This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).

STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1784

State of Minnesota,
Respondent,

vs.

Paul Alan Anderson,
Appellant.

Filed November 27, 2017
Affirmed
Smith, John, Judge[*]

Hennepin County District Court
File No. 27-CR-15-32845

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Jesson, Judge; and Smith, John, 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

SMITH, JOHN, Judge

We affirm appellant's conviction for ineligible person in possession of ammunition because the district court did not err by denying appellant's suppression motion, which was based on appellant's argument that the arresting officer did not have reasonable suspicion or probable cause to support expansion of a traffic stop and a warrantless search of appellant's person.

FACTS

Officer Steven Larson of the Plymouth Police Department was on patrol in Plymouth when he stopped a van with expired plates. As he approached the van, he noticed there were multiple passengers, some of whom "appeared to have lit fresh cigarettes." Larson, an experienced officer, believed this was either an indication that the passengers were nervous or they were attempting to cover up odors of alcohol or narcotics. As Larson approached, he shone his flashlight into the van, and his squad headlights illuminated the van.

Larson first spoke with the driver, who told Larson that he did not have a driver's license and did not know to whom the vehicle was registered. Larson discovered that the driver had a valid license, and the van was registered to the driver's ex-wife, who also had a no-contact order against the driver; these facts "heightened [Larson's] suspicion." When Larson asked the driver for proof of insurance, he hesitated, and then asked Larson to just issue him a ticket for no proof of insurance. This struck Larson as "unusual."

When he first stopped the van, Larson observed that none of the four passengers was wearing seatbelts, including one man who was sitting on a pile of clothes. After speaking with the driver, he asked for identification from the passengers, intending to issue citations for seatbelt violations. Larson recognized appellant Paul Alan Anderson from a prior encounter. While checking the identifications, Larson discovered that he had assisted in execution of a search warrant at appellant's residence based on a suspected controlled-substance crime, and that appellant was present at a search for weapons that had been conducted by other officers. Three of the passengers had felony convictions.

In order for Larson to talk with the passengers and collect their identification, the side door was opened; as Larson spoke with the passengers, he noticed 20 BBs lying loose on the van floor and what appeared to be a plunger from a syringe sticking out of the pile of clothes. Larson, who is a K-9 officer, decided to conduct a dog sniff of the van. After backup officers arrived, he directed all the passengers to get out of the van. Larson asked appellant if he had any weapons on him, in part because of the BBs he saw on the van floor, but also because of appellant's "history of weapons" and the fact that three of the four passengers in the van had felony records. Before Larson patted him down, appellant volunteered that he had a gun in his waist belt. [1] Another officer took the gun and Larson continued his pat search. Larson discovered six rounds of 40-caliber ammunition in appellant's front pocket. Appellant was arrested on probable cause that he was an ineligible

[1] The gun was a BB gun powered by CO_2. Under *State v. Haywood*, 886 N.W.2d 485, 490 (Minn. 2016), a CO_2 powered BB gun is not a "firearm" for purposes of Minn. Stat. § 609.165, subd. 1b (2014), and, therefore, appellant was not convicted of ineligible person in possession of a firearm.

person in possession of a firearm or ammunition before Larson's dog did an investigative sniff of the van.

Appellant waived his rights to jury trial and the charge of ineligible person in possession of ammunition was tried to the court. The district court issued its findings of fact, conclusions of law, and guilty verdict, concluding that the initial traffic stop was permissible, and Larson's expansion of the scope of the traffic stop was supported by reasonable articulable suspicion. The district court sentenced appellant to 60 months in prison. This appeal followed.

DECISION

Appellant argues that his conviction should be reversed because the district court erred by denying his suppression motion. Both the United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A warrantless search is presumptively unreasonable unless performed pursuant to an exception to the warrant requirement. *State v. Leibl*, 886 N.W.2d 512, 515-16 (Minn. App. 2016). A law enforcement officer may make a brief warrantless investigative stop of an automobile after observing even a minor traffic law violation. *State v. Flowers*, 734 N.W.2d 239, 251 (Minn. 2007). But "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* [*v. Ohio*, 392 U.S. 1, 88 S. Ct. 1968 (1968)]." *State v. Askerooth*, 681 N.W.2d 353, 365 (Minn. 2004). We review the district court's findings of fact on a suppression issue

for clear error and its legal conclusions de novo. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008).

The district court found that Larson stopped a van with expired plates, a minor traffic violation. "Ordinarily, if an officer observes a violation of a traffic law, however insignificant, the officer has an objective basis for stopping the vehicle." *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997). Appellant does not contest the validity of the original stop for the expired plates. Appellant argues, however, that Larson's expansion of the stop to include investigation of violations of the seatbelt law was not supported by reasonable articulable suspicion.

According to Larson's testimony, his suspicion was aroused because (1) all four passengers lighted cigarettes as he approached, which he interpreted as either a sign of nervousness or an attempt to cover up an odor of alcohol or drugs; (2) the driver denied having a driver's license or knowing the registered owner of the car; (3) Larson discovered the driver had a valid license and the car was registered to his ex-wife, who had a restraining order against the driver; (4) the driver refused to look for insurance information; and (5) it appeared that none of the passengers was wearing a seatbelt, including one passenger who was seated on a pile of clothes. This combination of circumstances led Larson to decide to identify the passengers in order to issue citations for seatbelt violations.

"To remain constitutional, an intrusion not strictly tied to the circumstances that rendered the initiation of the stop permissible must be supported by at least a reasonable suspicion of additional illegal activity." *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012). An officer has a reasonable suspicion of illegal activity when "the facts available to the

officer at the moment of the seizure would warrant a man of reasonable caution in the belief that the action taken was appropriate." *Id.* at 351-52 (quotation omitted). "The reasonable-suspicion standard is not high. It is enough that a law enforcement officer can articulate specific facts which, taken together with rational inferences from those facts, objectively support the officer's suspicion." *Lugo*, 887 N.W.2d at 486 (quotation and citations omitted). The circumstances Larson noticed were enough to support an expansion of the stop to include citing the passengers for violating the seatbelt law, which permitted him to ask for identification from the passengers.

Appellant argues that Larson did not have a particularized basis for believing that appellant was not wearing a seatbelt because Larson could not see that the passengers were not wearing seatbelts until after the van was stopped. Appellant testified that he was wearing a seatbelt and continued to do so after the van was stopped, and it was too dark for Larson to see into the van. Contrary to appellant's argument, the squad video indicates that Larson shone his flashlight into the van interior and could have seen the passengers. This action occurred immediately after the van stopped and it is unlikely that all passengers would have spontaneously removed their seatbelts in less than 15 seconds, which is the time lapse in the squad video between the stop and Larson's approach to the van. We defer to the district court's credibility determinations. Moreover, the district court found appellant's testimony not credible and believed Larson's testimony. *See State v. Super*, 781 N.W.2d 390, 396 (Minn. App. 2010) (stating that "factfinder is the exclusive judge of witness credibility"), *review denied* (Minn. June 29, 2010).

When the van door was opened so that he could obtain the passengers' identification, Larson saw 20 BBs and what appeared to be part of a syringe. He knew that three of the passengers had felony records. Larson decided to have his dog do an investigative sniff of the van, suspecting that there might be narcotics or weapons. "[A] police officer must have a reasonable, articulable suspicion of drug-related criminal activity before law enforcement may conduct a dog sniff around a motor vehicle lawfully stopped for some other reason." *Lugo*, 887 N.W.2d at 486. Even if an individual circumstance is consistent with innocent behavior, the totality of the circumstances may raise a reasonable suspicion of unlawful activity. *State v. Martinson*, 581 N.W.2d 846, 852 (Minn. 1998). The visible BBs, the passengers' felony records, and the presence of what appeared to be part of a syringe gave Larson reasonable suspicion to expand the stop.

Before permitting his dog to do a sniff, Larson removed the passengers from the van, both for the safety of the officers and for the safety of the passengers, because he knew his dog could jump through a window and hurt someone. A law enforcement officer may order a passenger to get out of a lawfully stopped vehicle despite having no individualized basis to do so, without offending either the United States or the Minnesota Constitutions. *Maryland v. Wilson*, 519 U.S. 408, 414 15, 117 S. Ct. 882, 886 (1997); *State v. Ortega*, 770 N.W.2d 145, 152 (Minn. 2009); *State v. Krenik*, 774 N.W.2d 178, 184 (Minn. App. 2009), *review denied* (Minn. Jan. 27, 2010).

When an officer secures a scene, he may perform a pat search for weapons. *Minnesota v. Dickerson*, 508 U.S. 366, 373, 113 S. Ct. 2130, 2136 (1993). Such a pat search is permissible when an officer is conducting an investigation at close range and the

search is limited to that necessary "to allow the officer to pursue his investigation without fear of violence." *Id.* (quotation omitted). As Larson performed the pat search, appellant informed him that he had a gun in his waist belt. The gun was removed by other officers and Larson continued the search, discovering by plain feel six rounds of 40 caliber ammunition.

The United States Supreme Court acknowledged the validity of the "plain feel" exception to the warrant requirement in *Dickerson*, concluding that like the plain-view doctrine, there is "no invasion of a legitimate expectation of privacy and thus no 'search' within the meaning of the Fourth Amendment." *Id.* at 375, 113 S. Ct. at 2137. "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." *Id.* at 375-76, 113 S. Ct. at 2137. Larson testified that as he patted appellant down, he "felt what appeared obviously to be ammunition in his front coin pocket, smaller pocket." Because Larson knew that appellant was ineligible to have either a firearm or ammunition, he arrested appellant.

We conclude that each incremental expansion of this traffic stop was supported by reasonable, articulable suspicion, and, therefore, the district court did not err by refusing to suppress the evidence recovered during the stop.

Affirmed.