STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1943

State of Minnesota,
Respondent,

vs.

Jah D. Culp,
Appellant.

Filed November 17, 2009
Affirmed
Kalitowski, Judge

St. Louis County District Court
File No. 69DU-CR-07-6198

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

Melanie S. Ford, St. Louis County Attorney, Nathaniel T. Stumme, Assistant County Attorney, 100 North Fifth Avenue West, #501, Duluth, MN 55802-1298 (for respondent)

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

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Stoneburner, Judge.

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

KALITOWSKI, Judge

Appellant Jah D. Culp challenges his conviction of possession of methamphetamine, arguing that the district court erred in denying his motion to suppress evidence obtained during an investigatory stop. Appellant contends that (1) the officers unreasonably extended the duration of the stop by detaining him indefinitely and without reasonable suspicion, and (2) the state failed to prove that he freely and voluntarily consented to a search of his shoes and socks. We affirm.

D E C I S I O N

Appellant was charged in St. Louis County District Court with possession of methamphetamine in violation of Minn. Stat. § 152.025, subd. 2(1) (2006). At his pretrial omnibus hearing, appellant argued that the evidence obtained during an investigatory stop should be suppressed on the ground that it was obtained as the result of an illegal search and seizure. The district court denied appellant's motion to suppress. Appellant waived his right to a jury trial and agreed to a court trial on stipulated facts. After the district court found appellant guilty, appellant brought this appeal, arguing that the district court erred in denying his motion to suppress.

I.

Appellant does not argue that the officers lacked reasonable, articulable suspicion to initiate an investigatory stop for purposes of determining what he was doing in the parking lot of a closed golf course at 5:00 a.m. Rather, appellant argues that once the officers learned what appellant was doing, the reasonable suspicion dissipated, making

the subsequent detention unlawful and requiring suppression of the evidence. We disagree.

In reviewing pretrial orders to suppress or admit evidence, this court may independently review the facts and determine whether the district court erred as a matter of law. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). The court reviews the legality of a limited investigatory stop and questions of reasonable suspicion de novo. *State v. Syhavong*, 661 N.W.2d 278, 281 (Minn. App. 2003).

Limited investigatory stops are subject to the prohibitions against unreasonable searches and seizures found in the Fourth Amendment of the United States Constitution and article I, section 10 of the Minnesota Constitution. *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004). A limited investigatory stop, commonly known as a "*Terry* stop," is lawful if there is "a particularized and objective basis for suspecting the person stopped of criminal activity." *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002); *see generally Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968). Such a stop requires a showing of "reasonable suspicion" rather than probable cause. *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). The factual basis needed to justify an investigatory stop is minimal. *Knapp v. Comm'r of Pub. Safety*, 610 N.W.2d 625, 628 (Minn. 2000).

The Duration and Scope of the Stop

In order to be reasonable under the Fourth Amendment and the Minnesota Constitution, an investigatory stop must be limited in scope and duration, lasting only long enough to effectuate the purpose of the stop. *Wiegand*, 645 N.W.2d at 135-36. Generally, law enforcement may continue the detention as long as reasonable suspicion

remains and the officers act diligently and reasonably in pursuing the investigation. *State v. Moffatt*, 450 N.W.2d 116, 119 (Minn. 1990). In reviewing whether police acted diligently and reasonably, a court should not engage in "unrealistic second guessing," and should look to the facts and circumstances of the case. *Id*.

The scope of a stop must be "strictly tied to and justified by the circumstances that rendered the initiation of the investigation permissible." *Wiegand*, 645 N.W.2d at 136; *see also Askerooth*, 681 N.W.2d at 364 (stating that each "incremental intrusion" during a stop must be justified by circumstances that permitted the stop in the first place or by independent probable cause or reasonableness). An officer may expand the scope of the stop to investigate other suspected illegal activity if there is reasonable suspicion of such other illegal activity. *Askerooth*, 681 N.W.2d at 364.

Here, the duration of the stop was not impermissibly extended because reasonable suspicion remained throughout the course of the stop and the officers acted reasonably and diligently in pursuing the investigation. An officer from the St. Louis County Sheriff's Department first became suspicious when he observed a vehicle parked close to a building of the Lester Park Golf Course at 5:00 a.m. It was dark, the golf course was not open, and there was at least one man standing behind the vehicle. As the officer pulled into the parking lot to investigate, his suspicion increased when he saw that the man was outside the vehicle carrying a box or milk crate. The man informed the officer that he was fixing his car stereo, and stated that he and his two friends, appellant and a second passenger, had been driving around all night. The officer's suspicion increased further when the man said that the two men in the car were friends, but that he did not

know their names. At this point, based on the totality of the circumstances, it was reasonable for the officer to ask the man to return to his vehicle and to call for backup. *See Moffatt*, 450 N.W.2d at 119 (stating that the officer had to be careful given the number of suspects).

In addition, after arresting the second passenger pursuant to an outstanding warrant for felony methamphetamine possession, it was reasonable for the officers, who indicated they had safety concerns, to ask appellant to step out of the vehicle. *See State v. Ortega*, 770 N.W.2d 145, 152 (Minn. 2009) (stating that "officer safety concerns increase when there is a passenger in a stopped vehicle as both the passenger and the driver may have similar motivations to prevent the discovery of crime in the vehicle by use of violence"). And the officers' suspicion properly increased when they perceived the men acting unusually nervous and having difficulty speaking.

When the officers walked around the car and peered in with a flashlight, they discovered, on the floor behind the driver's seat, a can of butane fuel that they associated with smoking controlled substances. They also found ammunition in the panel of the passenger-side door, near where appellant had been seated. Once the officers found these items in plain view, they acquired additional reasonable suspicion to justify the further detention and questioning of the men regarding possession of narcotics.

Following the driver's consent to a search of the car, the officers recovered the following items: a loaded handgun; a loaded "zip gun"; two glass pipes with residue on them; baggies; a computer; a box of checks in the name of a woman from Duluth; and a checkbook, paperwork, and Wisconsin driver's license belonging to a woman from

Superior, Wisconsin. We conclude that the record indicates that the officers' suspicion was increased incrementally in a "step-by-step" manner throughout the course of the stop, justifying the 45-minute length of the detention and each subsequent intrusion. *See Moffatt*, 450 N.W.2d at 119 (stating that the officers acted in a "graduated, balanced step-by-step way").

Individualized Suspicion With Regard to Appellant

Appellant argues that the officers lacked individualized suspicion to detain him and that they failed to investigate him diligently and reasonably throughout the investigation. We disagree.

"Mere proximity to criminal activity does not establish particularized probable cause that a person is engaged in criminal activity." *Ortega*, 770 N.W.2d at 150. But when evidence indicates that a vehicle's passengers were engaged in a common criminal enterprise and all passengers deny ownership of the contraband, there may be probable cause to arrest a passenger in the vehicle. *Id*. Furthermore, when officers see contraband in plain view, they may conclude that all passengers constructively possessed it. *Id*.

Here, there was individualized reasonable suspicion to detain appellant throughout the course of the stop. For the first approximately 20 minutes, appellant was an occupant in the suspicious vehicle. Subsequent discovery of the ammunition and butane torch in plain view allowed the officers to conclude that appellant constructively possessed them, creating reasonable suspicion to continue to detain him.

Appellant argues that because the driver claimed ownership of the handgun and zip gun, attributed the checkbook to a "friend's girlfriend," and the checks were

registered to a woman in Wisconsin (where the driver was from), the inference that appellant was involved in criminal activity regarding these items should have been dispelled. But the driver did not claim ownership or otherwise explain the presence of the butane torch or the pipes with residue on them. Furthermore, while *Ortega* provides that an informant's tip implicating one individual as the "guilty" party may deflect guilt from others associated with that individual, officers are not required to believe the informant. The court is only to ask whether the officer's actions were reasonable, and not engage in "unrealistic second-guessing." *See Moffatt*, 450 N.W.2d at 119. It is reasonable that the officers' suspicion with regard to appellant increased after these items were discovered, justifying his continued detention.

We conclude that the officers had individualized, reasonable suspicion throughout the investigatory stop to detain appellant and acted reasonably and diligently in pursuing the investigation. Therefore, the duration and scope of the stop did not violate appellant's constitutional rights.

II.

Appellant argues that the state failed to prove that he voluntarily consented to a search of his shoes and socks because the officers did not tell appellant that he could leave or refuse consent, the officers' conduct was coercive, and the state failed to establish the manner in which officers obtained appellant's consent. We disagree.

A reviewing court accepts the district court's factual findings concerning the circumstances under which a statement was given to the police unless the findings are clearly erroneous. *State v. Williams*, 535 N.W.2d 277, 286 (Minn. 1995). Whether a

suspect's consent to search is voluntary is subject to "careful appellate review." *State v. Smallwood*, 594 N.W.2d 144, 155 (Minn. 1999) (quotation omitted).

A search is constitutionally permissible when conducted pursuant to valid consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 2045 (1973). The state has the burden of proving that the consent was "freely and voluntarily given." *Id.* The concept of "voluntariness" reflects a balancing of the police interest in conducting investigations with the individual's constitutionally-protected right to be free from unreasonable searches and seizures. *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). This balancing assumes that individuals may be intimidated while subject to police investigation; it is only when the questioning is coercive that "the right to say no to a search is compromised by a show of official authority," that elicited consent becomes involuntary. *Id.*

Generally, consent is voluntary if a "reasonable person would have felt free to decline the officer's requests or otherwise terminate the encounter." *Id.* Whether consent is voluntary is a question of fact to be determined by considering the totality of the circumstances. *Id.* In looking at the totality of the circumstances, the court considers "the nature of the encounter, the kind of person the defendant is, what was said and how it was said." *Id.* at 880. Voluntariness is a "judgment call based on the credibility of the witnesses." *State v. Bunce*, 669 N.W.2d 394, 399 (Minn. App. 2003).

Here, following the search of the car, appellant was subjected to a patdown and consented to a search of his pockets, shoes, and socks. The officers observed appellant dragging his socks on the ground, and discovered a piece of cardboard containing what

appeared to be methamphetamine that had come out of appellant's sock. The district court found that appellant's consent to remove his shoes and socks was voluntary. We conclude that this finding is not clearly erroneous based on the totality of the circumstances.

As discussed above, the detention and investigation of appellant was justified by reasonable suspicion. And the record indicates that the police did not persistently or aggressively question appellant. Much of the time, appellant was "left alone" while police pursued investigation of the other men and a search of the vehicle. *See State v. Doren*, 654 N.W.2d 137, 143 (Minn. App. 2002) (holding that consent was voluntary where the investigation had largely focused on the driver, not the passenger, who was "left alone in the car"). Although the officers did not advise appellant of his right to refuse consent, this is not constitutionally required, but is only one factor to consider. *See Bustamonte*, 412 U.S. at 227, 93 S. Ct. at 2047 (stating that knowledge of right to refuse consent is merely one factor in totality-of-the-circumstances test).

The district court found that "[n]o evidence was presented to the Court that would indicate Defendant's consent was involuntary or that it was the product of duress or coercion." This court defers to the district court's credibility determinations, and the district court found the officers' testimony regarding the issue of consent to be credible. We conclude that the district court did not clearly err in holding that consent was voluntary based on the totality of the circumstances.

Affirmed.