STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1709

State of Minnesota,
Respondent,

vs.

Kristian Lozoya Acosta,
Appellant.

Filed September 30, 2008
Affirmed
Kalitowski, Judge

Dakota County District Court
File No. K4-06-1470

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

James C. Backstrom, Dakota County Attorney, Phillip D. Prokopowicz, Chief Deputy County Attorney, Dakota County Judicial Center, 1560 West Highway 55, Hastings, MN 55055 (for respondent)

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

Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

KALITOWSKI, Judge

Appellant Kristian Lozoya Acosta, convicted of one count of controlled substance crime in the first degree following a denial of his motion to suppress evidence and a bench trial pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980), challenges the conviction. Appellant contends that (1) the search of his vehicle was not justified; (2) his seizure was unlawful; and (3) his consent to search his motel room was not given freely. We affirm.

D E C I S I O N

I.

Appellant concedes that his driving conduct justified a *Terry* stop but argues that he was unreasonably detained by the officers and the subsequent search of his vehicle was not justified because the officers lacked probable cause. Specifically, appellant contends the police lacked probable cause to believe that his car contained cocaine because the tip from the confidential reliable informant (CRI) was "stale" and, therefore, the detention and search were unlawful. We disagree.

"When reviewing a pretrial order on a motion to suppress evidence, we may independently review the facts and determine whether, as a matter of law, the district court erred in suppressing or not suppressing the evidence." *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004). The United States and Minnesota Constitutions protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Generally, searches without a warrant are unconstitutional, except

under "certain narrow exemptions." *State v. Robb*, 605 N.W.2d 96, 100 (Minn. 2000). One exemption from the warrant requirement is that police may search a vehicle if they have "probable cause for believing that [the] vehicle[] [is] carrying contraband or illegal merchandise." *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999) (quotation omitted). Probable cause "must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers." *Id.* at 136 (quotation omitted).

When probable cause derives from an informant's tip, "[w]hether such information can establish probable cause to search depends on the totality of the circumstances of the particular case, including the credibility and veracity of the informant." *Id.*; *see also State v. Camp*, 590 N.W.2d 115, 119 n.8 (Minn. 1999) (stating that it is permissible for an officer to rely on information from another officer based on a tip from an informant).

If information is stale it cannot be used to establish probable cause for a search. *State v. Jannetta*, 355 N.W.2d 189, 193 (Minn. App. 1984), *review denied* (Minn. Jan. 14, 1985). To determine if the information is "stale" there are no rigid or arbitrary timelines; rather, it must be determined whether, based on practicality and common sense, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* (quotation omitted). "The likelihood that the evidence sought is still in place is a function not simply of watch and calendar . . . . Minnesota courts have concentrated primarily on whether there is an indication of ongoing criminal activity and

on the nature of the items sought." *State v. Ward*, 580 N.W.2d 67, 72 (Minn. App. 1998) (quotation and citations omitted).

Here, the information provided by the CRI indicated that there was ongoing criminal activity: selling two kilos of cocaine. *See State v. Cavegn*, 356 N.W.2d 671, 673-74 (Minn. 1984) (finding probable cause based on information suggesting that the defendant's narcotics dealing was a continuing business rather than an isolated incident). And a lapse of approximately 24 hours between when two individuals in a vehicle solicited the CRI to purchase cocaine and the search of a matching vehicle driven by appellant does not preclude a probable-cause determination. *See Ward*, 580 N.W.2d at 72 (stating that a single incidence of drug sales can generally support a probable-cause finding for "a few days").

We conclude that the CRI's tip was not stale and that the officers had probable cause to believe that appellant's vehicle contained cocaine based on the detailed and credible information the CRI provided. *See State v. Cook*, 610 N.W.2d 664, 668 (Minn. App. 2000), *review denied* (Minn. July 25, 2002) (explaining that the basis of an informant's knowledge can be demonstrated by first-hand knowledge and that the "quantity and quality of detail" should be considered). Because the officers had probable cause to believe that the vehicle driven by appellant contained cocaine, the district court properly determined that it was reasonable for the officers to detain appellant while waiting for the drug-sniff dog.

II.

Appellant argues that even if the search of his vehicle was lawful, police acted unlawfully when seizing him because (1) the manner was unreasonable and (2) it was a de facto arrest unsupported by probable cause. We disagree.

Manner of Detention

Appellant remained handcuffed for approximately five minutes until the drug-sniff dog arrived and discovered traces of cocaine in his vehicle, leading to appellant's subsequent arrest. We reject appellant's contention that these facts constituted an unreasonable seizure.

Whether the length and manner of the detention is reasonable depends on the facts and circumstances. *Munson*, 594 N.W.2d at 137. Appellant attempts to place his detention in the context of a limited-investigatory stop based on appellant's minor traffic violations in order to support his argument that the manner of appellant's seizure was unreasonable. But as explained above, the record indicates that the officers had probable cause to believe appellant's vehicle contained cocaine. An officer testified that they feared for officer safety because they believed appellant might be a major drug trafficker. "[B]riefly handcuffing a suspect while the police sort out the scene of an investigation" is permissible. *Id.* Placed in the proper context of a potential drug arrest, the officers proceeded diligently with their investigation and we cannot say this brief use of handcuffs was unreasonable.

De Facto Arrest

Appellant argues that a de facto arrest occurred because he remained handcuffed after it was determined that he was not armed. We disagree.

There is no bright-line rule separating a seizure, which requires merely a reasonable suspicion of criminal activity, from a de facto arrest, which requires probable cause. *Compare In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993) (holding that a seizure occurs when a reasonable person would have concluded that he "was not free to leave") *with State v. Vereb*, 643 N.W.2d 342, 347 (Minn. App. 2002) (explaining that a de facto arrest occurs when a reasonable person would conclude he was *under arrest* and not free to leave). In *State v. Blacksten* the supreme court held that the appellant was under de facto arrest from the moment he was ordered to the ground at gunpoint, handcuffed, and placed in a squad car. 507 N.W.2d 842, 846 (Minn. 1993). But in *Blacksten*, the officer "had no intention of conducting any investigation while detaining him . . . the stop was not a reasonable pre-arrest detention intended to freeze the scene so that an investigation could be made; it was an arrest." *Id.* Similarly, in *State v. Carver*, 577 N.W.2d 245, 247-48 (Minn. App. 1998), this court held that the appellant was under de facto arrest when he was ordered to the ground and handcuffed.

But the supreme court has also held that briefly handcuffing a suspect while police sort out a scene does not necessarily transform an investigatory detention into an arrest. *State v. Walsh*, 495 N.W.2d 602, 605 (Minn. 1993). Instead, courts evaluate the facts and circumstances of the detention to determine whether the reasonable suspicion for the

initial stop remained and whether the police acted reasonably and diligently. *State v. Moffatt*, 450 N.W.2d 116, 119-20 (Minn. 1990).

Here, appellant was ordered out of his vehicle, handcuffed, frisked, and told to sit along the side of the road. But, unlike the police in *Blacksten*, the officers here were conducting an investigation and, although appellant was not free to leave, we conclude that a de facto arrest did not occur. Because the seizure of appellant was lawful, we conclude that the district court did not err in denying appellant's motion to suppress evidence.

III.

Appellant argues that the district court's finding that he voluntarily consented to a search of his motel room was clearly erroneous. We disagree.

A district court's finding that consent to search was given voluntarily is reviewed for clear error. *State v. Alayon*, 459 N.W.2d 325, 330 (Minn. 1990). Whether consent was given voluntarily or by coercion is a question of fact determined by evaluating the totality of the circumstances. *Id.* "[T]he issue is whether a reasonable person would have felt free to decline" the request for consent. *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994) (quotation omitted).

Here, the record indicates that appellant was arrested after drugs were found in his car. But although appellant was under arrest when he signed the form consenting to the search of his motel room, the record indicates he consented because he hoped cooperation would garner him some benefit: "I thought that if I signed that paper perhaps I was not going to end up with having as many problems as it seems that I am having right now."

And the district court, in a thorough, well-reasoned order, found that "[n]o threats were made to [appellant] to make him sign the form and no guns were drawn or pointed at [appellant] at the time he was seated on the curb."

We conclude that the evidence and findings support the district court's conclusion that appellant's consent to the search of his hotel room was voluntary. Thus, the district court did not err by denying appellant's motion to suppress evidence.

Affirmed.