STATE OF MINNESOTA
IN COURT OF APPEALS
A17-2041

State of Minnesota,
Respondent,

vs.

Aaron Michael Anderson,
Appellant.

Filed August 13, 2018
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge

Olmsted County District Court
File No. 55-CR-15-8929

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Eric M. Woodford, Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, John Roach (certified student attorney), St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

U N P U B L I S H E D O P I N I O N

SMITH, TRACY M., Judge

Appellant Aaron Anderson appeals his conviction of first-degree controlled-substance crime, arguing that the officer who pulled him over, arrested him, and ultimately

found methamphetamine in his vehicle lacked a reasonable suspicion of criminal activity to justify the initial stop. Anderson also appeals his sentence, arguing the district court erred in not using the Minnesota Drug Sentencing Reform Act (DSRA) sentencing grid to calculate his sentence. Because the arresting officer had a reasonable suspicion that Anderson was driving with a cancelled license, thus justifying the stop, we affirm Anderson's conviction. But we reverse Anderson's sentence and remand for resentencing in conformance with the DSRA.

FACTS

On December 25, 2015, Trooper Eric Bormann was on patrol along Highway 52 in Olmsted County. At 10:30 p.m., a Jeep Cherokee was traveling in the adjoining lane ahead of Trooper Bormann. Trooper Bormann ran a search on the plates of the Jeep and discovered that the registered owner, J.C., had an outstanding felony warrant and a cancelled driver's license. The database also indicated that J.C. was 56 years old, 5'9" tall, and weighed 160 pounds.

Trooper Bormann testified that he pulled alongside the Jeep and attempted to look at who was driving to see if there was something that would eliminate the driver as the registered owner. He saw "a male [who] seemed about six feet tall, somewhere in that area, and middle age." Based on what he could see, Trooper Bormann decided he needed to stop the vehicle and investigate further to see if the driver was indeed J.C. After stopping the Jeep, Trooper Bormann walked up to the vehicle, and, though he "got a better look" at the driver, the driver, Trooper Bormann said, "still fit the general description, at least what

I was getting off the computer, until I could inquire further and get the exact height, age, [and] weight."

The exact sequence of events that followed is unclear from the record.[1] Eventually Trooper Bormann asked the driver of the Jeep if he was the vehicle's owner and if his driver's license was valid. Trooper Bormann learned that the driver was not J.C., but rather appellant Aaron Anderson. Anderson is "close to six feet tall, maybe just a little shorter, looks like he's around 30, 35, 40, somewhere in that area," and weighs 215 pounds. Anderson stated that he did not have a valid license. Trooper Bormann arrested Anderson and then conducted an inventory search of the Jeep. He discovered what was later confirmed to be 27.020 ± 0.008 grams of methamphetamine, as well as what appeared to marijuana.

Anderson was charged with first-degree controlled-substance crime (sale), first-degree controlled-substance crime (possession), driving after cancellation, and possession of marijuana in a motor vehicle. Anderson moved to suppress the evidence found as a result of the search of the Jeep and to dismiss the charges, identifying as the basis for the motion: "The challenge is to the stop of the vehicle, whether there was an articulable suspicion of criminal activity to justify the stop." At a contested omnibus hearing, Trooper Bormann, in addition to describing the events above, testified that when someone is "sitting in a car and it's dark, it's really hard to tell whether there's a three-inch difference" between

[1] At the contested omnibus hearing, the state repeatedly tried to elicit testimony about what happened after Trooper Bormann began approaching the vehicle. Anderson successfully excluded this testimony as being "beyond the scope of the challenge" because "[t]he challenge is [to] the stop of the vehicle only."

a driver's actual height and the height recorded in the database. Regarding weight, Trooper Bormann explained that it is difficult to gauge a person's weight "when there's only a 50-pound difference" because "people gain and lose weight over the time when they apply for a license" and, when observing a driver, "you can't see a lot of stuff" below "their arm and shoulder." Finally, regarding age, Trooper Bormann testified that "it's hard to tell . . . ages just by looking at [people] in the dark on the highway. . . . I can't tell the decades on the highway late at night." Trooper Bormann testified that the driver fit the general description of the registered owner, both while Trooper Bormann drove past the Jeep and when he approached the driver after the stop.

The district court denied Anderson's motion to suppress and dismiss. Anderson subsequently waived his right to a jury trial and filed a rule 26.01, subdivision 4, stipulation to the state's evidence regarding first-degree controlled-substance crime (possession), and the district court convicted him of that crime and dismissed the other three charges. Applying the 2015 sentencing guidelines, on September 28, 2017, the district court sentenced Anderson to an executed 138-month sentence.

D E C I S I O N

I. Trooper Bormann had a reasonable suspicion of criminal activity, justifying the stop.

Anderson argues the district court erred in denying his motion to suppress the evidence and dismiss the charges because Trooper Bormann lacked a reasonable suspicion to stop Anderson. We review de novo whether a stop is supported by reasonable suspicion, but review for clear error "the factual determinations underlying [that] legal conclusion[]."

State v. Chavarria-Cruz, 784 N.W.2d 355, 364 (Minn. 2010) (citing *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005)).

For a brief investigatory stop to be constitutional, police must have reasonable suspicion of criminal activity. *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). "Reasonable suspicion is a particularized and objective basis for suspecting the particular person stopped of criminal activity. . . . It is enough that a law enforcement officer can articulate specific facts which, taken together with rational inferences from those facts, objectively support the officer's suspicion." *State v. Lugo*, 887 N.W.2d 476, 486 (Minn. 2016) (quotation omitted).

"When an officer observes a vehicle being driven, it is rational for him or her to infer that the owner of the vehicle is the current operator" and stop the vehicle if the officer knows the owner has a revoked license. *Pike*, 551 N.W.2d at 922. However, such an inference "applies only while the officer remains unaware of any facts which would render unreasonable the assumption that the owner is driving the vehicle." *Id.* If the inference becomes unreasonable, the officer may "approach the car and inform the driver he is free to go," *State v. Lopez*, 631 N.W.2d 810, 814 (Minn. App. 2001), *review denied* (Minn. Sept. 25, 2001), but may not ask to see the driver's license absent other grounds justifying a continued reasonable suspicion of criminal activity. *See State v. Hickman*, 491 N.W.2d 673, 675 (Minn. App. 1992), *review denied* (Minn. Dec. 15, 1992).

Anderson concedes that Trooper Bormann reasonably suspected J.C. was driving the Jeep after running its plates, but argues that this suspicion should have been dispelled after Trooper Bormann drove next to the Jeep, or, if not at that time, when he approached

the vehicle after it was pulled over. The state argues that Anderson cannot attack his conviction based on the reasonableness of Trooper Bormann's suspicions (or lack thereof) after he pulled over the vehicle because Anderson "actively prevented [the state] from developing the factual record to address" whether Trooper Bormann's reasonable suspicion should have been dispelled as he approached the vehicle, and, in any event, Trooper Bormann had a reasonable suspicion at the time he asked Anderson if his license was valid.

Regarding Trooper Bormann's suspicions before he pulled Anderson over, the district court concluded that "the differences in the height and weight of the registered owner and Mr. Anderson are not so drastically different that Trooper Bormann's suspicion was unreasonable." This conclusion is supported by the record. Trooper Bormann testified that, although it is difficult to determine a driver's height, weight, and age while driving next to them at night, he attempted to look for "something that would [indicate] that that's not the owner." However, he saw an approximately six-foot-tall male that appeared to be middle aged, matching the general information about the registered owner available to him at the time. It was thus reasonable for Trooper Bormann to continue to suspect that J.C. was the driver of the Jeep.

We turn to Trooper Bormann's suspicions after he stopped the vehicle. The state argues that Anderson forfeited the issue of whether Trooper Bormann's reasonable suspicion was dispelled when he approached the vehicle and saw the driver. The state correctly points out that Anderson objected to Trooper Bormann testifying to events after the Jeep was pulled over. When Trooper Bormann was asked whether he "notice[d] anything about the driver" upon approaching the vehicle, Anderson objected as "beyond

the scope of the challenge. The challenge is to the stop of the vehicle only." The district court sustained this and other, similar objections. Anderson asserts, however, that his Fourth Amendment challenge was broad enough to encompass events after the stop of the vehicle and points to post-stop testimony that did come in without objection.

Assuming without deciding that Anderson did not forfeit the issue, we evaluate whether the district court erred in not concluding that Trooper Bormann's reasonable suspicion was dispelled when he approached the Jeep. Anderson argues that Trooper Bormann's acknowledgement that he "got a better look" when he approached the vehicle makes Trooper Bormann's continuing suspicion objectively unreasonable. Specifically, Anderson argues it was clear error for the district court to credit Trooper Bormann's testimony that Anderson "still fit the general description."

We are again unpersuaded. Trooper Bormann identified the difficulties officers face when attempting to determine if a particular driver matches a given set of physical characteristics: heights are difficult to determine when a driver is seated, weights are difficult to observe when most of the driver's body is obscured by the car door, and ages may not be readily determined by appearance alone. In light of this testimony, Trooper Bormann's suspicion that J.C. was the driver was reasonable at the time he approached the vehicle. Therefore, the district court did not err in denying Anderson's motion to suppress the results of the search of the Jeep and dismiss the charges.

II. Anderson is entitled to resentencing under the DSRA.

Anderson and the state agree that the district court erred in sentencing Anderson using the 2015 sentencing guidelines instead of the guidelines as amended by the DSRA.

Which sentencing guidelines apply to Anderson's sentence is a question of law subject to de novo review. *See State v. Washington*, 908 N.W.2d 601, 606 (Minn. 2018).

The DSRA instructed the Sentencing Guidelines Commission to "re-rank first-degree possession of a controlled substance under Minnesota Statutes, section 152.021, subdivision 2, paragraph (a), at the renumbered severity level D8." 2016 Minn. Laws ch. 160, § 18(b)(4) at 591. This directive was effective on May 23, 2016, and it "applies to crimes committed before its effective date if . . . final judgment has not been entered as of the date the amendment takes effect." *State v. Kirby*, 899 N.W.2d 485, 490 (Minn. 2017).

Final judgment had not been entered in Anderson's case by May 23, 2016. Therefore he is entitled to resentencing under the DSRA. We reverse Anderson's sentence and remand for resentencing in accordance with the DSRA.

Affirmed in part, reversed in part, and remanded.