09CR319

DISTRICT COURT
STATE OF COLORADO } ss.
Arapahoe County.
CERTIFIED to be a full, true and correct copy of the original in my custody

MAR 25 2011

SEAL

DATED: March 25, 2011

TAMMERA HERIVEL
Clerk of the District Court
By: _____ Deputy

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO Arapahoe County Justice Center 7325 South Potomac Street Centennial, CO 80112 (303) 649-6355	
Appeal from the County Court of Arapahoe County Division B-1, Honorable Judge Dana E. Murray Case Number: 09CR319	▲ COURT USE ONLY ▲
THE PEOPLE OF THE STATE OF COLORADO, **Plaintiff-Appellant,** v. **WALTER JAMES TATE,** **Defendant-Appellee.**	Case Number: 09CV2334 Division: 309

OPINION AND ORDER

THIS MATTER comes before the Court on People-Appellant's interlocutory appeal of the county court's decision to suppress evidence obtained in violation of Defendant-Appellee's Fourth Amendment rights. The Court has reviewed the briefs, the Record on Appeal, and applicable law to now find and rule as follows:

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The relevant facts necessary to decide this motion are largely undisputed and have been taken from the Parties' briefs and the Record on Appeal. At approximately 4:30 a.m. on February 8, 2009, Officer Benda of the Aurora Police Department was on patrol driving through an apartment complex parking lot. While driving through the parking lot, Officer Benda observed a green Ford Explorer with its engine running and a black male–later identified as the Defendant–sleeping behind the driver's seat of the vehicle. Officer Benda proceeded to park his patrol car directly behind and perpendicular to the Ford Explorer. Given that other unoccupied vehicles were parked in both of the immediately adjacent parking spaces and the space directly in front of the Ford Explorer, Defendant became blocked in when Officer Benda positioned his car behind the Ford Explorer.

After parking his patrol car behind the Defendant, Officer Benda used his spotlight to illuminate the interior of the Explorer. Officer Benda then proceeded to exit his patrol car and approach the driver's side of the Explorer. Upon arriving at the vehicle, Officer Benda observed

several open or empty beer cans on the passenger side. Officer Benda then knocked on the vehicle's window and woke the Defendant. Defendant complied with Officer Benda's request to turn off the vehicle and proceeded to exit the vehicle. Upon Defendant's exit, Officer Benda detected an odor of alcohol emanating from Defendant's breath and the interior of the vehicle. The subsequent events are irrelevant for the purposes of rendering a ruling; therefore, they need not be recounted.

On October 5, 2009, the trial court entered an order suppressing evidence obtained by Officer Benda on the grounds that Officer Benda unlawfully seized Defendant in violation of the Fourth Amendment. The trial court concluded that a reasonable person in Defendant's position would not feel free to end the encounter with law enforcement. Consequently, the trial court concluded that Defendant was seized the moment Officer Benda boxed in Defendant's car. Furthermore, the trial court found that Officer Benda lacked reasonable suspicion that would have justified seizing the Defendant. On October 20, 2009, the People of the State of Colorado filed a Notice of Interlocutory Appeal and Designation of Record challenging the county court's order entered on October 5, 2009.

II. STANDARD OF REVIEW

In suppression cases, the appellate court will defer to the trial court's factual findings and will not disturb them if they are supported by competent evidence contained in the record. *People v. Bonilla-Barraza*, 209 P.2d 1090, 1094 (Colo. 2009). "The legal conclusions of the trial court are subject to de novo review and reversal if the court applied an erroneous legal standard or came to a conclusion of constitutional law that is inconsistent with or unsupported by the factual findings." *People v. Syrie*, 101 P.3d 219, 222 (Colo. 2004) (citing *People v. Quezada*, 731 P.2d 730, 732–33 (Colo. 1987)).

III. ANALYSIS

In support of this Appeal, the People assert two grounds for reversing the county court's decision to suppress the evidence obtained after Officer Benda parked behind Defendant's vehicle. First, the People assert that the objective standard used for evaluating whether a seizure occurred necessarily requires the subject to be aware of the circumstances and, therefore, awake. Second, the People contest that even if Defendant was seized at the moment Officer Benda blocked Defendant's vehicle from leaving, Officer Benda had reasonable suspicion to conduct an investigatory stop and seizure.

In addition to urging this Court to uphold the trial court's decision to suppress evidence, Defendant argues that this Court lacks jurisdiction to decide this matter. In support of this argument, Defendant contends that the People have failed to file its Notice of Interlocutory Appeal within the ten day time period as designated and calculated by the Colorado Rules of Criminal Procedure. Because the issue of jurisdiction affects this Court's ability to render an opinion on the issues raised on appeal, it will be addressed first. Upon the finding in Part III.a., *infra*, that this Court does have jurisdiction over the appeal, the Court will address the merits of the appeal in the order in which they were raised.

a. Jurisdiction

Defendant asserts that this Court lacks jurisdiction to hear the People's interlocutory appeal because the People failed to timely file their notice of appeal within the ten day period required by Colo. R. Crim. P. 37.1(b). Specifically, Defendant asserts that Colo. R. Crim. P. 45 sets forth the appropriate method for calculating the ten day period. According to Colo. R. Crim. P. 45(a),

> [i]n computing any period of time, the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or a legal holiday. The term "calendar days" shall mean consecutive days including Saturdays, Sundays, and holidays. Unless otherwise specifically ordered, when a period of time prescribed or allowed is less than eleven days and not specified as "calendar days", intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Colo. R. Crim. P. 45(a). Applying Colo. R. Crim. P. 45(a) to the facts of the current case would render the People's Notice of Interlocutory Appeal and Designation of Record on Appeal untimely and jurisdiction of the reviewing court defective. However, Defendant's assertion fails based on the clear language and directive of Colo. R. Crim. P. 37.1(g).

Colorado Rule of Criminal Procedure 37.1(g) states, "[i]f no procedure is specifically prescribed by this rule, the court shall look to the Rules of Appellate Procedure for guidance." Colo. R. Crim. P. 37.1(g). As the Colorado Supreme Court noted in *People v. Zhuk*, "the use of the word 'this' indicates that where a procedure is not specifically provided within Crim. P. 37.1, a district court should employ the Colorado Appellate Rules." 239 P.3d 437, 440 (Colo. 2010). Moreover, the Court noted that had Colo. R. Crim. P. 37.1(g) "used the word 'these' instead of 'this' it would be referring to all Rules of Criminal Procedure, and Crim. P. 45 would then be applicable." *Id.* Since Colo. R. Crim. P. 37.1 does not provide any procedure for calculating the ten-day time frame prescribed for filing an appeal under that rule, the Court must consult the Colorado Appellate Rules. *See id.* Following the directive set forth in Colo. R. Crim. P 37.1(g), the Colorado Supreme Court concluded that "C.A.R. 26(a) should inform the calculation of the time period for filing an appeal under Crim. P. 37.1." *Id.*

In applying C.A.R. 26(a) to the facts in the current case, it is clear that Appellant filed their Notice of Appeal within the statutorily-provided time. The trial court's suppression order was entered on October 5, 2009. Because C.A.R. 26(a) provides that "the day of the act, event, or default from which the designated period of time begins to run shall not be included" in the computation, October 6, 2009 was the first day that counted towards the ten day period for filing an interlocutory appeal. *Id.* Furthermore, C.A.R. 26(a) provides that "[u]nless otherwise specifically ordered, when the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation." *Id.* Accordingly, Saturday, October 10; Sunday, October 11; Monday, October 12 (which was

Columbus Day, a legal holiday); Saturday, October 17; and Sunday, October 18 are all excluded from the computation. As a result, the final day to file the Notice of Appeal fell on Tuesday, October 20, 2009. Because Appellant filed their Notice of Appeal on October 20, 2009, the notice was timely filed; this Court has jurisdiction over the remaining issues.

b. The test for evaluating whether a seizure occurred under the Fourth Amendment inherently requires conscious perception.

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In the context of encounters between citizens and police, the Court recognized that "not all personal intercourse between policemen and citizens involves seizures of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

In *United States v. Mendenhall*, Justice Stewart articulated that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Although not included in the majority opinion, the Supreme Court has subsequently embraced Justice Stewart's objective test (hereafter referred to as the *Mendenhall* test) as the appropriate standard for evaluating seizures under the Fourth Amendment.[1]

The language contained in *Mendenhall* and its progeny inherently requires the reasonable person to consciously observe the totality of circumstances surrounding a potential seizure under the Fourth Amendment. The crux of Justice Stewart's test in *Mendenhall* is the reasonable person's **belief** as to whether or not he was free to leave based on the totality of the circumstances. 446 U.S. at 554 (emphasis added). Referring to *Mendenhall*, the Court in *Michigan v. Chesternut* stated, "[t]he test's objective standard look[s] to the reasonable man's **interpretation** of the conduct in question." *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988) (emphasis added). By focusing on the reasonable man's interpretation, *Mendenhall's* test is "designed to assess the coercive **effect** of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Id.* at 573 (emphasis added). "Moreover, 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.* (emphasis added). In *California v. Hodari D.*, the Court reiterated *Mendenhall's* objective standard by asserting that the relevant inquiry is what "the officer's words and actions would have **conveyed** [ ] to a reasonable person." *California v. Hodari D.*, 499 U.S. 612, 628 (1991) (emphasis added).

The notion that a Fourth Amendment seizure requires conscious awareness of police conduct is further supported by the Sixth Circuit's decision in *Peete v. Metropolitan Government of Nashville and Davison County*, 486 F.3d 217 (6th Cir. 2007). Although Sixth Circuit

[1] *See, e.g., California v. Hodari D.*, 499 U.S. 621, 628 (1991); *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988); and *INS v. Delgado*, 466 U.S. 210, 215 (1984).

precedent is not binding on this Court, the decision does provide valuable insight into an under-developed aspect of Fourth Amendment jurisprudence. In *Peete*, the defendants, who were paramedics, responded to a 911 call requesting medical attention for an unconscious individual experiencing an epileptic seizure. *See id.* at 219–20. As part of their response, the defendants proceeded to restrain the individual, which ultimately resulted in the individual's death. *Id.* at 220. The court concluded that because the individual "was unconscious at the time of his encounter with the defendants and could not perceive any restraint on his liberty or otherwise feel compelled to submit to a governmental show of force[,]" no seizure occurred pursuant to the Fourth Amendment. *Id.* at 221–22.

The D.C. Circuit further illustrated this point in *Yam Sang Kwai v. INS*, 411 F.2d 683 (D.C. Cir. 1969). Although *Yam Sang Kwai* preceded *Mendenhall*, the D.C. Circuit's seizure analysis is still valuable. In *Yam Sang Kwai*, the defendant's place of business was surrounded by INS officers who planned on interrogating any aliens within the restaurant. 411 F.2d at 684. Officers were stationed at the both the entrance and exit of the defendant's business; however, no individual inside the restaurant was aware of the officers presence prior to their entry. *Id.* Despite acknowledging he was unaware of the officers' presence prior to their entry, the defendant contended that he was seized at the moment his business was surrounded. *Id.* at 686. As the foundation for its seizure analysis, the court stated a person is seized when another individual "restrains his freedom to walk away." *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 16 (1968)). Although the officers surrounding the building technically restrained the defendant's freedom to walk way, the court concluded that a seizure "must contain the element of awareness on the part of both the protagonist and the antagonist." *Id.* Furthermore, "[t]here must be knowledge of the situation on behalf of both the police and the suspect. **There can be no seizure where the subject is unaware that he is seized.**" *Id.* (emphasis added). Contributing to this conclusion was the court's recognition that adopting the defendant's contention would produce absurd results in application[2] and have chilling implications. *Id.*

Applying the logic from the language articulated in *Mendenhall* and its progeny to the facts of this case, it is clear that the earliest moment at which Defendant could have been seized occurred when Defendant woke up and became consciously aware of his circumstances. Consciousness is a necessary condition for interpreting conduct and forming a conclusion based on that interpretation. *See Chesternut*, 486 U.S. at 573–575; *Peete*, 486 F.3d at 221–22. Absent the ability to interpret, there can be no coercive effect for the court to assess. *See Chesternut*, 486 U.S. at 573–575; *Peete*, 486 F.3d at 221–22. By virtue of being asleep, Defendant lacked the capacity to interpret Officer Benda's conduct and come to the conclusion that he was not free to leave prior to awakening. *See Hodari D.*, 499 U.S. at 628; *Chesternut*, 486 U.S. at 573–575; *Mendenhall*, 446 U.S. at 554; *Peete*, 486 F.3d at 221–22; *and Yam Sang Kwai*, 411 F.2d at 686. Furthermore, this Court is not willing to adopt a standard that produces absurd results and has a chilling effect on the application of the Fourth Amendment. *See Yam Sang Kwai*, 411 F.2d at 686. Therefore, the trial court erred in concluding that the Defendant was seized at the moment Officer Benda boxed in Defendant's car.

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[2] The court gave the example that if a gambling operation was being run in the basement of the courthouse, which was surrounded by police officers, each member of the judiciary would be unknowingly seized under the defendant's interpretation of the Fourth Amendment. *See Yam Sang Kwai* , 411 F.2d at 686.

c. Reasonable Suspicion

Having concluded that the earliest moment at which the Defendant could have been seized pursuant to the Fourth Amendment was when the Defendant woke up, the remaining issue is whether Officer Benda had a reasonable suspicion that the Defendant was committing, had committed, or was about to commit a crime prior to the Defendant's awakening.

In *Terry v. Ohio*, the Supreme Court established that in order for an investigatory stop and seizure to avoid running afoul of the Fourth Amendment, "an officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. at 21. When evaluating the reasonableness of an investigatory stop and seizure, "it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* at 21–22.

In this case, the totality of facts available to Officer Benda prior to seizing the Defendant, would cause a reasonable man to believe that the seizure was appropriate when evaluated from an objective standard. In *People v. Brown*, the Colorado Supreme Court stated that "reasonable suspicion to make a stop for the crime of driving under the influence may arise when a police officer sees a person asleep behind the wheel of a car with its engine running." *People v. Brown*, 217 P.3d 1252, 1256 (Colo. 2009). In this case, Officer Benda observed the defendant asleep while behind the wheel of a parked car with its engine running. While *Brown* suggests this evidence alone may be sufficient to support the conclusion that Officer Benda had reasonable suspicion, Officer Benda's additional observation of numerous empty or open beer cans on the vehicle's passenger side objectively establishes reasonable suspicion that Defendant was operating a vehicle under the influence of alcohol. These facts and the rational inferences drawn there from create a reasonable suspicion of criminal activity and, therefore, justify Officer Benda's seizure of the Defendant.

Defendant asserts that Officer Benda's failure to state that he suspected the Defendant of drunk driving based on his status as sleeping behind the wheel supports concluding that he lacked reasonable suspicion. This argument is without merit. As the Colorado Supreme Court noted in *People v. Cherry*, "the officer's subjective intent is not relevant to a determination that he has reasonable suspicion to conduct an investigatory stop." *People v. Cherry*, 119 P.3d 1081, 1083 (Colo. 2005) (quoting *People v. Rodriquez*, 945 P.2d 1351, 1360 (Colo. 1997)). "[A]ll that is relevant is the existence of specific and articulable facts and the rational inferences from those facts. *Id.* Furthermore, the officer's illicit motives will not invalidate an otherwise valid search or seizure." *Id.* at 1084 (quoting *Rodriquez*, 945 P.2d at 1360). Based on the above-referenced precedents, Officer Benda's initial motivation for his encounter with the Defendant is irrelevant. Therefore, the trial court erred in concluding that Officer Benda did not have reasonable suspicion prior to seizing the Defendant.

IV. CONCLUSION

Accordingly, the county court's order suppressing all evidence obtained after Officer Benda's initial contact with Defendant is **REVERSED** and **REMANDED** to that court for reinstatement of the proceedings consistent with this Opinion.

IT IS SO ORDERED.

Done this 10th day of March, 2011.

BY THE COURT:

Valeria N. Spencer
District Court Judge