STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0038

State of Minnesota,
Respondent,

vs.

Richard George Mager,
Appellant.

Filed November 25, 2013
Reversed
Halbrooks, Judge

Mille Lacs County District Court
File No. 48-CR-10-2434

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

Janice S. Jude, Mille Lacs County Attorney, Daniel N. Rehlander, Assistant County Attorney, Milaca, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Halbrooks, Judge; and Stauber, Judge.

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

HALBROOKS, Judge

On appeal from his controlled-substance and paraphernalia-possession convictions, appellant argues that the district court erred by denying his motion to

suppress evidence obtained in a warrantless search of his person. Because there was not probable cause to believe that appellant was in constructive possession of the contraband that was discovered in his companion's backpack, the subsequent search of appellant was not made incident to a lawful arrest. We therefore reverse.

FACTS

On October 31, 2010, appellant Richard George Mager was a backseat passenger in a vehicle traveling on Highway 169 in Mille Lacs County. Minnesota State Patrol Trooper Bryan Bearce stopped the vehicle because its rear tire was bouncing "violently" on the highway and the rear passengers were not wearing seatbelts. When Trooper Bearce approached the vehicle, he observed an open bottle of liquor between the two front seats. Trooper Bearce requested identification from the driver and the two rear passengers. The front passenger offered his identification as well. After performing a warrant check, Trooper Bearce informed the driver, R.H., that he was under arrest on an outstanding warrant for unpaid child support. Trooper Bearce searched R.H. and placed him in the patrol vehicle.

Trooper Bearce stated that he was going to search the vehicle for additional containers of alcohol and asked the three passengers to step out one at a time. Mager, who was seated in a back seat, exited the vehicle first and was frisked for officer safety. No contraband was found on him. Trooper Bearce asked the front passenger, M.H., whether the backpack at his feet belonged to him. M.H. replied that the backpack was his, and he stepped out of the vehicle. No contraband was found on M.H. during a frisk for officer safety. All the while, Trooper Bearce noticed the remaining rear passenger,

S.N., covertly gesturing to him. S.N. exited the vehicle and, as he was being frisked, whispered to Trooper Bearce that there was "something" in the bags in the vehicle. When Trooper Bearce asked whether it was weapons or narcotics, S.N. indicated that "he did not know." Trooper Bearce discovered a bag of marijuana and a glass pipe on S.N.

Trooper Bearce then searched M.H.'s backpack. In it, Trooper Bearce found a metal pipe, a small bag of marijuana, and two hypodermic needles, one of which contained clear liquid that was later determined to contain methamphetamine.

As Trooper Bearce searched the vehicle, he noticed that M.H. was not complying with his instruction to face the opposite direction of the vehicle. Trooper Bearce handcuffed M.H. and moved him to the grassy area along the shoulder of the highway. Trooper Bearce instructed Mager and S.N. to move to the shoulder as well. As Trooper Bearce was walking back to the vehicle after having moved the passengers, S.N. again tried to communicate with Trooper Bearce. S.N. gestured toward the crotch of his pants, pointed at M.H. and Mager, and mouthed that something was "in their pants."

After back-up assistance arrived, Trooper Bearce searched each passenger. He unbuttoned the top button of their pants and lifted their shirts to expose the waistband of their pants. Trooper Bearce found nothing on M.H. or S.N. but discovered a small bag containing a white crystal substance and two napkins rolled around hypodermic needles sticking out of Mager's waistband. The white substance later tested positive for methamphetamine.

Mager was arrested and charged with fifth-degree controlled-substance possession in violation of Minn. Stat. § 152.025 (2010), possession of hypodermic syringes in

violation of Minn. Stat. § 151.40 (2010), and possession of drug paraphernalia in violation of Minn. Stat. § 152.092 (2010).

Mager moved to suppress the state's evidence, arguing that the search of his pants was unlawful because there was not probable cause to arrest him of a crime at the time of that search. The state countered that the search could be justified as a search made incident to arrest because there was probable cause to arrest Mager for possession of the contraband found in M.H.'s backpack. The state theorized that the open container of alcohol together with the marijuana found on S.N., and M.H.'s furtive movements reasonably implied that Mager and the other vehicle occupants were involved in a common criminal enterprise to possess the drugs and drug paraphernalia concealed in M.H.'s backpack. The district court denied Mager's suppression motion, concluding that there was probable cause to arrest Mager for possession of the contraband discovered in M.H.'s backpack.

Mager pleaded not guilty, waived his right to a jury trial, and stipulated to the state's case. A bench proceeding was held pursuant to Minn. R. Crim. P. 26.01, subd. 4, preserving the district court's pretrial ruling for review. The district court found Mager guilty on all three counts, sentenced him to 366 days' imprisonment with a stay of execution, and placed him on probation. This appeal follows.

D E C I S I O N

"When reviewing a district court's pretrial order on a motion to suppress evidence, we review 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 guarantees an individual's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. Evidence seized in violation of the constitution must generally be suppressed. *State v. Jackson*, 742 N.W.2d 163, 177-78 (Minn. 2007). A warrantless search is per se unreasonable unless it falls within one of the recognized exceptions to the warrant requirement. *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005). One exception to the warrant requirement authorizes a search of a person's body and the area within his immediate control as "incident to a lawful arrest." *State v. Robb*, 605 N.W.2d 96, 100 (Minn. 2000). The purpose of this exception is to allow officers to remove weapons the arrestee might reach and prevent the arrestee from tampering with or destroying evidence. *Id.*

There is probable cause to arrest a person if an officer could reasonably believe that the person has committed a crime. *State v. Olson*, 436 N.W.2d 92, 94 (Minn. 1989). Even if a search is conducted before an arrest, it is valid as incident to arrest "if (1) the arrest and the search are substantially contemporaneous, and (2) probable cause to arrest existed before the search." *State v. Cornell*, 491 N.W.2d 668, 670 (Minn. App. 1992) (quotation omitted).

Here, the district court concluded that the warrantless search of Mager's pants was justifiable as a search incident to arrest because it was reasonable for the officer to infer that Mager and his companions were engaged in a common enterprise to possess and later use the drugs that M.H. was carrying. The question we must therefore resolve is whether

there was probable cause to arrest Mager for possession of the illegal drugs and paraphernalia that were in M.H.'s backpack.

"A person may constructively possess contraband jointly with another person." *State v. Ortega*, 770 N.W.2d 145, 150 (Minn. 2009). Constructive possession requires (1) that the contraband be found in a place under the defendant's exclusive control or (2) "a strong probability, inferable from the evidence, that the defendant was, at the time, consciously exercising dominion and control over [the contraband]." *State v. Lee*, 683 N.W.2d 309, 316 n.7 (Minn. 2004). The latter form of proof requires that the arrestee "had knowledge of, and exercised dominion and control over [the contraband]." *See Maryland v. Pringle*, 540 U.S. 366, 372, 124 S. Ct. 795, 800 (2003). Mere proximity to criminal activity does not establish particularized probable cause to believe that a person is engaged in criminal activity. *Ortega*, 770 N.W.2d at 150.

The district court reasoned that the following facts establish probable cause to believe that Mager constructively possessed M.H.'s contraband: (1) the "central location" of the container of alcohol in the vehicle; (2) S.N.'s communication to Trooper Bearce that "something" illegal was in M.H.'s backpack; (3) S.N.'s knowledge of what was inside the backpack; (4) S.N.'s indication that both Mager and M.H. possessed some kind of contraband "in their pants"; and (5) the marijuana found on S.N. Mager argues that these circumstances are insufficient to permit the inference that Mager exercised dominion and control over M.H.'s backpack during the traffic stop. In support of his argument, Mager cites three cases, each of which is instructive to our inquiry.

In *State v. Slifka*, officers initiated a traffic stop and noticed an open alcohol container between the front two occupants. 256 N.W.2d 90, 90 (Minn. 1977). The officers searched the vehicle for evidence relating to the open-bottle violation and found marijuana in the glove box. As they were about to search a passenger, the officers observed him place controlled substances within the cushions of the squad car. *Id.* at 90-91. The Minnesota Supreme Court held that the attempted search of the passenger was unlawful because the circumstances were insufficient to establish probable cause to believe that the passenger constructively possessed the marijuana that was concealed in a closed glove compartment. *Id.* at 91.

In *Pringle*, an officer pulled over a car for speeding, searched the vehicle, and discovered five glassine baggies of cocaine in between the vehicle's backseat armrest and the backseat and almost $800 in cash in the glove box, for which none of the three vehicle occupants claimed ownership or possession. 540 U.S. at 367-68, 124 S. Ct. at 798. The United States Supreme Court held that the quantity of drugs and cash, in combination with the refusal by all occupants to offer any information about the ownership of the drugs and cash, indicated the likelihood of drug dealing and permitted the inference of a "common enterprise" to sell the discovered drugs. *Id.* at 372-73, 124 S. Ct. at 800-01. Based on this evidence, there was probable cause to believe any of the occupants constructively possessed the discovered cocaine. *Id.* at 372, 124 S. Ct. at 800.

In *Ortega*, an officer conducting a traffic stop observed "overly nervous" behavior on the part of the driver and smelled burnt marijuana in the vehicle. 770 N.W.2d at 147. In searching the vehicle with the driver's consent, the officer observed a rolled up dollar

bill with cocaine on it sitting in the center console cup holder. *Id.* at 148. The supreme court concluded that the unconcealed cocaine-laced dollar bill located in an area accessible to both occupants when combined with the odor of burnt marijuana established probable cause to arrest both vehicle occupants for cocaine possession. *Id.* at 151.

This case is analogous to *Slifka.* After initiating the traffic stop, Trooper Bearce observed an open container of alcohol between the two front seat passengers—the same location in *Slifka*. As in *Slifka*, Trooper Bearce found *concealed* contraband—marijuana on S.N. and methamphetamine, marijuana, and a pipe in M.H.'s backpack. But, unlike the circumstances in *Pringle*, M.H. explicitly claimed ownership of the backpack, and the backpack was situated between his feet, not in a more general area within the vehicle. Further, there is only one bag of contraband at issue here, unlike the five individual bags of cocaine for which no one claimed ownership. The large quantity of contraband, together with these other factors, permitted the inference of a common criminal enterprise in *Pringle*.

Unlike the cocaine-laced dollar bill located in an unconcealed location in *Ortega*, the circumstances here do not reasonably suggest that the contraband in M.H.'s backpack was common property of the vehicle's occupants or that anyone other than M.H. was exercising dominion and control over it. Even though the district court inferred from the evidence that there was a "partying" atmosphere in the vehicle, there was neither an implication, as in *Ortega*, that the group had control over and access to the contraband, nor indicia, as in *Pringle*, of a criminal enterprise that involved joint possession of the drugs stashed in the vehicle.

We further conclude that the district court based its decision, in part, on the clearly erroneous finding that M.H. "was not the only passenger aware of [the backpack's] contents." The record contradicts this finding. Trooper Bearce repeated throughout his testimony that S.N. "did not know" what was inside of M.H.'s backpack and that, before he opened it, "nobody knew what was in [it]." This evidence is uncontroverted. There is no evidence that either Mager, S.N., or the driver knew what was inside of M.H.'s backpack. The state's repeated assertion on appeal that S.N. had such knowledge is unfounded and misleading.

Based on the standards governing probable cause and constructive possession, the circumstances surrounding the vehicle search here do not establish probable cause to believe that Mager possessed the contraband belonging to M.H. The presence of the centrally located open container of alcohol, together with S.N.'s possession of marijuana and S.N.'s indications to Trooper Bearce that both Mager and M.H. were in possession of some kind of contraband, does not permit the inference that Mager knew M.H. was carrying methamphetamine and marijuana in his backpack. And even had Mager been aware of the backpack's contents, the circumstances do not imply that Mager exercised control over those items. *See Lee*, 683 N.W.2d at 316 n.7 (requiring both conscious and present dominion and control). Even when considered in light of the additional fact that three of the four vehicle occupants were carrying some type of contraband, S.N.'s communications to Trooper Bearce never posited that Mager and M.H. were engaged in the same type of wrongdoing, were complicit in a common criminal enterprise, or had joint possession of each other's contraband.

We conclude that the circumstances as a whole do not establish probable cause to arrest Mager for constructive possession of the contraband belonging to M.H. Without a basis for his arrest, the search of Mager's pants was unlawful, and the evidence obtained in that search was inadmissible. We therefore reverse the denial of Mager's suppression motion and the resulting convictions.

Reversed.