STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0031

State of Minnesota,
Respondent,

vs.

Johnny Urman,
Appellant.

Filed May 6, 2008
Affirmed
Wright, Judge

Ramsey County District Court
File No. KX-06-1427

Lawrence Hammerling, Chief Appellate Public Defender, Sara J. Lathrop, Special Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104; and

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Considered and decided by Ross, Presiding Judge; Wright, Judge; and Johnson, Judge.

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

WRIGHT, Judge

Appellant challenges the district court's denial of his motion to suppress evidence obtained during the warrantless search of the vehicle he was driving, arguing that (1) the vehicle stop was unjustified and pretextual, and (2) the search was unsupported by probable cause. We affirm.

FACTS

On April 7, 2006, St. Paul police officers Timothy Bohn and Franklin Judge were patrolling in the neighborhood of the BP gas station at 374 North Lexington Avenue. The officers are often at the gas station because it is considered a "problem property" because of known drug and gang activity. Shortly before April 7, Officer Bohn had received information from a confidential informant, from whom he had received reliable information in the past, that a turf dispute was causing increased gang activity at the gas station. The confidential informant recently had been in a car at the gas station with some gang members, one of whom had brandished a gun and accidentally fired it in the car.

When the officers pulled into the gas station parking lot at approximately 9:15 p.m. on April 7, they observed a full-size conversion van parked in the "No Parking" zone along the west side of the parking lot. Appellant Johnny Urman was seated in the driver's seat of the van. Shortly thereafter, the officers saw a man whom Officer Bohn recognized as Bradford Woodberry get out of the passenger side of the van. Having had numerous prior contacts with Woodberry, Officer Bohn knew that Woodberry was a

Shotgun Crips gang member with a lengthy and violent criminal history that included weapons violations and drive-by shootings. As Woodberry exited the van, he looked in the direction of the officers' marked squad car, turned back, and communicated with Urman either through eye contact or orally. Woodberry then shut the door and walked away quickly. Urman immediately drove off.

As both officers watched Urman leave the parking lot, they observed that Urman did not slow down at the sidewalk or signal the turn. The officers also observed Urman fail to yield to oncoming traffic, causing a northbound vehicle to brake suddenly to avoid colliding with the van. Failure to stop at a sidewalk, failure to signal a turn, and failure to yield to oncoming traffic constitute traffic violations. Minn. Stat. §§ 169.31, 169.19, subd. 5, 169.20, subd. 4 (2004).

The officers next observed Urman make several lane changes as he drove north on Lexington Avenue toward University Avenue. Urman signaled the lane changes, but he did not do so 100 feet before he changed lanes, as required under Minn. Stat. § 169.19, subd. 5. As he approached University Avenue, the officers observed Urman abruptly change lanes, activate his turn signal, and turn onto eastbound University Avenue. Again Urman did not signal his turn at the required distance, and he failed to turn from the right lane, as required by Minn. Stat. § 169.19, subds. 1(a), 5 (2004). The officers followed Urman for four blocks on University Avenue and caught up to him at a red light at the intersection with Victoria Street. Immediately after Urman turned left to travel northbound on Victoria Street, Officer Judge activated the squad car's flashing lights and stopped Urman.

After exiting the squad car, Officer Judge approached the driver's side of the van and Officer Bohn approached the passenger's side. Using their flashlights, they looked in the vehicle as they approached to determine whether there were other people in the van. Initially, neither officer saw anything suspicious inside the van. As Officer Judge spoke with Urman and retrieved Urman's driver's license, Officer Bohn again looked in the van with his flashlight. Behind the driver's seat he observed what appeared to be a bullet-resistant vest. In his experience, possession of a bullet-resistant vest coincided with the presence of weapons. On the floor in front of the front passenger's seat, Officer Bohn also observed small, leafy flakes, which, based on his experience, looked like marijuana.

When Officer Judge returned to the squad car to run Urman's driver's-license number, Officer Bohn told Officer Judge what he had seen. When Officer Bohn mentioned the bullet-resistant vest, Officer Judge reported his observation of a pair of gloves and a ski mask lying on the floor of the van. He relayed his concern that these items were connected to recent armed robberies in the area committed by people wearing ski masks and gloves. As the officers discussed what to do, they learned from the driver's-license check that Urman was "a confirmed member of the Shotgun Crips."

To determine Urman's reason for possessing the bullet-resistant vest, Officer Judge returned to the van and asked Urman whether he was a night watchman or security guard. When Urman responded that he was not, Officer Judge directed Urman to exit the vehicle and frisked him for weapons. Urman was placed in the backseat of the squad car while the officers searched the van.

Officer Bohn recovered a loaded gun in a pouch at the back of the front passenger's seat, which could be reached from the driver's seat. The gun, a semi-automatic nine-millimeter pistol, was in the fire position and had an extended magazine with a 30-round capacity. The officers seized the gun, bullet-resistent vest, ski mask, gloves, and van.

Urman subsequently was charged with possession of a firearm by an ineligible person, Minn. Stat. §§ 624.713, subds. 1(b), 2(b), 609.11, subd. 5(b) (2004); and commission of a crime while possessing a bullet-resistant vest, Minn. Stat. § 609.486 (2004).

Urman moved to suppress the evidence of the gun and the bullet-resistant vest, arguing that (1) the stop was unjustified and pretextual, and (2) the officers lacked probable cause to search the van. The district court denied Urman's motion. Urman waived his right to a jury trial and submitted the case on stipulated facts pursuant to Minn. R. Crim. P. 26.01, subd. 3, and the procedure set forth in *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980), preserving the suppression issue for appeal. The district court found Urman guilty of the charged offenses, and this appeal followed.

D E C I S I O N

I.

Urman first argues that the stop of his vehicle was pretextual and, therefore, unconstitutional. The United States and Minnesota constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Whether a seizure violates the Fourth Amendment to the United States Constitution presents a

mixed question of fact and law. *State v. Lee*, 585 N.W.2d 378, 382-83 (Minn. 1998). We review the district court's findings of fact for clear error and give due weight to inferences drawn from those facts by the district court. *Id.* at 283. In doing so, we defer to the district court's assessment of witness credibility in performing its fact-finding duty. *State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003), *review denied* (Minn. July 15, 2003). But we review de novo whether, based on those facts, a seizure is justified. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005).

"A brief investigatory stop requires only reasonable suspicion of criminal activity, rather than probable cause." *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). Indeed, a law-enforcement officer need not observe a violation of the traffic laws to stop a vehicle. *Id.* The reasonable-suspicion standard is not high. *State v. Timberlake*, 744 N.W.2d 390, 394 (Minn. 2008). But reasonable suspicion is more than merely a whim, caprice, or idle curiosity. *Pike*, 551 N.W.2d at 921-22.

A police officer's observation of a traffic violation, however, is sufficient to establish the higher standard of probable cause to stop the vehicle. *Whren v. United States*, 517 U.S. 806, 810, 116 S. Ct. 1769, 1772 (1996); *see also State v. George*, 557 N.W.2d 575, 578 (Minn. 1997) (stating that observation of traffic violation, "however insignificant," gives police officer "an objective basis for stopping the vehicle"). When a stop is based on probable cause, a police officer's subjective intent has no bearing on the reasonableness of the stop. *Whren*, 517 U.S. at 812-13, 116 S. Ct. at 1774. Therefore, allegations of pretext cannot undermine the legality of a stop that is objectively justified by probable cause. *Id.*

Here, the district court found that the stop was justified by the officers' observations of traffic violations committed by Urman, which is supported by the record. Indeed, the officers testified that they saw Urman commit several traffic violations. Because of the multiple traffic violations that the officers observed, the officers had probable cause.

In light of the probable cause justifying the stop, the officers' subjective intent is irrelevant to our analysis under the Fourth Amendment. Although, as the district court found, the officers may have "suspected more was likely going on," any subjective desire to investigate other illegal activity does not undermine the objectively valid stop. *Id.* at 813, 116 S. Ct. at 1774; *see George*, 557 N.W.2d at 577 n.1 (observing that under *Whren*, officer's subjective desire for other evidence would not undermine otherwise valid stop). Accordingly, the district court did not err by denying Urman's motion to suppress on this ground.

Urman also relies on Article I, section 10, of the Minnesota Constitution to challenge the stop. But this argument is unavailing because the Minnesota Supreme Court has adopted the *Whren* analysis. *See George*, 557 N.W.2d at 579 (noting the *Whren* analysis and acknowledging, despite concerns regarding pretextual motives for the stop, that "the Supreme Court has now made clear that the constitutional reasonableness of a traffic stop does not turn on the actual motivations of the officer involved"). Although the Minnesota Supreme Court is free to interpret the Minnesota Constitution in a manner that offers greater protection of individual rights than the United States Constitution, *State v. Carter*, 596 N.W.2d 654, 656-57 (Minn. 1999), it has declined to do

so in this context. Thus, Urman's argument that the stop was pretextual and, therefore, invalid under the Minnesota Constitution fails.[1]

II.

Urman next argues that the search of his vehicle was not supported by probable cause. Whether there was probable cause to conduct a warrantless search also presents a question of law, which we review de novo. *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999).

Warrantless searches are per se unreasonable, subject to certain well-established exceptions. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd*, 508 U.S. 366, 113 S. Ct. 2130 (1993). Under the motor-vehicle exception, police may conduct a warrantless search of an automobile if there is probable cause in believing that the vehicle is transporting contraband or illegal items. *Munson*, 594 N.W.2d at 135. Probable cause to search an automobile exists when the officer is aware of facts and circumstances that are sufficient in themselves to warrant a reasonable person to believe that the automobile contains items that the officer is entitled to seize. *State v. Pederson-Maxwell*, 619 N.W.2d 777, 781 (Minn. App. 2000). Because probable cause is evaluated based on the totality of the circumstances, *State v. Johnson*, 689 N.W.2d 247, 251 (Minn. App. 2004), *review denied* (Minn. Jan. 20, 2005), "pieces of information that would not be substantial alone can combine to create sufficient probable cause," *State v. Jones*, 678 N.W.2d 1, 11 (Minn. 2004).

[1] Because there was a legal basis for the stop, we need not address Urman's evidentiary challenge to the district court's finding regarding pretext.

The district court correctly based its probable-cause determination on the following factors: (1) the officers knew that the BP gas station was a place where multi-level drug dealing is common; (2) the officers knew that the gas station was a place where gang members congregate; (3) the police department receives numerous calls for police assistance to the gas station because of criminal activity; (4) the officers saw Urman in the company of a known gang member; (5) a confidential informant told Officer Bohn that gang activity at the gas station was increasing because of a turf dispute over the gas station; (6) the confidential informant told Officer Bohn that he had been riding in a car with armed gang members, one of whom accidentally fired a gun in the car; and (7) the information the officers acquired during the stop.

The officers' observation of the bullet-resistant vest, ski mask, and gloves and the information regarding Urman's gang membership were particularly relevant to the probable-cause determination in light of the recent rash of armed robberies in the area perpetrated by individuals clad in ski masks and gloves. *See Pederson-Maxwell*, 619 N.W.2d at 781 (stating that probable-cause analysis looks to facts and circumstances within officer's knowledge). Urman's rapid departure from the gas station and the officer's observation of what appeared to be marijuana in the van[2] also are relevant to

[2] We observe that Urman's possession of even a small amount of marijuana in a vehicle may be sufficient to establish probable cause to search the van. *See State v. Hanson*, 364 N.W.2d 786, 789 (Minn. 1985) (holding that discovery of single marijuana cigarette "clearly justified the further search of the car"). But our analysis need not be so confined because probable cause is based on the totality of the circumstances. *Johnson*, 689 N.W.2d at 251. Given the numerous factors here that are relevant to probable cause, we decline to base our decision solely on the presence of what appeared to be marijuana in the van.

probable cause. *See State v. Harris*, 589 N.W.2d 782, 790 (Minn. 1999) (recognizing that evidence of flight can suggest consciousness of guilt).

We reject Urman's argument that, because many of the facts relied on by the officers merely concern the location where he was first observed, they cannot properly be considered in evaluating probable cause. Urman correctly observes that mere presence in a high-crime area is insufficient to justify a stop. *State v. Varnado*, 582 N.W.2d 886, 890 (Minn. 1998) (citing *Dickerson*, 481 N.W.2d at 843). But because evaluation of probable cause depends on the totality of the circumstances, *Johnson*, 689 N.W.2d at 251, consideration of a suspect's presence in such an area is permissible to contextualize other evidence, *see Dickerson*, 481 N.W.2d at 843 (contextualizing suspect's behavior by considering his departure from a building with a history of drug activity). Consequently, the district court did not err by basing its probable-cause determination, in part, on the high crime rate and gang activity at the gas station.

Urman also attempts to disqualify from consideration the information provided by the confidential informant on two grounds: (1) there were no indicia of the confidential informant's reliability, and (2) the information provided related to the gas station, not Urman. As an initial matter, we observe that the confidential informant's information is only one of multiple facts and circumstances considered as a whole. When determining whether a confidential informant's tip establishes probable cause to arrest or search, we consider the totality of the circumstances, including the confidential informant's basis of knowledge, veracity, and reliability. *State v. Ward*, 580 N.W.2d 67, 71 (Minn. App. 1998); *see also Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)

(adopting totality-of-the-circumstances approach to probable cause). But in doing so, we do not consider these factors in isolation. *Gates*, 462 U.S. at 233-35, 103 S. Ct. at 2329-30. Indeed, "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Id.* at 233, 103 S. Ct. at 2329.

There are six factors for determining the reliability of a confidential informant who is not anonymous:

> (1) a first-time citizen informant is presumably reliable; (2) an informant who has given reliable information in the past is likely also currently reliable; (3) an informant's reliability can be established if the police can corroborate the information; (4) the informant is presumably more reliable if the informant voluntarily comes forward; (5) in narcotics cases, "controlled purchase" is a term of art that indicates reliability; and (6) an informant is minimally more reliable if the informant makes a statement against the informant's interests.

State v. Ross, 676 N.W.2d 301, 304 (Minn. App. 2004). The record indicates that the confidential informant had provided Officer Bohn reliable information in the past. And the confidential informant's statement that he was in the presence of gang members brandishing and firing guns arguably is a statement against interest, which makes the informant "minimally more reliable." *Id.* Moreover, the confidential informant's information was consistent with what the officers already knew about the gas station. *See id.* (listing corroboration of information as indication of reliability). These factors demonstrate that the information is sufficiently reliable for inclusion in the totality of the circumstances establishing probable cause.

Arguing that Officer Bohn's testimony regarding Urman and Woodberry's gang membership is hearsay and without foundation, Urman contends that this information cannot be used to establish probable cause. We disagree. Probable cause can be based on facts "within the officer's knowledge and of which [the officer] has reasonably trustworthy information." *Pederson-Maxwell*, 619 N.W.2d at 781 (quotation omitted). This may include information regarding a suspect's criminal history or gang affiliation. *See State v. Lieberg*, 553 N.W.2d 51, 56 (Minn. App. 1996) (criminal history); *United States v. Feliciano*, 45 F.3d 1070, 1074 (7th Cir. 1995) (gang association). Because probable cause "shall be based upon the entire record including reliable hearsay in whole or in part," Minn. R. Crim. P. 11.03, and because Officer Bohn was personally aware of Woodberry's gang membership and obtained information about Urman's gang membership through routine police procedures, the district court properly considered their gang association as one component of the body of evidence establishing probable cause.

The record evidence indicates that Urman had just come from an area known for drug activity and had what appeared to be marijuana on the floor of the van he was driving. Officer Bohn is an experienced police officer who had frequently observed drug transactions and executed drug-related arrests. Without physical evidence of the substance that Officer Bohn saw when he looked into the van, the district court had to weigh Officer Bohn's credibility and experience in determining whether his testimony

regarding the marijuana helped establish probable cause.[3] Such credibility determinations are the province of the district court. *Miller*, 659 N.W.2d at 279. Accordingly, the district court properly considered the testimony regarding suspected marijuana in the van.

The record as a whole contains ample evidence to establish probable cause. Such evidence warrants a reasonable belief that the van contained evidence of a crime—specifically, the recent robberies in the area—and contraband in the form of marijuana. *Munson*, 594 N.W.2d at 135. As such, the district court did not err by denying Urman's motion to suppress.

Affirmed.

[3] Urman maintains that the state's failure to preserve the marijuana constitutes spoliation of evidence, which precludes its consideration in the probable-cause determination. But the district court was free to evaluate Officer Bohn's credibility regarding his observation of the substance. In addition, Urman waived his spoliation argument by failing to present it to the district court. *State v. Busse*, 644 N.W.2d 79, 89 (Minn. 2002) (stating general rule against deciding issues not raised before district court).