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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0885

State of Minnesota,
Respondent,

vs.

Luis Gerardo Gonzalez-Perez,
Appellant.

Filed August 17, 2020
Affirmed in part, reversed in part, and remanded
Segal, Chief Judge

Hennepin County District Court
File No. 27-CR-18-25432

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

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Segal, Chief Judge; and Bjorkman, Judge.

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

SEGAL, Chief Judge

Appellant challenges his convictions of three first-degree controlled-substance crimes, arguing that the district court erred by denying his motion to suppress evidence because law enforcement impermissibly expanded the scope of the traffic stop without reasonable, articulable suspicion of criminal activity and by entering convictions on both the more serious and a lesser-included offense. We affirm in part, reverse in part, and remand.

FACTS

The relevant testimony presented at the evidentiary hearing on the motion of appellant Luis Gerardo Gonzalez-Perez to suppress evidence is as follows. On October 11, 2018, Officer Broc Bartylla was surveilling a Bloomington hotel for suspicious activity because there had been calls about drugs and drug trafficking issues involving the hotel. The hotel is located near I-35W and I-494, which Officer Bartylla identified as a major drug corridor.

While on patrol, Officer Bartylla observed a white vehicle parked in the hotel parking lot. He was suspicious of the vehicle because it had Texas license plates and Officer Bartylla testified he knew Texas to be a source location for narcotics; the vehicle had multiple air fresheners hanging from the rearview mirror, which Officer Bartylla testified can be related to drug activity as a means to mask the odor of drugs; and the vehicle was parked in a secluded area in a far corner of the parking lot despite the availability of a number of parking spots close to the entrance of the hotel. The vehicle was running and

the sole occupant was a male in the driver's seat. The driver avoided making eye contact with Officer Bartylla and did not look at the squad car as it circled the parking lot.

Officer Bartylla left the parking lot and parked out of sight of the vehicle. The vehicle exited the parking lot approximately five minutes later. After the driver failed to signal more than 100 feet before making a turn, Officer Bartylla activated his emergency lights and initiated a traffic stop. He identified the driver as Gonzalez-Perez. When Officer Bartylla approached the vehicle, he noticed that there was a crack in the windshield and that air fresheners obstructed the driver's view. He also noticed that the vehicle contained fast food wrappers, empty water bottles, very little luggage and only a single key in the ignition. At Officer Bartylla's request, Gonzalez-Perez provided an identification card from Mexico and proof of insurance for the vehicle, but was not able to provide a driver's license.

Officer Bartylla contacted his partner, Officer Jose Rueda, to assist with the interview because Gonzalez-Perez spoke little English and Officer Rueda is fluent in Spanish. During the traffic stop, Gonzalez-Perez indicated that he had driven to Minnesota from Texas and only made one stop along the way in order to sleep at a rest area. He stated that he was there for two days to visit friends, but he could not name his friends or identify their address, saying that it was on his phone. The officers asked for permission to search the vehicle, and Gonzalez-Perez consented. During the search, Officer Bartylla did not discover any contraband, but he did notice that there were loose bolts and tools on the floor of the vehicle.

Based on his observations and the presence of the bolts, Officer Bartylla suspected narcotics were being transported in a hidden compartment of the vehicle, but was unable to conduct a thorough search because of the vehicle's location on the side of a busy street. He requested a K-9 unit to conduct a drug-sniff test, and the K-9 dog subsequently alerted on the vehicle. The vehicle was towed to a garage, and a search of the vehicle revealed four pounds of cocaine in the undercarriage of the vehicle.

Respondent State of Minnesota charged Gonzalez-Perez with one count of aggravated first-degree controlled-substance crime (sale), one count of first-degree controlled substance crime (sale) and one count of first-degree controlled-substance crime (possession). Gonzalez-Perez moved to suppress the results of the search of his vehicle, arguing that law enforcement impermissibly expanded the search of his vehicle without reasonable, articulable suspicion. Following an evidentiary hearing, the district court denied the motion on the record. Gonzalez-Perez waived his right to a jury trial and agreed to a court trial based on stipulated evidence. The district court found Gonzalez-Perez guilty of all counts, entered multiple convictions, and sentenced him to 96 months in prison for aggravated first-degree controlled-substance crime. Gonzalez-Perez appeals.

D E C I S I O N

I. The district court did not err by denying the motion to suppress.

Gonzalez-Perez challenges the district court's denial of his motion to suppress the evidence discovered during the search of his vehicle on the grounds that law enforcement impermissibly expanded the scope of the stop, first, by asking permission to search the

vehicle and, second, by conducting a K-9 unit drug-sniff test on the vehicle. He does not contest the validity of the initial stop of the vehicle based on the failure to signal a turn.

The legality of an expansion of a traffic stop beyond its original purpose is governed by the same legal standard as the initial stop—whether the officer had reasonable, articulable suspicion of criminal activity to support the expansion. *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002). We review questions of reasonable suspicion de novo, considering the totality of the circumstances. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). An officer's suspicion cannot be based on a hunch; it must be objectively reasonable under the totality of the circumstances. *State v. Smith*, 814 N.W.2d 346, 351 (Minn. 2012). 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). Evidence discovered during an invalid search must be suppressed. *State v. Askerooth*, 681 N.W.2d 353, 370 (Minn. 2004).

We turn first to the request for permission to search the vehicle. In support of its conclusion that the expansion was supported by reasonable, articulable suspicion, the district court noted that Officer Bartylla is an experienced officer, having conducted approximately 500 traffic stops and been involved in about 70 narcotics cases, including cocaine cases. The district court also pointed to a number of Officer Bartylla's observations in the hotel parking lot prior to the stop: the area is located along freeways known to be a drug corridor and there have been calls related specifically to that hotel about drugs and drug trafficking; the car was parked in an isolated area of the parking lot, even though there were spaces available close to the hotel entrance; there were multiple air

fresheners hanging from the rear view mirror and air fresheners are consistent with drug activity as an attempt to mask the smell of drugs from law enforcement and drug-sniffing dogs; the vehicle had license plates from Texas, a known drug source state; and Gonzalez-Perez avoided looking at the squad car while Officer Bartylla drove around the parking lot and did not leave the parking lot until after Officer Bartylla had exited the parking lot and parked out of view. Of the information obtained by Officer Bartylla after the stop, the district court found it "noteworthy in particular" that Gonzalez-Perez was "not able to produce the names of his so-called friends that he was coming to visit" when he had driven virtually straight through from Texas and was only planning to stay in Minnesota for two days.

Gonzalez-Perez argues that Officer Bartylla's observations fail to satisfy the reasonable-suspicion standard because none of the things observed by the officer are illegal and they are all subject to innocent explanations. But the Minnesota Supreme Court has recognized that in some circumstances, even where "each individual factor is consistent with innocent travel, all of the factors together may amount to reasonable suspicion." *State v. Martinson*, 581 N.W.2d 846, 852 (Minn. 1998). In addition, Officer Bartylla was experienced in dealing with drug-related cases and he testified that the behavior and circumstances he observed were consistent with someone engaged in drug trafficking. "[I]nnocent factors in their totality, combined with the investigating officer's experience in apprehending drug traffickers, can be sufficient bases for finding reasonable suspicion." *Id.* (quotations omitted); *see also State v. Flowers*, 734 N.W.2d 239, 251-52 (Minn. 2007) (noting that police officers may use their special training to "make inferences and

deductions that might well elude an untrained person”), *Britton*, 604 N.W.2d at 88-89 (stating that “[w]e are deferential to police officer training and experience”). Thus, even if each circumstance may have an innocent explanation, they can nonetheless provide reasonable suspicion when viewed in the aggregate.

We, therefore, conclude that the “constellation of signs consistent with illegal drug activity” observed by Officer Bartylla provided him with reasonable, articulable suspicion of criminal activity sufficient to support his request for permission to search the vehicle.

The second expansion of the traffic stop involved the use of a K-9 unit to conduct a drug-sniff test of the vehicle to detect the presence of drugs. The use of a K-9 unit to sniff a vehicle to determine if there are controlled substances present must be supported by “reasonable, articulable suspicion of drug-related criminal activity.” *Wiegand*, 645 N.W.2d at 135. An officer’s reasonable suspicion of criminal activity “evaporates” if the officer becomes aware of any facts that render the suspicion unreasonable. *State v. Pike*, 551 N.W.2d 919, 922 (Minn. 1996). Gonzalez-Perez argues that, because Officer Bartylla conducted a thorough search of the vehicle and failed to discover any illegal items or additional evidence of drug-related activity, any suspicion that existed to support the initial search evaporated and the drug-sniff test was thus an unlawful expansion of the traffic stop. We disagree.

Gonzalez-Perez is correct that Officer Bartylla did not discover any illegal items during the initial search. But he did observe loose bolts and tools scattered on the floor of the vehicle and Officer Bartylla testified that loose bolts and tools were consistent with vehicles that were altered to create a hidden compartment to transport controlled-

substances. He testified that when hidden compartments are made, "sometimes they'll leave tools or bolts and screws out of place" or "they'll have the tools inside the vehicle so when they get to the drop-off location, they have the exact tools to remove the concealment compartment." Officer Bartylla testified that, based on his training and experience, the combination of information he learned prior to the search of the vehicle, along with what he observed during the search, led him to believe that it was likely the vehicle was being used to transport a large quantity of drugs.

Officer Bartylla further testified that, for reasons of personal safety, he was not able to conduct a thorough search to try to detect any hidden compartments at the site of the stop. He testified that they were pulled over on the side of a busy road where vehicles were "flying past" at 60 to 70 miles per hour. It was at this point that he decided to call for a K-9 unit to conduct a drug-sniff test. As Gonzalez-Perez argues, the safety concern does not by itself justify the test. It does, however, serve to contradict Gonzalez-Perez's claim that a thorough search was conducted without finding any drugs and that the basis for suspecting drug activity thus "evaporated." *Pike*, 551 N.W.2d at 922.

In addition, this case is distinguishable from *State v. Wiegand* cited by Gonzalez-Perez. *Wiegand* involved a K-9 unit drug-sniff test following a traffic stop for a vehicle equipment violation. The alleged basis for the test was that "Wiegand was evasive, nervous, and had glossy eyes," but the officer acknowledged that he had no reason to suspect Wiegand was under the influence of drugs and that Wiegand was merely "acting suspiciously." *Id.* at 128, 137. The Minnesota Supreme Court concluded that the circumstances of the case failed to provide an articulable, reasonable suspicion to support

the K-9 unit drug-sniff test. Here, there are a number of circumstances supporting Officer Bartylla's suspicions of drug trafficking. The district court concluded that while "innocently explained in isolation, . . . these are things [Officer Bartylla] observed through his five senses that had stacked up to provide the officer reasonable articulable suspicion to request and carry out a sniff search."

We conclude that, on this record, under the totality of the circumstances, the second expansion of the investigation to conduct a K-9 unit drug-sniff test was also supported by reasonable, articulable suspicion. The district court therefore did not err by denying Gonzalez-Perez's motion to suppress.

II. The district court erred by entering multiple convictions.

"Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both. An included offense may be . . . a lesser degree of the same crime" or "a crime necessarily proved if the crime charged were proved." Minn. Stat. § 609.04, subd. 1 (2018). Gonzalez-Perez argues, and the state agrees, that the district court erred by entering convictions for both aggravated first-degree controlled-substance crime (sale) and first-degree controlled-substance crime (sale) because the latter is necessarily proved if an individual commits the former. An individual is guilty of aggravated first-degree controlled-substance crime if the person commits first-degree controlled-substance crime, sells more than 100 grams of the controlled substance, and the crime involves two aggravating factors. Minn. Stat. § 152.021, subd. 2b(2) (2018). Accordingly, first-degree controlled substance crime is necessarily proved if aggravated first-degree controlled-substance crime is proved. The district court therefore erred by

entering a conviction for first-degree controlled-substance crime, and we reverse and remand for the conviction to be vacated.

Affirmed in part, reversed in part, and remanded.