STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0451

State of Minnesota,
Respondent,

vs.

Emmanuel Joseph Peglow,
Appellant.

Filed May 19, 2009
Affirmed
Worke, Judge

Crow Wing County District Court
File No. K7-05-2108

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Donald F. Ryan, Crow Wing County Attorney, Crow Wing County Courthouse, 213 Laurel Street, Suite 31, Brainerd, MN 56401 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

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

WORKE, Judge

Appellant challenges his conviction for fifth-degree controlled substance crime, arguing that the drug evidence used to convict him should have been suppressed because he was illegally seized, and his continued detention and pat-search were illegal. We affirm.

D E C I S I O N

Appellant Emmanuel Joseph Peglow argues that the police officers who seized him did not have a particularized and objective basis to suspect that he was engaged in criminal activity. "Where, as here, the facts are not significantly in dispute, this court's standard of review is to determine as a matter of law whether the officer's actions amounted to a seizure and if the officer had an adequate basis for the seizure." *State v. Day*, 461 N.W.2d 404, 406 (Minn. App. 1990), *review denied* (Minn. Dec. 20, 1990).

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Minnesota courts must suppress evidence gathered as a result of an unreasonable seizure. *In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993). A seizure occurs "when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Id.* at 781 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 1879 n.16 (1968)). "[A] person has been seized if in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter." *State v. Cripps*, 533

N.W .2d 388, 391 (Minn. 1995). A brief investigatory seizure is not unreasonable if an officer has a "particular and objective basis for suspecting the particular person [seized] of criminal activity." *State v. Johnson*, 444 N.W.2d 824, 825 (Minn. 1989) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981)). An officer may justify a decision to seize a person based on the totality of the circumstances and "may draw inferences and deductions that might elude an untrained person." *Cripps*, 533 N.W .2d at 391. Articulable, objective facts that would justify an investigatory stop are "facts that, by their nature, quality, repetition, or pattern become so unusual and suspicious that they support at least one 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). However, a mere hunch, absent other objectively reasonable, articulable facts, will not justify a seizure. *State v. Harris*, 590 N.W.2d 90, 99 (Minn. 1999).

Here, an officer recognized one of the two men with appellant as a minor who was out after curfew, in violation of the local curfew law. The officer called for backup, and two other officers arrived within minutes. The second officer to arrive recognized appellant from prior narcotics-related contacts and noticed that appellant was attempting to create space between him and the other individuals. The officer also noticed that appellant appeared to be trying to empty his pockets into the weeds by a building. When the officer asked appellant what he was throwing into the weeds, appellant responded "nothing." Appellant appeared to be extremely sweaty and incoherent. Appellant contends that the officers did not have a reasonable suspicion to stop the entire group. But the officer stopped to give the minor a citation and another officer noticed appellant's

suspicious movements, evasive behavior, and incoherent response, all of which are consistent with a person involved in drug activity. Because the officer had reasonable suspicion of individualized criminal activity, appellant was legally stopped.

Appellant also argues that the continued detention and pat-search by the officer were illegal. "The Fourth Amendment prohibits an officer from searching an individual without a warrant, subject only to a few specifically established and well-delineated exceptions." *State v. Varnado*, 582 N.W.2d 886, 889 (Minn. 1998) (quotation omitted). The facts and circumstances that justify an investigatory stop will not necessarily provide a sufficient reasonable basis for a pat-search. *Wold v. State*, 430 N.W.2d 171, 175 (Minn. 1988).

The paramount justification for conducting a pat-search is officer safety. *Terry*, 392 U.S. at 30, 88 S. Ct. at 1884. "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). A reasonable basis involves "either a reasonable suspicion that the suspect is armed and dangerous *or the existence of other circumstances that pose a threat to the officer*." *Id.* at 217 (emphasis added). 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; *see also Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 1923 (1972) ("The purpose of this limited search is not to discover evidence of crime, but

to allow the officer to pursue his investigation without fear of violence . . . ."). The pat-search 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. *In re Welfare of G.M.*, 560 N.W.2d 687, 692 (Minn. 1997).

The record indicates that the stop occurred late at night and that appellant acted in an evasive manner by attempting to distance himself from the group. The record also indicates that appellant was reaching and shuffling his hands in his pockets. Appellant also appeared to be using drugs–he would not make eye contact, acted nervous, appeared extremely sweaty, and seemed a little incoherent. The officer testified that he had prior drug-related contacts with appellant and that he feared for his safety. These facts support the district court's finding that the officer had a reasonable basis to detain appellant and conduct a pat-search. Behavior that alone or in combination that tends to justify a pat-search includes furtive or sudden movements, avoiding eye contact, refusing to answer, not complying with police requests, acting nervously, and keeping or reaching hands in pockets. *See e.g.*, *Harris*, 590 N.W.2d at 104 (stating pat-search justified by unusual nervousness, furtive movements, and attempt to conceal object); *State v. Cavegn*, 294 N.W.2d 717, 721-22 (Minn. 1980) (stating pat-search justified based on lateness of hour, suspect's nervousness, and suspect's clutching object close to body).

Affirmed.