STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1650

State of Minnesota,
Respondent,

vs.

Matthew Edwin Millsop,
Appellant.

Filed August 19, 2013
Affirmed
Cleary, Judge

Roseau County District Court
File No. 68-CR-11-966

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

Karen M. Foss, Roseau County Attorney, Michael P. Grover, Assistant County Attorney, Roseau, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota; and

Aaron G. Thomas, Special Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Cleary, Judge.

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

CLEARY, Judge

On appeal from his conviction of a fifth-degree controlled-substance crime, appellant argues that (1) the district court erred in denying his motion to suppress evidence seized from an unlawfully expanded investigatory stop and pat-down search for weapons and (2) the district court erred in ruling that appellant's wallet was searched incident to a lawful arrest. Because there was probable cause to support appellant's arrest and because his arrest was not otherwise unlawful, we affirm.

FACTS

On or about October 4, 2011, Bureau of Criminal Apprehension (BCA) Special Agent Newhouse and Investigator Adams of the Roseau County Sheriff's Department interviewed a confidential informant (CI) who informed the officers that appellant Matthew Millsop and another individual, David Barkley, were involved in possessing and distributing methamphetamine in the Roseau County area. The CI told the officers that on or about October 3, he had observed appellant purchase an "eight ball" quantity of methamphetamine from Barkley. The CI further told the officers that he had drug-related communications with both Barkley and appellant via text messaging, which the CI showed the officers.

On October 4, Newhouse, Adams, and BCA Special Agent Woolever used the CI to conduct a controlled buy of a small amount of methamphetamine from Barkley near Warroad. Two additional controlled buys from Barkley took place at some point

thereafter. Newhouse was aware that there had also been a controlled buy of prescription medications from appellant and that the related investigation was ongoing.

On or about October 17, Newhouse was advised by the Warroad police chief that Seven Clans Casino security personnel had discovered a small baggie containing a substance resembling methamphetamine on or about October 11. Newhouse reviewed the incident report, which included a casino surveillance photo of one of the individuals that casino security personnel believed had dropped the baggie, and recognized the individual as Barkley.

That same day, Newhouse contacted the Red Lake Police Department and scheduled a meeting with the police and casino security personnel for October 18. At the meeting, casino security personnel told Newhouse that they had been observing suspicious activities in and around the casino involving several individuals who they believed were involved in possessing and/or distributing methamphetamine as well as laundering money from drug sales through the casino. Newhouse was shown several photographs of the individuals that casino security had been monitoring and recognized the individuals as appellant, Barkley, and others. Casino security personnel told Newhouse that they had reviewed surveillance video from the day they found the baggie with what appeared to be methamphetamine and that the video indicated that the baggie was dropped by appellant or Barkley, who had been seated next to each other and had been removing items from their pockets. Casino security personnel told Newhouse that they would continue monitoring the activities of these individuals and that they would

contact the Red Lake Police Department if any additional suspicious behavior was observed.

At approximately 9:00 p.m. on October 20, Newhouse received a telephone call from Investigator Brunelle of the Red Lake Police Department. Brunelle advised Newhouse "that he had received information from Red Lake Casino security persons" that appellant, Barkley, and "some other individuals [discussed at the previous meeting] may be at the casino, that they were concerned that they may be involved in selling drugs and/or laundering money."

After receiving the call from Brunelle, Newhouse contacted Woolever, advised him of what was happening at the casino, and requested his assistance. Newhouse then drove to Warroad to start conducting surveillance outside of the casino near the parking lot. At the time he arrived, Newhouse observed appellant's vehicle leaving the parking lot area and driving away. Newhouse lost sight of the vehicle but remained at the casino because "there were other suspects involved in [the] investigation [besides appellant] who had outstanding felony warrants" who law enforcement wanted to apprehend. While Newhouse continued surveillance, he did not enter the casino or witness any of the surveillance video of the allegedly suspicious behavior. Newhouse did, however, have telephone conversations with Brunelle, who was traveling from Bemidji to Warroad, and with casino security personnel located inside the casino, who "provided [Newhouse] with updates on some of the locations of individuals and some of the behavior that they had witnessed during the course of the evening."

Appellant returned to the parking lot at approximately 11:00 p.m. Newhouse made telephone contact with Woolever to advise him of appellant's presence and then approached appellant's vehicle on foot to discuss the ongoing investigations of appellant's suspected drug-related activities. Newhouse testified that "[w]e were going to ask [appellant] some questions and hopefully get some cooperation from him."

At the time Newhouse approached, appellant was in his vehicle and talking on his cellular phone to a person unknown to Newhouse. Newhouse requested that appellant end his telephone conversation, and appellant "spoke into the phone and said Don Newhouse is arresting me right now" and started pushing buttons on his phone. Woolever arrived on the scene shortly thereafter.

When Woolever arrived, he suggested that the three step into an alley behind a fence so that they could be out of sight from any other potential suspects involved in the investigation. In the alley, Woolever and Newhouse "started visiting with [appellant]." The officers advised appellant that they were aware he was on felony probation and that they would likely be contacting probation regarding the information they had received from the casino. Appellant became irritated as the officers began speaking with him regarding the ongoing investigation of him at the casino.

Newhouse conducted a pat-down search of appellant "for weapons and officer safety" and, while no weapons were found, Newhouse felt and removed from appellant's pocket what was later identified as a wallet and the keys to appellant's vehicle. A few seconds later, Newhouse observed Barkley drive past them and pull into the casino parking lot. Newhouse testified that he and Woolever "decided that [they] needed to

make contact with Barkley before he left the scene and [they] were unable to locate him, so [they] asked [a local officer] to take [appellant] up to the police department while [they] spoke or attempted to speak with Barkley." Appellant was handcuffed and placed in the back of a police vehicle. After appellant was driven away from the parking lot by the local officer, Newhouse and Woolever approached Barkley. Barkley was subsequently searched, and methamphetamine was discovered in an Altoids container that he was carrying. Barkley was then transported to the police station where appellant was being held.

At the station, Woolever approached appellant in an interview room, and appellant stated that he wanted to speak with an attorney. Woolever then searched appellant's wallet and discovered several small baggies of a substance that later tested positive for methamphetamine. Newhouse later found $1,549 in cash inside the wallet. Woolever advised appellant that he was under arrest for a fifth-degree controlled-substance crime (possession of methamphetamine). Appellant was then transported to the Roseau County jail. Shortly thereafter, Newhouse and Woolever returned to the casino parking lot and searched appellant's vehicle, finding and seizing additional controlled substances and other evidence.

Appellant was charged with controlled-substance crime in the fifth degree. He subsequently moved to suppress the evidence against him as the result of an illegal search and seizure and to dismiss the charge. When asked at the first omnibus hearing on December 5, 2011, whether appellant was under arrest at the time he was handcuffed and put in the squad car, Newhouse replied that appellant "was being detained" and affirmed

that appellant "was not free to leave." At the second omnibus hearing on January 30, 2012, Woolever also affirmed that, at the time appellant was handcuffed, he was not free to go. When asked at what point appellant would have been released that evening, Newhouse replied, "lacking any other evidence to link him to any ongoing controlled-substance crimes in Warroad at the Seven Clans Casino, [appellant] would have most likely been transported to the Lake of the Woods County [j]ail" because of the previous controlled buy of prescription drugs from appellant that took place in that county. Similarly, Woolever testified that if, on the evening of October 20, they had not found any controlled substances on appellant's body or in his vehicle, appellant would not have been free to leave because he would have been arrested for the controlled buy of prescription drugs. When asked whether the "information that [he] received from the casino [was his] basis for probable cause for detaining and searching" appellant, Newhouse responded that "[i]t also corroborated the ongoing investigation that we had on Barkley as far as the controlled buys, but yes."

On January 9, 2012, the complaint against appellant was amended to include three additional controlled-substance charges stemming from the search of appellant's vehicle. Appellant moved to dismiss the additional three counts and to suppress all evidence found during the search of his vehicle as incident to an unlawful arrest and not within the automobile exception to the warrant requirement. The district court held a second omnibus hearing on appellant's second motion to suppress on January 30.

The district court issued an order in March 2012 denying appellant's motion to suppress the evidence found during the search of the wallet. The order granted, however,

appellant's motion to suppress the evidence stemming from the search of his vehicle and dismissed the three added charges. In the order, the district court noted that appellant was under investigation for selling prescription medication as part of a controlled buy involving a confidential reliable informant (CRI) in Lake of the Woods County and that a warrant was "not required to arrest a felony suspect in a public place." The court further found that "[b]ecause the wallet was found on [appellant's] person during the pat search of [appellant] in the alley, the subsequent search of [appellant's] wallet at the Warroad Police Department was a valid search incident to arrest and did not require a warrant to execute." The district court concluded that "the search of [appellant] and of his wallet was a search incident to his arrest and that [appellant's] Fourth Amendment rights were not violated by such search."

Appellant pleaded not guilty and the district court conducted a trial pursuant to Minn. R. Crim. P. 26.01, subd. 4. The district court entered a finding of guilt and sentenced appellant to a 24-month commitment. The sentence was stayed, and appellant was ordered to serve 8 months in jail and thereafter be placed on supervised probation.

This appeal follows.

D E C I S I O N

I.

"When reviewing a pretrial order on a motion to suppress evidence, we may independently review the facts and determine whether, as a matter of law, the district court erred in suppressing or not suppressing the evidence." *State v. Askerooth*, 681

N.W.2d 353, 359 (Minn. 2004). This court reviews de novo whether a search or seizure is justified by probable cause. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005).

The Fourth Amendment to the United States Constitution and Article I, section 10 of the Minnesota Constitution guarantee an individual's right to be free from unreasonable searches and seizures. Evidence seized in violation of the constitution must generally be suppressed. *State v. Jackson*, 742 N.W.2d 163, 177–78 (Minn. 2007). "Warrantless searches are generally unreasonable unless they fall within a recognized warrant exception." *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009). One of the exceptions to the warrant requirement "is that a person's body and the area within his or her immediate control may be searched incident to a lawful arrest" for weapons or evidence. *State v. Robb*, 605 N.W.2d 96, 100 (Minn. 2000). Another exception is, for the purpose of officer safety, protective pat-down searches for weapons on the outside of a suspect's clothing. *Terry v. Ohio*, 392 U.S. 1, 29–31, 88 S. Ct. 1868, 1884–85 (1968).

If an officer exceeds the permissible scope of a pat down for officer safety, any evidence seized may still be admissible regardless of the illegality of the pat-down search if a subsequent arrest and the pat-down search were substantially contemporaneous, and probable cause to arrest existed before the illegal pat-down search. *State v. Cornell*, 491 N.W.2d 668, 670 (Minn. App. 1992). Similarly, "[a] search 'incident to arrest' based on probable cause to arrest is valid even if the search occurs before the arrest." *State v. Wasson*, 602 N.W.2d 247, 252 (Minn. App. 1999), *aff'd*, 615 N.W.2d 316 (Minn. 2000). "It is not important that the search precedes an arrest so long as the fruits of the search are not necessary to support probable cause to arrest." *Cornell*, 491 N.W.2d at 670.

Appellant argues that he was not under arrest at the time his wallet was seized. Therefore, he argues, the seizure did not occur during a search incident to an arrest and occurred instead during a pat down for officer safety. Appellant argues that the seizure of the wallet exceeded the permissible scope of a pat down and must be suppressed. Appellant also argues that his arrest subsequent to the frisk was not supported by probable cause, was therefore illegal, and that the search of the wallet at the police station was also therefore illegal.

The state admits, as we agree it must, that the seizure of appellant's wallet during the pat-down search exceeded the permissible scope of a pat down for officer safety. *See Terry*, 392 U.S. at 29–31, 88 S. Ct. at 1884–85 (limiting pat downs to the outer clothing unless what is felt is obviously a weapon); *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992) (providing that if, during a pat down, an officer feels something that cannot possibly be a weapon, they cannot reach inside a pocket to see what it is). The state asserts, however, that the fact that the officers exceeded the permissible scope of a pat-down search is irrelevant and argues that the pat down was actually a search incident to a lawful arrest because Woolever and Newhouse had probable cause to arrest appellant in the casino parking lot.

A. Arrest

Before we can determine whether probable cause existed to support appellant's arrest (and any substantially contemporaneous search), we must first identify *when* the arrest occurred so that we can evaluate what law enforcement knew at the time of the

arrest for purposes of the probable-cause analysis. *See State v. Carlson*, 267 N.W.2d 170, 174 (Minn. 1978).

This court examines all of the surrounding circumstances of police detention to determine whether an arrest has occurred. *State v. Olson*, 634 N.W.2d 224, 229 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). The fact of an arrest is not determined by the officer's subjective intent or formal declarations; this court instead applies an objective test to determine whether the restraints on the defendant's freedom were comparable to those associated with a formal arrest. *See State v. Hince*, 540 N.W.2d 820, 823 (Minn. 1995). "The ultimate test to be used in determining whether a suspect was under arrest is whether a reasonable person would have concluded, under the circumstances, that he was under arrest and not free to go." *State v. Beckman*, 354 N.W.2d 432, 436 (Minn. 1984). When law enforcement places a suspect in handcuffs, orders him into a police vehicle, and transports him to the police station, a full intrusion on the suspect's liberty and an arrest has occurred, regardless of whether the suspect was formally placed under arrest. *State v. Lohnes*, 344 N.W.2d 605, 610 (Minn. 1984).

Regardless of Newhouse's subjective intent at the time that appellant was handcuffed that appellant was merely being detained for questioning, we conclude that appellant was arrested when he was handcuffed, placed in the back of the police vehicle, and subsequently transported to the police station. *See id.* (rejecting the argument that defendant was merely in custodial detention and not arrested because the defendant had been handcuffed). Both Woolever and Newhouse testified that appellant was not free to leave at the time he was handcuffed.

Because appellant was arrested at the time that he was handcuffed, the next question is whether, at that time, the police had probable cause to arrest appellant. As long as the arrest was supported by probable cause, the pat-down search and subsequent search of appellant's wallet would be legal as incident to arrest and any evidence would have been lawfully obtained at that time. *See Cornell*, 491 N.W.2d at 670.

B. Probable Cause

A warrantless arrest like that which occurred here is legal as long as the police had probable cause before the arrest occurred. *See State v. Riley*, 568 N.W.2d 518, 524 (Minn. 1997); *State v. Dickey*, 827 N.W.2d 792, 796 (Minn. App. 2013). Whether there is probable cause for a citizen's arrest depends on findings of fact that are reviewed for clear error under the clearly erroneous standard, but it is ultimately a question of law to be reviewed de novo. *State, Lake Minnetonka Conservation Dist. v. Horner*, 617 N.W.2d 789, 795 (Minn. 2000).

Probable cause exists if the objective facts indicate that "'a person of ordinary care and prudence [would] entertain an honest and strong suspicion' that a crime had been committed." *State v. Johnson*, 314 N.W.2d 229, 230 (Minn. 1982) (alteration in original) (quoting *Carlson*, 267 N.W.2d at 173). "In applying this test, a court should not be unduly technical and should view the circumstances in light of the whole of the arresting officer's police experience as of the time of the arrest." *Carlson*, 267 N.W.2d at 174. Because the test for probable cause is an objective one, a search must be upheld "if there was a valid ground for the search, even if the officers conducting the search based the search on the wrong ground or had an improper motive." *State v. Pleas*, 329 N.W.2d

329, 332 (Minn. 1983). Information acquired through regular police channels can be used to support probable cause regardless of whether the arresting officer knows the underlying basis of the official suspicion. *State v. Cavegn*, 294 N.W.2d 717, 721 (Minn. 1980).

Before reaching its conclusion that there was probable cause to arrest appellant, the district court had an opportunity to listen to the testimony of Woolever and Newhouse and to review the police reports submitted as evidence. In analyzing whether there was probable cause, the district court noted that appellant was under investigation for selling prescription medications and that, as a part of that *ongoing* investigation, a CRI had participated in a controlled buy of prescription medication from appellant. The district court's findings of fact included that casino security personnel and the Red Lake police suspected that appellant was "one of several individuals possessing and/or distributing drugs and/or laundering money from drug sales inside the casino" and that both Newhouse and Woolever were "aware of [appellant] from prior and ongoing investigations, including investigations of [appellant] selling prescription medications."[1]

We are mindful that information acquired through regular police channels, like much of the information here, can be used to support probable cause. *Id.* Especially "in light of the whole of the arresting officer's police experience," we conclude that there

[1] Appellant does not challenge the credibility or reliability of the CI or the casino security personnel. Because the district court adopted in its findings of fact the information relayed by the CI and casino security personnel to Newhouse and Woolever, the district court found testimony regarding that information credible, a determination to which this court gives deference. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (providing that appellate courts defer to district court credibility determinations).

was probable cause to arrest appellant for involvement in controlled-substances crimes at the time he was handcuffed. *Carlson*, 267 N.W.2d at 174. In addition to the facts cited by the district court, evidence included that the CI told law enforcement officers that he had witnessed appellant purchase methamphetamine from Barkley, and that the casino security personnel had video indicating that either Barkley or appellant had dropped a baggie of methamphetamine inside the casino while they were sitting together at a bank of slot machines. These facts together would likely cause "a person of ordinary care and prudence to entertain an honest and strong suspicion that the person under consideration is guilty of a crime." *Id*. at 173.

Appellant argues that his arrest was not supported by probable cause because Woolever testified that he did not believe he had acquired probable cause to arrest appellant until speaking with Barkley—a conversation that occurred *after* appellant was handcuffed. In fact, many of appellant's arguments regarding whether probable cause existed at the time he was arrested are based on the subjective thoughts or beliefs of Woolever and Newhouse. These arguments are unavailing, as an officer's subjective belief that he did not have probable cause at a particular point does not mean that objective probable cause did not exist. *Beckman*, 354 N.W.2d at 436.

Appellant further argues that if probable cause to arrest him existed before October 20, then the officers would have done so. Yet, appellant cites no authority that requires law enforcement to arrest a suspect at the moment probable cause is established, and this court generally does not address argument unsupported by legal citation or analysis. *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994).

Moreover, the issue is not whether there was probable cause to support arresting appellant at some point in the past, but whether there was probable cause when he was arrested on October 20.

In a similar vein, appellant argues for the first time in his reply brief that any reliance on the ongoing investigation into appellant's sale of prescription drugs in May 2011 to support probable cause is impermissible because that information was stale at the time of arrest in October. Arguments generally cannot be raised for the first time in a reply brief. *State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009) (applying rule now found in Minn. R. Civ. App. P. 128.02, subd. 4). While there are undoubtedly temporal limits to what constitutes an "ongoing investigation," and while "[t]ime is . . . crucial to the probable cause concept," the district court found that the investigation was ongoing. *State v. Jannetta*, 355 N.W.2d 189, 193 (Minn. App. 1984), *review denied* (Minn. Jan. 14, 1985).[2] A factor that courts are to consider when analyzing whether information is stale is whether there is any indication of ongoing criminal activity. *Id*. at 193–94. Here, the support in the record regarding the ongoing nature of the investigation as it pertains to the appellant after the controlled buy in May of 2011 is minimal. However, there is sufficient evidence of appellant's involvement in ongoing controlled-substances

[2] Appellant also cites *State v. Souto*, 578 N.W.2d 744, 750 (Minn. 1998), which held six-month-old information offered in support of a search-warrant application to be stale. However, the age of information contained in a search-warrant application is qualitatively distinguishable from the length of an "ongoing investigation," as it pertains specifically to the search of a location where, after the passage of time, contraband may well no longer be present, negating probable cause for the search warrant. Here, the alleged staleness surrounded a five-month-old controlled buy, a completed felony that made appellant a felony suspect.

criminal activity at the casino between May of 2011 and October of 2011 to support the court's finding, and, consequently, the information supporting probable cause in this case was not stale.

Ultimately, because there was probable cause to arrest appellant at the time he was handcuffed, the officers were entitled to search him incident to his arrest. Because the search incident to arrest was limited and within the purpose of such a search—weapons or evidence—the seizure and search of appellant's wallet was valid.

II.

Appellant also argues that his arrest was illegal because Woolever failed to comply with Minn. Stat. § 629.35 (2010). We do not agree. Section 629.35 requires that, when making an arrest at night without a warrant, the officer shall inform the person arrested of his authority and "the cause of the arrest." The purpose of this statute is "to give notice to the person being arrested of the nature of the crime for which he is being arrested." *State v. Stark*, 288 Minn. 286, 291, 179 N.W.2d 597, 601 (1970).

Appellant was aware of the officer's authority to make the arrest—appellant knew that Newhouse and Woolever were police officers. The record shows that, before appellant was handcuffed, the officers advised him that they were aware he was on felony probation and that they would likely be contacting probation regarding the information they had received from the casino concerning their suspicions and investigation into appellant's suspected controlled-substance activities. The record also provides that appellant became irritated as the officers began speaking with him regarding the ongoing investigation of his activities at the casino. These facts indicate that appellant was aware

that he was being arrested because of his activities with controlled substances. Therefore, there was substantial compliance with the statute because appellant was on notice as to why he was being handcuffed and arrested.

Affirmed.