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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-2011**

State of Minnesota,  
Respondent,

vs.

Antione Maurice Straub,  
Appellant.

**Filed February 2, 2010  
Reversed; motion denied  
Peterson, Judge**

Hennepin County District Court  
File No. 27-CR-07-114252

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

Susan L. Segal, Minneapolis City Attorney, Michelle Doffing Baynes, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Theodora K. Gaitas, Assistant Public Defender, St. Paul, Minnesota; and

Jane E. Maschka, Special Assistant Public Defender, Halleland Lewis Nilan & Johnson, Minneapolis, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Peterson, Judge; and Ross,  
Judge.

## **UNPUBLISHED OPINION**

**PETERSON**, Judge

In this appeal from a conviction of carrying a pistol without a permit, appellant argues that there was no probable cause to arrest him because there was no evidence that he had any connection with the pistol other than his mere presence in the vehicle where it was found. We reverse, and we deny appellant's motion to strike portions of respondent's brief.

### **FACTS**

Minneapolis Police Sergeant Donald Smulski was in a marked squad car when he saw a vehicle commit a minor traffic offense. When Smulski activated the squad car's red lights to pull the vehicle over, the driver did not immediately pull over, and Smulski saw the left rear passenger "making a motion like stuffing something under the seat." Smulski did not see anyone else in the vehicle do anything unusual.

There were five people in the vehicle, and from previous contacts, Smulski recognized the driver and two passengers to be gang members and knew that there had been shootings between their gang and a rival gang. Smulski did not recall having any previous contact with appellant Antione Straub, who was sitting in the right rear passenger seat. The driver did not have a driver's license, so Smulski removed the driver from the vehicle and pat-searched him for weapons. Smulski could see that the front-seat passenger had no weapons on her, so he allowed her to wait at the curb.

Two officers arrived to assist Smulski, and all three officers removed the three passengers from the back seat and pat-searched them. Smulski believed that there might

be a gun in the vehicle and wanted to make sure that the officers would not be fired on. The officers searched the vehicle and found a gun under the left rear passenger seat. Appellant was arrested and transported to jail, where he made an incriminating statement to police.

Appellant was charged with carrying a pistol without a permit in violation of Minn. Stat. § 624.714, subd. 1a (2006). Arguing that the officer lacked probable cause to arrest him, appellant moved to suppress his statement to police and recordings of phone calls that he made from the jail to his mother and brother. The district court denied the motion, and the case was tried to a jury, which found appellant guilty as charged. The district court sentenced appellant to one year in jail, with 335 days stayed, and placed him on probation for two years.

## **DECISION**

When determining whether there was probable cause for arrest, this court “independently reviews the facts to determine the reasonableness of the conduct of police.” *State v. Riley*, 568 N.W.2d 518, 523 (Minn. 1997); *see also State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999) (applying same standard on review of pretrial motion to suppress evidence). But we will not reverse the district court’s underlying factual findings unless they are clearly erroneous. *State, Lake Minnetonka Conservation Dist. v. Horner*, 617 N.W.2d 789, 795 (Minn. 2000).

A warrantless arrest is permissible if there is probable cause to believe that a felony has been committed and that the person arrested has committed that crime. Probable cause exists if a person of ordinary care and prudence would

entertain an honest and strong suspicion that a crime has been committed.

*State v. Albino*, 384 N.W.2d 525, 527 (Minn. App. 1986) (quotations and citation omitted); see Minn. Stat. § 629.34, subd. 1(c) (2008) (governing when peace officer may make arrest without warrant).

In *Albino*, this court held that police did not have probable cause to arrest a woman merely because the woman was a passenger in a truck where drugs were found in a closed container. *Albino*, 384 N.W.2d at 528. The same principle applies here. Appellant was merely found in suspicious circumstances. The district court did not identify a crime that appellant might have committed, but it appears that the court had in mind a possession crime related to the pistol found in the car.

A person, other than a peace officer, . . . who . . . possesses a pistol in a motor vehicle . . . without first having obtained a permit to carry the pistol is guilty of a gross misdemeanor. A person who is convicted a second or subsequent time is guilty of a felony.

Minn. Stat. § 624.714, subd. 1a (2008).

Appellant could have committed this offense if he was in possession of the pistol and did not have a permit. But the information available to the officer when he arrested appellant was insufficient to support an honest and strong suspicion that appellant possessed the pistol. Because appellant was not in actual possession of the pistol, the officer would have to have a basis for concluding that appellant was in constructive possession.

To prove constructive possession, the state must prove that:  
(1) the police found the item in a place under the defendant's

exclusive control to which other people did not normally have access, or (2) if the police found it in a place to which others had access, that there is a strong probability, inferable from the evidence, that the defendant was, at the time, consciously exercising dominion and control over it.

*State v. Porter*, 674 N.W.2d 424, 427 (Minn. App. 2004).

The police found the pistol in a place to which others had access, and there was no evidence from which the police could entertain an honest and strong suspicion that appellant was consciously exercising dominion and control over the pistol. *Cf.* Minn. Stat. § 609.672 (2008) (permitting factfinder to infer knowing possession of firearm by driver or person in control of automobile). Consequently, there was not probable cause to arrest appellant for possessing the pistol.

Because the warrantless arrest was improper and the record contains no evidence of any intervening circumstances that would have removed the taint of the illegal arrest, the district court erred in not suppressing the statement and phone calls that appellant made following his arrest. *See State v. Bergerson*, 659 N.W.2d 791, 797 (Minn. App. 2003) (explaining fruit-of-the-poisonous-tree doctrine); *Albino*, 384 N.W.2d at 528 (applying fruit-of-the-poisonous-tree doctrine).

Because there is no evidence in the record that appellant possessed the gun, other than the statement and phone calls that appellant made following the illegal arrest, it is not necessary to address the legality of the search that resulted in the discovery of the gun. Also, appellant moves to strike portions of respondent's brief that refer to a shooting glove being found during the search and to the color red being associated with the Bloods gang. Appellant contends that these references are not supported by any

evidence in the record. Because we have confined our analysis to the evidence in the record, we deny appellant's motion as unnecessary.

**Reversed; motion denied.**