

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-748**

State of Minnesota,
Respondent,

vs.

Levi Junior Braziel,
Appellant.

**Filed May 21, 2012
Reversed
Chutich, Judge**

Hennepin County District Court
File No. 27-CR-10-44194

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

Michael O. Freeman, Hennepin County Attorney, Michael K. Walz, Assistant County Attorney, David C. Brown, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

William M. Ward, Hennepin County Public Defender, Paul J. Maravigli, Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Chutich, Judge; and Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CHUTICH, Judge

Appellant Levi Braziel challenges his conviction for fifth-degree possession of a controlled substance, contending that the district court erroneously denied his pretrial motion to suppress evidence of drugs found after his arrest. He argues that the evidence should have been suppressed because (1) the officers lacked probable cause to arrest him for loitering with intent to sell drugs; (2) the search conducted incident to his arrest was unlawful; and (3) the inevitable discovery doctrine does not apply. Because we conclude that the officers lacked probable cause to arrest Braziel, we reverse the denial of his motion to suppress.

FACTS

On the night of September 19, 2010, Officers Steven Lecy and Deanna Zalusky of the Minneapolis Police Department were on patrol in the area of Park Avenue South and Franklin Avenue in the City of Minneapolis. That area of the city has been deemed a “target enforcement area” by the police department and is frequently patrolled by officers because of its high volume of narcotic- and prostitution-related crimes. At approximately 9:30 p.m., the officers drove by the intersection of Park and Franklin and first observed Braziel standing on the street corner. Officer Lecy told Braziel “I know what you’re doing out here, you need to leave the area or you’re going to be arrested,” and Braziel left the corner. The officers drove by the intersection again later in the evening, saw Braziel standing on the corner, and again told him to move along. On those first two occasions,

the officers did not observe Braziel engaging in any conduct consistent with selling or attempting to sell drugs.

At approximately 1:48 a.m. on September 20, Officers Lecy and Zalusky again drove by the corner of Park and Franklin and observed Braziel surrounded by a group of approximately six people. The officers circled around the block, blacked out the squad car lights, and slowly approached the corner. Officer Lecy testified that the people surrounding Braziel were all known drug users, and observed that the man standing next to Braziel “had money in his hand and was trying to hand it to [Braziel].” Officer Lecy never saw Braziel take the money or give anything to the man in return. Officer Zalusky testified that she did not recognize any of the people as known drug users or dealers, and she did not see the man attempt to hand Braziel money.

When the group noticed the squad car, everyone began to leave. Officer Lecy immediately got out of the car, ordered Braziel to stay, walked over to him, and “just grabbed ahold of his arm and started escorting him over to the squad car; and kept telling him he needed to put his hands on the squad car.” The officers did not call out to or attempt to stop any of the other people leaving the corner, including the man who purportedly attempted to hand Braziel money. Officer Lecy testified that Braziel “wasn’t free to go anywhere,” and “at that point, I was going to place [Braziel] under arrest for loitering.” According to Officer Lecy, Braziel began to tense up and look around nervously while attempting to take his hands off the squad car, and Officer Lecy had to lean against Braziel on the car to detain him.

While conducting a pat search of Braziel's person, Officer Lecy felt a lump on Braziel's buttocks, which he immediately believed to be illegal drugs. The officer then pulled Braziel's boxer shorts straight out from his waist, reached down about an inch, grabbed the top of a baggie, and pulled it out. In the baggie, the officer found ten individually packaged rocks of crack cocaine.

Braziel was charged with one count of fifth-degree possession of a controlled substance under Minn. Stat. § 152.025, subd. 2(b)(1) (2010). He moved to suppress the drugs, contending that the officers did not have reasonable suspicion to stop and frisk him or probable cause to arrest him for loitering, and because the search conducted by Officer Lecy was an unlawful strip search.

The district court denied Braziel's motion to suppress, concluding that the officers had probable cause to arrest Braziel and that the drugs were discovered as the result of a lawful search following that arrest. After a stipulated-facts trial, the district court convicted Braziel of fifth-degree possession of crack cocaine. This appeal followed.

DECISION

Braziel argues that the district court erred in allowing the drugs into evidence because Officer Lecy did not have probable cause to arrest him. This court's review following a stipulated-facts proceeding is limited to whether the district court properly denied the suppression motion. *See* Minn. R. Crim. P. 26.01, subd. 4(f). When reviewing pretrial orders on motions to suppress evidence, "we review the district court's factual findings under a clearly erroneous standard and the district court's legal

determinations de novo.” *State v. Diede*, 795 N.W.2d 836, 849 (Minn. 2011) (quotation omitted).

Probable Cause to Arrest

Both the U.S. and Minnesota constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. “A warrantless arrest is reasonable if supported by probable cause.” *State v. Williams*, 794 N.W.2d 867, 871 (Minn. 2011). “There is probable cause to arrest without a warrant when a person of ordinary care and prudence, viewing the totality of the circumstances objectively, would entertain an honest and strong suspicion that a specific individual has committed a crime.” *State v. Ortega*, 770 N.W.2d 145, 150 (Minn. 2009).

The Minneapolis ordinance under which Braziel was arrested prohibits loitering with the purpose of engaging in illegal narcotic sales. Minneapolis, Minn., Code of Ordinances § 385.50 (2012). The ordinance contains a non-exhaustive list of circumstances to be considered in determining whether a person intends to loiter with the purpose of selling drugs, including whether the person repeatedly stops or attempts to stop or flag-down passing motor vehicles or pedestrians, acts as a look-out, or conducts furtive hand-to-hand transfers of small objects or currency. *Id.* § 385.50(d).

The district court found that the officers had probable cause to arrest Braziel because: (1) he was in a high-crime, “target enforcement area”; (2) the officers had observed Braziel at the same location on at least two prior occasions that night; (3) when they observed Braziel at approximately 2 a.m. he was surrounded by several known drug

users; (4) the group scattered when the officers approached; and (5) Officer Lecy observed what he believed to be a hand-to-hand transfer of money or drugs.

Based on our careful review of previous case law, we conclude that the totality of circumstances does not support a finding of probable cause to arrest Braziel for loitering with the intent to sell drugs. In *State v. Hawkins*, for example, the defendant was riding a bike around an intersection at approximately 1:40 a.m., whistling and waving at approaching vehicles, “a common way for street-level narcotics dealers to . . . let [people] know that they are selling narcotics.” 622 N.W.2d 576, 581 (Minn. App. 2001). The officer observed this behavior for about fifteen minutes and saw the defendant conduct two hand-to-hand transactions with other people in a manner consistent with drug transactions. *Id.* Based on these facts, the court concluded that probable cause existed to arrest the defendant for sale of a controlled substance. *Id.*; see also *State v. Smith*, 476 N.W.2d 511, 512, 517 (Minn. 1991) (concluding that probable cause existed to arrest the defendant under the loitering ordinance where officers observed him for thirty minutes at a known crack house; five cars drove up during that period and the defendant appeared to make exchanges with the cars’ occupants; and several persons walked up to the entryway of the building, stayed a short time, and then left).

Unlike the circumstances in *Hawkins* and *Smith*, the officers here did not observe Braziel for any meaningful period of time. They did not see him attempt to hail vehicles, attract passersby, or act as a look-out. Nor did the officers observe Braziel making a hand-to-hand exchange, much less multiple exchanges consistent with drug transactions. Officer Zalusky did not see anyone attempt to hand Braziel money, and by Officer Lecy’s

own candid admission, he did not observe Braziel take the proffered money or pass anything in exchange.

Further, Braziel's presence in a known high-crime area late at night, even if standing by known drug users,¹ is not sufficient to give the officers probable cause to arrest him for loitering. *See Diede*, 795 N.W.2d at 844 (holding that mere proximity to a person engaged in criminal activity is insufficient to support even reasonable suspicion for a *Terry* stop); *State v. Hardy*, 577 N.W.2d 212, 216 (Minn. 1998) (finding that mere presence in a high-crime area is insufficient to establish probable cause); *State v. Ingram*, 570 N.W.2d 173, 177 (Minn. App. 1997) (“[M]erely speaking with and being in close proximity with others suspected of criminal activity, without more, may be insufficient” to establish probable cause to arrest), *review denied* (Minn. Dec. 22, 1997). Even considering the additional observation that everyone but Braziel left when the police car pulled up, we cannot conclude that the officers had probable cause to arrest Braziel for loitering with the intent to sell drugs.

Reasonable Suspicion to Investigate

The state now contends, alternatively, that the initial detention, pat-down, and subsequent discovery of the drugs would have been valid under the investigatory procedures first authorized in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968). The state did not make this argument to the district court and the court did not address *Terry*, which permits an investigative stop when “specific and articulable facts” create a reasonable suspicion of criminal activity. *Id.* at 21–22, 88 S. Ct. at 1880. While we generally only

¹ The officers' testimony differed on this point.

review issues that are both argued to, and decided by, the district court, *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996), we conclude that sufficient facts exist in the record to address this alternative theory on appeal. *State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003).

We decline to uphold this stop on *Terry* grounds, however, because we conclude that the totality of the circumstances shows that Officer Lecy did not intend to, and did not in fact, conduct an investigatory *Terry* stop. The test for whether a seizure has occurred is an objective one: whether “on the basis of the totality of the circumstances . . . a reasonable person in the defendant’s shoes would have concluded that he or she was not free to leave.” *In re Welfare of E.D.J.*, 502 N.W.2d 779, 780 (Minn. 1993); *see also State v. Lohnes*, 344 N.W.2d 605, 610 (Minn. 1984) (holding that an arrest occurs when “officers restrain a suspect’s liberty of movement”).

We recognize that not every temporary seizure amounts to an arrest. *State v. Moffatt*, 450 N.W.2d 116, 120 (Minn. 1990), (“[A] person who is being detained temporarily is not free to leave during the period of detention, yet that does not convert the detention into an arrest.”). Moreover, the line between an investigatory detention, which is permitted under *Terry*, and a de facto arrest is not a bright one. *State v. Flowers*, 734 N.W.2d 239, 254 n.16 (Minn. 2007); *State v. Balenger*, 667 N.W.2d 133, 139 (Minn. App. 2003), *review denied* (Minn. Oct. 21, 2003); *State v. Ailport*, 413 N.W.2d 140, 143 (Minn. App. 1987), *review denied* (Minn. Nov. 18, 1987). To distinguish between a *Terry* stop and a de facto arrest, which demands the higher showing of probable cause at

the time of detention, the court must determine the reasonableness of the officer's actions in light of the circumstances existing at the time. *See Balenger*, 667 N.W.2d at 139–40.

Applying these principles, we conclude that Braziel was under arrest when Officer Lecy detained him. While Officer Lecy did not immediately tell Braziel that he was under arrest, his actions conveyed such intent when he ordered Braziel to stay, grabbed hold of his arm, escorted him to the squad car, and instructed him to put his hands on the car. Officer Lecy forthrightly testified that he immediately intended to arrest Braziel as soon as he, Lecy, got out of the squad car:

- A. . . . [A]t that point, I was going to place him under arrest for loitering.
- Q. And why were you going to do that?
- A. Because obviously he was—my belief was that his criminal behavior was going to continue and wasn't going to stop.
- Q. And what led you to that belief?
- A. Because he'd already been warned twice to leave the corner and he continued to stay there.²

While this unexpressed intent to arrest is not dispositive of whether Braziel was in fact under arrest, it shows that Officer Lecy did not feel the need to conduct any further investigation consistent with a *Terry* stop. Moreover, the record demonstrates that the officer did not in fact freeze the scene to investigate; rather, he immediately seized Braziel while allowing the other persons on the corner to leave. Nor did he tell Braziel why he had detained him. No reasonable person in Braziel's position would have

² When Officer Lecy first saw Braziel that evening, he told Braziel that Braziel would be arrested if he remained on the corner. After this first encounter, Officer Lecy told Officer Zalusky, "I guarantee [Braziel's] going to be out here all night long and he's the guy holding the dope." The record does not suggest that either officer knew Braziel or anything about him before this incident.

concluded that he was free to leave at any time after Officer Lecy got out of his car and ordered Braziel to stay. Officer Lecy confirmed that Braziel “wasn’t free to go anywhere.” The circumstances show that the seizure was an arrest rather than an investigatory stop.³

While Officer Lecy likely did have reasonable, articulable suspicion sufficient to justify a *Terry* stop, he did not conduct an investigatory stop, but instead immediately arrested Braziel. We decline to affirm the district court’s denial of the motion to suppress on the theory that the officer’s actions amounted only to an investigatory stop.

We do not wish to minimize the difficulties faced by law enforcement officers in policing high crime areas; they must often make quick judgments in changing situations based on incomplete information. On these facts, however, we cannot validate Braziel’s unlawful arrest by resorting to a *Terry* analysis, and we conclude that the district court erred in denying the suppression motion. Because we find that the arrest was unlawful, we need not address Braziel’s arguments regarding the legality of the search and the inevitable discovery doctrine.

Reversed.

³ Our conclusion is consistent with the state’s response to the suppression motion and the analysis of the experienced district court judge in his order. Neither addressed *Terry* but instead analyzed the situation as an arrest.