STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0239

State of Minnesota,
Respondent,

vs.
Travis Patrick Carlson,
Appellant.

Filed December 31, 2012
Affirmed
Toussaint, Judge[*]

Ramsey County District Court
File No. 62-CR-10-8937

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

John Jung-Hoon Choi, Ramsey County Attorney, Thomas Rolf Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Cleary, Judge; and Toussaint, 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

TOUSSAINT, Judge

Appellant Travis Patrick Carlson challenges his conviction of fifth-degree possession of a controlled substance, arguing that the district court erred in denying his motion to suppress the evidence discovered during a police stop because the stop was not supported by a reasonable, articulable suspicion that appellant was engaged in criminal activity and, even if the initial stop was valid, it was not immediately apparent that the bag inside appellant's pocket contained contraband. Because the initial stop was valid and because the record supports the district court's finding that it was immediately apparent that the bag inside appellant's pocket contained contraband, we affirm.

D E C I S I O N

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A search conducted without a warrant is presumptively unreasonable. *State v. Othoudt*, 482 N.W.2d 218, 221-22 (Minn. 1992).

An exception to the warrant requirement permits a police officer to make a limited investigatory stop of an individual if the officer has "a reasonable, articulable suspicion that a suspect might be engaged in criminal activity." *State v. Flowers*, 734 N.W.2d 239, 250 (Minn. 2007) (quotation omitted); *see Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85 (1968). A determination of reasonable suspicion presents a mixed question of fact and law. *State v. Lee*, 585 N.W.2d 378, 382-83 (Minn. 1998). This court reviews de novo a district court's legal determination of reasonable suspicion of unlawful activity to

justify a limited investigatory stop. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). But the factual findings underlying the legal determination are reviewed for clear error. *Lee*, 585 N.W.2d at 383; *see also State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (providing for de novo review of district court's decision on motion to suppress evidence based on undisputed facts).

A police officer may briefly stop a person for questioning if the officer "observes unusual conduct that leads the officer to reasonably conclude in light of his or her experience that criminal activity may be afoot." *In re Welfare of G.M.*, 560 N.W.2d 687, 691 (Minn. 1997). A reasonable suspicion must have some objective basis, including "specific and articulable facts which, taken together with some rational inferences from those facts, reasonably warrant the intrusion." *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (quotation omitted). "[W]hen circumstances exist to create an objectively reasonable concern for officer safety, the officer engaged in a valid stop may also conduct a brief pat-down search for weapons." *State v. Yang*, 814 N.W.2d 716, 718 (Minn. App. 2012). An officer may make inferences and suppositions that "might elude an untrained person." *State v. Syhavong*, 661 N.W.2d 278, 282 (Minn. App. 2003).

Three St. Paul police officers responded to a call from a gas station manager about suspicious people in the parking lot. The car's driver had not prepaid for gas, so the manager attempted to write down the car's license number but was unable to do so because someone, later identified as appellant Travis Carlson, was standing behind the car and blocking the manager's view. When the manager asked appellant to move, he

refused to do so. When police arrived, the car's driver admitted that he had intended to drive off without paying for gas.

Appellant argues that mere proximity to, or association with, a person who is suspected of criminal activity is insufficient to support a reasonable suspicion that the other person is also engaged in criminal activity. *State v. Ortega*, 770 N.W.2d 145, 150 (Minn. 2009). Appellant cites *State v. Eggersgluess*, in which this court concluded that a pat-down search was not justified when the officer's suspicion of the defendant was "derived solely from his observation of the conduct of others." 483 N.W.2d 94, 97 (Minn. App. 1992). Here, the officers' suspicion of appellant derived from his independent act of blocking the view of the car's license plate even after the manager asked him to move. Although blocking the view of the plate was not criminal in itself, appellant's act aided the driver in an intended criminal act—theft of gas. Also, an officer saw appellant reach toward his front pants pocket several times and put his hands into his pocket repeatedly, an activity that the officer testified is consistent with a person concealing a weapon. Appellant's actions were sufficient to give rise to a reasonable, articulable suspicion of criminal activity and justified the limited investigatory stop and a brief pat-down search.

Further, appellant claims that the district court erred in finding that appellant was a passenger in the car. Although the evidence at the *Rasmussen* hearing did not show that appellant was a passenger in the car, such a finding was irrelevant to the determination of a reasonable, articulable suspicion of criminal activity. Any error is therefore harmless and not a basis for reversal. Minn. R. Crim. P. 31.01.

Appellant next challenges the legality of the scope of the pat-down search. The United States and Minnesota Constitutions contain a plain-feel exception to the warrant requirement. *Minnesota v. Dickerson*, 508 U.S. 366, 375 113 S. Ct. 2130, 2137 (1993) (*Dickerson II*); *State v. Burton*, 556 N.W.2d 600, 603 (Minn. App. 1996), *review denied* (Minn. Feb. 26, 1997). Under that exception,

> [i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view doctrine.

Dickerson II, 508 U.S. at 375, 13 S. Ct. at 2137. The phrase "immediately apparent" does not mean that an officer must be certain about the object's identity; rather, an officer must "have probable cause to believe that the item is contraband before seizing it." *State v. Krenik*, 774 N.W.2d 178, 185 (Minn. App. 2009) (upholding seizure of glass pipe when officer testified that, when patting down outside of defendant's pocket, she "could feel a smoking glass tube" that she recognized as contraband, although she admitted that she could not be certain that the object was a glass pipe) (quoting *Dickerson II*, 508 U.S. at 375-76, 113 S. Ct. at 2137), *review denied* (Minn. Oct. 27, 2009).

Citing *State v. Dickerson*, appellant argues that the small amount of methamphetamine, .11 grams, in his pocket was consistent with the size of a legal substance, such as, a sugar packet. 481 N.W.2d 840, 843 (Minn. 1992) (*Dickerson I*), *aff'd* by *Dickerson II*. In *Dickerson II*, the seizure of .2 grams of cocaine from the

defendant's pocket was held to be unconstitutional. 508 U.S. at 370, 113 S. Ct. at 2134-35. In *Dickerson II*,

> [t]he Minnesota Supreme Court, after a close examination of the record, held that the officer's own testimony belie[d] any notion that he immediately recognized the lump as crack cocaine. Rather, the court concluded, the officer determined that the lump was contraband only after squeezing, sliding and otherwise manipulating the contents of the defendant's pocket — a pocket which the officer already knew contained no weapon.

Id. at 378, 113 S. Ct. at 2138 (quotation omitted).

Here, St. Paul Police Officer Thor Johnson denied manipulating the methamphetamine before removing it from appellant's pocket. He testified that he felt a granular substance when patting appellant's pocket that was consistent with a controlled substance. Officer Johnson also testified:

> Q: What was the reason that you pulled this item out of his pocket?
> A: To verify what I felt was drugs, was drugs.
> Q: In your experience in nine years as a police officer have you come across drugs?
> A: Yes, I have numerous times.
> Q: What kinds of drugs have you come across?
> A: Heroin, Crack Cocaine, Methamphetamines, and marijuana.
> Q: And have you felt them in your hands before?
> A: Yes, I have.
> Q: What you felt on this day was it consistent with your experience as potentially a controlled substance?
> A: Yes, it was.

The district court found, that "Officer Johnson felt an object that was immediately apparent to him to be contraband, that is to say, he had probable cause to believe that the

object was contraband under all the facts and circumstances inherent or present in this case."

It is the district court's role to make credibility determinations. *State v. Smith*, 448 N.W.2d 550, 555 (Minn. App. 1989), *review denied* (Minn. Dec. 29, 1989). This court defers to the district court's credibility determinations. *State v. Doren*, 654 N.W.2d 137, 141 (Minn. App. 2002), *review denied* (Minn. Feb. 26, 2003). It was within the district court's discretion to credit Officer Johnson's testimony, and we defer to that credibility determination. The district court did not err in denying appellant's motion to suppress the methamphetamine.

Affirmed.