STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1609

State of Minnesota,
Respondent,

vs.

Brian Curtis Winge,
Appellant.

Filed September 7, 2021
Reversed and remanded
Cochran, Judge

Beltrami County District Court
File No. 04-CR-20-67

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

David Hanson, Beltrami County Attorney, Ashley A. Nelson, Assistant County Attorney, Bemidji, Minnesota (for respondent)

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

Considered and decided by Cochran, Presiding Judge; Worke, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

Appellant Brian Curtis Winge argues that the district court erred by denying his motion to suppress evidence obtained after police seized him on the basis of an anonymous

tip. Because the tip did not have sufficient indicia of reliability to provide police with reasonable suspicion of criminal activity by Winge, we reverse and remand.

FACTS

Around 2:00 a.m. on January 8, 2020, police received an anonymous call that a man wearing dark clothes and carrying a large backpack had offered drugs to the caller as the caller walked by the local post office. The caller did not provide their name or any other identifying information. Two police officers arrived at the post office in their squad car shortly after receiving the call. After circling the building, the officers saw an individual, later identified as Winge, in the post office parking lot. Winge was wearing dark clothing and had a large backpack.

The officers parked the squad car near Winge and approached him on foot. One officer immediately asked Winge the following questions in quick succession: "What are you doing?" "Not offering anyone drugs?" "No? Why would someone call and say that?" "Specifically you." "What's your name?" After Winge identified himself, the officer continued: "No drugs on you at all? Find that hard to believe." Winge then admitted to having a small amount of methamphetamine in his pocket. During the questioning, two more officers arrived in another squad car. With Winge's consent, police searched Winge's pocket and located a plastic bag containing a small amount of methamphetamine. Police then arrested Winge. The state charged Winge with felony fifth-degree possession of a controlled substance.

Later in January 2020, Winge moved for an order suppressing all evidence obtained as a result of the seizure that culminated in his arrest "on the grounds [that] law enforcement

lacked reasonable articulable suspicion to initiate a seizure." The district court held a hearing on Winge's motion to suppress. Only one witness testified at the hearing—the officer who questioned Winge when police arrived at the post office. Through that witness, the state introduced footage from the officer's body-worn camera showing the officer's interaction with Winge and Winge's subsequent arrest.

At the hearing, Winge's counsel argued that Winge "was seized within just a few seconds of law enforcement having initial contact with him." Winge's counsel then argued that the seizure was not supported by reasonable suspicion of criminal activity because the anonymous caller's tip was not corroborated and the tip lacked sufficient indicia of reliability. The state argued that the district court should deny Winge's motion because he was not seized when he admitted to possessing methamphetamine. The district court took the matter under advisement.

In an order filed March 27, 2020, the district court denied Winge's motion to suppress. The district court concluded that Winge was seized when the officer started asking him questions, noting that an objectively reasonable person in Winge's situation would not have felt free to terminate the encounter. The district court then determined that the officers had a specific and articulable basis to suspect Winge of being involved in criminal activity, and thus the investigative seizure of Winge was reasonable.

After the district court denied Winge's motion to suppress, the parties agreed to proceed with a bench trial on stipulated evidence pursuant to Minnesota Rule of Criminal Procedure 26.01, subdivision 4. Winge decided to proceed in this manner to preserve the suppression issue for appeal. In September 2020, the district court entered its Findings of

Fact, Conclusions of Law, and Verdict of Guilt and adjudicated Winge guilty of gross-misdemeanor fifth-degree possession of a controlled substance. Winge now appeals the district court's denial of his motion to suppress.

DECISION

Winge argues that the district court erred by denying his motion to suppress the evidence obtained as a result of his seizure because police lacked reasonable, articulable suspicion of illegal activity to stop him. "When considering the denial of a pretrial motion to suppress, we review the district court's factual findings for clear error and its legal conclusions de novo." *State v. Edstrom*, 916 N.W.2d 512, 517 (Minn. 2018). Because the parties in this case do not contest the district court's factual findings, we review only the district court's legal conclusions. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007).

In conducting our de novo review, our analysis focuses on whether Winge was subject to an unconstitutional seizure. Both the United States and Minnesota Constitutions safeguard against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. "A police officer may stop and temporarily seize a person to investigate that person for criminal wrongdoing if the officer reasonably suspects that person of criminal activity." *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). "To reasonably suspect a person of criminal activity, the officer's suspicion must be based on specific, articulable facts." *Id.*

With this constitutional framework in mind, we consider first whether Winge was "seized." We next consider whether the officers had a reasonable, articulable suspicion of criminal activity to support the seizure. And, finally, we consider whether the district court

correctly denied Winge's motion to suppress the evidence obtained as a result of his seizure.

I. The district court properly concluded that Winge was seized.

The district court concluded that police seized Winge. The parties do not challenge this conclusion. Based on our independent review, we agree with the district court that Winge was seized. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (requiring appellate courts "to decide cases in accordance with law" even when the parties do not raise an issue).

"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." *Cripps*, 533 N.W.2d at 391 (quotation omitted). A person has been "seized" if an objective, reasonable person in the same position would conclude, under the totality of the circumstances, that they were not free to terminate an encounter with law enforcement. *In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993). Generally, a reasonable person would not believe that they have been seized merely because a police officer "approaches that person in a public place and begins to ask questions." *Cripps*, 533 N.W.2d at 391. But a person may be seized when a police officer approaches them and immediately begins to ask them questions aimed at determining whether they have committed a criminal offense. *Id.*

In reaching its conclusion that Winge was seized, the district court relied on *Cripps*. In *Cripps*, an officer approached the defendant while she was drinking at a bar and asked to see her identification. *Id.* at 390. The supreme court reasoned that when the officer asked to see the defendant's identification, the officer was asking her "to prove that she

was of legal age to consume alcohol." *Id.* at 391. Thus, the supreme court concluded that "an objectively reasonable person would have believed that he or she was neither free to disregard the officer's request nor free to terminate the encounter, knowing that he or she was being asked to prove his or her innocence of the crime of underage consumption of alcohol." *Id.*

Here, two police officers approached Winge in the post office parking lot. The officers approached on foot wearing their standard issued uniforms and gear, including visible weapons. As noted, one officer immediately barraged Winge with questions about whether he had offered anyone drugs and whether he had any drugs in his possession. Two more officers arrived less than a minute after the first two approached Winge. Similar to *Cripps*, police immediately asked Winge if he had committed a criminal act. Considering the nature of the questions, the tone of voice used, and the proximity of the officers to Winge, a reasonable person in Winge's situation would not have felt free to disregard the officer's questions or terminate the encounter. Accordingly, the district court correctly determined that police seized Winge when they conducted the investigative stop of Winge in the post office parking lot. The question becomes whether that investigative stop was reasonable.

II. The district court erred by concluding that police had reasonable, articulable suspicion to stop Winge.

Police may conduct a limited stop to investigate suspected criminal activity if they can point to specific, articulable facts that reasonably warrant the intrusion. *In re Welfare of M.D.R.*, 693 N.W.2d 444, 448 (Minn. App. 2005), *review denied* (Minn. June 28, 2005).

"A determination of whether the police have reasonable suspicion . . . is based on the totality of the circumstances." *Id.*

Here, officers relied solely on the anonymous tip as the basis for the investigative stop of Winge. The officers who seized Winge did not identify any other facts as the basis for the stop. At the suppression hearing, the officer who testified explained that, when he approached Winge, he immediately began questioning Winge about drugs because he wanted to "[s]ave time." The police officer stated that it was 2:00 a.m. and "not a lot of [officers] get calls [about] people just randomly offering" drugs. Accordingly, to the extent the officers reasonably suspected Winge of criminal activity, they did so based on the anonymous tip alone.

"[P]olice can base an investigative stop on an informant's tip if it has sufficient indicia of reliability." *In re Welfare of G.M.*, 560 N.W.2d 687, 691 (Minn. 1997). Whether a tip supplies police with the requisite indicia of reliability to justify reasonable suspicion for an investigative stop depends on two factors: (1) identifying information provided by the informant, and (2) objective facts that provide a basis for the citizen-informant's belief that the suspect is engaging in illegal behavior. *Rose v. Comm'r of Pub. Safety*, 637 N.W.2d 326, 328 (Minn. App. 2001), *review denied* (Minn. Mar. 19, 2002). Neither factor is dispositive alone. *Id.* "[T]he determination of whether the officer had a reasonable suspicion of criminal activity at the time of the stop is based on the totality of the circumstances." *Id.*

Regarding the first factor, the reliability of a tip is enhanced when the informant provides information that would allow police to identify the informant. *City of*

Minnetonka v. Shepherd, 420 N.W.2d 887, 890 (Minn. 1988). The informant need not give their name as long as they provide police with sufficient information so that the police have "a way to locate the caller and hold him accountable if he was knowingly providing false information." *Id.* Even when a caller provides very little specific identifying information, a tip can be reliable if police are able to corroborate that the caller is who they say they are. *Marben v. State, Dep't of Pub. Safety*, 294 N.W.2d 697, 699 (Minn. 1980). And a face-to-face tip is more reliable than a called-in tip because the informant can be held accountable for giving false information. *State v. Davis*, 393 N.W.2d 179, 181 (Minn. 1986).

Regarding the second factor, even an anonymous tip can provide reasonable suspicion if the informant provides "specific and articulable facts to support the bare allegation of criminal activity." *Olson v. Comm'r of Pub. Safety*, 371 N.W.2d 552, 556 (Minn. 1985). The United States Supreme Court has concluded that an anonymous tip can justify an investigative stop when the tip provides predictive information that the police can corroborate. *Alabama v. White*, 496 U.S. 325, 332, 110 S. Ct. 2412, 2417 (1990). And, even without predictive information, a tip justifies an investigative stop where it bears other adequate indicia of reliability such as firsthand observation of criminal activity, a report that is roughly contemporaneous with the observed activity, and the tipster's use of the 911 emergency system. *Navarette v. California*, 572 U.S. 393, 399-401, 134 S. Ct. 1683, 1689-90 (2014). But a tip that merely identifies a specific person without providing police means to corroborate the accusation of wrongdoing does not bear sufficient indicia of reliability. *Florida v. J.L.*, 529 U.S. 266, 272, 120 S. Ct. 1375, 1379 (2000).

In *J.L.*, an anonymous caller reported to police that a young Black man standing at a particular bus stop wearing a plaid shirt was carrying a gun. *Id.* at 268, 120 S. Ct. at 1377. An unknown amount of time later, police arrived at the bus stop and saw three Black men standing in the area. *Id.* One of the men, J.L., wore a plaid shirt. *Id.* Police approached the three men, frisked all of them, and found a gun on J.L. *Id.* The state argued that the tip was reliable because it accurately described the individual accused of criminal activity. *Id.* at 271, 120 S. Ct. at 1379. The Supreme Court rejected this argument, and explained:

> An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its *assertion of illegality, not just in its tendency to identify a determinate person*.

Id. at 272, 120 S. Ct. at 1379 (emphasis added). Accordingly, the Supreme Court concluded that an anonymous tip that was nothing more than a "bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information" was not sufficiently reliable in its assertion of illegality to support the stop and frisk. *Id.* at 271, 120 S. Ct. at 1379.

Based on this United States Supreme Court precedent, Winge argues that the tip at issue in this case did not have sufficient indicia of reliability to give police reasonable suspicion to seize him. Winge emphasizes that the tip contained no predictive information of future behavior that could be corroborated by police, the anonymous caller did not claim

to have seen any drugs, there is no direct information in the record to demonstrate that the report was contemporaneous with the alleged offer of drugs, and the state produced no evidence that the informant used the 911 emergency system to make the report. The state counters that the tip was reliable because the informant accurately described Winge, the caller made the report based on an offer of drugs made directly to them. The state also asserts that the police responded to the call minutes after it was made to the police "dispatch" system.

To evaluate the reliability of the anonymous tip at issue here, we find additional guidance from the Minnesota Supreme Court's decisions in *Marben* and *Olson*. In *Marben*, a state patrol trooper received a message from an unidentified trucker via a citizen's band radio communication. 294 N.W.2d at 698. The trucker told the trooper that a car had been tailgating the trucker for the last 60 to 70 miles. *Id.* The trooper did not get the trucker's name, but he was able to verify that the trucker was in the area, and consequently had been in close proximity to the tailgating car at the time the trooper received the report. *Id.* at 699. The trooper located the car described by the trucker and stopped it, despite the trooper not personally observing improper driving. *Id.* at 698. In reviewing the reliability of the tip, the supreme court noted that information from a private citizen is presumed to be reliable. *Id.* at 699. The Minnesota Supreme Court also noted that the reliability of the trucker's communication was "enhanced" by the fact that the trooper was able to verify that the trucker was in close proximity to the car. *Id.* Accordingly, the supreme court concluded that the trooper "had a specific and articulable suspicion that a traffic violation had occurred" to warrant a stop of the car based on the trucker's report of tailgating. *Id.*

Conversely, in *Olson*, the Minnesota Supreme Court concluded that an anonymous tip received by police lacked sufficient indicia of reliability to support a reasonable, articulable suspicion of criminal activity. In *Olson*, deputies out on patrol received a radio dispatch alerting them that "a citizen had called in reporting that he observed a—possibly drunken driver." 371 N.W.2d at 553. The caller described the vehicle, which the deputies located and stopped despite not independently observing any erratic driving. *Id.* Like in *Marben*, the report came from a private citizen and was presumed reliable. *Id.* at 555. But the supreme court did not rest on this presumption. Instead, the supreme court explained that the tip "must have indicia of reliability," and concluded that it did not. *Id.* at 556. The supreme court noted that there was no information about the informant, and no information about what the informant saw that led the informant to believe that the car's driver was "possibly" drunk. *Id.* The supreme court emphasized that "[i]t would have been a simple matter for the dispatcher to have elicited some minimal specific and articulable facts from the anonymous caller to support the caller's bare assertion of a possibly drunk driver on the road." *Id.* The supreme court concluded that to stop a driver on the basis of a tip alone, "the anonymous caller must provide at least some specific and articulable facts to support the bare allegation of criminal activity." *Id.* With this United States Supreme Court and Minnesota Supreme Court precedent in mind, we consider whether police reasonably suspected Winge of criminal activity based on the anonymous tip when they seized him.

Here, an anonymous caller contacted police around 2:00 a.m. The caller provided no identifying information. The caller reported that a man had offered drugs to the caller when the caller walked by the post office. The caller reported that the man was wearing

dark clothes and had a large backpack. The caller did not report any other details. Police arrived approximately four minutes after receiving the call. The officers initially circled the post office building and saw no one. When the officers entered the post office parking lot, they saw Winge wearing dark clothing and carrying a large backpack. The post office is not open at 2:00 a.m. The officers immediately exited the squad car and confronted Winge.

Based on this record, we conclude that the anonymous tip lacked sufficient indicia of reliability to give the officers reason to suspect Winge of criminal activity. First, the caller provided no information that the police could use to identify, or even find, the caller. *See Shepherd*, 420 N.W.2d at 890 (concluding informant who told police he worked at a specific gas station gave police means of holding him accountable for providing false information). The caller was completely anonymous. Second, the tip was a bare allegation. The caller alleged only that Winge offered them drugs. The caller did not claim that they saw any drugs in Winge's possession. Nor did the caller provide any other information to corroborate the allegation. Further, the caller did not provide any predictive information that would show that the caller was familiar with Winge's activities. Like the tip at issue in *Olson*, the tip here lacked "even the most minimal indicia of reliability." *See* 371 N.W.2d at 556. Consequently, the officers lacked reasonable, articulable suspicion to seize Winge on the basis of the tip.

Our conclusion is reinforced by the Third Circuit's decision in *United States v. Roberson*, 90 F.3d 75 (3d Cir. 1996).[1] In *Roberson*, an anonymous informant called 911 and reported that "a heavy-set, black male wearing dark green pants, a white hooded sweatshirt, and a brown leather jacket was selling drugs" on a certain city block known by police to be a "hot spot" for drug activity. 90 F.3d at 75-76. Police officers arrived at the block about 30 to 40 seconds after the informant's tip was relayed to them over the radio. *Id.* at 76. Upon arriving, the officers "saw a man meeting the tipster's description standing on the corner." *Id.* Despite not observing any "indicia of drug activity," the officers exited their car and approached the man with guns drawn. *Id.* The Third Circuit concluded that the tip did not provide reasonable suspicion for the officers to stop the man. *Id.* at 79.

In reaching this conclusion, the court acknowledged that the officers were able to corroborate much of the information provided by the informant. *Id.* But the tip did not provide reasonable suspicion because the informant's description, while accurate, was comprised entirely of facts that existed at the time of the call. *Id.* Because the tip lacked any predictive information, any basis for assessing the reliability of the informant, and any basis for assessing "the grounds on which the informant believed that a crime was being committed," the tip alone did not justify the investigative stop of the described suspect. *Id.* at 80. The Third Circuit concluded that where police "receive a fleshless anonymous tip

[1] The Third Circuit's decision in *Roberson* is not binding on this court, but we find the decision persuasive on the issue of whether an anonymous tip provides a reasonable, articulable suspicion of criminal activity.

of drug-dealing that provides only readily observable information, and they themselves observe no suspicious behavior," the police are not justified in conducting an investigative stop. *Id.* "To hold otherwise would work too great an intrusion on the Fourth Amendment liberties, for any citizen could be subject to police detention pursuant to an anonymous phone call describing his or her present location and appearance and representing that he or she was selling drugs." *Id.* Similarly, in this case, police relied on a "fleshless anonymous tip of drug-dealing" and did not testify to observing any suspicious behavior by Winge prior to seizing him. Accordingly, the tip failed to provide police with a reasonable, articulable suspicion of criminal activity by Winge.

We are not persuaded otherwise by the state's reliance on *Navarette* and *State v. Balenger*, 667 N.W.2d 133 (Minn. App. 2003), *review denied* (Minn. Oct. 21, 2003), to argue that police were justified in stopping Winge. In *Navarette*, police received a tip from a 911 caller that the driver of a pickup truck had just run the caller off the highway. 572 U.S. at 395, 134 S. Ct. at 1686-87. A police officer encountered the described truck approximately 20 minutes later and stopped it. *Id.*, 134 S. Ct. at 1687. The United States Supreme Court concluded that the tip provided reasonable suspicion justifying the stop because the caller provided a basis for police to conclude that the caller had eyewitness knowledge of the reported dangerous driving, the caller's report was roughly contemporaneous with the incident, and the caller used the 911 emergency system to make the report. *Id.* at 399-401, 134 S. Ct. at 1689-90.

There are important differences between this case and *Navarette*. Unlike the eyewitness observation of erratic driving in *Navarette*, the anonymous caller here did not

claim to have seen Winge in possession of any controlled substances. And unlike *Navarette*, the record here does not show that the caller used the 911 emergency system to make their report. The state implies that the caller did so but produced no evidence either of the call itself or the circumstances under which it was placed.[2] Accordingly, the state cannot rely on the alleged use of the 911 emergency system to augment the reliability of the anonymous tip here.

Balenger is also distinguishable from the current case in important ways. In *Balenger*, a woman tapped a police officer on the shoulder and told the officer that someone had just pointed a gun at her friend. 667 N.W.2d at 136. As noted above, a face-to-face interaction between an informant and the police augments the reliability of the tip. *Davis*, 393 N.W.2d at 181. Unlike in *Balenger*, there was no face-to-face interaction between the informant and the police in this case. Second, a tip that a person has just threatened someone with a gun creates a greater public safety concern than a tip solely about drugs. As the *Balenger* court stated, "[t]he element of imminent danger distinguishes a tip that a person is armed from one involving, for example, the possession of drugs." 667 N.W.2d at 138. Accordingly, neither *Navarette* nor *Balenger* persuades us that the officers had reasonable suspicion to stop Winge based on the bare tip provided by the anonymous caller.

[2] The state suggests in its brief that the caller used the 911 emergency system to make the report and appears to rely on the police report to support this assertion. But the district court did not receive the police report into evidence at the suppression hearing. We must confine our analysis to the facts presented to the district court at the suppression hearing. *See State ex rel. Rasmussen v. Tahash*, 141 N.W.2d 3, 13 (Minn. 1965) (requiring suppression motion to be decided "[u]pon the record of the evidence elicited" at the suppression hearing).

In sum, the anonymous tip here is much closer to the tips addressed in *J.L.*, *Olson*, and *Roberson*, which were found to lack sufficient indicia of reliability, than the tips at issue in *Navarette* and *Balenger*. Here, the caller did not give police any self-identifying information. Nor did the caller provide any predictive information about Winge that showed familiarity with him beyond circumstances that existed at the time of the call. Finally, the officers did not corroborate any details regarding the alleged illegal activity prior to the seizure of Winge. Because the tip did not bear sufficient indicia of reliability, and the state has no other basis to justify the investigative stop, the officers lacked reasonable, articulable suspicion to seize Winge.

III. The district court erred by denying Winge's motion to suppress.

Lastly, we consider whether the district court properly denied Winge's motion to suppress evidence obtained during the investigative stop. Evidence obtained as a result of an investigative stop that is not justified by reasonable, articulable suspicion of criminal activity must be suppressed. *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011). Because the officers' investigative stop of Winge was not supported by reasonable, articulable suspicion of criminal activity, the district court erred by denying Winge's motion to suppress. Accordingly, we reverse the district court's denial of Winge's motion to suppress and remand this case to the district court.

Reversed and remanded.