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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0924**

State of Minnesota,
Respondent,

vs.

Qumari Kenneth Spencer,
Appellant.

**Filed January 22, 2018
Affirmed
Schellhas, Judge**

Hennepin County District Court
File No. 27-CR-16-26185

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

Michael O. Freeman, Hennepin County Attorney, Minneapolis, Minnesota; and

Nicholas A. Hydukovich, Special Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Peterson, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

On appeal from his conviction of felon in possession of a firearm, appellant challenges the district court's denial of his suppression motion, arguing that the police lacked a reasonable articulable suspicion that appellant was involved in criminal activity at the time of his seizure. We affirm.

FACTS

After police detained appellant Qumari Spencer as he left the scene of a downtown Minneapolis shooting, officers discovered a loaded handgun on Spencer's person. Respondent State of Minnesota charged Spencer with being a felon in possession of a firearm. Spencer moved to suppress the handgun, arguing that he was unlawfully seized because the officer lacked reasonable articulable suspicion that Spencer was involved in criminal activity.

Officer Efrem Hamilton testified at the suppression hearing that at approximately 1:15 a.m. on the morning in question, he responded to shots fired at the intersection of Fourth Street and First Avenue in Minneapolis. Approximately ten minutes later, police heard more gunshots, this time near Hennepin Avenue and Fourth Street. Officer Hamilton observed people running from the scene in all directions and a majority of the police officers "running eastbound." Officer Hamilton "went southbound through an alley that is between the Gay 90's and the First Precinct," because he believed, based on his experience, that the shooters "weren't going to stay . . . where the shooting was at."

Officer Hamilton arrived at the parking lot of the Gay 90's and observed two individuals who "looked nervous." The individuals kept running and stopping as if unsure where to go. One of the individuals, later identified as Spencer, "had his hand on his left hip and he was manipulating something that was on his . . . left hip side." Officer Hamilton testified that he heard Spencer say "something to the effect of, 'I need to get out of here and I need to get rid of this.'"

Officer Hamilton testified that he believed that Spencer's words and actions indicated that he had a gun. Officer Hamilton therefore removed his service weapon and began walking toward the two individuals. But Spencer "turned around" and saw Officer Hamilton and began running westbound. Spencer continued to run after Officer Hamilton commanded him to "drop down." While chasing Spencer, Officer Hamilton radioed for assistance. Officer Alexander Brown observed the chase and tackled Spencer. A subsequent search of Spencer's person revealed a 9mm handgun.

In denying Spencer's suppression motion, the district court found that Officer Hamilton "observed that [Spencer] appeared nervous and was running and stopping as if he was unsure as to where to go." The district court also found that "Officer Hamilton noticed that [Spencer] had his hand on his left hip and was manipulating something," and that Officer Hamilton "heard [Spencer] say something to the effect of, 'I need to get out of here and I need to get rid of this.'"

Moreover, the district court found that Spencer "began running" after seeing Officer Hamilton, who was in full uniform, and "failed to stop even after being given numerous verbal commands." The court concluded that looking at the

“totality of the circumstances, . . . Officer Hamilton had a particularized and objective basis for at least suspecting [Spencer] had been involved in the shots fired incident.”

Spencer waived his right to a jury trial and other trial rights and stipulated to the prosecution’s case under Minn. R. Crim. P. 26.01, subd. 4. The district court found Spencer guilty of the charged offense and sentenced him to 60 months in prison, the legislatively mandated sentence. This appeal follows.

D E C I S I O N

The United States and Minnesota Constitutions guarantee “[t]he 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. A search or seizure that is conducted without a warrant is presumptively unreasonable. *State v. Lugo*, 887 N.W.2d 476, 486 (Minn. 2016). One exception to the warrant requirement that permits police to “conduct a brief, investigatory stop” occurs when police have “a reasonable, articulable suspicion that criminal activity is afoot.” *Id.* (quoting *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008)).

“In reviewing a district court’s determinations of the legality of a limited investigatory stop, we review questions of reasonable suspicion de novo.” *State v. Morse*, 878 N.W.2d 499, 502 (Minn. 2016) (quotation omitted). “Reasonable suspicion must be based on specific, articulable facts that allow the officer to be able to articulate . . . that he or she had a particularized and objective basis for suspecting the seized person of criminal activity.” *Id.* (alteration in original) (quotations omitted). “The reasonable-suspicion standard is not high.” *Id.* (quotations omitted). “A trained police officer is entitled to draw

inferences on the basis of all of the circumstances . . . inferences and deductions that might well elude an untrained person.” *Id.* (alteration in original) (quotations omitted). When reviewing the district court’s determination of the legality of a limited investigatory stop, we assess the question of reasonable suspicion based on the “totality of the circumstances.” *United States v. Cortez*, 449 U.S. 411, 417–18, 101 S. Ct. 690, 695 (1981). “When reviewing a pretrial order on a motion to suppress evidence, [appellate courts] review the district court’s factual findings under a clearly erroneous standard and its legal determinations de novo.” *State v. deLottinville*, 890 N.W.2d 116, 119 (Minn. 2017).

Spencer argues that the district court erred by denying his suppression motion because the police lacked a reasonable articulable suspicion that he was involved in criminal activity at the time of his seizure. We disagree. The supreme court has articulated the following nonexclusive factors, known as the *Appelgate* factors, when determining whether an officer has reasonable suspicion supporting a stop near the scene of a recently committed crime:

- (1) the particularity of the description, if any, of the offender;
- (2) the size or extent of the area in which the offender may be found as indicated by such facts as the elapsed time since the crime occurred;
- (3) the number of persons about in the area;
- (4) the known or possible direction of a person’s flight, if any;
- (5) the observed activity of the person stopped;
- (6) knowledge or suspicion that the person stopped has been involved in criminality of the type presently under investigation.

Wold v. State, 430 N.W.2d 171, 174 (Minn. 1988); *see also Appelgate v. Comm’r of Pub. Safety*, 402 N.W.2d 106, 108 (Minn. 1987) (discussing factors isolated by Professor

LaFave, 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.3(d), at 461 (2d ed. 1987)).

The state concedes that certain *Appelgate* factors weigh against it; for example, Officer Hamilton did not have a description of the shooter and had no knowledge or suspicion that Spencer was involved in criminal activity. Moreover, “a substantial number of civilians in the part of downtown Minneapolis where the shooting occurred” were present and the size of the area in which the offender might have been found was rather large. But these factors are not exclusive. The police may take into account the degree of potential danger being investigated. *United States v. Ramos*, 629 F.3d 60, 66–67 (1st Cir. 2010). And the *Appelgate* factors are not meant to supplant an analysis of the “totality of the circumstances” surrounding a stop. *See Appelgate*, 402 N.W.2d at 108–09 (discussing LaFave’s factors, but reaching conclusion about legality of stop based on “totality of the circumstances”).

Here, taking into account all of the relevant factors, the totality of the circumstances supports a determination that Officer Hamilton had the requisite reasonable, articulable suspicion to conduct an investigatory stop. The circumstances involved multiple shots from a firearm in an urban area near midnight in the vicinity of numerous pedestrians who were in the zone of danger. The gravity of the danger to the public supports the investigatory stop. Moreover, Spencer’s suspicious conduct of walking and running nervously through the parking lot while manipulating something on his hip and muttering about needing to get out of the vicinity and wanting to get rid of something weighs heavily in support of the state.

Spencer argues that his nervous behavior “cannot be relied upon to justify the seizure” because it was “understandable” in light of the recent gunshots and indistinguishable from other people in the area. He also contends that the district court clearly erred by relying on Officer’s Hamilton’s testimony that he overheard Spencer making statements about wanting to get rid of something. But the law is well settled that we defer to the district court’s assessment of witness credibility at pretrial suppression hearings. *See State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983) (stating that “at a pretrial suppression hearing the [district] court acts as finder of facts, deciding for purposes of admissibility which evidence to believe and whether the state has met its burden of proof” (quotation omitted)). Officer Hamilton testified about what he heard Spencer say without contradiction in the record. The district court was free to believe Officer Hamilton’s testimony, and we defer to that credibility determination. Moreover, although Spencer is correct that most people would likely leave the scene of a shooting in a nervous manner, this conduct, when combined with Spencer’s statements, and his manipulation of something on his left hip side, demonstrated suspicious conduct.

Spencer further argues that because the seizure occurred before he began to flee, the district court “erred by relying on [his] post-seizure flight from Hamilton and [his] conduct while fleeing Hamilton to justify the prior seizure.” Indeed, Spencer is correct that if the seizure occurred before he fled,¹ his flight cannot be used to support Officer Hamilton’s

¹ We note that it is unclear if the seizure actually occurred before Spencer fled. Although Officer Hamilton testified that he “believe[d] that he had his service weapon drawn when Spencer saw him and started to flee,” video from Officer Hamilton’s body camera reveals that the officer said nothing to Spencer until after he started to run away. Moreover, video

suspicion of criminal activity. *See State v. Diede*, 795 N.W.2d 836, 843–44 (Minn. 2011) (noting that only facts that existed at time of seizure are appropriate for consideration when determining whether officer had objective basis for seizing defendant). But within less than a minute of the shooting, Officer Hamilton observed Spencer nervously running and walking away from the scene, “manipulating something that was on his . . . left hip side,” which Officer Hamilton believed was a gun. Spencer’s flight from Officer Hamilton was not necessary to support a determination that Officer Hamilton seized Spencer with the requisite reasonable, articulable suspicion.

We conclude that Officer Hamilton’s articulation of Spencer’s conduct, when viewed together with the recent shooting, provided the officer with an objective basis to seize Spencer. Accordingly, the district court did not err by denying Spencer’s suppression motion.

Affirmed.

from Officer Hamilton’s body camera, as well as surveillance video of the Gay 90’s parking lot, is inconclusive because it fails to definitively show where the officer was pointing his service weapon at the time Spencer saw the officer, or whether the officer had unholstered his service weapon. And video from Officer Hamilton’s body camera shows that as soon as Spencer noticed the officer, he began to flee. Therefore, despite the state’s concession that the seizure occurred before Spencer fled, the seizure arguably occurred after Spencer started to flee because Spencer began to flee before Officer Hamilton ordered Spencer to stop, and because the record fails to indicate where the officer was pointing his service weapon when Spencer noticed him. But we need not decide when the seizure occurred because the issue was neither raised nor argued by the parties.