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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1793**

State of Minnesota,
Respondent,

vs.

Francisco Juan Rosario,
Appellant.

**Filed December 27, 2011
Reversed
Johnson, Chief Judge
Concurring specially, Larkin, Judge**

Ramsey County District Court
File No. 62-CR-10-1787

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

Sara R. Grewing, St. Paul City Attorney, Steven E. Heng, Assistant City Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Johnson, Chief Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

JOHNSON, Chief Judge

Francisco Juan Rosario was found guilty of possession of a pistol without a permit following a stipulated-evidence trial. On appeal, he argues that the district court erred by denying his motion to suppress evidence of the pistol, which sheriff's deputies found after an investigatory traffic stop expanded in scope and duration. We conclude that evidence of the pistol should have been suppressed because the search and seizure exceeded the original justification of the investigatory traffic stop but was not supported by additional grounds for a reasonable, articulable suspicion of criminal activity by Rosario. Therefore, we reverse.

FACTS

At approximately noon on March 15, 2010, Ramsey County Sheriff's Deputies Mark Koderick and Gregory Barr were looking for a man who had been charged with terroristic threats and a drug offense and had outstanding arrest warrants. Relying on what the district court later described as a confidential form of electronic surveillance, the deputies believed that the fugitive was at or near a particular location in the city of St. Paul. Several deputies conducted a stake-out at that location. A white sport-utility vehicle (SUV) with tinted windows departed from that location. Deputy Barr and Deputy Koderick pursued the SUV in two squad cars for approximately three or four miles, for approximately five to ten minutes. As they followed the SUV, Deputy Koderick received additional information from the electronic surveillance that the fugitive likely was inside the SUV.

Deputy Koderick signaled for the SUV to stop, and the SUV did so. Four additional squad cars, including Deputy Barr's, converged on the stopped SUV. Deputy Koderick approached the SUV on the driver's side, while Deputy Barr approached on the passenger's side. The deputies found two persons inside the SUV: Joshua Burton, who was driving, and Rosario, who was a passenger. The deputies quickly determined that the fugitive was not in the SUV. The deputies knew that the fugitive is African American and promptly determined that neither Burton nor Rosario is African American. Burton and Rosario also produced appropriate forms of photo-identification, which revealed their true names, not the name of the fugitive. While Burton and Rosario waited in the SUV, Deputy Koderick returned to his squad car to check for any outstanding warrants on Burton or Rosario, but he found none.

The deputies then asked Burton and Rosario to step out of the SUV for the purpose of questioning them about the fugitive. Deputy Barr led Rosario toward his squad car and prepared to frisk him. Before Deputy Barr began the frisk, Rosario indicated that he had a knife in his pocket. Deputy Barr removed the knife from Rosario's pocket and placed it on the squad car. Rosario's body began to shake after Deputy Barr asked him to spread his legs. Deputy Barr handcuffed Rosario and asked him why he was "acting so weird." Rosario informed Deputy Barr that he had a pistol in his waistband and that he did not have a permit to carry the weapon. Another deputy seized the pistol.

The next day, the state charged Rosario with the gross misdemeanor offense of possession of a pistol without a permit, a violation of Minn. Stat. § 624.714, subd. 1a

(2008), and the misdemeanor offense of illegal transportation of a firearm, a violation of Minn. Stat. § 97B.045, subd. 1 (2008).

In June 2010, Rosario moved to suppress evidence of the pistol. He argued to the district court that evidence of the pistol should be suppressed because the original justification for the stop ceased to exist when deputies discovered that the fugitive was not in the SUV. At the suppression hearing, Deputy Koderick described the investigation that gave rise to the traffic stop. After cross-examination by Rosario's attorney, the district court questioned Deputy Koderick about the source of the information indicating that the fugitive was in the particular area of the stake-out and inside the SUV. Deputy Koderick stated that revealing the source of the information "would give every fugitive out there the opportunity to evade capture or arrest by an officer of the law." The record indicates that the district court conducted a bench conference, which is not reported. The district court then announced a brief recess.

After the recess, the district court stated that it had just conducted an *in camera* proceeding with the two deputies and the prosecutor to learn more about the deputies' investigative techniques. The district court stated that it asked Rosario's counsel to not attend because of the district court's concern for the sheriff's department's attempt to protect the confidentiality of its investigative techniques. The district court stated that "the investigative technique that was used in this case is one that is reliable, not well-known, and needs to be protected in the interests of public safety." After noting a defendant's right to challenge the reasonableness of a search and seizure, the district court continued by stating:

I deem that type of surveillance to be . . . a reliable method for attempting to determine the location of a person who is the subject of the . . . interest of the sheriff's department.

So as we proceed we'll use that term electronic surveillance and nothing more – and I will not expect or elicit any more specific information from the deputies as to that technique.

The district court then asked Rosario's attorney whether she had "anything for the record at this point." Rosario's attorney responded, "Nothing, your honor." Neither before nor after the *in camera* proceeding did Rosario's attorney object to her exclusion or Rosario's exclusion from that proceeding. The *in camera* proceeding was not reported.

At the conclusion of the suppression hearing, the district court denied the motion from the bench. The district court initially found that the deputies had reasonable articulable suspicion to conduct the investigatory traffic stop, based in part on the information received by the district court during the *in camera* proceeding. The district court then reasoned that "there was reason to believe that if [the fugitive] was not in the vehicle, Mr. Rosario or the driver of the vehicle might very well have information that would have led the deputies to" the fugitive such that the deputies "had a reasonable basis upon which to question Mr. Rosario and to detain him for the purposes of that questioning." The district court further reasoned that Deputy Barr was justified in searching Rosario for the following reasons:

Given the nature of their occupation and given the reasonable belief that Mr. Rosario might very well have known [the fugitive] and given [the fugitive's] criminal history as known to the deputies, it's the finding of this Court that the deputies did have the justification for being concerned about their own

safety and that Officer Barr specifically was reasonably concerned under these circumstances for his own safety.

The district court concluded that Deputy Barr was justified in searching Rosario before questioning him concerning his knowledge of the fugitive and the fugitive's whereabouts.

The day after the suppression hearing, the case was submitted to the district court in a stipulated-evidence trial pursuant to Minn. R. Crim. P. 26.01, subd. 4. After Rosario made the waivers required by the rule, Rosario and the prosecutor specifically acknowledged that the suppression issue is dispositive of the case. *See* Minn. R. Crim. P. 26.01, subd. 4(c). The parties stipulated that on March 15, 2010, Rosario possessed a pistol without a permit in the city of St. Paul. The district court found Rosario guilty of the first charge, possession of a pistol without a permit. The state dismissed the second charge. The district court sentenced Rosario to 365 days of jail, with 350 days stayed for two years. Rosario appeals.

DECISION

Rosario raises two issues on appeal. First, he argues that the district court erred by denying his motion to suppress evidence of the pistol because the deputies unreasonably expanded the scope and duration of the investigatory traffic stop. His first argument assumes that the investigatory traffic stop initially was lawful. Second, Rosario argues, in the alternative, that the district court erred when ruling that the investigatory stop initially was justified because the district court relied on evidence that was elicited during the off-the-record, *in camera* proceeding, in violation of Rosario's right to be present.

I. Expansion of Investigatory Stop

The Fourth Amendment to the United States Constitution guarantees the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV; *see also* Minn. Const. art. I, § 10. The Fourth Amendment also protects the right of the people to be secure in motor vehicles. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

As a general rule, a law enforcement officer may not seize and search a person without probable cause. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). A law enforcement officer may, however, “consistent with the Fourth Amendment, conduct a brief, investigatory stop” of a motor vehicle if “the officer has a reasonable, articulable suspicion that criminal activity is afoot.” *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 675 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884 (1968))). A reasonable, articulable suspicion exists if, “in justifying the particular intrusion the police officer [is] able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880. Reasonable suspicion requires “something more than an unarticulated hunch”; rather, “the officer must be able to point to something that objectively supports the suspicion at issue.” *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (quotation omitted); *see also Terry*, 392 U.S. at 21, 88 S. Ct. at 1880.

A proper investigatory stop generally must be limited in scope and duration to the original purpose of the stop. *State v. Diede*, 795 N.W.2d 836, 845 (Minn. 2011). An

investigatory stop ““must be temporary 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) (quoting *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325 (1983) (plurality opinion)). A proper investigatory stop may be expanded in scope “to the investigation of only those additional offenses for which the officer develops a reasonable, articulable suspicion within the time necessary to resolve the originally-suspected offense.” *Diede*, 795 N.W.2d at 845 (quoting *Wiegand*, 645 N.W.2d at 136). Otherwise, the duration of an investigatory stop may be extended only if doing so would be “reasonably related to the investigation of an offense lawfully discovered or suspected during the stop.” *State v. Askerooth*, 681 N.W.2d 353, 370 (Minn. 2004). The scope of a proper investigatory stop may include a limited search for weapons for the purpose of ensuring the safety of the law enforcement officers conducting the stop. *See id.*; *State v. Varnado*, 582 N.W.2d 886, 889 (Minn. 1998).

For purposes of Rosario’s first argument, we assume that the deputies had reasonable, articulable suspicion to stop the SUV of which Rosario was a passenger. Rosario argues that, first, the scope and duration of the investigatory stop exceeded what was justified by its original purpose and, second, the deputies did not have any additional basis for a reasonable, articulable suspicion of criminal activity. Rosario is correct. The sole original purpose of the investigatory stop of the SUV was the deputies’ suspicion that a fugitive was inside. The deputies quickly learned that a fugitive was not inside the SUV; they quickly established that only two persons were inside the SUV and that neither of them was the fugitive they were seeking. They also learned that neither Burton

nor Rosario had an outstanding arrest warrant. At that point in time, the original justification for the investigatory stop ceased to exist, and the continued duration of the investigatory stop and its expanded scope can be justified only if other facts provided a reasonable, articulable suspicion of other criminal offenses. *See Diede*, 795 N.W.2d at 845; *Askerooth*, 681 N.W.2d at 370; *Wiegand*, 645 N.W.2d at 135-36. But the deputies did not have any such suspicion because they never suspected Burton or Rosario of any criminal offense.

The district court reasoned that the deputies were justified in detaining Burton and Rosario for purposes of questioning them. More specifically, the district court stated that it was reasonable for the deputies to believe that Burton and Rosario might know the fugitive and might have information about the fugitive's whereabouts. On appeal, the state contends that the deputies' interest in questioning Rosario is justified by the original purpose of the investigatory stop. The state's argument is contrary to caselaw. The reasonable suspicion necessary to justify the continued duration of the investigatory stop must "allow the officer to be able to articulate . . . that he or she had a particularized and objective basis for suspecting *the seized person* of criminal activity." *Diede*, 795 N.W.2d at 842-43 (emphasis added) (quotations omitted). Again, the deputies never suspected Burton or Rosario of a criminal offense. Furthermore, an officer does not possess a reasonable, articulable suspicion that a person is engaging in criminal activity merely because the person associates with a suspected or known criminal. *Id.* at 844. Thus, the continued duration of the investigatory stop cannot be justified by Burton's or Rosario's

status as a potential witness to a crime by the fugitive or by their possible association with the fugitive.

The district court also found that Deputy Barr was justified in searching Rosario for the purpose of ensuring officer safety. An officer may ask a person to step out of a vehicle for the purpose of ensuring officer safety only when the officer has ongoing justification for the investigatory stop. *See Askerooth*, 681 N.W.2d at 367. If an officer no longer has a reasonable, articulable suspicion of criminal activity, the officer no longer has a justification for the investigatory stop. *See id.*; *Wiegand*, 645 N.W.2d at 135. In this case, the original justification for the investigatory stop was to locate and apprehend the fugitive. As stated above, that justification ceased to exist after the deputies learned that the fugitive was not in the SUV, and no other valid grounds arose to justify an investigatory stop of continuing duration. Thus, given the circumstances of this case, the deputies were not justified in asking Burton and Rosario to step out of the SUV for officer safety because there was no proper additional investigation that would have exposed the officers to a safety risk.

The state also contends that the officers were justified in asking Rosario to step out of the SUV because of Rosario's failure to wear a seatbelt, in violation of Minn. Stat. § 169.686, subd. 1(a) (Supp. 2009). The seatbelt offense is a petty misdemeanor, punishable only by a \$25 fine. *See id.*, subd. 1(b) (Supp. 2009). The deputies did not issue a citation to Rosario for the offense. Nonetheless, we may consider the state's argument because we apply an objective test to the reasonableness of an investigatory stop. *Askerooth*, 681 N.W.2d at 368. But the state's contention fails because the state

cannot establish that issuing a seatbelt citation to Rosario necessarily would have extended the duration of the investigatory stop. Deputy Koderick did not find it necessary to remove Burton and Rosario from the SUV while he checked for outstanding arrest warrants from his squad car. After he found no outstanding warrants, Deputy Koderick could have prepared a seatbelt citation in his squad car and then simply handed it to Rosario and allowed him and Burton to leave the scene. The state bears the burden of establishing the reasonableness of an investigatory stop. *Id.* at 365. The state has not satisfied its burden of establishing that the time necessary to issue a seatbelt citation would have justified the request that Burton and Rosario step out of the SUV. *See id.* at 368-69 (rejecting state's argument that officer safety justified removing appellant from vehicle and placing him in squad car).

The state further contends that the deputies were justified in asking Burton and Rosario to step out of the SUV because law enforcement officers may do so as a matter of course during an investigatory stop. The state relies on *State v. Ortega*, 770 N.W.2d 145 (Minn. 2009), and *State v. Krenik*, 774 N.W.2d 178 (Minn. App. 2009), *review denied* (Minn. Jan. 27, 2010). But in those cases, there was an ongoing justification for the investigatory stop. *See Ortega*, 770 N.W.2d at 152; *Krenik*, 774 N.W.2d at 184. In this case, as stated above, there was no ongoing justification for the investigatory stop after the deputies learned that the fugitive was not in the SUV because the deputies had no objective reason to suspect Burton or Rosario of criminal activity.

The state last contends that Deputy Barr's search of Rosario was justified because Rosario admitted to possessing a pistol. But Rosario's statement to Deputy Barr occurred

after the original justification for the ongoing investigatory stop had ceased to exist. The investigatory stop was, at that time, beyond the scope of its original justification, without any additional justification and, thus, was unreasonable. This means that Rosario's possession of the pistol was not "lawfully discovered." *See Askerooth*, 681 N.W.2d at 370; *see also State v. Fort*, 660 N.W.2d 415, 418-19 (Minn. 2003) (suppressing evidence obtained by intrusive questioning of passenger of vehicle stopped for routine traffic violation). Thus, the state cannot justify its search of Rosario's person by Rosario's statement concerning his possession of the pistol.

To conclude, Deputy Barr's seizure of Rosario's pistol was not justified by the original purpose of the investigatory stop or by additional facts giving rise to a reasonable, articulable suspicion of criminal activity by Rosario. Thus, the seizure of Rosario's pistol was unreasonable and in violation of the Fourth Amendment to the United States Constitution and article I, section 10, of the Minnesota Constitution. Accordingly, evidence obtained by Deputy Barr during the search should have been suppressed.

II. Right to be Present

As stated above, Rosario also argues, in the alternative, that the district court committed reversible error by excluding him and his attorney from the *in camera* proceeding at which the district court apparently received testimony concerning the deputies' electronic surveillance methods. We have concluded in part I that the district court erred for other reasons when denying Rosario's motion to suppress. Thus, it is unnecessary to address Rosario's alternative argument.

In sum, the district court erred by denying Rosario's motion to suppress evidence of the pistol. The parties agreed to determine Rosario's guilt at a stipulated-evidence trial, which means that the resolution of the pre-trial suppression motion is dispositive and that a contested trial is unnecessary. *See* Minn. R. Crim. P. 26.01, subd. 4(c). Therefore, Rosario's conviction must be reversed.

Reversed.

LARKIN, Judge (concurring specially)

I concur with the majority's opinion but write separately to address the district court's failure to record the *in camera* proceeding regarding the reliability of the electronic-surveillance technique that led to the investigative seizure in this case. The *in camera* proceeding occurred after the district court judge questioned Deputy Koderick, on the record at the hearing, regarding the source of the information that led to appellant's seizure. Deputy Koderick responded that he could reveal the source of the information, but if he did so, it "would give every fugitive out there the opportunity to evade capture or arrest by an officer of the law." At this point, the district court recessed the hearing and, shortly thereafter, initiated the *in camera* proceeding.

The district court judge, the prosecutor, and the state's law-enforcement witnesses, Deputies Koderick and Barr, were present at the *in camera* proceeding. The district court judge described the proceeding as "a discussion with the deputies in chambers about the type of electronic surveillance that was used in this case." Based on that discussion, the district court "deem[ed] that type of surveillance to be a . . . reliable method for attempting to determine the location of a person who is the subject of . . . interest [to] the sheriff's department." And the district court ultimately concluded that

based on the information that has been presented to this Court in part in camera, I believe there was a reasonable and articulable suspicion to stop the vehicle. I also believe that under the circumstances, given the nature of the electronic surveillance in this particular case, there was reason to believe that if [the fugitive] was not in the vehicle, [appellant] or the driver of the vehicle might very well have information that would have led the deputies to [the fugitive]. And for that reason, I believe and I find that they had a reasonable

basis upon which to question [appellant] and to detain him for the purposes of that questioning.

When this court asked the state, at oral argument, whether it could establish the constitutional validity of the expansion of the investigative seizure without reliance on the *in camera* proceeding, which was not recorded, the state conceded that the district court's decision was based on information obtained during the *in camera* hearing. The state also conceded that "a mistake [was] made" in failing to record the *in camera* discussion with the deputies.

The case was before the district court for an omnibus hearing to determine whether the officers' search and seizure of appellant was constitutional and whether the resulting evidence was admissible. *See* Minn. R. Crim. P. 11.01 (stating that an omnibus hearing must be held if a defendant does not plead guilty in a gross-misdemeanor case), 11.02 (stating that if a defendant demands an omnibus hearing, the court must hear all motions, including those relating to constitutional issues). "*A verbatim record must be made*" of the omnibus hearing. Minn. R. Crim. P. 11.10, subd. 1 (emphasis added). Moreover, Minnesota statutes mandate a complete stenographic record of court proceedings in "[f]elony and gross misdemeanor offenses, except arraignments and first appearance in district court" and of "[c]ontested district court trials and fact-finding hearings." Minn. Stat. § 484.72, subd. 4 (2008). Rule 11 describes the omnibus hearing as a fact-finding hearing at which the court may receive evidence, including witness testimony. *See* Minn. R. Crim. P. 11.03 (providing for the receipt of evidence on any omnibus issue and cross-examination of any witness called by any party), 11.07 (stating,

“[t]he court must make findings and determinations on the omnibus issues in writing or on the record”).

In this case, the district court allowed an *in camera* discussion as a substitute for testimony during a fact-finding hearing regarding a constitutional issue. The district court was required to record the discussion.¹ See Minn. Stat. § 484.72, subd. 4; Minn. R. Crim. P. 11.10, subd. 1. It appears that the district court was attempting to obtain the information it needed to determine the constitutional validity of the search and seizure, while at the same time accommodating the state’s desire to protect the secrecy of its investigative technique in the “interests of public safety” and appellant’s right to challenge “information that is presented with regard to . . . any issue relating to [the] charges and the . . . right to defend . . . against those charges.” Although the district court’s attempt to maintain the integrity of a purportedly effective electronic-surveillance technique is understandable and commendable, the district court was nevertheless required to comply with the statute and rule that mandate recording of omnibus and fact-finding hearings.

¹ Appellant argues that the district court erred by excluding appellant and his attorney from the *in camera* proceeding. Because it is not necessary to reach this issue, I, like the majority, do not address it. My decision not to address the merits of the issue is not to be construed as an endorsement of the process.