STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0633

State of Minnesota,
Respondent,

vs.

Steven J. Allbee,
Appellant.

Filed June 2, 2009
Affirmed; motion denied
Halbrooks, Judge

Pine County District Court
File No. 58-CR-06-1090

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

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Lawrence Hammerling, Chief Appellate Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104; and

Keala C. Ede, Special Assistant State Public Defender, Robins, Kaplan, Miller & Ciresi, L.L.P., 2800 LaSalle Plaza, 800 LaSalle Avenue, Minneapolis, MN 55402 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Halbrooks, 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

HALBROOKS, Judge

Appellant challenges his conviction of third-degree controlled-substance crime on the ground that police did not have the requisite reasonable articulable suspicion of drug-related criminal activity to conduct a dog sniff of the exterior of his vehicle. The state has moved to strike portions of the appendix to appellant's principal brief. We affirm appellant's conviction and deny the state's motion to strike.

FACTS

In August 2006, Minnesota State Patrol Trooper Brett Westbrook learned from another law-enforcement officer that theft suspect Robert Allbee might be staying in the Grand Casino Hinckley RV park with his brother, appellant Steven Jay Allbee. Upon further investigation, Trooper Westbrook determined the make, model, year, and license-plate number of the sole vehicle registered in appellant's name.

At approximately 2:20 a.m. on August 12, 2006, Trooper Westbrook observed appellant's minivan in the valet parking area of Grand Casino Hinckley. Trooper Westbrook walked around the van and looked through its windows. He could also see "a clear plastic baggy protruding from a black case" and an "orange, slightly larger than chewing gum pack of rolling papers inside the clear plastic bag." According to Trooper Westbrook, the baggy "was the same type [he had] observed numerous times as those containing illicit narcotics."

Trooper Westbrook requested that a canine unit be sent to the scene. Deputy Daniel Kunz arrived with a canine officer, and they walked around the van. The dog

"alerted" on the back hatch of the van. Officers later found a variety of contraband, including methamphetamine, inside the van.

Appellant was charged with third-degree controlled-substance crime in violation of Minn. Stat. § 152.023, subds. 2(1), 3(a) (2006). Appellant moved to suppress evidence derived from the dog sniff. At the contested omnibus hearing, the parties agreed to submit the matter to the district court based on the criminal complaint, police reports, and the arguments of counsel.

The district court subsequently denied appellant's motion to suppress. The district court reasoned, in part:

> 6. Although the initial target of the police investigation in the instant matter was [Robert Allbee] on a theft matter, the police had an articulable suspicion of the commission of criminal activity by [appellant] when noting what appeared to be evidence of drug related activity when looking through the windows of a vehicle known to be registered to [appellant].
>
> 7. These suspicious items gave the officers a lawful basis to seek further investigation by the drug sniffing police canine.

Appellant agreed to a *Lothenbach* procedure on stipulated facts, and the district court found appellant guilty of third-degree controlled-substance crime. The district court stayed imposition of a 21-month sentence and placed appellant on probation for ten years. This appeal follows.

D E C I S I O N

I.

Appellant argues that, under the federal and state constitutions, Trooper Westbrook's observation of the plastic baggy and the rolling papers was not sufficient to support the requisite reasonable articulable suspicion for a dog sniff. "When reviewing a pretrial order on a motion to suppress evidence, we may independently review the facts and determine whether, as a matter of law, the district court erred in suppressing or not suppressing the evidence." *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004). We review de novo the district court's determination that there existed a reasonable articulable suspicion justifying the search. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

The Fourth Amendment to the U.S. Constitution and article I, section 10 of the Minnesota Constitution, which are textually identical, protect individuals from unreasonable searches and seizures. Although a dog sniff is not a "search" within the meaning of the federal constitution, it is a "search" within the meaning of the state constitution. *State v. Carter*, 697 N.W.2d 199, 202 (Minn. 2005).

Police must have "at least reasonable, articulable suspicion of criminal activity" before conducting a dog sniff. *Id.* ; *see also State v. Wiegand*, 645 N.W.2d 125, 132, 137 (Minn. 2002) (applying the standard of reasonable articulable suspicion to a police narcotics-detection dog sniff around the exterior of a motor vehicle located in a public place). Appellant carries the burden of establishing that the dog sniff violated his constitutional rights. *See State v. Gail*, 713 N.W.2d, 851, 859–60 (Minn. 2006).

The standard of reasonable articulable suspicion is lower than that of probable cause. *United States v. Arvizu*, 534 U.S. 266, 273-74, 122 S. Ct. 744, 750-51 (2002). But while the requisite showing to meet the standard is "'not high,'" *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (quoting *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S. Ct. 1416, 1422 (1997)), drug-detection dogs cannot be used "at random and without reason." *Carter*, 697 N.W.2d at 211 (quotation omitted).

"Reasonable suspicion must be based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *Davis*, 732 N.W2d at 182 (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968)). "[B]y virtue of the special training they receive, police officers articulating a reasonable suspicion may make inferences and deductions that might well elude an untrained person." *State v. Flowers*, 734 N.W.2d 239, 251–52 (Minn. 2007). But an officer cannot be "motivated by mere whim, caprice, or idle curiosity." *Wiegand*, 645 N.W.2d at 134 (quotation omitted); *State v. Baumann*, 759 N.W.2d 237, 240 (Minn. App. 2009) ("Caselaw thus distinguishes hunch, intuition, gut reaction, and instinctive sense—which will not suffice to meet the reasonable-suspicion standard—from objectively, externally perceived and perceivable events or circumstances augmented by rational inferences that can be drawn therefrom."), *review denied* (Minn. Mar. 31, 2009). An officer must be able to articulate precisely what the factual basis for the suspicion was; "it is not enough that [a] law enforcement officer claims that he had a factual basis for his suspicion." *Baumann*, 759 N.W.2d at 240.

In reviewing whether the standard of reasonable articulable suspicion was met, "we consider the totality of the circumstances pertaining to the issue, including possible innocent explanations for the alleged suspicious activity." *Id.* (citing *Davis*, 732 N.W.2d at 182). But even innocent activity might justify the suspicion of criminal activity. *State v. Johnson*, 444 N.W.2d 824, 826–27 (Minn. 1989); *see also State v. Martinson*, 581 N.W.2d 846, 852 (Minn. 1998) (stating that innocent factors "in their totality, combined with the investigating officer's experience in apprehending drug traffickers, can be sufficient bases for finding reasonable suspicion").

The district court made only one finding of fact upon which it based its conclusion that Trooper Westbrook had a reasonable articulable suspicion of drug-related criminal activity:

> 7. Westbrook looked into the windows of the parked and unoccupied vehicle and . . . "observed a clear plastic baggy protruding from a black case. The baggy was the same type I've observed numerous times as those containing illicit narcotics. I moved around to the other side and observed the orange, slightly larger than chewing gum pack of rolling papers inside the clear plastic bag."

The district court reasoned that "[t]hese suspicious items" gave law enforcement a sufficient basis to conduct the dog sniff.[1]

[1] The state argues that we should consider Trooper Westbrook's alleged knowledge of a previous drug offense by appellant and of Robert Allbee's use or possession of drugs. But the district court did not make findings regarding Trooper Westbrook's reliance on these matters. Nor, as the state claims, did appellant stipulate to the truth of Trooper Westbrook's police report. Instead, the parties agreed that the district court would make its decision based on the criminal complaint, police reports, and oral arguments of counsel. We further note that neither party has challenged the district court's factual findings as clearly erroneous.

The question before us is therefore whether the plastic baggy, rolling papers, and Trooper Westbrook's inference from those items, amounted to reasonable articulable suspicion of drug-related criminal activity. We conclude that the standard of reasonable articulable suspicion was met.

We find *Davis* and *Baumann* especially instructive. In *Davis*, police conducted a dog sniff of a common hallway in an apartment building based on two pieces of information reported by an apartment-complex employee: (1) the tenant had "marijuana-growing lights" in his apartment and (2) he refused to let maintenance enter the apartment to investigate a possible water leak. 732 N.W.2d at 175. The supreme court held: "The two facts reported by the apartment complex employee gave police something more than an unarticulated hunch. It was reasonable for police to infer from these facts that Davis might be growing marijuana in his apartment." *Id.* at 183.

Baumann also involved a dog sniff conducted in a common hallway of an apartment building. 759 N.W.2d at 238. In that case, the apartment-complex manager had complained to a detective that "she had suspicions about a certain unit in the complex because of the high number of people coming in and out and staying for a short amount of time." *Id.* at 238–39. This court acknowledged "the low threshold the courts have set for reasonable suspicion," and concluded that "the information [the detective] relied upon as the basis for his suspicion was 'something more' than an unarticulated hunch and that he was able to point to 'something' that 'objectively' supported his suspicion." *Id.* at 241.

We note that these two cases involved plausibly innocent activity or items—in *Davis*, the suspicious lights could have been used to grow legal plants and the refusal to let maintenance enter could have reflected a legitimate desire for privacy; in *Baumann*, heavy short-term traffic in and out of a unit the week before Christmas could have been consistent with non-drug-related holiday visitors.

It is clear from *Davis* and *Baumann* that the standard of reasonable suspicion is a low one. In *Baumann*, a single suspicious fact,[2] plus the inference that a police officer could draw from that fact, was enough to meet the standard of reasonable articulable suspicion to conduct a dog sniff. Here, the plastic baggy, the rolling papers, and the inference Trooper Westbrook drew from these two objects are sufficient to meet the standard because the trooper was able to point to a specific factual basis for his suspicion of drug-related criminal activity.

Because appellant's sole argument for reversal is based on the unconstitutionality of the dog sniff, we affirm his conviction.

II.

The state has moved to strike certain documents appended to appellant's principal brief and any reference to the documents within the brief. Because our analysis does not

[2] Although the *Baumann* opinion mentioned the tenant's "previous contacts" with law enforcement, this court specifically based its decision on the "single piece of information"—i.e., the tip from the manager. 759 N.W.2d at 239–40.

rely on the contested portions of appellant's brief and appendix, we deny the state's motion to strike as moot. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007).

Affirmed; motion denied.