STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1481

State of Minnesota,
Respondent,

vs.

Christopher Blane Hughes,
Appellant.

Filed August 14, 2017
Affirmed
Cleary, Chief Judge

St. Louis County District Court
File No. 69VI-CR-15-1125

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

Mark S. Rubin, St. Louis County Attorney, Sharon N. Chadwick, Assistant County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Bjorkman, Judge; and Toussaint, 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

CLEARY, Chief Judge

Appellant Christopher Blane Hughes challenges his conviction of a controlled-substance crime in the third degree, arguing that the district court erred in denying his motion to suppress the drug evidence. In the alternative, Hughes argues that he is entitled to be resentenced to the penalty for a controlled-substance crime in the fifth degree under the 2016 Drug Sentencing Reform Act (DSRA) and the amended sentencing guidelines grid. Because law enforcement had a reasonable suspicion that Hughes was committing a crime and was armed and dangerous, we affirm. We also conclude that Hughes is not entitled to resentencing under the DSRA-amended fifth-degree controlled-substance crime because the legislature did not intend for the DSRA's increased-weight threshold to apply to Hughes's crime, and the DSRA-amended sentencing grid does not mitigate Hughes's sentence.

FACTS

Around 2:00 a.m. on July 16, 2015, Officer Chiaverini of the East Range Police Department was on patrol in his squad car in Aurora. Chiaverini activated his emergency lights and pulled over a maroon vehicle for failing to signal a turn. After stopping the vehicle, the officer approached the driver's side door.

He began speaking with M.B., the driver. With the window rolled down, Chiaverini smelled a "strong odor of marijuana coming from the vehicle." He could not detect from where inside the vehicle the odor was emanating. He did not initially confront the driver about the odor of marijuana because he wanted to call for backup.

Hughes, who was the passenger in the vehicle, told Chiaverini that he owned the vehicle but that he had no insurance card in the vehicle. M.B. handed the officer a driver's license with a clipped corner, which, to the officer, indicated M.B.'s license might be expired. Chiaverini returned to his squad car to run M.B.'s license and make local checks on both Hughes and M.B. He called for backup and was able to confirm on his computer that M.B.'s license was valid.

Before backup arrived, the officer approached the vehicle again. When Chiaverini asked the driver, M.B., about the odor of marijuana, M.B.'s legs and hands started shaking. M.B. was nervous, very slow to respond to questions, and avoided eye contact. M.B. eventually handed him a baggie of marijuana. Chiaverini asked M.B. if he had anything else on his person, and M.B. admitted he had knives. The officer then asked M.B. to exit the vehicle and he complied. M.B. further admitted that he had a marijuana pipe.

He then searched M.B., locating two knives on his person. He also found another small container of marijuana, a pouch with a marijuana pipe, and two baggies containing trace amounts of a white powdery substance, which later tested positive for methamphetamine. The officer handcuffed M.B. and set him on the curb when his backup, Officer Garrick, arrived. He testified that M.B. was cooperative.

After securing the evidence found on M.B., Chiaverini then turned his attention to Hughes. On approaching the vehicle, the officer could still smell an odor of marijuana from the vehicle. He asked Hughes to exit the vehicle as a safety precaution because the officer wanted to search where M.B. had been sitting. Hughes was very tense, would not

make eye contact, his hands were shaking, and his voice was shaky. Chiaverini told him to relax.

He then told Hughes to place his hands behind his back and he pat-frisked Hughes. Hughes denied he had anything of interest on his person. On pat-frisking Hughes's pants, Chiaverini noticed a "heavy[,] bulky item" in his right pocket that seemed to be a case. The officer removed the object. The object was a soft, zippered case, and Chiaverini testified he could feel hard objects within it.

He asked Hughes what was in the case, but, at first, Hughes would not answer. When asked a second time, Hughes told Chiaverini, "You already know what is in the case." When the officer said he did not know what was in the case, Hughes stated it contained methamphetamine. Officer Garrick placed Hughes in handcuffs, and then Chiaverini opened the case, finding a baggie of a substance that later tested positive for methamphetamine, a methamphetamine pipe, and some marijuana. The methamphetamine weighed 6.854 grams. Police arrested both Hughes and M.B.

On August 17, 2015, the state charged Hughes with one count of a controlled-substance crime in the third degree for possession of three or more grams of methamphetamine. In November 2015, the district court held a contested omnibus hearing where Hughes moved to suppress the drug evidence.

On December 31, 2015, the district court denied Hughes's motion. In March of 2016, Hughes stipulated to the prosecution's evidence to obtain review of the pretrial ruling, pursuant to Minn. R. Crim. P. 26.01, subd. 4, and the district court found Hughes

guilty of a controlled-substance crime in the third degree, in violation of Minn. Stat. § 152.023, subd. 2(a)(1) (2014).

On June 20, 2016, Hughes was sentenced to a stayed sentence of 21 months, and six months of local jail time. Hughes now appeals.

D E C I S I O N

I. Expansion of the Scope of the Stop

Appellate courts undertake a de novo review to determine whether law enforcement possessed reasonable suspicion or probable cause to justify a search or seizure. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005). We 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). Usually the district court's factual findings are reviewed for clear error, but when the facts are undisputed, our review is entirely de novo. *Burbach*, 706 N.W.2d at 487.

A. Investigation of the Marijuana Odor

Hughes first argues that police unlawfully expanded the scope of the traffic stop in investigating the marijuana smell. We disagree.

Both the United States and Minnesota Constitutions protect against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. "A search conducted without a warrant issued upon probable cause is generally unreasonable." *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). The Fourth Amendment prohibits law enforcement from searching an individual without a warrant, subject only to a few

specifically established and well-delineated exceptions. *State v. Varnado*, 582 N.W.2d 886, 889 (Minn. 1998).

One exception to the warrant requirement is an investigatory stop, or *Terry* stop, which allows law enforcement to temporarily detain a suspect if an officer has a reasonable, articulable, and particularized suspicion of criminal activity. *State v. Diede*, 795 N.W.2d 836, 842-43 (Minn. 2011) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968)); *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). The reasonable-suspicion standard is not high, *Diede*, 795 N.W.2d at 843, and "an actual violation is not necessary." *State v. Haataja*, 611 N.W.2d 353, 354 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. July 25, 2000). However, a stop that is the product of "mere whim, caprice or idle curiosity" is invalid. *State v. Pike*, 551 N.W.2d 919, 921-22 (Minn. 1996).

Under the Minnesota Constitution, the principles and framework of *Terry* are applied when evaluating the reasonableness of searches and seizures during traffic stops, even when there is probable cause that a minor traffic law has been violated. *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004). Every 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*. *Id*. at 365.

Here, the officer's suspicion that Hughes may have possessed marijuana was reasonable to warrant an expansion of the scope of the stop because the officer smelled an odor of marijuana after he approached the vehicle. After the officer found marijuana on M.B., and M.B. was seized, the officer continued to smell marijuana when he approached

the vehicle to speak with Hughes. The expansion of the stop was justified under *Terry* principles because the marijuana odor provided the officer with a reasonable suspicion that Hughes could be in possession of a criminal amount of marijuana.

B. Search of Hughes Under the Search-Incident-to-Arrest Exception

Next, Hughes argues that the officer had no basis to search his person and that the pat-frisk was an unconstitutional expansion of the scope of the stop.

A pat-frisk of a person ordered out of a vehicle is an incremental intrusion during a traffic stop. Such an intrusion requires that an officer have either independent probable cause, or a reasonable suspicion under *Terry*. *Askerooth*, 681 N.W.2d at 365; *see Pennsylvania v. Mimms*, 434 U.S. 106, 111-12, 98 S. Ct. 330, 334 (1977) (holding that the *Terry* test controls when determining the validity of a pat-frisk after a person has been ordered out of a vehicle).

Here, the district court concluded that the pat-frisk search of Hughes was justified by probable cause and was valid under the search-incident-to-arrest exception to the warrant requirement. This exception allows police "to conduct a full search of the person who has been lawfully arrested." *State v. Bernard*, 859 N.W.2d 762, 767 (Minn. 2015) (quotation omitted), *aff'd sub nom. Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). When police have probable cause to arrest a suspect, police can then conduct a search incident to arrest even if the search occurs before the arrest. *In re Welfare of G.M.*, 560 N.W.2d 687, 695 (Minn. 1997). "A search incident to arrest can extend to small containers on the person and can be followed by a warrantless seizure of discovered contraband." *Id*.

The district court further concluded that based on the smell of marijuana emanating from the vehicle, law enforcement had probable cause to perform a pat-frisk search of Hughes for a "criminal amount of marijuana." The court concluded that the container of methamphetamine found on Hughes provided the probable cause to arrest Hughes for the crime charged. In its analysis, the district court determined that "[t]he odor of marijuana provides an officer with probable cause to search a vehicle *and its occupants* without a warrant." (Emphasis added.) The court determined that "the smell of marijuana allowed a search of . . . Hughes' person for a criminal amount of marijuana and the search which elicited the case of methamphetamine was proper as a search incident to arrest even though the search occurred prior to . . . Hughes' formal arrest."

The district court erred because the smell of marijuana emanating from a vehicle, on its own, does not provide probable cause to arrest the vehicle's occupants and conduct a full search incident to arrest. To support the conclusion that the odor of marijuana from the vehicle provided the officer with probable cause to search Hughes's person, the district court cited *State v. Schultz*, 271 N.W.2d 836, 837 (Minn. 1978), *State v. Piece*, 347 N.W.2d 829, 833 (Minn. App. 1984), and *State v. Ortega* (*Ortega I*), 749 N.W.2d 851, 854 (Minn. App. 2008). But in *Schultz*, the Minnesota Supreme Court held that the smell of marijuana in a motor vehicle provided police with sufficient cause under the "motor vehicle" exception, which requires probable cause to search the vehicle, not probable cause to arrest and search the occupant. 271 N.W.2d at 837; *see Flowers*, 734 N.W.2d at 248 (stating that police may search a vehicle without a warrant if there is probable cause to believe the

vehicle contains contraband). *Pierce* says the same—that an odor alone may constitute probable cause to search an automobile. 347 N.W.2d at 833.

In *Ortega I*, 749 N.W.2d at 854, this court held, citing *State v. Wicklund*, 295 Minn. 403, 405, 205 N.W.2d 509, 511 (1973), that the smell of burnt marijuana gave police probable cause to search the vehicle's occupants. This court rejected the argument, like Hughes's here, that the change in the marijuana laws making smaller amounts of marijuana possession noncriminal changed the probable-cause analysis. *Id*.

But the reasoning in *Ortega I* is no longer good law. While the Minnesota Supreme Court affirmed this court's decision in *Ortega I* in *State v. Ortega* (*Ortega II*), 770 N.W.2d 145, 151-52 (Minn. 2009), it did so on very different grounds. The supreme court found that police had probable cause to arrest and then search the occupant of a vehicle incident to arrest when police detected an odor of marijuana coming from the vehicle *and* upon finding cocaine in the vehicle in a location to which both the driver and passenger had access. *Ortega II*, 770 N.W.2d at 151. In a footnote, the supreme court disapproved of this court's reasoning in *Ortega I*. 770 N.W.2d at 149 n.2. The supreme court clarified that (1) an odor of marijuana providing probable cause that a person possesses a noncriminal amount of marijuana does not, in and of itself, create probable cause to trigger a search incident to arrest, and (2) while "probable cause to arrest" satisfies that search-incident-to-arrest exception, "probable cause to search" does not necessarily trigger an exception to the warrant requirement or lead to the conclusion that a search of a person was otherwise reasonable. *Id*. (noting that 1976 Minn. Laws ch. 42, § 1, at 101-02 (codified at

Minn. Stat. § 152.15, subd. 2(5) (1976)) reduced possession of a small amount of marijuana from a criminal offense to a petty misdemeanor).

As noted by the supreme court in *G.M.*, probable cause to search and probable cause to arrest are distinct concepts. 560 N.W.2d at 695. "Whereas probable cause to search requires police to have a reasonable belief that incriminating evidence is in a certain location, probable cause to arrest requires police to have a reasonable belief that a certain person has committed a crime." *Id*. (citation omitted).

The district court erred as a matter of law because the smell of marijuana, on its own, cannot create probable cause to arrest, triggering the search-incident-to-arrest exception. Further, even if police had probable cause to search the vehicle under the automobile exception, without more, this does not create a probable cause to search Hughes's person.

The district court erred as a matter of law in finding that police had probable cause to arrest Hughes and conduct a search of Hughes incident to that arrest.

C. Pat-Frisk Based on *Terry* Principles

Nevertheless, police may still have had the requisite cause to expand the scope of the stop in pat-frisking Hughes based on *Terry* principles.

Under *Terry*, "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. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (*Dickerson I*) (citing *Terry*, 392 U.S. at 30, 88 S. Ct. at 1884), *aff'd*, 508 U.S. 366, 113 S. Ct. 2130 (1993). If both of those facts are present, a

police officer 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." *Id.*

Here, the officer had a reasonable suspicion that Hughes was in possession of a criminal amount of marijuana in the vehicle, based on the continuing marijuana smell, and Hughes's nervousness. The reasonable suspicion standard is "not high," *Diede*, 795 N.W.2d at 843, and only requires that police are not acting out of "mere whim, caprice or idle curiosity," *Pike*, 551 N.W.2d at 921-22.

Hughes argues that because certain amounts of marijuana in a motor vehicle are noncriminal, police could not have a reasonable suspicion based on the odor of marijuana that Hughes possessed a criminal amount of marijuana. While this argument may be availing when the standard is probable cause to arrest, it is less convincing under the much lower reasonable-suspicion standard. Furthermore, even if police only had a reasonable suspicion that Hughes was possessing a petty-misdemeanor amount of marijuana, police may conduct a *Terry* stop for minor infractions constituting petty misdemeanors. *See State v. George*, 557 N.W.2d 575, 578 (Minn. 1997) (determining that an officer has sufficient cause to stop a vehicle based on a violation of an "insignificant" traffic law).

Officer Chiaverini also had a reasonable suspicion that Hughes might be armed and dangerous to justify the pat-frisk.

> An officer must have an objective articulable basis that a person may be armed and dangerous to conduct a lawful pat search. The examination of reasonableness is a fact-sensitive inquiry. The officer need not be absolutely certain that the individual is armed; 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.

State v. Lemert, 829 N.W.2d 421, 424 (Minn. App. 2013) (quotations and citations omitted), *aff'd*, 843 N.W.2d 227 (Minn. 2014). Under *Terry* principles, the suspicion must be individualized and particular as to Hughes. *See United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981) (requiring that police have a "particularized and objective basis for suspecting the particular person stopped of criminal activity").

Here, Hughes sat next to M.B. in the front passenger area of the vehicle before the stop occurred. The stop occurred around 2:00 a.m. Chiaverini found two knives on M.B., just prior to frisking Hughes. Hughes was nervous, as his hands were shaking, his voice was shaky, and he was looking away. Nervousness "must be coupled with other particularized and objective facts" to justify a pat-frisk. *State v. Syhavong*, 661 N.W.2d 278, 282 (Minn. App. 2003). Even though the knives were found on M.B., the fact that Hughes was recently sitting within the same vehicle as M.B., where other knives could have been present, is an objective fact particularized to Hughes. Under the totality of these circumstances, the officer had a reasonable suspicion that Hughes was armed and dangerous to justify a pat-frisk for officer safety.

Finally, Chiaverini executed a proper pat-frisk, leading to the discovery of the drug evidence. A pat-frisk must be "a carefully limited search of the outer clothing to discover weapons which might be used against the officer." *State v. Wiggins*, 788 N.W.2d 509, 513 (Minn. App. 2010) (quotation omitted), *review denied* (Minn. Nov. 23, 2010). "During the course of the frisk, if the officer feels an object that cannot possibly be a weapon, the officer is not privileged to poke around to determine what that object is." *Dickerson I*, 481 N.W.2d

at 844. If during a lawful pat-frisk, an officer "feels an object whose contour or mass makes its identity immediately apparent," then there is no invasion of privacy beyond that already authorized and the object may be seized without a warrant. *Minnesota v. Dickerson*, 508 U.S. 366, 375-76, 113 S. Ct. 2130, 2137 (1993) (*Dickerson II*); *see State v. Burton*, 556 N.W.2d 600, 602-03 (Minn. App. 1996) (applying the "plain feel" exception in *Dickerson II* under the Minnesota Constitution), *review denied* (Minn. Feb. 26, 1997). During a lawful pat-frisk for weapons, an officer may remove a "hard object of substantial size," from a suspect even though "the precise shape or nature of [the object] is not discernible through outer clothing." *State v. Bitterman*, 304 Minn. 481, 486, 232 N.W.2d 91, 94 (1975). This is because "weapons are not always of an easily discernible shape, [and] a mockery would be made of the right to frisk if the officers were required to positively ascertain that a felt object was a weapon prior to removing it." *Id*.

Here, the officer felt a heavy, bulky object when he patted Hughes's outer clothing. Unlike in *Dickerson II*, there is no evidence that the officer manipulated the object to determine its nature or removed the object after already concluding it was not a weapon. 508 U.S. at 378, 113 S. Ct. at 2138. While the object's identity was not immediately apparent, the officer had a reasonable suspicion that the heavy, bulky object was a weapon, or a case holding a weapon, to justify its removal and his further questioning of Hughes about the nature of the object. Hughes voluntarily told the officer that the object contained methamphetamine. At that point, the officer had probable cause to arrest Hughes.

II. Resentencing Under the 2016 Drug Sentencing Reform Act

Next, Hughes argues that, because his conviction was still on appeal when the legislature changed the threshold amount of a controlled-substance crime in the third degree, he should be resentenced under the 2016 law for fifth-degree possession, according to the 2016 drug-offender sentencing grid, which provides a presumptive twelve-month stayed sentence for a fifth-degree controlled-substance crime. *See* Minn. Sent. Guidelines 4.C (2016).

Hughes relies on *State v. Coolidge*, 282 N.W.2d 511, 514 (Minn. 1979), where the supreme court ruled that "a statute mitigating punishment is applied to acts committed before its effective date, as long as no final judgment has been reached." But the effect of *Coolidge* was limited in *Edstrom v. State*, 326 N.W.2d 10, 10 (Minn. 1982). The supreme court in *Edstrom* determined that a mitigating statute applies to acts committed before the effective date as long as no final judgment has been reached, "*at least absent a contrary statement of intent by the legislature*." *Id.* (emphasis added). The court in *Edstrom* concluded that the legislature clearly indicates its intent for a statute not to apply to crimes committed before its effective date when it specifically provides that a statute will have no effect on crimes committed before the effective date. *Id.*; *see* 1975 Minn. Laws ch. 374, § 12, at 1251 ("Except for section 8 of this act, crimes committed prior to the effective date of this act are not affected by its provisions.").

Here, the DSRA, signed into law on May 22, 2016, amended the third-degree controlled-substance-crime statute under which Hughes was convicted and sentenced. 2016 Minn. Laws ch. 160, § 5 at 581-82, 592. The new law provides that "effective

August 1, 2016," for a person to be guilty of a controlled-substance crime in the third degree under Minn. Stat. § 152.023, subd. 2(a)(1) (2016), the person would need to possess at least ten grams of a narcotic drug other than heroin. 2016 Minn. Laws ch. 160, § 5, at 582.

Hughes possessed 6.854 grams of methamphetamine, and under the 2014 law he could be convicted and punished for a third-degree controlled-substance crime, which required possession of three or more grams of methamphetamine. Minn. Stat. § 152.023, subd. 2(a)(1) (2014). If the new 2016 law applied to Hughes's conduct, Hughes could only be convicted and sentenced for a controlled-substance crime in the fifth degree, because he possessed less than ten grams. Minn. Stat. §§ 152.023, subd. 2(a)(1), .025, subd. 2(1) (2016).

The legislature indicated its intent that the statute would not apply to crimes committed before the effective date, as both the 2016 third- and fifth-degree controlled-substance-crime statutes provide that the laws will be "effective August 1, 2016," and that they apply "to crimes committed on or after that date." 2016 Minn. Laws ch. 160, §§ 5, 7 at 582, 584-85. Even though Hughes's conviction was on appeal and not final when the law was amended, the 2016 amendments in the DSRA that increased the threshold amount for a conviction of a third-degree controlled-substance crime do not apply to Hughes's case. Hughes is not entitled to be resentenced under the amended fifth-degree controlled-substance-crime statute.

Our conclusion is consistent with the recently released opinion of the Minnesota Supreme Court in *State v. Otto*, ___ N.W.2d ___, ___, 2017 WL 3161109, at *2-3 (Minn.

July 26, 2017). In *Otto*, the supreme court held that a person convicted of a controlled-substance crime, for which the controlled-substance weight threshold was increased by the DSRA before his conviction was final, was not entitled to have his conviction reversed because the language of sections 3 and 4 of the DSRA clearly establish that the legislature intended to abrogate the effect of the amelioration doctrine. *Otto*, 2017 WL 3161109, at *2. Here, the effective-date language under section 5 of the DSRA is identical to the effective-date language under sections 3 and 4. 2016 Minn. Laws ch. 160, §§ 3-5 at 579-82.

The DSRA-amended sentencing grid also does not affect Hughes's case. In *State v. Kirby*, ___ N.W.2d ___, ___, 2017 WL 3161079, at *9 (Minn. July 26, 2017), the supreme court held that the amelioration doctrine requires the resentencing of a person whose conviction was not yet final on the effective date of section 18(b) of the DSRA. Here, while Hughes's conviction was not yet final on the effective date of section 18(b) of the DSRA, that section does not mitigate punishment for a third-degree controlled-substance crime. 2016 Minn. Laws ch. 160, § 18(b) at 591. At sentencing, Hughes had zero criminal-history points, and whether Hughes was sentenced for a third-degree controlled-substance crime under the previous sentencing guidelines grid or the DSRA-amended sentencing grid makes no difference: in both instances, the result is a 21-month stayed sentence. *Compare* Minn. Sent. Guidelines 4.A (Supp. 2015), *with* Minn. Sent. Guidelines 4.C (2016).

In sum, Hughes is not entitled to be resentenced under the amended fifth-degree controlled-substance-crime statute because the DSRA's increase of the threshold weight

for a third-degree controlled-substance crime does not apply to Hughes's offense. Finally, the DSRA-amended sentencing grid does not affect Hughes's case because it did not mitigate punishment for a third-degree controlled-substance crime.

Affirmed.