Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-012

AUGUST TERM, 2019

State of Vermont v. Kevin R. Labounty*	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 748-6-18 Frcr
		Trial Judge: A. Gregory Rainville

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

After entering a conditional guilty plea on a charge of driving under the influence (DUI), defendant appeals the criminal division's denial of his motion to suppress, in which he argued that he was subjected to an unlawful stop at the time of his arrest. We affirm.

The trial court made the following unchallenged findings of fact. In May 2018, a state trooper was dispatched to conduct a welfare check requested by Adult Protective Services at a specified residential address. The trooper had been advised that the situation involved a potential assault of a vulnerable person by an alcoholic family member. The trooper had never been to the address and did not know any of the residents there. After turning into the long driveway at the address, the trooper encountered a vehicle with two occupants traveling down the driveway towards him. Defendant was driving the car. To ascertain whether the individual he wanted to speak to regarding the welfare check was one of the individuals in the car, the trooper waved at the car, signaling the driver to stop. Defendant stopped his car next to the trooper's cruiser and rolled down his window to speak to the trooper.

At this point, the two vehicles were aligned driver's window to driver's window, with the trooper's cruiser facing up the driveway and defendant's car facing down the driveway. The cruiser was not blocking defendant's car in any way. While speaking to defendant, the trooper noticed signs of defendant's intoxication. Based on his observations and defendant's admission to having consumed some alcohol, the trooper asked defendant to exit his car, perform field dexterity exercise, and submit to a preliminary breath test, which indicated a blood-alcohol level of .137%. The trooper then arrested defendant on suspicion of DUI.

After defendant was charged with DUI, he filed a motion to suppress the evidence and dismiss the charge, arguing that the stop of his vehicle was unlawful. The criminal division denied the motion, reasoning that the trooper's actions in this case did not rise to the level of a seizure that would require reasonable and articulable suspicion of wrongdoing. Defendant entered a conditional guilty plea and now challenges the trial court's denial of his motion to suppress.

"On appeal from a denial of a motion to suppress, this Court applies a deferential standard of review to the trial court's findings of fact," which we will uphold "unless, taking the evidence in the light most favorable to the prevailing party, and excluding the effect of modifying evidence, there is no reasonable or credible evidence to support them." State v. Nault, 2006 VT 42, ¶¶ 7, 9 180 Vt. 567 (mem.) (quotation omitted) ("Deferential appellate review of a trial court's factual findings on motions to suppress is appropriate because determining the weight of evidence and credibility of witnesses is primarily for the trier of fact." (quotation omitted)). On the other hand, our examination of the trial court's legal conclusions is "nondeferential and plenary." State v. Cook, 2018 VT 128, ¶ 4 (quotation omitted).

Defendant argues on appeal that the state trooper's actions in this case amounted to a stop that was not justified by either articulable suspicion of wrongdoing or the need for community caretaking. We disagree.

"A 'stop' is [a] shorthand way of referring to a seizure that is more limited in scope and duration that an arrest." State v. Burgess, 163 Vt. 259, 261 (1995). "While merely approaching a person seated in a parked car does not, in and of itself, constitute a seizure, activity which inhibits a person's freedom of movement does." State v. Jestice, 2004 VT 65, ¶ 5, 177 Vt. 513 (mem.) (quotation omitted). "[A] seizure does not occur when an officer merely approaches an individual and asks certain questions, and therefore no minimal level of suspicion of wrongdoing is necessary." State v. Pitts, 2009 VT 51, ¶ 7, 186 Vt. 71. "The point at which mere questioning or 'field inquiry' becomes a detention requiring some level of objective justification is not susceptible of precise definition." Id. ¶ 8 ("The oft-stated standard for deciding this question is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." (quotation omitted)). "The test is necessarily imprecise precisely because it is designed to assess police conduct taken as a whole, and therefore what constitutes a restraint on liberty prompting a person to conclude that he is not free to leave will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." Id. ¶¶ 8-9 (quotations omitted) (noting that this "contextual approach" has led courts to conclude that while mere questioning does not necessarily constitute seizure, pointed questions about suspected illegal activity may convert consensual encounter into seizure requiring articulable suspicion of wrongdoing).

In this case, the state trooper went to a residence to conduct a welfare check. The trooper was in uniform, armed, and driving a marked state police cruiser. The trooper encountered defendant as the trooper was driving up the driveway to the residence and defendant was driving down the driveway from the residence. Without making any verbal command, the trooper waved at defendant, the driver, indicating that he wanted to speak to him. The trooper sought to determine whether one of the individuals in the car was the person he wanted to speak to regarding the welfare check. The trooper did not activate his siren or blue lights and he did not block defendant's path down the driveway. Defendant pulled alongside the trooper's vehicle and rolled down his window to speak to the trooper. At no point did the trooper display his weapon and he did not ask defendant to exit his car until he observed signs of intoxication.

The trooper's actions in this case demonstrated only that he wished to determine if defendant was the person he wanted to speak to about the welfare check, not that he was conducting an investigative stop. The trooper was in uniform in a marked cruiser but he did not engage in any conduct asserting a show of authority or suggesting an investigation of wrongdoing. To the contrary, the trooper was merely attempting to gain the attention of the vehicle's occupants to initiate a consensual encounter. Police-motorist encounters, like police-pedestrian encounters, are not per se seizures. See, e.g., Nault, 2006 VT 42, ¶ 18 (finding no seizure where armed but

ununiformed police officer pulled unmarked cruiser alongside parked car, approached car, woke up driver and asked him to open car door, but did not apply force, block exit, or make any verbal threat or command). Further, the fact that defendant's car was moving at the time the trooper waved at it is merely a factor to consider and not determinative of whether there was a seizure.[*]

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

[*] Although defendant cites both the Fourth Amendment of the U.S. Constitution and Article Eleven of the Vermont Constitution in support of his argument, we decide this case on Fourth Amendment grounds alone because defendant has not explained how the analysis would differ under Article Eleven. "Merely citing the Vermont Constitution, without providing any analysis of how the state constitutional provision compares with its federal analog, does not adequately present the issue for our review, especially where the argument was not presented in the trial court." State v. Bergquist, 2019 VT 17, ¶ 53 n.11 (quotation omitted).