STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0429

State of Minnesota,
Respondent,

vs.

Tony C. Perry,
Appellant.

Filed April 22, 2008
Reversed and remanded
Halbrooks, Judge

Scott County District Court
File No. CR-06-21912

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

Patrick J. Ciliberto, Scott County Attorney, Michael J. Groh, Assistant County Attorney, Scott County Justice Center, 200 West Fourth Street, Shakopee, MN 55379 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

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

HALBROOKS, Judge

Appellant challenges his conviction of a fifth-degree violation of Minn. Stat. § 152.025, subd. 2(1) (2006), on the ground that the district court erred in denying his motion to suppress the evidence of drugs found on his person during an investigatory stop. Appellant contends that the police lacked reasonable articulable suspicion to support his seizure. Alternatively, appellant argues that even if the seizure was proper, the expansion of the scope of the seizure lacked justification. Because we conclude that the seizure that led to discovery of the drugs was improper, we reverse and remand.

FACTS

At approximately 1:15 a.m. on September 10, 2006, police dispatch advised Officer Jonathan Wamsley of a report of a suspicious vehicle with three occupants that had been parked for 20 minutes in the area of 130/131 Valley Green Trailer Park, in Jordan. A female caller had informed police dispatch that a black male had approached her residence, looking for a woman who did not live at that address.

Officer Wamsley responded to the call and observed that the parked vehicle had no lights on. Officer Wamsley drove up to the parked vehicle with his headlights off but then turned his spotlight on the vehicle. Once the spotlight was on, Officer Wamsley stated that the occupants made what he described as "furtive" movements.

Officer Stolee next arrived on the scene, and both officers approached the vehicle. Officer Wamsley walked up to the passenger's side as Officer Stolee approached the driver's side. Officer Wamsley asked the front-seat passenger to step out of the vehicle.

The front-seat passenger identified himself as Dustin Deutscher. Officer Wamsley conducted a pat-down search of Deutscher and found no weapons or contraband. When asked what they were doing in the area at 1:15 in the morning, Deutscher told Officer Wamsley that they were looking for a female they had brought to the area who had not yet returned to the car. Because Deutscher could not produce identification, Officer Wamsley placed him in the back seat of his squad car. Officer Wamsley subsequently verified Deutscher's identity through the driver's vehicle services website.

Officer Wamsley left Deutscher in the back seat of the squad car and returned to speak with appellant Tony Perry, who was seated in the rear passenger seat. Officer Wamsley asked appellant to step out of the vehicle and to provide identification. Appellant was also patted down, and Officer Wamsley found no weapons. When Officer Wamsley asked appellant why he was in the car at this location at 1:15 a.m., appellant's explanation was consistent with the one provided by Deutscher. Appellant produced his driver's license, and Officer Wamsley directed him to sit on the ground while he ran a warrant check on appellant.

Officer Wamsley subsequently ran warrant checks on both Deutscher and appellant and discovered that Deutscher had an outstanding warrant for his arrest in Le Sueur County. Appellant also had an outstanding warrant from the department of corrections. As a result, both appellant and Deutscher were placed under arrest and searched. Officer Wamsley found methamphetamine in his search of appellant. Both Deutscher and appellant were transported to the Scott County jail.

Appellant was charged with one count of a controlled-substance crime in the fifth degree. Before trial, appellant moved to suppress the methamphetamine. Following a contested omnibus hearing, the district court issued an order denying appellant's motion to suppress. Appellant was found guilty of the charged offense following a stipulated-facts *Lothenbach* procedure. The district court sentenced appellant to 19 months in prison but stayed the sentence and placed appellant on probation for five years. This appeal follows.

D E C I S I O N

Appellant argues that the district court erred in concluding that police had sufficient reasonable suspicion to support the seizure and search of appellant that led to the discovery of methamphetamine. We review a district court's determination regarding the legality of a stop based on reasonable suspicion de novo. *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999); *Gerding v. Comm'r of Pub. Safety*¸ 628 N.W.2d 197, 199 (Minn. App. 2001), *review denied* (Minn. Aug. 15, 2001).

Generally, warrantless seizures and searches are per se unreasonable under both the U.S. Const. amend. IV and the Minn. Const. art. I, § 10, subject to a few carefully delineated exceptions. *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005). An investigative stop or seizure must be supported by reasonable suspicion. *State v. Pike*, 551 N.W.2d 919, 921-22 (Minn. 1966). A person is seized for constitutional purposes when the totality of the circumstances suggests that a reasonable person would believe that he or she is not free to disregard police questions or terminate a police encounter. *State v. Johnson*, 645 N.W.2d 505, 509 (Minn. App. 2002). A limited investigative stop

by the police for the purpose of investigating suspected criminal activity is one delineated exception to the warrant requirement and is commonly known as a *Terry* stop. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968)).

Police are permitted to make a *Terry* stop if they have a reasonable and articulable suspicion that a person is engaged in criminal activity. *Id.* The "principles and framework of *Terry* [apply when] evaluating the reasonableness of [searches and] seizures during traffic stops even when a minor law has been violated." *Flowers*, 734 N.W.2d at 251 (alteration in original) (quotation omitted). A seizure for investigatory purposes is not unreasonable if an officer has a particular and objective basis for suspecting criminal activity by the person who has been seized. *State v. Harris*, 590 N.W.2d 90, 99 (Minn. 1999). But a hunch without other objectively reasonable facts will not justify a warrantless seizure. *Id.*

The district court found that Officer Wamsley had reasonable articulable suspicion to stop appellant. The district court also determined that appellant was seized when Officer Wamsley asked him to step out of the vehicle and took his identification to run checks on it. *Johnson*, 645 N.W.2d at 510. Noting that the female caller reported a "suspicious vehicle," the district court concluded that appellant was present at the scene in an atypical manner. The fact that the particular area where appellant was parked was a high crime area of Valley Green Trailer Park was also cited as support for appellant's seizure. Finally, the district court noted Officer Wamsley's statements that appellant made "furtive" movements when a spotlight was shined on him.

The dispatcher's transmittal of the report of a suspicious vehicle parked outside of the caller's home was confirmed when Officer Wamsley arrived on the scene. Wamsley testified that he purposefully questioned Deutscher and appellant separately because he prefers to hear individual accounts rather than group explanations. Presumably this is so he can ensure a more accurate assessment of the truth. But both appellant and Deutscher's explanations were consistent with the female caller's statement that the individuals in the parked vehicle said that they were waiting for an unnamed woman who they had left at this location earlier in the evening.

The actions of the police must be reasonably related to and justified by the circumstances that give rise to the stop itself. *Flowers*, 734 N.W.2d at 251. If the officer expands the scope of the stop to other suspected illegal activity, the officer must have reasonable articulable suspicion of that additional criminal activity. *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002).

Merely questioning appellant and Deutscher about their reasons for being in the area is not a seizure. *In re Welfare of E.D.J.*, 502 N.W.2d 779, 782 (Minn. 1993) (stating that "*generally* the mere act of approaching a person who is standing on a public street or sitting in a car that is parked and asking questions is not a 'seizure'"). While the time of day, location, and call to police dispatch provided articulable suspicion to investigate the vehicle, that minimal suspicion should have dissipated when appellant and Deutscher provided their separately confirmed explanations that indicated noncriminal behavior. *See Pike*, 551 N.W.2d at 922 (holding where an officer gathers facts which render suspicion of criminal activity unreasonable the investigatory stop is unconstitutional).

Appellant provided Officer Wamsley with his driver's license, which confirmed his identity. At that point, there was no reasonable basis to have expanded the initial purpose of the investigative inquiry with respect to appellant. We agree with the district court that appellant was seized when Officer Wamsley took his license to run a warrant check on it, but without a reasonable basis to do so. We conclude that the seizure was improper. *See Johnson*, 645 N.W.2d at 510 (holding a passenger in a stopped vehicle was seized when a police officer took his Minnesota ID card to run a warrant check).

The district court's reliance on *Thomeczek v. Comm'r of Pub. Safety*, 364 N.W.2d 471 (Minn. App. 1985), is misplaced. In *Thomeczek*, a police officer noticed a vehicle parked in front of a vacant lot in a residential development. 364 N.W.2d at 471-72. The vehicle's motor was running and its lights were on. *Id.* at 472. The officer suspected that the driver either needed assistance or was involved in some wrongdoing. *Id.* When the officer parked, got out of his squad car, and began to walk up to the vehicle, it started moving slowly forward. *Id.* The officer then signaled for the vehicle to stop, and when the defendant stepped out of his vehicle, he was unsteady and had slurred speech. *Id.*

We held that the officer's inquiry to the driver was reasonable because the officer regarded the behavior of the defendant as unusual. *Id.* But in this case, appellant did nothing to create suspicion after Officer Wamsley approached the car. Appellant and the other occupants of the car provided a reasonable and lawful explanation for their behavior. Because the officers had no other indicia of criminal activity, the investigation should have concluded at that point.

The state also relies on *State v. Fish* to support its contention that "[i]t is not only the right but the duty of police officers to investigate suspicious behavior, both to prevent crime and to apprehend offenders." 280 Minn. 163, 167, 159 N.W.2d 786, 789 (1968). But the supreme court further stated in *Fish* that "[o]f course, the right of police officers to stop a suspicious person does not extend to a right of search in the absence of probable cause." *Id.*

Like *Thomeczek*, *Fish* is factually distinguishable from this case. In *Fish*, officers were following a vehicle that they saw leaving a bar and general store at 2:30 a.m.—well after the establishment had closed for the evening. *Id.* at 164, 159 N.W.2d at 788. After following the car for a few blocks, officers stopped it and asked the driver to produce a license. *Id.* He was unable to do so. *Id*. The officers also noted a bow and quiver in the vehicle that resembled one that was publicly displayed at the bar the vehicle had just left. *Id.* at 165, 159 N.W.2d at 788. The officers detained the driver in order to check the status of his license, and while they were doing so, received a call from police dispatch that the bar that the vehicle had just left had been burglarized that evening. *Id.* In reaching its holding, the supreme court did not question the officer's ability to stop and investigate the identity of the occupants of the vehicle but concluded that probable cause for the arrest and search "arose from a sequence of events" that occurred before the officers had concluded their investigation. *Id.* at 169, 159 N.W.2d at 791. Here, the officers had no such sequence of events until long after the suspicion of criminal activity should have been dispelled.

Because we hold that appellant's seizure was improper, we do not address the expansion of the scope of the search that ultimately led to appellant's arrest and the discovery of the methamphetamine. The district court erred in denying appellant's motion to suppress the methamphetamine.

Reversed and remanded.