**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A18-1827**

State of Minnesota,
Respondent,

vs.

Shawn Casey Tope,
Appellant.

**Filed September 16, 2019**
**Affirmed**
**Worke, Judge**

Freeborn County District Court
File No. 24-CR-16-589

Keith Ellison, Attorney General, St. Paul, Minnesota; and

David J. Walker, Freeborn County Attorney, Albert Lea, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Hooten, Judge; and Kirk, 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

**WORKE**, Judge

Appellant challenges his drug-possession conviction, arguing that the district court erred by refusing to suppress evidence obtained during a stop. We affirm.

## FACTS

On April 17, 2016, around 11:30 p.m., a hotel manager called law enforcement to report people around a car that he did not recognize that was parked behind the hotel where guests typically do not park. Law enforcement had been "flooded" with reports of drug and other criminal activity occurring at the hotel. Several officers responded to the call.

When Officer Hamberg arrived, he saw an occupied vehicle with the front passenger door open. Officer Hamberg pulled in at an angle behind the vehicle and activated his spotlight. Officer Hamberg could see movement, specifically, "arms very busy in that front right passenger compartment," and suspected that the passenger was hiding something. At the same time, the rear right passenger exited the vehicle. Because of the suspicious behavior—the rapid movement and the exiting passenger—Officer Hamberg felt nervous, and requested that everybody "put their hands out in front of them, grab a headrest, grab a steering wheel, grab something just so [their] hands [were] visible."

Appellant Shawn Casey Tope was the front passenger, and there were three others in the vehicle. Another officer recognized Tope and two other occupants and knew that they were methamphetamine users. Officer Hamberg observed that Tope "appeared really fidgety, really nervous." Officer Hamberg asked what they were doing, and one of the individuals stated that a hotel employee gave them permission to have a fire. But Officer

Hamberg did not see evidence of a fire, and believed that something else—likely illegal drug use—was going on because everyone was in the vehicle. Officer Hamberg further thought that Tope might be armed because of his fidgety movements, prior contacts, the hotel's reputation, and the time of day.

Officer Hamberg requested that Tope exit the vehicle. Officer Hamberg noticed that Tope's hand was close to his pocket, and he was "nervous . . . fidgety. . . . [and] was actually shaking." After another officer looked through the vehicle's windows and saw a marijuana pipe, Officer Hamberg told Tope that he was going to pat him down for weapons. Tope "guarded the left side of his pant pocket." As Officer Hamberg began to pat search Tope's left side, and quickly felt what he believed was a pipe, Tope reached into his pocket and grabbed a pipe, which he tried to hide and destroy. Officer Hamberg took the pipe and noticed burnt residue in the bulb portion that field-tested positive for methamphetamine. Officers searched Tope and found baggies of methamphetamine.

Tope was charged with fifth-degree possession of methamphetamine and moved to suppress the evidence.[1] The district court denied Tope's motion to suppress. Following a court trial, the district court found Tope guilty of fifth-degree controlled-substance possession, and sentenced him to 21 months in prison. This appeal followed.

[1] Tope was also charged with first-degree possession related to methamphetamine found in the vehicle. The district court dismissed the charge for lack of probable cause because the state could not show that the methamphetamine belonged to Tope.

## D E C I S I O N

Tope argues that the evidence should have been suppressed because the seizure and pat search were not supported by reasonable, articulable suspicion. When reviewing a pretrial order on a suppression motion, this court reviews the district court's factual findings for clear error and legal determinations de novo. *State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012). This court reviews the district court's determination that a reasonable, articulable suspicion justified the search de novo. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

***Seizure of appellant***

Tope first argues that the district court erred in finding that he was seized after the officer saw the marijuana pipe in the vehicle, asserting that he was seized earlier when ordered to put his hands on the dashboard.

There is a constitutional protection against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. But officers may conduct a limited investigation into suspected criminal activity when they can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Britton*, 604 N.W.2d at 87 (quotation omitted). In reviewing whether reasonable suspicion existed to justify such an investigation, this court considers the surrounding events and "the totality of the circumstances." *Id.* "Reasonable suspicion is a particularized and objective basis for suspecting the particular person stopped of criminal activity." *State v. Lugo*, 887 N.W.2d 476, 486 (Minn. 2016) (quotations omitted). The reasonable-suspicion threshold is not high, but it does require the officer to have more

than a "hunch," and the ability to identify "something that objectively supports the suspicion." *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (quotation omitted).

Not every encounter between an officer and a citizen is a seizure. *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993). Generally, a person is not seized when an officer approaches him in a parked car and asks questions. *Id.* at 782. Rather, a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999) (quotation omitted). Said another way, a seizure occurs when, in view of all surrounding circumstances, a reasonable person would have believed that he was not free to leave. *E.D.J.*, 502 N.W.2d at 781.

This court has determined that an individual ordered out of a vehicle and instructed to raise his hands has been seized. *State v. Wiggins*, 788 N.W.2d 509, 513 (Minn. App. 2010), *review denied* (Minn. Nov. 23, 2010). Thus, a reasonable person may not feel free to leave when an officer instructs him to place his hands on a dashboard. However, even if Tope was seized when Officer Hamberg instructed everybody in the vehicle to grab something in order to show their hands, that does not mean that the seizure was unlawful. A limited investigation is lawful if the totality of the circumstances show that the officer had a reasonable basis to justify it. *Britton*, 604 N.W.2d at 87. The totality of the circumstances can include lawful conduct, such as being in a high-crime area, an unusual time of day, and evasive or furtive conduct. *State v. Uber*, 604 N.W.2d 799, 801-02 (Minn. App. 1999).

Here, it was around 11:30 p.m. when Officer Hamberg responded to a call for assistance at a hotel known for drug activity. The caller reported a suspicious, occupied vehicle, which was not registered with the hotel, parked in the back of the hotel. Officer Hamberg observed individuals in a vehicle, and when he pulled up and activated his spot light, he could see movement, specifically, "arms very busy in that front right passenger compartment." At the same time, another passenger exited the vehicle. Because of the suspicious behavior, Officer Hamberg felt nervous and requested "that everybody in the vehicle put their hands out in front of them [and] . . . grab something just so [their] hands [were] visible." Even if this was a seizure, as Tope suggests, it was not unreasonable and not unconstitutional because the circumstances show that it was based on a report of suspicious activity, it was late at night, it was at a hotel teeming with criminal activity, it involved a single officer approaching a vehicle occupied by four individuals, the officer saw movement in the front passenger seat, and one of the vehicle's occupants exited the vehicle when the officer approached.

***Expansion of seizure***

Tope argues that the seizure was unlawfully expanded when he was ordered out of the vehicle and pat searched. To be constitutional, "each incremental intrusion" during a stop must be connected to and justified by: "(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, 30, 88 S. Ct. 1868, 1884 (1968)]." *State v. Askerooth*, 681 N.W.2d 353, 365 (Minn. 2004); *see State v. Flowers*, 734 N.W.2d 239, 250 (Minn. 2007) (summarizing holding in *Terry* as "even in the absence of probable cause, the police may stop and frisk a person

when (1) they have 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" (quotation omitted)). And still, "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883.

The basis of an officer's suspicion must be reasonable based on the totality of the circumstances. *State v. Smith*, 814 N.W.2d 346, 351 (Minn. 2012). Because of their specialized training, officers are permitted to make inferences and deductions that might elude an untrained person when articulating a reasonable suspicion. *Flowers*, 734 N.W.2d at 251-52. The reasonable-articulable-suspicion standard is met when the officer "observes unusual conduct that leads the officer to reasonably conclude in light of his or her experience that criminal activity may be afoot." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotation omitted). Exhibited nervousness may be considered among the totality of circumstances to support a conclusion that drug-related criminal activity is afoot. *State v. Diede*, 795 N.W.2d 836, 852 (Minn. 2011).

Here, Officer Hamberg observed that Tope was fidgety and nervous. The officer also believed that the explanation given for the vehicle and its occupants' presence behind the hotel was bizarre because he saw no indication of a fire. Officer Hamberg believed that because everyone was in the vehicle, they were likely engaged in illegal drug use. He further believed that Tope could be armed because of Tope's fidgety movements, prior contact with Tope involving possession of a firearm, the hotel's reputation for drug activity,

and the time of day. Officer Hamberg, with his specialized training, and consideration of the totality of the circumstances—including the time and location, the unusualness of the situation, Tope's behavior, and the officer's investigation into a prior incident with Tope involving him being an ineligible person in possession of a firearm—had reasonable, articulable suspicion that Tope might be engaged in criminal activity and might be armed.

Tope argues that the pat search for weapons was impermissible because Officer Hamberg admitted that he manipulated the object in Tope's pocket. But Tope slightly mischaracterizes Officer Hamberg's testimony describing his discovery of the pipe. Officer Hamberg testified that in his experience with pat searches, he can identify a pipe easily and "[f]airly quickly." He agreed that in a matter of "[s]econds," he "manipulated" the pipe in Tope's pocket "and moved it around" before concluding that it was a pipe. Tope claims that because Officer Hamberg admitted to manipulating the pipe, he went beyond the limited scope of a pat search. But Officer Hamberg testified that it took him mere "seconds" to positively identify the pipe. Thus, the extent of the search was permissible and the district court did not err in denying Tope's suppression motion.

**Affirmed.**