STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0294

State of Minnesota,
Respondent,

vs.

Abdirahman Hassan Ali,
Appellant.

Filed July 1, 2008
Remanded
Lansing, Judge

Olmsted County District Court
File No. K6-05-3644

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

Mark A. Ostrem, Olmsted County Attorney, Katherine M. Wallace, Senior Assistant County Attorney, 151 Southeast Fourth Street, Rochester, MN 55904 (for respondent)

Jordan S. Kushner, Suite 2446, 431 South Seventh Street, Minneapolis, MN 55415 (for appellant)

Considered and decided by Lansing, Presiding Judge; Worke, Judge; and Collins, Judge.*

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

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

LANSING, Judge

The Olmsted County Attorney charged Abdirahman Ali with fifth-degree controlled substance crime for possession of cathinone. Ali moved to suppress khat stems containing cathinone as the product of an unlawful search. At the contested omnibus hearing, the district court heard testimony on the circumstances surrounding the pat-down search that produced the khat stems but, in its written order, addressed only the issues of the seizure of Ali and the probable cause for the charge. Because neither the record of the omnibus hearing nor the district court's written order contains findings or a specific determination on the constitutionality of the search, we remand to the district court.

F A C T S

Abdirahman Ali was a passenger in a car in downtown Rochester in August 2004 when police stopped the driver to execute an active arrest warrant. The stop occurred in early afternoon, in the 800 block of 15th Avenue Southeast. The police arrested and searched the driver and, after talking with the driver and Ali, performed a pat-down search on Ali. In the course of the pat-down search, the police removed khat stems from Ali's right pocket. After the khat stems were submitted to the Minnesota Bureau of Criminal Apprehension for testing, Olmsted County charged Ali with fifth-degree controlled substance crime for possessing 9.3 grams of plant material that tested positive for cathinone.

Ali challenged the seizure of his person and probable cause for the charge. He also moved to suppress statements that he made to the police at the time of his arrest and to suppress evidence of the khat stems that were removed from his pocket during the pat-down search. At the omnibus hearing, the officer who conducted the pat-down search testified that the search was necessary to protect his safety because Ali refused to follow his direction to step back when he was searching the driver and at one point Ali reached into the car and appeared to be taking something out of the car. But on cross-examination, when the police officer was questioned about whether Ali had interfered with the arrest of the driver, the officer acknowledged that his report of the incident stated that Ali had helped to translate because the driver had a limited ability to understand and respond.

The omnibus order recites that Ali withdrew his motion to suppress his statements to police, challenged his seizure, and requested dismissal for lack of probable cause. The order concludes that the facts are sufficient to support probable cause for the charge, that the seizure of defendant's person was lawful, and that the omnibus motion is denied. Although the majority of the testimony at the omnibus hearing is directed to the pat-down search, the order does not address it. The district court determined that there was probable cause to support the charge, but it made no findings on the testimony relating to the search either on the record at the omnibus hearing or in the written omnibus order.

The jury trial was conducted by a second judge, and the khat stems and the testing results were introduced as evidence. Ali, in this direct appeal from conviction, challenges the constitutional validity of the pat-down search, the adequacy of the district court's

findings on the search issue, and the chain-of-custody evidence for admission of the evidence of cathinone.

D E C I S I O N

The Fourth Amendment prohibits a police officer from conducting a warrantless search of an individual, subject to a few specifically established exceptions. *State v. Varnado*, 582 N.W.2d 886, 889 (Minn. 1998). One exception is that a police officer may conduct a pat-down search of a lawfully seized person if the officer has a reasonable, articulable suspicion that the person is armed and dangerous. *State v. Harris*, 590 N.W.2d 90, 104 (Minn. 1999). If, during a valid pat-down search, an officer locates what he immediately and without further manipulation has probable cause to believe is evidence of a crime, then the officer may legally seize that evidence. *Minnesota v Dickerson*, 508 U.S. 366, 375-76, 113 S. Ct. 2130, 2137 (1993). To determine whether the facts available to the officer at the time of the search justify the officer's decision, courts apply an objective standard. *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880 (1968). The district court "acts as [the] finder of facts, deciding for purposes of admissibility which evidence to believe and whether the state has met its burden of proof." *State v. LaFrance*, 302 Minn. 245, 246, 223 N.W.2d 813, 814 (1974).

In a case tried to a jury, the defendant may demand a pretrial suppression hearing if the state intends to use evidence obtained as a result of a search or a search and seizure. Minn. R. Crim. P. 7.01 (providing for prosecution's notice of evidence against defendant); Minn. R. Crim. P. 8.03 (providing for hearing on admissibility of evidence obtained from search). On defendant's demand, the district court is required to "hear and

determine" issues on the admissibility of evidence obtained from a search. Minn. R. Crim. P. 11.02, subd. 1 (providing for omnibus hearing in felony and gross misdemeanor cases). When issues are submitted for decision at an omnibus hearing, the district court "shall make appropriate findings in writing or orally on the record." Minn. R. Crim. P. 11.07.

The district court's omnibus order lists appearances, notes the withdrawal of the objection to statements, and lists the remaining issues by stating that the "[d]efendant challenged his seizure and requested dismissal for lack of probable cause." The district court then concludes that:

> Based upon the testimony and evidence presented, the written submission of [defendant's trial attorney], and all of the files and records herein, the [c]ourt finds that the seizure of [d]efendant was lawful and that there is a showing of facts sufficient to support the belief that the crime as charged may have been committed and that [d]efendant may have committed it.

The omnibus order then denies the defendant's entire omnibus motion and provides a date for the next appearance.

In our review of a district court's order following an omnibus hearing on the admissibility of evidence obtained in a warrantless search, we determine whether the district court's findings of fact are clearly erroneous. *State v. Lemieux*, 726 N.W.2d 783, 787 (Minn. 2007). In the absence of any findings of fact, appellate courts are not in a position to provide review. *State v. Wicklund*, 295 Minn. 402, 402, 201 N.W.2d 147, 147, (1972); *see also State v. Colvin*, 645 N.W.2d 449, 453 (Minn. 2002) (stating that district court's findings of fact operate as our foundation and appellate courts "have no . . . business" finding facts). Findings of fact are necessary in a suppression hearing

for trial guidance and, on appeal, to make it possible to ascertain from the record the basis for the district court's decision. *State v. Rainey*, 303 Minn. 550, 550, 226 N.W.2d 919, 920-21 (1975).

We recognize that in a few cases that involved "absolutely no conflict in the evidence," appellate courts have reviewed, for reasons of judicial economy, suppression orders that do not contain the requisite findings of fact. *Rainey*, 330 Minn. at 550, 226 N.W.2d at 921 (reviewing voluntariness of defendant's statements); *see also State v. Kvam*, 336 N.W.2d 525, 528-29 (Minn. 1983) (declining to remand for express findings in the interest of judicial economy). But in these cases, the appellate courts have declined to remand because they "have been able to infer the findings from the [district] court's conclusions." *See id.* at 528 (citing example). We are unable to extend review in this case because neither the omnibus order nor the transcript of the hearing provides a conclusion on the pat-down search that would permit us to draw factual inferences. The omnibus order simply does not refer to the search issue. The absence of any reference to the search issue as one of the issues to be decided also excludes the possibility of drawing inferences from the general denial of Ali's entire motion. Furthermore, the district court made no oral findings that would provide any basis for a conclusion on the search issue.

Ali clearly included in his written motion his challenge to the search that resulted in the removal of the khat stems from his pocket, and the testimony at the omnibus hearing was, in major part, directed to the pat-down search. Because the district court did not make findings or a determination on that issue orally on the record or in its written omnibus order, we remand for the district court to make findings of fact. In light of the

remand on this issue, we do not address the further challenge to the chain-of-custody evidence.

Remanded.