STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1364

State of Minnesota,
Respondent,

vs.

Brian James Verdoes,
Appellant.

Filed June 15, 2010
Affirmed
Minge, Judge

Nobles County District Court
File No. 53-CR-08-963

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

Gordon L. Moore, III, Nobles County Attorney, Worthington, Minnesota (for respondent)

Glenna L. Gilbert, Special Assistant State Public Defender, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Wright, Judge.

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

MINGE, Judge

Appellant challenges his conviction for fifth-degree possession of controlled substance and introduction of contraband into jail. Appellant argues that the district court

erred in denying his motion to dismiss because the charges against him were based on evidence discovered as a result of an illegal search. We affirm.

FACTS

On July 2, 2008, a Murray County deputy sheriff observed that a driver failed to signal a turn, was speeding, and crossed the fog line. The deputy pulled the car over for a routine traffic stop. The deputy incrementally expanded the stop, ultimately found a substance residue that field tested as methamphetamine, then arrested appellant Brian Verdoes and jailed him. Appellant was a passenger in and the owner of the car. Based on additional methamphetamine found in appellant's body in jail, he was charged with felony possession of that substance and introducing it into the jail.

Appellant moved to suppress the methamphetamine evidence, arguing that the expansion of the scope and duration of the stop and search of the car were impermissible, that the deputy lacked probable cause to believe he constructively possessed the object containing the methamphetamine residue or to arrest him, that the discovery of additional methamphetamine was the result of an illegal arrest, that the evidence of methamphetamine should be excluded, and that the charges against him should be dismissed.

The district court held omnibus hearings, taking testimony and receiving exhibits. It denied appellant's motion to dismiss the charges, finding that (1) the officers properly expanded the traffic stop because they had reasonable, articulable suspicion of criminal activity; and (2) the record established that the arresting deputy had probable cause to conclude that appellant constructively possessed residue of methamphetamine.

Appellant waived his rights to a trial and stipulated to the evidence against him pursuant to Minn. R. Crim. P. 26.01, subds. 3-4. The district court found appellant guilty of possession of methamphetamine, Minn. Stat. § 152.025, subds. 2(1), 3(a) (2008), and introduction of contraband into a jail, Minn. Stat. § 641.165, subd. 2(a) (2008), and imposed a sentence that included 60 days in jail, probation for five years, a $500 fine, and restitution. This appeal follows.

D E C I S I O N

In this appeal we are asked to review pretrial rulings. "When reviewing a district court's pretrial order on a motion to suppress evidence, we review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009) (quotation omitted).

I.

The first issue is whether the officers were justified in expanding the traffic stop's scope to include a search for drugs. Both the U.S. Constitution (Fourth Amendment) and Minnesota Constitution (article I, section 10) prohibit unreasonable searches and seizures. Warrantless searches and seizures are generally considered unreasonable. *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999). To avoid suppression of the evidence acquired from a warrantless search, the state must show that an exception to the warrant requirement applies. *State v. Metz*, 422 N.W.2d 754, 756 (Minn. App. 1988).

The reasonableness of searches and seizures during traffic stops involves a two-prong inquiry: (1) Was the stop justified at its inception? If so, (2) was the expansion of

the stop "reasonably related to and justified by the circumstances that gave rise to the stop in the first place." *State v. Krenik*, 774 N.W.2d 178, 182 (Minn. App. 2009), *review denied* (Minn. Jan. 27, 2010). Each prong is analyzed in turn.

A police officer may make a brief investigative stop of a car if the officer has reasonable, articulable suspicion that the person stopped is engaged in criminal activity. *State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880 (1968)). This standard is a minimal one: "Ordinarily, if an officer observes a violation of a traffic law, however insignificant, the officer has an objective basis for stopping the vehicle." *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997).

Here, because the deputy observed traffic violations, there is no claim that the initial stop of appellant's vehicle (first prong) was not justified. Appellant challenges the second prong, arguing that the deputy impermissibly expanded the scope and duration of the stop by investigating for drugs and then arresting appellant.

The scope of a traffic stop and its duration must be limited to the reason for the stop. *State v. Fort*, 660 N.W.2d 415, 418 (Minn. 2003). "An initially valid stop may become invalid if it becomes intolerable in its intensity or scope." *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (quotations omitted). Each incremental intrusion during a traffic stop must be tied to and justified by the original legitimate purpose of the stop, independent probable cause, or reasonable, articulable suspicion of other criminal activity. *Id*. at 364-65; *State v. Wiegand*, 645 N.W.2d 125, 135-37 (Minn. 2002). The justification for any intrusion is a heavily fact-based inquiry, and must be "individualized

to the person toward whom the intrusion is directed." *Askerooth*, 681 N.W.2d at 365. It is the state's burden to show that a seizure was sufficiently limited to satisfy these conditions. *Krenik*, 774 N.W.2d at 182.

Reasonable, articulable suspicion requires "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007). "The requisite showing is not high." *Id*. (quotation omitted). The officer must be able to point to facts that objectively support the suspicion and cannot base it on a mere unarticulated hunch. *Id*. In forming reasonable, articulable suspicion, an officer may make inferences and deductions that might elude an untrained person. *State v. Syhavong*, 661 N.W.2d 278, 282 (Minn. App. 2003). Courts examine the totality of the circumstances when determining whether reasonable, articulable suspicion exists, "and seemingly innocent factors may weigh into the analysis." *Davis*, 732 N.W.2d at 182.

The first incremental intrusion that appellant challenges is the drug-dog sniff. The omnibus hearing record indicates that after pulling over the car, the deputy asked the driver for his driver's license and proof of insurance. Because the driver did not have a license, the deputy asked the passengers if they had licenses. The deputy was entitled to ask these questions. *See Syhavong*, 661 N.W.2d at 281 (stating that officers may reasonably ask for a driver's license, registration, proof of insurance, and inquire about the purpose for the trip and the destination); *State v. Johnson*, 645 N.W.2d 505, 508, 510 (Minn. App. 2002) (noting that officers had a right to ask the owner of a vehicle who was not driving if she had a valid driver's license and could also ask the other passenger if he

had a driver's license after learning that no other occupants did). During this permitted conversation, the deputy observed that appellant was nervous and agitated, that his eyes were dilated, and that he never blinked. Based on his training and experience, these observations led the deputy to believe that appellant was on a drug. He further observed that the other passenger had a handkerchief in his pocket. Based on his training and experience, the deputy testified that he knew that methamphetamine users often wrapped their drug pipes in such cloth. Finally, based on information received from other law enforcement officers, the deputy was aware that appellant and the other passenger were involved with drugs. We conclude that the foregoing evidence in the record at the time of the omnibus hearing provided a reasonable, articulable suspicion of drug-related activity justifying the drug-dog sniff.[1]

II.

Appellant raises as a second issue the question of whether he voluntarily consented to the search of his car. Before reaching the merits of this issue, a threshold question is whether there was probable cause to search appellant's car for drugs without consent. Police officers may search a car without a warrant and without consent "when

[1] Appellant's reliance on *State v. Burbach*, 706 N.W.2d 484 (Minn. 2005) to challenge this conclusion is misplaced. In that case, the supreme court held that "when an officer's suspicion of drug possession during a traffic stop is supported only by a driver's nervous behavior, an unsubstantiated tip of unknown origin, and speeding, and when the driver *does not* exhibit other signs of impairment, the officer does not have a reasonable, articulable suspicion of drug possession sufficient to permit the officer to expand the traffic stop by requesting to search the vehicle." *Burbach*, 706 N.W.2d at 491 (emphasis added). Crucially, appellant, unlike the driver in *Burbach*, *did* exhibit other signs of impairment—dilated and unblinking eyes, unusually dry mouth, and rambling answers to questions. Here, compared to *Burbach*, there are additional facts justifying expansion of the stop.

there is probable cause to believe the vehicle contains contraband." *State v. Pederson-Maxwell*, 619 N.W.2d 777, 780-82 (Minn. App. 2000); *accord Maryland v. Dyson*, 527 U.S. 465, 467, 119 S. Ct. 2013, 2014 (1999) (stating that a finding of probable cause "alone satisfies the automobile exception to the Fourth Amendment's warrant requirement"); *State v. Nace*, 404 N.W.2d 357, 361 (Minn. App. 1987) (holding that under the automobile exception to the warrant requirement, only probable cause to believe that a car contains contraband is required because of a lower expectation of privacy in a motor vehicle), *review denied* (Minn. June 25, 1987). When the facts are undisputed, whether probable cause exists is a question of law we review de novo. *Shane v. Comm'r of Pub. Safety*, 587 N.W.2d 639, 641 (Minn. 1998).

Here, the facts relevant to determining probable cause are undisputed. By the time the officers searched appellant's car, they had concluded, based on their observations, that appellant was under the influence of mood-altering chemicals and a drug dog had indicated there were illegal drugs in the car. A drug dog indicating that a car contains drugs after sniffing the car's exterior establishes probable cause to believe that the car contains drugs. *Pederson-Maxwell*, 619 N.W.2d at 781. On this record, as a matter of law, we conclude that the deputy had probable cause to believe appellant's car contained drugs. Because there was probable cause, the search of the car did not require consent to be lawful and we do not reach appellant's second issue.

III.

The final issue raised by appellant is whether the deputy properly determined that appellant had constructive possession of a pop can with methamphetamine residue. The

state asserts that this constructive-possession determination established probable cause for appellant's arrest. Probable cause for an arrest exists "when police have facts and circumstances that would warrant a prudent person in the officer's position to reasonably conclude that the person committed a crime." *State v. Vereb*, 643 N.W.2d 342, 347 (Minn. App. 2002) (citing *In re Welfare of G.M.*, 560 N.W.2d 687, 695 (Minn. 1997)). Probable cause requires something more than mere suspicion of criminal activity, but less than the evidence necessary to convict. *Id*. at 348.

To convict appellant for possession of methamphetamine under Minn. Stat. § 152.025, subd. 2, "the state must prove that [appellant] consciously possessed, either physically or constructively, the substance and that defendant had actual knowledge of the nature of the substance." *State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975). Here, the state relied on constructive possession. Constructive possession is used in cases "where the state cannot prove actual or physical possession at the time of arrest but where the inference is strong that the defendant at one time physically possessed the substance and did not abandon his possessory interest in the substance but rather continued to exercise dominion and control over it up to the time of the arrest." *Id*. at 104-05. Where the police find drugs in a place that the defendant and others have access to, such as the backseat of the car, the state can prove constructive possession by showing that "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. The proximity of the drugs to the defendant "is an important consideration in assessing constructive possession." *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *review denied*

(Minn. Jan. 16, 2001). "Constructive possession need not be exclusive, but may be shared." *Id.* But the defendant's "mere presence" in a car with contraband without more does not justify arrest for constructive possession. *State v. Albino*, 384 N.W.2d 525, 527 (Minn. App. 1986). Other evidence must link the defendant to the contraband. *Id*. at 527-28.

Here, several facts in the record show that appellant constructively possessed the pop can that field tested positive for methamphetamine. Appellant was the only person sitting in the backseat of the car. Although the pop can was in the backseat on the driver's side, appellant was closer than the front-seat occupants. Also, appellant owned the car and, based on the deputy's observations of the car's occupants, the deputy suspected that appellant was the one who had taken drugs.

Based on this record, we conclude that the deputy properly decided that appellant had constructive possession of the pop can and that, based on his appearance and conduct and with the results of the field test showing that the pop can residue was methamphetamine, the officers had probable cause to arrest appellant for constructive possession. Therefore, we conclude that the district court did not err in admitting the challenged evidence.

Affirmed.

Dated: