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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0431**

State of Minnesota,
Respondent,

vs.

Rory Alan Mysliwicz,
Appellant.

**Filed November 18, 2013
Affirmed
Stauber, Judge**

Hennepin County District Court
File No. 27CR10398

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

Paul D. Baertschi, Tallen and Baertschi, Minneapolis, Minnesota (for respondent)

James H. Leviton, Minneapolis, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Stauber, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

Appellant challenges his conviction of gross misdemeanor driving with a blood alcohol level above .08 in violation of Minn. Stat. § 169A.20, subd. 1(5) (Supp. 2009) and misdemeanor leaving the scene of an accident in violation of Minn. Stat. § 169.09,

subd. 2 (2008), following appellant's stipulation to the prosecution's evidence pursuant to Minn. R. Crim. P. 26.01, subd. 4. Appellant argues that the investigative stop leading to his arrest was unlawful because the police lacked reasonable, articulable suspicion that he was involved in criminal activity when he was seen walking with a limp near the scene of the accident. We affirm.

FACTS

On the evening of December 17, 2009, Officer Darcy Spong of the Robbinsdale Police Department was dispatched to the scene of an accident, reportedly involving a Dodge truck that was in a ditch. When Officer Spong arrived at the scene, she observed a gray Dodge truck that had struck a pole. The pole was lodged halfway into the engine block. Surveying the scene, Officer Spong also observed a white male standing in front of the truck, "kind of looking at the front of the truck, at the damage on the vehicle." The man walked away. Officer Spong observed no other individuals in the area. Officer Spong radioed her colleague, Sergeant Cody Foss, to look for a "white male wearing a black jacket with red writing on the back" heading south, away from the accident scene. Officer Spong then checked the vehicle to see if anyone was injured.

When Sgt. Foss arrived in the vicinity he observed an individual, later identified as appellant Rory Mysliwicz, who matched the description reported by Officer Spong. As he approached appellant, he noticed that appellant was walking with a limp. As Sgt. Foss turned a corner, he observed that appellant saw his marked squad car and turned the other way. Sgt. Foss activated the lights on his squad car and stopped appellant. As he neared appellant, Sgt. Foss observed that appellant had blood stains on his knees and a red

contusion on his forehead. Sgt. Foss also smelled “a strong odor of an alcoholic beverage emitting from his breath and person.” Sgt. Foss asked appellant if he knew why he was being stopped. Appellant replied, “yes.” Sgt. Foss then asked if appellant was the individual involved in the vehicle crash one block away. Appellant replied, “yes,” and admitted that he was the driver of the car. Sgt. Foss placed appellant in the back of his squad car and transported him back to the scene of the accident where an ambulance was waiting. Appellant refused medical treatment.

Officer Spong also observed that appellant had a “strong odor of an alcoholic beverage on his breath” and thus conducted a preliminary breath test (PBT). The PBT results showed that appellant had a high blood-alcohol concentration. Appellant was arrested and charged with driving while intoxicated and leaving the scene of an accident.

Appellant moved to suppress the evidence obtained from the investigatory stop, arguing that the stop was unlawful. The district court denied the motion, concluding that the stop was justified under the emergency exception because Sgt. Foss observed that appellant matched the description that Officer Spong gave him and because he was walking with a limp. The district court also concluded that the police had reasonable, articulable suspicion that appellant had been involved in the commission of a crime, and that the officers had probable cause to arrest appellant.

Following a *Lothenbach* hearing pursuant to Minn. R. Crim. P. 26.01, subd. 4, the district court found appellant guilty on both charges. This appeal followed.

DECISION

“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 Minnesota and U.S. Constitutions protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. There is no dispute that appellant was seized when Sgt. Foss turned on his squad lights, stopped appellant, and asked whether he was involved in the accident. An investigatory stop is reasonable “if an officer has a particular and objective basis for suspecting the particular person seized of criminal activity.” *State v. Harris*, 590 N.W.2d 90, 99 (Minn. 1999) (quotation omitted). “The officer may justify his decision to seize a person based on the totality of the circumstances and may draw inferences and deductions that might elude an untrained person.” *Id.* (quotation omitted). “However, a mere hunch, absent other objectively reasonable articulable facts, will not justify a seizure.” *Id.*

“In addition to suspicion of criminal activity, an exception to the protections against warrantless seizures and searches exists for emergency situations.” *State v. Lopez*, 698 N.W.2d 18, 23 (Minn. App. 2005). There is a two-part test to determine whether the emergency exception applies: “(1) is the officer motivated by the need to render aid or assistance; and (2) under the circumstances, would a reasonable person believe that an emergency existed.” *Id.*

Appellant argues that the district court erred by concluding that the emergency exception applied to the investigatory stop because Sgt. Foss only observed appellant limping, and a limp is not a sufficient basis for an emergency. But Sgt. Foss testified that he stopped appellant because appellant matched the description of the person seen near the crash, he was the only person in the area, and because he had a limp which was consistent with injuries that could have been sustained in the crash. And Sgt. Foss testified that, after seeing the wreckage of the car, he was concerned that the driver of the car would have injuries. Considering the totality of the circumstances, it was not erroneous to conclude that a legitimate concern for appellant's welfare existed to justify the stop under the emergency exception. *See Lopez*, 698 N.W.2d at 24 (concluding that an investigatory stop was justified where defendant was found unconscious in a car).

Appellant also argues that the police lacked reasonable, articulable suspicion that he was involved in criminal activity to justify the stop. “[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has reasonable, articulable suspicion that criminal activity is afoot.” *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotation omitted). The standard for reasonable suspicion is “not high.” *Id.* (quotation omitted). It is less than what is required for probable cause or preponderance of the evidence. *Id.* But police “must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity.” *Id.* (quotations omitted).

Appellant argues that the investigatory stop was based on Officer Spong's mere “hunch” that appellant was involved in the accident. But Officer Spong testified that she

saw appellant “standing in front of the truck, sitting—it appeared he was kind of looking at the front of the truck, at the damage on the vehicle.” There were no other people in the area. And Sgt. Foss later observed the same person—appellant—walking away from the scene with a limp that was consistent with an injury that could have been sustained in the wreck. Based on the totality of the circumstances we conclude that there were sufficient articulable facts to justify the stop: appellant was the only person around, he was viewed inspecting the wrecked truck, he was then stopped less than a block from the scene, walking with a limp consistent with injuries he could have sustained from the crash. Therefore, the district court did not err by concluding that the stop was justified.

Affirmed.