STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2200

State of Minnesota,
Respondent,

vs.

Bobby Vang,
Appellant.

Filed December 22, 2009
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CR-06-65324

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

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

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

Considered and decided by Worke, Presiding Judge; Shumaker, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges his conviction of felony firearm possession by an ineligible person, arguing that the district court should have suppressed the evidence as the product of an illegal search and seizure. Because the search of the car that resulted in the discovery of the firearm was supported by a reasonable, articulable suspicion, we affirm.

FACTS

On September 14, 2006, Minneapolis Police Officers Timothy E. Devick and Scott Mars were on patrol in a marked squad car. The driver of a car passing from the other direction raised his left hand and shielded his face from view. The officers became suspicious and followed the car, which made a quick left turn without signaling. The officers then made a traffic stop for failure to signal the turn. They ran the car's license plate and discovered that the registered owner was a confirmed gang member with a violent history. As the officers approached the car, they observed appellant Bobby Vang, who was the passenger in the back seat behind the driver, making an unusual leaning movement to his right as if he were digging behind his back with his left arm.

Officer Mars asked for identification and confirmed that the driver was the car's registered owner. Officer Mars first ordered the driver out of the car, then ordered appellant and the other two passengers out of the car. Once they were sitting in the grass, Officer Devick watched the four of them while Officer Mars searched the car. The car was in good physical condition except for the back seat where appellant had been seated,

where the bottom part of the seat was pulled slightly away from the backrest. Officer Mars pulled the seat out and saw a handgun.

Appellant was charged with felony firearm possession by an ineligible person in violation of Minn. Stat. § 624.713, subds. 1(b), 2(b) (2006). The district court denied appellant's motion to suppress the handgun. Following a bench trial on stipulated facts, the district court found appellant guilty and sentenced him to 36 months in prison. This appeal follows.

D E C I S I O N

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Appellant argues that the search of the vehicle in which he was a passenger, and the seizure of his gun, violated his rights under both constitutions, and that the district court was therefore required to suppress the gun as evidence in the state's case against him.

Although U.S. Supreme Court cases have cast doubt on whether the Fourth Amendment still requires reasonableness under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), during a "very minor" traffic stop when the stop is supported by probable cause, the Minnesota Constitution independently requires that the *Terry* framework be used to evaluate "the reasonableness of seizures during traffic stops even when a minor law has been violated." *State v. Askerooth*, 681 N.W.2d 353, 360-63 (Minn. 2004) (citing *Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S. Ct. 1536 (2001)). We review de novo a district court's determination of reasonableness under *Terry*. *State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003).

Under *Terry*, a "stop and frisk," or limited investigatory seizure and search, is constitutionally reasonable if the officer's action was justified at its inception and reasonably related in scope to the circumstances that originally justified the interference. 392 U.S. at 19-20, 88 S. Ct. at 1879. The test is objective rather than subjective: "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" government intrusion upon a person's constitutionally protected liberty interests. *Id.* at 21, 88 S. Ct. at 1880. A *Terry* search is only justified for "the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.* at 29, 88 S. Ct. at 1884; *see also State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992) ("When the officer assures himself or herself that no weapon is present, the frisk is over.").

Under the first step of a *Terry* analysis, a traffic stop constitutes a lawful investigatory stop "whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation." *Arizona v. Johnson*, 129 S. Ct. 781, 784 (2009). Appellant concedes that the vehicle was lawfully stopped for an illegal turn and that the stop was justified at its inception.

Under the second step of a *Terry* analysis, the police may conduct a limited investigatory search of an automobile passenger if they reasonably suspect that the person is armed and dangerous. *Id.* Each incremental intrusion during a stop requires independent reasonableness under *Terry* to justify that particular intrusion. *Askerooth*,

681 N.W.2d at 364. Thus, a police officer may search the passenger compartments of a car in which a weapon may be placed or hidden if reasonable, articulable suspicion exists to support the officer's belief that the suspect is dangerous and has an immediately accessible weapon hidden in the vehicle. *State v. Flowers*, 734 N.W.2d 239, 251 (Minn. 2007). "We consider the totality of the circumstances when determining whether reasonable, articulable suspicion exists." *Id.* at 251. The state bears the burden of showing that the search or seizure was reasonable. *Askerooth*, 681 N.W.2d at 365.

The state contends that the officers possessed a reasonable, articulable suspicion that appellant hid a weapon in the car. Relevant factors in determining the permissible scope of a *Terry* stop include "erratic behavior," "suspicious movements," and "evasive conduct." *Flowers*, 734 N.W.2d at 253; *Dickerson*, 481 N.W.2d at 843. In *Flowers*, the defendant did not immediately stop driving when the patrol car's emergency lights activated; instead, he first drove slowly down an alley. 734 N.W.2d at 243. While driving down the alley, he "leaned left for a few seconds and appeared to be shifting his position in his seat," then leaned the other way, continuing to shift his position in his seat for approximately 45 seconds, during which time the police sounded their air horn and turned on the car's siren. *Id.* The supreme court concluded that the defendant's suspicious movements were sufficient to authorize an initial *Terry* search of the defendant's vehicle. *Id.* at 252. The court cited a number of federal cases for the proposition that "furtive movements" or "furtive gestures" can be reasonably interpreted as a suspect hiding a weapon in the car, thus warranting a limited investigatory search. *Id.* at 252 n.13.

Appellant argues that *Flowers* is distinguishable because the car in this case pulled over immediately when the officers activated their lights; appellant's suspicious movements did not last 45 seconds, but instead "could not have lasted more than a few seconds"; and appellant's movements "were consistent with someone scratching his back or manipulating the seat belt." We disagree. First, although the driver pulled over immediately, he had already acted evasively by shielding his face and making an abrupt, unsignaled turn. Second, although the defendant's furtive movements in *Flowers* lasted 45 seconds, the precise length of time was not determinative. Moreover, the record does not support appellant's assertion that his furtive movements lasted substantially less than 45 seconds. Third, the test is whether specific, articulable facts can reasonably justify the inference that a suspect might be armed and dangerous—the possibility of an alternative inference does not preclude the existence of reasonable suspicion. Further, appellant's proposed alternative interpretations are implausible and therefore do not significantly erode "the strength of the officers' articulable, objective suspicions." *Id.* at 253 (quotation omitted). It is unclear why a passenger would need to unfasten his seatbelt in the event of a traffic stop, and given the well-recognized need for a police officer to control the scene of a stop, police officers may reasonably expect—or insist—that passengers not move about unnecessarily. *See Brendlin v. California*, 127 S. Ct. 2400, 2407 (2007) ("It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety.").

Contrary to appellant's assertion, we believe that the driver's gang affiliation is relevant to the question of whether the officers had reasonable suspicion to search the car. Courts consider the totality of the circumstances in determining whether reasonable suspicion exists. *Flowers*, 734 N.W.2d at 251. A brief investigatory stop is permitted if the officer has a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *Waddell*, 655 N.W.2d at 809 (quotation omitted). However, the general rule that the police may not stop a person who is not personally suspected of criminal activity does not apply to a traffic stop, since the passengers are stopped whenever the police stop an automobile. *See Brendlin*, 127 S. Ct. at 2403 (holding that a passenger, like the driver of the car, is seized when a police officer makes a traffic stop). Although a police officer may not search a passenger merely because the driver is a gang member, totality-of-the-circumstances analysis entails examination of the context in which the police confront suspects. *See Johnson*, 129 S. Ct. at 784-85 (noting that the police were patrolling a neighborhood associated with the Crips gang and that the passenger whom the police searched was wearing clothing consistent with Crips membership); *Maryland v. Wilson*, 519 U.S. 408, 414, 117 S. Ct. 882, 886 (1997) (explaining that the presence of passengers may increase the risk of violence during a traffic stop); *Flowers*, 734 N.W.2d at 253 (noting that relevant factors include "the number of officers and police cars involved," "the nature of the crime," and "the need for immediate action by the officers"); *Dickerson*, 481 N.W.2d at 843 (explaining that, although "merely being in a high-crime area will not justify a stop," the police were justified in stopping the defendant based on his evasive conduct "combined with his

departure from a building with a history of drug activity"). The fact that the driver was a known gang member with a violent history is part of the context in which the officers encountered appellant, and it is relevant to what inferences may be reasonably drawn from the suspicious movements that appellant made while he was hiding a gun in the back seat of the car.

Appellant also contends that the timing of events precludes finding reasonable suspicion. Appellant argues that Officer Mars's decision to initially ask the driver for his driver's license and proof of insurance rather than immediately order appellant out of the car or draw his gun in response to appellant's furtive movements, coupled with the fact that Officer Mars told the driver to get out of the car before appellant, proves that there was no legitimate concern for officer safety. We disagree. First, the test is objective; courts do not inquire into an officer's subjective beliefs. Second, if the officer believed that appellant was hiding a weapon in the seat behind his back, proceeding initially with routine identity questions to the driver could have been an attempt to avoid escalating a potentially violent situation. Third, the stop remained ongoing, and the officers' safety concerns would not be minimized by ordering appellant out of the car if they were required to allow him to return to the car without searching the location where they believed they observed him hiding a weapon. *Cf. Johnson*, 129 S. Ct. at 788 ("[The officer] surely was not constitutionally required to give [the defendant] an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her.").

Based on the foregoing reasons, we conclude, as the district court did in a well-reasoned and thorough opinion, that the officers' search of the car that resulted in the discovery of appellant's gun was supported by reasonable, articulable suspicion. The search therefore did not violate appellant's constitutional rights, and the district court did not err in denying appellant's motion to suppress the firearm.

Affirmed.