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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2034**

State of Minnesota,
Respondent,

vs.

Fernando Delvalle Garcia,
Appellant.

**Filed October 1, 2012
Affirmed
Collins, Judge***

Anoka County District Court
File No. 02-CR-10-8331

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

Anthony C. Palumbo, Anoka County Attorney, M. Katherine Doty, Assistant County Attorney, Anoka, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Gurdip Singh Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and
Collins, Judge.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

COLLINS, Judge

Appellant challenges his convictions of first- and second-degree possession of a controlled substance, methamphetamine, arguing that the district court erred in three ways: (1) ruling that he was lawfully seized based on information provided by an informant; (2) ruling that the methamphetamine was admissible under the doctrine of inevitable discovery, and (3) admitting his pre-*Miranda* statements to the police into evidence at trial. We affirm.

FACTS

On October 19, 2010, Detective Russell Clark met with a confidential informant (CI). Clark had never worked with this CI before. The CI had a record of felony-related arrests and was promised some benefit for providing accurate information. The CI informed Clark that he could arrange for a purchase of methamphetamine from a man named Fernando. The CI described Fernando as a Hispanic male, about 30 years old. The CI also said that Fernando drove a blue Chevrolet Trailblazer. The CI also told Clark that he had purchased methamphetamine from Fernando in the past.

In the presence of Clark, the CI telephoned the person he identified as Fernando and arranged for a meeting that night in a Wal-Mart parking lot. Clark overheard references to a purchase of “two,” that Clark understood to mean two ounces of methamphetamine. Based on this information, Clark arranged for the Anoka-Hennepin Drug Task Force to set up a surveillance team at the Wal-Mart location.

Near the appointed time, the surveillance team informed Clark that a blue Chevrolet Trailblazer had entered the Wal-Mart parking lot. Accompanied by the CI in an unmarked vehicle, Clark drove past the Trailblazer and the CI identified its sole occupant as Fernando. Clark directed the surveillance team to detain the occupant of the Trailblazer.

Five to seven police officers surrounded the Trailblazer and removed appellant Fernando Garcia from the vehicle at gunpoint. Garcia was handcuffed and placed in a marked police squad car. Detective Paul Bonesteel asked for his name, and Garcia identified himself. Bonesteel did not ask any other questions. Garcia then spontaneously stated that he was there to deliver a package and asked what was going on. Bonesteel did not respond and had no further conversation with Garcia.

Detective Brek Larson arrived with his dog, Sherman. Sherman is trained and certified in the detection of narcotics. Sherman gave a positive indication for the presence of narcotics at the seam between the front and back doors on the driver's side of the Trailblazer. Inside the vehicle, Sherman again alerted to the presence of narcotics in the back seat area. The vehicle contained a large volume of items. After 30 minutes of searching, four to six officers had not found what they were looking for.

After the police either asked Garcia, or pointedly informed him of the seriousness of the situation and his need to cooperate, Garcia told them where the package that he was there to deliver was located. The package containing methamphetamine was seized and Garcia was formally arrested. Garcia was taken to the jail where, for the first time, he was given a *Miranda* warning. Garcia invoked his right to remain silent.

The state charged Garcia with first- and second-degree possession of a controlled substance. Garcia filed a motion seeking suppression of his statements at the scene and the evidence seized from his vehicle. He argued that his removal from the vehicle at gunpoint constituted a warrantless arrest without probable cause, that the ensuing search of his vehicle was unlawful, and that his statements at the scene were obtained in violation of *Miranda*. He later withdrew his motion regarding the initial search of the vehicle, and the district court subsequently noted that “[t]he dog sniff and vehicle search are not contested.”

Following a contested omnibus hearing, the district court found probable cause supporting Garcia’s seizure and arrest. And, although finding that Garcia’s statement as to the location of the package containing the methamphetamine “was the result of improper custodial interrogation,” the district court denied Garcia’s motion to suppress the evidence based on a violation of *Miranda*. The district court reasoned that the methamphetamine inevitably would have been discovered by other, lawful means. However, the district court did not address whether or not Garcia’s statement telling of the location of the package was to be suppressed. Garcia did not ask for clarification as to whether or not the district court was suppressing the statement, and he never renewed his motion that the statement be suppressed.

In its opening statement at trial, the state referred to Garcia’s statement that he was just delivering a package, and to his statement telling of the location of the package in his vehicle. Garcia did not object. Rather, Garcia likewise incorporated these statements in his opening statement to the jury. During trial, without objection, Clark testified that

Garcia made both statements. And in his closing, Garcia argued that his cooperation with the police in locating the package demonstrated that he was merely there to deliver a package and was unaware of its contents. The jury found Garcia guilty of both counts. The district court imposed and executed the guidelines sentence of 78 months. This appeal followed.

D E C I S I O N

Garcia argues that the district court erred by (1) ruling that he was lawfully seized based on information provided by an informant; (2) concluding that the methamphetamine would inevitably have been discovered without his statement obtained in violation of *Miranda*; and (3) admitting his non-*Mirandized* statements to the police into evidence. We address each of Garcia's claims in turn.

I.

On appeal, Garcia concedes that police may lawfully seize and investigate a person, “if the officer reasonably suspects the person of criminal activity.” But he argues that, here, the police acted on unreliable information from an informant and therefore lacked the reasonable suspicion of criminal activity necessary to legally seize him. We disagree. “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 Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution protect against unreasonable searches and seizures. To

conduct a stop for limited investigatory purposes, an officer must have reasonable, articulable suspicion of criminal activity. *State v. Munson*, 594 N.W.2d 128, 136 (Minn. 1999) (citing *Terry v. Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868, 1880 (1968)). To satisfy this legal standard, “[t]he police must only show that the stop was not the product of mere whim, caprice or idle curiosity, but was based upon ‘specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.’” *State v. Pike*, 551 N.W.2d 919, 921-22 (Minn. 1996) (quoting *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880). Reasonable, articulable suspicion must be present at the moment a person is seized. *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880; *see also State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995) (citing *Florida v. Royer*, 460 U.S. 491, 497-98, 103 S. Ct. 1319, 1323-24 (1983)).

“[A] person has been seized if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter.” *Cripps*, 533 N.W.2d at 391; *see United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980); *Matter of Welfare of E.D.J.*, 502 N.W.2d 779, 781-82 (Minn. 1993). When, under the totality of circumstances, a reasonable person would believe that, because of the conduct of the police, he or she is not free to leave, then a seizure has occurred, and “the police must be able to articulate reasonable suspicion justifying the seizure.” *E.D.J.*, 502 N.W.2d at 783. “The information necessary to support an investigative stop need not be based on the officer’s personal observations, rather, the police can base an

investigative stop on an informant's tip if it has sufficient indicia of reliability." *Matter of Welfare of G.M.*, 560 N.W.2d 687, 691 (Minn. 1997).

Among the factors considered to determine whether an informant is reliable are the officer's ability to corroborate the information and whether the informant provides statements against the informant's interest. *State v. Ross*, 676 N.W.2d 301, 304 (Minn. App. 2004). Even minor details that are corroborated can give credence to an informant's tip when the police know the identity of the informant. *See id.* at 304-05; *see also State v. Siegfried*, 274 N.W.2d 113, 115 (Minn. 1978) ("[T]he fact that police can corroborate part of the informer's tip as truthful may suggest that the entire tip is reliable.").

Here, the officers corroborated a number of important details. The CI described Fernando (subsequently determined to be Garcia) as a Hispanic male who drove a blue Chevrolet Trailblazer. By telephone, in the presence of Clark, the CI arranged the place and time to meet Garcia to purchase methamphetamine. The surveillance team engaged by Clark observed a blue Trailblazer enter the designated Wal-Mart parking lot at about the appointed time. Before the vehicle was stopped, the CI identified its sole occupant as Fernando, whom he had called. Additionally, the CI provided a statement against his penal interest: that he had purchased methamphetamine from this Fernando in the past.

Garcia relies on *State v. Cook*, 610 N.W.2d 664 (Minn. App. 2000), *review denied* (Minn. July 25, 2000), to argue that the CI provided only innocuous details that did not link Garcia to the incriminating part of the tip—that he was in possession of methamphetamine. *See Cook*, 610 N.W.2d at 669 (finding that police lacked probable cause when informant's tip included only a description of the defendant's clothing,

physical appearance, vehicle, and present location). But a telling distinction here is that the CI's tip was also consistent with Garcia's future conduct. *See Ross*, 676 N.W.2d at 305 (discussing *Cook* and observing the enhanced reliability a prediction of future behavior provides). The CI not only described Garcia and his vehicle, but predicted Garcia's future behavior by arranging a transaction and having Garcia meet him at the Wal-Mart parking lot at a specified time.

On these facts, the CI's tip had ample indicia of reliability, and the police therefore had the requisite reasonable suspicion to initiate an investigatory stop. The district court did not err by ruling that Garcia was lawfully seized based on the information provided by the CI.

II.

Garcia next argues that the district court erred by ruling that the methamphetamine was admissible under the doctrine of inevitable discovery. We disagree. The district court concluded that Garcia's statement directing the police to the location of the methamphetamine stemmed from custodial interrogation in violation of *Miranda*. *See Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 1630 (1966) (holding that an individual who is taken into custody must be warned that he has the right to remain silent and the right to the presence of an attorney). But the district court nonetheless denied Garcia's motion to suppress the methamphetamine on this basis, because "[Garcia's] statement was not necessary to the ultimate discovery of the narcotics in the Trailblazer."

Under the derivative evidence rule, evidence discovered by exploiting a previous illegality is inadmissible. Such evidence is considered fruit of the poisonous tree. To

admit evidence obtained after an illegality, the state must show that the evidence was obtained by means sufficiently distinguishable to be purged of the primary taint.

State v. Jensen, 349 N.W.2d 317, 321 (Minn. App. 1984) (citation and quotations omitted). The Minnesota Supreme Court has stated that

Numerous factors bear on the application of this test, including the temporal proximity of the illegality and the evidence alleged to be the fruit of that illegality, the presence of intervening circumstances, the purpose and flagrancy of the misconduct, and whether it is likely that the evidence would have been obtained in the absence of the illegality.

State v. Sickels, 275 N.W.2d 809, 814 (Minn. 1979).

Here, acting on the tip from the CI and the dog Sherman's positive indications for the presence of narcotics, the police were already looking in the right place before Garcia directed them to the exact location of the package containing methamphetamine within his vehicle. The search had been time consuming, apparently due to the large volume of items in the vehicle. The district court found,

[w]hile the statement by [Garcia] as to the location of the package assisted in its discovery, it was not critical to the package being found. The police were already in the correct vehicle and knew the location of the evidence was behind the front seats. The proximity of the package location had already been defined prior to any statement by [Garcia]. There is no evidence that the police were giving up the search absent the statement of [Garcia]. The ultimate discovery of the package containing narcotics was inevitable.

The district court did not err by denying Garcia's motion to suppress the methamphetamine on the basis of the *Miranda* violation.

III.

Finally, Garcia argues that the district court plainly erred by admitting his pre-*Miranda* statements at trial. We disagree. Garcia contests both his statement that he was at the scene to deliver a package and his statement directing the police to the location of the package within his vehicle.

Statements made by a suspect during custodial interrogation are generally inadmissible unless the suspect is first given a *Miranda* warning. The *Miranda* warnings are required in order to protect a defendant's Fifth Amendment privilege against self-incrimination. If the police take a suspect into custody and then ask questions without informing him of the rights enumerated in *Miranda*, his responses generally cannot be introduced into evidence to establish his guilt.

State v. Edrozo, 578 N.W.2d 719, 724 (Minn. 1998) (citations omitted).

“An appellate court reviews a district court’s findings of fact for clear error. It makes an independent review, however, of the district court’s determination regarding custody and the necessity of a *Miranda* warning.” *State v. Miller*, 573 N.W.2d 661, 670 (Minn. 1998) (citation omitted).

As to Garcia’s statement that he was at the scene to deliver a package, the district court found that Garcia said this spontaneously without any prompting from Bonesteel or any other officer. The district court found that Bonesteel asked Garcia for his name and did not ask any other questions. Garcia offers no argument as to why these findings are clearly erroneous and, upon review of the record, we see no clear error in this regard. Because Bonesteel said or did nothing to elicit this statement, Garcia was not interrogated within the meaning of the Fifth Amendment. *See Edrozo*, 578 N.W.2d at 724 (stating

that interrogation occurs “whenever a person in custody is subjected to either express questioning or its functional equivalent,” meaning “any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect”) (quotations omitted)). Garcia’s statement that he was at Wal-Mart to deliver a package was properly admitted into evidence.

As to Garcia’s statement to the police regarding the location of the package containing methamphetamine, the state argues that Garcia waived this issue and that it should be reviewed only for plain error. We agree.

[E]videntiary objections should be renewed at trial when an in limine or other evidentiary ruling is not definitive but rather provisional or unclear, or when the context at trial differs materially from that at the time of the former ruling. Common sense also dictates that, when an attorney is unsure whether evidence offered at trial violates an evidentiary ruling, the attorney should renew an objection or seek clarification or reversal of a prior ruling.

State v. Word, 755 N.W.2d 776, 783 (Minn. App. 2008). In this case, the district court’s March 21, 2011 order did not contain an explicit ruling on whether or not this statement was admissible at trial. Garcia did not renew his motion, ask for a ruling, or object to the statement at trial. Therefore, this issue is reviewed for plain error. *See id.* (applying the plain-error standard of review where appellant failed to renew his objection at trial following a district court order that was not a “definitive ruling”).

The United States Supreme Court has established a three-prong test for plain error, requiring that before an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. If these three prongs are met, the appellate court then

assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.

....

The third prong, requiring that the error affect substantial rights, is satisfied if the error was prejudicial and affected the outcome of the case. The defendant bears the burden of persuasion on this third prong. We consider this to be a heavy burden. We have defined plain error as prejudicial if there is a “reasonable likelihood that the [the error] in question would have had a significant effect on the verdict of the jury.

State v. Griller, 583 N.W.2d 736, 740-41 (Minn. 1998) (quotation omitted).

Even assuming, without deciding, that admission of Garcia’s statement satisfies the first two prongs of the plain-error test, Garcia has not demonstrated that it affected his substantial rights. *See State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007) (“If a defendant fails to establish that the claimed error affected his substantial rights, we need not consider the other [plain error] factors.”).

Rather than objecting to the admission of the statement at trial, Garcia adopted it and used it to advance the theory of his defense: that he did not know of the contents of the package that he was there to deliver. Garcia employed the statement in his opening to the jury. He also argued during his closing that “his cooperation with the police in helping them find the package shows his actual ignorance as to what was inside.” Garcia further argued that “[i]f he knows that there’s thousands of dollars’ worth of narcotics in his car, thousands of dollars’ worth of methamphetamine, he’s going to keep his mouth shut.” Because Garcia did not object to the statement and, indeed, adopted and used the statement to advance the theory of his defense, it is readily apparent that Garcia was not

disadvantaged by the admission of the statement. *See State v. Bauer*, 598 N.W.2d 352, 363-64 (Minn. 1999) (holding that admission of an expert's testimony stating that he believed the defendant intended to kill the victim was not plain error, in part because the defendant's theory of defense was not affected by the admission). Accordingly, we conclude that the admission into evidence of this statement did not constitute plain error.

Affirmed.