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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1027**

State of Minnesota,
Appellant,

vs.

Jesse Kelly Cooper,
Respondent.

**Filed January 14, 2013
Affirmed
Schellhas, Judge**

Rice County District Court
File No. 66-CR-11-2228

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

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Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and
Rodenberg, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the district court's pretrial suppression of child pornography found on respondent's cell phone during execution of a search warrant at his home. We affirm.

FACTS

The facts in this case are undisputed. The district court issued a search warrant for respondent Jesse Cooper's home in Faribault. The search warrant authorized law enforcement to search the premises for "CELLULAR PHONES USED TO ARRANGE AND CONDUCT CONTROLLED SUBSTANCE TRANSACTIONS."

Rice County Sheriff's Investigator Scott Robinson knew that Cooper had two aggressive pit bulls that presented safety concerns. Investigator Robinson and Officer Justin Hunt therefore waited for Cooper to leave for work, stopped his car because of his revoked driver's license within three blocks of his home, and asked him to return to his home to secure the pit bulls before a search warrant was executed in connection with marijuana believed to be grown in the home. Cooper admitted that he was growing marijuana in the home and agreed to secure the pit bulls. He also agreed to return to his home in Officer Hunt's squad car, first retrieving several items from his car and placing them in his pockets.

Before Cooper entered Officer Hunt's squad car, he told Officer Hunt that he had a box cutter on him that he used for work, and Officer Hunt pat frisked him. Among other

things, Officer Hunt retrieved a box cutter, wallet, and cell phone from Cooper's pockets. Upon arrival at the premises, Cooper secured the pit bulls and informed his girlfriend of the circumstances. While officers executed the search warrant, Cooper and his girlfriend sat on a couch in the living room. Officer Hunt placed Cooper's wallet and cell phone and his girlfriend's cell phone on a coffee table, which he moved away from the couch.

After finding a significant amount of marijuana in the home, Investigator Robinson arrested Cooper, and Officer Hunt transported him to jail. At around the same time, Investigator Jesus Cordova looked through Cooper's cell phone and discovered what he believed to be images of child pornography. Investigator Cordova then gave the phone to Detective Lisa Petricka, who agreed that the images were of child pornography. Detective Petricka then secured the cell phone and obtained a search warrant for it and other electronics located in Cooper's home. The Bureau of Criminal Apprehension found additional images of child pornography on Cooper's cell phone upon executing the search warrant.

Appellant State of Minnesota charged Cooper with 14 counts of possession of child pornography under Minn. Stat. § 617.247, subd. 4(a) (2010). Cooper moved to suppress the images found on his cell phone. The district court concluded that (1) Officer Hunt exceeded the scope of a *Terry* search when he seized Cooper's cell phone during the traffic stop, (2) Investigator Cordova's search of Cooper's cell phone was outside the scope of the search warrant for Cooper's home, and (3) the search of Cooper's cell phone was not permissible as a search incident to lawful arrest. The court suppressed the evidence and dismissed the charges of possession of child pornography.

This appeal follows.

DECISION

Critical Impact

When reviewing a pretrial order 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. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quotation omitted). The state may appeal “any pretrial order” arising from an alleged district court error, if the state can show that “the district court’s alleged error, unless reversed, will have a critical impact on the outcome of the trial,” Minn. R. Crim. P. 28.04, subds. 1(1), 2; *see State v. Underdahl*, 767 N.W.2d 677, 682 (Minn. 2009) (holding that under rule 28.04, state must show critical impact in pretrial appeals). The state must show “clearly and unequivocally” first that “the district court’s ruling will have a ‘critical impact’ on the State’s ability to prosecute the case” and second that “the district court’s ruling was erroneous.” *State v. Zais*, 805 N.W.2d 32, 36 (Minn. 2011) (quotation omitted). “Critical impact is a threshold showing that must be made in order for an appellate court to have jurisdiction.” *State v. Gradishar*, 765 N.W.2d 901, 902 (Minn. App. 2009). Cooper concedes that the state has shown that suppression of the cell-phone evidence will have a critical impact on the state’s prosecution of the case and that, without the cell-phone evidence, the state has no evidence supporting its charges of possession of child pornography.

We conclude that the pretrial order has a critical impact on the state’s case.

Scope of Terry Search

The district court determined that Officer Hunt was justified in conducting a pat search of Cooper before Cooper entered his squad car but that the seizure of Cooper's cell phone exceeded the scope of a *Terry* search. The state argues that the court clearly erred because the seizure of Cooper's phone was reasonable under the totality of the circumstances and therefore did not exceed the scope of a *Terry* search.

The United States Constitution and the Minnesota Constitution both guarantee “[t]he right of the people to be secure in their persons, houses, papers and effects” against “unreasonable searches and seizures.” U.S. Const. amend. IV; Minn. Const. art. 1, § 10. “The touchstone of the Fourth Amendment is reasonableness,” *State v. Johnson*, 813 N.W.2d 1, 5 (Minn. 2012) (quotation omitted), and “[g]enerally, warrantless searches are per se unreasonable,” *Gauster*, 752 N.W.2d at 502. Evidence seized in violation of the U.S. or Minnesota Constitutions must be suppressed. *Terry v. Ohio*, 392 U.S. 1, 13, 88 S. Ct. 1868, 1875 (1968); *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011).

An exception to the prohibition of warrantless searches is a *Terry* search, in which a police officer may, when he has a “reasonable articulable suspicion that a person he has seized is armed and dangerous,” conduct “a protective pat-down search of the person’s outer clothing in order to ascertain whether the person is armed.” *State v. Harris*, 590 N.W.2d 90, 104 (Minn. 1999). And the police may conduct a *Terry* search when “an officer has a valid reasonable basis for placing a lawfully stopped citizen in a squad car,” in which case a “[pat search] will often be appropriate without additional individual articulable suspicion.” *State v. Varnado*, 582 N.W.2d 886, 891 (Minn. 1998).

A *Terry* search is meant to be a “carefully limited frisk for weapons.” *State v. Flowers*, 734 N.W.2d 239, 252 (Minn. 2007) (emphasis omitted) (quotation omitted). Because the purpose of the *Terry* search is to determine if the suspect is carrying weapons, “[w]hen the officer assures himself or herself that no weapon is present, the frisk is over.” *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992), *aff’d*, 508 U.S. 366, 113 S. Ct. 2130 (1993). The burden is on the state to show that a “seizure was sufficiently limited” so that it does not violate the constitution. *State v. Askerooth*, 681 N.W.2d 353, 365 (Minn. 2004).

Officer Hunt testified that he seized Cooper’s wallet and cell phone because they can contain weapons and, when placing suspects in the back of his squad car, he seizes anything that could contain a weapon. The district court concluded that, because Cooper’s cell phone was not a weapon, Officer Hunt exceeded the scope of a *Terry* search by seizing it. The state argues that it was “at least conceivable that the cell phone could have concealed a weapon such as a razor blade or knife,” and therefore that the seizure of the cell phone was necessary to prevent unreasonable risks to police safety. The state also argues that Officer Hunt was justified in seizing Cooper’s cell phone to prevent Cooper from using his phone for the purpose of destroying evidence. The state’s arguments are persuasive.

In *State v. Krenik*, this court held that “[t]he scope of a pat search extends to all ‘concealed objects which might be used as instruments of assault.’” 774 N.W.2d 178, 185 (Minn. App. 2009) (quoting *Sibron v. New York*, 392 U.S. 40, 65, 88 S. Ct. 1889, 1904 (1968)), *review denied* (Minn. Jan. 27, 2010). Because “weapons are not always of an

easily discernible shape, a mockery would be made of the right to frisk if the officers were required to positively ascertain that a felt object was a weapon prior to removing it.” *Id.* (quoting *State v. Bitterman*, 304 Minn. 481, 486, 232 N.W.2d 91, 94 (1975)). In *Krenik*, this court concluded that the police were justified in seizing a box that they believed contained a weapon. *Id.* at 185–86.

Similar to *Krenik*, Officer Hunt testified that he seized Cooper’s cell phone because he believed that it might contain a weapon. Moreover, Officer Hunt knew that he would be in the squad car alone with Cooper on the way to Cooper’s home. We conclude that, under these circumstances, Officer Hunt’s seizure of Cooper’s cell phone was reasonable. *See Varnado*, 582 N.W.2d at 891 (stating that “officer safety is a paramount interest”); *Krenik*, 774 N.W.2d at 186 (concluding that “warrantless seizure of [a] box was justified because the box might have contained a weapon”).

In addition to enhancing officer safety, seizure of Cooper’s cell phone reasonably prevented Cooper from warning those at his home that the police were in route to search the premises, which could have led to the destruction of evidence or undermined police safety. *See United States v. Martinez-Cortez*, 566 F.3d 767, 768–71 (8th Cir. 2009) (concluding that police were justified in stopping a vehicle that was backing out of a driveway of a residence for which the police had a no-knock search warrant because, “had the officers allowed the [vehicle] to drive away, they faced the risk that its occupants would use a cell phone to warn those in the house of the imminent search, thereby undermining the protections of a no-knock entry”).

We conclude that Officer Hunt's seizure of Cooper's cell phone, before Cooper entered his squad car, was lawful and that the district court erred by concluding otherwise.

Scope of Search Warrant

The district court concluded that the search of Cooper's cell phone at his home exceeded the scope of the search warrant. The state seems to argue that, because Officer Hunt returned the cell phone to the premises, which were covered by the search warrant, the search of the cell phone fell within the scope of the search warrant. The state's argument is unpersuasive.

“[O]fficers executing a search warrant are, and ought to be, strictly limited to searching only the premises particularly described in the warrant,” and “[i]t is constitutionally impermissible to search one place under a warrant describing another place or to seize one item under a warrant naming another item.” *State v. Mathison*, 263 N.W.2d 61, 63 (Minn. 1978); *see also United States v. Johnson*, 640 F.3d 843, 845 (8th Cir. 2011) (“The authority to search granted by any warrant is limited to the specific places described in it and does not extend to additional or different places.”); *State v. Wills*, 524 N.W.2d 507, 509 (Minn. App. 1994) (“A search pursuant to a warrant may not exceed the scope of that warrant.” (quotation omitted)), *review denied* (Minn. Feb. 14, 1995). “[A] search warrant authorizing the search of a particular building or premises does not give the officers the right to search all persons who may be found in it.” *State v. Wynne*, 552 N.W.2d 218, 220 (Minn. 1996) (quoting *State v. Fox*, 283 Minn. 176, 179, 168 N.W.2d 260, 262 (1969)).

In *Wynne*, the defendant, who was not named in the search warrant, was outside the premises described in the search warrant. *Id.* at 219. The police brought her inside the premises, took her purse, and searched it. *Id.* The supreme court reasoned that because the purse was not found in the premises by the police but, rather, was carried by the defendant, the search of the purse “constituted a search of her person and did not fall within the ambit of the premises search warrant.” *Id.* at 220. The supreme court concluded that, because the search fell outside the scope of the search warrant, the search was unconstitutional, and suppressed the evidence discovered in the defendant’s purse. *Id.* at 220–23. Here, similar to *Wynne*, the police seized an item from Cooper that did not fall within the scope of the search warrant, brought the item onto the premises covered by the search warrant, and searched it.

The state argues that *Wynne* is not controlling because Cooper’s cell phone was within the scope of the search warrant. The state’s argument is unpersuasive. Cooper’s cell phone was not subject to the search warrant. The search warrant authorized the search of cell phones *found* on the premises; it did not authorize the search of cell phones *brought onto* the premises by the police. Officer Hunt seized Cooper’s cell phone almost three blocks away from the premises to be searched. At the time of seizure, the cell phone clearly did not fall within the scope of the search warrant.

The state also argues that, because the “police were . . . constitutionally justified in detaining [Cooper] and bringing him back to his residence prior to executing the search warrant,” the police were “also justified in bringing [Cooper]’s cell phone . . . back to the residence.” The state therefore argues that Cooper’s cell phone fell within the scope of

the search warrant and Investigator Cordova's search of it was constitutional. For this argument, the state principally relies on *Michigan v. Summers*, 452 U.S. 692, 704, 101 S. Ct. 2587, 2595 (1981). In *Summers*, the police detained the respondent, whom they encountered descending the front steps of premises subject to a search warrant, and returned him to the premises while they executed the search warrant. 452 U.S. at 693–94, 101 S. Ct. at 2589. After discovering narcotics on the premises and determining that the respondent owned the premises, police arrested him, searched him incident to arrest, and found heroin on his person. *Id.* The Supreme Court concluded that the initial police detention of the respondent was constitutional and that the eventual search of the respondent was constitutional as a search incident to arrest. *Id.* at 705–06, 101 S. Ct. at 2596.

Summers does not stand for the proposition that the police may detain and bring a person to premises subject to a search warrant and then search him or property found on his person on the basis that the search is within the scope of the search warrant. *Summers* therefore does not support a determination that Investigator Cordova's search of Cooper's cell phone at Cooper's home was a search within the scope of the search warrant.

We conclude that the district court did not err by determining that the search of Cooper's cell phone at his home was not justified as a search within the scope of the search warrant.

Search Incident to Arrest

The state argues that even if Officer Hunt should not have taken Cooper's cell phone from him because it was outside the scope of the *Terry* search, the child-

pornography images on the cell phone inevitably would have been discovered and searched incident to Cooper's lawful arrest for marijuana possession. The state therefore argues that the district court erred by suppressing the images on the cell phone. We disagree because we have already concluded that the seizure of Cooper's cell phone did not exceed the scope of the *Terry* search, and therefore the cell phone was properly removed from Cooper's possession during the traffic stop.

The state also argues that, regardless of the removal of the cell phone from Cooper's possession, the cell phone would have been searched incident to Cooper's ultimate arrest. We are not persuaded. The search-incident-to-arrest exception allows the officer to search "the arrestee's person and the area within his immediate control— [which] mean[s] the area from within which he might gain possession of a weapon or destructible evidence." *Arizona v. Gant*, 446 U.S. 332, 339, 129 S. Ct. 1710, 1716 (2009) (quotations omitted). "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Id.* Here, Officer Hunt constitutionally seized Cooper's phone during the traffic stop, transported Cooper and his cell phone to Cooper's home, and intentionally placed the cell phone out of Cooper's reach. We will not speculate about where the cell phone would have been had Officer Hunt not seized it as part of the traffic stop.

We conclude that the district court correctly concluded that the search-incident-to-arrest exception did not apply.

Exclusionary Rule

The state argues that, because the exclusion of the child-pornography images found on Cooper's cell phone does not serve the purpose of preventing future police misconduct, the exclusionary rule does not apply and the district court therefore erred by suppressing the evidence. The district court found that although "[t]here is no evidence that [Investigator Cordova was] *personally* aware" that Officer Hunt had seized Cooper's cell phone from Cooper's person, under the collective-knowledge doctrine, the police conduct was not in good faith. The district court's conclusion is not erroneous.

"All evidence obtained during an unlawful search is inadmissible to support a conviction unless an exception to the exclusionary rule applies." *State v. Barajas*, 817 N.W.2d 204, 217 (Minn. App. 2012), *review denied* (Minn. Oct. 16, 2012). "[T]he primary purpose of the exclusionary rule is to deter police misconduct." *State v. Hardy*, 577 N.W.2d 212, 217 (Minn. 1998). "If the police conduct a warrantless search, the state bears the burden of showing that at least one exception applies, or evidence seized without a warrant will be suppressed." *Barajas*, 817 N.W.2d 217 (quotation omitted). When evaluating the propriety of an officer's search, "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. Actual communication of information to the officer conducting the search is unnecessary." *State v. Lemieux*, 726 N.W.2d 783, 789 (Minn. 2007) (citations omitted) (discussing collective-knowledge doctrine in context of an emergency-aid search).

Under the collective-knowledge doctrine, Investigator Cordova knew that the cell phone had been obtained from Cooper's person and therefore did not fall within the scope of the search warrant. Because application of the exclusionary rule deters the police from seizing evidence that is outside the scope of a search warrant, we conclude that the district court did not err by applying the exclusionary rule in this case.

Affirmed.