STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0595

State of Minnesota,
Respondent,

vs.

Gary Jerrod Phillips,
Appellant.

Filed May 27, 2014
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-12-9325

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

Michael O. Freeman, Hennepin County Attorney, Adam Tomczik, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Peterson, Judge; and Hudson, Judge.

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

PETERSON, Judge

In this appeal from a conviction of second-degree controlled-substance crime, appellant argues that the district court erred by concluding that police properly detained him during the traffic stop of a vehicle in which he was a passenger. We affirm.

FACTS

At approximately 2:15 a.m. on January 27, 2012, Brooklyn Center Police Officer Ryan Soliday was on routine patrol at a hotel parking lot along Freeway Boulevard near Highway 694, which is an area known for heavy narcotics and prostitution activity. When Soliday entered the parking lot, he saw a blue Lincoln with three occupants move from a parking space near the main hotel entrance to another spot on the lot. Soliday checked the vehicle's license plate and found that the car was likely a rental car, which he knew are often used to transport narcotics.

Soliday left the lot and continued to watch the Lincoln from a distance of 200 to 300 yards, where he could not be seen. In the next ten minutes, one occupant loitered outside the car, and a person later identified as Richard Fonzy walked from the hotel to speak to the driver, then walked away from the car.

Soliday suspected that he was observing narcotics activity and notified backup police that he intended to make contact with Fonzy. As Soliday approached in his squad car, Fonzy loudly yelled out, "hey," to alert the Lincoln's two occupants. Fonzy then returned to the Lincoln and appeared to either pass or receive something through the driver's side window.

Without activating his emergency lights, Soliday parked his squad car near the Lincoln, leaving room for it to exit. Soliday approached Fonzy and "asked him for consent to pat search his person" because Soliday "wanted to make sure [Fonzy] didn't have any weapons," and Fonzy consented to be searched. Soliday discovered a small cellophane baggie that contained suspected narcotics and placed Fonzy under arrest. According to Soliday, as he was searching and arresting Fonzy at the rear of the Lincoln, he saw appellant Gary Phillips, who was seated in the right rear passenger seat, "looking back towards me over his left shoulder. He was also kind of shifting around in his seat, moving around quite a bit, which made me nervous that he may be trying to conceal a weapon . . . ."

Officer Cody Turner and another officer arrived at the scene. Turner approached appellant from the right rear of the car and saw that appellant "had his left hand pinned underneath his leg," and it looked like he was hiding something underneath his leg. Appellant seemed intoxicated, would not make eye contact, and inaudibly responded to Turner's questions. Appellant ignored Turner's repeated and increasingly louder commands to place his hands on his lap, and Turner became so concerned that he drew his firearm, kept it in a low-ready position, and told appellant to place his hands on the back cushion of the front seat. Thinking that appellant might have a weapon, Soliday, who by then had joined Turner, directed appellant to get out of the car so that they could conduct a pat search; because of appellant's conduct and movements, Turner was also "very concerned" that there might be a weapon in the car.

When Soliday pulled appellant from the car, he felt appellant tense his right arm. Soliday repeatedly told appellant to relax, and he handcuffed appellant's right hand, but appellant held his left hand out of reach and did not comply with Soliday's command to put his left hand on his head. As Turner attempted to grab appellant's left hand, appellant broke away and ran. The officers chased him, and to subdue him, they tased him twice. A mixture of heroin and morphine weighing .3 grams was discovered on appellant's person at the arrest site, and heroin weighing 24.1 grams was discovered in appellant's pants pocket while he was in an ambulance being transported to the hospital to be treated for injuries that resulted from the tasing.

Appellant was charged with first-degree controlled-substance crime. The district court denied appellant's pretrial motion to suppress evidence obtained from him. Following an evidentiary hearing, the district court concluded that appellant "was free to leave the scene up until the point that Officer Turner ordered [appellant] to place his hands in his lap," and that the search of appellant's person was justified as a search incident to arrest. Following a trial, appellant was convicted of second-degree controlled-substance crime and received an executed 78-month sentence.

D E C I S I O N

In reviewing a pretrial suppression order, an appellate court independently reviews the facts to determine whether, as a matter of law, the district court erred in denying a motion to suppress evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). This court reviews the district court's factual findings for clear error and defers to the district court's credibility determinations. *State v. Klamar*, 823 N.W.2d 687, 691 (Minn. App.

2012). We review legal determinations de novo. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009).

Appellant argues that he was illegally seized when Turner ordered him to place his hands on his lap and, therefore, evidence seized from him must be suppressed and his conviction must be reversed. Individuals have a constitutional right "to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. A warrantless seizure is unreasonable unless it falls under a recognized exception to the warrant requirement. *State v. Lemert*, 843 N.W.2d 227, 230 (Minn. 2014). "The Supreme Court of the United States recognized one such exception in *Terry v. Ohio*, in which it held that a law-enforcement officer may conduct a protective pat search of a person's outer clothing so long as the officer has a reasonable, articulable suspicion that the person whom the officer has lawfully detained may be armed and dangerous." *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 26-27, 88 S. Ct. 1868, 1882-83 (1968)). "Reasonable suspicion must be based on specific, articulable facts that 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." *State v. Diede*, 795 N.W.2d 836, 842-43 (Minn. 2011) (quotation omitted). Reasonable suspicion must be examined from the perspective of a trained police officer, and "courts must evaluate whether reasonable, articulable suspicion exists under a totality-of-the-circumstances approach." *Lemert*, 843 N.W.2d at 230-31.

For purposes of Fourth Amendment analysis, appellant was seized when police approached the car and Turner questioned appellant in an increasingly louder tone,

directed him to put his hands where they could be seen, and drew his revolver when appellant refused to respond. *See Harris*, 590 N.W.2d at 98 (stating "the threatening presence of several officers, the display of a weapon by an officer, . . . or the use of language or tone of voice indicating that compliance with the officer's request might be compelled" are circumstances that can indicate that a person has been seized (quotations omitted)); *see also State v. Fort*, 660 N.W.2d 415, 418 (Minn. 2003) (stating that a "temporary detention of individuals during the stop of an automobile by the police constitutes a seizure under the Fourth Amendment" (quotation omitted)).

Further, the facts known to the officers when they decided to pat search appellant establish that they had a reasonable, articulable suspicion that appellant was involved in criminal activity and might be armed and dangerous. Appellant was in a car after 2:00 a.m. in an area of known heavy narcotics activity. The car moved from one parking spot to another when Soliday's squad car entered the hotel lot. After parking where he could not be seen, Soliday saw an individual loitering outside the car and Fonzy coming and going from the hotel to the car. And when Soliday approached after watching for ten minutes, he heard Fonzy yell a loud warning to the car's occupants and then saw him return to the car and appear to give or receive something from the driver. Soliday discovered suspected narcotics on Fonzy while conducting a consensual pat search for weapons. In addition, appellant repeatedly turned around in the car during Fonzy's search and arrest, made furtive movements that suggested he might be hiding a weapon, and refused to follow police directives. Under the totality of these circumstances, police had a reasonable, articulable suspicion to support a pat search of appellant for weapons.

See State v. Yang, 814 N.W.2d 716, 718 (Minn. App. 2012) ("[W]hen circumstances exist to create an objectively reasonable concern for officer safety, the officer engaged in a valid stop may also conduct a brief pat-down search for weapons.").

Appellant argues that his lack of direct contact with Fonzy and his mere presence in the car were not sufficient to demonstrate a reasonable suspicion that he was involved in criminal activity or armed and dangerous. *Diede*, 795 N.W.2d at 844 ("Mere proximity to, or association with, a person who may have previously engaged in criminal activity is not enough to support reasonable suspicion of possession of a controlled substance."). In *Lemert*, the supreme court considered whether police could conduct a pat search of a vehicle's passenger after stopping the vehicle to arrest the driver, a suspected drug dealer who had used the same vehicle earlier that day for a meeting about a drug transaction. 843 N.W.2d at 232. The supreme court included in its consideration of the totality of circumstances "any reasonable inferences that an officer could make in light of the facts." *Id.* The inferences applied by the court were that car passengers are often "engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing" and that "a substantial nexus exists between drug dealing and violence." *Id.* (citing *United States v. Bustos-Torres*, 396 F.3d 935, 943 (8th Cir. 2005) ("Because weapons and violence are frequently associated with drug transactions, it is reasonable for an officer to believe a person may be armed and dangerous when the person is suspected of being involved in a drug transaction.")) (other citation omitted). Applying these inferences, as well as the other circumstances surrounding appellant's seizure, we conclude that neither appellant's lack

of direct contact with Fonzy nor his mere presence in the car changes our decision that police had a reasonable, articulable suspicion that appellant was involved in criminal activity and could be armed and dangerous.[1]

The district court did not err in declining to suppress evidence obtained during appellant's lawful seizure, and we affirm appellant's conviction.

Affirmed.

[1] Soliday's handcuffing of appellant's right hand after removing him from the car also was constitutionally permissible under the circumstances presented. When police officers have a valid concern for their safety during a valid traffic stop, it may be reasonable for them to remove vehicle occupants, frisk them, place them in the back of a squad car, and briefly handcuff them. *State v. Munson*, 594 N.W.2d 128, 137 (Minn. 1999); *see State v. Askerooth*, 681 N.W.2d 353, 369-70 (Minn. 2004) (stating that confinement in squad car of driver stopped for traffic violation may be justified if "reasonably related to . . . a threat to officer safety").