STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1110

State of Minnesota,
Appellant,

vs.

Eddy NMN DeLosSantos,
Respondent.

Filed January 28, 2013
Affirmed
Halbrooks, Judge

Freeborn County District Court
File No. 24-CR-11-2081

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

Craig S. Nelson, Freeborn County Attorney, David J. Walker, Assistant County Attorney, Albert Lea, Minnesota (for appellant)

Mark D. Nyvold, Fridley, Minnesota (for respondent)

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

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* 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UNPUBLISHED OPINION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 State of Minnesota challenges the district court's pretrial decision, determining that the warrantless search of a pill bottle found in the open back bed of respondent Eddy DeLosSantos's truck was unlawful, suppressing the drug evidence, and dismissing the charges of first- and second-degree possession of methamphetamine. Because we conclude that the district court did not err in suppressing the drug evidence, we affirm.

FACTS

At approximately 10:30 p.m. on November 1, 2011, Officer Adam Hamberg was on patrol in the city of Albert Lea when he saw a newer pickup truck towing a truck that did not have functioning headlights or taillights. Officer Hamberg stopped the vehicle based on a violation of Minn. Stat. §169.48, subd. 1(a) (2010) (providing that every vehicle traveling on a highway from sunset to sunrise "shall display lighted headlamps [and] lighted tail lamps"). The driver of the towing vehicle, identified by an ID card, was respondent Eddy DeLosSantos, who Officer Hamberg recognized from prior contacts. There was another man in the truck that was being towed. Respondent got out of his vehicle, and the officer verified that he had a valid driver's license. Respondent explained that he was towing the truck to a nearby repair shop, which was visible from the location of the stop. Officer Hamberg observed that respondent "was kind of quick and jittery, maybe a little bit nervous," which seemed different from how respondent had appeared during previous contacts.

When Officer Hamberg briefly turned away from respondent, he heard a "thud," which sounded to him like someone kicking or hitting a door. Officer Hamberg did not know if respondent kicked the truck's door or threw something through the open window of the truck that he was towing. But Officer Hamberg thought the sound was strange, and it caused him to think that respondent might be trying to get rid of something.

At that point, Officer Jason Taylor arrived to provide backup. Officer Taylor had received information from other officers at shift-change, indicating that respondent was known to deal methamphetamine and was previously suspected of transporting drugs in a trailer.

Because of the "thud" sound, Officer Hamberg asked Officer Taylor to walk around the truck to see if there was anything in plain view. Officer Taylor looked into both vehicles from the outside, using his flashlight, while Officer Hamberg stayed with respondent and the other man.

Believing that Officer Taylor was finished, Officer Hamberg told respondent and the other man that they were free to leave, and respondent got into the towing vehicle. But Officer Taylor saw what appeared to be a can of beer in a "coolie" on the passenger's side floorboard of the towing vehicle and asked respondent about it. Respondent said that he didn't drink that brand and that it belonged to his brother. Respondent denied drinking or having anything else illegal inside the vehicle. Neither of the officers suspected that respondent was drinking or was under the influence of drugs or alcohol.

After Officer Taylor discovered a small amount of liquid in the beer can, he asked respondent to get out of the towing vehicle while he searched for more open containers.

A third officer, Officer Adam Conn, assisted Officer Taylor in searching the driver's side and open back bed of respondent's truck. During the search, Officer Hamberg noted that respondent seemed to be paying very close attention to his truck. Although Officer Hamberg thought this was understandable, he nonetheless noted that respondent seemed to be very nervous.

During the search, Officer Taylor found a pair of metal knuckles in the center console and some bottle rockets in a plastic bag in one of the pockets on the passenger's side door. Officer Conn found a white plastic pill bottle located behind the driver's seat, in the open bed of the truck, tucked in the corner of the garbage-filled back bed. Officer Conn was aware of information passed on at shift-change that respondent was "very active in dealing meth" and that he possibly transported methamphetamine in the back bed of his truck. Officer Conn opened the pill bottle and found plastic baggies of suspected methamphetamine inside.

Respondent was charged with three counts: (1) first-degree possession of methamphetamine with intent to sell; (2) second-degree possession of methamphetamine; and (3) possession of metal knuckles. Before trial, respondent moved to suppress the evidence that was obtained in the warrantless search. The district court granted the motion in part with respect to the evidence of methamphetamine but denied the motion with respect to the brass knuckles. Based on its pretrial suppression of the evidence of methamphetamine, the district court dismissed the first two counts. The state now appeals.

D E C I S I O N

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

The state can appeal a pretrial order in a criminal prosecution if the order will "have a critical impact on the outcome of the trial." Minn. R. Crim. P. 28.04, subds. 1(1) and 2(1). Because the district court's omnibus order suppressing the drug evidence led to the dismissal of the drug-related charges, the critical-impact standard is met here. *See State v. Burbach,* 706 N.W.2d 484, 487 n.1 (Minn. 2005).

Law governing traffic stops.

The Fourth Amendment protects 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. The language of Minn. Const. art. I, § 10, parallels the language of the Fourth Amendment; but in the area of traffic stops, Minnesota affords greater protection against unreasonable searches and seizures than its federal counterpart. *State v. Askerooth*, 681 N.W.2d 353, 362-63 (Minn. 2004). Accordingly, Minnesota has explicitly adopted "the principles and framework of *Terry* for evaluating the reasonableness of seizures during traffic stops even when a minor law has been violated." *Id.* at 363.

In applying *Terry* to traffic stops, the first question in the analysis is whether the stop was justified at its inception. *Id.* at 364. Here, the district court held that it was, and respondent does not challenge the justification for the stop.

The next issue is whether the actions of the police during the stop "were reasonably related to and justified by the circumstances that gave rise to the stop in the first place." *Id.* This inquiry requires the district court to examine each incremental intrusion during the stop to ensure that it is "tied to and justified by one of the following: (1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness, as defined by *Terry.*" *Id.* at 365; *see also State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002) (holding the expansion of a routine traffic stop is permissible only if the officer has reasonable, articulable suspicion of other illegal activity). The district court determined that respondent's "nervousness alone would be insufficient to justify the expansion." But relying on *State v. Smith*, 814 N.W.2d 346 (Minn. 2012), the district court was persuaded that Officer Hamberg's additional observations of respondent's "strange conduct" and the "thud sound" provided reasonable suspicion of criminal activity to justify expanding the stop "to determine if there was anything in plain view in the vehicle." We agree.

The next question is whether the discovery of the open container of beer and subsequent search of the interior of the vehicle, revealing the metal knuckles and bottle rockets, justified the warrantless search of the pill bottle found in the back bed of the truck. In asserting that the district court erred in its analysis, the state advances theories on appeal that were not argued to the district court. Generally, only issues that are presented to and considered by the district court will be reviewed on appeal. *Roby v. State,* 547 N.W.2d 354, 357 (Minn. 1996). But when the issue is a constitutional issue, the parties have adequate time to brief the issues, and the issues were implicitly addressed by the district court, the reviewing court may, in the interests of justice, consider an alternate theory that was not presented to the district court. *See Tischendorf v. Tischendorf,* 321 N.W.2d 405, 410 (Minn. 1982); *see also State v. Grunig,* 660 N.W.2d 134, 137 (Minn. 2003) (permitting the state to raise alternate theories on appeal in defense of an underlying decision where the record is sufficient to review the issue). In this instance, the only issue is the constitutionality of the warrantless search of the pill bottle, the record is complete, and respondent addressed the alternate arguments in his brief. Moreover, the district court relied on two automobile-theory cases, *State v. Bigelow,* 451 N.W.2d 311 (Minn. 1990), and *State v. Hanson,* 364 N.W.2d 786 (Minn. 1985), in its analysis, so the automobile exception is implied in the district court's decision. Therefore, we will consider the automobile exception and the instrumentality theory in the interests of justice.

1. Automobile exception

Police may search a motor vehicle without a warrant provided they have probable cause to believe that the vehicle contains evidence of a crime. *Carroll v. United States,* 267 U.S. 132, 149, 45 S. Ct. 280, 283-84 (1925). The scope of a warrantless search under this exception is defined by "the object of the search and the places in which there is probable cause to believe that it may be found." *United States v. Ross,* 456 U.S. 798, 824, 102 S. Ct. 2157, 2172 (1982).

For example, the odor of alcohol coming from a car provides probable cause to search for open bottles or cans of alcohol, but it does not justify opening an ashtray because it would be unreasonable to believe that one would find an open bottle there. *State v. Schinzing,* 342 N.W.2d 105, 109-110 (Minn. 1983). On the other hand, the lawful discovery of marijuana in a vehicle provides probable cause to search the entire vehicle, including the trunk, for evidence of marijuana possession. *See id.* at 111 (remanding to the district court for factual finding on the question of whether the marijuana in the ashtray was properly discovered); *see also Bigelow,* 451 N.W.2d at 313 (holding that the search of the entire vehicle, including the defendant's tote bag, was justified by probable cause based on the lawful discovery of marijuana in the vehicle); *Hanson,* 364 N.W.2d at 789 (holding that discovery of marijuana cigarette in vehicle justified further search of the vehicle, including the trunk).

Under this exception, after the police found the illegal metal knuckles and bottle rockets, they were permitted to search containers where there was probable cause to believe that similar items would be found. But as the district court found, there is nothing about a pill bottle that would make it more likely than not that evidence of illegal metal knuckles and bottle rockets would be found inside. The district court also noted that possession of an open container of alcohol in the non-passenger part of a vehicle is not a crime. *See* Minn. Stat. § 169A.35, subd. 6(b) (2010). Therefore, the presence of the open container of beer in the passenger part of the vehicle did not provide the officers with probable cause to search the pill bottle for evidence of alcohol possession. Because the pill bottle was not the type of container where one would expect to find evidence of illegal weapons or bottle rockets, the search of the pill bottle was not justified by the automobile exception.

2. Instrumentality theory and probable cause

The state presents two final arguments why the warrantless search of the pill bottle is constitutionally valid: (1) because respondent was transporting contraband in his vehicle, the search was valid under the instrumentality theory and (2) the police had probable cause. Both of these arguments require probable cause to justify the search. Although these theories were not presented to the district court, the district court implicitly considered them when it found that the information available to the officers at the scene did not give the officers cause to suspect that evidence of a drug-related crime would be found in the pill bottle.

The instrumentality theory permits the police to search a vehicle without a warrant if they have probable cause to believe that the vehicle was used as an instrumentality of a crime or contains the fruits of a crime. *State v. Thiel*, 299 Minn. 179, 182-83, 217 N.W.2d 499, 501-02 (1974). Probable cause for a search must be based on "objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officers." *State v. Demry*, 605 N.W.2d 106, 108 (Minn. App. 2000) (quoting *Ross,* 456 U.S. at 808, 102, S. Ct. at 2164), *review denied* (Minn. Mar. 28, 2000). Probable cause is "a practical, common sense decision whether, given all the circumstances set forth . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* (quoting *Illinois v. Gates,* 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). The determination of probable cause requires consideration of the totality of the circumstances. *Id.*

But the instrumentality theory does not apply here because the police did not have probable cause to believe that the vehicle contained evidence of a drug crime. In *Thiel*, for example, the search of the defendant's vehicle was justified under the instrumentality theory because there was probable cause to believe that the vehicle contained evidence connected to a robbery. 299 Minn. at 183, 217 N.W.2d at 502. Before the police searched the vehicle, they had arrested the defendant on probable cause to believe that he was guilty of robbery and forging checks obtained in the robbery. *Id.* A starter gun was used during the robbery and was not found on the defendant's person at the time of his arrest, providing the police with probable cause to believe that the gun would be in the defendant's vehicle. *Id.*

Similarly, in *State v. Johnson*, the supreme court concluded that a search was justified under the instrumentality theory because the defendant was transporting marijuana in his vehicle. 277 N.W.2d 346, 349 (Minn. 1979). During a routine check of a disabled vehicle, an officer observed marijuana plants in the vehicle's open trunk. *Id.* at 348. The defendant was arrested, and the interior of the vehicle, including the glove compartment, was searched. *Id.* Baggies of suspected marijuana and a pill bottle containing marijuana roaches were found in the glove compartment. *Id.* The supreme court held that the search was valid because the observation of marijuana plants in the vehicle's trunk gave the officers probable cause to believe that there was additional marijuana in other parts of the vehicle. *Id.* at 349-50.

Here, the officers did not have a reasonable belief that the towing vehicle was being used to transport illegal drugs or was the instrumentality of a drug crime. At the time the officers searched the vehicle, they knew that respondent was stopped for a traffic violation, that he was nervous, and that Officer Hamberg heard a "thud" that could have been caused by respondent throwing something in the passenger part of the vehicle that was being towed. But the officers did not suspect that respondent was under the influence of drugs. And the location of the pill bottle in the corner of the open bed of the truck was not consistent with having been thrown there. Further, the shift-change tip that respondent might be transporting drugs in his truck was unreliable and unsubstantiated. *See Burbach,* 706 N.W.2d at 490 (discussing requirements for evaluating the reliability of a tip). Importantly, unlike the defendants in *Johnson* and *Thiel*, appellant had not been arrested on suspicion of committing any crime. And there is nothing about the presence of the open container of beer, metal knuckles, and bottle rockets that would have provided the officers with probable cause to believe that respondent was transporting illegal drugs in the truck. Based on the totality of the circumstances, the state has not demonstrated that there was probable cause to search the truck under any alternate theory.

We therefore conclude that the district court did not err in granting respondent's motion to suppress the drug evidence found in the pill bottle. Because the warrantless search was not justified by an exception, suppression of the drug evidence, along with dismissal of the drug-related charges, is warranted.

Affirmed.