**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-194**

State of Minnesota,
Respondent,

vs.

Bernard Kyler Connie,
Appellant.

**Filed December 22, 2009**
**Reversed and remanded**
**Larkin, Judge**

Hennepin County District Court
File No. 27-CR-08-14417

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (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 Toussaint, Chief Judge; Minge, Judge; and Larkin, Judge.

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

**LARKIN**, Judge

Appellant challenges his conviction of fifth-degree controlled-substance sale, arguing that the district court erred by denying his motion to suppress a pistol and marijuana that officers discovered during a search of appellant. The district court held that the search was lawful, relying on the consent and search-incident-to-arrest exceptions to the warrant requirement. Because the state did not meet its burden of establishing that appellant's consent was voluntary and because the search was not a valid search incident to arrest, we hold that the search was illegal. We therefore reverse and remand.

## FACTS

On March 20, 2008, members of the Minneapolis Police Department, assisted by agents from the Drug Enforcement Agency (DEA), conducted a "saturation detail" in an area of Minneapolis that law enforcement agencies consider to be a "high-crime area." The officers were focused on nuisance crimes such as loitering and street-level drug dealing. Among the officers participating in the patrol was DEA Special Agent Kevin Blackmon, an eight-year veteran of law enforcement, who was patrolling the area in an unmarked squad car with two other DEA agents and one Minneapolis police officer.

At approximately 7:30 p.m., Blackmon and the other officers noticed four males standing on a street corner. The officers parked about one and one-half blocks west of where the men were standing. Blackmon recognized one of the men, later identified as appellant Bernard Kyler Connie, as someone he had seen walking through the

neighborhood approximately 15 minutes earlier. The officers observed the men "loitering" on the street corner without any apparent purpose.

After approximately five minutes, Blackmon observed Connie holding a small, unidentified object in his hand, palm up, while manipulating the object with the fingers of his other hand. One of the other men handed Connie what appeared to be money, and Connie gave the man the object he had been holding. During this time, the two other men were looking around the area. Following this exchange, all four men remained on the street corner.

Believing that they had witnessed a drug transaction, the officers drove to the street corner where the men were standing. The police officers exited their vehicle, with their weapons drawn, identified themselves as police officers, and instructed the four men to put their hands up in the air. Each officer then approached one of the men; Blackmon approached Connie. After holstering his weapon, Blackmon instructed Connie to put his hands on a fence that was behind him. After Connie complied, Blackmon asked Connie for permission to search him for "guns, knives [or] drugs." Connie replied "yes," and he told Blackmon that he was carrying a pistol in his waistband and claimed he had a permit to carry the firearm.

Blackmon reached into Connie's waistband and removed the firearm. He then handcuffed Connie and told him he was under arrest. Blackmon continued to search Connie and discovered cash and five baggies of marijuana during the process. Connie was subsequently charged with fifth-degree controlled-substance crime under Minn. Stat.

§ 152.025, subd. 1(1) (2006) (providing that the sale of one or more mixtures containing marijuana, except a small amount for no remuneration, is a crime).

Connie moved to suppress the firearm and marijuana on the grounds that the search violated his Fourth Amendment constitutional right to be free from unreasonable search and seizure. The district court denied the motion. Connie subsequently waived his right to a jury trial and agreed to a stipulated-facts bench trial before another judge. Following trial, the district court found Connie guilty of controlled-substance crime in the fifth degree (sale). This appeal follows.

**D E C I S I O N**

"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)). The state bears the burden of establishing the existence of an exception

to the warrant requirement. *State v. Ture*, 632 N.W.2d 621, 627 (Minn. 2001). The district court here relied on two exceptions: consent and search-incident-to-arrest.

To justify a warrantless search based on consent, the state must prove that the consent was freely and voluntarily given. *State v. George*, 557 N.W.2d 575, 579 (Minn. 1997). "Consent must be received, not extracted." *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). "'Voluntariness' is a question of fact and it varies with the facts of each case. The test is the totality of the circumstances." *Id.* When determining whether consent was voluntary, we consider "the nature of the [police] encounter, the kind of person the defendant is, and what was said and how it was said." *Id.* The issue is "whether a reasonable person would have felt free to decline the officer['s] requests or otherwise terminate the encounter." *Id.* (quotation omitted). We have noted that "[t]he voluntariness of consent is not easily defined." *George*, 557 N.W.2d at 579. The determination requires "a careful examination of the circumstances surrounding the giving of the consent." *Id.*

Our careful examination of the totality of the circumstances surrounding the giving of consent in this case leads us to conclude the state did not satisfy its burden of proving that Connie's consent was voluntary. Connie was standing on a street corner when, without warning, four law-enforcement officers pulled up to the corner and exited their vehicle with guns drawn. They identified themselves as police officers and instructed Connie and his companions to put their hands up in the air. An officer then directed Connie to turn away from the officer and to place his hands on a fence. As Connie stood with his back to the officer and with his hands up against the fence, the

officer asked to search Connie for "guns, knives [or] drugs." A reasonable person would not have felt free to decline the officer's request or to otherwise terminate this encounter. Blackmon's immediately ensuing request for Connie's consent to a search is not severable or distinguishable from the multiple commands that preceded it. And we are not persuaded that the facts that Blackmon had holstered his gun and used "a calm voice" eliminated the coercive nature of the encounter.

Previous holdings of the supreme court and this court have found a suspect's consent to be involuntary in far less coercive situations. *See, e.g., Harris*, 590 N.W.2d at 104 (holding that a suspect did not voluntarily consent to the search of his person when an officer had already found plastic bindles in the suspect's bag pursuant to a valid consent search, and the officer pointedly told the suspect that he knew what the bindles were used for and that the suspect should give the officer the drugs); *George*, 557 N.W.2d at 581 (holding that the state failed to meet its burden of proving that a suspect voluntarily consented to the search of his motorcycle when the suspect was stopped for a minor traffic violation, he was confronted by two law enforcement officers, each of his responses to the officer's questions led to additional queries, and the suspect's responses appeared to be an effort to fend off a search with equivocal responses); *Dezso*, 512 N.W.2d at 880-81 (holding that the state did not sustain its burden to show that the suspect's consent was voluntary when the suspect and the officer were seated in the front seat of a parked squad car on a highway at night after the suspect was stopped for speeding, the officer repeatedly requested to examine the suspect's wallet, the officer's requests "though couched in nonauthoritative language, were official and persistent, and

were accompanied by the officer's body movement in leaning over towards the defendant seated next to him," and the circumstances were "intimidating"); *State v. Bell*, 557 N.W.2d 603, 607-08 (Minn. App. 1996) (holding that the state did not carry its burden to show that a suspect's consent to search his car was voluntary—even though the suspect signed a consent and waiver card stating that the suspect could refuse to allow the search—when the suspect was stopped for a petty misdemeanor, frisked for weapons, placed in the back of a locked squad car by two armed officers, and asked for his consent to search as the officers handed him a warning ticket), *review denied* (Minn. Mar. 18, 1997). *But see State v. Alayon*, 459 N.W.2d 325, 327, 330-31 (Minn. 1990) (holding that consent to search was voluntary when an officer encountered a suspect at the entry to his home and ordered the suspect to the ground at gun point, other officers approached, one officer entered the home and ordered the two individuals inside the home to remain seated while the officer conducted a "sweep" of the home, the officers holstered their guns, allowed the suspect to stand up, and prior to handcuffing the suspect or telling him that he was under arrest, requested permission to search the suspect's home).

And while we have previously held that "a simple request for permission to conduct a pat-down frisk" in the presence of officers does not constitute coercion in *State v. Doren*, 654 N.W.2d 137, 143 (Minn. App. 2002), *review denied* (Minn. Feb. 26, 2003), the circumstances here are distinguishable. In *Doren*, an officer stopped a vehicle for traffic violations. *Id.* at 139. After arresting the driver, the officer called for backup and then asked Doren, the passenger, to step out of the vehicle. *Id.* at 139-40. Doren's behavior led the officer to suspect that he was under the influence of a controlled

substance. *Id.* at 140. The officer asked Doren whether he had any outstanding warrants for his arrest or weapons. *Id.* Doren responded that he had neither. *Id.* The officer then asked Doren whether he could pat him down for weapons, and Doren consented. *Id.*

Doren later claimed that his consent was involuntary. *Id.* at 142. Doren argued that the following circumstances were coercive: "the arrest of his driver, the flashing patrol car lights, the presence of two officers, and the officer's order that Doren get out of the car." *Id.* at 142-43. We held that the district court did not err by finding Doren's consent voluntary. *Id.* at 143. We reasoned, in part, that the officer had not used an intimidating tone of voice or drawn his gun, and that prior to the request, the entire focus had been on the driver, while Doren was left alone in the car. *Id.* We explained: "Because Doren had not driven the car, and because the officer showed no sign whatsoever that he suspected Doren of any wrongdoing or that he was about to arrest Doren, Doren reasonably could not have felt coerced into giving his consent to the frisk." *Id.*

The circumstances here are readily distinguishable from those in *Doren*. Blackmon approached Connie with his gun drawn, along with three other similarly postured officers. Connie was the direct focus of the officer's attention from the moment the encounter began. Blackmon's actions indicated that he suspected Connie of wrongdoing. And Blackmon's request for consent immediately followed an unexpected police encounter at gunpoint, coupled with a command that Connie put his hands up in the air, followed by a command that he place his hands on a fence—a command that also required Connie to turn his back to Blackmon. These circumstances are far more

coercive than those in *Doren*, and they refute the state's claim that Connie's consent was voluntary.[1]

With regard to the marijuana found on Connie after discovery of his pistol, the district court reasoned that there was probable cause to arrest Connie for an unlawful sale of a controlled substance *after* Blackmon discovered the pistol and that the ensuing search was incident to Connie's lawful arrest. "One exemption from the warrant requirement is that a person's body and the area within his or her immediate control may be searched incident to a lawful arrest." *State v. Robb*, 605 N.W.2d 96, 100 (Minn. 2000). A police officer may arrest "a suspect without an arrest warrant when a felony has occurred, and [the officer] has reasonable cause for believing that the suspect committed it." *State v. Sorenson*, 270 Minn. 186, 196, 134 N.W.2d 115, 122 (1965) (noting that "reasonable cause" is synonymous with "probable cause").

[1] One may question whether the circumstances justified a limited pat frisk for officer safety. The state did not advance this theory on appeal. An officer may conduct a limited protective weapons frisk of a lawfully stopped person if the officer has an objective articulable basis for thinking that the person may be armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968). "Police may not conduct such a frisk in every case in which they validly stop someone, but there are certain cases in which the right to conduct such a frisk follows directly from the right to stop the person." *State v. Payne*, 406 N.W.2d 511, 513 (Minn. 1987). The right to frisk is viewed as automatic whenever the suspect has been stopped for a crime for which the offender would likely be armed including such offenses as robbery, burglary, rape, assault with weapons, homicide, and dealing in large quantities of narcotics. *Id.* (citing 3 W. LaFave, Search and Seizure § 9.4(a), at 506 (1987)). But here, we are not dealing with a stop for any of those crimes but rather "street-level" drug dealing. *See State v. Ingram*, 570 N.W.2d 173, 175, 178 (Minn. App. 1997) (rejecting the argument that officer's attempt to pat search a suspect was justified because the officer was investigating a crime in which the offender is normally armed and dangerous—drug dealing—when the officer encountered the suspect after a citizen reported that an individual was attempting to sell marijuana to people in a bus shelter), *review denied* (Minn. Dec. 22, 1997).

Connie argues that because the pistol was discovered during an unlawful search, it should not have played any role in the district court's determination that there was probable cause to arrest Connie and, therefore, a basis to search him incident to arrest. We agree. *See Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 417 (1963) (holding, in part, that narcotics were discovered by exploitation of an initial illegality and could not be used against a defendant when the narcotics were found as the result of statements made by the defendant following his illegal arrest). When determining whether evidence is suppressible as "fruit of the poisonous tree," the question is whether, given the establishment of the primary illegality, the evidence has been discovered by exploitation of the primary illegality or instead by means sufficiently distinguishable to be purged of the primary taint. *Id.* The marijuana in this case should not have been used against Connie if it was discovered by exploitation of the initial illegal search. *See id.* We therefore consider whether, as argued by the state, there was independent probable cause to arrest Connie, sufficiently distinguishable from the discovery of the pistol, such that the officers had a lawful basis to arrest Connie and to search him incident to arrest.

Probable cause exists when "officers in the particular circumstances, conditioned by their own observations and information and guided by the whole of their police experience, reasonably could have believed that a crime had been committed by the person to be arrested." *State v. Olson*, 436 N.W.2d 92, 94 (Minn. 1989). Police officers are entitled to assess probable cause in light of their experience. *State v. Anderson*, 439 N.W.2d 422, 426 (Minn. App. 1989), *review denied* (Minn. June 21, 1989); *see also State*

*v. Olson*, 634 N.W.2d 224, 228 (Minn. App. 2001) ("The facts must justify more than mere suspicion but less than a conviction."), *review denied* (Minn. Dec. 11, 2001). "The probable-cause standard is an objective one that considers the totality of the circumstances." *Olson*, 634 N.W.2d at 228.

The state cites *State v. Taylor*, No. A06-2011 (Minn. App. Apr. 1, 2008), in support of its argument that the officers had probable cause to arrest Connie for sale of a controlled substance based on their observations before the search. *Taylor* is an unpublished opinion and is not binding precedent. Minn. Stat. § 480A.08, subd. 3 (2008). The state also relies on *State v. Hawkins*, 622 N.W.2d 576 (Minn. App. 2001). In *Hawkins*, an officer saw the offender riding a bike around an intersection at approximately 1:40 a.m. while whistling and waiving at approaching vehicles. 622 N.W.2d at 577-78. The officers observed the offender for 15 minutes and saw the offender conduct several hand-to-hand transactions with other individuals. *Id.* at 578. Once each transaction was complete, the other individual left quickly. *Id.* The officer concluded that the manner of the hand-to-hand transactions was consistent with drug dealing. *Id.* at 581. We held that there was probable cause to arrest the offender because these facts were sufficient to permit a prudent person to reasonably believe that the offender had engaged in the sale of drugs. *Id.*

Another case that is instructive regarding the existence of probable cause to arrest for suspected street-level drug dealing is *State v. Smith*, 476 N.W.2d 511 (Minn. 1991). In *Smith*, the supreme court held that there was probable cause to arrest an individual for loitering with intent to distribute narcotics when an officer observed the individual

standing in the entrance hallway of an apartment building known for its high drug-traffic for one-half hour and during that time: five different cars drove up to the building, the individual approached each of the cars, talked to the occupants, put his hand into the car as if an exchange were taking place, and each of the cars left in less than one minute. *Id.* at 512, 517.

Unlike the circumstances in *Hawkins* and *Smith*, the officers here observed Connie for only five minutes. The officers did not observe Connie attempting to attract the attention of passing pedestrians or motorists. The officers did not observe Connie have contact with multiple individuals or automobiles for brief periods of time. Nor did the officers observe Connie engage in multiple hand-to-hand transactions. The officers observed a single hand-to-hand exchange of an unidentified item, described only as a "small object," and what appeared to be money. And none of the involved individuals left the area after the exchange.

The district court concluded, and we agree, that the officers had reasonable grounds to stop Connie in order to investigate whether Connie had engaged in a drug transaction. A police officer may initiate a limited investigative stop if the officer has reasonable, articulable suspicion of criminal activity. *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880; *State v. Pike*, 551 N.W.2d 919, 921-22 (Minn. 1996) (noting that an investigative stop is lawful if the state can show that the officer had a "particularized and objective basis" for suspecting criminal activity (quotation omitted)). "[T]he level of suspicion required for a *Terry* stop is obviously less demanding than that [required] for probable cause." *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585 (1989)

(discussing the difference between the showing required to justify an investigative seizure and probable cause). In this case, suspicious circumstances were present "but mere suspicion without more is insufficient for a warrantless arrest." *State v. Walker*, 584 N.W.2d 763, 769 (Minn. 1998). In such circumstances the police should continue to use their investigatory skills and resources to gather sufficient evidence before making an arrest. *Id.* The police may have had reasonable suspicion to stop and question Connie regarding his activities, but on these facts, they did not have probable cause to arrest him prior to the discovery of his pistol. Absent probable cause to arrest, a search incident to arrest was not justified. *See id.* (holding that because the police lacked probable cause to arrest, an ensuing search incident to arrest was not valid).

In summary, the officer's warrantless search of Connie was not justified under the consent or search-incident-to-arrest exceptions to the warrant requirement. Accordingly, the search was unlawful. Evidence that is obtained by the exploitation of illegal actions by law enforcement must be suppressed. *Wong Sun*, 371 U.S. at 487-88, 83 S. Ct. at 417. "It is established that evidence discovered by exploiting previous illegal conduct is inadmissible." *Olson*, 634 N.W.2d at 229 (citing *Wong Sun*, 371 U.S. at 488, 83 S. Ct. at 417). The pistol and marijuana obtained during the search of Connie were inadmissible. We therefore reverse the denial of Connie's motion to suppress and the resulting conviction and remand.

**Reversed and remanded.**

Dated:

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Judge Michelle A. Larkin