STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0585

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

Filed April 14, 2009
Reversed
Peterson, Judge

Hennepin County District Court
File No. 27-JV-07-11657

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent State of Minnesota)

Leonardo Castro, Chief Fourth District Public Defender, Peter W. Gorman, Assistant Public Defender, 701 Fourth Avenue South, Suite 1400, Minneapolis, MN 55487 (for appellant T.A.R.)

Considered and decided by Toussaint, Chief Judge; Peterson, Judge; and Randall, Judge.*

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

PETERSON, Judge

In this appeal from orders in a juvenile-delinquency proceeding, appellant argues that (1) because the arresting officer lacked reasonable suspicion to conduct an

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

investigative stop of appellant, the district court erred in denying appellant's motion to suppress; and (2) the district court failed to support its disposition order with sufficient findings. We reverse.

FACTS

On September 5, 2007, Officer Jeff Newman of the Minneapolis Police Department responded to a 911 call received at approximately 8:27 p.m. from a caller at 1642 Upton Avenue reporting shots fired, possibly in the area of Russell Avenue, which is three blocks east of Upton Avenue. Newman traveled northbound on Upton Avenue toward 16th Avenue and arrived at 16th Avenue about two or three minutes after receiving the dispatch. Newman testified that he knew that there was a park between Queen Avenue and Russell Avenue where young people frequently play and that he suspected that the shots may have come from that park and that the person who fired the shots would probably go into the smaller, less-traveled side streets west of Penn Avenue, which is a major north/south street two blocks east of Russell Avenue.

When Newman reached 16th Avenue, he turned right and saw appellant T.A.R walking west on the north side of 16th Avenue. With his service revolver drawn, which is standard procedure for a shots-fired call, Newman pulled beside appellant in his squad car. While still in his squad car, Newman asked appellant to lift up his shirt. Newman testified that before he asked appellant to lift his shirt, "[appellant] wouldn't make eye contact with me. He was looking away from me. He . . . appeared really nervous when he saw me." Appellant lifted up his shirt, revealing a white undershirt. Newman asked appellant to lift up the white undershirt. When appellant complied, Newman saw the

handle of a handgun in appellant's front waistband. Newman identified the gun as a semi-automatic .22-caliber Ruger.

Appellant was alleged by petition to be delinquent because he violated Minn. Stat. § 624.713, subd. 1(a) (2006) (certain persons not to have pistols). Appellant moved to suppress any evidence taken as a result of a search and seizure, and at the hearing on the motion, Newman and appellant testified about the events that occurred on September 5, 2007. The district court denied the motion.

Following a stipulated-facts trial, the district court determined that the state had proved beyond a reasonable doubt that appellant violated Minn. Stat. § 624.713, subd. 1(a), and adjudicated appellant delinquent. The court ordered that appellant be on supervised probation and stayed placement in a six-week out-of-home BETA program conditioned on appellant's compliance with the terms of probation. This appeal followed.

D E C I S I O N

Appellant argues that the district court erred by denying his motion to suppress. An appellate court undertakes "a de novo review to determine whether a search or seizure is justified by reasonable suspicion or by probable cause. The district court's findings of fact are reviewed for clear error." *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005) (citations omitted).

The United States and Minnesota Constitutions prohibit "unreasonable searches and seizures." U.S. Const. am. IV; Minn. Const. art. I, § 10. The parties agree that Newman's actions constituted a seizure of appellant. The issue is whether the seizure

was reasonable. *See Delaware v. Prouse*, 440 U.S. 648, 653-54, 99 S. Ct. 1391, 1396 (1979) ("The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents." (footnote omitted)).

> A limited investigative stop is lawful if the officer is able to articulate at the judicial hearing on the validity of the stop that he had a "particularized and objective basis for suspecting the particular person stopped of criminal activity." The officer makes his assessment on the basis of "all the circumstances" and "draws inferences and makes deductions-inferences and deductions that might well elude an untrained person." These circumstances include 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) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981)).

In *Appelgate*, the supreme court considered a situation where a police officer stopped a motor vehicle near a recent crime. *Id.* at 107-08. The supreme court explained:

> In such a situation, "the police must have some authority to freeze the situation." Indeed, "[e]ven if the circumstances are such that no one person can be singled out as the probable offender, the police must sometimes be allowed to take some action intermediate to that of arrest and nonseizure activity."

Id. at 108 (alteration in original) (quoting 3 Wayne R. LaFave, *Search and Seizure* § 9.3(d), at 460 (2d ed. 1987)).

The supreme court further explained:

> LaFave isolates six factors that may be taken into account in determining the propriety of the stop of a motor vehicle in such a situation: (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.

The district court concluded that given the totality of the circumstances, Newman's stop and search of appellant was based on reasonable suspicion of criminal activity. The district court's conclusion was based on its determinations that

> Newman responded to the "shots fired" call in approximately three minutes. When Officer Newman arrived on the block where the "shots fired" call was made, he encountered [appellant]. [Appellant] was the only person in the area. [Appellant] appeared to be a juvenile. [Appellant] appeared nervous and refused to make eye contact with Officer Newman.

The district court also determined that based on Newman's experience, Newman knew that the area of 16th Avenue and Upton Avenue was a high-crime area.

Taking into account the six factors identified by the supreme court in *Appelgate* for determining the propriety of a stop near a recent crime, we disagree with the district court that Newman articulated a particularized and objective basis for suspecting appellant of criminal activity. Newman did not have any description of an offender, and

he had no knowledge or suspicion that appellant had been involved in other criminality. Consequently, the facts that appellant appeared to be a juvenile and that shots had been fired did not provide any basis for suspecting that appellant had been involved with the shooting.

Because the 911 caller reported that shots had possibly been fired in the area of Russell Avenue, Newman's suspicion that the shots had been fired in the park between Queen Avenue and Russell Avenue was reasonable, and because Newman responded to the 911 call in approximately three minutes, his suspicion that the shooter was not far from the park was reasonable. Also, the fact that Penn Avenue is a major street was an objective basis for Newman's suspicion that the shooter would not travel toward Penn Avenue, although Newman did not explain why he thought that the shooter would be more likely to avoid a major street.

But even if we assume that Newman's suspicion that the shooter would not travel east toward Penn Avenue was reasonable, that suspicion does not provide a reasonable basis for suspecting that the shooter would travel west from the park, rather than north or south or any other direction other than east. Therefore, the area in which the shooter might be found was at least a semi-circle with its center at the park and a radius of at least three blocks, which is how far appellant was from the park when Newman stopped him. This is significant because, based on Newman's testimony, the district court determined that appellant was the only person in the area. However, Newman's testimony referred only to the area near 16th Avenue and Upton Avenue; it did not refer to the entire area in which the shooter might be found.

The circumstances of appellant's stop are very different from the circumstances in *Appelgate*, where a police officer who responded to a report of a burglary in progress at an apartment complex at 2:25 a.m. arrived at the apartment within one minute and stopped where he could see the only means of exit from the apartment complex. 402 N.W.2d at 107. The supreme court noted in *Appelgate* that it was significant that the stopped vehicle "was observed coming from the apartment complex where the burglarized apartment is located within a few minutes after the report of the burglary in progress was made and at a time of day (2:25 a.m.) when there was 'very little if any' traffic in the area." *Id.* at 109. In contrast, appellant was observed walking down a sidewalk in a residential area at approximately 8:30 in the evening during the first week of September. Under these circumstances, it was not reasonable to believe that appellant was the only person in the area in which the shooter might be found.

Also, Newman did not identify anything about appellant's activity before the stop that would reasonably support a suspicion that appellant was involved with the shooting. During cross-examination, Newman testified as follows:

> Q. Okay. But as soon as you stopped to talk with him, you had your gun drawn and visible to [appellant]; is that correct?
> A. Correct.
> Q. And he appeared nervous; is that right?
> A. Uh-huh.
> Q. And he didn't try to run away; is that right?
> A. No, he did not.
> Q. He didn't make a furtive gesture toward his waistband like he was going to pull a gun on you?
> A. No.
> Q. So it was more just a precautionary thing for you to have your gun drawn and pointed just in case?

A. Absolutely.
Q. Okay. When you saw [appellant], you stopped him because you felt like he might have something to do with this shots-fired call?
A. Correct.
Q. There was nothing about his demeanor though in terms of him appearing violent or angry or assaulting anybody around the area; is that right?
A. No.
Q. So you talked to him about whether he had a weapon immediately? That was the first thing that you did?
A. Yes.
Q. Did you say, "Do you have a gun?"
A. No. I said, "Hey, man, lift up your shirt."

The district court found, "[Appellant] appeared nervous and refused to make eye contact with Officer Newman." But nervousness, by itself, is not sufficient to establish a reasonable suspicion. *State v. Syhavong*, 661 N.W.2d 278, 282 (Minn. App. 2003). Also, Newman testified that his gun was drawn when he stopped his squad car beside appellant, which could explain appellant's nervousness. *See In re Welfare of M.D.B.*, 601 N.W.2d 214, 216 (Minn. App. 1999) ("[W]hen confronted by an armed, uniformed officer in a squad car with flashing lights, it is not unusual for a person to appear nervous."), *review denied* (Minn. Jan. 18, 2000).

We conclude that the only objective basis for stopping appellant was that he was in the area in which the shooter might be found. But because it was not reasonable to believe that appellant was the only person in the area, his location, by itself, was not a particularized and objective basis for suspecting him of criminal activity. Therefore, the investigative stop was not justified by reasonable suspicion, and the district court erred in denying appellant's motion to suppress and in adjudicating appellant delinquent based on

evidence obtained as a product of the stop. Because we conclude that the district court erred in adjudicating appellant delinquent, we need not address appellant's challenges to the district court's factual findings or his arguments regarding the disposition order.

Reversed.