

No. 13-109679-A

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**IN THE  
COURT OF APPEALS OF THE  
STATE OF KANSAS**

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STATE OF KANSAS  
Plaintiff-Appellee

vs.

MICHAEL D. PLUMMER  
Defendant-Appellant

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**BRIEF OF APPELLEE**

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Appeal from the District Court of Pottawatomie County, Kansas  
Honorable Jeff Elder, Judge  
District Court Case No. 12 TR 383

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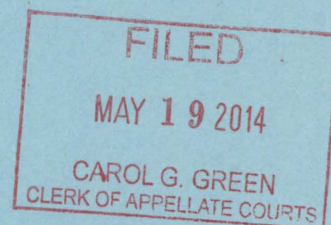


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**BRIEF OF APPELLEE**

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Nature of the Case

The defendant, Michael D. Plummer, was convicted by bench trial on stipulated facts to a first offense DUI on January 17, 2013. The defendant appeals the district court's denial of his motion to suppress.

**Statement of the Issues**

**Issue I: The district court did not err in denying the defendant's motion to suppress.**

**Statement of the Facts**

The defendant was convicted of driving under the influence (first offense) after a trial on stipulated facts. (I, 30-32; III, 1-7) Prior to trial, the defendant filed a motion to suppress for lack of reasonable suspicion to detain. (I, 17-19) The following testimony was taken at the hearing on the defendant's motion. (II, 4-28)

On April 21, 2012, just after midnight, deputies with the Pottawatomie County Sheriff's Office were dispatched to a rural area in the vicinity of Gasser Road and Flint Rock Road. (II, 4-5) The dispatch was in reference to a reported juvenile party in a pasture with a green gate off of Flint Rock Road. (II, 5) Sgt. Rice arrived in the area at approximately 12:25 a.m. (II, 5) He observed an unusually high amount of vehicle traffic on Flint Rock Road with a vehicle entering into a pasture off of Flint Rock Road. (II, 5) When the officer proceeded to the location he observed the vehicle enter into the pasture and observed a closed gate at the area. (II, 6) The officer drove a short way and turned his vehicle around. (II, 6) As he did so, he observed a bonfire off in the pasture and another vehicle appeared to be coming from the bonfire, down the road towards the gate. (II, 6)

After observing the vehicle approaching the gate, Sgt. Rice pulled his vehicle along the side of the road, shut his headlights off and waited to see if the vehicle was leaving. (II, 6) The vehicle did appear to be leaving the pasture, so Sgt. Rice turned on his headlights and pulled up towards the gate. (II, 6) The driver of the approaching vehicle got out of his car and approached the gate. (II, 6) Sgt. Rice parked his vehicle, with only his headlights on, to the north of the field access. (II, 6) Sgt. Rice approached the gate on foot and testified his vehicle did not block the gate and vehicles could come and go from the area. (II, 7, 12)

Sgt. Rice made contact with the driver, who would eventually be identified as the defendant, Michael Plummer. (II, 7) Sgt. Rice advised the defendant he was investigating a report of a juvenile party in the area. (II, 8) He asked the defendant whether he owned the property to which the defendant told him that he leased the

property. (II, 21-22) Sgt. Rice could see the bonfire in the pasture and asked the defendant about the fire and whether any juveniles were on the property drinking. (II, 8, 22) The defendant indicated he did not know what was going on in the pasture and was out checking cattle. (II, 8, 22) Sgt. Rice had observed the defendant to have bloodshot eyes and asked if the defendant had been drinking here tonight to which the defendant stated that he had not. (II, 9, 14-15) Sgt. Rice asked the defendant for ID, to which the defendant provided a Kansas driver's license. (II, 15, 22)

At approximately the same time Sgt. Rice was inquiring about ID, another vehicle pulled up behind the defendant's vehicle. (II, 8,22) This vehicle came from the direction of the bonfire in the pasture. (II, 9) Also, Sgt. Chris Schmidt arrived on scene as well. (II, 9) Sgt. Schmidt parked his vehicle on the south side of the access gate, but again, did not block the gate. (II, 9, 18) Sgt. Rice spoke to the youthful individuals that pulled up behind the defendant's vehicle, about any juvenile party taking place in the pasture. (II, 9, 22) The occupants of the vehicle confirmed there was a party in the pasture and that people were drinking. (II, 9, 22) Sgt. Rice indicated that at this time, Sgt. Schmidt also approached him and indicated he could smell an odor of alcohol coming from the defendant at the gate. (II, 9)

On cross examination, Sgt. Rice testified that the defendant could have left the area through the gate, and although he was standing by the gate to speak with the defendant about the call, he would have moved. (II, 14, 16-17) Sgt. Rice further testified that at the time he asked the defendant for ID, he would have been free to ignore the request. (II, 15-17) Sgt. Rice testified he asked for ID because the defendant had told him that he leased the property and was checking cattle, but did not know what was going

on in the pasture where a bonfire was taking place. (II, 22) When the deputy asked the defendant for his ID, only he and the defendant were present and standing on opposite sides of the pasture gate. (II, 17)

On re-direct, Sgt. Rice testified he requested the defendant to submit to field sobriety tests because of the bloodshot eyes, odor of alcohol, denial of consuming alcohol and knowing the defendant had just left a juvenile party. (II, 23) Sgt. Rice testified that from the time he first met the defendant at the gate to the point he was no longer free to leave was five minutes or less. (II, 19)

The defendant also testified at the suppression hearing. (II, 25-28) On direct examination, he testified the officer was blocking the gate by standing in front it. (II, 25) He testified he did not feel free to leave and that he did not really feel he could refuse to provide ID. (II, 25-26) On cross examination, the defendant acknowledged that when asked for his ID it was only he and Sgt. Rice present. (II, 27) He further admitted that prior to evaluating him for DUI, the questions Sgt. Rice asked him were related to his investigation of a juvenile party. (II, 27)

At the conclusion of this testimony, the parties presented argument to the court. (II, 28-38) The court took the motion under advisement. (II, 38) The court issued an order denying the motion to suppress ruling the initial encounter was voluntary, and it ceased to be one at the point the officer began inquiry into sobriety tests. (I, 20-21) The defendant filed additional arguments and authorities to the court. (I, 28-29) The court again addressed the defendant's motion briefly just prior to the trial on stipulated facts and again overruled the defendant's motion to suppress for lack of reasonable suspicion. (III, 2) The matter proceeded to trial with a continuing objection noted by defense

counsel. (III, 4) The defendant was convicted. (III, 4-5) Defendant was sentenced on March 12, 2103. (I, 33) The defendant timely appeals. (I, 35-36)

### **Arguments and Authorities**

**Issue I: The district court did not err in denying the defendant’s motion to suppress.**

#### **Standard of Review**

“An appellate court reviews the district court’s decision on a motion to suppress using a bifurcated standard. Without reweighing the evidence, the district court’s findings are reviewed to determine whether they are supported by substantial competent evidence. Then the ultimate legal conclusion regarding the suppression of evidence is reviewed using a de novo standard.” *State v. Woolverton*, 284 Kan. 59, 70, 159 P.3d 985 (2007).

“When the facts material to a trial court’s decision on a motion to suppress evidence are not in dispute, the question of whether to suppress is a question of law over which an appellate court has unlimited review.” *State v. Fitzgerald*, 286 Kan. 1124, 1126, 192 P.3d 171 (2008).

#### **Analysis**

The defendant argues he was seized by Sgt. Rice, without reasonable suspicion, when he initially encountered the officer at the pasture gate. Appellant’s Brief at 6-8. The state argues the initial encounter with the defendant was a voluntary encounter and did not become investigatory until the time Sgt. Rice asked the defendant to submit to field sobriety tests.

“[A] voluntary encounter is not considered a seizure and is not afforded protection by the Fourth Amendment to the United States Constitution.” *State v. N. Thomas*, 291 Kan. 676, 682, 246 P.3d 678, 683 (2011)(citing *State v. McGinnis*, 290 Kan. 547, 551, 233 P.3d 246 (2010)). A “totality of the circumstances” test is used to determine whether there is a seizure or a consensual encounter. See *State v. Thompson*, 284 Kan 763, 775, 166 P.3d 1015 (2007). Under the test, interaction between law enforcement and another person is consensual if the officer’s conduct “conveys to a reasonable person that he or she is free to refuse the requests or otherwise end the encounter.” *Id.* at 775.

‘[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen...[Citations omitted.] Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. [Citations omitted.] The person approached, however, need not answer any questions put to him; indeed, he may decline to listen to the questions at all and may go on his way. [Citations omitted.]

*N. Thomas*, 291 Kan. at 683(citing *Florida v. Royer*, 460 U.S. 491, 497-98, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)) See *Thompson*, 284 Kan. 763, Syl. ¶ 17, 166 P.3d 1015 (“Law enforcement questioning, by itself, is unlikely to result in Fourth Amendment violation. Unless the surrounding conditions are so intimidating as to demonstrate that a reasonable person would have believed he or she was not free to disregard the questions, there has been no intrusion upon the detained person’s liberty or privacy that would implicate the Fourth Amendment.”).



Over the years, Kansas courts have recognized several objective factors to help determine whether a law enforcement-citizen encounter is voluntary or an investigatory detention.

This nonexhaustive and nonexclusive list includes: the presence of more than one officer, the display of a weapon, physical contact by the officer, use of a commanding tone of voice, activation of sirens or flasher, a command to halt or to approach, and an attempt to control the ability to flee. See *State v. Lee*, 283 Kan. 771, 775, 156 P.3d 1284 (2007); *State v. Morris*, 276 Kan. 11, 19-20, 72 P.3d 570 (2003); *State v. Gross*, 39 Kan. App. 2d 788, 798-800, 184 P.3d 978 (2008). There is no rigid application of these factors; instead, we analyze the facts of each case independently. We have held that “[i]n applying the totality of the circumstances test in a Fourth Amendment context, no one factor is legally determinative, dispositive, or paramount. The outcome does not turn on the presence or absence of a single controlling or infallible touchstone and requires careful scrutiny of all the surrounding circumstances.” *Thompson*, 284 Kan 763, Syl. ¶ 20, 166 P.3d 1015. On the other hand, “we do not expect courts to merely count the number of factors weighing on one side of the determination or the other. In the totality of the circumstances, a factor may be more indicative of a coercive atmosphere in one case than in another. [Citations omitted.]” 284 Kan at 804, 166 P.3d 1015.

*State v. McGinnis*, 290 Kan. 547, 553, 233 P.3d 246, 252 (2010).

The defendant argues a reasonable person would not have felt free to leave under the totality of circumstances facing him. Appellant’s Brief at 7. He bases his argument on the officer’s position at the gate, the initial questions asked by law enforcement, a request for identification, the presence of another officer and the duration of inquiry being approximately ten minutes between initial contact and the request for field sobriety tests. Appellant’s Brief at 7. The defendant places a lot of emphasis on the position of Sgt. Rice and his vehicle. Appellant’s Brief at 6.

The facts in this case are similar to *State v. McGinnis*. In *McGinnis*, the officer was dispatched to a call regarding a possible stolen vehicle submerged in a creek. See

290 Kan. at 548-49. The officer responded to the area and observed McGinnis' vehicle going the same direction. See *Id.* at 549. The officer followed McGinnis' vehicle and observed its movements until it stopped at the riverbank. See *id.* The officer parked his vehicle approximately two or three car lengths behind McGinnis and approached him on foot. See *id.*

When the officer approached McGinnis, he said hello, asked how he was doing and whether he knew anything about the submerged car. See *id.* McGinnis denied any knowledge of the vehicle, and indicated he was looking for a fishing spot. See *id.* At this time, the officer noticed slurred speech, bloodshot eyes, and an odor of alcohol coming from McGinnis and began an investigation of DUI. See *id.* 549-50. McGinnis was subsequently arrested and charged with felony DUI. See *id.* at 550. McGinnis filed a motion to suppress based upon unlawful restraint/seizure without reasonable suspicion. See *id.* The motion was denied, and McGinnis was convicted after a trial on stipulated facts. See *id.* On appeal, the Kansas Court of Appeals affirmed the trial court's denial of the suppression motion finding:

“Here, Clark was the only law enforcement officer involved in the encounter. Significantly, he parked his patrol vehicle two or three car lengths behind McGinnis' car, and the evidence was undisputed that McGinnis' car was not blocked from leaving the driveway. Clark did not activate his emergency lights when he exited his patrol vehicle. Clark approached McGinnis on foot and did not brandish any weapons. The evidence established that Clark spoke in a normal voice and he did not command McGinnis to stop or to answer any questions. Clark did nothing to convey to McGinnis that he was being detained against his will. Viewed objectively, McGinnis was free to leave, and he could have declined to answer Clark's initial questions. Under the totality of circumstances, the initial encounter between Clark and McGinnis was voluntary.

*Id.* at 550-51 (quoting *State v. McGinnis*, 40 Kan. App. 2d 620, 627-28, 194 P.3d 46 (2009)). The Kansas Supreme Court granted petition for review. See *id.* at 554. The Supreme Court concluded that the trial court found from the officer's testimony that his vehicle did not block McGinnis' vehicle, and because an appellate court does not "weigh conflicting evidence or redetermine questions of fact," easily concluded there was substantial competent evidence supporting the factual findings. *Id.*

The Supreme Court analyzed *State v. Parker*, 282 Kan. 584, 147 P.3d 115 (2206) (voluntary encounter found where officer parked his marked unit behind two cars in a driveway and rejecting that this alone would constitute a show of authority) as giving great guidance concerning placement of law enforcement vehicles as a factor in a seizure test. See *id.* at 554. The Kansas Supreme Court further stated that even if McGinnis' vehicle was blocked by the officer's car, this fact, alone, is not dispositive of the voluntariness of the encounter. See *id.* at 561. "Where an individual is on foot when approached by the police officer, the fact that his car may be blocked does not, in itself, render the person's decision to answer questions or consent to a search involuntary." *Id.* (quoting *United States v. Thompson*, 546 F.3d 1223, 1229 (10<sup>th</sup> Cir. 2008)). The Supreme Court affirmed the Kansas Court of Appeals and the trial court in the denial of the defendant's motion to suppress, finding the encounter to be voluntary. See *id.* at 562.

As in the *McGinnis* case, Sgt. Rice approached the defendant on foot, who was also on foot. (II, 6) The officer did not display any lights other than his vehicle's headlights and parked his vehicle so as not to block the gate. (II, 6) The officer remained on the opposite side of the gate from the defendant. (II, 17) The officer advised the defendant of his purpose for being there, and the questions asked of him were in relation

to the investigation of a juvenile party. (II, 8-9, 21-22, 27) The defendant himself testified that the conversation he had with Sgt. Rice up to an including being asked for ID involved only himself and the officer. (II, 27)

Sgt. Rice testified that if the defendant had refused to provide ID or walked away at this point, he would have been free to leave. (II, 15-16) It was immediately after being asked for ID that the other vehicle and Sgt. Schmidt arrived. (II, 8, 22) At this time, the occupants of the other vehicle confirmed a juvenile party at the bonfire and the consumption of alcohol, and Sgt. Schmidt relayed the odor of alcohol. (II, 9, 22) Here Sgt. Rice testified the defendant was no longer free to leave as he had bloodshot eyes, denied knowledge of a party where alcohol was being consumed, had an odor of alcohol and was seen driving from the location of the party. (II, 23)

In denying the defendant's motion, the court issued a written order. (I, 20-22) The trial court found law enforcement was investigating a juvenile party believed to be in the pasture. (I, 20) The officer noted heavy vehicle traffic in the area. (I, 20) The defendant's vehicle approached the pasture gate and stopped, and the defendant exited his vehicle. (I, 20) Sgt. Rice approached on foot, having parked his vehicle "to the side of the gatted (sic) opening to the pasture." (I, 20) The initial contact between the officer and the defendant was voluntary until the officer requested sobriety tests. (I, 21) The court found there was reasonable suspicion based on the odor of alcohol, denial of drinking and bloodshot eyes for the officer to continue to detain the defendant. (I, 21)

Under the totality of the circumstances, it is clear that the officer's conduct did not convey to the defendant that he was not free to leave or refuse the requests of the officer or end the encounter.

Conclusion

The state respectfully requests the court affirm the district judge's denial of the defendant's motion to suppress as the initial encounter between Sgt. Rice and defendant was voluntary.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that the original and sixteen (16) copies of Appellee's Brief were delivered on the 15 day of March, 2014, to the following:


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