STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2331

State of Minnesota,
Respondent,

vs.

Frank Lucellerson Tubbs,
Appellant.

Filed April 22, 2008
Affirmed
Hudson, Judge

Ramsey County District Court
File No. K1-06-1560

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101; and

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, Minnesota 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Paul J. Maravigli, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Toussaint, Presiding Judge; Hudson, Judge; and Worke, Judge.

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

HUDSON, Judge

Appellant argues that the district court erred by denying his motion to suppress and that his conviction must be reversed because (1) the police officer illegally stopped appellant; (2) the police officer exceeded the scope of a lawful stop; and (3) the police officer did not have probable cause to arrest appellant. Because the police officer had reasonable suspicion sufficient to justify appellant's stop, the officer's actions were not unreasonable, and the officer had probable cause sufficient to justify appellant's arrest, we affirm.

FACTS

In April 2006, the St. Paul Police Department received a tip with a report of a gunshot fired in the alley behind 514 Minnehaha Avenue West in St. Paul.[1] The tipster told the police that he or she had seen "a black male, 30 to 40 years old, wearing a white T-shirt and glasses . . . firing one shot in the alley behind 514 Minnehaha." A police officer who was nearby was alerted and arrived at the scene in "not more than a minute."

When the officer arrived he saw a group of 10 to 20 people barbecuing by a detached garage near 514 Minnehaha. The officer asked whether any of the people had any information about the gunshot that had been reported, but no one offered the officer any additional information.

[1] It appears that although the caller requested to remain anonymous, he or she may have given the police some sort of self-identifying information since the arresting officer's report states that after the incident, he was able to "sp[eak] with the concerned citizen who originally called police."

The officer returned to his squad car, drove briefly around the neighborhood, and stopped in the alley behind 514 Minnehaha to review the information he had received about the call. As the officer was sitting in his car, he "saw a person matching the suspect description—black male, 30 to 40 years old, wearing a white T-shirt and glasses—walk around the southeast corner of that detached garage." The officer stated that "[the man] came around the garage, he was walking towards the squad car, didn't appear to immediately notice the [squad] car, but within seconds, and just in the normal course of walking, looked up and saw the squad car." The man, later identified as appellant Frank Lucellerson Tubbs, then stopped walking and turned away from the squad car.

The officer later testified that appellant's turning away from the squad car was significant to him because "normally, when people do avoid us, it's because they're attempting to hide something, preparing to flee. Generally, when someone avoids us, they have done something they don't want us to discover." But the officer also stated that "[h]ad he not turned away and just been in the area, with the close match of the suspect description, I still would have talked to him."

After appellant turned around, the officer got out of his car in order to investigate and "try and quickly establish control over [appellant]." The officer ordered appellant to walk towards him and appellant complied. The officer explained, "[a]s he walked towards me . . . I asked him to put his hands up behind his head, for two reasons: One so he wouldn't suddenly reach anywhere; and two, so—I was beginning to put him into a position which I would frisk him for weapons." The officer stated that he wanted to frisk

appellant "[b]ecause of the nature of the call, shots fired; because he matched the suspect description; and because of his initial seemingly startled response when he first noticed the marked police car."

As appellant walked towards the officer, the officer "[did] a visual frisk or search of him, just looking him over" and "noticed in his right front pocked there was an item, something large enough to be seen in the pocket." When appellant reached the officer, the officer asked him whether he had a weapon on him. Appellant admitted that he did have a weapon. The officer testified that while he was asking appellant whether he had a weapon, he was "holding [appellant's] hands up behind his head." The officer then handcuffed appellant "before I actually started the frisk, and I completed the frisk and recovered a weapon before having much further conversation with him." The officer then placed appellant in the squad car. The police officer observed that appellant "smelled like alcohol, and from the way he was talking and the smell of alcohol, it seemed like he was quite drunk."

The weapon was later identified as .380 Bersa Thunder handgun, which was loaded and "[t]he safety was in the 'fire' position, the chamber was empty." The officer also found a .380 bullet casing near the garage at 514 Minnehaha. Appellant was arrested for reckless discharge of a firearm and ineligible person in possession of a firearm. While being interviewed later that same day, appellant admitted to possessing the gun and said he needed it "because people are after him." Appellant also admitted firing the gun one time into the air "because he was being stupid."

Two days later appellant was charged with ineligible person in possession of a firearm in violation of Minn. Stat. § 624.713, subd. 1(b) (2004), and failure to register as a predatory offender in violation of Minn. Stat. § 243.166, subd. 5(a) (2004). The charge of failure to register was later dismissed.

Appellant moved for suppression of evidence of the gun obtained as a result of the search and seizure, statements made by him, and any evidence resulting therefrom. Appellant also moved for dismissal of the charge, arguing that there was insufficient probable cause for arrest.

The district court heard arguments on the motion at a *Rasmussen* hearing. Following testimony by the arresting officer and arguments by the parties, the district court denied appellant's motion to suppress, and, from the bench, stated that "[g]iven the totality of the circumstances, the [appellant's] appearance and actions, [the police officer] had a duty to investigate and had reasonable, articulable suspicion of criminal activity that was corroborated by the physical appearance and actions of [appellant.]" The district court also concluded that "[t]he nature of the call warranted [the police officer's] actions in investigating and stopping individuals at the scene to question them. In the interest of officer's safety, [the police officer] did have a justifiable, reasonable, and articulable basis to question [appellant] about the object in his pocket" and that "[e]ven if the call that went in to dispatch was an anonymous tip, [the police officer] had a duty to investigate in the interest of public safety; and, therefore, the stop was justified."

A few weeks later, the district court held a hearing on a motion by appellant to reduce his bail. The district court denied the motion. Almost immediately afterward,

appellant's attorney indicated that appellant wanted to proceed pursuant to *State v. Lothenbach*, 296 N.W.2d 854, 858 (Minn. 1980) (authorizing the submission of a criminal case for a court trial based on stipulated facts, rather than the entry of a guilty plea, to preserve the defendant's right to appeal pretrial decisions regarding the suppression of evidence). The district court took a short recess to allow appellant to consult with his attorney, then began the *Lothenbach* proceeding. After being questioned by his attorney, appellant signed a form waiving his right to a jury trial. The district court convicted appellant of possession of a firearm by an ineligible person. Several weeks later, the district court denied appellant's motion for a dispositional and/or durational downward departure and sentenced appellant to 60 months. This appeal follows.

D E C I S I O N

An appellate court reviewing a pretrial ruling on a motion to suppress "may independently review the facts and determine whether, as a matter of law, the district court erred in suppressing or not suppressing the evidence." *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004). A district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to conduct a warrantless search are reviewed de novo. *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999).

A. The stop

Appellant first argues that the police officer did not have reasonable suspicion sufficient to justify his stop. We disagree.

In order to make a legal investigatory stop or seizure, Minnesota law requires that the police must be able to show a reasonable suspicion based on "specific and articulable

facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968)); *see also State v. Balenger*, 667 N.W.2d 133, 137 (Minn. App. 2003) (stating that an investigatory stop, a *Terry* stop, and a seizure are the same things), *review denied* (Minn. Oct. 21, 2003). Reasonable suspicion requires "more than an unarticulated hunch, [and] that the officer must be able to point to something that objectively supports the suspicion at issue." *Davis*, 732 N.W.2d at 182 (quoting *State v. Wasson*, 615 N.W.2d 316, 320 (Minn. 2000)).

When determining whether reasonable suspicion exists, the "totality of the circumstances" should be considered. *Id.* Articulable, objective facts that would justify an investigatory stop are "facts that, by their nature, quality, repetition, or pattern become so unusual and suspicious that they support at least one inference of the possibility of criminal activity . . . ." *State v. Schrupp*, 625 N.W.2d 844, 847–48 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). But our supreme court has stated that trained police officers are entitled to draw "inferences and deductions that might well elude an untrained person," and that in some circumstances, even "innocent activity might justify the suspicion of criminal activity." *State v. Johnson*, 444 N.W.2d 824, 826 (Minn. 1989). A police officer must only show "that the stop was not the product of mere whim, caprice or idle curiosity . . . ." *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). The requisite showing for reasonable, articulable suspicion is "not high." *Davis*, 732 N.W.2d at 182 (quoting *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S. Ct. 1416, 1422 (1997)).

Based on the totality of the circumstances, we conclude that the police officer had reasonable suspicion sufficient to justify appellant's stop.

First, we note that "[o]rdinarily, uncorroborated anonymous tips provided by private citizens are sufficient to justify an investigative stop because the reliability of the tipster may be presumed." *Balenger*, 667 N.W.2d at 138. Here, the tipster provided a detailed description of the suspect, his approximate location, and stated that he or she had witnessed the suspect shooting the gun. And the nature of the call—a report of a gunshot—also provides support for the stop of appellant. This court has stated that "[t]he element of imminent danger distinguishes a tip that a person is armed from one involving, for example, the possession of drugs." *Id*. (noting that "[s]ome federal courts have concluded that officers receiving an anonymous tip that a person is armed are almost invariably justified in conducting an investigative stop"). Additionally, as noted above, it is not clear from the record that the tip was actually anonymous because the arresting police officer's report clearly indicates that he was able to talk with the original tipster after the arrest and get more information from him or her.

Second, the tip described a black male, 30- to 40- years old, wearing a white T-shirt and glasses in the vicinity of 514 Minnehaha. The police officer responded to the scene quickly and shortly thereafter saw an individual who matched every aspect of that description. We conclude that the district court did not err by concluding that the police officer had reasonable, articulable suspicion sufficient to justify the stop. *See, e.g.*, *Appelgate v. Comm'r of Pub. Safety*, 402 N.W.2d 106, 108–09 (Minn. 1987) (holding that an investigatory stop of a motorist found in the vicinity of a recently reported

burglary was justified even though the police officer had no description of the burglar or the vehicle).

"Unduly intrusive police conduct may, but does not automatically, transform an otherwise legitimate investigative stop into an unlawful arrest." *Balenger*, 667 N.W.2d at 139. But "the use of reasonable force is almost invariably justified in cases involving persons suspected of being armed." *Id*. at 139–40 (noting that "the trend has been to grant[] officers greater latitude in using force in order to neutralize potentially dangerous suspects during an investigatory [stop]" (quotation omitted)).

Here, the police officer was acting on the basis of a report of an armed person who had discharged a firearm in public. After responding to the scene, the police officer saw appellant, who matched every aspect of the description given by the tipster, and noticed something that may have been a weapon in appellant's pocket. And appellant himself admitted to the police officer that he was armed. When the police officer physically restrained appellant, he was acting in the interest of both his own safety and that of the public. Based on these circumstances, the amount of force used by the police officer to effectuate the stop was not unreasonable. *See Cady v. Dombrowski*, 413 U.S. 433, 447, 93 S. Ct. 2523, 2531 (1973) (stating that fact that officers' and public's safety might be accomplished by less-intrusive means does not, by itself, render search unreasonable).

B. The arrest

Appellant argues that the police officer did not have probable cause to arrest him. We disagree.

Probable cause for arrest is assessed by considering the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 230–31, 103 S. Ct. 2317, 2328 (1983); *State v. Perkins*, 582 N.W.2d 876, 878 (Minn. 1998). "Probable cause exists where the facts would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person under consideration is guilty of a crime." *State v. Carlson*, 267 N.W.2d 170, 173 (Minn. 1978). The analysis depends on the individual facts and circumstances of the case and should not be "unduly technical." *Id.* at 173–74. In Minnesota, it is a felony to "recklessly discharge[ ] a firearm within a municipality." Minn. Stat. § 609.66, subd. 1a(a)(3) (2004).

Here, appellant matched the description of the suspect provided by the tipster, both in terms of location and physical characteristics, and appellant admitted to the police officer that he was carrying a weapon. Based on the totality of the circumstances, we conclude that the police officer had probable cause sufficient to support appellant's arrest.

Affirmed.