STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0947

State of Minnesota,
Respondent,

vs.

Darin Thomas Mousseau,
Appellant.

Filed April 29, 2013
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge

Itasca County District Court
File No. 31-CR-11

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

John J. Muhar, Itasca County Attorney, David S. Schmit, Assistant County Attorney, Grand Rapids, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Rodenberg, Judge.

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

RODENBERG, Judge

On appeal from his conviction of second degree possession of methamphetamine, third-degree test refusal, and fourth-degree driving while impaired (DWI), appellant

Darin Thomas Mousseau challenges the expansion of the traffic stop which led to the search of his vehicle and evidence seized during the warrantless search. In the alternative, appellant argues that his sentence for fourth-degree DWI must be vacated because it arose from the same behavioral incident as the third-degree test-refusal charge. We affirm in part, reverse in part, and remand.

FACTS

In the early morning hours of July 11, 2011, Officer Breeden was patrolling the beach area of the O'Brien Reservoir in Itasca County near Highway 169. He followed a vehicle traveling westbound. He observed the driver-side tires of the vehicle cross the marked centerline by approximately one foot, followed by the driver's "jerking motion" back into his own lane of traffic. He also noted that the passenger-side tires made contact with the fog line. A license plate check indicated that the vehicle's tabs had expired in February 2010. Officer Breeden initiated a traffic stop. Appellant does not challenge the validity of the initial traffic stop.

Officer Breeden recognized appellant because he had previously charged him with third-degree possession of methamphetamine in 2010. Standing outside of appellant's open window, Officer Breeden immediately noticed that appellant's face was "real pale," he was "sweating around his hairline and face area," he had some "fresh new marks" and some "older scabs" on the outside of his left forearm, "bloodshot eyes," more constricted pupils than normal based on lighting conditions, and appeared to be "real shaky." Officer Breeden also noticed that appellant had dried saliva around his mouth and that he "smack[ed] his mouth" as he spoke. Appellant told Officer Breeden that he had bought

the vehicle one to two months earlier and had transferred the title and the tabs to his name. Appellant started looking for the receipt to prove the ownership and current licensing of the vehicle. Officer Dasovich arrived at the scene to assist Officer Breeden.

Officer Breeden saw a large amount of cash when appellant opened his wallet to retrieve his driver's license. Appellant explained that he was unemployed but that his wife had given him the cash. Officer Breeden observed that the vehicle was in "disarray" and that there was a "fuzz buster" above the rear-view mirror and three air fresheners hanging from the center air vent. Officer Breeden also saw a vent on the driver's side at a "weird angle," which appeared to have been tampered with, and noticed that panels and portions of the vehicle interior had been removed, exposing wiring.

Officer Breeden ran appellant's driver's license through dispatch and found that he was on probation for a third-degree possession of methamphetamine charge from 2010. Based on his observations, Officer Breeden suspected that appellant was under the influence of controlled substances and that controlled substances could be present in the vehicle. Appellant located the receipt for his renewed tabs, and Officer Breeden determined that the receipt was valid. At that time, while still standing outside the driver's side window, and with Officer Dasovich at the passenger-side door shining his flashlight inside appellant's vehicle, Officer Breeden surveyed the interior of the car and noticed a small, black, "cinch end" bag just behind the passenger seat. Officer Breeden shined his flashlight through the back window of the vehicle and saw near the open end of the black bag "[what] appeared to be a large amount of money folded up, a stack of baggies . . . , some Q-tips . . . , and [what] appeared to be the stem smoking portion of

a—a glass pipe." Officer Breeden recognized the pipe based on similar pipes he had seen in past drug arrests.

Officer Breeden sought consent to search the vehicle and interpreted appellant's ambiguous response as affirmative.[1] In the car, Officer Breeden confirmed the presence of a large amount of cash, small baggies, Q-tips, and a glass smoking device that had "white residue toward the mouthpiece." Officer Breeden then arrested appellant for possession of a pipe containing controlled substance residue.

Appellant fell asleep in the squad car before Officer Breeden could administer field sobriety tests, which were later performed at the police station. Officer Breeden concluded that appellant was under the influence of a controlled substance. Appellant was unable to provide a urine sample. He admitted to jail staff that he had used methamphetamine and THC approximately three days prior to his arrest.

Appellant was charged with second-degree possession of methamphetamine; third-degree test refusal; fourth-degree DWI; possession of a small amount of marijuana; and possession of drug paraphernalia. He moved to suppress the evidence seized during the stop. The district court found that the initial stop was justified by the observed driving conduct and that Officer Breeden had a reasonable suspicion to expand the scope of the stop to investigate possible drug offenses. The district court concluded that the search

[1] The officer testified that he believed consent to search had been given. The district court found that the officer described the conversation once as his having asked if appellant had any objection to a search of the vehicle, and at another point as his having asked "if I could look in the vehicle." In context, appellant's reply, "yeah, sure," was ambiguous. The district court did not rely on appellant's consent as justifying the search of the vehicle.

was justified by the plain-view and automobile exceptions to the warrant requirement. Following a trial on stipulated facts, appellant was convicted of second-degree possession of methamphetamine, third-degree test refusal, and fourth-degree driving while impaired. This appeal followed.

D E C I S I O N

"The clearly erroneous standard controls our review of a district court's factual findings." *In re Source Code Evidentiary Hearings*, 816 N.W.2d 525, 537 (Minn. 2012). "We review a district court's determination regarding the legality of an investigatory traffic stop and questions of reasonable suspicion de novo." *Wilkes v. Comm'r of Pub. Safety*, 777 N.W.2d 239, 242–43 (Minn. App. 2010). We defer to the district court's assessment of witness credibility. *State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003), *review denied* (Minn. July 15, 2003).

I.

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The stop of an automobile and detention of its occupants constitute "a seizure" under state and federal law. *Blaisdell v. Comm'r of Pub. Safety*, 375 N.W.2d 880, 881 (Minn. App. 1985), *aff'd on other grounds*, 381 N.W.2d 849 (Minn. 1986). But officers may conduct an investigative stop of a vehicle as long as the stop is reasonable in both its scope and duration. *State v. Wiegand*, 645 N.W.2d 125, 136 (Minn. 2002) (citing *Terry v. Ohio*, 392 U.S. 1, 19, 88 S. Ct. 1868, 1878 (1968)). Minnesota has explicitly adopted "the principles and framework of *Terry* for evaluating the reasonableness of seizures [under the state Constitution]

during traffic stops even when a minor law has been violated." *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004).

The first inquiry is whether the stop was justified at its inception. *Id.* at 364. Here, Officer Breeden observed appellant's car cross the centerline and its passenger-side wheels touch the fog line. Ordinarily, if a police officer observes a violation of a traffic law, however insignificant, it provides an objective basis for stopping the vehicle. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997). The stop was initially justified, and appellant does not argue otherwise.

We must next examine whether the police actions during the stop "were reasonably related to and justified by the circumstances that gave rise to the stop in the first place." *Askerooth*, 681 N.W.2d at 364. This inquiry requires us to examine each incremental intrusion during the stop to ensure that it is "tied to and justified by one of the following: (1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness, as defined in *Terry*." *Id.* at 365; *see also State v. Fort*, 660 N.W.2d 415, 419 (Minn. 2003) (holding that an expansion of a routine traffic stop is permissible only if the officer has reasonable, articulable suspicion of other illegal activity).

Here, because the initial stop was for a routine traffic violation, any intrusion beyond the initial reason for the stop requires reasonable, articulable suspicion of additional criminal activity. *See State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005). The determination of reasonable suspicion requires the district court to consider the totality of the circumstances. *See id.* at 488–89 (considering whether totality of the

circumstances gave rise to reasonable, articulable suspicion of drug possession). But the state's justification for each expansion of the scope of a stop must be separately evaluated. *Id*. This determination requires the district court to consider the facts available to the officer at each step of the intrusion. *See Askerooth*, 681 N.W.2d at 365 (stating that, if not tied to the original basis for the stop, each incremental intrusion must be tied to "independent" probable cause or reasonableness). A police officer need not be absolutely certain of the possibility of criminal activity before expanding the scope of a stop. *State v. Schrupp*, 625 N.W.2d 844, 847 (Minn. App. 2001). Rather, the officer is simply required to articulate specific facts beyond the "inchoate and unparticularized suspicion or hunch." *Id.* at 846–47 (quotation omitted).

The district court found that, based on his observations during the investigative stop, Officer Breeden had a reasonable, articulable suspicion that appellant was either driving under the influence of controlled substances, in possession of controlled substances, or both. The district court found Officer Breeden's testimony credible, particularly since he had undergone specialized controlled-substances training which allowed him to identify that appellant exhibited several indicia of drug use.

The duration of the traffic stop was relatively brief—just under 22 minutes. *Cf. State v. Moffat*, 450 N.W.2d 116, 118–19 (Minn. 1990) (upholding the reasonableness of a 61-minute investigatory stop). Officer Breeden's immediate observations after initiating the traffic stop were that appellant was sweating around his hairline and face, his eyes appeared bloodshot, and his pupils were more constricted than would seem normal based on the lighting conditions. Officer Breeden also noted the presence of fresh

and old scabs on appellant's left forearm, dried saliva around appellant's mouth, and that appellant was "smack[ing]" his lips. During his interactions with Officer Breeden, appellant appeared "shaky" and presented an "inability to sit still and pay attention." *Cf. State v. Prax*, 686 N.W.2d 45, 49 (Minn. App. 2004) (finding that violation of traffic laws and physical indicia of intoxication such as "sweating, dilated pupils, and anxious, fidgety behavior" supplied probable cause to arrest a driver for DWI by a controlled substance), *review denied* (Minn. Dec. 14, 2004).

A significant portion of the stop consisted of appellant's search for the vehicle's license tab receipt. While waiting for appellant to produce the receipt, Officer Breeden observed the cluttered interior of appellant's car and the large amount of cash in appellant's wallet. Based on his experience as a police officer, Officer Breeden testified that weapons and controlled substances may be concealed in void areas behind vents and panels. The "fuzz buster" in appellant's car reasonably indicated to Officer Breeden the need for the driver to be "aware of law enforcement presence or . . . to try to avoid detection [by] law enforcement." Even in the absence of the air fresheners, the presence of which appellant disputes, Officer Breeden's observations of the missing car panels, the hanging wires, and the vent at a "weird angle" gave rise to the reasonable, articulable suspicion that controlled substances were hidden in appellant's vehicle. This reasonable suspicion supported Officer Breeden's decision to look more closely at the contents of the vehicle from his vantage point outside of it. To the extent this action was an expansion of the stop, the expansion was minimal. Officer Breeden articulated specific facts, undisputed by appellant, that under the totality of the circumstances reasonably

warranted his minimal expansion of the stop to look into the car almost immediately after appellant handed him the license tab receipt.

The Minnesota Supreme Court has recognized a "well-established exception to the search warrant requirement for cases involving transportation of contraband goods in motor vehicles." *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999). Under this exception, police officers may conduct a warrantless search, including any closed containers within the vehicle, "if they have probable cause to believe the search will result in a discovery of evidence or contraband." *State v. Search*, 472 N.W.2d 850, 852 (Minn. 1991). Additionally, the "plain view" doctrine allows police, once lawfully in a position to see incriminating evidence, to seize that evidence if its incriminating nature is "immediately apparent." *State v. DeWald*, 463 N.W.2d 741, 747 (Minn. 1990). The record shows, and the district court found, that Officer Breeden was standing outside the driver-side door of appellant's vehicle when both officers shined their flashlights inside the vehicle. Officer Breeden saw a black "cinch end" bag. The bag opening revealed the end of a glass pipe of the type used to ingest illegal drugs, cash, Q-tips, and small plastic bags, all of which Officer Breeden had seen in previous drug arrests. A police officer may rely on training and experience in assessing circumstances leading to probable cause. *State v. Skoog*, 351 N.W.2d 380, 381 (Minn. App. 1984). Based on Officer Breeden's observations of appellant, his experience with drug arrests, and his specialized controlled-substances training, he had probable cause to believe that the contents of the bag were incriminating. *Cf. State v. Lembke*, 509 N.W.2d 182, 184 (Minn. App. 1993) (upholding seizure of a bag from a driver based on conclusion that officer's training and

experience permitted him to develop probable cause to believe that bag contained contraband). The district court did not err in concluding that the search was constitutionally permissible under the plain-view and automobile exceptions to the warrant requirement.

II.

Appellant also challenges the district court's decision to impose sentences for both the third-degree test refusal and fourth-degree DWI offenses. No objection was made at sentencing.

In Minnesota, a person whose conduct "constitutes more than one offense" may only be punished for one of them. Minn. Stat. § 609.035, subd. 1 (2010). The test is whether the offenses are part of "a single behavioral incident." *Effinger v. State*, 380 N.W.2d 483, 487 (Minn. 1986). A district court's determination of whether offenses are part of a single behavioral incident is a fact determination that can be reversed on appeal only if clearly erroneous. *Id.* at 489. However, when the facts are undisputed, the determination becomes a question of law that is reviewed de novo. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001). Failure to raise the issue of multiple sentences arising from a single behavioral incident at sentencing does not preclude relief on appeal. *Ture v. State*, 353 N.W.2d 518, 523 (Minn. 1984).

Appellant argues that the offenses of third-degree test refusal and fourth-degree DWI occurred substantially at the same time and place and that his refusal to test was purposeful to avoid apprehension on the DWI. Whether a series of offenses constitutes a single behavioral incident for sentencing under Minn. Stat. § 609.035, subd. 1 depends on

unity of time and place and whether the segment of conduct was motivated by an effort to obtain a single criminal objective. *Marchbanks*, 632 N.W.2d at 731. The state bears the burden of establishing by a preponderance of the evidence that the conduct did not occur as part of a single behavioral incident. *State v. Williams*, 608 N.W.2d 837, 841–42 (Minn. 2000).

In *State v. Simon*, this court held that the offenses of test refusal and DWI were not part of the same behavioral incident for purposes of Minn. Stat. § 609.035 and allowed separate sentencing. 485 N.W.2d 719, 724 (Minn. App. 1992), *rev'd mem.*, 493 N.W.2d 528 (Minn. 1992). The appellant in *Simon* was also arrested on suspicion of DWI and later refused to submit to testing. *Id.* at 721. Upon limited review on that issue, the supreme court held that the appellant could be sentenced for only one of the two offenses under Minn. Stat. § 609.035 because the two offenses arose from the same behavioral incident. *State v. Simon*, 493 N.W.2d 528, 528 (Minn. 1992).

The facts here are similar to those in *Simon*. The state concedes that the conduct occurred as part of a single behavioral incident. Therefore, we reverse the sentences and remand to the district court for resentencing consistent with this opinion.

Affirmed in part, reversed in part, and remanded.