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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1473

State of Minnesota,
Respondent,

vs.

Apiemi Junior Kebaso,
Appellant.

Filed July 6, 2010
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CR-08-64211

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

Susan L. Segal, Minneapolis City Attorney, Heidi L. Johnston, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Richard S. Virnig, Virnig & Gunther PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

SCHELLHAS, Judge

Appellant challenges the district court's denial of his motion to suppress, arguing that evidence obtained from an apartment after officers' warrantless entry was constitutionally impermissible. We affirm on the basis that probable cause and exigent circumstances justified the officers' warrantless search.

FACTS

In 2008, Special Agent Julien Kubesh of the United States Department of Housing and Urban Development and Ramsey County Sheriff's Deputy Donald Rindal served on the East Metro Fugitive Task Force, which comprised "local, state and federal law enforcement that work together to apprehend fugitives." Rindal was conducting electronic surveillance on Shiloe Nixon, a fugitive for whom a warrant had been issued for failure to appear for sentencing on a first-degree aggravated-robbery conviction.

Through his surveillance, on December 16, 2008, Rindal discovered that Nixon's e-mail account had been accessed from an IP address associated with apartment 110, located at 102 19th Street East in Minneapolis. Rindal called Kubesh to inform him that Nixon was located at the Minneapolis apartment and that Nixon was a black male, approximately six feet tall, weighing around 150 pounds. Kubesh did not know anything else about Nixon's appearance at the time and had never seen Nixon in person, but may have seen a photograph of him. Kubesh, who was in closest proximity to the apartment, proceeded to the address and called other units for assistance. Kubesh arrived at the apartment building around 5:00 p.m. and established a surveillance position in a parking

lot south of the building. At about 5:15 p.m., Kubesh observed an individual matching Nixon's description enter the building through a door on the southern face of the west wing of the building. A short time later another task force member, Officer David Schiebel of the Department of Corrections, joined Kubesh. Schiebel had viewed a photograph of Nixon on the computer en route to the apartment building but did not have a hard copy of it. Kubesh continued to watch the building while Schiebel contacted a building-management employee and learned that apartment 110 was at the southeast corner of the west wing of the building, that the apartment was leased to a white female, and that a management employee had seen a black male fitting Nixon's description coming and going from the apartment.

At approximately 5:30 p.m., a building-management employee let Kubesh and Schiebel into the building, and the officers attempted to gather more intelligence to support an application for a search warrant. The officers established surveillance positions in the hallway outside apartment 110, which had two doors to the hall. Kubesh positioned himself near the south door and Schiebel positioned himself by the north door. The officers listened and tried to determine the number of people inside the apartment. The officers thought that they "could hear, clearly hear, two black males conversing in the apartment." Schiebel asked an individual, who came from downstairs, about apartment 110, and the individual told him that he had seen some black males going in and out but could not identify them.

After a short time, the south door opened and a black male whom Kubesh thought was in his mid 40s exited the apartment. Kubesh identified Schiebel and himself as

police and, although Kubesh knew the individual was not Nixon, directed him to raise his hands. The individual was slow to comply and, as Schiebel, who did not know whether the individual was Nixon, approached to assist Kubesh, Schiebel could see another black male. That male, who was later identified as appellant Apiemi Junior Kebaso, was located 12 to 15 feet inside the apartment, facing the door with a handgun in his right hand. The officers knew that Nixon had been involved in a shooting, but Schiebel, despite having earlier viewed Nixon's photograph on a computer, did not know whether Nixon was the individual holding the handgun. Schiebel concentrated his attention on the gun because he believed that he and Kubesh "were in great danger," and he was concerned for the safety of the people in and outside of the building. From the hall, Schiebel yelled, "Police officer, drop the gun," and threatened to shoot appellant. Appellant turned and ran deeper into the apartment, and Schiebel, with his gun drawn, pursued appellant in the apartment. Appellant stopped running, threw the gun into a bedroom, ran toward Schiebel in the kitchen, and failed to immediately comply when Schiebel ordered him to the ground. Schiebel and Kubesh then apprehended appellant and placed him under arrest.

After appellant was handcuffed, Schiebel conducted a security sweep of the apartment and found a gun under a bed in the bedroom. Schiebel recognized the gun he found as the same gun that appellant had thrown. The officers asked appellant about Nixon's whereabouts, and he told them that Nixon had been at the apartment for two or three hours but had left about ten minutes before the officers arrived. When asked about who resided at the apartment, appellant said that his girlfriend, K.B., was the registered

tenant of the apartment. K.B. testified that appellant was her boyfriend and that he was at her apartment "fairly frequently" with her permission, that he spent the night there twice a week or so, that he kept clothes there, and that she regularly let him use her apartment keys.

Respondent State of Minnesota charged appellant with possession of a pistol within three years of a domestic-assault conviction in violation of Minn. Stat. § 609.2242, subd. 3(e) (2008). Appellant moved to suppress all evidence obtained as a result of the officers' entry into the apartment. After an evidentiary hearing, the district court denied the motion, crediting the officers' testimony and concluding that although appellant had a Fourth Amendment expectation of privacy in his girlfriend's apartment, the officers had probable cause and exigent circumstances that justified their warrantless entry. Appellant waived his right to a jury trial and stipulated to the prosecution's case to obtain review of the suppression ruling. The district court found appellant guilty. 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). We review de novo whether a search or seizure is justified by reasonable suspicion or probable cause. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005). We review the district court's findings of fact for clear error. *Id.* Evidence seized in violation of the constitution must generally be suppressed. *State v. Jackson*, 742 N.W.2d 163, 177–78 (Minn. 2007).

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10; *see also Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691 (1961) (applying the Fourth Amendment to the states by way of the Fourteenth Amendment's due-process clause). "To determine whether this constitutional prohibition has been violated, we examine the specific police conduct at issue." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008).

I

"The Minnesota Constitution protects citizens against *unreasonable* government intrusions upon areas where there is a legitimate expectation of privacy." *State v. Davis*, 732 N.W.2d 173, 178 (Minn. 2007). "There is no question that a person has a legitimate expectation of privacy inside her or his residence." *Id.* "If the police enter a place where a person has a legitimate expectation of privacy there is of course a great intrusion upon that privacy interest." *Id.* The district court found that appellant had a Fourth Amendment expectation of privacy in his girlfriend's apartment because he was her social guest. The state does not challenge this finding on appeal and we therefore need not review it.

But the fact that appellant generally had a Fourth Amendment expectation of privacy in the apartment does not mean that he had a legitimate expectation of privacy as he stood inside his girlfriend's open apartment door holding a handgun. And appellant does not argue that the officers were not lawfully in the hallway or in the apartment building itself nor has he presented evidence to support such an argument. *See id.* at 179 (stating that the defendant had "not shown that he had an expectation of privacy in the

common hallway in addition to that expectation of privacy he had inside his residence"). The officers in this case were lawfully in the hallway outside of the apartment.

In *United States v. Santana*, the Supreme Court held that the defendant did not have an expectation of privacy as she stood in the doorway of her house. 427 U.S. 38, 42, 96 S. Ct. 2406, 2409 (1976). The Court explained:

> What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection. [The defendant] was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house.

Id. (quotation and citation omitted). Similarly here, appellant stood within view of the door, holding a handgun as another individual opened the apartment door to leave. Like the defendant in *Santana*, appellant lacked a Fourth Amendment expectation of privacy when the apartment door was opened and Schiebel could see appellant holding a handgun.

Officers may constitutionally conduct limited stops to investigate suspected criminal activity if they can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968)) (quotation marks omitted). A determination of whether the police have reasonable suspicion to conduct an investigative stop is based on the totality of the circumstances. *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695

(1981). Seemingly innocent factors may "weigh into the analysis" of whether police have reasonable suspicion. *Davis*, 732 N.W.2d at 182.

The Minnesota Supreme Court has recognized that "the reasonable suspicion standard is not high." *Timberlake*, 744 N.W.2d at 393 (quotations omitted). "Reasonable, articulable suspicion requires a showing that the stop was not the product of mere whim, caprice, or idle curiosity." *State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003) (quotation omitted). "That standard is met when an officer observes unusual conduct that leads the officer to reasonably conclude in light of his or her experience that criminal activity may be afoot." *Timberlake*, 744 N.W.2d at 393 (quotation omitted).

In *Timberlake*, the supreme court held that information that an individual is in possession of a pistol *in a public place* is sufficient for an investigatory stop; officers need not have particular suspicion that the individual lacks a permit. *Id.* at 395 (emphasis added); *see also* Minn. Stat. §§ 624.714, subd. 1a (criminalizing possession of a pistol in a public place without a permit), .7181, subd. 1(c) (defining public place to exclude a person's dwelling or the premises thereof) (2008). Here, although appellant was not in a public place, the officers had reasonable suspicion sufficient to justify an investigatory stop. They were conducting surveillance of an apartment at which they believed a violent fugitive was located, and when the apartment door opened, the officers saw from the hallway a man facing the door with a handgun in his hand. The officers reasonably thought the man might be the fugitive.

Under the totality of the circumstances, we conclude that the officers had a valid basis to direct appellant to stop and drop the weapon.

II

Appellant next argues that the officers' warrantless entry into the apartment was invalid because they lacked probable cause coupled with exigent circumstances. A warrantless search of a home is presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380 (1980). To rebut the presumption of unreasonableness, the state must show either consent or probable cause and exigent circumstances. *State v. Paul*, 548 N.W.2d 260, 264 (Minn. 1996); *State v. Morin*, 736 N.W.2d 691, 695 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007). "[E]xigent circumstances exist in cases of hot pursuit, danger to human life, imminent destruction of evanescent evidence, and possible flight of a suspect." *Paul*, 548 N.W.2d at 264. "If a warrantless entry is made without probable cause and exigent circumstances, its fruit must be suppressed." *Id.*

The district court concluded that when appellant ignored the command to stop and ran deeper into the apartment, the officers had probable cause to believe that appellant was guilty of the criminal offense of fleeing the police on foot[1] and had exigent

[1] The crime is defined as follows:

> Whoever, for the purpose of avoiding arrest, detention, or investigation, or in order to conceal or destroy potential evidence related to the commission of a crime, attempts to evade or elude a peace officer, who is acting in the lawful discharge of an official duty, by means of running, hiding, or by any other means except fleeing in a motor vehicle, is guilty of a misdemeanor.

Minn. Stat. § 609.487, subd. 6 (2008).

circumstances justifying their pursuit into the apartment. Appellant challenges this reasoning on the basis that the misdemeanor offense of fleeing an officer on foot is not sufficiently serious to justify the warrantless entry into a dwelling. Appellant relies primarily on *State v. Othoudt*, 482 N.W.2d 218, 223–24 (Minn. 1992), in which the supreme court stated, "Neither this court nor the United States Supreme Court has ever held that exigent circumstances would permit a warrantless entry into a home to arrest for an offense of lesser magnitude than a felony." But the supreme court discredited this argument in 1996 in *Paul*, noting,

> We have previously upheld the warrantless entry of a home by police in hot pursuit of a suspect when the underlying offense was less than a felony. *See [State v.] Koziol*, 338 N.W.2d [47,] 47–48 [(Minn. 1983)] (approving warrantless entry of home for gross misdemeanor offense of fleeing police officer after police officer stopped defendant to warn him of speeding). [The defendant] essentially asks this court to overturn *Koziol* and to adopt a bright-line rule prohibiting warrantless arrests in the home when the underlying offense is of lesser magnitude than a felony. As support, [the defendant] cites dicta in *Othoudt*, where we stated that neither the United States Supreme Court nor the Minnesota Supreme Court has ever held that exigent circumstances would "permit a warrantless entry into a home to arrest for an offense of lesser magnitude than a felony." 482 N.W.2d at 223–24.
>
> [The defendant's] reliance on . . . *Othoudt* is misplaced, for that case did not involve an officer in hot pursuit of a suspect because the officer did not observe the offense and was not in hot pursuit. We would not permit the warrantless entry into Othoudt's home because the legislature has determined that an officer may not make a warrantless entry into a home to arrest for a misdemeanor offense unless the individual committed the offense in the officer's presence. *See* Minn. Stat. § 629.34, subd. 1(c)(1), 1(d) (1994). . . . [B]ecause [the officer] observed the offense at issue here and

> was in hot pursuit, neither the statute nor the dicta in *Othoudt* apply.

Paul, 548 N.W.2d at 265–66 (footnote omitted); *see also Morin*, 736 N.W.2d at 696 (citing *id.*) (holding that flight from an officer on foot was sufficient to justify hot-pursuit entry into a dwelling); *Pahlen v. Comm'r of Pub. Safety*, 382 N.W.2d 552, 553–54 (Minn. App. 1986) (approving warrantless entry of home after arresting officer observed defendant committing petty misdemeanor of speeding), *cited with approval in Paul*, 548 N.W.2d at 266 n.3.

Like *Paul* and unlike *Othoudt*, the probable-cause-supplying offense of fleeing an officer on foot in this case was committed in the presence of the officers. Based on the doctrine of hot pursuit as well as the officers' reasonable desire to secure their own safety and the safety of others in the building, the officers had exigent circumstances which, when coupled with probable cause to believe appellant was guilty of fleeing, justified the officer's warrantless entry into the apartment.

During rebuttal at oral argument, appellant suggested for the first time that if an individual is in a Fourth Amendment–protected space, the individual cannot "by definition" flee. Issues not briefed on appeal are waived, *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997), as are allegations of error based on mere assertion without legal argument or authority to support them unless prejudicial error is obvious on mere inspection, *State v. Ouellette*, 740 N.W.2d 355, 361 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007). Appellant did not raise this

issue in the district court or in his appellate brief and has provided no authority to support it. We therefore do not address this argument.

We conclude that the district court correctly denied appellant's motion to suppress, and we affirm.

Affirmed.