STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1540

State of Minnesota,
Appellant,

vs.

Tomond Romell Grissom,
Respondent.

Filed June 6, 2022
Reversed
Hooten, Judge[*]

Ramsey County District Court
File No. 62-CR-20-5358

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for appellant)

Charles F. Clippert, Clippert Law Firm, P.L.L.C., St. Paul, Minnesota (for respondent)

Considered and decided by Segal, Chief Judge; Smith, Tracy M., Judge; and Hooten, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

In this pretrial appeal, appellant State of Minnesota argues that the district court erred by suppressing evidence after determining that officers (1) unreasonably expanded the traffic stop to search the vehicle for drug-related activity, and (2) conducted an unreasonable pat search of respondent. Because the evidence, when viewed from an objective standard, shows that the officers had probable cause to search the vehicle for drug-related activity and pat search respondent for weapons before placing him in the squad car during the search, we reverse.

FACTS

The relevant facts are undisputed. Officers C.J. and N.P. were patrolling a high-crime area when they drove past a parked car. The officers saw two male occupants leaning far back in their seats and attempting to hide their faces. The officers checked the license plate of the car and, after the car drove off, eventually pulled the car over for expired tabs. Officer C.J. approached the driver's side while officer N.P. approached the passenger's side. The driver explained that he had just bought the car and did not know about the expired tabs. He also did not have his driver's license with him. The officers gathered the occupants' information and identified the driver as C.K. and the passenger as respondent Tomond Romell Grissom.

Throughout the exchange, C.K. and Grissom acted respectfully and responded to the officers' questions; the officers saw what appeared to be marijuana pieces in the center console and cup-holder area; and the officers smelled burnt marijuana coming from inside

the car. Officer C.J. also observed that Grissom "seemed extremely nervous" and was visibly breathing heavy.

After the exchange, officer N.P. asked C.K. and Grissom if they had "anything else" "besides the little bit of weed" in the car. C.K. and Grissom denied that the substance was marijuana, but claimed it was tobacco. They also showed the officers a rolled cigarette. Officer N.P. went back to the squad car to look up C.K. and Grissom on his squad computer and then returned to the vehicle to search it for more evidence of marijuana.

Before beginning their search of the vehicle, officer C.J. frisked C.K. for weapons and finding none, placed him in the back of the squad car. Video footage shows that officer C.J. explained to C.K. that he was not under arrest, but was placed in the squad car while they conducted their search because only two officers were present and there were two occupants, C.K. and Grissom. Soon after C.K. was frisked, officer N.P. frisked Grissom. While so doing, he asked Grissom if he had any weapons on him. Footage from the video shows that Grissom replied that he did not. Officer N.P. then felt something heavy and metal, which officer N.P. later testified appeared to be a gun, in Grissom's front jean pocket. Footage shows that officer N.P. asked Grissom about the item and Grissom stated that it was his phone. Officer N.P. then opened Grissom's front jean pocket and saw the handle of a gun, after which Grissom confirmed that the item was a loaded gun. Officer N.P. testified that "for my safety", he asked Grissom if there was a live round in the chamber of the gun and he answered "yes".

The state charged Grissom with two counts of possessing a firearm while ineligible under Minn. Stat. § 624.713, subd. 1(2) (2020). Grissom moved to suppress the gun, and

the district court held an omnibus hearing. Both officers testified and the district court admitted the officers' bodycam footage into evidence. The district court granted Grissom's motion to suppress evidence, determining, in part, that because the sight and smell of marijuana are indistinguishable from legal industrial hemp,[1] the officers did not have the requisite probable cause to expand the traffic stop to search the vehicle, nor did they have reasonable, articulable suspicion to frisk Grissom for weapons. This pretrial appeal by the state follows.

DECISION

The United States and Minnesota Constitutions prohibit "unreasonable searches and seizures" by the government. 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]." *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003). Evidence obtained during an unconstitutional search or seizure must be suppressed. *See State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011).

When we review a pretrial order on a motion to suppress where the facts are not in dispute, as here, we review the decision de novo and determine whether the police

[1] Minnesota legalized industrial hemp in the 2015 Industrial Hemp Development Act, Minn. Stat. §§ 18K.01-.09 (2020). The Act defines "[i]ndustrial hemp" as "the plant Cannabis sativa L. and any part of the plant . . . with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." Minn. Stat. § 18K.02, subd. 3. The federal legislature later legalized industrial hemp in the 2018 Farm Bill. *See* Agricultural Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, 4828-29.

articulated an adequate basis for the search or seizure at issue. *See State v. Lugo*, 887 N.W.2d 476, 487 (Minn. 2016). To determine whether the constitutional prohibition against unreasonable searches and seizures has been violated, we examine the specific police conduct at issue. *See State v. Davis*, 732 N.W.2d 173, 178 (Minn. 2007) (explaining that "what constitutes an unreasonable search must be assessed based on the facts of each particular case"). The parties agree that the initial traffic stop was lawful. The conduct at issue is the two later expansions: first, when the officers expanded the traffic stop to search the vehicle for additional marijuana and drugs; and second, when the officers conducted a frisk of Grissom for weapons when he was asked to get out of the vehicle prior to the search.

We apply principles derived from *Terry v. Ohio*, 392 U.S. 1 (1968), to the expansion of minor traffic stops. *See State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004) (applying *Terry* principles to "traffic stops even when a minor law has been violated"). We must consider whether "each incremental intrusion" beyond the initial traffic stop was justified, either by "the original legitimate purpose of the stop," "independent probable cause," or "reasonableness, as defined in *Terry*." *Id.* at 365.

First Expansion

The state argues that the officers had a reasonable, articulable suspicion that a search of the vehicle would reveal a criminal amount of marijuana.

As an initial matter, we note that under the automobile exception to the warrant requirement, the officers needed *probable cause*, not reasonable suspicion, to search C.K.'s vehicle. *See State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016). Under the automobile

exception, the warrantless search of a vehicle includes any "closed containers in that car, if there is probable cause to believe the search will result in a discovery of evidence or contraband." *Id.* (quotation omitted). And, while "the bar for reasonable suspicion is low," *see State v Taylor*, 965 N.W.2d 747, 752, 758 (Minn. 2021) (stating that reasonable suspicion requires "more than a mere 'hunch' but 'is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause'" (quoting *Navarette v. California*, 572 U.S. 393, 397 (2014)), probable cause requires more.

"Probable cause to search an automobile exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a reasonable man . . . in the belief that the automobile contains articles the officer is entitled to seize." *State v. Gallagher*, 275 N.W.2d 803, 806 (Minn. 1979). When reviewing whether police had probable cause to conduct a search, we must look to the totality of the circumstances. *State v. Johnson*, 689 N.W.2d 247, 251 (Minn. App. 2004), *rev. denied* (Minn. Jan. 20, 2005). "[T]he totality of the circumstances includes reasonable inferences that police officers draw from facts, based on their training and experience, because police officers may interpret circumstances differently than untrained persons." *Lester*, 874 N.W.2d at 771.

Applying those principles, we conclude that the expansion of the stop to include a search of the vehicle was constitutional because the officers had probable cause to believe that Grissom was involved in drug-related criminal activity. Before the initial traffic stop, the officers were patrolling the area "a little heavier" because of "calls of shootings and

assaults." When the officers drove by C.K.'s parked car, C.K. and Grissom "began to lean far back in their seats." The officers found that "very suspicious" and that "[i]t appeared they were maybe trying to hide their faces from us, or didn't want to be seen inside of that vehicle." When the officers approached the car, officer C.J. observed that Grissom "seemed extremely nervous" and that "[Grissom] was breathing heavy" with his chest "going in and out." Based on their training and experience as officers, the officers also saw what appeared to be marijuana in the cup-holder area of the car's console and could smell burnt marijuana coming from inside the car. And, when the officers questioned Grissom and the driver about the presence of drugs in the car, they responded that it was tobacco that the officers smelled.

As a rule, the sight, and smell of marijuana are enough to justify the search of a car. *See State v. Thiel*, 846 N.W.2d 605, 609 (Minn. App. 2014) (holding that search of vehicle was justified after state trooper "detected a 'strong' and 'overwhelming' odor of marijuana emanating from the vehicle"), *rev. denied* (Minn. Aug. 5, 2014). Grissom argues that the rule no longer applies because the Minnesota legislature legalized industrial hemp and the sight and smell of hemp are indistinguishable from that of marijuana.

But as the state correctly asserts, just as the district court did not have the authority to overrule precedential opinions, *see State v. Peter*, 825 N.W.2d 126, 129 (Minn. App. 2012), *rev. denied* (Minn. Feb. 27, 2013), we are also bound by precedent*, State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010) (explaining that this court "is bound by supreme court precedent and the published opinions of the court of appeals"), *rev. denied* (Minn. Sept. 21, 2010). And until changed, it remains that the sight and smell of marijuana can

justify the search of a car. We also note that Grissom did not claim that the substance was hemp. He claimed that it was tobacco. So while the sight and smell of hemp may be indistinguishable from that of marijuana, given Grissom's own assertion about the substance and the other facts known to the officers and the rational inferences from them, the officers' suspicion that the substance was marijuana is objectively supported. *Lugo*, 887 N.W.2d at 486.

Grissom further argues that because the officers only saw a small amount of marijuana and because Minnesota has decriminalized possessing a small amount of marijuana, the smell of burnt marijuana and sight of a non-criminal amount of marijuana does not meet the probable-cause standard.

But the question here is not whether the amount of marijuana the officers observed constitutes a crime. Instead, it is whether, given the totality of the circumstances, the officers had the requisite probable cause to believe that a search of the car *would reveal* a criminal amount of marijuana. *See, e.g.*, *State v. Johnson*, 444 N.W.2d 824, 826 (Minn. 1989) (stating that "innocent activity might justify the suspicion of criminal activity"). We also reiterate that under Minnesota law, as it stands, the "lawful discovery of drugs or other contraband in a motor vehicle gives the police probable cause to believe that a further search of the vehicle might result in the discovery of more drugs or other contraband." *State v. Bigelow*, 451 N.W.2d 311, 312-13 (Minn. 1990) (citations omitted).

Based on the totality of the circumstances, the facts available to the officers, and the reasonable inferences drawn from those facts, we conclude that the first expansion of the stop to include a search of the car was justified.

Second Expansion

The state asserts that the officers' second expansion was lawful because the officers here had reasonable, articulable suspicion to search the car, the officers reasonably asked Grissom to get out of the car and search him for weapons prior to placing him in the squad car during the search.

The frisk of a suspect for weapons after being ordered out of a vehicle is an incremental intrusion during a traffic stop. In determining whether such an intrusion is constitutionally permitted, a district court must consider whether the requirements set forth in *Terry* are satisfied. *Askerooth*, 681 N.W.2d at 365; *see Pennsylvania v. Mimms*, 434 U.S. 106, 111-12, (1977) (holding that *Terry* test controls when determining validity of a frisk for weapons after person has been ordered out of vehicle). "*Terry* holds that police may stop and frisk a person when (1) they have a reasonable, articulable suspicion that a suspect might be engaged in criminal activity and (2) the officer reasonably believes the suspect might be armed and dangerous." *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd*, 508 U.S. 366, 379 (1993).

The reasonableness test "depends upon the totality of the circumstances," which requires looking closely at "the facts available to the officer" as well as "any reasonable inferences to be drawn from them." *Id.* at 753 (quotations omitted). And in making that assessment, the district court is required to judge the facts against an objective standard of whether the facts available to the officer at the time of the search or seizure would warrant an officer using reasonable caution to conduct such search or seizure. *Terry*, 392 U.S. at 21-22; *State v. Sargent*, 968 N.W.2d 32, 38 (Minn. 2021).

The reasonable-suspicion standard is met when an officer observes conduct that leads the officer to "reasonably conclude in light of his or her experience that criminal activity may be afoot." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotation omitted). Trained law enforcement officers may 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). We consider "the officer's experience, general knowledge, and observations; background information, including the nature of the offense suspected and the time and location of the seizure; and anything else that is relevant." *State v. Klamar*, 823 N.W.2d 687, 691 (Minn. App. 2012). Ultimately, we must determine whether the combination of "objective, particularized facts and any resulting rational inferences warranted a reasonable, articulable suspicion that justified expansion of the stop." *Taylor*, 965 N.W.2d at 753.

The purpose of a frisk for weapons is to allow police officers to pursue their investigation without fear of violence. *Adams v. Williams*, 407 U.S. 143, 146 (1972). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that [their] safety or that of others was in danger." *Terry*, 392 U.S. at 27. Confinement in the back of a squad car for a minor traffic violation "may be justified if it is reasonably related to the initial lawful basis for the stop, reasonably related to the investigation of an offense lawfully discovered or suspected during the stop, or a threat to officer safety." *Askerooth*, 681 N.W.2d at 369-70. *See also State v. Varnado*, 582 N.W.2d 886, 891 (Minn. 1998) (declaring that "officer safety is a paramount interest and that when an officer has a valid

reasonable basis for placing a lawfully stopped citizen in a squad car, a frisk will often be appropriate without additional individual articulable suspicion").

As set forth above, the first prong of the *Terry* test, whether the officers had a reasonable, articulable suspicion that Grissom and C.K. might be engaged in criminal activity, was satisfied. Because what appeared to be marijuana was located in the center console of the vehicle in plain view and could be easily accessed by either or both the driver and Grissom, the officers had a reasonable, articulable suspicion that Grissom may have additional marijuana or drugs in the car. *Ortega*, 770 N.W.2d at 150-51 (holding that contraband which has been in plain view in a motor vehicle supports a rational inference that the vehicle occupants were aware of the contraband and had the ability and intent to exercise dominion and control over the contraband).

Under the second prong of the *Terry* test, the remaining question for our consideration is whether the officers "had an objectively reasonable concern for officer safety or suspicion of danger." *United States v. Smith*, 645 F.3d 998, 1003 (8th Cir. 2011). "The legality of a pat search depends on an objective examination of the totality of the circumstances." *State v. Lemert*, 843 N.W.2d 227, 230 (Minn. 2014). "[A] pat search may still be lawful even if the officer conducted it based on departmental policy rather than the officer's subjective assessment of the circumstances." *Id.* at 230. "[T]he actual, subjective beliefs of the officer are not the focus in evaluating reasonableness." *Id.* at 231 (quoting *State v. Koppi*, 798 N.W.2d 358, 363 (Minn. 2011)).

In this case, the officers had a reasonable, articulable suspicion that Grissom and C.K. had additional marijuana or drugs in the car based upon the officers' plain view of

purported marijuana in the console of the car, the smell of what they believed to be marijuana, and the evasiveness and untruthfulness of Grissom and C.K. in response to the officers' stop and questioning. Once the officers made the decision to search the car in this high-crime area for additional drugs, they removed both C.K. and Grissom from the car with the intention that they would sit in or stand by the squad car while the officers completed their search. Because the officers had a reasonable, articulable suspicion that Grissom and C.K. were either committing a crime or about to commit a crime, the officers were warranted in conducting a pat search for weapons prior to beginning their search of the vehicle.

Reversed.