STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2211

State of Minnesota,
Respondent,

vs.

Richard Lee Holston,
Appellant.

Filed November 23, 2010
Affirmed
Connolly, Judge

Ramsey County District Court
File No. 62-CR-08-682

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Wright, Judge.

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

CONNOLLY, Judge

Appellant challenges the district court's denial of his motion to suppress evidence obtained during the stop of his vehicle, arguing that the police did not have reasonable, articulable suspicion to conduct the stop. Appellant also challenges the condition that he have no contact with known gang members as part of his probationary sentence. Because we conclude that the district court neither erred in denying appellant's motion to suppress nor abused its discretion in imposing the no-contact condition, we affirm.

FACTS

While on patrol on the evening of April 6, 2008, St. Paul police officers Matthew Yunker and Jeff Stiff were directed to meet with the victim of an armed robbery in a parking lot. The robbery reportedly occurred approximately one block away from the lot in a residential area. The dispatcher advised them that the victim had identified the alleged robber as a male, who was armed with a handgun and driving a green Tahoe. A Tahoe is a type of large Chevrolet sports-utility vehicle (SUV). The officers arrived within a few minutes of being dispatched.

While in the parking lot, the officers observed a green Suburban pull into the lot and park in one of the spaces. A Suburban is also a type of large Chevrolet SUV. The vehicle was driven by a black male, later identified as appellant Richard Lee Holston, who was the sole occupant. The officers parked behind the Suburban and activated their emergency lights.

Officer Yunker asked appellant for his driver's license. Appellant told him that he did not have any identification and that he was 15 years old. Officer Yunker was immediately suspicious because appellant looked considerably older. Appellant complied with Officer Yunker's request for him to step out of the vehicle, and Officer Yunker performed a pat-down search for weapons and contraband. During the pat-down, Officer Yunker felt a "small knot near [appellant's] rectum area." After discovering the knot, Officer Yunker asked appellant his name and date of birth. This time, appellant provided his name and date of birth. He also told Officer Yunker that he was not 15 and that there was an outstanding felony warrant for his arrest.

Officer Yunker then "used the seat of [appellant's] pants to pull the object that [he] had felt out and let it drop through [appellant's] pant leg." Officer Yunker observed a plastic bag containing what appeared to be crack cocaine fall to the ground, which appellant stepped on, trying to crush it. Officer Yunker conducted a full search of appellant and also discovered a large amount of cash.

Appellant was subsequently arrested and charged with felony fifth-degree possession of a controlled substance under Minn. Stat. § 152.025, subd. 2(1) (2006). Appellant was not involved in the alleged robbery. Appellant moved to suppress the evidence obtained as a result of the stop and a hearing took place. The district court concluded that the stop was lawful and denied appellant's motion.[1] Appellant then

[1] We note that the record does not appear to contain a signed and dated copy of the district court's order. Appellant provided an unsigned and undated order as part of his addendum, and the state does not appear to dispute that this was the order issued by the district court. The register of actions also does not indicate that the order was actually

proceeded to a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 4, preserving his right to appeal the suppression issue. Appellant was found guilty, received a stay of execution of a 15-month prison sentence, and was placed on probation. One of the conditions of appellant's probation was to have no contact with known gang members. This appeal follows.

D E C I S I O N

I. The district court did not err in concluding that the police had a reasonable, articulable basis to stop appellant.

"When reviewing pretrial orders on motions to suppress evidence, [appellate courts] 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). This court reviews the district court's factual findings under the clearly erroneous standard, but legal determinations are reviewed de novo. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006).

The United States and Minnesota constitutions protect individuals against unreasonable searches and seizures. U.S. Const., amend. IV; Minn. Const., art. 1, § 10. A limited investigatory stop is lawful if an officer has "a 'particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *State v. Pike*,

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filed. The district court administrator is hereby directed to ensure that the order denying appellant's motion to suppress is properly filed. *See* Minn. R. Civ. App. P. 110.05 ("If anything material to either party is omitted from the record by error or accident or is misstated in it, the parties by stipulation, or the trial court, either before or after the record is transmitted to the appellate court, or the appellate court, on motion by a party or on its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be approved and transmitted.").

551 N.W.2d 919, 921 (Minn. 1996) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981)). This brief stop "requires only reasonable suspicion of criminal activity." *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880 (1968)).

The standard for reasonable suspicion is not high. *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008). "The police must only show that the stop was not the product of mere whim, caprice or idle curiosity, but was based upon 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *Pike*, 551 N.W.2d at 921-22 (quoting *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880).

Appellant argues that the officers lacked a reasonable, articulable basis to stop him because (1) the description of the robbery suspect was weak; (2) the officers ignored the single piece of specific information they had regarding the robbery—the model of the vehicle; (3) the officers did not know when the robbery occurred and were thus unaware of the area in which the suspect could be; and (4) appellant was not engaged in any suspicious behavior.

Although agreeing with appellant that he was not engaged in any suspicious behavior prior to the stop, the state asserts that the officers had reasonable, articulable suspicion to stop appellant because he sufficiently matched the description of the suspect: "he was an African American male driving a large, green SUV." The state also points to the officers' testimony that Tahoes and Suburbans are both Chevrolet vehicles and have similar body styles, and Officer Yunker's testimony that a victim's description of a

suspect may not be entirely accurate. Additionally, the state emphasizes that the officers knew the robbery occurred approximately one block away and that other officers were driving around the area looking for the suspect. We conclude that the state has the more persuasive argument.

We first address the parties' dispute over whether the race of the suspect was known to Officers Yunker and Stiff at the time of the stop. On cross-examination, Officer Yunker was asked if he had a description of the robbery suspect, to which he responded, "Without looking at my report, all I know is that the description was that it was a black male driving a green Tahoe." Officer Yunker then acknowledged that the race of the suspect was not in his report. The district court ultimately concluded that the officers had been advised that "the victim had identified the robber as a black male driving a green Tahoe." Although appellant argues that "[t]his finding is not substantiated by the record," we disagree. We conclude that the district court's finding is supported by Officer Yunker's testimony and thus not clearly erroneous.

Second, as the state correctly asserts, Minnesota courts have routinely upheld investigatory stops when the stopped vehicle varies somewhat from the description given to officers. In *State v. Waddell*, the Minnesota Supreme Court upheld the stop of a dirty Pontiac station wagon despite the fact that the vehicle's color and number of occupants were not identical to the description officers had of the suspect vehicle. 655 N.W.2d 803, 810 (Minn. 2003). A witness had reported seeing a dark General Motors station wagon in the lot of a convenience store in which a shooting subsequently took place. *Id.* at 806-

07. Later, dispatched updates indicated that the vehicle was "a dark blue or black station wagon—possibly a Chevrolet Celebrity—with three black males inside." *Id.* at 807.

Approximately two-and-one-half hours later and roughly six to eight miles from the convenience store, an officer observed "a 'darker colored real dirty station wagon similar to a Chevy Celebrity.'" *Id.* The vehicle was in fact a silver-gray, but its color was obscured by winter road salt. *Id.* at 809-10. The vehicle was stopped, and Waddell was subsequently convicted in connection with the shooting. *Id.* at 807-08. Waddell challenged the legality of the stop on the basis that the vehicle description was too general to warrant an investigatory stop. *Id.* at 808-09. The supreme court concluded that the officer had reasonable, articulable suspicion to stop the Pontiac and observed, "Given that considerable discretion will be given to an officer's decision to conduct an investigatory stop, the decision to stop a vehicle very similar in body style but slightly lighter in color cannot be considered mere caprice or whim." *Id.* at 810.

Similarly, in *State v. Yang*, the supreme court upheld the stop of a "dark-blue Honda Civic hatchback" when the suspect vehicle was a "black four-door Honda-type vehicle." 774 N.W.2d 539, 549, 552 (Minn. 2009). The officer who performed the stop subsequently "testified that he thought the [hatchback] matched the description of the suspect vehicle." *Id.* at 552. The supreme court concluded that the district court did not err in denying Yang's motion to suppress because, "[w]hile a Honda Civic hatchback is different in size and style than a Honda Accord, both Hondas have somewhat similar shapes in comparison to other brands of vehicles." *Id.*

In the present case, officers were looking for a black male driving a green Tahoe, which is a large, green SUV. Appellant, a black male, was observed driving a large, green SUV approximately one block away from the location of the robbery. These facts create reasonable, articulable suspicion that appellant was involved in the robbery. As the district court ably stated,

> It would have been a dereliction of their duty, for [the officers] to ignore [appellant's] green Suburban because they did not know the exact shade of green or because it was not a Tahoe. Their obligation, in light of the totality of the circumstances and their training and experience, was to further investigate the situation to determine whether an armed robber had unwittingly stumbled into their presence.

See Adams v. Williams, 407 U.S. 143, 145, 92 S. Ct. 1921, 1923 (1972) ("The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."). Therefore, the district court did not err in denying appellant's motion to suppress.

II. The district court did not abuse its discretion in ordering appellant to have no contact with known gang members as a condition of his probation.

Appellate courts review a sentence imposed or stayed by the district court for an abuse of discretion. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). "Generally, conditions of probation must be reasonably related to the purposes of sentencing and must not be unduly restrictive of the probationer's liberty or autonomy." *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989). Conditions of probation may include

placing "restrictions upon employment or business activities, places the probationer may frequent and even people with whom the probationer may associate." *Id.* at 516.

"The purpose of probation is to deter further criminal behavior, punish the offender, help provide reparation to crime victims and their communities, and provide offenders with opportunities for rehabilitation." Minn. Stat. § 609.02, subd. 15 (2006). The parties agree that the present offense was not gang-related. Appellant also denied he was a gang member at the sentencing hearing. However, confidential information available to the district court at the time of sentencing indicates that appellant is a confirmed gang member. *See* Minn. Stat. § 299C.091, subd. 2(b)(1) (2006) (defining a confirmed gang member as a person meeting three of "the criteria or identifying characteristics of gang membership"). Given the confidential information in the record, we conclude that the district court did not abuse its discretion in imposing the no-contact condition for the current offense despite the fact that the offense was not gang-related.

Appellant also argues that the no-contact provision "implicates the constitutional right of free association," and, at minimum, should "be modified to clarify that he must not associate with people *known to him* to be in a gang." (Emphasis added.) Appellant is correct that the district court's discretion in establishing conditions of probation is carefully reviewed when a condition restricts fundamental rights. *See Friberg*, 435 N.W.2d at 516. However, it appears to us that appellant is raising this argument for the first time on appeal as no objection was made to the condition on constitutional grounds

at appellant's sentencing.[2] The only objection raised at sentencing was that the condition was not proper because the current offense was not gang-related. Generally, this court will not address issues raised for the first time on appeal, even though those issues may involve constitutional questions. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996); *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989). We therefore conclude that appellant's constitutional argument is waived.

Affirmed.

[2] We note that defense counsel was aware of the confidential information and the confidential nature of the information did not preclude counsel from arguing the constitutional issue now raised on appeal to the district court.