STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2080

State of Minnesota,
Respondent,

vs.

Abdirahman Hassan Ali,
Appellant.

Filed August 18, 2009
Affirmed
Larkin, Judge

Olmsted County District Court
File No. 55-K6-05-003644

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

Mark A. Ostrem, Olmsted County Attorney, Katherine M. Wallace, Assistant County Attorney, 151 Fourth Street Southeast, Rochester, MN 55904 (for respondent)

Jordan S. Kushner, Law Office of Jordan S. Kushner, 431 South Seventh Street, Suite 2446, Minneapolis, MN 55415 (for appellant)

Considered and decided by Larkin, Presiding Judge; Schellhas, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

In this post-remand appeal from his conviction of fifth-degree possession of a controlled substance, appellant contends that the district court erred by (1) denying appellant's request to reopen the omnibus hearing on remand, (2) concluding that appellant's pat frisk was supported by reasonable, articulable suspicion, and (3) admitting evidence without sufficient chain-of-custody foundation. Because the district court complied with our remand instructions, appellant's pat frisk was legal, and the district court did not abuse its discretion in its evidentiary ruling, we affirm.

FACTS

Appellant Abdirahman Ali was charged with controlled substance crime in the fifth degree after police found khat stems containing cathinone (khat) on his person during a pat frisk. Ali moved to suppress the khat, claiming that it was the product of an unlawful search. After a contested omnibus hearing, the district court issued an order denying Ali's entire omnibus motion. While the order addressed Ali's seizure and probable cause for the charge, the order did not specifically address the district court's decision regarding the constitutionality of the search of Ali. The case proceeded to trial, and Ali objected to the admission of the khat into evidence, arguing that the state failed to establish sufficient chain-of-custody foundation. The district court overruled the objection, and the jury ultimately convicted Ali.

Ali appealed the district court's order denying his motion to suppress and the district court's evidentiary ruling regarding foundation. *See State v. Ali*, No. A07-0294,

2008 WL 2572856 (Minn. App. July 1, 2008). We remanded the case to the district court without deciding the issues presented because neither the omnibus-hearing record nor the district court's written order contained findings of fact or a specific determination on the constitutionality of the search. *Id.* at *3. On remand, Ali requested that the omnibus hearing be reopened for additional testimony. The district court denied Ali's request, issued an amended omnibus order, and made the following findings of fact.

On August 27, 2004, Rochester Police Officer Fishbaugher decided to stop a motor vehicle because he recognized the driver as someone who had an active warrant for his arrest. While stopping the vehicle, Officer Fishbaugher observed Ali, the passenger in the vehicle, reaching his left hand toward his right side and then toward his waist. Officer Fishbaugher stopped the vehicle and ordered the driver to exit the vehicle. As Officer Fishbaugher placed the driver under arrest, Ali got out of the vehicle and interrupted the arrest by talking to Officer Fishbaugher and the driver. For safety reasons, Officer Fishbaugher asked Ali to step back several times and to stay away from the arrest area.

Officer Fishbaugher observed Ali walk back to the vehicle, reach inside, and then stand with his hands in his pockets. Ali was wearing large, baggy pants with large pockets. Officer Fishbaugher was not able to see what Ali did when he reached into the vehicle. Officer Fishbaugher told Ali to remove his hands from his pockets, and Ali did not comply. Because Officer Fishbaugher was concerned for his safety, he pat frisked Ali. During the pat frisk, Officer Fishbaugher felt a stem consistent with khat in Ali's

right pants pocket. Because Ali's pants were baggy, the officer could see khat stems inside the pocket, in plain view.

The district court concluded that based on all of the facts available to Officer Fishbaugher, he had reasonable and articulable suspicion that Ali may be armed and dangerous and was justified in pat frisking Ali. The district court specifically found that the search was lawful. This appeal follows.

D E C I S I O N

I. The district court complied with our instructions on remand.

Ali argues that the district court erred by denying his request to reopen the omnibus hearing for further testimony on remand. On remand, a district court must strictly execute the remanding court's instructions without altering, amending, or modifying the mandate. *Halverson v. Vill. of Deerwood*, 322 N.W.2d 761, 766 (Minn. 1982). If, however, a district court does not have "specific directions as to how it should proceed" on remand, it has discretion to "proceed in any manner not inconsistent with the remand order." *Duffey v. Duffey*, 432 N.W.2d 473, 476 (Minn. App. 1988). "Appellate courts review a district court's compliance with remand instructions under the deferential abuse of discretion standard." *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005).

Because the absence of findings and a specific determination regarding the constitutionality of Ali's search precluded appellate review, we remanded for the district court to make findings of fact. *Ali*, 2008 WL 2572856, at *3. We did not remand for an evidentiary hearing. When Minnesota's appellate courts intend the district court to

reopen the record on remand, we say so. *See, e.g.*, *State v. Wright*, 726 N.W.2d 464, 482 (Minn. 2007) (stating, "On remand, the state should be given an opportunity to establish, by a preponderance of the evidence, that [defendant] forfeited his confrontation claim"); *State v. Licari*, 659 N.W.2d 243, 255 (Minn. 2003) (remanding for reopening of the record because "the district court did not reach the issue of the impact of the relocation clause on the landlord's actual authority to consent to a search or several factual issues crucial to inevitable discovery"); *State v. Perkins*, 582 N.W.2d 876, 877 (Minn. 1998) (remanding for further findings and a reopening of the record because "[t]he subject of police *entry* into the motel room was never specifically addressed by the defense attorneys or the prosecutor during the hearing"). The purpose of reopening the record on remand is generally to develop a record regarding a new issue. Here, the pat-frisk issue was the subject of an evidentiary hearing, and the record was adequately developed. There was no need to reopen the record for further testimony. The district court simply needed to articulate the findings of fact and conclusions of law that supported its denial of that portion of Ali's omnibus motion challenging the legality of his search.

Ali contends the district court's decision was "predetermined" because the amended order supports the district court's original decision to deny Ali's omnibus motion in its entirety. There is merit to Ali's contention, but we fail to see how predetermination constitutes error on these facts. The district court's original order denied Ali's omnibus motion in its entirety, which included a challenge to his search. We did not direct the district court to reconsider its original decision or to render a new decision. We simply directed the district court to make findings of fact in order to

facilitate appellate review. The district court complied with our instruction, and thus, there is no error.

Ali also argues that the district court's decision regarding the legality of his search needed to be made at the same time that the district court heard the evidence or the district court would lack an "open mind." Ali fails to recognize that the district court rendered its decision denying Ali's omnibus-hearing motion in its entirety near the time of the omnibus hearing. The district court simply failed to state its findings of fact and conclusions of law regarding the search contemporaneously. We reject Ali's argument that post-hearing fact finding based on a transcript is impermissible. Ali cites no legal authority in support of this argument. And postconviction and appellate courts frequently review transcripts and make decisions based on those transcripts years after hearings have occurred.

Ali next claims that the district court's failure to make explicit credibility findings demonstrates its inability to make a credibility determination based on a transcript. We disagree. There is no indication that the district court did not make its credibility determinations at the time of the hearing. And to the extent that the district court's findings of fact are consistent with Officer Fishbaugher's testimony, the findings reflect the district court's implicit determination that Officer Fishbaugher was credible. *See Modaff v. Comm'r of Pub. Safety*, 664 N.W.2d 400, 402, 403 (Minn. App. 2003) (concluding where the district court's memorandum only recited a description of the officer's testimony that this court "can discern that the district court found the officer's

testimony about the events leading up to [petitioner's] seizure to be credible and [petitioner's] version of those events not credible").

Finally, Ali argues that the district court's refusal to reopen the omnibus hearing violated his right to due process of law under the state and federal constitutions. But Ali provides no briefing on this issue. Issues not adequately briefed are waived. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). Moreover, we doubt that Ali could maintain a meritorious due-process argument even if the issue were fully briefed. Ali was afforded a contested hearing on his omnibus motion, which included the opportunity to call and cross-examine witnesses and to offer legal argument. And Ali fails to explain what new, favorable evidence he expected to offer or elicit at a reopened hearing.

We hold that the district court did not abuse its discretion by denying Ali's request to reopen the omnibus hearing on remand.

II. The district court did not err by concluding that Officer Fishbaugher articulated a lawful basis to pat frisk Ali.

Ali claims the district court erred by concluding that his pat frisk was supported by reasonable, articulable suspicion. "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). We review the district court's findings of fact under a clearly erroneous standard, but legal determinations are reviewed de novo. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006).

The Fourth Amendment to the United States Constitution and Article I of the Minnesota Constitution prohibit the unreasonable search and seizure of "persons, houses, papers, and effects." U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless searches are per se unreasonable, subject to limited exceptions. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992) (citing *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)). A police officer may conduct a limited pat frisk of a seized person for weapons on less than probable cause if he or she can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *State v. Gilchrist*, 299 N.W.2d 913, 916 (Minn. 1980) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968)).

Police officers can "stop and frisk a person when (1) they have a reasonable, articulable suspicion that a suspect might be engaged in criminal activity and (2) the officer reasonably believes the suspect might be armed and dangerous." *State v. Flowers*, 734 N.W.2d 239, 250 (Minn. 2007) (quoting *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd*, 508 U.S. 366, 113 S. Ct. 2130 (1993)). The officer need not be absolutely certain that the individual is armed; rather, the issue is whether a reasonably prudent officer in the circumstances would be justified in believing that his safety or that of others was in jeopardy. *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883; *see also Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 1923 (1972) ("The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence."). Courts consider the "specific reasonable inferences" an officer is entitled to draw from the facts in light of his or her experience

when determining whether an officer acted reasonably. *State v. Crook*, 485 N.W.2d 726, 729 (Minn. App. 1992), *review denied* (Minn. Aug. 4, 1992). The paramount justification for conducting a pat frisk is officer safety. *Terry*, 392 U.S. at 24-26, 88 S. Ct. at 1881-82.

Ali again argues that the district court erred by not making a specific credibility determination regarding Officer Fishbaugher's testimony. But we presume the district court credited the officer's testimony because the district court's findings are consistent with the testimony. *See Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004) ("Based on the findings, we must assume that the district court found [the petitioner to be] credible."). Although Ali contends that Officer Fishbaugher's credibility was impeached, we defer to the district court's implicit determination that Officer Fishbaugher's testimony was credible. *See State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003) ("Because the weight and believability of witness testimony is an issue for the district court, we defer to that court's credibility determinations."), *review denied* (Minn. July 15, 2003).

Officer Fishbaugher testified that (1) while stopping the vehicle, he observed Ali in the vehicle, reaching with his left hand toward his right side, and then toward his waist; (2) Ali interrupted Officer Fishbaugher's attempt to arrest the driver; (3) Ali had to be asked to step back several times; (4) Ali reached into the vehicle and Officer Fishbaugher could not see what Ali was doing; (5) after withdrawing from the vehicle Ali kept his hands in his pockets and refused to comply with Officer Fishbaugher's commands to

remove his hands from his pockets; and (6) Officer Fishbaugher suspected that Ali possessed a weapon and conducted the pat frisk to assuage his safety concerns.

Notwithstanding Officer Fishbaugher's testimony, Ali argues that there were no specific circumstances to support a reasonable belief that Ali was armed and dangerous. Ali cites to *State v. Eggersgluess*, 483 N.W.2d 94 (Minn. App. 1992), and *State v. Buchanan*, No. C0-00-1508, 2001 WL 477122 (Minn. App. May 8, 2001), in which this court concluded that reasonable, articulable suspicion was lacking. *Buchanan* is an unpublished case and is not binding precedent. Minn. Stat. § 480A.08, subd. 3(c) (2008). *Eggersgluess* is factually distinguishable because the pat frisk there was based solely on the supposition that "it is always possible that a weapon may be present." 483 N.W.2d at 97. In *Eggersgluess*, we concluded that there was no reasonable, articulable suspicion in part because there was no sudden or furtive movement toward a place where a weapon could be concealed. *Id.* Conversely, Ali's furtive movements before and after the vehicle stop provided Officer Fishbaugher with a reasonable basis to suspect that Ali was armed and dangerous.

Moreover, a suspect's unwillingness to follow an officer's instructions can support a determination that a pat frisk is necessary. *See State v. Richmond*, 602 N.W.2d 647, 651 (Minn. App. 1999) (considering inability or unwillingness to answer officer's questions during a stop as part of the determination that a pat search was based on reasonable suspicion), *review denied* (Minn. Jan. 18, 2000); *contra State v. Varnado*, 582 N.W.2d 886, 890 (Minn. 1998) (concluding that a weapons search was not justified where suspect fully cooperated with police). In the present case Ali was reluctant to

follow Officer Fishbaugher's instructions to back away from the area of the arrest and refused to follow Officer Fishbaugher's command to remove his hands from his pockets. Ali's unwillingness to follow Officer Fishbaugher's instructions provided a basis for the pat frisk.

An officer's observation of a suspect reaching into an area where a weapon could be concealed also supports a determination that a pat frisk is necessary. *See State v. Alesso*, 328 N.W.2d 685, 688 (Minn. 1982) (holding that an officer reasonably could reach into defendant's pocket where "defendant made a furtive movement of his hand toward the pocket, causing the officer to suspect that he might be reaching for a weapon"); *Richmond*, 602 N.W.2d at 651 (holding that an officer had reasonable suspicion to search in part because defendant made a "furtive movement" by reaching toward his car's passenger compartment); *contra Varnado*, 582 N.W.2d at 890 (concluding that a weapons search was not justified where the suspect did not make any furtive or evasive movements). In the present case, Officer Fishbaugher observed Ali reach into the vehicle and then into his pockets: both are places where weapons might be concealed. These actions provided a basis for the pat frisk.

An officer need not be absolutely certain that an individual is armed before conducting a pat frisk; the issue is whether a reasonably prudent person under the circumstances would be warranted in the belief that his or her safety or the safety of others was in danger. *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883. We hold that the facts in this case warranted Officers Fishbaugher's safety concerns and justified a limited pat frisk for officer safety. Because Officer Fishbaugher had a reasonable, articulable

suspicion that Ali may be armed and dangerous, the district court did not err by concluding that Ali's search was lawful.

III. The district court did not abuse its discretion by determining that there was sufficient chain-of-custody foundation.

Ali contends that the district court abused its discretion by admitting the khat seized during his pat frisk because the state failed to establish sufficient chain-of-custody foundation. Specifically, Ali argues there was no evidence regarding who possessed the khat between the time that Officer Fishbaugher brought the khat to the police station and when the khat was tested at the Minnesota Bureau of Criminal Apprehension (BCA) laboratory. Ali claims that sufficient foundation requires testimony, or at least identification, of the person who delivered the khat to the BCA and retrieved it after testing.

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted). Chain-of-custody issues are left to the sound discretion of the district court. *State v. Johnson*, 307 Minn. 501, 504, 239 N.W.2d 239, 242 (1976).

Minn. R. Evid. 901(a) states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

> When the item is not unique and thus not readily identifiable, such as when narcotics are involved, . . . [a]ll possibility of

> alteration, substitution, or change of condition need not be eliminated in laying a chain-of-custody foundation. In the absence of any indication of substitution, alteration, or other form of tampering, reasonable probative measures are sufficient. . . .
>
> If, upon consideration of the evidence as a whole, the court determines that the evidence is sufficient to support a finding by a reasonable juror that the matter in question is what its proponent claims, the evidence will be admitted.

State v. Hager, 325 N.W.2d 43, 44 (Minn. 1982) (quoting M. Graham, *Evidence and Trial Advocacy Workshop: Relevance and Exclusion of Relevant Evidence—Real Evidence*, 18 Crim. L. Bull. 241, 243-46, 247 (1982) (quotations omitted).

Officer Fishbaugher testified that he recovered the khat from Ali, heat sealed the khat in an evidence bag, initialed the seal, placed an evidence sticker on the bag, and labeled the sticker. He also testified that the khat and bag offered as an exhibit by the state were the ones he handled. A forensic scientist from the BCA testified that she received the khat in a sealed bag, cut the original seal, and placed the original seal in the bag. The forensic scientist also testified that the bag offered at trial bore the initials of the person at the BCA who checked the bag in and that the initials indicate the evidence arrived intact. The forensic scientist testified that she recognized the exhibit as the sample she analyzed.

In *State v. Bellikka*, this court stated: "[T]he fact that everyone who handled the evidence did not testify is not fatal to establishment of a chain of custody." 490 N.W.2d 660, 664 (Minn. App. 1992), *review denied* (Minn. Nov. 25, 1992). In *Bellikka* the defendant claimed that the chain of custody of physical evidence was not adequately

established because two individuals who handled the evidence failed to testify in court. *Id.* at 663-64. This court concluded that the district court did not abuse its discretion because (1) the evidence was sealed, labeled, and sent to the BCA; (2) the seals on the containers were intact when the BCA forensic received them; and (3) the defendant offered no evidence of tampering. *Id.* at 664. Under *Bellikka*, the lack of evidence regarding how the khat was transported from Officer Fishbaugher's possession to the BCA and from the BCA to court is not fatal, especially where there was no evidence or claim of tampering. We hold that the district court did not abuse its discretion by admitting the khat into evidence because the evidence was sufficient to support a finding that it was the khat that Officer Fishbaugher obtained from Ali during the pat frisk.

Affirmed.

Dated: _____

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The Honorable Michelle A. Larkin