STATE OF MINNESOTA
IN COURT OF APPEALS
A10-746

Charles Barlow, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 18, 2011
Affirmed
Kalitowski, Judge

Olmsted County District Court
File No. 55-K0-04-1698

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Lansing, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

In this postconviction appeal, appellant Charles Barlow argues that (1) he was subject to an illegal investigative stop and pat-down search of his person; (2) the

warrantless search of his vehicle was unlawful; and (3) he was denied a fair trial because of prosecutorial misconduct. We affirm.

D E C I S I O N

Appellant was charged with first-degree sale of a controlled substance, in violation of Minn. Stat. § 152.021, subds. 1(1) and 3(b) (2002) (count one), and second-degree possession of a controlled substance, in violation of Minn. Stat. § 152.022, subds. 2(1) and 3(b) (2002) (count two). At a contested omnibus hearing, appellant challenged the constitutionality of a pat-down search, which revealed marijuana, and a warrantless search of his vehicle, which uncovered a bag of cocaine. The district court denied appellant's motion to suppress the evidence obtained from both searches. Following a jury trial, the jury found appellant not guilty of count one, but guilty of count two. Appellant filed a petition for postconviction relief, stating that (1) he was subject to an illegal investigative pat-down search of his person; (2) the warrantless search of his vehicle was unlawful; and (3) he was denied a fair trial because of prosecutorial misconduct. In a thorough and well-reasoned order and memorandum, the postconviction court denied appellant's petition.

I.

Appellant's convictions were not based on the marijuana found during the frisk, but the marijuana and appellant's subsequent admissions support the search of his car. We, therefore, begin our analysis with the officer's stop and frisk. Appellant argues that the postconviction court erred in determining that a police officer's warrantless

investigative stop and pat-down search did not violate appellant's constitutional rights. We disagree.

"The decisions of a postconviction court will not be disturbed unless the court abused its discretion." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). This court examines the postconviction court's findings to determine if they are supported by the evidence, but reviews issues of law de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). Whether a search or seizure is justified by reasonable suspicion or probable cause is an issue of law that is reviewed de novo. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005).

Warrantless searches and seizures are per se unreasonable under the United States and Minnesota constitutions. *State v. Martinson*, 581 N.W.2d 846, 849 (Minn. 1998). But there are a few well-delineated exceptions, including brief investigatory stops, which require only reasonable suspicion of criminal activity, rather than probable cause. *Id.* at 850. Under *Terry v. Ohio*, the police may stop and frisk a person when (1) the officer has 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. 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85 (1968). A reviewing court considers the totality of the circumstances surrounding the stop, giving due regard to the officer's experience and training in law enforcement. *State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983). Reasonable articulable suspicion must be based on more than an officer's "mere whim, caprice, or idle curiosity." *State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003).

Appellant first asserts that because the officer lacked a reasonable articulable suspicion that appellant was involved in criminal activity, the investigative stop of appellant was unjustified. Specifically, appellant argues that any initial suspicion as to drug activity was dispelled before the officer approached appellant. *See State v. Hickman*, 491 N.W.2d 673, 675 (Minn. App. 1992) (finding that once an officer's original suspicion has been dispelled, he lacks reasonable, articulable suspicion to perform an investigative stop), *review denied* (Minn. Dec. 15, 1992). Appellant argues that the initial complaint from an identified informant about alleged drug activity referred to three black males and one white male behind a trash dumpster. But when the officer arrived at the scene 40 minutes later, he only observed appellant, sitting in a Cadillac, with a Dodge Intrepid parked nearby surrounded by tools and electronic equipment, and no immediate evidence of drug activity. Therefore, appellant argues, the officer's "original suspicion" should have been dispelled. We disagree.

When the officer arrived in response to a complaint of a drug sale and found appellant in the area, it was not unreasonable for the officer to approach appellant and speak with him. Minnesota courts have determined that there is no seizure for constitutional purposes when an officer walks up to an already-parked car and converses with the driver. *State v. Vohnoutka*, 292 N.W.2d 756, 757 (Minn. 1980); *Crawford v. Comm'r of Pub. Safety*, 441 N.W.2d 837, 839 (Minn. App. 1989).

Appellant also argues that the officer's *Terry* frisk was unlawful because the officer had no reasonable, articulable suspicion that appellant was engaged in criminal activity or was armed and dangerous. *See Wold v. State*, 430 N.W.2d 171, 174 (Minn.

1988) (stating that an officer must have reasonable, articulable suspicion of criminal activity and that the individual "may be armed and capable of immediately causing permanent harm"); *In re Welfare of M.D.R.*, 693 N.W.2d 444, 450 (Minn. App. 2005) (stating that an officer may conduct a limited, pat-down search for weapons if the officer reasonably believes that "such a search is necessary to protect the officer's safety or the safety of others"), *review denied* (Minn. June 28, 2005).

The officer testified that after approaching appellant the officer noticed on the seat of appellant's car, an empty plastic bag with a corner torn off in a manner that, in the officer's experience, indicated drug sales. When the officer asked appellant about the plastic bag, appellant tore the bag in half before handing it to the officer. The officer stated he believed appellant was trying to destroy the evidence that the bag was torn distinctively.

Appellant argues that the bag "is hardly sufficient evidence of criminal activity." To support his assertion, appellant cites to several cases: *United States v. Charrington*, 285 F. Supp. 2d 1063, 1069 (S.D. Ohio 2003) (finding that a security force member did not have probable cause to suspect criminal activity where the defendant merely possessed cigarette rolling papers and plastic bags); *United States v. Williams*, 346 F. Supp. 2d 934, 938 (E.D. Mich. 2004) (finding that "neither [d]efendant's late night trip nor his possession of empty sandwich bags supplied the officers with reasonable suspicion"); *State v. Shoulderblade*, 905 P.2d 289, 295 (Utah 1995) (holding that a passenger stuffing a clear plastic sandwich bag between the front bucket seats of a car does not raise reasonable suspicion of drug activity). But the cases cited by appellant

involve intact plastic bags, not a bag torn in a way indicative of drug sales. Thus, contrary to appellant's assertions, the officer had a reasonable, articulable suspicion of criminal activity.

The officer also testified that appellant became "extremely nervous," "was all over the place," and was acting erratically when asked about the torn bag. In discussing the constitutionality of frisks, the *Terry* Court highlighted concerns for officer safety, stating that "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." 392 U.S. at 27, 88 S. Ct. at 1883. Based on the totality of the circumstances, the officer had a reasonable, articulable suspicion that appellant was engaged in criminal activity and was armed and dangerous. The officer's pat-down was lawful and not the product of mere whim, caprice, or idle curiosity. *See Waddell*, 655 N.W.2d at 809 (stating standard).

Appellant argues that the officer did not lawfully seize the marijuana found in appellant's pocket during the pat-down search because the nature of the object was not immediately apparent. A *Terry* pat-down search is a limited search for weapons, not a search for evidence of a crime. *State v. Gilchrist,* 299 N.W.2d 913, 917 (Minn. 1980). But when an officer conducting a *Terry* search feels an item that is immediately apparent to be contraband, the officer may seize it. *Minnesota v. Dickerson*, 508 U.S. 366, 375-76, 113 S. Ct. 2130, 2137 (1993).

Here, the officer testified that when he patted down appellant, he "felt a plastic-wrapped bundle in [appellant's] left front pocket." The officer did not reach into

appellant's pocket or otherwise manipulate the bundle, but instead told appellant that he suspected it was marijuana and asked appellant what it was. Appellant admitted that it was marijuana. The officer did not remove the baggie until after appellant told the officer that it was marijuana. Appellant argues that this does not conform to the law that the nature of the object need be immediately apparent for the officer to seize it. We disagree. Upon feeling the object, the officer had reasonable, articulable suspicion to inquire about the contents of the bag. *See Berge v. Comm'r of Pub. Safety*, 374 N.W.2d 730, 732 (Minn. 1985) (requiring a "particularized and objective basis" for suspecting a seized person of criminal activity). After appellant himself identified the object as marijuana, the officer had probable cause to seize the contraband. *See Dickerson*, 508 U.S. at 375-76, 113 S. Ct. at 2137 (stating that if an officer finds contraband during a lawful frisk "its warrantless seizure would be justified"). We conclude that the officer lawfully seized the bag of drugs from appellant's pocket.

The officer's investigative stop and pat-down search of appellant were lawful and did not violate appellant's constitutional rights. Thus, the postconviction court correctly affirmed the denial of appellant's pretrial motion to suppress evidence.

II.

Appellant argues that the warrantless search of his vehicle was unconstitutional. We disagree.

A warrantless search of a motor vehicle may be conducted if the police have probable cause to believe that contraband might be found in the vehicle. *United States v. Ross*, 456 U.S. 798, 806-08, 102 S. Ct. 2157, 2163-64 (1982); *State v. Nace*, 404 N.W.2d

357, 360 (Minn. App. 1987), *review denied* (Minn. June 25, 1987). Probable cause exists when there are "facts and circumstances sufficient to warrant a reasonably prudent person to believe that the vehicle contains contraband." *State v. Johnson*, 277 N.W.2d 346, 349 (Minn. 1979). Mere suspicion of criminal activity does not satisfy the requirements of probable cause. *State v. Brazil*, 269 N.W.2d 15, 19 (Minn. 1978).

Appellant argues that the dog sniff of appellant's vehicle was not justified. To conduct a dog sniff, an officer does not need probable cause, but must have reasonable, articulable suspicion of drug-related activity. *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002). Here, the facts show that the dog sniff of appellant's car was lawful. Law enforcement had been called to this particular location on report of a drug deal. The plastic bag with a corner torn off in a way that indicates drug sales, appellant's erratic behavior and attempt to conceal the bag's distinctiveness, the marijuana found on appellant's person, and appellant's statement that the car contained more drugs were enough to support the dog sniff of appellant's vehicle. The dog's reaction indicated that there were drugs in the vehicle and taken together with the other indications of narcotics, we conclude the officer possessed probable cause to search the car for drugs.

The postconviction court correctly determined that the officer's search of appellant's vehicle was lawful and did not violate his rights under the federal and state constitutions.

Appellant also argues that the search of his vehicle could not be justified as a search incident to arrest because the officer did not have probable cause to arrest him. But we conclude that the officer's search of the vehicle falls under the automobile

exception to the warrant requirement. Thus, even assuming that appellant's arrest was illegal, the drugs that provided a basis for appellant's conviction were found after a legal search of the vehicle, independent from the arrest. Thus, the postconviction court correctly affirmed the denial of appellant's pretrial motion to suppress evidence.

III.

Appellant argues that he should receive a new trial because the prosecutor committed prosecutorial misconduct. We disagree.

Appellant did not object to the statements made by the prosecutor that he now asserts amounted to prosecutorial misconduct. We review this claim under a modified plain-error standard of review. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The burden is on appellant to demonstrate (1) error, and (2) that the error was plain. *Id.* If plain error is shown, then the burden shifts to the state to show that the appellant's substantial rights were not affected. *Id*. In other words, the state must show that there is no reasonable likelihood that the absence of the prosecutorial misconduct would have significantly affected the verdict of the jury. *Id*. If plain error affecting appellant's substantial rights is established, then the court must assess "whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.*

Appellant asserts that the prosecutor "improperly misstated the burden of proof," by using "confusing and misleading" metaphors to describe the 'beyond a reasonable doubt' standard." Misstatements of the burden of proof are highly improper and constitute prosecutorial misconduct. *State v. Coleman*, 373 N.W.2d 777, 782-83 (Minn. 1985). The general rule is that no adverse inference may be drawn from a defendant's

failure to produce evidence. *State v. Swain*, 269 N.W.2d 707, 717 (Minn. 1978). It is a misstatement of the burden of proof and improper for the prosecutor to argue that the jury should "weigh the story" of each side and decide "which one is most reasonable, which one makes the most sense," or words to that effect. *State v. Strommen*, 648 N.W.2d 681, 690 (Minn. 2002).

In order to explain what proof beyond a reasonable doubt meant, the prosecutor said to the jury that the standard has been used in "millions and millions" of criminal trials "[a]nd so it is not an impossibly high standard." The prosecutor compared proof beyond a reasonable doubt to "decisions to have medical care for a loved one, a parent or child, [a] decision to get married, [or] to buy a house." The prosecutor also stated, in describing circumstantial evidence, that if a person walks into the kitchen and finds a pie plate on the floor with the dog standing over it with blueberry pie all over its face and no one else in the house, she could be "pretty sure," or "sure beyond a reasonable doubt" that the dog ate the pie. Appellant argues that this description of the proof beyond a reasonable doubt standard and circumstantial evidence "trivialized the burden that the state bears in a criminal prosecution." Appellant also argues that the prosecutor improperly shifted the burden of proof to appellant and confused the jury by stating that while the defense "makes much out of the fact that the police didn't test" the bag for drug residue, neither did the defense.

Appellant fails to establish misconduct. We are not persuaded that the prosecutor misstated the burden of proof or confused the jury. Although the prosecutor's explanations of proof beyond a reasonable doubt and circumstantial evidence could have

been more artfully stated, they were not inappropriate. And the prosecutor did not state that appellant had an obligation to produce evidence of his innocence. Nor did the prosecutor state that the jury should weigh each side of the story or choose the one that seems most reasonable. The district court properly instructed the jury on the state's burden to prove each element of the charges beyond a reasonable doubt before their deliberations. Because when viewed as a whole, the statements of the prosecutor did not amount to misconduct and did not deny appellant of a fair trial, there was no plain error.

Appellant also argues that the prosecutor improperly interjected his personal opinion about appellant's credibility, and denigrated appellant's defense. Although prosecutors may point out inconsistencies in a defendant's version of events, they may not give their opinion as to any witness's credibility. *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984). It is improper for a prosecutor to express a personal opinion during closing by saying "I think," or "I think you will be able to find that," thereby suggesting an opinion of guilt or credibility. *State v. Prettyman*, 293 Minn. 493, 495, 198 N.W.2d 156, 158 (1972). But "a prosecutor is not required to make a colorless closing argument" and "has the right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom." *State v. Ali*, 752 N.W.2d 98, 105 (Minn. App. 2008), *review granted* (Minn. Sept. 23, 2008) *and appeal dismissed* (Minn. May 27, 2009).

Appellant argues that the prosecutor made numerous improper comments during closing argument regarding appellant's testimony at trial, including that appellant told "a cockamamie story" and that appellant's "story is not reasonable." As the postconviction

court characterized it, the prosecutor did exhibit unprofessional or overzealous conduct in characterizing defendant's theory of the case. But in making the complained of comments, the prosecutor sufficiently related them to evidence that was before the jury. He identified evidence that did not support appellant's version of what happened. We conclude that the prosecutor's descriptions of appellant's theory of the case did not rise to the level of prosecutorial misconduct. *See State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000) (stating that claims of prosecutorial misconduct arising out of closing argument are considered as a whole, rather than focusing on particular remarks that may be taken out of context and given undue prominence).

In conclusion, the postconviction court correctly determined that no prosecutorial misconduct occurred here to warrant a new trial.

Affirmed.