STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0627

State of Minnesota,
Respondent,

vs.

Torrey Hugh Hudson,
Appellant.

Filed July 7, 2009
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-07-110115

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

Michael O. Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Melissa V. Sheridan, Assistant Public Defender, 1380 Corporate Center Curve, Suite 320, Eagan, MN 55121 (for appellant)

Considered and decided by Peterson, Presiding Judge; Connolly, 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

PETERSON, Judge

In this appeal from a theft-from-person conviction, appellant argues that the district court erred by denying his motion to suppress the victim's social security card, which was discovered on appellant during an investigative stop and search, and by refusing to instruct the jury about the factors it should consider when evaluating an eyewitness's identification of appellant. We affirm.

FACTS

On September 1, 2007, while R.H. was in his car at a stoplight at the intersection of Lyndale Avenue and Lowry Avenue North in Minneapolis, a man crossed the street and asked R.H. if he had any one-dollar bills as change for a bus ticket. When R.H. reached into his wallet to get the money, the man grabbed the wallet and ran away. R.H. chased the man, who jumped into a car that drove off. R.H. called 911, and an officer arrived to take a report. R.H. told the officer that his wallet contained a bank card, his driver's license, and his social security card.

On September 3, 2007, Officer George Peltz was patrolling in a marked squad car in the area around Bryant Avenue and 21st Avenue North in Minneapolis. He saw a man leaning over and reaching into the window of a van that was pulled over to the side of Bryant Avenue. When the man and the van driver saw the squad car, they broke off contact with each other. The man crossed north onto the next block and then walked east from Bryant Avenue, and the van drove away. Peltz drove north one block and, within less than a minute, circled back around to the corner where he first saw the man. The

man had returned to the corner, and when he saw the squad car approaching, he began walking west, away from the corner.

Peltz testified that, when he first saw the man leaning into the van, "[i]t was like 50/50" that the man was engaging in a narcotics deal. After he circled the block and again saw the man walk away, Peltz made a stop "for the investigation of narcotics." Peltz wrote in his police report that he stopped the man for loitering. He did a quick pat search of the man, during which he felt what he knew to be a crack pipe. He removed the entire contents of the pocket, because it is "easier to grab everything that's in there, as opposed to just trying to fish out a piece of jagged glass," and, in addition to a crack pipe, discovered R.H.'s social security card. Because Peltz was the officer who took the report about R.H.'s stolen wallet two days earlier, he recognized the name on the card.

The man identified himself to Peltz as appellant Torrey Hugh Hudson, and Peltz ran the name through the state computer. The computer showed a felony warrant for fourth-degree assault, which Peltz confirmed to be active. Peltz arrested appellant, handcuffed him, placed him in the squad car, and performed a search incident to the arrest.

On September 4, 2007, R.H. received a call from a police officer who said that he was in possession of R.H.'s social security card. R.H. went to the police station, where an investigator gave him six photographs to review. He identified the man in one of the photographs as the person who stole his wallet, and the investigator confirmed that the man he identified was the man who was found in possession of R.H.'s social security card.

Appellant was charged with one count of theft from person in violation of Minn. Stat. § 609.52, subds. 2(1), 3(3)(d)(i) (2006). Appellant moved to suppress the social security card that Peltz found during his search of appellant, and, following a hearing, the district court denied the motion.

At trial, R.H. identified appellant as the man who stole his wallet. Peltz testified that he had taken the police report from R.H. and that he stopped and searched appellant and, during the search, he recovered R.H.'s social security card. The investigator who prepared the photo lineup testified about the procedure used to prepare the lineup and about R.H.'s identification of appellant.

Appellant asked the district court to give a cautionary instruction to the jury regarding the reliability of eyewitness identifications, which the court refused to give. The jury found appellant guilty, and the district court imposed an executed prison sentence. This appeal challenging the conviction followed.

D E C I S I O N

I.

Appellant argues that the district court erred by refusing to suppress the social security card because the card was discovered as a result of an unconstitutional stop and search. The United States and Minnesota Constitutions prohibit "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. An officer may conduct a brief investigative stop if the officer has a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981). The officer must be able to point to

"specific and articulable facts which, taken together with rational inferences from those facts," reasonably warrant the stop. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968). The officer may draw reasonable inferences based on experience but may not rely on "an inchoate and unparticularized suspicion or 'hunch.'" *Id.* at 27, 88 S. Ct. at 1883. 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).

Appellant argues that Peltz did not have sufficient information to justify stopping him because Peltz simply saw him leaning in the window of a parked car interacting with the car's occupants and did not see appellant give or receive an object. But Peltz did not stop appellant based only on this initial observation. When Peltz first saw appellant leaning into the van window, he believed, based on his experience, that there was a 50/50 chance that appellant was engaging in a narcotics deal. *See State v. Britton*, 604 N.W.2d 84, 89 (holding that courts are "deferential to police officer training and experience and recognize that a trained officer can properly act on suspicion that would elude an untrained eye"). Upon seeing the squad car, appellant engaged in suspicious and evasive conduct. Peltz testified that he believed it is "not normal behavior for people to just break off their contact when they see a squad." He also testified that, after driving around the block, he saw appellant return to his original location. Appellant again walked away from the intersection upon seeing the squad car, but this time he walked west, instead of

east. Based on these observations, Peltz determined that appellant wanted to avoid the squad car.

Evasive conduct is a circumstance that can establish reasonable suspicion. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (upholding a stop based on "evasive conduct after eye contact with the police" after the defendant left a building with a known history of drug activity); *State v. Johnson*, 444 N.W.2d 824, 827 (Minn. 1989). (upholding a stop where "the [officer] reasonably inferred that the defendant was deliberately trying to evade him"). When viewed together, the specific facts that Peltz articulated established a particularized and objective basis for suspecting that appellant was engaged in criminal activity and provided a reasonable basis for Peltz to conduct a limited investigatory stop.

Appellant argues that the pat-down search that produced the social security card was not reasonable because Peltz did not identify specific facts that justified a concern for his safety or the safety of others. But we need not address this issue because we conclude that regardless of the validity of the pat-down search, once Peltz stopped appellant, he would have inevitably discovered the social security card even if there had been no pat-down search. Evidence is admissible when the state can show that "the fruits of a challenged search ultimately or inevitably would have been discovered by lawful means." *State v. Licari*, 659 N.W.2d 243, 254 (Minn. 2003) (quotation omitted). The inevitable-discovery doctrine "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *Nix v. Williams*, 467 U.S. 431, 444 n.5, 104 S. Ct. 2501, 2509 n.5 (1984).

Citing Peltz's testimony that he would ticket and release a person that he stopped for loitering if he could identify the person, appellant argues that the inevitable discovery doctrine does not apply because once appellant told Peltz his name, Peltz had no reason to run the name through the state computer. As additional support for this argument, appellant cites Minn. R. Crim. P. 6.01, subd. 1(1)(a), which requires an officer to issue a citation for a misdemeanor, unless there is a safety need to arrest or the officer does not believe that the person will respond to a citation.

Appellant is correct that Peltz testified that he would give somebody a ticket for loitering "[i]f you can identify them." But although appellant gave Peltz his name, Peltz was not required to take appellant at his word. In a typical investigatory stop, an officer "may ask the detainee a moderate number of questions to determine his identity and try to obtain information confirming or dispelling the officer's suspicions." *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S. Ct. 3138, 3150 (1984). Also,

> there are several investigative techniques which may be utilized effectively in the course of a *Terry*-type stop. The most common is interrogation, which may include both a request for identification and inquiry concerning the suspicious conduct of the person detained. Sometimes the officer will communicate with others, either police or private citizens, in an effort to verify the explanation tendered or to confirm the identification or determine whether a person of that identity is otherwise wanted.

Michigan v. Summers, 452 U.S. 692, 700 n.12, 101 S. Ct. 2587, 2593 n.12 (quotation omitted). Peltz was permitted to identify appellant even if he had not found the crack pipe, and he would have run appellant's name through the state computer to verify the name that appellant provided. That would have revealed the active warrant.

Once Peltz learned about the active warrant, he was required to arrest appellant. *See State v. Robb*, 605 N.W.2d 96, 101 n.2 (2006) (holding that once officers had an arrest warrant for the defendant, they had "no discretion regarding whether to arrest him"). And when Peltz arrested appellant, he was authorized to perform a search incident to the arrest, which would have produced the social security card. *See State v. Walker*, 584 N.W.2d 763, 766 (Minn. 1998) (holding that, if the police had probable cause to arrest the defendant, a search of his person resulting in the discovery of narcotics would have been lawful). Therefore, because Peltz would inevitably have discovered the social security card during the search incident to arrest, the district court did not err by denying the motion to suppress.

II.

At the end of the trial, defense counsel asked the district court to include CRIMJIG 3.19 in the final jury instructions. That instruction states:

> Testimony has been introduced tending to identify the defendant as the person observed at the time of the alleged offense. You should carefully evaluate this testimony. In doing so, you should consider such factors as the opportunity of the witness to see the person at the time of the alleged offense, the length of time the person was in the witness's view, the circumstances of that view, including light conditions and the distance involved, the stress the witness was under at the time, and the lapse of time between the alleged offense and the identification. (If the witness has seen and identified the person before trial and after the alleged offense, you should also consider the circumstances of that earlier identification, and you should consider whether in this trial the witness's memory is affected by that earlier identification.)

10 *Minnesota Practice*, CRIMJIG 3.19 (2006).

The district court refused to give the instruction and gave the following explanation for its decision:

> I'm not going to give that instruction in large part because I granted the defense motion to exclude the lineup photos from evidence. I did so on the grounds that the lineup, that the testimony regarding identification was clear and unambiguous and the lineup photos would really be cumulative evidence and that there was some prejudicial aspect in the lineup photos because they showed [appellant] in a significantly different visual depiction than he has now and in a manner in which the jury might be unduly prejudiced against him. So I am balancing those items off. I did not allow the photos in. It seems to me that if I granted the defense motion now, I would have to allow the State to reopen the case and seek to put in the photos.

Appellant argues that the district court erred by refusing to give the requested instruction. "The refusal to give a requested jury instruction lies within the discretion of the district court and no error results if no abuse of discretion is shown." *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). The supreme court has stated that "where requested by defendant's counsel, we think the court should instruct on the factors the jury should consider in evaluating an identification and caution against automatic acceptance of such evidence." *State v. Burch*, 284 Minn. 300, 315, 170 N.W.2d 543, 553 (1969).[1] But the supreme court has also explained that "[t]he care with which a jury should be instructed with reference to this type of testimony must depend on the particular circumstances in each case." *State v. Bishop*, 289 Minn. 188, 195, 183 N.W.2d 536, 540-41 (1971).

[1] In *Burch*, the supreme court identified the factors that are now listed in CRIMJIG 3.19 as the factors that a jury should consider when evaluating an eyewitness identification. 284 Minn. at 316, 170 N.W.2d at 553-54.

In the present case, defense counsel requested that the district court include CRIMJIG 3.19 in its final instructions after the district court granted a defense motion to exclude the lineup photos from the evidence. The requested instruction, in part, would have instructed the jury that "[i]f the witness has seen and identified the person before trial and after the alleged offense, you should also consider the circumstances of that earlier identification, and you should consider whether in this trial the witness's memory is affected by that earlier identification." CRIMJIG 3.19. Because R.H. saw and identified appellant during the photo lineup before trial and after the alleged offense, the jury would have needed to consider the circumstances of the photo lineup in order to follow the instruction. But the jury could not fully consider the circumstances of the photo lineup and compare appellant's photo to the other photos in the lineup because the district court had excluded the lineup photos from the evidence. Furthermore, the defense was given full opportunity to call into question the reliability of the eyewitness testimony, including questions regarding the length of time the robber was in R.H.'s view, why R.H. hesitated before identifying appellant, and potential bias in the preparation of the photo lineup. Under these circumstances, the district court did not abuse its discretion when it refused to include CRIMJIG 3.19 in its final instructions to the jury.

Affirmed.