STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2115

State of Minnesota,
Respondent,

vs.

Timothy Warren Kuhnau,
Appellant.

Filed April 15, 2008
Affirmed
Willis, Judge

Crow Wing County District Court
File No. K7-05-1959

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

Donald F. Ryan, Crow Wing County Attorney, 213 Laurel Street, Brainerd, MN 56401 (for respondent)

Shari L. Jerde, Special Assistant State Public Defender, Dorsey & Whitney, L.L.P., 50 South Sixth Street, Suite 1500, Minneapolis, MN 55402-1498 (for appellant)

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

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

WILLIS, Judge

Appellant challenges his conviction of fifth-degree possession of a controlled substance, arguing that the district court should have suppressed controlled-substance

evidence because it was obtained as a result of (1) an unconstitutional seizure or, in the alternative, (2) a search that was unconstitutional because it was not incident to a lawful custodial arrest. We affirm.

FACTS

Shortly after 12:00 a.m. on August 3, 2005, while Sergeant David Holtz of the Brainerd Police Department was on patrol driving north on a residential street, he saw appellant Timothy Warren Kuhnau walking south along the street. Sergeant Holtz stopped his unmarked squad car near Kuhnau and "asked him how he was doing that night." Kuhnau "simply looked straight ahead" and responded, "'I'm headed towards downtown'" and continued walking without hesitating. Sergeant Holtz then made a U-turn with his squad car, and, as he did so, Kuhnau "abruptly turned" off the street and began walking west along a set of railroad tracks. Sergeant Holtz turned his squad car onto a maintenance road that paralleled the railroad tracks, got out of the car, began walking toward Kuhnau, and said, "Hey," in an attempt to get Kuhnau's attention. At that point, Kuhnau started running away. Sergeant Holtz pursued Kuhnau and several times ordered him to stop.

Kuhnau eventually stopped running and turned and faced Sergeant Holtz, who ordered Kuhnau to lie down on the ground. Kuhnau did not comply, and as a result, Sergeant Holtz pushed him to the ground and handcuffed him. Another officer, who had joined Sergeant Holtz during the pursuit, searched Kuhnau and discovered a bag containing methamphetamine.

Kuhnau was charged with one count of fifth-degree possession of a controlled substance, in violation of Minn. Stat. § 152.025, subds. 2(1), 3(b) (2004). Kuhnau moved to suppress the evidence of the methamphetamine obtained as a result of the search and to dismiss the charge. The district court denied Kuhnau's motion, a jury found him guilty of fifth-degree possession of a controlled substance, and the district court sentenced him to 28 months' imprisonment. This appeal follows.

D E C I S I O N

When reviewing a denial of a motion to suppress evidence, we independently review the facts and determine, as a matter of law, whether the district court erred by not suppressing the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). When the facts are not disputed, this court must determine whether a police officer's actions constitute a seizure and, if so, whether the officer articulated an adequate basis for the seizure. *Id*.

I. The seizure of Kuhnau was supported by reasonable suspicion of criminal activity.

Kuhnau argues that the district court erred by concluding that he had not been seized until Sergeant Holtz, while running after him, ordered him to stop. Kuhnau argues also that, whenever the seizure occurred, it was not justified by reasonable suspicion of criminal activity. We address first the issue of when the seizure occurred.

A. The seizure

Not all encounters between police officers and citizens are seizures. *In re E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993). A seizure occurs "when the officer, by means of

physical force or show of authority, has in some way restrained the liberty of a citizen." *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995) (quotation omitted). If an officer conveys a message that "compliance with [his] request is required," a seizure has occurred. *Harris*, 590 N.W.2d at 98 (quotation omitted).

Under the Minnesota Constitution, "a person has been seized if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he . . . was neither free to disregard the police questions nor free to terminate the encounter." *Id.* In judging the totality of the circumstances to determine the point at which a seizure has occurred, Minnesota courts apply the *Mendenhall-Royer* standard. *E.D.J.*, 502 N.W.2d at 781-82 (citing *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 1877 (1980); *Florida v. Royer*, 460 U.S. 491, 501, 103 S. Ct. 1319, 1326 (1983)). Under that standard, the supreme court has explained that circumstances that might indicate that a seizure has occurred include: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Harris*, 590 N.W.2d at 98 (quotation omitted). Generally, a person is not seized merely because a police officer approaches that person in a public place and begins to ask questions. *E.D.J.*, 502 N.W.2d at 782.

The district court concluded that the seizure did not occur until Sergeant Holtz ordered Kuhnau to stop, while running after him. Kuhnau argues that he was seized earlier in the encounter, when Sergeant Holtz called out "hey" to get Kuhnau's attention—after Sergeant Holtz had turned his squad car onto the maintenance road, left

his squad car, and approached Kuhnau on foot. Kuhnau asserts that under these circumstances, a reasonable person would no longer believe that he was free to terminate the encounter.

In view of the totality of the circumstances, we conclude that the district court properly determined that the seizure occurred when Sergeant Holtz ordered Kuhnau to stop, while running after him. Before that time, Sergeant Holtz had made no show of authority that would cause a reasonable person to believe that he was not free to disregard Sergeant Holtz or to terminate the encounter; Sergeant Holtz had not ordered Kuhnau to do anything, he had not requested anything of Kuhnau, he had not displayed his weapon or physically touched Kuhnau's person, and there had been no threatening presence of several officers. It was not until Sergeant Holtz, while chasing Kuhnau, ordered him to stop that a reasonable person would believe that he was not free to disregard Sergeant Holtz or to terminate the encounter.

B. Reasonable suspicion

Having determined the point at which Sergeant Holtz seized Kuhnau, we consider next whether there was reasonable suspicion of criminal activity to support that seizure. We review de novo whether a seizure is justified by a reasonable suspicion. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005).

The United States and Minnesota Constitutions prohibit "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. The brief seizure of a person for investigatory purposes is not unreasonable if there is a "particular and objective basis for suspecting the particular person [seized] of criminal activity." *Harris*,

590 N.W.2d at 99 (quotation omitted). This standard is satisfied if the police have a reasonable suspicion "based upon specific and articulable facts which, taken together with rational inference from those facts, reasonably warrant [the] intrusion." *State v. Anderson*, 683 N.W.2d 818, 822-23 (Minn. 2004) (quotation omitted). The officer may make his assessment on the basis of "inferences and deductions that might elude an untrained person." *Cripps*, 553 N.W.2d at 391.

The state argues that the totality of the circumstances shows that the seizure was supported by reasonable suspicion of criminal activity. We agree. First, Kuhnau exhibited evasive conduct—he avoided making eye-contact with Sergeant Holtz and he abruptly changed directions when Sergeant Holtz made a U-turn with his squad car—and he was in an area that had a history of criminal activity; Sergeant Holtz testified that he had frequently encountered persons engaged in criminal activity in that area and that there had been recent property crimes in the residential areas of Brainerd. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (concluding that a person who refused to make eye contact with a police officer and suddenly changed the direction that he was walking when he noticed the police officer, combined with being in an area that had a history of criminal activity, justified a reasonable suspicion of criminal activity); *State v. Houston*, 654 N.W.2d 727, 733 (Minn. App. 2003) ("[E]vasive behavior is a pertinent factor in determining reasonable suspicion.") (quotations omitted). Second, Sergeant Holtz's encounter with Kuhnau occurred late at night. *See State v. Lande*, 350 N.W.2d 355, 357-58 (Minn. 1984) (concluding that the totality of the circumstances, which included the time of day and the suspect's nervous behavior, justified a reasonable

suspicion of criminal activity). Third, Kuhnau fled when Sergeant Holtz called out "hey" to get Kuhnau's attention. *See City of St. Paul v. Vaughn*, 306 Minn. 337, 344, 237 N.W.2d 365, 369 (1975) (recognizing that flight from the police may give rise to a reasonable suspicion of criminal activity).

Kuhnau argues that the district court's finding that he was in an area that had experienced recent property crimes is clearly erroneous. A district court's factual findings will not be reversed unless they are clearly erroneous. *See State v. Gilbert*, 262 N.W.2d 334, 340 (Minn. 1977). Kuhnau contends that although Sergeant Holtz testified that residential areas of Brainerd, in general, had recently experienced property crimes, he did not testify that the specific area where he saw Kuhnau had experienced crime. But Sergeant Holtz testified that Brainerd police had frequently encountered people involved in violations of the law in the area where he saw Kuhnau. Moreover, as the state notes, Brainerd is not a large city and the area where Kuhnau was walking was a residential area. We conclude that the district court's finding was not clearly erroneous.

The district court did not err by concluding that Sergeant Holtz had a reasonable suspicion of criminal activity that justified his seizure of Kuhnau.

II. The search of Kuhnau was incident to a lawful arrest.

After Sergeant Holtz and the other officer apprehended Kuhnau, they searched him. "Warrantless searches 'are per se unreasonable'" unless the search falls within one of the narrow exceptions to the warrant requirement. *Dickerson*, 481 N.W.2d at 843 (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)). One such exception is for a search incident to a lawful arrest, provided that the arrest is supported

by probable cause. *In re Welfare of G.M.*, 560 N.W.2d 687, 695 (Minn. 1997). If an officer has probable cause to arrest, he may search the suspect for weapons or evidence. *State v. Varnado*, 582 N.W.2d 886, 892 (Minn. 1998). An officer has probable cause to arrest when "the objective facts are such that under the circumstances, a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed." *G.M.*, 560 N.W.2d at 695. But the offense for which there is probable cause to arrest must be an offense for which a custodial arrest is authorized. *Varnado*, 582 N.W.2d at 892.

The parties agree that the search was incident to an arrest for the offense of fleeing a police officer, in violation of Minn. Stat. § 609.487, subd. 6 (Supp. 2005), which is a misdemeanor. And Kuhnau does not dispute that Sergeant Holtz had probable cause to make an arrest for that offense. Kuhnau contends, however, that because the offense of fleeing a police officer is a misdemeanor, it is not an offense for which a custodial arrest is authorized, and, therefore, the subsequent search was unconstitutional because it was not incident to a lawful custodial arrest.

Generally, when police officers are acting without a warrant, custodial arrests are not permitted for misdemeanors. *See* Minn. R. Crim. P. 6.01, subd. 1(1)(a); *State v. Martin*, 253 N.W.2d 404, 405-06 (Minn. 1977). In ruling that the search was incident to a lawful custodial arrest, the district court reasoned that a police officer acting without a warrant may make an arrest when a "public offense," which includes misdemeanors, has been committed in the officer's presence. *See* Minn. Stat. § 629.34, subd. 1(c)(1) (2004); *Smith v. Hubbard*, 253 Minn. 215, 220, 91 N.W.2d 756, 761 (1958). Accordingly, the

district court concluded that Sergeant Holtz's arrest of Kuhnau was lawful because Kuhnau committed the misdemeanor offense of fleeing a police officer in Sergeant Holtz's presence, and, therefore, the subsequent search was a constitutional search incident to that arrest.

Kuhnau contends that even when section 629.34 applies because a misdemeanor offense is committed in the presence of a police officer, a custodial arrest is not permitted unless rule 6.01 of the Minnesota Rules of Criminal Procedure also is satisfied. Under rule 6.01, a custodial arrest for a misdemeanor is permitted if "it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or further criminal conduct, or that there is a substantial likelihood that the accused will fail to respond to a citation." Minn. R. Crim. P. 6.01, subd. 1(1)(a). Previous decisions of this court have required that rule 6.01 also be satisfied for a custodial arrest to be lawful, even when section 629.34 applies. For example, in *State v. Richmond*, this court recognized that section 629.34 authorizes arrests for misdemeanors committed in the presence of an officer but proceeded to analyze whether rule 6.01 was satisfied.[1] 602 N.W.2d 647, 653 (Minn. App. 1999), *review denied* (Minn. Jan. 18, 2000).

[1] In *State v. Askerooth*, the Minnesota Supreme Court noted that there is "tension" between rule 6.01 and section 629.34. 681 N.W.2d 353, 363 n.6 (Minn. 2004). Although the supreme court noted this tension, it expressed no opinion on whether a custodial arrest can be based on section 629.34 without regard to rule 6.01. Therefore, we analyze the issue here as we did in *Richmond*, which requires us to consider whether rule 6.01 has been satisfied.

Kuhnau argues that the state failed to present testimony showing that his arrest was necessary to prevent harm to anyone or to prevent further criminal activity or that it was necessary because there was a concern that he would not respond to a citation. He argues, therefore, that a custodial arrest was not authorized under rule 6.01. The state responds that the evidence shows that there was no basis for the officers to believe that Kuhnau would respond to a citation. Thus, the state concludes, a custodial arrest was authorized under rule 6.01.

In re Welfare of T.L.S. presented the issue of whether the custodial arrest for a misdemeanor in that case was authorized under rule 6.01. *See* 713 N.W.2d 877, 881-82 (Minn. App. 2006). In *T.L.S.*, a suspect refused to comply with an order by police officers, even after the officers warned her that if she failed to comply, they would take her into custody. *Id.* at 879. On these facts, this court held that there was "no basis for the officers to believe" that the suspect in that case would respond to a citation, and, thus, the officers' custodial arrest of the suspect was authorized under rule 6.01. *Id.* at 882.

Here, Sergeant Holtz testified that while he was chasing Kuhnau, he ordered him several times to stop. Sergeant Holtz testified further that Kuhnau did not comply when he ordered him to the ground and that Sergeant Holtz had to physically force Kuhnau to the ground and pin his arms behind his back. On this record, as in *T.L.S.*, there would have been no basis for Sergeant Holtz to believe that Kuhnau would respond to a citation. *See id.* A custodial arrest of Kuhnau was therefore authorized under rule 6.01, and the subsequent search incident to that arrest was proper. *See Martin*, 253 N.W.2d at 405

(holding that if a custodial arrest is proper, then the subsequent search of the suspect's person is also proper).

Because we conclude that the seizure of Kuhnau was supported by reasonable suspicion and that the search of Kuhnau was incident to a lawful custodial arrest, we need not address the parties' remaining arguments.

Affirmed.