STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1926

State of Minnesota,
Respondent,

vs.

Jermar Antwan Kellum,
Appellant.

Filed January 6, 2009
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 06024149

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

Michael O. Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Kalitowski, Judge; and Stoneburner, Judge.

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

STONEBURNER, Judge

Appellant challenges his conviction of controlled-substance crime in the fifth degree, arguing that the district court erred in denying his motion to suppress evidence obtained from what he asserts were illegal searches of his person and motel room. We affirm.

FACTS

At all times relevant, the Crystal Motel (motel) was known to Crystal police to be a place where people were involved with drugs. One very early morning, a Crystal police officer pulled into the motel parking lot in a marked squad car. He saw a Chevy Suburban start to back out of a parking space. When the officer stopped to let the Suburban back out, the driver pulled forward and turned the lights off. The officer drove through the lot, parked on the street and turned off his lights. Shortly thereafter, the Suburban left the parking lot. The officer stopped the Suburban for an equipment violation: no working center brake light.

Appellant Jermar Antwan Kellum was a passenger in the Suburban. The officer approached the driver's side of the Suburban. When the driver rolled down his window, the officer immediately smelled unburned marijuana. He called for backup because he intended to search the vehicle. Backup arrived. Kellum and the driver were asked to step out of the vehicle. One officer pat-searched Kellum and found two vials of marijuana. The officer asked Kellum what room he was staying in at the motel. Kellum's response was evasive: he did not give a room number. Kellum was then placed in a squad car.

The officer searching the Suburban found marijuana. Kellum volunteered that all of the marijuana in the Suburban was his. Based on the amount of marijuana found, the officer issued a misdemeanor citation to Kellum, let him out of the squad car and told him that he was free to leave. Kellum walked about 30 feet away and waited for the driver of the Suburban.

Pursuant to police protocol, the officer searched the area of the patrol car where Kellum had been seated and found a key fob for motel room 19. The officer told Kellum that Kellum had left something in the squad car. Kellum pulled a key out of his pocket and attempted to attach it to the key fob. Kellum then admitted that he was staying in room 19 and stated that he had rented the room in someone else's name. Based on Kellum's earlier evasiveness about his connection to the motel and finding the key fob disconnected from the room key, the officer suspected criminal activity in Kellum's motel room. He again placed Kellum in the back of the squad car and called his sergeant for advice.

The police sergeant arrived on the scene and was briefed. He asked Kellum if there were more drugs in the motel room. Kellum said no, and the sergeant asked if officers could check the room to make sure. According to the police, Kellum said it was "not a problem." Kellum testified, however, that he did not consent to a search of his room, but the officer would not accept his refusal. Kellum testified that he felt that he was "pressured the whole time."

At the motel, Kellum opened the door to room 19 with his key. He later testified that he felt that he had to let the officers into the room because they told him they would

get a key from the manager and get into the room regardless of what Kellum said. Kellum entered the room first. On entering the room, the sergeant immediately smelled marijuana. Kellum pulled clothes out of the dresser drawers and said, "[s]ee, there is no dope here." Kellum walked into the bathroom and made a similar statement. The sergeant opened a cupboard under the sink and found a pillowcase with something inside. Kellum immediately said, "That's not my marijuana." In the pillowcase, the sergeant found what appeared to be, and later proved to be, marijuana.

Kellum was charged with fifth-degree controlled-substance crime for possession of marijuana. After his suppression motion was denied, he submitted the matter to the district court on stipulated facts. He was found guilty as charged and sentenced to the presumptive sentence of a year and a day, stayed for three years. This appeal followed.

D E C I S I O N

Kellum argues that the evidence (marijuana) should have been suppressed because (1) the smell of unburned marijuana in the vehicle was insufficient to establish probable cause to detain him; (2) the key fob in the back of the squad car and his earlier unwillingness to answer questions about the motel were insufficient to establish probable cause to detain him a second time; and (3) he did not voluntarily consent to the search of the motel room.

"When reviewing pretrial orders on motions to suppress evidence, [this Court] independently review[s] the facts and determine[s], as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). When the facts are undisputed, the court's review is de

novo, and it must determine whether the police articulated an adequate basis for the search or seizure. *Id*. This Court will not reverse the district court's factual findings unless they are clearly erroneous. *State v. Ruoho*, 685 N.W.2d 451, 458 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

I. Kellum's initial detention was not unlawful

Kellum argues that the traffic stop was pretextual, but he does not contest that a malfunctioning brake light justified the stop. Kellum argues that the stop was unlawfully expanded when he was placed in the squad car because his detention was not justified by probable cause or reasonable, articulable suspicion of criminal activity. Kellum asserts that the officer's claim that he smelled unburned marijuana was "factually impossible" because the small amount of marijuana in the car and the fact that it was unburned made any smell undetectable.

At the suppression hearing, the officer testified that he was trained to "detect and know what street level narcotics look like and smell like." And the district court credited the officer's testimony. In criminal cases, it is well settled that judging the credibility of witnesses and the weight given to their testimony rests within the province of the finder of fact. *State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997).

A lawful stop does not validate an expansion of the stop that is "intolerable" in its "intensity or scope." *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (quoting *Terry v. Ohio*, 392 U.S. 1, 17–18, 88 S. Ct. 1868, 1877–78 (1968)). The relevant inquiry is whether an officer's actions, subsequent to a lawful stop, are reasonably related to and validated by the circumstances justifying the stop in the first instance or whether there is

independent probable cause or reasonableness validating the additional intrusion. *Id*. Both probable cause and reasonableness are evaluated by looking at the "totality of the circumstances." *State v. Henning*, 666 N.W.2d 379, 384–85 (Minn. 2003).

The reasonableness test is an objective test; it asks whether a person of reasonable caution, given the facts available to the officer at the time of the seizure, would believe that his/her action is appropriate. *Askerooth*, 681 N.W.2d at 364. Appropriateness is determined by balancing the public's need for freedom from arbitrary interference from law enforcement against the state's need to search or seize. *Id*. at 365. The district court concluded that appellant's detention in the back of the squad car was an "incremental expansion" of the traffic stop, justified by the odor of unburned marijuana that supplied independent probable cause to expand the stop. We agree.

Kellum relies on three cases to support his argument that the expansion of the scope of the stop was illegal in his case. Each of those cases involved an expansion of a lawful traffic stop that was not justified by circumstances legitimizing the initial stop or by independent probable cause or reasonableness to justify the additional intrusion.

In *Askerooth*, the supreme court held that the driver's interest in being free from unreasonable seizure outweighed an officer's convenience, which was the only reason articulated by the officer for confining the driver in the back of a squad car after a stop for a minor traffic violation. *Id*. at 365-66. In *State v. Fort*, the supreme court found Fort's nervousness and avoidance of eye contact with the officer to be insufficient to create a reasonable, articulable suspicion of criminal activity justifying Fort's seizure after a vehicle in which he was a passenger was stopped in a "high drug" area for

speeding and having a cracked windshield. 660 N.W.2d 415, 416–17, 419 (Minn. 2003). In *State v. Varnado*, the supreme court held that a pat-search was illegal because there was not a valid reason to place an unlicensed driver, who was stopped for a cracked windshield in an area of suspected drug trafficking, in the back of a squad car. 582 N.W.2d 886, 888 (Minn. 1998).

But Kellum's circumstances are distinguishable from those of Askerooth, Fort, and Varnado. Here, the officer did not detain Kellum for a traffic violation, failure to produce a license, or because he appeared nervous. Kellum was detained after the officer smelled marijuana in the vehicle and found marijuana on Kellum's person.

The smell of marijuana has been held to be sufficient to establish independent probable cause justifying the expansion of a traffic stop. *State v. Schultz*, 271 N.W.2d 836, 837 (Minn. 1978) (holding that an officer, who smelled marijuana emanating from a lawfully stopped vehicle, had a right to search the passenger compartment for marijuana pursuant to the motor-vehicle exception); *State v. Wicklund*, 295 Minn. 403, 405, 205 N.W.2d 509, 511 (1973) (holding that the smell of burned marijuana emanating from a vehicle justified a vehicle search).

Because the smell of marijuana provided probable cause to expand the stop, we conclude that detaining Kellum in the squad car was not unreasonable. *See State v. Varnado*, 582 N.W. 2d at 891 (citing examples in *State v. Curtis*, 290 Minn. 429, 437, 190 N.W.2d 631, 636 (1971), of situations justifying placement in squad car, including reasonable suspicion of more serious crime after initial traffic stop). Kellum was properly released with a citation when the search of the Suburban did not result in

discovery of a sufficient amount of marijuana to justify further action. We find no merit in Kellum's argument that, because the officer only found a petty-misdemeanor amount of marijuana on his person, his detention was unreasonable.

II. Kellum's second detention was supported by additional reasonable, articulable suspicion

The district court correctly concluded, and the state concedes on appeal, that the scope of Kellum's initial detention for probable cause "[did] not extend to the subsequent re-detention." Kellum's second detention was lawful only if it was supported by additional reasonable, articulable suspicion or probable cause beyond that which justified his first detention. *See Askerooth*, 681 N.W.2d at 364 (stating that "[a]n intrusion not closely related to the initial justification for the search or seizure is invalid . . . unless there is independent probable cause or reasonableness to justify that particular intrusion" (citation omitted)).

Articulable, objective facts are those facts that, "by their nature, quality, repetition, or pattern," are "so unusual and suspicious" that they support at least an inference of the possibility of criminal activity. *State v. Schrupp*, 625 N.W.2d 844, 847–48 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). The factors supporting a reasonable, articulable suspicion are considered in the aggregate. *State v. Martinson*, 581 N.W.2d 846, 852 (Minn. 1998). An officer may rely on inferences that would elude the untrained, and a reviewing court may consider the officer's experience, knowledge, and observations; background information, including the time and location of the stop; and any other relevant information. *Appelgate v. Comm't of Pub. Safety*, 402 N.W.2d 106,

108 (Minn. 1987). But a particularized and objective basis for suspecting criminal activity requires that an officer "be able to articulate something more than an 'inchoate and unparticularized suspicion or 'hunch.'" *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585 (1989) (quoting *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883). Whether an officer had a reasonable, articulable suspicion is determined objectively: an officer has a reasonable, articulable suspicion if, in light of the totality of the circumstances, a reasonable officer would harbor such a suspicion. *Martinson*, 581 N.W.2d at 850, 852.

Kellum argues that the officer did not have additional probable cause or reasonable, articulable suspicion to re-detain him for merely "forgetting" the key fob in the back of the squad car.[1] Kellum argues that his evasiveness in answering the officer's questions about his connection to the motel was a normal reaction to an adverse encounter with the police. Kellum also asserts that he is a victim of profiling, but Kellum did not provide any evidence to support this allegation.

An individual's evasive answers when questioned is one factor that, when taken with other factors, has been held to support a determination of reasonable, articulable suspicion. *See State v. Bergerson*, 671 N.W.2d 197, 204 (Minn. App. 2003) (concluding that officers had reasonable suspicion justifying a protective sweep of a barn, where appellant's co-conspirator was evasive about whether anyone else was in the barn, appellant had a potential for violence and there was evidence of criminal narcotics production occurring in the barn).

[1] The district court did not determine whether appellant left the key fob intentionally or accidentally. The court only found that defendant left the key fob in the back-seat area, where the officer later found it.

Kellum's evasiveness about his connection with the motel, coupled with separating the room-identifying fob from the room key reasonably led the officers to suspect that Kellum did not want the officers to know about criminal activity in the motel room. In *Illinois v. Gates*, the United States Supreme Court stated: "innocent behavior frequently will provide the basis for a showing of probable cause" and "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." 462 U.S. 213, 243–44, n.13, 103 S. Ct. 2317, 2335 (1983). Under the totality of the circumstances, we conclude that the officer had a reasonable, articulable suspicion that further criminal activity was connected with Kellum's motel room sufficient to justify Kellum's brief further detention. Kellum's second detention in the back of the squad car was not unreasonable.

III. The evidence supports the district court's finding that Kellum consented to the search of his motel room

Even where an officer does not have reasonable, articulable suspicion or probable cause, the "officer has a right to ask to search and an individual has a right to say no." *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). An individual's consent must be voluntary—"without coercion or submission to an assertion of authority." *Id.* The relevant question is "whether a reasonable person would [have felt] free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 436, 111 S. Ct. 2382, 2387 (1991). "[T]he burden of proof is on the prosecutor to show that the search and seizure was with the individual's voluntary consent." *Dezso*, 512 N.W.2d at 880.

Voluntariness is a question of fact determined under the totality of the circumstances." *Id*. (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 249, 93 S. Ct. 2041, 2059 (1973)). Relevant circumstances include "the nature of the encounter, the kind of person the defendant is, and what was said and how it was said." *Id*. A subject's knowledge of a right to refuse is a factor to be taken into account but is not a necessary element of consent. *Id*. at 881. Even when the person giving consent has been seized, consent is not necessarily involuntary; the proper test is still the "totality of the circumstances." *Harris*, 590 N.W.2d at 104.

Kellum relies on *State v. Fort* to argue that his consent was not voluntary, but *Fort* held that evidence obtained from a search based on consent during an impermissibly expanded traffic stop must be suppressed. *Fort* is not dispositive in this case because we have concluded that the investigation of Kellum was not impermissibly expanded. 660 N.W.2d at 419. Kellum also relies on *Dezso*, in which the supreme court concluded that the totality of circumstances made Dezso's consent to show an officer his wallet involuntary. 512 N.W.2d at 878. After Dezso was legally stopped for speeding and found to have a valid driver's license and no outstanding citations, the officer, who had noticed that Dezso kept his wallet tilted away from the officer's view, asked twice if he could look in the wallet. *Id*. at 878–79. Dezso refused, but the officer leaned toward Dezso, trying to look in the wallet, and asked again whether he could look in the wallet. *Id*. at 879. Due to the officer's official and persistent questioning, combined with the officer's body movement and Dezso's equivocal responses, the supreme court concluded

that the state failed to meet the burden of proving that Dezso's consent was voluntary. *Id.* at 880–81.

This case is distinguishable. When the sergeant arrived at the scene of the stop, he told Kellum that there were problems with drug use at the Crystal Motel and that people were using rooms for drug activity. He asked Kellum whether he had any more marijuana in his motel room; Kellum said that he did not. He then asked if the officers could go check. Kellum answered: "not a problem." The sergeant testified that he spoke to Kellum in a conversational tone of voice; there is no evidence of any show of force associated with the questioning. The sergeant testified that Kellum was no longer detained in the squad car when the sergeant spoke to him. *See id.* at 880 (stating that the "involuntariness of a consent to a police request is not to be inferred simply because the circumstances of the encounter are uncomfortable for the person being questioned"). Kellum's version of the conversation is different from the sergeant's version, but the district court found the officers credible and Kellum not credible regarding this conversation. Because the record supports the district court's findings, they are not clearly erroneous. *See Ruoho*, 685 N.W.2d at 458 (stating that we will not reverse the district court's findings of fact unless they are clearly erroneous). The district court did not err in concluding that Kellum's consent was voluntary and in denying Kellum's motion to suppress evidence discovered during the search.

Affirmed.