STATE OF MINNESOTA
IN COURT OF APPEALS
A10-454

State of Minnesota,
Respondent,

vs.

Sir Charles McCurtis,
Appellant.

Filed January 25, 2011
Affirmed in part, reversed in part, and remanded
Wright, Judge

Anoka County District Court
File No. 02-CR-09-3094

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

Anthony C. Palumbo, Anoka County Attorney, Catherine McPherson, Assistant Anoka County Attorney, Anoka, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Stauber, Judge.

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

WRIGHT, Judge

Appellant challenges his convictions of possession and sale of a controlled substance, arguing that the district court erred by denying his motion to suppress

evidence seized following an investigatory stop of his car and subsequent arrest based on information obtained from a confidential informant. Appellant also argues that his adjudicated convictions of two counts of a second-degree controlled substance offense arising from a single criminal act violate Minn. Stat. § 609.04 (2008). We affirm in part, reverse in part, and remand.

FACTS

On June 24, 2008, Columbia Heights police officers executed an arrest warrant at a local motel. Once in custody, the subject of the arrest warrant admitted that he is a drug user and offered to work as a confidential informant to "order" drugs valued at $150 from his dealers. The informant placed a telephone call during which he said, "I'm looking for 150" and gave the motel as the delivery location. According to the informant, the dealer requested delivery to a different location. Although the informant did not know the dealer's name, he described the dealer as a "black male with braids" who drove a white car.

When the officers rejected the proposal to complete the drug sale at a different location, the informant contacted a different dealer. While waiting for the delivery from the second dealer, Officer Erik Johnston observed a white car drive into the motel parking lot. Immediately thereafter, the informant received a telephone call from the first dealer that the informant contacted. The informant advised the officers that the caller said that he was in the motel parking lot. The informant looked out the window and confirmed that the dealer was there in the white car. The officers directed Corporal Paul

Bonesteel, who was waiting outside the motel, to stop the white car in the parking lot. And Officer Johnston left the motel room to assist in executing the stop.

According to Corporal Bonesteel, the only vehicle in the parking lot that was occupied and moving was the white car. He observed the white car travel toward the parking lot exit. Corporal Bonesteel activated his emergency lights and, with the assistance of other officers, approached the car. As the officers approached, they observed the driver lean toward the floor of the car in a manner consistent with hiding or picking up an object. They ordered the driver out of the car. With his gun drawn, Officer Johnston ordered the driver to raise his hands, opened the vehicle's passenger-side door, and directed the driver to turn off the car. When he opened the door, Officer Johnston observed on the floor of the car a plastic bag containing a white substance, which he believed to be crack cocaine. The driver was arrested and later identified as appellant Sir Charles McCurtis. During a search of the vehicle, the officers recovered two additional bags of a white substance. The substance in the three bags later tested positive for cocaine.

McCurtis was charged with possession with intent to sell cocaine, a violation of Minn. Stat. § 152.022, subd. 1(1) (2008); possession of cocaine, a violation of Minn. Stat. § 152.022, subd. 2(1) (2008); and driving after license revocation, a violation of Minn. Stat. § 171.24, subd. 2 (2008). McCurtis moved to suppress the evidence obtained during the search of the vehicle, and an evidentiary hearing was held on the motion. The district court denied the suppression motion, ruling that the officers had reasonable, articulable suspicion of criminal activity to stop the white car and probable cause to arrest McCurtis

and search the car based on the information provided by the informant and the arrival of the white car after the informant's telephone call.

Following McCurtis's waiver of his right to a jury trial and submission of the case on stipulated facts pursuant to Minn. R. Crim. P. 26.01, subd. 3, and *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980), the district court found McCurtis guilty of each of the charged offenses. The district court adjudicated a conviction and imposed a sentence of 75 months' imprisonment for possession of cocaine with intent to sell, adjudicated a conviction without a sentence for possession of cocaine, and adjudicated a conviction and imposed a jail sentence of 36 days for driving after revocation. This appeal followed.

D E C I S I O N

I.

McCurtis argues that the district court erred by denying his motion to suppress evidence obtained from the police search of his vehicle. When reviewing a pretrial order denying a motion to suppress evidence based on undisputed facts and the district court's application of the law, we review de novo whether the evidence must be suppressed as a matter of law. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

A.

The Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution protect against unreasonable searches and seizures. To conduct a stop for limited investigatory purposes, an officer must have reasonable, articulable suspicion of criminal activity. *State v. Munson*, 594 N.W.2d 128, 136 (Minn. 1999) (citing *Terry v. Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868, 1880 (1968)). To satisfy this

legal standard, "[t]he 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.'" *State v. Pike*, 551 N.W.2d 919, 921-22 (Minn. 1996) (quoting *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880). Reasonable, articulable suspicion must be present at the moment a person is seized. *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880; *see also State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995) (citing *Florida v. Royer*, 460 U.S. 491, 497-98, 103 S. Ct. 1319, 1323-24 (1983)). "[A] person has been seized if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter." *Cripps*, 533 N.W.2d at 391; *see United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980); *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781-82 (Minn. 1993). When, under the totality of circumstances, a reasonable person would believe that, because of the conduct of the police, he or she is not free to leave, then a seizure has occurred, and "the police must be able to articulate reasonable suspicion justifying the seizure." *E.D.J.*, 502 N.W.2d at 783. "The information necessary to support an investigatory stop need not be based on the officer's personal observations, rather, the police can base an investigative stop on an informant's tip if it has sufficient indicia of reliability." *In re Welfare of G.M.*, 560 N.W.2d 687, 691 (Minn. 1997).

The officers' decision to stop McCurtis was based on the information supplied by the informant and the corroborative evidence and rational inferences that followed. Among the factors considered to determine whether an informant is reliable are the

officer's ability to corroborate the information and whether the informant provides statements against the informant's interest. *State v. Ross*, 676 N.W.2d 301, 304 (Minn. App. 2004). Even minor details that are corroborated can give credence to an informant's tip when the police know the identity of the informant. *See id.* at 304-05; *see also State v. Siegfried*, 274 N.W.2d 113, 115 (Minn. 1978) ("[T]he fact that police can corroborate part of the informant's tip as truthful may suggest that the entire tip is reliable.")

Here, the officers corroborated several significant details provided by the informant. After placing the drug order with the first dealer, the informant provided a physical description of the dealer and his car. The officers observed a car matching that description subsequently drive into the parking lot and pull alongside the motel without parking. The timing of the car's arrival coincided with a telephone call to the informant. When the informant advised the officers that the dealer was calling from the motel parking lot, the informant was unaware that the officers had observed the white car in that location. The informant next looked out the window and confirmed that the white car in the parking lot belonged to the first dealer that he contacted. Although the officers overheard only the informant's side of the telephone conversation, the description of McCurtis's vehicle and personal appearance, the temporal relationship between the telephone calls and McCurtis's arrival at the motel, in addition to McCurtis's manner of driving the car are unique facts that, when considered together, are highly probative of the informant's reliability.

McCurtis argues that corroboration of details describing his vehicle and appearance is not sufficient to establish reliability. Citing *State v. Cook*, McCurtis

maintains that the facts about McCurtis's appearance were readily obtainable by anyone who knew McCurtis. *See* 610 N.W.2d 664, 669 (Minn. App. 2000) (finding that police lacked probable cause when informant provided only physical description of defendant, defendant's name, and present location), *review denied* (Minn. July 25, 2000). But the critical distinction here is that the informant's tip also was consistent with McCurtis's future conduct. *See Ross*, 676 N.W.2d at 305 (discussing *Cook*, 610 N.W.2d at 669, and observing the enhanced reliability a prediction of future behavior provides). The informant not only described McCurtis and his car, but also, based on the second telephone call between the informant and his dealer regarding the delivery location, predicted McCurtis's future action.

The informant's tip also included a statement against his interest, thereby enhancing his reliability. To establish the basis for his knowledge, the informant admitted that he was a regular drug user who had purchased drugs from multiple dealers in the past. ''[A]ny circumstances which suggest the probable absence of any motivation to falsify [and] the apparent motivation for supplying the information" are relevant facts. *United States v. Harris*, 403 U.S. 573, 600, 91 S. Ct. 2075, 2090 (1971); *accord State v. McCloskey*, 453 N.W.2d 700, 704 (Minn. 1990). We would be naïve to ignore that, among the competing harms, the informant was hoping to secure some benefit from his cooperation. Nevertheless, by establishing the source of the informant's knowledge of McCurtis as a drug dealer, the informant's statement against interest provides additional support for the reliability of the informant and the information he supplied.

The reliability of the informant and the information obtained from him were more than sufficient, when corroborated by other information and actions, to provide the officers with a reasonable, articulable suspicion that the driver of the white car was engaged in criminal activity. The officers had first-hand knowledge of the circumstances surrounding the tip. They knew the identity of the informant and witnessed the informant place a telephone call to order drugs from one of his dealers. The dealer's arrival at the motel, his call to the informant, and the appearance of the dealer's car corroborated several other details of the informant's tip. On these facts, the police had the requisite reasonable, articulable suspicion to initiate an investigatory stop.

B.

McCurtis also argues that the police lacked probable cause to arrest him and search his vehicle. Probable cause is a more demanding standard than the reasonable suspicion of criminal activity required for an investigatory stop. *Alabama v. White*, 496 U.S. 325, 329, 110 S. Ct. 2412, 2416 (1990). When determining whether there is probable cause to arrest, we consider "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 has been committed." *G.M.*, 560 N.W.2d at 695.

Here, we consider the totality of the circumstances, including the informant's basis of knowledge, veracity, and reliability, when determining whether the informant's tip establishes probable cause to arrest or search. *Ward*, 580 N.W.2d at 71; *see also Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983) (adopting totality-of-the-circumstances approach to probable cause). But we do not do so in isolation. *Gates*, 462

U.S. at 233-35, 103 S. Ct. at 2329-30. A deficiency in one factor may be overcome by a strong showing as to other indicia of reliability. *Id.* at 233, 103 S. Ct. at 2329. We also consider the officers' observations during the investigatory stop in our analysis of whether the arrest and search were constitutional.

Subject to certain well-established exceptions, a warrantless search is per se unreasonable under the Fourth Amendment. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd sub nom. Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130 (1993). Based on the circumstances present here, we consider the applicability of two exceptions to the warrant requirement: a search incident to a lawful arrest and the automobile exception. An officer may conduct a warrantless search incident to a lawful arrest that is limited in scope to the arrested person and the area within the arrestee's immediate control. *United States v. Robinson*, 414 U.S. 218, 224, 94 S. Ct. 467, 471 (1973). An officer may conduct a warrantless search of an automobile if there is probable cause to believe that the vehicle is transporting contraband. *Munson*, 594 N.W.2d at 135-36. Probable cause necessary to comply with the automobile exception exists when the officer is aware of facts and circumstances that are sufficient to warrant a reasonable person to believe that the automobile contains items that the officer is entitled to seize. *State v. Pederson-Maxwell*, 619 N.W.2d 777, 780-81 (Minn. App. 2000).

Here, the informant's tip and subsequent activity observed by the officers established a reasonable probability that McCurtis was transporting drugs in his vehicle to sell to the informant. This, in turn, established probable cause to arrest McCurtis. For the reasons addressed in section I.A., the informant's tip was amply corroborated by the

facts that developed on the scene. In addition, as the police officers approached the car, McCurtis moved furtively. This movement was consistent with an attempt to hide contraband. From these facts and circumstances, the officers formed a reasonable belief and strong suspicion that McCurtis was transporting the drugs that the informant commissioned by telephone in order to complete the narcotics sale. Because the possession and the sale of narcotics are felony offenses, the officers had probable cause to arrest McCurtis and conduct a warrantless search of the vehicle under two exceptions to the warrant requirement, namely, as a search incident to McCurtis's lawful arrest and as a search of an automobile unlawfully transporting narcotics for sale.

The district court correctly concluded that the confidential informant's tip and subsequent corroborative evidence gave the officers a reasonable, articulable suspicion to conduct an investigatory stop as well as probable cause to arrest McCurtis and search his car incident to the arrest.

II.

McCurtis also challenges the district court's entry of convictions for both second-degree controlled substance offenses because they arose from a single criminal act. This argument requires us to interpret and apply Minn. Stat. § 609.04. The construction and application of a statute present questions of law, which we review de novo. *State v. Holmes*, 719 N.W.2d 904, 907 (Minn. 2006). A defendant "may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1. An included offense is defined as any of the following:

(1) A lesser degree of the same crime; or

> (2) [a]n attempt to commit the crime charged; or
> (3) [a]n attempt to commit a lesser degree of the same crime; or
> (4) *[a] crime necessarily proved if the crime charged were proved*; or
> (5) [a] petty misdemeanor necessarily proved if the misdemeanor charge were proved.

Id. (emphasis added). In *State v. LaTourelle*, the Minnesota Supreme Court set forth the procedure to follow when a defendant is convicted of more than one charge for the same act. 343 N.W.2d 277, 284 (Minn. 1984). The district court must "adjudicate formally and impose [a] sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time." *Id.* The *LaTourelle* court explained that, if the formally adjudicated conviction is later vacated and the reason for doing so does not apply to any of the remaining unadjudicated convictions, the district court may formally adjudicate one of the remaining unadjudicated convictions and impose a sentence with credit for time served on the vacated sentence. *Id.*

Here, the district court erred when it adjudicated McCurtis's convictions of possession of a controlled substance with intent to sell (Count 1), Minn. Stat. § 152.022, subd. 1(1), and possession of a controlled substance (Count 2), *id.*, subd. 2(1).[1] Count 2 is a lesser-included offense of Count 1. Minn. Stat. § 609.04, subd. 1(4). Because section 609.04, subdivision 1, proscribes conviction of both a crime and an included offense, the district court erred by adjudicating McCurtis's conviction of Count 2, possession of a controlled substance. Accordingly, we reverse the adjudicated conviction

[1] Although the district court adjudicated both convictions, it did not impose a sentence on Count 2.

of Count 2 and remand to the district court with instructions to vacate the adjudicated conviction of possession of a controlled substance, Minn. Stat. § 152.022, subd. 2(1).

Affirmed in part, reversed in part, and remanded.