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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1146**

State of Minnesota,
Appellant,

vs.

Davante Rashaud Harrington,
Respondent.

**Filed December 10, 2012
Reversed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CR-11-28655

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

Susan L. Segal, Minneapolis City Attorney, Paula J. Kruchowski, Assistant City Attorney, Minneapolis, Minnesota (for appellant)

Mark D. Nyvold, Special Assistant State Public Defender, Fridley, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Cleary, Judge; and Toussaint, Judge.*

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

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant State of Minnesota challenges the district court's pretrial order suppressing evidence of a BB gun found on respondent during a pat frisk. Because the officer had reasonable grounds to believe respondent was armed and dangerous, the pat frisk was lawful, and we reverse.

FACTS

At approximately 11:30 p.m. on September 12, 2011, a 911 caller reported seeing a man attempt to break into a car with tools on Second Avenue SE in Minneapolis. Police dispatch advised officers that the suspect was wearing black clothes and a baseball cap. Within two minutes of receiving the report, Sergeant Eric Madson found respondent Davante Harrington one block from the scene. Harrington matched the suspect's description and appeared nervous.

Sergeant Madson pulled his squad car to within 20 to 25 feet of Harrington and said, "Come here." Sergeant Madson exited his car and noticed a bulge in Harrington's waistband. Because the suspect reportedly had burglary tools, Sergeant Madson was concerned that the bulge was a screwdriver, gun, or knife. In his experience, people who commit crimes usually carry such items to facilitate their criminal activity.

Sergeant Madson ordered Harrington to put his hands on the squad car. As he guided Harrington to the car, he performed what he described as a bump-search,¹

¹ The parties agree that a bump-search is a cursory pat frisk.

touching the bulge with his hand and immediately recognizing it as a pistol. Sergeant Madson retrieved what turned out to be a BB gun, and arrested Harrington.

Harrington was charged with carrying a BB gun in public. Harrington moved to suppress evidence of the BB gun, arguing that the stop and the pat frisk were unreasonable. The district court granted the motion, determining that the stop was lawful but the pat frisk was not. This appeal follows.

D E C I S I O N

I. The district court's order has a critical impact on the state's case.

When the state appeals a pretrial order, it must clearly and unequivocally establish that the order has a critical impact on the state's case and that the district court erred. *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998). A suppression order critically impacts the state's case if "the lack of the suppressed evidence significantly reduces the likelihood of a successful prosecution." *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987). The parties do not dispute, and we agree, that the pretrial order critically impacts the state's case; if the evidence is suppressed, the state cannot prove Harrington possessed the BB gun. *See* Minn. Stat. § 624.7181, subd. 2 (2010) (requiring the state to prove the defendant carried a BB gun in a public place).

II. There were reasonable grounds to conduct a pat frisk.

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless searches are presumptively unreasonable unless permitted by an exception. *State v. Licari*, 659

N.W.2d 243, 250 (Minn. 2003). Evidence seized during an unreasonable search generally must be suppressed. *State v. Jackson*, 742 N.W.2d 163, 177-78 (Minn. 2007).

A police officer may conduct a limited pat frisk for weapons of a lawfully stopped person when the officer has reasonable grounds to believe the person may be armed and dangerous. *State v. Payne*, 406 N.W.2d 511, 513 (Minn. 1987) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85 (1968)). The principle justification for conducting a pat frisk is officer safety. *State v. Varnado*, 582 N.W.2d 886, 891 (Minn. 1998); *see also Terry*, 392 U.S. at 24, 88 S. Ct. at 1881 (finding that it is “clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm”). The officer does not need to be certain the suspect is armed; rather, a pat frisk is permitted when a reasonably prudent person in the officer’s circumstances would believe he or she was in danger. *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883.

This court independently reviews the totality of the circumstances to determine whether, as a matter of law, an officer had reasonable grounds to conduct a pat frisk. *See State v. Flowers*, 734 N.W.2d 239, 248, 251 (Minn. 2007). We review the district court’s factual findings for clear error and its legal determinations de novo. *State v. Diede*, 795 N.W.2d 836, 849 (Minn. 2011).

The state argues that based on the totality of the circumstances, Sergeant Madson had reasonable grounds to believe Harrington was armed and dangerous. We agree. Harrington matched the description of a suspect who was seen using tools to break into a car. Breaking into cars is more serious than a minor traffic violation, *see Varnado*, 582

N.W.2d at 889-90 (considering the nature of the offense in evaluating a pat frisk), and tools used to break into cars can be used as dangerous weapons, *see* Minn. Stat. § 609.02, subd. 6 (2010) (defining a dangerous weapon as any device that may be used to produce death or great bodily harm). And Sergeant Madson’s reasonable safety concern was heightened because he was alone and stopped Harrington late at night. *See Flowers*, 734 N.W.2d at 257 (explaining that an officer may need to take additional precautions when acting alone); *State v. Cavegn*, 294 N.W.2d 717, 721-22 (Minn. 1980) (concluding that the time of day may contribute to the reasonableness of an officer’s safety concerns).

Sergeant Madson’s observations that Harrington had a bulge in his waistband and appeared nervous further suggested that Harrington was armed and dangerous. *See Pennsylvania v. Mimms*, 434 U.S. 106, 112, 98 S. Ct. 330, 334 (1977) (“The bulge in the jacket permitted the officer to conclude that [the suspect] was armed and thus posed a serious and present danger to the safety of the officer.”); *State v. Harris*, 590 N.W.2d 90, 104 (Minn. 1999) (considering the suspect’s nervousness). Moreover, Harrington had a cell phone in his hand, suggesting the bulge was not a cell phone. Based on his training, experience, and the report that the suspect was seen using tools to break into a vehicle, Sergeant Madson reasonably believed that the bulge was a tool or other weapon.

Harrington argues Sergeant Madson’s safety concerns were dispelled by Harrington’s cooperation, as demonstrated by the fact Sergeant Madson did not ask Harrington whether he was armed. We disagree. A suspect’s threatening behavior and an officer’s inquiries are relevant to the reasonableness of a pat frisk. *See Harris*, 590 N.W.2d at 104 (considering an officer’s questions and the suspect’s responses in

evaluating a pat frisk); *State v. Richmond*, 602 N.W.2d 647, 651 (Minn. App. 1999) (considering a suspect's furtive movements), *review denied* (Minn. Jan. 18, 2000). But no single factor is determinative in the totality-of-the-circumstances analysis. The fact that Harrington was calm and cooperative does not change the fact that he matched the description of a person seen using burglary tools and that he could have reached for the bulge at any time.

The district court also determined that the vague way Sergeant Madson described the bulge in his written report and testimony indicates that he did not believe Harrington posed a danger. We disagree. Although Sergeant Madson did not describe the bulge in detail, he testified that he suspected it was a gun, knife, or screwdriver. On this record, we conclude that Sergeant Madson had reasonable grounds to believe that Harrington was armed and dangerous and that his safety was at issue. Accordingly, the pat frisk was reasonable, and the district court erred in suppressing evidence of the BB gun.

Reversed.