**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A16-0990**

State of Minnesota,
Respondent,

vs.

Jovon Nathan Freshwater,
Appellant.

**Filed April 3, 2017**
**Affirmed**
**Kalitowski, Judge***

Hennepin County District Court
File No. 27-CR-15-22422

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, Minnesota; Kate M. Baxter-Kauf, Special Assistant Public Defender, Lockridge Grindal Nauen P.L.L.P., Minneapolis, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Peterson, Judge; and Kalitowski, 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 Jovon Freshwater challenges his convictions of two counts of second-degree controlled-substance crimes. Following proceedings under Minn. R. Crim. P. 26.01, subd. 4, Freshwater argues that the district court erred in denying his motion to suppress evidence because (1) police lacked reasonable suspicion to stop his vehicle, (2) reasonable suspicion that he was armed and dangerous did not support the pat-search, (3) police lacked probable cause to arrest him, and (4) the district court erred in crediting the officers' testimony. We affirm.

## D E C I S I O N

Appellate review following a stipulated-facts proceeding is limited to whether the district court's ruling on a specific pretrial issue was proper. Minn. R. Crim. P. 26.01, subd. 4(f). When the pretrial order is a motion to suppress evidence, this court reviews the district court's factual findings for clear error and its legal determinations de novo." *State v. Diede*, 795 N.W.2d 836, 849 (Minn. 2011).

### I. The Stop

Freshwater argues that police lacked reasonable suspicion to stop his vehicle. Under the Fourth Amendment, "a police officer may not stop a vehicle without a reasonable basis for doing so." *In re Welfare of G.M.*, 560 N.W.2d 687, 691 (Minn. 1997) (quotation omitted). A stop is lawful when police can "articulate[] a particularized and objective basis for *suspecting* the particular persons stopped of criminal activity." *Id.* (quotation omitted). Whether such a basis exists is based on the totality of the circumstances, and police are

allowed to "draw[] inferences and make[] deductions that might well elude an untrained person." *Id*. (quotation omitted). "[T]he reasonable suspicion standard is not high" and "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 omitted).

The district court concluded that the officer had probable cause to arrest Freshwater at the time of the stop. The district court cited several pieces of evidence to support its conclusion, including that an experienced police officer personally observed two known narcotics users for approximately 10 to 15 minutes as they appeared to be waiting for someone. During this time, Freshwater drove up to the curb, the female narcotics user went to the rear of the vehicle and appeared to be acting as a lookout, and the male narcotics user went to the front passenger door where the officer observed a hand-to-hand exchange between the male narcotics user and Freshwater. The interaction happened quickly, lasting approximately 30 seconds. The district court also noted the officer has observed "hundreds of drug transactions" during his career, and "these facts gave the officer not just reasonable, articulable suspicion, but, in fact, probable cause that a narcotics transaction had taken place."

We need not determine whether the officer had probable cause to arrest Freshwater after observing the interaction between the male narcotics user and Freshwater, because the district court also concluded that the facts gave the officer reasonable suspicion to stop Freshwater. The totality of the circumstances, including the time that the officer spent observing the parties, the parties' behaviors, and the hand-to-hand exchange is conduct that

allowed the officer, making inferences based on his training and experience, to reasonably conclude that Freshwater was involved in criminal activity. *See State v. Hunter*, 857 N.W.2d 537, 544 (Minn. App. 2014) (finding reasonable suspicion to stop and investigate where officers conducting surveillance in an area known for drug activity observed appellant park his SUV in a remote area of a parking lot, a sedan entered and parked next to the SUV a few minutes later, and the individuals in the sedan left the car running and entered the SUV). Thus, the district court properly concluded that the officer had reasonable suspicion to stop Freshwater.

## II. The *Terry* Search

Freshwater argues that evidence found during the pat-search should not be considered in the probable-cause determination. He contends that he was arrested immediately upon being stopped and, because police lacked probable cause, the pat-search was an illegal search incident to arrest. Alternatively, Freshwater argues that if the pat-search was not conducted as incident to an arrest, the *Terry* standard was not satisfied.

"Warrantless searches are 'per se unreasonable'" subject to limited exceptions. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)). One exception exists when police "have a reasonable, articulable suspicion that a suspect might be engaged in criminal activity" and police "reasonably believe[] the suspect might be armed and dangerous." *State v. Flowers*, 734 N.W.2d 239, 250 (Minn. 2007) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884 (1968)). Absolute certainty that an individual is armed and dangerous is not required; "the issue is whether a reasonably prudent man in the circumstances would be warranted in the

belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883. Because "a substantial nexus exists between drug dealing and violence," it is reasonable for police "to believe a person may be armed and dangerous when the person is suspected of being involved in a drug transaction." *United States v. Bustos-Torres*, 396 F.3d 935, 943 (8th Cir. 2005); *State v. Lemert*, 843 N.W.2d 227, 232 (Minn. 2014). Any evidence obtained during a lawful pat-search may be confiscated. *Welfare of G.M.*, 560 N.W.2d at 693.

We first address when Freshwater was arrested. The test for whether a person is arrested is "whether a reasonable person would have concluded, under the circumstances, that he was under arrest *and* not free to go." *State v. Beckman*, 354 N.W.2d 432, 436 (Minn. 1984) (emphasis added). Conversely, a person is seized when an officer "by physical force or show of authority, has in some way restrained the liberty of a citizen." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999) (quotation omitted). Whether someone is under arrest is determined by an objective standard. *Beckman*, 354 N.W.2d at 436. It is not determinative that a reasonable person may believe they are not free to go. *Id*. The "not free to leave language" is not dispositive, because someone being detained temporarily "is not free to leave" but "that does not convert the detention into an arrest." *State v. Moffatt*, 450 N.W.2d 116, 120 (Minn. 1990).

In *State v. Moffatt*, the supreme court held that persons detained in a squad car for more than an hour while police conducted an investigation were not under arrest. *Id.* at 119–20. The supreme court reasoned that the men, who were being investigated for burglary, were told they were being detained and that they were not under arrest, and not

putting them in a squad car may have been foolish because they may have had access to weapons in the car they were driving. *Id*. at 120. The court also reasoned it would have been foolish to allow the men to "stand around outside." *Id*. Thus, the supreme court concluded that the most reasonable and prudent decision was to place the men in different squad cars while the officers conducted their investigation. *Id*.

Here, Freshwater was being investigated for a narcotics crime, which often involves weapons. As in *Moffatt*, the officer reasonably did not leave him in his car where he may have access to weapons. Additionally, the officer did not tell Freshwater that he was under arrest, but that he was being detained because a narcotics investigator was on the way. Freshwater was handcuffed and pat-searched pending arrival of the investigator, which happened only minutes after he was detained. Under the circumstances, a reasonable person would likely conclude they were being detained for further investigation, but not arrested. *See Moffatt*, 450 N.W.2d at 120. Thus, Freshwater was not arrested immediately after he was stopped.

Freshwater challenges the district court's basis for the pat-search and its conclusion that the officer had reason to believe Freshwater was armed and dangerous. The totality of the circumstances supports the district court's conclusion. First, the officer was instructed to stop Freshwater due to his suspected involvement in a narcotics transaction. Upon being stopped, Freshwater was nervous and visibly shaking, which the officer testified made him suspicious that Freshwater was in possession of contraband. Taking into account the officer's seven years of experience, Freshwater's demeanor, the recognition that narcotics and weapons are often discovered together, as well as the officer's personal experience of

discovering narcotics and weapons together in prior investigations, the officer conducted a lawful pat-search of Freshwater.

During the search, the officer felt a hard object tucked behind Freshwater's genitals. The officer did not believe this object to be a weapon, so he left it in place. When the officer patted down Freshwater's front pockets, he felt several hard objects that he testified could have been weapons. He removed these objects and discovered a digital scale of the type commonly used to weigh and measure narcotics and over $1,000 in currency. Because the officer had a reasonable, articulable suspicion that Freshwater was involved in criminal activity, and that he was armed, and dangerous, the pat-search was lawful. Thus, the district court did not err in denying Freshwater's motion to suppress.

## III. The Arrest

Freshwater argues that police lacked probable cause to arrest him. Freshwater relies on two unpublished cases of this court to make this argument. But an unpublished decision of this court is not precedent. Minn. Stat. § 480A.08, subd. 3 (2016); *see also Freeman v. State*, 804 N.W.2d 144, 147 (Minn. App. 2011) (stating that unpublished decisions are not binding authority), *review denied* (Minn. Dec. 13, 2011).

Both the federal and state constitutions prohibit unreasonable seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Although an arrest without a warrant is presumed unreasonable, "[a] warrantless arrest is reasonable if supported by probable cause." *State v. Williams*, 794 N.W.2d 867, 871 (Minn. 2011). Probable cause to arrest is established when "the objective facts are such that under the circumstances, a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been

committed." *Welfare of G.M.*, 560 N.W.2d at 695. In determining whether probable cause exists, this court "takes into account the totality of the circumstances, including the expertise and experience of the arresting police officers." *State v. Hawkins*, 622 N.W.2d 576, 580 (Minn. App. 2001).

Here, law enforcement observed two known narcotics users for a period of 10 to 15 minutes who appeared to be waiting for someone. During this time, Freshwater was the only person who pulled up to the curb and interacted with the individuals. One of the persons then acted as a lookout while a hand-to-hand transaction occurred between the other person and Freshwater. All of this occurred in an area known for drug activity. After the transaction, the narcotics users began to leave the area, which suggests that they were there to meet Freshwater. When officers responded to the scene, Freshwater drove away. Following a stop, a lawful *Terry* search was conducted in which officers found a digital scale consistent to what is usually used to weigh and measure narcotics and a large sum of money. The scale and the money, together with the circumstances occurring before the stop, provided probable cause to arrest Freshwater.

Because officers had probable cause to arrest Freshwater, the heroin discovered at the police station was found as a lawful search incident to arrest. Thus, the district court did not err in admitting the heroin into evidence.

## IV. Officer Testimony

Finally, Freshwater argues that the district court erred in crediting the officers' testimony. "The assessment of a witness's credibility is exclusively the province of the [factfinder]." *State v. McCray*, 753 N.W.2d 746, 754 (Minn. 2008) (quotation omitted).

This court assumes that the factfinder "credited the state's witnesses and rejected any contrary evidence." *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009). Where there is conflicting evidence, this court "defer[s] to the district court's credibility determination." *State v. Kramer*, 668 N.W.2d 32, 38 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003). We therefore reject Freshwater's argument.

**Affirmed.**