STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0625

State of Minnesota,
Respondent,

vs.

Andre L. Carter,
Appellant.

Filed April 28, 2009
Affirmed
Connolly, Judge

Ramsey County District Court
File No. K3-05-4546

Lori Swanson, Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Lydia Villalva Lijo, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

¬¬¬¬¬¬¬¬¬¬¬¬¬ Considered and decided by Connolly, Presiding Judge; Hudson, Judge; and Randall, Judge.*

U N P U B L I S H E D¬¬ O P I N I O N

CONNOLLY, Judge

Appellant challenges his conviction of felony controlled-substance crime in the second degree, contending that there was no probable cause to arrest him and search his vehicle. The district court denied appellant's motion to suppress the evidence. Because appellant was detained and not arrested at the time of the search, and because the search was justified pursuant to the automobile exception to the warrant requirement, we affirm.

FACTS

On the evening of December 27, 2005, Saint Paul Police Officers Chad Degree and Darryl Boerger were monitoring the area near a British Petroleum (BP) service station on University Avenue. Officer Degree testified that the police frequently encounter narcotics dealings at the station and have received numerous citizen complaints of drug dealing, fights, and disorderly persons.

The officers, standing across the street from the station, watched as a silver Chevrolet Tahoe entered the lot and parked. The male driver, later identified as appellant Andre Carter, exited the Tahoe and urinated on the side of the building. He then entered the station's convenience store. After appellant entered the store, a green Ford Explorer entered the lot and parked. The male driver of the Explorer exited his vehicle and peered in the driver's side window of the Tahoe. He then entered the store, briefly talked to appellant, and both men exited the building and proceeded to the Tahoe. Both men entered the Tahoe. The windows of the Tahoe were tinted, preventing the officers from seeing any activity inside the vehicle. After approximately five minutes, the driver of the Explorer exited the Tahoe, returned to the Explorer, and both vehicles exited the lot.

The police officers, based on their experience and training, suspected that the two men had just engaged in a street-level drug deal. The officers

located the Tahoe approximately two minutes later parked in a lot at a club located a few blocks away from the service station. The officers identified the vehicle based on its license plate number. The officers parked the squad car and approached the Tahoe on foot. The officers observed that there were two occupants in the Tahoe and saw smoke coming from the driver's side window. As they approached, the officers smelled burned marijuana and saw money and three cell phones in appellant's lap.

The officers decided to remove both appellant and the passenger from the vehicle. Officer Degree testified at the suppression hearing that Officer Boerger requested that appellant exit the vehicle and when he refused to comply, Officer Boerger removed appellant from the Tahoe.[1] After appellant attempted to flee, Officer Boerger placed appellant in handcuffs and put him in the back of another officer's squad car. Officer Degree removed the passenger, A.H., from the vehicle.[2] Once both occupants were removed from the vehicle, the officers conducted a full search of the Tahoe which led to the discovery of marijuana, "crack" cocaine, and powder cocaine.

A.H. testified at the suppression hearing that the windows were rolled up and no one in the vehicle had smoked marijuana. A.H. further stated that he and appellant were forced from the vehicle and thrown to the ground at gunpoint.

Appellant was charged by complaint in Ramsey County District Court with felony second-degree controlled substance crime in violation of Minn. Stat. §§ 152.022 subd. 1(1), 609.05, subd. 1 (2004). At the suppression hearing, appellant challenged his seizure, detention, and arrest by the officers and moved to suppress the marijuana and cocaine found in his motor vehicle on the date of the

offense. ☐After finding Officer Degree☐s testimony to be credible, the district court denied appellant☐s motion to suppress.

Appellant waived his right to a jury trial and proceeded pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). ☐The district court found appellant guilty as charged and ordered appellant to serve an executed prison term of 68 months.☐ This appeal follows.

D E C I S I O N

Appellant argues that his arrest was not supported by probable cause and the drugs obtained as a result of the search incident to his arrest should have been suppressed.☐ ☐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 United States Supreme Court has stated that generally, warrantless searches and seizures are per se unreasonable. ☐*Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967).☐ But not all contact between a citizen and a police officer constitutes a ☐seizure.☐☐ *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993). ☐No seizure occurs when a police officer walks up and talks to a driver sitting in an already stopped car.☐ *State v. Vohnoutka*, 292 N.W.2d 756, 757 (Minn. 1980).☐ In this case, the officers were merely conducting an investigation of an already stopped vehicle.☐ Therefore, there was no need for the officers to suspect criminal activity in order to approach the Tahoe.

Police may search a vehicle without a warrant, pursuant to the automobile exception, if they have probable cause to believe the vehicle contains contraband or other evidence of criminal conduct. ☐*Maryland v. Dyson*, 527 U.S. 465, 467, 119 S.

Ct. 2013, 2014 (1999).[illegible] Probable cause determinations are based on the totality of the circumstances.[illegible] *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995). [illegible]Probable cause to search exists where there is a [illegible]fair probability that contraband or evidence of a crime will be found in a particular place.[illegible] [illegible]*Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983).[illegible]

[illegible][T]he detection of odors alone, which trained police officers can identify as being illicit, constitutes probable cause to search automobiles for further evidence of crime.[illegible] [illegible]*State v. Pierce*, 347 N.W.2d 829, 833 (Minn. App. 1984).[illegible] Specifically, the odor of burned marijuana inside a stopped motor vehicle provides probable cause to search the vehicle and its occupants. [illegible]*State v. Hodgman*, 257 N.W.2d 313, 315 (Minn. 1977).

Appellant concedes that officers have probable cause to search occupants of a vehicle based on the odor of marijuana.[illegible] Furthermore, the district court found that the officers saw appellant urinate on the side of a building, observed actions by appellant consistent with the sale of narcotics, saw smoke coming from the window of appellant[illegible]s vehicle, smelled burned marijuana, and observed three cell phones and money in appellant[illegible]s lap. [illegible]The fact that there might have been an innocent explanation for the suspect[illegible]s conduct at the BP service station, or that the occupants of the vehicle were not smoking marijuana, does not preclude the finding of probable cause at the time the officers made that assessment. [illegible]*See State v. Hawkins*, 622 N.W.2d 576, 580 (Minn. App. 2001) ([illegible]The fact that there might have been an innocent explanation for [the defendant[illegible]s] conduct does not demonstrate that the officers could not reasonably believe that [the defendant] had committed a crime.[illegible]).[illegible] Therefore, the district court did not err in determining the search of the

vehicle was supported by probable cause and was justified pursuant to the automobile exception to the warrant requirement.

Appellant further argues that he was arrested when the officers removed him from the vehicle, placed him on the ground, handcuffed him, and detained him in the back of the squad car.[3] ☐Appellant contends that the district court failed to analyze whether this seizure and arrest were separately justified by probable cause.

Typically, issues which are not first addressed by the district court and are raised for the first time on appeal will not be decided, even if the issues involve constitutional questions regarding criminal procedure. ☐*State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989). ☐However, the court may, at its discretion, decide to hear such issues when the interests of justice require their consideration and addressing them would not work an unfair surprise on a party. ☐☐*Id.*☐ While the district court did not directly analyze whether the arrest of appellant was justified or when the arrest took place, the district court noted that appellant was *placed in handcuffs* prior to the search and *arrested* after the search of the vehicle was conducted. ☐

The district court found Officer Degree☐s testimony more credible than A.H. and rejected A.H.☐s claim that the officers threw him and appellant on the ground at gunpoint. ☐The district court☐s credibility determinations must be afforded ☐great deference☐ on appeal. ☐*State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff☐d*, 508 U.S. 366, 113 S. Ct. 2130 (1993). ☐☐The [district] court☐s findings will not be reversed upon review unless clearly erroneous or contrary to law.☐ ☐*Id.* (quotation omitted).

A person has been seized when, ☐in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter.☐

State v. Cripps, 533 N.W.2d 388, 391 (Minn. 1995). A reasonable person would not believe that he or she has been seized when an officer merely approaches that person in a public place and begins to ask questions. *Id.*

The law differentiates between an investigative seizure and an arrest. The factual basis required to justify an investigative seizure is minimal. *State v. Haataja*, 611 N.W.2d 353, 354 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. July 25, 2000). An investigative seizure is less intrusive than an arrest and therefore requires only an articulable basis for suspecting criminal activity. *Michigan v. Summers*, 452 U.S. 692, 699, 101 S. Ct. 2587, 2592-93 (1981). The police must show that the seizure was not the result of mere whim, caprice, or idle curiosity. *State v. Munson*, 594 N.W.2d 128, 136 (Minn. 1999) (quotation omitted). During a lawful investigative seizure, officers may handcuff a suspect and place the suspect in the back of a squad car if necessary to ensure officer safety or the integrity of the on-scene investigation. *Id.* at 137.

Here, appellant was initially subjected to an investigative seizure and not an arrest. The officers, based on their observations at the BP service station and the odor of burned marijuana, had probable cause to search the vehicle and to remove the occupants of the vehicle in order to facilitate that search. Once Officer Boerger removed appellant and appellant attempted to flee the scene, Officer Boerger was justified in placing appellant in handcuffs and putting him in the back of a squad car to ensure the safety of the officers and the integrity of the search.

Appellant, in his pro se brief, argues that the police officers actions were pretextual and unjustified by probable cause or reasonable suspicion. We disagree.

Based on the record and the court's findings, the district court did not err in holding that the officers objectively and reasonably believed that there were narcotics

in the vehicle. Therefore, the officers had probable cause to search the vehicle and detain appellant until the search was completed.

Affirmed.

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, ¬ 10.

[1] Neither Officer Boerger nor appellant testified at the suppression hearing.

[2] A.H. was not handcuffed or placed in a squad car but was monitored by other officers while the search was conducted.

[3] Appellant cites to *State v. Blacksten* to support the argument that he was arrested at the time he was removed from the vehicle, handcuffed, and confined in the back of a squad car.¬ 507 N.W.2d 842, 846 (Minn. 1993).¬ However, in *Blacksten* a determinative factor in concluding that it was an arrest and not a reasonable pre-arrest detention was the lack of intention by the police officers to conduct any investigation during the detention.¬