STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0808

State of Minnesota,
Respondent,

vs.

Brian Thomas Whaley,
Appellant.

Filed June 23, 2014
Affirmed
Connolly, Judge

Ramsey County District Court
File No. 62-CR-11-8452

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Annalise Backstrom (certified student attorney), St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Willis, 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

CONNOLLY, Judge

Appellant challenges his conviction for possession of a firearm by an ineligible person, arguing that the district court erred by denying his motion to suppress evidence allegedly obtained in violation of his Fourth and Fifth Amendment rights. We affirm.

FACTS

On October 14, 2011, a police officer was on patrol in St. Paul. He was familiar with the particular area he was in because law enforcement had received several complaints about criminal activity associated with a nearby residence. While driving past the residence, the officer noticed a vehicle parked across the street with its headlights on. He also saw a person in the upstairs window of the residence, who appeared to be looking at him or the parked vehicle. When he drove past the vehicle, the officer saw one person in the driver's seat, who was later identified as appellant, Brian Thomas Whaley. Appellant seemed startled by the officer's presence. Based on appellant's reaction, the officer drove to the next block to continue to watch the vehicle.

Appellant started to drive away approximately 30 seconds later. The officer tried to read appellant's license plate number but was unable to do so because appellant's license plate light was not working. He decided to initiate a traffic stop based on the equipment violation and his suspicion that appellant was involved in criminal activity.

The officer approached the driver's side of appellant's vehicle and noticed that there were two people inside. He asked them to keep their hands up, which they both initially did. He observed that the driver seemed extremely nervous, much more so than

the typical driver stopped by police. Appellant's entire body was shaking, which concerned the officer based on his experience with criminal activity at the nearby residence. Appellant confirmed that he was coming from that address.

During the stop, the officer noticed a baseball bat with the handle pointing up in the front seat of the vehicle between the appellant and the passenger. He thought the bat could be used as a weapon against him. He decided to remove appellant from the vehicle. As appellant was exiting the vehicle, he put his left hand in his left pocket. The officer, concerned for his safety, asked appellant to put his hands behind his head. He grabbed appellant's hands while he got out of the car and handcuffed him but told appellant that he was not under arrest.

The officer asked appellant why he was so nervous. Appellant said he was nervous because he was on probation. This concerned the officer because he thought appellant was telling him that he would find something that would trigger a probation violation. He performed a weapons frisk, but did not find any contraband or weapons on appellant's person. He then brought appellant to the back of his squad car so he could frisk appellant's socks and shoes for weapons.

By this time, two other officers had arrived at the scene to assist with the investigation. The original officer noticed that appellant's feet were twitching noticeably back and forth and commented on it to one of the other officers. The other officer looked at appellant's feet and noticed an object or bulge in appellant's right sock. The officers asked appellant about the bulge. At first, appellant said it was nothing, but later admitted that it was narcotics. The officers recovered the narcotics and had appellant stay in the

squad car while they searched his vehicle incident to the narcotics arrest. They recovered a handgun from the glove compartment of appellant's vehicle.

Based on these events, the state charged appellant with possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(2) (2010). Appellant filed a motion to suppress the gun, which the district court denied. On September 20, 2012, the district court held a court trial on stipulated facts. On October 10, 2012, the district court found appellant guilty and subsequently sentenced him to 60 months in prison. This appeal follows.

D E C I S I O N

I.

Appellant first argues that "the [district] court erred by failing to suppress the evidence obtained in violation of [appellant's] Fourth Amendment rights where the actions of the police were not constitutionally justified by the circumstances that gave rise to the stop." We disagree. When reviewing a pretrial order on a motion to suppress evidence, we examine the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo. *State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012). A determination as to the existence of reasonable, articulable suspicion or probable cause is reviewed de novo. *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999).

The Minnesota Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." Minn. Const. art. I, § 10. A traffic stop does not violate this right as long as "each

incremental intrusion during a stop [is] 'strictly tied to and justified by the circumstances which rendered [the initiation of the stop] permissible.'" *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (quoting *Terry v. Ohio*, 392 U.S. 1, 19, 88 S. Ct. 1868 (1968)). "To remain constitutional, an intrusion not strictly tied to the circumstances that rendered the initiation of the stop permissible must be supported by at least a reasonable suspicion of additional illegal activity." *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012).

The district court found that "[a]n officer's hunch of wrongdoing with a minor traffic violation does provide probable cause for a stop." On appeal, appellant concedes the legality of the stop. We agree. Appellant's license plate was not illuminated, which is a violation of Minn. Stat. § 169.50, subd. 2 (2010). An equipment violation is an objective basis for a stop. *State v. Miller*, 659 N.W.2d 275, 278 (Minn. App. 2003) (citing *State v. Battleson*, 567 N.W.2d 69, 71 (Minn. App. 1997) (stating that a violation of a traffic law, however insignificant, provides an objective basis for a stop)), *review denied* (Minn. July 15, 2003).

Appellant next argues that the officer "improperly expanded the scope of the traffic stop by immediately treating a petty misdemeanor stop as if it was a felony stop, removing [appellant] from his vehicle, and placing him in handcuffs right away." We disagree.

First, an officer may order a driver out of a lawfully stopped vehicle. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6, 98 S. Ct. 330, 333 n.6 (1977); *Askerooth*, 681 N.W.2d. at 357, 367. But appellant argues that his Fourth Amendment rights were violated when the officer pulled him out of the vehicle, handcuffed him and performed a

pat frisk for weapons. "If we determine that the officers expanded the duration or scope of a traffic stop, we next consider whether the officers had reasonable, articulable suspicion to support that expansion." *Smith*, 814 N.W.2d at 351. "Reasonable suspicion must be particularized and based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 352 (quotations and citations omitted). To be reasonable, the basis must satisfy an objective, totality-of-the-circumstances test: "would the facts available to the officer at the moment of the seizure [. . .] warrant a man of reasonable caution in the belief that the action taken was appropriate." *Askerooth*, 681 N.W.2d at 364 (quotation omitted). "[T]he use of reasonable force is almost invariably justified in cases involving persons suspected of being armed." *State v. Balenger*, 667 N.W.2d 133, 140 (Minn. App. 2003), *review denied* (Minn. Oct. 21, 2003).

On the night in question, the officer who stopped appellant was working alone, and there were two occupants in appellant's vehicle. Based on his previous experience with criminal activity at the residence where appellant was parked, he asked appellant and the passenger to put their hands up. When he approached appellant's vehicle, he noticed that appellant's whole body was shaking and that he was much more nervous than the average offender. Appellant confirmed that he was coming from a residence that the officer recognized due to the high level of criminal activity originating at the address. The officer also noticed that appellant had a baseball bat that was placed in such a way that it could be used as a weapon. Although appellant argues that the bat was for appellant's softball league and that appellant would not have been able to reach the bat

inside the car, our conclusion as to whether an officer is in danger does not depend on the sharpness of the knife's blade, whether the gun is loaded, or the ability of the defendant to reach the club.

Appellant also argues that the officer "violated [his] right to be free from unreasonable search and seizure by performing a weapons frisk without reasonable suspicion that [he] was armed and dangerous." An officer may frisk a person for weapons if the officer is justified in believing that the suspect is armed and dangerous. *In re Welfare of G.M.*, 560 N.W.2d 687, 692 (Minn. 1997). As appellant stepped out of the vehicle, he put his left hand in his pocket, despite being told to keep his hands up. When appellant failed to comply with the officer's orders to keep his hands up, the officer grabbed his arm, pulled him out of the vehicle, handcuffed him and pat-searched him. Appellant explained that he was on probation, which the officer understood as implying that he would find something on appellant's person that would trigger a probation violation. It would also not be the first time that a defendant who is on probation was found to carry a weapon.

The officer placed appellant in the back of his squad car to perform a frisk on his socks and shoes. Confinement in the back of a squad car for a minor traffic violation "may be justified if it is reasonably related to the initial lawful basis for the stop, reasonably related to the investigation of an offense lawfully discovered or suspected during the stop, or a threat to officer safety." *Askerooth*, 681 N.W.2d at 369-70. The officer stated that he was concerned about officer safety due to appellant's nervous behavior.

Based on the totality of the circumstances, the record supports the officer's action of removing appellant from the vehicle and securing him due to officer safety concerns. *See Munson*, 594 N.W.2d at 137 (explaining that an officer may briefly handcuff a suspect without turning the encounter into an arrest); *see also, State v. Walsh*, 495 N.W.2d 602, 605 (Minn. 1993) (stating that briefly handcuffing a suspect while sorting out the crime scene does not necessarily transform an investigatory detention into an arrest). We conclude that the district court did not err by denying appellant's motion to suppress.

II.

Appellant next argues that "the [district] court erred by failing to suppress the evidence obtained in violation of [appellant's] Fifth Amendment rights because [appellant] was subjected to custodial interrogation for purposes of *Miranda*." We disagree.

"In order for constitutional challenges to the admission of evidence to be timely, objections to such evidence must be raised at the omnibus hearing." *State v. Pederson-Maxwell*, 619 N.W.2d 777, 780 (Minn. App. 2000). Appellant's request for a *Rasmussen* hearing requested the following relief:

> Pursuant to the procedures set forth in *State ex rel. Rasmussen v. Tahash*, 141 N.W.2d 3 (Minn. 1965), the Defendant hereby requests a hearing . . . on his motion to suppress the evidence in this case against him which may include any or all of the following items . . . any oral statements made by the Defendant at any time to any law enforcement personnel, whether solicited or unsolicited.

But appellant did not argue or brief the *Miranda* issue at the *Rasmussen* hearing, and the district court did not consider it. We conclude that appellant's argument regarding the alleged *Miranda* violation is waived. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that generally, an appellate court will not consider matters not argued to and considered by the district court).

Affirmed.