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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0706

State of Minnesota,
Respondent,

vs.

Eddie Arlondoe Burch,
Appellant.

Filed March 3, 2014
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CR-12-27524

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

Susan L. Segal, Minneapolis City Attorney, Zenaida Chico, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

William Ward, Chief Public Defender, Kellie M. Charles, Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Kirk, Judge.

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

LARKIN, Judge

Appellant challenges the district court's denial of his motion to suppress evidence, arguing that the police unlawfully pat frisked him during a valid investigative stop. We affirm.

FACTS

Respondent State of Minnesota charged appellant Eddie Arlondoe Burch with one count of gross-misdemeanor possession of a pistol without a permit and one count of misdemeanor interference with pedestrian or vehicular traffic. Burch moved the district court to suppress a gun that a police officer found in his pocket after the officer stopped and frisked him. Burch claimed that the stop and pat-frisk were unconstitutional. The district court held an evidentiary hearing on Burch's motion to suppress and made the following factual findings. *See* Minn. R. Crim. P. 11.07 ("The court must make findings and determinations on the omnibus issues in writing or on the record within 7 business days of the Omnibus Hearing."); Minn. R. Crim. P. 26.01, subd. 2(d) (stating that, in the context of a court trial, the necessary findings may appear in a memorandum).

On August 20, Minneapolis Police Sergeant David Robinson and his partner, Officer James Frost, were on duty in north Minneapolis in an unmarked squad car. The officers were working as part of a surveillance team with Officers Brandy Steberg and Joel Pucely, who were in a marked squad car.

At approximately 11:30 p.m., Sergeant Robinson was driving northbound on Upton Avenue, which is a one-way residential street. At that time, cars were parked on

both sides of the street, with one lane open for traffic in the middle. Sergeant Robinson observed a car parked on the west side of the street with the passenger door open and a man, later identified as Burch, standing in the street blocking traffic. Another man was standing on the sidewalk on the driver's side of the car. Burch and the other man appeared to be talking to two women who were inside of the car. Sergeant Robinson slowed the unmarked squad car down so Burch could move out of the way, but Burch did not move. Sergeant Robinson smelled burnt marijuana as he drove past Burch and the parked car.

Officer Robinson reported to Officers Steberg and Pucely that Burch was obstructing traffic and likely smoking marijuana. Sergeant Robinson heard Officer Frost[1] tell Officers Steberg and Pucely that he had seen Burch grab the left side of his coat as if he possibly had a weapon. Sergeant Robinson drove the unmarked squad car around the block and back onto Upton Avenue northbound. Next, Officers Steberg and Pucely approached Burch in their marked squad car.

As they slowed the marked squad car, Officer Pucely saw Burch make a motion toward his left pocket as though he was carrying a weapon. The officers smelled a strong odor of burnt marijuana as they approached the parked vehicle.[2] Officer Steberg saw Burch put his hands inside the vehicle through the open window as if to "drop something or get something." Officer Steberg was concerned that Burch was hiding evidence or getting a weapon from inside the vehicle. Officer Steberg had made weapons and

[1] Officer Frost did not testify at the hearing because he was sick.
[2] Officer Pucely confirmed that one of the women was ultimately cited for possession of marijuana.

narcotics arrests in the area before and described it as a high-crime area. Officer Steberg grabbed Burch's arms, led him away from the window, and put Burch's arms on the vehicle's hood to conduct a pat-frisk. Officer Steberg felt a hard, heavy object in Burch's left pocket, which he immediately recognized as a gun. Officer Steberg asked Burch if it was a real gun or a BB gun, and Burch stated that it was a real gun. Officer Steberg removed the gun from Burch's pocket.

The district court denied Burch's motion to suppress. Burch waived his right to a jury trial and consented to a stipulated-evidence trial under Minn. R. Crim. P. 26.01, subd. 4. The district court found Burch guilty as charged, stayed his 90-day sentence, and placed him on probation. This appeal follows.

D E C I S I O N

Burch argues that the district court "erred as a matter of law when it held that the search of . . . Burch did not violate his rights under the Minnesota and United States Constitutions." He contends that because "the officers in this case lacked a reasonable, articulable suspicion that he was armed and dangerous, the evidence subsequently discovered must be suppressed and the possession of a pistol without a permit charge be dismissed."

"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). An appellate court reviews the district court's findings of

fact under a clearly erroneous standard, but legal determinations are reviewed de novo. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006).

The Fourth Amendment to the United States Constitution and Article I of the Minnesota Constitution prohibit the unreasonable search and seizure of "persons, houses, papers, and effects." U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless searches are per se unreasonable, subject to limited exceptions. *State v. Othoudt*, 482 N.W.2d 218, 221-22 (Minn. 1992).

A police officer acting without a warrant may stop a person for investigative purposes and perform a limited pat-frisk of the person for officer safety so long as the officer (1) has a reasonable, articulable suspicion that the person might be engaged in criminal activity and (2) reasonably believes that the person might be armed and dangerous. *State v. Flowers*, 734 N.W.2d 239, 250 (Minn. 2007). The officer need not be absolutely certain that the individual is armed; rather, the issue is whether a reasonably prudent officer in the same circumstances would be justified in believing that his safety or that of others was in jeopardy. *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883 (1968); *see also Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 1923 (1972) ("The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence."). When determining whether an officer acted reasonably, courts consider the "'specific reasonable inferences'" an officer is entitled to draw from the facts in light of his or her experience. *State v. Crook*, 485 N.W.2d 726, 729 (Minn. App. 1992) (quoting *Terry*, 392 U.S. at 30, 88 S. Ct. at

1884), *review denied* (Minn. Aug. 4, 1992). The paramount justification for conducting a pat-frisk is officer safety. *Terry*, 392 U.S. at 24-26, 88 S. Ct. at 1881-82.

Relying on the "collective knowledge of the four police officers," the district court concluded that both parts of the stop-and-frisk test were satisfied. Burch contends that the second part of the test is not satisfied, arguing that the officers lacked "reasonable, articulable suspicion that [he] was armed and dangerous."[3]

The district court concluded that it was reasonable for the officers to believe that Burch might be armed and dangerous because the officers smelled an odor of marijuana coming from Burch's group, Officer Frost reported to Officers Steberg and Pucely that he saw Burch look at the unmarked squad and move his hand over his left pocket as if to indicate that he possessed a firearm, Burch made additional furtive movements with his hands when the marked squad car arrived, and these actions all occurred late at night in a high-crime area.

Burch argues that "this Court has previously rejected the argument that investigating the crime of drug-dealing—let alone marijuana smoking—without more, provides reasonable suspicion to frisk" and that "it is silly to assume that someone who commits the crime of standing too far out in the street is 'armed and dangerous.'" We agree. The Minnesota Supreme Court has recognized that when a suspect has been validly stopped for a type of crime for which the offender would likely be armed, such as "robbery, burglary, rape, assault with weapons, homicide, and dealing in large quantities of narcotics," the right to frisk may be automatic. *State v. Payne*, 406 N.W.2d 511, 513

[3] On appeal, Burch does not challenge the validity of the initial stop.

(Minn. 1987) (quotation omitted). But here, the police did not suspect any of those crimes. And the minor crimes that were under investigation did not independently provide a basis for a pat-frisk for weapons.

However, the presence of furtive gestures heavily influences a determination of whether a pat-frisk was lawful. *See State v. Alesso*, 328 N.W.2d 685, 688 (Minn. 1982) (holding that an officer reasonably could reach into defendant's pocket where "defendant made a furtive movement of his hand toward the pocket, causing the officer to suspect that he might be reaching for a weapon"); *State v. Richmond*, 602 N.W.2d 647, 651 (Minn. App. 1999) (holding that an officer had reasonable suspicion to search in part because defendant made a "furtive movement" by reaching toward his car's passenger compartment), *review denied* (Minn. Jan. 18, 2000); *cf. State v. Varnado*, 582 N.W.2d 886, 890 (Minn. 1998) (concluding that a weapons search was not justified where, among other circumstances, the suspect did not make any furtive or evasive movements).

Here, the district court found that Burch made three furtive gestures: (1) "Officer Frost reported to Officers Steberg and Pucely that he saw [Burch] look at the unmarked squad and move his hand over his left pocket as if to indicate that he possessed a firearm"; (2) Officer Pucely saw Burch "make a motion toward his left pocket as though he was carrying a weapon"; and (3) Officer Steberg saw Burch "put his hands inside the vehicle through the open window[,] as if to drop something or get something," while Officer Steberg approached him. These furtive movements provided Officer Steberg with a reasonable basis to suspect that Burch might be armed and dangerous.

Burch argues that his gestures were inadequate to create reasonable suspicion because they lasted only a few seconds. He relies on *Flowers* and argues "the officers watched Flowers fumble around in his car for a full 45 seconds." *See Flowers*, 734 N.W.2d at 252 ("We agree that Flowers' movements in the vehicle, which lasted for approximately 45 seconds, gave the officers a reasonable suspicion that Flowers may have been involved in some type of criminal activity and that he might have been armed and dangerous."). But *Flowers* does not establish a minimum standard for furtive gestures; appellate courts have frequently upheld pat-frisks based on furtive gestures without referring to the duration of the gestures. *See Alesso*, 328 N.W.2d at 686 ("[D]efendant move[d] his right hand to his right pocket as if he was either reaching for something or trying to hide something"); *Richmond*, 602 N.W.2d at 651 (concluding that appellant made a "furtive" movement by "reaching toward his car's passenger compartment").

Moreover, the pat-frisk occurred in a high-crime area late at night. Although Burch's mere presence in a high-crime area was insufficient to justify a frisk for weapons, Burch's location was only one factor in Officer Steberg's decision to conduct the pat-frisk. *See Varnado*, 582 N.W.2d at 890 ("[W]ithout more, presence in a high-crime area is insufficient to justify a frisk after a lawful stop for a minor traffic violation."). Officer Steberg's reasons for the pat-frisk also included his suspicion that Burch was engaged in criminal activity (albeit minor), Officer Frost's observation of Burch reaching for his left pocket, and Burch's additional furtive actions after the marked squad car arrived. Burch's presence in a high-crime area was a relevant consideration

when combined with those other circumstances, including the late hour. *See State v. Dickerson*, 481 N.W.2d 840, 842-43 (Minn. 1992) (concluding that the fact that defendant, after making eye contact with police, stopped, turned around, and took a sidewalk to an alley, combined with the fact that the location was an area with a history of drug activity justified a pat-frisk after a valid stop); *aff'd*, 508 U.S. 368, 113 S. Ct. 2130 (1993); *State v. Cavegn*, 294 N.W.2d 717, 721-22 (Minn. 1980) (upholding a pat-frisk search based on "the lateness of the hour; defendant's apparent nervousness; and the fact that defendant was clutching something close to his body").

Burch's challenges to the pat-frisk primarily focus on the credibility of the officers' testimony, inconsistencies in their testimony, and the probative value of their testimony. For example, Burch argues that because Officer Frost did not testify at the hearing, the court "is left to look for reasonable suspicion only in the scant, vague hearsay statements of the other officers which lack any clear articulation of what Officer Frost's basis might have been." But Burch does not assign clear error to any of the district court's findings; he just argues that the evidence should have been weighed differently. *See State v. Crane*, 766 N.W.2d 68, 71 (Minn. App. 2009) ("[W]hen a district court's pretrial order is based on factual findings, we review those factual findings for clear error."), *review denied* (Minn. Aug. 26, 2009).

Although there were minor inconsistencies in the officers' testimony and that testimony conflicted with Burch's testimony, the district court's decision shows that it credited the officers' testimony. *See Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009) (noting that the district court's findings "implicitly indicate[d]" that it found

certain evidence credible). Assessing the credibility of a witness and the weight to be given to a witness's testimony is exclusively the province of the fact-finder. *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990). And "[i]nconsistencies or conflicts between one state witness and another do not necessarily constitute false testimony or a basis for reversal." *State v. Daniels*, 361 N.W.2d 819, 826 (Minn. 1985). In sum, Burch's arguments regarding the officers' credibility and the persuasive value of their testimony do not provide a basis for reversal.

Burch also challenges the district court's reliance on the collective knowledge doctrine. He argues that "[a]s for the 'collective knowledge' doctrine, neither of the cases relied upon by the [district] court or the State involve a 'pat-frisk' situation" and therefore the collective knowledge doctrine "is inapplicable." "Under the 'collective knowledge' approach, the *entire* knowledge of the police force is pooled and imputed to the arresting officer for the purpose of determining if sufficient probable cause exists for an arrest." *State v. Conaway*, 319 N.W.2d 35, 40 (Minn. 1982). In *State v. Lemieux*, the supreme court stated that "the officer who conducts the search is imputed with knowledge of all facts known by other officers involved in the investigation, *as long as the officers have some degree of communication between them*," but it also stated that "[a]ctual communication of information to the officer conducting the search is unnecessary." 726 N.W.2d 783, 789 (Minn. 2007) (emphasis added).

Contrary to Burch's suggestion, an investigative stop and frisk can be based on the collective knowledge of all investigating officers. *See Cavegn*, 294 N.W.2d at 721 ("The information necessary to support an investigative stop and frisk need not be based on the

officer's personal observations. . . . [T]his information may have been acquired through regular police channels, and the underlying basis of official suspicion need not be known to the officer acting in the field."); *In re Welfare of M.D.R.*, 693 N.W.2d 444, 449 n.3 (Minn. App. 2005) (rejecting appellant's argument that the collective knowledge rule does not apply to investigative stops as "misguided"), *review denied* (Minn. June 28, 2005); *In re Welfare of G. (NMN) M.*, 542 N.W.2d 54, 57 (Minn. App. 1996) ("[T]he grounds for making [an investigative] stop can be based on the collective knowledge of all investigating officers."), *aff'd*, 560 N.W.2d 687 (Minn. 1997). Because there was some degree of communication between Officer Frost and the other officers, Officer Frost's knowledge is properly imputed to the other officers when determining the validity of the pat-frisk. *See Lemieux*, 726 N.W.2d at 789.

In conclusion, although the crimes under investigation alone did not provide a basis to believe that Burch was armed and dangerous, the totality of the circumstances did. Burch made multiple furtive gestures and the incident occurred late at night in a high-crime area. Under the circumstances, a reasonably prudent officer would have been justified in believing that Burch was armed and dangerous and that officer safety was at risk. Because Officer Steberg had reason to believe, based on the totality of the circumstances, that Burch might be armed and dangerous, the pat-frisk was lawful. *See Richmond*, 602 N.W.2d at 651 ("[B]ased on the totality of the circumstances and the facts, the district court did not err when it concluded that [the officer] had reasonable suspicion to perform a pat-down search for weapons."). We therefore affirm.

Affirmed.