STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1255

State of Minnesota,
Respondent,

vs.

Danon Jason Russell,
Appellant.

Filed July 21, 2009
Reversed
Halbrooks, Judge

Ramsey County District Court
File No. 62-K6-07-003492

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Toussaint, Chief 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

HALBROOKS, Judge

Appellant Danon Russell challenges the district court's refusal to suppress the evidence against him, arguing that (1) the police unlawfully seized him and (2) a witness's statement was insufficient to establish probable cause to support the search warrant that permitted the police to obtain a sample of his DNA. Because we conclude that appellant was not lawfully seized, we reverse.

FACTS

Officers Robert Buth and Trygve Sand of the St. Paul Police Department routinely patrol the city's East District. When not responding to a call, Officers Buth and Sand regularly drive by a list of addresses that they have identified as "problem properties" or "high-crime areas" that have yielded "numerous arrests in the past." The residence at 853 York Avenue East (the York house) is one of these addresses. The resident there, M.P., was known to Officer Buth as a person involved in the scrap-metal trade and a sometime copper thief. Officer Buth had been to the York house at least 20 times during the preceding one-and-a-half years that M.P. had lived there. The visits had resulted in the recovery of approximately five stolen vehicles and approximately ten arrests for outstanding warrants, auto theft, and drug-related crimes.

On August 4, 2006, at about 3:30 p.m., Officers Buth and Sand, who were uniformed and in a marked squad car, drove by the York house. They approached the house from the alley and observed M.P. with two white males and one black male. The men with M.P. were unknown to the officers. About 20 seconds after the officers and the

men were visible to each other, the three unidentified men walked quickly into the York house. Officer Buth testified that he "wouldn't say [the men] ran." Officer Buth did not observe the men alert each other to the police arrival, attempt to conceal anything from the police officers, or conduct any hand-to-hand transactions.

The officers called M.P. over to their squad car and inquired as to who the other three men were. M.P. identified one of the white males as "Morrison" and the black male as "D." M.P. was unable to give a name for the other white male. While the officers were talking to M.P., the unidentified white male came out of the house by a side door and began walking toward the front of the house. The officers drove around the block to the front of the York house and saw that the male had taken a small canvas bag from a vehicle parked in front and was walking back toward the house. The officers stopped the man, searched the bag, and found what appeared to be "a meth kit." The officers arrested the man, who was identified as Benjamin Danielski.

Officer Buth then approached the house to identify the other two men. By the front gate, Officer Buth encountered the black male whom M.P. had identified only as "D." Officer Buth testified that D knew the officers were there, because he had likely been watching the officers arrest Danielski and was standing outside the house. The man did not try to flee or evade the officer. Officer Buth grabbed D by the arm, which the officer testified was his normal practice "only to avoid a foot chase." Other than D's presence at the York house, Officer Buth said he had no specific information tying D to Danielski or to drug activity. Officer Buth asked D what his name, age, and date of birth were. D said his name was "Treyvon," that he was 22, and that he was born in July 1982.

D's response made Officer Buth suspicious because he thought the nickname "D" would correspond to a first name that started with that letter and because the given birth date would make him 24, not 22. The officer handcuffed D and escorted him to the squad car. At that point, D admitted that his real identity was Danon Jason Russell and that there were outstanding warrants for his arrest.

The officers also sought to determine who owned the vehicle from which Danielski had presumably retrieved the meth kit. Danielski said that he had recently purchased the vehicle but did not have documentation, so Officer Buth decided to have the vehicle towed. The officers first performed an inventory search and found a handgun in a duffel bag in the trunk.

The next day, Danielski gave a recorded statement in which he stated he had seen the handgun in appellant's possession before. Based on Danielski's statement, as well as the initial encounter at the York house, the police applied for and received a search warrant to collect a sample of appellant's DNA for comparison to the DNA obtained from the handgun. Appellant's DNA was determined to be a match to the DNA recovered from the handgun.

Appellant was charged with possession of a firearm by an ineligible person, in violation of Minn. Stat. § 624.713, subd. 1(b) (2006). He moved to suppress the evidence against him on the grounds that (1) he was unlawfully seized and (2) the search warrant used to obtain his DNA was not supported by probable cause. The district court denied the motion, and a jury convicted appellant. This appeal follows.

D E C I S I O N

A. The seizure was unlawful.

On appeal from a reasonable-suspicion determination supporting a seizure, we review the district court's findings of fact for clear error, but review its ultimate determination de novo. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). And when reviewing an order on a motion to suppress evidence, we "may independently review the facts and determine, as a matter of law, whether the district court erred." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

Both the United States and Minnesota constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The state constitution affords Minnesotans greater protection in this area than the federal constitution. *State v. Askerooth*, 681 N.W.2d 353, 361–63 (Minn. 2004) (discussing cases in which the supreme court determined Minn. Const. art. I, § 10 afforded greater protection). Under the Minnesota Constitution, police officers "must be able to articulate reasonable suspicion justifying [a] seizure, [or] else any evidence that is the fruit of the seizure is suppressible." *In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993). Reasonable suspicion is "not the product of mere whim, caprice or idle curiosity, but [is] based upon specific and articulable facts." *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996) (quotation omitted).

A person's mere presence in a high-crime area or mere association with a known criminal is insufficient to establish reasonable suspicion. *State v. Varnado*, 582 N.W.2d 886, 890 (Minn. 1998); *see also E.D.J.*, 502 N.W.2d at 780, 783 (rejecting reasonable

suspicion based on presence near a location known for criminal activity). But a person's evasive conduct around police, especially when coupled with his presence in a high-crime area, can create reasonable suspicion. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992). In *Dickerson*, the suspect left a known crack house walking in one direction but abruptly changed direction after making eye contact with police officers who were in a nearby squad car. *Id.* at 842.

Here, the district court identified the York house as a high-crime area and cited two facts as evidence of appellant's evasive conduct: that he "was observed immediately going inside" the York house when the officers drove up and that he emerged once Danielski, carrying the meth kit, had been arrested.

Appellant challenges the district court's characterization of his behavior as evasive conduct.[1] Although appellant did go inside the house almost immediately upon the police officers' arrival, there is no evidence that anyone in the group signaled the others that the police were near. Nor did appellant run inside; he merely walked quickly. And appellant did not attempt to conceal anything from the officers as he went inside. The officers saw Danielski leave the building while they were talking to M.P., but they did not see appellant leave. And when Danielski was being arrested in front of the house, appellant did not try to leave from the back. Instead, he stood outside and watched the arrest take place. When Officer Buth approached appellant, appellant did not try to flee. Neither in comparison to *Dickerson*, nor in light of the common understanding of the meaning of

[1] Appellant also questions the determination that the York house is a high-crime area. But whether a location is in a high-crime area is not dispositive; the inquiry focuses on whether the suspect engages in evasive conduct. *Dickerson*, 481 N.W.2d at 843.

the word "evasive,"[2] is this evasive conduct that supports a determination of reasonable suspicion.

Officer Buth offered no other basis for his seizure of appellant. The district court therefore erred as a matter of law in determining that the seizure was lawful.

B. Appellant's statement of identification should have been suppressed.

Evidence obtained through an illegal seizure is inadmissible as "fruit of the poisonous tree," unless the state proves "that the evidence was obtained by means sufficiently distinguishable to be purged of the taint." *State v. Bergerson*, 659 N.W.2d 791, 797 (Minn. App. 2003) (quotation omitted). In determining whether evidence is fruit of the poisonous tree, we examine and balance (1) the purpose and flagrancy of the police misconduct, (2) the presence or absence of intervening circumstances, (3) whether the evidence would likely have been obtained in the absence of the illegality, and (4) the temporal proximity of the illegality and the alleged "fruit" evidence. *Id.*

In regard to the first factor, Officer Buth's misconduct was designed precisely to obtain appellant's identity, and it was with flagrant disregard for whether there was a lawful basis to detain appellant. This is the sort of misconduct that the exclusionary rule seeks to prevent. *See State v. Hardy*, 577 N.W.2d 212, 217 (Minn. 1998) (stating that "the primary purpose of the exclusionary rule is to deter police misconduct" by eliminating temptation for police officers to proceed without lawful basis for search and seizure). This factor weighs in favor of suppression.

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[2] The root verb "evade" means to "escape or avoid by cleverness or deceit." *The American Heritage Dictionary of the English Language* 634 (3d ed. 1992).

The second factor also weighs in favor of suppression, because there were no intervening circumstances. As to the third factor, the state has not shown that it would have obtained appellant's true name independent of the police misconduct. It is quite likely, based on the record, that Officer Buth may never have learned appellant's name without seizing him, because all the officer had was appellant's nickname. This factor weighs in favor of suppression. Finally, the fourth factor also weighs in favor of suppression: the unlawful seizure almost immediately preceded appellant's statement of his true name. Therefore, the evidence of appellant's identity is fruit of the poisonous tree.

The state argues that even if appellant's identity is fruit of the poisonous tree, it is not suppressible, citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S. Ct. 3479 (1984), for this proposition. Specifically, the state seizes on one sentence from the Supreme Court's opinion: "The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." 468 U.S. at 1039, 104 S. Ct. at 3483–84.

But the state mischaracterizes what appellant sought to suppress. His motion to the district court sought to suppress his statement of identification made after the arrest, not his identity itself. This is an important distinction, as *Lopez-Mendoza* bears out.

Lopez-Mendoza involved two Mexican citizens who were ordered deported: Adan Lopez-Mendoza (Lopez) and Elias Sandoval-Sanchez (Sandoval). *Id.* at 1034, 104 S. Ct. at 3481. Lopez and Sandoval made substantially different objections at their deportation

hearings. Lopez "objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest; he entered no objection to the evidence offered against him." *Id.* at 1040, 104 S. Ct. at 3484. But Sandoval "objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding." *Id.* The "never itself suppressible" sentence appears in a section of the opinion discussing only Lopez, not Sandoval. *Id.* at 1039, 104 S. Ct. at 3483–84. Indeed, the Court analyzed Sandoval's appeal as though the exclusionary rule *could* apply to suppress his statements, which included statements of identification. *Id.* at 1040–50, 104 S. Ct. at 3483–89. The Court ultimately concluded that the exclusionary rule should not be extended from the criminal context to civil deportation hearings. *Id.* at 1051, 104 S. Ct. at 3489.

Our reading of *Lopez-Mendoza* leads us to conclude that the sentence the state relies on simply restates a long-standing legal principle: illegal police activity does not affect the court's jurisdiction or require dismissal of the prosecution, but illegal police activity may affect the admissibility of evidence. This interpretation is consistent with the cases that the Court cited immediately following the quoted sentence. *See Gerstein v. Pugh*, 420 U.S. 103, 119, 95 S. Ct. 854, 865 (1975) (stating that "illegal arrest or detention does not void a subsequent conviction"); *Frisbie v. Collins*, 342 U.S. 519, 522, 72 S. Ct. 509, 511 (1952) ("This Court has never departed from the rule . . . that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'"); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 158, 44 S. Ct. 54, 57 (1923)

("Irregularities on the part of the Government official prior to, or in connection with, the arrest would not necessarily invalidate later proceedings in all respects conformable to law."). Further, we observe that several United States Courts of Appeals have adopted the same interpretation. *See, e.g.*, *United States v. Farias-Gonzalez*, 556 F.3d 1181, 1185–86 (11th Cir. 2009); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1109–12 (10th Cir. 2006); *United States v. Rodriguez-Arreola*, 270 F.3d 611, 617–19 (8th Cir. 2001). *But see, e.g.*, *United States v. Bowley*, 435 F.3d 426, 430 (3d Cir. 2006) (noting the unlikelihood that the Court would lightly use sweeping language such as "never itself suppressible"), *as amended* (3d Cir. Feb. 17, 2006); *United States v. Del Toro Gudino*, 376 F.3d 997, 1000–01 (9th Cir. 2004) (same).

Therefore, although identity itself is not suppressible, evidence of identity is suppressible. Here, appellant's statement made after his unlawful seizure is evidence of his identity. Because this statement is fruit of the poisonous tree, the district court erred by not suppressing the statement.

Because we conclude that appellant's statement of identification should have been suppressed, we do not reach the issue of whether the search warrant for appellant's DNA was supported by probable cause. A warrant cannot issue without identifying its target. Minn. Stat. § 626.08 (2006).

Reversed.