STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1404

State of Minnesota,
Respondent,

vs.

Von Shane William Aune,
Appellant.

Filed June 17, 2013
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-11-19368

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Kirk, Judge.

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

BJORKMAN, Judge

Appellant challenges his convictions of two controlled-substance offenses, arguing that police unlawfully seized a plastic bag containing heroin from his pocket. We affirm.

FACTS

On June 28, 2011, Officer Karl Sauskojus stopped a vehicle in a high-crime area of Minneapolis after observing that a passenger in the vehicle was not wearing a seat belt and one of the brake lights was not functioning. Appellant Von Shane William Aune, the vehicle's driver, handed Officer Sauskojus his driver's license and permit to carry a handgun. Officer Sauskojus asked Aune whether he had a gun in the car, and Aune indicated that there was one in the glove compartment. Officer Sauskojus smelled a strong odor of burnt marijuana coming from inside the vehicle.

Officer Sauskojus asked Aune to exit the vehicle. As he did, Aune reached down toward his right side. Officer Sauskojus was concerned that Aune had a weapon and decided to frisk him. When Officer Sauskojus began to frisk Aune, he saw a clear plastic baggie with a ripped corner sticking out of the right front coin pocket of Aune's pants.[1] Based on his experience, Officer Sauskojus believed the baggie contained narcotics. Officer Sauskojus removed the baggie from Aune's pocket and saw that it contained a brown powder that resembled heroin. Aune admitted that the substance was heroin.

Aune was charged with third-degree sale and fifth-degree possession of a controlled substance. Aune moved to suppress evidence of the heroin. The district court denied the motion, and the parties submitted the case for a bench trial on stipulated facts

[1] Officer Sauskojus was not sure whether he had to lift Aune's shirt to see the baggie and which pocket he reached into first.

pursuant to Minn. R. Crim. P. 26.01, subd. 4.[2] The district court found Aune guilty on both counts and sentenced him to 36 months' imprisonment. This appeal follows.

D E C I S I O N

Aune challenges the denial of his suppression motion under the plain-view exception to the search-warrant requirement. When reviewing a pretrial order on a motion to suppress evidence, we independently review the facts to determine whether, as a matter of law, the district court erred by suppressing the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We review the district court's factual findings for clear error and its legal determinations de novo. *State v. Diede*, 795 N.W.2d 836, 849 (Minn. 2011).

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless searches and seizures are presumed unreasonable unless they fall within an exception to the warrant requirement. *Diede*, 795 N.W.2d at 846. Evidence seized in violation of the constitution must generally be suppressed. *State v. Jackson*, 742 N.W.2d 163, 177-78 (Minn. 2007).

The plain-view exception to the warrant requirement permits police to seize an object believed to be the fruit or instrumentality of a crime if "(1) [the] police are legitimately in the position from which they view the object; (2) they have a lawful right of access to the object; and (3) the object's incriminating nature is immediately

[2] The district court order states that the bench trial was conducted under Minn. R. Crim. P. 26.01, subd. 3, but the record indicates that the parties proceeded under Minn. R. Crim. P. 26.01, subd. 4. *See State v. Antrim*, 764 N.W.2d 67, 69 (Minn. App. 2009) (stating that Minn. R. Crim. P. 26.01, subd. 4, implements and supersedes the procedure authorized in *Lothenbach*).

apparent." *State v. Milton*, 821 N.W.2d 789, 799 (Minn. 2012) (alteration in original) (quotation omitted). An object's incriminating nature is immediately apparent when there is probable cause to believe that the object is contraband without conducting a further search of the object. *Id.* at 801. Probable cause exists "when the facts available to the officer would warrant a [person] of reasonable caution in the belief that certain items may be contraband . . . or useful as evidence of crime." *State v. Zanter*, 535 N.W.2d 624, 632 (Minn. 1995) (alteration in original) (quotations omitted).

Aune argues that the plain-view exception to the warrant requirement does not apply. We disagree. First, Officer Sauskojus was lawfully in the position from which he saw the baggie. Aune does not challenge the validity of the traffic stop or being asked to exit the vehicle, and the record demonstrates that Officer Sauskojus had reasonable grounds to believe Aune might be armed and dangerous. Officer Sauskojus was in a high-crime area, Aune told the officer a gun was in the glove compartment, and Aune reached toward his right side as he exited the vehicle.

A police officer may conduct a limited frisk for weapons of a lawfully stopped person when the officer has reasonable grounds to believe the person may be armed and dangerous. *State v. Payne*, 406 N.W.2d 511, 513 (Minn. 1987) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968)). On this record, we conclude that Officer Sauskojus had reasonable grounds to believe that he was in danger and the frisk search was warranted. *See State v. Flowers*, 734 N.W.2d 239, 253 (Minn. 2007) (considering a suspect's furtive movements when justifying a *Terry* search).

Second, Officer Sauskojus had lawful access to the plastic baggie. A corner of the baggie was sticking out of Aune's pants pocket, which the officer encountered as he began to frisk Aune. Police officers may confiscate contraband they discover while conducting a frisk search. *See In re Welfare of G.M.*, 560 N.W.2d 687, 692-93 (Minn. 1997).

Third, the incriminating nature of the baggie was immediately apparent. Officer Sauskojus smelled a strong odor of marijuana coming from inside the vehicle and knew, from his experience, that narcotics are often carried in plastic baggies. Based on his observation during the stop and his experience, we conclude that Officer Sauskojus had probable cause to believe the baggie contained narcotics. Accordingly, the plain-view exception to the warrant requirement applies.

This court reached the same conclusion under substantially similar circumstances in *State v. Lembke*, 509 N.W.2d 182, 184 (Minn. App. 1993). In *Lembke*, a police officer stopped the defendant's vehicle for speeding and saw a plastic bag sticking out of the pocket of the defendant's jacket. 509 N.W.2d at 183. Although the contents of the plastic bag were not visible, the officer testified, based on his training and experience, that similar bags are often used to carry marijuana. *Id.* This court concluded that the incriminating nature of the bag was immediately apparent based on the officer's testimony and the fact that a plastic bag found on a speeding driver late at night is more likely to contain marijuana than a legitimate substance. *Id.* at 184.

If anything, this case presents an even stronger basis for applying the plain-view exception to the warrant requirement. Although Aune was stopped in the afternoon,

Officer Sauskojus smelled marijuana inside Aune's vehicle and, while performing a valid frisk search, observed a plastic baggie that is often used to carry narcotics. On this record, we conclude that the plain-view exception applies and the district court did not err by denying Aune's suppression motion.

Affirmed.