STATE OF MINNESOTA
IN COURT OF APPEALS
A11-378

State of Minnesota,
Appellant,

vs.

Rory Alexander Kendall,
Respondent.

Filed June 20, 2011
Affirmed
Muehlberg, Judge[*]

Clay County District Court
File No. 14-CR-10-3877

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

Brian J. Melton, Clay County Attorney, Matthew D. Greenley, Assistant County Attorney, Moorhead, Minnesota (for appellant)

Mark D. Nyvold, Special Assistant State Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Johnson, Chief Judge; Worke, 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

MUEHLBERG, Judge

The state appeals from the district court's order suppressing evidence of methamphetamine gathered from a cigarette case that officers removed from respondent's person during a frisk for officer safety. Because opening the cigarette case went beyond what was necessary or reasonable for officer safety, the district court did not err in suppressing the drug evidence. Therefore, we affirm.

FACTS

The facts of this case are not in dispute. Eight police officers executed a search warrant authorizing the search of a residence and person on September 3, 2010. When the officers knocked on the door to the residence named in the search warrant, respondent Rory Kendall opened the door to let them inside. The search warrant did not authorize the police to search respondent. Upon entering the residence, an officer noticed that respondent was sweating and appeared frail and sickly. The officer believed that respondent was "coming down" from narcotic use or was very ill.

The officers ordered respondent to lie face-down on the floor, then had him stand up and handcuffed his hands behind his back. An officer asked respondent if he had any weapons on his person. Respondent said that he had two knives in his right-front pants pocket. An officer searched the pocket and removed two knives. Respondent then told the officer that he had needles in his left-front pants pocket. One officer pulled respondent's left pocket open so that another officer could reach in and remove three syringes from the pocket. The officer pulling the pocket open noticed that there also was

a metal canister in respondent's left pocket, but was unable to identify it while it was in the pocket. After the other officer removed the needles from respondent's pocket, he removed the canister, revealing it to be a cigarette case, and handed it to the officer who had pulled the pocket open. That officer opened the cigarette case to determine if its contents would be dangerous to the officers executing the search warrant. The officer also believed that the canister itself could have been a weapon because he had previously seen other items that could transform into various weapons. Upon opening the cigarette case, the officer discovered a plastic baggie containing what was later identified as methamphetamine. Respondent was transported to a medical facility five to ten minutes after the officers entered the residence.

The state charged respondent with fifth-degree controlled-substance crime, in violation of Minn. Stat. § 152.025, subd. 2(a)(1) (2010). Respondent moved to suppress evidence of the methamphetamine discovered in the cigarette case, arguing that the removing officer did not reasonably suspect that the case was a weapon before removing it from his pocket and opening it. Respondent also moved to dismiss the complaint against him if the district court granted his motion to suppress the drug evidence.

The district court granted respondent's motion to suppress evidence of the methamphetamine, concluding that the officers had no objectively reasonable belief that the cigarette case was a weapon and, therefore, the officers were not justified in removing it. Alternatively, the district court concluded that even if the officers were justified in removing the cigarette case from respondent's pocket, the officers were not justified in opening it because it was not immediately apparent that it contained contraband. Without

the suppressed drug evidence, the district court concluded that there was not sufficient evidence to convict respondent of possession of a controlled substance in the amount required under the statute and granted respondent's motion to dismiss. The state appeals.

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). The district court's findings of fact are reviewed for clear error. *State v. Lee*, 585 N.W.2d 378, 383 (Minn. 1998).

A search warrant that does not expressly allow a search of persons provides only the limited authority to detain, not search, unarmed individuals present during the execution of the warrant. *State v. Wynne*, 552 N.W.2d 218, 222 (Minn. 1996). "Warrantless searches 'are *per se* unreasonable under the fourth amendment—subject only to a few specifically established and well-delineated exceptions.'" *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)), *aff'd*, 508 U.S. 366, 113 S. Ct. 2130 (1993). One exception is a pat-down search for weapons. *Terry v. Ohio*, 392 U.S. 1, 29-30, 88 S. Ct. 1868, 1884-85 (1968).

In a pat-down search, police officers may feel only for weapons that could harm the officers or others nearby. *Id.* at 26, 88 S. Ct. at 1882. "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." *Dickerson*, 508 U.S. at 373, 113 S. Ct. at 2136.

A protective search for weapons is not improper simply because the item discovered is something other than a weapon. *State v. Hart*, 412 N.W.2d 797, 801 (Minn. App. 1987), *review denied* (Minn. Nov. 13, 1987). The standard under the Fourth Amendment is whether the officer's actions were reasonable under the circumstances. *See Adams v. Williams*, 407 U.S. 143, 147-48, 92 S. Ct. 1921, 1924 (1972) (determining it was reasonable for police officer to reach into suspect's waistband when suspect did not comply with officer's request to exit vehicle and officer reasonably believed weapon was hidden in waistband); *State v. Alesso*, 328 N.W.2d 685, 688 (Minn. 1982) (determining police officer's reach into defendant's pocket was justified when "defendant made a furtive movement of his hand toward the pocket, causing the officer to suspect that he might be reaching for a weapon").

Under the circumstances of this case, we conclude that opening the cigarette case went beyond what was necessary or reasonable for officer safety. Therefore, we do not address the issue of whether the officer was justified in removing the cigarette case from respondent's pocket. "Generally, the officer who removes an object in a weapons search should not be permitted to open the object if it is clear upon observing it that it is not a weapon and does not contain a weapon." *Alesso*, 328 N.W.2d at 689. But an officer may open a container if it is immediately apparent that the removed container holds contraband. *Id.*

The officer here did not think the cigarette case contained contraband, but he thought that it might contain a weapon. Although the officer thought the case might contain a weapon, he was not justified in opening it, for officer-safety reasons,

considering that respondent was in handcuffs and was in the presence of eight police officers. In addition, it is difficult to understand how the cigarette case remained a threat after it was removed from respondent's person. *See Wynne*, 552 N.W.2d at 222 (concluding that purse was not a threat after officers removed it from resident of house being searched). And even if the cigarette case did remain a threat to the officers because of the risk that respondent could overpower them or somehow obtain the case and use its contents as a weapon, it was nonetheless unreasonable and unnecessary for the officer to have opened the case for officer safety because respondent was transported to a medical facility five to ten minutes after officers entered the residence. The officer's continuing exploration of the contents of respondent's cigarette case went beyond what was necessary or reasonable for officer safety and was "unrelated to '[t]he sole justification of the search [under *Terry*:] . . . the protection of the police officer and others nearby.'" *Dickerson*, 508 U.S. at 378, 113 S. Ct. at 2139 (quoting *Terry*, 392 U.S. at 29, 88 S. Ct. at 1884).

Because opening the cigarette case went beyond what was necessary or reasonable for officer safety, the district court did not err in suppressing the drug evidence.

Affirmed.