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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-836**

State of Minnesota,
Respondent,

vs.

Lavell Edward Lovelady,
Appellant.

**Filed March 19, 2012
Affirmed
Randall, Judge***

Hennepin County District Court
27-CR-10-32986

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

Michael O. Freeman, Hennepin County Attorney, J. Michael Richardson, Assistant
County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public
Defender, St. Paul, Minnesota; and

Matthew R. Brodin, Special Assistant State Public Defender, Minneapolis, Minnesota
(for appellant)

Considered and decided by Connolly, Presiding Judge; Johnson, Chief Judge; and
Randall, Judge.

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

UNPUBLISHED OPINION

RANDALL, Judge

On appeal from his conviction of prohibited person in possession of a firearm, appellant challenges the district court's denial of his motion to suppress evidence obtained as a result of a stop. We affirm.

FACTS

The state charged appellant Lavell Edward Lovelady with felony prohibited person in possession of a firearm, in violation of Minn. Stat. §§ 624.713, subs. 1(2), 2(b), 609.11 (2008). Appellant filed a motion to suppress the evidence obtained as a result of the stop.

At the evidentiary hearing on appellant's motion, Minneapolis Police Officer Christopher Cushenbery testified that at about 1:15 in the morning he and his partner received a report from dispatch of shots fired in the area of Lake Street and Portland Avenue. They responded to the report and arrived in the area within minutes. When they arrived, an ambulance was parked on the corner of Fifth Avenue and Lake Street, near a victim who had been shot in the foot. Officer Cushenbery and his partner used their squad car to block westbound traffic. Many other police officers also responded to the report. Officer Cushenbery testified that there were people in the area when he arrived, but it was not very busy. He testified that a caller, who provided his name and phone number, reported that he had seen a black male wearing a blue shirt and blue jean shorts running in an alley near the crime scene. The same caller also reported that he saw two black males in a garden area north of Lake Street.

When Officer Cushenbery received the information about the possible suspect, he jogged across a parking lot and jumped a fence to reach an alley between Fifth Avenue and Portland Avenue. He testified that he was in the southeast corner of the alley, along the fence line, when he saw two males walk around the corner about 50 feet away from him. He explained that: “They came up around this white house, right up here inside the garden [indicating]. So we were right here and they kind of walked up in the corner, right up in here [indicating].” Officer Cushenbery stated that “[w]e were looking for guys with guns, and there were two guys walking around the corner. So we wanted to talk to them.” He testified that the two people saw him, stopped, and then “ran northbound on the east side of the street.” Officer Cushenbery testified that he said “come here!” before they started running. He yelled at them to stop, but they continued to run away and he chased after them.

Officer Cushenbery testified that he could tell that one person, who was later identified as appellant, was male, but the other person was smaller and he could not tell if the person was male or female. He stated that it was dark, but he mentally compared what the individuals were wearing to the description of the suspect that he had received.

He testified that:

We have it all the time where somebody will say it was a male with a black shirt or a blue shirt, but a lot [of] times the lighting is not good and so they don't accurately see it. It's a different case if you see somebody with a red shirt, you know, compared to a—he didn't explain that it was a dark blue shirt or a light blue shirt.

Officer Cushenbery testified that appellant was wearing a black t-shirt and blue jeans at the time of his arrest.

Officer Cushenbery commanded appellant and the other person to stop as he chased them. The officer testified that he was concerned that appellant was holding some type of weapon because appellant was holding up the front of his pants as he ran. Officer Cushenbery caught up to appellant after he started to lose his shoes and stumbled, and he jumped on top of appellant. Officer Cushenbery pinned appellant to the ground and then punched appellant because appellant did not comply with the officer's commands to get both of his hands behind his back and the officer was concerned that appellant had a weapon. After Officer Cushenbery handcuffed appellant, he called for an ambulance because appellant was bleeding. When he picked appellant up to walk him to the ambulance, a gun fell out of appellant's pant leg. Officer Cushenbery testified that he apprehended appellant "within a half block" of where the shooting victim was found, about 20 minutes after he received the report that shots were fired.

The district court denied appellant's motion to suppress evidence. The district court concluded that appellant was stopped when Officer Cushenbery told him to "come here!" but concluded that, "[r]egardless of discrepancies in the general clothing description, the totality of the circumstances, taken together with rational inferences, provided Officer Cushenbery with a reasonable articulable suspicion warranting his attempt to conduct a brief investigatory stop of [appellant]." The district court based its conclusion on the following findings: (1) the police officers had "a particular description of the time and location of a shooting" based on the "shotspotter" system and 911 calls;

(2) a 911 caller gave a physical description of a possible suspect and the location where the caller saw the suspect running; (3) Officer Cushenbery was familiar with the area, which he referred to as “a ‘high crime area,’” and he searched the location that the 911 caller described; (4) there were few people in the area; (5) Officer Cushenbery saw two black males “wearing dark clothing and jeans” in the area described by the 911 caller; and (6) the two males “immediately turned and walked [in] a different direction” when they saw Officer Cushenbery.

A jury found appellant guilty of prohibited person in possession of a firearm, and the district court sentenced him to 60 months in prison. This appeal follows.

D E C I S I O N

“When reviewing pretrial orders on motions to suppress evidence, we review the facts to determine whether, as a matter of law, the court erred when it failed to suppress the evidence.” *State v. Flowers*, 734 N.W.2d 239, 247 (Minn. 2007). An appellate court reviews a district court’s findings of fact for clear error, but reviews its legal determinations de novo. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009).

Both the United States and Minnesota Constitutions protect against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A police officer may “conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.” *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotation omitted). “Reasonable suspicion must be based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007)

(quotation omitted). The standard for reasonable suspicion is “less demanding than probable cause or a preponderance of the evidence,” but it does require “a minimal level of objective justification for making the stop.” *Timberlake*, 744 N.W.2d at 393 (quotation omitted). The seizure may not be the product of “mere whim, caprice or idle curiosity.” *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996).

The reviewing court considers the totality of the circumstances surrounding a stop, taking into account the officer’s law-enforcement experience. *State v. Wiggins*, 788 N.W.2d 509, 513 (Minn. App. 2010). The following factors may be considered when determining the validity of an investigatory stop near the scene of a recent crime:

- (1) the particularity of the description of the offender or the vehicle in which he fled;
- (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred;
- (3) the number of persons about in that area;
- (4) the known or probable direction of the offender's flight;
- (5) observed activity by the particular person stopped;
- and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.

Appelgate v. Comm’r of Pub. Safety, 402 N.W.2d 106, 108 (Minn. 1987).

Appellant argues that the totality of the circumstances did not give Officer Cushenbery reasonable suspicion for the stop and seizure. Appellant argues that he did not fit the description of the suspect, other than being a black male, and that a significant amount of time passed between the time of the shooting and when Officer Cushenbery saw him in the alley. Based on the totality of the circumstances, we disagree. While appellant did not meet the exact description of the suspect because he was wearing a black t-shirt and blue jeans, Officer Cushenbery first saw appellant when it was dark

outside. As he noted, the witness “didn’t explain that it was a dark blue shirt or a light blue shirt,” and in the dark a blue shirt and a black shirt look very similar. Further, as the district court noted, because the witness gave a description at night, the police officer could “make a rational inference as to the general color and nature of clothing the suspect may have been wearing.” It was reasonable for Officer Cushenbery to take into account that a witness’s description of a suspect is not always correct, especially when the witness observes the suspect when it is dark outside. In addition, Officer Cushenbery testified that he apprehended appellant about 20 minutes after he received the report that shots were fired and about half a block from where the shooting victim was found. While the suspect certainly could have traveled further away from the crime scene in 20 minutes if he chose, it is also possible that he remained in the immediate area. The hard evidence supporting probable cause is not overwhelming. The factors considered do support the district court’s conclusion that the totality of the circumstances gave Officer Cushenbery “articulable suspicion of criminal activity”—enough to stop appellant.

Appellant contends that he was not acting suspiciously before he was stopped but was simply walking down an alley. He argues that the district court clearly erred when it concluded that he “immediately turned and walked [in] a different direction” when he saw Officer Cushenbery. In response, the state argues that the district court’s conclusion is supported by Officer Cushenbery’s testimony because he indicated on a map that appellant changed direction.

Officer Cushenbery testified that appellant stopped walking as soon as he saw him. He testified that he then shouted to appellant to “come here!” before appellant ran

away. In addition, the record establishes that Officer Cushenbery indicated on a map during his testimony the direction that appellant was walking. Officer Cushenbery did not testify that appellant changed direction before he told appellant to “come here!” While the record does not support the district court’s finding that appellant engaged in “evasive behavior,” we conclude that, considering the totality of the circumstances, Officer Cushenbery had a reasonable, articulable suspicion to conduct an investigatory stop of appellant. The district court properly denied appellant’s motion to suppress evidence.

Affirmed.