STATE OF MINNESOTA
IN COURT OF APPEALS
A11-452

State of Minnesota,
Respondent,

vs.

Zane Robert Stigen,
Appellant.

Filed March 5, 2012
Affirmed
Connolly, Judge

Polk County District Court
File No. 60-CR-10-791

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

Gregory Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Renée Bergeron, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Stauber, Judge.

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

CONNOLLY, Judge

Appellant challenges the sufficiency of the evidence underlying his conviction for third-degree possession of a controlled substance in violation of Minn. Stat. § 152.023

subd. 2(6) (2008). Appellant also argues that his constitutional right to equal protection was violated because there is no rational basis for applying Minn. Stat. § 152.023 subd. 2(6), to the facts of this case. Lastly, appellant asserts that the district court erred when it denied his motion to suppress evidence. Because we conclude that the evidence was sufficient to sustain appellant's conviction, his constitutional claim has been waived, and that the district court properly denied his motion to suppress evidence, we affirm.

FACTS

At approximately 1:00 a.m. on April 8, 2010, two East Grand Forks police officers observed a car making a right-hand turn without using a blinker signal. The officers entered the license plate number of the car into their computer and found the license plate registration expired in 2005. The officers continued to follow the vehicle eastbound past Sacred Heart School, where the center line of the road is within 300 feet of school property. The officers followed the vehicle until it weaved to the right, crossing the fog line. They activated their emergency lights and pulled the car over. The stop occurred approximately two miles from Al LaFave Park and approximately one and one-half miles from Sacred Heart School.

Appellant Zane Stigen was driving the car; a passenger, J.M., was in the car. One officer approached appellant and one officer approached J.M. They noticed the sticker on the license plate showed it to be registered in 2010 but the previous police computer scan indicated it expired in 2005. One officer verified that the sticker was registered with a different vehicle. J.M. told one officer that they were traveling from Grand Forks, North Dakota en route to Crookston, Minnesota. Because of the path the car traveled

from Grand Forks, North Dakota, to the location where it was stopped, it would have passed over the Sorlie Bridge. Al LaFave Park is located on both sides of the Sorlie Bridge.

During his conversation with both officers, appellant cursed, avoided eye contact, and admitted the car was not insured. Appellant also stated he had recently purchased the car. The officer asked appellant to step out of the vehicle because he admitted the car was not insured, appellant's actions were not normal for a typical traffic stop, and because the officers wanted to take him out of his comfort zone. Appellant continued to avoid eye contact so the officer asked to conduct a Romberg test.[1] Appellant agreed to take the test and estimated 15 seconds and 30 seconds of real time. This showed he had a fast internal clock. During the test, one officer observed eyelid tremors that commonly occur when someone is under the influence of a controlled substance, namely stimulants. The officer then asked if appellant was under the influence of drugs; appellant denied that he was under the influence. He was not placed under arrest at this time.

The East Grand Forks Police Department policy mandates that uninsured vehicles be towed off the roadway and impounded. Appellant and J.M. were told of this policy and offered the choice of a ride in the police car, or walking to town. They were told that the officers had to wait for the tow truck and during that time they could wait in the police car. Both appellant and J.M. were told they were not under arrest. They chose to

[1] A Romberg test is conducted by having individuals place their feet together, hands at their side, tilt their head back and close their eyes. They then count to 30 in their head and when they reach 30 they lower their head and tell the officer to stop the test. The purpose of the test is to see if their internal clock is approximately the same as one who is not impaired.

accept a ride to town in the police car. One officer conducted a pat-down search of appellant before being placed in the police car to quickly check for anything that could harm the officer. After nothing was discovered, appellant entered the back of the patrol car to wait for a ride. Before the officers conducted a pat-down search of J.M., he informed them that he had a hypodermic needle in his pocket. J.M. indicated he was diabetic and used the needle for insulin. The needle was returned to J.M. and he was placed in the back of the police car with appellant.

The East Grand Forks Police Department policy also mandates that any vehicle impounded must undergo an inventory search.[2] During the inventory search of appellant's car at the scene of the stop, the officers found pieces of broken glass from the bulb of a pipe and a broken glass pipe. The glass and glass pipe contained black marks that were consistent with a pipe used for smoking methamphetamine. Because the glass and glass pipe were discovered on the passenger side of the vehicle, J.M. was questioned about the glass. J.M. denied any knowledge of the pipe in the car. The officers conducted a full search of J.M., near the rear passenger side of the police car, seized the needle as evidence, and placed him under arrest.

After J.M. was placed under arrest and secured in a different patrol car, one officer removed appellant from the patrol car to question him near the driver's side rear bumper. During this initial conversation, appellant admitted he knew the pipe was in the car but

[2] "A procedure that requires officers to conduct an inventory search before towing a vehicle is not, in and of itself, unconstitutional." *State v. Delwo*, No. C9-00-633, 2001 WL 50905 (Minn. App. Jan. 23, 2001) (citing *Colorado v. Bertine*, 479 U.S. 367, 372-73, 107 S. Ct. 738, 742 (1987)). The record does not indicate the specific East Grand Forks Police Department policy, nor is the policy challenged by appellant.

later recanted his statement in front of the officers. While the officer was questioning appellant, another officer discovered a clear baggie with a powdery substance and crystals in it near the rear tire of the patrol car from which appellant had exited. Appellant denied any knowledge of the baggie and indicated it may have come from another vehicle passing by. The officers did not see any vehicles drive by during the traffic stop, nor did they see the baggie on the ground before its discovery by one officer. Appellant was searched and placed under arrest for possession of a controlled substance. At his booking, appellant stated that giving a statement would not do him any good and that he was going to prison.

That same day, a detective obtained search warrants to obtain blood samples from appellant and J.M. Appellant's blood sample revealed .09 milligrams per liter of amphetamine and .25 milligrams per liter of methamphetamine. Later laboratory testing revealed .3 grams of methamphetamine in the small plastic baggie.

Appellant was charged with felony third-degree possession of a controlled substance. After a jury trial, he was convicted of third-degree possession as well as the lesser included fifth-degree possession of a controlled substance. He was sentenced to 71 months in prison for the third-degree possession of a controlled-substance charge. He was not sentenced on the fifth-degree possession charge. He challenges his conviction.

D E C I S I O N

I. Sufficiency of the evidence

In considering a claim of insufficient evidence, this court's review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a

light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "the jury believed the State's witnesses and disbelieved contrary evidence." *State v. Moore*, 481 N.W.2d 355, 360 (Minn. 1992). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Because the glass pipe was found near the passenger seat and the bag of methamphetamine was found on the ground near where appellant was questioned, the evidence against appellant was circumstantial. "[A] conviction based entirely on circumstantial evidence merits stricter scrutiny than convictions based in part on direct evidence." *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). But "[w]hile it warrants stricter scrutiny, circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). The circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt. *Jones*, 516 N.W.2d at 549. A jury, however, is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference. *Webb*, 440 N.W.2d at 430.

In applying this standard, the reviewing court examines only the inferences that can be drawn from the circumstances proved. *State v. Stein*, 776 N.W.2d 709, 715 (Minn. 2010). But the reviewing court does not "reverse convictions simply because the defendant can point to facts in the record that arguably support a rational inference other than guilt." *Id.* The court does not consider conflicting facts and circumstances that the jury has rejected, or inferences from those facts. *Id.* But in assessing the inferences to be drawn from the circumstances proved, the court examines whether there are "no other reasonable, rational inferences that are inconsistent with guilt." *Id.* at 716. This is because the "inquiry addresses not only the reasonableness of the inferences made by the fact finder, but also the reasonableness of other possible inferences that the fact finder may not have drawn." *Id.*

"A person is guilty of controlled substance crime in the third degree if . . . the person unlawfully possesses one or more mixtures containing methamphetamine or amphetamine in a school zone, a park zone, a public housing zone, or a drug treatment facility." Minn. Stat. § 152.023 subd. 2(6). "[I]n order to convict a defendant of unlawful possession of a controlled substance, the state must prove that defendant consciously possessed, either physically or constructively, the substance and that defendant had actual knowledge of the nature of the substance." *State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975).

Appellant did not physically possess the bag of methamphetamine when the officers discovered it. Therefore, the state was required to prove that appellant constructively possessed the bag of methamphetamine.

> Constructive possession may be proved by showing either that (1) the controlled substance was found in an area under the defendant's control and to which others normally had no access; or (2) if others had access to the location of the controlled substance, the evidence indicates a strong probability that the defendant exercised dominion and control over the area.

State v. Denison, 607 N.W.2d 796, 800 (Minn. App. 2000), *review denied* (Minn. June 13, 2000). In considering whether or not the evidence was sufficient to prove constructive possession, this court considers the totality of the circumstances. *Id.*

Appellant argues that the evidence was insufficient to show he possessed the bag of methamphetamine because (1) no witnesses testified to seeing appellant drop the bag on the ground; (2) J.M. possessed a needle; (3) J.M. had an opportunity to hide the glass pipe while the officers were talking with appellant; and (4) the broken glass from the bulb of the pipe with black residue was found on the passenger side of appellant's car. Appellant contends these reasons prove that J.M. was the actual possessor of the methamphetamine.

However, the bag of methamphetamine was found near the rear of the patrol car and directly in appellant's path when he was taken out of the patrol car and questioned. [3] Because J.M. exited appellant's car on the passenger side, walked along the passenger side of the patrol car, entered the rear passenger side of the patrol car, and was later searched and questioned near the rear passenger side of the patrol car, J.M was never at the location where the methamphetamine was found. Appellant also tested positive for

[3] We recognize the officers had access to the area around the patrol car, however, it has not been argued that the officers played any role in placing the bag of methamphetamine on the ground.

methamphetamine from blood tests taken after being booked. A positive test does not, by itself, constitute possession. *State v. Lewis*, 394 N.W.2d 212, 217 (Minn. App. 1986), *review denied* (Minn. Dec. 12, 1986). However, the evidence of a positive test is relevant in proving possession of the substance appellant tested positive for. *U.S. v. Trotter*, 270 F.3d 1150, 1153 (7th Cir. 2001). ("Inferring possession of a drug from the consumption of that drug is just as sensible as inferring, from the statement 'I ate a hamburger for lunch,' that the person possessed the hamburger before wolfing it down.").

Appellant further argues that whoever possessed the glass pipe was more likely to be the person who possessed the methamphetamine. Appellant contends the evidence proves J.M. possessed the glass pipe because (1) broken glass was found on the floor of the passenger compartment; (2) the pipe was found near the passenger seat; and (3) J.M. possessed a hypodermic needle. Therefore, appellant contends J.M. was the possessor of the methamphetamine.

Appellant's argument rests on the notion that it was impossible for both J.M. and appellant to possess the methamphetamine. However, "[a] person may constructively possess a controlled substance alone or with others." *Denison*, 607 N.W.2d at 799. Thus, even J.M.'s ownership of the glass pipe does not make the state's evidence insufficient to show appellant's constructive possession of the methamphetamine. *See State v. Cusick*, 387 N.W.2d 179, 180-81 (Minn. 1986) (concluding that location of cocaine kit, including cocaine, next to the defendant's wallet on the ground on the driver's side was sufficient to show defendant's constructive possession even though his

girlfriend testified that the kit had been in her purse in the backseat with her clothing and other items).

Further, appellant (1) admitted to owning the car where the glass pipe was found between the seat and the console, within reach of the driver's seat; (2) admitted to knowledge of the pipe being in the car before he later recanted his statement; (3) acted unusual throughout his encounter with the officers and appeared to be under the influence of stimulants; (4) tested positive for amphetamine and methamphetamine; and (5) stated he was going to prison during the booking process. All of this suggests he was in possession of the methamphetamine.

The totality of the circumstances and the facts surrounding the arrest were sufficient for a jury to find that appellant had exercised dominion and control over the area between the passenger seat and center console, where the glass pipe was found. In turn, this suggests that he was the one who possessed the methamphetamine that was found near the rear of the police car. *See State v. Willis*, 320 N.W.2d 726, 727-29 (Minn. 1982) (concluding constructive possession was established when gun was found underneath the seat where defendant had been sitting and officer observed defendant engaging in furtive movements prior to stop); *State v. Johnson*, 551 N.W.2d 244, 247 (Minn. App. 1996) ("The heroin was not any less within Johnson's dominion and control merely because it was on his nightstand, rather than on his person."), *review denied* (Minn. Sept. 20, 1996).

II. Motion to suppress

"When reviewing pretrial orders on motions to suppress evidence, [the reviewing court] may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Appellant concedes the stop was justified at its inception but contends the evidence should have been suppressed because the officers illegally seized him by locking him in the back of the police car without a warrant, reasonable articulable suspicion, or probable cause.

"[A] traffic stop is more analogous to an investigative stop . . . than to a formal arrest." *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004) (noting the principles originally set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968)). "[T]he Minnesota Constitution requires that each incremental intrusion during a traffic stop be tied to and justified by one of the following: (1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness as defined in *Terry*." *Id.* at 365.

A motorist may not be confined in a police car for the officer's safety after being pulled over for a minor traffic violation. *Id.* at 369-70. However, a police officer merely offering a ride to the appellant does not constitute an unlawful seizure. *See United States v. Ward*, 23 F.3d 1303, 1306 (8th Cir. 1994) (concluding that a seizure did not occur when the officer offered the defendant a ride because the record did not show the officers

conveyed a messaged to defendant that he must accept the offer); *United States v. Logan*, 241 F. Supp. 2d 1164, 1182 (D. Kan. 2002) (holding an unlawful seizure did not occur because there was no evidence that the officer ordered defendant into the car, no evidence that he had to accept the ride from the officer, and because nothing prevented the defendant from arranging other modes of transportation).

Here, after appellant was lawfully pulled over, officers notified him that his car would be impounded for lack of insurance. *See State v. Richardson*, 622 N.W.2d 823, 825-26 (2001) (concluding that a police officer observing a car hit the fog line could reasonably indicate the violation of a number of Minnesota statutes); *State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983) (stating that observation of a car weaving within its own lane in an erratic manner can justify an officer stopping a driver). The officers informed appellant that he was not under arrest and was free to leave on foot while his car would be lawfully impounded and towed; he chose to accept a ride and consented to entering the police car. The officers then performed an inventory search of appellant's vehicle while he waited in the squad car. The officers questioned J.M., but no evidence was presented that appellant asked to exit the car or was told he was not free to leave. Appellant was removed from the police car and questioned about the broken glass and glass pipe. The discovery of these items gave the officers probable cause to believe a crime had been committed. *See Askerooth*, 681 N.W.2d at 364 (stating independent probable cause is needed to justify intrusions involving searches or seizures). While questioning the appellant, the officer found a plastic baggie containing crystal pieces and white powder on the ground. This discovery gave police officers probable cause to arrest appellant.

These facts indicate that the seizure was not impermissibly expanded in scope, intensity, and duration, nor was the seizure unreasonable. By consenting to a ride from the officers in the police car, appellant chose to comply with the officers' one condition of the ride, that he wait in the back seat of the police car while the officers waited for the tow truck. Therefore, the appellant was not unlawfully seized and the district court did not err by denying appellant's motion to suppress evidence.

III. Equal protection

Appellant argues there is no rational basis for applying Minn. Stat. § 152.023 subd. 2(6) (prohibiting methamphetamine in a school zone, park zone, public housing zone, or a drug treatment facility) to a person who drives or is a passenger in an enclosed vehicle which passes a school or park on a public street or highway. Appellant concedes this issue was not raised at the district court level. Generally, an appellate court will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). However, an appellate court may consider constitutional issues when required in the interests of justice, when parties have adequate briefing time, and when issues were implied in district court. *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 410 (Minn. 1982). Appellant further argues that the disparity in the sentences for third-degree possession of a controlled substance and fifth-degree possession of a controlled substance is sufficient under the interests-of-justice standard to allow the issue to be considered by this court, but offers no legal support for that argument.

This issue has been waived. Moreover, we believe that because the supreme court already ruled directly on this issue, the interests of justice do not require this court to rule

on it again. *See State v. Benniefield*, 678 N.W.2d 42, 47 (Minn. 2004) (holding that "there is a rational basis for the legislature to enhance a crime for those who possess illegal drugs in a place where children are likely to be present on a regular basis in order to protect children from discarded drugs or drug paraphernalia").[4]

Affirmed.

[4] We recognize that *Benniefield* concerned illegal drug possession while walking through a school zone and here, appellant drove through a school zone and a park zone while possessing illegal drugs. However, this distinction is not compelling.