STATE OF MINNESOTA
IN COURT OF APPEALS
A11-55

State of Minnesota,
Respondent,

vs.

Ryan Anthony Colclasure,
Appellant.

Filed October 31, 2011
Affirmed
Huspeni, Judge[*]

St. Louis County District Court
File No. 69HI-CR-10-412

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

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota; and

Jeffrey M. Vlatkovich, Assistant St. Louis County Attorney, Hibbing, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Bjorkman, Judge; and Huspeni, 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

HUSPENI, Judge

Appellant challenges his conviction of fifth-degree possession of a controlled substance, arguing that the district court erred by denying his motion to suppress evidence seized during an unconstitutional search of his person. We affirm.

FACTS

Shortly after 2:45 a.m. on June 8, 2010, Hibbing Police Officer Adam Wright responded to a report of a male sprawled on the sidewalk in front of a restaurant. Upon arrival, Officer Wright identified the man as appellant Ryan Colclasure, whom Officer Wright knew had previously been arrested on numerous occasions for disorderly conduct, assaultive behavior, and marijuana possession. At the start of Officer Wright's shift the previous evening, a pharmacist had reported to Officer Wright that appellant's girlfriend had asked the pharmacist not to fill prescriptions for appellant because appellant was selling the pills.

After speaking with appellant, Officer Wright determined that appellant was intoxicated and could not be left on his own, and Officer Wright agreed to transport him to his mother's home. Before allowing appellant into his squad car, Officer Wright inquired whether appellant carried any concealed weapons. Without being asked, appellant placed his hands on the trunk of the squad car in a manner that Officer Wright recognized as a position that is generally used for police searches. Officer Wright conducted a pat-down search for safety reasons because of appellant's past assaultive behavior and state of intoxication.

During the search, Officer Wright felt an object in the pocket of appellant's jeans that he recognized by feel as a pill bottle. After securing appellant's assent, Officer Wright removed from appellant's pocket an orange bottle that appeared to be a prescription pill bottle without a prescription label and contained numerous small white pills and one round orange pill. Appellant told Officer Wright that the white pills were Lortab, which had been prescribed to him, and the orange pill, which he referred to as an "extra pill," was Adderall. Officer Wright arrested appellant. Appellant was charged with two counts of fifth-degree possession of a controlled substance, violations of Minn. Stat. § 152.025, subd. 2(a)(1) (Supp. 2009).

Appellant moved to suppress the pills as evidence seized in an unlawful search. After an omnibus hearing, the district court denied the motion, finding that Officer Wright articulated reasonable grounds for conducting a pat-down search based on the risk to the officer's safety, appellant consented to removal of the pill bottle from his pocket, and Officer Wright observed a violation of law when he viewed the bottle containing two types of pills and no label. The district court concluded that these were sufficient grounds for Officer Wright to seize the Adderall pill.

Following appellant's waiver of his right to a jury trial and submission of the case on stipulated facts pursuant to Minn. R. Crim. P. 26.01, subd. 4 (superseding procedure recognized by *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980)), the district court found appellant guilty of one count of possession of a controlled substance, dismissed the remaining count, and imposed a sentence of 17 months. Execution of the sentence was

stayed and appellant was placed on probation for three years subject to certain conditions. This appeal followed.

D E C I S I O N

When reviewing a pretrial order on a motion to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred by declining to suppress the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We review the district court's findings of fact for clear error. *State v. Lee*, 585 N.W.2d 378, 383 (Minn. 1998).

The United States and Minnesota constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art I, § 10. Evidence obtained during an unreasonable search and seizure is inadmissible to support a conviction, unless an exception to this exclusionary rule applies. *James v. Illinois*, 493 U.S. 307, 311, 110 S. Ct. 648, 651 (1990) (stating that United States Supreme Court has identified exceptions to exclusionary rule); *State v. Olson*, 634 N.W.2d 224, 229 (Minn. App. 2001) (citing *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417 (1963)) (stating that fruit of illegal conduct is inadmissible), *review denied* (Minn. Dec. 11, 2001).

An officer may conduct a protective pat-down search for weapons when the officer has an objective reasonable suspicion that the individual may be armed and dangerous and capable of immediately causing permanent harm. *State v. Varnado*, 582 N.W.2d 886, 889 (Minn. 1998) (citing *Terry v. Ohio*, 392 U.S. 1, 27, 30, 88 S. Ct. 1868, 1883–85 (1968)). The officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the]

intrusion." *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880. "[O]fficer safety is a paramount interest and . . . when an officer has a valid reasonable basis for placing a lawfully stopped citizen in a squad car, a frisk will often be appropriate without additional individual articulable suspicion." *Varnado*, 582 N.W.2d at 891; *accord State v. Curtis*, 290 Minn. 429, 437, 190 N.W.2d 631, 636 (1971) (recognizing that police may, "for their own protection, . . . search a person before placing him in a squad car if there is a valid reason for requiring him to enter the vehicle and it is not merely an excuse for an otherwise improper search"). The Minnesota Supreme Court has recognized that, when an individual is known by police to have a record of assaultive behavior, a pat-down search for weapons may be justified. *Curtis*, 290 Minn. at 437, 190 N.W.2d at 636. We consider the totality of the circumstances when determining whether the police had a reasonable, articulable suspicion of illegal activity. *State v. Flowers*, 734 N.W.2d 239, 251 (Minn. 2007).

Appellant first contends that Officer Wright did not articulate a valid safety reason for a pat-down search, arguing that Officer Wright's knowledge of appellant's criminal history and state of intoxication is an insufficient justification for the pat-down search. We disagree. Officer Wright testified at the pretrial omnibus hearing that he agreed to transport appellant to his mother's home because he observed that appellant was too intoxicated to be left in his own care. In addition, although appellant appeared to be cooperative, Officer Wright knew that appellant had a history of assaultive behavior. Officer Wright testified that, in his experience, an intoxicated individual who has previously exhibited assaultive behavior may carry concealed weapons. Reviewing the

totality of the circumstances, we agree that Officer Wright had a reasonable concern for his own safety based on appellant's apparent state of intoxication and history of assaultive behavior. Accordingly, the district court's conclusion that Officer Wright articulated sufficient officer-safety concerns to justify a pat-down search of appellant is sound.

Appellant also challenges the district court's finding that he consented to Officer Wright's removal of the pill bottle from his pocket, arguing that his consent was not voluntary. Police do not need probable cause or reasonable suspicion if a person voluntarily consents to a search. *State v. George*, 557 N.W.2d 575, 579 (Minn. 1997). But for a search to fall under this exception to the warrant requirement, the state must demonstrate by a preponderance of the evidence that consent was freely and voluntarily given. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). The voluntary nature of consent is a question of fact to be determined from the totality of the circumstances, "including the nature of the encounter, the kind of person the defendant is, and what was said and how it was said." *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). Mere acquiescence or submission to a show of police authority or force is insufficient to establish that consent is voluntary. *State v. Howard*, 373 N.W.2d 596, 599 (Minn. 1985). But "[c]onsent is not involuntary merely because the circumstances of the encounter are uncomfortable for the person being questioned." *Diede*, 795 N.W.2d at 846 (quotation omitted). A district court's finding of voluntary consent will be reversed only if it is clearly erroneous. *Id.*

Appellant argues that the state failed to establish that his consent was voluntary because the record contains no evidence as to the manner in which Officer Wright asked to remove the item from appellant's pocket or that appellant knew that he could refuse to consent. But the record contains substantial evidence supporting the district court's decision on the issue of consent. Appellant acquiesced to Officer Wright's request to remove the pill bottle from appellant's pocket after being asked only once; the record does not reflect that he refused at any time. *Cf. Diede*, 795 N.W.2d at 847-48 (concluding that defendant did not voluntarily consent to search when she initially refused to consent but acquiesced after multiple requests by officers). Moreover, appellant was not restrained by handcuffs and was not confined in the squad car when he consented to removal of the pill bottle from his pocket. And although appellant was not informed that he had a right to decline the request, such knowledge is not a prerequisite to voluntary consent. *See Dezso*, 512 N.W.2d at 881 ("[T]he Fourth Amendment does not require for a voluntary search that the defendant know or be told that he has a right to refuse.").

There is ample support in the record for the district court's determination that appellant consented to the search of his pocket. Accordingly, the district court did not err by denying appellant's motion to suppress the evidence discovered during the pat-down search.

Affirmed.