrest.

¶27 Rymal does not dispute that her non-sequitur disclosure to Griffith of her apparent active warrant status gave rise to a particularized suspicion of criminal activity from that

point forward, thus justifying temporary detention for verification. She asserts only that he effectively seized her earlier at the point when he asked if she had any identification, thus rendering her subsequent disclosure of her active warrant status, and subsequent post-arrest discovery of illegal methamphetamine in her body pursuant to a search warrant, the tainted fruit of an unlawful investigative police seizure of her person without particularized suspicion of criminal activity.

¶28 As threshold matter, even if we assume *arguendo* that Officer Griffith effectively seized her at the point he asked her for identification, conspicuously missing from Rymal’s “fruit of the poisonous tree” logic is her failure to articulate, much less demonstrate, an unbroken sequential chain of causation-in-fact between the alleged earlier unlawful investigative seizure of her person in the parking lot, her non-sequitur warrant status disclosure, and resulting arrest, on one hand, and the subsequent discovery of the information independently obtained by police from her companion, which then resulted in issuance of a judicial warrant to subsequently search her body for illegal methamphetamine, on the other. The upshot of her attenuated causation-in-fact logic is that, but for her arrest resulting from an earlier unlawful police investigative stop, she would not have been in police custody by the time police independently developed probable cause for a search warrant, and thus would have had opportunity to thwart any resulting warrant by avoiding arrest long enough to remove the previously-inserted methamphetamine from her body before police relocated her for execution of the search warrant.

¶29 Putting aside the attenuated logic of Rymal’s fruit of the poisonous tree exclusionary rule theory, we will maintain focus on the more fundamental question raised on appeal—whether Rymal was effectively seized by police at the time that Officer Griffith requested identification from her. As a threshold matter, Rymal’s logic effectively concedes that she was *not* seized until the officer asked whether she had any identification. We agree. The uniformed Officer Griffith calmly approached on foot with a flashlight guiding his way, from a patrol car parked a short distance away with no lights or siren. In the sparsely populated and open grocery store parking lot, he calmly continued toward the opposite rear of the car in which Rymal was exiting from the passenger seat. Those circumstances neither manifest an overt show of force, nor other police conduct, that would have caused an objectively reasonable person to feel that she was not free to get back in her car and decline to talk to him, or continue getting out of her car and then either follow her companion into the grocery store, walk her dog, or walk completely away. Nor was it objectively unreasonable under the totality of the circumstances for the approaching officer to politely tell Rymal not to dig-around in her car in the dark parking lot as he approached on foot. Any basis for characterizing his statement as an authoritative command that would have caused an objectively reasonable person to feel not free to ignore him, not speak with him, or disregard and continue on about her way is belied by the facts that he: (1) did not say anything that could be objectively construed as a command to remain in place or not leave—only to stop digging around in the car as he approached; (2) did not loudly bark out the directive as evidenced by the fact that she responsively asked, “what was that?”;

(3) immediately politely rephrased by preceding his statement with “please”; and then  
(4) immediately accepted her explanation that she was merely looking for her dog leash, to which she laughingly said, “sorry.”

¶30 Griffith’s body cam video clearly manifests that he at all times interacted with Rymal in a calm and polite manner; did not command, demand, or otherwise direct her to step over and talk to him; made no accusatory statements toward her; permissively asked if he could speak with her; cordially engaged in light and engaging conversation with her in response to her explanation as to what she and her companion were doing earlier at the casino; did not dispute or disparage any of her responses to his questions; and did not say or do anything overtly suggesting or implying that she was not free to either decline to speak with him in the first instance, or disengage and move-on at any time thereafter. In context of the manifestly polite, cordial, permissive, and non-coercive conversation that occurred, there simply is no objective record indication that anything Officer Griffith said or did would have caused an objectively reasonable person to feel not free to ignore his request for identification, tell him that she needed to go (whether to walk her dog, go into the store, or otherwise walk away), or, alternatively, get back in the car and not speak with him any further at that time. Under the totality of the objective circumstances of record, we hold that the District Court correctly found and concluded that Rymal was not constitutionally seized at any time before she voluntarily disclosed her apparent active warrant status non-sequitur to Officer Griffith.

## CONCLUSION

¶31 For the foregoing reasons, we hold that the District Court correctly found and concluded that Rymal was not constitutionally seized at any time before she voluntarily disclosed her apparent active warrant status non-sequitur to Officer Griffith. The court thus correctly denied Rymal's motion to suppress the subject illegal drug evidence as the tainted fruit of an unlawful police investigative seizure of her in the grocery store parking lot on the night in question. AFFIRMED.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH  
/S/ INGRID GUSTAFSON  
/S/ BETH BAKER  
/S/ JIM RICE