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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0264**

State of Minnesota,
Respondent,

vs.

Eric Eugene Baker,
Appellant.

**Filed January 22, 2013
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CR-09-28469

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Cleary, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his conviction of attempted first-degree possession of a controlled substance, arguing that (1) the district court's dismissal of the original

complaint bars prosecution, (2) the district court erred by denying his motion to suppress, and (3) the district court erred by reducing his jail credit to satisfy a fine. We affirm appellant's conviction, but because the district court erred in its jail-credit calculation, we reverse and remand for resentencing.

FACTS

On June 23, 2008, respondent State of Minnesota charged appellant Eric Baker with first-degree possession of a controlled substance after a traffic stop led to the seizure from Baker's vehicle of 257 grams of a substance containing cocaine. Baker moved to suppress the drug evidence; his *Rasmussen* hearing was continued three times because the state's witnesses repeatedly failed to appear. On May 4, 2009, the district court dismissed the complaint "w/out prejudice."

On May 22, the state filed a new complaint charging Baker with the same offense. After a *Rasmussen* hearing on October 14, the district court denied Baker's motion to suppress. Baker subsequently pleaded guilty to an amended charge of attempted first-degree possession of a controlled substance. The district court sentenced Baker to 73 months' imprisonment and imposed a \$4,000 fine but subtracted 20 days from Baker's 29 days of jail credit to satisfy the fine. This appeal follows.

D E C I S I O N

I. Baker waived his challenge to the second complaint.

Baker argues that Minn. R. Crim. P. 17.06 bars the state from prosecuting him for the offense charged in the first complaint after the district court dismissed that complaint.

The state contends that Baker waived this argument by failing to raise it before the district court and by pleading guilty. We agree.

First, we generally do not decide issues raised for the first time on appeal. *State v. Roby*, 463 N.W.2d 506, 508 (Minn. 1990). This includes questions of criminal procedure. *Id.*; *see also State v. Burns*, 632 N.W.2d 794, 796 (Minn. App. 2001) (stating that failure to assert nonjurisdictional objections to a complaint generally constitutes waiver). This rule is based on practical and policy concerns. *See Roby*, 463 N.W.2d at 508 n.1 (noting that “the record would . . . have been clarified” if defendant had raised the issue); *State v. Senske*, 291 Minn. 228, 232, 190 N.W.2d 658, 661 (1971) (observing that the failure to raise an issue before the district court essentially asks for an advisory opinion).

Baker argues that his failure to challenge the second complaint in the district court should not preclude review because the record is sufficient to decide the issue. We are not persuaded. Even if an adequate record alone would justify addressing the issue for the first time on appeal, the record indicates only part of the factual basis for the district court’s dismissal of the first complaint. The prosecutor acknowledged at Baker’s October 14 *Rasmussen* hearing that the state did not have its witnesses ready for several previously scheduled *Rasmussen* hearings, but the record does not indicate the reason for that failure or the legal significance that the district court attributed to it in dismissing the first complaint. Had Baker raised this issue to the district court, it could have either dismissed the second complaint, eliminating the need for an appeal, or further explained

why it dismissed the first complaint “w/out prejudice” and why that dismissal does not preclude the filing of the second complaint.

Second, a counseled guilty plea generally operates as a waiver of all non-jurisdictional defects arising prior to the entry of the plea. *State v. Jeffries*, 806 N.W.2d 56, 64 (Minn. 2011). The guilty plea “renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt.” *Id.* (quoting *Menna v. New York*, 423 U.S. 61, 62 n.2, 96 S. Ct. 241, 242 n.2 (1975)). But a guilty plea cannot bar a claim that “the State may not convict petitioner no matter how validly his factual guilt is established, . . . if the claim can be proven based on the existing record.” *Id.* (quotation omitted).

Baker argues that he did not waive his challenge to the second complaint by pleading guilty because he asserts an unwaivable jurisdictional defect—that the dismissal of the first complaint forever prevents the state from recharging or convicting him of the offense charged therein. We disagree. The caselaw on which Baker relies exempts only constitutional double-jeopardy claims from the guilty-plea waiver rule. *See id.* at 65 (emphasizing that *Menna* “did not merely establish a procedural rule” but held double-jeopardy claims are not waivable based on the federal constitution). Baker has not identified any authority holding that a dismissal, as here, before jeopardy attaches presents a nonwaivable jurisdictional bar. Moreover, Baker’s failure to raise the issue leaves material questions unresolved such that his claim cannot be “proven based on the existing record.” *See id.* at 64.

On this record, we conclude that Baker waived his argument that rule 17.06 bars the second complaint by failing to raise it to the district court and by pleading guilty to the renewed charge contained in the second complaint. We therefore decline to address the merits of that argument.

III. The district court properly denied Baker's motion to suppress.

In a pro se supplemental brief, Baker argues that the district court erred by denying his motion to suppress. When reviewing a pretrial suppression order, we independently review the facts to determine 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). We review the district court's factual findings for clear error and its legal determinations de novo. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009). Baker challenges the validity of the initial stop, the dog sniff, and the search of his vehicle. We address each of these issues in turn.

A. Baker's traffic violations warranted the initial stop.

The officer who stopped Baker testified that he did so because he observed Baker commit multiple traffic violations, including weaving in his lane and crossing lane markers. Direct observation of a traffic violation generally provides "an objective basis for stopping the vehicle." *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997). Baker argues that the traffic violations could not have been the actual reason for the stop, essentially challenging the officer's credibility. We defer to the district court's express finding that the officer's testimony was credible. *See State v. Smith*, 448 N.W.2d 550, 555 (Minn. App. 1989) (stating that determinations of credibility of witnesses at the

omnibus hearing are left to the district court), *review denied* (Minn. Dec. 29, 1989). On this record, we conclude that the initial stop of Baker's vehicle was valid.

B. Police had reasonable suspicion of drug activity to conduct a dog sniff.

An investigatory stop must be limited in scope and last “no longer than is necessary to effectuate the purpose of the stop.” *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002) (quotation omitted). Police must have reasonable, articulable suspicion of other illegal activity to expand the scope of a stop. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S. Ct. 1868, 1879-80 (1968)). A narcotics-detection dog sniff around the exterior of a vehicle during a routine traffic stop is lawful if the law-enforcement officer has a reasonable, articulable suspicion of drug-related criminal activity. *Id.* at 137.

Police detained Baker and conducted a dog sniff of his vehicle because a confidential informant (CI) informed the police that Baker had sold cocaine to the CI in the past and was, at the time of the traffic stop, on his way to sell cocaine to the CI. Police also observed suspicious behavior during the traffic stop consistent with drug sales. Baker argues that his “nervous behavior” and what he characterizes as “an unsubstantiated tip of unknown origin” are insufficient to establish the requisite reasonable, articulable suspicion of drug-related criminal activity. We disagree.

A confidential informant's tip can establish reasonable suspicion “if it has sufficient indicia of reliability.” *In re Welfare of G.M.*, 560 N.W.2d 687, 691 (Minn. 1997). Reliability depends on the totality of the circumstances, *id.*, including the ability of police to corroborate the information provided and whether that information goes against the informant's interest, *State v. Ross*, 676 N.W.2d 301, 304 (Minn. App. 2004).

Police corroborated several items of information the CI provided: (1) police observed Baker return to his home in one of the two vehicles the CI described, and Baker did so during a time frame that was consistent with the information the CI provided; (2) Baker later left his home in a vehicle that matched the other vehicle the CI described; and (3) Baker obtained a package at his home and left to drive toward Brooklyn Park, as the CI had indicated he would. The corroborated facts are particularly notable because they include reliable predictions of future behavior. *See id.* at 305 (noting the reliability a prediction of future behavior provides). The CI also acted against his interest by meeting with police and implicating himself in criminal activity, which weighs in favor of the CI's credibility.

Moreover, police observed indicia of drug activity during the traffic stop. Baker was extremely nervous during the stop, there were three cell phones in plain view near the driver's seat, and the officer who stopped Baker observed approximately \$1,000 in cash when Baker retrieved his driver's license. *See State v. Smith*, 814 N.W.2d 346, 352-53 (Minn. 2012) (considering driver's nervousness in context of other behavior); *State v. Heaton*, 812 N.W.2d 904, 909-10 (Minn. App. 2012) (considering defendant's possession of \$3,000 cash as "part of the totality of the circumstances"), *review denied* (Minn. July 17, 2012). On this record, we conclude that the police had reasonable, articulable suspicion of drug-related criminal activity that warranted detaining Baker and conducting a dog sniff of the outside of his vehicle.

C. The police had probable cause to search Baker’s vehicle.

The automobile exception permits the warrantless search of a vehicle if the police have probable cause to believe that the vehicle contains evidence of contraband. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). Probable cause exists when, looking at the totality of the circumstances, “there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983). A drug-detecting dog alerting to a vehicle can establish probable cause to search the vehicle. *State v. Pederson-Maxwell*, 619 N.W.2d 777, 781 (Minn. App. 2000).

The drug-detecting dog alerted to the presence of controlled substances in Baker’s vehicle. This fact, particularly viewed in light of the other evidence indicative of drug activity, raises a fair probability that police would find contraband in the vehicle. Accordingly, we conclude that the search of Baker’s vehicle was valid.

III. The district court erred by reducing Baker’s jail credit to satisfy his fine.

A defendant is entitled to jail credit for all time spent in custody following arrest, including time spent in custody on other charges, beginning when the prosecution has probable cause to charge the defendant with the current offense. Minn. R. Crim. P. 27.03, subd. 4(B); *State v. Fritzke*, 521 N.W.2d 859, 862 (Minn. App. 1994). The granting of jail credit is not discretionary with the district court. *State v. Johnson*, 744 N.W.2d 376, 379 (Minn. 2008). The district court imposed both a prison term and a \$4,000 fine. But rather than crediting Baker for his 29 days in custody, the court applied 20 of those days to satisfy his fine and afforded him only 9 days of jail credit. The state

concedes that the district court lacked the discretion to grant Baker fewer than 29 days of jail credit, and we agree. Accordingly, we reverse the district court's jail-credit award and remand for the district court to grant Baker 29 days of jail credit and reinstate Baker's fine.

Affirmed in part, reversed in part, and remanded.