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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2133

State of Minnesota,
Respondent,

vs.

Jerson Anibal Lopez-Marroquin,
Appellant.

Filed September 14, 2010
Affirmed
Larkin, Judge

Nobles County District Court
File No. 53-CR-09-445

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

Gordon L. Moore, III, Nobles County Attorney, Travis J. Smith, Assistant County Attorney, Worthington, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, Nicolas Tymoczko, John T. Sullivan, Jessica D. Nowlin, Susan Gad (certified student attorneys), St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges his conviction of third-degree possession of a controlled substance, arguing that the district court erred by denying his motion to suppress evidence that he abandoned after he was pat frisked by a police officer. Because the pat frisk was constitutional and the evidence is not "fruit of the poisonous tree," we affirm.

FACTS

Shortly after midnight on April 12, 2009, Worthington police officers were dispatched to a local bar in response to a report of a "fight in progress." Sergeant William Bolt arrived at the scene and observed Officer Kristi Honermann escorting two men out of the bar. Sergeant Bolt took control of one of the individuals, appellant Jerson Anibal Lopez-Marroquin, and walked him toward Sergeant Bolt's squad car.

As they walked toward the squad car, Lopez-Marroquin attempted to pull away from Sergeant Bolt. Sergeant Bolt strengthened his hold on Lopez-Marroquin, and when they reached the squad car, Sergeant Bolt laid Lopez-Marroquin across the hood of the car. Next, Sergeant Bolt frisked Lopez-Marroquin, but he did not find any weapons. Sergeant Bolt held Lopez-Marroquin against the hood of the squad car for six or seven minutes, while he waited for Officer Honermann to approach.

When Officer Honermann arrived, Sergeant Bolt released his hold on Lopez-Marroquin and allowed him to stand so Officer Honermann could speak with him. During Officer Honermann's interview of Lopez-Marroquin, Sergeant Bolt noticed a clear plastic bag containing a white substance on the ground next to Lopez-Marroquin's

right foot. When Sergeant Bolt asked Lopez-Marroquin about the bag, Lopez-Marroquin responded that he did not know what the officer was talking about and tried to sweep the bag beneath the squad car with his foot. Sergeant Bolt then noticed a $20 bill and a second clear plastic bag containing a white substance on the ground slightly behind Lopez-Marroquin's right foot. The substance in the bags field tested positive for methamphetamine, and Lopez-Marroquin was arrested.

Lopez-Marroquin was charged with several offenses, including one count of third-degree possession of a controlled substance under Minn. Stat. § 152.023, subd. 2(1) (2008). Lopez-Marroquin moved to suppress the methamphetamine on the ground that Sergeant Bolt's pat frisk was unlawful and Lopez-Marroquin's abandonment of the controlled substance was prompted by the illegal search. Lopez-Marroquin did not challenge the legality of his seizure.

The district court held a hearing on the suppression motion and concluded that the pat frisk was illegal. But the district court denied the motion, reasoning that the methamphetamine was not discovered by exploitation of the search. A jury found Lopez-Marroquin guilty of third-degree possession of a controlled substance, and the district court sentenced him to a 21-month stayed prison sentence. This appeal follows.

D E C I S I O N

"When reviewing pretrial orders on motions to suppress evidence, [an appellate court] 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). Appellate courts review the district court's findings of

fact under a clearly erroneous standard, but legal determinations are reviewed de novo. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006).

Lopez-Marroquin claims that Sergeant Bolt's pat frisk was unconstitutional and that the evidence discovered after the search should have been suppressed as "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 417 (1963) (holding that evidence obtained by the exploitation of previous illegal police conduct is inadmissible). The state argues that the district court erroneously concluded that the pat frisk was illegal but correctly concluded that the methamphetamine was not discovered as a result of the search.

A party, without filing a notice of related appeal, may "raise alternative arguments on appeal in defense of the underlying decision when there are sufficient facts in the record for the appellate court to consider the alternative theories, there is legal support for the arguments, and the alternative grounds would not expand the relief previously granted." *State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003) (citing Minn. R. Crim. P. 29.04, subd. 6, and concluding that the court of appeals erred by failing to apply the rule). Because the factual record is adequate, there is legal support for the state's argument, and the alternative theory would not expand the relief previously granted, we first review the district court's decision regarding the legality of the pat frisk.

The Pat Frisk

The Fourth Amendment to the United States Constitution and Article I of the Minnesota Constitution prohibit the unreasonable search and seizure of "persons, houses, papers, and effects." U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless

searches are per se unreasonable, subject to limited exceptions. *State v. Othoudt*, 482 N.W.2d 218, 221-22 (Minn. 1992) (citing *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)). A police officer may conduct a limited pat frisk of a seized person for weapons on less than probable cause if he can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *State v. Gilchrist*, 299 N.W.2d 913, 916 (Minn. 1980) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968)) (quotation marks omitted).

Police officers may "stop and frisk a person when (1) they have a reasonable, articulable suspicion that a suspect might be engaged in criminal activity and (2) the officer reasonably believes the suspect might be armed and dangerous." *State v. Flowers*, 734 N.W.2d 239, 250 (Minn. 2007) (quoting *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd*, 508 U.S. 366, 113 S. Ct. 2130 (1993)) (quotation marks omitted) (other citation omitted). The officer need not be absolutely certain that the individual is armed; rather, the issue is whether a reasonably prudent officer in the circumstances would be justified in believing that his safety or that of others was in jeopardy. *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883; *see also Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 1923 (1972) ("The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. . . ."). The paramount justification for conducting a pat frisk is officer safety. *Terry*, 392 U.S. at 23-24, 88 S. Ct. at 1881. Courts consider the specific, reasonable inferences an officer is entitled to draw from the facts in light of his or her experience when

determining whether an officer acted reasonably. *State v. Crook*, 485 N.W.2d 726, 729 (Minn. App. 1992), *review denied* (Minn. Aug. 4, 1992).

At the motion hearing, Sergeant Bolt testified that when he laid Lopez-Marroquin across the hood of the squad car, he was concerned for his safety because he had been called to investigate a fight, there were a lot of people around, Lopez-Marroquin had tried to pull away from him, and Lopez-Marroquin was "fairly strong." Sergeant Bolt also testified that as he held Lopez-Marroquin against the hood of the squad car, Lopez-Marroquin tried to rise up from the hold. Finally, Sergeant Bolt testified that despite the "fight in progress" call, he did not learn that there had not actually been a fight until after the pat frisk.

The district court's memorandum in support of its decision notes that Sergeant Bolt was called to the scene in response to a report of a "fight in progress," and that Lopez-Marroquin "attempted to pull away" from Sergeant Bolt as they walked toward the squad car. Because the district court's findings are consistent with Sergeant Bolt's testimony, we presume that the district court found his testimony credible. *See Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004) (stating that when a district court's findings are consistent with a witness's testimony, an appellate court must assume that the district court found the witness to be credible). Notwithstanding Sergeant Bolt's testimony, the district court concluded that there were "no facts" to support a reasonable suspicion that Lopez-Marroquin was armed and dangerous. The district court reasoned that there was no evidence that the alleged fight at the bar involved weapons or that Sergeant Bolt intended to place Lopez-Marroquin in his squad car while he waited for

Officer Honermann to investigate. The district court also reasoned that Lopez-Marroquin's "resistance" to Sergeant Bolt "does not force the conclusion that he was armed or dangerous."

A suspect's refusal to follow an officer's instructions can support a determination that a pat frisk is necessary. *See State v. Richmond*, 602 N.W.2d 647, 651 (Minn. App. 1999) (considering a defendant's inability or unwillingness to answer officer's questions during a stop as part of the determination that a pat search was reasonable), *review denied* (Minn. Jan. 18, 2000); *cf. State v. Varnado*, 582 N.W.2d 886, 890 (Minn. 1998) (concluding that a weapons search was not justified where suspect fully cooperated with police). In this case, Lopez-Marroquin did not fully cooperate with Sergeant Bolt as the officer attempted to walk him to the squad car. And Lopez-Marroquin's failure to cooperate must be considered in light of the fact that Sergeant Bolt had reason to believe that Lopez-Marroquin had been involved in an early-morning bar fight.

While Lopez-Marroquin's physical resistance does not "force" a conclusion that he was armed or dangerous, his unwillingness to cooperate with Sergeant Bolt provides support for the pat frisk. An officer need not be absolutely certain that an individual is armed before conducting a pat frisk; the issue is whether a reasonably prudent person under the circumstances would be warranted in the belief that his or her safety or the safety of others was in danger. *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883. We hold that the facts in this case warranted Sergeant Bolt's safety concerns and justified a limited pat frisk for officer safety.

Because we hold that the pat frisk was lawful, there is no basis to suppress the alleged fruit of the search, and we affirm on this ground. But in the interest of providing thorough review, we also review the district court's conclusion that the methamphetamine was not the fruit of the pat frisk.

The Fruit of the Poisonous Tree

Generally, evidence seized in violation of a defendant's constitutional protections must be suppressed. *State v. Jackson*, 742 N.W.2d 163, 177-78 (Minn. 2007). Similarly, "evidence discovered by exploiting previous illegal [police] conduct is inadmissible." *State v. Olson*, 634 N.W.2d 224, 229 (Minn. App. 2001) (citing *Wong Sun*, 371 U.S. at 488, 83 S. Ct. at 417), *review denied* (Minn. Dec. 11, 2001). "When property is abandoned, however, generally the owner no longer has a reasonable expectation of privacy and the exclusionary rule will not apply." *State v. Askerooth*, 681 N.W.2d 353, 370 (Minn. 2004). "But, if the property is abandoned because of an unlawful act by police officers, it will not be admissible as evidence." *Id.*

"[E]vidence is not 'fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police.'" *State v. Doughty*, 472 N.W.2d 299, 305 (Minn. 1991) (quoting *Wong Sun*, 371 U.S. at 487-88, 83 S. Ct. at 417) (other quotation marks omitted). Instead, the relevant inquiry is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* (quoting *Wong Sun*, 371 U.S. at 488, 83 S. Ct. at 417-18) (quotation marks omitted). Numerous factors bear on the

application of this test, including the presence of intervening circumstances.[1] *State v. Sickels*, 275 N.W.2d 809, 814 (Minn. 1979).

Caselaw provides several examples of circumstances in which abandoned evidence was determined to be the fruit of a search. These cases generally involve situations in which evidence was abandoned in direct response to the threat of a search or an attempt to search. *See State v. Hardy*, 577 N.W.2d 212, 217 (Minn. 1998) (concluding that the officers' attempt to search the defendant caused the events that led to the "abandonment" of the evidence); *State v. Dineen*, 296 N.W.2d 421, 422 (Minn. 1980) (concluding that an officer's persistence in trying to force a defendant to remove a coat from the back seat of a car so the officer could see what was under the coat "clearly

[1] We have previously stated that a four-factor test is used. *See Olson*, 634 N.W.2d at 229 (citing *State v. Sickels*, 275 N.W.2d 809, 814 (Minn. 1979)) (stating courts must consider (1) the purpose and flagrancy of the officer's misconduct, (2) the presence of intervening circumstances, (3) whether it is likely the evidence would have been obtained in the absence of the illegality, and (4) the temporal proximity of the illegality and the evidence alleged to be the fruit of the illegality). We have also said that "[n]o one factor is dispositive; rather, courts must balance all of these factors." *Id.*; *see also State v. Bergerson*, 659 N.W.2d 791, 797 (Minn. App. 2003) (same). We cited *State v. Weekes*, 268 N.W.2d 705, 709 (Minn. 1978), for this proposition. *Olson*, 634 N.W.2d at 229. But *Weekes* concerned the admissibility of an in-custody confession that was made after an illegal arrest and the subsequent provision of a Miranda warning. 268 N.W.2d at 706-07. The supreme court listed seven factors that must be considered when determining whether the primary "taint" of an illegal arrest has been purged including (1) whether a Miranda warning was given, (2) the temporal proximity of the arrest and the confession, (3) the presence of any intervening circumstances, (4) the purpose and flagrancy of the official misconduct, (5) the treatment of defendant while confined, (6) his relationship with his interrogators, and (7) his freedom of communication with persons other than law-enforcement officers. *Id.* at 708-09. In this context, the court said: "No one factor provides a certain guide. One must balance all of these factors and attempt to determine whether the illegal arrest was a proximate contributing cause of the confession." *Id.* at 709. It is not clear that this rule was meant to apply in other contexts, such as in abandoned-evidence cases. Therefore, we do not analyze each of the four factors here.

prompted" the defendant's flight and abandonment of the marijuana that was under the coat); *State v. Slifka*, 256 N.W.2d 90, 90 (Minn. 1977) (noting that it was undisputed that the "defendant abandoned . . . drugs in the face of a threatened search of his person by law enforcement officers"); *In re Welfare of M.D.B.*, 601 N.W.2d 214, 218 (Minn. App. 1999) (concluding that a gun was abandoned as a result of an officer's attempt to conduct a search), *review denied* (Minn. Jan. 18, 2000).

Unlike the circumstances in the examples cited above, the district court found that Lopez-Marroquin abandoned the methamphetamine *after* the pat frisk, while he spoke with Officer Honermann. This finding is not clearly erroneous. *See State v. Kvam*, 336 N.W.2d 525, 529 (Minn. 1983) ("A [district] court's finding is erroneous if [an appellate] court, after reviewing the record, reaches the firm conviction that a mistake was made."). The record would not support a finding that Lopez-Marroquin removed the drugs from his person and dropped them on the ground while Sergeant Bolt physically restrained him over the hood of the squad car. Moreover, Sergeant Bolt did not notice the plastic bags on the ground until after he released Lopez-Marroquin and Lopez-Marroquin began talking with Officer Honermann. Because the abandonment occurred after the search, the district court correctly recognized that the abandonment was not a "direct result" of an improper search "without any intervening circumstances." We therefore consider whether the methamphetamine was obtained by exploitation of the pat frisk or instead by means sufficiently distinguishable from the search. *See Doughty*, 472 N.W.2d at 305.

The district court reasoned that the time that elapsed between the pat frisk and the abandonment, along with the ensuing conversation between Lopez-Marroquin and

Officer Honermann, constituted sufficient intervening circumstances to disconnect the pat frisk from the subsequent abandonment. And the district court concluded that Lopez-Marroquin's "effort to dispose of the methamphetamine in this case was prompted, not by the . . . frisk, but, rather by his continued detention." We agree.

Lopez-Marroquin does not explain how Sergeant Bolt allegedly exploited the pat frisk to obtain the methamphetamine. And with the exception of time and location, we discern no connection between the pat frisk and the abandonment. Absent any causal connection between the pat frisk and Lopez-Marroquin's abandonment of the methamphetamine, or any indication that the methamphetamine was obtained by exploitation of the pat frisk, the district court correctly concluded that the methamphetamine was not the "fruit" of the pat frisk. Therefore, even if the pat frisk were illegal, the methamphetamine would not be subject to suppression under the fruit-of-the-poisonous-tree doctrine. We affirm on this ground as well.

Affirmed.

Dated: ______________________________

Judge Michelle A. Larkin