

IN THE CIRCUIT COURT OF THE NINTH
JUDICIAL CIRCUIT, IN AND FOR
ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

APPELLATE CASE NO: 2013-AP-26-A-O
Lower Case No. 2013-CT-376-A-E

Appellant,

vs.

MARK JOSEPH STILLMAN,

Appellee.

_____ /

Appeal from the County Court
for Orange County, Florida
Martha Adams, County Court Judge

Jeffrey Ashton, State Attorney
and Syed M. Qadri, Assistant State Attorney
for Appellant

Thomas D. Sommerville, Esq.
for Appellee

Before WOOTEN, HIGBEE and H. RODRIGUEZ, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

Following his encounter with a police officer in a store parking lot, Appellee Mark Stillman was arrested for driving under the influence. The trial court granted his motion to suppress the stop. The State appeals.

According to the testimony at the suppression hearing, a Winter Park police officer received an anonymous tip about an erratic driver. He located the car in a store parking lot. After parking some distance away, he approached the car on foot. He did not activate his lights or siren. He said he intended to conduct a well-being check.

The officer testified that the car's motor was running and he noticed through the car window that the driver appeared to be profusely sweating, moving back and forth, and seemed incoherent. He asked the driver three times to roll down his window. The driver twice put the car into drive, then back into park, and then fumbled with the window button; he finally opened the car door. The officer immediately smelled the odor of alcohol; a DUI investigation and arrest ensued. The trial court granted the motion to suppress, finding that a seizure occurred when the officer directed Appellee to open his car window and that the officer lacked reasonable suspicion for that seizure.

Whether or not there was a reliable tip about Appellee's driving, there was no constitutional barrier to the officer approaching his car to speak to him. "A seizure does not occur when an officer merely approaches an individual in a public place or a driver seated in an already parked vehicle." *Houston v. State*, 925 So. 2d 404, 406 (Fla. 5th DCA 2006). And, "[i]t is well recognized that police officers may conduct welfare checks and that such checks are considered consensual encounters that do not involve constitutional implications." *Dermio v. State*, 112 So. 3d 551, 555 (Fla. 2d DCA 2013).

A seizure of a person occurs "only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Houston* at 406. The only arguable show of authority in this case was the officer's repetition of his request, but that alone, absent any other factor, does not create a totality of circumstances suggesting that a reasonable person would not have felt free to leave. There was no evidence that his voice or behavior was demanding or coercive in any manner. As in *Dermio*, the officer here approached a parked car, observed some signs of possible distress on the part of the driver, and made an attempt to determine whether the driver was in need of assistance. This was not a seizure.

Once Appellee opened his car door and the officer smelled alcohol, the officer had sufficient indicia of possible impairment, including his observations of the driver up to that point, to initiate an investigatory stop.

IT IS THEREFORE ORDERED AND ADJUDGED that the trial court's order granting the motion to suppress is REVERSED and the matter REMANDED for further proceedings.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 13th day of March, 2014.

/S/

WAYNE C. WOOTEN
Presiding Circuit Judge

HIGBEE and RODRIGUEZ, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **Syed M. Qadri,, Assistant State Attorney**, 415 N. Orange Avenue, Ste. 200, Orlando, Florida 32802-1673; and to **Thomas D. Sommerville, Esq.**, 529 North Magnolia Avenue, Orlando, Florida 32801 this 13th day of March, 2014.

/S/

Judicial Assistant