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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1988,
A18-0348

Terry John Ascheman, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent (A17-1988),

and

State of Minnesota,
Respondent (A18-0348),

vs.

Terry John Ascheman,
Appellant.

Filed December 3, 2018
Affirmed
Bratvold, Judge

Swift County District Court
File Nos. 76-CV-16-428, 76-CR-16-422

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Considered and decided by Bratvold, Presiding Judge; Rodenberg, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

In this consolidated appeal from the district court's decision to affirm the revocation of appellant's driving privileges and from appellant's judgment of conviction for driving while impaired (DWI), appellant argues that the district court erred in denying his motion to suppress evidence, for two reasons: (1) the district court erred in overruling his objection to hearsay testimony regarding what a complaining witness reported to police; and (2) police illegally stopped him while mowing the complaining witness's field at 2:30 a.m. in a rural area. Because the witness's statements were not offered for the truth of the matter asserted, and because police had reasonable articulable suspicion of criminal activity to stop appellant, we affirm.

FACTS

At approximately 2:30 a.m. on Sunday, September 11, 2016, A.A.S. called police and reported that someone was operating a tractor in her yard in rural Clontarf, Minnesota. A.A.S. said the tractor was "really loud" and she did not know why it was there. Officer Reigstad of the Benson Police Department drove to A.A.S.'s residence, along with two deputy sheriffs from Swift County. Reigstad saw a tractor drive westbound on A.A.S.'s driveway, and then turn northbound into an adjacent field, roughly 100 to 200 yards away from the house. A.A.S. told Reigstad that she did not know who was driving the tractor.

Reigstad drove into the field and activated his emergency lights and siren. The tractor stopped and Reigstad identified the driver as appellant Terry Ascheman. Reigstad testified that he stopped the tractor "to identify who was driving the tractor and see why he was on [A.A.S.'s] property, to make sure everything was all right." Reigstad, who had nine years' experience as a licensed peace officer, also testified that it was "very unusual" for a farmer to be mowing at night, although he sometimes saw farmers harvesting or planting at night.

Ascheman told Reigstad that he was mowing his cousin's field and "trying to catch up" on work after getting his tractor fixed. Ascheman admitted that earlier he had consumed a few alcoholic drinks. A deputy sheriff determined that Ascheman appeared intoxicated; Ascheman performed poorly on field sobriety tests and agreed to provide a preliminary breath test. Police arrested Ascheman, who submitted to a second breath test, which registered an alcohol concentration of 0.134.

The Minnesota Commissioner of Public Safety (commissioner) revoked Ascheman's license. Additionally, the state charged Ascheman with two counts: (1) operating a motor vehicle under the influence of alcohol in violation of Minn. Stat. § 169A.20, subd. 1(1); and (2) driving, operating, or being in physical control of a motor vehicle with an alcohol concentration of 0.08 or within two hours of the act in violation of Minn. Stat. § 169A.20, subd. 1(5).

Ascheman, the state, and the commissioner appeared for a combined omnibus and license revocation hearing, during which the district court heard testimony from Reigstad,

Ascheman, and Ascheman's spouse.[1] Ascheman identified one issue: evidence of his intoxication must be suppressed because Reigstad lacked reasonable articulable suspicion to justify stopping Ascheman in the field. Ascheman also made one hearsay objection during the hearing, which was overruled. In October 2017, the district court issued an order denying Ascheman's challenge to the stop and affirming the license revocation. Ascheman appealed the decision to deny rescission of his license revocation.

In December 2017, Ascheman and the state appeared for a pretrial hearing and agreed to stipulate to evidence for a court trial, while preserving the pretrial issue for appellate review under Minn. R. Crim. P. 26.01, subd. 4. In January 2018, the district court issued an order finding Ascheman guilty on both counts. The district court subsequently convicted him of count 2 and imposed a sentence of 365 days in jail with 305 days stayed for two years. Ascheman appealed the judgment of conviction. We granted Ascheman's motion to consolidate the two appeals.

D E C I S I O N

I. The district court did not abuse its discretion when it overruled Ascheman's hearsay objection.

Ascheman argues that the district court erred in admitting hearsay testimony about what A.A.S. told Reigstad. Ascheman also contends that he was prejudiced by this error because the district court relied on A.A.S.'s statements in determining that the stop was

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[1] Ascheman testified that he did not remember what happened on September 11, 2016, because he later had an aneurysm that affected his memory. Ascheman's spouse confirmed his testimony.

justified.[2] "Evidentiary rulings on hearsay statements are reviewed for clear abuse of discretion." *State v. Burrell*, 772 N.W.2d 459, 469 (Minn. 2009).

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Generally, hearsay is not admissible. Minn. R. Evid. 802. The rule excluding hearsay, however, does not apply if "the statement is introduced merely to prove the fact of its being made and not to prove the truth of what the communication contains." *State v. Schifsky*, 69 N.W.2d 89, 92 (Minn. 1955). For example, "[w]hen evidence that a tip was received is offered to explain why police have established surveillance of the scene of an expected crime, the evidence is not hearsay." *State v. Ford*, 322 N.W.2d 611, 615 (Minn. 1982). Additionally, an officer can rely on facts obtained from another person "to form the basis for reasonable suspicion to stop." *Klotz v. Comm'r of Pub. Safety*, 437 N.W.2d 663, 664 (Minn. App. 1989), *review denied* (Minn. May 24, 1989).

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[2] All parties appear to assume that the Minnesota Rules of Evidence govern this issue. We note, first, that the rules of evidence are inapplicable to questions of fact preliminary to the admissibility of evidence. Minn. R. Evid. 104(a); Minn. R. Evid. 1101(b)(1). The rules of evidence also are inapplicable to probable cause hearings. Minn. R. Evid. 1101(b)(3). In fact, this court specifically has recognized that "reliable hearsay is admissible on the issue of probable cause" in implied consent hearings. *Heuton v. Comm'r of Pub. Safety*, 541 N.W.2d 361, 364 (Minn. App. 1995). Similarly, in an omnibus hearing, "[t]he court may find probable cause based on the complaint or the entire record, including reliable hearsay." Minn. R. Crim. P. 11.04, subd. 1(c); *see also State v. Ortiz*, 626 N.W.2d 445, 450-51 (Minn. App. 2001), *review denied* (Minn. June 27, 2001). Here, Ascheman raised a hearsay objection to evidence offered at a combined implied consent/omnibus hearing where the sole issue was suppression of evidence. Because we conclude that the objected-to evidence was not hearsay, we resolve this issue without deciding whether the rules of evidence apply to a combined implied consent/omnibus hearing.

Here, Ascheman's attorney objected when Reigstad testified to what A.A.S. reported. The relevant testimony and objection included the following exchange during direct examination:

> Q. Okay. What specifically did that caller tell you was happening?
> A. There was a suspicious vehicle at the residence, and they didn't know who the person was.
> Q. Okay. Did she say where on—where at her residence this vehicle was?
> A. It was by her house.
> MR. KLUVER: Objection. Hearsay.
> Q. Okay.
> THE COURT: Overruled.

We conclude that the district court did not abuse its discretion in overruling Ascheman's objection to A.A.S.'s statements for two reasons. First, A.A.S.'s statements were not offered to prove where Ascheman's tractor was located, but were offered to prove why Reigstad responded to A.A.S.'s property and investigated her complaint. *See, e.g.*, *Ford*, 322 N.W.2d at 615 (holding that evidence police received from a reliable informant "was needed to explain the action of the police" and was therefore not hearsay). Second, A.A.S.'s statements also were offered, in part, to prove that Reigstad had reasonable articulable suspicion to stop Ascheman. A.A.S. told Reigstad that she did not know the person who was mowing near her house in the middle of the night. When A.A.S.'s statements are considered in connection with other information that Reigstad acquired after he arrived at A.A.S.'s house, as discussed in more detail below, Reigstad reasonably stopped Ascheman. Because A.A.S.'s statements were not offered for the truth of the matter asserted, but to prove why Reigstad proceeded to investigate and stop Ascheman,

we conclude the statements were not hearsay. *See, e.g.*, *Klotz*, 437 N.W.2d at 664 (holding that trial court did not improperly rely on hearsay evidence in denying motion to suppress because officers "may rely on facts which another person told him" as the basis for suspicion to stop). Consequently, the district court did not err in overruling Ascheman's hearsay objection.

Respondent commissioner also argues that admitting the statements should be deemed harmless error even if the statements were inadmissible hearsay because Reigstad personally observed the tractor mowing on A.A.S.'s property. *See* Minn. R. Crim. P. 31.01 ("Any error that does not affect substantial rights must be disregarded."). The commissioner's point is well-taken. The erroneous admission of evidence is harmless error "when the evidence is cumulative or there is other extensive evidence connecting [the defendant] to the commission of the crime." *State v. McDonald-Richards*, 840 N.W.2d 9, 19 (Minn. 2013) (quotation omitted). Because Reigstad personally observed the tractor mowing A.A.S.'s field and his observations were admitted into evidence, any error in admitting A.A.S.'s statements was harmless.

II. The district court did not err when it denied Ascheman's motion to suppress and determined that reasonable suspicion supported Reigstad's stop of Ascheman.

Ascheman contends that Reigstad illegally stopped Ascheman while he was mowing in the field because the officer lacked any reasonable belief of criminal behavior. We review questions of reasonable suspicion de novo. *State v. Lugo*, 887 N.W.2d 476, 487 (Minn. 2016). A district court's factual determinations related to a limited investigatory

stop, however, "will not be set aside unless they are clearly erroneous." *Id.* (quotation omitted). Here, Ascheman does not contest the factual findings of the district court.

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. 1, § 10. "Warrantless . . . seizures are '*per se* unreasonable unless they fall under an established exception' to the warrant requirement." *Ries v. State*, 889 N.W.2d 308, 315 (Minn. App. 2016) (quoting *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992)). One exception permits a police officer to conduct a limited investigative seizure without a warrant if the officer has reasonable articulable suspicion of criminal activity. *Lugo*, 887 N.W.2d at 486. This brief investigatory seizure is often called a *Terry* stop. *See Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968).

In determining whether an officer had reasonable articulable suspicion to stop a defendant, "the officer's suspicion must satisfy an objective, totality-of-the-circumstances test." *State v. Smith*, 814 N.W.2d 346, 351 (Minn. 2012). This test asks whether "the facts available to the officer at the moment of the seizure . . . [would] 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (quoting *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880). Reasonable suspicion requires "something more than an unarticulated hunch, [and] that the officer must be able to point to something that objectively supports the suspicion at issue." *State v. Davis*, 732 N.W.2d 173, 182-83 (Minn. 2007).

Reasonable suspicion can be "based on information provided by a reliable informant." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008). Minnesota courts "presume that tips from private citizen informants are reliable," particularly when they

"give information about their identity so that the police can locate them if necessary." *Davis*, 732 N.W.2d at 183. There is a "distin[ction] between anonymous and identifiable informants." *Rose v. Comm'r of Pub. Safety*, 637 N.W.2d 326, 328 (Minn. App. 2001), *review denied* (Minn. Mar. 19, 2002). An officer can presume an identified informant is truthful because she "provides sufficient information to locate [her] and hold [her] accountable for providing false information." *Id.* Here, A.A.S. identified herself to dispatch and personally spoke to Reigstad, creating a presumption of reliability. *See id.*

Ascheman argues that Reigstad articulated no reasonable belief of a particular crime to justify the stop and simply pulled the driver over "to see who was driving." It is correct that Reigstad testified that he stopped the tractor because he wanted to identify the driver "and see why he was on [A.A.S.'s] property, to make sure everything was all right." It is also correct that the district court did not identify a specific crime of which Ascheman was thought to be committing when it denied the motion to suppress.

But even "innocent activity might justify the suspicion of criminal activity." *State v. Martinson*, 581 N.W.2d 846, 852 (Minn. 1998). For example, an actual traffic violation is not required. *See Marben v. State*, 294 N.W.2d 697, 699 (Minn. 1980). To establish reasonable suspicion, an officer only needs to articulate particular and objective facts that "by their nature, quality, repetition, or pattern become *so unusual and suspicious* that *they support at least one inference of the possibility of criminal activity.*" *State v. Schrupp*, 625 N.W.2d 844, 847-48 (Minn. App. 2001) (emphasis added), *review denied* (Minn. July 24, 2001).

Here, particular and objective facts, taken in totality, were so unusual that they supported an inference of the possibility of criminal activity. *See id.* These facts include: (a) A.A.S. reported to dispatch that an unknown person was on her property operating a tractor in the middle of the night; (b) Reigstad spoke with A.A.S., who confirmed her earlier report; (c) Reigstad saw Ascheman's tractor mowing on A.A.S.'s field at about 2:30 a.m.; and (d) in Reigstad's nine years of experience as a peace officer, it was "very unusual" for farmers to mow grass late at night. *See generally Appelgate v. Comm'r of Pub. Safety*, 402 N.W.2d 106, 108 (Minn. 1987) (stating that an officer may suspect suspicious activity on the basis of "all the circumstances," which include "the officer's general knowledge and experience, the officer's personal observations, information the officer has received from other sources, the nature of the offense suspected, the time, [and] the location"). We agree with the district court's apt summary: "Other facts make [Ascheman's conduct] seem unusual such as [A.A.S.] noting there [was] no need for a tractor to be present, no predetermined permission to be on her yard for access, and the time of the incident at the early hours of the morning."

Based on these particular and objective facts, Reigstad reasonably suspected Ascheman's conduct might be criminal, e.g., criminal trespass, theft of crops, disorderly conduct, or even driving while impaired. *See* Minn. Stat. § 609.605 (2016) (trespass); Minn. Stat. § 609.52 (2016) (theft); Minn. Stat § 609.72 (2016) (disorderly conduct); Minn. Stat. § 169A.20, subd. 1 (driving while impaired). Reigstad's failure to testify to these particular offenses at the omnibus hearing does not persuade us that he lacked reasonable suspicion. Because Reigstad had reasonable suspicion sufficient to justify the stop, we

conclude that the district court did not err in denying Ascheman's motion to suppress. We therefore affirm both the order denying rescission of the license revocation and Ascheman's judgment of conviction.

Affirmed.