STATE OF MINNESOTA
IN COURT OF APPEALS
A10-538

State of Minnesota,
Respondent,

vs.

David Louis Ellis,
Appellant.

Filed March 15, 2011
Reversed
Hudson, Judge

Hennepin County District Court
File No. 27-CR-09-659

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Paul R. Scoggin, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, St. Paul, Minnesota; and

Tara Reese Duginske, Special Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Toussaint, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

Appellant, who was convicted of possession of a firearm as an ineligible person, challenges the district court's denial of his motion to suppress evidence gained as a result of his seizure following a reported burglary. Because the district court erred by concluding that reasonable, articulable suspicion existed to justify the seizure, we reverse.

FACTS

The state charged appellant David Louis Ellis as a prohibited person in possession of a firearm in violation of Minn. Stat. § 624.713, subds. 1(b), 12(b) (2006), and Minn. Stat. § 609.11 (2006), based on his possession of a firearm when he was stopped by police after a reported burglary.

At an evidentiary hearing on appellant's motion to suppress evidence gained as a result of the stop, a Minneapolis police officer testified that, while on patrol in south Minneapolis, he received a radio-dispatch call stating that, about 20 minutes earlier, a burglary had occurred near 25th Street and 12th Avenue South, and the suspect, a black male wearing dark clothing and carrying a black gun, had fled southbound. The officer testified that, about 20 minutes after hearing the dispatch, he saw appellant, who is a black male, walking eastbound on the north side of 31st Street between Chicago and Elliot Avenues, about six or seven blocks from the reported burglary location. Appellant was wearing a dark, hooded sweatshirt and dark colored jeans.

The officer testified that he saw appellant stop briefly next to a pickup truck and glance in its window. He then saw appellant glance back at the officer's squad car. The

officer testified that he believed, based on appellant's behavior in looking into the truck window, that appellant may have been engaged in breaking into vehicles. On direct examination, the officer testified that, after seeing the squad car, appellant turned and walked away, but on cross-examination he testified that appellant kept walking in the same direction as before.

The officer drove his squad car next to appellant and performed a stop. Because appellant failed to raise his hands as directed, because appellant was wearing a sweatshirt on a 70-degree day, and because appellant was a possible suspect in the reported burglary, the officer believed that appellant may have been carrying a weapon and performed a pat search, which revealed a small, loaded handgun at appellant's waistband. The officer ran a warrants check, discovered that appellant had an outstanding felony warrant for a parole violation, and arrested him.

Appellant testified that he was headed toward his stepfather's house when the officer approached him. He testified that he was wearing a dark brown, hooded sweatshirt, that it had been cold and rainy in the morning, and that it had become sunny in the afternoon. He testified that when he saw the officer, he did not change his behavior, but continued walking in the same direction.

The district court denied the motion to suppress. The district court concluded that the officer's observation of appellant in close temporal and geographic proximity to the burglary and in the reported direction of flight, along with the match of appellant's clothing, build, and race, and appellant's suspicious conduct with respect to the parked truck, provided reasonable articulable suspicion of criminal activity. The district court

found that "[w]hen [appellant] noticed the police squad, he turned to walk quickly away." The district court also concluded that:

> [The officer's] knowledge that the burglary suspect was armed combined with [appellant's] non-compliance with instructions and furtive attempts to reach into the waistband of his pants led to [a] reasonable belief that [appellant] might have been armed and dangerous. Therefore, [the] initial stop . . . to investigate whether [appellant] might have been involved in the burglary, as well as the subsequent pat frisk . . ., was justified.

The district court held a stipulated-facts trial, and appellant was convicted of the firearms-possession offense. The court imposed the 60-month mandatory-minimum sentence, and this appeal follows.

D E C I S I O N

When a suppression order is challenged on appeal, this court independently reviews the facts and determines as a matter of law whether the district court erred by suppressing or refusing to suppress the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We review the district court's findings of fact for clear error. *State v. Lee*, 585 N.W.2d 378, 383 (Minn. 1998).

Investigative stops and seizures of the person are subject to the prohibitions against unreasonable searches and seizures in the Fourth Amendment to the United States Constitution and article I, section 10 of the Minnesota Constitution. *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 694–95 (1981); *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004). To justify an investigative stop, an officer "must be able to point to specific and articulable facts which, taken together with rational inferences

from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968). Facts supporting a stop are those "that, by their nature, quality, repetition, or pattern [are] so unusual and suspicious that they support at least one inference of the possibility of criminal activity." *State v. Schrupp*, 625 N.W.2d 844, 847–48 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). A decision to conduct a stop must be based on more than "mere whim, caprice, or idle curiosity." *Marben v. Minn. Dep't of Pub. Safety*, 294 N.W.2d 697, 699 (Minn. 1980) (quotation omitted). A reviewing court considers the totality of the circumstances surrounding the stop, giving due regard to the officer's experience and training in law enforcement. *State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983).

In assessing the validity of a stop conducted near a recent crime scene, the court considers information relating to

> (1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.

Appelgate v. Comm'r of Pub. Safety, 402 N.W.2d 106, 108 (Minn. 1987). Appellant argues that the totality of the circumstances did not give the officer a reasonable, articulable suspicion for the stop and seizure. He maintains that he did not meet the description of the burglary suspect, that there was no temporal or geographic proximity to

the burglary, and that his single glance into the truck window did not give the officer a basis to seize him following the burglary.

Based on the application of the factors in *Appelgate*, we agree. The officer testified that he stopped appellant because he met the general description of the burglary suspect and was found walking in the same direction as the suspect, 40 minutes after the burglary and six or seven blocks from the burglary location. But appellant's general appearance as a black male wearing dark clothing does not distinguish his presence in an urban area during daylight hours. His act of walking in the same direction as a suspect who had left the scene of a burglary, which occurred about one-half mile away and 40 minutes earlier, does not contribute to a reasonable suspicion that he committed the burglary. Nor did the officer testify that appellant had been involved in previous similar criminal activity. Finally, appellant's act of glancing into a truck window and then at the squad car does not provide reasonable suspicion of either the burglary or vehicle theft. *See State v. Syhavong*, 661 N.W.2d 278, 282 (Minn. App. 2003) (noting that nervousness "by itself" is not sufficient to provide reasonable suspicion).

Evasive behavior may also provide reasonable suspicion for a stop. *State v. Johnson*, 444 N.W.2d 824, 827 (Minn. 1989). The district court found that "[w]hen [appellant] noticed the police squad, he turned to walk quickly away." Although the officer originally testified that he became "more suspicious" after appellant glanced at him and then turned to walk away, on cross-examination the officer testified instead that appellant did *not* change direction after noticing him. Appellant also testified that he kept walking in the same direction. Based on this record, the district court clearly erred by

finding that appellant turned to walk away from the officer. We conclude that appellant's activity did not provide reasonable suspicion for a stop based on evasive behavior, and the district court erred by determining that his seizure was supported by reasonable articulable suspicion.

Appellant also argues that the district court improperly used appellant's post-seizure conduct to justify his initial stop. Although we do not read the district court's order to reflect this determination, we need not examine appellant's post-seizure conduct because we conclude that appellant's seizure was not justified at its inception. *See In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993) (stating that 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") (quotation omitted)). The district court erred by denying the motion to suppress.

Reversed.