STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0203

State of Minnesota,
Respondent,

vs.

Benjamin Harris,
Appellant.

Filed April 7, 2009
Affirmed
Crippen, Judge[*]

Anoka County District Court
File No. CR-07-3164

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

Kathryn M. Timm, Anoka County Attorney Office, 2100 3rd Avenue, Anoka, MN 55303 (for respondent)

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

Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and Crippen, Judge.

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

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

CRIPPEN, Judge

In pretrial proceedings, appellant Benjamin Harris challenged his stop and detention near the scene of a reported burglary and the show-up identification that followed his detention. After the district court denied his suppression motion, appellant waived his right to a jury trial and the matter was submitted to the court under *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). The court found appellant guilty of first-degree aggravated robbery, sentenced him to the presumptive 48-month prison term, and dismissed the remaining counts pursuant to the parties' agreement.

Because appellant's stop and continued detention were supported by reasonable suspicion of criminal activity and the show-up identification was not unnecessarily suggestive, we affirm.

FACTS

In the early morning hours of May 11, 2007, three unknown men entered a residence in Columbia Heights. One of the men pointed a chrome handgun at the owner of the residence, K.B., and at his friend, C.R. The men took six marijuana plants from the basement, money from K.B.'s wallet, two cell phones, and $1,800 in cash that belonged to C.R.

Fridley Police Sergeant Rick Crestik responded to the radio dispatch regarding the robbery and set up a perimeter about a block and a half south of the residence. After several minutes, Crestik observed appellant on foot heading away from the general direction of K.B.'s residence. Crestik pulled up behind appellant, parked, and ordered

him to stop. Appellant stopped as directed and turned around. After he was unable to tell Crestik from where he was coming, he was handcuffed and taken to K.B.'s residence, where K.B. identified him as the gunman.

Following testimony by Crestik and one of the officers on the scene, the district court determined that there was "[p]robable cause to stop" appellant and to detain him further, that "there is no showing of unnecessary suggestiveness in this show-up," and that even if the show-up was unnecessarily suggestive, K.B.'s identification was otherwise reliable.

D E C I S I O N

On appeal of a pretrial suppression order, we may independently review the facts to determine whether the district court erred in suppressing or refusing to suppress the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

1.

It is undisputed that appellant was "seized" when Crestik ordered him to stop. *See In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993) (holding that defendant was seized when police directed him to stop). Appellant argues that the basis for the seizure was invalid because Crestik chose to stop him merely because he fit the generic description of one of the suspects: he was a black man wearing a white t-shirt and dark jeans.

A limited investigative stop is permissible if the officer is able to articulate a "particularized and objective basis for suspecting criminal activity." *State v. Riley*, 667 N.W.2d 153, 156 (Minn. App. 2003), *review denied* (Minn. Oct. 21, 2003). The officer

makes this assessment based on "all the circumstances," which includes "the officer's general knowledge and experience, the officer's personal observations, information the officer has received from other sources, the nature of the offense suspected, the time, the location, and anything else that is relevant." *Appelgate v. Comm'r of Pub. Safety*, 402 N.W.2d 106, 108 (Minn. 1987) (quotation omitted).

As appellant acknowledges, Minnesota law recognizes that investigatory stops may be necessary to "freeze the situation" to develop necessary information about a recent crime. *See id.* The parties agree that this authority is limited and depends upon consideration of the following six factors:

> (1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.

Id. Appellant argues that the mere fact that he was found in the vicinity of a recent robbery did not justify the stop and detention in this case.

With the exception of factor (6), the other five factors all support Crestik's decision to stop appellant. Appellant generally fit the description received by Crestik that one of the suspects was a black man on foot wearing a white t-shirt and dark pants. Crestik observed appellant within 30 minutes of the crime, approximately one-half block away from K.B.'s residence, moving quickly away from the general direction of that residence. Appellant was the only pedestrian seen by Crestik while he was on perimeter

watch near the crime scene. Crestik did not know the direction of the suspects' flights, but knew that appellant was traveling away from the general direction of the crime scene. Finally, when confronted by Crestik, appellant appeared agitated and displayed a defensive posture with clenched fists. Crestik's decision to stop appellant was supported by reasonable suspicion of criminal activity.

On appeal, appellant only appears to challenge Crestik's initial decision to stop him, not Crestik's decision to handcuff him and detain him further. The district court concluded that Crestik had "probable cause" to detain appellant when he was stopped. "[B]riefly handcuffing a suspect while the police sort out the scene of an investigation does not per se transform an investigatory detention into an arrest." *State v. Munson*, 594 N.W.2d 128, 137 (Minn. 1999). As long as a reasonable suspicion for the detention remains, police may continue provided they act diligently and reasonably. *Id.*

Appellant's continued detention was reasonable and did not violate his Fourth Amendment rights. Police later conducted a show-up, a little more than one hour after the stop and detention of appellant. The investigating officer testified that because the suspects fled on foot, it would have been foolish to conduct the show-up without handcuffs and an "escort hold." The officer also testified that a show-up was the quickest way to determine whether appellant was a viable suspect, because a full line-up could not have been completed until the next day.

2.

In determining whether a pretrial identification must be suppressed, a court must first determine whether the procedure was unnecessarily suggestive, which includes

determining "whether the defendant was *unfairly* singled out for identification." *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999) (quotation omitted) (emphasis in original). If an identification procedure is found to be unnecessarily suggestive, the court must then determine whether the "totality of the circumstances" establishes that the identification was nevertheless reliable. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995).

Appellant contends that the one-person show-up conducted in this case was unnecessarily suggestive because he was singled out based on a description that referred to the suspect's race, he was handcuffed and placed in a squad car, he was told to step out of the squad to be viewed by the victims, and he was flanked by an officer during the identification. *See, e.g., In re Welfare of M.E.M.*, 674 N.W.2d 208, 215 (Minn. App. 2004) (one-man show-up identification of defendant in handcuffs was unnecessarily suggestive); *State v. Anderson*, 657 N.W.2d 846, 851 (Minn. App. 2002) (identification was unnecessarily suggestive when police singled out defendant, brought him to the scene in a squad car, presented him in handcuffs flanked by police, and told the witness that they thought they had the person in custody who matched the description).

Courts have consistently rejected the argument that one-person show-ups are impermissibly suggestive per se. *See, e.g., Taylor*, 594 N.W.2d at 161-62. One person show-ups are permissible unless there is a "very substantial likelihood of irreparable misidentification." *State v. Gutberlet*, 346 N.W.2d 639, 642 (Minn. 1984).

The investigating officer testified that he took care not to tell K.B. that appellant was a suspect or that he may be the person who committed the crime, and K.B. and C.R. were separated during the show-up and were not told of each other's statements regarding

identification. In addition, K.B. told the officer that he did not know the robbers, but that he would recognize them if he saw them in a line-up; he gave detailed descriptions of the gunman, his accomplices, and the gun; and his description matched that of appellant, with the exception of appellant's age.

Finally, both K.B. and C.R. were consistent in their statements to the officer regarding what they saw and what they described. K.B. claimed that he focused on the gunman and believed that he could identify that person in a line-up; his identification of appellant was immediate and unwavering. And while C.R. could not identify appellant, she had told the officer that she had lowered her eyes during the incident and she had admitted that she probably would not be able to identify the perpetrators. If the show-up was unnecessarily suggestive, it is reasonable to expect that C.R. also would have identified appellant. The district court did not err in concluding that the show-up was not impermissibly suggestive.

And even if the show-up was impermissibly suggestive, K.B.'s identification was admissible because, under the totality of the circumstances, he had an independent basis for making the identification. *See Ostrem*, 535 N.W.2d at 921. The factors to consider under this test include (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the time of the show-up; and (5) the time between the crime and the show-up. *Id.*

Consideration of these factors supports the admission of K.B.'s show-up identification: K.B. had ample opportunity to observe the gunman during the crime,

because the robbers were inside his home for approximately 20 minutes and because the gunman spoke roughly to K.B. and was physically abusive to him; K.B. was alert and unimpaired when the officer was taking his statements, and K.B.'s attention was focused on the gun and gunman; K.B. provided details about the events, the gun, the gunman, and his accomplices, that included physical descriptions and descriptions of stolen items; K.B. identified appellant within three seconds and never wavered in his identification of appellant; and the show-up was conducted approximately one to one and one-half hours after the crime occurred.

3.

Appellant has submitted a pro se supplemental brief and a pro se supplemental reply brief. He raises issues involving Crestik's decision to stop and detain him that evening, K.B.'s identification of him as the gunman, and statements he made to investigating officers before he was advised of his right to counsel. He also appears to challenge the credibility of K.B. and of the investigating and responding officers. He finally appears to argue that his due process rights were violated when he was counseled to waive his right to a jury trial, proceed under *Lothenbach*, and submit the case to the court.

Appellant's challenges to the legality of his stop and detention and to the admissibility of K.B.'s show-up identification are the same issues raised by the state public defender on appellant's behalf and have been addressed and rejected. And appellant is not specific as to what statements he seeks to exclude. His claim that the state's witnesses are not credible does not appear to be a challenge that can be made

following a *Lothenbach* proceeding, in which he has waived his right to a jury trial and agreed to submit the case to the court based on the evidence presented by the state.

Some of the statements made by appellant in his pro se supplemental brief could be construed as raising ineffective assistance of counsel claims. To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance "fell below an objective standard of reasonableness," and (2) there is a "reasonable probability" that, but for counsel's errors, the proceeding would have resulted in a different outcome. *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005).

Appellant is not specific in his criticism of his attorney's performance and his pro se claims lack supporting arguments and citations to the record. In any event, claims of attorney error commonly cannot be adequately assessed on direct appeal and can only be resolved in a postconviction proceeding. *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). Because no prejudicial error is "obvious on mere inspection," we find appellant's pro se claims to be without merit. *See State v. Bartylla*, 755 N.W.2d 8, 23 (Minn. 2008) (quotation omitted).

Affirmed.