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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0414

William Eduardo Fajardo, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed December 4, 2017
Affirmed
Reyes, Judge

Ramsey County District Court
File No. 62-CR-14-2407

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

John Choi, Ramsey County Attorney, Adam E. Petras, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Jesson, Presiding Judge; Reilly, Judge; and Reyes, Judge.

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

REYES, Judge

On appeal from the denial of postconviction relief following conviction of first-degree controlled-substance crime, appellant argues that the postconviction court erred in concluding that the district court properly denied his motion to suppress evidence obtained during a warrantless investigative stop and frisk. We affirm.

FACTS

Around 10:45 p.m. on April 8, 2014, Officer McNeill of the Saint Paul Police Department pulled over a vehicle for making an illegal right turn. He suspected the driver may have been impaired. After he turned on his squad-car lights, but before the car pulled over, Officer McNeill noticed "a bunch of movement" coming from the front passenger's side of the vehicle. Both the driver and the front passenger were shifting positions in the vehicle. Based on his training and experience, Officer McNeill believed the occupants of the vehicle may have been hiding something or reaching for a weapon. He radioed for backup.

Officer McNeill approached the vehicle and spoke with the driver as he waited for backup. When backup arrived, Officer McNeill frisked the driver for weapons. He secured the driver in the back of his squad car after he found no weapons on the driver's person.

Officer McNeill told backup Officer Wilson of the Saint Paul Police Department that he was concerned about the front passenger, appellant William Eduardo Fajardo, because he exhibited multiple movements during and after the stop. Officer Wilson asked

questions of appellant, who exhibited nervous behaviors. Officer Wilson believed appellant may have had a weapon and pat-searched him for officer safety.

Officer Wilson felt something hard and rectangular in appellant's pocket as he pat-searched appellant. He removed the object, which was a cigarette hard pack. As he set the cigarette pack down on the hood of the squad car, Officer Wilson felt something hard inside of the cigarette pack. He opened the cigarette pack because he suspected a weapon may have been concealed inside. Inside the cigarette pack was a baggie that contained a crystalline substance that appellant confirmed was methamphetamine.

After arresting appellant and securing him in the back of his squad car, Officer Wilson searched the front passenger's seat where appellant had been sitting. He found a jacket on the seat and a search of the jacket revealed a scale and a baggie that contained a large amount of a substance, which later testing identified as methamphetamine.

Respondent State of Minnesota charged appellant with one count of first-degree controlled-substance crime in violation of Minn. Stat. § 152.021, subd. 2(a)(1) (2012). Appellant filed a motion to suppress the evidence, arguing that law enforcement illegally expanded the scope and duration of the stop. The district court denied appellant's motion. Appellant waived his right to a jury trial, and the parties agreed to proceed with a court trial pursuant to Minn. R. Crim. P. 26.01, subd. 4. The district court found appellant guilty, imposed a downward dispositional departure by staying the presumptive 94-month prison term, and placed him on probation for ten years.

Appellant filed a postconviction petition, arguing that the district court erred when it denied his motion to suppress because law enforcement impermissibly: (1) expanded the

scope and duration of the stop; (2) pat-searched appellant; and (3) searched the cigarette pack found on appellant's person. Appellant filed an amended postconviction petition, making an additional argument of ineffective assistance of counsel. The postconviction court denied appellant's postconviction petition and amended postconviction petition in separate orders. This appeal follows.

D E C I S I O N

I. The postconviction court did not abuse its discretion when it denied appellant's postconviction petition challenging the scope and duration of the stop.

This court reviews the denial of a petition for postconviction relief for an abuse of discretion. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015) (citations and quotations omitted). "We review legal issues de novo, but on factual issues our review is limited to whether there is sufficient evidence in the record to sustain the postconviction court's findings." *Id.* (quotation omitted). We will not reverse an order absent a showing that the "postconviction court exercised its discretion in an arbitrary or capricious manner, based on its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Id.*

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures, subject to certain exceptions. U.S. Const. amend. IV; Minn. Const. art. I, § 10. One such exception is an investigatory *Terry* stop, which allows law-enforcement officials to temporarily detain a suspect if the officer harbors a reasonable, articulable suspicion of a motor-vehicle violation or criminal activity. *Navarette v. California*, 134 S. Ct. 1683,

1687 (2014) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880 (1968)); *State v. Duesterhoeft*, 311 N.W.2d 866, 867-68 (Minn. 1981).

"An initially valid stop may become invalid if it becomes intolerable in its intensity or scope." *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (quotation omitted). The scope of the stop must be limited to the reason for the stop, unless identifiable and objective facts lead the officer to develop a reasonable, articulable suspicion of other illegal activity, in which case the officer may legally expand the scope and duration of the stop to investigate that other illegal activity. *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012). Each incremental intrusion 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*." *Askerooth*, 681 N.W.2d at 365.

A. Officer McNeill permissibly expanded the scope of the stop when he called for backup.

Appellant argues that the postconviction court erred when it rejected his claim that Officer McNeill did not have reasonable, articulable suspicion to expand the scope of the stop when he called for backup officers. We disagree.

Here, Officer McNeill observed identifiable, objective factors that warranted his call for backup. First, he had a reasonable suspicion that the driver may have been impaired because the driver left his blinker on for a few seconds after making a wide right turn. The driver did not immediately pull over, and when he did, the vehicle jumped up onto the driveway ramp and curb on the side of the road.

Second, Officer McNeill observed both appellant and the driver making furtive movements and shifting their weight as he pulled over the vehicle. At that time, appellant also leaned forward as if he were reaching under his seat. Therefore, objectively reasonable facts support Officer McNeill's call for backup for officer-safety reasons. *See State v. Varnado*, 582 N.W.2d 886, 891 (Minn. 1998) ("officer safety is a paramount interest"); *State v. Flowers*, 734 N.W.2d 239, 251-52 (Minn. 2007) (deferring to officer's inferences and deductions when articulating reasonable suspicion because of special training they receive).

B. Officer McNeill permissibly expanded the scope of the stop when he made small talk with the driver of the vehicle.

Appellant argues that the postconviction court erred when it rejected his claim that Officer McNeill illegally expanded the stop when he made small talk with the driver of the vehicle. We disagree.

An officer may expand the stop if it is tied to the stop's original purpose. *Askerooth*, 681 N.W.2d at 365. Officer McNeill stopped the vehicle because he observed the driver commit a moving violation, engaged in small talk with the driver for one minute, and asked for the driver's identification during that time. Thus, his small talk with the driver was tied to the original purpose of the stop and was reasonable.

In addition, officer safety is sufficient to warrant Officer McNeill's expansion of the scope of the stop. *See Askerooth*, 681 N.W.2d at 365 (reasonableness, as defined in *Terry*, is one way to expand the scope of a search or seizure). Based on an objective analysis of the totality of the circumstances, there were sufficient facts to establish a reasonable,

articulable suspicion that either the driver or appellant, or both, were reaching for a weapon or engaged in other illegal activities.

C. Officer McNeill permissibly expanded the scope of the stop when he pat-searched the driver for weapons.

Appellant argues that the postconviction court erred when it rejected his claim that Officer McNeill did not have reasonable, articulable suspicion to expand the scope of the stop to pat-search the driver of the vehicle based on the officer's two observations of the driver's and appellant's furtive movements and the driver's nervousness. We are not persuaded.

A police officer making a lawful investigatory detention of a vehicle may conduct a limited protective pat-down search for weapons if there exists a reasonable suspicion, based on articulable facts, that a person is armed and dangerous. *Arizona v. Johnson*, 555 U.S. 323, 326-27, 129 S. Ct. 781, 784 (2009); *see Terry*, 392 U.S. at 30, 88 S. Ct. at 1884-85. The officer does not need to be certain that the person is armed; rather, the inquiry is whether a reasonably prudent officer would fear for his safety or the safety of others. *Id.* at 27; *see, e.g.*, *Flowers*, 734 N.W.2d at 250-51.

Observation of furtive movement heavily influences the determination of whether a resulting pat-frisk is lawful. *See State v. Richmond*, 602 N.W.2d 647, 651 (Minn. App. 1999) (stating officer had a reasonable suspicion to search in part because defendant made a "furtive movement" by reaching toward his car's passenger compartment), *review denied* (Minn. Jan. 18, 2000).

Generally, nervousness alone cannot serve as a basis for expanding the scope of an unrelated traffic stop. *See Smith*, 814 N.W.2d at 351 (articulating reasonable nervousness alone is insufficient, but violent shaking and evasive responses may provide reasonable suspicion necessary to justify expansion of a traffic stop). Nervousness is "a subjective assessment derived from the officer's perceptions" and generally "is not sufficient by itself and must be coupled with other particularized and objective facts." *State v. Syhavong*, 661 N.W.2d 278, 282 (Minn. App. 2003) (citations omitted).

Here, Officer McNeill thought the driver was nervous because his voice cracked when he spoke. Although nervousness alone generally does not warrant a pat-search, nervousness coupled with furtive movements does. *Id.* at 282 (nervousness "must be coupled with other particularized and objective facts" to justify pat-frisk). Based on an objective analysis of the totality of the circumstances, there were sufficient facts to establish a reasonable, articulable suspicion that the driver was armed and dangerous. Therefore, Officer McNeill permissibly pat-searched the driver.

D. Officer Wilson permissibly expanded the scope of the stop when he pat-searched appellant for weapons.

Appellant argues that the postconviction court erred when it rejected his claim that Officer Wilson did not have reasonable, articulable suspicion to expand the scope of the stop to pat-search him. We disagree.

Appellant exhibited nervous behaviors, did not make eye contact with Officer Wilson, and gave one-word answers to questions. He had sweat forming on his forehead while wearing a t-shirt in 45-degree weather. Officer Wilson could also see the carotid

artery in appellant's neck pulsating because his heart was beating rapidly. Appellant's nervousness coupled with his furtive movements are facts that would lead a reasonable officer to conduct a pat-search based on objective reasonable suspicion.

II. Appellant did not forfeit his challenges to the removal and opening of the cigarette pack.

Appellant argues that the postconviction court erred when it adopted the state's assertion that appellant forfeited his challenges to the removal and opening of the cigarette pack. We agree.

A forfeiture is "a failure to make a timely assertion of a right." *State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015). A pretrial motion to suppress evidence must specify the grounds for suppression "with as much particularity as is reasonable under the circumstances." *State v. Needham*, 488 N.W.2d 294, 296 (Minn. 1992); s*ee State v. Balduc*, 514 N.W.2d 607, 609-10 (Minn. App. 1994) (concluding appellant did not forfeit challenge to particularity of search warrant description where appellant notified prosecutor "all usual omnibus hearing issues would be contested;" asked to have all police officers present; and questioned officer about contents of search warrant, application, and other factors relevant to particularity). Based on the record, the state had sufficient notice of the issues relating to appellant's pat-search claims.

Here, appellant moved the district court to suppress "any and all evidence [ ] obtained as a result of the illegal warrantless stop and search of the vehicle and [his person]." In response, the state addressed the exceptions to the warrant requirement, including the scope of a protective weapons frisk under *Terry* and the search of the cigarette

pack. In addition, the officers testified about the pat-search of appellant and the search of the cigarette pack.

Furthermore, the district court ruled on both of these issues. Finally, we note that the proper remedy where the defendant fails to provide sufficient notice is to reopen the omnibus hearing to permit the state an opportunity to elicit relevant testimony to argue the issue. *Needham*, 488 N.W.2d at 296. We reject the state's forfeiture argument and conclude that appellant did not forfeit the challenge to the removal and search of the cigarette pack found on appellant's person. We address each in turn.

A. Officer Wilson permissibly expanded the scope of the pat-search when he removed the cigarette pack from appellant's pocket.

Appellant argues that the removal of the cigarette pack exceeded the scope of a protective search for weapons because it was not immediately apparent that the cigarette pack was a weapon or contraband. We are not persuaded.

A valid protective pat-search consists "solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault." *Sibron v. New York*, 392 U.S. 40, 65, 88 S. Ct. 1889, 1904 (1968). During a lawful pat-frisk for weapons, an officer may remove a "hard object of substantial size" from a suspect's person 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, Officer Wilson felt something hard and rectangular in shape in appellant's pocket and did not specifically know if it was or was not a cigarette pack prior to removing it. He testified that anything he "can't clearly identify as not being a weapon from the outside of the clothing I'll remove to check it further to ensure that it's not a weapon or not concealing a weapon." Officer Wilson was unsure whether the cigarette pack was a weapon; thus, his pat-search of appellant was permissible.

B. Officer Wilson permissibly searched the cigarette pack.

Appellant argues that Officer Wilson illegally searched the cigarette pack recovered during the pat-search of appellant's person. We disagree.

After Officer Wilson retrieved the rectangular object from appellant's pocket and discovered that it was a cigarette pack, he set the pack down on the hood of the squad car and noticed a hard object in the pack. Officer Wilson could not discern what was in the cigarette pack, but he knew that cigarettes are not typically hard. Although Officer Wilson had never personally found a weapon in a cigarette pack, he knew from training, bulletins, and other classes that weapons can be concealed in cigarette packs. He had also recovered firearms that are small enough to fit inside a cigarette pack. Based on the totality of the circumstances, Officer Wilson had a reasonable, particularized suspicion that the cigarette pack may have contained a weapon.

III. The postconviction court did not abuse its discretion in rejecting appellant's claim of ineffective-assistance-of-counsel.

Appellant argues that the postconviction court abused its discretion in denying his claim of ineffective-assistance-of-counsel because his motion to suppress would have been

granted had defense counsel raised and preserved arguments that Officer Wilson's pat-search of appellant and opening of the cigarette pack were impermissible. Appellant's argument lacks merit.

To prevail on his ineffective-assistance-of-counsel claim, appellant must demonstrate "(1) that his counsel's representation 'fell below an objective standard of reasonableness'; and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). We address the two prongs "in any order and may dispose of the claim on one prong without analyzing the other." *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006). As discussed above, appellant did not waive his challenges to the pat-search of his person and the opening of the cigarette pack.

Affirmed.