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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1887**

State of Minnesota,
Respondent,

vs.

Chakotay Bobbie Johnson,
Appellant.

**Filed December 11, 2017
Affirmed
Reyes, Judge
Jesson, Judge, Dissenting**

St. Louis County District Court
File No. 69DU-CR-15-4365

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

Mark S. Rubin, St. Louis County Attorney, Jessica J. Fralich, Assistant County Attorney,
Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Reilly, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

REYES, Judge

On appeal from his conviction of first-degree sale of a controlled substance, appellant argues that the district court erred in denying appellant's motion to suppress evidence obtained during an unlawful seizure. We affirm.

FACTS

In November and December 2015, law enforcement received information from two confidential reliable informants (CRIs) that an apartment located on Grand Avenue in Duluth was being used to sell heroin. The CRIs informed the officers that two residents of the apartment were working with a group of black males from Chicago, Illinois, and selling heroin in an area behind the apartment. The CRIs did not know the apartment residents by name. The investigating officers conducted surveillance of the apartment and observed the two residents, A.C. and A.R., engage in hand-to-hand drug transactions. The officers also learned that the group from Chicago was in Duluth at that time and typically brought substantial quantities of heroin. On December 6, 2015, the officers obtained a warrant to search the apartment.

The next morning, the officers surveilled the apartment prior to executing the search warrant. At approximately 10:43 a.m., the officers observed A.C., A.R., and an unknown black male, later identified as appellant Chakotay Bobbie Johnson, arrive in a white Toyota Corolla registered to A.C. and park near the apartment. They exited the vehicle and walked toward the front door of the apartment. The officers observed appellant carrying a bulky object, later determined to be a black bag, concealed underneath a blanket.

After they walked past the front of the apartment building, two officers in plain clothes drew their guns and ordered all three to lie face down on the ground. Three additional officers joined to secure and handcuff them. One officer approached appellant to place handcuffs on him, and a second officer knelt by appellant to move the black bag from his reach. From their vantage points, both officers could see inside appellant's unzipped right jacket pocket and observed a baggie containing numerous smaller baggies and what appeared to be heroin in plain view.

The officers placed appellant under arrest and searched him. They discovered 61 individually wrapped baggies of suspected heroin, weighing 32.4 grams, on his person. The suspected heroin field-tested positive for heroin. The officers also discovered \$7,440 in U.S. currency and assorted clothing and personal items within the black bag. The state charged appellant with felony first-degree sale of a controlled substance in violation of Minn. Stat. § 152.021, subd. 1(1) (2014).

Prior to trial, appellant filed a motion to suppress the heroin, arguing that it was the fruit of an unlawful seizure. The district court denied appellant's motion and determined that the officers' seizure of appellant was reasonable in view of the circumstances of the situation and law-enforcement interests, particularly officer safety. Appellant filed a motion to reconsider, which the district court denied.

Appellant waived his right to a jury trial and agreed to proceed to trial before the district court to preserve appellate review of the pretrial suppression ruling pursuant to Minn. R. Crim. P. 26.01, subd. 4. The district court convicted appellant of felony first-degree sale of a controlled substance. This appeal follows.

DECISION

On a stipulated-evidence trial pursuant to Minn. R. Crim. P. 26.01, subd. 4, our review “is limited to the pretrial order that denied the motion to suppress.” *State v. Sterling*, 782 N.W.2d 579, 581 (Minn. App. 2010). “[W]e 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). We review the district court’s factual findings for clear error. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008). When the facts are not in dispute, as here, we review the pretrial decision de novo and “determine whether the police articulated an adequate basis for the search or seizure at issue.” *State v. Flowers*, 734 N.W.2d 239, 247-48 (Minn. 2007).

Here, the parties agree that the officers seized appellant. The only issue in dispute is whether the officers *lawfully* seized appellant.

I. The officers’ seizure of appellant was not authorized as a detention incident to the execution of a search warrant because appellant did not occupy the apartment subject to the search warrant.

The district court analyzed the facts using a *Summers* analysis. Appellant challenges the district court’s denial of his motion to suppress evidence, arguing that the *Michigan v. Summers* rule, which authorizes detention incident to the execution of a search warrant, is inapplicable because appellant was a nonoccupant of the apartment subject to the search warrant. *See* 452 U.S. 692, 705, 101 S. Ct. 2587, 2595-96 (1981). We agree.

The Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution guarantee 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; Minn. Const. art. 1, § 10. As a general rule, a seizure is unreasonable unless it is based on probable cause to believe that the person has committed a crime. *Bailey v. United States*, 568 U.S. 186, 192, 133 S. Ct. 1031, 1037 (2013). As an exception to this general rule, the United States Supreme Court held in *Michigan v. Summers* that a search warrant “implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.” 452 U.S. at 705, 101 S. Ct. at 2595.

The Supreme Court did not define “occupant” in the *Summers* decision and has not since expanded on a definition. *United States v. Johnson*, 640 F.3d 843, 845 n.3 (8th Cir. 2011). However, the Supreme Court’s rationale in *Summers* suggests that it limited its holding to individuals residing at the place to be searched. 452 U.S. at 704-05, 101 S. Ct. at 2595. The Supreme Court concluded that, on balance, the interests of law enforcement during the execution of a search warrant are substantial compared to the slight increase in the intrusion on individual liberty when a person whose residence is already subject to a search is also detained. *Id.* at 703, 101 S. Ct. at 2594; *Muehler v. Mena*, 544 U.S. 93, 98 125 S. Ct. 1465, 1469 (2005). An “occupant” is “one who occupies a particular place; especially: RESIDENT.” *Merriam-Webster’s Collegiate Dictionary* 858 (11th ed. 2014). Neither the State nor the district court cited caselaw where the detention of a nonoccupant was justified based solely on the *Summers* rule.

Here, no facts show that appellant resided at or occupied the apartment subject to the search warrant and the officers detained him outside of the apartment. Appellant produced an Illinois ID after his arrest, and the officers had not observed him at the apartment before detaining him. Moreover, the district court referred to appellant as a

nonoccupant of the apartment. The state also conceded in its brief and at oral argument that appellant was a nonoccupant. We conclude that appellant was neither an occupant of the apartment nor subject to the search warrant and his detention cannot be justified solely on the basis of *Summers*.¹

II. The officers' seizure of appellant was authorized as an investigatory detention because the officers possessed a reasonable, articulable basis to suspect appellant of criminal activity.

The state alternatively argues that the officers had a reasonable, articulable suspicion to detain appellant. We may consider an alternative argument when the record contains sufficient facts to support our consideration. *State v. Bunce*, 669 N.W.2d 394, 400 (Minn. App. 2003) (citing *State v. Grunig*, 660 N.W.2d 134 (Minn. 2003)), *review denied* (Minn. Dec. 16, 2003). At the hearing on appellant's motion to reconsider, the district court suggested that the police reports did not support the state's argument. However, in its order denying appellant's suppression motion, the district court relied in part on *State v. Bitterman*, 304 Minn. 481, 232 N.W.2d 91 (1975). In *Bitterman*, the Minnesota Supreme Court affirmed the detention and frisk of a nonoccupant who had arrived at a residence during the execution of a search warrant. *Id.* at 484-85, 232 N.W.2d at 94. The supreme court concluded that the detention was justified because the officers had reasonable, articulable suspicion in light of the circumstances and facts of the situation. *Id.*

Here, the district court evaluated both the *Summers* law-enforcement interests and the circumstances and facts known to the officers at the time of appellant's detention and

¹ We need not address appellant's additional arguments concerning the inapplicability of the *Summers* rule.

determined that it was reasonable to detain appellant. We conclude that the reasonable-suspicion argument is properly before this court.

A. The officers had a reasonable, articulable suspicion of criminal activity.

Appellant argues that the officers did not articulate a reasonable basis for detaining him. We disagree.

Under *Terry v. Ohio*, a police officer may temporarily seize a person if the officer has a reasonable, articulable basis to suspect that person of criminal activity. *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011) (discussing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968)). To determine whether an investigatory detention is reasonable, we ask “whether the stop was justified at its inception . . . [and] 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.” *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (citing *Terry*, 392 U.S. at 19-20, 88 S. Ct. at 1879).

The reasonable-suspicion standard is not high, but cannot be based solely on a hunch. *Diede*, 795 N.W.2d at 843. The subjective beliefs of the officer are not the focus of our inquiry. *State v. Lemert*, 843 N.W.2d 227, 231 (Minn. 2014). We apply a totality-of-the-circumstances test to review the officer’s suspicion from the perspective of a reasonable officer in light of any inferences and deductions drawn from the officer’s training and experience. *State v. Smith* 814 N.W.2d 346, 351-352 (Minn. 2012). We review the constitutional basis for the seizure de novo. *Flowers*, 734 N.W.2d at 248.

The district court noted the following facts and circumstances available to the officers at the time of appellant’s detention: (1) information of illegal drug trafficking

occurring at the apartment occupied by A.C. and A.R.; (2) observation of A.C. and A.R. selling heroin; (3) possession of a probable-cause warrant to search the apartment for narcotics; (4) information that a group of black males from Chicago was supplying substantial quantities of heroin to the area, was working with A.C. and A.R. to sell heroin, and had recently brought a supply; (5) observation of appellant, a black male, arriving with A.C. and A.R. in their car; and (6) observation of appellant accompanying A.C. and A.R. toward the front door of the apartment the officers were about to search. The officers also observed appellant carrying a bulky object concealed underneath a blanket as he accompanied the occupants toward their apartment.

In light of the circumstances presented here, where appellant arrived in the company of A.C. and A.R., suspected heroin dealers, matched the race and gender description of individuals suspected of supplying heroin to A.C. and A.R., accompanied them toward the precise location for which law enforcement had obtained a narcotics search warrant, and carried a large concealed object, we conclude that the officers had a reasonable, articulable basis to suspect appellant of criminal activity sufficient to temporarily detain him.

B. The officers did not exceed the permissible scope of the investigatory detention.

Appellant argues that, even if the officers justifiably detained him, they exceeded the permissible scope of an investigatory detention by performing a de facto arrest when they drew their weapons, ordered him to lie face down on the ground, and handcuffed him. We disagree.

An investigatory detention justified at its inception “may become invalid if it becomes ‘intolerable’ in its ‘intensity or scope.’” *Askerooth*, 681 N.W.2d at 364 (quoting *Terry*, 392 U.S. at 17-18, 88 S. Ct. at 1878). There is no bright-line test to distinguish an investigatory detention from an unlawful arrest. *State v. Balenger*, 667 N.W.2d 133, 139 (Minn. App. 2003), *review denied* (Minn. Oct. 21, 2003). “Unduly intrusive police conduct may, but does not automatically, transform an otherwise legitimate investigative stop into an unlawful arrest.” *Id.* Police officers may take reasonable precautions to protect themselves during an investigatory detention and may order suspects to lie on the ground. *State v. Nading*, 320 N.W.2d 82, 84 (Minn. 1982). They may also proceed with weapons ready when the officers have a reasonable suspicion that a person may be armed. *State v. O’Neill*, 299 Minn. 60, 68, 216 N.W.2d 822, 828 (1974). In addition, “briefly handcuffing a suspect while the police sort out the scene of an investigation does not per se transform an investigatory detention into an arrest” *State v. Munson*, 594 N.W.2d 128, 137 (Minn. 1999). In these situations, we balance the intrusiveness and forcefulness of the stop against the legitimate officer-safety concerns, and determine, in light of the available facts, whether a person of reasonable caution would believe that the action taken is appropriate. *Balenger*, 667 N.W.2d 133, 139.

Here, the investigatory detention involved multiple suspects, two of whom law enforcement had observed selling heroin. The officers reported officer safety as their primary concern in securing appellant along with A.C. and A.R. In light of their training and experience, the officers understood the potential volatility and officer safety risks involved in executing a search warrant for narcotics, and the potential for weapons to be

present. The officers had an additional reason to be cautious when they approached appellant because he carried a large concealed object. Because “a substantial nexus exists between drug dealing and violence,” it is reasonable for police officers to believe that a person suspected of being involved in drug transaction may be armed and dangerous. *Lemert*, 843 N.W.2d at 232. Further, the execution of a warrant to search for narcotics may elicit sudden violence. *Summers*, 452 U.S. at 702-03, 101 S. Ct. at 2594. Under these circumstances, “the risk of harm . . . is minimized if officers exercise unquestioned command of the situation.” *Id.* We conclude that the officers did not exceed the permissible scope of the investigatory detention and acted reasonably. The officers lawfully observed, from their vantage points, the baggie of suspected heroin, justifying the custodial arrest and full search of appellant incident to arrest. The evidence was therefore lawfully seized.

Affirmed.

JESSON, Judge (dissenting)

I respectfully dissent. While I agree with the majority’s careful analysis of the *Michigan v. Summers* rule, as well the conclusion that the officers had a reasonable, articulable suspicion for their initial seizure of Johnson, reasonableness is not without limits. The officers did not detain Johnson for a traditional “stop and frisk.” Rather, they drew their guns, forced Johnson at gunpoint to lie prone on the ground, and began to handcuff him—simply because Johnson was in the company of suspected drug dealers and matched the race of men who may have been associated with possible drug dealing activities. By the time Johnson was handcuffed, there were a total of five officers on the scene. While this show of force may have been justified with regard to the two suspects—given that the officers had a search warrant for their apartment—the aggressive nature of the stop lacked justification with regard to Johnson.

The Fourth Amendment protected Johnson as he walked down the sidewalk in Duluth. It protected him from unreasonable searches and seizures just as it protects each of us from any government overreach. But the Constitution generally permits a search and seizure where police obtain a warrant from a neutral and detached magistrate who has determined that there is probable cause for this governmental intrusion. *State v. McBride*, 666 N.W.2d 351, 362 (Minn. 2003). This does not mean that officers must allow crimes to unfold before them, or that they should place themselves in harm’s way while they apply for search warrants. To the contrary, if police have a reasonable suspicion that criminal activity is brewing, a temporary seizure is justified. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884 (1968). But to “be reasonable under the Fourth Amendment, an

investigative stop must be limited in scope and duration to its initial justification.” *State v. Balenger*, 667 N.W.2d 133, 139 (Minn. App. 2003) (citing *Terry*, 392 U.S. at 19-20, 88 S. Ct. at 1879 (1968)), *review denied* (Minn. Oct. 21, 2003).

For Johnson, the initial justification for the stop was slender. As the district court correctly noted, “[I]t does not appear from the record that the officers had any information regarding [Johnson] specifically.” What the officers knew, according to the district court, was that the suspected drug dealers “were operating with at least one other individual, likely a black man from Chicago; and that [Johnson] was going to walk into the residence with suspected drug dealers right before a search warrant was going to be executed.”

I agree that this slender reed provided justification to detain Johnson under *Terry*. As the Minnesota Supreme Court noted in *State v. Lemert*, a car passenger will often be involved in a common enterprise with the driver, an important fact in a totality-of-the-circumstances analysis. 843 N.W.2d 227, 232 (Minn. 2014). But a *Terry* analysis does not end here. It also inquires 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.” *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004). Here, neither the facts nor our precedent justify the scope and aggressive nature of this *Terry* stop.

What did police know about Johnson at the time? They knew he was a black man, matching the race of men purportedly working with the apartment tenants to distribute drugs. They also knew that Johnson was in a vehicle with the tenants and was walking

with them toward the apartment.² And police knew that, by the time they forced Johnson to the ground and began placing him in handcuffs, five officers were on the scene.³ Given the limited information the police knew about Johnson at the time of detention (his race, gender, and the company he kept) and the number of officers at the scene, a reasonable person would not think descending upon Johnson with weapons drawn was appropriate. *See, e.g., Balenger*, 667 N.W.2d at 139 (applying an objective standard to determine whether forceful tactics were justified, given what police knew at time of detention).

Minnesota precedent cautions restraint, not aggressive tactics, where police detain a person without individualized suspicion. In *Lemert*, for example, where the court upheld the detention of the passenger in a car driven by a suspected drug dealer, the question before the court was the legality of a *pat search* for weapons. *Lemert*, 843 N.W.2d at 231-32; *see also State v. Varnado*, 582 N.W.2d 886, 890 (Minn. 1998) (concluding that a pat search for weapons was unreasonable where suspect was stopped for a minor traffic violation and there was no reasonable basis to suspect she was armed or dangerous). Only where there

² The majority points out that, according to police reports, Johnson was carrying a bag and a blanket, but the record is inconsistent on this point. For instance, one officer's report states that Johnson was holding an item wrapped in a blanket which, after unwrapping, revealed the bag. Another officer's report says that Johnson was carrying a blanket and a bag when he was detained. But importantly, none of the officers' reports stated that the bag was a factor in their decision to detain and search Johnson. They relied only on the fact that he was a black man in the company of suspected drug dealers.

³ The record shows that two officers approached Johnson and the tenants with their weapons drawn and ordered them to the ground. Three more officers quickly arrived and began handcuffing the three individuals. In weighing whether police have exceeded the scope of a permissible *Terry* stop, the Minnesota Supreme Court considers a variety of factors, including the number of officers present. *State v. Flowers*, 734 N.W.2d 239, 253 (Minn. 2007) (quotation omitted).

is specific information that an individual may be armed and dangerous have the courts upheld aggressive tactics in making a reasonable investigatory stop. See, e.g., *State v. Bitterman*, 304 Minn. 481, 484-85, 232 N.W.2d 91, 93-94 (1975) (concluding a forcible stop of defendant at gunpoint was justified where defendant arrived with another person at duplex that was subject of search warrant and police recognized defendant as a heavy heroin user and officers knew it was common for heroin users to carry weapons); *Balenger*, 667 N.W.2d at 140 (concluding that grabbing an individual and forcing him to halt may elevate investigative stop into an arrest in other cases, but in this case it was reasonable given information that Balenger was armed and had pointed a gun at someone); *State v. Ailport*, 413 N.W.2d 140, 144 (Minn. App. 1987) (holding forceful investigatory detention of appellant, described as rough-looking, believed to be dangerous, known to carry weapons, and believed to be a fence involved in narcotics sales, was lawful), *review denied* (Minn. Nov. 18, 1987).

The majority's position is that Johnson was in the company of suspected drug dealers, and because there is a link between drug dealing and violence, then it was reasonable for officers to link Johnson to violence. While it is true that the law recognizes an inference connecting drug dealing and violence,⁴ the majority goes one step further to build an inference upon this inference. That is, not only are suspected drug dealers assumed to be dangerous, but someone in the company of drug dealers is also assumed to be dangerous. This is an inference—and a bridge—too far. And it is an inference the supreme

⁴ *Lemert*, 843 N.W.2d at 232 (stating that there is a substantial nexus between drug dealing and violence).

court held is improper to draw. *Varnado*, 582 N.W.2d at 890 (“[M]ere association with a suspected drug dealer does not provide a reasonable basis to suspect that a person may be armed and dangerous.”).

Caselaw from other jurisdictions is also instructive. I acknowledge the recent trend of increased acceptance of more aggressive police tactics during *Terry* stops. Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.2(d) (5th ed. 2017). But in other jurisdictions, as well as Minnesota, tactics traditionally associated with arrest—such as the drawing of weapons and handcuffing individuals—are almost universally seen in cases where there is specific information that the suspect presents a danger. *See, e.g., El-Ghazzawy v. Berthiaume*, 636 F.3d 452, 457 (8th Cir. 2011) (determining that using handcuffs violated the Fourth Amendment where there was no suggestion suspect was armed or dangerous and did not exhibit any erratic or suspicious behavior); *Flowers v. Fiore*, 359 F.3d 24, 30 (1st Cir. 2004) (upholding police use of firearms during *Terry* stop where officers were responding to a report of armed suspects); *United States v. Perdue*, 8 F.3d 1455, 1463 (10th Cir. 1993) (upholding officers pointing guns at suspects and ordering them to the ground where guns had been found on the property being searched); *United States v. Tilmon*, 19 F.3d 1221, 1227 (7th Cir. 1994) (determining that multiple officers surrounding a suspected bank robber’s car with guns drawn was not unreasonable where officers were told that the suspect was armed and dangerous). As the Ninth Circuit concluded in *Washington v. Lambert*, 98 F.3d 1181, 1187, 1189 (9th Cir. 1996), under typical circumstances, without some reasonable inclination that the suspect presents an actual threat or is possibly armed, drawing weapons,

using handcuffs, or any other aggressive police restraints will violate the Fourth Amendment.

A Fourth Amendment violation, in my opinion, occurred here. To be a reasonable search and seizure, the investigative stop “must be limited in scope and duration to its initial justification.” *Balenger*, 667 N.W.2d at 139. But rather than a limited detention and protective pat and frisk, a man was forced to lie face down on the pavement at gunpoint and handcuffed. This exceeds the bounds of a reasonable search and seizure under *Terry*, based upon the sparse information the police held about Johnson.⁵

⁵ I do not reach the issue, argued by Johnson, that the police conduct here constituted an arrest. *But see State v. Hill*, 130 P.3d 1, 8, 10 (Kan. 2016) (concluding Hill was arrested, not detained, when he was ordered from truck at gunpoint and handcuffed, and that the police officers lacked probable cause to arrest Hill where they did not know him, he was not named in the search warrant, not anticipated to be a resident of the house that was the subject of the search warrant, and there was no reason to believe he was involved in manufacturing methamphetamine at the residence).