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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0976

State of Minnesota,
Respondent,

vs.

Philip Charles Borer-Nelson,
Appellant.

Filed July 14, 2009
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-07-031509

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Marie L. Wolf, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Johnson, 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 a conviction of ineligible person in possession of a firearm, appellant argues that the district court erred by (1) denying his motion to suppress evidence obtained during an inventory search that police conducted when they impounded the vehicle that appellant was driving and (2) refusing to dismiss the possession charge when the state could not produce the video recording of events that occurred when police stopped the vehicle. We affirm.

FACTS

On May 15, 2007, at approximately 2:00 a.m., Minneapolis Police Officer James Archer was on patrol in a marked squad car in downtown Minneapolis. As Archer was making a right turn at a green light, an approaching late-model Mercury Mountaineer made a left turn in front of him, which forced him to stop. The Mountaineer then went through a red light. At the next stoplight, the vehicle stopped in a left-turn-only lane but then went straight when the light changed. After observing these traffic violations, Archer stopped the vehicle.

Archer ran the license-plate number to check the vehicle's registration and determine whether it was stolen. The vehicle was registered to D.C. and did not show up as having been reported stolen. Appellant Philip Borer-Nelson was in the driver's seat. Archer asked him for identification and proof of insurance. Appellant showed Archer his driver's license and said that he did not have proof of insurance. Archer asked appellant who owned the vehicle, and appellant said that it belonged to a friend. Archer asked for

the friend's name, and appellant said James,[1] but he did not know James's last name. Archer asked where James lived, and appellant said "north," but he could not be more specific or provide an address. The two passengers in the vehicle, who were in a position to hear Archer ask who owned the vehicle, remained silent and looked straight ahead.

Archer asked appellant to step out of the vehicle. He suspected that the vehicle may have been stolen recently and not yet reported by the owner as stolen. Archer placed appellant in the back seat of his squad car, and when two backup officers arrived, they removed the two passengers from the vehicle and placed them in the back seat of a squad car. Neither of the passengers was identified as D.C., and neither said that he knew who owned the Mountaineer.

Because there was no proof of insurance and the occupants did not know the name of the vehicle's owner, Archer thought at that point that he would tow the vehicle and cite appellant for no proof of insurance. He performed an inventory search of the vehicle, which he testified is required by police-department policy whenever a vehicle is towed. During the search, Archer found a loaded .40-caliber Browning semi-automatic pistol under the driver's seat. He asked appellant if he had a permit to carry a handgun, and appellant did not respond. The other officers found two handguns, one under the front passenger seat and one in the right rear of the vehicle. Archer handcuffed appellant and placed him under arrest.

[1] The district court found that appellant said that his friend's name was John, but Archer testified that appellant said that his friend's name was James.

Appellant and the two passengers were each charged with possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(b) (2006), and they were scheduled for a joint omnibus hearing, which was held on September 7, 2007. Appellant moved to suppress the evidence obtained during the inventory search on the basis that there was no probable cause to arrest him and impound the vehicle. One of the passengers made a demand for disclosure of any videotape of the stop. At the hearing, appellant's attorney objected to going forward with testimony before the videotape was produced, but because the two other defendants did not object, he agreed to go forward with the hearing.

After the hearing, the state provided appellant and the passengers with a videotape that was not the correct tape. The state later informed the three defendants that the videotape of the stop was destroyed after 90 days, in accordance with a police-department rule.

The district court denied appellant's motion to suppress. The court found that Archer's squad car was equipped with a video camera that operates when the car's emergency lights are turned on, but for reasons that the state could not explain, no videotape of the stop existed. The court concluded that appellant failed to demonstrate any intentional misconduct or prejudice in connection with the state's failure to produce the videotape.

Appellant moved to dismiss the charge against him based on the destruction of evidence, arguing that the videotape would be dispositive as to whether appellant was handcuffed before he was initially placed in the squad car. Appellant testified that

Archer handcuffed him and frisked him immediately after he asked him to step out of the vehicle. The district court did not change its finding that appellant was not handcuffed when he was initially placed in the squad car. Appellant then agreed to a stipulated-facts trial. The district court found appellant guilty and, based on appellant's age and the less-serious nature of his prior offense, sentenced him to an executed 36-month sentence, which is a downward durational departure from the presumptive sentence. This appeal followed.

D E C I S I O N

I.

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

The Minnesota Constitution prohibits "unreasonable searches and seizures." Minn. Const. art. I, § 10. In interpreting Article I, Section 10, of the Minnesota Constitution, the Minnesota Supreme Court has explicitly adopted the principles and framework of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), for evaluating the reasonableness of seizures during traffic stops when a minor law has been violated. *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004).

> A *Terry* analysis involves a dual inquiry. First, we ask whether the stop was justified at its inception. Second, we ask whether the actions of the police during the stop were reasonably related to and justified by the circumstances that gave rise to the stop in the first place.

Id. at 364 (citations omitted).

"An intrusion not closely related to the initial justification for the search or seizure is invalid under article I, section 10 unless there is independent probable cause or reasonableness to justify that particular intrusion." *Id.*

> The basis for intrusion must be reasonable so as to comply with article I, section 10's general proscription against unreasonable searches and seizures. To be reasonable, the basis must satisfy an objective test: "would the facts available to the officer at the moment of the seizure warrant a man of reasonable caution in the belief that the action taken was appropriate."

Id. (quoting *Terry*, 392 U.S. at 21-22, 88 S. Ct. 1868) (other quotation and citation omitted). "The test for appropriateness, in turn, is based on a 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.'" *Id.* at 365 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S. Ct. 2574 (1975)). The state bears the burden to show that a seizure was sufficiently limited to satisfy these conditions. *Id.*

Appellant does not dispute that the traffic stop was justified at its inception. Appellant argues that when Archer put him in the locked squad car, Archer had only an unconfirmed and unfounded suspicion that the Mountaineer was stolen and, without at least some attempt to investigate further, this suspicion did not provide probable cause for an arrest. Therefore, appellant contends, his arrest was unreasonable and unlawful, and because the discovery of the firearm was a direct result of his unlawful arrest, the district court erred by denying his motion to suppress.

In making this argument, appellant simply asserts that he was under arrest when Archer put him in a squad car because he was not free to leave. But in *State v. Moffatt*, 450 N.W.2d 116, 119 (Minn. 1990), the supreme court explicitly declined to adopt a rule that when an officer puts a person in a squad car, the officer has converted what might have been deemed to be a detention into a de facto arrest. In *Moffatt*, police took three men from a vehicle that had been stopped near the scene of a reported burglary and placed them in separate squad cars while the officers investigated the men's suspected involvement in the burglary. 450 N.W.2d at 118. In reversing an order suppressing items found during a search of the men's car, the supreme court acknowledged that the men were not free to leave the squad cars but explained that the inability to leave, by itself, did not convert the detention into an arrest "because a person who is being detained temporarily is not free to leave during the period of detention, yet that does not convert the detention into an arrest." *Id.* at 120. The supreme court concluded that the record established that the officers were merely detaining the men while they conducted a limited investigation to determine whether the men had something to do with the burglary and that what the officers did was reasonable and prudent. *Id.* Under *Moffatt*, the mere fact that appellant was not free to leave the squad car does not mean that appellant was under arrest.

However, even though appellant was not under arrest when Archer placed him in the squad car, he was detained, and detaining appellant was not reasonably related to and justified by the traffic offenses that gave rise to the traffic stop. Consequently, the detention was invalid unless there was independent probable cause or reasonableness to

justify it. We conclude that there was. Before Archer placed appellant in the squad car, he had learned the name of the registered owner of the vehicle that appellant was driving and that appellant did not know the name of the registered owner. Archer had also learned that appellant did not know the full name or address of the friend who he claimed owned the vehicle and that appellant could not provide proof of insurance for the vehicle. Based on all of this information, Archer thought that he would tow the vehicle and cite appellant for no proof of insurance.

These facts made it reasonable for Archer to decide to tow the vehicle because they would warrant a man of reasonable caution in believing that the vehicle was not insured and, therefore, that appellant could not just be cited for no proof of insurance and allowed to drive away. These facts would also warrant a man of reasonable caution in believing that the vehicle was stolen and that further investigation was needed to determine whether it was stolen. Detaining appellant in the squad car to either issue him a citation or to further investigate why he did not know the name of the person whose vehicle he was driving appropriately balanced the government's need to seize appellant against appellant's right to personal security free from arbitrary interference by law officers because issuing a citation or conducting any investigation would take at least some time and placing appellant in the squad car protected the officer's safety and prevented appellant from fleeing while the officers completed their work, and the detention did not occur until after Archer had a reasonable belief that the vehicle was not insured and might have been stolen.

Appellant notes that Archer testified that he frequently issued a citation to a driver without proof of insurance, but he did not do so in this case, which suggests that Archer's conduct should have been limited to just issuing a citation. But when asked what were the circumstances under which he would cite someone for failure to provide proof of insurance and let them drive away, Archer answered, "If they are the owner of the vehicle or if they have a previous insurance card, they have something to prove that they own the vehicle or that they have had insurance in the past, something like that." These are not the circumstances in this case. Archer had no reason to believe that appellant or his passengers owned the vehicle or that the vehicle was insured. Consequently, it would not have been reasonable for Archer to simply cite appellant and allow him to drive away.

Appellant also suggests that because Archer acknowledged that he could have called the police dispatcher, who could have attempted to get the telephone number of the registered owner, Archer should have made this effort to contact the owner to determine whether there was insurance. But when he was asked why he would not have called the precinct and have them track down the registered owner, Archer testified:

> I have never done that in 11 years as a police officer. We don't—we don't readily have the phone number information of owners of vehicles. We don't call people generally at 2:00 in the morning unless it's some kind of an emergency. We just don't have access to that kind of information.

Even if it might have been possible for Archer or someone at the precinct to track down the registered owner of the vehicle, nothing in the record indicates how that could have been done or suggests that it was unreasonable for Archer to choose not to try to contact the registered owner at 2:00 a.m. in order to avoid towing the vehicle.

Archer's incremental expansion of the stop to include impounding the vehicle and detaining appellant to issue a citation for no proof of insurance or to further investigate whether the vehicle was stolen was reasonable in light of the information that Archer obtained during the stop. Apparently, appellant was not cited and Archer did not investigate whether the vehicle was stolen because before either of those things could happen, the firearms were found during the inventory search of the vehicle before towing,[2] and appellant was arrested for a different offense. But this change in the nature of the traffic stop does not affect our analysis of events that occurred before the firearms were discovered. Therefore, we conclude that the discovery of the firearm was not the direct result of an unlawful seizure, and the district court did not err by denying appellant's motion to suppress.

II.

Appellant argues that the district court erred by refusing to dismiss the charge against him because the state failed to produce the squad-car videotape. The district court concluded that appellant "failed to establish any intentional misconduct or prejudice in connection with the State's failure to produce Officer Archer's squad video of the stop, assuming such video ever existed."

"[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 337 (1988). Citing

[2] Other than suggesting that Archer should have attempted to contact the registered owner before impounding the vehicle, which might have avoided the impoundment, appellant does not claim that the inventory search was improper.

Youngblood, the Minnesota Supreme Court refused to find reversible error based on the destruction of evidence, holding that although the destruction of evidence was intentional there was "no suggestion that the State destroyed or released items to avoid discovery of evidence beneficial to the defense." *State v. Bailey*, 677 N.W.2d 380, 393 (Minn. 2004) (quotation omitted); *see also State v. Koehler*, 312 N.W.2d 108, 109 (Minn. 1981) (refusing to grant judgment of acquittal when there was no suggestion that state intentionally lost potentially exculpatory evidence to avoid discovery of evidence beneficial to the defense).

There is no evidence that the police department destroyed the videotape in order to prevent the defense from discovering beneficial evidence. The record indicates that the Minneapolis police department's normal protocol is to destroy squad-car videotapes after 90 days. When appellant specifically requested the videotape during the omnibus hearing, the 90-day period had already run. Appellant had made a demand for disclosure on July 5, before the 90-day period ended, but the demand did not expressly request the videotape, and appellant does not identify any part of the demand that could reasonably be interpreted as requesting the videotape. One of the passengers who were also charged requested the videotape before the omnibus hearing, but the record does not show whether the request was made within the 90-day period. Because appellant presented no evidence that the state destroyed the tape to avoid discovery of evidence beneficial to the defense, he has not demonstrated bad faith on the part of the police.

Affirmed.