STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1100

State of Minnesota,
Respondent,

vs.

Gerald Gerard Beverly,
Appellant.

Filed June 2, 2014
Reversed
Smith, Judge

Anoka County District Court
File No. 02-CR-11-6898

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

Anthony Palumbo, Anoka County Attorney, Marcy S. Crain, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Susan J. Andrews, Rochelle Rene Winn, Assistant Public Defenders, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Johnson, Judge; and Toussaint, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment under Minn. Const. art. VI, § 10.

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

SMITH, Judge

We reverse the district court's order denying appellant's motion to suppress evidence discovered during a traffic stop because the officer expanded the scope of the stop without reasonable, articulable suspicion of criminal activity.

FACTS

Fridley police dispatch received an anonymous complaint about alleged drug activity at an address on Second Street in Fridley. Dispatch relayed to Officer Chris McClish the anonymous caller's report that a "suspicious black male" in a red pickup, wearing a white tee shirt and gray sweatpants, was "suspected of buying and selling narcotics" and was "waiting for someone." As he arrived in the area, Officer McClish saw a red pickup make an unsignalled left turn into the parking lot of an apartment building. Officer McClish followed as the driver, a black male dressed in a white tee shirt and gray sweatpants, parked and got out of the truck.

Officer McClish got out if his squad car and ordered the driver to stay by the truck. The driver asked, "What did I do?" Officer McClish stated that he had received a complaint about possible drug activity at the Second Street address. The driver said he lived on Second Street and had driven from there to the apartment building to visit his girlfriend. When Officer McClish asked for the girlfriend's name and apartment number, the driver refused to respond. The driver identified himself with a Minnesota photo ID card as appellant Gerald Gerard Beverly.

Officer McClish told Beverly he was going to have his K-9 partner sniff around the exterior of the pickup. As Officer McClish went to his squad car to get the dog, he saw Beverly drop something on the ground. Officer McClish picked the object up and found what he suspected was cocaine. Beverly was arrested and charged with fifth-degree possession of a controlled substance.

Beverly moved to suppress the evidence recovered by Officer McClish. When Officer McClish did not appear to testify at a hearing on the motion, the parties stipulated to the above facts as they appeared in the police report. The district court denied the suppression motion, concluding that "Officer McClish had a sufficient basis to stop [Beverly's] vehicle and did not unlawfully expand the scope of the stop." Testing showed that the substance Officer McClish recovered was cocaine. A jury found Beverly guilty, and the district court sentenced him to 15 months' imprisonment, but stayed execution of the sentence subject to certain conditions.

D E C I S I O N

When reviewing a pretrial order on a motion to suppress evidence, appellate courts may independently review the facts and determine whether the district court erred as a matter of law. *State v. Harris*, 590 N.W.2d 90, 98 (Minn.1999). When the facts are not disputed, an appellate court reviews the validity of an investigative stop as a matter of law. *Berge v. Comm'r of Pub. Safety*, 374 N.W.2d 730, 732 (Minn. 1985). We review de novo a district court's conclusions as to the application of a provision of the Minnesota Constitution. *State v. Fort*, 660 N.W.2d 415, 417-18 (Minn. 2003). We also review de

novo a district court's determination of reasonable suspicion as it relates to investigative stops. *In re Welfare of G.M.*, 560 N.W.2d 687, 690 (Minn. 1997).

To determine whether a brief investigative stop is constitutionally permissible, Minnesota courts apply the principles established by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968). *Askerooth*, 681 N.W.2d at 363. Under *Terry* and its progeny, a police officer may stop and temporarily seize a person to investigate if the officer reasonably suspects the person of criminal activity based on specific, articulable facts providing a particularized and objective basis for the suspicion. *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). Whether a police officer's suspicions are reasonable must be measured by what the officer knew before the intrusion. *Florida v. J.L.*, 529 U.S. 266, 271, 120 S. Ct. 1375, 1379 (2000). An initially valid stop may become invalid if police expand its intensity or scope, unless each expansion is supported by independent, reasonable, articulable suspicion of additional criminal activity. *Askerooth*, 681 N.W.2d at 364.

I.

The parties agree that because Officer McClish personally witnessed Beverly's unsignalled left turn, the initial traffic stop was valid. We concur. *See State v. George*, 557 N.W.2d 575, 578 (Minn. 1977) (holding that any violation of a traffic law, however insignificant, will justify a traffic stop). The state argues that Officer's McClish's expansion of the stop's scope was supported by Beverly's refusal to give his girlfriend's name and apartment number, which "[a]dded to the suspicion" of the situation. The state

cites caselaw supporting the proposition that an individual's evasiveness under questioning is a factor that may support reasonable, articulable suspicion.

We reject the state's argument because whether Officer McClish had reasonable, articulable suspicion to expand the scope of the stop must be measured by what he knew at the time of the expansion. *See Florida v. J.L.*, 529 U.S. at 271, 120 S. Ct. at 1379. Beverly's refusal to answer Officer McClish's question occurred after the expansion, and is therefore irrelevant to our analysis of the expansion. Prior to the expansion, the only information available to Officer McClish that might establish reasonable, articulable suspicion of drug activity was the information from the anonymous tip.

II.

The factual basis necessary to support an investigatory stop may arise from the personal observations of the police officer, or from information provided by another person. *Magnuson v. Comm'r of Pub. Safety*, 703 N.W.2d 557, 560 (Minn. App. 2005). The United States Supreme Court and the Minnesota Supreme Court have held that an anonymous tip may be sufficient to establish a reasonable, articulable suspicion if it has certain characteristics that indicate its reliability. For instance, in *Alabama v. White*, the Supreme Court concluded that an anonymous tip was a sufficient basis for a *Terry* stop leading to a drug arrest because the informant gave an accurate description of the suspect and her vehicle and made accurate predictions about her movements that could not be predicted by the general public. 496 U.S. 325, 332, 110 S. Ct. 2412, 2417 (1990). The Supreme Court characterized *White* as a "close case," observing that the accurate description of the suspect would not be sufficient on its own because that information

would be available to any member of the general public. *Id*. at 332, 110 S. Ct. at 2417. The Minnesota Supreme Court has held that tips from anonymous citizens are presumed reliable, especially when informants provide information that would make it possible for police to locate them. *Timberlake*, 744 N.W.2d at 394.[1]

On the other hand, both the U.S. Supreme Court and the Minnesota Supreme Court have found anonymous tips insufficient to support *Terry* stops when they lacked predictive information and were unsupported by objective facts. For example, in *Olson v. Commissioner of Public Safety*, an anonymous caller described a white Datsun driving in a particular area. 371 N.W.2d 552, 553 (Minn. 1985). The caller gave the car's license plate number and alleged that the driver might be drunk, but stated no basis for that opinion. *Id*. Officers located and followed the car near the area described, but observed no erratic driving or other conduct to corroborate the drunk-driving allegation. *Id*. They stopped the car anyway, observed indicia of intoxication, and arrested the driver. *Id.* A blood test showed that his blood alcohol concentration was .155. *Id*. The commissioner revoked the driver's license, but the municipal court rescinded the revocation on the ground that the officers did not have sufficient reliable information to justify the stop. *Id.* The Minnesota Supreme Court affirmed, holding that "[i]f the police chose to stop on the basis of the tip alone, the anonymous caller must provide at least some specific and

[1] In *Rose v. Comm'r of Pub. Safety*, we observed that such tips are not truly anonymous because the caller can be identified and held accountable. 637 N.W.2d 326, 328–29 (Minn. App. 2001), *review denied* (Minn. Mar. 19, 2002). We note that the anonymous caller in this case was later identified and testified at Beverly's trial. We nonetheless analyze her call as an anonymous tip because she did not give any identifying information at the time of the call by which she might have expected to be identified and held accountable. Additionally, the parties stipulated that the call was anonymous.

articulable facts to support the bare allegation of criminal activity." *Id.* at 556. The supreme court concluded that the stop might have been justified if the dispatcher had "elicited some minimal specific and articulable facts from the anonymous caller" in support of the allegation of criminal activity. *Id.*

In *Florida v. J.L.*, police went to a bus stop based on an anonymous tip that a young black man wearing a plaid shirt, standing at that particular stop, was carrying a gun; when they arrived, they found a young black man, later identified as J.L., standing at the bus stop in a plaid shirt. 529 U.S. at 268, 120 S. Ct. at 1377. The officers frisked J.L.—even though they no reason to suspect him of illegal conduct apart from the anonymous tip—and seized a gun from his pocket. *Id.* at 268, 120 S. Ct. at 1377. The U.S. Supreme Court observed that the allegation of illegal activity contained in the anonymous tip included an accurate description of J.L's location and appearance, but no facts supporting the caller's suspicions. *Id.* at 271–72, 120 S. Ct. at 1379. The state argued that the tip was reliable because "its description of the suspect's visible attributes proved accurate: There really was a young black male wearing a plaid shirt at the bus stop." *Id.* at 271, 120 S. Ct. at 1379. The Supreme Court rejected this argument, stating that it "misapprehend[ed] the reliability needed for a tip to justify a *Terry* stop" and holding that "reasonable suspicion . . . requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Id.* at 272, 120 S. Ct. at 1379. The Supreme Court also rejected the suggestion that the tip might be corroborated because its allegation proved true, stating: "The reasonableness of official suspicion must be measured by what the officers knew before they conducted their

search." *Id.* at 271, 120 S. Ct. at 1379. Contrasting the case with *Alabama v. White*, the Supreme Court noted that the tip in *White* was deemed reliable because it accurately described the suspect *and* made accurate predictions about her specific activities, demonstrating that the informant had inside information. *Id*. at 270, 120 S. Ct. at 1378. The court stated that in *White*, "the tip would not have justified a *Terry* stop" without the predictive information. *Id*. at 270, 120 S. Ct. at 1378.

The anonymous tip in this case is unlike the reliable anonymous tip in *White*, and similar to the unreliable anonymous tips in *Olson* and *J.L.* As in *Olson* and *J.L.*, this tip identified a determinate person but failed to provide specific, articulable facts supporting the allegation of criminal activity. The caller made no predictions like those that made the *White* tip reliable. That Beverly was actually in possession of cocaine is irrelevant because whether Officer McClish had reasonable, articulable suspicion to expand the scope must be measured by what he before he expanded the scope. *See J.L.*, 529 U.S. at 271, 120 S. Ct. 1379. For the same reason, we decline the state's invitation to consider additional facts that "came forth at trial."

In this case, the anonymous tip did not establish a reasonable, articulable suspicion of drug activity. Officer McClish's expansion of the traffic stop was therefore invalid.

III.

The state also argues that the evidence Officer McClish recovered is admissible because Beverly abandoned it. We disagree. "When property is abandoned . . . generally the owner no longer has a reasonable expectation of privacy and the exclusionary rule will not apply. But, if the property is abandoned because of an unlawful act by police

officers, it will not be admissible as evidence." *Askerooth*, 681 N.W.2d at 370 (citation omitted). "An attempt to dispose of incriminating evidence . . . is a predictable and common response to an illegal search. The proper application of the exclusionary rule requires that evidence of such an attempt be suppressed if the initial police intrusion was illegal." *State v. Balduc*, 514 N.W.2d 607, 611 (Minn. App. 1994) (citation omitted).

Minnesota appellate courts have repeatedly held that evidence abandoned in response to illegal searches and seizures must be suppressed. *E.g.*, *Askerooth*, 681 N.W.2d at 357, 369–70 (holding that the district court erred by refusing to suppress drugs abandoned in the back seat of a squad car when abandonment resulted from an illegal seizure); *State v. Dineen*, 296 N.W.2d 421, 422 (Minn. 1980) (holding that when an officer conducting a traffic stop demanded that a passenger move a coat that was covering an object in the back seat, and the passenger responded by fleeing the scene, marijuana discovered in a subsequent search should have been suppressed because the officer did not have probable cause to conduct a search); *State v. Slifka*, 256 N.W.2d 90, 90 (Minn. 1977) (holding that when a defendant abandoned drugs while being held in the back seat of a squad car after officers told him he would be searched, the evidence should have been suppressed because the seizure and search were both impermissible); *Balduc*, 514 N.W.2d at 612 (holding that when police executed an invalid search warrant, evidence that defendant disposed of marijuana plants during the search must be suppressed because defendant's actions were prompted by the illegal search).

In *In re Welfare of E.D.J.*, the Minnesota Supreme Court concluded that drugs abandoned during an impermissible *Terry* stop must also be suppressed. 502 N.W.2d

779, 783 (Minn. 1993). The facts of *E.D.J.* are analogous to those in this case: Officers encountered three pedestrians, including the juvenile defendant, in an area frequented by drug dealers. *Id*. at 780. When officers ordered the three to stop, the juvenile continued to walk away and dropped something on the ground before stopping. *Id*. The dropped item was cocaine, and the juvenile was charged with fifth-degree possession of a controlled substance. *Id*. The supreme court held that the officers did not articulate a sufficient basis for the *Terry* stop and concluded that "[s]ince [the defendant] abandoned the cocaine *after* he was unlawfully directed to stop, the abandonment was the suppressible fruit of the illegality." *Id*. at 783.

We have already concluded that the expansion of the scope of the *Terry* stop in this case was not supported by reasonable, articulable suspicion. Under *E.D.J.*, the evidence Beverly abandoned must be suppressed because he abandoned it in response to an impermissible police intrusion. We therefore reverse the district court's order denying the suppression motion. Because suppression of the evidence precludes conviction, we also reverse Beverly's conviction. Finally, because we reverse, we do not reach the arguments in Beverly's pro se brief.

Reversed.