STATE OF MINNESOTA
IN COURT OF APPEALS
A09-812

State of Minnesota,
Respondent,

vs.

Kareem Karel Mitchell,
Appellant.

Filed April 6, 2010
Affirmed
Larkin, Judge

Ramsey County District Court
File No. 62-CR-08-6220

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, Nathan T. Cariveau, (certified student attorney), St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Wright, Judge; and Worke, 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 third-degree controlled-substance possession, arguing that the district court erred by denying his motion to suppress narcotics discovered during a search of his person. Appellant claims that the evidence was the product of an illegal seizure. Appellant also challenges his sentence, arguing that the sentence violates the parties' sentencing negotiation. Because appellant's seizure was lawful and he has not established a basis for sentence modification, we affirm.

FACTS

On April 24, 2008, Saint Paul police officers were conducting surveillance from a parked, unmarked police vehicle near a business in Saint Paul. The surveillance vehicle was parked on the street, with a view towards the business's parking lot. The building occupied by the business is known by the Saint Paul Police Department as a "problem property." As of April 24, there had been ten police case numbers in 2008 associated specifically with the property and 49 police case numbers associated with the intersection the building is on. Many of these cases involved street-level drug deals.

One of the officers on the scene was Officer Thomas Tanghe. Officer Tanghe has more than ten years of experience as a police officer and has observed hundreds of street-level drug deals. He testified at the suppression hearing, and the district court found his testimony credible. Officer Tanghe testified that he observed a vehicle, later determined to be driven by appellant Kareem Karel Mitchell, parked on the east end of the parking lot. The windows of the vehicle were tinted, and Officer Tanghe could not see inside the

vehicle. A second vehicle was parked on the west end of the parking lot. Two people were seated inside the second vehicle. A person standing in the parking lot walked up to the second vehicle, spoke to the passenger, and then walked toward the middle of the parking lot. The individual nodded his head in the direction of Mitchell's vehicle.

Immediately after the individual nodded his head, Mitchell exited the lot, drove around the block, and re-entered the parking lot through a different entrance. As the vehicle drove around the block, Officer Tanghe observed that the vehicle had no visible front license plate.[1] After re-entering the lot, Mitchell stopped the vehicle, but did not pull into a parking spot. Instead, the vehicle idled near the entry, in a location that could obstruct traffic in the parking lot. Based on his training and experience, Officer Tanghe thought this behavior was suspicious and believed that it was a set-up for a street-level drug transaction.

Officer Tanghe and Officer Tony Holter approached Mitchell's vehicle while two other officers approached the second vehicle. Officer Holter asked Mitchell for his driver's license, and Mitchell told him that his license had been cancelled. Officer Holter determined that Mitchell's driver's license was cancelled as inimical to public safety, and he began to place Mitchell under arrest. Officer Holter searched Mitchell and found

[1] Minn. Stat. § 169.79, subd. 6 (2006) requires the display of a license plate at both the front and rear of a vehicle. However, the district court found that Officer Tanghe later observed an auto-dealer sticker in the rear window of Mitchell's vehicle. We read this finding to indicate that the vehicle had a temporary vehicle permit, as authorized under Minn. Stat. § 168.092 (2006). Therefore, the lack of a front license plate in no way impacts our holding in the present case.

narcotics in Mitchell's pants pocket. Mitchell was subsequently charged with a third-degree controlled-substance crime under Minn. Stat. § 152.023, subd. 2(1) (2006).

Mitchell moved to suppress the evidence.[2] At the suppression hearing, defense counsel indicated that Mitchell was challenging the "stop" and the officer's request to see his driver's license. At the end of the hearing, the state provided oral argument regarding the legality of Mitchell's seizure. Defense counsel requested time to submit a written argument, which the district court granted, but then failed to submit any argument. The district court denied Mitchell's motion to suppress, concluding that his seizure was supported by reasonable articulable suspicion. Mitchell agreed to submit the case to the district court on stipulated facts, preserving his right to appeal the seizure issue under Minn. R. Crim. P. 26.01, subd. 4.[3] The district court found Mitchell guilty of third-degree controlled-substance possession.

In exchange for Mitchell's agreement to proceed with a stipulated-facts trial, the state agreed that Mitchell would receive a sentence that was six months less than the "low end of the box" if found guilty. The parties agreed that the final presumptive sentence would be determined by a presentence investigation (PSI). A PSI was completed and indicated that the presumptive-sentence range was 52-71 months. Pursuant to the

[2] Our review of the district court file does not reveal a written motion to suppress.

[3] The procedure, formally known as a *Lothenbach* proceeding, is a proceeding in which a defendant submits to a court trial on stipulated facts without waiving the right to appeal pretrial issues. *See State v. Lothenbach*, 296 N.W.2d 854, 858 (Minn. 1980) (approving this procedure). "Minn. R. Crim. P. 26.01, subd. 4, effective April 1, 2007, implements and supersedes the procedure authorized by [*Lothenbach*]." *State v. Antrim*, 764 N.W.2d 67, 69 (Minn. App. 2009).

agreement, the district court sentenced Mitchell to a term of 46 months. This appeal follows.

D E C I S I O N

I.

"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).

Mitchell does not challenge any of the district court's findings of fact. But Mitchell argues that the district court erred by denying his motion to suppress, because (1) Officer Tanghe's decision to stop his vehicle was based on a preconceived hunch rather than reasonable articulable suspicion and was therefore pretextual; (2) the police impermissibly expanded the scope and duration of the stop by ordering Mitchell to provide identification and exit his vehicle; and (3) a custodial arrest was not justified for Mitchell's offense of driving after cancellation.

Generally, we will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Mitchell's first two arguments fall within the scope of the issues that he raised at the suppression hearing (i.e., the "stop" and the officer's request to see his driver's license). But Mitchell did not argue that a custodial arrest was impermissible for the gross-misdemeanor offense of

driving after cancellation below. We therefore will not consider this argument on appeal. *See id.* (stating that the court of appeals may decline to address matters not argued to and considered by the district court).

A. Reasonable Articulable Suspicion

The United States and Minnesota Constitutions prohibit unreasonable search and seizure by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A police officer may, however, initiate a limited investigative stop without a warrant if the officer has reasonable, articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968); *see also State v. Pike*, 551 N.W.2d 919, 921-22 (Minn. 1996) (noting that an investigative stop of a vehicle is lawful if the state can show that the officer had a "particularized and objective basis" for suspecting criminal activity (quotation omitted)). Whether police have reasonable suspicion to conduct an investigatory stop depends on the totality of the circumstances, and a stop is not justified if it is "the product of mere whim, caprice, or idle curiosity." *In re Welfare of M.D.R.*, 693 N.W.2d 444, 448 (Minn. App. 2005) (quotation omitted), *review denied* (Minn. June 28, 2005). The court may consider the officer's experience, general knowledge, and observations; background information, including the time and location of the stop; and anything else that is relevant. *Appelgate v. Comm't of Pub. Safety*, 402 N.W.2d 106, 108 (Minn. 1987).

The factual basis required to justify an investigative seizure is minimal. *Magnuson v. Comm't of Pub. Safety*, 703 N.W.2d 557, 560 (Minn. App. 2005).

> There is no fixed or definitive test for the reasonableness of an investigatory stop. Rather, we must balance the need for the stop against the invasion the stop entails. There can be no rational disagreement that an investigatory stop is necessary when the totality of the circumstances points to some observable "unusual conduct * * * [that leads the officer] reasonably to conclude in light of his experience that criminal activity may be afoot." But the officer must articulate specific facts that, "taken together with rational inferences from those facts," reasonably justify the stop. The officer need not be absolutely certain of the possibility of criminal activity, but he cannot satisfy the test of reasonableness by relying on an "inchoate and unparticularized suspicion or 'hunch.'"

State v. Schrupp, 625 N.W.2d 844, 846-47 (Minn. App. 2001) (citations omitted), *review denied* (Minn. July 24, 2001). The police may seize a person so long as the facts "support at least one inference of the possibility of criminal activity." *Id*. at 847-48.

The state points to the following facts in support of a finding of reasonable suspicion. The stop occurred in a location known for criminal activity, including street-level drug dealing. Officer Tanghe has observed "hundreds" of street-level drug deals. Based on his experience, Officer Tanghe concluded that the head-nod communication between the individual on foot and Mitchell, immediately following the apparent communication between the individual and the occupant of the second vehicle, was consistent with an attempt to "make an arrangement or possibly call[] in the source of narcotics." Immediately after this signal, Mitchell drove out of the parking lot, re-entered the lot, and idled the car in a location that could impede traffic. Based on these observations, Officer Tanghe believed that a street-level drug transaction was about to occur.

When deciding whether a seizure was justified, courts review the totality of the circumstances and recognize that experienced police officers may make inferences and deductions that can elude an untrained person. *State v. Richardson*, 622 N.W.2d 823, 825 (Minn. 2001). And while each of the individual facts above could be consistent with innocent activity, "'innocent' factors in their totality, combined with the investigating officer's experience in apprehending drug traffickers, can be sufficient bases for finding reasonable suspicion." *State v. Martinson*, 581 N.W.2d 846, 852 (Minn. 1998). Officer Tanghe was not operating on mere whim or idle curiosity. The observed behavior was suspicious to a trained officer and reasonably indicative of a possible drug transaction. Under these facts, there was reasonable, articulable suspicion for the investigative stop. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (noting that presence in high-crime area, when combined with other suspicious conduct, is sufficient to justify an investigative stop).

Mitchell claims that his seizure was pretextual, arguing that there was no legitimate basis for his seizure and that it was based solely on Officer Tanghe's "hunch" that criminal activity was afoot. But we have determined that Officer Tanghe articulated reasonable suspicion of criminal activity—more than a hunch—that justified an investigatory seizure. And an officer's subjective reasoning is irrelevant when there is an objective basis for a seizure. *See State v. Everett*, 472 N.W.2d 864, 867 (Minn. 1991) ("'Legal' pretexts–i.e., activities which can be legally justified if the actual reason for the conduct is put aside–consistently pass constitutional muster."). We hold that the initial investigative seizure was lawful.

B. Expansion of the Scope or Duration of the Seizure

Mitchell argues that the officers impermissibly expanded the scope and duration of the stop when they ordered Mitchell to provide identification. "[T]he scope of the police investigation during a detention which follows a lawful stop must be 'strictly tied to and justified by the circumstances which rendered [the] initiation [of the investigation] permissible.'" *State v. Pleas*, 329 N.W.2d 329, 333 (Minn. 1983) (quoting *Terry*, 392 U.S. at 19, 88 S. Ct. at 1878 (other quotation omitted)). "[T]he detention of the person stopped may not continue indefinitely but only as long as reasonably necessary to effectuate the purpose of the stop." *State v. Blacksten*, 507 N.W.2d 842, 846 (Minn. 1993).

"It is clear that there are several investigative techniques which may be utilized effectively in the course of a *Terry*-type stop. The most common is interrogation, which may include both a request for identification and inquiry concerning the suspicious conduct of the person detained." *Michigan v. Summers*, 452 U.S. 692, 700 n.12, 101 S. Ct. 2587, 2593 n.12 (1981) (quoting 3 W. LaFave, *Search and Seizure* § 9.2 (1978)). Requesting a stopped driver to show his license is standard procedure in stop cases. *State v. Schinzing*, 342 N.W.2d 105, 109 (Minn. 1983). We find no constitutional violation in Officer Holter's request that Mitchell provide identification during the investigative seizure.

In support of his argument that the officers were not authorized to request that Mitchell provide identification, Mitchell relies on an excerpt from the United States Supreme Court case of *Delaware v. Prouse*, in which the Court stated

> *except* in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

440 U.S. 648, 663, 99 S. Ct. 1391, 1401 (1979) (emphasis added). *Prouse* in no way limits an officer's ability to ask a driver for identification during a lawful stop. Because there was reasonable suspicion that Mitchell was subject to seizure for violation of law, the limitation discussed in *Prouse* does not apply in the present case.

Mitchell also argues that Officer Holter impermissibly expanded the scope of the investigative seizure when he directed Mitchell to step out of his vehicle. But "a police officer may order a driver out of a lawfully stopped vehicle without an articulated reason." *State v. Askerooth*, 681 N.W.2d 353, 367 (Minn. 2004) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S. Ct. 330, 330 (1977)). Because the stop of Mitchell's vehicle was lawful, the officers were permitted to order Mitchell–the driver–out of the vehicle.

Because Mitchell's seizure was supported by articulated reasonable suspicion of criminal activity and the police did not impermissibly expand the scope or duration of the seizure, the district court did not err by denying Mitchell's motion to suppress.

II.

We next address Mitchell's challenge to his sentence. Mitchell agreed to a stipulated-facts trial, waiving his right to a jury trial, pursuant to Minn. R. Crim. P. 26.01, subd. 4. In exchange, the state agreed to recommend a sentence six months less than the

"low end of the box" on the Sentencing Guidelines. Mitchell argues that the 46-month sentence imposed by the district court violated the parties' negotiation, "as it was explained to him and as he understood it," and that his sentence should be reduced to 43 months. The state contends that Mitchell is not entitled to relief because he was not promised a sentence of 43 months, citing *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.") (quotation omitted)).

Mitchell does not cite legal authority in support of his argument. And because Mitchell did not plead guilty, the state's reliance on *Brown* is misplaced. An agreement to resolve a criminal charge by way of a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 4, is fundamentally different from an agreement to plead guilty, regardless of the labeling used by the parties and district court. *See* Minn. R. Crim. P. 26.01, subd. 4 (providing that the "defendant must maintain the plea of not guilty" and "must stipulate to the prosecution's evidence in a trial to the court"); *State v. Verschelde*, 585 N.W.2d 429, 432 (Minn. App. 1998) ("The *Lothenbach* stipulation of facts, even if termed a 'plea,' leaves no room for an agreement as to sentence or other disposition."), *aff'd on other grounds*, 595 N.W.2d 192 (Minn. 1999).

Mitchell argues that because he was giving up constitutional rights, "his understanding of the negotiation is especially significant." But Mitchell cites no legal authority to support his vague assertion that we should treat the state's failure to comply with a sentencing promise made in the context of a defendant's agreement to proceed by

way of a stipulated-facts trial similarly to the state's failure to comply with a sentencing promise made in the context of a defendant's agreement to plead guilty. Normally, "[a]n assignment of error in a brief based on 'mere assertion' and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection." *State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006), *aff'd on other grounds*, 728 N.W.2d 243 (Minn. 2007).

Moreover, the record does not support Mitchell's argument. He argues that "it is only fair to give him the 43-month sentence that was prominently used as the sentence he was likely to receive." But the record demonstrates that Mitchell understood that there was no guarantee that he would receive a 43-month sentence. The district court addressed Mitchell regarding the parties' sentencing proposal, explaining:

> And, at this point, it would be important for Mr. Mitchell to understand that while the State is accepting the six-month off the low end of the box, until the Presentence Investigation is done, we don't know for sure what the calculation of your criminal history points will amount to. So, I understand the offer to be or the State's willingness to accept the Defense Offer, six months off the low end of the box, whatever it is. We think it is 49, but it might be a different number, up or down, depending on what comes out of the Presentence Investigation.

Mitchell stated that he understood. The district court explained the situation to Mitchell a second time, stating

> you would be ordered to serve six months off the low end of the box on the State Sentencing Guidelines whatever that turns out to be. I understand that you and your attorney believe at this point it's 49 months minus six, being 43 months. But, as we just discussed, preparation of the Presentence Investigation will actually determine what that is.

Mitchell ignores the fact that he was informed, and he acknowledged, that his sentence would be determined by the PSI and that the 43-month term referenced in parties' on-the-record discussion was not determinative. And Mitchell agrees that the district court based its sentence on the correct presumptive-sentence range (i.e., 52-71). In sum, Mitchell fails to demonstrate a basis—either in the law or in the record—for sentence modification. We therefore affirm the sentence imposed by the district court.

Affirmed.

Dated:

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Judge Michelle A. Larkin