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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0151

State of Minnesota,
Respondent,

vs.

Laurie Lea Oliveira,
Appellant.

Filed December 24, 2012
Affirmed
Schellhas, Judge

Ramsey County District Court
File No. 62-CR-11-916

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

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

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota; and

Brock J. Specht, Special Assistant State Public Defender, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Kirk, Judge; and Harten, Judge.[*]

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges her conviction of second-degree possession of controlled substance, arguing that the district court erred by denying her pretrial suppression motion. We affirm.

FACTS

On the evening of January 13, 2011, St. Paul Narcotics Vice Response Team police officers monitored a drug-store parking lot at the corner of White Bear Avenue and Old Hudson near the entrance ramp to Highway 94, where a large number of illegal drug transactions were known to have occurred. During their monitoring, the officers observed a red Dodge Neon automobile enter the parking lot and back into a parking space in an obscure area some distance from the store's entrance, even though the night was extremely cold. No other vehicles were parked in that area. The driver of the Neon did not leave the vehicle. After approximately 20 minutes, another vehicle entered the parking lot, approached the Neon, and stopped. Two passengers exited the vehicle and entered the Neon. The second vehicle then left with the Neon following it. The driver of the Neon did not turn on the Neon's headlights.

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

Suspecting that the passengers of both vehicles were engaged in a drug transaction, the officers followed the Neon and attempted to stop it before it reached Highway 94. The Neon did not stop immediately. It swerved, and the passengers appeared to move around as if trying to hide or reach for something. The Neon's driver exited the vehicle and was unable to explain to Officer Ian Kough why she had been in the Walgreen's parking lot for so long, and she could not name one of her passengers. The driver denied that the Neon contained anything illegal, she was defensive and evasive, and she appeared to Officer Kough to be under the influence of drugs.

While Officer Kough questioned the Neon driver, Officer James LaBarre observed that one of the passengers was fidgety, nervous, unable to remain motionless, and had trouble with simple commands. Officer LaBarre believed that the passenger's behavior was consistent with someone under the influence of drugs. Because of the passenger's behavior, the officers asked her to exit the vehicle. After exiting the vehicle, the passenger did not position her hands on her head as instructed but, rather, repeatedly moved them down toward the Neon. When Officer LaBarre asked the passenger if she was carrying weapons, she responded, "Yes," and then immediately said, "No, I have nothing on me; I have nothing on me." Officer LaBarre became concerned about officer safety and attempted to pat search the passenger. After two attempts were unsuccessful due to the passenger's lack of cooperation (she attempted to walk away), Officer LaBarre handcuffed her hands behind her back and radioed for a female police officer to perform the pat search.

Officer Catherine McGuire arrived at the scene 10−15 minutes later and pat searched the passenger, who was identified as appellant Laurie Oliveira. Oliveira was wearing a hooded sweatshirt and, according to Officer McGuire, the sweatshirt "was covering at least the top [of Oliveira's jeans]—where the belt loops are." Officer McGuire wanted to check Oliveira's waistband first because, based on her experience, it was the most common place "for people to obscure objects or weapons or objects that could be used as a weapon." Officer McGuire began the search by patting down the front pocket of Oliveira's hooded sweatshirt, specifically searching in the "center of [Oliveira's] waist area, which is typically where [Officer McGuire] always search[es] first." Officer McGuire did not feel anything except that Oliveira's jeans had a hard fabric waistband. Officer McGuire then took her "right hand and moved [Oliveira's] sweatshirt so that [she would] have access to [Oliveira's] jeans waistband" because, "typically when [the police] do a pat search, anything that's a hard item or hard fabric like that would conceal something such as a razor blade or syringe, that has to be examined further." Officer McGuire's concern was that she did not want to "just put [her] hand on someone without seeing what . . . [she was] attempting to pat-search first [because she did not] want to put [her] hand into the edge of a needle or to the blade of a knife."

Officer McGuire testified that she could not remember exactly how she moved Oliveira's sweatshirt but that she "probably would have just taken [her] hand flatly and moved [Oliveira's sweatshirt] aside." After Officer McGuire moved Oliveira's sweatshirt, a bag full of a white substance fell out. Officer McGuire testified that the

substance easily fell out and that she was surprised to see it. The police officers then arrested Oliveira for second-degree possession of a controlled substance. The police later identified the white substance as methamphetamine.

At the *Rasmussen* hearing, Officer McGuire testified that she never saw anything in plain view on Oliveira that looked like drugs or weapons and that she did not remember Oliveira "being uncooperative." On cross-examination, Officer McGuire testified that she had no specific reason to believe that Oliveira had a syringe concealed on her body but said that "that's a type of weapon that [is] hidden in those areas."

Oliveira moved to suppress the evidence of the methamphetamine on the grounds that the police did not have reasonable, articulable suspicion to frisk her and that the frisk exceeded the scope of a legal weapons frisk under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968). The district court held a *Rasmussen* hearing and denied Oliveira's motion, concluding that the police conducted a lawful stop and that Officer McGuire's "slight movement" of Oliveira's sweatshirt was "in keeping with the principles set forth in *Terry*" and so did not exceed the scope of a *Terry* weapons search.

Oliveira stipulated to the prosecution's case under Minn. R. Crim. P. 26.01, subd. 4. The district court found Oliveira guilty of second-degree possession of a controlled substance and sentenced her to 68 months' imprisonment.

This appeal follows.

D E C I S I O N

When the facts are not in dispute and an appellate court reviews a pretrial order on a motion to suppress evidence, it "may independently review the facts and determine

whether, as a matter of law, the district court erred in suppressing or not suppressing the evidence." *State v. Shriner*, 751 N.W.2d 538, 540 (Minn. 2008) (quotation omitted). An appellate court "review[s] the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quotation omitted).

The United States Constitution and the Minnesota Constitution both guarantee "[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. 1, § 10. "The touchstone of the Fourth Amendment is reasonableness," *State v. Johnson*, 813 N.W.2d 1, 5 (Minn. 2012) (quotation omitted), and "[g]enerally, warrantless searches are per se unreasonable," *Gauster*, 752 N.W.2d at 502. Evidence seized in violation of the U.S. or Minnesota Constitutions must be suppressed. *Terry*, 392 U.S. at 13–15, 88 S. Ct. at 1875–76; *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011). One exception to the warrantless search prohibition is the *Terry* search exception, wherein "even in the absence of probable cause, the 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. Flowers*, 734 N.W.2d 239, 250 (Minn. 2007) (quotation omitted). The "protective pat-down search" is of the person's "outer clothing in order to ascertain whether the person is armed." *State v. Harris*, 590 N.W.2d 90, 104 (Minn. 1999).

The principles of the *Terry* search exception apply when "evaluating the reasonableness of searches and seizures during traffic stops." *Flowers*, 734 N.W.2d at 251 (quotation omitted). Under *Terry*,

> 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.

Diede, 795 N.W.2d at 842 (quotations omitted). "The second *Terry* prong constrains the scope and methods of a search or seizure. An initially valid stop may become invalid if it becomes intolerable in its intensity or scope." *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (quotation omitted). Therefore, "each incremental intrusion during a stop must be strictly tied to and justified by the circumstances which rendered the initiation of the stop permissible . . . unless there is independent probable cause or reasonableness to justify that particular intrusion." *Id.* at 364 (quotations omitted).

On appeal, Oliveira does not challenge the reasonableness of the stop or the reasonableness or justification for a *Terry* frisk. Rather, she argues that Officer McGuire's pat search exceeded the scope of a *Terry* frisk because the movement of Oliveira's sweatshirt without a particularized reason to do so was unconstitutional. To support her argument, Oliveira cites four Minnesota cases in which an appellate court determined that a frisk exceeded the scope of a *Terry* frisk. But the cases cited are not controlling or persuasive because they are factually distinguishable.

In *Harris*, the supreme court concluded that a police officer exceeded the scope of a *Terry* frisk when he did not pat search the defendant but instead reached directly into the defendant's jacket sleeve and pulled out a bag of marijuana. 590 N.W.2d at 104. The supreme court stated that "[b]y searching [defendant's] jacket sleeve from inside the jacket, [the police officer] exceeded the scope of a proper protective pat-down search." *Id.*

In *State v. Gannaway*, the supreme court held that a police officer exceeded the scope of a *Terry* frisk by emptying out the defendant's pants pockets during the frisk, finding marijuana. 291 Minn. 391, 392–93, 191 N.W.2d 555, 556–57 (1971). The supreme court stated that the police officer "for [an] unexplained reason . . . expanded his search to other clothing of the defendant that gave no indication of the possible presence of a concealed weapon" and concluded that because there was "no palpable indication of a possible weapon in defendant's trouser pocket . . . that [defendant's] pocket was not within the permissible area of a protective search." *Id.* at 392–94, 191 N.W.2d at 556–57.

In *State v. Richmond*, this court held that a police officer exceeded the scope of a *Terry* frisk when, without pat searching the defendant first, he "reach[ed] into [the defendant's] pocket." 602 N.W.2d 647, 652 (Minn. App. 1999), *review denied* (Minn. Jan. 18, 2000).

In *State v. Crook*, this court held that "the removal of appellant's cap from his head as an alternative to a pat search of the cap went beyond a *Terry* reasonable protective weapons search," reasoning that "a cap or hat should not be removed from a person's head during a *Terry* protective weapons search unless a prior pat search of the

cap or hat reveals a weapon." 485 N.W.2d 726, 729–30 (Minn. App. 1992), *review denied* (Minn. Aug. 4, 1992).

Unlike the police officers in *Harris* and *Richmond*, Officer McGuire pat searched Oliveira's waistband area, determined that Oliveira's clothing could have concealed a razor blade or syringe, and *then* moved Oliveira's sweatshirt. Unlike the police officer in *Gannaway*, Officer McGuire articulated a reason for the pat search and the manner in which she conducted it—she was concerned that the fabric of Oliveira's jeans could conceal a knife or needle and, without being able to view Oliveira's waistband, she risked putting her hand "into the edge of a needle or to the blade of a knife." And Officer McGuire did not ask Oliveira to remove a hat or any other article of clothing, as in *Crook*. Officer McGuire's pat search was far less intrusive than the police officers' frisks in the above cases.

Oliveira has provided no Minnesota caselaw to support her argument that a slight movement of a sweatshirt to inspect a waistband unlawfully exceeds the scope of a *Terry* frisk, nor could we locate any. Because we agree with the district court that Officer McGuire's pat search did not exceed the scope of the lawful *Terry* frisk, we conclude that the district court did not err by denying Oliveira's motion to suppress the methamphetamine evidence.

Affirmed.