STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1474

State of Minnesota,
Respondent,

vs.

Gregory James Head,
Appellant.

Filed November 29, 2021
Reversed and remanded
Reilly, Judge

Beltrami County District Court
File No. 04-CR-19-2850

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

David L. Hanson, Beltrami County Attorney, David P. Frank, Chief Assistant County Attorney, Bemidji, Minnesota (for respondent)

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

Considered and decided by Gaïtas, Presiding Judge; Ross, Judge; and Reilly, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

Appellant challenges his conviction for unlawful firearm possession and third-degree drug possession, arguing that the district court: (1) erred in denying his motion to suppress, (2) violated his constitutional rights, and (3) erred in its sentencing decision. We determine that the district court erred in considering evidence that was not presented at the

suppression hearing when it made its finding that there was reasonable, articulable suspicion for the stop. We therefore reverse and remand for the district court to consider whether the police officer had reasonable, articulable suspicion to stop, based exclusively on the record of the evidence elicited at the suppression hearing.

FACTS

In September 2019, an anonymous tipster, who was later identified as a law enforcement investigator, saw appellant Gregory James Head in a Walmart parking lot. The investigator was familiar with appellant and suspected that he had an outstanding warrant for his arrest. The investigator called the Bemidji Police Department to report appellant's location. The police department dispatched a police officer to the Walmart parking lot to arrest appellant on the outstanding warrant.

The officer drove to Walmart and saw a vehicle in the parking lot that he believed matched the description provided by the dispatcher. The officer activated his emergency lights and stopped the vehicle. The squad video depicts two people sitting in a large, dark-colored vehicle. The officer identified appellant as the front passenger in the vehicle and placed him under arrest. The officer saw a baggie between the passenger seat and the door, which contained a substance that field tested positive for heroin. The officer also found a loaded firearm and a box of ammunition under the front passenger seat where appellant had been sitting.

Respondent State of Minnesota charged appellant with ineligible possession of a firearm and possession of heroin. Appellant moved to suppress the evidence discovered in the vehicle, arguing that the police officer did not have a reasonable basis to stop the vehicle

and conduct a search. Following a contested omnibus hearing, the district court denied appellant's suppression motion. Appellant then pleaded not guilty to the charged offenses and the matter proceeded to trial. The jury found appellant guilty of both crimes and the district court imposed sentence.

This appeal follows.

DECISION

Appellant challenges the district court's order denying his motion to suppress evidence. When reviewing a pretrial order on a motion to suppress evidence, an appellate court independently reviews the facts and determines, as a matter of law, whether the district court erred by denying the motion. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We review the district court's factual findings for clear error. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008). A factual finding "is not clearly erroneous if it is reasonably supported by the evidence as a whole." *State v. Barshaw*, 879 N.W.2d 356, 366 (Minn. 2016). We also defer to the district court's credibility determinations. *State v. Klamar*, 823 N.W.2d 687, 691 (Minn. App. 2012).

We begin with the state's argument that it lacked sufficient notice at the omnibus hearing that appellant was challenging the constitutionality of the vehicle stop. A pretrial suppression motion must specify with reasonable particularity the grounds for suppression, so that the state has advance notice and can meet its burden at the hearing. *State v. Needham*, 488 N.W.2d 294, 296-97 (Minn. 1992). But "[i]n practice, the defense counsel at the outset of an omnibus hearing often makes a rather general statement of the issues." *Id.* at 296; *see also State v. Balduc*, 514 N.W.2d 607, 609-10 (Minn. App. 1994) (holding

that defense provided prosecutor with sufficient notice through a letter stating that "all usual omnibus hearing issues" would be contested). Here, appellant moved to suppress evidence on the grounds that: (1) the "evidence was obtained in violation of [appellant's] constitutional and statutory protections against unreasonable searches and seizures," and (2) the informant's tip to the dispatcher "did not possess sufficient indicia of reliability." Before the suppression hearing, the state advised the defense that the tip came from a law enforcement investigator. In response to the state's disclosure, appellant focused his argument on the constitutionality of the stop. Thus, the state had sufficient notice of the issues relating to appellant's constitutional claims before the hearing.

Next, appellant argues that the district court erred in denying the motion to suppress because it incorrectly determined that the officer had reasonable, articulable suspicion of criminal activity to conduct a traffic stop. Both the United States and Minnesota Constitutions protect individuals against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]." *Whren v. United States*, 517 U.S. 806, 809-10 (1996) (citations omitted). Warrantless seizures are generally unreasonable. *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992). But a law enforcement officer may initiate a limited, investigatory stop without a warrant if the officer has a 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 (1968)). The reasonable suspicion showing is "not high," *State v. Bourke*, 718 N.W.2d 922, 927 (Minn.

2006), but requires more than an unarticulated "hunch," *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008). "Reasonable suspicion must be based on specific, articulable facts that allow the officer to be able to articulate . . . that he or she had a particularized and objective basis for suspecting the seized person of criminal activity." *State v. Morse*, 878 N.W.2d 499, 502 (Minn. 2016) (quotations omitted). The state bears the burden of proof at a suppression hearing. *State v. Othoudt*, 482 N.W.2d 218, 223 (Minn. 1992).

Here, the district court held a contested omnibus hearing on appellant's motion to suppress. The arresting police officer testified at the hearing. The officer testified that he received a report from dispatch that appellant was in a Walmart parking lot and had an outstanding arrest warrant. The information came from a law enforcement investigator, who did not testify. According to the officer, he learned that appellant "was at [Walmart] and eventually leaving in a vehicle with Red Lake plates." Appellant argues that the "bare, non-specific description" of a "vehicle with Red Lake plates" could not establish reasonable, articulable suspicion of criminal activity. We agree.

Minnesota courts have routinely held that an officer's decision to stop a vehicle that is similar to a suspect vehicle "cannot be considered mere caprice or whim." *State v. Waddell*, 655 N.W.2d 803, 810 (Minn. 2003). In *Waddell*, the Minnesota Supreme Court upheld the stop of a vehicle that was "very similar in body style but slightly lighter in color" to a suspect vehicle. *Id.* (upholding stop of gray vehicle although crime vehicle was described as dark blue or black). Similarly, in *State v. Yang*, the supreme court upheld the stop of a dark blue Honda, when the suspect vehicle was a black "Honda-type vehicle." 774 N.W.2d 539, 549, 552 (Minn. 2009). But here, by contrast, the state did not put *any*

evidence into the record about the investigator's description of the vehicle. The officer did not testify about color, make, model, or body type of the reported vehicle. Instead, the officer simply described it as a "vehicle with Red Lake plates."

The district court order implicitly acknowledges that the police officer did not provide an adequate description of the suspect vehicle, because the district court relied on the complaint—rather than the officer's testimony at the hearing—to deny the motion to suppress. The complaint was not part of the record at the suppression hearing.[1] The district court stated:

> According to the complaint, [the investigator] told dispatch that Defendant 'was in a black Ford Explorer.' [The arresting officer's] squad car video . . . shows what clearly appears to be a black Ford Explorer driving through the parking lot and heading toward the exit—just as [the investigator] had described. Thus, when [the arresting officer] activated his lights to stop the SUV, he knew that [the investigator] had very recently positively identified Defendant to be in a black Ford Explorer with Red Lake plates that was beginning to leave [Walmart]—an exact description of the vehicle that [the arresting officer] saw driving toward him.

Appellant argues that the district court erred by relying on the assertions in the complaint in denying the suppression motion. Caselaw supports appellant. A suppression ruling must be made "[u]pon the record of the evidence elicited" at the suppression hearing. *State ex rel. Rasmussen v. Tahash*, 141 N.W.2d 3, 13 (Minn. 1965); *see also State v. Cripps*,

[1] The district court relied on Minn. R. Crim. P. 11.04, subd. 1(c), for the proposition that a "court may find probable cause based on the complaint or the entire record, including reliable hearsay." *See, e.g., State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976) (permitting district court to rely on police report in probable-cause challenge). But appellant did not assert a probable-cause challenge here and instead sought to suppress evidence arising out of an illegal stop. Rule 11.04, subd. 1(c), does not apply.

533 N.W.2d 388, 391 (Minn. 1995) (noting that reasonable suspicion must be "based on specific, articulable facts" that allow the officer "to articulate at the omnibus hearing that he or she had a particularized and objective basis for suspecting the seized person of criminal activity"). While the complaint asserted that appellant was in a black Ford Explorer, the state did not elicit any testimony from the officer at the omnibus hearing establishing that he was looking for a vehicle of that description. Nor did the state offer the complaint as an exhibit at the omnibus hearing or call the original investigator to testify about the vehicle. The district court clearly erred by relying on documents outside the record at the suppression hearing.[2]

If the district court made factual findings based on information in the complaint, those findings are not supported by the record and are clearly erroneous. The district court made the following factual findings:

> At around 8:30 p.m. on September 20, 2019, [the investigator] reported to Beltrami County dispatch that he had seen Defendant in a vehicle in the parking lot of the Bemidji [Walmart] store. [The investigator] knew that Defendant had an outstanding felony warrant for his arrest. [The investigator] informed the dispatch operator that Defendant was beginning to leave the parking lot in a black Ford Explorer with Red Lake plates. [The police officer] responded to the scene, and as he entered the [Walmart] parking lot, could see a black Ford

[2] We have reached similar decisions in other recent nonprecedential cases. *See, e.g.*, *State v. Winge*, No. A20-1609, 2021 WL 4059319, at *6 n.2 (Minn. App. Sept. 7, 2021) (declining to consider report from 911 call because district court did not receive police report into evidence at suppression hearing and confining our analysis "to the facts presented to the district court at the suppression hearing"); *State v. Miller*, No. A20-0558, 2021 WL 1522665, at *6 n.5 (Minn. App. Apr. 19, 2021) (stating that if the district court made factual findings based on transcript of 911 call, which was not in the record from the suppression hearing, those findings were not supported by the record and appeared clearly erroneous).

> Explorer traveling westbound across the lot, and then turn southbound and drive directly toward him. [The officer] immediately activated his emergency lights and stopped the vehicle. Defendant was a passenger in the vehicle, and [officers] removed him from the Explorer and placed him under arrest.

Without the complaint, there is no support in the suppression record for the district court's findings that: (1) appellant "was beginning to leave the parking lot in a black Ford Explorer," (2) the officer "could see a black Ford Explorer traveling westbound across the lot, and then turn southbound and drive directly toward him," or (3) officers removed appellant "from the Explorer."

Based on the evidence and testimony presented at the hearing, and without the factual findings arising from the complaint, it is not clear that the officer had a particularized and objective basis for the vehicle stop. A district court's erroneous denial of a defendant's motion to suppress evidence requires an appellate court to reverse and remand. *See, e.g.*, *State v. Carter*, 697 N.W.2d 199, 212 (Minn. 2005) ("Because the error in admitting the seized evidence was prejudicial to appellant, we reverse his conviction and remand for a new trial.").[3] The district court erred in relying on evidence not in the record. As a result, we reverse the district court's suppression order and remand for the district

[3] We have remanded in similar situations in other nonprecedential cases. *See, e.g.*, *State v. Vanguilder*, No. A19-1274, 2020 WL 4280044, at *5 (Minn. App. July 27, 2020) (reversing denial of suppression motion and remanding for further proceedings); *State v. Mattson*, No. A18-1145, 2019 WL 2079468, at *4 (Minn. App. May 13, 2019) (remanding with instructions to consider only the record of evidence elicited at suppression hearing), *rev. denied* (Minn. Aug. 6, 2019); *State v. Sundrum*, No. A13-0506, 2014 WL 502929, at *7 (Minn. App. Feb. 10, 2014) (determining that defendant was entitled to a new trial when state introduced unlawfully obtained evidence, and reversing and remanding for further proceedings).

court to consider whether the police officer had a reasonable, articulable suspicion to stop the vehicle, based solely "[u]pon the record of the evidence elicited" at the suppression hearing. *Tahash*, 141 N.W.2d at 13. Because we reverse and remand, we do not reach appellant's remaining issues.

Reversed and remanded.