STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0145

State of Minnesota,
Respondent,

vs.

Susie Edana Clark,
Appellant.

Filed February 10, 2020
Affirmed in part, reversed in part, and remanded
Bratvold, Judge
Concurring specially, Connolly, Judge

Pennington County District Court
File No. 57-CR-17-621

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

Seamus P. Duffy, Pennington County Attorney, Thief River Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Adam S. Lozeau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Bratvold, Judge; and Worke, Judge.

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

BRATVOLD, Judge

In this direct appeal from her conviction of third-degree driving while impaired (DWI), appellant raises three issues and seeks reversal of her conviction, or, in the

alternative, seeks reversal of the district court's disposition of two controlled-substance offenses. First, appellant challenges the district court's order denying her motion to suppress evidence and argues that police lacked probable cause to arrest her, thus, the search following her arrest was unconstitutional. Second, appellant argues that the district court erred by staying adjudication of two controlled-substance offenses for a period that exceeded the statutory maximum. Third, appellant argues that the district court lacked authority to impose a $50 fine for two controlled-substance offenses. We conclude that the search incident to arrest was lawful, the district court lacked authority to impose four years of probation for appellant's controlled-substance offenses, and the district court had authority to require appellant to pay prosecution costs as a condition of probation. For these reasons, we affirm in part, reverse in part, and remand.

FACTS

On the evening of July 31, 2017, Deputy Lovly of the Pennington County Sheriff's Department drove through a city park in St. Hilaire and saw a car parked with its lights on near some campers. Lovly turned his squad car around and the parked car "took off in the other direction." Lovly followed the car for about three-quarters of a mile and the driver twice failed to use a signal before executing a turn. Lovly turned on his emergency lights and stopped the car.

Lovly spoke with the driver, appellant Susie Edana Clark, and noticed that Clark "appeared 'twitchy' and her eyes seemed dilated." Based on his experience, Lovly suspected that Clark was under the influence of a narcotic. Lovly asked Clark to exit her

car and to perform two field sobriety tests, which she did.[1] First, Lovly used his flashlight to check Clark's pupil response. The district court found that Clark's eyes did not adjust to the light. Second, Lovly administered the Romberg test, which required Clark to stand with her feet together, tilt her head back, and estimate when 30 seconds had passed. Lovly testified that Clark ended the Romberg test "short of the 30 seconds" and that persons under the influence of narcotics cannot correctly estimate the passage of 30 seconds. The district court found that Lovly "did not testify what constitutes a test failure or the specific time when Clark stopped the [Romberg] test." Lovly also testified that he detected no alcohol on Clark. Based on these observations and the field sobriety tests, Lovly believed Clark "was under some type of drug that would impair her driving," specifically, methamphetamine.

Lovly arrested Clark for DWI and placed her in the back of his squad car. Police then searched Clark's car interior without a warrant using a dog. The search uncovered one pill and a clear baggie with white powder residue.[2] The state charged Clark in an amended complaint with two counts of possession of a controlled substance in the fifth degree under Minn. Stat. § 152.025, subd. 2(1) (2016) (counts one and two); third-degree DWI under Minn. Stat. § 169A.20, subd. 1(2) (2016) (count three); and operating a motor

[1] The district court found that Lovly asked for and Clark consented to the car search and that Clark withdrew her consent "almost immediately."

[2] The pill was later determined to be clonazepam, a schedule IV controlled substance. The powder residue later tested positive for methamphetamine.

vehicle without proof of insurance under Minn. Stat. § 169.791, subd. 2(a) (2016) (count four).

Clark filed an omnibus motion to suppress the evidence found in the car search, arguing, in relevant part, that the Romberg test "alone could not have provided enough probable cause to determine that she was under the influence of an illegal substance and she should not have been arrested at that point." Lovly and Clark testified at an omnibus hearing to the facts described above. The district court denied Clark's motion in a written order.

The state dismissed count four, operating a vehicle without proof of insurance. Clark agreed to stipulate to the prosecution's case while maintaining a plea of not guilty so she could obtain review of the district court's omnibus ruling under Minn. R. Crim. P. 26.01, subd. 4. The district court found Clark guilty of two counts of fifth-degree controlled-substance crimes (counts one and two) and one count of third-degree DWI (count three). The district court convicted Clark of third-degree DWI and sentenced her to serve 365 days, 335 days stayed for four years, with a $500 fine. The district court stayed adjudication of both fifth-degree controlled-substance offenses for four years under Minn. Stat. § 152.18 (2016) and required Clark to pay $50 as "a minimum fine or minimum costs of prosecution." All dispositions were concurrent. Clark appeals.[3]

[3] The state did not submit a responsive brief in this appeal. We therefore conduct our review under Minn. R. Civ. App. P. 142.03 (default of respondent results in merits review).

D E C I S I O N

I. The district court did not err by denying Clark's motion to suppress evidence.

Clark argues that police lacked probable cause to arrest her for DWI and thus the district court erred in determining that the warrantless search of her car was valid incident to arrest. Clark does not challenge the legality of the initial police stop or the scope of the search after her arrest.

The United States and Minnesota Constitutions guarantee individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A warrantless search is unreasonable "unless it falls into one of the recognized exceptions to the warrant requirement." *State v. Bernard*, 859 N.W.2d 762, 766 (Minn. 2015). One recognized exception is for searches incident to lawful arrest. *See Arizona v. Gant*, 556 U.S. 332, 338, 129 S. Ct. 1710, 1716 (2009); *Bernard*, 859 N.W.2d at 766. A lawful arrest requires probable cause, which exists "when a person of ordinary care and prudence, viewing the totality of circumstances objectively, would entertain an honest and strong suspicion that a specific individual has committed a crime." *State v. Onyelobi*, 879 N.W.2d 334, 343 (Minn. 2016) (quotation omitted and emphasis removed). "The quantum of proof required for a finding of probable cause is more than mere suspicion but less than the evidence necessary for conviction." *Id.* (quotation omitted).

Probable cause is a "common-sense, nontechnical" concept that involves "the factual and practical considerations of everyday life on which reasonable and prudent [people], not legal technicians, act." *State v. Lee*, 585 N.W.2d 378, 382 (Minn. 1998) (quotation omitted). The totality of the circumstances "includes reasonable inferences that

police officers draw from facts, based on their training and experience, because police officers may interpret circumstances differently than untrained persons." *State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016). Appellate courts must give "due weight" to "reasonable inferences drawn by police officers and to a district court's 'finding that the officer was credible and the inference was reasonable.'" *Id.* (quoting *Ornelas v. United States*, 517 U.S. 690, 700, 116 S. Ct. 1657, 1663 (1996). Appellate courts review de novo the district court's legal determinations, including probable cause. *Lee*, 585 N.W.2d at 383.

Clark's sole argument to overturn the district court's omnibus order is that police lacked probable cause to arrest her after she performed two field sobriety tests. The district court's order included findings of fact that credited Lovly's omnibus testimony. The district court found that Lovly saw Clark commit two traffic violations and, when Lovly first spoke with Clark while she sat in her car, she appeared "twitchy" and her eyes "seemed dilated." The district court also credited Lovly's testimony that he had experience observing persons under the influence of narcotics with "similar symptoms" and that he "believed Clark was under the influence of a controlled substance."

The district court found that Lovly administered two field sobriety tests after Clark exited her car, Lovly observed that Clark's eyes would not adjust to his flashlight, and Clark stopped the Romberg test short of 30 seconds. Lovly also testified that he observed no signs of alcohol on Clark. The district court found that, "[b]ased upon his observations and experience," Lovly arrested Clark for DWI. Based on these findings, the district court determined that police had probable cause to arrest Clark for DWI.

Clark challenges the district court's determination of probable cause to arrest on two grounds, which we discuss in turn. First, Clark argues that the district court's factual findings on her performance on the field sobriety tests are unsupported by the record and thus cannot sustain its probable-cause analysis. Clark contends that Lovly did not testify that her pupils did not respond to the light and "the stop occurred at nighttime, when a driver's pupils would be expected to be dilated due to low light." Clark also argues that Lovly "did not testify" that she failed the Romberg test or "even what would constitute a test failure." We disagree.

When reviewing a district court's determination of probable cause, we "give due weight to inferences drawn from [the] facts by resident judges and local law enforcement officers." *Lee*, 585 N.W.2d at 383 (quotation omitted). Lovly first testified that he had experience making similar observations of other people under the influence of narcotics. Lovly then testified that he brought a flashlight to Clark's eyes to check "the restrictions of her pupils" and that he "gained evidence" from the field sobriety tests that Clark was "under some type of drug that would impair her driving." He specifically suspected methamphetamine. The district court thus credited Lovly's testimony and from it inferred that Clark's eyes did not respond to the flashlight. This inference is based on record evidence, so we defer to the district court's factual finding. *See id.*

As to the Romberg test, Lovly testified that persons under the influence of a narcotic cannot correctly estimate the passage of 30 seconds and that Clark stopped the test short of 30 seconds. From this testimony, the district court inferred that Clark failed the Romberg

test. It is true that the district court found that Lovly "did not testify what constitutes a test failure or the specific time when Clark stopped the test." We acknowledge that the state could have elicited more details about Clark's performance on the field sobriety tests, but those details go to the weight and credibility of the testimony—which we do not second-guess on appeal. *See State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989) (stating that "[t]he weight and credibility of the testimony of individual witnesses" is for the fact-finder to determine). Thus, the district court did not err in considering evidence that Clark failed the flashlight and Romberg field sobriety tests.

Second, Clark argues that "'twitchy behavior' does not establish probable cause to believe a driver is impaired." To support her contention, Clark relies on three cases analyzing whether a defendant's nervousness may be a sufficient basis to establish reasonable suspicion, a standard lower than probable cause. In *State v. Burbach*, the supreme court affirmed a district court's order suppressing evidence and held that officers did not have reasonable suspicion to search a vehicle where defendant passed field sobriety tests, acted nervously "in the context of intense police questioning," and matched the description of an unsubstantiated tip. 706 N.W.2d 484, 490-91 (Minn. 2005). In *State v. Wiegand*, the supreme court affirmed a district court order suppressing evidence and held that officers did not have reasonable suspicion to conduct a dog sniff of a vehicle exterior where defendant acted evasively and nervously and had glossy eyes. 645 N.W.2d 125, 137 (Minn. 2002). The supreme court emphasized that the officer who first stopped the vehicle testified that "he did not suspect that [defendant] was under the influence of any drugs, but

instead concluded simply that [defendant] was acting suspiciously." *Id.* And, in *State v. Tomaino*, we affirmed a district court order suppressing evidence and held that an officer did not have reasonable suspicion to ask for consent to search a vehicle based on defendant's nervousness after being detained and questioned in the officer's squad car. 627 N.W.2d 338, 340-41 (Minn. App. 2001).

These cases are distinguishable. Each case involved a defendant's "nervous" behavior; here, Lovly testified that Clark was "twitchy" rather than "nervous." In *Tomaino* and *Burbach*, defendants showed nervous behavior after police questioning; here, Lovly observed Clark's "twitchy" behavior "[u]pon making contact with her." *See Tomaino*, 627 N.W.2d at 340-41; *Burbach*, 706 N.W.2d at 490-91. In *Wiegand*, the officer testified that he did not suspect defendant was under the influence of drugs; here, Lovly testified that he suspected Clark was under the influence of narcotics shortly after he spoke with her. *See Wiegand*, 645 N.W.2d at 137. In *Burbach*, defendant passed field sobriety tests; here, Clark failed two field sobriety tests. *See Burbach*, 706 N.W.2d at 486.

We find a different case helpful, although it, too, turned on reasonable suspicion and not probable cause. In *State v. Smith*, officers stopped defendant for traffic violations and one of them noticed defendant "was shaking very violently—way worse than anyone with Parkinson's disease." 814 N.W.2d 346, 348-49 (Minn. 2012) (quotations omitted). Officers found defendant's behavior evasive and odd, suspected criminal activity, and asked defendant whether he had any weapons or illegal items in the vehicle. *Id.* at 349. Defendant said he had a pistol, so officers searched the vehicle, found the pistol, and arrested defendant for possessing a pistol without a permit. *Id.* Defendant moved to suppress the

pistol, arguing that officers did not have reasonable suspicion to expand the scope of the traffic stop. *Id.* at 348. The district court denied the motion because it found that defendant's behavior justified the police's inquiry. *Id.* at 350. Defendant appealed; this court and the supreme court affirmed. *Id.* at 350, 355.

The supreme court held that defendant's "violent shaking" and "evasive" response provided reasonable suspicion to expand the scope of the traffic stop. *Id.* at 354. The supreme court distinguished cases focusing on a suspect's nervousness because defendant "exhibited behavior that went beyond mere 'nervousness'" by shaking "violently" before "any intense police questioning" and giving evasive responses to police questions. *Id.* (discussing *Burbach* and *Wiegand*). The supreme court emphasized that its review was guided by the procedural posture of the case, which included the district court's factual findings and decision to deny defendant's motion to suppress evidence. *Id.* at 353-54.

We find *Smith* instructive. The defendant in *Smith* showed more than "mere" nervousness, and the supreme court held this provided officers with reasonable suspicion of criminal activity to expand the scope of the traffic stop. *Id.* at 354. Clark similarly exhibited more than one telltale behavior indicative of drug impairment: "twitchiness" *and* dilated pupils. And as did the reasonable-suspicion analysis in *Smith*, our probable-cause analysis considers the totality of the circumstances, which includes Clark's two traffic violations, two failed field sobriety tests, and the absence of any signs of alcohol use.

We conclude that, viewing the totality of the circumstances, police had probable cause to arrest Clark for DWI. Because probable cause for arrest is the only issue raised by

Clark, we also conclude that the search of Clark's car was a valid search incident to arrest. The district court did not err in denying Clark's motion to suppress evidence.

II. The district court erred by pronouncing a probationary term of four years when it stayed adjudication of Clark's fifth-degree controlled-substance offenses.

Clark argues that the district court exceeded its statutory authority when it placed her on probation for four years after staying adjudication of both fifth-degree controlled-substance offenses (counts one and two).[4] We review a stayed sentence for abuse of discretion and review the legal question of a district court's statutory authority de novo. *Moody*, 806 N.W.2d at 877.

Minnesota statutes provide that a district court may defer prosecution for a defendant found guilty of certain drug offenses if the defendant meets eligibility requirements. Minn. Stat. § 152.18, subd. 1(a). For example, if a district court finds a defendant guilty of fifth-degree controlled-substance crimes under Minn. Stat. § 152.025, subd. 2, and the defendant has not been previously convicted of any felony or gross misdemeanor under Minn. Stat. § 152.025, a district court "must" stay adjudication of the controlled-substance offense. *Id.*, subd. 1(b). When a district court stays adjudication under

[4] Clark did not address the appealability of her stays of adjudication and the state did not file a brief. We note that a defendant cannot appeal as of right from a stay of adjudication unless a district court stays a felony offense. *See State v. Verschelde*, 595 N.W.2d 192, 196 (Minn. 1999); *see also State v. Moody*, 806 N.W.2d 874, 876 (Minn. App. 2012), *review denied* (Minn. Mar. 28, 2012). Here, the stays of adjudication involved gross misdemeanors for fifth-degree controlled-substance crimes. Minn. Stat. § 152.025, subds. 2, 4. Where a court has heard an issue without objection to appealability, the decision is "no authority upon the issue of appealability and [is] to be explained by the fact that the issue of appealability was never raised or called to the attention of the court." *Chapman v. Dorsey*, 41 N.W.2d 438, 443 (Minn. 1950).

section 152.18, it shall "place the person on probation upon such reasonable conditions as it may require and for a period, *not to exceed the maximum sentence provided for the violation*." Minn. Stat. § 152.18, subd. 1(c) (emphasis added).

The district court found Clark guilty of two counts of fifth-degree controlled-substance crime under Minn. Stat. § 152.025, subd. 2, and she had not been previously convicted under that statute. At sentencing, the district court stayed adjudication of Clark's fifth-degree controlled-substance offenses and placed her on probation for four years. But Clark's fifth-degree controlled-substance offenses are gross misdemeanors, Minn. Stat. § 152.025, subd. 4(a), and carry a statutory maximum sentence of two years, Minn. Stat. § 609.135, subd. 2(c) (2016). Thus, the district court lacked authority to impose a probation period of four years for Clark's fifth-degree controlled-substance offenses. *See* Minn. Stat. § 152.18, subd. 1(c). We reverse Clark's four-year probation for counts one and two and remand with instructions to place Clark on probation for no longer than two years.

III. The district court did not err by requiring Clark to pay $50 in prosecution costs for each fifth-degree controlled-substance offense.

Clark argues that the district court erred when it required her to pay $50 as a "minimum fine." Clark contends that because the district court stayed adjudication of her fifth-degree controlled-substance offenses, she was not "convicted" of those offenses and the imposition of a "fine" was not lawful.

We disagree. At sentencing, the district court stayed adjudication of Clark's fifth-degree controlled-substance offenses (counts one and two) and placed her on

probation "subject to certain conditions." While pronouncing the probation conditions, the district court said that it was "imposing a minimum fine or minimum costs of prosecution of $50." We understand the district court to have required Clark to pay prosecution costs as a condition of probation.

Minnesota statutes provide that when a district court stays adjudication of a first-time drug offender, it shall "place the person on probation *upon such reasonable conditions as it may require*." Minn. Stat. § 152.18, subd. 1(c) (emphasis added). "[C]onditions of probation must be reasonably related to the purposes of sentencing and must not be unduly restrictive." *Moody*, 806 N.W.2d at 877 (quoting *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989)). We review the district court's decision to impose probation conditions for stayed offenses for an abuse of discretion. *See id.*

While no reported appellate decision has determined whether a district court may impose prosecution costs as a condition of probation for stayed offenses, multiple cases have held that a district court may impose jail time as a condition of probation. *See, e.g.*, *State v. Lee*, 706 N.W.2d 491, 495-96 (Minn. 2005) (noting district courts may impose jail time when staying adjudication, although reversing because district court erred in staying adjudication); *Moody*, 806 N.W.2d at 877-78 (affirming district court decision to stay adjudication and impose jail time because "[a] period of local incarceration is not inconsistent with section 152.18's rehabilitative purpose").

We conclude that a district court may order the payment of prosecution costs as a condition of probation. Thus, the district court acted within its statutory authority when it

imposed prosecution costs of $50 as a condition of probation for Clark's stayed fifth-degree controlled-substance offenses (counts one and two).

Affirmed in part, reversed in part, and remanded.

CONNOLLY, Judge (concurring specially)

I agree with the majority's decision, but write separately to emphasize the limit imposed on this court by the clearly erroneous standard of review applied to a district court's findings of fact. *See In re Stisser Grantor Trust*, 818 N.W.2d 495, 507 (Minn. 2012). In the fact section of the memorandum attached to its order denying appellant's motion to suppress the evidence, the district court found that:

> While speaking to [appellant], [the deputy] noticed that she appeared "twitchy" and her eyes seemed dilated. [The deputy] had observed other people under the influence of narcotics with similar symptoms. [He] believed [appellant] was under the influence of a controlled substance . . . .
>
> . . . [The deputy]. . . checked [appellant's] eyes with a flashlight and saw that they would not adjust to the light. He then gave her the Romberg test, which helps determine if the person is under the influence of a controlled substance. This test involves a person tipping her head back, closing her eyes, and estimating 30 seconds time. [The deputy] testified that when people are under influence of a narcotic, they cannot estimate the correct amount of time. [He] testified that [appellant] stopped the test short of 30 seconds.

This court's duty is not to reassess witnesses' testimony and make its own determination as to whether that testimony supports the district court's findings of fact; it is to determine whether those findings are clearly erroneous.

> When determining whether a finding is clearly erroneous, we take the view of the evidence which is most favorable to the district court's findings and defer to the district court's opportunity to assess the credibility of witnesses. Findings of fact are not clearly erroneous unless we are left with the definite and firm conviction that a mistake has been made.

Id. (quotations and citations omitted). Absent such a conviction, this court may not overturn the findings.

Here, the evidence viewed in the light most favorable to the district court's findings does not indicate that any mistake was made, particularly not if we defer to the district court's superior opportunity to assess the deputy's credibility. Because the district court's findings of fact are not clearly erroneous, we may not reverse them.