STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0441

In the Matter of the Welfare of: R. T.

Filed January 13, 2009
Reversed and remanded
Larkin, Judge

Ramsey County District Court
File No. 62-JV-07-510

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

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Considered and decided by Hudson, Presiding Judge; Larkin, Judge; and Collins, Judge.*

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

LARKIN, Judge

In this appeal from a pretrial order suppressing evidence and dismissing a juvenile delinquency charge, the state argues that the district court's decision had a critical impact

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

on the state's ability to prosecute respondent and that the district court erred by suppressing the evidence. Because the district court failed to make an essential finding, we reverse and remand.

FACTS

The state charged respondent with possession of a firearm by a minor in violation of Minn. Stat. § 624.713, subds. 1(a), 2 (2006). Respondent moved the district court to suppress the evidence against him and dismiss the charge. The district court held an evidentiary hearing on respondent's motion. The district court found that on October 11, 2007, at approximately 8:15 a.m., Officers Reilly and Shanley were dispatched to a McDonald's parking lot in St. Paul to investigate a report from a citizen caller that three Asian males were standing outside of a vehicle, license plate PXE322, possibly smoking marijuana. Officer Reilly arrived first and located the car. Three Asian males were seated inside the vehicle. Officer Reilly alleged that when she arrived, she saw a blunt, a cigar-shaped object that may be used to smoke marijuana, on the center console inside the car. Officer Reilly asked the males whether they were smoking marijuana and whether they were late for school.

Officer Shanley arrived after Officer Reilly. Officer Shanley also alleged that he saw the blunt on the center console inside the car. Officer Shanley removed all three occupants from the car and told them to sit on the curb. Officer Reilly monitored the males, and Officer Shanley searched the car for marijuana. Officer Shanley did not pick up the blunt and smell it to confirm that it contained marijuana, but acknowledged that, based on his training and experience, he could have verified the suspicion simply by

smelling the object. During his search of the vehicle, Officer Shanley found a carbon-dioxide-powered BB gun and cartridges under the passenger seat of the vehicle. In response to questioning by Officer Shanley, respondent admitted that the gun was his.

After the evidentiary hearing, the district court concluded that the officers had a constitutional basis to stop all three males and to further investigate whether the blunt contained marijuana. But the district court concluded that the officers did not have probable cause to search the car without first confirming that the blunt contained marijuana. Therefore, the district court granted respondent's motion to suppress evidence and dismissed the charge. This appeal follows.

D E C I S I O N

If the state appeals a pretrial suppression order, the state "must clearly and unequivocally show both that the trial court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998) (citing *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995)). "[T]he critical impact of the suppression must be first determined before deciding whether the suppression order was made in error." *Id.* Because the district court dismissed the charge against respondent as the result of its suppression order, the critical-impact standard is satisfied. *See State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (stating that critical impact is present when suppression of evidence leads to the dismissal of charges).

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, 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). We review the district court's findings of fact under a clearly erroneous standard, but legal determinations are reviewed de novo. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006).

Both the United States and Minnesota Constitutions prohibit unreasonable search and seizure by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless searches are per se unreasonable, subject to limited exceptions. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992) (citing *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)). "An officer may search a vehicle [without a warrant] under the automobile exception to the Fourth Amendment if that officer has probable cause to believe the search will produce evidence of a crime." *State v. Lopez*, 631 N.W.2d 810, 814 (Minn. App. 2001) (quotation omitted), *review denied* (Minn. Sept. 25, 2001). Probable cause "exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a reasonable man of reasonable caution in the belief that the automobile contains articles the officer is entitled to seize." *State v. Gallagher*, 275 N.W.2d 803, 806 (Minn. 1979). "The probable-cause standard is an objective one that considers the totality of the circumstances." *State v. Johnson*, 689 N.W.2d 247, 251 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. Jan. 20, 2005).

Courts have held that "the detection of odors alone, which trained police officers can identify as being illicit, constitutes probable cause to search automobiles for further evidence of crime." *State v. Pierce*, 347 N.W.2d 829, 833 (Minn. App. 1984); *see also*

State v. Hodgman, 257 N.W.2d 313, 315 (Minn. 1977) ("Once he [the officer] smelled the marijuana, [the officer] had probable cause to arrest defendant and conduct a full search of both defendant and the car."). In *State v. Wicklund*, the Minnesota Supreme Court reasoned that:

> [J]ust as the Fourth Amendment does not require law-enforcement officers in such a situation to close their eyes lest they see, in plain sight, evidence of criminal conduct, . . neither does it require them to avoid using their other senses. Here, both the officers smelled an odor which their professional training and experience told them was the odor of burned marijuana. This, in our view, gave the officers probable cause to believe that one or more of the occupants of the automobile had smoked marijuana in violation of the law.

295 Minn. 403, 405, 205 N.W.2d 509, 511 (1973) (citation omitted).

Officer Reilly testified that "[w]e could smell marijuana and they admitted to smoking marijuana, but we did not do a test on the cigar to determine that it was marijuana." Officer Reilly's claim regarding the odor of marijuana was not included in her police report. But respondent's witness, C.T. (later identified as the driver), provided testimony that tends to corroborate Officer Reilly's testimony that she smelled marijuana. When asked, "[d]id you hear the female officer tell the male officer that she smelled marijuana?" C.T. responded, "[s]he radioed it in, but I'm not sure if it got to the male officer or not . . . [Officer Reilly said over the radio] that she smelled marijuana." Officer Shanley testified that he could not remember whether or not Officer Reilly mentioned that she smelled marijuana when he arrived.

The district court's findings of fact do not mention Officer Reilly's claim that she smelled marijuana. The district court appears to have found that Officer Reilly was not credible but that finding is not explicit. And we are unwilling to presume that the district court did not find Officer Reilly's testimony credible when respondent's own witness appeared to corroborate Officer Reilly's claim that she smelled marijuana. Under these circumstances, the district court's failure to make an explicit finding on the credibility of Officer Reilly's testimony that she smelled marijuana precludes appellate review because the finding is essential to a determination regarding whether there was probable cause to search the vehicle. *See Hodgman*, 257 N.W.2d at 315 (stating that officer had probable cause to arrest and search defendant upon smelling marijuana).

We therefore reverse the district court's order and remand for an explicit finding as to whether the district court discredited Officer Reilly's testimony that she detected an odor of marijuana. We will afford the district court's credibility determination considerable deference. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996) (explaining that "a district court is in a superior position to assess the credibility of witnesses"). Because detection of an odor of marijuana would establish probable cause to search, the district court's credibility finding is critical in this case.

Reversed and remanded.

Dated: _____

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The Honorable Michelle A. Larkin
Minnesota Court of Appeals