STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0372

State of Minnesota,
Respondent,

vs.

Ahmed Hassan Sule,
Appellant.

Filed January 28, 2013
Affirmed
Connolly, Judge

Anoka County District Court
File No. 02-CR-11-3767

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

Anthony C. Palumbo, Anoka County Attorney, Marcy S. Crain, Assistant County Attorney, Anoka, Minnesota (for respondent)

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

Considered and decided by Hooten, Presiding Judge; Connolly, Judge; and Rodenberg, Judge.

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

CONNOLLY, Judge

On appeal from his conviction of multiple counts of criminal sexual conduct and one count of burglary, appellant argues (1) the district court erred by refusing to suppress the DNA evidence that police obtained by exploiting knowledge gained from their earlier violations of appellant's Fourth Amendment rights; and (2) the district court committed reversible error by impermissibly requiring appellant to be restrained by a "rack belt" during the trial. Because the district court did not err in denying appellant's motion to suppress and did not commit reversible error by requiring appellant to wear a rack belt during trial, we affirm.

FACTS

On September 19, 2010, the Fridley Police Department received a 911 call from G.J.N., who alleged that someone had broken into his home and sexually assaulted him. An examination yielded DNA evidence of the assailant. G.J.N., who is legally blind, could identify the intruder only as a black male wearing dark clothing.

Appellant Ahmed Hassan Sule lived near G.J.N.'s home and was a suspect in other burglaries in the area. His native language is Oromo, and he can converse in English only at a basic level. G.J.N. was unable to identify appellant in a photo line-up, due to his poor eyesight. A detective from the Anoka County Sheriff's Office (ACSO) went to appellant's address sometime after 11:00 p.m. on September 19 and asked if appellant would agree to speak to him. Appellant agreed. The detective conducted the interview in his squad car with the doors unlocked and appellant unrestrained.

Both appellant and the detective described the conversation as confusing. Appellant stated that he was intoxicated and did not speak English well. The detective eventually convinced appellant to consent to a DNA sample using a buccal swab. Testing on the DNA sample revealed that appellant could not be excluded as a contributor of the DNA recovered from G.J.N., but that 99.9999995% of the general population could be excluded.

On October 28, another detective from the ACSO interviewed appellant at the sheriff's department. He confronted appellant with the DNA evidence, and appellant denied any involvement in the burglary and assault. At the end of the interview, the detective arrested appellant.

On October 29, prosecutors told the first detective that appellant's DNA sample might be problematic because appellant said he was intoxicated at the time the sample was taken. They decided to obtain a second sample. The detective visited appellant in jail, read him a Miranda warning, and asked if he would be willing to talk. Appellant agreed. The detective asked to take a second DNA sample, stating generally that it would help clear appellant as a suspect. Appellant initially refused to give a sample, but after the detective persisted, he agreed. The results of this test confirmed the results of the September 19 test.

Appellant moved to suppress the DNA evidence collected on September 19 and October 29 (the 2010 searches), arguing that the evidence was obtained in violation of his Fourth Amendment rights. Following a hearing on April 8, 2011, the district court ruled in appellant's favor, holding that the evidence was not obtained voluntarily and that,

without the DNA evidence, there was no probable cause to sustain the complaint. Appellant was released from jail on April 20.

The ACSO then placed appellant under surveillance. Officers followed his car from the jail to a gas station, where a detective observed him discard a cigarette before entering the store. The detective recovered the cigarette butt and submitted it for DNA testing. On April 25, testing again revealed that appellant could not be excluded as a contributor of the DNA recovered from G.J.N., but that 99.9999995% of the general population could be excluded.

On April 28, detectives applied for a search warrant to obtain a buccal swab from appellant. The request was granted; the warrant was issued and executed on April 29. The results matched the results of the previous tests. Appellant was arrested and charged with burglary and sexual assault.

On August 5, 2011, appellant moved to suppress the DNA evidence collected on April 20 and April 29 (the 2011 searches). He argued that the state exploited the unconstitutional 2010 searches: officers knew the DNA would match only as a result of those illegal searches and only because appellant was placed under surveillance immediately upon his release from jail, giving police the opportunity to obtain the cigarette butt. Following a contested omnibus hearing, the district court denied the motion to suppress.

The district court held that the 2011 searches were not the "poisonous fruit" of the 2010 searches because (1) appellant's release from jail and voluntary abandonment of the cigarette were intervening circumstances; (2) the evidence would have been obtained

absent the illegal conduct because appellant was a suspect prior to the 2010 searches; and (3) the 2011 searches were not sufficiently temporally close to the 2010 searches to support exclusion.

During the jury trial, at the request of court security personnel and over the objection of defense counsel, appellant was ordered to wear a "rack belt" under his clothing. A rack belt releases an electrical charge in the event that the wearer needs to be restrained. The court stated that the belt would not prejudice the defendant in front of the jury and was "not out of line" because the appellant was "charged with a crime of violence and [was] facing in excess of 400 months in prison." A deputy noted on the record that appellant had "go[ne] after a guard" and was in lockdown at the jail. Appellant was found guilty of all six charges against him and sentenced to an executed prison term of 57 months for the burglary conviction, and a concurrent executed prison term of 346 months for the sexual assault. On appeal, he challenges the district court's denial of the motion to suppress DNA evidence and the district court's decision requiring him to wear a rack belt during the trial.

D E C I S I O N

I. Motion to Suppress

Appellant argues that the district court erred in failing to suppress the DNA evidence collected during the 2011 searches because it was obtained by exploiting knowledge gained during the 2010 searches.[1]

[1] The April 29, 2011, DNA sample was obtained pursuant to a warrant based on the April 20, 2011, search. The only argument that the April 29 search should be suppressed

On appeal of a pretrial motion to suppress evidence, this court reviews "the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Buckingham*, 772 N.W.2d 64, 70 (Minn. 2009) (quotation omitted). Findings are not clearly erroneous if they are supported by reasonable evidence in the record. *Sykes v. State*, 578 N.W.2d 807, 812 (Minn. App. 1998), *review denied* (Minn. July 16, 1998). This court reviews the facts independently to determine whether the district court erred as a matter of law in suppressing or not suppressing the evidence at issue. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

Evidence is inadmissible if it is obtained "by exploiting previous illegal conduct." *State v. Olson*, 634 N.W.2d 224, 229 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). "Such evidence is considered 'fruit of the poisonous tree,'" and is admissible only if the state can prove that it was obtained "'by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* (quoting *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417 (1963)).

The parties do not dispute that the 2010 searches violated appellant's rights under the Fourth Amendment to be free from unreasonable searches and seizures. Therefore, this court must determine whether the conduct leading to the evidence obtained in the 2011 searches is sufficiently distinguishable from the illegal conduct of the 2010 searches, considering: (1) "the purpose and flagrancy of the misconduct;" (2) "the presence of intervening circumstances;" (3) "whether it is likely that the evidence would

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rests on the assumption that the April 20 search was inadmissible. Therefore, we focus on the April 20 search.

have been obtained in the absence of the illegality;" and (4) "the temporal proximity of the illegality and the evidence alleged to be the fruit of the illegality." *Knapp v. Comm'r of Pub. Safety*, 610 N.W.2d 625, 628 (Minn. 2000) (quotation omitted). We must balance these factors, and no single factor is dispositive. *State v. Bergerson*, 659 N.W.2d 791, 797 (Minn. App. 2003).

A. Purpose and Flagrancy of the Misconduct

During the hearing on appellant's motion to suppress the 2011 searches, the detective testified that the purpose of the September 19, 2010 interview was to question appellant as a suspect and to ask for his consent to a DNA sample. He also testified (1) as a result of the language barrier, the conversation was confusing; (2) he told appellant that signing the form was voluntary, but did not clarify that appellant could refuse to take the test; (3) appellant stated several times that he was intoxicated and had just woken up; and (4) he persisted in asking for consent to the DNA test until appellant agreed.

Concerning the October 29, 2010 conversation, the detective testified that (1) he told appellant another test would be taken because appellant did not believe the first test; (2) appellant refused to consent; and (3) the detective persisted in trying to get a voluntary sample. The evidence reasonably supports the conclusion that the detective's unconstitutional behavior was both purposeful and flagrant.

B. Intervening Circumstances

When appellant was released from jail, he was followed by the ACSO, whose purpose was obtaining DNA evidence. A cigarette butt that yielded such evidence was

found. The district court held that appellant's release from jail and subsequent abandonment of the cigarette butt were sufficient intervening circumstances to purge the taint of the illegal conduct.

Appellant argues that: (1) he was solely released to enable the state to collect DNA evidence because the state had probable cause to hold him for unrelated charges; (2) the intervening circumstances "were orchestrated by police precisely so they could take advantage of the prior illegality"; and (3) because the cigarette butt was abandoned due to police misconduct, the evidence derived from it should be suppressed.

Abandoned property is not generally subject to Fourth Amendment protection unless the abandonment occurred "because of an unlawful act by police officers." *State v. Askerooth*, 681 N.W.2d 353, 370 (Minn. 2004). Although the 2010 searches were unlawful, there is nothing in the record to indicate that the police were acting unlawfully when they placed appellant under surveillance following his release from jail, or that they took any action, illegal or otherwise, causing him to drop the cigarette butt.

"'[E]vidence is not fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police.'" *State v. Doughty*, 472 N.W.2d 299, 305 (Minn. 1991) (quoting *Wong Sun*, 371 U.S. at 487-88, 83 S. Ct. at 417). No restrictions were placed on appellant following his release from custody, and he was not aware that he was under surveillance. Appellant's voluntarily abandonment of the cigarette butt following his release from jail was an intervening circumstance sufficient to distinguish the 2011 searches from the 2010 searches.

C. Likelihood of Obtaining Evidence in the Absence of the Illegality

Appellant was identified as a person of interest prior to the suppressed September 19, 2010, interview because he was a suspect in other burglaries in the area and lived close to G.J.N. The detective testified that appellant would have remained a suspect even if he had refused to consent to a DNA sample on September 19. Although the circumstances would have been different if appellant had not been arrested based on the 2010 searches, it is likely that ACSO could have obtained a DNA sample through other means. Unlike evidence that could have been hidden or destroyed in the absence of the illegal behavior, appellant could not have permanently hidden or destroyed his DNA. *See State v. Raj*, 368 N.W.2d 14, 16 (Minn. App. 1985) (holding that a knife recovered from a dumpster would not have been discovered absent illegal statements because the knife probably "would have been destroyed in the course of normal trash removal"), *review denied* (Minn. July 11, 1985). This factor speaks strongly in favor of admitting the 2011 searches.

D. Temporal Proximity of the Illegality

Where the evidence sought to be suppressed as fruit of the poisonous tree is temporally close to the illegal action, courts will favor exclusion. *Olson*, 634 N.W.2d at 229. Appellant argues that the relevant temporal proximity is the time between his release from jail as a result of the suppression order and the retrieval of the evidence. Respondents argue that the correct measurement of time is that between the illegal conduct and the collection of the challenged evidence. Caselaw supports the second interpretation. *See State v. Maldonado-Arreaga*, 772 N.W.2d 74, 81 (Minn. App. 2009)

(discussing temporal proximity between receipt of illegally obtained immigration form and commencement of investigation that led to challenged evidence); *State v. Miller*, 659 N.W.2d 275, 282 (Minn. App. 2003) (temporal proximity between illegal arrest and interrogation leading to challenged evidence); *Olson*, 634 N.W.2d at 229 (temporal proximity between illegal arrest and discovery of challenged evidence); *Raj*, 368 N.W.2d at 16 (temporal proximity between statements taken in violation of the right to counsel and discovery of challenged knife). The amount of time between the 2010 searches and the 2011 searches indicates that the intervening factors of appellant's release from jail and voluntary abandonment of the cigarette butt resulted in the challenged evidence, not the initial illegal acts.

Because the facts support the conclusion that the 2011 searches were sufficiently distinct from the 2010 searches so as to purge the taint of the initial illegality, the district court did not err as a matter of law in denying appellant's motion to suppress the 2011 searches.

II. Rack Belt

The use of restraints in a criminal trial is within the discretion of the district court and is reviewed for an abuse of discretion. *State v. Jones*, 678 N.W.2d 1, 22 (Minn. 2004). But, because the use of restraints is "an inherently prejudicial practice," it is constitutionally permissible "only when justified by an essential state interest specific to each trial." *State v. Shoen*, 578 N.W.2d 708, 713 (Minn. 1998) (quotation omitted). Physical restraint of a defendant is prohibited unless the court "finds the restraint necessary to maintain order or security." Minn. R. Crim. P. 26.03, subd. 2(c)(1).

When a district court orders a defendant's restraint during trial, it must make a record justifying its decision. *Shoen*, 578 N.W.2d at 713. The use of restraints must be "eminently necessary," and the restraints themselves "reasonable and the least coercive under the circumstances." *Id.* A court may "infer immediate necessity from the defendant's attributes or prior conduct." *Id.* The seriousness of the charge against the defendant is one factor for the court to consider in determining the necessity of restraints, but a court must not adopt a per se rule restraining all defendants accused of serious crimes. *Id.* at 715. Even if a district court errs in requiring use of a restraint, the error is not prejudicial absent evidence that the jury knew the defendant was wearing a restraint. *Id.*

The district court allowed the use of the rack belt because the appellant was "charged with a crime of violence and [was] facing in excess of 400 months in prison." The court noted that it would ensure that the belt would not prejudice the defendant in front of the jury. In addition to these findings, a deputy noted on the record that appellant had "go[ne] after a guard" and was in lockdown at the jail. The court stated that it "didn't consider" those factors because the court had not been aware of them prior to the bailiff's statement.

The factors that the district court relied on in allowing the use of the belt are uncomfortably similar to those found insufficient in both *Shoen* and *Jones*. The district court in *Shoen* was not objectively justified in restraining the defendant simply because he had been accused of first-degree murder and the restraints used were the most innocuous type available. 578 N.W.2d at 715. In *Jones*, the district court erred in

ordering that the defendant be restrained solely because of "the serious nature of the charges, the presumptive sentence of life in prison, and [the fact] that this was the least restrictive means available." 678 N.W.2d at 22. The court noted that relying solely on the "seriousness of the charged crime and the inconspicuous nature of the restraint" was not objectively reasonable. *Id.* "To hold otherwise would be to encourage courts to order restraints for all defendants charged with serious crimes." *Id.* We caution the district court that the use of such restraints must be accompanied by findings that such restraint is both "eminently necessary" and "the least coercive under the circumstances."

However, even if the district court erred in allowing the use of the belt, the error is prejudicial only if the jury was aware that the defendant was wearing the belt. *See Shoen*, 578 N.W.2d at 715-16 (remanding for a hearing so court could ask jurors if they knew defendant was wearing restraint). Unlike in *Shoen*, the appellant has not presented any reason to be concerned that any member of the jury knew about the belt or that it affected the outcome of the trial in any way. The record shows that the district court was aware of the potential for prejudice and was careful to ensure the belt was not visible. Because the error was not prejudicial, the district court did not commit reversible error.

Affirmed.