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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1276**

State of Minnesota,
Respondent,

vs.

Trenton John Horn,
Appellant.

**Filed June 11, 2018
Reversed and remanded
Larkin, Judge**

St. Louis County District Court
File No. 69VI-CR-16-1281

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

Mark S. Rubin, St. Louis County Attorney, Karl G. Sundquist, Assistant County Attorney,
Virginia, Minnesota (for respondent)

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

Andrew P. Muller, Special Assistant Public Defender, Muller & Muller, PLLC,
Minneapolis, Minnesota (for appellant)

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

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the district court's denial of his motion to suppress evidence obtained during a warrantless search of his vehicle. We conclude that the search was unconstitutional and therefore reverse and remand.

FACTS

Respondent State of Minnesota charged appellant Trenton John Horn with possession of a controlled substance, driving while impaired (DWI), possession of drug paraphernalia, and failure to use a seatbelt. Horn requested an omnibus hearing, at which he challenged the underlying warrantless search of his vehicle. State Trooper Sergeant Chris Thostenson testified at the hearing, and the state indicated it would file "all the reports" after the hearing. The district court found the relevant facts to be as follows.¹

Sergeant Thostenson observed Horn driving an automobile and stopped him because he was not wearing a seatbelt. Sergeant Thostenson asked Horn for proof of insurance. Horn gave Sergeant Thostenson an expired insurance card and did not look for any other proof of insurance in his vehicle. Sergeant Thostenson thought this behavior was odd and testified that some people avoid opening areas where insurance cards are normally kept because they have contraband or weapons in those areas. Sergeant Thostenson observed that Horn avoided eye contact, appeared excessively nervous, talked very fast,

¹ The district court's findings of fact are not challenged on appeal, and they are supported by the testimony of Sergeant Thostenson and his DWI arrest report regarding Horn's arrest.

and was slow to respond to some questions. Sergeant Thostenson also smelled a faint odor of marijuana coming from Horn's vehicle.

Sergeant Thostenson returned to his squad car, printed a ticket for the seatbelt violation, returned to Horn's car, and asked Horn to step out of his vehicle. Sergeant Thostenson noticed that Horn's front teeth were discolored and decaying. He testified that such conditions indicated drug use. Sergeant Thostenson explained the seatbelt citation to Horn, handed Horn the ticket, and asked Horn if he had any questions before the sergeant let him go. Horn responded, "No." Sergeant Thostenson then asked Horn if he could take a quick look in Horn's vehicle. Horn agreed to the ensuing vehicle search.

During cross-examination, Sergeant Thostenson agreed that after he handed Horn the seatbelt-violation ticket, Horn was free to go, but that he nonetheless asked to search Horn's car after he gave Horn the ticket. The relevant exchange was as follows:

Q: My question for you is very simple. Once you handed him the ticket, after you explained, I'm giving you a ticket for seatbelt violation, you handed him the ticket, he turned, and he was free to go at that point in time; correct?

A: Yes.

Q: So after you released him on the initial stop for the seatbelt violation and he was free to go, at that point, then, you asked him for the first time, can I go and take a look in your vehicle and search your vehicle?

A: Yes.

Q: After you had released him?

A: Yes.

Q: He was no longer seized at that point, now was he?

A: No.

During the search of Horn's vehicle, Sergeant Thostenson found a zippered container, which he recognized as the type of container commonly used for drugs and

paraphernalia. He opened the container and found a pipe and methamphetamine inside. Horn admitted that he had used methamphetamine earlier that morning. Horn agreed to perform field sobriety tests and performed poorly on the tests. Sergeant Thostenson arrested Horn, obtained a search warrant to test his blood, and the blood sample was positive for methamphetamine.

At the hearing in district court, Horn argued that Sergeant Thostenson's investigation exceeded the scope of the initial traffic stop. He argued that Sergeant Thostenson's incremental intrusion of asking to search Horn's vehicle was unrelated to the purpose of the stop for failure to wear a seatbelt and that the circumstances did not otherwise justify the request to search the vehicle. Horn therefore argued that the evidence obtained as a result of the search should be suppressed. The district court denied Horn's motion to suppress, concluding that "the odor of marijuana along with the other factors was sufficient to justify" the trooper's request to search the vehicle.

After the district court's pretrial ruling, the state dismissed the drug-paraphernalia and seatbelt charges, and Horn stipulated to the prosecution's evidence in a court trial to preserve review of the district court's ruling, referring to the procedure as a *Lothenbach* plea.² The district court found Horn guilty of DWI and possession of a controlled substance. The district court stayed adjudication of guilt on the controlled-substance offense and entered judgment of conviction on the DWI offense.

² It appears that the parties intended to proceed under Minn. R. Crim. P. 26.01, subd. 4. See *State v. Myhre*, 875 N.W.2d 799, 802 (Minn. 2016) (noting that Minn. R. Crim. P. 26.01, subd. 4, "replaced *Lothenbach* as the method for preserving a dispositive pretrial issue for appellate review in a criminal case").

Horn appeals, challenging the district court’s pretrial ruling regarding the search of his vehicle.

DECISION

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. I, § 10. “The touchstone of the Fourth Amendment is reasonableness.” *State v. Johnson*, 813 N.W.2d 1, 5 (Minn. 2012) (quotation omitted). A police officer may initiate a limited, investigative stop without a warrant if the officer has reasonable, articulable suspicion of criminal activity. *State v. Munson*, 594 N.W.2d 128, 136 (Minn. 1999) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968)). “[E]ach incremental intrusion during a stop must be strictly tied to and justified by the circumstances which rendered the initiation of the stop permissible.” *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (quoting *Terry*, 392 U.S. at 19, 88 S. Ct. at 1878) (quotation marks omitted). “[A]n intrusion not strictly tied to the circumstances that rendered the initiation of the stop permissible must be supported by at least a reasonable suspicion of additional illegal activity.” *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012).

“Generally, warrantless searches are per se unreasonable.” *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008). “When a search is conducted pursuant to consent . . . , neither probable cause nor a warrant is required.” *State v. Pilot*, 595 N.W.2d 511, 519 (Minn. 1999). However, a “suspect’s consent, taken alone, is insufficient to permit expansion of a routine traffic stop; the police officer must have a reasonable, articulable

suspicion of further criminal activity in order to request to expand the stop.” *State v. Volkman*, 675 N.W.2d 337, 341 (Minn. App. 2004).

This court considers “the totality of the circumstances when determining whether reasonable suspicion exists, and seemingly innocent factors may weigh into the analysis.” *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007). The reasonable-suspicion standard is “less demanding than probable cause,” but requires more than an unarticulated “hunch.” *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008). This court evaluates whether reasonable articulable suspicion exists from the perspective of a trained police officer, who may make “inferences and deductions that might well elude an untrained person.” *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 695 (1981).

Evidence seized in violation of the U.S. or Minnesota Constitutions must be suppressed. *Terry*, 392 U.S. at 13, 88 S. Ct. at 1875; *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011). Appellate courts “review de novo a district court’s ruling on constitutional questions involving searches and seizures.” *State v. Anderson*, 733 N.W.2d 128, 136 (Minn. 2007). “When reviewing pretrial orders on motions to suppress evidence, [appellate courts] 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).

Horn contends that any suspicions that might have justified the request to search his vehicle were dispelled prior to the request. He notes that Sergeant Thostenson “had completed the initial stop and immediately before asking to search the car, he had admittedly concluded that Horn was ‘free to go.’” Horn therefore argues that “regardless

of anything [Sergeant Thostenson] may have observed prior to handing [him] the ticket, when he asked to search the car, no reasonable suspicion remained.” Horn concludes that “because the search of [his] car was invalid, the fruits of the search and all related evidence must be suppressed.”

We would have a difficult time concluding that Sergeant Thostenson articulated constitutionally adequate support for his request to search Horn’s vehicle given his testimony that Horn was free to go *before* the request. Sergeant Thostenson’s agreement that Horn was no longer seized when he asked to search Horn’s vehicle significantly undercuts the state’s argument that the trooper articulated reasonable suspicion of criminal activity that justified the request to search. In our view, this record does not support a conclusion that Sergeant Thostenson articulated reasonable suspicion justifying his request to search Horn’s vehicle. We therefore hold that the search was unconstitutional and reverse the district court’s order denying Horn’s motion to suppress.

The parties agreed to a stipulated-evidence court trial under Minnesota Rules of Criminal Procedure 26.01, subdivision 4, which allows a defendant to stipulate to the prosecution’s case to obtain review of a pretrial ruling. The rule provides, in relevant part, that “[t]he defendant and the prosecutor must acknowledge that the pretrial issue is dispositive, or that a trial will be unnecessary if the defendant prevails on appeal.” Minn. R. Crim. P. 26.01, subd. 4 (c). Given the parties’ agreement to proceed under rule 26.01, subdivision 4, our conclusion that Horn prevails on the pretrial issue is dispositive and a contested trial is unnecessary. We therefore reverse and remand solely for the district court

to vacate Horn's judgment of conviction on the DWI offense and his stay of adjudication on the controlled-substance offense.

Reversed and remanded.