STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2268

State of Minnesota,
Respondent,

vs.

Andrew Terrell Davis, Jr.,
Appellant.

Filed January 12, 2010
Affirmed
Kalitowski, Judge

Stearns County District Court
File No. 73-CR-07-13107

Lori Swanson, Attorney General, Kimberly R. Parker, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

KALITOWSKI, Judge

Appellant Andrew Terrell Davis, Jr., challenges the district court's denial of his motion to suppress evidence seized pursuant to a warrantless search of his person and

vehicle, arguing that (1) law enforcement officers lacked reasonable articulable suspicion to stop appellant, and (2) the officers lacked probable cause to arrest appellant. Appellant argues that the error in admitting the evidence was not harmless and reversal is required. Because we conclude that the searches of appellant's person and vehicle were lawful, we affirm.

D E C I S I O N

On November 8, 2007, officers from the Central Minnesota Drug and Gang Task Force observed appellant drive J.T.B. to a park, wait in the car while J.T.B. sold cocaine to a confidential police informant in the informant's car, and confer with J.T.B. in appellant's car following the controlled sale. When appellant left the park, the officers stopped appellant's vehicle, arrested appellant, and searched appellant's person and vehicle, seizing prerecorded money received from the informant and a cell phone. Appellant was charged with one count of first-degree controlled substance crime (sale) in violation of Minn. Stat. § 152.021, subd. 1(1) (2006); one count of aiding and abetting second-degree controlled substance crime (sale) in violation of Minn. Stat. §§ 152.022, subd. 1(1), 609.05 (2006); and one count of aiding and abetting first-degree controlled substance crime (sale) in violation of Minn. Stat. §§ 152.021, subd. 1(1), 609.05 (2008).

Appellant moved the district court to suppress the evidence obtained pursuant to the search incident to arrest. The district court denied appellant's motion. Following a court trial, the district court found appellant guilty of all three counts and sentenced appellant to 150 months' incarceration.

Appellant argues that the district court erred in denying his motion to suppress the cell phone, cell phone records, prerecorded money, and appellant's November 8, 2007 statement to police because the task force officers lacked both reasonable articulable suspicion to stop appellant and probable cause to arrest appellant. And because the only other evidence supporting appellant's convictions was uncorroborated accomplice testimony, appellant contends the error was not harmless. We disagree.

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). But the district court's factual findings are subject to a clearly erroneous standard of review. *State v. Critt*, 554 N.W.2d 93, 95 (Minn. App. 1996), *review denied* (Minn. Nov. 20, 1996).

The Fourth Amendment to the United States Constitution and Article I, section 10 of the Minnesota Constitution guarantee an individual's right to be free from unreasonable searches and seizures. Warrantless searches are generally unreasonable unless they fall within a recognized warrant exception. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009).

Reasonable Suspicion to Stop Appellant

One exception to the warrant requirement is the limited investigatory stop, commonly known as a *Terry* stop. *See generally Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968) (setting forth the rationale and tests for initiating and carrying out limited investigatory stops). A *Terry* stop is lawful if there is a "particularized and objective

basis for suspecting the person stopped of criminal activity." *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002). Such a stop requires a showing of "reasonable suspicion" rather than probable cause. *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). In assessing whether there is reasonable suspicion, officers may make inferences that elude an untrained person, but a stop must not be based on a mere hunch. *State v. Cripps*, 533 N.W.2d 388, 391-92 (Minn. 1995). We apply a totality-of-the-circumstances test to analyze the legality of a vehicle stop near a recent crime scene. *State v. Yang*, 774 N.W.2d 539, 551 (Minn. 2009).

Here, the totality of the circumstances supports the district court's determination that the officers had reasonable suspicion to justify the stop. The officers had reasonable suspicion to believe that J.T.B. sold cocaine to the informant while in the informant's car because (1) the officers heard money being counted over the informant's recording device; (2) the same informant had bought cocaine from J.T.B. at the same location on November 5, 2007; (3) the informant said "they picked up" into the recording device after J.T.B. left his car; (4) the officers knew that the individual at the scene who told the informant that J.T.B. was on his way was a known drug dealer; and (5) the transaction occurred in an area characterized by drug activity.

Furthermore, the officers had reasonable suspicion to believe that appellant actively participated in the sale based on their observations of appellant driving J.T.B. to the park, waiting nearby as J.T.B. sold cocaine to the informant, and conferring with J.T.B. in appellant's car after the sale. Moreover, the informant's post-buy statement to an officer that he believed appellant to be the main supplier of the cocaine also supports

the determination that the officers had reasonable suspicion to justify the stop of appellant's vehicle.

Based on the totality of the circumstances, we conclude that the district court did not err in concluding that there was reasonable suspicion to justify the officers' stop of appellant following the controlled buy.

Probable Cause to Arrest Appellant

A second exception to the Fourth Amendment warrant requirement is that a person's body and the area within her immediate control may be searched incident to a lawful arrest. *Ortega*, 770 N.W.2d at 149-50. "There is probable cause to make a warrantless arrest when a person of ordinary care and prudence, viewing the totality of the circumstances objectively, would entertain an honest and strong suspicion that a *specific* individual has committed a crime." *Id*. at 150 (emphasis in original). In reviewing probable cause determinations, a reviewing court "should not be overly technical and should accept the officer's probable-cause determination if reasonable and prudent men . . . would under the same circumstances make the same determination." *State v. Compton*, 293 N.W.2d 372, 375 (Minn. 1980). Absent clear error, the district court's finding that the officer had probable cause to arrest will not be disturbed. *State v. Prax*, 686 N.W.2d 45, 48 (Minn. App. 2004), *review denied* (Minn. Dec. 14, 2004).

Here, the record supports the district court's determination that the task force officers had probable cause to believe that appellant was aiding and abetting J.T.B. in selling cocaine to the informant. The factors that support the finding of reasonable suspicion to effectuate a stop of appellant, as discussed above, also support the officers'

determination of probable cause to arrest appellant. In particular we note that shortly after the transaction, the informant, who had provided reliable information regarding the November 5 sale, told officers that he believed appellant was the main source of the cocaine.

Appellant argues that because the informant did not provide the officers with a basis to support his tip that appellant was the main supplier of the cocaine, and because it was unclear that the informant gave the statement before the officers arrested appellant, this factor does not support a finding of probable cause to arrest. But the record indicates that the tip was provided prior to the arrest of appellant. One officer testified that the decision to stop appellant was made after the informant's statement, and another officer noted in his report that the information was radioed to the arresting officers shortly before the stop was made. *See Yang*, 774 N.W.2d at 551 ("[A]ppellate review requires that we analyze the testimony of officers and determine whether, as a matter of law, their observations provided an adequate basis for the stop.").

Furthermore, the tip was reliable because the informant had previously provided accurate information to the officers regarding the November 5, 2007 controlled sale. *See State v. Siegfried*, 274 N.W.2d 113, 115 (Minn. 1978) (stating that an informant's credibility may be established by showing that the informant has given accurate information to police in the past and also by evidence corroborating details of the tip). Therefore, the informant's tip that appellant was the "main source" of the cocaine supports a determination that the officers had probable cause to arrest appellant following the controlled sale.

Appellant asserts that appellant's "mere association" with J.T.B. was not enough to justify the warrantless arrest and search of appellant. Specifically, appellant emphasizes that police observed nothing to indicate that appellant was aware of the cocaine sale going on in the informant's car. Although mere proximity to criminal activity is not enough to establish particularized probable cause that a person is engaged in criminal activity, *Ortega*, 770 N.W.2d at 150, officers may have probable cause to arrest an individual for aiding and abetting a crime when evidence indicates that the individual was aware of the crime being committed and intentionally acted to further commission of the crime. *See State v. Mahkuk*, 736 N.W.2d 675, 682 (Minn. 2007) (stating that in an aiding-and-abetting case, the state must prove that the defendant knows her accomplices are going to commit a crime and that she intends her presence or actions to further the commission of that crime); *In re Welfare of D.K.K.*, 410 N.W.2d 76, 77 (Minn. App. 1987) ("Presence, companionship, and conduct before and after the offense are circumstances from which a person's participation may be inferred."); *State v. Swanson*, 707 N.W.2d 645, 658-59 (Minn. 2006) (stating that a person is criminally liable for the crimes of another under Minn. Stat. § 609.05, subd. 1 (2006), when one plays some knowing role in the commission of the crime and takes no steps to thwart its completion) (quotation omitted).

Here, it was reasonable for the officers to believe that appellant knew that a crime was taking place in the informant's car based on their observations, the location of the transaction, and the informant's post-buy statement. Furthermore, appellant's intent to aid in the commission of the crime may be inferred by appellant driving J.T.B. to the

scene, his presence at the scene while J.T.B. sold the cocaine to the informant, and his meeting with J.T.B. following the transaction. *See Swanson*, 707 N.W.2d at 659 (stating that intent to aid in the commission of a crime may be inferred from the defendant's presence at a crime scene and the defendant's close association with the principal before and after the crime).

Based on the totality of the circumstances, we conclude that the district court did not err in determining that the officers had probable cause to arrest appellant following the November 8, 2007 sale. And because the arrest was lawful, the evidence obtained in the search incident to the arrest was properly admitted at trial.

Harmless Error

If the district court has erred in admitting evidence, the reviewing court determines whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). If there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence, then the error is prejudicial. *Id*.

Here, the district court did not err in admitting the challenged evidence because the task force officers had reasonable suspicion to stop appellant and probable cause to arrest him. But even if it was error to admit the cell phone, cell phone records, appellant's November 8 statement, and the prerecorded buy money, we conclude that the error was harmless in light of the remaining evidence supporting appellant's convictions: six officers testified at appellant's trial regarding the events of November 8, 2007, when they observed appellant drive J.T.B. to the scene of the sale and confer with him

afterward. J.T.B. testified at length regarding his business arrangements with appellant, as well as to the events of November 5 and 8. This testimony was corroborated by Bertrand in her November 8 statement to police, and in more detail in her trial testimony. Bertrand also described appellant's frequent contact with J.T.B., stating that appellant sometimes called J.T.B. up to 20 times a day to collect money owed to him. The informant testified at trial without objection regarding two prior incidents where he observed appellant give cocaine to J.T.B. in exchange for money. Thus, even if the district court erred in admitting the challenged evidence, the error was harmless beyond a reasonable doubt because there is no reasonable possibility that the challenged evidence significantly affected the verdict.

Affirmed.