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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-631**

State of Minnesota,
Respondent,

vs.

Rico Romane Kirk,
Appellant.

**Filed April 23, 2012
Affirmed
Klaphake, Judge**

Ramsey County District Court
File No. 62-CR-10-6087

David W. Merchant, Chief Appellate Public Defender, Jodie Lee Carlson, Assistant Public Defender, St. Paul, Minnesota; and

Elizabeth C. Kramer, Leonard, Street and Deinard, Minneapolis, Minnesota (for appellant)

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Peter Reed Marker, Assistant County Attorneys, St. Paul, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Klaphake, Judge; and Cleary, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

On appeal from his conviction of third-degree sale of a controlled substance, appellant Rico Kirk challenges the district court's order denying his motion to suppress evidence of his identity obtained from an investigative stop and a police officer's identification of appellant from a photograph. Appellant argues that the police lacked reasonable suspicion to stop him and the police officer's identification of appellant based on a single-photograph lineup violates his due process rights. Because the record establishes that the investigative stop was supported by a reasonable suspicion of criminal activity and the officer's identification was reliable, the district court did not err by refusing to suppress the evidence. We therefore affirm.

DECISION

Investigative Stop

Whether the district court erred by declining to suppress evidence presents a question of law, which we review de novo. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). The United States and Minnesota constitutions prohibit the warrantless search and seizure of an individual, subject to limited exceptions. U.S. Const. amend. IV; Minn. Const. art. I, § 10. An officer may make a limited investigative stop of an individual if the officer has “a reasonable, articulable suspicion that a suspect might be engaged in criminal activity.” *State v. Flowers*, 734 N.W.2d 239, 250 (Minn. 2007) (quotation omitted); see *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85 (1968). This standard requires a particularized and objective basis for the stop. *Terry*, 392 U.S. at 21,

88 S. Ct. at 1880. An officer must be able to articulate specific facts which, “taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Id.* A reviewing court evaluates the totality of the circumstances to determine whether a reasonable and articulable suspicion existed to justify the stop. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

On April 7, 2010, St. Paul Police Officer James LaBarre, while working undercover, purchased narcotics from a man who drove a tan Jaguar. A short time later, surveillance officers informed St. Paul Police Officer Craig Rhode that the driver of a tan Jaguar had sold suspected narcotics to an undercover officer that evening. Surveillance officers gave Officer Rhode the vehicle’s license plate number, its location, and a description of the driver, and instructed Officer Rhode to make contact with the occupants of the Jaguar. Officer Rhode performed an investigatory stop of the Jaguar and identified the driver as appellant.

Appellant argues that the investigatory stop of his vehicle was unconstitutional because Officer Rhode lacked a reasonable and articulable suspicion of criminal activity. Within one hour of the undercover narcotics transaction, Officer Rhode performed an investigatory stop of a vehicle matching the description provided by surveillance officers, in the location where surveillance officers indicated the vehicle would be, and driven by an individual matching the description provided by surveillance officers. These circumstances are more than sufficient to demonstrate that Officer Rhode had a reasonable and articulable suspicion of criminal activity. *See Olson v. Comm’r of Pub. Safety*, 371 N.W.2d 552, 555-56 (Minn. 1985) (recognizing that officer and dispatcher’s

collective knowledge may provide reasonable, articulable suspicion); *State v. Conaway*, 319 N.W.2d 35, 40 (Minn. 1982) (“Under the ‘collective knowledge’ approach, the *entire* knowledge of the police force is pooled and imputed to the arresting officer for the purpose of determining if sufficient probable cause exists for an arrest.”). Appellant’s identity was obtained during a valid investigative stop supported by a reasonable, articulable suspicion that appellant had engaged in criminal activity. Accordingly, the district court did not err by declining to suppress the identification evidence.

Photographic Identification

Appellant also argues that the district court violated his due-process rights by denying his motion to suppress Officer LaBarre’s identification of appellant from a booking photograph. The United States Constitution guarantees all criminal defendants due process of law. U.S. Const. amend. XIV, § 1. A conviction based on identification evidence violates due process if the identification evidence was produced through procedures “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968). We review de novo whether a district court’s evidentiary decision has denied a defendant due process. *Spann v. State*, 704 N.W.2d 486, 489 (Minn. 2005).

To determine whether a defendant’s due-process rights were violated by the admission of identification evidence, we examine whether the procedure was unnecessarily suggestive. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn.1995). If an identification procedure is found to be unnecessarily suggestive, we determine whether

the totality of the circumstances establishes that the identification was nevertheless reliable. *Id.*

We first consider whether the photographic identification was suggestive. When determining whether an identification procedure was unnecessarily suggestive, we inquire whether the procedure influenced the identification of the defendant. *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999). The critical consideration is “whether the defendant was unfairly singled out for identification.” *Ostrem*, 535 N.W.2d at 921. Identifications arising from single-photograph displays have been widely condemned as unnecessarily suggestive. *Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S. Ct. 2243, 2254 (1977); *Simmons*, 390 U.S. at 383-84, 88 S. Ct. at 971; *Ostrem*, 535 N.W.2d at 921.

Following the investigative stop, Officer Rhode advised Officer LaBarre of the name and birth date of the driver of the tan Jaguar. Using that information, Officer LaBarre obtained a booking photograph of appellant from a police database and identified appellant as the individual who sold him the narcotics. Appellant was singled out by name as the only suspect, and Officer LaBarre reviewed only a single photograph when making the identification. In this case, we agree with the district court that Officer LaBarre’s identification procedure was suggestive.

Nevertheless, a photographic-identification procedure that is suggestive may be deemed reliable when considered in the totality of the circumstances. *Ostrem*, 535 N.W.2d at 921. Factors to consider include (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness’s degree of attention, (3) the accuracy of

the witness's prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. *Id.*

Here, Officer LaBarre testified that the street where he first engaged appellant was well-lit, he recognized appellant immediately upon approaching the Jaguar, and he had an opportunity to study appellant's face while they conversed. He followed appellant from the location of their initial conversation to a nearby dimly lit street, where he again conversed with appellant. Officer LaBarre has fifteen years of training and experience in identifying suspects and testified that, when he interacted with appellant, he was concentrating on making a future identification. Officer LaBarre expressed no uncertainty about his positive identification of appellant as the individual who sold him the suspected narcotics, and he identified appellant within one hour of the transaction.

These circumstances establish that Officer LaBarre's identification of appellant was not the product of the suggestive nature of the identification procedure he employed, but of Officer LaBarre's opportunity and ability to make a clear determination of the suspect's identity. Although the single-photograph identification procedure was suggestive, the totality of the circumstances reflects that the identification is nonetheless reliable. Accordingly, the district court did not violate appellant's due-process rights by denying his motion to suppress the identification evidence.

Affirmed.