STATE OF MINNESOTA
IN COURT OF APPEALS
A17-2052

State of Minnesota,
Respondent,

vs.

Andrew Timothy Barnett,
Appellant.

Filed September 10, 2018
Reversed
Kirk, Judge

Hennepin County District Court
File No. 27-CR-16-30983

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Amanda Harrington (certified student attorney), Minneapolis, Minnesota (for respondent)

Paul P. Sarratori, Mesenbourg & Sarratori Law Offices, P.A., Coon Rapids, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Kirk, Judge.

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

KIRK, Judge

In this appeal from a conviction and sentence for a fifth-degree controlled-substance crime, appellant challenges the district court's pretrial order denying his motion to suppress drug evidence obtained during a traffic stop of a vehicle in which he was a passenger. Because

no valid exception justified the warrantless search of appellant's person, the evidence obtained as a result of the search was inadmissible, and we reverse appellant's conviction and sentence.

FACTS

On September 1, 2016, Brooklyn Center police officers J.W. and B.B. were on patrol in an area known for a high rate of violent crime and drug offenses. They learned over the police radio that a suspicious vehicle with three black male occupants had just left a nearby hotel with a broken taillight. They located the vehicle and followed it. The vehicle did not have a broken taillight, but a license-plate check revealed that the vehicle was registered to a female owner and that the vehicle's registration was revoked.

The officers conducted a traffic stop at the onramp to Interstate 94 and approached the vehicle's three male occupants: appellant Andrew Timothy Barnett, who was seated in the front passenger seat; the driver; and a second passenger, who had been laying down in the backseat. After determining that the vehicle was a hazard parked on the onramp and would have to be towed, the officers asked the occupants to exit the vehicle.

Upon exiting the vehicle, appellant spontaneously disclosed that he had marijuana. Officer J.W. asked appellant to consent to a pat-frisk search, and he agreed. Officer J.W. then performed a full search of appellant's person and discovered heroin in his pocket. Appellant was arrested and charged with a fifth-degree controlled-substance crime—heroin possession. Appellant moved to suppress the heroin, an omnibus hearing was held, and the district court denied the motion. Appellant waived his right to a jury trial, and the matter proceeded to a stipulated evidence court trial under Minn. R. Crim. P. 26.01, subd. 4, where appellant was found guilty. Appellant appeals the denial of his pretrial suppression motion.

D E C I S I O N

I. Initial traffic stop

We review "whether a search or seizure is justified by reasonable suspicion or by probable cause" de novo and the district court's disputed findings of fact for clear error. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005). "To conduct a stop for limited investigatory purposes, an officer must have reasonable, articulable suspicion of criminal activity." *State v. Bergerson*, 659 N.W.2d 791, 794 (Minn. App. 2003). "Generally, if an officer observes a violation of a traffic law, no matter how insignificant the traffic law, that observation forms the requisite particularized and objective basis for conducting a traffic stop." *State v. Anderson*, 683 N.W.2d 818, 823 (Minn. 2004).

It is illegal for "[a]ny person" to drive a motor vehicle with a revoked registration, Minn. Stat. § 168.36, subd. 1 (2016), and a vehicle's expired registration is a sufficient basis to justify a stop. *Carter v. State*, 787 N.W.2d 675, 679 (Minn. App. 2010). Appellant argues that under *State v. Pike*, the officers' reasonable suspicion for the traffic violation—the vehicle's revoked registration—dissipated once they learned that the registered owner was female and that all of the vehicle's occupants were male. 551 N.W.2d 919 (Minn. 1996). But *Pike* is distinguishable because it involved a revoked driver's license, a violation for a particular driver, not a revoked vehicle registration, a violation for any person who drives the vehicle. *Id.* at 921.

Appellant also contends that the stop was pretextual, that the officers actually stopped the vehicle based on the report of suspicious activity at a nearby hotel, and that the squad video shows that the alleged broken taillight was fully functional. "Our task is not to decide

whether the particular officer's suspicion was *genuine* . . . ; we examine whether the suspicion was objectively reasonable." *State v. Britton*, 604 N.W.2d 84, 88 (Minn. 2000). Because the suspected traffic violation was an objectively reasonable basis to initiate the traffic stop, the initial stop and seizure of the vehicle and its occupants were valid.

II. Incremental expansion of the stop

An officer may expand the scope of the initial stop to investigate other suspected illegal activity "only if the officer has reasonable, articulable suspicion of such other illegal activity." *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002). Each incremental intrusion must be tied to and justified by the stop's original purpose, by probable cause, or by reasonableness. *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012). Appellant argues that the officers impermissibly expanded the traffic stop into a drug investigation by asking for his driver's license, questioning him, and asking him to consent to a search, even though he was a passenger. The state argues that requesting appellant's driver's license was reasonably related to the initial stop and that even if it was improper, no evidence was obtained as a result.

Appellant does not dispute the officers' determination that the vehicle had to be towed or that the officers had the authority to ask the occupants to exit the vehicle as part of the routine traffic stop. *See State v. Krenik*, 774 N.W.2d 178, 183-84 (Minn. App. 2009) (applying *Maryland v. Wilson*, 519 U.S. 408, 415, 117 S. Ct. 882, 886 (1997)) (explaining that police may ask a driver and passengers to exit a lawfully stopped vehicle without an individualized basis until the stop's completion), *review denied* (Minn. Jan. 27, 2010).

The record shows that the search of appellant occurred, and the inculpatory drug evidence was discovered, after appellant admitted to having marijuana upon the lawful request

to exit the vehicle. Neither the initial questioning of appellant nor the request for his driver's license resulted in the discovery of the suspect heroin. Thus, we need not determine whether these incremental expansions were impermissible, because any resultant error was harmless beyond a reasonable doubt. *See State v. Davis*, 820 N.W.2d 525, 533 (Minn. 2012) (explaining that constitutional error "is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the error") (quotation omitted).

III. Pat-frisk and full search of appellant

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" unless "the state proves that the search fell within one of the exceptions to the warrant requirement." *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). We review probable cause for a warrantless search de novo and will reverse a district court's findings only if they are clearly erroneous or contrary to law. *In re Welfare of G.M.*, 560 N.W.2d 687, 690 (Minn. 1997).

Officer J.W. testified that upon exiting the vehicle, appellant spontaneously stated that he had marijuana on his person. Appellant argues that it is "laughable" that he made this statement. Although the squad video does not have audio to verify appellant's statement or its timing, the district court found that Officer J.W.'s testimony was credible. The court's finding was not clearly erroneous, and we defer to this credibility determination. *DeMars v. State*, 352 N.W.2d 13, 16 (Minn. 1984) ("The credibility of witnesses and the weight to be given their testimony are determinations [for] the factfinder.").

Following appellant's spontaneous admission, Officer J.W. asked appellant if he had any weapons. Appellant said no. Officer J.W. then asked appellant if he could perform a pat-down search, and appellant consented. "[D]uring a routine stop for a minor traffic violation, a pat-down search is improper unless some additional suspicious or threatening circumstances are present." *State v. Varnado*, 582 N.W.2d 886, 890 (Minn. 1998). A limited pat-frisk search for weapons is permitted if "(1) [an officer has] 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), *aff'd*, *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130 (1993).

Given appellant's admission to marijuana possession, Officer J.W. had reasonable, articulable suspicion that appellant may be engaged in illegal drug activity. Further, Officer J.W. testified that he pat-searched appellant for safety reasons and that the officers' suspicions were raised by the backseat passenger laying down and by reports of the vehicle's suspicious activity at a nearby hotel. This record supports that additional suspicious circumstances were present to justify Officer J.W.'s request for appellant's consent to pat-frisk him.

"For a search to fall under the consent exception, the [s]tate must show by a preponderance of the evidence that consent was given freely and voluntarily." *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). The district court considers "the totality of the circumstances" in weighing consent; a "mere acquiescence to a claim of lawful authority" is not enough. *Id.* (quotations omitted). "The mere presence of two officers and a simple request for permission to conduct a pat-down frisk do not constitute coercion." *State v. Doren*, 654 N.W.2d 137, 143 (Minn. App. 2002), *review denied* (Minn. Feb. 26, 2003).

Appellant challenges the district court's finding that he freely and voluntarily consented to the pat-frisk search. The record shows that two officers initially arrived at the scene and two others arrived to assist, but that appellant primarily interacted with Officer J.W. Neither appellant, nor the driver, were initially put in handcuffs, and the driver was placed in the backseat of the squad car with the door open. Officer J.W. asked to pat-search appellant one time, and appellant agreed after that request. The totality of the circumstances supports the district court's finding that appellant freely and voluntarily consented to a pat-frisk search.

After appellant consented to a pat-frisk search, Officer J.W. asked appellant where the marijuana was. Appellant said that he did not know. The squad video shows that Officer J.W. immediately started to search inside appellant's pants. The district court found that "[o]nly after [d]efendant stated he did not know where the drugs were located did the officer perform a more thorough search—a search supported by probable cause—and find the heroin." A warrantless search of a person based on probable cause is not a valid exception to the warrant requirement. *See generally Arizona v. Gant*, 556 U.S. 332, 338, 129 S. Ct. 1710, 1716 (2009) (including among exceptions to warrant requirement a search incident to lawful arrest); *Dickerson*, 508 U.S. at 375, 113 S. Ct. at 2137 (finding no violation of Fourth Amendment rights if officer lawfully pats down "suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent"); *U.S. v. Ross*, 456 U.S 798, 807-09, 102 S. Ct. 2157, 2164-65 (1982) (allowing "automobile exception" to warrant requirement to search a car believed to be involved in transportation of contraband goods or illegal merchandise); *U.S. v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981) (permitting limited investigative stop if officer can show "particularized and objective basis for suspecting

the particular person stopped of criminal activity"); *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880 (1968) (requiring only reasonable suspicion of criminal activity rather than probable cause to search for individual weapons for the protection of officer when officer reasonably believes that individual is armed and dangerous).

The state argues that the entire search was justified by appellant's consent and was similar to the expansion of a pat-frisk search where an officer uncovers contraband. But Officer J.W. did not testify that he felt or discovered anything during the pat-frisk, so as to justify an expanded search. *Dickerson*, 508 U.S. at 375, 113 S. Ct. at 2137. Indeed, it is clear from the squad video that Officer J.W. never completed a pat-frisk search of appellant's outer clothing. Instead, the video shows that Officer J.W. led appellant to the back of the vehicle and immediately began digging deeply into appellant's pants with his hands.

In its suppression order, the district court also implied that appellant's initial consent could justify the full search here because it was freely and voluntarily given. But this finding is internally inconsistent with the remainder of the order and is clearly erroneous on this record, which shows that appellant consented to a pat-frisk search only. *Id.* at 373, 113 S. Ct. at 2136 (noting pat-frisk is limited to search for weapons to ensure officer safety, not to discover evidence of a crime). Despite appellant's limited consent, Officer J.W. immediately began searching appellant's pockets, far beyond the scope of a pat-frisk search.

Because the state did not argue, and the district court did not find, that another exception to the warrant requirement applied here, the full search of appellant was illegal and all evidence obtained as a result was inadmissible. *See State v. Vang*, 636 N.W.2d 329, 333

(Minn. App. 2001) ("If no exception applies, then the fruits of the warrantless search must be suppressed."). Thus, the district court improperly admitted the heroin.

Without the admission of the heroin evidence, there is insufficient evidence that appellant committed a fifth-degree controlled-substance crime—heroin possession, and we therefore reverse appellant's conviction and sentence. *See State v. Souto*, 578 N.W.2d 744, 751 (Minn. 1998) (vacating a conviction where evidence should have been suppressed).

Reversed.