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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-2273**

State of Minnesota,  
Respondent,

vs.

Craig Thomas Hayes,  
Appellant.

**Filed January 25, 2011  
Affirmed  
Lansing, Judge**

Ramsey County District Court  
File No. 62-CR-08-15169

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Considered and decided by Kalitowski, Presiding Judge; Lansing, Judge; and  
Worke, Judge.

## UNPUBLISHED OPINION

LANSING, Judge

In this appeal from conviction following a stipulated-facts trial on a charge of fifth-degree possession with intent to sell, Craig Hayes challenges the denial of his pretrial suppression motion, the determination that a BB gun was a firearm for purposes of sentence enhancement, and the absence of a jury determination on the enhanced sentence. Because the seizure and ensuing search of Hayes was constitutionally valid, the BB gun was properly determined to be a firearm, and Hayes was not entitled to a jury determination on the law that applied to his sentence, we affirm.

### FACTS

St. Paul police officers who were on patrol in the afternoon of October 30, 2008, heard a dispatch report that a man near the intersection of University and Lexington was armed with a gun. The citizen informant told the dispatcher that the person with the gun was a black male who was wearing a puffy blue jacket. The officers drove directly to the intersection, a distance of five blocks.

As the officers approached Lexington from University, they saw a group of black males, who appeared to be juveniles, running across traffic in the northbound lanes of Lexington, only narrowly avoiding being struck by oncoming cars. About the same time, the officers received a second dispatch saying that the armed suspect and a black male companion wearing a black jacket were walking west on University Avenue. Continuing west on University for about two blocks, the officers observed two men who matched the descriptions.

The officers approached the men with their service revolvers drawn. In a protective pat-down search, one of the officers discovered a BB gun in the upper-left, inside jacket pocket of the person wearing the puffy blue jacket who was later identified as Craig Hayes. The officer also discovered thirty baggies containing marijuana in the pockets of Hayes's pants.

The citizen informant told the officers that he was driving west on University at Lexington and saw the man later identified as Hayes on the southwest corner of the intersection pointing a black handgun at several black male juveniles. The informant made a U-turn and drove back to the intersection. Another witness, who got off the bus at Lexington and University, heard Hayes arguing with the juveniles about a debt and then saw him pull out "a black-colored handgun." The police transported Hayes and his companion, who had an active warrant, to the law enforcement center.

The state charged Hayes with possession with intent to sell, a fifth-degree controlled substance crime, in violation of Minn. Stat. § 152.025, subd. 1(1) (2008). At a pretrial hearing, Hayes moved to suppress the BB gun and the marijuana, arguing that they were discovered as a result of an impermissible search and seizure. Following testimony and argument, the district court denied the suppression motion.

Hayes and the state stipulated to the facts and submitted the case to the district court for determination under Minn. R. Crim. P. 26.01, subd. 4. Hayes waived his right to a jury trial in writing and on the record. He acknowledged that the suppression issue was dispositive and said that he would seek review on appeal. The district court also heard arguments on whether the BB gun qualified as a firearm for purposes of the

sentence-enhancement provisions of Minn. Stat. § 609.11 (2008). Hayes’s counsel noted on the record that Hayes was stipulating to the submitted facts, which established that Hayes possessed the BB gun, but was not stipulating that the BB gun was a firearm.

Following the submission on stipulated facts and argument, the district court found Hayes guilty of possession with intent to sell. As part of its sentencing decision, the district court concluded as a matter of law that Hayes’s black Crossman Model C11, 4.5 millimeter BB gun was a firearm for purposes of the enhanced-sentencing provision in Minn. Stat. § 609.11. In response to a joint motion for a downward dispositional departure, the district court stayed Hayes’s mandatory-minimum sentence of thirty-six months and placed him on probation for up to five years. On appeal Hayes challenges the district court’s denial of his pretrial suppression motion, its ruling that section 609.11 applies to enhance his sentence, and the failure to provide a jury trial on the sentence-enhancement issue.

## **D E C I S I O N**

### **I**

In his challenge to the denial of his suppression motion, Hayes argues that the seizure of his person and the ensuing search that produced the gun and the thirty baggies of marijuana was unconstitutional. Whether a search or seizure is constitutionally justified is a question of law that we review de novo. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005).

The United States and Minnesota Constitutions prohibit “unreasonable searches and seizures.” U.S. Const. amend. IV; Minn. Const. art. I, § 10. Investigatory seizures

are constitutionally permissible if they are based on a reasonable suspicion of criminal activity that is supported by “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968)). Whether an investigative stop is reasonable depends on whether the stop was justified “at its inception” and whether the officer’s actions were reasonably related in scope to the circumstances justifying the stop. *Terry*, 392 U.S. at 19-20, 88 S. Ct. at 1879. When determining whether an officer had reasonable suspicion, courts consider the totality of the circumstances and any inferences reasonably drawn from an officer’s training and expertise. *State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983).

The district court found that the citizen informant’s tip, the officers’ observations that corroborated the tip, the update on the suspect’s location, the description of the suspect’s companion, and the short time frame between the report and the officers’ response, justified an investigatory seizure.

Information of criminal activity that is reported by a reliable informant may be considered to meet the reasonable-suspicion standard. *Adams v. Williams*, 407 U.S. 143, 147, 92 S. Ct. 1921, 1924 (1972). A disinterested private citizen is presumed to be a reliable source. *State v. Jones*, 678 N.W.2d 1, 11 (Minn. 2004). This is particularly true when an informant, as in this case, discloses their identity so that they can be located. *State v. Timberlake*, 744 N.W.2d 390, 394 (Minn. 2008).

The officers’ initial information came from a report by a disinterested citizen informant. The citizen’s tip contained specific information about the location of a person

armed with a gun. The informant described the person as a black male wearing a puffy blue jacket. The officers were able to respond immediately because they heard the dispatch when they were only five blocks from the reported location. The report of a dangerous situation was corroborated by the officers' observations as they neared the intersection and saw a group of young black males run into oncoming traffic, only narrowly avoiding injury. The officers then received an update that the armed suspect and another man were walking west on University Avenue. The man with the suspect was described as a black male wearing a black jacket. The officers immediately observed two men matching the descriptions at a street corner two blocks west of Lexington. These facts and the applicable law support the district court's determination that an investigatory seizure of the suspect was justified. We now turn to the question of whether the methods used to accomplish the procedure were constitutionally permissible.

As they approached the two men, the police had their service revolvers drawn. Law enforcement officers conducting investigative stops are commonly faced with fluid situations in which they must determine, in the moment, the amount of force that is necessary. *See Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 1872 (1989) (recognizing that officers must adjust their use of reasonable force to evolving circumstances). Officers may conduct an investigative stop with firearms drawn when a suspect is reasonably believed to be armed. *See United States v. Lloyd*, 36 F.3d 761, 763 (8th Cir. 1994) (holding that officers investigating tip of armed threat acted reasonably when they brandished weapons); *see also State v. Balenger*, 667 N.W.2d 133, 139 (Minn. App. 2003) (discussing importance of balancing "legitimate concerns about the safety of

law enforcement officers” against intrusion on individual’s Fourth Amendment rights), *review denied* (Minn. Oct. 21, 2003).

The reasonableness of an officer’s belief that a suspect may be armed and dangerous is dependent on the facts. *Terry*, 392 U.S. at 30, 88 S. Ct. at 1884. A tip that someone is armed must be differentiated from a general report of illegal activity because of the potential for imminent danger. *Balenger*, 667 N.W.2d at 138 (citing *United States v. Clipper*, 973 F.2d 944, 951 (D.C. Cir. 1992)). “If an officer making a reasonable investigatory stop has cause to believe that the individual is armed, he is justified in proceeding cautiously with weapons ready.” *State v. O’Neill*, 299 Minn. 60, 68, 216 N.W.2d 822, 828 (1974). The use of force during an investigative stop is not unconstitutional if it is necessary for the officers’ protection and reasonable under the circumstances. *See State v. Nading*, 320 N.W.2d 82, 84 (Minn. 1982) (holding officers acted reasonably by ordering suspects to lie on ground when they believed suspects were armed).

In light of the citizen informant’s report that a man matching Hayes’s description accompanied by a man who matched his companion’s description had publicly displayed a gun only eleven minutes earlier at an intersection two blocks away, it was reasonable for the police officers to believe that Hayes was armed and to take precautionary measures. Because the record indicates that as the situation progressed, specific, articulable facts provided the officers with sufficient information to suspect Hayes of criminal activity and to continue to believe that he was armed, the officers’ seizure and ensuing search of Hayes did not violate his constitutional rights.

Hayes also argues that the police had insufficient evidence to take him into custody. “There is probable cause to arrest . . . when a person of ordinary care and prudence, viewing the totality of circumstances objectively, would entertain an honest and strong suspicion that a specific individual has committed a crime.” *State v. Ortega*, 770 N.W.2d 145, 150 (Minn. 2009). Officers may search a person’s body incident to a lawful arrest. *Id.* at 149-50.

The record supports the district court’s determination that, at the time police arrested Hayes, they reasonably believed that Hayes had committed a crime. A disinterested citizen informant reported seeing a man with a gun at a specific location on a public street; Hayes was near the specified location and fit the description given by the informant; the officers removed from Hayes’s jacket pocket a BB gun that was loaded and ready to fire; and the officers had observed a group of young men who were fleeing in a manner that suggested a dangerous situation. Based on these undisputed facts, the police had probable cause to believe that Hayes had committed a crime and had an objective legal basis to arrest him. And, as part of the search incident to his lawful arrest, the officers found thirty baggies of marijuana.

For these reasons, the district court properly denied Hayes’s motion to suppress the evidence of the BB gun and the thirty baggies of marijuana.

## II

Under Minnesota law, a person who commits an offense that is included within a specified category of offenses must receive an enhanced sentence if the person, “at the time of the offense, had in possession . . . a firearm.” Minn. Stat. § 609.11, subd. 5(a).

Hayes's conviction under Minn. Stat. § 152.025, subd. 1(1), places him within this category of offenses. *See* Minn. Stat. § 609.11, subd. 9 (listing all felonies under chap. 152 as subject to enhancement provision). The enhancement provision does not, however, define the term "firearm." The district court concluded that for purposes of section 609.11, a BB gun qualifies as a firearm.

Whether the BB gun qualifies as a firearm presents a question of statutory construction, which we review de novo. *State v. Anderson*, 666 N.W.2d 696, 698 (Minn. 2003). We conclude that controlling precedent supports the district court's determination that the BB gun is a firearm for purposes of Minn. Stat. § 609.11, subd. 5(a). In *State v. Seifert*, 256 N.W.2d 87, 88 (Minn. 1977), the supreme court determined that a BB gun constituted a firearm in the context of a criminal statute, establishing that the term should be construed broadly. At the time, there was no definition of "firearm" within the criminal code, and the supreme court relied on the provisions of the game and fish law that defined "firearm" as "any gun from which a shot or projectile is discharged by means of an explosive, gas, or compressed air." *Id.*

We have, in turn, relied on *Seifert*'s broad interpretation of firearm in subsequent criminal cases. In *State v. Newman*, we held that a BB gun constituted a firearm for purposes of Minn. Stat. § 690.66, subd. 1e(a) (Supp. 1993), the drive-by shooting statute. 538 N.W.2d 476, 477-78 (Minn. App. 1995), *review denied* (Nov. 30, 1995). And in *State v. Fleming*, we held that a BB gun qualified as a firearm within the meaning of Minn. Stat. § 624.713, subd. 1(b) (2004), which prohibits a person convicted of a crime of violence from possessing a firearm. 724 N.W.2d 537, 540 (Minn. App. 2006).

Hayes argues that *Seifert* is not controlling because some current provisions of the criminal code contain a statutory definition of “firearm” that excludes BB guns. He points to sections 609.669 and 609.666, both of which limit the definition of “firearm” to that section only. *See* Minn. Stat. §§ 609.666, subd. 1(a), .669, subd. 2(2) (2010) (limiting definition of “firearm” to each respective section).

“Courts presume that the legislature acts with full knowledge of previous statutes and existing caselaw.” *Pecinovsky v. AMCO Ins. Co.*, 613 N.W.2d 804, 809 (Minn. App. 2000) (citing *Minneapolis E. Ry. v. City of Minneapolis*, 247 Minn. 413, 418, 77 N.W.2d 425, 428 (1956)), *review denied* (Sept. 26, 2000). We also presume that when the supreme court “has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed [on] such language.” Minn. Stat. § 645.17(4) (2010). Because the legislature has not defined “firearm” for purposes of the entire criminal code or specifically for section 609.11, it has presumptively adopted the supreme court’s definition in *Seifert* for the statutory section at issue. *See Fleming*, 724 N.W.2d at 540 (applying presumptive adoption to hold that legislature adopted supreme court’s *Seifert* definition of “firearm”); *Newman* 538 N.W.2d at 478 (same).

The district court properly concluded that for purposes of Minn. Stat. § 609.11, the operative definition of “firearm” includes a BB gun. Under that definition the district court was required to apply the enhancement provision to Hayes’s sentence.

### III

Finally, Hayes contends that the imposition of an enhanced sentence based on the district court's factual finding violated his constitutional right to a jury trial. Issues of constitutional interpretation are legal questions that we review de novo. *State v. Barker*, 705 N.W.2d 768, 771 (Minn. 2005).

Hayes correctly states that caselaw prohibits enhancing a criminal sentence based on a factual finding not made by a jury. *State v. Shattuck*, 704 N.W.2d 131, 142 (Minn. 2005). But the district court enhanced Hayes's sentence not as a result of a factual finding, but as a result of a legal conclusion. Section 609.11 applied to Hayes's sentence only if he was in possession of a firearm at the time he committed the offense. Hayes admitted that he possessed the BB gun and displayed it to the group of young black males at the intersection. He does not challenge the validity of that admission. Hayes also stipulated to the fact that he possessed the BB gun, and his attorney noted on the record that Hayes was stipulating to possessing the BB gun at the time the offense was committed.

Hayes's dispute was solely directed at the legal issue of whether the BB gun qualified as a firearm under section 609.11. The district court concluded that it did. Construction of a criminal statute is a legal question. *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002). The question of whether a BB gun qualifies as a firearm in a criminal statute, has properly been treated as a question of statutory interpretation in *Seifert*, *Fleming*, and *Newman*. 256 N.W.2d at 88; 724 N.W.2d at 538-40; 538 N.W.2d at 477-78. Thus, the district court properly applied Minn. Stat. § 609.11 to enhance Hayes's

sentence based on its legal conclusion, not a finding of fact, that for purposes of the statute, a BB gun qualified as a firearm as a matter of law. Enhancing Hayes's sentence, therefore, did not violate his right to a jury trial.

**Affirmed.**