STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1095

State of Minnesota,
Respondent,

vs.

Gary White,
Appellant.

Filed September 14, 2010
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CR-07-125362

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Paul R. Scoggin, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Johnson, 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 prohibited person in possession of a firearm in violation of Minn. Stat. § 624.713, subd. 1(b) (2006). Appellant argues that the district

court erred by not suppressing the gun that was found in the SUV he was driving. Because we conclude that the stop of appellant's vehicle was justified and because the gun was found pursuant to an authorized warrantless search of his car, the district court did not err by denying appellant's suppression motion. We affirm.

FACTS

On November 25, 2007, dispatch informed Officers Matt Alberts and Daniel Ledman that it had received a call about a black male who had a gun, and was tampering with another vehicle. The man was described as wearing a white hooded jacket, a hat, and a scarf, and driving a red SUV. Officers Alberts and Ledman arrived at the location provided, 34th and James Avenues in Minneapolis, and saw a red SUV with the passenger door open and a man standing between the SUV and another car. As the officers approached, the man got into the passenger side of the SUV, and the SUV sped away. The officers followed. When the SUV turned into an alley and the officers activated the lights on their squad car, the driver got out of the SUV and fled on foot. Officer Ledman pursued the driver and returned with appellant Gary White, whom Officer Alberts recognized as the SUV driver. Meanwhile, Officer Alberts apprehended the passenger, Ricardo Walker, and as he did so, noticed a bag of what looked like marijuana in the door of the SUV. Officer Alberts then searched the car and noticed that a panel of the dashboard was askew, so he pried it up with a pocket knife and found a gun.

Appellant had a previous felony conviction that made it illegal for him to possess a firearm. He was charged with prohibited person in possession of a firearm in violation of

Minn. Stat. § 624.713, subd. 1(b). Appellant moved to suppress evidence of the gun; after a pretrial evidentiary hearing, the district court denied his motion. Appellant was found guilty after a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 4. Appellant received a 60-month sentence stayed for three years.

Appellant initially challenged both the district court's denial of his motion to suppress the gun and his waiver of his right to a jury trial, claiming that the waiver was invalid. Respondent State of Minnesota conceded the invalid-waiver issue without briefing the denial of the suppression motion and requested remand. Appellant, in his reply brief, argued that this court should reach the suppression issue, regardless of the validity of his waiver, or, alternatively, offered to withdraw his appeal of the validity of the waiver. We requested supplemental briefing from the state on the suppression issue and on appellant's ability to withdraw his appeal of the waiver issue.

D E C I S I O N

I.

In its supplemental brief, the state argues that appellant should not be allowed to withdraw his appeal of the issue of whether his jury-trial waiver was valid. The state argues that the lack of a valid waiver created "a defect *ab initio*, not subject to waiver or withdrawal," but does not cite authority for this proposition.

It is true that under Minnesota appellate case law, this court will not review a Fourth Amendment claim when an appellant successfully argues that there was an invalid jury-trial waiver. *State v. Antrim*, 764 N.W.2d 67, 71 (Minn. App. 2009); *State v. Rasmussen*, 749 N.W.2d 423, 427-28 (Minn. App. 2008); *State v. Knoll*, 739 N.W.2d

919, 922 (Minn. App. 2007). In *Rasmussen*, this court explained the logic behind this prohibition: "[Ramussen's] desire to obtain appellate review of the district court's pretrial suppression ruling is inconsistent with her contemporaneous assertion of her right to a jury trial. Waiving the right to a jury trial is . . . a prerequisite to accelerated appellate review of a pretrial suppression ruling." 749 N.W.2d at 427. "Because we have concluded that Rasmussen did not waive her right to a jury trial, we may not review the suppression ruling at this time." *Id.* at 428. *Antrim*, *Rasmussen*, and *Knoll* all involved the contemporaneous assertion of errors.

But the state did not cite any authority for the proposition that an appellant is not entitled to choose which issues to appeal or to withdraw a previously appealed issue; nor are we aware of any authority that restricts an appellant's rights in this way. We conclude that it is an appellant's right to choose a legal strategy and which alleged errors (if any) he will appeal. Accordingly, we accept appellant's withdrawal of the issue of whether or not his jury-trial waiver was valid, and we decline to address it.[1] Because we are not addressing the validity of the jury-trial waiver, there is no inconsistency presented by appellant's argument that the district court erred by denying his suppression motion, and we will address the merits of that issue.

[1] Contrary to the state's argument, this allowance does not change the well-settled law in Minnesota that the requirements of Minn. R. Crim. P. 26.01, subd. 4, are to be strictly complied with. We reach no conclusion about the validity of appellant's jury-trial waiver because he has not asserted any related error.

II.

The Minnesota Constitution prohibits "unreasonable searches and seizures." Minn. Const. art. I, § 10. In interpreting article I, section 10, of the Minnesota Constitution, the Minnesota Supreme Court has explicitly adopted the principles and framework of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968). *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004).

> A *Terry* analysis involves a dual inquiry. First, we ask whether the stop was justified at its inception. Second, we ask whether the actions of the police during the stop were reasonably related to and justified by the circumstances that gave rise to the stop in the first place.

Id. at 364 (citations omitted). "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).

The Stop

To justify an investigative stop, a police officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880. We will analyze the totality of the circumstances to determine whether the officer who made the stop is able to articulate a particularized and objective basis for suspecting the stopped person of criminal activity. *State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983). In applying the *Terry* standard, "Minnesota case law shows how very low the threshold is to stop a vehicle in order to carry out the duty to investigate possible violations of the law."

State v. Claussen, 353 N.W.2d 688, 690 (Minn. App. 1984). "All that is required is that the stop be not the product of mere whim, caprice, or idle curiosity." *State v. Johnson*, 257 N.W.2d 308, 309 (Minn. 1977) (quotation omitted).

Here, the officers were responding to an anonymous call about a black male in a red SUV breaking into a car in the area of 34th and James Avenues. Appellant argues that the tip cannot be used as a basis for the officers' reasonable articulable suspicion because it was an anonymous tip and the officers never followed up by identifying the caller. The factual basis to support a stop need not be based on the officer's personal observations, but may be based on information provided by another person. *Marben v. State Dep't of Pub. Safety*, 294 N.W.2d 697, 699 (Minn. 1980). "Police generally may not effect a stop on the basis of an anonymous informant's tip unless they have some minimal information suggesting the informant is credible and obtained the information in a reliable way." *In re Welfare of G.M.*, 560 N.W.2d 687, 691 (Minn. 1997). While we presume that anonymous citizen informants are reliable, the tip must still provide reasonable articulable suspicion based on the totality of the circumstances, which may include the specificity of the information provided and the corroboration of the information by the officers. *Olson v. Comm'r of Pub. Safety*, 371 N.W.2d 552, 554–55 (Minn. 1985).

Although the citizen caller here was never identified, the caller provided specific information to dispatch. The caller indicated that a black male was tampering with a vehicle in the area of 34th and James Avenues in Minneapolis. The caller further described the male as wearing a white hooded jacket, a hat, and a scarf, and stated that

the male was driving a red SUV. The caller also indicated that the man had a gun. This detailed information by the caller provided the police with reasonable articulable suspicion that the male described was engaged in criminal activity. Additionally, the description that the caller provided was corroborated by what the officers saw when they arrived at the scene. When the officers arrived, they saw two black males in a red SUV with the passenger-side door open and parked alongside another car; one of the men was wearing a white sweatshirt with a hood. Many of the details provided by the caller were corroborated by the officers at the scene. We conclude that the informant was sufficiently credible and that the details the caller provided, when viewed in the totality of the circumstances, provided the officers with reasonable articulable suspicion to stop appellant.

The Search

Appellant argues that even if the stop was valid, there was an insufficient basis for the warrantless search of the SUV. A warrantless search is per se unreasonable unless it fits within one of the recognized exceptions to the warrant requirement. *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999). "Certain exceptions apply to the warrant requirement . . . and the ultimate touchstone of the Fourth Amendment is reasonableness." *State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009) (quotation omitted). The state bears the burden of demonstrating that a search was justified by an established exception to the warrant requirement. *State v. Anderson*, 388 N.W.2d 784, 787 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986). The district court found that the search of the SUV was valid under each of three exceptions: (1) the automobile

exception; (2) a search incident to a lawful arrest; and (3) an inventory search. Because we conclude that the search was valid under the automobile exception, we decline to address the other two bases for the district court's denial of appellant's suppression motion.

The automobile exception provides that warrantless searches of automobiles are not unreasonable if supported by probable cause. *Munson*, 594 N.W.2d at 135. Probable cause to search exists when the facts and circumstances would lead a reasonably prudent person to believe that the vehicle contains contraband. *Id.*

Officer Alberts searched the SUV after he observed the suspected marijuana in plain sight. The lawful discovery of drugs or other contraband in a vehicle gives the police probable cause to believe that a further search of the vehicle result in the discovery of more drugs or other contraband. *State v. Schinzing*, 342 N.W.2d 105, 110 (Minn. 1983). The visible marijuana, even if a noncriminal amount, provided probable cause to believe that more marijuana might be found in the SUV. *See id.*

Appellant argues that "even if the suspected marijuana that was found on the passenger-side door provided probable cause to search the vehicle, there is nothing in the record to suggest that it was reasonable to remove the dashboard panel in furtherance of the search." But this misstates the record. Officer Alberts testified that the position of the panel he observed aroused his suspicion because it was raised an eighth of an inch. In addition, if probable cause exists to justify a search of the vehicle for drugs, police may search "every part of the vehicle that may contain the object of the search." *Id.* at 111 (quotation omitted). We conclude that Officer Alberts' observation regarding the raised

panel in conjunction with the probable cause to conduct the search, justified his decision to pry up the panel enough to notice the grip of the gun.

The Arrest

Appellant argues that there was no basis for his arrest and that, as a result, "any evidence seized as a result of the illegal seizure must be suppressed." Under the exclusionary rule, evidence seized in violation of the constitution generally must be suppressed. *State v. Jackson*, 742 N.W.2d 163, 177-78 (Minn. 2007). The independent-source doctrine permits the admission of evidence obtained during an unlawful search if the police could have retrieved the evidence "on the basis of information obtained independent of [the officers'] illegal activity." *State v. Richards*, 552 N.W.2d 197, 203–04 n.2 (Minn. 1996). Even assuming that appellant's arrest for fleeing a police officer or for tampering with a motor vehicle was illegal, the gun was found after a legal search of the vehicle. Therefore, the gun was discovered independently from the arrest, and the exclusionary rule does not apply.

We conclude that because the officers had a reasonable articulable suspicion sufficient to justify the stop of the red SUV and because the search of the red SUV after discovering the suspected marijuana was permitted under the automobile exception to the warrant requirement, the district court did not err by denying appellant's motion to suppress the gun.

Affirmed.