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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0329**

State of Minnesota,
Respondent,

vs.

Troy Allan Keske,
Appellant.

**Filed March 4, 2013
Affirmed
Schellhas, Judge**

Hubbard County District Court
File No. 29-CR-11-612

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

Donovan D. Dearstyne, Hubbard County Attorney, Erika C. H. Randall, Assistant County Attorney, Park Rapids, Minnesota (for respondent)

Mark D. Kelly, Law Offices of Mark D. Kelly, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Bjorkman, Judge; and
Klaphake, Judge.*

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant argues that the district court erred by denying his motion to suppress evidence. We affirm.

FACTS

Appellant Troy Keske appeals from the district court's denial of his motion to suppress evidence after respondent State of Minnesota charged him with fifth-degree controlled-substance possession and third-degree driving while impaired. The facts underlying the charge are undisputed.

On the night of June 1, 2011, Deputy Adam Williams observed a pickup truck traveling five miles over the speed limit, south on Highway 71 in Hubbard County. The pickup truck was pulling a boat on a trailer and its taillights were not lighted. When Deputy Williams followed the pickup truck for the purpose of stopping it, he observed the trailer cross the center line twice. Deputy Williams stopped the pickup truck, approached the driver, and asked for the driver's license and proof of insurance. The driver, later identified as Keske, produced his driver's license but he did not have proof of insurance. Deputy Williams observed that Keske had "bloodshot, watery eyes [and] slurred speech," and the deputy could smell the "strong odor of an alcohol beverage," which was a "very strong odor" coming from within the vehicle. A passenger was seated in the front seat, and Deputy Williams could not determine whether the odor of alcohol was coming from the pickup truck or one or both of its occupants. Upon questioning, Keske told Deputy Williams that he had "quit drinking some time ago," which Deputy

Williams believed meant that Keske had quit drinking sometime that day. When Deputy Williams told Keske and the passenger that he could smell “a lot” of alcohol in the pickup truck, the passenger said that he had been drinking.

While Keske was still in the driver’s seat in the pickup truck, Deputy Williams performed a “quick horizontal gaze nystagmus” test on him. Because Keske showed “a lack of smooth pursuit,” Deputy Williams asked him to exit the pickup truck, after which Deputy Williams did not detect the odor of alcohol. Keske told Deputy Williams that he had multiple sclerosis, which made him unable to perform some field sobriety tests and caused him to slur his speech. Keske also told Deputy Williams that he did not have any prior DWIs. Deputy Williams performed another horizontal gaze nystagmus test, and Keske again showed a “lack of smooth pursuit” and some “minor nystagmus.” Deputy Williams did not ask Keske to perform other field sobriety tests because of Keske’s multiple sclerosis but did administer a preliminary breath test (PBT), which indicated that Keske had not been drinking. Deputy Williams then ran Keske’s license and learned that Keske in fact had a prior DWI conviction.

When Deputy Williams asked Keske if any open containers of alcohol were in the pickup truck, Keske replied, “Not that I know of.” Deputy Williams told Keske that he had probable cause to search the pickup truck because he smelled alcohol coming from it, and Keske consented to the search. Deputy Williams then re-approached the pickup truck and questioned the passenger because “the alcohol issue ha[d] not been resolved” and, based on his “training and experience . . . a lot of times there’s an open container within a vehicle” when an odor of alcohol is “coming from the vehicle,” “especially at that time of

night.” Deputy Williams told the passenger that the deputy had “reason to search [the] vehicle for any open containers” and asked the passenger if there were any open containers of alcohol “in [a] bag” that was located in the pickup truck. The passenger answered no but handed Deputy Williams an open container of alcohol with a “consumable amount” of alcohol in it. Deputy Williams then searched under the passenger’s seat and found an open can of beer and asked the passenger to step out of the pickup truck. As the passenger stepped outside the pickup truck, Deputy Williams heard the sound of “glass hitting together” coming from the passenger “when he walked.” Deputy Williams performed a pat search for officer safety and felt an object in the passenger’s pocket like “a marijuana pipe.” Deputy Williams then recovered a marijuana pipe and marijuana from the passenger’s pockets.

Deputy Williams then searched the bag that was located on the floor behind the passenger seat. The bag was “large enough to . . . conceal[] alcohol.” Within the bag was a “small, black leather or imitation leather pouch,” which Deputy Williams opened and found pipes that had a “white, cloudy substance within . . . and . . . burn marks.” Deputy Williams believed that the cloudy substance and burn marks were “consistent with . . . methamphetamine.” Deputy Williams then handcuffed Keske, resumed his search of the pickup truck, found several marijuana and methamphetamine pipes in the glove box and center console of the passenger compartment, and found marijuana and methamphetamines in the bed of the pickup truck. While Deputy Williams searched the pickup truck, Trooper Mike Engum, a drug-recognition evaluator, arrived and performed field sobriety tests on Keske and observed several indicia of methamphetamine use.

Trooper Engum concluded that Keske had some drug impairment. Deputy Williams transported Keske to the Hubbard County Law Enforcement Center, where Keske was read the implied-consent advisory; consented to a blood test that revealed the presence of amphetamine, methamphetamine, and THC; and made post-*Miranda* admissions.

The state charged Keske with fifth-degree controlled-substance possession in violation of Minn. Stat. § 152.025, subd. 2(a)(1) (2010) and third-degree driving while impaired in violation of Minn. Stat. §§ 169A.20, subd. 1(2), 169A.26, subd. 1(a) (2010). Keske moved to suppress “all evidence obtained as a result of the search of his motor vehicle, and all other evidence obtained as a result of the arrest.” Keske argued that Deputy Williams exceeded the scope and duration of the stop of Keske. The district court denied the motion, and Keske proceeded with a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 4. The court found Keske guilty of fifth-degree controlled-substance possession and third-degree driving while impaired.

This appeal follows.

D E C I S I O N

Keske does not challenge the validity of the initial traffic stop; instead, he argues that “Deputy Williams[’s] re-approach of . . . Keske’s pick-up [truck] to question the occupant and then search for open containers was an improper expansion of the duration and scope of the traffic stop.” The district court concluded that Deputy Williams had reasonable grounds to expand the scope of the stop and that Deputy Williams had probable cause to search Keske’s pickup truck.

An appellate court reviews a district court's factual findings in a pretrial suppression order under a clearly erroneous standard and legal determinations, including its probable-cause determination, de novo. *State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012). When reviewing the legality of a seizure or search, this court will not reverse the district court's findings unless clearly erroneous or contrary to law. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd*, 508 U.S. 366, 113 S. Ct. 2130 (1993).

The United States Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" U.S. Const. amend. IV; *accord* Minn. Const. art. I, § 10. "The touchstone of the Fourth Amendment is reasonableness." *State v. Johnson*, 813 N.W.2d 1, 5 (Minn. 2012) (quotation omitted). "Automobiles constitute 'effects' under the Fourth Amendment" *State v. Wiegand*, 645 N.W.2d 125, 131 (Minn. 2002). "Generally, warrantless searches are per se unreasonable." *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008). "Evidence resulting from an unreasonable seizure must be excluded." *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012); *see also State v. Wiggins*, 788 N.W.2d 509, 512 (Minn. App. 2010) (stating that evidence seized in violation of prohibition of unreasonable searches and seizures must "generally . . . be suppressed"), *review denied* (Minn. Nov. 23, 2010).

"[A] traffic stop does not violate Minn. Const. art 1, § 10, as long as each incremental intrusion during a stop [is] tied to and justified by one of the following: (1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness, as defined in *Terry [v. Ohio]*." *Smith*, 814 N.W.2d at 350 (quoting

State v. Askerooth, 681 N.W.2d 353, 365 (Minn. 2004)). “Article I, Section 10, imposes this reasonableness limitation on both the duration and the scope of a traffic stop.” *Id.* (quotation omitted). “To be reasonable, the basis of the officer’s suspicion must satisfy an objective, totality-of-the-circumstances test.” *Id.* at 351. In applying this test, we ask “whether the facts available to the officer at the moment of the seizure would warrant a man of reasonable caution in the belief that the action taken was appropriate.” *Id.* at 351–52 (quotations omitted). To be reasonable, “any intrusion in a routine traffic stop must be supported by an objective and fair balancing of the government’s need to search or seize and the individual’s right to personal security free from arbitrary interference by law officers.” *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005) (quotations omitted).

Scope and Duration of Stop

“[A] police officer may expand the scope of a traffic stop to include investigation of other suspected illegal activity only if the officer has reasonable, articulable suspicion of such other illegal activity.” *Smith*, 814 N.W.2d at 351 (quotation omitted). Here, Deputy Williams articulated specific facts, based on his training and experience, that led him to form a particularized, reasonable suspicion that an open container might be in Keske’s pickup truck. Deputy Williams testified that when he initially approached Keske’s pickup truck, he was unable to determine whether the odor of alcohol “was coming from the vehicle or specifically one of the two occupants.” After he administered the PBT to Keske, he re-approached Keske’s pickup truck because the odor of alcohol coming from the pickup truck was very strong, which meant to him that the vehicle contained an open container of alcohol.

Citing *Burbach*, Keske argues that Deputy Williams unlawfully expanded the scope of the stop. In *Burbach*, a police officer stopped the defendant for speeding and smelled a strong odor of alcohol either coming from the driver-defendant or her passenger. 706 N.W.2d at 486. The passenger volunteered that “the alcohol smell came from” him, and Burbach exhibited no indicia of alcohol impairment and successfully completed several field sobriety tests. *Id.* The officer nevertheless asked Burbach for consent to search her vehicle, Burbach consented, and the officer found crack cocaine in the vehicle. *Id.* at 487. The supreme court concluded that the district court did not err by suppressing the drugs, concluding that an “officer’s detection of the odor of alcohol coming from an adult *passenger* during a traffic stop does not, *by itself*, provide a reasonable, articulable suspicion of an open-container violation sufficient to permit an officer to expand the traffic stop by *requesting to search the vehicle.*” *Id.* at 489 (emphasis added).

Keske’s reliance on *Burbach* is misplaced because this case is distinguishable from *Burbach*. Deputy Williams articulated the facts that supported his suspicion that the alcoholic odor was coming from an open container because of the “very strong odor” of alcohol coming from the pickup truck, not, as in *Burbach*, from the adult passenger. *Burbach*, 706 N.W.2d at 489. Moreover, unlike in *Burbach*, in which the driver exhibited no indicia of intoxication and passed every field sobriety test, Deputy Williams suspected that Keske was “intoxicated or under the influence of some sort of drug” after he passed the PBT because of his slurred speech, “the nystagmus,” and Keske’s “extremely bloodshot, watery eyes.” Finally, we note that Deputy Williams did not search Keske’s

pickup truck based only on his detection of the odor of alcohol coming from an adult passenger. Deputy Williams re-approached Keske's pickup truck and the passenger and inquired about whether an open container of alcohol was in a bag in the pickup truck, after which the passenger produced an open container of alcohol. Only then did Deputy Williams search the pickup truck.

This case is similar to the case of *State v. Lopez*, 631 N.W.2d 810, 813–14 (Minn. App. 2001), *review denied* (Minn. Sept. 25, 2001). In *Lopez*, this court stated that a police officer, who had resolved the initial issue that led to the traffic stop but then lawfully approached the vehicle to inform the occupants that they could leave, “detected the odor of alcohol coming from the interior” and had a “reasonable suspicion of criminal activity, i.e., an open bottle in the car.” 631 N.W.2d at 813–14. This court concluded that, because the police officer smelled the odor of alcohol, she had a “lawful basis to continue the detention and conduct an investigation,” which included the police officer questioning a passenger as to whether there was “anything illegal or anything that she should know about in the car.” *Id.* at 814.

We conclude that Deputy Williams had a reasonable suspicion, based on articulable facts, of additional illegal activity—that an open container was located in Keske's pickup truck—and that the deputy's re-approach of Keske's pickup truck was not an unlawful expansion of the traffic stop.

Warrantless Search of Pickup Truck

“Generally, warrantless searches are per se unreasonable.” *Gauster*, 752 N.W.2d at 502; *accord 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)). “Evidence resulting from an unreasonable seizure must be excluded.” *Smith*, 814 N.W.2d at 350. An exception to the search-warrant requirement is the automobile exception. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007); see *United States v. Ross*, 456 U.S. 798, 823, 102 S. Ct. 2157, 2172 (1982) (stating that “an individual’s expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband”). “When probable cause exists to believe that a vehicle contains contraband, the Fourth Amendment permits the police to search the vehicle without a warrant.” *Flowers*, 734 N.W.2d at 248.

Probable cause to search an automobile exists where the facts and circumstances within the officer’s knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a reasonable man of reasonable caution in the belief that the automobile contains articles the officer is entitled to seize.

State v. Gallagher, 275 N.W.2d 803, 806 (Minn. 1979).

Here, Deputy Williams detected a strong odor of alcohol coming from the vehicle and, upon inquiry, Keske’s passenger handed him an open container of alcohol. Deputy Williams had information sufficient to warrant his belief that the pickup truck contained other evidence of open bottle violations. We conclude that Deputy Williams’s search was justified because Deputy Williams had probable cause. See *State v. Alesso*, 328 N.W.2d 685, 686, 688 (Minn. 1982) (stating that a police officer “could have searched the car for other evidence relating to the open-bottle violation” after observing the driver and passenger of a car drinking from cups that the police officer believed contained alcohol);

Lopez, 631 N.W.2d at 814 (concluding that the police officer had probable cause to search a vehicle when she smelled an odor of alcohol and the passenger told her that there was an alcoholic beverage in the vehicle); *State v. Collard*, 414 N.W.2d 733, 735–36 (Minn. App. 1987) (concluding that a police officer had probable cause to search a vehicle when he observed an open container of alcohol in plain view, even when there was no indication that the driver had been drinking), *review denied* (Minn. Jan. 15, 1988); *see also State v. Schinzing*, 342 N.W.2d 105, 107, 109 (Minn. 1983) (concluding that the police officer had probable cause to search a vehicle when he smelled alcohol coming from a car that only had 17-year-old passengers in it).

Scope of Search

“[E]vidence found as a result of a reasonable expansion may be admitted at trial.” *Smith*, 814 N.W.2d at 351. Keske argues that the district court erred by not suppressing evidence of the methamphetamine pipes found in the leather pouch inside the bag because Deputy Williams’s search of the leather pouch exceeded the lawful scope of the search. Keske argues that the lawful scope of the search encompassed only items that could hold containers of alcohol and the leather pouch was too small to hold a container of alcohol. But Keske failed to raise this argument in the district court, and the district court therefore did not make findings about whether the pouch was large enough to hold a container of alcohol or whether Deputy Williams reasonably believed that it might hold a container of alcohol. Because Keske did not raise his argument in the district court, he waived it, and we decline to consider it on appeal. *See Roby v. State*, 547 N.W.2d 354,

357 (Minn. 1996) (stating that supreme court will “generally . . . not decide issues which were not raised before the district court”).

Based on the facts and circumstances in this case, we conclude that Deputy Williams had probable cause to search Keske’s pickup truck for evidence related to an open-bottle crime and that the district court did not err by denying Keske’s motion to suppress the evidence found as a result of the lawful search.

Affirmed.