Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-380

AUGUST TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Essex Circuit
Timothy L. Heath	}	
	}	DOCKET NO. 47-6-05 Excr
		Trial Judge: Robert R. Bent

In the above-entitled cause, the Clerk will enter:

Defendant appeals the trial court's order denying his motion to suppress. Defendant was charged with driving under the influence of intoxicating liquor in violation of 23 V.S.A. § 1201. Defendant argues that he was unlawfully stopped and that the resulting evidence is thus inadmissible. We hold that there was no seizure and affirm.

The parties agree on the basic facts. Late at night on June 3, 2005, two wardens of the Vermont Fish and Wildlife Department were investigating possible fish and game violations on Leonard Hill Road in Concord, Vermont. The wardens observed that a passing truck had no tail lights. The wardens activated their blue lights and effected a stop so that both the wardens' vehicle and the truck were stopped on the side of the road. While the wardens were questioning this first driver, another vehicle, apparently out of gas, approached the scene and stopped behind the wardens' truck. Defendant's car then also approached the scene and pulled in behind this vehicle. After defendant had stopped, one warden questioned him, noticed signs of impairment and called a state police officer to the scene to process defendant for DUI. Defendant filed a motion to suppress, claiming that the wardens had conducted an illegal stop and seizure of defendant.

The court held a hearing on defendant's motion to suppress. At the hearing, there was conflicting testimony as to whether one of the wardens directed defendant to stop his vehicle. After considering the testimony, the trial court found that the warden did not direct defendant to pull over. The trial court further found that there was adequate room for defendant to pass the stopped vehicles and that a reasonable person would not have believed that he was obligated to stop or not free to leave. Consequently, the trial court denied defendant's motion and defendant entered a conditional plea.

On appeal, defendant argues that the stop was illegal because the police presence on Leonard

Hill Road: (1) created such a show of authority that a reasonable driver would have felt an obligation to stop; (2) created a situation where a reasonable driver would not have felt free to leave; and (3) was a de facto roadblock.

In reviewing a denial of a motion to suppress, we will not set aside findings of fact unless clearly erroneous. State v. Nault, 2006 VT 42, ¶ 7, __ Vt. ___. "We apply a de novo standard of review to the ultimate legal conclusion of whether the actions of the police officer constituted a seizure of defendant." Id. ¶ 12. "The question in determining whether an encounter between a citizen and police constitutes a seizure is whether, given all of the circumstances, the encounter is so intimidating that a reasonable person would not feel free to leave without responding to the officer's requests." State v. Jestice, 2004 VT 65, ¶ 5, 177 Vt. 513.

We agree with the trial court that the presence of the wardens' truck on the side of the road did not constitute a seizure. According to the trial court's findings, which defendant does not contest, the wardens did not direct defendant to stop. Instead, defendant chose to pull over. Moreover, the roadway was not blocked—of the twenty-two feet of the roadway, the wardens' truck was only eight and a half feet wide, leaving adequate room for vehicles to pass by. Indeed, other cars passed by while the wardens' truck was stopped on the side of the road. Thus, we conclude that the mere presence of the wardens' truck on the side of the road did not create such a show of authority that a reasonable person would have felt compelled to stop, or would not have felt free to leave. Compare Nault, 2006 VT 42, ¶¶ 13-15 (holding that officer's request to open the door was not a seizure because there was no display of force, blocking of exits or command), with Jestice, 2004 VT 65, ¶ 6 (concluding that there was a seizure where officer parked nose to nose with defendant's car, blocking the exit). We also reject defendant's argument that the stop constituted a de facto roadblock. As explained, the trial court found that the wardens did not direct defendant to stop, and other cars passed by without incident. Thus, there was no stop or seizure, and defendant's motion to suppress was properly denied.

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice