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STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1893

State of Minnesota,
Respondent,

vs.

Rick Allen Austin,
Appellant.

Filed January 29, 2008
Affirmed
Klaphake, Judge

Ramsey County District Court
File No. K8-06-390

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Mark N. Lystig, Assistant County Attorney, 50 West Kellogg Blvd., Suite 315, St. Paul, MN 55102 (for respondent)

John M. Stuart, State Public Defender, Lydia Maria Villalva Lijo, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and Shumaker, Judge.

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

KLAPHAKE, Judge

Appellant Rick Allen Austin appeals from his conviction for unlawful possession of a firearm under Minn. Stat. § 609.165, subd. 1b(a) (2004). Appellant argues that the district court erred by refusing to suppress evidence discovered during a warrantless search of the vehicle in which he was a passenger and further argues that the BB gun found in the vehicle is not a firearm under Minn. Stat. §609.165, subd. 1b(a). Because the police had probable cause to conduct the search and had a reasonable and articulable suspicion of additional criminal activity to permit expansion of the search beyond the initial justification for the stop, and because a BB gun constitutes a firearm within the meaning of Minn. Stat. §609.165, subd. 1b(a), we affirm.

D E C I S I O N

I. Expansion of Scope of Stop

Both the U.S. Const. amend. IV and Minn. Const. art. I, §10 protect against unreasonable searches and seizures. A traffic stop is a seizure covered by both of these provisions. *State v. Askerooth,* 681 N.W.2d 353, 359 (Minn. 2004). This court reviews de novo a district court's pretrial order regarding suppression of evidence to determine whether the district court erred as a matter of law in making its decision. *Id.*

Police are permitted to make a limited investigative stop if they have a reasonable and articulable suspicion that a person is engaged in criminal activity. *State v. Britton,* 604 N.W.2d 84, 88-89 (Minn. 2000). However, once stopped, "the scope and duration of

a traffic stop investigation must be limited to the justification for the stop." *State v. Fort*, 660 N.W. 2d 415, 418 (Minn. 2003). A stop which is initially valid may become invalid if it becomes "intolerable" in its "intensity or scope." *Askerooth*, 681 N.W.2d at 364. Each expansion of a stop beyond the original purpose must be justified by independent reasonable, articulable suspicion of additional criminal activity. *Id.*; *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005). The existence of reasonable suspicion is determined from the totality of the circumstances. *Id.* Even if one factor is not "independently suspicious," several "factors in their totality" may provide an officer with sufficient reasonable suspicion to expand the scope of a stop. *State v. Martinson*, 581 N.W.2d 846, 852 (Minn. 1998).

Appellant concedes that the initial stop of the vehicle in which he was a passenger was lawful. Before stopping the vehicle, the police officer had a reasonable and articulable suspicion of criminal wrongdoing based on observing black plastic covering the driver's window, which is illegal under Minn. Stat. § 169.71, subd. 1(a)(3) (Supp. 2005). Appellant argues that the district court erred in finding that the officer had reasonable, articulable suspicion of additional criminal activity necessary to expand the scope of the initial investigatory detention. We disagree.

The district court made explicit findings regarding the circumstances surrounding this stop and the observations made by the officer during the course of the stop which led to the search of the vehicle. The stop occurred at about 2:00 a.m. in a high crime area. The driver's only identification was a state driver and vehicle services receipt with no photo identification. The officer, who was initially alone before additional officers

arrived at the scene, was unable to verify the information provided because the state computers were not working. Through the opened driver's door, the officer recognized the front seat passenger as a persistent offender with a lengthy criminal history. He also observed appellant, in the backseat directly behind the front seat passenger, checking his pockets, fidgeting, making no eye contact with the officer and failing to pay attention to what was going on. He then observed appellant making furtive movements in an attempt to hide a small green bag under the backseat. These cumulative observations led the officer to believe there might be weapons or contraband in the bag, and that the two passengers might attempt to flee from the other side of the vehicle. The district court's factual determinations supporting its finding of reasonable suspicion were not clearly erroneous.

Any one of these facts, standing alone, would be insufficient to justify expanding the scope of the stop. However, under the totality of these circumstances, we conclude that the officer had reasonable, articulable suspicion to expand the scope of the initial stop.

II. Probable Cause to Search

This court reviews de novo whether there was probable cause to support the search of a vehicle following a stop. *In re Welfare of G.M.*, 560 N.W.2d 687, 690 (Minn. 1997). We review the district court's factual determinations for clear error. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997). Probable cause exists when there is a substantial basis in light of the totality of the circumstances "that contraband or evidence of a crime will be

found in a particular place." *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995) (quotation omitted).

The record shows that (1) the officer could not verify the driver's identity; (2) the officer recognized one passenger as a known offender with a lengthy record; (3) appellant was checking his pockets, fidgeting, and avoiding eye contact with the officer; and (4) the officer observed appellant making furtive movements as if to hide something under the backseat. *See State v. Gallagher*, 275 N.W.2d 803, 807-08 (Minn. 1979) (finding probable cause based on observations of passenger's attempt to hide a paper bag and suspicious appearance sufficient to justify detention and search). Based on all these circumstances, we conclude that the officer had a substantial basis to believe that contraband or a weapon would be found and, thus, had probable cause to search the vehicle in which appellant was a passenger.

III. Is a BB Gun a Firearm?

Appellant was originally charged under Minn. Stat. § 624.713, subd. 1(b) (2004), for possession of a firearm by an ineligible person. This charge was amended to Minn. Stat. § 609.165, subd. 1b(a), which prohibits any person convicted of a crime of violence from shipping, transporting, possessing, or receiving a firearm. Appellant argues that the district court erred as a matter of law in determining that a BB gun constituted a firearm under this statute.

Whether a BB gun is a firearm under Minn. Stat. § 609.165, subd. 1b(a), is a question of statutory interpretation, which is reviewed de novo. *State v. Anderson*, 666 N.W.2d 696, 698 (Minn. 2003). This statute does not define the term "firearm." In *State*

v. Seifert, 256 N.W.2d 87, 88 (Minn. 1977), the supreme court adopted the game-and-fish definition to determine that a BB gun is a "firearm" where appellant was charged with using a dangerous weapon during a robbery. Likewise, this court determined a BB gun is a "firearm" under the felony drive-by shooting statute. *State v. Newman*, 538 N.W.2d 476, 478 (Minn. App. 1995), *review denied* (Minn. Nov. 30, 1995). Appellant attempts to distinguish these cases by arguing they should not apply to a charge of simple possession, which is not a crime against persons. We disagree.

In *State v. Fleming*, 724 N.W.2d 537 (Minn. App. 2006), this court held that "firearm" includes a BB gun under Minn. Stat. § 624.713, subd. 1 (2004), the felon-in-possession statute, even though a BB gun is specifically excluded from the definition of "pistol," as set forth in Minn. Stat. § 624.712, subd. 2 (2004). *Fleming*, 724 N.W.2d at 539-40. The legislature amended Minn. Stat. § 624.713, subd. 1, in 1994, long after the supreme court's 1977 decision in *Seifert*. 1994 Minn. Laws ch. 636, art. 3, § 27, 28. This court later determined that "[b]y choosing not to define 'firearm' for purposes of [Minn. Stat. § 624.713], the legislature presumptively adopted the Minnesota Supreme Court's definition" in *Seifert* applying the game-and-fish statutory definition of "firearm." *Fleming*, 724 N.W.2d at 540[1]; *see also State v. Newman*, 538 N.W.2d at 478. We apply

[1] In addition, the court in *Fleming* noted that the state could have charged Fleming under Minn. Stat. § 609.165, subd. 1b(a), the firearm prohibition statute at issue here, indicating that a BB gun is a firearm for purposes of that statute because that statute does not reference pistols and, therefore, the BB gun exclusion of Minn. Stat. § 624.712, subd. 2, does not apply. *Fleming*, 724 N.W.2d at 540 n.1. The court observed that Minn. Stat. §§ 609.165 and 624.713 were intended to be coextensive. Given that the "intention of [the] legislature may be discerned from other laws on same or similar subjects," BB guns should be considered "firearms" under both statutes. *Fleming*, 724 N.W.2d at 540 n.1

the same reasoning in interpreting Minn. Stat. § 609.165, subd. 1b(a). The legislature amended this statute in 1996, following *Seifert* and *Newman* without defining "firearm." Therefore, we presume that the legislature adopted the game-and-fish definition with respect to this statute.

Based on law established in *Seifert*, *Newman*, and *Fleming*, and the logic embodied therein, we conclude that a BB gun is a firearm under Minn. Stat. § 609.165, subd. 1b(a).

IV. Pro Se Issues

In his pro se brief, appellant argues that the district court should not have allowed respondent to amend its complaint, and that this decision should have been appealed prior to trial. Prior to the commencement of trial, under Minn. R. Crim. P. 3.04, subd. 2, the district court is free to allow an amendment that adds an additional offense in a criminal complaint. *State v. Bluhm*, 460 N.W.2d 22, 24 (Minn. 1990). Therefore, the district court did not err in permitting the amendment here.

Appellant also argues that BB guns are not firearms because they do not have serial numbers and there is no requirement to show Minnesota identification or to wait prior to purchasing one. These observations have no bearing in light of this court's recent decision in *Fleming*, and the law established in *Seifert* and *Newman*.

Affirmed.