STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0990

State of Minnesota,
Respondent,

vs.

Bernard Neal,
Appellant.

Filed May 27, 2014
Affirmed
Hooten, Judge

Hennepin County District Court
File No. 27-CR-12-42030

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

Susan L. Segal, Minneapolis City Attorney, Paula J. Kruchowski, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

William M. Ward, Chief Hennepin County Public Defender, Paul J. Maravigli, Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

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

HOOTEN, Judge

Appellant challenges the district court's denial of his pretrial motion to suppress evidence, arguing that he was subjected to an unreasonable search and seizure. We affirm.

FACTS

On the evening of December 18, 2012, Sgt. Brian Anderson of the Minneapolis Police Department was patrolling the Chicago/Franklin neighborhood of South Minneapolis in an unmarked squad car. Over the course of an hour, he observed appellant Bernard Neal, whom he recognized from prior contacts, "in the area walking back and forth on Franklin [Avenue]."

At around 10:51 p.m., Sgt. Anderson was driving westbound on Franklin when he observed Neal yelling and waving at a vehicle that was traveling in front of Sgt. Anderson's squad car. The vehicle turned north onto Elliott Avenue. Sgt. Anderson turned south onto Elliott, entered a parking lot, and continued to observe Neal. The vehicle then stopped in the lane of traffic on Elliot because there were cars parked along the street. There was a streetlight on the corner of Elliott and Franklin, but no other streetlights along Elliott.

Sgt. Anderson then saw Neal with his hands in his jacket pockets walk to the passenger side of the vehicle and lean into the passenger-side window so that his upper body was inside of the car. Sgt. Anderson could see Neal's jacket and elbow moving,

signaling to him that Neal was moving his arms inside of the car, but Sgt. Anderson could not see the number of occupants inside of the vehicle.

Sgt. Anderson believed that this was a drug deal and contacted another officer to assist him with an investigatory stop. Sgt. Anderson approached the vehicle in his squad car, parking behind it. He then activated his emergency lights. The other officer arrived in an unmarked squad car about a minute later and parked in front of the vehicle. Upon exiting his squad car, Sgt. Anderson approached Neal and then, using an "escort hold," moved Neal to his squad car. Sgt. Anderson placed his left hand on Neal's left wrist and his right hand on Neal's left upper arm. He explained what happened next:

> [W]hen I had that escort hold and walked him back to my vehicle, my thumb had wrapped around his jacket and it was like a black bombers jacket that had a zipper pockets on the arms and so when I had initially grabbed him, I felt an object.
>
> . . . .
>
> I immediately knew it was a crack pipe right away.
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> . . . .
>
> Based on all my experiences in recovering crack pipe[s], I knew it was, based on its size, its cylinder shape, the length of what the object was that I immediately knew it was a glass crack pipe.

While performing a pat-frisk on Neal, Sgt. Anderson asked Neal if the object he felt was a crack pipe. Neal responded affirmatively. Sgt. Anderson then retrieved the crack pipe but the pat-frisk yielded no further contraband. Sgt. Anderson charged Neal by citation with misdemeanor possession of drug paraphernalia in a public place in

violation of Minneapolis, Minn., Code of Ordinances (MCO) § 223.235 (2012) and released him.

Neal moved to suppress the evidence, challenging "the stop, the search, [and] the arrest." At the *Rasmussen* hearing, Sgt. Anderson testified on the events of the evening, and added that he has attended multiple trainings regarding narcotics investigation, has investigated narcotics crimes for about seven years, and is familiar with the Chicago/Franklin area. Sgt. Anderson described the area as having high rates of violent crime and stated that "it's the highest open air drug market that is in Minneapolis. . . . [A] majority of the people that do go to that area [are] specifically looking for some sort of narcotics." He knew this based on statistics and experience.

Sgt. Anderson explained that he believed that Neal and the occupant in the vehicle were engaged in a drug deal "[b]ased on the area, based on seeing Mr. Neal walking back and forth and the different people that he interacted with[,] . . . flagging down the vehicle, [and] not getting into the vehicle, but going through the window." In his experience, "this was very consistent" with interactions that have resulted in arrests for narcotics offenses. He has made over 100 arrests over the past 16 years after watching someone walk up and down a street throughout an evening, flag down a car, approach it, and lean inside of it.

Sgt. Anderson further explained that he placed Neal in an escort hold and moved Neal back to his squad car "[b]ecause it was such a confined area between the vehicle" and the parked vehicles along the street and because Neal "was still right at the window." Sgt. Anderson added, "I didn't know what was occurring with his hands. That's why I

wanted to get up there to be able to escort him away from that window." Sgt. Anderson acknowledged that he did not see anything in Neal's hands when he approached Neal, but clarified that he was looking "to see if anything is dropped, if there is any movement in the mouth . . . . [and] at his waistband. There [are] multiple things going on at one time." He did not ask Neal to step on to the sidewalk because there was a parked vehicle in the way.

Sgt. Anderson admitted that in his previous interactions with Neal, Neal "never gave [him] any indication that he would be prone to violence." But he testified that, as a police officer, he always needs to be careful and that he pat-frisked Neal because there have been "quite a few crimes of violence in the area from stabbings, shootings, and association of narcotics and weapons."

The district court denied Neal's motion to suppress, concluding that Sgt. Anderson had reasonable articulable suspicion to conduct an investigatory stop, did not conduct a search, and did not arrest Neal. The parties agreed to a *Lothenbach* proceeding under Minn. R. Crim. P. 26.01, subd. 4. Neal was found guilty of possession of drug paraphernalia and sentenced to, among other things, 45 days in the workhouse.

This appeal follows.

D E C I S I O N

Neal challenges the district court's denial of his motion to suppress, arguing that he was subject to an unreasonable search and seizure. Both the Fourth Amendment of the United States Constitution and article I, section 10 of the Minnesota Constitution protect individuals from unreasonable searches and seizures. *State v. Balenger*, 667 N.W.2d 133,

137 (Minn. App. 2003), *review denied* (Minn. Oct. 21, 2003). Because the facts are not in dispute and the district court's decision is a matter of law, we independently review the facts and determine, as a matter of law, whether the evidence should be suppressed. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

I.

The parties agree that Neal was seized when Sgt. Anderson approached Neal and, using an escort hold, moved him to the squad car.[1] The parties disagree, however, on whether the seizure was reasonable. "The touchstone of our analysis under the Fourth Amendment is always the reasonableness in all circumstances of the particular governmental invasion of a citizen's personal security." *Pennsylvania v. Mimms*, 434 U.S. 106, 108–09, 98 S. Ct. 330, 332 (1977) (quotation omitted). "Whether such a seizure, known as an investigative or *Terry* stop, is reasonable depends on (1) whether the stop was justified 'at its inception' and (2) whether the actions of the police were reasonably related in scope to the circumstances that justified the stop in the first place."

[1] We note that Neal was actually seized earlier. A seizure occurs when a reasonable person in the defendant's shoes would have concluded that he or she was not free to leave. *Matter of Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993). We have held that a seizure occurs when an officer positions his car so that another vehicle is blocked in and unable to drive away. *See, e.g.*, *Klotz v. Comm'r of Pub. Safety*, 437 N.W.2d 663, 665 (Minn. App. 1989) (holding seizure occurred where state trooper partially blocked in vehicle with squad car and instructed defendant to stop and identify himself), *review denied* (Minn. May 24, 1989); *State v. Sanger*, 420 N.W.2d 241, 243 (Minn. App. 1988) (holding seizure occurred where police officer boxed in vehicle with squad car, activated flashing red lights, and sounded horn). Here, Sgt. Anderson, who had activated his emergency lights, and the other officer blocked in the vehicle with which Neal was associated. Under these circumstances, no reasonable person in Neal's shoes would have felt free to leave.

Balenger, 667 N.W.2d at 137 (quoting *Terry v. Ohio*, 392 U.S. 1, 19–20, 88 S. Ct. 1868, 1879 (1968)).

A. Reasonable articulable suspicion

A police officer may stop and temporarily seize a person to investigate criminal wrongdoing if the officer reasonably suspects that person of criminal activity. *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). An officer must be able to articulate a particularized and objective basis for suspecting the person of criminal activity before the seizure. *Id.* The reasonable-suspicion standard is not high, demands less than the standard for probable cause or a preponderance of the evidence, requires at least a minimal level of objective justification, and requires more than a hunch. *State v. Diede*, 795 N.W.2d 836, 843 (Minn. 2011). "[W]e consider the totality of the circumstances and acknowledge that trained law enforcement officers are permitted to make inferences and deductions that would be beyond the competence of an untrained person." *State v. Richardson*, 622 N.W.2d 823, 825 (Minn. 2001). The totality of the circumstances include "the officer's general knowledge and experience, the officer's personal observations, information the officer has received from other sources, the nature of the offense suspected, the time, the location, and anything else that is relevant." *Appelgate v. Comm'r of Pub. Safety*, 402 N.W.2d 106, 108 (Minn. 1987).

Sgt. Anderson articulated a particularized and objective basis for suspecting Neal of criminal activity. Sgt. Anderson testified that the area is known for having high rates of drug crime. He also testified that he observed Neal pacing up and down Franklin Avenue and interacting with different people over the course of an hour. He saw Neal

flag down a vehicle, but did not get inside. Instead, he leaned into the vehicle's passenger-side window and then appeared to be moving his hands inside the vehicle. Sgt. Anderson added that he has made over 100 drug-related arrests involving these circumstances. Based on his experience and training, Sgt. Anderson characterized Neal's behavior to be "very consistent" with a narcotics transaction.

Neal contends that he did not engage in any conduct listed in MCO § 385.50(d) (2012). Section 385.50(d) lists factors that may be considered to determine whether a person intends to loiter to engage in illegal narcotics transactions in violation of MCO § 385.50(a) (2012). But commission of a crime is not necessary to provide reasonable suspicion to support a temporary seizure. *Richardson*, 622 N.W.2d at 825. Sgt. Anderson neither suspected Neal of nor charged Neal with loitering in violation of MCO § 385.50(a). And we review the totality of the circumstances when reviewing the constitutionality of a stop. Based on the totality of the circumstances, the seizure was justified at its inception.

B. Officer conduct

Neal contends that Sgt. Anderson's escort hold transformed the seizure into an arrest without probable cause. To be reasonable, a seizure must be limited in scope and duration to its initial justification. *Balenger*, 667 N.W.2d at 139. But an officer is authorized to take reasonable steps to protect his personal safety and to maintain the status quo during an investigatory stop. *United States v. Hensley*, 469 U.S. 221, 235, 105 S. Ct. 675, 683–84 (1985). In determining whether an officer's conduct transformed a seizure into an unlawful arrest, "courts must balance the nature and degree of the intrusion on an individual's Fourth Amendment rights against the governmental interest

in crime prevention and legitimate concerns about the safety of law-enforcement officers." *Balenger*, 667 N.W.2d at 139.

Sgt. Anderson's use of an escort hold did not transform the seizure into an unlawful arrest. Sgt. Anderson was investigating a suspected drug transaction and the intrusion was minimal. Sgt. Anderson did not draw his firearm, handcuff Neal, or otherwise use a display of force. *See id.* at 141 (stating that an officer's conduct was reasonable "[e]ven if [the officer] could have executed the stop through a less intrusive means"). Moreover, Sgt. Anderson was concerned for his safety. He testified that he felt compelled to pat-frisk Neal because there had been several crimes of violence in the area. He agreed with defense counsel that he always needed to be careful. The stop occurred in a high-crime area at night in the traffic lane of a poorly lit street. At the time that he approached the vehicle, Sgt. Anderson did not know who or how many occupants were in it. Sgt. Anderson testified that he used the escort hold to move Neal to his squad car because he did not know what was going on with Neal's hands and he wanted to move Neal out of the confined area. Under these circumstances, we conclude that Sgt. Anderson's use of an escort hold during a seizure to move Neal to his squad car was reasonable. The district court did not err in determining that there was no arrest.

II.

Neal challenges the district court's determination that Sgt. Anderson did not subject him to a search. A "search" occurs when the government invades a person's reasonable expectation of privacy. *State v. Johnson*, 831 N.W.2d 917, 922 (Minn. App. 2013), *review denied* (Minn. Sept. 17, 2013). "A reasonable expectation of privacy exists

as to areas and objects in which the person invoking the Fourth Amendment has a subjective expectation of privacy that society is prepared to recognize as reasonable." *Id.* Warrantless searches are per se unreasonable, subject to a few exceptions. *Othoudt*, 482 N.W.2d at 222.

An officer's incidental contact with a defendant's clothing during a constitutionally justified seizure is not a search requiring additional justification. *State v. Wiggins*, 788 N.W.2d 509, 514 (Minn. App. 2010), *review denied* (Minn. Nov. 23, 2010). In *Wiggins*, we determined that defendant had been lawfully seized. *Id.* at 513. We concluded that the officer's act in pulling up defendant's pants after they had fallen to the ground did not constitute a search, even though she felt and retrieved a gun from his front pocket as a result of incidental contact with his clothing. *Id.* at 514. We affirmed the district court's description of the contact, "an accidental finding of a gun as she's trying to help him get his pants into a decent position," and emphasized that "the officer's conduct was objectively reasonable despite its arguably invasive nature" because it arose, in part, "from her legitimate concerns about her own safety." *Id.* at 513–14.

Similarly here, Sgt. Anderson's act in subjecting Neal to an escort hold was not a search, but a reasonable intrusion. The discovery of the crack pipe was accidental. Neal may have had a subjective expectation of privacy in his jacket pocket, but there was no objective expectation of privacy when the escort hold was reasonable under the circumstances and the incidental contact resulted from that reasonable seizure.

Neal contends that because Sgt. Anderson retrieved the crack pipe under the "plain-feel doctrine," he must have subjected Neal to a search, relying on *Minnesota v.*

Dickerson, 508 U.S. 366, 113 S. Ct. 2130 (1993). Police may seize an item under the "plain-feel" doctrine if (1) the police are in lawful position to view or feel the object; (2) its incriminating nature is immediately apparent; and (3) police have lawful access to it. *Welfare of G.M.*, 560 N.W.2d 687, 693 (Minn. 1997). "The seizure of an item whose identity is already known occasions no further invasion of privacy." *Dickerson*, 508 U.S. at 377, 113 S. Ct. at 2138.

In *Dickerson*, the question posed to the Supreme Court was whether an officer may seize contraband during a *Terry* search. *Id.* at 371, 113 S. Ct. at 2134. The Supreme Court did not consider whether an officer may seize contraband during other lawful intrusions, such as a seizure involving officer contact. In determining that a seizure of contraband during a lawful *Terry* search is constitutional, the Supreme Court explained that the plain-feel doctrine stems from the plain-view doctrine:

> The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no 'search' within the meaning of the Fourth Amendment—or at least no search independent of the initial intrusion that gave the officers their vantage point. The warrantless seizure of contraband that presents itself in this manner is deemed justified by the realization that resort to a neutral magistrate under such circumstances would often be impracticable and would do little to promote the objectives of the Fourth Amendment. The same can be said of tactile discoveries of contraband. If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Id. at 375–76, 113 S. Ct. at 2137 (citations omitted).

Because the rationale behind the plain-feel doctrine derives from the plain-view doctrine, the plain-feel doctrine is not so narrow as to apply only to *Terry* searches. Under the plain-feel doctrine, so long as an officer feels contraband from a lawful position, there is no search requiring additional justification.

Neal asserts that Sgt. Anderson's escort hold and moving of Neal was "both sensory and exploratory in nature, not merely a physical movement." The record does not support this assertion. Sgt. Anderson testified that immediately after touching Neal's arm during the escort hold, he knew that he had felt a crack pipe. He did not need to manipulate the crack pipe to determine its identity. And Sgt. Anderson specifically asked Neal whether the object he felt was a crack pipe. Neal responded, "Yes." At that point, Sgt. Anderson had probable cause to believe that Neal had committed a crime—possession of drug paraphernalia. Because the escort hold during Neal's lawful seizure was a reasonable intrusion under these circumstances, and Sgt. Anderson was in a lawful position to feel the crack pipe, the district court did not err by determining that the discovery of the crack pipe was not the product of a search.

Affirmed.