STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1572

State of Minnesota,
Appellant,

vs.

Renaldo Valentino Sept,
Respondent.

Filed May 16, 2022
Affirmed
Cleary, Judge[*]
Dissenting, Ross, Judge

Ramsey County District Court
File No. 62-CR-20-5607

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

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

Drake D. Metzger, Jasmin Quiggle, Metzger Law Firm, LLC, Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Cochran, Judge; and Cleary, Judge.

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

NONPRECEDENTIAL OPINION

CLEARY, Judge

The state appeals the district court's pretrial order granting respondent's motion to suppress evidence seized during a vehicle search, arguing that the district court erred because investigators had probable cause to search the vehicle based on evidence discovered on respondent's person, following a lawful search incident to arrest, combined with respondent's diminished expectation of privacy as a parolee. We affirm.

FACTS

Appellant State of Minnesota charged respondent Renaldo Valentino Sept with two counts of ineligible person in possession of a firearm or ammunition in violation of Minn. Stat. § 624.713, subds. 1(2), 2(b) (2020), and fifth-degree drug possession in violation of Minn. Stat. § 152.025, subd. 2(1) (2020). The charges are based on the evidence seized by investigators while executing a warrant for Sept's arrest for violating the terms of his parole.

On August 5, 2020, investigators were conducting surveillance of an apartment where they believed Sept was staying. Investigator Wilmes observed Sept entering the parking lot of the apartment complex in a red car. Sept then parked the car and walked into one of the apartments carrying a backpack. Some time passed before Sept exited the apartment with the backpack, walked back to the parked car, got inside, and started the engine. Investigators then surrounded Sept and ordered him to exit the car. Sept stepped out of the car and investigators handcuffed and searched him.

Search incident to arrest

Investigator Bliven searched Sept's person and found two sets of keys,[1] 2.2 grams of marijuana, and $1,400. Sept was then placed in the back of a patrol car. The seized items "were placed into an evidence bag," and investigators returned the keys to Sept's then-girlfriend, S.K., who was inside the apartment Sept was seen entering just before his arrest.

Vehicle search

At some point after Sept was taken into custody, Investigator Pankratz noticed that Sept's car was still running. Investigator Pankratz then "opened up the car door to shut the vehicle off."

Investigator Pankratz "watched [Sept] being taken into custody" but he did not participate in the search of Sept's person, nor did he have knowledge of what was found during that search when he opened the car door. "When [Investigator Pankratz] opened the door to actually go inside" the car, he saw a pistol magazine sticking out of a backpack pocket located on the front passenger seat. Investigator Pankratz "stopped everything [he] was doing, backed out" of the car, and told Investigator Wilmes what he saw. Investigator Wilmes was not informed of "a possible handgun magazine inside the vehicle" until after the seized items were placed in the evidence bag.

[1] The keys found on Sept's person were "fob style" keys, and not traditional metal keys consisting of a head and blade. S.K. testified that the car "was a push to start vehicle" operated by a fob.

According to Investigator Pankratz, the pistol magazine was visible from outside of the car through either the windshield or the driver's side window. However, none of the investigators saw the pistol magazine until after Investigator Pankratz opened the car door.

Warrant to search the vehicle

S.K., now in possession of the keys, went out to the parking lot to try and speak with Sept before he was taken away. S.K. testified that while she was speaking to Sept "through the window" of the patrol car an investigator asked her for the keys back so he could "go in[side] the vehicle." S.K. told investigators that they would need to show her a warrant to go inside the car. Investigator Wilmes then applied for a search warrant, based on the information reported earlier from Investigator Pankratz. Once investigators produced the search warrant, S.K. returned the keys. The subsequent search of the car uncovered a pistol, ammunition, and 177.6 grams of marijuana. After the search of the car was complete, investigators "left the car there but took the keys" with them. S.K. "had to go to the jail and pick the keys back up after [investigators] left."

Sept moved the district court to suppress the evidence found in his car. The district court granted Sept's motion. This appeal followed.

DECISION

The state argues that the district court erred by granting Sept's suppression motion because the investigators had probable cause to search his car. "When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing . . . the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We review the district court's

factual findings for clear error and its legal determinations de novo. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009). As an initial matter, we address whether the suppression of the evidence has a critical impact on the state's case.

Critical impact

When the state challenges a pretrial order, it must first show that "the district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial." Minn. R. Crim. P. 28.04, subd. 2(2)(b). This court will reverse only if the state can "clearly and unequivocally show both that the [district] court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995) (quotation omitted). "We view critical impact as a threshold issue and will not review a pretrial order absent such a showing." *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017) (quotation omitted). If the "lack of the suppressed evidence significantly reduces the likelihood of a successful prosecution," the district court's order has critically impacted the state's case. *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987).

The state argues that without the evidence seized from Sept's car, there is no likelihood of a successful prosecution. Each of the alleged charges against Sept arise from the search of his car and evidence obtained during that search. Because no further evidence exists to support the charges alleged against Sept, the suppression of the evidence seized from Sept's car has a critical impact on the state's ability to prosecute. Next, we consider whether a search occurred when investigators opened the car door to turn off the engine.

Search and seizure

The United States Constitution and the Minnesota Constitution protect 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]." *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003). Evidence obtained during an unconstitutional search or seizure must be suppressed. *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011). To determine whether the constitutional prohibition against unreasonable searches and seizures has been violated, we examine the specific police conduct at issue. *State v. Davis*, 732 N.W.2d 173, 178 (Minn. 2007).

The district court determined that "[r]egardless of Investigator Pankratz's innocent intent to turn off the car engine, the act of opening the door and moving into the car constituted a search." The district court concluded that, because Sept had a reasonable expectation of privacy in his car's interior, the "entry into . . . Sept's private car, even to merely turn off the engine, constituted a search[,]" requiring either "a warrant or an exception to the warrant requirement."

We agree with the district court, and the state does not dispute that the investigator's opening of the car door was a search. Because investigators did not have a search warrant for Sept's car before entering the car, absent an exception to the warrant requirement, any evidence found inside the car must be suppressed. *See Diede*, 795 N.W.2d at 842. We

now consider whether there was a valid exception to the warrant requirement that justified investigators' entry into the car.

The automobile exception

The state argues that investigators had probable cause to justify entry into Sept's car under the automobile exception based on the marijuana and large amount of cash found on Sept's person, combined with his status as a parolee. The district court determined that the automobile exception did not apply because "investigators lacked probable cause to search" prior to the entry into Sept's car.

In reviewing whether there existed a valid exception to the warrant requirement, 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).

"When probable cause exists to believe that a vehicle contains contraband, the Fourth Amendment permits the police to search the vehicle without a warrant." *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). 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." *State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016) (quotation omitted).

"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,

this court 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.

Totality of the circumstances

Investigators were executing an arrest warrant for Sept's violation of the terms of his parole. Investigators were surveilling an apartment Sept was thought to be residing at when they saw Sept drive into the apartment's parking lot, park his car, and walk into an apartment. Once Sept got back into his car, investigators converged on the now running, parked car, and placed Sept under arrest. During the lawful search of Sept's person, incident to his arrest, investigators found 2.2 grams of marijuana and $1,400.

1. Marijuana

The state argues that, because the holding in *State v. Thiel* justified the search of a car after a state trooper "detected a 'strong' and 'overwhelming' odor of marijuana emanating from the vehicle[,]" investigators' discovery of marijuana on Sept's person also justifies such a search. 846 N.W.2d 605, 609 (Minn. App. 2014), *rev. denied* (Minn. Aug. 5, 2014). However, the facts in *Thiel* are distinguishable from the facts here. In *Thiel*, the driver "produced from inside his vehicle a pipe containing partially burnt marijuana, which gave the trooper probable cause to search the vehicle for more marijuana." *Id.* at 611. This court concluded that because the "trooper reasonably suspected that the vehicle contained

a larger amount of marijuana based on the strong and overwhelming odor emanating from the vehicle," the trooper had probable cause to search the vehicle's interior. *Id.*

Here, investigators did not discover the marijuana while Sept was inside the car; it was discovered on Sept's person after he was ordered to get out of the car by investigators.

Because investigators did not have a search warrant for Sept's car, any search of Sept's car would require probable cause supported by reasonable and articulable suspicion. *See Gallagher*, 275 N.W.2d at 806. The district court determined that investigators did not articulate "a basis to search" Sept's car, and that "the totality of the circumstances [did] not support probable cause to search in this case." We next consider whether the marijuana and the large amount of cash discovered on Sept's person, together, justified the warrantless search of Sept's car.

2. Large amount of cash

The state argues that the large amount of cash found on Sept's person, viewed in conjunction with the marijuana, gave investigators probable cause to search the car. *See Maryland v. Pringle*, 540 U.S. 366, 372 n. 2, 124 S. Ct. 795, 800 n. 2 (2003) (stating that a court's consideration of money in isolation is mistaken, but is properly considered in a probable-cause determination "as a factor in the totality of the circumstances"). The district court determined that the large amount of cash and the marijuana did not give investigators "probable cause to believe that a search of . . . Sept's car would reveal contraband." The district court concluded that "the totality of the circumstances [did] not support probable cause to search [the car] in this case."

Given the amount of marijuana investigators discovered on Sept's person—2.2 grams—a large amount of cash would not necessarily suggest Sept was trafficking or selling marijuana. *See* Minn. Stat. §§152.01, subd. 16 (2020) (providing small amount of marijuana is defined by statute to mean "42.5 grams or less"); .027, subd. 4(a) (2020) (providing possession of "small amount of marijuana" is a petty misdemeanor). According to Investigator Bliven's testimony, 2.2 grams of marijuana is for "personal use." Investigator Wilmes testified that he "would not have been arresting [Sept] just for the marijuana and the cash." This testimony suggests that investigators' assessment of the totality of the circumstances did not give them probable cause to further search the car for additional contraband.

Here, the reasonable inferences investigators had drawn from the marijuana and the large amount of cash found on Sept's person, "based on their training and experience," did not give investigators probable cause to believe that a search of the car would result in the discovery of contraband. *Lester*, 874 N.W.2d at 771. To establish probable cause there must be "more than mere suspicion but less than the evidence necessary for conviction." *State v. Onyelobi*, 879 N.W.2d 334, 343 (Minn. 2016) (quotation omitted). The small amount of "personal use" marijuana and the $1,400 on Sept's person does not show that investigators had any suspicions that what was discovered on Sept's person would lead to the discovery of further contraband inside of the car. We next consider whether Sept's status as a parolee, combined with the marijuana and the large amount of cash, justified the warrantless search of Sept's car.

3. Parolee status

The district court determined that Sept's status as a parolee diminished his expectation of privacy, but not to the extent that justified the warrantless search of his car. The state contends that, as a parolee, Sept has a "substantially diminished expectation of privacy," and that, combined with the evidence found on Sept's person, established the probable cause necessary to search the car. *See Samson v. California*, 547 U.S. 843, 850, 857, 126 S. Ct. 2193, 2193, 2198, 2202 (2006) (upholding the suspicionless search of a parolee, stating that "parolees have fewer expectations of privacy than probationers" under California law).

This court has previously declined to follow the holding in *Samson* which allowed for police to conduct a suspicionless search of a parolee's home. *See State v. Heaton*, 812 N.W.2d 904, 908 (Minn. App. 2012) (stating that California law relied on in *Samson* regarding a parolee's written agreement to searches without cause was distinguished from the applicable Minnesota statute that did not permit suspicionless searches), *rev. denied* (Minn. July 17, 2012). In *Heaton*, this court determined that a parolee's expectation of privacy is diminished. *Id.* However, *Heaton* is distinguishable from this case because in *Heaton* the parolee had consented to the search of his home as one of the terms of his parole. *Id.* at 906. And despite the diminished expectation of privacy, the state is not arguing that a standard less than probable cause applies. In *Heaton*, this court concluded that only a reasonable suspicion was necessary to conduct a suspicionless search of a parolee's home. *Id.* at 911.

The terms of Sept's parole are not included in the record. Therefore, it is unclear whether Sept consented to suspicionless searches of his home or car as terms of his parole. Absent this consent, Sept's status as a parolee does not justify the suspicionless search of his car, even after the totality of the circumstances are considered.

Given the totality of the circumstances, the need to enter Sept's car to turn off the engine did not outweigh Sept's reasonable expectation of privacy in the car's interior. Therefore, the investigator's warrantless search of the car did not satisfy the probable-cause requirement under the automobile exception.

The plain-view exception

On appeal, the state does not rely, as the dissent does, on the alternative theory that the warrantless search of the car was justified under the plain-view exception to the warrant requirement. *See State v. Robinette*, 964 N.W.2d 143, 147 n. 6 (Minn. 2021) (stating that "a party forfeits appellate review by failing to brief or argue an issue on appeal, even if raised in an earlier stage of the proceedings"). Therefore, we decline to address the merits of the plain-view exception as it applies to the facts here.

Affirmed.

ROSS, Judge (dissenting)

I respectfully dissent from the majority's decision to affirm the district court's suppression of evidence. It is clear to me that the district court errantly refused to apply the plain-view exception and that it did so in a manner that deems unconstitutional a routine, safe, reasonable, and responsible police practice. And it replaces it with an unrealistic and dangerous alternative. Because the parties sufficiently discussed the issue for our review on appeal, we ought to address it and correct the district court's error.

The majority does not address the plain-view exception, but I believe that the question of whether the exception applies is sufficiently before us. The district court thoroughly analyzed the issue and concluded that the exception does not apply because, according to the district court, Investigator Pankratz entered Sept's car unlawfully before he saw the contraband in plain view. The state loosely challenges that holding on appeal, contending, "A fundamental flaw in the district court's suppression order is its focus on the investigator's intent when he entered Mr. Sept's car to turn off the engine, and saw the magazine in plain view." Although the state does not further develop the plain-view argument, the facts and law are clear, and, most important, the respondent recognized that the state has raised the issue and he therefore briefed it fully. He argues against reversing on plain-view grounds because the investigator had no authority "to take immediate action to secure the vehicle or even turn it off" and that this is "especially true because [Sept's companion] was readily available to take possession of the vehicle to secure it." Because the issue was decided below, referenced by the appellant, and briefed fully by the respondent, there is no reason for us to overlook the error and good reasons to correct it.

The district court's undisputed factual findings should compel us to reverse its legal conclusion regarding the plain-view exception. Police executed a felony stop to confront Renaldo Sept as he sat in an apartment parking lot in a car registered only in his name. They removed him from the car at gunpoint and handcuffed him to enforce a warrant for his arrest. "Investigator Pankratz opened the driver's side door of Mr. Sept's car to turn off the car engine." The district court clarified that the investigator's "initial entry . . . of Mr. Sept's car was not to search it . . . but to turn off the car's engine." The district court heard testimony that "Investigator Pankratz [reported] that he observed in plain view a handgun magazine sticking out of the pocket of the gray backpack that was sitting in the front passenger seat." And it then found, "As he opened the driver's side door and reached in, Investigator Pankratz saw . . . a black pistol magazine sticking out of the pocket of the gray backpack on the front passenger seat." For the reasons I outline below, this everyday law-enforcement activity (safeguarding an arrestee's car by turning it off before locking it and driving the arrestee to jail) is constitutionally reasonable, supporting a plain-view justification to seize the evidence inside the car with or without a warrant. The district court did not think so.

The district court erroneously failed to apply the plain-view exception. The plain-view exception allows a police officer to seize an object without a warrant if the officer is lawfully in a position from which he can view the object, the object's incriminating character is immediately apparent, and the officer has a lawful right to access the object. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). The district court reasoned that the plain-view exception does not apply because the investigator first saw the gun

magazine protruding from Sept's backpack on the front seat only after the investigator opened the car door to turn off Sept's engine. And according to the district court, the Fourth Amendment prohibited the investigator opening the door. This is wrong.

The district court is wrong because police have a commonsense duty to take reasonable steps to safeguard the property that suspects possess at the time of their arrest. As the supreme court explained in the somewhat analogous situation of an impoundment, "The police could be held responsible if valuables in a car under its control were stolen." *City of St. Paul v. Myles*, 218 N.W.2d 697, 701 (Minn. 1974); *cf. Harris v. United States*, 390 U.S. 234, 235-36 (1968) (holding that the plain-view discovery of evidence inside arrested suspect's impounded car was constitutional because "the officer opened the door in order to secure the window and door"). Inasmuch as police act reasonably by taking steps to protect items inside a car that had been possessed by an arrestee, they of course act reasonably by taking simple steps to protect the car itself. This is particularly so where, as here, it was lawful police activity that rendered the car unoccupied with its engine running and especially vulnerable to theft.

The district court gave two clearly flawed reasons to support its conclusion that the investigator lacked the authority to open Sept's car to turn off the engine. The district court's first reason was that Sept's running car was sitting in the parking lot of a private apartment building rather than on a public road. But the officer's duty to protect an arrestee's possessions applies even on a private lot, where failing to secure "a vehicle that was unlocked and running" on the lot creates a circumstance in which, "[i]n only a matter of seconds, an individual could have taken the car." *Smith v. Thornburg*, 136 F.3d 1070,

1075 (6th Cir. 1998) (applying a community caretaking exception to the Fourth Amendment's warrant requirement on private property). The investigator had no constitutional duty to forgo a simple and reasonable act to safeguard Sept's car simply because the car sat on a privately owned parking lot.

The district court's second reason for concluding that the investigator lacked the authority to open Sept's car to turn off the engine is not only legally flawed, it is also highly dangerous. The district court reasoned that the Constitution prohibits the investigator from shutting off Sept's car because the investigator failed to instead ask Sept's companion (who was not in Sept's car during the arrest and not a registered owner) "to step out of her ground level apartment . . . and shut off the car." But whether police could have summoned Sept's companion from her apartment and invited her to enter the car to turn off Sept's engine is irrelevant to the limited constitutional issue, which is only whether the investigator acted reasonably by opening the car door to turn off the engine. As the supreme court put it, "While the protection of the contents of the car . . . might in the abstract have been accomplished by less intrusive means, we cannot say the standard procedure used was unreasonable." *Myles*, 218 N.W.2d at 700. It is constitutionally inconsequential that some other option might have been available to police.

Most alarming, the district court's suggestion that the investigators were constitutionally required to ask Sept's companion to turn off the engine rather than turn it off themselves disregards the grave hazard that this requirement presents. The investigators knew of Sept's dangerous propensity and therefore executed a high-risk, felony stop to order him from his car at gunpoint and arrest him on the spot. Ever since

the Supreme Court's opinion in *Terry v. Ohio*, 392 U.S. 1, 27 (1968), courts have consistently recognized that the Fourth Amendment's reasonableness test gives ample room for officers to make their own safety-conscious tactical decisions without judicial second-guessing. I am sure that no reasonably trained police officer would end a felony stop the way the district court suggests—by inviting a dangerous arrestee's unvetted companion to reach inside the arrestee's unsearched car where any weapon left behind might be easily accessed for use against the officers or others. And in this case, in fact a loaded handgun was sitting on the car seat within easy reach. The district court might be correct that entering Sept's car to turn off the engine "could have been accomplished by a means other than an officer entering the car," but the means the district court suggests is, in my opinion, profoundly dangerous and certainly not constitutionally required.

In sum, the Constitution did not prohibit the investigators from turning off the engine of Sept's unoccupied car or require them to usher Sept's companion from her apartment to do so for them. We should reverse the district court's suppression order.