STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0350

State of Minnesota,
Respondent,

vs.

Jimmy Wade Hollins,
Appellant.

Filed May 20, 2008
Affirmed; motion granted
Shumaker, Judge

Dakota County District Court
File No. K9-06-444

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

James C. Backstrom, Dakota County Attorney, Debra E. Schmidt, Assistant County Attorney, Dakota County Government Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Willis, Presiding Judge; Shumaker, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

SHUMAKER, Judge

Appellant challenges the district court's pretrial order denying his motion to suppress evidence seized during a warrantless search of his impounded vehicle. Appellant also challenges his conviction of being an ineligible person in possession of a firearm as unsupported by sufficient evidence. We affirm and grant respondent's motions to strike portions of appellant's briefs and appendices.

FACTS

On October 7, 2005, police officers responded to a report that a woman, later identified as Dianna Jones, entered a gas station with a bleeding hand, asked the clerk to call the police, and then left in a van. From the clerk's description of the van and the direction it traveled, officers identified and stopped the van at a second gas station. Officers interviewed the driver, identified as appellant Jimmy Wade Hollins, and the female passenger, Jones. Although Jones was crying and complained of a broken finger, officers determined that they did not have enough information to arrest appellant. Officers then learned that appellant owned the van but that he did not have a valid driver's license. Because no one present could drive the van, it was searched[1] and towed to an impound lot. Officers did not find any contraband and did not place the van under a hold.

Based on Jones's statements that she was scared of appellant and feared for her safety and that of her children, officers told appellant that he was not to go back to

[1] Appellant does not challenge this inventory search.

Jones's residence. Appellant had arranged for a ride, but when it arrived, he left the gas station on foot. Officers went to Jones's residence and saw appellant near her house. Appellant ran into a wooded area and officers were unable to locate him.

While officers waited with Jones at her residence until her ride arrived, she told them that appellant had a handgun with him when they left Jones's house that night. Jones said that appellant concealed the gun, along with a camouflaged holster, in the van under the carpeted floor on the front passenger side. Jones also put on a jacket that she said belonged to appellant, and withdrew from a pocket a baggie containing .38-caliber ammunition, which she turned over to the officers.

Based on this information, an officer went to the impound lot and, without a warrant, conducted a second search of the van. He found a .38-caliber handgun with a camouflaged holster in the exact location that Jones had described. Upon investigation, officers discovered the appellant had previous felony convictions. Officers also found that the handgun was not stolen, but could not determine the current or registered owner and could not identify any usable fingerprints.

Appellant was charged with being an ineligible person in possession of a firearm, in violation of Minn. Stat. § 624.713, subd. 1(b) (2004). Before trial, appellant moved to suppress evidence of the handgun, arguing that the second search of his impounded vehicle "required either a warrant or another recognized exception to the warrant requirement." The district court denied appellant's motion, concluding that the handgun "could have been a threat to public safety" because, although the vehicle was in a locked

impound lot, it was not secure, it was not under a police-hold, and appellant had access to it.

At trial, Jones recanted her previous statements to officers and denied saying anything regarding appellant's gun or its location. Appellant argued in closing that Jones could have planted the handgun to frame appellant and pointed to the absence of any physical evidence tying appellant to the handgun or the ammunition. The jury found appellant guilty of being an ineligible person in possession of a firearm.

Before sentencing, appellant moved for a judgment of acquittal on the basis that the circumstantial evidence presented a reasonably strong inference that Jones planted the handgun. Appellant also moved for a new trial on the bases that the warrantless search of appellant's van was illegal, and that a letter allegedly written by Jones and delivered to appellant after his trial stated that Jones had lied to the officers. The district court denied both motions, and sentenced appellant to 60 months in prison. This appeal followed.

D E C I S I O N

1. *Pretrial suppression order*

Appellant asserts that evidence of the handgun should have been suppressed because the second, warrantless search of his impounded vehicle violated his constitutional right to be free of unreasonable searches or seizures. "[W]hen reviewing a pre-trial order suppressing evidence where the facts are not in dispute and the [district] court's decision is a question of law, the reviewing court may independently review the facts and determine, as a matter of law, whether the evidence need be suppressed." *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

The Fourth Amendment to the United States Constitution and Article I, Section 10 of the Minnesota Constitution prohibit unreasonable searches and seizures. *State v. Burbach*, 706 N.W.2d 484, 487-88 (Minn. 2005). "Warrantless searches 'are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *State v. Hardy*, 577 N.W.2d 212, 216 (Minn. 1998) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)). If police conduct a warrantless search, "[t]he state bears the burden of showing that at least one exception applies, or evidence seized without a warrant will be suppressed." *State v. Metz*, 422 N.W.2d 754, 756 (Minn. App. 1988).

Appellant argues that the district court erred in concluding that the search fell within "a public safety exception" under *New York v. Quarles*, 467 U.S. 649, 104 S. Ct. 2626 (1984). Appellant is correct that *Quarles* did not establish a public-safety exception to the Fourth Amendment warrant requirement. Rather, *Quarles* established a public-safety exception to the Fifth Amendment privilege against self-incrimination, which allows police officers, under certain exigent circumstances, to ask necessary questions of a suspect before giving *Miranda* warnings. 467 U.S. at 657-8, 104 S. Ct. at 2632. Notably, the Supreme Court recognized that the concern for public safety precluding rigid adherence to *Miranda* rules is rooted in the "long recognized [] exigent-circumstances exception to the warrant requirement in the Fourth Amendment context." *Id*. at 653 n.3, 104 S. Ct. at 2630 n.3.

Although the district court misidentified the applicable exception, its conclusion suggests that it found that exigent circumstances existed to support the officer's

warrantless search. According to the state, the facts as the officers knew them that night created an exigency that "justified the search for the gun without delay." But there is no separate exigency requirement when probable cause exists to search a vehicle without first obtaining a warrant. *Maryland v. Dyson*, 527 U.S. 465, 466, 119 S. Ct. 2013, 2014 (1999). Under the automobile exception, "[a] law enforcement officer may make a warrantless search of an automobile when there is probable cause to believe the vehicle contains contraband." *State v. Pederson-Maxwell*, 619 N.W.2d 777, 780 (Minn. App. 2000). The issue in this case is whether the officers had probable cause to conduct a second search of appellant's impounded vehicle.

Probable cause to search an automobile is shown if "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985). Probable cause "exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a reasonable man of reasonable caution in the belief that the automobile contains articles the officer is entitled to seize." *State v. Gallagher*, 275 N.W.2d 803, 806 (Minn. 1979). A determination of probable cause relating to warrantless searches is subject to de novo review. *In re Welfare of G.M.*, 560 N.W.2d 687, 690 (Minn. 1997).

"The probable-cause standard is an objective one that considers the totality of the circumstances." *State v. Johnson*, 689 N.W.2d 247, 251 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. Jan. 20, 2005). The facts as known to the officers on October 7, 2005, included an alleged altercation between appellant and Jones during

which Jones apparently asked for police help. Officers found Jones crying, and she told them she feared for her safety. Officers told appellant to stay away from Jones's house, but when they later saw him nearby, appellant fled the area. While officers were at Jones's house, she produced what she said was appellant's jacket containing a baggie of ammunition, and she gave police a detailed description of a handgun hidden in appellant's vehicle. The officer who conducted the second search stated that he did so because "even though the impound lot was locked it was not secure in a way which would prohibit anyone from entering the fenced area to get into the van to get the handgun."

Under the totality of these circumstances, the officers' decision to conduct a warrantless search of the impounded vehicle was not unreasonable. "[I]f the search is objectively reasonable, then the search is lawful . . . ." *State v. Everett*, 472 N.W.2d 864, 867 (Minn. 1991). Furthermore, a valid warrantless search is not rendered unreasonable "even though the automobile was in police custody and even though a prior inventory search had already been made." *Florida v. Myers*, 466 U.S. 380, 382, 104 S. Ct. 1852, 1853 (1984). Given Jones's detailed description of how the weapon was concealed, police had probable cause even though the earlier search had turned up nothing. Thus the district court did not err in denying appellant's motion to suppress, as the search was supported by probable cause and valid under the automobile exception.

2. *Sufficiency of the evidence*

Appellant asserts that the circumstantial evidence presented at trial was insufficient to prove he possessed the handgun found in his vehicle. Circumstantial

evidence is "based on inference and not on personal knowledge or observation." *Black's Law Dictionary* 595 (8th ed. 2004). A conviction based on circumstantial evidence "will be upheld if the reasonable inferences from such evidence are consistent only with the defendant's guilt and inconsistent with any rational hypothesis except that of his guilt." *State v. Anderson*, 379 N.W.2d 70, 75 (Minn. 1985). This court will affirm the jury's verdict "only if the circumstantial evidence forms a complete chain which, in light of the evidence as a whole, leads directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilt." *State v. Laine*, 715 N.W.2d 425, 430-31 (Minn. 2006) (quotation omitted). Because a jury is generally in the best position to evaluate circumstantial evidence, its "verdict is entitled to due deference." *State v. Berndt*, 392 N.W.2d 876, 880 (Minn. 1986).

In order to prove that appellant violated section 624.713, the state had to show that he constructively possessed the handgun found in his vehicle. To establish constructive possession, the state must show either

> (a) that the police found the [item] in a place under defendant's exclusive control to which other people did not normally have access, or (b) that, if police found the item in a place to which others had access, there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it.

State v. Florine, 226 N.W.2d 609, 611 (Minn. 1975). Constructive possession need not be exclusive and may be shared. *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). Also, "[p]roximity is an important consideration in assessing constructive possession." *Id.*

As the state describes in its brief, the jury heard evidence sufficient to support appellant's conviction. Appellant owned the van for approximately six weeks before the night in question. Appellant had been at Jones's house earlier in the day. Jones had appellant's jacket and produced a baggie containing .38-caliber ammunition. Jones described in detail the appearance and location of the handgun, and an officer found the handgun concealed under the carpeted floor of the front passenger seat of appellant's van, exactly where and how Jones described it. The driver had access to the handgun, when concealed, from the driver's seat. And Jones did not have an opportunity to plant the handgun once she was approached by officers at the gas station.

On appeal, appellant reiterates the arguments he made at trial. He argues that the evidence permits a reasonably strong inference that Jones framed appellant, pointing to the lack of physical evidence and Jones's testimony denying any knowledge of appellant's gun or its location. But despite these alternative theories, the jury found appellant guilty of being an ineligible person in possession of a firearm. Viewing the evidence in a light most favorable to the verdict leads to only one reasonable inference: on October 7, 2005, Hollins had constructive possession of a handgun hidden in the floor of his vehicle. Thus the evidence presented at trial was sufficient to support appellant's conviction.

3. *Appellant's pro se arguments*

Appellant first argues that he is entitled to a new trial because newly discovered evidence shows that Jones set him up. At sentencing, appellant submitted a letter, purportedly written by Jones and delivered to appellant after his conviction, stating that

Jones lied to the police on the night in question. The district court heard counsel's arguments regarding the authenticity of the letter and concluded that it did not warrant a new trial.

A new trial based upon newly discovered evidence may be granted when a defendant proves

> (1) that the evidence was not known to the defendant or his/her counsel at the time of the trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative, impeaching, or doubtful; and (4) that the evidence would probably produce an acquittal or a more favorable result.

Rainer v. State, 566 N.W.2d 692, 695 (Minn. 1997). At trial, appellant argued that Jones lied to police and planted the handgun to frame him. Because its substance was known at trial, the letter, even if written by Jones, does not warrant a new trial.

Appellant next argues that he received ineffective assistance of counsel for a number of reasons, all without merit. Contrary to appellant's claim that his attorney failed to submit a memorandum in support of his motion to suppress evidence, the record shows that appellant's attorney did submit a letter brief to the district court. The record also rebuts appellant's claim that his attorney did not cross-examine Jones at trial, revealing instead that appellant's attorney was appropriately brief in questioning Jones, who had recanted her prior incriminating statements on direct examination.

Appellant also argues that his constitutional right to an unbiased jury was violated. Appellant did not raise this issue before the district court, so there is no record to review.

Failure to raise issues before the district court constitutes waiver of those issues on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

The rest of appellant's pro se arguments are repetitive and without merit.

4. *The state's motions to strike*

The state moves to strike certain pages in appellant's brief and appendix. Because the challenged pages refer to unrelated incidents between appellant and Jones that have no bearing on the matters challenged on appeal, the state's motion as to these pages is granted.

The state also moves to strike certain pages in appellant's pro se supplemental brief and appendix. Because the challenged pages contain material that was not included in the district court record and is otherwise irrelevant to the arguments on appeal, the state's motion as to these pages is also granted.

Affirmed; motion granted.