STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0449

State of Minnesota,
Respondent,

vs.

Key Khampanyavong,
Appellant.

Filed December 24, 2012
Reversed
Peterson, Judge

Hubbard County District Court
File No. 29-CR-10-1305

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

Donovan Dean Dearstyne, Hubbard County Attorney, Park Rapids, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Brian James Wambach, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Cleary, Judge.

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

PETERSON, Judge

In this appeal from his conviction of fifth-degree possession of a controlled substance, appellant argues that (1) the dog sniff of his duffel bag constituted an illegal

search; and (2) the automobile exception to the warrant requirement does not apply to the search of his duffel bag because the bag was not in appellant's automobile when the police first suspected that it held contraband. We reverse.

FACTS

In November 2010, Minnesota State Trooper Brett Kent responded to a report of a single-vehicle rollover accident. Enroute to the accident scene, Kent learned that a passenger in the automobile had pending felony drug charges and requested the assistance of a canine unit. Three people were standing outside the vehicle and declined Kent's offer to warm up inside the police vehicle.

Appellant Key Khampanyavong identified himself as the driver of the vehicle. Appellant claimed that snow and wind had caused the accident, but two passengers stated that appellant had not been paying attention to the road. As the vehicle was being turned to an upright position, a black duffel bag fell out of a window, and appellant picked up the bag. Appellant and his two passengers accepted Kent's offer to give them a ride to a gas station in Akeley about five miles away. Appellant and one of his passengers rode with Kent, and the other passenger rode with a deputy sheriff.

In the squad car, appellant held the black duffel bag on his lap. After turning up the heat, Kent smelled the odor of raw marijuana. Appellant denied smoking marijuana before or during the accident and consented to a search of his vehicle. In Akeley, Kent and appellant and his passengers waited outside the squad car. When the canine unit arrived, Kent asked appellant, "Just one more time . . . you are OK if the dog sniffs your bag and your car, correct?" Appellant did not respond. Kent told the canine officer that

appellant had given permission for a dog sniff of the duffel bag. The dog indicated the presence of a controlled substance in the duffel bag. The canine officer searched the duffel bag and found nine bags containing 54.2 grams of marijuana.

Appellant was charged with fifth-degree possession of a controlled substance. The district court denied appellant's motion to suppress the evidence found in his bag. The district court determined that (1) Kent's observations, the odor of raw marijuana, and the questionable explanation for the accident, gave him a reasonable, articulable suspicion of criminal activity that justified the temporary investigative detention and the dog sniff and (2) the dog's alerting on the duffel bag provided probable cause to believe that there were controlled substances in the bag and in appellant's vehicle and, therefore, the warrantless search of the duffel bag was permissible under the automobile exception to the warrant requirement. The case was tried to the court, which found appellant guilty as charged. The district court stayed imposition of sentence and placed appellant on probation for five years. This appeal followed.

D E C I S I O N

"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—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

I.

The Fourth Amendment to the United States Constitution and Article I of the Minnesota Constitution prohibit unreasonable searches and seizures. U.S. Const. amend.

IV; Minn. Const. art. I, § 10. A warrantless search is per se unreasonable unless it fits within one of the recognized exceptions to the warrant requirement. *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999). One of the exceptions to the warrant requirement is that police may conduct a warrantless search of "an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." *California v. Acevedo*, 500 U.S. 565, 580, 111 S. Ct. 1982, 1991 (1991).

The district court concluded that the automobile exception to the warrant requirement applied to the warrantless search of appellant's duffel bag and, therefore, the search was lawful. But, as the district court also concluded, probable cause to believe that there were controlled substances in the bag existed only when the dog alerted on the bag. The dog did not alert on the bag until after the bag fell from appellant's automobile and was transported to a gas station approximately five miles away. When the bag was within appellant's automobile, the police did not have probable cause to believe that it contained contraband or evidence, and the bag was not searched when it was within appellant's automobile. The mere fact that the bag was within appellant's automobile when the police arrived at the accident scene does not make the automobile exception applicable. Consequently, the automobile exception to the warrant requirement does not apply to the warrantless search of appellant's duffel bag.

Because we have concluded that the warrantless search of appellant's duffel bag was not permitted under the automobile exception to the warrant requirement, we need not address appellant's argument that the dog sniff of his duffel bag constituted an illegal search.

II.

Citing *United States v. Munoz*, 590 F.3d 916 (8th Cir. 2010), respondent State of Minnesota argues that the marijuana found in appellant's bag is admissible under the inevitable discovery doctrine. In *Munoz*, the court explained that when a search is unlawful,

> "the evidence found need not be suppressed if the two prongs of the inevitable discovery doctrine are proved by a preponderance of the evidence: (1) there is a reasonable probability the evidence would have been discovered by lawful means in the absence of police misconduct, and (2) the government was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation."

Id. at 923 (quoting *United States v. Thomas*, 524 F.3d 855, 858 (8th Cir. 2008)).

In *Munoz*, a state trooper conducting a consensual search of a rented Pontiac automobile found a backpack on the floorboard. *Id*. at 920. The trooper searched the backpack and found a loaded handgun, a digital scale, and a small quantity of methamphetamine. *Id.* The trooper continued searching the automobile, and in the console between the front seats he found two glass pipes that he recognized as "crack pipes." *Id.*

In denying Munoz's motion to suppress the evidence found in the backpack, the district court assumed that the search of the backpack was unlawful but ruled that the contraband in the backpack would have been inevitably discovered. *Id.* Munoz pleaded guilty to being a felon in possession of a firearm and, in the plea agreement, reserved the

right to appeal the denial of his motion to suppress. *Id.* at 919. On appeal, the court concluded:

> The fact that [the trooper] searched the console after searching the backpack proves, beyond a reasonable probability, that he would have eventually searched the console. [The trooper] testified about his background and training in identifying drugs and drug paraphernalia, testimony the lower court found credible. He immediately recognized the glass pipes in the console as "crack pipes." His discovery of drug paraphernalia provided probable cause to search everywhere in the Pontiac, including Munoz's backpack, for further evidence of drugs. While looking for drug contraband in the backpack, [the trooper] would have discovered the handgun. The district court correctly ruled that the contraband in the backpack would have been discovered by lawful means in the absence of police misconduct.
>
> The second prong requires that the government prove that there was, at the time of the search of the backpack, an actual other investigation that would have led to discovery of the otherwise unconstitutionally obtained evidence. Before searching the backpack, [the trooper] had obtained . . . consent to search the Pontiac, and was in the process of searching the entire car (including the console). [The] valid consent was an actual other investigative method of searching the Pontiac. The lawful search of the console would have led to the discovery of the (otherwise unlawfully obtained) evidence in Munoz's backpack.

Id. at 923-24 (quotation and citations omitted).

Respondent contends that the facts of this case are similar to *Munoz* and that after arresting appellant, officers went to the impound lot with a dog to sniff around the exterior of appellant's automobile. The dog hit on the passenger-side door during the pass around the car, but no contraband was found. Respondent argues that it is reasonable to conclude that if the dog had sniffed appellant's automobile

contemporaneously with the sniff of his bag, the dog would have hit on the passenger-side door and officers would have searched objects that had been in the car, including appellant's bag, which would have resulted in the discovery of the marijuana in the bag.

Unlike *Munoz*, respondent has not proved that, at the time appellant's bag was searched, an actual other investigation would have led to discovery of the marijuana in appellant's bag. Appellant's bag was not searched after the dog hit on the passenger-side door of appellant's automobile. And even if a contemporaneous dog sniff had established probable cause to search appellant's automobile, appellant's bag was not in the automobile. Consequently, unlike the backpack in *Munoz*, a warrantless search of appellant's bag was not permitted under the automobile exception to the warrant requirement and the marijuana in the bag would not inevitably have been discovered by lawful means.

Reversed.