STATE OF MINNESOTA
IN COURT OF APPEALS
A17-2079

State of Minnesota,
Respondent,

vs.

Somboon Lor,
Appellant.

Filed December 31, 2018
Affirmed in part, reversed in part, and remanded
Worke, Judge

Stearns County District Court
File No. 73-CR-16-6461

Lori Swanson, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Karen Mohrlant, F. Clayton Tyler, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Worke, Judge; and Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

WORKE, Judge

Appellant argues that the evidence introduced against him should have been suppressed as the result of an unconstitutionally initiated and expanded stop of his vehicle. Appellant also argues that his criminal-history score was improperly calculated to include separate points for two out-of-state convictions committed as part of a single behavioral incident. We affirm in part, reverse in part, and remand.

FACTS

On July 11, 2016, Trooper Anthony Butler of the Minnesota State Patrol was traveling eastbound on Interstate 94 when he observed a rented minivan with Washington license plates travelling 66 mph in a 70 mph zone. Upon pulling up next to the van, Butler noticed that the driver would not make eye contact with him, which Butler found to be unusual. Butler, aware of a "trend" in which "Asians in minivans" would travel from the west coast transporting large quantities of marijuana, briefly exited the highway in an effort to "relax" the driver, hoping to observe a traffic violation that would provide a reason to stop the vehicle. Shortly after reentering the highway, Butler saw the minivan following too closely to the vehicle ahead of it and initiated a traffic stop.

Butler approached the minivan on its passenger side and observed blankets, pillows, and "a couple of suitcases" in the backseat. He also noticed "a bunch of trash, cans, candy wrappers and junk food from convenience stores" in the vehicle, which made the vehicle seem "kind of lived in like they were driving in [it] for a long time." Butler asked the driver for his license and insurance card; the driver did not have an insurance card, but

provided his license and a rental agreement for the minivan. Butler noted that the van had been rented in Sacramento, California and, according to the rental agreement, was to have been returned on July 5, 2016, making it six days overdue.

Having made these observations, Butler asked the driver to accompany him for a conversation in the front seat of his squad car. Butler asked about his travel plans, and the driver indicated that they had visited Bozeman, Montana, Yellowstone, and South Dakota. Butler felt that the driver was very talkative and that he kept attempting to change the subject. Butler left the driver in the front seat of the squad car and returned to the minivan to speak with the passenger, appellant Somboon Lor. Butler asked Lor where he had visited on the trip, and he responded that they had caught fish at Devil's Lake in North Dakota. Butler asked if he had been anywhere else and Lor replied "No."

Butler issued the driver a warning, asked him if there was anything illegal inside the minivan, and asked for permission to search the vehicle. The driver stated that there was nothing illegal in the van and that Butler could search it. Butler also asked Lor for permission to search the van, and Lor said that Butler would have to ask the driver. When Butler told Lor that he would be running his canine officer around the van, Lor stated something to the effect of "Okay, you caught me this time." Butler's canine alerted twice at the driver's side door and alerted inside the van at seams in the floor around compartments used to store modular seats. Upon searching the van, police recovered approximately 100 pounds of marijuana.

Lor was charged with one count of third-degree controlled-substance crime for possession of marijuana, and one count of second-degree controlled-substance crime for

possession with intent to sell marijuana. Lor moved to suppress the evidence found in the minivan on the grounds that the initial stop of the vehicle was pretextual and based on racial profiling, and because Butler impermissibly expanded the scope of the stop. The district court denied Lor's motion, concluding that the traffic stop was not unconstitutionally pretextual because it was based on an observed traffic violation, and that Butler's expansion of the scope of the stop was based upon reasonable articulable suspicion of additional criminal activity.

Following the denial of his motion, Lor agreed to stipulate to the state's case to obtain review of this ruling pursuant to Minn. R. Crim. P. 26.01, subd. 4. The district court found Lor guilty of both charged offenses, convicted Lor of the second-degree crime, and sentenced him to 98 months in prison. Lor appeals.

D E C I S I O N

The initial stop

Lor first argues that the traffic stop of the vehicle in which he was the passenger was unconstitutional because it was the product of discriminatory law enforcement based upon the race of the occupants, and was not supported by a reasonable, articulable suspicion of wrongdoing.

Whether reasonable suspicion exists to support a traffic stop is a mixed question of fact and law. *State v. Lugo*, 887 N.W.2d 476, 487 (Minn. 2016). This court reviews the district court's findings of fact for clear error, but reviews whether those findings support reasonable suspicion de novo. *Id.* Determining whether police have engaged in discriminatory law enforcement involves application of the Equal Protection Clause of the

Fourteenth Amendment. *Gerding v. Comm'r of Pub. Safety*, 628 N.W.2d 197, 200 n.2 (Minn. App. 2001), *review denied* (Minn. Aug. 15, 2001). We review equal-protection questions de novo. *State v. Holloway*, 916 N.W.2d 338, 347 (Minn. 2018).

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. *Lugo*, 887 N.W.2d at 486. Warrantless searches and seizures are presumptively unreasonable. *State v. Othoudt*, 482 N.W.2d 218, 221-22 (Minn. 1992). An exception to the warrant requirement allows police to conduct a brief investigatory stop if the officer has reasonable, articulable suspicion of criminal activity. *Lugo*, 887 N.W.2d at 486. A limited investigative stop is lawful if the state demonstrates that the officer had a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). Ordinarily, if police observe a traffic violation, "however insignificant, the officer has an objective basis for stopping the vehicle." *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997).

Minnesota law provides: "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the conditions of the highway." Minn. Stat. § 169.18, subd. 8(a) (2014). Here, Butler testified that he observed the minivan following one or two car-lengths behind another vehicle, which he concluded was "too close." This testimony was not challenged at the evidentiary hearing, and it adequately establishes a reasonable and objective basis to have suspected the van's driver of having committed a traffic violation.

Notwithstanding a reasonable objective basis on which to have stopped the vehicle, *see Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 1774 (1996) (holding that the constitutional reasonableness of a traffic stop does not depend on the subjective motivations of the officer), a traffic stop may be unconstitutionally pretextual if it represents "intentional, discriminatory enforcement of the law" in violation of the Equal Protection Clause of the Fourteenth Amendment. *Gerding*, 628 N.W.2d at 200-01 n.2 (citing *State v. Hyland*, 431 N.W.2d 868, 872 (Minn. App. 1988). To demonstrate discriminatory enforcement, a defendant must establish:

> (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of a constitutional right.

Hyland, 431 N.W.2d at 872-73.

In his brief, Lor argues that the minivan was "targeted for traffic enforcement based on the race of the occupants" due to Butler's testimony that he had been made aware of a trend of Asian individuals transporting marijuana from western states, that he had pulled up alongside of the van and so was presumably aware of the race of its occupants, and that he expressed a desire to thereafter witness a traffic violation that would provide him with a reason to stop the vehicle. Lor's argument fails to establish an equal protection violation, however, because although the identity of the men in the van as Asian was certainly a

relevant factor in Butler's interest in stopping the vehicle, there is no indication from the record that this was his sole reason for doing so.

"It is well-established that an investigatory stop may be based in part on a description of a suspect's race, but race or color alone is not a sufficient basis for making an investigatory stop." *State v. Yang*, 774 N.W.2d 539, 551 (Minn. 2009) (quotation omitted). Here, the district court credited Butler's testimony that the State Patrol had received information about people of Asian descent using minivans to transport marijuana across the country, as well as his additional observations about the van being rented, its state of origin, its being driven below the speed limit, and the lack of eye-contact by the driver prior to the stop. These findings were not clearly erroneous and they establish that the occupants of the van being Asian was but one circumstance among others that collectively led Butler to legitimately suspect that the men were transporting drugs. There is no reason conclude that Butler's motivation for stopping the van was "invidious or in bad faith" and "based upon such impermissible considerations as race." *Hyland*, 431 N.W.2d at 872-73.

The expansion of the stop

Lor next argues that Butler's expansion of the traffic stop to include additional questioning, a request for consent to search, and a canine search was not supported by reasonable suspicion of further wrongdoing. We review the district court's findings of fact for clear error, but review whether those findings support reasonable suspicion of criminal activity de novo. *State v. Diede*, 795 N.W.2d 836, 843 (Minn. 2011).

"[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002). "[T]he scope of a stop must be strictly tied to and justified by the circumstances that rendered the initiation of the investigation permissible." *Id.* Police may expand the scope of a stop to investigate other suspected illegal activity only if "the officer has reasonable, articulable suspicion of such other illegal activity." *Id.* Reasonable suspicion must be based on "specific, articulable facts" that allow an officer to form "a particularized and objective basis for suspecting the seized person of criminal activity." *Diede*, 795 N.W.2d at 842-43. Determinations of reasonable suspicion are based on the totality of the circumstances. *State v. Lande*, 350 N.W.2d 355, 357-58 (Minn. 1984). This court analyzes whether reasonable suspicion exists "from the standpoint of an objectively reasonable police officer." *State v. Martinson*, 581 N.W.2d 846, 850 (Minn. 1998).

Here, the district court determined—and we agree—that the initial stop was first expanded beyond its original purpose when Butler requested that the driver join him in the squad car "to investigate the possibility of further criminal activity." *See State v. Fort*, 660 N.W.2d 415, 418 (Minn. 2003). At the time he expanded the scope of the stop to separate and question Lor and the driver, Butler was aware that the minivan had been rented in California and that the rental agreement had expired six days prior. We conclude that these facts are sufficient to have permitted an objectively reasonable officer to suspect that the men were not lawfully in possession of the minivan, and to expand the scope of the stop to investigate further.

Butler again expanded the scope of the initial stop when he asked for consent to search the minivan after having separately questioned the men about their travel plans. Even when an officer asks for consent to conduct a search of a vehicle during a traffic stop, the request for consent itself must be supported by a reasonable suspicion of criminal activity. *See Fort*, 660 N.W.2d at 419 (concluding that because there was no articulable basis to justify a request for consent to search a vehicle, the "consent inquiry" went beyond the scope of the traffic stop and was not supported by reasonable articulable suspicion).

In questioning Lor and the driver, Butler noted their inconsistent statements concerning where they had visited on their trip and where they intended to go. He observed that the driver was "very talkative, rambling, trying to change the subject, talking about [Butler's] hat and the weather and just basic kind of changing the subject." Combined with Butler's earlier observations that the minivan was a rental vehicle from California and that it had a lived-in look, and given his awareness of a trend of Asian males driving minivans from the west coast with large amounts of marijuana, it appears that these facts, taken together, support reasonable suspicion to have asked for consent to search the vehicle.

Finally, Butler expanded the scope of the initial stop a third time when he actually conducted a search of the vehicle with his canine. "[I]n order to lawfully conduct a narcotics-detection dog sniff around the exterior of a motor vehicle stopped for a routine equipment violation, a law enforcement officer must have a reasonable, articulable suspicion of drug-related criminal activity." *Wiegand*, 645 N.W.2d at 137. Here, when Butler indicated to Lor that he would be taking his canine officer around the minivan, Lor's response indicated that Butler had "caught" them. This statement, together with all of

Butler's prior observations during the course of the stop, provided adequate suspicion of drug-related activity to have conducted a dog-sniff of the van pursuant to the driver's consent. The district court therefore did not err in denying Lor's motion to suppress the evidence against him.

Sentencing

Lor argues that the district court erred in calculating his criminal-history score because it assigned points to two 2014 convictions from California, which he asserts arose from a single behavioral incident. This court reviews the district court's determination of a defendant's criminal-history score for an abuse of discretion. *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). The district court may not use out-of-state convictions in calculating a defendant's criminal-history score unless the state lays proper foundation to do so. *Id.* In evaluating out-of-state felony convictions, a defendant may not receive criminal-history points for more than one offense arising out of a single behavioral incident, save for those involving multiple victims. *State v. McAdoo*, 330 N.W.2d 104, 107 (Minn. 1983); Minn. Sent. Guidelines 2.B.1, 2.B.5, cmt. 2.B.107 (2015). At sentencing, the state bears the burden of demonstrating "the divisibility of a defendant's course of conduct" in the case of multiple conviction to support their inclusion in the defendant's criminal-history score. *McAdoo*, 330 N.W.2d at 109.

The record indicates that Lor was convicted of marijuana possession and selling or furnishing marijuana in California, and that the offense date for both convictions was November 11, 2012. The calculation of Lor's criminal history on the sentencing worksheet indicates that he was assigned two felony points for each of these convictions. Because it

is reasonable that the two California convictions may have arisen from a single behavioral incident, and because the existing record is insufficient to establish otherwise, the state did not meet its burden of demonstrating that separate criminal-history points may be assigned. However, because Lor did not previously object to the calculation of his criminal-history score on this ground, the proper remedy is to reverse the sentence and remand to the district court where the state may "further develop the sentencing record" to permit the court to appropriately determine whether the California convictions arose from a single behavioral incident. *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008).

Affirmed in part, reversed in part, and remanded.