STATE OF MINNESOTA
IN COURT OF APPEALS
A11-140

State of Minnesota,
Respondent,

vs.

Marvin Jewell Dancy,
Appellant.

Filed February 21, 2012
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CR-10-22128

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Wright, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant challenges his conviction of third-degree controlled-substance crime, arguing that the district court erred by denying his motion to suppress drugs, which police

seized from him during a traffic stop. In three supplemental pro se briefs, appellant argues, among other things, that the district court violated his Sixth Amendment right of confrontation by prohibiting him from presenting evidence during his stipulated-facts trial of an alleged Fourth Amendment violation. We affirm.

FACTS

On the evening of November 14, 2009, Robbinsdale Police Officer Robert Kaehn was in uniform and traveling northbound on Victory Memorial Drive in Robbinsdale in an unmarked squad car equipped with a headliner, a computer, and mirrors with LED lights. He observed a vehicle traveling southbound on Victory Memorial Drive at a speed in excess of the posted speed limit of 25 miles per hour and activated his front radar unit, which revealed that the vehicle was traveling 30 miles per hour. Officer Kaehn entered the vehicle's license plate number in his squad-car computer and followed the vehicle, which appeared to increase its speed. A KOPS alert,[1] issued by the Mounds View Police Department, appeared on Officer Kaehn's computer. According to Officer Kaehn's testimony, a KOPS alert is an alert "which indicates from one police agency to others that there is an officer safety issue with [the] vehicle." The KOPS alert stated:

> INFORMATION ONLY, BLACK MALE, HGT/507, WGT/140LBS, SHORT HAIR WITH GOATEE, DRIVING VEH LIC/894CKY, MAY HAVE HANDGUN AND CRACK COCAINE INSIDE THE VEHICLE, SPECIAL ATTENTION BROOKLYN PARK, INFORMATION ONLY, YOU WILL NEED YOUR OWN P/C FOR PICKUP, MN062013N, 651 266 7701, OPR 76.
>
> . . . .

[1] The record does not explain the words represented by the KOPS acronym.

> FOR OFFICER SAFETY PURPOSES ONLY, THIS IS NOT A WARRANT. CONTACT ENTERING AGENCY TO CONFIRM STATUS. STANDING ALONE, THIS RECORD DOES NOT FURNISH GROUNDS FOR THE SEARCH OR SEIZURE OF ANY INDIVIDUAL, VEHICLE, OR DWELLING. THIS RECORD TO BE USED ONLY FOR OFFICIAL CRIMINAL JUSTICE PURPOSES.

After reading the alert, Officer Kaehn activated his emergency lights and stopped the vehicle, which had four occupants, two in the front seat and two in the rear seat, including appellant Marvin Dancy. As Officer Kaehn approached the vehicle, he observed the two passengers in the rear seat make furtive movements, "like they were trying to hide something, putting it in their pockets." He also noticed that the front-seat passenger was shaking uncontrollably as though he was nervous. Concerned for his safety, Officer Kaehn radioed dispatch and asked for multiple officers to assist him.

Upon reaching the vehicle, Officer Kaehn noticed that, except for weight, the driver matched the description in the KOPS alert. Officer Kaehn removed the driver from the vehicle, obtained his driver's license, and conducted a pat-search. Although the pat-search revealed no weapons or contraband and the driver's license appeared valid, Officer Kaehn placed the driver in the rear seat of his squad car. One back-up police officer arrived while Officer Kaehn was removing the driver from the vehicle.

Officer Kaehn next removed the passenger seated behind the driver, conducted a pat-search for weapons, and felt a large object in the passenger's pants pocket. While removing the object from the passenger's pants pocket, Officer Kaehn observed a plastic baggie containing a white powdery substance fall to the ground. Believing the substance to be cocaine, Officer Kaehn handcuffed the passenger and placed him in the rear seat of

another squad car. Officer Kaehn next removed the front-seat passenger from the vehicle, conducted a pat-search, found no weapons or contraband, and placed the passenger in the rear seat of a squad car. Assisting Minneapolis Police Officer William Gregory removed Dancy from the rear seat, conducted a pat-search, and felt a lump in Dancy's pants pocket, which he believed to be narcotics. Officer Gregory looked into Dancy's pocket and saw a clear plastic bag and removed it. Police later determined that the bag contained 4.8 grams of crack cocaine.

The state charged Dancy with third-degree controlled-substance crime for possessing three or more grams of cocaine after a prior felony-level offense in violation of Minn. Stat. §§ 152.01, subd. 16a, .023, subd. 2(1) (2008). Dancy moved to suppress the cocaine that Officer Gregory found during his pat-search. After a Rasmussen hearing, the district court denied Dancy's motion, and Dancy agreed to a stipulated-facts trial in accordance with Minn. R. Crim. P. 26.01, subd. 4, and *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980), to preserve the suppression issue for appeal. The district court convicted Dancy of third-degree controlled-substance crime, as charged. This appeal follows.

D E C I S I O N

An appellate court reviews the district court's findings of fact for clear error and its "determination that its factual findings support a reasonable suspicion of criminal activity justifying the police officer's search or seizure" de novo. *State v. Diede*, 795 N.W.2d 836, 843 (Minn. 2011).

Dancy concedes that Officer Kaehn was justified in stopping the vehicle for exceeding the posted speed limit. We therefore direct our analysis to whether the police impermissibly expanded the scope of the stop.

Scope of the Traffic Stop

Dancy argues that Officer Gregory's pat-search of him unlawfully exceeded the scope of the stop and that Officer Gregory conducted the pat-search without a reasonable suspicion to believe Dancy was armed and dangerous. He argues that the state failed to prove the reliability of the KOPS alert; Officer Kaehn's suspicion based on the KOPS alert was dispelled when the driver's description did not meet the description in the alert; a passenger's nervousness and Dancy's furtive movements did not create reasonable suspicion; the officers' suspicion about Dancy was not individualized to him; and the officers' search of the passengers was a pretextual search for a gun rather than a search for officer safety purposes. Dancy's arguments are unpersuasive.

The district court concluded that the pat-search of Dancy was permissible, reasoning that

> expanding the scope of the investigative stop to include a pat-down search of [Dancy] was permissible because Officer Kaehn identified a particularized basis for suspecting criminal activity. The particularized basis for suspecting criminal activity consisted of (1) the KOPS alert indicating that there may be a handgun and crack cocaine in the vehicle; (2) the furtive hand movements of the backseat passengers, which had added significance given the information in the KOPS alert; and (3) the nervous behavior (i.e., the uncontrollable shaking) of the front-seat passenger. . . . In addition, based on the KOPS alert and the furtive hand gestures, Officer Kaehn had a reasonable belief that [Dancy] might be armed and dangerous.

We agree.

The United States and Minnesota Constitutions prohibit "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. Any evidence seized in violation of the Fourth Amendment to the United States Constitution or article 1, section 10 of the Minnesota Constitution must be suppressed. *Diede*, 795 N.W.2d at 842.

> Under the principles set out by the United States Supreme Court in *Terry v. Ohio*, a police officer may temporarily detain a suspect without probable cause if (1) the stop was justified at its inception by reasonable articulable suspicion, and (2) the actions of the police during the stop were reasonably related to and justified by the circumstances that gave rise to the stop in the first place.

Id. (citation and quotations omitted). "The scope of a *Terry* investigation must be limited [1] to that which occasioned the stop, [2] to the limited search for weapons, and [3] to the investigation of only those additional offenses for which the officer develops a reasonable, articulable suspicion within the time necessary to resolve the originally-suspected offense." *Id.* at 845 (quotation omitted). "A stop may be expanded beyond the circumstances that initially justified it only if the expansion is supported by independent probable cause or reasonableness to justify that particular intrusion." *Id.* (quotation omitted).

In the context of vehicle stops, the Minnesota Supreme Court has "interpreted article I, section 10 of the Minnesota Constitution to provide more protection from unreasonable searches and seizures than the Fourth Amendment to the United States Constitution." *State v. Ortega*, 770 N.W.2d 145, 152 (Minn. 2009). The court has

concluded that in the context of vehicle stops, the police must have "an individualized, articulable, and reasonable suspicion of wrongdoing" to search or seize. *Id.* Courts must "balance the government's need to search or seize a vehicle's occupants against the individual's right to personal security free from arbitrary interference by law officers." *Id.* (quotation omitted). The *Ortega* court stated that

> police can order a passenger out of a vehicle, as the passengers are already stopped by the stop of the vehicle, and the only change is that they are outside of, and not inside of, the stopped vehicle. Moreover, officer safety concerns increase when there is a passenger in a stopped vehicle as both the passenger and the driver may have similar motivations to prevent the discovery of crime in the vehicle by use of violence. A police officer is not constitutionally required to give a passenger an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, the officer is not permitting a dangerous person to get behind the officer.

Id. (citations and quotation omitted). In addition to *Ortega*, we note that both the United States and Minnesota Supreme Courts have recognized the risks associated with traffic stops and the importance of officer safety. *See Maryland v. Wilson*, 519 U.S. 408, 413, 117 S. Ct. 882, 885 (1997) (noting 5,792 officers were assaulted and 11 officers were killed during traffic pursuits and stops in 1994); *State v. Askerooth*, 681 N.W.2d 353, 368 (Minn. 2004) (acknowledging risks with traffic stops made by one officer during the early morning hours); *State v. Varnado*, 582 N.W.2d 886, 891 (Minn. 1998) (noting that "officer safety is a paramount interest"). Because of safety concerns, an officer may order out of a stopped vehicle both the driver, *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6, 98 S. Ct. 330, 333 n.6 (1977); *Askerooth*, 681 N.W.2d. at 357, 367, and any passengers,

Wilson, 519 U.S. at 414–15, 117 S. Ct. at 886; *State v. Krenik*, 774 N.W.2d 178, 184 (Minn. App. 2009), *review denied* (Minn. Jan. 27, 2010).

In this case, the police officers had the legal authority to order the passengers out of the vehicle even if the police officers did not have an individualized basis for doing so. *See Krenik*, 774 N.W.2d at 184 (stating that police officers need not have an individualized basis for ordering a passenger to get out of a lawfully stopped vehicle). And, based on the KOPS alert, the officers had the legal authority to conduct limited searches of the passengers "'not to discover evidence of crime, but to allow the officer[s] to pursue [their] investigation without fear of violence.'" *State v. Flowers*, 734 N.W.2d 239, 251 (Minn. 2007) (quoting *Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 1923 (1972)). The record before us contains ample evidence that would cause a reasonably prudent officer in the circumstances to be warranted in the belief that his or her safety was in danger.

After Officer Kaehn found drugs in the possession of the passenger seated behind the driver, Officer Gregory had an individualized basis for removing and patting down each of the remaining occupants in the vehicle, including Dancy. *See id.* at 250−51 (stating that "[a] *Terry* stop permits an officer who suspects that an individual is engaged in illegal activity and also believes that a suspect may be armed and dangerous to frisk the suspect in order to reduce concerns that the suspect poses a danger to officer safety").

In *Flowers*, the supreme court identified five factors that courts should consider to determine whether officers have exceeded the scope of a *Terry* stop:

> (1) the number of officers and police cars involved; (2) the nature of the crime and whether there is reason to believe the suspect might be armed; (3) the strength of the officers' articulable, objective suspicions; (4) the erratic behavior of or suspicious movements by the persons under observation; and (5) the need for immediate action by the officers and lack of opportunity for them to have made the stop in less threatening circumstances.

Id. at 253 (quoting *United States v. Raino*, 980 F.2d 1148, 1149–50 (8th Cir. 1992)).

Here, Officer Kaehn was alone when he stopped the vehicle, which contained four occupants. Ultimately, four officers and four squad cars came to assist Officer Kaehn. Although Officer Kaehn stopped the vehicle for speeding, he was aware of the KOPS alert of a possible gun in the vehicle and observed two passengers making furtive movements as he approached on foot. Although Dancy argues on appeal that the district court erred by relying on the KOPS alert because the state failed to prove its reliability, Dancy did not raise this issue in district court. We therefore need not consider Dancy's argument. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (noting that generally, an appellate court will not consider matters not argued to and considered by the district court). But even if we were to consider the argument, we would find it unpersuasive. *See State v. Gilchrist*, 299 N.W.2d 913, 914–16 (Minn. 1980) (upholding the admission of evidence seized on basis of allegedly stale information posted at police headquarters in a "handwritten notice or bulletin" derived from regular police transmission sources, which could not later be found or a copy produced). In this case, the KOPS alert originated from the Mounds View Police Department and was dispersed through regular police transmission sources.

Dancy argues that any reasonable suspicion based on the KOPS alert was dispelled when the driver did not meet the description in the KOPS alert, and that the officers' pat-searches of the vehicle's occupants were pretextual searches for a gun rather than searches for officer-safety purposes. Dancy correctly notes that "[o]nce the original suspicion that justified the stop has been dispelled, the officer may not continue to detain a person unless there exists additional reasonable suspicion." *State v. Doren*, 654 N.W.2d 137, 141 (Minn. App. 2002), *review denied* (Minn. Feb. 26, 2003). And he is also correct in recognizing that for intrusions not based on probable cause, "the pretext factor is relevant to determining whether the intrusion is reasonable." *Varnado*, 582 N.W.2d at 892. But the district court found that "[e]xcept for *weight*, the driver fit the description listed in the KOPS alert." (Emphasis added.) Based on the record evidence, the court's finding is not clearly erroneous. Under the circumstances in this case, Dancy's arguments are unpersuasive.

Dancy also argues that the district court erred by imputing Officer Kaehn's knowledge about the KOPS alert to Officer Gregory and that Officer Gregory's pat-search of Dancy was therefore not based on reasonable suspicion that Dancy may be armed and dangerous. In its order, the district court did not address the imputation of Officer Kaehn's knowledge to Officer Gregory but did state that Officer Gregory searched Dancy and that Officer Kaehn had reasonable suspicion to justify a pat-search of Dancy. The court seems to have implicitly relied on the collective-knowledge doctrine. Based on the collective-knowledge doctrine, Officer Kaehn's knowledge about a possible gun in the vehicle in which Dancy was an occupant was imputed to Officer Gregory. *See*

State v. Conaway, 319 N.W.2d 35, 40 (Minn. 1982) (noting that Minnesota Supreme Court adopted collective-knowledge approach in *State v. Radil*, 288 Minn. 279, 283, 179 N.W.2d 602, 605 (1970), *cert. denied*, 401 U.S. 921, 91 S. Ct. 910 (1971), and stating that under approach, "the *entire* knowledge of the police force is pooled and imputed to the arresting officer for the purpose of determining if sufficient probable cause exists for an arrest"); *see also Magnuson v. Comm'r of Pub. Safety*, 703 N.W.2d 557, 559–60 (Minn. App. 2005) (stating that under collective-knowledge doctrine, factual basis justifying investigatory stop need not be known to officer acting in field, and that doctrine may provide basis for *Terry* stop).

Dancy argues that the collective-knowledge doctrine did not provide Officer Gregory with a basis for conducting a pat-search of him because the doctrine requires communication between the police officers and Officer Kaehn did not order Officer Gregory to search Dancy or communicate to Officer Gregory that a reasonable suspicion to search existed. Dancy cites *State v. Lemieux*, 726 N.W.2d 783, 789 (Minn. 2007), as support for his argument. In *Lemieux*, the supreme court addressed the collective-knowledge doctrine in the context of an emergency-aid search, not a pat-search incident to an investigative stop. *Id.* The *Lemieux* court stated that "the officer who conducts the search is imputed with knowledge of all facts known by other officers involved in the investigation, *as long as the officers have some degree of communication between them*," but it also stated that "[a]ctual communication of information to the officer conducting the search is unnecessary." *Id*. (citing *United States v. Twiss*, 127 F.3d 771, 774 (8th Cir. 1997) (emphasis added)). Dancy's reliance on *Lemieux* is misplaced. We conclude that

Officer Gregory's pat-search of Dancy was supported by reasonable suspicion under the collective-knowledge doctrine and therefore lawful.

The district court did not err by relying on the KOPS alert and the passengers' furtive movements as a basis for concluding that the officers reasonably suspected that the vehicle's occupants might be armed and dangerous and that the officers' pat-searches of the occupants were warranted. In consideration of the five factors set forth in *Flowers*, we conclude that the officers' pat-searches of the vehicle's occupants were reasonable and not pretextual, because Officer Kaehn knew of the KOPS alert and saw furtive movements in the vehicle. In these circumstances, reasonably prudent officers would have believed that the vehicle's occupants may be armed and dangerous. *See Flowers*, 734 N.W.2d at 252 (stating that officers had reasonable suspicion that defendant was armed and dangerous when defendant moved in vehicle for 45 seconds after stop); *State v. Munson*, 594 N.W.2d 128, 137 (Minn. 1999) (noting appropriateness of officers' removal of car occupants and frisk of them when car stopped late at night, car had multiple occupants, and officers had information that occupants may be armed and carrying illegal drugs); *State v. Ludtke*, 306 N.W.2d 111, 112–13 (Minn. 1981) (upholding frisk of defendant under Fourth Amendment challenge when defendant made furtive movement in back seat of car and officer was alone); *Gilchrist*, 299 N.W.2d at 916 (noting that officer need not be absolutely certain that individual is armed, and that issue is whether reasonably prudent person in circumstances was warranted in belief that his or her safety was in danger).

Considering the factors set forth in *Flowers*, we conclude that the pat-search of Dancy did not exceed the permissible scope of the traffic stop. We therefore also conclude that the district court did not err by denying Dancy's motion to suppress.

Claim of Erroneous District Court Finding

The district court found that "[a]t Officer Kaehn's request, Officer Gregory asked [Dancy] to exit the vehicle and conducted a pat-down search." Dancy argues that this finding is not based on the evidence. The evidence consists of Officer Gregory's testimony that Officer Kaehn asked him to remove and detain Dancy but did not ask him to search Dancy. Officer Gregory testified that he pat-searched Dancy because it was his policy to pat-search anyone he removed from a vehicle. If, in fact, Officer Gregory did not search Dancy at the request of Officer Kaehn, as found by the district court, we conclude that this error is insignificant because we have already concluded that Officer Gregory's pat-search of Dancy was supported by reasonable suspicion under the collective-knowledge doctrine. Moreover, unless the district court's findings are clearly erroneous, we will accept them on appeal, and "[f]indings of fact are not clearly erroneous if there is reasonable evidence to support them." *State v. Colvin*, 645 N.W.2d 449, 453 (Minn. 2002). Because the record contains reasonable evidence to support the district court's finding in this case, we accept the finding, and we reject Dancy's argument.

Pro Se Supplemental Brief

In his pro se supplemental brief, Dancy argues that he was wearing a jacket that was so large that Officer Gregory could not have seen into his pants pocket to observe

drugs. The district court found that Officer Gregory "looked down into Defendant's front pocket. The pocket was so loose that Officer Gregory could see the object without manipulating the pants fabric." The court's finding is supported by Officer Gregory's testimony. We conclude that the district court's finding is not clearly erroneous, and we therefore reject Dancy's argument.

Dancy also argues that Officer Gregory did not have a legal right to search Dancy's pocket, making the plain-view doctrine inapplicable. Under the plain-view doctrine, officers may seize an item if "(1) police were lawfully in a position from which they viewed the object, (2) the object's incriminating character was immediately apparent, and (3) the officers had a lawful right of access to the object." *In re Welfare of G.M.*, 560 N.W.2d 687, 693 (Minn. 1997) (citing *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S. Ct. 2130, 2137 (1993)). Here, Officer Gregory had a lawful right of access to the object in Dancy's pocket because he was conducting a pat-search within the limits circumscribed by *Terry*.

Moreover, Officer Gregory's seizure of the drugs from Dancy's pocket was justified under the plain-feel doctrine, which is an exception to the warrant requirement under both the United States and Minnesota Constitutions. *See Krenik*, 774 N.W.2d at 185 (stating that "if a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons") (quoting *Dickerson*, 508 U.S. at 375–76, 113 S. Ct. at 2137)). Officer Gregory felt a lump in Dancy's pocket, and based on his prior experience of

feeling "[h]undreds" of these types of lumps, he believed the lump was some sort of narcotics. We conclude that, under the plain-feel doctrine, Officer Gregory lawfully seized the drugs from Dancy's pocket.

Dancy also argues that the district court violated his Sixth Amendment right of confrontation when it prevented him from arguing, during the stipulated-facts trial, that the police had violated his Fourth Amendment rights. Before Dancy agreed to proceed with a stipulated-facts trial, the district court informed Dancy, in the presence of his counsel, that he would not "get to argue [the Fourth Amendment] issue in front of the jury. That is an issue for the judge, and a trial court judge has already made the determination that your search passed constitutional standards." Dancy had no right to argue during his stipulated-facts trial that the police had violated his Fourth Amendment rights. His argument is without merit.

Affirmed.