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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0854

State of Minnesota,
Respondent,

vs.

Jeffery Myles Folkert,
Appellant.

Filed February 11, 2013
Affirmed
Rodenberg, Judge

Winona County District Court
File No. 85-CR-11-159

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

Karin L. Sonneman, Winona County Attorney, Christina M. Davenport, Assistant County Attorney, Winona, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, St. Paul, Minnesota; and

Scott M. Flaherty, Special Assistant State Public Defender, Briggs and Morgan, P.A., Minneapolis, 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

RODENBERG, Judge

On appeal from his conviction of fifth-degree controlled substance crime, appellant argues that the district court erred when it failed to suppress evidence obtained as a result of an exterior canine sniff of appellant's vehicle, which occurred following expansion of a routine traffic stop. We affirm.

FACTS

Late at night on August 17, 2010, a state trooper saw a vehicle with one taillight out travelling on Interstate 90 in Winona County. The trooper initiated a traffic stop and then approached the vehicle on foot. As he approached the vehicle, the trooper, a certified drug recognition evaluator, observed that the passenger, later identified as appellant Jeffery Myles Folkert, was displaying symptoms of recent drug use, and the trooper observed that his abdomen was shaking and he had beads of sweat on his nose. The driver of the vehicle, W.K., was also observed "moving about the motor vehicle quickly," and she was unable to produce a driver's license. After the trooper indicated why he had stopped the vehicle, appellant fixed the taillight by opening the trunk and adjusting the wires and/or light.

Appellant identified himself as the owner of the vehicle. He claimed to have recently purchased it, but he was unable to provide any purchase documents or proof of insurance. After running a check of the license plates, the trooper discovered that the vehicle was registered to a car dealership.

Appellant advised the trooper that his driver's license had been suspended. W.K. offered "multiple explanations" for her inability to produce a driver's license. The trooper ran a license check and discovered that, although W.K.'s status was listed as "valid," the computer check returned no information regarding her height and weight, nor did the computer records indicate any "class" of license identified. The trooper testified that, because of the missing information, the trooper believed that W.K. did not have a valid Minnesota driver's license. In addition, the trooper found a computer entry indicating that, one month earlier, W.K. had admitted to being a heroin and methamphetamine user during an arrest for driving while intoxicated. The trooper also found a computer listing of a prior police contact with appellant, wherein appellant had been a passenger in a vehicle with a driver who was an admitted heroin user.

The trooper requested that appellant exit the vehicle. He observed that appellant's pupils were constricted and his eyelids were droopy, both of which indicated to the trooper that appellant was using narcotic analgesics. The trooper also had W.K. exit the car and perform some field sobriety tests. Although W.K. admitted using Adderall, she did not exhibit any signs of impairment on field sobriety testing. The trooper observed that W.K. had bleeding scratches on her legs, which he knew from his training and experience to be a sign of methamphetamine use.

The trooper again spoke with appellant outside the vehicle and noticed that appellant had a fresh puncture wound in the crook of his arm, consistent with a needle injection. The trooper asked appellant if he used any drugs, questioning him about specific types of drugs. When the trooper asked about heroin, appellant's eyes widened.

At this point, about fifty minutes into the traffic stop, a canine unit arrived at the trooper's request. The trooper requested permission to conduct an exterior dog sniff of the vehicle, to which appellant consented. The dog alerted to the vehicle. Upon searching the car, the trooper found a Nintendo DS box covered in a white, powdery substance. The box was next to the front passenger seat, where appellant had been sitting. The powdery substance later tested positive for methamphetamine.

The state charged appellant with one count of controlled substance crime in the fifth degree for possession of methamphetamine. Appellant moved to suppress the evidence obtained from the traffic stop, arguing that the expansion of the stop was not supported by a reasonable, articulable suspicion of criminal drug-related activity.

Following an omnibus hearing, the district court denied the motion to suppress the evidence. The parties stipulated to the state's case pursuant to Minn. R. Crim. P. 26.01, subd. 4, and the district court found appellant guilty. This appeal followed.

D E C I S I O N

Appellant argues that the trooper lacked a reasonable, articulable suspicion to expand the scope and duration of the traffic stop. Specifically, appellant contends that the district court did not adequately analyze the facts in an incremental fashion, as they developed during the traffic stop. He also argues that the facts do not support a reasonable, articulable suspicion of criminal drug-related activity, but only of possible drug use or addiction, which are not in themselves crimes.

In reviewing a pretrial order denying a motion to suppress, 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). When the facts are not in dispute, we independently review those facts to 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). Similarly, whether a police officer had a reasonable, articulable suspicion sufficient to justify a search or seizure is a question of law, which we review de novo. *State v. Diede*, 795 N.W.2d 836, 843 (Minn. 2011).

The Fourth Amendment to the United States Constitution protects individuals against "unreasonable searches and seizures" by state actors. U.S. Const. amend. IV; *see Mapp v. Ohio*, 367 U.S. 643, 654–55, 81 S. Ct. 1684, 1691 (1961) (holding that the Fourth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment). A police officer may conduct a limited, investigatory detention, such as a traffic stop, without probable cause if (1) "the stop was justified at its inception" by a reasonable, articulable suspicion of criminal activity and (2) the police officer's actions were "reasonably related to and justified by the circumstances that gave rise to the stop in the first place." *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (citing *Terry v. Ohio*, 392 U.S. 1, 19–21, 88 S. Ct. 1868, 1878–80 (1968)). A reasonable, articulable suspicion must be based on specific facts, and the police officer must have a particularized and objective basis for suspecting the detained individual of criminal activity. *Diede*, 795 N.W.2d at 842–43. This standard is "not high," but it must be based on more than a hunch. *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008); *Harris*, 590 N.W.2d at 101.

Generally, the scope and duration of a traffic stop must be limited to the reason for the stop's inception. *State v. Wiegand*, 645 N.W.2d 125, 136 (Minn. 2002). A police officer may expand the stop to investigate additional offenses only if the police officer develops a reasonable, articulable suspicion of those offenses within the time necessary to resolve the originally suspected offense. *Id.* at 135–36. Whether the officer developed a reasonable, articulable suspicion is determined by the totality of the circumstances, viewed objectively. *State v. Smith*, 814 N.W.2d 346, 351–52 (Minn. 2012); *State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005).

Each incremental intrusion must be reasonably justified. *See Askerooth*, 681 N.W.2d at 365. To justify expanding the scope or duration of a traffic stop, the officer's reasonable, articulable suspicion must be based on facts in existence at the time of the expansion. *See Diede*, 795 N.W.2d at 843–44 (noting that facts discovered after seizure could not have provided a basis for the seizure). In reviewing whether the officer had a reasonable, articulable suspicion, we consider whether the facts known to the officer at the moment of the expansion would warrant a person of reasonable caution in the belief that the expansion was appropriate. *Smith*, 814 N.W.2d at 351–52. To expand a traffic stop to include a drug-detection canine sniff around a vehicle's exterior, the police officer must have "a reasonable, articulable suspicion of *drug-related criminal activity*." *Wiegand*, 645 N.W.2d at 135 (emphasis added).

In this case, appellant does not dispute that the traffic stop was justified at its inception because a taillight was out on the vehicle. *See State v. George*, 557 N.W.2d 575, 578 (Minn. 1997) (recognizing that a traffic violation, however slight, provides an

objective basis for conducting a traffic stop). Immediately upon stopping the vehicle, the trooper observed that appellant's stomach was shaking and there were sweat beads on his nose, both of which the trooper found unusual. W.K. was making swift movements, and she gave broken and varied explanations for her inability to produce a driver's license. The trooper also observed the "rather large" age difference of about twenty years between W.K. and appellant, who said they had known each other for only about a week. Appellant told the trooper that he was giving W.K. a ride to La Crosse, Wisconsin, even though his driver's license was suspended. The trooper testified that these circumstances led him to suspect that "there [was] possibly more going on in that car," and he was suspicious of criminal narcotics activity.

Although appellant fixed the taillight a few minutes into the traffic stop, the trooper reasonably questioned whether W.K. had a valid license and whether appellant actually owned the vehicle. The trooper was therefore justified in expanding the duration of the stop to resolve those suspicions.

While running license checks, the trooper found that both appellant and W.K. had previous contacts with police, W.K. was an admitted methamphetamine user, and appellant had been associated with a heroin addict. The trooper testified that this information further led him to suspect criminal narcotics activity in the vehicle. Additionally, because the vehicle was still registered to a dealership and appellant could not provide any sales documents or proof of insurance, the trooper suspected that the vehicle may have been stolen. The trooper's expansion of the duration of the traffic stop

to further investigate those suspicions was reasonable, and it was based on specific and articulable facts.

While questioning appellant about the registration of the vehicle, the trooper also noticed that appellant had constricted pupils and droopy eyelids. Based on his training as a certified drug recognition evaluator, the trooper recognized those symptoms as indicators of narcotic analgesia abuse. The trooper also observed bleeding scratch marks on W.K.'s legs, which indicated methamphetamine use. She admitted to taking Adderall, a controlled substance.

While further questioning appellant, the trooper noticed a fresh puncture wound on his arm, consistent with a needle injection. When the trooper asked appellant whether he used heroin, appellant's eyes widened. The trooper thought it was unusual that appellant would display a physical reaction when asked about heroin, after not having so reacted to questioning about other types of illegal drugs.

The trooper requested a canine unit "[b]ased upon the . . . indicators of criminal activity [he] was observing." Upon the arrival of the canine unit, appellant declined to consent to a search of the vehicle but consented to an external canine sniff of the vehicle. The expansion of the stop to a canine sniff was based on facts known to and articulated by the trooper: (1) appellant's stomach shaking; (2) the sweat beads on appellant's nose; (3) W.K.'s quick and agitated movements; (4) W.K.'s varied explanations for her inability to produce a driver's license; (5) the age difference between appellant and W.K.; (6) the short time appellant and W.K. had known each other; (7) the implausible explanation for why they were riding together; (8) appellant's constricted pupils;

(9) appellant's droopy eyelids; (10) the puncture wound on appellant's arm; (11) appellant's visible reaction to the trooper's questioning about heroin use; (12) appellant's prior association with a heroin addict; (13) the bleeding scratches on W.K.'s legs; (14) W.K.'s admission to using Adderall; and (15) W.K.'s very recent history of DWI and admitted drug use. Based on the totality of these circumstances, as well as the trooper's experience and training as a certified drug recognition expert, the trooper had a reasonable, articulable suspicion of criminal drug-related activity sufficient to justify expanding the traffic stop to a drug-detection canine sniff.

Appellant argues that these facts supported only a suspicion that he was a drug addict, and that addiction is not criminal activity. He contends that the facts do not support a reasonable suspicion that he was engaged in *criminal* drug-related activity—i.e., trafficking or possessing drugs.

As a preliminary matter, appellant does not cite any authority requiring the district court to analyze which specific statutory drug offenses were supported by a reasonable, articulable suspicion. The indicia of drug use observed by the trooper are precisely the sort of particularized, articulable facts that support an objective suspicion of illegal drug possession sufficient to justify an exterior dog sniff. *Cf. Burbach*, 706 N.W.2d at 490 (observing that where the defendant did *not* show any physical signs of drug use or impairment, the minimal other facts did not support a reasonable suspicion of drug possession). The trooper testified that, based on his training and experience, he harbored a suspicion of *criminal* narcotics activity throughout the duration of the traffic stop. He was not suspicious only of possible drug use or addiction, and specifically testified that

his concern was "indicators of criminal activity." The totality of the circumstances as those circumstances developed during the course of the traffic stop support a reasonable, articulable suspicion of illegal drug possession. *See* Minn. Stat. §§ 152.021–.025 (defining controlled substance crimes, including possession).

Police officers are entitled to rely on their training and experience to determine whether a particular factor supports a reasonable suspicion of criminal activity. *See Smith*, 814 N.W.2d at 352. They may rely on "inferences and deductions that might well elude an untrained person." *Id*. Moreover, a police officer may begin an inquiry based on suspicion of a particular offense but later develop a suspicion that a different offense has occurred. *See Wiegand*, 645 N.W.2d at 135 (stating that officer may expand scope of stop to investigate other illegal activity if officer develops reasonable, articulable suspicion to support expanded investigation). The trooper in this case reasonably suspected, based on the myriad indicia of illegal drug use, that drugs might be in the car.

Appellant relies on *Wiegand* to argue that indicia of drug use do not support a reasonable, articulable suspicion of criminal drug-related activity. In *Wiegand*, the officer observed that the defendant had slow and quiet speech, was somewhat nervous, was shaking, and had glossy eyes. 645 N.W.2d at 128. The officer testified, however, that he did *not* suspect the defendant to be under the influence of any drugs when he conducted an exterior dog sniff of the vehicle. *Id.* This lack of suspicion was crucial to the supreme court's conclusion that the officer did not have a reasonable, articulable suspicion of criminal drug-related activity to justify the dog sniff. *See id.* at 136 (stressing the lack of suspicion).

Here, by contrast, the trooper expressly testified that he suspected criminal narcotics activity throughout the traffic stop, and he articulated several facts that developed during the course of the stop supporting that suspicion. *Wiegand* is therefore distinguishable.

Appellant also relies on *Burbach*, wherein the police officer stopped a vehicle for speeding. 706 N.W.2d at 486. The officer recognized the defendant's name from a tip he had received during a shift change, which indicated that the defendant was suspected of carrying crack cocaine. *Id.* The officer testified that the defendant was unusually nervous, fidgety, and talkative. *Id.* Based solely on those facts, the police officer requested and obtained the defendant's consent to search the vehicle and during the search found illegal drugs. *Id.* at 487. The supreme court applied the totality-of-the-circumstances test to determine that the police officer lacked a reasonable, articulable suspicion of criminal activity. *See id.* at 490-91. It noted that the defendant's nervous response to intense police questioning did not support a reasonable suspicion. *See id.* The supreme court also observed that the defendant showed no signs of impairment or drug use. *See id.*

Here, by contrast, the facts supporting a reasonable suspicion of criminal drug-related activity were far more extensive than those found in *Burbach.* Both appellant and W.K. exhibited physical signs of recent drug use. Appellant's constricted pupils, droopy eyelids and puncture wound led the trooper to suspect, based on his specialized training and experience, that appellant was under the influence of narcotic analgesics. *Burbach* is therefore distinguishable.

Appellant also appears to argue that the trooper's conduct in repeatedly ordering him out of the car indicates that the trooper lacked a reasonable, articulable suspicion of criminal drug-related activity under an incremental analysis. But police officers may order drivers and passengers out of lawfully stopped vehicles without an articulated reason. *Askerooth*, 681 N.W.2d at 367; *see also Ortega*, 770 N.W.2d at 152 (stating that police can order passengers to exit lawfully stopped vehicles for purposes of investigating criminal activity and for officer safety). Here, appellant first volunteered to get out of the car in order to fix the taillight. The trooper later had appellant exit the car to speak with him about the vehicle's ownership. The squad car video also reveals that appellant exited the car to assist W.K. in finding her driver's license. Viewed in context, the trooper's actions in each incremental intrusion were reasonable in light of his suspicions of drug-related activity, which first arose at the inception of the stop when he noticed appellant's physical symptoms of drug use.

Appellant next argues that the facts only support a reasonable, articulable suspicion that W.K. may have been under the influence of drugs and that this suspicion was dispelled following her completion of field sobriety tests. As discussed above, many of the facts supporting a reasonable suspicion of drug-related criminal activity relate to appellant—his shaking stomach, constricted pupils, sweat beads, puncture wound, and reaction to questioning about heroin. These facts support broader suspicions of criminal drug-related activity beyond a mere suspicion that W.K. was impaired. Thus, W.K.'s successful completion of field sobriety tests did not dispel those suspicions; to the

contrary, the bleeding marks on her legs and admission to using Adderall further bolstered them.

Lastly, appellant argues that an association with drug users is not enough to support a reasonable, articulable suspicion of criminal activity. *See Diede*, 795 N.W.2d at 844 (recognizing that mere association with criminals is not, by itself, enough to support a reasonable, articulable suspicion of drug possession). In this case, however, appellant's prior association with a heroin addict was not the sole factor in support of the trooper's suspicions. It was but one among many factors.

The totality of the circumstances established a reasonable, articulable suspicion sufficient to justify the exterior canine sniff of appellant's vehicle. The district court therefore did not err in denying appellant's motion to suppress evidence.

Affirmed.