STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2114

State of Minnesota,
Respondent,

vs.

John Christopher Day,
Appellant.

Filed December 16, 2008
Affirmed in part and reversed in part
Kalitowski, Judge

Ramsey County District Court
File No. K4-06-1911

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

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

KALITOWSKI, Judge

Following a court trial on stipulated facts, appellant John Christopher Day challenges his convictions of felon in possession of a firearm, possession of a firearm with an altered serial number, and felon in possession of tear gas. Appellant argues that (1) the district court erred in denying his motion to suppress evidence found pursuant to an inventory search of his vehicle because the inventory search was unlawful at its inception; and (2) the district court violated Minn. Stat. § 609.035 (2006) by sentencing him on all three convictions. We conclude that the search of appellant's vehicle was lawful but that the district court erred when it sentenced appellant for both convictions of felon in possession of a firearm and possession of a firearm with an altered serial number. Therefore, we affirm the district court's denial of appellant's motion to suppress and we affirm appellant's sentences for felon in possession of firearm and felon in possession of tear gas. But we reverse in part, vacating appellant's 19-month sentence for possession of a firearm with an altered serial number.

I.

Appellant argues the district court erred when it denied his motion to suppress evidence found during an inventory search of his vehicle. We disagree.

When reviewing a district court's pretrial order on a motion to suppress evidence, we review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (citation and quotation marks omitted). We may independently review

facts that are not in dispute, and determine, as a matter of law, whether the evidence need be suppressed. *Id.* (citation and quotation marks omitted).

The constitutions of the United States and Minnesota prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I. § 10. Generally, warrantless searches are per se unreasonable. *State v. Ture*, 632 N.W.2d 621, 627 (Minn. 2001). But inventory searches are a well-defined exception to the warrant requirement. *Gauster*, 752 N.W.2d at 502 (citing *Colorado v. Bertine*, 479 U.S. 367 371, 107 S. Ct. 738, 741 (1987)). The act of impoundment gives rise to the need for and justification of an inventory search. *Gauster*, 752 N.W.2d at 502. Thus, the threshold inquiry when determining the reasonableness of an inventory search is whether the impoundment of the vehicle was proper. *Id.* For impoundment to be proper, the state must have a legitimate interest in impoundment that outweighs the defendant's Fourth Amendment right to be free from unreasonable searches and seizures. *Id*. at 502. And both the impoundment and the subsequent inventory search must be conducted pursuant to standard procedures. *Id*. at 502-03.

Appellant argues that the inventory search of his vehicle was invalid because it was not necessary for the Ramsey County Sheriff's officers to impound his vehicle. Appellant argues that his friends were present and they could have taken possession of his vehicle, thus obviating the sheriff's department's need to impound his vehicle. But appellant waived this argument by failing to raise it before the district court.

Generally, reviewing courts will not consider matters not argued to and considered by the district court. *State v. Sorenson*, 441 N.W.2d 455, 459 (Minn. 1989).

Constitutional challenges to the admission of evidence must be raised at the omnibus hearing. *State v. Pederson-Maxwell*, 619 N.W.2d 777, 780 (Minn. App. 2000). And we have precluded parties from raising issues on appeal that were not raised at the omnibus hearing. *See Garza v. State*, 632 N.W.2d 633, 637 (Minn. 2001) (holding that the state waived its argument by failing to assert it at the omnibus hearing where the relevant factual details could have been developed); *State v. Lieberg*, 553 N.W.2d 51, 56 (Minn. App. 1996) (holding that appellant waived his right to challenge the issue of whether the warrant contained material misstatements and omissions because appellant failed to raise that issue at the omnibus hearing); *State v. Brunes*, 373 N.W.2d 381, 386 (Minn. App. 1985) (holding that appellant waived his challenge to a nighttime search because appellant did not object to the validity of the search at the omnibus hearing), *review denied* (Minn. Oct. 11, 1985). In *Sorenson*, the court declined to consider a challenge to a vehicle stop because the issue was not raised to the district court and there was insufficient information in the district court record to permit the reviewing court to decide the question. 441 N.W.2d at 459.

Here, the record shows that appellant did not challenge the validity of the impoundment, or the initial inventory search of his vehicle, in the district court. Thus, the relevant factual details regarding whether appellant had friends who could have taken possession of his vehicle were not developed in the district court record. We therefore conclude that appellant waived the challenge to the initial impoundment and inventory search because he did not make this challenge to the district court.

Appellant also argues that, even if the impoundment was valid, the inventory search of appellant's trunk was not conducted pursuant to departmental policy because the officers had an investigatory motive. We disagree.

Appellant argues that once the Ramsey County deputy, who was conducting the inventory search, developed a hunch that there was a gun in the vehicle, the search ceased to be an inventory search and became an investigation into a crime. But "[t]o be invalid, the investigatory motive must be the *sole* purpose behind the search, meaning that the search would not have occurred but for the investigatory motive." *Ture*, 632 N.W.2d at 629. Here, the record supports the district court's finding that, "in addition to inventorying the contents of the vehicle [the deputies] were also looking for evidence." The inventory policy here requires the police to search the entire vehicle, including the trunk. Thus, because the deputy's purpose in searching the trunk was not solely investigatory, appellant's argument fails.

In addition, because of the nature of the items inventoried prior to the search of the vehicle's trunk, the deputies had probable cause to believe there was evidence of a crime in the trunk. Under the automobile exception to the warrant requirement, "[w]hen probable cause exists to believe that a vehicle contains contraband, the Fourth Amendment permits the police to search the vehicle without a warrant." *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007) (citing *Maryland v. Dyson*, 527 U.S. 465, 467, 119 S. Ct. 2013, 2014 (1999)). The scope of a warrantless search under the automobile exception is "defined by the object of the search and the places in which there is probable cause to believe that it may be found." *California v. Acevedo*, 500 U.S. 565,

579-80, 111 S. Ct. 1982, 1991 (1991) (citation omitted). Here, the record indicates that during the initial roadside inventory search, the deputies found a walking cane that contained 12-inch blades, a butterfly knife, a container of pepper gas or mace, a bulletproof vest, a clear pipe with residue, a scale, burnt scissors, controlled substances, and two .25 caliber bullets in a bag in the front seat. Thus, the officers had probable cause to search the trunk for additional contraband and evidence of crime. We conclude that the district court did not err in denying appellant's motion to suppress.

II.

The district court sentenced appellant to concurrent terms of 60 months for felon in possession of a firearm, 21 months for felon in possession of tear gas, and 19 months for possession of a firearm with an altered serial number.

This court may review a sentence to determine whether it is inconsistent with statutory requirements. Minn. Stat. § 244.11, subd. 2(b) (2006). Generally, where a person's conduct constitutes more than one offense, the person may only be punished for one of the offenses. Minn. Stat. § 609.035, subd. 1 (2006). For purposes of section 609.035, "[w]hether a segment of conduct constitutes a single behavioral incident turns on the time and place of the offenses, as well as the defendant's criminal objective in perpetrating each offense." *State v. Spears*, 560 N.W.2d 723, 727 (Minn. App. 1997).

Appellant argues that because his convictions and sentences for felon in possession of a firearm and possession of a firearm with an altered serial number arise from a single behavioral incident, sentencing on both convictions violates section 609.035. The state does not dispute that multiple sentences for these convictions violates

section 609.035. And we conclude that the language of subdivision 3 of section 609.035 suggests that additional conduct beyond the mere possession of a firearm is required in order for that subdivision's exception to apply to the prohibition on multiple sentences. *See* Minn. Stat. § 609.035, subd. 3 (stating felon-in-possession conviction "is not a bar to . . . punishment for any other crime committed by the defendant as part of the same conduct"). Here, both firearms convictions arose from the possession of a single handgun. Consequently, appellant can only be sentenced for one these convictions and we vacate appellant's sentence for possession of a firearm with an altered serial number.

Appellant also argues that his conviction of felon in possession of tear gas is part of the same behavioral incident as his felon in possession of a firearm conviction, and therefore, sentencing on both of these convictions violates section 609.035. Appellant points to decisions that hold that multiple sentences for the possession of two different controlled substances violates section 609.035. *See State v. Barnes*, 618 N.W.2d 805, 813 (Minn. 2001) (stating possession of two controlled substances at the same time and place for personal use constitutes a single behavioral incident). But appellant cites no caselaw supporting his argument that for sentencing purposes, possessing two different types of weapons is the same as possessing two controlled substances for personal use. Moreover, section 609.035, subdivision 3, provides that a conviction for felon in possession of firearm under section 624.713 is not a bar to conviction of, or punishment for, any other crime committed by the defendant, such as the possession of tear gas, as part of the same conduct.

We conclude that the district court did not err in denying appellant's motion to suppress and did not err in imposing concurrent sentences on appellant's convictions for felon in possession of a firearm and felon in possession of tear gas. We conclude, however, that the district court violated section 609.035 in sentencing appellant for both felon in possession of a firearm and felon in possession of tear gas.

Affirmed in part and reversed in part.