STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2444

State of Minnesota,
Respondent,

vs.

Stephen Claude Porter,
Appellant.

Filed December 9, 2008
Affirmed
Klaphake, Judge

Stearns County District Court
File No. 73-K1-07-170

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

Janelle Prokopec Kendall, Stearns County Attorney, Room 448, Administration Center, 705 Courthouse Square, St. Cloud, MN 56303 (for respondent)

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

Considered and decided by Klaphake, Presiding Judge; Lansing, Judge; and Worke, Judge.

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

KLAPHAKE, Judge

Appellant Stephen Claude Porter was convicted of first-degree controlled substance crime, Minn. Stat. § 152.021, subds. 1(1), 2(1) (2006), after a stipulated facts trial in order to challenge a pretrial ruling. *See* Minn. R. Crim. P. 26.01, subd. 4. Appellant challenges the district court's order refusing to suppress evidence discovered after police stopped a Chevrolet Suburban in which he was a passenger, contending that the stop was unlawful.

Because police had a reasonable and articulable suspicion that appellant, who was subject to arrest for sale of a controlled substance, was in the Suburban, we conclude that the stop was lawful and that the district court properly refused to suppress the drug evidence. We therefore affirm.

D E C I S I O N

When considering the district court's decision on a motion to suppress evidence, we independently review the facts and determine as a matter of law whether the district court erred in its decision. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

A police officer may make a warrantless stop of an automobile if the officer has a "particularized and objective basis" to suspect that a particular person is engaged in criminal activity. *In re Welfare of G.M.*, 560 N.W.2d 687, 691 (Minn. 1997). The officer assesses the need for a stop based on the totality of circumstances. *Id.* The officer must rely on more than a "hunch" and cannot stop a car based on "mere whim, caprice or idle curiosity." *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). The standard for an

investigatory stop is less stringent than probable cause. *Id.* The officer must be able to articulate specific facts that support his or her belief that criminal activity has occurred. *Harris*, 590 N.W.2d at 100-01. In this case, the officer had to articulate specific facts to support his belief that appellant was in the Suburban that police stopped; the evidence of criminal activity was supplied by the informant to whom appellant sold drugs.

The following facts support the police officer's belief that appellant was subject to warrantless arrest for controlled substance crime, and was in the Suburban: (1) the informant tipped police to appellant's identity as a crack cocaine seller, purchased crack cocaine in a controlled buy at a mobile home, and identified appellant by photo as the person who sold him crack cocaine; (2) St. Cloud police officer Nicholas Riba had placed the mobile home under surveillance during the controlled buy; (3) the Suburban in which appellant was a passenger was at the mobile home during the controlled buy; (4) although Riba left for a period of about 15-20 minutes to take the informant to police headquarters, the Suburban was at the exact location when he returned; (5) Riba observed a man who appeared to be appellant leave the mobile home in the company of three other men, and the man matched appellant's physical description and a photograph provided during the operational briefing; (6) Riba noted that the man he identified as appellant had a gait that suggested he was the leader of the group; and (7) the four men got into the Suburban and drove away; police stopped this car a short time later.

These facts provide a sufficiently particularized and objective basis for the police to make an investigatory stop of the Suburban. The district court therefore did not err by refusing to suppress the drug evidence recovered as a result of the stop.

*Appellant's Pro Se Issue*s

Appellant raises several issues in his pro se supplemental brief. Construed broadly, appellant challenges (1) probable cause for the stop; (2) the reliability of the informant and the controlled buy; (3) his arrest and continued detention without a warrant; and (4) the lack of a factual basis for his plea.

Appellant's attorney addressed the question of whether there was a particularized and objective reason for the stop in the appellate brief; appellant's pro se arguments add nothing to this issue.

Appellant did not challenge the informant's credibility or the handling of the controlled buy before the district court. Issues not raised before the district court are deemed waived and must be disregarded. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). This issue has been waived.

Appellant challenges the lawfulness of his arrest and continued detention without a warrant. Again, appellant did not raise this issue before the district court and it must be deemed to be waived. *Id.*

Finally, appellant argues that the district court erred by failing to put factual findings in the record. Appellant did not plead guilty but submitted the record to the court for determination in accordance with Minn. R. Crim. P. 26.01, subd. 4. According to the rule, which became effective on April 1, 2007, the court must make findings of fact, either in writing or orally on the record, to support a guilty verdict. The court's August 2, 2007 order does not include written findings, and the sentencing record contains no oral findings.

Minn. R. Crim. P. 26.01, subd. 4, does not state what the consequence is for omitting findings with the guilty verdict. It is clear from the rule that this type of trial is for the limited purpose of contesting a pretrial issue that may be dispositive of the case and that by agreeing to this procedure, a defendant is limited to appellate review of the pretrial issue and may not challenge the finding of "guilt, or . . . other issues that could arise at a contested trial." Minn. R. Crim. P. 26.01, subd. 4. Before the enactment of subdivision 4, written findings were not required. *See State v. Mahr*, 701 N.W.2d 286, 292 (Minn. App. 2005) ("Because a *Lothenbach* proceeding is not a court trial or a stipulated facts trial, the findings requirement of rule 26.01 does not apply."), *review denied* (Minn. Oct. 26, 2005).

In *State v. Thomas*, 467 N.W.2d 324 (Minn. App. 1991), this court discussed the consequences of failing to make findings as required by Minn. R. Crim. P. 26.01 (requiring written or oral findings on the record within seven days after completion of a trial). Because there is no sanction in the rule for a violation, this court concluded that the requirement is directory rather than mandatory, while noting that courts should comply with the rule. *Thomas*, 467 N.W.2d at 326. Further, this court declined to reverse a conviction for "a technical error" without a demonstration of prejudice to appellant. *Id.* at 326-27. Like the rule in *Thomas*, the language of Minn. R. Crim. P. 26.01, subd. 4, is directory, rather than mandatory. And, because he cannot challenge the sufficiency of the evidence but is limited to challenging the district court's pretrial ruling, for which there are findings, appellant has failed to show that he was prejudiced by the lack of findings. Although, in this instance, appellant has not demonstrated prejudice, we

recommend that in the future, the district court comply with the directive of the rule and include factual findings on the issue of guilt in its order.

Affirmed.