STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1415

State of Minnesota,
Respondent,

vs.

Jeremia Michael Roberts,
Appellant.

Filed August 6, 2018
Reversed in part and remanded
Rodenberg, Judge

Rice County District Court
File No. 66-CR-16-2531

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

John Fossum, Rice County Attorney, Terence Swihart, Assistant County Attorney, Faribault, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Haley L. Waller Pitts, Fredrickson & Byron, P.A., Special Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and Florey, Judge.

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

RODENBERG, Judge

Appellant challenges the district court's denial of his motion to suppress the evidence seized from the van he was driving and, derivatively, argues that the admissible evidence is insufficient to support his unlawful-possession-of-a-firearm conviction. We reverse in part and remand.

FACTS

Appellant Jeremia Michael Roberts was arrested for providing a false name to police after a police chief responded to a report of a suspicious van. After the chief located and stopped the van, a shotgun was found in the van, and appellant was charged with unlawful possession of that firearm. Appellant moved to suppress evidence of the firearm, arguing that the evidence resulted from an illegal search of the van.

At a contested omnibus hearing, the chief testified that, at 11:30 a.m. on October 28, 2016, he received a report of a suspicious van parked in a field. The chief knew that the field "is commonly where people park to drink, [and] dispose of stolen property." When the chief approached the area, the van began to move away. Appellant was driving. The chief knew the owners of the van and knew that they had no sons, so he found it suspicious that a male was driving the van. The chief initiated a traffic stop, and asked for appellant's driver's license and insurance information. Appellant said that he did not have a valid license, and wrote down a name and date of birth for Z.F.R. The chief requested that dispatch check the driver's-license status corresponding to that name. Dispatch reported that Z.F.R. had a valid license.

The chief testified that, because the van had dark tinted windows, he did not initially observe anyone else in the van. But a woman appeared from under a blanket in the center of the van and began looking for proof of insurance. The woman told the chief that four people were in the van. The chief believed people were hiding under the blankets, so he made all four occupants get out of the van. The chief then requested backup.

The chief testified that he recognized the female passenger as the daughter of the van's owners. He attempted to identify the two males who had been in the back of the van. One of the male passengers then took off running. The chief then handcuffed appellant and placed him on the ground in the grassy ditch area "for safety." The chief testified that he was outnumbered and he "still did not know for sure who [he] had because the driver indicated that he was not valid. However, the name he [provided] came back as valid." The female sat on the ground, and the chief placed the remaining male passenger in the squad car. The chief testified that the female could have accessed the van during this time, but she neither did so nor made any attempt to do so.

When another officer arrived, the chief undertook what he described as "a full-on search" of appellant, including a search of his pockets. A wallet was removed from appellant's pocket. It contained a birth certificate for Jeremia Roberts, whom appellant identified as his brother. The chief was eventually able to identify appellant as Jeremia Roberts after he consulted computer records from his squad car. After appellant had been searched, the assisting officer began searching the van.

The assisting officer testified at the omnibus hearing that he had responded to a request for assistance on a suspicious-vehicle call. He was informed that someone had fled

from the vehicle. Upon arriving, this officer spoke to the chief who "told [the officer] what he had thus far, who the driver was, what had happened."[1] The chief "told [the officer] one had fled from the scene. Acknowledged the rest he had here at the scene, the three." The assisting officer testified that, after aiding in the search of appellant, he walked around the van and could see into it by looking through the glass. Despite the passenger-side sliding door being open, the officer opened the driver-side sliding door and saw blankets and pillows in the back of the van. The assisting officer moved a blanket in the van and found a shotgun. He testified that he moved the blanket because "the scene was quite chaotic" and "when [he] got there, [the chief] said he had people running from the van or a person. [The officer] didn't know if there were other people hiding in the van, other possible runaways, and for safety reasons." He testified that the female passenger told him the gun belonged to appellant. He acknowledged that the sequence of events was: "arrive on scene, find all the people are out of the vehicle, pat down [appellant], walk over, open the door, search the vehicle."

Appellant argued to the district court that the assisting officer's warrantless search of the van did not fall under any exception to the warrant requirement. The state argued that the officer performed a constitutional "protective sweep" of the vehicle, based on a reasonable suspicion that other people could be hiding in the van. The district court denied appellant's suppression motion.

[1] The inconsistency between this testimony and the timing of the chief ascertaining appellant's true identity is unresolved by the record.

The district court concluded that the search of the van was a legitimate protective sweep, because the female had access to the van when she was outside of it, and because the chief did not personally check the van to determine if anyone else remained hiding in it. Appellant moved the district court to reconsider its decision, arguing the protective-sweep exception to the warrant requirement is limited to a "cursory visual inspection of those places in which a person might be hiding" and must be incident to an arrest. Appellant argued he was not under arrest at the time of the search and the assisting officer did not reasonably suspect someone was hiding in the van. The district court declined to reconsider.

The case was tried to a jury. At trial, S.D., the female passenger, testified that she had been using her parents' van with their permission. She testified that on the "night before . . . we were pulled over, the boys were out carjacking. And [appellant] had put the shotgun in the car from someone's garage. So that is how it got in the car." The chief and the assisting officer also testified, and the squad-car video from the chief's vehicle was admitted into evidence and played for the jury. The squad-car video lasts 43 minutes and clearly depicts the chief's stop of and approach to the vehicle, the exit of all persons from the vehicle, the flight of one of the males from the scene, the search of appellant, and the search of the vehicle. The jury found appellant guilty of both unlawfully possessing a firearm and providing false information to law enforcement.

This appeal followed.[2]

[2] Appellant does not challenge his conviction for providing false information to law enforcement, and we do not review it on appeal.

D E C I S I O N

Appellant argues that the district court erred in concluding that police were entitled to search the van of which he had been the driver as part of a protective sweep, because the officer did not have reasonable suspicion to search the vehicle and appellant was not under arrest at the time of the search. He also challenges the sufficiency of the evidence supporting a conviction.

We first consider whether the assisting officer's search of the van fell within an exception to the warrant requirement.[3] "[W]hen reviewing a pre-trial order suppressing evidence where the facts are not in dispute and the trial court's decision is a question of law, the reviewing court may independently review the facts and determine, as a matter of law, whether the evidence need be suppressed." *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). Where the facts are in dispute, an appellate court reviews the district court's findings for clear error and its legal determinations de novo. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009).

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[3] Under the Fourth Amendment, a defendant challenging a search of a vehicle must have a possessory interest in the vehicle or the property seized, or must demonstrate an actual and reasonable expectation of privacy in the place searched. *Rakas v. Illinois*, 439 U.S. 128, 148-49, 99 S. Ct. 421, 433 (1978); *In re Welfare of B.R.K.*, 658 N.W.2d 565, 571 (Minn. 2003); *State v. Ortega*, 749 N.W.2d 851, 853 (Minn. App. 2008) (declining to address whether a passenger had a reasonable expectation of privacy in a car because it is not a jurisdictional question and the state did not contend that the defendant lacked such an expectation), *aff'd*, 770 N.W.2d 145 (Minn. 2009). Appellant did not specifically allege either that he had a reasonable expectation of privacy in the vehicle owned by S.D.'s parents, or that he had a possessory interest in the property seized. However, the state did not, at the district court, challenge appellant's ability to invoke Fourth Amendment protections concerning the search of the van, and, on appeal, makes no argument concerning this issue. Therefore, we do not address whether appellant had a reasonable expectation of privacy in the center area of the van.

The United States and Minnesota Constitutions guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. 1, § 10. Evidence seized in violation of the United States or Minnesota Constitutions must be suppressed. *Terry v. Ohio*, 392 U.S. 1, 13, 88 S. Ct. 1868, 1875 (1968); *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011). A search or seizure that is conducted without a warrant is presumptively unreasonable. *State v. Lugo*, 887 N.W.2d 476, 486 (Minn. 2016). Exceptions to the warrant requirement "are based on particular exigencies of a situation and must be 'jealously and carefully drawn.'" *State v. Robb*, 605 N.W.2d 96, 100 (Minn. 2000) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S. Ct. 2022, 2032 (1971)). The burden is on the state to demonstrate an exception to the warrant requirement. *Id.*

The state argues that *Maryland v. Buie*, 494 U.S. 325, 330, 110 S. Ct. 1093, 1096 (1990), and *State v. Bergerson*, 671 N.W.2d 197, 203 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004), justify the search of the van in this case.

In *Buie*, the Supreme Court considered the permissibility and limits of a protective sweep. 494 U.S. at 330, 110 S. Ct. at 1096. The Supreme Court began its analysis by stating that police with an arrest warrant and probable cause to believe the person covered by the arrest warrant is in a home have authority to search for the person in any room in the house. *Id.* at 332-33, 110 S. Ct. at 1097. Once the person subject to the arrest warrant is found, the ability of law enforcement officers to enter other rooms is limited. *Id.* at 333, 110 S. Ct. at 2097. At the time the person subject to the warrant is found, "the arresting officers are permitted . . . to take reasonable steps to ensure their safety after, and while

making the arrest." *Id.* at 334, 110 S. Ct. at 1098. Those "reasonable steps" include "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Id.* at 327, 110 S. Ct. at 1094.

An officer, therefore, is permitted to "look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched" without requiring probable cause or reasonable suspicion to do so. *Id.* at 334, 110 S. Ct. at 1098. Beyond those spaces, "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* Such a protective sweep "may extend only to a cursory inspection of those spaces where a person may be found" and "lasts no longer than is necessary to dispel the reasonable suspicion of danger." *Id.* at 335-36, 110 S. Ct. at 1099. The supreme court clarified that a "protective sweep . . . occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime," as opposed to a *Terry* frisk, which occurs before a "confrontation has escalated to the point of arrest." *Id.* at 333, 110 S. Ct. at 1098.

In *Bergerson*, this court adopted the protective-sweep exception in Minnesota, holding that officers may conduct "protective sweep searches" in the area "immediately adjoining the place of arrest without probable cause or reasonable suspicion" of a crime, and areas near the place of arrest, if supported by "articulable facts and rational inferences from those facts [that] warrant a reasonable suspicion that the area to be searched harbors

one or more individuals who threaten the safety of officers and others at the scene." 671 N.W.2d at 203.

Here, the district court concluded that the assisting officer conducted a valid protective sweep because "[t]he officers had a reasonable articulable concern for their safety because the officers *reasonably believed that criminal activity was occurring*." (Emphasis added.) But this is not the standard articulated by *Buie.* Under *Buie*, a sweep of areas outside of the immediate area of arrest[4] must be supported by reasonable suspicion "that the area . . . harbors an individual posing a danger to those on the arrest scene." 494 U.S. at 334, 110 S. Ct. at 1098. The district court conflated the legal justification for stopping the individuals with the justification for searching the interior of the van. A search of the interior of the vehicle is not permitted solely because an officer reasonably believed that a crime had been committed by an occupant of the vehicle.[5]

[4] Because we hold that the search of the vehicle was not supported by reasonable suspicion that the vehicle harbored one or more persons posing a danger to those on scene, we do not consider whether appellant was under arrest at the time of the search or whether the protective-sweep exception articulated in *Buie* is applicable to traffic stops.

[5] To support the order denying the motion to suppress, the district court cited *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469 (1983), for the proposition that contraband found during a legitimate protective sweep of a vehicle is not required to be suppressed. In *Long*, the supreme court held that the search of the passenger compartment of a vehicle is permitted if the officer "possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous *and* the suspect may gain immediate control of weapons." 463 U.S. at 1049-50, 103 S. Ct. at 3481 (emphasis added) (quoting *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880). The assisting officer and the chief presented no testimony at the omnibus hearing that would have justified a search of the vehicle for weapons under *Long.*

On our thorough review of the record, we are convinced that the search of the van was not a valid protective sweep. The assisting officer acknowledged in his testimony that the chief told him that one person had fled the scene and that the three other individuals who had been in the van were outside. He agreed that, when he arrived, "all the people [were] out of the vehicle." He testified that he could see into the van before he opened the door and began moving items in the van.

Although the assisting officer testified that the scene was "chaotic" when he arrived, the record supports no such characterization. At the time the assisting officer arrived, the chief had the individuals separated and contained and was attempting to identify the individuals and decide if a crime had been committed. At that time, one male was in the back seat of the squad car; appellant was handcuffed on the ground in the ditch area away from the van; and neither the chief nor the assisting officer evidenced any concern about the female passenger, who stayed near the front of the van and was, by all accounts, cooperative and not perceived as a threat.

Whatever safety concerns might have existed earlier, everything was under control long before the assisting officer entered the van and began searching it. We see no articulable facts that would warrant a reasonably prudent officer to suspect at that point that the van harbored one or more individuals who posed a danger to the officers or others present. *See Buie*, 494 U.S. at 334, 110 S. Ct. at 1098; *Bergerson*, 671 N.W.2d at 203. Nor does the officer's testimony indicate that the officer limited his search of the van to a "cursory visual inspection" to ascertain if other individuals were in the van. *Buie*, 494 U.S. at 327, 110 S. Ct. at 1094. Rather, the assisting officer testified that he could see into the

van before he entered it and began moving items in—and removing the firearm from—the van. The officer did not possess articulable facts to support a suspicion that the van harbored additional individuals.

The warrantless search of the van and the seizure of the firearm violated appellant's Fourth Amendment rights.[6] The firearm was therefore not properly admitted as evidence at trial. In the absence of the firearm, the evidence is insufficient to support the unlawful-possession conviction.

We reverse appellant's unlawful-possession-of-a-firearm conviction, and remand to the district court to vacate the judgment of conviction and sentence on that charge. *See State v. Souto*, 578 N.W.2d 744, 751 (Minn. 1998) (ordering conviction be vacated where evidence should have been suppressed).

Reversed in part and remanded.

[6] The state also argued that the search was incident to a lawful arrest. At oral argument, the state withdrew that argument and indicated it intended to rely solely on the protective-sweep exception. We therefore do not consider whether the search could be upheld under the incident-to-lawful-arrest exception.