STATE OF MINNESOTA
IN COURT OF APPEALS
A09-48

State of Minnesota,
Respondent,

vs.

Terry John McDevitt,
Appellant.

Filed January 5, 2010
Affirmed
Ross, Judge

Anoka County District Court
File No. 02-CR-08-5484

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

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Considered and decided by Toussaint, Chief Judge; Wright, Judge; and Ross, Judge.

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

ROSS, Judge

This case concerns the stop, search, and arrest of Terry McDevitt after he interacted with a suspected drug dealer whom police were closely watching. A police officer who saw McDevitt's interaction with the drug dealer ordered McDevitt from his car at gunpoint, handcuffed him, directed him to lie on the ground, and frisked him. The officer asked McDevitt's driver if any crack cocaine was in the car. The driver revealed that McDevitt had just purchased crack cocaine, and, after the officer began searching the car, McDevitt announced that the cocaine was hidden in his sock.

McDevitt moved the district court to suppress evidence of the cocaine in his sock, arguing that the stop and his warrantless arrest violated his constitutional rights. The district court denied the motion and found him guilty of one count of controlled substance crime in the fifth degree. McDevitt appeals his conviction, arguing that the district court erred by denying his motion to suppress the evidence. McDevitt correctly contends that he was arrested without probable cause when police apprehended him based only on the officer's observation of his brief interaction with the drug dealer. But because police obtained the challenged evidence on constitutional grounds independent of the illegal arrest, we affirm.

FACTS

Members of the Southwest Metro Drug Task Force assembled in a Menards parking lot in Fridley for a briefing before executing a search warrant on Edward Mack's vehicle, person, and nearby residence. Officers expected the search to uncover drugs,

including crack cocaine, based on information received from a confidential informant and through three recent controlled purchases of crack cocaine from Mack. To the officers' surprise, Mack, driving the vehicle identified in the search warrant, pulled into the same parking lot.

Police watched as Mack stopped his car far from the store entrance. He did not get out. A silver Nissan soon arrived and stopped beside Mack's car. The Nissan had three occupants: Terry McDevitt in the front passenger seat, a woman in the driver's seat, and a child in the back seat. McDevitt left the Nissan and entered Mack's car. Detective Nicholas Adler saw McDevitt reach down toward the floor. After only 20 to 30 seconds, McDevitt returned to the Nissan. The Nissan then moved toward the parking lot's exit. The officers suspected that a drug transaction had just occurred and decided to immediately execute the search warrant on Mack and to stop the Nissan.

Most officers approached Mack's vehicle while Detective Adler alone stopped the Nissan. Detective Adler blocked the Nissan, stepped from his car with his gun pointed at McDevitt, and ordered the occupants to raise their hands. Detective Adler ordered McDevitt out, immediately handcuffed him, and directed him to the ground. He pat-searched McDevitt for weapons but found none. He told McDevitt that Mack was the subject of a cocaine-dealing investigation. McDevitt denied having any cocaine. Detective Adler left McDevitt on the ground and ordered the driver from the car. He asked her if there was crack cocaine in the car, and she immediately disclosed that McDevitt had just purchased three to four "pills" of crack cocaine.

Detective Adler began searching the Nissan, but McDevitt interrupted and said that he had the crack cocaine hidden in his left sock. Detective Adler searched McDevitt's sock and found the cocaine.

McDevitt moved the district court to suppress the evidence of his initial statement to Detective Adler that he did not have any cocaine, his statement to the detective that the cocaine was in his sock, and the crack cocaine found in his sock. He based his motion on his assertion that police lacked a reasonable, articulable suspicion to justify stopping his car or a particularized, objective basis justifying his immediate arrest. The district court granted the motion to suppress McDevitt's initial statement that he did not have any crack cocaine, deeming the denial to be the fruit of an illegal custodial interrogation that Detective Adler undertook without giving McDevitt a *Miranda* warning. But it rejected the other aspects of McDevitt's motion to suppress. The case proceeded to a court trial, and the district court found McDevitt guilty of one count of fifth-degree controlled substance crime. This appeal follows.

D E C I S I O N

McDevitt argues that the district court erred by not suppressing the evidence that he possessed the cocaine. When reviewing pretrial suppression rulings, we consider the facts independently and decide whether suppression is warranted as a matter of law. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). McDevitt argues that the drug evidence must be suppressed either because his brief interaction with Mack did not create a reasonable, articulable suspicion of crime justifying Detective Adler's decision to stop

the car he was riding in or because the police lacked probable cause to immediately arrest him.

I

We first address McDevitt's contention that his brief stay in the suspected drug dealer's car fails to establish a reasonable, articulable suspicion of crime justifying the seizure of the car in which he was riding. Because the seizure was illegal, he argues, all evidence obtained must be suppressed. We are not persuaded.

The district court rejected McDevitt's argument that the automobile stop violated his constitutional rights. We review the district court's determination of the legality of an investigatory stop de novo and its findings of fact for clear error. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). The United States and Minnesota constitutions prohibit unreasonable seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. This prohibition applies to investigative motor vehicle stops. *See Britton*, 604 N.W.2d 87. A police officer may stop a person to investigate if the officer has a reasonable, articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21–22, 88 S. Ct. 1868, 1880 (1968); *State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003). Whether police have a reasonable suspicion to stop depends on the totality of the circumstances. *In re Welfare of M.D.R.*, 693 N.W.2d 444, 448 (Minn. App. 2005), *review denied* (Minn. Mar. 22, 2005). On review, we recognize that trained law enforcement officers may interpret circumstances by making inferences and deductions that are beyond the competence of untrained persons. *State v. Richardson*, 622 N.W.2d 823, 825 (Minn. 2001). "[T]he reasonable suspicion standard is not high," *State v. Timberlake*, 744 N.W.2d 390, 393

(Minn. 2008) (quotation omitted), and we give considerable discretion to an officer's decision to conduct an investigative stop, *Waddell*, 655 N.W.2d at 810.

We have no difficulty agreeing with the district court that Detective Adler had a reasonable, articulable suspicion of criminal activity to justify the investigatory stop of McDevitt's vehicle. Detectives watched a suspected drug dealer under investigation stop in a large commercial parking lot far from the store entrance in a vehicle that he had driven to three recent controlled buys and that was subject to an active search warrant for drugs. The detectives considered the suspicious circumstances: McDevitt's car stopped next to the drug dealer's car, McDevitt entered the drug dealer's car, McDevitt reached down toward the floor, and McDevitt returned to his car after less than one minute. Also, despite the retail location of the encounter, McDevitt demonstrated no interest in legitimate shopping. One of the detectives testified that he has learned in his six years' experience in drug enforcement that drug deals commonly occur in busy commercial parking lots. The detective had participated in 397 drug investigations and executed more than 190 search warrants seeking illegal drugs. It "was obvious [to him] that someone parked that distance away probably wasn't going to visit the store." The detectives reasonably suspected that McDevitt might have just made a drug transaction.

Because police had a reasonable, articulable suspicion of criminal activity, the investigatory stop of McDevitt's car did not violate the Fourth Amendment or article I, section 10 of the Minnesota Constitution.

II

We turn to McDevitt's argument that the police conducted an illegal warrantless arrest without probable cause when they removed him from the car at gunpoint, placed him in handcuffs, and forced him to lie on the ground. The argument is convincing. The district court held that probable cause existed to arrest McDevitt, but it did not identify at what point McDevitt was arrested or what information established the probable cause. When determining whether probable cause exists to justify a warrantless arrest, this court "independently reviews the facts to determine the reasonableness of the conduct of police." *State v. Riley*, 568 N.W.2d 518, 523 (Minn. 1997).

Before we determine whether probable cause existed to support the arrest, however, we must identify when the arrest occurred and consider only the suspicions that the police held at that time. *See State v. Carlson*, 267 N.W.2d 170, 174 (Minn. 1978) ("[A] court . . . should view the circumstances in light of the whole of the arresting officer's police experience as of the time of the arrest."). After we pinpoint the time of arrest, we will then consider the circumstances leading to the arrest to decide whether probable cause existed.

Point of McDevitt's Arrest

Detective Adler testified implicitly that McDevitt was the subject of a *Terry* investigative stop and was not under arrest when he handcuffed him and frisked him for weapons. The state argues similarly. But the fact of an arrest is not determined by the officer's subjective intent or formal declarations. *See State v. Hince*, 540 N.W.2d 820, 823 (Minn. 1995) (applying an objective test to determine whether the restraints on the

defendant's freedom were comparable to those associated with a formal arrest); *see also State v. Vereb*, 643 N.W.2d 342, 347 (Minn. App. 2002) ("Although police did not formally arrest appellant until after they had detained and transported him to police headquarters, we conclude that once he believed he was not free to leave, his continued detention became a de facto arrest requiring probable cause."). We examine all of the surrounding circumstances of police detention to determine whether the detention was an arrest. *State v. Olson*, 634 N.W.2d 224, 229 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). A person is under arrest when his circumstances would make a similarly situated reasonable person believe that he was in custody. *Id*.

Pondering liberty from a face-down and handcuffed position in a Menards parking lot, a reasonable person in McDevitt's shoes would have recognized that he was in custody. Detective Adler had just pulled his squad car in front of McDevitt's car, jumped out with his gun pointed at McDevitt, ordered McDevitt to raise his hands, removed him from the car, handcuffed him and laid him on the ground, frisked him, and left him prone and in handcuffs after the frisk. The detective kept McDevitt in this highly restrained position while he questioned the driver even after he had already established that McDevitt was unarmed. At least by that point, any reasonable person would have considered himself to be in police custody.

The state argues that Detective Adler's need for personal safety when single-handedly investigating the suspected drug transaction justified his temporarily securing McDevitt to determine whether he was armed. But officer-safety concerns provided an insufficient basis for him to leave McDevitt face down, handcuffed, after determining

that McDevitt had no weapons. Even if Detective Adler intended merely to momentarily detain McDevitt to investigate further, the extensive nature of the restraint that continued after the detective had resolved any concern about weapons constituted an arrest. *See State v. Carver*, 577 N.W.2d 245, 248 (Minn. App. 1998) (holding that defendant was under arrest at the time he was placed in handcuffs after being ordered from his vehicle to lie on the road); *State v. Blacksten*, 507 N.W.2d 842, 847 (Minn. 1993) ("Respondent was de facto under arrest from the time he was ordered to the ground at gunpoint, handcuffed, and placed in the squad car."); *State v. Rosse*, 478 N.W.2d 482, 486 (Minn. 1991) (holding that reasonable person would believe she was under arrest when police blocked her parked car, ordered her out with their guns drawn, pat-searched her for weapons, and handcuffed her passenger). We hold that Detective Adler's restraining conduct was tantamount to a formal arrest, which required probable cause beforehand.

Probable Cause for Arrest

We must now answer whether Detective Adler had probable cause before he made the de facto arrest. This is a very close call, but we hold that he did not. Police must have probable cause before making an arrest. *See Riley*, 568 N.W.2d at 524. This applies to both formal and de facto arrests. *See Vereb*, 643 N.W.2d at 347. Probable cause exists when "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." *In re Welfare of G.M.*, 560 N.W.2d 687, 695 (Minn. 1997).

The circumstances easily justified the stop, as already discussed. But this is a more difficult and particularly close case as it regards probable cause. It is true, as the

state emphasizes, that McDevitt's driver told Detective Adler that McDevitt had purchased crack cocaine and that McDevitt confessed that he had cocaine in his sock. But these statements and the subsequent discovery of the crack cocaine occurred only after Detective Adler arrested McDevitt and therefore cannot establish probable cause for that arrest.

The known inculpatory circumstances before the arrest, taken together, are certainly suspicious. But a person cannot be arrested "merely because he is found in suspicious circumstances." *State v. Clark*, 312 Minn. 44, 49, 250 N.W.2d 199, 202 (1977). We hold that the circumstances do not establish probable cause to arrest McDevitt for any crime. The police did not expect to see Mack in the Menards parking lot, and they had no information that he intended to sell drugs there. They had been altogether unaware of McDevitt, who stumbled into the drug investigation at a rather unlucky moment. None of Mack's three recent drug deals occurred in a large commercial parking lot, and in each one Mack had left his vehicle to meet the buyer. Police also did not observe McDevitt exchange drugs or cash with Mack. *Cf. State v. Hawkins*, 622 N.W.2d 576, 581 (Minn. App. 2001) (finding probable cause to arrest defendant for a drug offense where police officers briefly observed defendant conduct hand-to-hand transactions consistent with other narcotics cases). As one of the testifying detectives acknowledged to the district court, the suspicious conduct could have had an innocent explanation. *But see id.* at 580 (explaining that the inquiry of whether some hypothesis of innocence is reasonably consistent with the circumstances is more appropriate when measuring whether guilt has been proven beyond a reasonable doubt).

Although Detective Adler appropriately stopped McDevitt, he needed to develop his suspicion further before making the arrest. Because the objective facts would not have led a person of ordinary care to a firm enough belief that McDevitt had engaged in a crime, McDevitt's immediate, pre-investigation arrest was unconstitutional.

III

McDevitt argues that because police lacked probable cause to arrest him, the evidence found during the search of his person must be suppressed. He is wrong. If evidence is seized in violation of the Constitution, it generally must be suppressed. *State v. Jackson*, 742 N.W.2d 163, 177−78 (Minn. 2007). McDevitt argues that the evidence found during the search of his person must be suppressed as "fruit of the poisonous tree." It is true that evidence that "would not have come to light but for the illegal actions of the police" might be deemed "fruit of the poisonous tree" and, under some circumstances, be excluded from the state's use at trial. *Wong Sun v. United States*, 371 U.S. 471, 487−88, 83 S. Ct. 407, 417 (1963). But the state accurately asserts that discovery of the crack cocaine was the product not of any police illegality but of a valid investigatory stop. We agree that the crack cocaine was not found because of McDevitt's unlawful arrest but because of the lawful stop and lawful questioning of McDevitt's driver. The evidence that arose from these lawful police actions was therefore admissible.

No causal connection links McDevitt's unlawful arrest to the search of his person. Detective Adler made a valid investigation into the possibility of a drug transaction by questioning McDevitt's driver. We have already found that Detective Adler had reasonable, articulable suspicion of criminal activity to justify the investigative stop

under *Terry*. In immediate response to Detective Adler's investigative questioning, the driver stated that McDevitt had purchased three or four pieces of crack cocaine. That statement by an eyewitness capped the body of evidence that had justified the stop, and it established probable cause to search the vehicle or to arrest and search McDevitt. *See State v. Charley*, 278 N.W.2d 517, 518 (Minn. 1979) (explaining that warrantless searches of vehicles are permitted whenever the police have probable cause to believe that a crime has been committed and probable cause to believe that there is evidence of the crime in the vehicle); *In re Welfare of G.M.*, 560 N.W.2d at 695 (holding that "police who have probable cause to arrest a suspect can then conduct a search incident to arrest" regardless of the arrest's timing).

The detective chose to search the car. The district court determined that the vehicle search was proper, that the search was interrupted when McDevitt voluntarily called to Detective Adler and stated that he had the cocaine in his sock, and that McDevitt consented to the search of his sock. Substantial evidence supports all of those findings. The crack cocaine was the fruit of a valid investigation that resulted from stopping and questioning the driver, not fruit of McDevitt's premature arrest.

McDevitt emphasizes that the driver's statement implicating him was made only after she saw him ordered from the car at gunpoint, forced to the ground, handcuffed, and arrested. But McDevitt offers no support for his speculative proposition that the driver would not have revealed that McDevitt purchased cocaine had police not already arrested him at gunpoint. His *post hoc, ergo propter hoc* contention is not persuasive.

The district court did not find that a causal connection linked the driver's statement to McDevitt's arrest, and no evidence supports such a finding. We acknowledge that the driver may have been especially motivated to disclose McDevitt's crime after she watched police stop her car, extract McDevitt from her car at gunpoint, search McDevitt for weapons, and prevent McDevitt from leaving the scene. But all of these police actions were lawful under the circumstances. *See State v. Ortega*, 770 N.W.2d 145, 152 (Minn. 2009) (holding that police may order a passenger out of a vehicle to foster officer safety); *State v. Munson*, 594 N.W.2d 128, 137 (Minn. 1999) (stating that an officer may proceed with weapon ready during investigatory stop of a person the officer suspects to be armed); *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (explaining that an officer with a reasonable, articulable suspicion that a person might be engaged in criminal activity may frisk the person if he reasonably suspects the person is armed and dangerous); *United States v. Bustos-Torres*, 396 F.3d 935, 943 (8th Cir. 2005) (observing that weapons and violence are frequently associated with drug transactions). The lawful police conduct and the facts establishing the unlawful de facto arrest are overlapping and almost indistinguishable. The slight difference between the two is too insignificant to support McDevitt's but-for argument that the illegal police conduct caused the driver to disclose his drug purchase. In other words, it is implausible that the officer's small step from lawfully detaining McDevitt to unlawfully arresting him caused the driver's disclosure. We see no factual basis to support, let alone require, a district court finding that the driver made her statement implicating McDevitt because McDevitt was arrested.

McDevitt characterizes the state's argument as one invoking the inevitable discovery doctrine, and he challenges that implied argument on the merits. We do not base our decision on the doctrine of inevitable discovery. Establishing admissibility by inevitable discovery requires the state to show that evidence arising from illegal police conduct inevitably would have been discovered by lawful means. *State v. Licari*, 659 N.W.2d 243, 254 (Minn. 2003). Because the challenged evidence here did not result from illegal police conduct, however, we have no reason to consider the inevitable discovery doctrine. And because the cocaine evidence was obtained by lawful means, the district court properly denied McDevitt's motion to suppress it.

Affirmed.