STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1516

State of Minnesota,
Respondent,

vs.
Michael Sean Dickenson,
Appellant.

Filed June 23, 2014
Affirmed
Stoneburner, Judge[*]

Douglas County District Court
File No. 21-CR-11-1221

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Chad M. Larson, Douglas County Attorney, Alexandria, Minnesota (for respondent)

John D. Ellenbecker, St. Cloud, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Reilly, Judge; and Stoneburner, 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

STONEBURNER, Judge

Appellant challenges his conviction of possession of a controlled substance, arguing that the district court erred by failing to suppress evidence that he asserts a police officer obtained as the result of an unlawful search of a backpack located in the trunk of his legally stopped vehicle. Because the officer had probable cause to conduct a warrantless search of appellant's vehicle for a controlled substance, we affirm.

FACTS

On July 12, 2011, a law enforcement officer stopped a vehicle that appellant Michael Sean Dickenson was driving due to loud exhaust. As the officer approached the passenger side of the vehicle, he smelled an odor of burnt marijuana coming from inside. The officer separated Dickenson and his passenger and questioned each of them about any recent use of marijuana. Both denied smoking marijuana and denied that there was any marijuana in the vehicle. Both said that they had been around others who had been smoking marijuana while camping at a lake the previous evening. Dickenson could not recall the name of the lake. Both Dickenson and his passenger told the officer that the officer's dog, who is trained in the detection of controlled substances, would not alert if the dog sniffed the exterior of the vehicle. When the officer asked Dickenson if the dog would alert to any drugs inside the vehicle, Dickenson laughed skittishly and said that he was "pretty sure" that the dog would not find any drugs. When the passenger was asked the same question, he looked down at the console, but stated there were no drugs inside the vehicle.

Dickenson gave the officer permission to search the console inside the vehicle. The dog alerted to a duffle bag on the back seat, but the officer did not find any drugs in the duffle bag or elsewhere inside the rear passenger compartment. The dog alerted on the back part of a seat in the rear passenger compartment. The officer gained access to the trunk through the rear seats, and smelled stale marijuana.

When the officer asked Dickenson how to open the trunk, Dickenson questioned whether the officer needed a warrant to search the trunk. The officer said a warrant was not needed because the dog alerted to the trunk. While other officers observed Dickenson and his passenger, the officer opened the trunk and instructed the dog to jump on top of the bags in the trunk. The dog alerted on a tent and a backpack in the trunk. The officer observing Dickenson told the officer conducting the search that Dickenson was shaking his head after the dog sniffed the contents of the trunk. Dickenson admitted that the backpack belonged to him. The top pocket of the backpack contained three small baggies of marijuana, a glass pipe, a grinder, and rolling papers. The main compartment of the backpack contained a Tupperware container wrapped in plastic and clothing. As the officer investigated this container, the other officer observed Dickenson shaking his head. A large bag of marijuana was inside the container. The passenger denied having any knowledge of the marijuana, and Dickenson said the marijuana belonged to him.

The Bureau of Criminal Apprehension tested the substance and verified that it was 62.9 grams of marijuana. The state charged Dickenson with fifth-degree possession of a controlled substance, in violation of Minn. Stat. § 152.025, subd. 2(a)(1) (2010).

After the district court denied Dickenson's motion to suppress evidence of the marijuana, the parties agreed to submit the case to the district court on stipulated evidence. The district court found Dickenson guilty as charged and sentenced him to 17 months in prison, stayed for five years with conditions.

D E C I S I O N

The United States Constitution and the Minnesota Constitution both prohibit warrantless searches and seizures, with limited exceptions. U.S. Const. amend. IV, Minn. Const. art. I, § 10. The issues on appeal are whether the police officer improperly expanded the scope of the traffic stop, and whether the district court erred by denying Dickenson's motion to suppress evidence of marijuana found in his vehicle based on its conclusions that (1) the smell of burnt marijuana provided sufficient suspicion for law enforcement officers to expand the scope of a lawful equipment-violation stop of Dickenson's vehicle, and (2) the subsequent search of Dickenson's vehicle, including a backpack located in the trunk, was lawful under the automobile exception to the warrant requirement of the Fourth Amendment. When reviewing a pretrial order on a motion to suppress evidence where, as in this case, the facts are not in dispute, a reviewing court independently reviews the facts and determines, as a matter of law, whether the evidence need be suppressed. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

Dickenson argues that the vehicle search was beyond the scope of the lawful traffic stop and was not supported by reasonable suspicion sufficient to justify expansion of the scope of the stop. Dickenson does not cite any authority for the proposition that the smell of burnt marijuana emanating from a vehicle does not provide reasonable

suspicion to expand the scope of an equipment-violation stop, and we decline to address this issue because he failed to raise it in the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that an appellate court will generally not consider matters not argued to and considered by the district court).

Under the automobile exception to the warrant requirement, police may conduct a warrantless search of a vehicle, including any closed containers located in the vehicle when they have probable cause to believe that the vehicle contains contraband. *Maryland v. Dyson*, 527 U.S. 465, 467, 119 S. Ct. 2013, 2014 (1999); *State v. Search*, 472 N.W.2d 850, 853 (Minn. 1991). Probable cause necessary to support a warrantless search of a vehicle "must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers." *State v. Munson*, 594 N.W.2d 128, 136 (Minn. 1999) (quotation omitted). "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity, . . . the significant fact being not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts." *State v. Holiday*, 749 N.W.2d 833, 843 (Minn. App. 2008) (alteration in original) (quotations omitted).

The district court relied on *State v. Wicklund*, 295 Minn. 403, 205 N.W.2d 509 (1973), to conclude that the smell of burnt marijuana provided probable cause for the vehicle search. Dickenson argues that, since the 1976 decriminalization of possession of a small amount of marijuana, the odor of burnt marijuana cannot provide probable cause to suspect possession of a *criminal* amount of marijuana and therefore cannot supply

probable cause for the search of his vehicle. *See* Act of March 11, 1976, ch. 42, § 1, 1976 Minn. Laws 101, 102 (currently codified as Minn. Stat. § 152.027, subd. 4 (2012)). Dickenson relies on *State v. Ortega*, in which the supreme court noted that the odor of burnt marijuana that justified the search of a passenger in *Wicklund* provided probable cause to believe that the passenger "possessed a *criminal* amount of marijuana as possession of any amount of marijuana was a crime under then-existing law." 770 N.W.2d 145, 149 n.2 (Minn. 2009). The supreme court cautioned that probable cause to search a *person* does not necessarily trigger an exception to the warrant requirement. *Id.*

But Dickenson fails to provide any authority for the assertion that the smell of burnt marijuana emanating from a vehicle does not provide probable cause for a warrantless search of a vehicle under the automobile exception to the warrant requirement. Caselaw is contrary to such an assertion. *State v. Armstrong*, 291 N.W.2d 918, 918-19 (Minn. 1980) (reversing suppression of small amount of marijuana found in defendant's vehicle during a search incident to arrest and remanding for an additional hearing because the district court may have correctly determined that the vehicle search was justified under the automobile exception); *State v. Schultz*, 271 N.W.2d 836, 837 (Minn. 1978) (citing *Wicklund* for the proposition that the odor of marijuana coming from a vehicle constitutes probable cause to search the vehicle); *State v. Pierce*, 347 N.W.2d 829, 833 (Minn. App. 1984) ("It has long been held that the detection of odors alone, which trained officers can identify as being illicit, constitutes probable cause to search automobiles for further evidence of crime."); *State v. Thiel*, ___ N.W.2d ___, ___, 2014 WL 2178757 at *1, *6 (Minn. App. May 27, 2014) (concluding probable cause existed

for police officer to search vehicle after he detected a "strong" and "overwhelming" odor of marijuana emanating from the vehicle, and driver handed the officer a smoking pipe containing a small amount of burnt marijuana).

We conclude that the district court did not err by holding that the smell of burnt marijuana from Dickenson's vehicle established probable cause to conduct a warrantless search of the vehicle, including containers in the vehicle under the automobile exception to the warrant requirement. The district court did not err by denying Dickenson's motion to suppress.

Affirmed.