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STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2389

State of Minnesota,
Respondent,

vs.

Thomas Jon Kelsen,
Appellant.

Filed March 4, 2008
Affirmed
Stoneburner, Judge

Washington County District Court
File No. K9057645

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

Douglas Johnson, Washington County Attorney, Richard D. Allen, Assistant County Attorney, 14949 62nd Street North, Box 6, Stillwater, MN 55082 (for respondent)

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Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and Wright, Judge.

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

STONEBURNER, Judge

Appellant challenges his convictions of fifth-degree controlled-substance crime (possession), driving after cancellation, obstructing legal process with force, and

possession of drug paraphernalia. Appellant argues that police officers lacked a reasonable suspicion of criminal activity to stop the truck in which he was a passenger and that the district court erred in denying his motion to suppress evidence resulting from the stop. Appellant also argues that there was insufficient evidence to prove beyond a reasonable doubt (1) that he used force or violence in obstructing his arrest and (2) that he possessed "any amount" of methamphetamine. We affirm.

FACTS

At approximately 3:00 a.m. on a November morning, Stillwater Police Sergeant Jeffrey Stender was patrolling a residential neighborhood in a marked SUV. Stender observed and followed a red truck traveling east on Interlachen Drive. The truck turned right at Maryknoll Drive and immediately stopped on the right side of the road, in front of a driveway to a residence. Stender saw a person he knew to be Jarod Cragoe, who lived at that residence, walk out of the house and get into the passenger side of the truck. Stender, who was passing the truck at that time, was able to see the driver illuminated by the dome light. He observed that the driver was wearing a gray jacket and had a stocking cap low on his head. Stender thought, but was not sure, that the driver was appellant Thomas Jon Kelsen, whom he recognized from multiple prior contacts.[1] Stender knew that Kelsen's driving privileges had been cancelled as inimical to public safety.

[1] Cragoe testified at the omnibus hearing that he left his house wearing a stocking cap and met Kelsen, who was standing by a tree in the middle of Cragoe's yard. Cragoe did not know how the truck came to be parked in front of his driveway. Cragoe said that he "got in the driver's side" and that the keys were already in the truck.

Stender drove to the next intersection and stopped, waiting for the truck to pass him. He checked the truck's registration and found that it was registered to Kelsen's father, whom Stender also knew. When the truck did not pass him, Stender turned around and saw the truck travelling toward him. The truck had been out of his view for approximately two minutes. Stender turned around again and followed the truck.

Stender thought that the driver of the truck was trying to evade him by making numerous right turns. He also thought that the truck was exceeding the speed limit. Stender stopped the truck. At the time of the stop, Cragoe was in the driver's seat and Kelsen, wearing the gray jacket and stocking cap that Stender had earlier observed the driver wearing, was the passenger.

Stender asked both Cragoe and Kelsen for their driver's licenses. Kelsen provided a Colorado driver's license. Stender confirmed that Kelsen's Minnesota driving privileges had been cancelled as inimical to public safety. Stender called for assistance and told Kelsen he was under arrest for driving with an invalid license. Officer Mitchell arrived as Kelsen walked with Stender to Stender's SUV. Kelsen stood between the two police cars with his hands on his head while Stender searched him. Stender found a spoon in Kelsen's pants pocket. Stender later testified that, based on his training and experience, the spoon he found in Kelsen's jacket was likely "drug paraphernalia, used to consume powdered narcotics." Just as Stender handed the spoon to Mitchell, Kelsen broke away and ran north.

Both officers chased Kelsen on foot. Stender yelled at Kelsen to stop and yelled that he would fire his Taser. When Stender believed Kelsen was within 25 feet, he fired

his Taser but missed. Stender caught up with Kelsen, grabbed him around the shoulders, and dragged him to the ground face first. Kelsen continued to struggle against Mitchell's attempts to subdue him and Stender's attempts to handcuff him. Stender heard Mitchell scream and give oral commands for Kelsen to "let go of my hand, let go of my hand." Stender could not see Kelsen's hands and was struggling to pull Kelsen's right arm from under his body to behind his back. Based on Mitchell's repeated commands, Stender believed that Kelsen "ha[d] Officer Mitchell's hand and that Officer Mitchell couldn't break free." Stender stunned Kelsen in the small of his back with the Taser, but Kelsen continued to struggle, and Mitchell continued to tell Kelsen to let go of his hand. Stender stunned Kelsen again and was then able to handcuff him.

Stender placed Kelsen in the back of his SUV and searched the passenger compartment of the truck. Behind the driver's seat, on the floor, Stender found a black case containing a small plastic baggie and a digital scale. Stender later testified that the baggie was the type normally used to package narcotics. Stender also observed that the weighing portion of the scale contained "a white powder substance" that he believed was "most likely methamphetamine."

Kelsen was charged with fifth-degree possession of methamphetamine, driving after cancellation, obstructing legal process with force, and possession of drug paraphernalia. Kelsen moved to suppress all evidence seized as the result of the traffic stop, arguing that the stop was illegal. The district court denied Kelsen's motion, concluding that the stop was lawful because Stender reasonably suspected that Kelsen

was driving the truck and that Kelsen's driving privileges were cancelled as inimical to public safety.

Three witnesses testified at Kelsen's jury trial: Stender; the monitoring clerk for the Washington County Sheriff's Office, who provided foundation for five recorded phone calls that Kelsen made from the jail; and the chemist who analyzed the scale for controlled substances. The chemist testified that because he could not see any substance on the scale, he ran a few drops of distilled water down the scale's cracks and crevices to obtain a sample for testing. He testified that this is a standard procedure at the Minnesota Bureau of Criminal Apprehension. The sample tested positive for methamphetamine. Recordings of Kelsen's telephone calls from the jail were played for the jury. In a call to Cragoe, Kelsen said that he ran from the police because he "had the bub on [him]" and did not want to get caught with it, and that he had put it in his mouth when he got out of the truck. In a telephone conversation with an unidentified woman, Kelsen said he ran from the police "[t]o get rid of something" and that the police did not find anything because it was in his mouth. He told the woman he was "not traveling with s--- ever … again."

The jury found Kelsen guilty of all four counts. The district court sentenced Kelsen, and this appeal followed.

D E C I S I O N

I. Reasonable, articulable suspicion

Kelsen argues that the district court erred in denying his motion to suppress the evidence obtained as a result of the traffic stop because Stender acted on nothing more

than a mere hunch that Kelsen was driving the truck. "When reviewing pretrial orders on motions to suppress evidence, [a reviewing court] 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). This court reviews de novo a district court's determination of reasonable, articulable suspicion with respect to a traffic stop. *State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003).

An officer must have a specific and articulable suspicion of criminal activity before stopping a vehicle. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968); *Marben v. State Dep't of Pub. Safety*, 294 N.W.2d 697, 699 (Minn. 1980). A limited investigatory stop of a motorist is permissible if the officer has a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *Berge v. Comm'r of Pub. Safety*, 374 N.W.2d 732 (Minn. 1985) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981)). "Ordinarily, if an officer observes a violation of a traffic law … the officer has an objective basis for stopping the vehicle." *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997). "The police must only show that the stop was not the product of mere whim, caprice or idle curiosity." *State v. Johnson*, 713 N.W.2d 64, 66 (Minn. App. 2006) (quoting *State v. Pike*, 551 N.W.2d 919, 921-22 (Minn. 1996)).

Kelsen challenges the reasonableness of Stender's suspicion that Kelsen was driving the truck but does not challenge Stender's knowledge that his license was cancelled. Stender testified that he had a good view of the driver when he saw Cragoe enter the passenger side of the truck and that he believed the driver to be Kelsen. His

belief was bolstered by confirmation that the truck was registered to Kelsen's father. The fact that Stender lost sight of the truck for approximately two minutes did not dilute his reasonable suspicion that Kelsen was driving at the time of the stop. The district court did not err in concluding that Stender's reasonable suspicion that Kelsen was driving the truck without a valid license justified the stop.

II. Obstructing arrest with force

Kelsen does not dispute that he intentionally obstructed his arrest, but argues that the state did not prove beyond a reasonable doubt that he used force or violence when struggling with Stender and Mitchell. In considering a claim of insufficient evidence, this court's review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

A person is guilty of obstructing legal process when he intentionally "obstructs, resists, or interferes with a peace officer while the officer is engaged in the performance of official duties." Minn. Stat. § 609.50, subd. 1(2) (2006). The offense is a gross misdemeanor "if the act was accompanied by force or violence or the threat thereof." *Id.*, subd. 2(2); *see* Minn. Stat. § 609.02, subd. 4 (2006) (defining gross misdemeanor). The phrase "force or violence" is not defined by the statute. The district court instructed the jury that "force" means "intentionally inflicting, attempting to inflict or threatening to

inflict bodily harm upon another, or intentionally causing fear in another of immediate bodily harm. … [which] means physical pain or injury, illness or any impairment of a physical condition." *See* 10 *Minnesota Practice*, CRIMJIG 24.26 (2006) (referencing CRIMJIG 12.01 for the definition of force or violence).

The only evidence of Kelsen's use of force is the inference created by Stender's testimony that Mitchell repeatedly commanded Kelsen to let go of his hands. Kelsen was gripping Mitchell's hand with sufficient force that Mitchell could not free himself even after Stender stunned Kelsen with the Taser. This evidence is sufficient to allow the jury to reasonably infer that, beyond a reasonable doubt, Kelsen's grip inflicted or threatened to inflict pain or injury, and is sufficient to support the jury's conclusion that Kelsen used force while obstructing his arrest.

III. Possession of "any amount" of controlled substance

Kelsen argues that the trace of methamphetamine found on the scale is not a sufficient amount to support his conviction for fifth-degree possession of a controlled substance. This court "will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude [that the] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

Methamphetamine is a schedule II controlled substance. Minn. Stat. § 152.02, subd. 3(3)(b). A person who possesses one or more mixtures containing methamphetamine is guilty of a controlled-substance crime in the fifth degree. Minn.

Stat. § 152.025, subd. 2(1) (2006). Minnesota caselaw is clear that section 152.025 does not require that the state prove a specific weight as an element of the offense of possessing mixtures containing a controlled substance classified in schedule I, II, III, or IV of section 152.02. *See, e.g.*, *State v. Traxler*, 583 N.W.2d 556, 562 (Minn. 1998) (concluding that trace amounts of methamphetamine found on a coffee filter and in a sample liquid was sufficient evidence to prove a fifth-degree controlled-substance crime); *State v. Ali*, 613 N.W.2d 796, 800 (Minn. App. 2000) (concluding that section 152.025 "prohibits the possession of cathinone [a schedule I controlled substance] regardless of whether the amount present is sufficient to produce a stimulant effect"), *review denied* (Minn. Sept. 13, 2000).

In this case, Stender testified that he saw a white, powdery substance on the weighing portion of the scale, and he thought the substance was most likely methamphetamine. The chemist confirmed that a trace amount of methamphetamine was found on the scale. The jury was instructed in relevant part that in order to convict Kelsen for fifth-degree possession they must determine that he "unlawfully possessed one or more mixtures containing methamphetamine." Because any quantity of the drug is sufficient to support a conviction under the statute, the evidence in this case supports the verdict.

Affirmed.