STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1978

State of Minnesota,
Respondent,

vs.

Curtis A. Anderson,
Appellant.

Filed February 24, 2009
Affirmed in part and remanded
Hudson, Judge

Dakota County District Court
File No. K8-07-672

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

James C. Backstrom, Dakota County Attorney, Vance B. Grannis, III, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, Minnesota 55033 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, Andrea Johnson (certified student attorney), 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

HUDSON, Judge

Appellant Curtis A. Anderson challenges the district court's pretrial evidentiary ruling, arguing that the district court erred when it admitted evidence obtained as the result of an unconstitutional stop and search. Appellant also argues that the district court failed to make requisite findings of fact pursuant to Minn. R. Crim. P. 26.01, subd. 4. Because the district court did not make the requisite findings of fact on the record, we affirm in part and remand for further proceedings.

FACTS

On the evening of February 17, 2007, Sergeant Rutherford was on duty for the City of Farmington monitoring traffic. At 11:35 p.m., he noticed Curtis A. Anderson (appellant) come out from behind a closed Dairy Queen. The sergeant thought that this was unusual because of the hour of the night and the fact that the Dairy Queen and surrounding businesses were closed. He testified that businesses in that area, including the Dairy Queen, had been burglarized in the past, and that it is not normal to see somebody in that area at that time of night. But he acknowledged that individuals staying at a nearby hotel would possibly need to cross part of the parking lot near the Dairy Queen. The sergeant also noticed that appellant was carrying a backpack, and observed that "sometimes when people are up to criminal activities, whether it's breaking into cars or burglarizing buildings, they use backpacks to carry their tools or things that they are stealing."

The sergeant pulled his squad car in front of appellant and asked him to step to the front of the car to speak with him. The sergeant testified that appellant appeared nervous and fidgety, and that nervousness indicates that someone is trying to hide something and is "up to criminal activity." The sergeant asked appellant what he was doing behind the Dairy Queen, and appellant stated, "I'm staying at the Restwell [Hotel] and I'm going to the Qwik Trip." The sergeant noted that appellant was walking in the opposite direction of the Qwik Trip. Appellant stated that he was going to meet a friend. The sergeant felt that, under the "totality of the circumstances," appellant was "up to something." When the sergeant asked appellant what was in his backpack, appellant stated that he had tools. Appellant consented to a search of his backpack; the search revealed some tools, a propane torch, screwdrivers, and a pair of pliers. The sergeant suspected they were burglary tools.

The sergeant also testified that appellant exhibited signs of methamphetamine use, specifically, twitching, shifting his weight back and forth a lot, trying to "crack" his neck, and moving his hands in and out of his pockets. The sergeant indicated that he had found weapons in individuals' pockets on many occasions, and thus repeatedly asked appellant to keep his hands out where they were visible. Nevertheless, appellant continued to place his hands in his pockets four to six times, and as a result, the sergeant decided to pat appellant down to make sure that he was not carrying any weapons. The sergeant patted appellant's pockets first and discovered a butterfly knife, two "lumps" of marijuana, and a glass pipe.

At that point, the sergeant decided to search appellant more thoroughly, whereupon he discovered that appellant was wearing a fanny pack. When the sergeant asked appellant what was in the fanny pack appellant answered, "I don't know; it's not mine." The sergeant removed the fanny pack and searched it. Inside was an electronic gram scale and a small silver tin that contained a crystal-like substance. The sergeant believed the substance was methamphetamine. Appellant was arrested and charged with third-degree possession of a controlled substance in violation of Minn. Stat. § 152.023, subds. 2(1), 3(b) (2006).

In a pretrial hearing, appellant moved to suppress the drug evidence and argued that the sergeant did not have a reasonable, articulable suspicion of criminal activity to seize him or to continue the detention and search him. The district court denied the motion to suppress and ruled that the sergeant conducted a lawful investigatory stop and pat-search. Appellant proceeded to trial pursuant to a *Lothenbach* stipulation. Appellant waived his right to a jury trial and stipulated to the record generated at the pretrial hearing. The district court announced a guilty verdict but made no findings of fact as to any element of the offense. Appellant was sentenced to a 45-month executed prison term. This appeal follows.

D E C I S I O N

I

Appellant argues that the district court erred when it denied his motion to suppress evidence because the police did not have an objectively reasonable basis for the search and seizure. Because the parties stipulated to the facts, our review of the stop, frisk, and

seizure is entirely de novo. *See Berge v. Comm'r of Pub. Safety*, 374 N.W.2d 730, 732 (Minn. 1985) (stating that whether an investigatory stop is valid is a legal determination subject to de novo review when the facts are undisputed).

Appellant argues that the sergeant did not have a reasonable, articulable suspicion of criminal activity to support the initial stop. A police officer may initiate an investigatory stop if the officer has reasonable, articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968); *State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003). Whether police have reasonable suspicion to conduct an investigatory stop depends on the totality of the circumstances, and the stop is not justified if it was "the product of mere whim, caprice, or idle curiosity." *In re Welfare of M.D.R.*, 693 N.W.2d 444, 448 (Minn. App. 2005) (quotation omitted). The officer may make an investigatory stop based on his own observations. *In re Welfare of G.M.*, 560 N.W.2d 687, 691 (Minn. 1997).

The sergeant thought that appellant's presence behind the Dairy Queen was unusual because of the hour of the night and the fact that the Dairy Queen and surrounding businesses were closed and had been burglarized in the past. The sergeant noticed that appellant was carrying a backpack, a fact he deemed significant because criminals often use backpacks to carry their tools or things that they are stealing. Under the "totality of the circumstances"—the place, time of night, appellant's mannerisms, actions, how he was carrying himself, how he was dressed, and his nervousness—the sergeant concluded that appellant was "up to something."

Admittedly, these facts are sparse and some—notably, the presence of a backpack—are subject to innocent interpretation. But we must also acknowledge that similar facts have resulted in sustained investigatory stops. *See, e.g.*, *State v. Uber*, 604 N.W.2d 799, 801–02 (Minn. App. 1999) (holding that where the appellant was driving vehicle slowly through business district at 2:00 a.m., "reports of recent robberies, the time of night, the commercial nature of the area, and [the appellant's] unusual driving behavior" supported conclusion that arresting officer had adequate basis for stop); *Olmscheid v. Comm't of Pub. Safety*, 412 N.W.2d 41, 42–43 (Minn. App. 1987) (citation omitted) (upholding investigatory stop where officer observed vehicle "on a dead-end road at approximately 1:30 a.m. coming from an area behind a car dealership which had recently experienced property theft" and concluding that officers are justified in stopping vehicles late at night "to investigate whether a burglary of a closed commercial establishment is pending or had occurred when the suspect is seen in such close proximity to that establishment that he appears to be something other than a mere passerby"), *review denied* (Minn. Nov. 6, 1987); *Thomeczek v. Comm't of Pub. Safety*, 364 N.W.2d 471, 472 (Minn. App. 1985) (holding that officer had a reasonable, articulable suspicion of criminal activity when observing a vehicle in "an empty lot late in the evening in an area undergoing construction, where a burglary, vandalism or theft might occur").

While these cases involved the investigatory stop of persons in vehicles, they are otherwise factually analogous. Accordingly, based on the totality of the circumstances, the police sergeant had a reasonable, articulable suspicion to suspect that appellant was

involved in a burglary of the closed businesses, and therefore, the investigatory stop was justified.

Appellant next argues that the police did not have a reasonable basis to conduct a pat-down search. The state argues that the frisk was justified based on previous burglaries in the area. The paramount justification for conducting a pat-search is officer safety. *Terry*, 392 U.S. at 25–27, 88 S. Ct. at 1882–83. "An officer may conduct a limited protective weapons frisk of a lawfully stopped person if the officer has an objective articulable basis for thinking that the person may be armed and dangerous." *In re Welfare of M.D.B.*, 601 N.W.2d 214, 216 (Minn. App. 1999), *review denied* (Minn. Jan. 18, 2000). The personal frisk is limited to a protective search of a suspect's outer clothing to discover weapons that might be used by the suspect to harm the officer or others nearby. *G.M.*, 560 N.W.2d at 692. The facts and circumstances that justify an investigatory stop will not necessarily provide a sufficient reasonable basis for a frisk. *Wold v. State*, 430 N.W.2d 171, 175 (Minn. 1988). A reasonable basis involves either reasonable suspicion that the suspect is armed and dangerous or the existence of other circumstances that pose a threat to the officer. *M.D.B.*, 601 N.W.2d at 217. The officer need not be absolutely certain that the individual is armed; rather, the issue is whether a reasonably prudent officer in the circumstances would be justified in believing that his safety or that of others was in jeopardy. *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883. In this framework, we address whether the state identified specific, articulable facts to warrant the frisk.

The record indicates that the sergeant believed that appellant was armed and dangerous or that the circumstances posed a risk to the officer or others. The record also indicates that appellant exhibited behavior that alone or in combination tends to justify a frisk, such as furtive or sudden movements, avoiding eye contact, refusing to answer, not complying with police requests, acting nervously, and continuing to reach his hands into his pockets. *See*, *e.g.*, *State v. Harris*, 590 N.W.2d 90, 104 (Minn. 1999) (holding that unusual nervousness, furtive movements, and attempt to conceal object provided a reasonable basis for a pat search); *State v. Richmond*, 602 N.W.2d 647, 651 (Minn. App. 1999) (holding that nervous and fidgety, furtive movement, and unwillingness to answer questions provided reasonable basis for pat search), *review denied* (Minn. Jan. 18, 2000); *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (holding that exiting building in high drug-activity area where officer articulated personal experience seizing guns from that building provided a reasonable basis for a pat search), *aff'd*, *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130 (1993); *State v. Cavegn*, 294 N.W.2d 717, 721–22 (Minn. 1980) (holding that lateness of hour, suspect's nervousness, and suspect's clutching object close to body provided reasonable basis for pat search).

The district court did not err in finding that the sergeant had a reasonable basis for both the stop and the pat-down search of appellant.

II

Appellant argues that the district court erred when it failed to issue any findings of fact in the *Lothenbach* proceeding. "Construction of a rule of procedure is a question of law subject to de novo review." *State v. Nerz*, 587 N.W.2d 23, 24–25 (Minn. 1998).

Appellant waived his right to a jury trial and stipulated to the record generated at the omnibus hearing. Under the United States and Minnesota constitutions, a criminal defendant has the right to a jury trial, to cross-examine witnesses, and to subpoena favorable witnesses. U.S. Const. amend. VI; Minn. Const. art. I, § 6. In *State v. Lothenbach*, 296 N.W.2d 854, 858 (Minn. 1980), the supreme court concluded that a defendant does not waive the right to appeal pretrial issues despite stipulating to facts. The Minnesota Rules of Criminal Procedure now codify *Lothenbach* and require an express waiver of those rights if the defendant waives a jury trial or agrees to a stipulated-facts trial. Minn. R. Crim. P. 26.01, subds. 1, 3. An amended version of the applicable rule, which became effective April 1, 2007, provides that the defendant in a *Lothenbach* proceeding "shall waive the right to a jury trial under Rule 26.01, subdivision 1(2)(a), and shall also waive the rights specified in Rule 26.01, subdivision 3." Minn. R. Crim. P. 26.01, subd. 4. The same rule provides that if the *Lothenbach* court finds the defendant guilty, the district court "shall [ ] make findings of fact, orally on the record or in writing, as to each element of the offense(s)." *Id*.

A primary reason for requiring written findings is "to aid the appellate court in its review of conviction resulting from a nonjury trial." *State v. Scarver*, 458 N.W.2d 167, 168 (Minn. App. 1990). "Particularized findings . . . ensure that prescribed standards are utilized by the [district] court, and . . . satisfy the parties that an important question is fairly considered and decided by the [district] court." *Reyes v. Schmidt*, 403 N.W.2d 291, 293 (Minn. App. 1987) (citing *Bjerke v. Wilcox*, 384 N.W.2d 250, 252 (Minn. App. 1986)).

This court has, in some cases, remanded for compliance with the written-findings requirement when the district court has made oral findings but has not provided separate written findings. *E.g.*, *State v. Taylor*, 427 N.W.2d 1, 5 (Minn. App. 1988), *review denied* (Minn. Sept. 28, 1988). It is appropriate to remand when the oral findings are devoid of any facts on which this court can conduct review. *Scarver*, 458 N.W.2d at 168. Conclusory oral statements are not an adequate substitute for written findings. *Id.* But findings may be "gleaned from comments from the bench" so long as they "afford a basis for intelligent appellate review." *Id.* (quotation omitted).

Here, the district court did not make any findings, but the record appears to contain evidence sufficient to support the convictions. Thus, the district court's decision will not be reversed. *See Taylor*, 427 N.W.2d at 5 (remanding, but not reversing, when district court failed to make written findings as required under Minn. R. Crim. P. 26.01, subd. 2). But because Minn. R. Crim. P. 26.01, subd. 4, requires the district court, upon finding a defendant guilty, to make findings of fact (orally on the record or in writing) as to each element of the offense, this matter is remanded to the district court to make those findings in accordance with this opinion and Minn. R. Crim. P. 26.01, subd. 4.

Affirmed in part and remanded.