

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0199**

State of Minnesota,
Respondent,

vs.

Jason Gordon Soderman,
Appellant.

**Filed January 22, 2013
Reversed
Halbrooks, Judge**

Anoka County District Court
File No. 02-CR-11-3501

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

Anthony C. Palumbo, Anoka County Attorney, M. Katherine Doty, Assistant County Attorney, Anoka, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Stauber, Judge; and
Collins, Judge.*

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

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant Jason Gordon Soderman challenges the district court's denial of his motion to suppress drug evidence. Soderman argues that the district court erred by admitting the evidence pursuant to the search-incident-to-arrest exception to the general prohibition against warrantless searches. Alternatively, Soderman argues that he is entitled to a new trial due to prosecutorial misconduct. Because we conclude that the drug evidence was obtained in violation of Soderman's constitutional rights, we reverse.

FACTS

On May 15, Deputy Sheriff Mick Hlavinka was in Ham Lake driving by "a known trouble house." As he approached, he observed a blue Chevy Beretta that appeared to be backing out of the driveway and was impeding traffic. Deputy Hlavinka stopped his car and motioned for the driver to continue. The driver of the Beretta motioned back to Deputy Hlavinka, and the two cars were at a standstill until the driver of the Beretta eventually pulled into the driveway again. Deputy Hlavinka ran the license-plate number of the Beretta and continued driving.

The license-plate check showed that the car belonged to Jamie Arnold, who lived at the same address as Stefanie Arnold. Deputy Hlavinka knew that Stefanie Arnold had an outstanding warrant for her arrest, and he thought that a woman whom he had seen outside of the known trouble house resembled Stefanie. So Deputy Hlavinka pulled up Stefanie's driver's license photo, which he thought was similar to the woman at the house. Deputy Hlavinka returned to the house, got out of his car, and approached the

woman. He asked the woman her name, and she responded “Tonia Lorge.” Deputy Hlavinka asked Lorge who the blue vehicle belonged to, and she responded that it belonged to Jamie Arnold. As Deputy Hlavinka was asking Lorge about Arnold, the driver of the Beretta approached.

Deputy Hlavinka asked the driver for his name, and the driver responded “Jason Soderman.” Deputy Hlavinka went back to his squad car and looked up the name Jason Soderman. Deputy Hlavinka learned that there was a warrant for Soderman’s arrest for an insurance violation, that his driver’s license was cancelled, and that Soderman had been known to use an alias. Deputy Hlavinka also looked at Soderman’s driver’s license photo to confirm that the driver of the Beretta was really Soderman. Deputy Hlavinka testified that he did not think that the photo looked like the driver. Deputy Hlavinka testified that “[he] believed [Soderman] was giving [him] a false name.”

Deputy Hlavinka then got out of his squad car and saw Soderman walking toward the house. Deputy Hlavinka said something to the effect of “Jason, come here.” Soderman complied, and Deputy Hlavinka asked Soderman for his full name and his date of birth. Soderman answered, and the information matched what Deputy Hlavinka had seen from the database. At that point, Deputy Hlavinka told Soderman that he did not look like his driver’s license photo. Soderman shrugged his shoulders and looked down. Deputy Hlavinka asked if Soderman had identification, but Soderman said that he did not. Deputy Hlavinka then told Soderman that “Jason Soderman” had a warrant for his arrest and placed him under arrest. Deputy Hlavinka handcuffed Soderman and placed him in the back of his squad car.

Deputy Hlavinka then walked up to the driver's side of the Beretta and saw a black jacket in the backseat. Deputy Hlavinka asked Lorge about the jacket, and she said that it was "Jason's jacket." Deputy Hlavinka testified that he believed that the jacket might contain identification for Soderman. Deputy Hlavinka reached through an open window and grabbed the jacket. Deputy Hlavinka testified that he was investigating a gross misdemeanor level "false information" offense at that point. Deputy Hlavinka found a metal container in the jacket which he thought was approximately the size of a credit card. He opened the container and found a white crystal substance which he later learned was methamphetamine. After finding the methamphetamine, a more thorough search of the car was conducted and additional drug paraphernalia and cash was discovered.

Soderman was charged with one count of violating Minn. Stat. § 152.021, subd. 2(1) (2010) (first-degree controlled-substance possession). He moved to suppress the evidence against him, and the district court denied the motion. After a jury trial, Soderman was convicted and sentenced to 84 months in prison. This appeal follows.

D E C I S I O N

The state asserts for the first time on appeal that Soderman cannot challenge the search because he did not own the car in which the drugs were found and therefore had no expectation of privacy with respect to the car. Ordinarily we will not review issues raised for the first time on appeal. *See State v. Roby*, 463 N.W.2d 506, 508 (Minn. 1990). But Minn. R. Crim. P. 29.04, subd. 6, states that "[t]he court may permit a party, without filing a cross-petition, to defend a decision or judgment on any ground that the law and

record permit that would not expand the relief that has been granted to the party.” The supreme court has interpreted this rule to allow for appellate review of issues not raised to the district court as long as the factual record necessary to review the issue has been fully developed. *State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003). The question we must address, therefore, is whether there is a sufficient factual record to review the issue of Soderman’s expectation of privacy.

To establish a legitimate expectation of privacy, the defendant must establish, with regard to the item searched: (1) a subjective expectation of privacy (2) which society recognizes as reasonable. *State v. Jordan*, 742 N.W.2d 149, 156 (Minn. 2007). Soderman did not testify at the suppression hearing and had no opportunity to establish a factual record with respect to his subjective expectation of privacy. Soderman could have developed the factual details surrounding his expectation of privacy in either the jacket or the car had he known that the state would raise the issue of his right to challenge the search. Because the factual record regarding Soderman’s expectation of privacy is not developed, we do not find Minn. R. Crim. P. 29.04 applicable to this situation and conclude that the state has waived its right to raise this issue. *See Garza v. State*, 632 N.W.2d 633, 637 (Minn. 2001) (holding that the interests of justice do not require the resolution of an issue when the factual record is not fully developed); *see also Grunig*, 660 N.W.2d at 137 (distinguishing *Garza* on the basis that the record on the issue was not fully developed).

We therefore turn to Soderman’s argument that the search of his jacket violated his Fourth Amendment rights and that the district court erred by denying his motion to

suppress the drug evidence. The Fourth Amendment to the United States Constitution guarantees 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; *see also* Minn. Const. art. I, § 10. “When reviewing a district court’s pretrial order on a motion to suppress evidence, we review the district court’s factual finding 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).

A warrantless search is generally per se unreasonable unless it falls within one of the recognized exceptions to the warrant requirement. *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005). The state bears the burden of showing that at least one of the exceptions applies in order to avoid suppression of the evidence acquired from the warrantless search. *State v. Metz*, 422 N.W.2d 754, 756 (Minn. App. 1988). The state argues that the warrantless search was valid under either the search-incident-to-arrest exception or the automobile exception.

Search-Incident-to-Arrest Exception

There are two possible justifications for searching a car following a lawful arrest. First, if the arrestee is unsecured and within reaching distance of the passenger compartment, a search may be justified without a warrant. *Arizona v. Gant*, 556 U.S. 332, 343, 129 S. Ct. 1710, 1719 (2009). Both parties agree that this scenario is inapplicable here. Second, a search may be justified when it is reasonable to believe that the car contains evidence relevant to the crime of arrest. *Id.* We agree with Soderman that there would be no basis to believe that the car contained evidence relevant to

Soderman's arrest on the misdemeanor warrant. *See id.* (explaining that when an arrest is based on a traffic violation there will be "no reasonable basis to believe the vehicle contains relevant evidence"). But Soderman's identification would be relevant to the crime of providing false information to a police officer, and, as long as there is probable cause at the time of the search to believe that a crime was committed, it does not matter that Soderman may actually have been arrested for a different crime. *See State v. Varnado*, 582 N.W.2d 886, 893 (Minn. 1998). Because providing false information to a police officer is the only "crime of arrest" that would support a search, we must examine whether there was probable cause to arrest Soderman for providing false information to a police officer. *Id.*; *see also State v. Williams*, 794 N.W.2d 867, 871 (Minn. 2011) (holding that an arrest must be supported by probable cause to be considered lawful).

"Probable cause exists where, in the totality of the circumstances, the officer[,] conditioned by his observations and information, and guided by the whole of his police experience, reasonably could have believed that a crime had been committed by the person to be arrested." *State v. Nace*, 404 N.W.2d 357, 360 (Minn. App. 1987) (quotation omitted), *review denied* (Minn. June 25, 1987). In a probable-cause determination, "the issue is whether there was objective probable cause, not whether the officer[] subjectively felt that [he] had probable cause." *State v. Speak*, 339 N.W.2d 741, 745 (Minn. 1983). But great deference should be paid to the officer's experience and judgment. *Vertina v. Comm'r of Pub. Safety*, 356 N.W.2d 412, 414 (Minn. App. 1984).

The state argues that Deputy Hlavinka had probable cause to believe that Soderman had provided him with false information based on Deputy Hlavinka's belief

that Soderman's driver's license photo did not look like him, the alert that Soderman had been known to use an alias, and the fact that Soderman was driving a car when he had a suspended license. In addition, we find it relevant that Soderman was unable to provide proof of identification. *See State v. White*, 489 N.W.2d 792, 793 (Minn. 1992) (noting that White only had a traffic citation as evidence of identity and that the officer considered his "assertions of identity untrustworthy"); *State v. Bauman*, 586 N.W.2d 416, 420 (Minn. App. 1998) (noting as part of probable cause that "the driver said he did not have his license with him"), *review denied* (Minn. Jan. 27, 1999).

But not all of the evidence relied on by the state to establish probable cause is appropriately considered in this case. First, there is nothing in the record to substantiate Deputy Hlavinka's testimony that he believed Soderman's photo did not look like him. "While objective observations may provide a sufficient basis for an investigatory stop, the determinative issue is whether an officer's 'belief' (or 'suspicion' or 'assumption') that the violation occurred was reasonably inferable from what he did see." *State v. Delaney*, 406 N.W.2d 584, 586 (Minn. App. 1987) (quotation and citation omitted) (discussing objective observations versus subjective beliefs in determining whether a stop was warranted). Because there is no objective information in the record—not even a description of how the photo differed in appearance—it is impossible to determine if Deputy Hlavinka's "belief" that Soderman did not look like his photo was "reasonably inferable from what he [saw]." Further, Soderman argues that the fact that he is known to use an alias does not lead to the reasonable inference that somebody else might be using the name "Jason Soderman" as an alias. We agree. That leaves us with the facts that

Soderman was driving with a cancelled license and did not have identification to establish probable cause for providing false information to a police officer.

The supreme court has not answered the question of whether or not having identification—or even “provid[ing] obviously false identification”—will support a limited search. *White*, 489 N.W.2d at 794; *see also Varnado*, 582 N.W.2d at 892 (analyzing whether a search incident to arrest was justified when a driver was unable to produce identification and concluding there was no valid basis for a custodial arrest for the crime of driving without a license). But the supreme court has cautioned under similar factual circumstances that searches under this exception should be carefully scrutinized:

A careful analysis of a search incident to arrest is prudent because, unlike 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. If what took place here was valid as a search incident to arrest, then *any person who is stopped for a minor traffic violation and who does not have a driver's license with them, may be subjected to a full scale search, without any articulable suspicion.* Again, such a procedure would eviscerate the Fourth Amendment's protection against unreasonable seizures. Indeed, what occurred in this case was more akin to an arrest incident to a search.

Vardano, 582 N.W.2d at 893 (emphasis added).

Under this careful scrutiny, we compare this case to other cases in which probable cause for providing false information to a police officer has been established. In *Bauman*, the facts used to establish probable cause were that

the driver had given the name and date of birth of an individual with a valid driver's license, but the registered

owner of the vehicle had a suspended license. He also knew that the driver said he did not have his license with him, could not say how old he was, was unsure of his address, was unsure of the purported car owner's address, and could not tell the officer where he was going.

586 N.W.2d at 420. In *White*, the supreme court held that there was probable cause to arrest for driving without a license and providing false identification when the driver offered only a citation as proof of his identity, but then could not spell his middle name, and the temporary permit affixed to the car bore a different name. 489 N.W.2d at 793, 795. In contrast to these cases, and as Soderman points out, all of the information that he provided Deputy Hlavinka matched the deputy's records. We do not find the mere fact that a person is driving with a cancelled license and cannot provide identification on the spot leads to the conclusion that he is not who he says he is. We therefore conclude that Deputy Hlavinka did not have probable cause to arrest Soderman for the crime of providing false information to a police officer. Because Soderman's arrest on the misdemeanor warrant did not justify a search of the car and because his arrest on the alternate basis of providing false information to a police officer would not have been lawful, the warrantless search was not reasonable as a search incident to an arrest.

Automobile Exception

According to the automobile exception to the warrant requirement, “[w]hen probable cause exists to believe that a vehicle contains contraband, the Fourth Amendment permits the police to search the vehicle without a warrant.” *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). “The Supreme Court developed the automobile exception based on the exigent character of evidence in a vehicle and a

person's reduced expectation of privacy in a vehicle.” *Bauman*, 586 N.W.2d at 422. “Thus, the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable.” *Id.* (quotation omitted).

In *Bauman*, we upheld a search of a car for evidence of a driver's identity under the automobile exception. *Id.* at 423. We noted that “Minnesota law . . . requires a person operating a vehicle to have a driver's license in possession” and that “[t]his requirement allows an officer to verify that a driver has a valid license to operate a vehicle.” *Id.* And we also noted that the officer “had probable cause to search for the driver's license as evidence that Bauman had provided false information to an officer.” *Id.* at 422. Ultimately, we decided that “the search of Bauman's vehicle was justified by probable cause together with exigent circumstances.” *Id.* at 423.

The exigent circumstances in this case do not rise to the level of what transpired in the *Bauman* case. Bauman was pulled over for speeding and issued a citation—he was not placed under arrest. Therefore, if the officer had not verified Bauman's identity prior to releasing him, “it is unlikely the state would have later discovered that the driver had committed the offense of providing false information to an officer.” *Id.* at 422. Here, Soderman had already been placed under arrest, and he was handcuffed in the back of the squad car. Soderman's identity could have been (and ultimately was) confirmed or disproved during the booking process. As noted by this court in *Bauman*, “a driver's license, which reveals a person's identity, does not in itself bear many of the characteristics of exigent evidence. . . . [T]he person still exists and his or her identity may be discovered.” *Id.* And, as discussed above, there was no probable cause to arrest

Soderman for providing false identification to a police officer. Because the non-exigent character of the evidence and lack of probable cause make the automobile exception inapplicable, we decline to affirm the district court on this alternate ground.

Because we reverse the district court's denial of Soderman's motion to suppress the drug evidence, we do not reach his alternative argument that he is entitled to a new trial due to prosecutorial misconduct.

Reversed.