STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0301

State of Minnesota,
Appellant,

vs.

Roy Manuel Ramirez,
Respondent.

Filed August 4, 2009
Reversed and remanded
Halbrooks, Judge

Nobles County District Court
File No. 53-CR-08-1742

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

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Bradford S. Delapena, Special Assistant Public Defender, Bradford Delapena, Ltd., P.O. Box 40418, St. Paul, MN 55104 (for respondent)

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 State of Minnesota challenges the district court's pretrial order suppressing evidence of a controlled substance seized during a traffic stop and dismissing the charge of second-degree possession of a controlled substance. Because we conclude that sufficient reasonable articulable suspicion existed to justify the officer's expansion of the scope of the stop, we reverse and remand.

FACTS

On November 21, 2008, Officer Brett Wiltrout of the Worthington Police Department, stopped a vehicle because the driver made a right turn from the left lane. As the officer approached the stopped vehicle, he saw no furtive movements but did observe respondent Roy Manuel Ramirez, who was in the back seat, light a cigarette. Officer Wiltrout testified at the omnibus hearing that, in his experience, people often light cigarettes during traffic stops as a way to mask odors, such as alcohol. He recognized Ramirez from past police contacts and knew that Ramirez was on probation. Officer Wiltrout also knew that one of the conditions of Ramirez's probation was that he abstain from the use of drugs and alcohol.

Nineteen-year-old L.W. was driving the car. When questioned by Officer Wiltrout, she said that she did not have her driver's license or any other form of identification with her. L.W. also said that she did not own the vehicle and had no proof of insurance. In addition to L.W. and Ramirez, another male was in the front passenger seat. While talking to L.W., Officer Wiltrout smelled an "odor of an alcoholic beverage

and a chemical odor coming from inside the vehicle." Based on his experience, Officer Wiltrout stated that he associates such a chemical odor with illegal drug activity.

Based on L.W.'s answers to his initial questions, Officer Wiltrout asked L.W. to accompany him to his squad car for further questioning. Once L.W. was in the squad car, Officer Wiltrout no longer smelled any alcohol or chemical odor. L.W. stated that the individual sitting in the front passenger seat was her brother, M.B., and the person in the back seat was his friend. When asked about alcohol consumption, L.W. said that she had had nothing to drink and that her brother did not drink because he is a recovering alcoholic. L.W. said that she was unaware if Ramirez had been drinking because they had just picked him up. Ramirez, whom L.W. did not know, was giving her directions to take him to a friend's house.

After speaking separately to L.W., the officer returned to the vehicle and spoke to Ramirez and M.B. The officer again smelled an odor of alcohol and chemicals coming from the interior of the vehicle but could not identify the source of the odor. Ramirez told Officer Wiltrout that they were going to J.V.'s house. The officer knew that J.V. had past convictions of drug use. Officer Wiltrout asked Ramirez if he had been drinking, and Ramirez said that he had not.

Officer Wiltrout returned to his squad car and asked L.W. if there were any guns, drugs, or large amounts of cash in the vehicle. She responded that she did not think so, but she did not know because it was not her vehicle. The officer then asked L.W. for consent to search the vehicle, and she consented.

In the course of the search, Officer Wiltrout found an empty, but still cold, beer can in the back seat and liquid that appeared to have been poured from the can onto the floor. Officer Wiltrout also found a clear plastic bag that contained what was later determined to be 6.4 grams of methamphetamine.

Ramirez was arrested and charged with second-degree possession of a controlled substance, in violation of Minn. Stat. § 152.022, subds. 2(1), 3(a) (2008). Ramirez moved to suppress the methamphetamine found during the search and for dismissal. Following a contested omnibus hearing, the district court granted the motion to suppress and dismissed the charge. This appeal follows.

D E C I S I O N

"When the state appeals a pretrial order, it must show clearly and unequivocally (1) that the ruling was erroneous and (2) that the order will have a critical impact on its ability to prosecute the case." *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005) (quotation omitted). Ramirez concedes that the district court's suppression of the methamphetamine seized during the search has a critical impact on the state's ability to prosecute. *See State v. Miller*, 659 N.W.2d 275, 278 (Minn. App. 2003) ("[I]t is clear that the likelihood of conviction of possession of drugs is significantly reduced without the drugs."), *review denied* (Minn. July 15, 2003). Accordingly, we review whether the state has shown clearly and unequivocally that the district court's ruling was erroneous.

I.

The state argues that Ramirez does not have standing to challenge the search because he had neither an ownership nor a possessory interest in the vehicle. We

disagree. The issue of standing "is not one of jurisdictional standing but whether a defendant had a reasonable expectation of privacy in the place searched." *State v. Ortega*, 749 N.W.2d 851, 853 (Minn. App. 2008), *review granted* (Minn. Aug. 19, 2008). Generally, "passengers in a vehicle who ha[ve] neither a possessory interest in the automobile searched nor an interest in the property seized, and who [have] failed to show legitimate expectation of privacy in the areas searched, [are] not entitled to challenge the search." *State v. Ritchie*, 379 N.W.2d 550, 552 (Minn. App. 1985) (citing *Rakas v. Illinois*, 439 U.S. 128, 134, 99 S. Ct. 421, 425 (1978)), *review denied* (Minn. Feb. 14, 1986). But passengers do have a Fourth Amendment interest in not being stopped. *Id.* at 552–53. In *Miller*, this court held that a passenger has a Fourth Amendment interest supporting a challenge to an officer's expansion of the scope of a traffic stop to allow a dog-sniff search of the vehicle. 659 N.W.2d at 282.

Here, Ramirez is not challenging the search of the vehicle except insofar as the expansion of the scope of the stop allowed the officer to obtain consent to search and conduct the search. Because Ramirez has an interest in not having his own detention prolonged during an expanded stop, Ramirez, like the passenger in *Miller*, can challenge the expansion of the stop that allowed the consent search.

The state cites *United States v. Green* to support its argument. 442 F.3d 677 (8th Cir. 2006). In *Green*, officers stopped a vehicle containing a driver and a passenger on suspicion that the driver and the passenger had committed a theft. *Id.* at 679. Following the stop, the driver gave the officer consent to search the vehicle. *Id.* at 679-80. The passenger challenged the initial stop and his own detention during the stop, but the Eighth

Circuit declined to address that issue because it concluded that the driver's "consent was sufficient to purge the taint of any alleged Fourth Amendment violation." *Id.* at 680–81. *Green* does not hold that the passenger had no grounds to challenge his continued detention, only that the discovery of the drugs resulted from the driver's "independent consent to search the vehicle." *Id.* at 680. *Green* is not inconsistent with *Miller*. And because the theory that L.W.'s consent purged any taint from an illegal detention of Ramirez was not presented to the district court and is unnecessary to our decision, we need not address it.

II.

The parties here do not dispute that Officer Wiltrout had a proper basis for an investigatory stop of the vehicle. The issue is whether the officer unlawfully expanded the scope of the stop. "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). Detention of a person during an automobile stop, even for a brief period, constitutes a seizure protected by the Fourth Amendment. *See State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002). "Expansion of the scope of the stop to include investigation of other suspected illegal activity is permissible under the Fourth Amendment only if the officer has reasonable, articulable suspicion of such other illegal activity." *Id.* The Minnesota Supreme Court has similarly construed Minn. Const. art. I, § 10, to limit the scope of a *Terry* stop to the investigation of the suspected offense that prompted the stop, the limited search for weapons, and the "investigation of only those

additional offenses for which the officer develops a reasonable, articulable suspicion within the time necessary to resolve the originally-suspected offense." *Id.* at 136.

"When an officer expands a traffic stop by requesting to search a vehicle, and when this request is not justified by the original purpose of the stop, the officer must have a reasonable articulable suspicion of other criminal activity going beyond the initial reason for the stop." *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005) (quotation omitted). An officer may make inferences and deductions that might elude an untrained person. *Appelgate v. Comm'r of Pub. Safety*, 402 N.W.2d 106, 108 (Minn. 1987). But the officer's suspicion must be based on objective facts and not a mere hunch. *State v. Cripps*, 533 N.W.2d 388, 391–92 (Minn. 1995).

In his report, Officer Wiltrout listed the following "combination of indicators" that prompted him to ask L.W. for consent to search the vehicle:

> - Driver was unaware of her destination
> - Driver didn't know the back seat passenger
> - Driver was driving a 3rd party vehicle
> - Chemical odor from the vehicle interior
> - Alcoholic beverage coming from the vehicle interior
> - Driver had unexplained laughter during our conversation
> - Front Passenger showed indicators of drug use
> - Driver was unsure if there was anything illegal in the vehicle
> - Back seat passenger was traveling to a known drug users residence
> - Back seat passenger was on probation for alcohol related violations
> - Vehicle had a "lived in" appearance on the inside with debris and garbage
> - Driver and front seat passenger drove from Slayton to Worthington to visit their mother at the Travel Lodge Hotel. The Travel Lodge Hotel is located on Highway 59. The driver would have [driven] right [past] the hotel as they entered Worthington.

Wiltrout testified to the same facts at the omnibus hearing. We conclude that these facts, taken together, provided a reasonable articulable suspicion justifying the continuation and expansion of the stop, including the prolonged detention of Ramirez, until consent to search the vehicle was obtained.

The state argues that the officer's detection of the odor of alcohol created a reasonable suspicion of other illegal activities occurring in the vehicle sufficient to allow expansion of the scope of the stop. We agree with the state's argument regarding the strength of this suspicion, while noting that the smell of alcohol was not the only factor relied on by the officer.

The state cites *Burbach*, in which the supreme court declined to articulate "a bright-line rule that the odor of alcohol always justifies a vehicle search." 706 N.W.2d at 489. Instead, it ruled that each case must be "viewed under the totality of the circumstances." *Id.* (quotation omitted). In *Burbach*, the supreme court concluded that reasonable articulable suspicion did not exist because the passenger was a "middle-aged" adult who admitted to drinking and the officer concluded that the driver had not been drinking. *Id.* The supreme court noted that, at most, "these facts provide only an attenuated inference of an open container." *Id.*

The supreme court contrasted the facts of *Burbach* with those of its earlier case of *State v. Schinzing*, 342 N.W.2d 105 (Minn. 1983). In *Schinzing*, the supreme court held that probable cause existed to allow a search of a vehicle. 342 N.W.2d at 109. In *Schinzing*, an officer pulled a car over for committing minor violations of traffic laws. *Id.*

The three people in the car were all under the age of 21, and the officer smelled the odor of alcohol in the car. *Id.* at 106–07, 109. The supreme court in *Schinzing* concluded that "the odor of alcohol coming from the car gave [the officer] probable cause to believe that a search of the passenger compartment would reveal open bottles or cans of alcohol." *Id.* at 109. The supreme court in *Burbach* distinguished *Schinzing* by stating:

> Most significantly, in *Schinzing* the officer's knowledge that the vehicle's passengers were 17 made his detection of the odor of alcohol clear evidence of underage drinking. Having established this first alcohol-related crime, it was reasonable to suspect an open-container violation as well. Since people who are underage cannot legally drink alcohol, such people are more likely to drink in vehicles, out of the public view.

Burbach, 706 N.W.2d at 489.

In addition to the odor of alcohol, an individual's probationary condition not to possess or consume alcohol and evidence of alcohol consumption in a vehicle can constitute "probable cause, allowing [an officer] to search the car for evidence of an open bottle violation under the automobile exception to the warrant requirement." *State v. Pierce*, 347 N.W.2d 829, 833 (Minn. App. 1984) (quotation omitted). But probable cause to search the vehicle is not at issue here. The officer was only required to meet the standard of reasonable articulable suspicion to expand the stop. The driver consented to the search during the stop, and the validity of that consent is not at issue.

The officer reported that when he approached the vehicle the first time, he smelled the odor of alcohol. When he took L.W. back to his squad car, the officer determined that she had not been drinking. Then, during the conversation in the squad car, L.W. stated that the front-seat passenger, her brother, did not drink because he was a

recovering alcoholic. The officer also reported that he recognized Ramirez and knew that he was prohibited from consuming alcohol. The odor of alcohol may, therefore, have indicated a violation of probation, and not merely the aftermath of a passenger's legal drinking. But regardless of who may have been consuming alcohol, the officer had grounds to suspect there was an open container of alcohol in the vehicle.

We conclude that the odor of alcohol was one factor contributing to a reasonable articulable suspicion to expand the scope of the stop. The odor of alcohol indicated a possible probation violation and/or the possible presence of an open container of alcohol.

Ramirez attempts to distinguish *Pierce* based on the significant evidence of alcohol consumption by the defendant in that case. *See* 347 N.W.2d at 833. But the reason *Pierce* is applicable here is not the evidence of alcohol in the vehicle but the probationary status of the individual. *See id.* at 831. Therefore, Ramirez's probation condition that he not consume alcohol is relevant to the reasonable-articulable-suspicion inquiry, and Ramirez's argument fails.

The state also argues that the district court erred in concluding that the evidence of drug use in the vehicle did not provide reasonable articulable suspicion to allow the officer to expand the scope of the stop so that L.W. could consent to the search. Again, we note that the continuation of the stop was not based on a single fact or a single suspicion. But based on the facts contained in the police report and testimony by the officer, we conclude that the district court erred in concluding that the officer did not have reasonable articulable suspicion to believe that the vehicle contained controlled substances.

First, at the time of the stop the officer had four years of experience and had over 48 hours of drug interdiction courses. Second, when the officer first approached the vehicle, he saw Ramirez light a cigarette. The officer testified that based on his training and experience individuals in stopped vehicles "use the cigarette smoke as a masking agent for other odors." Third, when the officer first approached the vehicle, he smelled a chemical odor. While the officer conceded that the chemical odor was not methamphetamine smoke and could have been some type of a solvent or acetone, the officer did state that, in his experience, chemical odors are often associated with drug activity. Fourth, the officer testified that the front passenger had a complexion that was "consistent with methamphetamine use," including "discolored, missing, blackend [sic] teeth," and sunken eyes and cheeks. Fifth, Ramirez told the officer that they were going to the house of an individual whose name the officer recognized as that of a known drug user. When combined, these facts meet the standard of reasonable articulable suspicion and allowed the officer to expand the scope of the stop and to ask L.W. for consent to search the vehicle. Therefore, the district court erred in suppressing the evidence.

Ramirez argues that the factors listed by the officer do not justify the expansion of the stop. While Ramirez claims not to be doing so, Ramirez is taking each factor in isolation. But courts must consider "the totality of the circumstances when determining whether reasonable, articulable suspicion exists." *State v. Flowers*, 734 N.W.2d 239, 251 (Minn. 2007). Further, "[t]he requisite showing is 'not high'" for reasonable articulable suspicion. *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)).

Ramirez contends that this court should defer to the district court's determination as to the officer's credibility. Ramirez maintains that the district court's use of the word "equivocal" in the following sentence was a credibility determination: "The thirteen 'factors' [the officer] lists in his report to support his 'suspicion' of criminal activity are, in the Court's view, equivocal in terms of providing probable cause[1] to believe that the vehicle contained controlled substances." But a statement that certain factors are "equivocal" does not imply that they were fabricated. The district court did not state that the underlying facts were questionable or that it had doubts as to the veracity of the officer. Instead, it indicated that the facts cited by the officer could have a different interpretation.

Because we conclude that the district court did not make a credibility determination, we do not need to defer to such a determination. Further, there is a video from the officer's squad car that supports the version of events stated by the officer, and Ramirez's counsel at oral argument stated that the facts are undisputed. Accordingly, we conclude that the district court erred in ruling that the officer unlawfully expanded the scope of the stop.

Reversed and remanded.

[1] Reasonable articulable suspicion, rather than probable cause, is the proper standard to apply to the continuation and expansion of the stop.