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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1007**

State of Minnesota,
Respondent,

vs.

Kyle Steven Kottom,
Appellant.

**Filed May 21, 2018
Affirmed
Bjorkman, Judge**

St. Louis County District Court
File No. 69HI-CR-15-886

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

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Timothy J. Droske, Special Assistant Public Defender, Caitlin L.D. Hull, Ian Blodger,
Dorsey & Whitney LLP, Minneapolis, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Bjorkman, Judge; and Reilly,
Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his conviction of fifth-degree possession of marijuana with intent to sell, arguing that the district court erred by denying his motion to suppress drug evidence recovered during a warrantless search of his person. We affirm.

FACTS

During the evening of October 24, 2015, Officer Brandon Svoboda of the Chisholm Police Department stopped a vehicle because its taillight was out. He checked the identification of the driver, K.L., and the passenger, appellant Kyle Kottom, and discovered that K.L.'s driver's license had been canceled as inimical to public safety. Officer Svoboda directed K.L. to step out of the vehicle.

As Officer Svoboda searched K.L. prior to his arrest, Officer Edward Chamernick arrived to assist. Officer Chamernick noticed that the passenger door was open and Kottom had placed his feet on the ground. He told Kottom to stay in the vehicle and walked toward him. As the officer approached the passenger door, he noted the "overwhelming odor" of unburnt marijuana. Officer Chamernick mentioned the odor and asked Kottom if he had any drugs; Kottom said he did not. Officer Chamernick left Kottom briefly to help secure K.L. in Officer Svoboda's squad car. He told Officer Svoboda he had detected the odor of unburnt marijuana, and the two officers returned to the vehicle.

Kottom held up a "a small little baggie" containing "[m]aybe an eighth [of an ounce]" of what appeared to be marijuana, stating that he had just found it. The officers asked him to step out of the vehicle. Officer Svoboda observed the handle and blade of a

pocket knife protruding from Kottom's pants pocket. He removed the knife and conducted a pat-down search of Kottom for officer safety. During the pat-down, the officer also noticed a blue object protruding from Kottom's jacket pocket and recognized it as a grinder, commonly used to prepare marijuana for smoking. He also noted an unknown "hard object" in Kottom's shirt pocket and observed "the front of his pants were bulging and there was a corner of a plastic baggie sticking out of the pants line." He retrieved the "hard object," which was a small scale; the plastic baggie, which contained three smaller baggies of marijuana; and another baggie of marijuana from the pocket that had held the knife. The officers arrested Kottom and subsequently confirmed that he possessed a total of 118.8 grams (4.19 ounces) of marijuana.

Kottom was charged with fifth-degree possession of marijuana with intent to sell and fifth-degree possession of marijuana. Kottom moved to suppress the drug evidence obtained from his person. The district court concluded that the incriminating nature of the scale and the portion of the baggie sticking out of Kottom's waistband was not immediately apparent during the pat-down search. But the court denied the motion because other facts known to the officers—the grinder, strong odor of unburnt marijuana, and the small baggie of marijuana—established probable cause to believe Kottom possessed a criminal quantity of marijuana, which justified an arrest and incident search. Kottom thereafter stipulated to the state's evidence and submitted the charges to the district court pursuant to Minn. R. Crim. P. 26.01, subd. 4. The district court found Kottom guilty of possession with intent to sell and dismissed the lesser-included second count. Kottom appeals.

DECISION

When reviewing a district court's pretrial order on a motion to suppress evidence, we review the district court's factual findings under a clearly erroneous standard, *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009), and defer to the district court's credibility determinations, *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992). We review legal determinations de novo. *Ortega*, 770 N.W.2d at 149.

Both the United States and Minnesota Constitutions protect an individual against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. "A search conducted without a warrant issued upon probable cause is generally unreasonable." *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). The Fourth Amendment prohibits law enforcement from searching an individual without a warrant, subject to only a few exceptions. *State v. Varnado*, 582 N.W.2d 886, 889 (Minn. 1998).

One exception to the warrant requirement permits law enforcement to search "a person's body and the area within his or her immediate control" incident to a "lawful arrest." *Ortega*, 770 N.W.2d at 150; see also *In re Welfare of G.M.*, 560 N.W.2d 687, 695 (Minn. 1997) (stating that search incident to arrest may occur before actual arrest so long as there is probable cause for the arrest). Probable cause to arrest exists "when a person of ordinary care and prudence, viewing the totality of circumstances objectively, would entertain an honest and strong suspicion that a *specific* individual has committed a crime" for which "a custodial arrest is authorized." *Ortega*, 770 N.W.2d at 150. The probable-cause standard "is less demanding and requires far less evidence than proof beyond a

reasonable doubt.” *State v. Dickey*, 827 N.W.2d 792, 796 (Minn. App. 2013) (quotation omitted).

We begin our analysis by considering the circumstances of Kottom’s search and arrest, as found by the district court. Kottom was a front-seat passenger in a stopped vehicle that gave off an “overwhelming odor” of marijuana. When Officer Chermanick asked if he had any drugs, Kottom said no. But when the officer returned to the vehicle a short time later, Kottom produced a baggie containing a small amount of marijuana, which he “purported to have just found.” This conduct did not assuage Officer Chermanick’s suspicion of drug activity because, in his experience, such a small amount was insufficient to explain the unburnt marijuana odor that was so strong he could smell it “from the rear of the vehicle.” The district court concluded, and we agree, that these circumstances, together with the pocket knife plainly visible in Kottom’s pocket, warranted a brief pat-down search. *See Dickerson*, 481 N.W.2d at 843 (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884 (1968)). And that pat-down led the officers to discover and lawfully seize the marijuana grinder, and to observe the suspicious, though not patently criminal, presence of another plastic baggie in Kottom’s pants.¹ *See G.M.*, 560 N.W.2d at 693 (stating that officers are authorized to seize an object that they see or feel during a pat-down if its incriminating character is immediately apparent).

¹ We agree with the district court that because the incriminating character of the “hard object” in Kottom’s pocket and the baggie in his pants was not immediately apparent, the officers were not authorized to seize those items during the pat-down. For purposes of considering probable cause, we therefore consider only the generally suspicious character of the baggie.

Kottom does not challenge the district court's factual determinations or its conclusion that the pat-down search was warranted. But he argues that these circumstances do not establish probable cause to arrest because "the odor of marijuana, possession of a grinder, and possession of a noncriminal amount of marijuana constitutes only noncriminal conduct." We agree that each of those circumstances individually indicates noncriminal conduct. See Minn. Stat. §§ 152.027, subd. 4(a) (possession of "small amount" of marijuana is a petty misdemeanor), .092 (possession of "drug paraphernalia" is a petty misdemeanor) (2014). As such, not one of the circumstances, "in and of itself," is sufficient to "trigger the search-incident-to-arrest exception to the warrant requirements of the Fourth Amendment." *Ortega*, 770 N.W.2d at 149 n.2 (citing *State v. Martin*, 253 N.W.2d 404, 405-06 (Minn. 1977)). But the existence of probable cause depends on the totality of the circumstances, *State v. Williams*, 794 N.W.2d 867, 871 (Minn. 2011), and includes circumstances that are individually innocent or noncriminal, *State v. McGrath*, 706 N.W.2d 532, 543 (Minn. App. 2005).

The facts here collectively suggest not only that Kottom possessed more marijuana than the small amount he acknowledged but also that he possessed a quantity sufficient to produce an "overwhelming" odor. See *State v. Thiel*, 846 N.W.2d 605, 611 (Minn. App. 2014) (recognizing, in the context of a vehicle search, that "strong and overwhelming odor" of marijuana may indicate presence of "a larger amount of marijuana" than noncriminal amount acknowledged by suspect), *review denied* (Minn. Aug. 5, 2014). Kottom's act of producing a small amount of marijuana could reasonably be interpreted by the officers as an attempt to distract them from further investigation of the "overwhelming" odor. The

evidence of the drug paraphernalia provided further support for their growing suspicions. And the plastic baggie, which itself may not have been suspicious, suggested nefarious activity because of its placement in the waistband of his pants. While these circumstances may present a close case, we are persuaded that, when viewed in totality, they support an “honest and strong suspicion” that Kottom possessed a criminal amount of marijuana. Accordingly, the district court did not err by denying the suppression motion.

Affirmed.