STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1369

State of Minnesota,
Appellant,

vs.

Rasheem Akeem Figaro,
Respondent.

Filed January 29, 2008
Affirmed
Kalitowski, Judge

Ramsey County District Court
File No. K4-06-3934

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for appellant)

Mark D. Nyvold, Special Assistant State Public Defender, 332 Minnesota Street, Suite W-1610, St. Paul, MN 55101 (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Randall, Judge; and Hudson, Judge.

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

KALITOWSKI, Judge

Appellant State of Minnesota challenges the district court's suppression of evidence, arguing that the evidence was obtained during a search incident to the lawful arrest of respondent Rasheem Akeem Figaro. We affirm.

D E C I S I O N

I.

The state argues that the district court's suppression order has a critical impact on its ability to prosecute respondent. We agree.

When the state appeals a pretrial suppression order, it "must 'clearly and unequivocally' show both that the [district] court's order will have a 'critical impact' on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995). The standard for critical impact is that the state's proceeding without the suppressed evidence "*significantly reduces* the likelihood of a successful prosecution." *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987) (emphasis added). The state's case as a whole must be considered before determining if the suppression was erroneous. *Scott*, 584 N.W.2d at 416.

Although we acknowledge that it is the state's burden to demonstrate that this suppression order has a critical impact on its case, we note that respondent failed to argue against critical impact. Considering the state's evidence as a whole, without the benefit of arguments from respondent's counsel, we conclude that the suppressed evidence will significantly impair the state's ability to prosecute respondent.

Here, respondent was charged with financial transaction card fraud for using a credit card "without the consent of the cardholder, and *knowing that the cardholder has not given consent*." Minn. Stat. § 609.821, subd. 2(1) (2006) (emphasis added). The suppressed evidence included a stolen credit card found in respondent's wallet and statements made by respondent that he had permission to use the card because he claimed the cardholder was his girlfriend's friend. The state may prove the intent element of the crime, respondent's mental state, using circumstantial evidence. *State v. Davis*, 656 N.W.2d 900, 905 (Minn. App. 2003), *review denied* (Minn. May 20, 2003). At trial the state must show that respondent knew the cardholder had not given him consent to use her credit card. Because respondent's explanation for its presence forms a crucial link in the state's circumstantial case, suppression of his explanatory statements would significantly reduce the likelihood of a successful prosecution. *See Zanter*, 535 N.W.2d at 631 (holding that the critical impact test is satisfied when one link in the state's circumstantial case is broken).

And suppressing the credit card found on respondent's person also has a critical impact on the state's case.

> [We] examine the inherent qualities of the suppressed evidence itself, its relevance and probative force, . . . its chronological proximity to the alleged crime, its effect in filling gaps in the evidence viewed as a whole, its quality as a perspective of events different than those otherwise available, its clarity and amount of detail and its origin. Suppressed evidence particularly unique in nature and quality is more likely to meet the critical impact test.

In re Welfare of L.E.P., 594 N.W.2d 163, 168 (Minn. 1999). Because the stolen credit card, in the context of appellant's statements, is relevant and unique, its suppression would have a critical impact here.

II.

The state argues that the suppression was erroneous because the evidence was obtained as a search incident to a lawful arrest. We disagree.

"[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). A warrantless search incident to a lawful arrest requires only the justification necessary for the arrest itself. *United States v. Robinson*, 414 U.S. 218, 235-36, 94 S. Ct. 467, 477 (1973). And if probable cause to arrest exists before the search, and the search and arrest are nearly contemporaneous, a search incident to arrest may be conducted prior to the suspect's arrest. *State v. Cornell*, 491 N.W.2d 668, 670 (Minn. App. 1992).

Probable cause to arrest exists where "the objective facts are such that under the circumstances 'a person of ordinary care and prudence [would] entertain an honest and strong suspicion' that a crime has been committed." *State v. Johnson*, 314 N.W.2d 229, 230 (Minn. 1982) (alteration in original) (quoting *State v. Carlson*, 267 N.W.2d 170, 173 (Minn. 1978)). And because probable cause "is a fluid concept," it can be difficult to determine precisely when it is established. *Maryland v. Pringle*, 540 U.S. 366, 370-71, 124 S. Ct. 795, 800 (2003) (quotation and citation omitted). Under certain circumstances,

an officer can infer that passengers in the same vehicle are engaged in a joint criminal enterprise to establish probable cause. *Id.* at 373, 124 S. Ct. at 801 (holding that a large quantity of drugs and cash found in a vehicle indicated all occupants were involved in drug dealing because "a dealer would be unlikely to admit [to his vehicle] an innocent person with the potential to furnish evidence against him."). And an arresting officer's probable cause finding may be based on the "collective knowledge" of the entire police force when the officer "act[s] in good faith *on the basis of* such information" and the underlying assumption is ultimately proved correct. *State v. Conaway*, 319 N.W.2d 35, 40 (Minn. 1982) (emphasis added). Although whether probable cause existed is dependent on factual findings reviewed for clear error, it is ultimately a question of law to be reviewed de novo. *State v. Horner*, 617 N.W.2d 789, 795 (Minn. 2000).

Appellant argues that the state had probable cause to arrest respondent pursuant to the collective-knowledge doctrine. We disagree. Here, West St. Paul police officers began investigating a purse theft on September 28, 2006. During the investigation, the West St. Paul officers warned gas station employees that two men were using a stolen credit card in a gas-for-cash scam. But the St. Paul police officers who conducted the search were responding to a call from a gas station employee who reported that one individual, Leslie Burton, had attempted to use a stolen credit card to purchase gas.

When the first St. Paul officer arrived at the gas station, he was told by the employees that Burton left with another male, later identified as respondent, in a blue Chevy Lumina with Minnesota plates CMM 735. The officer's understanding was that although there were two individuals in the car, only one of those individuals was a

potential suspect in the fraud. At a nearby gas station, the officer found two men who matched the description of the individuals at the gas station sitting in a parked blue Chevy Lumina with Minnesota plates DMM 735. After back-up arrived, the St. Paul officer handcuffed and pat-searched the driver, discovering he was carrying cards identifying him as Leslie Burton. Then another St. Paul officer pat-searched respondent, recovering a stolen credit card contained in his wallet. Thus the driver was identified as the suspect reported by the gas station employee before the search. Only later did the St. Paul investigating officer learn what West St. Paul police officers had told the gas station employees.

Generally, for probable-cause purposes, the collective knowledge doctrine imputes information known by the entire police force to the arresting officer. *Conaway*, 319 N.W.2d at 40. But although the collective knowledge doctrine does not require that probable cause be based on the arresting officer's personal knowledge, it applies only where the pooled information somehow *catalyzes* the police action. *Id.* at 39-40. Here, where St. Paul police officers responded to a call reporting a single suspect, the background knowledge of the West St. Paul police officers is not imputed to the St. Paul officers. Thus, it cannot be used to establish probable cause.

The state also argues that probable cause existed independent of the police force's collective knowledge because (1) respondent was a passenger in the suspect's vehicle and (2) respondent "fled" from the vehicle when confronted with an officer. We disagree. Unlike the drug dealing at issue in *Pringle*, financial transaction card fraud is not so open a crime that passengers in the same vehicle would necessarily be engaged in a joint

criminal enterprise. 540 U.S. at 373, 124 S. Ct. at 801. Furthermore, the cases the state cites in support of its "flight" argument are not controlling here. In *State v. Bias*, the suspect's flight from Minneapolis was found by the jury to be incriminating. 419 N.W.2d 480, 485 (Minn. 1988). And in *State v. Vivier* the suspect failed to stop and accelerated his vehicle when an officer initially signaled for him to pull over. *State v. Vivier*, 453 N.W.2d 713, 717 (Minn. App. 1990). Here, respondent and Leslie Burton exited the Lumina and started to walk away before an officer attempted to detain them, and they stopped and returned to the vehicle when the officer ordered them to. Because probable cause to arrest respondent did not exist at the time of the search, the evidence was not obtained as part of a search incident to a lawful arrest.

The district court correctly determined that the initial stop was justified by a reasonable and articulable suspicion of criminal activity and that it was reasonable to expand the scope of the stop to seize respondent. *See Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S. Ct. 1868, 1879 (1968). But in a well-reasoned order, the court went on to determine that the frisk of respondent was unlawful because the officers lacked a reasonable belief that respondent was armed and dangerous. *See id.* at 27, 88 S. Ct. at 1883 (holding a reasonable search for weapons permissible only where an officer has reason to believe the individual is armed and dangerous). Because this search was not pursuant to a lawful arrest, we conclude that the fruits of the illegal search were properly suppressed.

Affirmed.