STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0431

State of Minnesota,
Respondent,

vs.

Zay Ghna Kwadoo Kway,
Appellant.

Filed March 6, 2017
Affirmed
Halbrooks, Judge

Carlton County District Court
File No. 09-CR-14-1729

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

Thomas H. Pertler, Carlton County Attorney, Carlton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Cleary, Chief Judge; and Jesson, Judge.

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

HALBROOKS, Judge

Appellant challenges the district court's denial of her motion to suppress evidence, arguing that the controlled substances that were found in her purse are the result of an unlawful search. We affirm.

FACTS

Deputy Tory Cawcutt stopped a vehicle, driven by appellant Zay Ghna Kwadoo Kway, after he observed that both of the vehicle's taillights were not functioning. Instead of pulling over to the shoulder of the road, Kway continued driving for a short period of time and stopped in a store parking lot. As Deputy Cawcutt approached the passenger side of the vehicle, he observed three people inside; he recognized both passengers. The right leg of one of the passengers was shaking uncontrollably—behavior that Deputy Cawcutt had never observed in this passenger. Deputy Cawcutt also smelled an overwhelming scent of air freshener coming from inside the vehicle, noted that one of the passengers had recently lit a cigarette, and observed a container of laundry detergent in the vehicle.

Kway gave Deputy Cawcutt her expired driver's license and said that she did not have insurance. After Kway and another passenger gave him conflicting and inconsistent statements when asked individually about where they were coming from and where they were going, Deputy Cawcutt asked Kway for her consent to search the vehicle. Kway gave her consent. Under the front passenger seat of the vehicle, Deputy Cawcutt found "several pills, a hypodermic needle, and other drug paraphernalia." Kway and the passengers were immediately detained, and because Deputy Cawcutt was by himself, he requested backup

for officer-safety purposes. Deputy Cawcutt testified that he and another deputy searched Kway's vehicle again because he had already found evidence of a controlled-substance offense and he "wasn't sure what else [he] would find in the vehicle." In the second search, the deputies discovered four Clonazepam pills inside Kway's purse, which was in her vehicle. Deputy Cawcutt testified that he knew that Clonazepam is a controlled substance.

Kway was arrested and charged with fifth-degree possession of a controlled substance, in violation of Minn. Stat. § 152.025, subd. 2(a)(1) (2014), and no proof of insurance, in violation of Minn. Stat. § 169.791, subd. 4 (2014). At a contested omnibus hearing, Kway moved to suppress the evidence seized from her purse, arguing that the search of her purse was outside the scope of her consent.

The district court denied Kway's motion to suppress evidence, concluding that Deputy Cawcutt formed a "reasonable, articulable suspicion of drug-related activity necessary to justify requesting consent to search [Kway's] motor vehicle," that he had probable cause to arrest Kway for a controlled-substance offense, and that the search of Kway's purse was a lawful search incident to arrest. Kway waived her right to a jury trial and agreed to a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 3, in order to preserve appellate review of the omnibus order. The district court stayed adjudication and placed Kway on probation for three years. This appeal follows.

D E C I S I O N

Kway argues that the four Clonazepam pills should be suppressed because the search of her purse was unlawful. "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).

The United States and Minnesota Constitutions protect citizens against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. 1, § 10; *State v. Ture*, 632 N.W.2d 621, 627 (Minn. 2001). Generally, warrantless searches are "per se unreasonable," and "unless one of the well-delineated exceptions to the warrant requirement applies," a warrantless search is unconstitutional. *Ture*, 632 N.W.2d at 627 (quotations omitted). "The state bears the burden of establishing an exception to the warrant requirement." *Id.*

Here, respondent State of Minnesota failed to argue the applicability of an exception to the warrant requirement before the district court and failed to file a brief in this court. Notwithstanding the state's failure to file a brief, we may determine this case on the merits. Minn. R. Civ. App. P. 142.03. At a minimum, the burden of establishing an exception to the warrant requirement requires the state to anticipate what exceptions to the warrant requirement may apply and to fully develop the record so that we may address the issue on appeal. The state waives any claim that an exception to the warrant requirement applies if it fails to sufficiently develop the record and fails to argue that the exception applies. *See State v. Gauster*, 752 N.W.2d 496, 508 (Minn. 2008) (concluding that the state waived an argument that the automobile exception to the warrant requirement applied because the record was not sufficiently developed and the state failed to raise the argument at the district court). Because the district court concluded that the warrantless search was valid under the search-incident-to-arrest exception and because Kway only challenges the

expansion of the scope of the stop and whether the search incident to her arrest was lawful, our review is limited to those issues.

Although Kway did not raise this issue before the district court, we first examine whether Deputy Cawcutt improperly expanded the scope of the stop. *See State v. Benniefield*, 678 N.W.2d 42, 45 (Minn. 2004) (stating that we may consider issues not presented to the district court in the interests of justice). Police officers may not "routinely extend an otherwise-completed traffic stop, absent reasonable suspicion" of criminal activity. *State v. Lugo*, 887 N.W.2d 476, 486 (Minn. 2016) (citing *Rodriguez v. United States*, 135 S. Ct. 1609, 1616 (2015)). But expansion of the scope of the stop is reasonable if it satisfies "an *objective*, totality-of-the-circumstances test." *State v. Smith*, 814 N.W.2d 346, 351 (Minn. 2012) (emphasis added). Circumstances that may give rise to a reasonable, articulable suspicion of criminal activity include "violent shaking" and conflicting stories between two passengers. *Id.* at 353; *State v. Shellito*, 594 N.W.2d 182, 184 (Minn. App. 1999) (upholding an initial stop, in part, because the officer "receiv[ed] slightly different stories" from the two vehicle occupants); *see also United States v. Sanchez*, 417 F.3d 971, 975 (8th Cir. 2005) ("[C]onflicting stories may provide justification to expand the scope of the stop and detain the occupants." (quotation omitted)). A police officer may also "rely on trained intuition and observations drawn from his experience." *State v. Lembke*, 509 N.W.2d 182, 184 (Minn. App. 1993).

Here, Deputy Cawcutt testified that he recognized one of the passengers and witnessed that passenger's leg uncontrollably shaking. Deputy Cawcutt had never before observed this behavior with that individual. The deputy also testified that he smelled an

odor of air freshener and noted that one of the passengers had recently lit a cigarette. Through his training and experience, Deputy Cawcutt testified that cigarettes and air fresheners are commonly used "to mask an agent that someone may be trying to hide" from law enforcement. Deputy Cawcutt also testified that Kway and one of her passengers provided conflicting or confusing explanations about their recent whereabouts. Under the objective, totality-of-the-circumstances test, we conclude that these circumstances provided Deputy Cawcutt with a reasonable, articulable suspicion of criminal activity that permitted him to ask Kway for her consent to search the vehicle.

Kway challenges the expansion of the scope as improper because, after he issued a warning for the taillights and expired license, Deputy Cawcutt continued his investigative questioning by asking her "to confirm that [he] heard right, that she was coming from her house." "[A]ny expansion of the scope or duration of a traffic stop must be justified by a reasonable articulable suspicion of other criminal activity." *State v. Fort*, 660 N.W.2d 415, 419 (Minn. 2003). Because Deputy Cawcutt was justified to continue questioning Kway based on a reasonable, articulable suspicion of drug-related activity, we conclude that any expansion of the scope of the stop was lawful.

Kway next argues that the district court improperly relied on the search-incident-to-arrest exception. Relying on decisions prior to *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710 (2009), the district court concluded, "When conducting a search incident to arrest, an officer may search the person and the area within the control of the person, including her purse." *See State v. Frazier*, 318 N.W.2d 42, 43 (Minn. 1982); *State v. Bauman*, 586 N.W.2d 416, 419 (Minn. App. 1998) ("If an officer has probable cause to arrest a vehicle's

driver, the officer can search the vehicle incident to the arrest of the driver." (citing *New York v. Belton*, 453 U.S. 454, 460, 101 S. Ct. 2860, 2864 (1981))), *review denied* (Minn. Jan. 27, 1999). But the analysis that governs the search-incident-to-arrest exception has changed following *Gant.* 556 U.S. at 338, 129 S. Ct. at 1716.

A search incident to a lawful arrest is an exception to the warrant requirement, which "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Id.* In *Gant*, the United States Supreme Court clarified this exception, stating that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or* it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 351, 129 S. Ct. at 1723 (emphasis added). The Court noted that a traffic violation alone does not provide police with a reasonable basis to believe that the vehicle contains relevant evidence, but in some circumstances, "the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein," which would include purses. *Id.* at 343-44, 346, 129 S. Ct. at 1719-20.

Kway contends that the search was unlawful because, based on her location, she was physically incapable of reaching the passenger compartment of her car. But the arrestee need not be within reaching distance if police have a reasonable basis to believe that the vehicle contains evidence relevant to the offense of arrest. *Id.* at 343, 129 S. Ct. at 1719. Here, as the district court concluded, Deputy Cawcutt had probable cause to arrest Kway for the possession of controlled substances because he found "controlled substances and drug paraphernalia in [Kway]'s vehicle" during his first search. Because it is

reasonable that further evidence relevant to a controlled-substance offense was inside Kway's vehicle, we conclude that the warrantless search was lawful and justified as a search incident to a lawful arrest.

Because we conclude that any expansion of the scope of the traffic stop and subsequent search of Kway's purse were lawful and justified by the search-incident-to-arrest exception to the warrant requirement, the district court did not err in its decision to deny suppression of the evidence.

Affirmed.