STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1623

State of Minnesota,
Respondent,

vs.

Levar Randolph Mitchell,
Appellant.

Filed July 27, 2020
Affirmed
Larkin, Judge

Douglas County District Court
File No. 21-CR-17-2001

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

Chad M. Larson, Douglas County Attorney, Alexandria, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Abigail H. Rankin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Johnson, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges his conviction of third-degree possession of marijuana, arguing that the district court erred by denying his pretrial motion to suppress. Appellant

also challenges his sentence, arguing that the district court abused its discretion by denying his request for a downward dispositional departure. We affirm.

FACTS

On October 25, 2017, a state trooper was sitting in his squad car in the median of Interstate 94 near Alexandria while on a drug-interdiction assignment with a drug-sniffing dog. He clocked a vehicle driven by appellant Levar Randolph Mitchell moving at 74 miles per hour. The trooper pulled out of the median to catch up to the vehicle, which had Washington license plates. The trooper followed the vehicle for about two minutes and obtained a speed reading of 75 miles per hour. The posted speed limit was 70 miles per hour. The trooper activated his squad car's emergency lights and stopped the vehicle.

The trooper exited his squad car and walked along the passenger side of the vehicle toward the front passenger door. As he did so, the trooper saw a large amount of luggage in the vehicle. The trooper tapped on the front passenger-side window, and the passenger, Mitchell's fiancée, rolled down the window about four inches. The trooper testified at a later suppression hearing that he thought that the partial opening was suspicious because, based on his training and experience, it "is associated almost every time with the smuggling or hiding of drug odors," and "rolling the window down so many inches keeps the odors inside the vehicle."

The trooper asked Mitchell for his driver's license and insurance information. Mitchell looked for that information for approximately 40 seconds before the trooper asked where Mitchell and his fiancée were heading. Mitchell responded that they were traveling to Illinois. The trooper then asked where they were traveling from, and Mitchell said that

they were coming from Oregon and that they had gone there to attend a football game. The trooper asked Mitchell if he owned the vehicle. Mitchell said it was a rental. At some point, Mitchell's fiancée opened the glove box to look for Mitchell's driver's license and insurance information, and the trooper saw a large bottle of air freshener in the glove box. The trooper testified that he "believed this to be extremely suspicious" because "the vehicle was a rental vehicle and it was coming from a high distribution area . . . along the corridor of [Interstate] 94, which is [known for] drug smuggling efforts of specifically marijuana coming from the west coast."

About two minutes after the trooper had requested Mitchell's driver's license, the trooper stated, "Why don't you just come back here with me? I'll just get it from you, date of birth and stuff like that. Just come on back here." Mitchell got out of the vehicle and met the trooper in front of the trooper's squad car. There, the trooper asked Mitchell if he had any weapons or drugs in the vehicle, which Mitchell denied. The trooper then asked Mitchell if he had a wallet. Mitchell responded, "I usually keep [my license] in my insurance card." The trooper testified that Mitchell's reply was "weird," but that he "believe[d it] was associated with his nervousness." Mitchell showed the trooper a credit card, which had his name on it. The trooper then said, "Why don't you just come on and have a seat up there in the front," referring to the trooper's squad car. Mitchell obliged and sat in the front passenger seat of the squad car.

Once in the squad car, the trooper noticed that Mitchell "was extremely nervous." The trooper asked him questions about his travels. Mitchell said that they had been traveling for about "a day and a half" and stopped a couple times for gas. Mitchell told the

trooper that he and his fiancée missed the football game because of a delayed flight but that they had visited with family. Mitchell said that he and his fiancée chose to drive back to Ohio to "enjoy the country" and were planning to spend the night with relatives in Illinois. When the trooper asked about the large amount of luggage in the vehicle, Mitchell said that they flew to Oregon with one suitcase each, went shopping in Oregon, and put their purchases in new suitcases. The trooper testified that the amount of luggage in the vehicle was "extremely suspicious" because "it is often associated" with transporting large amounts of marijuana from the west coast. The trooper also testified that Mitchell became increasingly nervous to the point where "you could physically see the rise and fall of his chest," that he was "literally shaking," and that he misspelled his middle name. The trooper testified that he attributed Mitchell's nervousness to something other than a traffic violation.

After approximately six minutes in the squad car, the trooper told Mitchell that he suspected that Mitchell was involved in drug smuggling. The trooper then exited the squad car, checked the vehicle identification number (VIN) on Mitchell's vehicle, and spoke to Mitchell's fiancée. Contrary to Mitchell's claim that they had missed the football game, Mitchell's fiancée said that all the men in the family had gone to the game and that she had stayed home with the women. The trooper testified that at that point, the passenger window was rolled down completely and that he smelled "a strong odor of marijuana emitting from the vehicle." The trooper asked Mitchell's fiancée to step out of the vehicle and directed the drug-sniffing dog that was on the scene to sniff the exterior of the vehicle. The dog alerted to the presence of marijuana. The trooper searched the vehicle and found

approximately 24 kilograms of marijuana in the luggage. He also found approximately 400 grams of hash oil.

The state charged Mitchell with one count of second-degree possession of marijuana, in violation of Minn. Stat. § 152.022, subd. 2(a)(6) (2016). Mitchell moved to suppress the drug evidence. The district court held an evidentiary hearing on Mitchell's motion, and the trooper testified regarding the circumstances above. Mitchell filed a memorandum of law after the hearing, arguing that the initial stop was unconstitutional and that the stop was unconstitutionally expanded in both scope and duration. The district court denied the motion to suppress.

The state filed an amended complaint that reduced the charge against Mitchell to third-degree possession of marijuana under Minn. Stat. § 152.023, subd. 2(a)(5) (2016). Mitchell stipulated to the prosecution's case under Minn. R. Crim. P. 26.01, subd. 4, to obtain review of the district court's pretrial ruling on his suppression motion. The parties agreed to hold any sentencing hearing the same day as the trial. Before trial, Mitchell filed a motion for a downward dispositional departure from the presumptive sentence. The district court ultimately found Mitchell guilty of third-degree possession of marijuana. After hearing argument from Mitchell and his attorney, the district court denied Mitchell's motion for a downward dispositional departure and sentenced Mitchell to serve 34 months in prison. Mitchell appeals.

D E C I S I O N

I.

Mitchell contends that the district court erred by denying his motion to suppress. The United States and Minnesota Constitutions guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects" against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. "The touchstone of the Fourth Amendment is reasonableness." *State v. Johnson*, 813 N.W.2d 1, 5 (Minn. 2012) (quotation omitted).

Generally, warrantless searches and seizures are per se unreasonable. *State v. Horst*, 880 N.W.2d 24, 33 (Minn. 2016). However, a police officer may initiate a limited, investigatory stop without a warrant if the officer has reasonable, articulable suspicion of criminal activity. *State v. Munson*, 594 N.W.2d 128, 136 (Minn. 1999) (citing *Terry v. Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868, 1880 (1968)). "[T]he reasonable suspicion standard is not high," but it requires more than an unarticulated "hunch." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotations omitted). In determining whether reasonable suspicion exists, we "consider the totality of the circumstances and acknowledge that trained law enforcement officers are permitted to make inferences and deductions that would be beyond the competence of an untrained person." *State v. Richardson*, 622 N.W.2d 823, 825 (Minn. 2001).

"[E]ach incremental intrusion during a stop must be 'strictly tied to and justified by the circumstances which rendered [the initiation of the stop] permissible.'" *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (alteration in original) (quoting *Terry*, 392

U.S. at 19, 88 S. Ct. at 1878) (other quotation omitted). Under the Minnesota Constitution, "an intrusion not strictly tied to the circumstances that rendered the initiation of the stop permissible must be supported by at least a reasonable suspicion of additional illegal activity." *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012).

We review a district court's determination of reasonable suspicion de novo, but we accept the district court's factual findings unless they are clearly erroneous. *Id.* Any evidence obtained as the result of an unreasonable seizure must be excluded. *Id.*

Although he challenged it below, Mitchell does not contest the validity of the initial traffic stop for speeding on appeal. *See State v. George*, 557 N.W.2d 575, 578 (Minn. 1997) (providing that an officer has an objective basis for stopping a vehicle if the officer "observes a violation of a traffic law, however insignificant"). Instead, Mitchell contends that the trooper unreasonably expanded the scope and duration of the traffic stop. He argues that the stop was unreasonably expanded at the following five points: (1) when, after Mitchell exited his vehicle, the trooper asked Mitchell whether there were any weapons or drugs in the vehicle; (2) when the trooper instructed Mitchell to sit in the front seat of the squad car; (3) when the trooper questioned Mitchell about the luggage in his vehicle; (4) when the trooper continued to question Mitchell after determining that Mitchell had a valid license status; and (5) when the trooper left Mitchell confined in the squad car while he checked the vehicle's VIN and talked with Mitchell's fiancée.

The first alleged expansion occurred when Mitchell stepped out of the vehicle and the trooper asked him whether there were any weapons or drugs in the vehicle. By that time, the trooper had seen an unusually large amount of luggage in Mitchell's vehicle,

Mitchell's fiancée had rolled down her window only four inches in response to the trooper's tapping, the trooper had learned that the vehicle was a rental, and the trooper had observed a bottle of air freshener in the glove box. The trooper testified that, from this information and based on his training and experience, he was "extremely suspicious" of drug-smuggling activity. He specifically testified that the window being rolled down only a few inches "is associated almost every time with the smuggling or hiding of drug odors" and that the vehicle "was a rental vehicle and it was coming from a high distribution area . . . along the corridor of [Interstate] 94, which is [known for] drug smuggling efforts of specifically marijuana coming from the west coast."

"The reasonable-suspicion standard is not high." *State v. Morse*, 878 N.W.2d 499, 502 (Minn. 2016) (quotations omitted). An officer need only articulate specific facts which, taken together with rational inferences from those facts, objectively support the officer's suspicion. *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007). Trained police officers may make reasonable inferences that are beyond those of an untrained person. *Richardson*, 622 N.W.2d at 825. Considering the totality of the circumstances set forth above and the trooper's reasonable inferences, the trooper articulated specific facts that objectively supported his suspicion that Mitchell was engaged in drug-related activity. He therefore had a valid basis to expand the traffic stop to include investigation of the suspected drug activity.

Appellant argues that the trooper did not have reasonable suspicion that Mitchell was engaging in criminal drug activity because he did not smell drugs or detect an odor of air freshener while he stood next to the partially open passenger window for over two

minutes. The trooper's failure to detect an incriminating odor when he initially spoke to Mitchell's fiancée through the partially opened passenger window does not negate all of the other circumstances that supported his reasonable suspicion.

An officer may lawfully conduct a dog sniff around the exterior of a vehicle stopped for a traffic violation when the officer has reasonable, articulable suspicion of drug-related criminal activity. *State v. Wiegand*, 645 N.W.2d 125, 137 (Minn. 2002). "[A] dog sniff around the exterior of a legitimately stopped motor vehicle is not a search requiring probable cause . . . ." *Id.* at 133. As explained above, by the time the trooper asked Mitchell to get out of his vehicle and questioned him about drugs and weapons in the vehicle, the trooper had reasonable, articulable suspicion of criminal drug activity. That suspicion provided a lawful basis to conduct a dog sniff around the vehicle.

We do not address the other allegedly unreasonable expansions that Mitchell has identified because they are immaterial: the trooper articulated specific facts which, taken together with rational inferences from those facts, objectively supported his suspicion that Mitchell was engaged in drug-related criminal activity when the first expansion occurred. Those circumstances justified the dog sniff of Mitchell's vehicle and the ensuing warrantless seizure of marijuana from the vehicle. *See State v. Pederson-Maxwell*, 619 N.W.2d 777, 781 (Minn. App. 2000) (concluding that drug-sniffing dog's alert to the presence of controlled substances in a motor vehicle provided probable cause for lawful warrantless search under the automobile-exception to the warrant requirement). Although the trooper obtained additional information that buttressed his reasonable suspicion of drug-related activity before he conducted the dog sniff, that information was not necessary

to justify the dog sniff. More importantly, the additional information did not dispel the officer's reasonable suspicion. *See State v. Hickman*, 491 N.W.2d 673, 675 (Minn. App. 1992) (explaining that once reasonable suspicion of criminal activity has been dispelled, an investigative seizure must end), *review denied* (Minn. Dec. 15, 1992).

In sum, because reasonable, articulable suspicion objectively supported the trooper's expansion of the traffic stop to include the dog sniff, the district court did not err by denying Mitchell's motion to suppress.

II.

Mitchell contends that the district court abused its discretion by denying his request for a downward dispositional departure. "The sentences provided in the [Minnesota Sentencing Guidelines] Grids are presumed to be appropriate for the crimes to which they apply." Minn. Sent. Guidelines 2.D.1 (Supp. 2017). "[A] sentencing court can exercise its discretion to depart from the guidelines *only if* aggravating or mitigating circumstances are present, and those circumstances provide a substantial and compelling reason not to impose a guidelines sentence." *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (citations and quotations omitted). "When factors that may justify departing from the presumptive sentence are present, a court must exercise its discretion and consider the factors." *State v. Kier*, 678 N.W.2d 672, 677 (Minn. App. 2004), *review denied* (Minn. June 15, 2004). We generally will not interfere with a presumptive sentence, even if there are grounds that would justify a departure. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006).

Appellate courts "afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion." *Soto*, 855

N.W.2d at 307-08 (quotation omitted). "[A]s long as the record shows the [district] court carefully evaluated all the testimony and information presented [to it] before making a determination," we will not interfere with the district court's decision to impose a presumptive sentence. *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011) (quotation omitted). Only in a "rare" case will an appellate court reverse a district court's refusal to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); *see State v. Witucki*, 420 N.W.2d 217, 223 (Minn. App. 1988) ("An appellate court will not generally review the [district] court's exercise of its discretion in cases where the sentence imposed is within the presumptive range." (quotation omitted)), *review denied* (Minn. Apr. 15, 1988).

When considering a dispositional departure, the district court focuses "more on the defendant as an individual and on whether the presumptive sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). "[A] defendant's *particular* amenability to individualized treatment in a probationary setting will justify departure" from a guidelines sentence. *Soto*, 855 N.W.2d at 308 (quotation omitted). The particular-amenability requirement "ensure[s] that the defendant's amenability to probation distinguishes the defendant from most others and truly presents the substantial and compelling circumstances that are necessary to justify a departure." *Id.* at 309 (quotation omitted).

Relevant factors for determining whether the defendant is particularly amenable to probation include the defendant's age, prior criminal record, remorse, cooperation, attitude in court, and support of friends and family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). However, a district court is not required to depart from the presumptive-sentence range

even if there is evidence in the record that the defendant would be amenable to probation. *State v. Olson*, 765 N.W.2d 662, 663 (Minn. App. 2009).

The record reflects the district court's reasons for denying Mitchell's motion for a downward dispositional departure, including that there were "some big strikes" weighing against a departure. First, the district court described Mitchell's participation in drug trafficking as "very concerning." Second, the district court stated that Mitchell was transporting approximately 50 pounds of marijuana, which is "a large amount." Third, the district court "wrestled with" the fact that Mitchell "went through a similar set of circumstances" in 2006, when he was convicted of third-degree possession of marijuana and unlawful possession of a firearm. The district court ultimately stated, "I don't doubt for a moment that 99 percent of the time you make good decisions and you're a good person, but I cannot in good conscience waive a prison sentence for drug trafficking under these circumstances. So the request for a departure is denied."

Mitchell argues that a departure was warranted based on his age and maturity and because he had committed no crimes since 2006, had shown remorse for his offense, had been cooperative throughout the district court proceedings, had the support of his community and family, and could uniquely "serve his community through his entrepreneurial endeavors." But the district court is not required to depart from the guidelines even if there is evidence that the defendant may be amenable to probation. *Id.*

In sum, because the record shows that the district court carefully considered Mitchell's argument for a departure, this is not a rare case in which we would reverse the district court's imposition of a presumptive sentence.

Affirmed.