STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0468

State of Minnesota,
Respondent,

vs.

Frederick Tyrone Gray,
Appellant.

Filed June 9, 2009
Affirmed
Stoneburner, Judge

Ramsey County District Court
File No. K3072459

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, Monica Miller, Certified Student Attorney, Suite 315, 50 West Kellogg Boulevard, St. Paul, MN 55102-1657 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Toussaint, Chief Judge; Stoneburner, Judge; and

Willis, 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

STONEBURNER, Judge

Appellant challenges his conviction of possession of a firearm by an ineligible person, arguing that the district court erred by denying his motion to suppress evidence based on the excessive force used to stop him. Alternatively, appellant challenges his sentence, arguing that the district court erroneously concluded that it was without authority to depart from the presumptive sentence for an offense involving a gun. Because the district court did not err in denying appellant's motion to suppress evidence of the firearm and did not abuse its discretion in sentencing, we affirm.

FACTS

St. Paul police officer Patrick Scott, who was conducting surveillance of a drug house in St. Paul, saw appellant Frederick Tyrone Gray walking nearby. Gray raised his shirt as he walked past Scott's vehicle and Scott saw a semi-automatic handgun tucked into Gray's waistband. Based on Gray's youthful appearance and the manner in which he was carrying the gun, Scott suspected that Gray did not have a permit to carry a firearm. Scott radioed Gray's description and location to other officers and told them Gray was armed.

Four officers and a canine responded to the call. They approached Gray with their guns drawn and ordered him to the ground. Gray went to the ground but did not immediately obey when ordered to put his hands behind his back. He was maced and handcuffed, and force was used to roll him onto his side to remove a .38 semi-automatic handgun from his waistband.

Gray, who is ineligible to possess a firearm, was arrested, questioned, and charged with possession of a firearm by an ineligible person. Gray moved to suppress evidence of the gun, arguing that he was seized unlawfully due to the amount of force used and that his statement was taken in violation of his *Miranda* rights. The district court denied the motions. Gray submitted the case to the district court on stipulated facts. He was found guilty. At sentencing, he moved for a downward dispositional departure. The district court denied the motion and sentenced him to 60 months, the mandatory minimum sentence under Minn. Stat. § 609.11, subd. 5(b) (2006). This appeal followed, challenging only the legality of Gray's seizure and denial of his motion for a downward sentencing departure.

D E C I S I O N

I. Suppression motion

When reviewing a pretrial order on a motion to suppress evidence, we independently review the facts and determine, as a matter of law, whether the district court erred in its decision. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). "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).

Gray asserts that evidence of the gun must be suppressed because the police exceeded the scope of a valid investigative stop, citing *State v. Blacksten*, 507 N.W.2d 842, 846 (Minn. 1993) (holding that the detention of a robbery suspect two miles from his residence for well over an hour while a search warrant was being sought was not a reasonable pre-arrest investigatory stop). Gray also notes that although the supreme

court's holding in *State v. Timberlake* supports the district court's holding that Scott's observation of the gun in Gray's waistband justified an investigative stop, the supreme court limited that opinion to the stop and expressly declined to discuss or analyze post-stop conduct. 744 N.W.2d 390, 392 n.2 (Minn. 2008).

The state argues that Gray has waived this argument on appeal by failing to assert it in the district court. *See State v. Roby*, 463 N.W.2d 506, 508 (Minn. 1990) (stating that this court will generally not consider matters not argued to and considered by the district court). In the district court, Gray primarily argued that the police did not have probable cause to seize him, but he also argued that there was not enough evidence "to justify this sort of seizure and this [sort] of conduct." The district court concluded that Scott's observation of the gun coupled with his reasonable suspicion that Gray was too young to have a permit to carry a gun supported an investigative stop and held that this was an "appropriate *Terry* stop." We conclude that even though Gray did not focus on the ferocity of the stop, the issue was sufficiently preserved for appeal. And, we choose to review the issue in the interest of judicial economy because the record is sufficiently developed for review. *See* Minn. R. Crim. P. 28.02, subd. 11 (stating that appellate courts may review matters as the interests of justice may require).

The Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution protect against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. But, an officer who has a reasonable, articulable suspicion of criminal activity may conduct an investigatory stop. *See State v. Munson*, 594 N.W.2d 128, 136 (Minn. 1999) (citing *Terry v. Ohio*, 392 U.S. 1, 20–22, 88

S. Ct. 1868, 1879–80 (1968)); *see also State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996) ("A brief investigatory stop requires only reasonable suspicion of criminal activity, rather than probable cause."). The scope of an investigatory (*Terry*) stop is limited: it only permits law enforcement officers to make reasonable inquiries limited to verifying or dispelling the reasonable articulable suspicion of criminal activity. *Terry*, 392 U.S. at 30; 88 S. Ct. at 1884.

"An initially *valid* stop may become *invalid* if it becomes 'intolerable' in its 'intensity or scope.'" *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (emphasis added) (quoting *Terry*, 392 U.S. at 17–18, 88 S. Ct. at 1878). The reasonableness of an investigative stop is determined "by an objective and fair balancing of the government's need to search or seize and the individual's right to personal security free from arbitrary interference by law officers." *State v. Flowers*, 734 N.W.2d 239, 252 (Minn. 2007) (quoting *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005)). The Minnesota Supreme Court considers the following factors in determining whether police have exceeded the scope of a permissible *Terry* stop:

> (1) the number of officers and police cars involved; (2) the nature of the crime and whether there is reason to believe the suspect might be armed; (3) the strength of the officers' articulable, objective suspicions; (4) the erratic behavior of or suspicious movements by the persons under observation; and (5) the need for immediate action by the officers and lack of opportunity for them to have made the stop in less threatening circumstances.

Id. at 253. The actions of law enforcement officers must be evaluated in light of relevant surrounding circumstances. *State v. Ailport*, 413 N.W.2d 140, 143 (Minn. App. 1987), *review denied* (Minn. Nov. 18, 1987).

In *Blacksten*, the supreme court cited the United States Supreme Court for the proposition that an assessment of whether a detention is too long in duration to be justified as an investigative stop involves examination of "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." 507 N.W.2d at 846 (quoting *United States v. Sharpe*, 470 U.S. 675, 676, 105 S. Ct. 1568, 1570 (1985)). The supreme court held that Blacksten was not detained for an investigative stop: here it is undisputed that police were investigating Gray's possession of a gun. When investigating officers have cause to believe that a person being stopped is armed, they are "justified in proceeding cautiously with weapons ready." *Munson*, 594 N.W.2d at 137 (quoting *State v. O'Neill*, 299 Minn. 60, 68, 216 N.W.2d 822, 828 (1974)).

The four officers approaching Gray knew that the stop involved at least one gun, justifying their drawn weapons and their ordering Gray to the ground with hands behind his back. Officer conduct toward Gray escalated due to his unresponsiveness to orders made to ensure officer safety.

Gray asserts that the officers lacked probable cause to arrest him because they made no attempt to determine if he had a permit to carry the gun, but the record is silent about when the officers determined that Gray was ineligible to possess a firearm. We conclude that because the officers knew that Gray was armed and because Gray did not

immediately put his hands in a safe position, the manner of Gray's seizure did not exceed the scope of a proper investigatory stop in this case. The district court did not err in denying Gray's motion to suppress.

II. Sentencing

Gray asserts that the district court denied his motion for a downward departure from mandatory minimum sentencing based on an erroneous conclusion that it lacked authority to depart. Gray asks for a remand for resentencing in order for the district court to exercise its sentencing discretion.

The state argues that it is reasonable to presume that the district court was familiar with legal authority cited in Gray's motion and supporting memorandum concerning the district court's power to depart downward from the mandatory sentence for crimes involving firearms if the district court finds substantial and compelling reasons to do so. Gray's motion cited Minn. Stat. § 609.11, subd. 8(a) (2008) (giving a district court the authority on its own motion to depart downward from mandatory sentences contained in that section); Minn. Sent. Guidelines II.D.2.a (listing factors that may support departure); and *State v. Olson*, 325 N.W.2d 13, 19 (Minn. 1982) (giving judges power to depart downward from certain mandatory statutory sentences). We agree.

The district court indicated that it had reviewed Gray's motion, and the district court heard all of Gray's arguments supporting a departure. The presentence-investigation report recommended against a downward departure because it concluded that Gray is not amenable to probation. The state pointed to Gray's criminal and probation history (he was on probation at the time of this crime) as supporting its position

that Gray is not amenable to probation. The state also countered Gray's argument that his actions were less onerous than the average firearm-possession offense, noting that Gray was typical of a firearm-possession offender.

Although the district court praised Gray for his strengths and talents, the district court noted the great risk created by guns in the community. The district court expressed some displeasure with having to impose the presumptive sentence, but said "this is a mistake I can't look past. It's in the realm of the most serious kinds of offenses." Gray seizes on the district court's statement "I am not pleased about where I have to go with this sentence in terms of following the Guideline" to argue that the district court failed to recognize its authority to grant a downward departure, but given the context of the statements and the district court's demonstrated consideration of arguments supporting a departure, we conclude that the record reflects the district court's awareness of its discretion and rejection of the argument that substantial and compelling reasons for a downward departure existed in this case.

Affirmed.