STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0146

State of Minnesota,
Respondent,

vs.

Gregory Wayne Larson,
Appellant.

Filed November 18, 2008
Affirmed
Larkin, Judge

Aitkin County District Court
File No. K6-04-4

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 445 Minnesota Street, Bremer Tower, Suite 1800, St. Paul, MN 55101; and

Jim Ratz, Aitkin County Attorney, Aitkin County Courthouse, 217 Second Street NW, Aitkin, MN 56431 (for respondent)

Craig E. Cascarano, 150 South Fifth Street, Suite 3260, Minneapolis, MN 55402; and

Joel Fink (of counsel), 9112 Minnehaha Court, St. Louis Park, MN 55426 (for appellant)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges his conviction of first-degree controlled-substance crime (attempted manufacture) and the district court's denial of his motion to suppress evidence recovered during a search of appellant and his vehicle. Appellant argues that the search was unconstitutional. Because the search was proper under exceptions to the warrant requirement, we affirm.

FACTS

On January 4, 2004, at approximately 1:15 a.m., Deputy John Novotny observed a vehicle that did not appear to have current registration tags. Deputy Novotny called dispatch and learned that the vehicle's registration was valid until April 2004. As Deputy Novotny called dispatch, the vehicle turned right toward a residence and pulled over outside of the residence. The driver, appellant Gregory Wayne Larson, exited the vehicle as Deputy Novotny pulled in behind it. The deputy did not turn on his overhead lights or siren. He approached the vehicle and spoke to appellant. He noticed that one of the passengers appeared to be Kimberly Kath. Deputy Novotny knew that there was an active warrant for Kath's arrest. Deputy Novotny informed appellant that he was talking to him because of appellant's registration tags, at which time appellant walked to the back of the vehicle and knocked some snow off of the bumper to reveal the current registration tags.

As Deputy Novotny and appellant spoke, Leone Thoms exited the back seat of appellant's vehicle and approached Deputy Novotny. Then, the front seat passenger and

the person Deputy Novotny believed to be Kath exited the vehicle and walked quickly toward the residence. Deputy Novotny pursued them and apprehended Kath at the front door of the residence. The front seat passenger, later identified as Elizabeth Towle, went into the residence. Deputy Novotny arrested Kath, placed her in the back of his squad car, ensured that the pass-through window between the front and back seat was closed, and locked the doors of his squad car.

Deputy Novotny then went to appellant's vehicle to search the vehicle incident to Kath's arrest. Thoms was standing between the squad car and the vehicle, and Deputy Novotny asked appellant to stand next to her. As Deputy Novotny opened the back passenger door, appellant approached the deputy and objected to the search. Deputy Novotny informed appellant that he had arrested Kath and that he was going to search the vehicle. Deputy Novotny looked under the seat where Kath had been seated and saw a yellow butane torch. Appellant again approached Deputy Novotny and protested the search. Deputy Novotny believed that appellant was trying to distract him. Deputy Novotny continued his search and noticed a plastic glass in the front passenger cup holder that contained a brown liquid. Deputy Novotny seized the glass and noted that the liquid smelled like an alcoholic beverage. Appellant again stood right next to Deputy Novotny and refused to follow the deputy's directions to stand away from him.

Throughout the vehicle search, Thoms repeatedly told Deputy Novotny that she needed to use the bathroom. Deputy Novotny decided to allow Thoms to use the bathroom inside the residence. The deputy determined that he, Thoms, and appellant would go inside together so Deputy Novotny could keep track of them.

Within a minute of entering the residence, Deputy Drahota arrived and asked Deputy Novotny where Kath had gone because she was not in the squad car. Deputy Novotny exited the residence and discovered that Kath had escaped from his squad car. Deputy Novotny believed that someone must have assisted Kath in her escape. Deputy Novotny placed Thoms in the back of his squad car. Deputy Novotny asked Deputy Drahota to place appellant in the back of his squad car for questioning regarding Kath's escape. Deputy Drahota walked appellant to his squad car and pat frisked appellant based on officer-safety concerns. During the pat frisk, Deputy Drahota felt a long, hard object in appellant's front shirt pocket. Appellant's pocket was open, and Deputy Drahota could see that the object was a glass pipe. Deputy Drahota seized the pipe and noticed that it contained a white residue. Deputy Novotny informed appellant that he was under arrest for possession of methamphetamine and returned to appellant's vehicle to search it. Deputy Novotny found evidence of methamphetamine production in appellant's vehicle.

Appellant was charged with one count of first-degree controlled-substance crime pursuant to Minn. Stat. § 152.021, subd. 2a(a) (2002 & Supp. 2003) and one count of fifth-degree controlled-substance crime pursuant to Minn. Stat. § 152.025, subd. 2(1) (2002), based on the evidence of methamphetamine possession and production found during the search of appellant and his vehicle.[1] Appellant moved the district court to

[1] The state later amended the complaint to include a count of attempted first-degree controlled-substance crime pursuant to Minn. Stat. §§ 152.021, subd. 2a(a), and 609.17, subd. 1 (2002).

suppress this evidence at an omnibus hearing. At the hearing, appellant and the state agreed to submit the suppression issues to the court on a stipulated record.

After briefing by the parties, the district court issued an order denying appellant's motion to suppress based on the conclusions that law-enforcement officers (1) did not impermissibly expand the scope of appellant's investigative seizure, (2) were justified in conducting a limited pat frisk of appellant, and (3) permissibly searched appellant's vehicle without a warrant pursuant to the search-incident-to-arrest exception to the warrant requirement. Appellant challenges each of these conclusions on appeal.

D E C I S I O N

"When reviewing pretrial orders on motions to suppress evidence, we 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). We review the district court's findings of fact under a clearly erroneous standard, but legal determinations are reviewed de novo. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006).

Appellant's Investigative Seizure

We first address whether the district court erred in concluding that the scope of appellant's seizure was not impermissibly expanded. Both the United States and Minnesota Constitutions prohibit unreasonable search and seizure by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A police officer may initiate a limited investigative stop if the officer has reasonable, articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883 (1968); *State v. Waddell*, 655 N.W.2d

803, 809 (Minn. 2003); *see also State v. Pike*, 551 N.W.2d 919, 921-22 (Minn. 1996) (noting that an investigative stop is lawful if the state can show that the officer had a "particularized and objective basis" for suspecting criminal activity). Whether police have reasonable suspicion to conduct an investigatory stop depends on the totality of the circumstances, and a stop is not justified if it is "the product of mere whim, caprice, or idle curiosity." *In re Welfare of M.D.R.*, 693 N.W.2d 444, 448 (Minn. App. 2005) (quotation omitted), *review denied* (Minn. June 28, 2005).

Appellant challenged the basis for his initial seizure for the first time at oral argument on appeal. Even though appellant did not raise this claim below, this court will address appellant's argument in the interest of thorough review. "[I]t is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities." *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (quotation omitted). Further, it is possible for us to evaluate this argument on facts already present in the record. *See Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 523 (Minn. 2007) (examining a witness credibility claim under a sufficiency-of-the-evidence standard as properly before the court on review, even though appellant did not assign any error to the district court's consideration of the issue below, in part because it was possible to consider the argument on facts already presented).

Minnesota cases "do not require much of a showing in order to justify a traffic stop." *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997). Ordinarily, if an officer observes a violation of a traffic law, however insignificant, the officer has a

particularized and objective basis for stopping the vehicle. *See, e.g.*, *State v. Barber*, 308 Minn. 204, 204-07, 241 N.W.2d 476, 476-77 (1976) (upholding a stop based on an officer's observation that a license plate was wired rather than bolted to a vehicle).

Appellant argues that because Deputy Novotny had verified that appellant's vehicle registration was valid before he stopped the vehicle, appellant's initial seizure was not justified by reasonable, articulable suspicion. We disagree. Even though Deputy Novotny knew that the vehicle registration was valid, appellant's seizure was nonetheless justified because the registration tags on appellant's license plates were obscured by snow, and Deputy Novotny suspected a violation of Minn. Stat. § 169.79, subd. 1 (2002) (prohibiting obstructed plates). This suspicion provided a particularized and objective basis for stopping appellant. Thus, even if appellant had properly challenged his initial seizure on appeal, the challenge is without merit.

Appellant next argues that Deputy Novotny impermissibly expanded the scope of appellant's initial seizure. "[T]he scope and duration of a traffic stop investigation must be limited to the justification for the stop." *State v. Fort*, 660 N.W.2d 415, 418 (Minn. 2003). Expansion of the scope or duration of an investigative stop is only proper where the officers have a reasonable, articulable suspicion of other criminal activity. *Id.* at 419 (citing *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002)).

Appellant's initial investigative stop was based on a suspected traffic violation. Deputy Novotny arrested a passenger in appellant's vehicle during the traffic stop and

searched the vehicle incident to the passenger's arrest.[2] *See State v. White*, 489 N.W.2d 792, 794 (Minn. 1992) (explaining that an officer may search the passenger compartment of an automobile incident to the lawful arrest of a passenger). The vehicle search revealed an open container of alcohol, which provided reasonable, articulable suspicion of other criminal activity that justified the expansion of appellant's seizure. Minn. Stat. § 169A.35, subd. 3 (2002) (prohibiting possession of any bottle or receptacle containing an alcoholic beverage, distilled spirit, or 3.2 percent malt liquor that has been opened in a private motor vehicle). Upon discovery of the open container of alcohol, Deputy Novotny had a basis to search appellant's vehicle for other open containers of alcohol. *State v. Lopez*, 631 N.W.2d 810, 814-15 (Minn. App. 2001) (noting that vehicle owner's response that there was an alcoholic beverage in the car combined with the odor of alcohol provided probable cause to search the vehicle), *review denied* (Minn. Sept. 25, 2001). It was reasonable for Deputy Novotny to continue appellant's investigative seizure while he searched appellant's vehicle. *State v. Munson*, 594 N.W.2d 128, 137-38 (Minn. 1999) (holding that the detention of a vehicle's occupant during a search of the vehicle was reasonable, noting that the detention of a person stopped may continue as long as reasonably necessary to effectuate the purpose of the stop).

Appellant argues that Deputy Novotny completed his search of appellant's vehicle before the parties went inside the residence to use the bathroom. Appellant asserts that all suspicions of criminal activity were "dispelled and alleviated" at this point and that his

[2] As discussed in the last section of this opinion, the search of appellant's vehicle was permissible under exceptions to the warrant requirement.

continued seizure was no longer justified. The district court considered and rejected this argument. The district court found that the vehicle search was merely interrupted, not completed, when the parties went inside the residence. The district court's finding is not clearly erroneous. The facts indicate that the search was interrupted by both appellant and Thoms's conduct and by Deputy Novotny's decision to allow Thoms to go inside the residence to use the bathroom. The search continued shortly after the parties' exited the residence. Because the search was not complete it was reasonable to continue appellant's seizure.

Kath's subsequent escape from Deputy Novotny's squad car provided additional reasonable, articulable suspicion of other criminal activity that justified further expansion of appellant's seizure. *See* Minn. Stat. § 609.485, subd. 2(1) (2002) (outlining as a crime a person's escape "while held pursuant to a lawful arrest, in lawful custody on a charge or conviction of a crime"). Because Deputy Novotny believed that Kath had escaped from a locked squad car, it was reasonable for Deputy Novotny to suspect that appellant may have directly or indirectly assisted Kath. The deputy therefore had a basis to continue appellant's seizure for the purpose of investigating appellant's possible involvement in Kath's escape.

In summary, appellant's initial investigative seizure was justified by the suspected traffic violation. During the traffic stop, reasonable, articulable suspicion of other criminal activity developed that justified the expansion of appellant's seizure. The district court did not err in concluding that law-enforcement officers permissibly expanded the scope of appellant's investigative seizure.

Appellant's Pat Frisk

We next address whether the district court erred in finding that Deputy Drahota was justified in conducting a pat frisk of appellant for weapons and that the seizure of the glass pipe was lawful. Warrantless searches are per se unreasonable, subject to limited exceptions. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992) (citing *Katz v. U.S.*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)). A police officer may conduct a limited pat frisk of a seized person for weapons on less than probable cause if he can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *State v. Gilchrist*, 299 N.W.2d 913, 916 (Minn. 1980) (quoting *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880). Police officers can "stop and frisk a person when (1) they have a reasonable, articulable suspicion that a suspect might be engaged in criminal activity and (2) the officer reasonably believes the suspect might be armed and dangerous." *State v. Flowers*, 734 N.W.2d 239, 250 (Minn. 2007) (quoting *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd*, 508 U.S. 366, 113 S. Ct. 2130 (1993)). The officer need not be absolutely certain that the individual is armed; rather, the issue is whether a reasonably prudent officer in the circumstances would be justified in believing that his safety or that of others was in jeopardy. *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883; *see also Adams v. Williams*, 407 U.S. 143, 145-46, 92 S. Ct. 1921, 1923 (1972) ("The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence."). Courts consider the specific reasonable inferences an officer is entitled to draw from the facts in light of his or her experience when determining whether an officer acted

reasonably. *State v. Crook*, 485 N.W.2d 726, 729 (Minn. App. 1992), *review denied* (Minn. Aug. 4, 1992). The paramount justification for conducting a pat frisk is officer safety. *Terry*, 392 U.S. at 26, 88 S. Ct. at 1882.

Appellant argues that Deputy Drahota conducted an unlawful pat frisk because there was no evidence that appellant was armed, dangerous, or posed a threat to the officers. Appellant further notes that Deputy Drahota failed to identify any specific reason for the pat frisk and instead cited officer-safety concerns generally. Appellant argues that such a basis, without more, is insufficient to justify a frisk.

A limited protective frisk of appellant was justified under the circumstances. A number of facts support this conclusion. First, it was early in the morning and there were only two officers present at the time of the pat frisk. Second, one of the passengers in appellant's car had an active warrant for her arrest, had escaped from a locked squad car just moments before the pat frisk, and her whereabouts were unknown. Third, the deputies suspected that appellant and others may have aided the prisoner's escape. Fourth, Deputy Novotny reasonably believed that appellant had tried to distract him during the vehicle search by continually interrupting and by failing to follow directions to stand back. Finally, Deputy Novotny had discovered an open container of alcohol and a butane torch in appellant's vehicle. These facts reasonably imply that appellant might have been involved in more dangerous criminal activity and might present a threat to the officers' safety. The district court did not err in concluding that law-enforcement officials were justified in conducting a pat frisk of appellant.

Appellant's Vehicle Search

Finally, we address whether the district court erred in finding that the search of appellant's vehicle was valid under the search-incident-to-arrest exception to the warrant requirement. Warrantless searches are per se unreasonable, subject to limited exceptions. *Othoudt*, 482 N.W.2d at 222 (citing *Katz*, 389 U.S. at 357, 88 S. Ct. at 514). The state bears the burden of establishing the existence of an exception to the warrant requirement. *State v. Ture*, 632 N.W.2d 621, 627 (Minn. 2001); *see State v. Fitzgerald*, 562 N.W.2d 288, 288 (Minn. 1997). One of the exceptions to the warrant requirement is a search incident to arrest. *New York v. Belton*, 453 U.S. 454, 457, 101 S. Ct. 2860, 2862 (1981). "[W]hen a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous incident of the arrest, search the passenger compartment of the car and any containers found within the passenger compartment." *White*, 489 N.W.2d at 794. This exception to the warrant requirement applies only when an officer makes a lawful arrest. *State v. Bauman*, 586 N.W.2d 416, 419 (Minn. App. 1998), *review denied* (Minn. Jan. 27, 1999).

Appellant argues that the district court erred when it failed to invalidate the vehicle search on constitutional grounds. Appellant's theory hinges on the following propositions: (1) that the initial search of appellant's vehicle was completed rather than interrupted when the parties entered the residence to use the bathroom, and (2) that appellant's pat frisk and subsequent arrest were unlawful. But we have determined that the initial search of appellant's vehicle was merely interrupted, not completed, and that appellant's pat frisk and subsequent arrest were lawful.

Deputy Novotny lawfully arrested Kath pursuant to an active warrant and lawfully arrested appellant based upon probable cause to believe he possessed methamphetamine. Deputy Novotny was authorized to search appellant's vehicle without a warrant incident to both arrests. The district court properly concluded that the warrantless search of appellant's vehicle was permissible as a search incident to the arrests of Kath and appellant. Having reached this conclusion, the district court did not address whether the search was valid under the automobile exception to the warrant requirement. However, both appellant and respondent addressed the automobile exception in their briefs. Because the automobile exception to the warrant requirement clearly applies to the facts of this case, we address it here.

"An officer may search a vehicle [without a warrant] under the automobile exception to the Fourth Amendment if that officer has probable cause to believe the search will produce evidence of a crime." *Lopez*, 631 N.W.2d at 814 (citation and quotations omitted). Courts have held that the mere detection of an alcoholic odor emanating from a vehicle provides probable cause for the officer to search "anywhere in the passenger compartment where [ ] open bottles or cans might be found." *State v. Schuette*, 423 N.W.2d 104, 106 (Minn. App. 1988) (quoting *State v. Schinzing*, 342 N.W.2d 105, 109 (Minn. 1983)). Probable cause for such a search does not expire after seizure of an open bottle. *State v. Collard*, 414 N.W.2d 733, 736 (Minn. App. 1987), *review denied* (Minn. Jan. 15, 1988). Rather, after an officer observes such evidence in plain view, a warrantless search of the remainder of the passenger compartment is justified. *Id.* at 736 (citation omitted).

Deputy Novotny found a glass containing what appeared to be an alcoholic beverage during his search of appellant's vehicle incident to Kath's arrest. Discovery of the open container of alcohol provided probable cause to search the passenger compartment of appellant's vehicle for additional open bottles or cans under the automobile exception to the warrant requirement. *Schuette*, 423 N.W.2d at 106. The search of the passenger compartment of appellant's vehicle was therefore justified under the automobile exception.

Affirmed.

Dated: _____

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The Honorable Michelle A. Larkin