STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1120

State of Minnesota,
Respondent,

vs.

Erika Lynn Diede,
Appellant.

Filed April 20, 2010
Affirmed
Hudson, Judge

Otter Tail County District Court
File No. 56-CR-08-1333

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

David J. Hauser, Otter Tail County Attorney, Ryan C. Cheshire, Assistant County Attorney, Fergus Falls, Minnesota (for respondent)

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

Considered and decided by Hudson, Presiding Judge; Connolly, Judge; and Johnson, Judge.

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

HUDSON, Judge

Appellant challenges her conviction of fifth-degree controlled-substance crime, arguing that the district court erred by failing to suppress methamphetamine found during

a warrantless search of her person. Because police had a reasonable, articulable basis for seizing appellant, and the district court did not clearly err by finding that appellant voluntarily consented to the search, we affirm.

FACTS

Detective Rod Jensen of the West Central Drug Task Force Agency reported that he was conducting surveillance on the Fergus Falls residence of Jason Dean Hanson because police had probable cause to arrest Hanson for a controlled-substance offense. Jensen saw a vehicle pull up to the residence, and a short time later, two people, identified as Hanson and appellant Erika Lynn Diede, entered the vehicle and drove off. Jensen followed the vehicle, which appellant was driving, and conducted a stop after it pulled up at a different address.

Jensen saw Hanson open the passenger door, turn his legs out of the vehicle, and look in Jensen's direction. He saw Hanson move his right hand as if looking in his pocket for something and, a short time later, leave the vehicle. It appeared to Jensen that Hanson either dropped or threw something back onto the seat of the vehicle. Jensen then informed Hanson that he was under arrest. Jensen observed that appellant remained sitting in the car for about 30 seconds after Hanson's exit and appeared to be talking on the phone. When appellant exited the vehicle, Jensen told her that he "needed to speak with her." He asked appellant whether Hanson had thrown something into the vehicle; she told him that she did not see him throw anything.

Jensen then asked appellant what she had in her pockets. She stated that she had a cigarette pack and a lighter, producing the pack and the lighter in her hands. Jensen, who

reported that he knew from training and experience that illegal drugs are often kept in cigarette packs, asked if he could look inside the pack. Appellant told him that he could not.

Other officers arrived at the scene, and Hanson was placed in a squad car. Detective Mark Haberer, an agent with the West Central Minnesota Drug Task Force, approached the area where Jensen and appellant were standing. Haberer reported that he heard Jensen ask appellant whether Hanson had handed anything to her, or vice versa. Haberer also reported that Jensen stated that when he first contacted appellant, he had seen hand movement between Hanson and appellant, indicating that an exchange had taken place. Both officers reported that appellant kept her hands in her pockets, and Haberer reported that appellant "appeared to be very nervous [and] fidgety, [with] her voice quivering."

Haberer asked appellant if she would turn her pockets inside out, which she started to do. Jensen reported that Haberer asked appellant if she "had anything else," and she then produced the cigarette pack and flipped the top of it open. Haberer, but not Jensen, also reported that Jensen asked her to open the pack after Haberer arrived. Both officers reported that they saw the top of a small plastic baggie protruding from the pack. Appellant turned around and started crushing the pack; the officers placed her on the hood of the vehicle and retrieved the pack. Jensen retrieved the baggie, which contained a substance that later tested positive for methamphetamine.

The state charged appellant with fifth-degree controlled-substance crime, possession of methamphetamine, in violation of Minn. Stat. § 152.025, subd. 2(1) (2006).

Appellant moved to suppress the methamphetamine as the product of an illegal seizure and warrantless search and for dismissal based on lack of probable cause. The parties agreed to submit the matter on oral argument and a stipulated record of Jensen's and Haberer's reports.

The district court denied the motion to suppress. The district court concluded that appellant was seized when she was instructed not to leave the scene, but police properly expanded the scope of their investigation to the cigarette pack because appellant denied seeing Hanson throw or drop anything into the vehicle, and appellant appeared to be very nervous as she held her hands in her pockets.[1] The district court also concluded that appellant voluntarily consented to the search of the cigarette pack by her act of removing it from her pocket and opening the top.

Appellant waived her right to a jury trial and agreed to submit the case for a bench trial on a stipulated record under Minn. R. Crim. P. 26.01, subd. 4, preserving her right to appeal the suppression issue. The district court found appellant guilty of fifth-degree controlled-substance crime, possession of methamphetamine. The district court stayed imposition of sentence and placed appellant on probation for ten years. This appeal follows.

[1] The district court also determined that a seizure did not occur when police initially approached appellant's stopped vehicle. But because appellant has not challenged this determination on appeal, we need not address this issue.

D E C I S I O N

I

In reviewing a district court's order denying a motion to suppress evidence, this court conducts an independent review of the facts and determines, as a matter of law, whether the district court erred by refusing to suppress the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). In order to effect a lawful stop or seizure, police must have a particularized and objective basis that the person stopped is engaged in criminal activity. *State v. Anderson*, 683 N.W.2d 818, 822–23 (Minn. 2004). The officer must make an objective determination, based on the totality of the circumstances, and may draw inferences and deductions that may elude an untrained person, but may not rely on a mere "hunch" to justify a seizure. *State v. Cripps*, 533 N.W.2d 388, 391–92 (Minn. 1995).

Appellant argues that police illegally seized her because they lacked a particularized and objective basis to suspect her of criminal activity. She maintains that, under the facts contained in the police reports, the officers could have believed only that she witnessed Hanson's controlled-substance possession, not that she herself possessed a controlled substance.

But the police reports show that: (1) appellant was driving a vehicle with a passenger, Hanson, whom police had probable cause to arrest for a controlled-substance offense; (2) before Hanson exited the vehicle, a police officer observed him look at the officer and move his hand as if reaching into his pocket for something; (3) as Hanson exited the vehicle, the officer saw him toss something back into the vehicle; and

(4) appellant was the only other occupant of the vehicle. Based on these facts, police had a reasonable, articulable suspicion that appellant was engaged in the criminal activity of possessing a controlled substance.

Appellant maintains that in determining the legality of her initial seizure, the district court improperly relied on events that did not occur until after appellant was seized, such as appellant's denial to Jensen that Hanson had thrown anything into the vehicle and appellant's nervous appearance. But under the totality of the circumstances surrounding the seizure, even without these additional events, the officers had a sufficient objective basis to seize appellant.

Appellant also argues that, even if the initial seizure was valid, expanding its scope to a search of the cigarette pack was improper because police lacked a basis to believe that appellant was committing additional criminal activity by possessing drugs in the pack. *See State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002) (stating that "[e]xpansion of the scope of the stop to include investigation of other suspected illegal activity is permissible under the Fourth Amendment only if the officer has reasonable, articulable suspicion of other illegal activity"). But by the time police expanded the scope of the seizure, Jensen had reason to believe, based on his observations, that appellant might have lied to him about not seeing Hanson throw something into the car. Further, appellant was standing with her hands in her sweatshirt pockets, from which she produced a cigarette pack. Jensen knew from his training and experience that illegal drugs are often kept in cigarette packs, and appellant was acting very nervous. Therefore, under the totality of the circumstances, the officers could have reasonably inferred that

appellant may have possessed drugs in the cigarette pack, and a sufficient factual basis existed to expand the seizure to investigate the pack.

II

Appellant argues that she did not voluntarily consent to the search of the cigarette pack. This court subjects voluntary-consent claims to "'careful appellate review.'" *State v. Smallwood*, 594 N.W.2d 144, 155 (Minn. 1999) (quoting *State v. George*, 557 N.W.2d 575, 580 (Minn. 1997)). Whether consent was voluntary presents a factual question. *State v. Alayon*, 459 N.W.2d 325, 330 (Minn. 1990). This court will overturn a district court's finding of voluntary consent only if the finding was clearly erroneous. *Id.*

A search is constitutionally permissible when conducted pursuant to valid consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 2045 (1973). The state has the burden of proving, by a preponderance of the evidence, that consent was freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S. Ct. 1788, 1792 (1968); *Harris*, 590 N.W.2d at 102.

The concept of voluntariness reflects a balancing of the police interest in conducting investigations with the individual's constitutionally protected right to be free from unreasonable searches and seizures. *State v. Deszo*, 512 N.W.2d 877, 880 (Minn. 1994). Consent is voluntary if it is "the product of an essentially free and unconstrained choice by its maker," rather than the product of express or implied duress or coercion. *Schneckloth*, 412 U.S. at 225, 93 S. Ct. at 2047. On the other hand, consent is involuntary if it results from circumstances that overbear the consenting party's will and impair his or her capacity for self-determination. *Id.* at 233, 93 S. Ct. at 2051. Thus, a

defendant's consent has been determined voluntary when the record lacks evidence that police acted in an intimidating fashion, or dealt with the defendant any way other than professionally. *Smallwood*, 594 N.W.2d at 155; *see also United States v. Crowder*, 62 F.3d 782, 787 (6th Cir. 1995) (stating that a defendant must show "[not only] a subjective belief of coercion, but also some objectively improper action on the part of the police"). But a defendant's consent has been considered involuntary when, for example, an officer used his official authority to exert pressure by leaning over defendant's motorcycle, observing his wallet, and repeatedly asking to look at it. *George*, 557 N.W.2d at 580–81; *see also Deszo*, 512 N.W.2d at 881 (concluding that consent was involuntary when an officer placed the defendant in a squad car and engaged in a series of requests to examine his wallet while leaning over toward the defendant).

Consent need not be oral, but may be implied from a person's actions. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992). In determining whether voluntary consent was received, the court must consider the totality of the circumstances. *Deszo*, 512 N.W.2d at 880.

The district court found that, although the record differed as to whether appellant opened the top of the pack without command from either officer, or whether Jensen asked her to open the pack, based on all relevant circumstances, appellant voluntarily consented to the search. Although it is a close question, we conclude that the district court correctly determined that the state sustained its burden to show that appellant voluntarily consented to a search of the pack by removing it from her pocket, flipping it open and, however briefly, displaying its contents to the officers. Appellant may have subjectively felt some

pressure to produce the pack and its contents when she was questioned by both officers. But the record shows that both officers acted professionally and did not use deception or undue influence that would have critically impaired appellant's judgment relating to consent. And the possibility that Jensen may have asked appellant a second time to open the pack does not objectively show that police acted improperly, absent additional evidence of coercive actions such as leaning over appellant, displaying weapons, or otherwise attempting to intimidate her. *Cf. George*, 557 N.W.2d at 581 (considering officer's leaning over defendant as part of improper coercion to extract consent). We conclude, based on a careful review of the record, that the district court did not clearly err by determining that, under the totality of the circumstances, appellant voluntarily consented to the search.

Further, the district court's denial of the motion to suppress may be sustained on the alternative theory that appellant's act of voluntarily exposing the contents of the cigarette pack, along with other relevant circumstances, provided police with probable cause to arrest her for a controlled-substance offense. "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 had been committed." *In re Welfare of G.M.*, 560 N.W.2d 687, 695 (Minn. 1998). Appellant's nervousness when stopped in the context of Hanson's arrest for a controlled-substance offense, her display of the baggie, which police believed based on training and experience may contain illegal drugs, and her immediate act of attempting to crush the

pack, gave police an objective basis for their strong suspicion that appellant possessed a controlled substance and to arrest her for that offense.

Affirmed.