STATE OF MINNESOTA
IN COURT OF APPEALS
A10-916

State of Minnesota,
Respondent,

vs.

Brandon Ryan Smith,
Appellant.

Filed April 5, 2011
Affirmed in part and reversed in part
Toussaint, Judge

Dakota County District Court
File No. 19HA-CR-09-3350

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

James C. Backstrom, Dakota County Attorney, Nicole E. Nee, Assistant County Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defendant, St. Paul, Minnesota (for appellant)

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

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

TOUSSAINT, Judge

Appellant Brandon Ryan Smith challenges his convictions of gross-misdemeanor possession of a pistol without a permit in a motor vehicle and misdemeanor

transportation of a firearm in a motor vehicle, arguing that the district court erred by admitting the firearm because investigative questioning during the traffic stop expanded the scope of the stop and was not supported by independent reasonable, articulable suspicion. Because the officer's questioning did not expand the scope of the stop, we affirm appellant's convictions. Appellant also challenges the sentence for the misdemeanor conviction, arguing that both convictions are based on the same behavioral incident. Because both convictions arise from the same behavioral incident, we vacate the sentence for the illegal-transportation conviction.

D E C I S I O N

I.

Appellant argues that investigative questioning during a lawful traffic stop expanded the scope of the stop and was not supported by reasonable, articulable suspicion, thereby rendering the search of his car illegal. After the district court's pretrial ruling denying appellant's motion to suppress the evidence, the matter was tried by the court on stipulated facts. We review de novo a district court's pretrial order on a motion to suppress evidence based on the undisputed facts and the district court's factual findings that are not clearly erroneous. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008).

The federal and state constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The Minnesota Constitution independently requires that the framework of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), be used to evaluate "the reasonableness of seizures during traffic stops even when

a minor law has been violated." *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004). Determination of reasonableness under *Terry* is a question of law. *State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003).

At the contested omnibus hearing, Minnesota State Patrol Trooper Michael James Gensmer testified that he and a state patrol trainee were in a marked squad car monitoring speeds on a state highway when appellant drove by, speeding and not wearing a seatbelt. Appellant pulled over to the shoulder and stopped before the officers activated their emergency lights. They then pulled up behind appellant, activated the squad car's emergency lights, and conducted a traffic stop.

Trooper Gensmer asked appellant why he had stopped on the shoulder, and appellant, who was driving a car with Illinois plates, explained that he needed to get GPS directions because he did not know how to get to his destination in St. Paul. During this conversation, appellant "was shaking very violently" in a "very noticeable" manner. Trooper Gensmer asked appellant why he was shaking; appellant stated that he had an undiagnosed medical condition. In Trooper Gensmer's experience, although individuals often become nervous when they are stopped, they do not do so to the extent shown by appellant in this case. Trooper Gensmer also thought that appellant's response, that he was shaking because of a lifelong medical condition that had never been diagnosed, was evasive.

The officers went back to the squad car to discuss their suspicions and to enter appellant's driver's license information into the computer. Because the trainee forgot to ask for appellant's middle name, which was not on his driver's license, the trainee had to

return to get appellant's middle name in order to receive a report concerning appellant's driving privileges. When the trainee went back to appellant's car, he also asked if there were weapons or drugs in the car; appellant acknowledged that he had a handgun next to him. The officers told appellant to get out of his car and placed him in handcuffs. They then looked and saw the gun between the driver's seat and the center console.

Under the first step of a *Terry* analysis, a traffic stop constitutes a lawful investigatory stop "whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation." *Arizona v. Johnson*, 129 S. Ct. 781, 784 (2009). Appellant concedes that his car was lawfully stopped for speeding and a seatbelt violation and that the stop was justified at its inception.

Under the second step of a *Terry* analysis, each incremental intrusion during a traffic stop must be strictly tied to and justified by the initial basis for the valid stop, supported by independent probable cause, or supported by independent reasonableness under *Terry*. *Askerooth*, 681 N.W.2d at 365. This prong concerns the scope, duration, and methods of the search or seizure. *Id.* at 364-65.

Appellant's sole argument is that the trainee's question whether appellant had any illegal drugs or weapons in his car violated his constitutional right to be free from unreasonable searches and seizures because the question expanded the scope of the traffic stop and was not supported by reasonable, articulable suspicion. In support of this claim, he relies heavily on the supreme court's opinions in *Askerooth*, *Fort*, and *Wiegand*, as well as this court's opinion in *Syhavong*; his argument largely hinges on the notion that nervous behavior is not, by itself, sufficient to create reasonable, articulable suspicion.

All of these cases are distinguishable from the present facts.

In *State v. Askerooth*, a police officer stopped Askerooth for failing to obey a stop sign, at which point he learned that Askerooth did not have a driver's license. 681 N.W.2d at 356-57. The officer patted down Askerooth and confined him to the back seat of the squad car before asking for and receiving consent to search Askerooth's van. *Id.* at 357. The officer testified that Askerooth was cooperative and did not do anything to arouse the officer's suspicion or lead him to believe that he was dangerous. *Id.* at 358. The supreme court held that escalation of the seizure from questioning Askerooth as he sat in his van to confining Askerooth in the back seat of the squad car was unreasonable. *Id.* at 365, 367. The court explained that "most drivers expect during a traffic stop to be detained briefly, asked a few questions, and then be allowed to leave after an officer either issues a citation or concludes that issuance of a citation is not warranted." *Id.* at 366. By contrast, telling a driver to get out of his vehicle, patting him down, and holding him in the back of a squad car violates a driver's reasonable expectation of privacy. *Id.*

In *State v. Fort*, the supreme court held "that in the absence of reasonable, articulable suspicion a consent-based search obtained by exploitation of a routine traffic stop that exceeds the scope of the stop's underlying justification is invalid." 660 N.W.2d 415, 416 (Minn. 2003). In that case, the police officers made a routine traffic stop. *Id.* Because neither the driver nor the passenger had a valid driver's license, the officers decided to tow the car. *Id.* at 417. One officer told Fort, the passenger, to get out of the car. *Id.* On the way to the squad car, he asked Fort whether there were drugs or weapons in the car, and Fort said that there were not. *Id.* The officer then asked Fort whether he

had any drugs or weapons on his person, and Fort said that he did not. *Id.* The officer then asked Fort whether he would mind if the officer searched him—without informing Fort that he could refuse the search request or that he was free to leave—and Fort consented. *Id.* The officer patted him down and found crack cocaine. *Id.* The officer testified that Fort was nervous and avoided eye contact. *Id.* But because the purpose of the stop was to process speeding and cracked-windshield violations, and because there was no reasonable, articulable suspicion of any other crime, "the investigative questioning, consent inquiry, and subsequent search went beyond the scope of the traffic stop" and was therefore invalid. *Id.* at 419.

In *State v. Wiegand*, the supreme court held that the "the investigative method used by the officers exceeded the permissible scope of a traffic stop for a routine equipment violation in the absence of a reasonable, articulable suspicion of drug-related criminal activity." 645 N.W.2d 125, 128 (Minn. 2002). A police officer testified that he did not suspect that Wiegand was under the influence of any drugs but only believed that Wiegand was acting suspiciously. *Id.* at 128. When asked if there were any narcotics in the car, Wiegand said that there were not. *Id.* The officer asked another officer to write the warning so he could retrieve his narcotics-detection dog from his patrol car and have it walk around the suspect's car; while doing so, the dog alerted to narcotics at the front, passenger-side corner of the car, which led to a full-blown search and arrests. *Id.* at 129. The court concluded that the dog sniff was not a full-blown search requiring probable cause. *Id.* at 133. Instead, it applied *Terry* principles to "balance the nature and quality of the intrusion into the individual's Fourth Amendment interests against the importance

of the governmental interests at stake." *Id.* at 134. Expressing concern that "the officer appeared to have used the opportunity of a routine equipment violation, along with the availability of other officers to write a warning ticket, to conduct the dog sniff," and noting that the officer had no reason to suspect drug-related activity, the court held that the officers did not have the required reasonable, articulable suspicion. *Id.* at 136-37.

In *State v. Syhavong*, this court held that mere nervousness, without more, on the part of the driver and passenger of a stopped car does not amount to reasonable, articulable suspicion justifying expansion of the duration or scope of a traffic stop: "While an officer's perception of an individual's nervousness may contribute to an officer's reasonable suspicion, nervousness is not sufficient by itself and must be coupled with other particularized and objective facts." 661 N.W.2d 278, 282 (Minn. App. 2003). In that case, the officer did not allow the stopped vehicle to leave after a citation was given. *Id.* at 281.

Appellant is correct that these cases establish that reasonable, articulable suspicion is needed to expand the scope or duration of a traffic stop. But they all involve greater invasions into a driver or passenger's expectation of privacy than one simple question. *Askerooth* involves confinement to the back of a police squad car and a consent request; *Fort* involves repeated questioning, tantamount to badgering and described by the supreme court as "exploitation," which culminated in a consent request; *Wiegand* involves a narcotics-detection dog sniff; and *Syhavong* involves continued detention of the vehicle and a consent request. Here, the duration of the stop was not extended. The trooper asked only one question, did not use enhanced investigative methods such as a

narcotics-detection dog, and did not request consent to search appellant's car. *Cf. State v. Hussong*, 739 N.W.2d 922, 927 (Minn. App. 2007) (observing the difference between an officer asking a boat operator "to *show* him a flotation device instead of asking merely whether he *had* one"). We conclude that the single question posed to appellant did not expand the scope of the stop. Consequently, the district court did not err by admitting the evidence.

II.

Appellant also argues, and respondent State of Minnesota agrees, that the district court erred by staying imposition of the sentence for both convictions because the violations arise out of the same behavioral incident. *See* Minn. Stat. § 609.035, subd. 1 (2008) ("[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses . . . ."); *see also State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006) ("Typically, when a person commits multiple offenses that all arise from a single behavioral incident, Minn. Stat. § 609.035 allows a court to enter a sentence for only one of the crimes." (Footnote omitted.)). Both parties urge this court to reverse the sentence for the misdemeanor conviction of illegal transportation of a firearm, leaving in place the sentence for the gross-misdemeanor possession of a pistol in a motor vehicle without a permit. Both convictions arise from the same behavioral incident: appellant's possession of the firearm in his car when he was stopped. We therefore vacate the sentence for the illegal-transportation conviction.

Affirmed in part and reversed in part.