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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1327**

State of Minnesota,
Respondent,

vs.

Igor Pavlovich Albantov,
Appellant

**Filed July 2, 2018
Affirmed in part, reversed in part, and remanded
Worke, Judge**

Hennepin County District Court
File No. 27-CR-16-14164

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his convictions and sentence for first-degree controlled-substance crime, arguing that (1) the district court erred in denying his motion to suppress

evidence when the police lacked reasonable articulable suspicion to justify a dog sniff, (2) the evidence was insufficient to prove that he possessed the drugs, and (3) he is entitled to resentencing under the Drug Sentencing Reform Act (DSRA). We affirm appellant's convictions, but reverse and remand for resentencing.

FACTS

On May 24, 2016, Officer Gruber was on routine patrol in a high-crime area around a hotel when Tyson Keezer "popped out of the bushes" in front of the officer's squad car. Keezer told the officer that he was there to meet his friend Igor. Keezer's cell phone continuously rang, and Officer Gruber saw the name "Egor" displayed as the caller. As Officer Gruber talked to Keezer, Keezer's mother and her boyfriend approached. Keezer pulled out a Taser. Officer Gruber detained Keezer and called for assistance. Keezer consented to a search of his vehicle. During the search, Keezer provided a physical description of Igor and Igor's vehicle and stated that he was there to buy heroin from Igor. Officer Gruber found heroin in Keezer's vehicle.

In response to Officer Gruber's call for assistance, Sergeant Yates met Officer Gruber on the south side of the building and Sergeant Spark parked on the north side of the building. Sergeant Yates provided Sergeant Spark with "vague information" regarding the description of Igor and his vehicle; he told him to look for a "brown car driven by a white male." Sergeant Spark was watching incoming traffic when he noticed a female and a white male walk out of the hotel toward a brown vehicle. Sergeant Spark contacted the officers and asked if the brown car could already be in the parking lot. The officers

responded that they thought that the car “could have been coming in,” but that it was “certainly possible” that it was already there.

Sergeant Spark approached the couple. After the male identified himself as Igor, Sergeant Spark called Officer Gruber to the north side of the building. Appellant Igor Pavlovich Albantov told the officer that he was at the hotel to see someone in room 210. When Officer Gruber asked Albantov if he was there to buy or sell heroin, Albantov became “extremely nervous”; his “pulse in his neck was very rapid. He was breathing heavily; [and] he looked down when” responding to the officer.

Albantov admitted that he was a user, and dispatch confirmed Albantov’s drug-activity history. Albantov consented to a search of his person. Officer Gruber found keys in Albantov’s pocket with a capsule on the keychain that contained heroin residue, and a little over \$3,000 in Albantov’s wallet. Albantov refused to consent to a search of his vehicle. Officer Gruber called for a K-9 officer to perform a sniff around the vehicle. After a positive indication to the odor of narcotics in the vehicle, Officer Gruber searched the vehicle and found a fanny pack under the driver’s seat that held a scale, a hypodermic needle, and over 43 grams of heroin.

Officer Gruber gave the heroin to a detective who arrived with a search warrant for room 210. In the room registered to Matthew Lander, officers found drug paraphernalia and Albantov’s credit card. Albantov was charged with two counts of first-degree controlled-substance crime—sale and possession. Albantov moved to suppress the drugs. The district court denied the motion, concluding that the officers had reasonable articulable suspicion for a dog sniff.

On April 21, 2017, the jury found Albantov guilty as charged. The district court sentenced Albantov to the presumptive sentence of 110 months in prison for first-degree controlled-substance crime (sale). This appeal followed.

DECISION

Dog sniff

Albantov argues that the dog sniff was unconstitutional. This court reviews the district court's pretrial fact findings for clear error. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009). This court reviews de novo the district court's ruling on the constitutionality of a search and seizure. *State v. Anderson*, 733 N.W.2d 128, 136 (Minn. 2007).

In *State v. Wiegand*, our supreme court adopted the reasonable-articulable-suspicion standard to sustain a dog sniff. 645 N.W.2d 125, 137 (Minn. 2002). Reasonable suspicion is a particularized and objective basis for suspecting the person stopped of criminal activity. *State v. Lugo*, 887 N.W.2d 476, 486 (Minn. 2016) (quotations omitted). "The reasonable-suspicion standard is not high." *State v. Diede*, 795 N.W.2d 836, 842-43 (Minn. 2011). Police officers must be able to articulate specific facts, with rational inferences drawn from those facts, to objectively support the officer's reasonable suspicion. *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007). Trained police officers are entitled to draw inferences and deductions "that might well elude an untrained person." *Lugo*, 887 N.W.2d at 487 (quotation omitted).

We consider the totality of the circumstances in reviewing whether the reasonable-suspicion standard was met. *State v. Baumann*, 759 N.W.2d 237, 240 (Minn. App. 2009), review denied (Minn. Mar. 31, 2009). Even innocent activity might justify the suspicion

of criminal activity. *State v. Johnson*, 444 N.W.2d 824, 826-27 (Minn. 1989); *see also State v. Martinson*, 581 N.W.2d 846, 852 (Minn. 1998) (stating that innocent factors “in their totality, combined with the investigating officer’s experience in apprehending drug traffickers, can be sufficient bases for finding reasonable suspicion”).

Here, the totality of the circumstances show that, in a high-crime area, Keezer “popped out of the bushes” in front of Officer Gruber’s squad car. Keezer told the officer that he was at the hotel to meet his friend Igor and buy heroin from him. Keezer’s phone continuously rang with the name “Egor” displayed as the caller. The officer found heroin in Keezer’s car.

Keezer described Igor and Igor’s vehicle. Another officer spotted a white male leaning into a vehicle, and both the male and vehicle matched the descriptions provided by Keezer. The individual identified himself as Igor and became nervous when asked about buying and selling drugs. Albantov consented to a search of his person and the officer found a large amount of cash, keys to the vehicle, and a capsule on the keychain that contained residual heroin. Albantov admitted that he was a drug user and dispatch confirmed Albantov’s drug-activity history. Based on these circumstances, the officer requested a dog sniff around Albantov’s vehicle.

Albantov asserts that there was nothing connecting illegal activity to his vehicle because he was not driving when the officer approached him. But Keezer stated that he was there to meet and buy drugs from Igor, and “Egor” continuously called Keezer’s phone, providing reasonable suspicion that Igor would need a means of travel to the meeting place. An officer then observed a male leaning into a vehicle, which matched

Keezer's descriptions of Igor and Igor's vehicle. Sergeant Spark testified that Albantov's "torso was in the car," in the driver's seat, and he was "bent over doing something." Albantov then acted nervous when asked about drug activity and he had heroin residue and a large amount of cash on his person. These circumstances provide a connection to the vehicle and reasonable suspicion that drugs would be found there.

Some of these facts could include innocent activity—Albantov walking out of the hotel toward his vehicle, and he could have been nervous because of police contact and not because of the drug-activity questions—but in context, the totality of the facts, and the rational inferences drawn from them, objectively support the officer's reasonable suspicion of criminal activity to support a dog sniff of the vehicle. *See Baumann*, 759 N.W.2d at 240-41 (concluding that a single suspicious fact was sufficient to meet the reasonable-suspicion threshold).

Sufficiency of the evidence

Albantov argues that the evidence of possession was insufficient to sustain his conviction. Because Albantov did not have the drugs on his person, the state had to prove possession with circumstantial evidence. "A conviction based on circumstantial evidence warrants heightened scrutiny." *State v. Sam*, 859 N.W.2d 825, 833 (Minn. App. 2015) (quotation omitted); *see also State v. Al-Naseer*, 788 N.W.2d 469, 471 (Minn. 2010). When reviewing a conviction based on circumstantial evidence, this court applies a two-step test. *Sam*, 859 N.W.2d at 833. First, this court determines the circumstances proved by "resolving all questions of fact in favor of the jury's verdict . . . [and] disregard[ing] evidence that is inconsistent with the jury's verdict." *State v. Harris*, 895 N.W.2d 592,

600-01 (Minn. 2017). Second, this court “independently consider[s] the reasonable inferences that can be drawn from the circumstances proved, when viewed as a whole.” *Id.* at 601. To sustain the conviction, the circumstances proved must be “consistent with guilt and inconsistent with any other rational or reasonable hypothesis.” *Sam*, 859 N.W.2d at 833.

The district court instructed the jury that Albantov was in constructive possession of the heroin if it “was in a place under his exclusive control to which other people did not normally have access, or if found in a place to which others had access, [he] knowingly exercised dominion and control over the heroin.” *See State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975) (stating that to establish constructive possession, the state must show either (1) that the prohibited item was found “in a place under defendant’s exclusive control to which other people did not normally have access,” or (2) if the prohibited item was found “in a place to which others had access, there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it”). The district court also instructed the jury that possession “may be either exclusive or joint. If one person alone has actual or constructive possession of heroin, possession is exclusive. If two or more persons share actual or constructive possession of heroin, possession is joint.”

Albantov argues that the evidence is insufficient because other people connected to drug-related activity had recently been in his vehicle where the drugs were found. Albantov testified that he drove to the hotel on the date of the incident with two females and Lander. There was evidence that a purse holding a small bag of heroin was found in

Albantov's vehicle that belonged to one of the females whom Albantov claimed was in his vehicle. But the purse alone does not prove that this individual was in Albantov's vehicle on the date of the offense or that she possessed the drugs found in the fanny pack.

Further, while Albantov claims that there was no factual dispute that Lander arrived at the hotel with Albantov in Albantov's vehicle, an officer testified that Albantov told him that he was at the hotel "to meet a friend in [room] 210." Room 210 was registered to Lander. Other than Albantov's testimony, there was no evidence that Lander was in Albantov's vehicle on the date of the offense. In determining the circumstances proved, this court resolves issues of fact in "favor of the jury's verdict" and disregards inconsistent evidence. *See Harris*, 895 N.W.2d 600-01. As such, Albantov's claim that Lander was in his vehicle and sitting behind the driver's seat (the drugs were found under the driver's seat) is not a circumstance proved. Additionally, there was evidence that officers found a hypodermic needle in the fanny pack. Albantov testified that he smoked and injected heroin. But he testified that Lander "is a smoker." Thus, the presence of the hypodermic needle in the fanny pack is consistent with the fanny pack belonging to Albantov, a smoker and intravenous user, rather than Lander. Moreover, a detective testified that a personal-use amount of heroin is a "tenth of a gram to a gram," similar to the size of a small sugar packet. He testified that a tenth of a gram of heroin typically costs \$20. There was over 43 grams of heroin in the fanny pack, a value of approximately \$8,600. The jury could have reasonably concluded that if the fanny pack belonged to Lander, he would have it with him in his hotel room, rather than in Albantov's vehicle in a high-crime area.

The circumstances proved show that, in a high-crime area, an officer encountered Keezer who stated that he was at the hotel to meet his friend Igor. Keezer's phone continuously rang and the name "Egor" displayed as the caller. Keezer told the officer that he was there to buy heroin from Igor. Keezer described Igor and Igor's vehicle. The officer found heroin in Keezer's car. An officer spotted an individual who matched the description provided by Keezer. The individual was leaning into a vehicle that matched the description provided by Keezer. The vehicle was registered to Albantov. The individual identified himself as Igor. Albantov became nervous when asked about drug activity. Albantov consented to a search of his person and the officer found a large amount of money, the keys to the vehicle, and a capsule on the keychain that contained residual heroin. Albantov admitted that he was a drug user and dispatch confirmed Albantov's drug-activity history. And the drugs were found under the driver's seat of Albantov's vehicle that Albantov drove to the hotel. The reasonable inference drawn from these circumstances proved supports the jury's verdict that Albantov constructively possessed the drugs, exclusively or jointly.

Sentence

The parties agree that Albantov should be resentenced under the DSRA, which reduced presumptive sentences for first-degree controlled-substance crimes. *See State v. Kirby*, 899 N.W.2d 485, 487 (Minn. 2017). The supreme court stated in *Kirby* that "[a]n amended statute applies to crimes committed before its effective date if: (1) there is no statement by the Legislature that clearly establishes the Legislature's intent to abrogate the amelioration doctrine; (2) the amendment mitigates punishment; and (3) final judgment has not been entered as of the date the amendment takes effect." *Id.* at 490. The supreme

court determined that the legislature made no statement clearly establishing its intent to abrogate the amelioration doctrine and that the DSRA mitigates punishment. *Id.* at 495, 496. Because this is Albantov's direct appeal, his case is not final. Because the three conditions have been met, we reverse and remand Albantov's sentence for resentencing consistent with the DSRA.

Affirmed in part, reversed in part, and remanded.