STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2129

State of Minnesota,
Respondent,

vs.

Quenton Tyrone Williams,
Appellant.

Filed January 19, 2010
Affirmed
Hudson, Judge
Dissenting, Stauber, Judge

Hennepin County District Court
File No. 27-CR-08-15527

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Robin M. Wolpert, Special Assistant Public Defender, Greene Espel, PLLP, Minneapolis, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

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

HUDSON, Judge

Appellant Quenton Tyrone Williams challenges the district court's order denying his motion to suppress evidence supporting his conviction of fifth-degree controlled-

substance crime, with a sentence enhancement based on his possession of a firearm during the commission of the fifth-degree controlled-substance offense. We conclude that, although police lacked probable cause at the time to arrest appellant for the offense ultimately charged, based on the totality of the circumstances, police had probable cause to arrest appellant for the uncharged offense of carrying a pistol without a permit in violation of Minn. Stat. § 624.714, subd. 1a (2006), and we affirm.

FACTS

On March 26, 2008, a Minneapolis police officer responded to a radio report of a robbery involving a gun, which had just occurred at 22nd Street and Fremont Avenue North. Dispatch information indicated that one of the suspects, a black male wearing a hooded sweatshirt, was last seen running westbound from 22nd Street and Emerson Avenue North. The responding officer saw a person who matched that description, who was later identified as appellant, run westbound on 22nd Street and cut southbound in an alley between Emerson and Fremont Avenues. The officer exited his squad, ran after appellant, and caught up to him in a backyard on Fremont Avenue, calling, "Police. Stop."

When appellant turned to his right, the officer saw the butt of a pistol sticking out of appellant's right front sweatshirt pocket. The officer ordered appellant to the ground, and appellant immediately complied. Once appellant was on the ground and handcuffed, the officer asked appellant if he had a gun. Appellant responded that it was in his pocket. The officer then recovered the gun, a loaded .38-caliber revolver.

Appellant was taken into custody, and the robbery victim was then brought to appellant's location for a show-up. The victim was not able to positively identify appellant as one of the persons who committed the robbery. At a *Rasmussen* hearing on appellant's motion to suppress evidence, the officer testified that, "If it wasn't [appellant], I wasn't going to—I had no option. I had no point of arresting [appellant]." The officer further testified, "So he wasn't charged with the robbery. He was charged with the handgun." On cross-examination, when the officer was asked why he had probable cause to arrest appellant, the officer testified that "[appellant] had a gun on [him]."[1] The record does not indicate whether appellant had obtained a permit to carry the pistol or whether the officer demanded a permit from appellant or otherwise determined that he did not have a permit.

Appellant was taken to jail for booking. As the officer and appellant were waiting in the sally port for the booking process, appellant stated that he did not want to be booked into jail because he possessed illegal drugs. The officer asked the location of the drugs. Appellant stated that they were in his sleeve and moved around to show the officer the location of the drugs. The officer retrieved a small plastic baggie containing drug material, which weighed 2.2 grams and later tested positive for cocaine. After appellant was booked into jail and was read his *Miranda* rights, appellant gave a statement indicating that he had purchased the pistol for $100 and that he carried it for protection when he was carrying drugs.

[1] Although appellant's public defender represented appellant at the *Rasmussen* hearing and at trial, at appellant's request, the district court allowed appellant to question the officer on cross-examination.

The state charged appellant with fifth-degree controlled-substance crime, possession, in violation of Minn. Stat. §§ 152.025, subds. 2(1), 3(a) (2006); 609.101, subd. 3 (2006), with the offense committed while in possession of a firearm, thus subjecting appellant to a mandatory minimum sentence under Minn. Stat. § 609.11, subd. 5 (2006). The defense moved to suppress evidence of the handgun and drugs found in appellant's possession as the product of an illegal arrest. The defense argued that, although police had initially stopped and detained appellant as a suspect in a robbery, after the show-up occurred, they did not have probable cause to arrest appellant because the robbery victim could not positively identify appellant as one of the persons who committed the robbery. The defense also moved to suppress appellant's statement to police on the ground that he was not given a proper *Miranda* warning.

The district court denied the motion to suppress. The court found "that there was probable cause to believe that [appellant] had committed an offense and that [appellant] was properly charged." The district court did not identify the offense which it determined was supported by probable cause. The district court ruled that appellant voluntarily turned over the cocaine and answered questions, effectively waiving his *Miranda* rights. The district court also denied appellant's pro se motions for a continuance, dismissal on the basis of a speedy-trial violation, and a change of counsel.

A jury convicted appellant of fifth-degree controlled-substance crime and found that he possessed a firearm at the time of the offense, triggering a sentence enhancement under Minn. Stat. § 609.11. The district court sentenced appellant to the mandatory

minimum, 36-month sentence for the drug offense, based on his possession of a firearm during the offense. This appeal follows.

D E C I S I O N

When reviewing a district court's order denying a motion to suppress evidence, this court independently reviews the facts and determines, as a matter of law, whether the district court erred by not suppressing the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). Appellant argues that the district court erred by not suppressing evidence recovered as a result of his arrest and subsequent search because the police lacked probable cause to arrest him for any weapons-related offense. Appellant argues that because his arrest was illegal, the evidence obtained from the arrest and subsequent search must be suppressed as "fruit of the poisonous tree," and his convictions must be reversed. *See Wong Sun v. United States*, 371 U.S. 471, 484–85, 83 S. Ct. 407, 415–16 (1963). When the facts are not significantly in dispute, the determination of probable cause to arrest is a matter of law subject to de novo review. *See State v. Storvick*, 428 N.W.2d 55, 58 n.1 (Minn. 1988).

"The test of probable cause to arrest is whether the objective facts are such that under the circumstances, a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed." *In re Welfare of G.M.*, 560 N.W.2d 687, 695 (Minn. 1997). In determining whether the police had probable cause to arrest a person, courts "tak[e] into account the totality of the circumstances." *State v. Perkins*, 582 N.W.2d 876, 878 (Minn. 1998). The analysis of whether the police had probable cause to arrest is an objective test. *G.M.*, 560 N.W.2d at 695 n.8.

A district court may conclude that the police had probable cause to arrest a person for one offense, even if the police later charge that person with a different offense. *See In re Welfare of T.L.S.*, 713 N.W.2d 877, 881 (Minn. App. 2006) (holding that police officers had probable cause to arrest a juvenile for disorderly conduct, even though probable cause was based in part on an uncharged trespass violation). Therefore, even though appellant was ultimately charged with fifth-degree controlled-substance crime, we examine whether the district court erred by denying appellant's motion to suppress based on whether probable cause existed to arrest appellant for any offense.

Probable cause to arrest for fifth-degree controlled-substance crime, with possession of a firearm

Appellant argues that because police did not discover the drugs until after they arrested him, the drugs cannot provide probable cause for his earlier arrest. Probable cause to arrest must exist before a search and cannot be provided by the search itself. *Smith v. Ohio*, 494 U.S. 541, 543, 110 S. Ct. 1288, 1290 (1990). Although a formal arrest need not precede a search incident to lawful arrest, the arrest and search must be substantially contemporaneous, and the fruits of the search must not be the basis for probable cause to arrest. *State v. Varnado*, 582 N.W.2d 886, 892 (Minn. 1998); *State v. Cornell*, 491 N.W.2d 668, 670 (Minn. App. 1992).

Appellant was arrested at the scene of the show-up and transported to the jail. At the jail, he told police he was carrying drugs, and a search revealed that he possessed cocaine. Because the discovery of the drugs did not occur substantially contemporaneously with appellant's arrest, the drugs cannot provide the basis for

probable cause for the arrest. The district court erred to the extent that it may have determined that the drugs discovered at the police station provided probable cause for appellant's earlier arrest.

Probable cause to arrest for possession-without-a-permit offense

Appellant argues that the police also lacked probable cause to arrest him for the uncharged offense of possessing a pistol without a permit. It is a crime to possess a pistol in a motor vehicle or public place "without first having obtained a permit to carry the pistol." Minn. Stat. § 624.714, subd. 1a (2006) (defining gross-misdemeanor offense of carrying a pistol without having obtained a permit). A permit holder must carry the permit and government-issued identification "at all times when carrying a pistol and must display the permit card and identification document upon lawful demand by a peace officer." Minn. Stat. § 624.714, subd. 1b(a) (2006). A citation for failure to present a permit "must be dismissed if the person demonstrates, in court or in the office of the arresting officer, that the person was authorized to carry the pistol at the time of the alleged violation." *Id*., subd. 1b(b).

The Minnesota Supreme Court recently interpreted Minn. Stat. § 624.714, subds. 1a and 1b, in *State v. Timberlake*, 744 N.W.2d 390 (Minn. 2008). In *Timberlake*, an informant reported that the defendant was carrying a gun in a motor vehicle. The supreme court concluded that this report provided police with a reasonable, articulable suspicion that the defendant had violated the gun-permit statute, sufficient to conduct a *Terry* stop, even though the police did not know whether the defendant had a permit to carry the gun. *Id*. at 396–97. The supreme court applied the reasoning of its previous

decision, *State v. Paige*, 256 N.W.2d 298, 303–04 (Minn. 1977), in which the court determined that the "without a permit" language in the gun-permit statute did not add an element to the offense of carrying a pistol in a public place. Rather, it created an exception to criminal liability. *Id*. at 395 (citing *Paige*, 256 N.W.2d at 303). The court concluded that recent changes in the statutory scheme relating to gun possession did not affect its construction of the gun-permit statute, which includes a provision for an affirmative defense: the ability to "avoid prosecution for carrying a firearm in public by presenting a valid permit and identification to police." *Id*. at 396 (citing *Paige*, 256 N.W.2d at 303).[2] The court also noted that this affirmative defense was specifically included in the statute. *Id.* (citing Minn. Stat. § 624.714, subd. 1b(b)). The court stated that "'[i]n order to place the burden of proving the 'exception' on the defendant, a court must decide that the act in itself, without the exception is 'ordinarily dangerous to society or involves moral turpitude' and that requiring the state to prove the acts would place an impossible burden on the prosecution.'" *Id*. at 396–97 (citations omitted). Thus, *Timberlake* reaffirmed the holding in *Paige* that "the state did not have to prove as part of its case-in-chief that the defendant did not have a permit." *Id.* at 395, 397.

The state argues that *Timberlake* controls our decision here. Specifically, the state contends that because, under *Timberlake*, a defendant has the burden to produce evidence of a permit to avoid criminal responsibility, police may arrest a person for carrying a

[2] We observe, however, that, following *Timberlake*, the Minnesota Jury Instruction Guide nevertheless lists, as an *element* of the crime of possession of a pistol without a permit, that "the defendant did not possess a permit to carry a pistol." 10A Minnesota Practice CRIMJIG 32.37 (5th ed. 2006).

pistol without having obtained a permit without first having to inquire about the suspect's permit status. Appellant, on the other hand, argues that *Timberlake* is not controlling because *Timberlake* does not apply to a probable-cause determination. Appellant also urges this court to interpret the gun-permit statute in a manner that would require a peace officer to determine proactively that a person does not have a permit before arresting that person for a permit violation. Appellant maintains that, because the record does not show that police demanded a permit from him or otherwise determined that he did not have a permit, they lacked probable cause to arrest him for a gun-permit offense.[3] We decline, however, to conclude that either interpretation of *Timberlake* directs our analysis of this case.

Police officers have probable cause to arrest a person if they reasonably believe that the person has committed a crime, based on their observations, information, and experience. *State v. Olson*, 436 N.W.2d 92, 94 (Minn. 1989), *aff'd*, 495 U.S. 91, 110 S. Ct. 1684 (1990). "Probable cause is not to be evaluated from a remote vantage point of a library, but rather from the viewpoint of a prudent and cautious police officer on the scene at the time of arrest." *City of St. Paul v. Johnson*, 288 Minn. 519, 523, 179 N.W.2d 317, 320 (1970) (quotation omitted). In other words, police do not make probable-cause determinations in a vacuum, but rather in the real-world context of assessing whether

[3] The dissent urges a reading of the gun-permit statute which would require police to demand a permit as part of a determination of probable cause to arrest for a permit violation. But we note that the gross-misdemeanor crime of carrying a pistol in a public place without having obtained a permit in violation of Minn. Stat. § 624.714, subd. 1a (2006), and the petty misdemeanor violation of failure to display a permit on lawful demand by police in violation of Minn. Stat. § 624.714, subd. 1b (2006), are separate and distinct offenses.

they reasonably believe that a crime has been committed. Therefore, in order to determine whether police had probable cause to arrest appellant for a gun-permit violation, we must examine the totality of the circumstances.

Here, police stopped appellant immediately after receiving a report that a crime had just been committed with a firearm by a tall, black male with a black hooded sweatshirt who was last seen running near 22nd and Emerson Avenue North. Police saw appellant, who is black, tall, and was wearing a black hooded sweatshirt, running down the street and into an alley, a block from the location of the report. As police stopped appellant and ordered him to the ground, they discovered that he had a loaded pistol in his sweatshirt pocket.

We conclude that, for several reasons, when police stopped and detained appellant, they could have drawn a reasonable inference, based on their observations and information, that appellant did not possess a permit for the pistol he was carrying. First, the gun-permit statute requires that a person who wishes to obtain a permit must complete an application and present evidence of training in the safe use of a pistol. Minn. Stat. § 624.714, subds. 2, 2a (2006). Appellant's action of running in a residential neighborhood carrying a loaded pistol in his sweatshirt pocket is inconsistent with the behavior of a person who has successfully completed gun-safety training and obtained a permit. Further, police officers are entitled to evaluate a situation based on their training and experience. *State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983); *State v. Uber*, 604 N.W.2d 799, 801 (Minn. App. 1999). Here, the arresting officer observed appellant running and carrying a loaded pistol in his sweatshirt pocket. The record does not show

that appellant claimed to have a permit to carry the pistol. These circumstances justified the officer's reasonable belief that appellant had not obtained a permit to carry the gun. *Cf. State v. Balenger*, 667 N.W.2d 133, 138 (Minn. App. 2003) (concluding that an anonymous tip that the defendant was armed provided reasonable suspicion to conduct an investigative stop when the officer believed that his safety and the safety of others was threatened), *review denied* (Minn. Oct. 21, 2003). Thus, under the totality of the circumstances, police had a basis to reasonably believe that appellant had committed the offense of carrying a pistol without a permit, and they had probable cause to arrest him for that offense.

As discussed above, we do not decide this case based on the application of *Timberlake*. But we do note that the supreme court in *Timberlake* declined to address whether its holding extended to determinations of probable cause to arrest, rather than the "less-demanding" standard of reasonable suspicion to conduct a *Terry* stop. *Timberlake*, 744 N.W.2d at 392 n.2, 393. We thus caution that an overly broad reading of *Timberlake* may conflate the differing standards of reasonable suspicion and probable cause. *See id.* at 393. And we are not prepared to accept the state's argument that *Timberlake* stands for the proposition that an affirmative defense can never be part of a probable-cause determination. But we need not address this broader issue.

Appellant also argues that an interpretation of *Timberlake* that carrying a gun presumptively indicates illegal activity and provides probable cause to arrest violates the Second Amendment to the United States Constitution. *See District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). In *Heller*, the United States Supreme Court determined

that "the Second Amendment confer[s] an individual right to keep and bear arms." *Id*. at 2799. But because appellant did not raise this argument before the district court, we need not address it. *See State v. Barnes*, 618 N.W.2d 805, 810–11 (Minn. App. 2000) (stating that this court will generally not address constitutional claims not raised in district court), *review denied* (Minn. Jan. 16, 2001). Even if we were to consider this issue, this court has recently held that Minnesota's ineligible-person-in-possession-of-a-firearm statute does not infringe on a person's Second Amendment rights because the Second Amendment is not incorporated in the Due Process clause, so as to be enforceable against the states. *State v. Turnbull*, 766 N.W.2d 78, 80 (Minn. App. 2009). If we were to apply the reasoning in *Turnbull* to this case, appellant's challenge to the gun-permit statute would fail because the Second Amendment has not been determined to be enforceable against the State of Minnesota.

On this record, we conclude that the state presented sufficient evidence to sustain a determination that probable cause existed to arrest appellant for the offense of possessing a pistol without a permit. Accordingly, the district court did not err by denying appellant's motion to suppress.

Appellant has also submitted a pro se supplemental brief asserting several additional arguments. We have carefully reviewed his claims in light of the record before the district court and determine these arguments to be without merit.

Affirmed.

STAUBER, Judge, dissenting

I respectfully dissent. I take issue with the determination that there was probable cause to arrest appellant for possessing the pistol without a permit. Based on the plain language of the permitting statute, probable cause for this offense does not exist until law enforcement asks whether a suspect possesses a valid permit for the weapon.

Minnesota's gun-permitting statute prohibits a non-peace officer from "carr[ying], hold[ing], or possess[ing] a pistol . . . in a public place without first having obtained a permit to carry the pistol." Minn. Stat. § 624.714, subd. 1a (2006). A permit holder must carry the permit and government-issued identification "at all times when carrying a pistol and must display the permit card and identification document upon lawful demand by a peace officer." Minn. Stat. § 624.714, subd. 1b (2006).[1]

When Minn. Stat. § 624.714 is read as a whole, its plain language indicates that possession of a pistol in a public place without having obtained a permit, absent certain exceptions not relevant here, is prohibited, and that a person who holds a permit must display the permit and proper identification "upon lawful demand by a peace officer." *Id.* Therefore, the statute imposes a requirement that police make a "lawful demand" for a person's permit to carry a pistol in a public place before making a probable-cause determination to arrest for that offense. Otherwise, the language "upon lawful demand" would be meaningless in the context of the statute as a whole.

[1] Violation of subdivision 1a is a gross misdemeanor; violation of subdivision 1b is a petty misdemeanor. Minn. Stat. § 624.714, subds. 1a, 1b (2006).

The state argues that the supreme court's recent decision in *State v. Timberlake*, 744 N.W.2d 390 (Minn. 2008) is controlling. But *Timberlake* only addressed whether the police had a reasonable, articulable suspicion to conduct a *Terry* stop. It did not address the standard required to support a determination of probable cause to arrest a person for a suspected violation of the gun-permitting statute. An arrest, like a search, implicates a person's Fourth Amendment rights to be free from search and seizure to a greater degree than a brief investigatory stop. *Cf. State v. Dickerson*, 481 N.W.2d 840, 846 (Minn. 1992) (holding that no "plain feel" exception to warrant requirement exists, and after it became apparent during *Terry* frisk that defendant had no weapon, "[a]ny further intrusion into the defendant's privacy required a warrant or probable cause to arrest"), *aff'd sub. nom Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130 (1993). Thus, the state's argument conflates the higher, reasonable-probability standard for probable cause to arrest with the "less-demanding" reasonable-suspicion determination. *Timberlake*, 744 N.W.2d at 393. By enacting the Minnesota Citizens' Personal Protection Act in 2003, the legislature authorized persons to carry pistols as long as they satisfied the statutory requirements for obtaining and possessing a permit. *See* Minn. Stat. § 624.714 (Supp. 2003). Under the state's interpretation of *Timberlake*, police would be allowed to arrest *any* person with a gun—without ever demanding production of a permit, as the statute requires—based on a police officer's mere suspicion that the gun holder has no permit. I reject the state's invitation to engage in such a radical departure from established Fourth Amendment jurisprudence without explicit direction from our supreme court. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (stating that supreme court

or legislature, rather than this court, has task of extending existing law), *review denied* (Minn. Dec. 18, 1987).

Requiring police to demand production of a permit also comports with the supreme court's statement in *Paige* that "[a] defendant ha[ve] the immediate opportunity to present his permit, if he has one, and thus avoid prosecution under the statute. There is nothing inherently unfair in requiring persons charged under the statute to present their permits." *State v. Paige*, 256 N.W.2d 298, 303 (Minn. 1977). Thus, when determining whether probable cause exists to arrest a person for a gun-permitting violation, it is reasonable to require the police to demand a permit, and thereby provide the suspect with an "immediate opportunity to present [that] permit" in order to avoid arrest. *See id*. Although under *Paige* it is not "inherently unfair" to require that a person present a permit on demand, it may well be "inherently unfair" to allow police to arrest that person without giving him an opportunity to present his permit. *Id*.

Obviously, police need not always preliminarily demand a permit. When conducting a valid stop, police may briefly detain a suspect to investigate a crime, particularly if a suspect is believed to be armed, because officer safety and protection of the public may require immediate action to secure the weapon. *See In re G.M.*, 560 N.W.2d at 692 (stating that once police have reasonable suspicion to stop a suspect, they may conduct a pat-down search without probable cause or a warrant if they believe the suspect is armed). Nor must police demand a weapons permit if, under the totality of the circumstances, they have probable cause to arrest a person for a different offense. Appellant does not argue that police lacked reasonable suspicion to detain him initially

for investigation regarding the robbery. But that does not negate the "lawful demand" requirement under Minn. Stat. § 624.714, subd. 1b. Failure to do so here meant that the police had no probable cause to arrest appellant for a permitting offense.

Consistent with a plain reading of the gun-permitting statute, Fourth Amendment principles, and the supreme court's language in *Paige*, the police must explicitly give a person suspected of a gun-permitting violation "the immediate opportunity to present his permit" before determining that probable cause exists to arrest him for that offense.

In appellant's case, this conclusion is especially warranted. Appellant was never charged with a permitting violation. The record does not show that he was ever asked whether he had a permit to carry the pistol he possessed, and it does not, in fact, indicate whether appellant had a permit. As appellant's counsel noted at oral argument, the police could have alleviated any concerns about the legality of appellant's possession of the pistol by simply asking him whether he carried a valid permit for the weapon. Because the record does not show that police demanded of appellant whether he had a permit for the pistol he was carrying, they lacked probable cause to arrest him for a gun-permitting offense (or any other offense), and appellant's conviction should be reversed.