STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1332

State of Minnesota,
Respondent,

vs.

Mark Charles Oberg,
Appellant.

Filed October 7, 2008
Affirmed
Johnson, Judge

Meeker County District Court
File No. 47-CR-06-1719

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Stephanie Beckman, Meeker County Attorney, Meeker County Courthouse, 325 Sibley Avenue North, Litchfield, MN 55355-2155 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Marie Wolf, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Harten, 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

JOHNSON, Judge

Law enforcement officers stopped Mark Charles Oberg's car after receiving reports that occupants of the car might possess drugs and a gun. Two officers had their weapons drawn as they ordered the four occupants from the car individually, handcuffed them, and ordered them to sit on the pavement during the procedure. The officers found methamphetamine on one person while frisking her. On appeal from his conviction of first-degree conspiracy to sell a controlled substance, Oberg challenges the district court's denial of his motion to suppress evidence on the grounds that the investigatory stop was not supported by reasonable, articulable suspicion and that the officers conducted the stop in an unreasonable manner. We affirm.

FACTS

On December 11, 2006, Brenda Munsinger called the Meeker County Sheriff's Office to report that her son, Andrew Munsinger, had told her friend that someone had a gun to his head. She also told Deputy Donald Schmidt that Andrew Munsinger might be high on methamphetamine and in possession of methamphetamine. She told Deputy Schmidt that she thought Andrew Munsinger might be at an apartment in the city of Cosmos. Deputy Schmidt went to the apartment in an attempt to find Andrew Munsinger.

Upon arriving at the door to the apartment, Deputy Schmidt spoke with C.L., who was leaving the apartment. C.L. told Deputy Schmidt that Andrew Munsinger had been at the apartment but had left a short time earlier in a white, boxy-looking Chrysler car

that was headed to the city of Hutchinson for the purpose of purchasing drugs. Deputy Schmidt walked through the apartment to determine if Andrew Munsinger was there, but he was not.

The sheriff's office then received a call from W.S., a resident of rural Meeker County, who reported that a vehicle was "spinning cookies" or "doing doughnuts" in her yard (i.e., was driving in tight circles, with wheels spinning on a slippery surface). It appears from the record that there was new snowfall on the ground that afternoon. Deputy Schmidt spoke with W.S., who described the car as white and boxy and reported that there were three or four people in the vehicle.

At that time, Deputy Schmidt was about half a mile from W.S.'s residence. Deputy Schmidt spotted a white, boxy vehicle shortly thereafter, and he initiated an investigatory stop. After the vehicle pulled over to the side of the road, Deputy Schmidt noticed furtive movements within the vehicle, so he did not immediately approach. He soon received backup assistance from state trooper Eric Mathwig. When Trooper Mathwig arrived, he and Deputy Schmidt decided to conduct a "felony stop" due to the furtive movements and the report of a gun.

The officers first ordered Oberg to get out of the vehicle. The officers ordered him to put his hands in the air and to walk backward toward the officers. The officers then handcuffed and frisked him but found no weapons. The officers ordered him to sit against the rear bumper of one of the squad cars.

The officers then ordered Andrew Munsinger to get out of the vehicle in the same manner, and he also was handcuffed and frisked. The officers followed the same

procedure for a third passenger, Nicole King. The officers did not find a weapon on either Andrew Munsinger or King.

The officers then ordered the final passenger, Cassandra Walker, to get out of the vehicle in the same manner. While frisking her, Deputy Schmidt noticed that she was guarding something in the area of her abdomen. Deputy Schmidt found a shaving kit tucked inside the front of her pants that was large enough to contain a weapon. Deputy Schmidt removed it, opened it, and found a substance that he believed to be methamphetamine. The officers then searched Oberg's car and found drug paraphernalia. All four occupants of the car were arrested. In his statement to the police, Oberg admitted that the group had purchased the methamphetamine that was found on Walker and, at the time they were stopped, was planning to sell it.

Oberg was charged with first-degree possession of a controlled substance in violation of Minn. Stat. § 152.021, subd. 2(1) (2006); first-degree intent to sell a controlled substance in violation of Minn. Stat. § 152.021, subd. 1(1) (2006); and first-degree conspiracy to sell a controlled substance in violation of Minn. Stat. § 152.096, subd. 1. Oberg and his co-defendants moved to suppress the evidence that was obtained as a result of the investigative stop. After a joint omnibus hearing, the district court denied each defendant's motion to suppress.

Oberg was tried on stipulated facts pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). The district court found him guilty of first-degree conspiracy to sell a controlled substance. Pursuant to an agreement, the state dismissed the other two counts.

The district court sentenced Oberg to 158 months of imprisonment. Oberg appeals, challenging only the district court's denial of his pretrial motion to suppress.

D E C I S I O N

"[A] two-step inquiry is appropriate when evaluating the reasonableness of a traffic stop. First, was the stop justified at its inception? Second, were the actions of the police reasonably related to and justified by the circumstances that gave rise to the stop in the first place?" *State v. Flowers*, 734 N.W.2d 239, 251 (Minn. 2007) (citing *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004)). In this case, Oberg challenges the investigatory stop at each step. First, he argues that Deputy Schmidt's decision to stop his vehicle was not justified by a reasonable, articulable suspicion. Second, he argues that, even if Deputy Schmidt was permitted to conduct a stop, the methods used to effectuate the stop--a so-called "felony stop" with weapons drawn--were unreasonable. "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).

A. Justification for Investigatory Stop

Both the United States Constitution and the Minnesota Constitution protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. This constitutional protection applies to investigatory stops of motor vehicles. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). Thus, a police officer "'may, consistent with the Fourth Amendment, 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) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 675 (2000)); *see also Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85 (1968). Reasonable suspicion requires "something more than an unarticulated hunch." *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (quotation omitted). Rather, "the officer must be able to point to something that objectively supports the suspicion at issue." *Id.* An objective standard is applied to determine whether an investigatory stop is supported by a reasonable, articulable suspicion. *State v. Pleas*, 329 N.W.2d 329, 332 (Minn. 1983).

The evidentiary record contains several significant pieces of information that collectively provided an objective basis for a reasonable suspicion of criminal activity so as to justify Deputy Schmidt's investigatory stop of Oberg's vehicle. First, Brenda Munsinger had reported that someone possessed a gun and might be using it to threaten her son. Second, she reported that her son might be high on methamphetamine and might be in possession of methamphetamine. Third, C.L. informed Deputy Schmidt that Andrew Munsinger had just left an apartment in Cosmos and was traveling to Hutchinson in a vehicle like Oberg's for the purpose of purchasing drugs. Fourth, W.S. reported that Oberg's vehicle was driving in an unlawful manner on her private property. The information provided by Brenda Munsinger, C.L., and W.S. is presumed to be reliable because each was a citizen informant who identified himself or herself. *See Davis*, 732 N.W.2d at 182-83; *Rose v. Commissioner of Pub. Safety*, 637 N.W.2d 326, 328 (Minn. App. 2001), *review denied* (Minn. Mar. 19, 2002). The district court properly concluded

that these facts provided justification for Deputy Schmidt's decision to conduct an investigatory stop of Oberg's car.

Oberg contends that the stop was improper because it was merely a "welfare check" on Andrew Munsinger. Oberg cites an unpublished decision of this court, which is not binding authority. *See* Minn. Stat. § 480A.08, subd. 3(c) (2006); *Vlahos v. R & I Constr., Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004). Regardless, Oberg's argument is inconsistent with caselaw holding that, even in the absence of a reasonable suspicion of criminal activity, an officer may investigate a report of distress by stopping or making contact with a person, if the officer is "motivated by the need to render aid or assistance" and the circumstances justify the officer's intervention. *State v. Lopez*, 698 N.W.2d 18, 23 (Minn. App. 2005) (citing cases). But in this case, as stated above, Deputy Schmidt had several reasons to suspect that criminal activity was afoot. Thus, Oberg is incorrect in stating that Deputy Schmidt's stop was unreasonable because it was a welfare check.

Oberg also contends that the stop was not justified by the report that his car was "doing doughnuts" in W.S.'s yard because, at most, that action was misdemeanor reckless driving. Oberg is incorrect. In *Yoraway v. Commissioner of Pub. Safety*, 669 N.W.2d 622 (Minn. App. 2003), this court upheld the validity of a traffic stop based on a private citizen's report that a person was driving a vehicle erratically. *Id*. at 626-27. As this court stated, "A reliable informant's factually specific report of unlawful driving will alone justify a stop." *Id*. at 626 (citing *Olson v. Commissioner of Pub. Safety*, 371 N.W.2d 552, 555 (Minn. 1985)). Furthermore, W.S.'s report was neither the initial reason nor the primary reason for Deputy Schmidt's pursuit of Oberg's car. The reports

of drugs and guns provided sufficient bases for the stop without consideration of W.S.'s report of erratic driving.

Thus, Deputy Schmidt had a reasonable, articulable suspicion that criminal activity was afoot and, accordingly, was justified in initiating an investigatory stop of Oberg's car.

B. Manner of Executing Investigatory Stop

As stated above, Oberg argues that, even if Deputy Schmidt was permitted to conduct an investigatory stop, the methods used by law enforcement officers to effectuate the stop were unreasonable. More specifically, Oberg challenges the fact that the officers ordered him and his passengers out of the car with weapons drawn; that all occupants were frisked, handcuffed, and briefly detained; and that the occupants were forced to sit on the ground while the procedure was underway.

To reiterate, the United States Constitution and the Minnesota Constitution protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. This protection applies to investigatory stops of motor vehicles. *Britton*, 604 N.W.2d at 87. In *Askerooth*, the supreme court "adopt[ed] the principles and framework of *Terry* for evaluating the reasonableness of seizures during traffic stops even when a minor law has been violated." 681 N.W.2d. at 363. Three years later, the supreme court applied the same type of *Terry* analysis when analyzing an appellant's argument that law enforcement officers employed unreasonable procedures in effectuating an investigatory stop of a vehicle. *Flowers*, 734 N.W.2d at 258.

"An initially valid stop may become invalid if it becomes 'intolerable' in its 'intensity or scope.'" *Askerooth*, 681 N.W.2d at 364 (quoting *Terry*, 392 U.S. at 17-18, 88 S. Ct. at 1878). The reasonableness of an investigative stop is determined "by an objective and fair balancing of the government's need to search or seize and the individual's right to personal security free from arbitrary interference by law officers." *Flowers*, 734 N.W.2d at 252 (quoting *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005). More specifically,

> when determining whether the police have exceeded the permissible scope of a *Terry* stop, courts should consider a number of factors, including:
>
> > (1) the number of officers and police cars involved; (2) the nature of the crime and whether there is reason to believe the suspect might be armed; (3) the strength of the officers' articulable, objective suspicions; (4) the erratic behavior of or suspicious movements by the persons under observation; and (5) the need for immediate action by the officers and lack of opportunity for them to have made the stop in less threatening circumstances.

Id. at 253 (quoting *United States v. Raino*, 980 F.2d 1148, 1149-50 (8th Cir. 1992)).

Applied to this case, the five-factor *Flowers* test leads to the conclusion that the officers did not exceed the permissible scope of the investigative stop. First, the officers were outnumbered by the occupants of Oberg's vehicle, four to two. The stop occurred on a rural road. To ensure that the stop unfolded with minimal danger, the officers were justified in ordering the occupants out of the car one by one and handcuffing them until the purpose of the investigatory stop was accomplished.

Second, Deputy Schmidt had specific information that someone in the car might be armed. In addition, the officers had information suggesting that one or more occupants of the car might have committed felony offenses--assault with a firearm and various drug-related offenses.

Third, the reasonable suspicion possessed by Deputy Schmidt was strong. He had spoken directly with Brenda Munsinger, who provided him with specific information that she had received from her friend, who had spoken directly to Andrew Munsinger. Deputy Schmidt also had spoken directly with C.L. outside the apartment in Cosmos shortly after C.L. had personally observed Andrew Munsinger, and C.L. gave Deputy Schmidt information about the purpose of Munsinger's travels to Hutchinson. Deputy Schmidt also had spoken directly with W.S. about Oberg's erratic driving on her property.

Fourth, Deputy Schmidt observed furtive movements by the occupants of Oberg's car after the car had stopped. Deputy Schmidt testified that those movements, combined with the report of a gun, led him to decide to not approach the car but instead to conduct a felony stop because of his concern that one or more individuals in the car might be armed.

Fifth, Deputy Schmidt reasonably perceived a need to take immediate action in light of the report from Brenda Munsinger that a person had threatened her son with a gun. In addition, Deputy Schmidt had information that the car was traveling to Hutchinson to conduct a drug deal, which could have caused a dangerous situation if an occupant of the car had been armed. Deputy Schmidt had no readily available alternative

that would have allowed Deputy Schmidt to stop Oberg's car "in less threatening circumstances." *Id.* at 253 (quoting *Raino*, 980 F.2d at 1150).

Thus, each of the five factors articulated by *Flowers* supports a conclusion that the officers did not exceed the permissible scope of a *Terry* stop. This conclusion is consistent with the caselaw. The supreme court has recognized that "'[i]f an officer making a reasonable investigatory stop has cause to believe that the individual is armed, he is justified in proceeding cautiously with weapons ready.'" *State v. Munson*, 594 N.W.2d 128, 137 (Minn. 1999) (quoting *State v. O'Neill*, 299 Minn. 60, 68, 216 N.W.2d 822, 828 (1974)). In addition, an officer may handcuff a suspect briefly while sorting out a scene without transforming the investigatory stop into an arrest. *State v. Walsh*, 495 N.W.2d 602, 605 (Minn. 1993). Furthermore, an officer may frisk a person for weapons if the officer is justified in believing that the suspect is armed and dangerous. *In re Welfare of G.M.*, 560 N.W.2d 687, 692 (Minn. 1997); *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd*, 508 U.S. 366, 113 S. Ct. 2130 (1993). Moreover, if there is reason to believe that a suspect might be armed, an officer may briefly detain the suspect in a place that will ensure the officer's safety, such as by requiring the person to sit or lie on the ground, *State v. Nading*, 320 N.W.2d 82, 84 (Minn. 1982), or by placing the person in the back of a squad car, *State v. Moffatt*, 450 N.W.2d 116, 119-120 (Minn. 1990).

The facts of this case are different in several ways from the facts of *Flowers*, in which the officers' actions were held to be unreasonable. First, the officers in *Flowers* were not outnumbered. Flowers was alone and was stopped initially by two officers, who

soon were joined by at least three other officers. *Flowers*, 734 N.W.2d at 244. Second, the officers stopped Flowers merely because he did not have a rear license-plate light, and the officers had no information suggesting that Flowers might be armed. *Id*. at 243. Third, the officers in *Flowers* did not find any guns or drugs when frisking Flowers and did not find any weapons or contraband in an initial, protective search of Flowers's vehicle. The supreme court held that the officers exceeded the scope of the investigatory stop when they later conducted a second, more invasive search of Flowers's vehicle. *Id.* at 255. The facts of this case are quite similar to the facts of *Munson*, where the officers "approach[ed] the [vehicle] with weapons drawn, removing the occupants from the [vehicle], frisking them, placing them in the back seat of squad cars and even handcuffing them briefly until it was determined they were not armed." 594 N.W.2d at 137. The officers' actions were justified because Oberg's vehicle contained multiple suspects and because the officers were acting on information that the occupants might be armed and carrying drugs. *See Moffatt*, 450 N.W.2d at 119-20; *Nading*, 320 N.W.2d at 84.

In sum, the actions of the officers in this case were reasonable under the Fourth Amendment to the United States Constitution and Article 1, Section 10, of the Minnesota Constitution. Therefore, the district court did not err in denying Oberg's pretrial motion to suppress evidence.

Affirmed.