STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1905

State of Minnesota,
Respondent,

vs.

Sherwood B. Kenerson,
Appellant.

Filed December 30, 2008
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CR-06-06707

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth R. Johnston, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

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

Considered and decided by Kalitowski, Presiding Judge; Halbrooks, 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

KALITOWSKI, Judge

Appellant Sherwood B. Kenerson challenges the district court's denial of his motion to suppress, arguing that the district court erred in determining that the police properly seized appellant based on a reasonable, articulable suspicion that appellant was involved in a drug transaction. We affirm.

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). This court reviews questions of reasonable suspicion de novo. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

The United States Constitution and the Minnesota Constitution prohibit "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. A police officer may stop and temporarily seize a person to investigate if the officer reasonably suspects that person of criminal activity. *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). The officer must be able to show a reasonable suspicion of criminal activity based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968) (quotation marks omitted)); *see also State v. Balenger*, 667 N.W.2d 133, 137

(Minn. App. 2003) (noting that an investigative stop and a *Terry* stop are the same things), *review denied* (Minn. Oct. 21, 2003). In deciding the propriety of investigative stops, an appellate court examines the totality of the circumstances to ascertain whether there are articulable, objective facts to justify the stop. *Britton*, 604 N.W.2d at 87. The seizure cannot be the product of mere whim, caprice or idle curiosity. *State v. Anderson*, 683 N.W.2d 818, 823 (Minn. 2004).

Here, police Officers Carter and Infante testified that they were on patrol in north Minneapolis around midnight on September 29, 2006, when they observed a parked vehicle with several individuals standing outside the vehicle. While driving through the intersection at 10 to 20 miles per hour, Officer Carter testified that he observed a hand-to-hand transaction occur between appellant, who was standing outside the vehicle, and the individuals inside the vehicle. The officers circled the block, pulled up behind the parked vehicle, and activated the squad's spotlights. Officer Infante testified that he got out of the squad and ordered appellant to stop. At this point, appellant turned and ran, putting something from his hand into his mouth. The officers assumed appellant possessed and was trying to conceal or get rid of narcotics. The officers began to chase appellant. Officer Infante followed appellant on foot and Officer Carter followed in the squad. Officer Infante observed appellant toss something dark between two houses. A short time later, Officer Infante caught appellant and arrested him. After a search of the area where appellant threw the dark object, the officers recovered a gun.

Appellant was charged with possession of a firearm by an ineligible person. Appellant moved to suppress the gun as fruit of an unlawful seizure. The district court denied the motion, concluding that Officer Carter's observation of hand-to-hand transactions, which Carter identified as being characteristic of a drug exchange, coupled with the location of the incident and the time of day when the incident occurred justified the seizure.

Appellant argues that Officer Carter's testimony was not credible because: (1) it was dark when Officer Carter claimed he saw the hand-to-hand transaction; (2) Officer Carter was driving when he saw this transaction; (3) Officer Carter observed the transaction while driving through an intersection; (4) the distance between the squad and the parked vehicle where the transaction allegedly occurred was at least 50 feet; and (5) Officer Carter's partner, Officer Infante, did not observe the transaction. But this court gives great deference to the fact-finder's determination of witness credibility. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd*, 508 U.S. 366, 113 S. Ct. 2130 (1993).

Appellant contends that Officers Carter and Infante were unable to clearly observe the conduct occurring at the parked vehicle. But both police officers testified to the contrary. Both officers noticed the color of the parked vehicle and noted the number of people present. And although Officer Infante did not observe the hand-to-hand drug transaction, he stated that he was "canvassing the rest of the area," making it unlikely that he and Officer Carter were viewing the exact same areas at the same time. Moreover,

Officer Carter explained that, "as a police officer, you have to be able to multitask," and claimed that he was able to observe the drug transaction even though he was driving. Given this record, we conclude that the district court did not err in crediting Officer Carter's testimony that he observed a hand-to-hand drug transaction.

Appellant points to discrepancies between the two officers' testimony to further support his assertion that Officer Carter's testimony was not credible. But minor inconsistencies in witnesses' testimony do not constitute error requiring a reversal. *See State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980) (noting that inconsistencies in the state's case do not require a reversal of the verdict). Here, there are only minor discrepancies regarding the distance from the squad to the parked vehicle, and the different observations made by the officers while driving through the intersection and upon pulling up behind the parked vehicle. And the officers' statements are largely consistent and corroborative. Because any discrepancies are minor, the district court's credibility determination was not erroneous.

Appellant also argues that even if Officer Carter's testimony was credible, he failed to make the required specific observations necessary to justify a seizure. Officer Carter testified that appellant and another individual "appeared to be leaning inside the vehicle making hand-to-hand transaction with two white females that were inside the vehicle." When asked why he thought those transactions were being made, Officer Carter stated, "I could see hand – they were leaning into the car. I could kind of see their hands and it kind of appeared they were moving around." Appellant argues that Officer

Carter's use of the words "kind of" shows that the officer was not certain that there was a drug transaction taking place between appellant and another individual.

But Officer Carter had enough experience to recognize when a hand-to-hand drug transaction was taking place. In *State v. Hawkins*, a police officer testified that he had knowledge of the methods that narcotics dealers use to signal to others that they are selling narcotics, and that he had experience with hand-to-hand drug transactions. 622 N.W.2d 576, 581 (Minn. App. 2001). This court noted that the officer's experience and knowledge was sufficient to permit a prudent person to reasonably believe that the defendant was engaged in illegal activity after the officer observed the defendant for a 15-minute period riding a bicycle around an intersection, whistling and waving at approaching vehicles, and engage in hand-to-hand drug transactions with two different vehicles at approximately 2 a.m. *Id.* Here, the record indicates that Officer Carter had experience with hand-to-hand transactions during his two years on the police force.

Appellant relies on *State v. Flowers* and *State v. Shellito* to assert that furtive hand movements, like the ones observed by Officer Carter, are insufficient to show reasonable suspicion. *Flowers*, 734 N.W.2d 239, 248-49 (Minn. 2007) (finding that furtive movements alone do not give rise to a finding of probable cause to search a vehicle); *Shellito*, 594 N.W.2d 182, 185-86 (Minn. App. 1999) (affirming the district court's finding that the furtive movement observed by a police officer did not give rise to probable cause and thus, the subsequent seizure was not supported by reasonable suspicion). But the supreme court has held that in determining reasonable suspicion,

police officers are entitled to draw "inferences and deductions that might elude an untrained person." *Cripps*, 533 N.W.2d at 391. An officer's general knowledge and experience, the officer's personal observations, the nature of the offense suspected, the time, the location, and other relevant information can also support a reasonable, articulable suspicion. *Appelgate v. Comm'r of Pub. Safety*, 402 N.W.2d 106, 108 (Minn. 1987). Furthermore, an officer's observations may support reasonable suspicion even if the observed conduct is seemingly innocent. *See Hawkins*, 622 N.W.2d at 580 (concluding that the "fact that there might have been an innocent explanation for [the defendant's] conduct does not demonstrate that the officers could not reasonably believe that [the defendant] had committed a crime").

Appellant correctly notes that the mere fact that he was in a high-crime location is insufficient to support reasonable, articulable suspicion. Nonetheless, "officers are not required to ignore the relevant characteristics of a location" when deciding whether to investigate further. *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 676 (2000). And the time of day is also a factor to support reasonable suspicion. *State v. Lande*, 350 N.W.2d 355, 357-58 (Minn. 1984) (determining that under the totality of the circumstances analysis, considering both the time of day and the suspect's nervous behavior, officers had reasonable suspicion). Here, both officers noted that they were in a high-crime area around midnight, Officer Infante testified that drug offenses had occurred in the exact same location on prior occasions, and Officer Carter observed conduct that was characteristic of a drug transaction in a high-crime area. We conclude

the location and time of day were relevant factors that the officers were permitted to consider when determining whether there was reasonable, articulable suspicion to justify seizing appellant.

In determining whether the seizure of appellant was justified by reasonable, articulable suspicion, the district court properly credited the testimony of Officer Carter and considered the location and time of day of the seizure. Thus, we conclude that the district court did not err in denying appellant's motion to suppress.

Affirmed.