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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0188**

State of Minnesota,
Respondent,

vs.

Tyrone Ward McGhee,
Appellant.

**Filed December 24, 2012
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CR-11-16093

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Edwin Stockmeyer (certified student attorney), Minneapolis, Minnesota (for respondent)

A. Elizabeth Burnett, Gerardo Alcazar, Special Assistant Public Defenders, Robins, Kaplan, Miller & Ciresi, L.L.P., Minneapolis, Minnesota, and

Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and
Ross, Judge.

UNPUBLISHED OPINION

ROSS, Judge

This case concerns the alleged search of Tyrone McGhee and a BB gun found in his possession. McGhee challenges his conviction of being a prohibited person in possession of a firearm, contending that the district court erroneously denied his motion to suppress the evidence of a BB gun he carried and that Minnesota Statutes section 624.713, subdivision 1(2), is unconstitutionally vague because a person of ordinary intelligence would have to guess whether possessing a BB gun violates the statute. Because McGhee volunteered that he had the BB gun after the officers had justifiably stopped him and because we have previously held that a BB gun is a firearm under Minnesota Statutes section 624.713, we affirm.

FACTS

On a Thursday afternoon in May 2011, Minneapolis Police Sergeant David Robinson was conducting surveillance in an area known to him for frequent street-level narcotics trafficking and shooting incidents. Sergeant Robinson planned to call other officers nearby to stop suspects after he observed any suspicious behavior. Sergeant Robinson noticed a man approaching people outside a gas station. The man huddled with them and engaged in at least three hand-to-hand exchanges. The sergeant did not see what was being exchanged.

After about 30 minutes, Sergeant Robinson saw the man move across the street and approach other pedestrians and vehicles at another lot. The man continued until he noticed a passing squad car unrelated to Sergeant Robinson's surveillance. The man

darted away. Sergeant Robinson suspected that he had been selling drugs and decided to stop him and investigate. He asked Officers Tucker and McDonald to stop the man.

These officers were a few blocks away, but they soon located the man and, with their guns drawn, stopped him. They ordered the man to put his hands on the car and identified him as Tyrone McGhee. Officer Tucker reached toward McGhee intending to check him for drugs. As he did, McGhee announced, "It's only a BB gun." Officer Tucker found an unloaded BB gun in a holster on McGhee's waistband. McGhee could not lawfully possess a firearm because he had been previously convicted of a felony controlled-substance offense. The state therefore charged McGhee with one count of being a prohibited person in possession of a firearm in violation of Minnesota Statutes section 624.713, subdivision 1(2). McGhee moved the district court to suppress the evidence of the BB gun, arguing that police found the gun during an unlawful search and seizure. The district court denied the motion. It held that the officers had probable cause to arrest McGhee for possession with intent to sell controlled substances and that the warrantless search of his person was legal as incident to a lawful arrest.

McGhee waived his right to a jury trial to allow the state to submit the case on stipulated facts, preserving the suppression issue for appellate review. *See State v. Lothenbach*, 296 N.W.2d 854, 857–58 (Minn. 1980); Minn. R. Crim. P. 26.01, subd 4. The district court found McGhee guilty of being a prohibited person in possession of a firearm.

McGhee appeals his conviction.

DECISION

McGhee's appeal challenges the district court's denial of his pretrial suppression motion. He also disputes the constitutionality of Minnesota Statutes section 624.713, subdivision 1(2). Neither argument is convincing.

I

McGhee first argues that evidence of the BB gun should have been suppressed because it was the product of an unlawful seizure and search. The Fourth Amendment to the United States Constitution and Article I, section 10, of the Minnesota Constitution protect citizens from unreasonable government searches and seizures. Police may lawfully detain a person temporarily to investigate, but the officer must first have a reasonable, articulable suspicion that the person was or will be engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968); *State v. Smith*, 814 N.W.2d 346, 352 (Minn. 2012). We assess the constitutionality of a stop and frisk based on the totality of the circumstances from an objectively reasonable officer's perspective, recognizing that an experienced officer may draw inferences and make deductions that might elude an untrained person. *Appelgate v. Comm'r of Public Safety*, 402 N.W.2d 106, 108 (Minn. 1987) (quotation omitted). As McGhee's attorney conceded at oral argument and as the evidence shows, the officers had reasonable suspicion to stop and investigate McGhee for loitering, trespassing, and possible drug dealing.

Sergeant Robinson had reason to suspect that McGhee was engaging in criminal activity. The Supreme Court has held that presence in a high crime area and unprovoked flight from police are factors supporting reasonable suspicion. *Illinois v. Wardlow*, 528

U.S. 119, 124, 120 S. Ct. 673, 676 (2000). Sergeant Robinson has been a police officer for 19 years with significant experience in surveillance and arrests for drug transactions. He testified that lingering around a store without using the store, making contact with pedestrians, and huddling and making hand-to-hand transactions can indicate drug dealing. Sergeant Robinson observed McGhee doing just that for thirty minutes in a high crime area. He also noticed McGhee run when he saw a squad car pass, and he said that this “added to [his] suspicion for the loitering” and his suspicion that McGhee “probably had contraband on him of some sort.” These circumstances taken together would lead a reasonable officer to believe that McGhee may have been engaging in criminal activity, justifying the investigative seizure of McGhee.

McGhee argues that the search was also unlawful. But no search actually occurred. Officer Tucker testified that before he touched McGhee, McGhee blurted out that he possessed the gun, stating, “It’s only a BB gun.” The officers became aware of the gun not because of a search but because of McGhee’s unsolicited disclosure.

We add that even if McGhee had been silent and Officer Tucker had discovered the gun in a pat-down search, the discovery still would have been admissible. A protective pat-down search for weapons is an exception to the warrant requirement. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992). Police can frisk a lawfully detained person for weapons when they have reasonable, articulable suspicion that the detained person might be armed. *Id.* (citing *Terry*, 392 U.S. at 30, 88 S. Ct. at 1884). Sergeant Robinson testified that he had witnessed both drug activity and shootings in the area where he encountered McGhee. Officer Tucker testified that he was aware of violence

around that intersection and that there had been a recent increase in criminal activity, including “a lot of gunfire, shots fired, attempted murder.” He specified, “We’ve had, I think, two people shot there within the last couple of weeks.” This testimony, combined with McGhee’s suspicious huddling and flight, provides reasonable suspicion for a pat search for officer safety without regard to McGhee’s unsolicited disclosure.

The district court went further, holding that probable cause existed to arrest McGhee for possession with intent to sell controlled substances, denying McGhee’s suppression motion on that ground. We need not go so far for the reasons just given. We may affirm the district court’s decision on any ground supported by the record. *Williams v. Nat’l Football League*, 794 N.W.2d 391, 395 (Minn. App. 2011), *review denied* (Minn. Apr. 27, 2011). We hold that the stop was justified based on an objectively reasonable suspicion and that no unlawful search occurred. The district court did not err by admitting evidence of the BB gun into evidence.

II

McGhee argues that his conviction should be reversed because Minnesota Statutes section 624.713, subdivision 1(2) (2010), is unconstitutionally vague because a person of ordinary intelligence must guess whether it prohibits possession of a BB gun. He argues that the meaning of “firearm” in section 624.713 is ambiguous, which results in “noncompliance and arbitrary enforcement.” The argument fails because caselaw has already determined that BB guns are firearms under section 624.713, subdivision 1(2).

State v. Fleming, 724 N.W.2d 537, 541 (Minn. App. 2006). There is therefore no ambiguity in the law, and we are bound by precedent to affirm.

Affirmed.