STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2148

State of Minnesota,
Respondent,

vs.

Ron An,
Appellant.

Filed January 19, 2010
Affirmed
Hudson, Judge

Olmsted County District Court
File No. 55-CR-07-416

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

Mark A. Ostrem, Olmsted County Attorney, Jeffrey D. Hill, Assistant County Attorney, Government Center, Rochester, Minnesota (for respondent)

Marie Wolf, Interim Chief Public Defender, Lydia Villalva Lijo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Shumaker, Judge.

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

HUDSON, Judge

On appeal from his conviction of several counts of controlled-substance crime, possession of a pistol, and receiving stolen property, appellant argues that the district

court abused its discretion in denying his motion for a suppression hearing and that the evidence is insufficient to support his conviction of first-degree controlled-substance crime. Because the district court did not abuse its discretion in refusing to hold a suppression hearing after the state had rested, when appellant previously waived such a hearing, and because the evidence is sufficient to support the jury verdict, we affirm.

FACTS

In late December 2006, Rochester police received information from a confidential reliable informant that appellant Ron An was selling and in possession of cocaine and marijuana. The police determined that appellant was a convicted felon, on probation, and had a revoked driver's license. On January 10, 2007, probation officers and Rochester police officers conducted surveillance of appellant's residence. They knocked on the door but received no answer. The officers left the residence, leaving behind an officer to continue surveillance.

At some point, the remaining officer informed the other officers that a female, later identified as appellant's girlfriend, and a child had arrived in a small white vehicle and entered the residence. Appellant's girlfriend came back out, placed the child in the backseat of the vehicle, and got in the driver's seat. Appellant then exited the residence and got into the front passenger seat of the vehicle. The remaining officer and other officers followed the vehicle to St. Mary's Hospital, where appellant's girlfriend exited the vehicle and went inside. Appellant moved into the driver's seat and began to drive away from St. Mary's. An Olmsted County deputy, one of the officers following appellant, contacted a Rochester police officer to make a traffic stop, because appellant

was driving with a revoked driver's license. The deputy followed appellant through traffic and observed appellant reaching over to the passenger seat, lift up what appeared to be a jacket, and repeatedly move his arm in the passenger seat area manipulating something. After the vehicle was stopped, appellant was asked for his driver's license. Appellant initially reached over to the passenger side, but then he looked back up and said he did not have a license. The car came back as registered to appellant's girlfriend, and appellant was ordered out of the vehicle. Appellant was dressed in a tee-shirt and shorts in 20-degree weather, but he said that he did not want the jacket on the passenger seat. The arresting deputy testified that as the stop continued, appellant became more agitated and stated "you can search me, but what's not mine is not mine." The arresting deputy became uncomfortable with appellant's actions and placed him in the squad car.

Other officers arrived at the scene, and a probation search of the vehicle was conducted. A jacket on the front passenger seat contained appellant's Minnesota identification card, a small amount of crack cocaine, and a small amount of marijuana. In the glove compartment, officers found a napkin around a small plastic bag containing white powder, later identified as cocaine. The cocaine in the bag weighed 13.033 grams. A small electronic scale with white residue, which tested positive for cocaine, was also found in the glove compartment. The vehicle was taken to the law enforcement center garage, where it was searched further, and police obtained a warrant to search appellant's trailer-residence.

Police then conducted a search of appellant's trailer. Appellant told police that he had moved to the trailer recently and that he lived there alone. During the search, officers

found a can of WD40 with a false bottom that contained methamphetamine weighing 3.168 grams. A latent fingerprint matched appellant's fingerprints. Officers also found a loaded nine-millimeter long gun in the closet, additional ammunition, and a handgun. In the bathroom, officers found a baggie containing nine individually packaged pieces of crack cocaine with a combined weight of 3.651 grams. In the kitchen, officers found a digital scale, two individually wrapped pieces of cocaine weighing 0.828 grams, and sandwich baggies similar to those the cocaine was packaged in, one of which had a missing corner. Officers also found a pair of pants with $591 in the pocket. When asked where he was getting his "stuff" from, appellant indicated that he would talk if offered a deal.

Appellant was charged by complaint with six offenses: (1) first-degree controlled-substance crime (cocaine sale); (2) second-degree controlled-substance crime (cocaine possession); (3) possession of a pistol within ten years of conviction for a violent crime; (4) fifth-degree controlled-substance crime (methamphetamine possession); (5) receiving stolen property; and (6) theft of a firearm.

On March 20, 2007, with appellant present, appellant's attorney waived the omnibus hearing, and appellant entered a not-guilty plea. At a hearing on November 20, 2007, appellant's counsel informed the district court that appellant had hired new private counsel, and the hearing was continued for one week to provide the new attorney an opportunity to prepare for an omnibus hearing. At the hearing one week later, appellant's new attorney was not present, and no certificate of representation had been filed. Appellant again indicated that he wanted a speedy trial and wanted to waive omnibus. At

that point, appellant's counsel again waived omnibus. At the January 30, 2008 status hearing, appellant appeared with his new attorney, who requested additional time to review the case and discuss potential motions with appellant. The district court then set a new status hearing date for February 4, 2008. At the February 4, 2008 status hearing, appellant's new counsel entered a speedy-trial demand but made no other motions. At a pretrial conference on March 20, 2008, the state informed the court that "it sounds like the defense is going to be filing some sort of suppression motion." Substitute counsel for appellant stated that he did not know if a motion would be forthcoming. The district court noted that it did not intend to hear omnibus issues on the day of trial, but gave appellant until noon the next day to file any motions. No motion was filed by that deadline.

At the beginning of trial on March 24, 2008, appellant's counsel indicated that he wanted to file a motion regarding the evidence found in the trailer-residence and that he would file the motion over the lunch break. No motion was filed by that time. After the state rested on March 25, 2008, appellant's attorney stated that he had promised his client that he would file a suppression motion but had been forgetful, and asked permission to file the motion at that point. The district court allowed the motion, and the state objected to the motion as untimely and previously waived. The district court made no ruling on the motion beyond noting that the issue was waived at the omnibus hearing. The motion challenged the reasonable articulable suspicion for the initial traffic stop and alleged that there was "no probable cause or nexus to the original traffic stop and the house searched by police."

The district court granted appellant's motion for judgment of acquittal on the charge of receiving stolen property, and the remaining charges were submitted to the jury. Appellant was found guilty of the five remaining charges and sentenced to 94 months for first-degree controlled-substance crime and a consecutive mandatory minimum term of 60 months for felon in possession of a firearm. This appeal follows.

D E C I S I O N

I

Appellant argues that the district court abused its discretion by denying appellant's motion for a suppression hearing after he had previously waived an omnibus hearing. The state argues that the district court did not err in denying the motion because appellant had waived an omnibus hearing and because the motion was untimely. Appellant now claims that the search of the vehicle was an unreasonable search in violation of the Fourth Amendment.

The district court has inherent authority to decide motions to reconsider an omnibus ruling, and this court will not reverse a district court's decision not to reopen an omnibus hearing absent an abuse of discretion. *See State v. Papadakis*, 643 N.W.2d 349, 356–57 (Minn. App. 2002).

A motion to suppress evidence must be raised at an omnibus hearing. *State v. Brunes*, 373 N.W.2d 381, 386 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985); *see also* Minn. R. Crim. P. 11 cmt. (stating that a motion to suppress evidence should be addressed at the omnibus hearing). "This is necessary to give the state the opportunity to present evidence to refute appellant's claims." *Brunes*, 373 N.W.2d at 386. "[A] pretrial

motion to suppress should specify, with as much particularity as is reasonable under the circumstances, the grounds advanced for suppression in order to give the state as much advance notice as possible as to the contentions it must be prepared to meet at the hearing." *State v. Needham*, 488 N.W.2d 294, 296 (Minn. 1992). A suppression issue not raised at the omnibus hearing is considered waived. *Brunes*, 373 N.W.2d at 386; *see also State v. Lieberg*, 553 N.W.2d 51, 56 (Minn. App. 1996) (holding that failure to raise constitutional challenges to evidence at omnibus waives those challenges). When a defendant does not plead guilty, he must either waive or demand a hearing as provided by Minn. R. Crim. P. 11.02 on the admissibility of evidence at trial obtained by search. Minn. R. Crim. P. 8.03.

From a review of the facts surrounding the late motion to suppress, it is apparent that the district court gave appellant numerous opportunities to file a suppression motion before trial, but no suppression motion was filed until after the state rested. Appellant also repeatedly waived omnibus hearings. A motion to suppress must be filed at the omnibus hearing, and failure to file one at the appropriate time constitutes waiver. *Brunes*, 373 N.W.2d at 386. Therefore, the district court did not abuse its discretion by not reopening the omnibus issues and refusing to suppress the evidence.

Furthermore, the argument raised now in this appeal—challenging the search of the car—was not raised in the late motion filed in district court. That motion referred only to the initial *stop* of the car and the search of appellant's home, not the search of the car. A reviewing court will not decide issues, including constitutional questions, raised for the first time on appeal unless justice requires consideration and doing so would not

unfairly surprise a party to the appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). By waiving the vehicle-search issue at omnibus, appellant deprived the state of the opportunity to establish an adequate factual record of the search because it was not an issue at trial. The record on that issue is therefore incomplete, and considering it on appeal is not in the interests of justice.

II

Appellant argues that the evidence is insufficient to support his guilty verdict for first-degree controlled-substance crime because the state presented no evidence that he consciously exercised dominion and control over the cocaine found in the glove compartment of the car he was driving.

Review of a claim of insufficient evidence is "limited to ascertaining whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged." *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978). This court does not retry facts but takes the view of the evidence most favorable to the jury verdict and assumes that the jury believed the state's witnesses and disbelieved any contrary evidence. *Id.* If the jury could have reasonably found the defendant guilty, giving due regard to the presumption of innocence and the state's burden of proof beyond a reasonable doubt, the verdict will not be reversed. *State v. Pierson*, 530 N.W.2d 784, 787 (Minn. 1995).

To convict appellant of first-degree controlled-substance crime (sale), the state had to prove beyond a reasonable doubt that appellant unlawfully sold a mixture of 10 grams or more of cocaine on one or more occasions within a 90-day period. Minn. Stat.

§ 152.021, subd. 1(1) (2006). The definition of "sell" includes possession with intent "to sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture." Minn. Stat. § 152.01, subd. 15a (2006). Possession may be proved by evidence of either actual or constructive possession. *State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975). Constructive possession may be proved by evidence showing that the substance was found in a place under the defendant's exclusive control to which others normally do not have access, or if found "in a place to which others had access, there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it." *Id.* at 105, 226 N.W.2d at 611. While a conviction can be based solely on circumstantial evidence, such a conviction warrants stricter scrutiny than one based in part on direct evidence. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). "The circumstances proved must be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Bernhardt v. State*, 684 N.W.2d 465, 477 (Minn. 2004) (quotation omitted).

Here, over ten grams of cocaine were found in the glove compartment of the car driven by appellant. Because the cocaine was not in appellant's physical possession and the glove compartment was not under appellant's exclusive control, constructive possession needed to be shown by evidence that there is a strong probability that appellant was consciously exercising dominion and control over the cocaine. *See Florine*, 303 Minn. at 105, 226 N.W.2d at 611. Evidence showed that appellant was driving the vehicle when it was pulled over. The arresting deputy testified that he

observed appellant reach over to the passenger side of the vehicle and apparently lift up a jacket and manipulate something. Upon being asked for his driver's license, appellant initially reached toward the passenger side but then stopped and said that he had no license. Officers testified that, as the stop continued, appellant grew more nervous and agitated. During the search of the vehicle, cocaine and marijuana were found in the jacket on the passenger seat along with appellant's Minnesota identification card. In the glove compartment, officers found over 13 grams of cocaine and an electronic scale. A narcotics officer who participated in the search testified that this amount of cocaine was greater than a typical user amount and that electronic scales are often found in the possession of people who are selling illegal drugs. The arresting deputy testified that the street value of the cocaine found in the glove compartment would be between $1,000 and $1,300. No drugs or drug paraphernalia were found in any other area of the vehicle.

Appellant's girlfriend testified that she owned the car appellant was stopped in and that he had driven her car before. She testified that she did not allow others to drive her vehicle, that she did not have any drugs in the car, and that the jacket, scale, and drugs found in the vehicle were not hers. She testified that she was not using drugs, has never sold drugs, and knew nothing about the drugs or guns found at appellant's residence.

A search warrant executed at appellant's residence uncovered multiple additional packaged pieces of crack cocaine, methamphetamine, firearms, cash, baggies, and a digital scale similar to the one found in the glove compartment of appellant's girlfriend's vehicle. No paraphernalia for drug use was found at appellant's residence. Appellant's girlfriend also testified that she had never seen appellant use illegal drugs.

Taken in the light most favorable to the jury verdict, the evidence is sufficient to support the jury's verdict. The testimony of arresting officers and appellant's girlfriend support the inference that appellant maintained constructive possession over the cocaine found in the glove compartment. Furthermore, additional drugs were found in a jacket that also contained appellant's identification card; drugs, a scale, and weapons were found at appellant's residence. This other evidence also supports the inference that appellant at one time had physical possession of the cocaine in the vehicle and that appellant exercised dominion and control over it when it was found.

Affirmed.