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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1655**

State of Minnesota,
Respondent,

vs.

Deonandre Tyree Pendelton,
Appellant.

**Filed June 2, 2014
Reversed
Rodenberg, Judge**

Ramsey County District Court
File No. 62-CR-10-6092

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

John Choi, Ramsey County Attorney, Kaarin Long, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and Johnson, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

On appeal from his conviction of second-degree possession of a controlled substance, appellant Deonandre Tyree Pendelton contends that the district court erred in

denying his motion to suppress evidence because (1) law enforcement officers unlawfully pat-searched him without reasonable suspicion that he was armed and dangerous; (2) the plain-feel exception to the warrant requirement does not justify the seizure of evidence after the officers determined that appellant possessed no weapons; and (3) the search was not justified as a search incident to arrest. Because no exception to the warrant requirement applies, the district court erred in denying appellant's motion to suppress, and we therefore reverse.

FACTS

Appellant was charged with second-degree possession of a controlled substance in violation of Minn. Stat. § 152.022, subd. 2(1) (2008), after police stopped his vehicle and, during a pat-search, discovered crack cocaine concealed in his underwear. Appellant moved to suppress all evidence obtained as a result of the stop and pat-search and derivatively moved to dismiss the charge.¹ The district court denied appellant's motion to suppress and later found appellant guilty of second-degree possession of a controlled substance.

St. Paul Police Officer James LaBarre was working as part of Operation Street Spot, focusing on making drug arrests. He received a tip from an informant that a black male in his mid-20s with a shorter-build, driving a gold Mercury Marquis with a specific license plate number, "would be in possession of a large amount of crack cocaine" and would be selling drugs in the area of Fuller and Marion Streets in St. Paul. The informant

¹ Appellant also moved to require the state to disclose "the name and contact information of the confidential informant." The district court denied appellant's motion to disclose the informant's identity, and appellant does not challenge this ruling on appeal.

also mentioned that the individual “sometimes keeps the narcotics in his underwear.” Officer LaBarre testified that he had previously received reliable information from this informant and would be able to find the informant again if necessary. Officer LaBarre provided the information he had received from the informant to other police officers. Both he and St. Paul Police Officer Paul Cottingham independently confirmed by consulting computer records that the license plate in question was issued to appellant and that appellant’s driver’s license was revoked.

Officer LaBarre drove an unmarked police car to Fuller and Marion Streets looking for the vehicle. He eventually spotted the Marquis and radioed other police officers to investigate. Officer Cottingham and his partner, Sergeant Steve Anderson, drove up behind the Marquis, verified that it displayed the license plate number they were looking for, and activated their emergency lights. Appellant, driving the Marquis, promptly pulled over. According to Officer Cottingham, appellant told Sergeant Anderson that his driver’s license was revoked, that he did not have insurance on his vehicle, and that he was on probation for a prior drug charge.

Officer Cottingham asked appellant to exit his vehicle and asked if he could pat-search him for weapons. Officer Cottingham admitted that he had no information indicating that appellant was either dangerous or that he might be carrying a weapon. But he decided to search appellant “for weapons and contraband.” Officer Cottingham testified that he specifically intended to pat-search appellant for drugs, but he asked appellant to consent to a pat-search for weapons “because [he] knew [appellant] was gonna take off running” if he asked to search for drugs.

Appellant consented to Officer Cottingham's request to pat-search for weapons. According to Officer Cottingham, "I felt several hard rock-like substances which I knew to be crack cocaine from past experience and training. And I indicated to Sergeant Anderson . . . that there was something down in his underwear." Officer Cottingham nodded at Sergeant Anderson, who then told appellant that Officer Cottingham had something to ask him. Officer Cottingham asked, "'What's this right here,' indicating what I was gripping onto in his crotch area. And [appellant] said: 'Nothing,' and I said: 'Well, dude, it's got to be something.' And then at that point he said: 'Well, it's crack.'" Officer Cottingham handcuffed appellant, put on rubber gloves, reached into appellant's underwear, and removed four plastic bags of crack cocaine (13.83 grams) from a pouch in the underwear.

After appellant was arrested and advised of his *Miranda* rights, he "stated that he had bought about an ounce of crack for around \$450 and was going to more than double his money by selling it to help support his family." Appellant testified that he agreed to purchase cocaine for a friend and then sell it to him on Fuller Street. But appellant disagreed with Officer Cottingham's version of events, testifying that Officer Cottingham "patted me down one time and didn't find nothing. Then he went to the truck. He sat in the truck like five minutes, came back with some blue gloves, and then he patted me down again and then went in my drawers."

In denying appellant's motions to suppress and dismiss, the district court concluded that "the officers clearly had reasonable suspicion . . . to stop [appellant's] vehicle" due to the informant's tip and the reliability of the informant's information. It

also concluded that the officers “were clearly justified in conducting a patdown search for” their safety and that discovery of the cocaine in appellant’s underwear “was justified under the plain-feel doctrine.”

Appellant stipulated to the state’s case pursuant to Minn. R. Crim. P. 26.01, subd. 4, to obtain appellate review of the district court’s pretrial ruling.² The parties agreed that the pretrial ruling was dispositive and that no trial would be required if the pretrial ruling was reversed on appeal. The district court found appellant guilty of second-degree possession of a controlled substance in violation of Minn. Stat. § 152.022, subd. 2(1). Appellant was sentenced to 68 months in prison. This appeal followed.

D E C I S I O N

“When reviewing a district court’s pretrial order on a motion 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). We review reasonable suspicion and probable cause determinations de novo. *In re Welfare of G.M.*, 560 N.W.2d 687, 690 (Minn. 1997).

“The United States and Minnesota Constitutions protect ‘the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’” *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011) (quoting U.S. Const. amend. IV) (citing Minn. Const. art. I, § 10). “A search conducted without a warrant

² Before this stipulation, the state amended its complaint, adding an additional charge of first-degree sale of a controlled substance in violation of Minn. Stat. § 152.021, subd. 1(1) (2008). The state agreed to dismiss the new first-degree-sale charge if the district court found appellant guilty of second-degree possession. The first-degree-sale charge has been dismissed and is not part of this appeal.

issued upon probable cause is generally unreasonable.” *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). The state has the burden to prove that an exception to the warrant requirement applies and justifies a warrantless search. *Id.*

One exception to the warrant requirement is “the *Terry* search exception.” *Id.* at 250. Under *Terry*, “police may stop and frisk a person when (1) they have a reasonable, articulable suspicion that a suspect might be engaged in criminal activity and (2) the officer reasonably believes the suspect might be armed and dangerous.” *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884 (1968)). “The reasonable-suspicion standard is not high” and is “less demanding than the standard for probable cause.” *Diede*, 795 N.W.2d at 843 (quotations omitted). “We consider the totality of the circumstances when determining whether reasonable, articulable suspicion exists.” *Flowers*, 734 N.W.2d at 251.

On appeal, appellant does not challenge the district court’s determination that the officers had reasonable suspicion to stop the Marquis. He instead challenges the district court’s determination that the officers had reasonable suspicion to conduct a pat-search. The district court concluded that the officers knew from experience “that people who deal drugs likely have weapons. It is very well-known that weapons and drugs go together.” Although it does not concede the issue, the state admitted during oral argument that whether the officers had reasonable suspicion to pat-search appellant was a “close case,” and its principal argument on appeal is that the search is justified as having been performed incident to a lawful arrest.

“An officer may conduct a limited protective weapons frisk of a lawfully stopped person if the officer reasonably believes that the suspect might be armed and dangerous and capable of immediately causing permanent harm.” *State v. Varnado*, 582 N.W.2d 886, 889 (Minn. 1998). “An assumption that weapons might always be present when a law enforcement officer confronts a citizen, standing alone, cannot amount to adequate cause to pat search for weapons.” *State v. Eggersgluess*, 483 N.W.2d 94, 97 (Minn. App. 1992). And a pat-search is not authorized when it is justified solely by a desire to discover or preserve contraband. *Id.*

In *Varnado*, two police officers suspected a driver of selling drugs and stopped her for driving with a cracked windshield. 582 N.W.2d at 888. One officer frisked the driver before placing her in the back of the squad car because “he always frisk[ed] people before placing them in the back of his squad car.” *Id.* The supreme court concluded that the officers could not reasonably suspect that the driver was armed and dangerous due to the “innocuous nature of the basis for the stop, [and] the circumstances of the stop itself” when the driver fully cooperated with the officers, “did not make any furtive or evasive movements,” and there was “no reason to believe that [the driver] had a criminal history of any kind.” *Id.* at 890. Because the officers had no reason to believe that the driver was armed and dangerous, the frisk was not justified. *Id.*

Here, as in *Varnado*, the officers had no previous knowledge that would suggest that appellant was armed and dangerous. *See id.* Appellant stated that he was on probation, but the informant did not provide any information indicating that appellant was armed. And appellant fully cooperated with the two police officers conducting the

stop. Officer Cottingham's primary stated purpose in pat-searching appellant was to determine whether he had drugs in his crotch area, not because he had any information that appellant might have a weapon or be dangerous. And at the time he made the decision to pat-search, and as discussed below, Officer Cottingham had no confirmation that appellant was the person about whom the informant had provided information. Granting the accuracy of the district court's observation that "weapons and drugs go together," the information available to the officers at the time of the pat-search was minimal as to *either* weapons *or* drugs being in the possession of the person being pat-searched. The record is insufficient under the relevant authorities to support Officer Cottingham's decision to pat-search for weapons.

But even if the officers were entitled to pat-search appellant for weapons based solely on the general correlation that "weapons and drugs go together," the scope of the search here was impermissible. And, without any specific information indicating that appellant had either weapons or drugs, a *Terry* pat-search sanctions only "a carefully limited frisk for weapons." *Dickerson*, 481 N.W.2d at 846.

When the officer assures himself or herself that no weapon is present, the frisk is over. During the course of the frisk, if the officer feels an object that cannot possibly be a weapon, the officer is not privileged to poke around to determine what that object is; for purposes of a *Terry* analysis, it is enough that the object is not a weapon.

Id. at 844. The district court determined that whether Officer Cottingham felt an object that could not possibly be a weapon "perhaps could be argued either way here." But it

concluded that Officer Cottingham was entitled to seize the drugs under the plain-feel doctrine.

Police may seize an object under the plain-feel doctrine if “(1) police were lawfully in a position from which they [felt] the object, (2) the object’s incriminating character was immediately apparent, and (3) the officers had a lawful right of access to the object.” *G.M.*, 560 N.W.2d at 693 (discussing plain-view doctrine). The plain-feel doctrine finds its genesis in the plain-view doctrine. *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S. Ct. 2130, 2137 (1993).

The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no “search” within the meaning of the Fourth Amendment—or at least no search independent of the initial intrusion that gave the officers their vantage point.

Id. “The seizure of an item whose identity is already known occasions no further invasion of privacy.” *Id.* at 377, 113 S. Ct. at 2138. “[A] police officer can seize an object in plain view without a warrant only if the object’s incriminating character is immediately apparent.” *G.M.*, 560 N.W.2d at 693. This requires “probable cause to believe that the item is contraband before seizing it.” *Dickerson*, 508 U.S. at 376, 113 S. Ct. at 2137. The plain-feel doctrine applies when a police officer is conducting a proper pat-search and can plainly discern the incriminating object by feel. *G.M.*, 560 N.W.2d at 692-93. The exception does not apply if an officer must squeeze, slide, and manipulate an object to determine whether it is contraband. *Dickerson*, 508 U.S. at 378, 113 S. Ct. at 2138.

On appeal, appellant challenges the district court's application of the plain-feel test, arguing that the incriminating character of the small objects in his underwear could not have been immediately apparent to Officer Cottingham. *See G.M.*, 560 N.W.2d at 693. Appellant argues that Officer Cottingham's actions, including asking appellant what the objects were and removing them only after appellant admitted they were cocaine, undercut his assertion that the incriminating character of the objects was immediately apparent. Officer Cottingham testified that he "felt several hard rock-like substances which [he knew] to be crack cocaine from past experience and training." It is not clear from the testimony when Officer Cottingham reached inside of appellant's pants, which Officer Cottingham described as "a pair of jeans." When he felt these items, he was "gripping onto . . . [appellant's] crotch area," apparently with his hand outside of appellant's pants. Although he testified that he knew the "rock-like substances" to be crack cocaine, the record fails to explain how Officer Cottingham could "know" that to be true through appellant's jeans and underwear. And the record similarly fails to explain why, if he knew the substances to be cocaine, Officer Cottingham continued "gripping onto . . . [appellant's] crotch area" while interrogating him concerning what he felt.

Careful review of the record does not support a conclusion that the incriminating character of the objects was immediately apparent. Officer Cottingham testified that, when he felt the objects, he nodded at Sergeant Anderson to indicate "that there was *something* down in his underwear." (Emphasis added). "Gripping onto . . . his crotch area," Officer Cottingham then twice asked appellant what the objects were. He did not remove the objects until *after* appellant admitted that they were cocaine.

The record is at best equivocal on the question of whether the incriminating character of the objects was immediately apparent. But what is clear from the record is that Officer Cottingham had already assured himself that appellant did not have a weapon by the time he was gripping and inquiring about the small, hard objects. Therefore, Officer Cottingham was required to have stopped the search. *See Dickerson*, 481 N.W.2d at 844. He was “not privileged to poke around to determine what” the objects were. *See id.* Under *Dickerson*, Officer Cottingham’s search, which included “gripping onto . . . [appellant’s] crotch area” while interrogating him, impermissibly expanded the scope of a *Terry* pat-search.

A *Terry* pat-search, authorized and intended as a search for weapons, is constitutionally permissible only within a narrowly circumscribed scope. *See id.*; *see also State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (“An initially valid stop may become invalid if it becomes ‘intolerable’ in its ‘intensity or scope.’” (quoting *Terry*, 392 U.S. at 17-18, 88 S. Ct. at 1878)). Officer Cottingham certainly knew that he was not gripping a knife, gun, or other weapon. Because Officer Cottingham could not have been reasonably concerned for his safety at the time that he gripped onto and inquired concerning the objects located in appellant’s underwear, and expanded the scope of his pat-search, the plain-feel doctrine does not justify the warrantless search in this case. *See Dickerson*, 481 N.W.2d at 845 (explaining that an officer may continue a *Terry* pat-search “[s]o long as his continued concern for his safety is reasonable”).

But the state’s principal argument on appeal is not that this was a permissible pat-search pursuant to which the plain-feel doctrine justifies the warrantless seizure of the

cocaine. The state principally argues that the search was justified as a search incident to arrest. *See id.* at 845-46 (explaining that a search incident to arrest is another exception to the warrant requirement). The district court did not consider whether the search-incident-to-arrest exception applies here. But “[a] respondent can raise alternative arguments on appeal in defense of the underlying decision when there are sufficient facts in the record for the appellate court to consider the alternative theories, there is legal support for the arguments, and the alternative grounds would not expand the relief previously granted.” *State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003).

The search-incident-to-arrest exception allows officers to search “a person’s body and the area within his or her immediate control.” *State v. Robb*, 605 N.W.2d 96, 100 (Minn. 2000). “This exemption ensures officer safety by allowing officers to remove any weapons the arrestee might reach and also prevents the arrestee from tampering with or destroying evidence or contraband.” *Id.* “[U]nlike a protective weapons search, a search incident to arrest is very broad in scope; it may include pockets, containers, and even the passenger compartment of automobiles.” *Varnado*, 582 N.W.2d at 893. But the arrestee must be able to “reach into the area that law enforcement officers seek to search.” *Arizona v. Gant*, 556 U.S. 332, 339, 129 S. Ct. 1710, 1716 (2009).

“[P]robable cause to arrest requires police to have a reasonable belief that a certain person has committed a crime.” *G.M.*, 560 N.W.2d at 695. If officers have probable cause to arrest, they can “conduct a search incident to arrest even if the search occurs before the arrest.” *Id.* And the officers can seize any discovered contraband. *Id.* But

“the evidence discovered in the contemporaneous search cannot later be used to justify the finding of probable cause.” *Id.*

Appellant argues that the search-incident-to-arrest exception cannot apply because the officers on the scene did not believe that they had probable cause to arrest. And Officer Cottingham testified that appellant was not arrested until after the cocaine was removed from his underwear. But whether Officer Cottingham believed that he had probable cause to arrest appellant is not dispositive of our objective analysis regarding whether the officers actually had probable cause to arrest. *See id.* at 695 n.8 (noting that the test for probable cause is objective and not based on the officer’s belief).

“When determining the legality of a warrantless arrest, we look to the information that police took into consideration when making the arrest” *State v. Cook*, 610 N.W.2d 664, 667 (Minn. App. 2000), *review denied* (Minn. July 25, 2000). The parties agree that we must therefore determine whether the informant provided reliable information to the police and whether that information sufficed to provide the officers with probable cause to arrest. “When police rely on information provided by an informant, all of the stated facts relating to the informer should be considered in making a totality-of-the-circumstances analysis.” *Id.* (quotation omitted). Such facts include “the credibility of the informant and the basis of the informant’s knowledge in light of all the circumstances.” *Id.*

Appellant argues that, as in *Cook*, the informant failed to predict appellant’s future behavior. In *Cook*, the informant provided information that the suspect was dealing cocaine in a certain location, and described the suspect’s clothing and vehicle. *Id.* at 666.

Nevertheless, this information “did not predict any future behavior” because it was “simply a report of [the suspect’s] appearance and present location.” *Id.* at 669. In contrast, the informant here predicted future behavior, including that the Marquis would appear on a certain street on a certain evening.

But an informant must also display or provide police with a basis of knowledge, which “may be supplied directly, by first-hand information,” or “indirectly through self-verifying details that allow an inference that the information was gained in a reliable way and is not merely based on a suspect’s general reputation or on a casual rumor circulating in the criminal underworld.” *Id.* at 668. In *Cook*, the informant provided a description of the suspect’s clothing, appearance, vehicle, and location, but “fail[ed] to offer any explanation for the basis of the [informant’s] claim that [the suspect] was selling drugs.” *Id.* Similarly, the informant here provided information regarding appellant’s appearance, vehicle, and future location, “details easily obtainable by anyone, not necessarily by someone with inside information.” *Id.* at 669. And the informant here did not even identify appellant by name and did not identify the drug-seller as the owner of the Marquis. He said only that the seller would be driving the Marquis. As Officer Cottingham testified, the police did not know the identity of the seller based on the information provided by the informant. Because the informant failed to provide a basis for his knowledge, the officers lacked probable cause to arrest appellant before finding the cocaine. *See G.M.*, 560 N.W.2d at 695 (“[T]he evidence discovered in the contemporaneous search cannot later be used to justify the finding of probable cause.”).

The informant's information fell far short of sufficient to give rise to a reasonable belief that a certain person had committed a crime. Therefore, the officers did not have probable cause to arrest appellant until after he admitted that the objects in his underwear were cocaine. *See id.* (“[P]robable cause to arrest requires police to have a reasonable belief that a certain person has committed a crime.”). And appellant only made this admission after an unjustified and intrusive search of his underwear.

Nor was there probable cause to arrest appellant for a different crime. “[A]n arrest for a crime other than the one that provided the basis for the frisk . . . is one factor we will consider when assessing the validity of a search incident to arrest.” *Varnado*, 582 N.W.2d at 893. In *Varnado*, the police officer had probable cause to suspect the driver of failing to have her driver's license in her possession while driving, but the officer instead arrested her for possession of a controlled substance after conducting a pat-search. *Id.* at 892-93. Here, the officers may well have had probable cause to believe that appellant was driving without a valid license: they determined that the owner of the Marquis had a revoked driver's license and appellant admitted to Sergeant Anderson that his license was revoked. But appellant was not arrested for driving after revocation.³ Instead, the officers expanded the scope of the stop, conducted an intrusive search of appellant's

³ Although Officer Cottingham testified that there was probable cause to arrest appellant for driving without insurance, Minn. R. Crim. P. 6.01, subd. 1(a), requires the police to release the driver after issuing the citation in misdemeanor cases absent enumerated circumstances about which the record reveals nothing here. The state provided no evidence that the officers had to detain appellant in order to prevent bodily injury, to prevent further criminal activity, or to ensure appellant's appearance in court for driving without a license or insurance. *See* Minn. R. Crim. P. 6.01, subd. 1(a). As a result, the record does not support a conclusion that appellant was or could properly have been arrested for driving after revocation.

person, including reaching into his underwear, and eventually arrested him after cocaine was found. This was not a search incident to arrest. As in *Varnado*, “what occurred in this case was more akin to an arrest incident to a search.” *Id.* at 893.

In sum, evidence discovered as a result of a violation of an individual’s constitutional right to be free from unreasonable searches and seizures must be suppressed. *Askerooth*, 681 N.W.2d at 370. Officer Cottingham discovered the cocaine as a result of his unconstitutional search of appellant’s underwear, a search that impermissibly continued after Officer Cottingham had established that appellant was not armed, *see Dickerson*, 481 N.W.2d at 844, and that did not qualify as a search incident to arrest, *see G.M.*, 560 N.W.2d at 695. When a citizen has not been arrested, where police have no probable cause to believe that the citizen has committed any crime other than a traffic offense, and where police have already assured themselves that the citizen has no weapon, police may not continue to grope at and manipulate the citizen’s groin area and undergarments while interrogating the citizen regarding items that may or may not be contraband. Therefore, the cocaine evidence seized from appellant must be suppressed. *See Askerooth*, 681 N.W.2d at 370.

Appellant waived his right to a jury trial and stipulated to the state’s case under Minn. R. Crim. P. 26.01, subd. 4, to obtain review of the pretrial ruling upholding the constitutionality of the traffic stop and seizure. According to the requirements of rule 26.01, the parties agreed that the pretrial ruling was dispositive and that no trial would be required if the pretrial ruling was reversed on appeal. Therefore, because we reverse the

district court's pretrial ruling and suppress the cocaine evidence, we also reverse appellant's conviction of second-degree possession of a controlled substance.

Reversed.