STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0402

State of Minnesota,
Appellant,

vs.

Bryant Estrada,
Respondent.

Filed September 4, 2018
Affirmed
Bjorkman, Judge

Clay County District Court
File No. 14-CR-17-2864

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

Brian J. Melton, Clay County Attorney, Cecilia A. Knapp, Assistant County Attorney, Moorhead, Minnesota (for respondent)

Mark D. Nyvold, Fridley, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Bjorkman, Judge; and Hooten, Judge.

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

BJORKMAN, Judge

The state challenges the suppression of marijuana evidence obtained during a dog sniff of respondent's commercial vehicle, arguing that the district court erred by concluding

that the information a commercial-vehicle inspector (CVI) relayed to police did not establish reasonable, articulable suspicion of drug-related activity. We affirm.

FACTS

On August 11, 2017, at approximately 10:00 a.m., respondent Bryant Estrada drove his semi-trailer into an Interstate 94 weigh station near Moorhead. As Estrada drove over the preliminary scales, the automated system directed him to the static scale for weighing. Estrada's semi did not register as over the weight limit or exhibit any equipment violations, but CVI[1] Brett Syverson decided to conduct a "random" inspection. Syverson approached the semi on the scale, greeted Estrada, and asked him to open his door; Estrada complied. As Syverson stood on the step by the open driver's door, he detected an odor that he believed was burnt marijuana. But he was not sure, because many drivers smoke cigars or use cologne or vehicle scents and he had only smelled marijuana twice approximately nine years earlier, during his CVI training. Syverson did not mention his suspicion to Estrada or contact law enforcement.

Syverson directed Estrada to park and bring his driver's license, log books, and other paperwork into the building. Syverson also asked Estrada if anyone else was in the vehicle, and Estrada indicated he had a co-driver. Syverson initially permitted the co-driver to remain in the cab. After reviewing two log books, Syverson noted inconsistencies and believed Estrada had falsified entries, possibly "to get more hours." He directed Estrada

[1] A CVI is an unsworn employee of the state patrol with limited authority to enforce laws relating to commercial-vehicle equipment, size, and weight. *See* Minn. Stat. § 299D.06 (2016) (establishing powers of state patrol "employees"). This court held in *State v. Stall*, 845 N.W.2d 246, 248 (Minn. App. 2014), that CVIs are not authorized to stop vehicles.

to go back to the semi to get the co-driver; he did not accompany Estrada or watch him. When they returned, Syverson asked if they had "anything illegal" in the semi. They said no but "became nervous" and did not make much eye contact thereafter. As Syverson continued to review Estrada's paperwork, he permitted Estrada and his co-driver to return to the semi multiple times, and to use the restroom. On one occasion, Syverson noticed the co-driver carrying a box over to the dumpster and throwing it in.

At approximately 11:00 a.m., Syverson contacted law enforcement for assistance, indicating that he believed he had smelled marijuana. By that point, Syverson's inspection was complete except to provide Estrada the inspection report.

After about ten minutes, Sergeant Gerald Hanson of the Minnesota State Patrol responded, followed shortly thereafter by Moorhead Police Officer Michael Fildes and his drug-detection canine partner. Syverson told them that he "smelled the odor of what he thought was burnt marijuana," that the occupants did not want to come into the inspection station right away, that they had deposited something in the dumpster nearby and had gone to the bathroom, and that there were discrepancies in the log books. Officer Fildes spoke with Estrada and his co-driver. He asked if there was anything illegal in the vehicle and if there was "any reason [his] dog may or may not alert on the vehicle." One of them indicated that he had smoked marijuana "a month prior."

Officer Fildes walked his canine partner around the semi. The canine alerted to the presence of drugs at the bottom corner of the driver's door. Officer Fildes and Sergeant Hanson recovered two "mostly burnt up" marijuana cigarettes or "roaches" in a compartment behind the driver's seat and "a large quantity" of marijuana remnants or

"shake" from a compartment in the passenger door panel, totaling approximately one-half gram of marijuana.

Estrada was charged with operating a commercial vehicle while in possession of a controlled substance.[2] Estrada moved to suppress the marijuana evidence, arguing that the initial inspection stop and subsequent dog sniff were both unjustified. After an evidentiary hearing at which Syverson, Sergeant Hanson, and Officer Fildes testified, the district court determined that "the information supplied by CVI Syverson lacked sufficient indicia of reliability to give rise to reasonable, articulable suspicion that drug-related criminal activity was afoot." The court suppressed the marijuana evidence and dismissed the charge. The state appeals.

D E C I S I O N

When reviewing a pretrial order on a motion to suppress evidence, we independently review the facts and determine whether, as a matter of law, the district court erred in suppressing or not suppressing the evidence.[3] *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004). We review the district court's factual findings for clear error and its legal determinations de novo. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008).

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[2] Estrada's alleged conduct is a violation of federal regulations governing commercial vehicles engaged in interstate commerce, which Minnesota incorporates by reference in Minn. Stat. § 221.605, subd. 1(a) (2016).

[3] When the state appeals a pretrial order, it must show not only error but also "that the order will have a critical impact on its ability to prosecute the case." *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005) (quotation omitted). Suppression of the marijuana evidence, which resulted in dismissal of the charge against Estrada, has a critical impact. *See State v. Strandness*, 684 N.W.2d 516, 519 (Minn. App. 2004).

A dog sniff around a stopped motor vehicle is a constitutionally cognizable "intrusion into privacy interests." *State v. Wiegand*, 645 N.W.2d 125, 134 (Minn. 2002). A police officer may conduct a dog sniff around a lawfully stopped vehicle only if he has reasonable, articulable suspicion of drug-related criminal activity. *State v. Lugo*, 887 N.W.2d 476, 486 (Minn. 2016). The reasonable-suspicion standard is not high but requires more than a "hunch," *State v. Diede*, 795 N.W.2d 836, 843 (Minn. 2011), or "mere whim, caprice, or idle curiosity," *State v. Davis*, 910 N.W.2d 50, 54 (Minn. App. 2018) (quotation omitted). The detection of identifiable drug odors more than meets the reasonable-suspicion standard. *See State v. Pierce*, 347 N.W.2d 829, 833 (Minn. App. 1984) (stating that police officer's trained detection of illicit odors establishes probable cause to suspect drug activity).

The "factual basis" necessary to establish reasonable suspicion need not come from an officer's personal observation "but may be supplied by information acquired from another person." *Marben v. State, Dep't of Pub. Safety*, 294 N.W.2d 697, 699 (Minn. 1980). But the other person's information must "have indicia of reliability." *Olson*, 371 N.W.2d at 556. Reliability is determined from the totality of the circumstances, including (1) whether the informant is identified and (2) "the facts that support the informant's assertion." *Jobe v. Comm'r of Pub. Safety*, 609 N.W.2d 919, 921 (Minn. App. 2000). Identified citizen informants generally are presumed to be reliable. *Id.*

The state argues that the district court erred by failing to give Syverson's observations the presumption of reliability afforded information provided by identified citizens. This argument is unavailing. An officer generally may presume the reliability of

an identified informant because "[i]nformants who identify themselves are likely to be telling the truth." *Vivier v. Comm'r of Pub. Safety*, 406 N.W.2d 587, 589 (Minn. App. 1987). But even honest informants can provide unreliable information. *See City of Minnetonka v. Shepherd*, 420 N.W.2d 887, 890 (Minn. 1988) (distinguishing between informant credibility and reliability). For that reason, the fact a citizen informant is identified does not determine the reliability of the information. *Jobe*, 609 N.W.2d at 921.

Numerous other circumstances bear on reliability, including whether the informant indicated doubt or certainty, the information is based on personal observation, the information is conclusory or supported by detail, the information concerns a matter with which the informant can be presumed to be familiar, and police are able to corroborate any of the information. *See Olson*, 371 N.W.2d at 556; *Marben*, 294 N.W.2d at 699; *Jobe*, 609 N.W.2d at 922; *Playle v. Comm'r of Public Safety*, 439 N.W.2d 747, 749 (Minn. App. 1989). When these circumstances collectively indicate that the informant's report is no more than a hunch or mere whim, it cannot establish a reliable factual basis for suspecting criminal activity, even if the informant is known to police. *See Olson*, 371 N.W.2d at 556 (recognizing that police cannot act "on the basis of mere whim" or on the basis of "the mere whim of an anonymous caller"); *Rose v. Comm'r of Pub. Safety*, 637 N.W.2d 326, 330 (Minn. App. 2001) (holding drunk-driving stop unlawful based on tip from identified informant because there was "no information in the record regarding how the [informant] concluded that the driver might be drunk").

The district court properly examined the information Syverson provided Officer Fildes for indicia of reliability, focusing on the sole disputed issue—the basis of Syverson's

information regarding a marijuana odor. The district court found that Syverson was equivocal, both at the time of the inspection and sniff and in his testimony about whether the odor he detected was marijuana. It also noted that, unlike Officer Fildes, Syverson is not a sworn officer with significant training and experience in identifying such odors.[4] *See Pierce*, 347 N.W.2d at 833. The district court further found that Syverson exhibited "outward manifestations" inconsistent with having smelled marijuana—not mentioning the odor to Estrada before asking him to come inside the building, allowing Estrada and his co-driver to move freely between the semi and the building and use the restroom (contrary to protocol), and waiting a substantial period of time before calling for law enforcement.[5] And Officer Fildes did not independently discern a marijuana odor or otherwise corroborate Syverson's report before conducting the canine sniff.[6] Based on these circumstances, the district court determined that Syverson's assessment that he smelled marijuana was no more than a "mere hunch." *See Olson*, 371 N.W.2d at 556.

[4] The district court considered that Syverson is not a typical citizen informant because he received some specialized training to become a CVI but found that Syverson's training and experience in detecting the odor of burnt marijuana was "quite scant."

[5] If Syverson's investigation had been a traffic stop, this substantial lapse in time—over an hour—between when Syverson supposedly smelled the marijuana and the dog sniff would also be troubling. *See Rodriguez v. United States*, 135 S. Ct. 1609, 1613, 1616 (2015) (holding that even a delay of only seven or eight minutes to conduct a dog sniff after the completion of traffic stop violated petitioner's Fourth Amendment rights).

[6] We observe that police always retain the discretion to conduct further investigation before undertaking a traffic stop or dog sniff based on a citizen's report of suspected criminal activity. *See Olson*, 371 N.W.2d at 556 (observing that a "bare allegation of criminal activity" of indeterminate reliability may require further investigation before police action).

The state does not challenge any of these findings but contends that the district court, by considering all of these facts, improperly shifted the focus from the reasonableness of Officer Fildes's reliance on Syverson's report at the time of the dog sniff to Syverson's credibility at the suppression hearing, contrary to *Jobe*, 609 N.W.2d at 922 (stating that Fourth Amendment inquiry focuses on officer reliance at "the time of the stop," not "some later point in time"). We disagree. While the district court discussed the credibility of Syverson's testimony, its factual findings focus on circumstances that Syverson expressly communicated to Officer Fildes or which Officer Fildes could reasonably infer from Syverson's report. We agree that those circumstances did not establish a reliable basis for Officer Fildes to suspect drug activity.

We therefore turn to whether the totality of the other, reliably reported circumstances established reasonable, articulable suspicion of drug-related criminal activity. The district court found that Syverson told Officer Fildes that Estrada was initially hesitant to enter the weigh station; his log books contained "false" entries; Estrada and his co-driver moved between the semi and the building during the inspection, used the restroom, and threw a box away; and they appeared nervous when asked whether they had "anything illegal" in the semi. The district court also found that neither Syverson nor Officer Fildes mentioned any marijuana-related suspicions to Estrada or observed any indicia of impairment from Estrada or his co-driver. The district court concluded that these circumstances, as a whole, do not satisfy the reasonable-suspicion standard for a dog sniff. We agree. The nervousness of Estrada and his co-driver and vague references to "false" log-book entries, viewed in light of the men's otherwise unremarkable and cooperative

behavior, are insufficient to give rise to a reasonable, articulable suspicion of drug-related criminal activity. *See Wiegand*, 645 N.W.2d at 137 (holding dog sniff unjustified based solely on driver "acting suspiciously"). Accordingly, we conclude the district court did not err by determining that the dog sniff was improper and suppressing the fruits of the resulting search.

Affirmed.