

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1138**

State of Minnesota,
Respondent,

vs.

Darcy Wayne Christianson,
Appellant.

**Filed August 8, 2022
Reversed and remanded
Bryan, Judge**

Becker County District Court
File No. 03-CR-20-1539

Keith Ellison, Attorney General, Lydia Villalva Lijó, Assistant Attorney General, St. Paul, Minnesota; and

Brian W. McDonald, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

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

Considered and decided by Bryan, Presiding Judge; Cochran, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this direct appeal of his conviction, appellant argues that the district court erred in denying his motion to suppress evidence because law enforcement officers lacked probable cause to search the center console of his vehicle for illegal drugs. We agree and

reverse the denial of the suppression motion. However, respondent made an alternative argument to justify the search that the district court declined to address. We remand the case to the district court to consider the alternative justification for the search on the existing record from the suppression hearing.

FACTS

On August 6, 2020, respondent State of Minnesota charged appellant Darcy Wayne Christianson with first-degree possession of a controlled substance. Christianson moved to suppress the controlled-substance evidence, arguing that it was obtained during an unconstitutional search. At the contested hearing, the district court heard testimony from Becker County Sheriff's Deputy Cody Bouchie and admitted a video recording from Bouchie's body-worn camera. The evidence presented at the contested hearing provides the basis for the following, uncontested facts.

On August 5, 2020, around 11:29 p.m., Bouchie initiated a traffic stop of a vehicle registered to Christianson, whose license was canceled as inimical to public safety. Bouchie approached the driver's side of the vehicle and Minnesota State Trooper Cody Kisor approached the passenger side. Christianson and his passenger were both smoking newly lit cigarettes. Kisor immediately observed an open beer bottle in the front cupholder of the center console, between the occupants. Bouchie testified that he also detected the faint odor of burnt marijuana. Bouchie asked Christianson to step out of the vehicle. During their ensuing conversation, Christianson admitted to drinking one beer and stated that he was coming from visiting a friend. Christianson denied having anything illegal in the vehicle or any other open containers. Christianson also admitted to using

methamphetamine a few days earlier. Bouchie instructed Christianson to perform the modified Romberg field sobriety test, which requires the driver to close their eyes, tip their head back, and estimate the passage of 30 seconds. An estimate that is within five seconds of the actual 30-second mark is acceptable. Christianson estimated the passage of 30 seconds at the 23-second mark, and Bouchie testified that he believed Christianson was under the influence of a controlled substance based on the Romberg test. Bouchie then placed Christianson under arrest for driving with a canceled license and driving while impaired. While Bouchie was with Christianson, Kisor spoke with the passenger, who remained in the vehicle. The passenger explained that they were returning from looking at wedding dresses in Fargo and stated that she had an expired license. Kisor then instructed the passenger to exit the vehicle. Kisor recovered a small amount of marijuana and paraphernalia on the passenger.

Bouchie returned to the squad car and retrieved his K-9 partner, Cooper, a dog trained to detect the presence of illegal drugs. The video recording admitted into evidence shows that during this time, Kisor said something inaudible and Bouchie responded, "That's probably why I could smell marijuana when I went up to the passenger side. Very faint odor." Bouchie testified that he initiated a dog search of the interior of the vehicle "based on the odor of burnt marijuana and the open container, searching for more evidence of that." As Bouchie and K-9 Cooper approached the vehicle, the driver's side door remained open, and K-9 Cooper immediately jumped into the driver's seat. K-9 Cooper then alerted to the presence of illegal drugs inside the vehicle. Bouchie returned K-9 Cooper to the squad car and based on K-9 Cooper's signal during the initial search, the

police officers began to search the interior of the vehicle themselves. Kisor located a knife in the driver's door and Bouchie opened the center console between the seats. Inside the console, he observed a digital camera inside a case, some pieces of paper, and a plastic bag containing what appeared to be methamphetamine. The contents of the plastic bag field-tested positive for methamphetamine.

In his motion to suppress, Christianson argued that there was insufficient probable cause to justify the initial search of the vehicle's interior with a trained K-9 and that the search-incident-to-arrest exception did not apply. The district court denied Christianson's motion to suppress. While the district court noted that Bouchie testified to smelling a "faint odor of burnt marijuana," the district court did not credit this testimony because Bouchie never mentioned that to Kisor as justification for the search. Therefore, the district court concluded that Bouchie did not have probable cause to search for illegal drugs. Nevertheless, the district court denied the suppression motion because it determined that the officers "had sufficient probable cause for an interior search of the center console of [Christianson]'s vehicle for open containers of alcohol and other contraband." More specifically, the district court concluded that the open alcohol container, by itself, gave Deputy Bouchie sufficient probable cause to justify a "limited search for contraband" in the console even though the officers were "mistaken as to the law justifying the use of the K-9 unit":

Had a non-K-9 (human) officer searched only the center console specifically for alcohol-related contraband, the officer would still have discovered the bag of methamphetamine. Had the methamphetamine been discovered in another area of the vehicle this case might not survive dismissal. While mistaken

as to the law justifying the use of the K-9 unit to search the entirety of the interior of the vehicle, Deputy Bouchie had sufficient probable cause to justify a limited search for contraband located in the center console.

Christianson's case proceeded to jury trial and on May 21, 2021, the jury convicted him of possession of a controlled substance in the first degree. The district court sentenced him to 110 months in prison. Christianson appeals.

DECISION

Christianson argues that the district court erred its discretion in denying his motion to suppress because the officers lacked the requisite probable cause to search the center console of the vehicle for illegal drugs. The state argues that the search of the center console was justified under both the automobile and search-incident-to-arrest exceptions to the warrant requirement.¹ Because the initial search in question in this case was a search for illegal drugs and not a search for containers of alcohol, and because the totality of the circumstances would not warrant a reasonably prudent person to believe that the center console contained illegal drugs, the automobile exception does not apply. In addition, because the district court declined to address whether the search-incident-to-arrest exception applies, we are unable to review this argument, and we remand this issue.

¹ The state did not attempt to justify the search of the vehicle based on the doctrine of inevitable discovery, which permits admission of evidence seized without a warrant, if the evidence "ultimately or inevitably would have been discovered by lawful means." *State v. Licari*, 659 N.W.2d 243, 254 (Minn. 2003) (quotation omitted). Given the arguments presented to the district court, and because the search in question was one to detect the presence of illegal drugs using K-9 Cooper, we cannot review the record to determine whether the officer's subsequent search of the console was justified by the doctrine of inevitable discovery. Instead, we determine whether there was probable cause to justify the K-9 search of the vehicle's interior for evidence of drug-related criminal activity.

The United States and Minnesota Constitutions protect “[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. A warrantless search is presumptively unreasonable unless it falls within one of the recognized exceptions to the warrant requirement. *State v. Milton*, 821 N.W.2d 789, 798-99 (Minn. 2012). “The state bears the burden of establishing the applicability of an exception [to the warrant requirement].” *Licari*, 659 N.W.2d at 250. Evidence obtained during an unconstitutional search or seizure must be suppressed. *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011).

One exception to the warrant requirement is the “automobile exception,” under which the police may search a vehicle without a warrant, including closed containers inside, if there is “probable cause to believe the search will result in a discovery of evidence or contraband.” *State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016) (quotation omitted). Probable cause is an “objective inquiry that depends on the totality of the circumstances” and exists in cases relying on the automobile exception when “there are facts and circumstances sufficient to warrant a reasonably prudent person to believe that the vehicle contains contraband.” *Id.* (quotation omitted). Courts examine the specific police conduct at issue, assessing the reasonableness of that conduct “based on the facts of each particular case.” *State v. Davis*, 732 N.W.2d 173, 178 (Minn. 2007).

Further, the scope of a search under the automobile exception is “defined by the object of the search” and limited to “the places in which there is probable cause to believe [the object] may be found.” *State v. Gauster*, 752 N.W.2d 496, 508 (Minn. 2008) (quoting *United States v. Ross*, 456 U.S. 798, 824 (1982)). The Minnesota Supreme Court has also

limited vehicle searches using a dog trained to detect illegal drugs to those situations when the suspicion of law enforcement officers relates to drug-related criminal activity. In *State v. Wiegand*, the court concluded that there was no reasonable suspicion to conduct an exterior vehicle search using a police dog because the circumstances did not support a suspicion that the defendants were under the influence of drugs or that they were transporting drugs, even though the driver exhibited some indicia of impairment and displayed suspicious behavior. 645 N.W.2d 125, 136-37 (Minn. 2002).

In reviewing whether there existed a valid exception to the warrant requirement to justify a warrantless search or seizure, appellate courts review the district court's factual findings for clear error and its legal conclusions de novo. *State v. Stavish*, 868 N.W.2d 670, 677 (Minn. 2015); *State v. Molnau*, 904 N.W.2d 449, 451 (Minn. 2017). In addition, appellate courts defer to the credibility determinations of the district court. *State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003), *rev. denied* (Minn. July 15, 2003).

Here, Christianson challenges the initial search of the center console of the vehicle, arguing that at the time the officers deployed the police dog, they did not have probable cause to suspect that the console of the vehicle contained illegal drugs or evidence of drug-related criminal activity.² We consider the totality of the circumstances and the scope of the search in light of *Wiegand*, while deferring to the district court's determinations of

² The parties agree that probable cause is required. Given their arguments, we assume probable cause (and not reasonable suspicion) is required to justify an interior vehicle search using a dog trained to detect illegal drugs. See *State v. Glidden*, 455 N.W.2d 744, 746 (Minn. 1990) (observing that when an issue was not raised on appeal, "it is proper for an appellate court to decide [such] an issue . . . only when the reasoning relied upon by the appellate court is neither novel nor questionable").

credibility. We conclude that the automobile exception does not justify the search of the vehicle in this case for two related reasons.

First, to the extent that portions of the state's brief relate to whether there was probable cause to believe that the center console concealed containers of alcohol, we conclude that the search cannot be justified on this basis. The initial search of the center console that occurred in this case was a search by a dog trained to detect the presence of illegal drugs. There is no evidence that the dog could also detect the odor of alcohol or the presence of containers of alcohol. There is also no evidence regarding the center console and whether the dimensions of any potential storage compartments inside the console could reasonably hold bottles, cans, or other containers of alcohol. Because searches under the automobile exception are defined by the object of the search, *Gauster*, 752 N.W.2d at 508, and because searches using a drug dog are justified only by a suspicion of drug-related criminal activity, *Wiegand*, 645 N.W.2d at 136-37, the state cannot justify the dog search for illegal drugs based on a suspicion regarding open containers of alcohol.

Second, we conclude that there was no probable cause to believe that the center console contained illegal drugs or evidence of criminal drug-related activity. The state argues there was probable cause to suspect that the center console contained illegal drugs based on the following uncontested facts: Kisor's immediate observation of an open beer bottle in plain sight; Christianson's admission to using methamphetamine a few days earlier; inconsistencies between Christianson's and the passenger's statements regarding their whereabouts that day; Christianson's imperfect performance on the Romberg test; Bouchie's testimony that he detected the odor of burnt marijuana prior to the dog search;

and the recovery of marijuana and paraphernalia from the passenger. The district court made no findings regarding whether Christianson was impaired at the time of the search. Nor did the district court analyze whether Christianson's imperfect performance on the Romberg test is sufficient to suspect him of driving while impaired. Moreover, the district court did not find credible Bouchie's testimony that he smelled the odor of burnt marijuana. Because this court does not make its own findings of fact and defers to the district court's credibility determinations, we cannot consider the circumstances regarding Christianson's imperfect performance on the Romberg test or testimony regarding marijuana in our analysis. The remaining circumstances would not lead a reasonable officer to suspect that the center console concealed illegal drugs or evidence of drug-related criminal activity.

The state made an alternative argument in support of the suppression motion, based on caselaw allowing a warrantless search if the search was conducted incident to a lawful arrest. *See State v. Bernard*, 859 N.W.2d 762, 766 (Minn. 2015) ("A search incident to a lawful arrest is a well-recognized exception to the warrant requirement under the Fourth Amendment."). The district court did not need to address this alternative argument in light of its decision to deny the motion on the basis of the automobile exception. Police may "search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or [if] it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Arizona v. Gant*, 556 U.S. 332, 351 (2009). Under *Gant*, "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Id.* at 343 (quotation omitted). Because

consideration of the state's alternative warrant exception requires additional findings of fact, we are unable to review the argument. We remand the matter for the district court to make additional findings based on the record from the suppression hearing regarding whether the warrantless search was justified as incident to a lawful arrest.

Reversed and remanded.