STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0623

State of Minnesota,
Respondent,

vs.

Leontawan Lentez Holt,
Appellant.

Filed March 6, 2017
Affirmed
Halbrooks, Judge
Concurring specially, Cleary, Chief Judge

Hennepin County District Court
File No. 27-CR-15-24673

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Aaron P. Knoll, Special Assistant Public Defender, Faegre Baker Daniels LLP, Minneapolis, 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 his conviction of possession of a firearm by a prohibited person in violation of Minn. Stat. § 624.713, subd. 1(2) (2014), arguing that the district court erred by denying his motion to suppress evidence of the firearm because it was the fruit of an unconstitutional search. We affirm.

FACTS

While on patrol on July 24, 2015, Officers Andrew Braun and Xavier Rucker saw a car that they believed was speeding. The officers followed the car, which then made a hard and aggressive left turn. As the car pulled over to the side of the road, Officer Braun activated the patrol car's emergency lights. The driver, M.S., got out of the car and took a few steps toward the front of the vehicle. Officer Braun noticed that M.S. had something in his hand but could not identify the object. Both officers drew their guns and pointed them at M.S., ordering him to get back into the car. Within about five or six seconds, M.S. stopped and got back into the car.

As he approached the car, Officer Braun noticed that the two people in the front seat, M.S. and appellant Leontawan Lentez Holt, were moving around. Because he noticed that M.S. was fidgeting with his hands, Officer Braun asked M.S. to place his hands outside of the car door. Office Braun also observed that Holt appeared nervous and was leaning on his right side "as though he was trying to conceal something." Officer Rucker asked Holt if he had any identification; Holt did not. Holt appeared nervous to Officer Rucker and would not make eye contact with him. The officers then decided to remove M.S. and

Holt from the car. Officer Rucker handcuffed Holt and brought him near the patrol car. Before conducting a pat search, Officer Rucker observed a bulge in Holt's vest pocket and asked Holt what it was. When Holt responded that it was a firearm, Officer Rucker called out that Holt had a gun and removed the firearm. Holt was arrested and charged with possession of a firearm by a prohibited person.

Holt moved to suppress evidence of the firearm and the district court held a *Rasmussen* hearing. At the hearing, Officers Braun and Rucker testified to their observations during Holt's arrest. Following the district court's denial of Holt's motion to suppress the firearm, Holt agreed to a stipulated-facts trial pursuant to Minn. R. Crim. P. 26.01, subd. 4, in order to preserve the issue for appellate review. The district court found Holt guilty of being a prohibited person in possession of a firearm. This appeal follows.

D E C I S I O N

Holt argues that the district court erred by denying his motion because Officer Rucker did not possess reasonable, articulable suspicion that he might be engaged in criminal activity and might be armed and dangerous. When reviewing a pretrial order on a motion to suppress evidence, we review the district court's factual findings for clear error and legal determinations de novo. *State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012). We review de novo the district court's determination that a reasonable, articulable suspicion existed to justify the search. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

Both the United States and Minnesota Constitutions protect against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. Here, Holt does

not challenge the validity of the traffic stop or that *Maryland v. Wilson* permits "an officer making a traffic stop [to] order passengers to get out of the car pending completion of the stop." 519 U.S. 408, 415, 117 S. Ct. 882, 886 (1997). Holt only challenges Officer Rucker's search as an unreasonable expansion of the scope of the traffic stop.

To be constitutional, "each incremental intrusion during a traffic stop [must] be tied to and justified by one of the following: (1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness, as defined in *Terry*." *State v. Askerooth*, 681 N.W.2d 353, 365 (Minn. 2004). The supreme court has summarized *Terry* as follows: "[E]ven in the absence of probable cause, the police may stop and frisk a person when (1) they have a reasonable articulable suspicion that a suspect might be engaged in criminal activity and (2) the officer reasonably believes the suspect might be armed and dangerous." *State v. Flowers*, 734 N.W.2d 239, 250 (Minn. 2007) (quotations omitted); *accord Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884 (1968). Police officers must "articulate a particularized and objective basis for suspecting the particular person stopped of criminal activity. That standard is met when an officer observes unusual conduct that leads the officer to reasonably conclude in light of his or her experience that criminal activity may be afoot." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotations and citations omitted). A police officer who possesses the requisite suspicion "may conduct a carefully limited search of the outer clothing of such person[] in an attempt to discover weapons which might be used to assault him." *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (alteration in original) (quotation omitted).

While the reasonable-suspicion standard is not high, it does require a minimal level of objective justification. *Timberlake*, 744 N.W.2d at 393. Because of their special training, police officers "may make inferences and deductions that might well elude an untrained person" when articulating a reasonable suspicion. *Flowers*, 734 N.W.2d at 251-52. But the officer's suspicion must be based on objective facts and not a mere hunch. *State v. Cripps*, 533 N.W.2d 388, 391-92 (Minn. 1995).

Here, the district court found that the officers had a reasonable basis to stop the car but that the situation "turned into something more than just a traffic stop" when M.S. got out of the car and only returned to it after three loud commands to do so from the officers. The district court found that Officer Braun observed that (1) M.S. had an unidentified object in his hand when he was out of the car; (2) the two people in the car were moving around; (3) M.S. continued to fidget with his hands until Officer Braun asked him to hold his hands outside the window; and (4) Holt appeared nervous and was leaning on his right side as though he was trying to conceal something. The district court also found that Officer Rucker noticed that Holt appeared nervous and would not make eye contact and that Holt could not provide Officer Rucker any identification when he asked for it. As a result, Officer Rucker ordered Holt out of the car, handcuffed him, and brought him to the squad car to conduct a pat search. The district court found that Officer Rucker was credible in his testimony that before he conducted the pat search, he saw a bulge in Holt's pocket and asked Holt about it; Holt responded that it was a firearm. Based on these facts, the district court denied the motion to suppress.

Holt contends that Officer Rucker found the firearm only as a result of the pat search and that the district court's finding otherwise is clear error. In support of his contention, Holt states that Officer Braun testified that he did not personally observe Officer Rucker's search of Holt; so Officer Braun did not know how the firearm was found. But Officer Rucker testified that he knew of the firearm before conducting the pat search based on his personal observation of the bulge in Holt's pocket and Holt's admission in response to his follow-up question. We therefore conclude that the district court did not clearly err in making this finding of fact.

Citing *State v. Fort*, Holt contends that nervous behavior and a lack of eye contact is insufficient to justify a search. 660 N.W.2d 415 (Minn. 2003). In *Fort*, an officer noted that Fort, the passenger of a vehicle stopped for speeding and having a cracked windshield, appeared nervous and avoided eye contact before being asked whether he possessed drugs or weapons. *Id.* at 416-17. The officer removed Fort from the vehicle, requested and received consent to search him, and found what the officer suspected to be crack cocaine as a result of the search. *Id.* at 417. Fort moved to suppress the cocaine found during the search, arguing that there was no valid reason to suspect wrongdoing. *Id.* The district court granted the motion. *Id.* On appeal, we reversed and remanded, holding that the law requires a totality-of-the-circumstances approach in analyzing consent-to-search cases. *Id.* Holt appealed to the supreme court. *Id.* at 416. The supreme court reversed our court's decision, concluding that the search was unsupported by any reasonable, articulable suspicion. *Id.* at 419.

Unlike *Fort*, we conclude that Officer Rucker had reasonable, articulable suspicion that criminal activity was afoot and that Holt was armed and dangerous. While we agree with Holt that a suspect's nervous demeanor alone is insufficient, Officer Rucker observed much more than that to justify his search. This was not a typical traffic stop, as evidenced by the fact that M.S. exited the vehicle once stopped, requiring the officers to get out of the squad car, draw their weapons, and yell several times to him to return to the vehicle. When Holt could not provide identification, Officer Rucker ordered him out of the vehicle, as permitted by *Wilson*. 519 U.S. at 415, 117 S. Ct. at 886. After escorting Holt to the side of the squad car, Officer Rucker noticed a bulge in Holt's pocket and asked Holt what it was. Holt responded that it was a firearm. Possession of a firearm without a permit in a public place is prohibited. Minn. Stat. § 624.714, subd. 1a (2014). At that point, given the totality of the circumstances, Officer Rucker possessed reasonable suspicion that criminal activity was afoot and that Holt was armed and dangerous.

The state contends that, in addition to the facts above, Officer Rucker was imputed with the knowledge of Officer Braun under the collective-knowledge approach. Under this approach, "the officer who conducts the search is imputed with knowledge of all facts known by other officers involved in the investigation, as long as the officers have some degree of communication between them." *State v. Lemieux*, 726 N.W.2d 783, 789 (Minn. 2007). Holt argues that there was insufficient communication for the collective-knowledge doctrine to apply because the only oral communication between the two officers occurred when Officer Rucker told Officer Braun that they should remove the occupants from the vehicle. The district court, noting that the communication need not be "[a]ctual

communication of information to the officer conducting the search," found that sufficient communication existed because Officer Rucker was present for the events to which Officer Braun testified. *Id.* Because we conclude that Officer Rucker's personal observations provided a reasonable, articulable suspicion sufficient to pat frisk Holt for weapons, we do not reach this issue.

Affirmed.

CLEARY, Chief Judge (concurring specially)

While I concur with the majority's decision to affirm the district court's denial of appellant's suppression motion, on the basis that Officer Rucker's personal observations provided a reasonable, articulable suspicion to detain appellant and inquire about weapons, I write separately because I believe that the law surrounding the collective-knowledge doctrine in Minnesota is confusing and ill-defined. In this case, I do not believe that Officer Rucker was justified under the collective-knowledge doctrine to stop and search appellant based on Officer Braun's observations. That said, there is little guidance from existing caselaw as to what level of communication between officers simultaneously investigating a scene is sufficient to impute the knowledge and observations of one officer to a fellow officer.

The source of the confusion is *State v. Lemieux*, where the Minnesota Supreme Court concluded that, under the collective-knowledge doctrine, an officer who conducts a warrantless search "is imputed with knowledge of all facts known by other officers involved in the investigation as long as the officers *have some degree of communication*." 726 N.W.2d 783, 789 (Minn. 2007) (emphasis added). The *Lemieux* court, though, stated in the next sentence that "[a]ctual communication of information to the officer conducting the search is unnecessary." *Id*. (citing *United States v. Twiss*, 127 F.3d 771, 774 (8th Cir. 1997)). It is unclear how there can be "some degree of communication" between the officers without actual communication of information.

The facts of *Lemieux* do not help to clarify this apparent contradiction. In *Lemieux*, the officers at the scene communicated vertically up the chain of command informing a

lieutenant of facts sufficient to justify a warrantless search of an apartment, before the lieutenant directed the officers to conduct a limited emergency-aid search of the defendant's residence. 726 N.W.2d at 785. The facts of *Lemieux* show a large degree of communication of information between the commanding and acting officers. *Id.*

The facts of *Twiss* (the Eighth Circuit Court of Appeals case cited in *Lemieux*) are more informative. In *Twiss*, the appeals court upheld a warrantless urinalysis search of a defendant after a fatal car crash under the collective-knowledge doctrine. 127 F.3d at 772-74. *Twiss* also involved vertical communication up and down the chain of command where an FBI agent not at the accident scene ordered the warrantless search after local tribal officers briefed the agent about what they observed at the accident scene. *Id.* While it was unclear how much the FBI agent knew before ordering a warrantless search, the appeals court upheld the search under the collective-knowledge doctrine because the FBI agent knew that a local tribal officer observed indications at the scene that the defendant could have been driving the vehicle when it crashed, and that there were drugs and alcohol at the crash scene. *Id.* The rule from *Twiss* instead seems more nuanced than the one line quoted in *Lemieux*. *Twiss* stands for the proposition that if officers at a scene possess facts establishing probable cause and communicate some of those facts to the officer directing the search, then the knowledge of the officers at the scene is imputed to the directing officer. Actual communication of all the details creating probable cause is not necessary. *See id.*

This case is distinguishable from *Lemieux* and *Twiss* because it does not involve a vertically communicated directive, but rather potential horizontal communication between

officers who were simultaneously investigating the same scene but observing different things. In this type of situation, it seems that the better rule is that the degree of communication that is necessary between fellow officers investigating a scene is enough communication whereby the acting officer can reasonably believe that his fellow officer has the required justification—probable cause, reasonable suspicion, or otherwise—to lawfully conduct searches or arrests. 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.5(c) (5th ed. 2012) (quoting *State v. Mickelson*, 18 Or. App. 647, 650, 526 P.2d 583, 584 (1974)).

This interpretation is supported by at least two federal courts of appeals. For example, in *United States v. Massenburg*, 654 F.3d 480, 482-83 (4th Cir. 2011), two officers encountered a group of four men on the street after a report of gun shots in a high-crime area. After the group voluntarily agreed to speak with police, two of the four men consented to being frisked but the defendant was reluctant to consent. *Id*. at 482. One officer testified that he observed a small bulge in the left jacket pocket of the defendant but did not alert the second officer present. *Id*. at 483. The second officer pat frisked the defendant and found a firearm in his waist band. *Id*. At the suppression hearing, the second officer never indicated that he saw a sign or signal from his partner. *Id.* at 483-84, 491 n.4. In declining to uphold the search, the Fourth Circuit noted that the collective-knowledge doctrine as articulated by the Fourth Circuit and the United States Supreme Court has a limited domain: "officers acting on the information and instructions of other officers." *Id.* at 492 (citing *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568, 91 S. Ct. 1031, 1037 (1971) (finding in dicta that police officers called upon to aid other officers in

executing arrest warrants are entitled to assume that the officers requesting aid provided a magistrate sufficient information to support a finding of probable cause); *United States v. Hensley*, 469 U.S. 221, 232, 105 S. Ct. 675, 682 (1985) (holding that if a flyer or bulletin from law enforcement is issued on the basis of articulable facts supporting a reasonable suspicion that a person committed a crime, then reliance on that flyer or bulletin by other police departments justifies a stop to check identification)). The Fourth Circuit concluded that the collective-knowledge doctrine "simply directs us to substitute the knowledge of the *instructing officer or officers* for the knowledge of the *acting officer*; it does not permit us to aggregate bits and pieces of information from among myriad officers, nor does it apply outside the context of communicated alerts or instructions." *Id*. at 493. Similarly, the Seventh Circuit Court of Appeals in *United States v. Ellis*, 499 F.3d 686, 687-88, 690-91 (7th Cir. 2007), concluded that when two officers in a drug investigation spoke to an occupant of a home at the front door, the knowledge and observations of those officers could not be imputed to the officer at the side door who made the decision to enter the house, because there was no evidence of communication between the front-door officers and the side-door officer who initiated the search without probable cause.

At oral argument in this case, the state argued for a far more expansive interpretation of the collective-knowledge doctrine. The state asserted that the knowledge of one officer may be imputed to a fellow officer who is simultaneously investigating a scene even without actual communication, and that when two officers are acting as partners working in tandem they implicitly communicate their observations to each other, following *Lemieux*.

While I have no doubt that officers can effectively communicate to each other non-verbally through signs and signals, the state's view of what constitutes "some degree of communication" stretches the phrase's meaning too far: police officers are not telepathic. If courts assume that officers working in tandem are always implicitly communicating with each other and that whatever one officer observes, the other officer must have observed as well, we would not need to use the doctrine of collective knowledge at all to impute knowledge from one officer to another.

The district court in this case found that Officer Braun's knowledge and observations of the driver of the vehicle should have been imputed to Officer Rucker because Officer Rucker saw and heard everything his partner observed as far as the driver exiting the vehicle and being commanded multiple times to return to the vehicle. Yet the information that supposedly created the requisite reasonable suspicion to seize and search appellant under the collective-knowledge doctrine was based on Officer Braun's observations that the driver possessed an object in his hand and was fidgeting with the object in the vehicle. That information was never communicated to Officer Rucker and we cannot assume that Officer Rucker made the same observation. The only communication in the record is Officer Rucker telling Officer Braun that the two men should be removed from the vehicle. Had Officer Braun said to the arresting officer "I saw an object in the car that may be dangerous" or communicated something similar non-verbally, e.g. a signal the two developed to indicate a suspect is armed and dangerous, Officer Rucker may well have had a reasonable belief that his fellow officer had the requisite suspicion to seize and frisk the appellant. This squares with the holding in *Lemieux* because there would have

been some degree of communication between the officers, but the actual basis behind Officer Braun's determination that someone in the car was armed and dangerous need not have been communicated in full detail.

When the opportunity arises, the Minnesota Supreme Court should clarify the requisite communication needed under the collective-knowledge doctrine. Communication means more than presumed mutual observation. "Some degree of communication" should mean enough communication between the officers whereby the arresting officer can reasonably believe that his or her fellow officer possesses the requisite cause to constitutionally conduct a search or seizure before that search or seizure occurs. That did not happen here based on the record provided. I believe such a rule properly balances law enforcement's need to work effectively as a team with a citizen's Fourth Amendment right to be free from unreasonable searches and seizures.