STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0384

State of Minnesota,
Respondent,

vs.

Theodore Cantrial Fox,
Appellant.

Filed March 3, 2014
Affirmed
Klaphake, Judge[*]

Pine County District Court
File No. 58-CR-12-361

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

John Carlson, Pine County Attorney, Steven C. Cundy, Assistant County Attorney, Pine City, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Stephanie A. Karri, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and Klaphake, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving 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

KLAPHAKE, Judge

Appellant Theodore Cantrial Fox challenges his second-degree controlled substance conviction, arguing that police unreasonably expanded the scope and duration of a traffic stop that led to discovery of cocaine in his possession. Appellant also challenges the procedural validity of his bench trial, arguing that the proceedings failed to comply with Minn. R. Crim. P. 26.01, subds. 3, 4.

Because police had reasonable, articulable suspicion of criminal activity to support expansion of the stop, we affirm the district court's decision not to suppress evidence discovered in the vehicle. Because the district court complied with Minn. R. Crim. P. 26.01, subd. 2, we also conclude that appellant's bench trial was not procedurally defective.

D E C I S I O N

I. Expansion of Scope and Duration of Traffic Stop

Unreasonable searches and seizures are prohibited by both the U.S. Const. amend. IV and the Minn. Const. art. I, § 10. A traffic stop is a seizure under both state and federal law. *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004). This court reviews de novo a district court's pretrial suppression order. *Id.*

Police are permitted to make a limited investigative stop if they have a reasonable, articulable suspicion that a person is engaged in criminal activity. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). However, once stopped, "the scope and duration of a traffic stop investigation must be limited to the justification for the stop." *State v. Fort*,

660 N.W.2d 415, 418 (Minn. 2003). A stop may become invalid if police expand the scope and duration of the traffic stop. *Askerooth*, 681 N.W.2d at 364. Each expansion of a stop must be supported by independent, reasonable, articulable suspicion of additional criminal activity. *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005). We review the totality of the circumstances to determine whether this standard is met. *Id.* at 488-89. When one factor alone is not "independently suspicious," several "innocent factors in their totality" may permit an officer to expand the scope and duration of a traffic stop. *State v. Martinson*, 581 N.W.2d 846, 852 (Minn. 1998) (quotation omitted).

Appellant concedes that the initial stop of the vehicle in which he was a passenger was lawful. A citizen phoned in a traffic complaint that the vehicle was driving erratically, and an officer saw the vehicle speeding and swerving on the road. But appellant argues that the officer unlawfully expanded the scope and duration of the traffic stop by waiting near the vehicle until a second officer arrived, based on his belief that the vehicle occupants looked "nervous." *See State v. Smith*, 814 N.W.2d 346, 353 (Minn. 2012) ("[W]e have been reluctant to rely on nervous behavior as evidence to support a reasonable, articulate suspicion of criminal activity . . . .").

The record shows that the officer approached the vehicle and asked the driver lawful questions about his driver's license, driving conduct, and destination. *See State v. Syhavong*, 661 N.W.2d 278, 281 (Minn. App. 2003) (finding that "an officer may reasonably ask for the driver's license and registration and ask the driver about his destination and the reason for the trip"). The driver was unable to provide a driver's license or proof of insurance. Appellant then provided an Illinois driver's license and

told the officer that the vehicle was a rental car. Appellant provided the car-rental contract and informed the officer that the car was rented under his sister's name. In addition, the officer noticed that the men looked nervous; they avoided eye contact, and appellant clutched a jacket close to his body. These facts prompted the officer, who knew another officer would be arriving shortly, to wait "less than five minutes" for the second officer to arrive.

The totality of these circumstances provided the officer with a sufficient factual basis for waiting less than five minutes for the second officer to arrive. The driver could not provide proof of his identity, appeared nervous, and the car was rented to a third party. Waiting for the second officer to arrive ensured that the men would not flee while the officer processed the ticket. Given the totality of these facts, we conclude that the first-responding officer was justified in expanding the duration of the traffic stop. Moreover, because the duration of the traffic stop was valid, the second-responding officer was lawfully in position when he saw the baggie of cocaine in plain view on appellant's lap. *See State v. Zanter*, 535 N.W.2d 624, 631 (Minn. 1995) (stating that "under the 'plain view' exception to the warrant requirement, the police may, without a warrant, seize an object they believe to be the fruit or instrumentality of a crime, provided: (1) the police are legitimately in the position from which they view the object; (2) they have a lawful right of access to the object; and (3) the object's incriminating nature is immediately apparent" (quotation omitted)). It was not until the second-responding officer saw the cocaine in plain view that the scope of the traffic stop was expanded. His observation provided valid justification for expanding the scope of the

traffic stop. *State v. Lembke*, 509 N.W.2d 182, 184 (Minn. App. 1993) (concluding that during a traffic stop, an officer who saw a partially concealed plastic bag in the driver's pocket had probable cause to seize the bag under plain view exception to the warrant requirement). Thus, we observe no error in the district court's refusal to suppress the evidence obtained during the traffic stop.

II. Stipulated Facts Trial

Appellant and the prosecutor agreed to submit the question of appellant's guilt to the district court under Minn. R. Crim. P. 26.01, subd. 3, which permits the district court to make its decision based on stipulated facts. The parties submitted documentary evidence to the district court, and appellant waived all trial rights. Appellant now argues that his bench trial was procedurally defective because the evidence submitted to the district court contained contradictory, unstipulated facts in violation of this rule.[1]

Rule 26.01, subdivision 3 prohibits a body of disputed evidence from forming the basis of a decision in a stipulated facts trial. *Dereje v. State*, 837 N.W.2d 714, 720 (Minn. 2013). In *Dereje*, the supreme court distinguished between the use of "evidence" in subdivision 4 and "facts" in subdivision 3, suggesting that the language difference "indicates that the two terms have different meanings." *Id.* In *Dereje*, the supreme court

[1] Appellant also argues that his bench trial did not comply with Minn. R. Crim. P. 26.01, subd. 4. The district court found that the procedure in Minn. R. Crim. P. 26.01, subd. 4 was not properly followed at the time of trial because appellant did not acknowledge that he was limiting his appeal to pre-trial issues and neither the state nor appellant made the required acknowledgments under Minn. R. Crim. P. 26.01, subd. 4(g). Respondent concedes this point, and we agree with the district court's findings that the requirements of Minn. R. Crim. P. 26.01, subd. 4 were not satisfied here.

also defined a "stipulated fact" as an "agreement between opposing parties regarding the actual event or circumstance." *Id.* at 720.

We conclude that the parties did not comply with Minn. R. Crim. P. 26.01, subd. 3 here. While they agreed on the materials to be submitted to the district court, they disagreed about the events that actually occurred. And, as indicated by the district court's 14-paragraph findings of fact section, the court did not simply apply the law to the parties' stipulated facts; rather, the court adopted the state's version of the facts and rejected appellant's version.

This error does not end our inquiry, however. Appellant validly waived his jury-trial rights; he knowingly waived his right to cross-examination and to submit supporting evidence; and the district court made detailed findings drawn from the stipulated evidence. Although appellant may not have had a valid stipulated facts trial as described by rule 26.01, subd. 3, we conclude that he was afforded a valid bench trial under rule 26.01, subd. 2. *See* Minn. R. Crim. P. 26.01, subd. 2 (permitting a bench trial to proceed without live witnesses, based solely on documentary testimony); *Dereje*, 837 N.W.2d at 721 (holding that bench trial was invalid under Minn. R. Crim. P. 26.01, subd. 3, but was valid under rule 26.01, subd. 2, where defendant waived his jury-trial rights and the district court made thorough findings of fact based on documentary evidence). Thus, we conclude that any error in appellant's bench trial did not affect his substantial rights and does not warrant reversal of his conviction.

Affirmed.