STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1439

State of Minnesota,
Respondent,

vs.

Allen Ralph Pecholt,
Appellant.

Filed May 25, 2010
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-08-26611

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

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

William M. Ward, Chief Public Defender-Hennepin County, Kellis M. Charles, Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Larkin, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant Allen Pecholt challenges his conviction of fifth-degree possession of a controlled substance on the basis that the search of his person and seizure of baggies from

his pants' pocket violated his constitutional rights. Because the officer had probable cause to arrest Pecholt, we affirm.

FACTS

On the evening of May 28, 2008, Minneapolis Police Officer Jeff Carter was in an unmarked car monitoring a suspected drug house in northeast Minneapolis. Officer Carter had received information from neighborhood residents that the duplex received frequent, short-term visits from numerous non-residents, which, in Officer Carter's experience, is consistent with narcotics trafficking. Around 8:00 p.m., Officer Carter saw a man park his vehicle approximately five houses away from the duplex, walk through the alley, enter the duplex, and leave within five minutes. One hour later, Officer Carter witnessed Pecholt and a companion enter the house, stay for about five minutes, and leave. The officer followed the pickup truck in which Pecholt was a passenger, and he observed that the vehicle had an inoperable license-plate light and made a right turn without signaling. Officer Carter called for a marked squad car to assist him in conducting a traffic stop.

As the marked squad car arrived, Officer Carter saw Pecholt bend down to the floor of the truck and make movements consistent with trying to hide something. Once the vehicle was stopped, Officer Carter approached the passenger side of the truck with his gun drawn. He noticed that Pecholt was jittery, extraordinarily nervous, excitable, had dilated pupils, and was sweating profusely, all of which are indicia of methamphetamine intoxication. Officer Carter asked the men where they were traveling from, and Pecholt gave an address about four blocks away from the duplex.

Officer Carter then ordered Pecholt out of the truck and searched him for drugs. He found two baggies with crystal methamphetamine residue in the coin pocket of Pecholt's pants. After securing Pecholt, Officer Carter searched the truck and found another bag with crystal meth and drug paraphernalia under Pecholt's seat.

Pecholt was charged with controlled-substance crime in the fifth degree, Minn. Stat. § 152.025, subd. 2(1), and aiding and abetting fifth-degree possession of a controlled substance, Minn. Stat. §§ 152.025, subd. 2(1), 609.05, subd. 1 (2006). Pecholt moved to suppress the evidence found in his pocket on the basis that Officer Carter impermissibly expanded the scope of the *Terry* search. The district court denied the motion, and the parties tried the case to the district court on stipulated facts. The district court found Pecholt guilty of the possession charge based on the baggies discovered in his pocket. This appeal follows.

D E C I S I O N

"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).

Both the federal and state constitutions guarantee the right to be free from unreasonable searches and seizures. U.S. Const. amend IV; Minn. Const. art. I, § 10. Our supreme court, in interpreting article I, section 10 of the Minnesota Constitution, expressly adopted the principles of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1838 (1968), in the context of traffic stops. *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004). A

Terry analysis involves a two-part inquiry: (1) Was the stop justified at its inception? If so, (2) were the actions of the police during the stop "reasonably related to and justified by the circumstances that gave rise to the stop in the first place"? *Id.* at 364. "[T]he scope and duration of a traffic stop investigation must be limited to the justification for the stop." *State v. Fort*, 660 N.W.2d 415, 418 (Minn. 2003).

The parties agree that the initial traffic stop was valid. Our focus is on the second prong of the *Terry* analysis. A valid stop may become invalid if it becomes "intolerable" in its "intensity or scope." *Askerooth*, 681 N.W.2d at 364. "[E]ach incremental intrusion during a traffic stop [must] be tied to and justified by one of the following: (1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness, as defined in *Terry*." *Id.* at 365.

Because the traffic stop was valid at its inception, Pecholt was lawfully seized at that point. *See Arizona v. Johnson*, 129 S. Ct. 781, 788 (2009) (holding that passengers are lawfully seized from the beginning of a traffic stop until the officers have completed the stop). Officer Carter's contact with Pecholt was consistent with the purpose of the stop. Officer Carter's question to Pecholt about where he was coming from was tied to and justified by the legitimate purpose of the stop. *See State v. Syhavong*, 661 N.W.2d 278, 281 (Minn. App. 2003) (stating that during a traffic stop, officers may reasonably inquire about the purpose for the trip and the destination). And because Pecholt was a passenger in a lawfully stopped vehicle, Officer Carter could reasonably ask him to exit that vehicle without infringing on his constitutional rights. *See State v. Krenik*, 774 N.W.2d 178, 184 (Minn. App. 2009) (citing Minnesota and United States Supreme Court

cases and concluding that officers do not violate article I, section 10 of the Minnesota Constitution by asking passengers in lawfully stopped vehicles to get out of the vehicle), *review denied* (Minn. Jan. 27, 2010).

Pecholt argues that Officer Carter's search of his coin pocket was not a valid *Terry* search. But we do not need to determine whether it was a permissible *Terry* search because we conclude that it was a valid search incident to arrest.

Probable cause to arrest without a warrant exists "when a person of ordinary care and prudence, viewing the totality of the circumstances objectively, would entertain an honest and strong suspicion [that a crime has been committed]." *State v. Ortega*, 770 N.W.2d 145, 150 (Minn. 2009). The crime must be one for which custodial arrest is authorized.[1] *Id.* When there is probable cause to arrest, the person's body and the area within his immediate control may be searched. *Id.* at 149-50. "A search incident to arrest based on probable cause to arrest is valid even if the search occurs before the arrest." *State v. Wasson*, 602 N.W.2d 247, 252 (Minn. App. 1999) (quotation omitted), *aff'd*, 615 N.W.2d 316 (Minn. 2000).

In determining whether Officer Carter had probable cause to arrest Pecholt for narcotics possession at the time of the search, we consider the totality of the circumstances: (1) the officer observed Pecholt enter and quickly leave a suspected drug house; (2) the officer observed Pecholt bending forward in the truck when approached by

[1] Pecholt does not contest that custodial arrest is authorized for the crime of fifth-degree possession of a controlled substance.

the marked squad car; (3) Pecholt appeared to lie about where he had been prior to the stop; and (4) Pecholt exhibited indicia of methamphetamine intoxication.

Pecholt's assertions that these circumstances are not sufficient to establish probable cause are unavailing. First, Pecholt argues that Officer Carter did not know whether drug sales had occurred in the duplex. The officer had received information about suspected drug traffic from two neighbors. We presume that private citizen informants are reliable, especially when the citizens give identifying information so the police may locate them again. *State v. Davis*, 732 N.W.2d 173, 182-83 (Minn. 2007). The neighbors described a pattern of foot traffic that Officer Carter testified, from his experience, was consistent with drug activity. Officer Carter's personal observations, including Pecholt's brief presence in the duplex, support a suspicion that Pecholt was using or selling narcotics.

Second, Pecholt argues that Officer Carter could not actually see what he was doing in the car, and that the officer misinterpreted his gestures. So-called "furtive gestures" can provide a basis for probable cause. *State v. Munoz*, 385 N.W.2d 373, 376 (Minn. App. 1986); *see also State v. Gallagher*, 275 N.W.2d 803, 807 (Minn. 1979) (citing the Supreme Court for the theory that furtive motions on the approach of strangers are strong indicia of mens rea). When interpreting gestures, "[a]n officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person." *Munoz*, 385 N.W.2d at 376 (quotation omitted). Officer Carter's observations reasonably suggested that Pecholt was hiding contraband or reaching for a weapon.

Third, Pecholt argues that he did not intentionally give the wrong address when asked where he was coming from, asserting that he made an innocent mistake because the two streets have similar names and are easily confused. But "[t]he fact that there might have been an innocent explanation . . . does not demonstrate that the officers could not reasonably believe" that a crime had been committed. *State v. Hawkins*, 622 N.W.2d 576, 580 (Minn. App. 2001).

Finally, Pecholt argues that the claimed indicia of methamphetamine intoxication could just as likely indicate other things, such as nervousness created by having an officer approach with a loaded gun. But officers are permitted to rely on their experience in recognizing signs of intoxication. And the supreme court determined that probable cause supported a warrantless search of a vehicle where an officer observed that the driver and passenger exhibited signs of controlled-substance use. *Gallagher*, 275 N.W.2d at 808.

We need not determine whether any of the circumstances present here, standing alone, would be sufficient to establish probable cause because we look at the totality of the circumstances. *See Ortega*, 770 N.W.2d at 150. Where a person visits a suspected drug house for five minutes, attempts to hide something under his seat when a marked squad car approaches his vehicle, appears to lie to the officer, and shows signs of methamphetamine intoxication, an officer could reasonably have believed a crime had been committed. Because Officer Carter had probable cause to arrest Pecholt, the attendant search of his person was valid and the district court did not err in denying Pecholt's motion to suppress.

Affirmed.