STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2026

State of Minnesota,
Respondent,

vs.

Erik Chase Boerboon,
Appellant.

Filed August 1, 2011
Affirmed
Minge, Judge

Dakota County District Court
File No. 19HA-CR-09-4741

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

James C. Backstrom, Dakota County Attorney, Vance B. Grannis, III, Assistant County Attorney, Hastings, Minnesota (for respondent)

Eric J. Nelson, Jeremy J. Kaschinske, Halberg Criminal Defense, Bloomington, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Peterson, Judge; and Schellhas, 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 a controlled substance under Minn. Stat. § 152.025, subd. 2(a)(1) (Supp. 2009), arguing that there was

not probable cause to search his vehicle, that a search warrant was required after appellant left the scene, and that the search was unconstitutional in its scope and duration. Because we conclude that the search of the vehicle was constitutional, we affirm.

FACTS

On September 1, 2009, Officer William Duggan observed appellant Erik Boerboon driving a car without a front license plate and executed a traffic stop. When the officer approached the car, he immediately detected an odor he believed was raw marijuana coming from the passenger-side window and observed "tidbits" of a green substance on the center console that appeared consistent with marijuana. The officer observed that Boerboon was also "immediately extremely nervous." Based on these and other observations, the officer believed that criminal activity was occurring.

After running routine checks on the car and Boerboon's driver's license, the officer returned to the car and had Boerboon exit the vehicle. The officer informed Boerboon of the reasons he had him step out of the car, asked him if there were any illegal narcotics in the car, and asked his consent to search it. Boerboon refused to permit a search.

Believing that he had a reasonable suspicion that there were illegal narcotics in the car, Officer Duggan called in a canine unit. He also informed Boerboon that he was free to leave the scene, but that the vehicle had to stay. Another officer gave Boerboon and a passenger a ride to their destination. After the canine unit arrived, the officer had the dog perform a drug sniff of the car. The dog alerted to the presence of narcotics at the passenger-side of the trunk. The car was subsequently searched, and marijuana, plastic

bags, and scales commonly used for weighing narcotics were found in the trunk. A marijuana pipe and a glass container with green residue were found in the center console.

Boerboon was charged with felony fifth-degree possession of a controlled substance, Minn. Stat. § 152.025, subd. 2(a)(1), and petty misdemeanor possession of drug paraphernalia, Minn. Stat. § 152.092 (2008). Boerboon moved to suppress the evidence. The district court denied the motion. Boerboon waived his right to a jury trial and the parties submitted the case to the district court on stipulated facts pursuant to Minn. R. Crim. P. 26.01, subd. 4. The drug-paraphernalia charge was dismissed and the district court found Boerboon guilty of fifth-degree possession of a controlled substance. 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). This court accepts the district court's findings of fact unless they are clearly erroneous. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

I. Probable Cause

The first issue is whether Officer Duggan had probable cause to search Boerboon's car. The United States and Minnesota Constitutions protect against unreasonable searches and seizures. U.S. Const. amends. IV, XIV, § 1; Minn. Const. art. I, § 10. A warrantless search is per se unreasonable unless it falls within one of the

recognized exceptions to the warrant requirement. *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005).

The automobile exception permits the warrantless search of a vehicle if the police have probable cause to believe that the vehicle contains evidence of contraband. *Maryland v. Dyson*, 527 U.S. 465, 467, 119 S. Ct. 2013, 2014 (1999). Probable cause exists when, looking at the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983).

An officer identifying an odor emanating from a vehicle as marijuana is enough to establish probable cause to search the vehicle. *State v. Schultz*, 271 N.W.2d 836, 837 (Minn. 1978). A drug-detecting dog alerting to a vehicle can also establish probable cause to search the vehicle. *State v. Pederson-Maxwell*, 619 N.W.2d 777, 781 (Minn. App. 2000).

Here, the officer testified that he smelled the odor of raw marijuana immediately upon approaching Boerboon's car and observed what he believed to be tidbits of marijuana on the center console. The officer also smelled a cleaning agent or air freshener that he believed was being used as a masking agent to hide the odor of marijuana when he approached the car. The officer observed numerous signs that Boerboon was extremely nervous: his eyes darted back and forth, he did not make direct eye contact, his voice was trembling, he was breathing in a fashion the officer recognized as consistent with someone in a very nervous situation, and his hands shook so strongly that he almost dropped a business card when he handed it to the officer. Finally, after

Boerboon stepped out of the vehicle, the officer observed a thick bundle of cash visible in the pocket of Boerboon's shorts; in the officer's experience, this also indicated the potential of illegal activity.

Boerboon argues that the officer's testimony that he smelled raw marijuana was not credible because the dog did not alert to the car's passenger compartment and because of the presence of the masking agent. Appellate courts give great deference to the district court's determination of witness credibility. *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)). The district court found the officer's testimony credible and the record supports that determination. We note that the officer who handled the narcotics dog testified that wind can have a significant impact on where the dog will alert, stating that "[e]ven our narcotic hidden in the middle of the vehicle, that dog can alert on the rear of the vehicle due to the wind and the presence of the narcotic odor actually moving through the vehicle with the wind direction."

However, we do not need to consider the dog-alert evidence. Giving full weight to the officer's testimony, we conclude that the combination of the odor of marijuana, the presence of what appeared to be tidbits of marijuana, the odor of a masking agent, the many signs that Boerboon was extremely nervous, and the large amount of cash he was carrying, provided probable cause to search the vehicle for contraband.

II. Warrantless Search

Boerboon raises as a second issue the question of whether probable cause still existed after Boerboon left the scene, or whether the officer was then required to obtain a

search warrant. The automobile exception permits the warrantless search of a vehicle if the police have probable cause to believe that the vehicle contains evidence of contraband. *Dyson*, 527 U.S. at 467, 119 S. Ct. at 2014. Given probable cause to search a vehicle, the search may be conducted at the scene of the stop or after the vehicle is taken to the police station. *Chambers v. Maroney*, 399 U.S. 42, 52, 90 S. Ct. 1975, 1981 (1970); *see also State v. Johnson*, 324 N.W.2d 199, 202 (Minn. 1982) (concluding that automobile exception permits search after vehicle is towed to police impound). "[T]he 'automobile exception' has no separate exigency requirement." *Dyson*, 527 U.S. at 466–67, 119 S. Ct. at 2014.

Boerboon argues that the rationale of the United States Supreme Court case, *Arizona v. Gant*, should apply in this case. 129 S. Ct. 1710 (2009). In *Gant*, the Supreme Court held that after Gant was arrested for driving with a suspended license and secured in the back of the squad car, a warrantless search of his vehicle incident to his arrest was unconstitutional. *Id.* at 1723–24.

However, an analogy to *Gant* is unpersuasive in this situation. As Boerboon admits, *Gant* is not directly applicable because the illegal search there was performed incident to arrest. The rationale for a search incident to arrest, including the safety of the police officers and preserving the integrity of evidence, is not the same rationale for the automobile exception. All that is required for the automobile exception is probable cause to believe that the vehicle contains evidence of contraband. If probable cause exists to search a vehicle, the police may search it at the scene or at the police station. *Johnson*, 324 N.W.2d at 202. The search is not conditioned on the location of the suspect in

relation to the vehicle. *Dyson*, 527 U.S. at 466, 119 S. Ct. at 2014. As previously noted, probable cause existed to search Boerboon's car; therefore, the officer was permitted to search the car at the scene regardless of Boerboon's presence.

III. Scope and Duration of the Stop

The third issue is whether the investigatory stop was unconstitutional in its scope and duration. An investigatory stop must be limited in scope and last "no longer than is necessary to effectuate the purpose of the stop." *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002) (quotation omitted). "Expansion of the scope of the stop to include investigation of other suspected illegal activity is permissible under the Fourth Amendment only if the officer has reasonable, articulable suspicion of such other illegal activity." *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20–21, 88 S. Ct. 1868, 1879–80 (1968)). The police may continue a valid investigatory stop as long as they investigate in a diligent and reasonable manner. *State v. Moffatt*, 450 N.W.2d 116, 119 (Minn. 1990).

Boerboon argues that a 45-minute lapse in time from the initial stop to the search demonstrates that Officer Duggan did not pursue the investigation in a diligent and reasonable manner. In *Moffatt*, the police detained three suspects for one hour before arresting them, yet the supreme court concluded this was a reasonable investigation. 450 N.W.2d at 118. Here, Boerboon was actually given a ride from the area after approximately 20–25 minutes. The only delay in the traffic stop was an approximate 20–25 minute wait from the time the canine unit was called until it arrived on scene. As previously stated, at the time the stop was extended for the dog sniff, Officer Duggan had probable cause to believe that narcotics were present in the vehicle. On the facts of this

case, Officer Duggan acted in a diligent and reasonable manner in making the stop, he did not lose his authority to search under the vehicle exception, and the stop was not unconstitutional in its scope or duration.

Affirmed.

Dated: