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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-800**

State of Minnesota,
Respondent,

vs.

Donald Timothy Palardis,
Appellant.

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

Clay County District Court
File No. 14-CR-10-1425

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

Brian Melton, Clay County Attorney, Matthew D. Greenley, Assistant County Attorney,
Moorhead, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Cleary, Judge; and
Rodenberg, Judge.

UNPUBLISHED OPINION

CLEARY, Judge

Appellant Donald Palardis was convicted of fifth-degree possession of a controlled substance and possession of marijuana in a motor vehicle after methamphetamine and marijuana were discovered in his vehicle during a traffic stop. Appellant challenges the convictions, arguing that the evidence against him should have been suppressed because the police officer discovered the drugs after a series of unconstitutional actions. Because we find that appellant was unlawfully seized and his vehicle unlawfully searched, we reverse.

FACTS

On April 20, 2010, Officer Eli Paluga of the Glyndon Police Department was on patrol on Highway 10 in Clay County. He was following a vehicle and observed the driver of that vehicle lean toward the passenger side as if to reach for something. This caused the vehicle to swerve and cross the fog line of the highway a couple of times. The officer activated his squad car's emergency lights, stopped the vehicle, and identified its driver as appellant.

The officer told appellant why he had been stopped, and appellant stated that he did not realize he was crossing the fog line and that he was on his way home from work. The officer did not ask to see appellant's license. The officer noticed that appellant's eyes were red and bloodshot and that he appeared to be nervous and fidgety, but the officer did not smell anything unusual. The officer asked appellant if he had recently smoked marijuana, and appellant responded "not today." The officer asked when

appellant last smoked marijuana, and appellant indicated that it was approximately two weeks prior. The officer asked why appellant's eyes were red, and appellant stated that he did not know and just wanted to go home. Based on appellant's driving, his nervousness, his red and bloodshot eyes, and his admission that he had smoked marijuana approximately two weeks ago, the officer thought appellant could be under the influence of marijuana. It was the officer's experience that many people who smoke marijuana smoke it in their vehicles and carry drug paraphernalia in their vehicles.

The officer next asked if there was any marijuana or drug paraphernalia in the vehicle, and appellant said that there was not and that he rolls cigarettes when he smokes marijuana. The officer asked to see the ashtray, and appellant showed it to him. The officer noticed that the ashtray contained the ends of two cigarettes which appeared to be marijuana cigarettes. The officer asked if there was anything else in the vehicle, and appellant opened the center console and gave the officer a device which contained a pipe and a small amount of what appeared to be marijuana.

The officer asked appellant to exit the vehicle while he searched the passenger compartment, and appellant complied. The officer patted down appellant for weapons and felt a hard metal object in appellant's pants pocket. The officer asked what it was, and appellant said it was another pipe. The officer removed the pipe from appellant's pocket, placed him in the back seat of the squad car, and told him that he was not under arrest but to sit there while his vehicle was searched. The officer then searched the passenger compartment of the vehicle. Between the seats on the front passenger side, the

officer located a small plastic baggie which contained a white crystallized powder consistent with methamphetamine.

Appellant was arrested and charged with fifth-degree possession of a controlled substance, a felony in violation of Minn. Stat. § 152.025, subd. 2(a)(1) (Supp. 2009), and possession of marijuana in a motor vehicle, a misdemeanor in violation of Minn. Stat. § 152.027, subd. 3 (2008). Appellant pleaded not guilty to the charges and requested a contested omnibus hearing, claiming that the scope of the traffic stop was improper and that the search of his vehicle was not supported by probable cause or by an exception to the warrant requirement.

The district court held an omnibus hearing and subsequently issued an order denying appellant's motion to suppress the evidence. In an attached memorandum, the court stated that it had determined that the officer had reasonable, articulable suspicion to request that appellant produce contraband, that appellant consented to the search of his vehicle, and that the stop and search conducted by the officer were lawful.

Following issuance of the district court's order, appellant waived his right to a jury trial and the parties agreed to submit an affidavit of appellant and a supplemental police report to the court and allow it to make a determination of guilt. The court issued guilty verdicts on both charges, and this appeal followed.

D E C I S I O N

When reviewing a pretrial order on a motion to suppress evidence, a court independently reviews the facts and determines whether, as a matter of law, the district court erred in suppressing or not suppressing the evidence. *State v. Harris*, 590 N.W.2d

90, 98 (Minn. 1999). The district court’s factual findings are reviewed under the clearly erroneous standard and its legal determinations are reviewed de novo. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006). The clearly erroneous standard requires that the reviewing court “be left with the definite and firm conviction that a mistake has been made.” *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008) (quotation omitted). If there is reasonable evidence to support the district court’s findings of fact, those findings should not be disturbed. *Id.*

Both the Fourth Amendment of the United States Constitution and Article I, section 10 of the Minnesota Constitution guarantee the “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. I, § 10. The temporary detention of an individual during the stop of a vehicle by the police, even if only for a brief period and for a limited purpose, is a seizure of a person. *Whren v. United States*, 517 U.S. 806, 809–10, 116 S. Ct. 1769, 1772 (1996); *State v. Fort*, 660 N.W.2d 415, 418 (Minn. 2003). A search of a vehicle is a search of a person’s effects. *Cady v. Dombrowski*, 413 U.S. 433, 439, 93 S. Ct. 2523, 2527 (1973); *State v. Wiegand*, 645 N.W.2d 125, 131 (Minn. 2002). The Minnesota Supreme Court has interpreted the Minnesota Constitution to afford greater protection from unreasonable searches and seizures in the context of traffic stops than the United States Constitution does. *See State v. Askerooth*, 681 N.W.2d 353, 361–63 (Minn. 2004). Appellant argues that actions by the officer during the traffic stop were unlawful, mandating suppression of the drug evidence.

I. Questioning appellant about marijuana use and whether the vehicle contained marijuana or drug paraphernalia was unlawful.

The Minnesota Supreme Court has adopted the principles and framework of *Terry v. Ohio* for evaluating the reasonableness of seizures during traffic stops. *Id.* at 363 (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968)). “A *Terry* analysis involves a dual inquiry. First, we ask whether the stop was justified at its inception. . . . Second, we ask whether the actions of the police during the stop were reasonably related to and justified by the circumstances that gave rise to the stop in the first place.” *Askerooth*, 681 N.W.2d at 364 (citing *Terry*, 392 U.S. at 19–20, 88 S. Ct. at 1879) (other citations omitted). “An initially valid stop may become invalid if it becomes intolerable in its intensity or scope.” *Askerooth*, 681 N.W.2d at 364 (quotations omitted). Thus, each incremental intrusion during a traffic stop must be tied to and justified by the original legitimate purpose of the stop, independent probable cause, or reasonableness. *Id.* at 365.

Appellant admits that the initial stop of his vehicle was justified due to the swerving of the vehicle over the fog line. *See State v. George*, 557 N.W.2d 575, 578 (Minn. 1997) (“Ordinarily, if an officer observes a violation of a traffic law, however insignificant, the officer has an objective basis for stopping the vehicle.”). However, appellant argues that that the officer’s questions regarding marijuana use and whether the vehicle contained marijuana or drug paraphernalia constituted an intrusion that expanded the scope of the stop beyond its original purpose and was unreasonable.

A. The officer's questions were an expansion of the traffic stop beyond its original purpose.

Appellant argues that the officer's questions regarding marijuana use and whether the vehicle contained marijuana or drug paraphernalia expanded the scope of the stop beyond its original purpose, which was to process the crossing-the-fog-line violation. The state argues that these were simple questions and not a great intrusion into appellant's privacy.

In *State v. Fort*, police officers stopped a vehicle for speeding and having a cracked windshield. 660 N.W.2d 415. One of the officers asked the defendant, a passenger, to exit the vehicle and began questioning him about drugs and weapons. *Id.* at 416–17. Specifically, the officer asked whether there were any drugs or weapons in the vehicle, whether the defendant had any drugs or weapons on him, and whether the defendant would mind if the officer searched him for drugs and weapons. *Id.* at 417. The defendant replied “No, sir” to each of these questions, and cocaine was ultimately discovered in the defendant's pocket. *Id.* The Minnesota Supreme Court determined that the officer's questions went beyond the original purpose of the traffic stop, which was to process violations for speeding and a cracked windshield, and stated that “[i]nvestigation of the presence of narcotics and weapons had no connection to the purpose for the stop,” necessitating suppression of the cocaine. *Id.* at 419. See also *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005) (determining that an officer's request to search the defendant's vehicle expanded the scope of the traffic stop from its original purpose of investigating speeding); *State v. Syhavong*, 661 N.W.2d 278, 281 (Minn. App. 2003)

(determining that, during a traffic stop, an officer's question to the defendant regarding whether there was anything illegal in the vehicle exceeded the original purpose of the stop, a broken tail light, and stating that, "During a traffic stop, an officer's questions must be limited to the purpose of the stop.") (citing *Florida v. Royer*, 460 U.S. 491, 498–500, 103 S. Ct. 1319, 1324–25 (1983)).

In this case, the officer's questions to appellant expanded the traffic stop beyond its original legitimate purpose. The questions regarding marijuana use and whether the vehicle contained marijuana or drug paraphernalia were unnecessary for the processing of the crossing-the-fog-line violation. Although there is no indication how long the questioning took, as in *Fort*, the officer asked a series of questions which were beyond the scope of the reason for the traffic stop.

B. The officer's questions were not reasonable.

Even if the officer's questions expanded the scope of the traffic stop, they were lawful if they were reasonable. An expansion of a traffic stop must be "justified by a reasonable articulable suspicion of other criminal activity." *Fort*, 660 N.W.2d at 419. Reasonable, articulable suspicion arises "when an officer observes unusual conduct that leads the officer to reasonably conclude in light of his or her experience that criminal activity may be afoot." *In re Welfare of G.M.*, 560 N.W.2d 687, 691 (Minn. 1997) (citing *Minnesota v. Dickerson*, 508 U.S. 366, 373, 113 S. Ct. 2130, 2135–36 (1993)). The reasonable suspicion standard is not high, but the suspicion must be based on specific, articulable facts, not just a hunch or a whim. *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008); *State v. Volkman*, 675 N.W.2d 337, 341 (Minn. App. 2004). "[T]he officer

must have objective support for his belief that the person is involved in criminal activity.” *George*, 557 N.W.2d at 578. Reasonableness is evaluated by looking at the totality of the circumstances and must be particularized and individualized to the defendant. *Burbach*, 706 N.W.2d at 488.

Minnesota courts “have been reluctant to rely on nervous behavior as evidence to support a reasonable, articulable suspicion of criminal activity.” *Id.* at 490 (determining that a defendant’s nervousness during intense police questioning did not lead to a finding of reasonable suspicion). *See also Wiegand*, 645 N.W.2d at 137 (determining that a defendant’s evasiveness, nervousness, and glossy eyes did not give police officers reasonable, articulable suspicion of drug-related criminal activity). “While an officer’s perception of an individual’s nervousness may contribute to an officer’s reasonable suspicion, nervousness is not sufficient by itself and must be coupled with other particularized and objective facts.” *Syhavong*, 661 N.W.2d at 282. Bloodshot eyes may be one factor leading to reasonable, articulable suspicion of criminal activity. *See, e.g., LaBeau v. Comm’r of Pub. Safety*, 412 N.W.2d 777, 779–80 (Minn. App. 1987) (holding that a driver’s red and bloodshot eyes, odor of alcohol, and slurred speech gave an officer reasonable, articulable suspicion to support asking the driver to exit the vehicle).

In this case, when the officer began questioning appellant about marijuana, the officer had observed that appellant appeared to have reached for something on the passenger side of the vehicle, causing it to swerve over the fog line, that appellant’s eyes were red and bloodshot, and that appellant appeared to be nervous and fidgety. The officer did not smell anything unusual and had not seen any drugs or drug paraphernalia

at that point. Taken together, these observations were not enough to give the officer reasonable, articulable suspicion of criminal activity.

After a few questions, the officer learned that, while appellant claimed he had not smoked marijuana that day, he had smoked it approximately two weeks prior. However, other than appellant's bloodshot eyes, the officer still had no concrete sign that appellant had been smoking marijuana on the day of the stop or that appellant's vehicle contained marijuana or drug paraphernalia. The officer did not have reasonable, articulable suspicion of criminal activity when he was questioning appellant. Because the officer's questions expanded the scope of the traffic stop beyond its original purpose and were not reasonable, the questioning was unlawful.

II. The officer could not lawfully request to search the vehicle's ashtray.

After posing questions to appellant, the officer asked to see the vehicle's ashtray.¹ Appellant argues that the officer searched the ashtray and center console and that this was unlawful. Appellant also argues that he did not voluntarily consent to the officer's search. The state claims, and the district court found, that appellant consensually showed the officer what was in the ashtray and center console.

¹ The state argues that the officer did not ask to see the ashtray, but rather asked appellant if there were any "roaches" in the ashtray, and that appellant showed the officer the ashtray in response to this question. However, the district court found that "[t]he officer asked to see [appellant's] ash tray, and [appellant] showed it to the officer," and that "[t]he officer . . . asked [appellant] if he could see what was in the ash tray. [Appellant] complied" The district court's finding is consistent with the complaint, which states that "Officer Paluga asked to see [appellant's] ash tray, and [appellant] showed it to the officer." Because there is reasonable evidence to support the district court's finding, that finding is not clearly erroneous.

The request by the officer to see the ashtray was a request to search the ashtray, and the officer's action by looking into the ashtray constituted a search.² *See, e.g., State v. Diede*, 795 N.W.2d 836, 845 (Minn. 2011) (stating that an officer's request to look inside a cigarette package was a request to search the package). The police may search a vehicle without a warrant if, among other things, the owner of the vehicle consents to the search. *George*, 557 N.W.2d at 579 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 2045 (1973)).

Under Minnesota law, during a traffic stop an officer must have reasonable, articulable suspicion of criminal activity to request a search that expands the scope of the stop. *Fort*, 660 N.W.2d at 416 (“[I]n the absence of reasonable, articulable suspicion a consent-based search obtained by exploitation of a routine traffic stop that exceeds the scope of the stop’s underlying justification is invalid.”); *Volkman*, 675 N.W.2d at 341 (“[T]he suspect’s consent, taken alone, is insufficient to permit expansion of a routine traffic stop; the police officer must have a reasonable, articulable suspicion of further criminal activity in order to request consent to expand the stop.”) (citing *Fort*, 660 N.W.2d at 418).

Because the officer did not develop reasonable, articulable suspicion of criminal activity while questioning appellant, the officer could not lawfully request to search the vehicle. Appellant denied having smoked marijuana that day and denied there being any

² The evidence does not show, and the district court did not find, that the officer requested to look into the center console or that he did look into it, only that he asked appellant if there was anything else in the vehicle and that appellant then opened the console and gave the officer the device that was inside. Appellant’s characterization of this as a “search” of the console by the officer is incorrect.

marijuana or drug paraphernalia in his vehicle. Therefore, the search of the ashtray was unlawful even if appellant consented to it.

After the officer had viewed what he believed to be marijuana taken from the vehicle's ashtray and center console, the officer asked appellant to exit the vehicle and searched it, eventually finding methamphetamine. Because the drugs were discovered after an illegal search and seizure, this evidence must be suppressed as the fruit of the illegality. *Harris*, 590 N.W.2d at 97; *In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993).

Reversed.