STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2139

State of Minnesota,
Respondent,

vs.

Kevin Dovel Clifton, Sr.,
Appellant.

Filed December 23, 2013
Affirmed
Hooten, Judge

Hennepin County District Court
File No. 27-CR-12-8718

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Charles F. Clippert, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Halbrooks, Judge; and Stauber, Judge.

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

HOOTEN, Judge

Appellant Kevin Clifton, Sr., was convicted of being a prohibited person in possession of a firearm after police found a handgun during a search of his vehicle.

Before trial, Clifton moved to suppress the gun, arguing that officers impermissibly exceeded the scope of his traffic stop and that the vehicle search was unreasonable. The district court denied the motion, and we affirm because the police officers' actions were reasonable under the circumstances.

FACTS

Minneapolis police officer Jomar Villamor was conducting surveillance for a narcotics investigation on March 20, 2012, when he and other officers noticed the driver of a white Chevrolet Tahoe behaving suspiciously. After the suspect of the investigation was pulled over, the Tahoe's driver—later identified as Clifton—passed the traffic stop, circled the block, waited several seconds at a stop sign facing the traffic stop, and slowly passed the traffic stop again. He then turned into a parking lot and positioned his vehicle facing toward the traffic stop. Clifton was on his phone and appeared to have a lot of interest in the traffic stop. This caused Officer Villamor to become concerned. Clifton had exited a building with the suspect and others moments before the suspect's traffic stop. Officer Villamor thought that Clifton might compromise the narcotics investigation, alert others that the suspect had been arrested, and that Clifton may have had bad intentions toward the squad car transporting the suspect.

When the suspect was placed in the back of a marked squad car, Clifton exited the parking lot and began to follow the squad car. Officer Villamor, who was driving an unmarked vehicle, saw that an upcoming traffic light was about to turn red, so he positioned himself between the squad car and Clifton's Tahoe. The squad car was able to turn before the light turned red, but Officer Villamor stopped. Instead of also stopping,

Clifton abruptly turned without signaling and drove through a nearby parking lot. His engine revved and his tires squealed as he exited the parking lot and drove away at a high rate of speed toward the squad car.

Convinced that Clifton intended to catch up with the squad car, Officer Villamor instructed another officer to stop the Tahoe. Once Clifton was pulled over, Officer Villamor and a group of fellow officers approached the Tahoe with their guns drawn. They ordered Clifton to exit his vehicle, but Clifton indicated that he could not open his door from the inside. Officer Villamor opened it for him and asked Clifton to exit, which he did. Officer Villamor smelled marijuana emanating from the inside of the Tahoe. When asked about the odor, Clifton said that he had just finished smoking marijuana and had marijuana in the vehicle. Clifton was then handcuffed and driven to the police unit's office in Officer Villamor's vehicle.

Soon after, Officer Thomas Fahey and Torren, his canine partner, arrived to search Clifton's Tahoe. The vehicle was moved before the search because Clifton did not stop on the side of the road and there was heavy rush-hour traffic. Officer Fahey noticed a strong odor of marijuana when he opened the driver's door. At his direction, Torren sniffed through the vehicle and alerted him to several locations. Officer Fahey observed marijuana flakes and seeds on the floor below the driver's seat and in the cup holders. When he removed a set of rear cup holders connected to the vehicle's center console, he found a .45-caliber semiautomatic handgun inside.

On March 22, 2012, Clifton was charged with being a prohibited person in possession of a firearm, in violation of Minn. Stat. § 624.713, subd. 1(2) (2010). Before

trial, Clifton moved to suppress all evidence found during the search of his vehicle, arguing that the stop and search were illegal. The district court denied Clifton's motion, and a jury found Clifton guilty on August 31, 2012. Clifton appeals.

D E C I S I O N

Clifton challenges the district court's denial of his suppression motion. When reviewing pretrial orders on motions to suppress evidence, we examine the facts to determine whether the district court erred as a matter of law by failing to grant the motion. *State v. Flowers*, 734 N.W.2d 239, 247 (Minn. 2007). Because the parties here do not dispute the facts, our review is de novo. *See id.*

Both the United States and Minnesota Constitutions guarantee the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. We determine the reasonableness of a seizure made during a traffic stop using the principles of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968). *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004). "*Terry* allows a police officer to stop and temporarily seize a person to investigate that person for criminal wrongdoing if the officer reasonably suspects that person of criminal activity." *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011) (quotation omitted).

Under *Terry*, the standard for temporarily stopping a person is not high. *Id.* at 842–43. Police must have more than a hunch, but a reasonable suspicion of wrongdoing based on specific, articulable facts is enough. *Id.* Here, Officer Villamor saw Clifton commit several traffic violations—following too closely, turning without signaling, speeding, and driving carelessly. These observations provided more than enough reason

to stop Clifton. *See State v. George*, 557 N.W.2d 575, 578 (Minn. 1997) (Ordinarily, "if an officer observes a violation of a traffic law, however insignificant, the officer has an objective basis for stopping the vehicle").

Having established that the stop was reasonable, we must address the police's subsequent actions. "An initially valid stop may become invalid if it becomes intolerable in its intensity or scope." *Askerooth*, 681 N.W.2d at 364 (quotations omitted). Each incremental intrusion must be tied to and justified by "(1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness, as defined in *Terry*." *Id.* at 365.

After stopping Clifton, the police officers ordered him out of his vehicle. This request was clearly permissible. *See Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S. Ct. 330, 333 n.6 (1977) ("[O]nce a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment."); *Askerooth*, 681 N.W.2d at 367 ("[A] police officer may order a driver out of a lawfully stopped vehicle without an articulated reason.").

But in addition to telling Clifton to exit his vehicle, the group of police officers approached him with their guns drawn, which increased the significance of the intrusion. Clifton was seized at this point because a reasonable person in a similar situation would not feel free to leave. *See State v. Fort*, 660 N.W.2d 415, 418 (Minn. 2003) ("[A] person is seized if a reasonable person, under the circumstances, would not feel free to disregard the police questions or to terminate the encounter."). The fact that Clifton had committed minor traffic violations cannot justify this intrusion, and whether the police had

independent probable cause to suspect Clifton of a crime at this point is questionable. To justify the seizure, therefore, the police's actions must have been reasonable.

Whether an intrusion is reasonable depends on an objective analysis: would a reasonably cautious person believe the action was appropriate based on the facts available at the time? *Askerooth*, 681 N.W.2d at 364. The facts available when Clifton was seized were as follows. The police were in the midst of a narcotics investigation involving numerous officers. They had made a controlled purchase of an illegal substance from the investigation's suspect, obtained a warrant to search the suspect's home, and planned to arrest the suspect prior to executing the search warrant. While conducting surveillance of the suspect, the officers saw the suspect exit a barber school in Minneapolis with a group of individuals, including Clifton. The officers stopped and arrested the suspect when he left in his vehicle. During the stop, Clifton passed by slowly, circled the block, lingered at a stop sign, passed by again, and parked facing the stop. Clifton was on a cell phone and showing a high interest in the suspect's arrest. After the suspect was arrested and placed in a squad car, Clifton exited the parking lot and began following the squad car and driving erratically to keep up with it.

Based on these facts, a reasonable person would believe that the officers' actions—drawing their weapons and ordering Clifton out of his vehicle—were appropriate. There was reason to believe that Clifton held ill intentions and posed a threat to the safety of the officer driving the squad car. The police had seen Clifton with the suspect moments before, and Clifton had demonstrated a clear interest in the suspect's

arrest and intent to follow the squad car. Accordingly, the seizure of Clifton after stopping him in his vehicle was reasonable.[1]

Clifton also contests the reasonableness of the search of his vehicle. Once police took Clifton away and moved his vehicle to a safer location, Officer Fahey and his canine partner searched the vehicle. Warrantless searches are per se unreasonable unless they fall within a specific exception. *State v. Search*, 472 N.W.2d 850, 852 (Minn. 1991). The automobile exception to the warrant requirement provides that police may search a vehicle without a warrant if probable cause exists to believe that the search will uncover evidence or contraband. *Id.*

Probable cause to support a warrantless vehicle search must be based on facts that could objectively justify the issuance of a warrant. *State v. Craig*, 807 N.W.2d 453, 465 (Minn. App. 2011), *aff'd* (Minn. Feb. 27, 2013). The officer must know of facts and circumstances that would cause a reasonably cautious person to believe that the automobile contains contraband. *Id.* When an officer smells marijuana coming from inside a vehicle, probable cause exists to search the vehicle. *State v. Schultz*, 271 N.W.2d

[1] Even if Clifton's seizure was unreasonable, it does not necessarily follow that the district court should have suppressed the gun found in his vehicle. The independent source doctrine permits the "introduction of otherwise illegally seized evidence if the police could have retrieved it on the basis of information obtained independent of their illegal activity." *State v. Richards*, 552 N.W.2d 197, 203 n.2 (Minn. 1996). Thus, we must ask "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *State v. Warndahl*, 436 N.W.2d 770, 775 (Minn. 1989) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417 (1963)). Clifton's gun was found from the search of his vehicle, not his seizure. Therefore, assuming that Clifton's seizure was illegal, the discovered gun was not necessarily tainted because it came from an independent source.

836, 837 (Minn. 1978) (stating that automobile exception permitted officer to search vehicle without warrant if he smelled marijuana emanating from passenger compartment); *State v. Hodgman*, 257 N.W.2d 313, 315 (Minn. 1977) ("Once he smelled the marijuana, [the police officer] had probable cause to arrest defendant and conduct a full search of both defendant and the car."); *State v. Ortega*, 749 N.W.2d 851, 854 (Minn. App. 2008) ("[T]he odor of marijuana provides an officer with probable cause to suspect criminal activity."), *aff'd*, 770 N.W.2d 145 (Minn. 2009); *cf. State v. Doren*, 654 N.W.2d 137 (Minn. App. 2002) ("The odor of burned marijuana inside a stopped motor vehicle provides probable cause for the search of the vehicle's occupants."), *review denied* (Minn. Feb. 26, 2003).

Officers Villamor and Fahey both testified that they smelled marijuana emanating from the inside of Clifton's vehicle when they opened the driver's door,[2] and Clifton admitted to having just finished smoking marijuana and having marijuana in his vehicle. Based on these facts, it was reasonable for the officers to suspect that a search of Clifton's vehicle would uncover contraband. Probable cause existed to search Clifton's vehicle, and the automobile exception permitted the warrantless search.

Clifton asserts that the automobile exception is inapplicable because his car was immobile once he pulled over and the police took control and therefore no exigent

[2] Clifton argues that the officers' testimony about smelling marijuana is not credible. He claims that because the subsequent search of his vehicle revealed only flakes and seeds of marijuana and no smoking paraphernalia, we should not believe the officers' testimony. We do not weigh evidence and defer to the district court's judgment of witnesses' credibility. *State v. Schluter*, 653 N.W.2d 787, 793 (Minn. App. 2002), *review denied* (Minn. Feb. 18, 2003).

circumstances were present. In support he quotes *State v. Johnson*, 277 N.W.2d 346, 349 (Minn. 1979), in which the Minnesota Supreme Court explained that the original justification for the automobile exception was that "the inherent mobility of vehicles creates exigencies which make it impractical to obtain a warrant before the search is conducted." But we have since acknowledged that the U.S. Supreme Court no longer recognizes an exigency requirement. *State v. Pederson-Maxwell*, 619 N.W.2d 777, 782 (Minn. App. 2000). The exception requires solely probable cause to believe that the vehicle contains contraband. *Id.* Moreover, a warrantless search conducted pursuant to the automobile exception may be conducted at the scene or at another location at a later time. *State v. Johnson*, 324 N.W.2d 199, 202 (Minn. 1982).

Because the stop, seizure, and search of Clifton and his vehicle were reasonable, the district court did not err by denying Clifton's motion to suppress the gun found during the search of his vehicle.

Affirmed.