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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1753**

State of Minnesota,
Appellant,

vs.

Michael Alexander Johnson,
Respondent.

**Filed May 7, 2018
Reversed and remanded
Larkin, Judge**

Hennepin County District Court
File No. 27-CR-17-22239

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Considered and decided by Florey, Presiding Judge; Larkin, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

In this pretrial appeal, the state challenges the district court's order suppressing a gun recovered during a warrantless investigative seizure and dismissing the resulting charge of unlawful possession of a firearm. The district court ruled that the arresting officers did not articulate reasonable suspicion of criminal activity justifying the underlying seizure and that the seizure was therefore unlawful. Because respondent's immediate, unprovoked, headlong flight from the officers supported a reasonable inference that respondent was deliberately trying to evade the police and the officers reasonably suspected that respondent was engaged in criminal activity based on this evasive conduct, we hold that the seizure was lawful. We therefore reverse and remand.

FACTS

Appellant State of Minnesota charged respondent Michael Alexander Johnson with unlawful possession of a firearm. Respondent moved to suppress the firearm, arguing that it was obtained as the result of an unlawful seizure. The district court held a hearing on respondent's motion and found the relevant facts to be as follows.

On September 4, 2017, Minneapolis police officers Jacob Spies and Daniel Ledman were on patrol in a marked police vehicle around 5:45 a.m. in north Minneapolis. They drove down an alley and observed respondent walking down the alley ahead of them, wearing a dark sweatshirt or jacket. Within seconds of the officers observing respondent, respondent looked over his shoulder toward the officers and immediately ran through a backyard off the alley. Officer Spies got out of the vehicle and pursued respondent on foot.

The foot chase spanned two blocks. When Officer Spies caught up to respondent, he was sitting on the front steps of a house. Officer Spies ordered respondent to the ground, held him at gunpoint, and handcuffed him. The officers traced the path of the chase and discovered a cell phone, a sweatshirt, a hat, a glove, and a firearm.

Officer Spies testified that after the squad car turned down the alley behind respondent, respondent looked back, saw the squad car, and took off running. Officer Spies testified that the neighborhood where he apprehended respondent was a “high crime area known for . . . robberies, burglaries, car break-ins, shootings.” Officer Spies further testified that he considered the time of day significant in interpreting respondent’s actions because officers do not normally encounter many people in the alley or walking around at that time of day. Officer Spies testified that during the ensuing foot chase, he saw respondent “flailing his arms and attempting to shed his jacket.”

Officer Ledman testified that he had responded to “dozens and dozens” of calls from the neighborhood where respondent was apprehended. He also testified that the time of day factored into his decision to pursue respondent “because it’s dark out, things happen with the cover of darkness.” He testified that “[i]t’s in an alley” and “things happen in alleys in that area It could be burglaries. It could be auto thefts. It could be, you know, who knows what.”

The state conceded that respondent was seized when the foot chase began and argued that the seizure was justified by the following circumstances: respondent was walking through an alley in a high-crime neighborhood at 5:45 a.m. and fled through residential yards without provocation when he observed a marked police vehicle.

The district court rejected the state's proffered grounds for the seizure. The district court reasoned that it was "unclear why the time, 5:45 a.m., played into the officers' decision on how to respond in the situation," because "crimes can be committed at any time of night or day" and there was "no evidence that 5:45 a.m. is a common time for crimes to be committed or that the officers had a heightened response because of the fact that it was 5:45 a.m." The district court further reasoned that there was no evidence that "the blocks in question . . . needed particular or extra patrol for any specified reason" and that there was "no specificity to this particular alley in question." The district court rejected the state's reliance on cases in which flight from police officers justified seizures, explaining that "[w]hile fleeing contributed to a finding of [a lawful seizure] in case law cited by [the parties], the [grounds for seizure] in those cases [were] born out of additional facts that are not present here."

The district court further explained:

[N]one of these things occurred here and thus differentiate this case from case law cited by both parties. It is undisputed that [respondent] looked over his shoulder toward the squad car and then ran away. Flight is not necessarily indicative of criminal behavior though the ambiguity surrounding the reason for [respondent's] flight does not preclude the officers from chasing and stopping [him]. In this case, the chase is made different because Officer Spies had his gun drawn the entire time. Officers were not responding to a 911 call or complaint, they did not see [respondent] do anything criminal, they did not see him in an area specifically known for illegal activity, and they did not see him attempt to conceal anything illegal.

The district court concluded,

For these reasons, the Court finds that the officers had no reasonable articulable suspicion to seize [respondent].

There were no specifics articulated by the officers as to why they chased [respondent] other than it was 5:45 a.m., in a high crime neighborhood, and [respondent] looked in their direction then ran.

The district court then dismissed the case based on its suppression of the firearm. The state appeals.

DECISION

When the state appeals a pretrial suppression order, it “must ‘clearly and unequivocally’ show both that the [district] court’s order will have a ‘critical impact’ on the state’s ability to prosecute the defendant successfully and that the order constituted error.” *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998) (quoting *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995)). “The critical impact requirement has evolved into a threshold issue, so that in the absence of critical impact [appellate courts] will not review a pretrial order.” *State v. Underdahl*, 767 N.W.2d 677, 681 (Minn. 2009) (quotation omitted).

Critical impact is established if “the lack of the suppressed evidence significantly reduces the likelihood of a successful prosecution.” *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987). The dismissal of a criminal complaint following the suppression of evidence satisfies the critical-impact requirement. *State v. Varnado*, 582 N.W.2d 886, 889 & n.1 (Minn. 1998). Thus, the critical-impact requirement is satisfied here, and we review the merits of the pretrial suppression order.

“When reviewing a pretrial order on a motion to suppress evidence, [appellate courts] may independently review the facts and determine whether, as a matter of law, the

district court erred in suppressing or not suppressing the evidence.” *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004). We review a district court’s determination of reasonable suspicion de novo and accept the district court’s factual findings unless they are clearly erroneous. *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012).

Basis for the Seizure

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10. “The Fourth Amendment applies to seizures of the person, including brief investigatory stops An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 694-95 (1981) (citations omitted). “The touchstone of the Fourth Amendment is reasonableness.” *State v. Johnson*, 813 N.W.2d 1, 5 (Minn. 2012) (quoting *United States v. Knights*, 534 U.S. 112, 118, 122 S. Ct. 587, 591 (2001)). In justifying a particular warrantless seizure, a “police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968)).

Whether an officer has reasonable suspicion to conduct an investigative seizure depends on the totality of the circumstances and a showing that the seizure was not “the product of mere whim, caprice, or idle curiosity.” *In re Welfare of M.D.R.*, 693 N.W.2d 444, 448 (Minn. App. 2005) (quotation omitted), *review denied* (Minn. June 28, 2005). The factual basis required to justify an investigative seizure is minimal. *Magnuson v.*

Comm'r of Pub. Safety, 703 N.W.2d 557, 560 (Minn. App. 2005). The police may seize a person so long as the facts “support at least one inference of the possibility of criminal activity.” *State v. Schrupp*, 625 N.W.2d 844, 847-48 (Minn. App. 2001), *review denied* (Minn. July 24, 2001).

There is no fixed or definitive test for the reasonableness of an investigatory [seizure]. Rather, we must balance the need for the [seizure] against the invasion [it] entails. There can be no rational disagreement that an investigatory [seizure] is necessary when the totality of the circumstances points to some observable unusual conduct that leads the officer reasonably to conclude in light of his experience that criminal activity may be afoot. But the officer must articulate specific facts that, taken together with rational inferences from those facts, reasonably justify the [seizure]. The officer need not be absolutely certain of the possibility of criminal activity, but he cannot satisfy the test of reasonableness by relying on an inchoate and unparticularized suspicion or “hunch.”

Id. at 846-47 (quotations and citations omitted).

Evasive behavior, such as unprovoked flight upon noticing the presence of police, is a pertinent factor in a reasonable-suspicion determination. *Illinois v. Wardlow*, 528 U.S. 119, 124-25, 120 S. Ct. 673, 676 (2000). “Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.” *Id.* at 124, 120 S. Ct. at 676.

In arguing that respondent’s seizure was lawful, the state relies on respondent’s immediate flight upon observing the officers, as well as the officers’ testimony that respondent was seized in an alley in a high-crime area, in the early morning hours, while wearing dark clothing. The time, the location, and the defendant’s clothing have been

recognized as relevant in determining whether the totality of the circumstances justified an investigative seizure. See *State v. Lande*, 350 N.W.2d 355, 357-58 (Minn. 1984) (“Although the police apparently did not need articulable suspicion to approach defendant, they arguably had it, given the totality of the circumstances (including the time, the place, defendant’s manner of dress, and his suspicious behavior).” (citation omitted)). Nevertheless, we share the district court’s reluctance to rule that walking down an alley in north Minneapolis at 5:45 a.m. while wearing dark clothing creates reasonable suspicion of criminal activity. In our view, the issue is whether respondent’s evasive conduct alone justified the seizure. We therefore focus on that issue.

In *State v. Johnson*, this court concluded that “[a]n evasive act alone, in the absence of other indicia of criminal activity or other extreme behavior, is not a sufficient basis for conducting a *Terry* stop.” 439 N.W.2d 400, 400 (Minn. App. 1989), *rev’d*, 444 N.W.2d 824 (Minn. 1989). On further review, the Minnesota Supreme Court rejected that conclusion, reasoning that “the United States Supreme Court’s decisions do not support the court of appeals’ new rule” and that “[t]he Court has also suggested quite strongly that it would not agree with the court of appeals’ new rule.” *State v. Johnson*, 444 N.W.2d 824, 825-26 (Minn. 1989). The supreme court quoted Professor LaFave’s analysis of the issue. *Id.* at 826. Although the quoted passage is long, we repeat it here because it is instructive.

Another rather common situation is that in which police suspicions are based in whole or in part upon the reactions of the suspect in response to the appearance of police in the vicinity. Police are trained to be suspicious of such reactions, and stops are not infrequently made because of them. As one empirical study concluded: A person who manifests concern for the presence of the police, who repeatedly glances at the

officer, who changes his direction in an apparent attempt to avoid confronting the officer, or who flees at the sight of an officer will commonly be detained and questioned. It is not to be doubted that such reactions may be taken into account by the police and that together with other suspicious circumstances these reactions may well justify a stopping for investigation. Courts have so held when persons already suspected to some degree kept a watch upon the police, turned to conceal something from the police, tried to conceal themselves from the police, or drove away, ran away or walked off at a fast pace upon the approach of the police.

More difficult, however, is the question of whether such actions as these may, *in and of themselves*, justify a stopping for investigation. Perhaps at least some of them do, for, as the Supreme Court acknowledged in *Peters v. New York*, [392 U.S. 40, 88 S. Ct. 1912, 20 L.Ed.2d 917 (1968)], “deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*.” However, some actions which may fairly be said to be in response to an awareness that police are in the vicinity are not of that type; persons on the street watch police and engage in similar activities out of interest in what the police are doing and out of a desire to avoid some minor misstep, such as a minor traffic violation, which would involve them unnecessarily with the police. Thus, it has properly been held that the hesitancy of a car to pass a police cruiser and a glance at the officer [sic] by a passenger, a startled look at the sight of a police officer, appearing nervous when a police car passed, looking away from police activity in the vicinity, pointing toward police, or quickening one’s pace upon seeing the police are not, standing alone, sufficient bases for an investigative stop. *By contrast, such stops have been upheld when the individual made repeated efforts to avoid police contact, when he engaged in a combination of several different possibly furtive actions, and when the person engaged in a rather extreme means of avoidance such as high-speed flight.*

Id. (second emphasis added) (alteration in original) (quoting 3 W. LaFave, *Search and Seizure* § 9.3(c) at 448-51 (2d ed. 1987) (citations omitted)) (quotation marks omitted).

Our supreme court applied LaFave's analysis in determining whether evasive driving conduct in *Johnson* justified an investigative seizure. *Id.* at 827. The supreme court reasoned:

As we see it, the issue is partly a semantic question depending on what one means when one says that the defendant engaged in evasive conduct. On the one hand, if a driver merely appears startled at the sight of a police officer passing him and then slows down a bit and if a reasonable police officer would not infer any wrongdoing from the driver's response, then the officer does not have a particular and objective basis for suspecting the driver of criminal activity and may not stop the driver. On the other hand, *if the driver's conduct is such that the officer reasonably infers that the driver is deliberately trying to evade the officer and if, as a result, a reasonable police officer would suspect the driver of criminal activity, then the officer may stop the driver.*

Id. at 826-27 (emphasis added). The supreme court concluded:

In this case, the trooper did not base his decision to stop on mere whim, caprice, or idle curiosity. Moreover, the trooper did not base his decision to stop solely on the fact that the defendant made a quick turn off the highway seconds after he looked the trooper in the eye. The trooper also observed the defendant turn off the secondary street into a driveway or side street and then resume his driving on the highway within a minute after turning off the highway. While defendant's behavior may have been consistent with innocent behavior, it also reasonably caused the officer to suspect that defendant was deliberately trying to evade him. In short, the record we have on appeal in this case indicates that the trooper reasonably inferred that defendant was deliberately trying to evade him and that, as a result, the trooper reasonably suspected petitioner of wrongdoing.

Id. at 827 (quotation and citation omitted).

In sum, *Johnson* establishes that evasive conduct alone may give rise to reasonable suspicion of criminal activity justifying an investigative seizure. *See, e.g., State v. Petrick*, 527 N.W.2d 87, 87-89 (Minn. 1995) (relying on *Johnson* and concluding that officer articulated sufficient grounds for traffic stop based solely on evasive driving conduct).

Notwithstanding *Johnson*'s holding, respondent argues that "courts have consistently regarded evasive conduct as justifying a seizure only with additional evidence of criminal activity." Although there are cases in which seizures were determined to be lawful based on evasive conduct combined with other evidence of criminal activity, *see, e.g., Wardlow*, 528 U.S. at 124-25, 120 S. Ct. at 676 (assessing flight in the context of police convergence on an area known for heavy narcotics trafficking); *State v. Houston*, 654 N.W.2d 727, 732-34 (Minn. App. 2003) (assessing flight in the context of possible gunfire), *review denied* (Minn. Mar. 26, 2003), *Johnson* makes it clear that additional suspicion of criminal activity is not always necessary: reasonable suspicion may be based on evasive conduct alone if the conduct gives rise to reasonable suspicion of criminal activity. 444 N.W.2d at 827.

Respondent also argues that "*Johnson* was a traffic stop case, which is not in the same category of investigative stops as those in [pedestrian stop cases]." He suggests that the standard for stopping a motorist is lower than the standard for stopping a pedestrian. *Cf. State v. Davis*, ___ N.W.2d ___, ___, 2018 WL 1569783, at *5 (Minn. App. Apr. 2, 2018) (noting absence of caselaw as to "whether the *Johnson* holding applies to pedestrian stops" but "offer[ing] no opinion" on the issue). We disagree. The standard for a warrantless investigative seizure requires "only that the officer have a 'particular and

objective basis for suspecting the particular person stopped of criminal activity.’” *Johnson*, 444 N.W.2d at 825 (quoting *Cortez*, 449 U.S. at 417-18, 101 S. Ct. at 695). *Johnson* clarifies that some evasive conduct alone may reasonably cause the police to suspect criminal activity. Although *Johnson* involved a traffic stop, nothing in the language of the opinion suggests that the supreme court was adopting a new standard that would apply only to traffic stops. The supreme court explained:

We simply reaffirm the standard which we have followed in numerous cases: that a police officer may make a brief limited investigative stop if the officer has a particular and objective basis for suspecting the person stopped of criminal activity. Because we conclude that the rule adopted by the court of appeals makes an unjustified refinement of this standard . . . we reverse the decision of the court of appeals and reinstate defendant’s judgment of conviction.

Id. at 827.

We do not discern a principled basis to limit the rule from *Johnson* to traffic stops and thereby create different standards for assessing the constitutional validity of seizures of pedestrians and motorists. As the Minnesota Supreme Court stated in *Johnson*, “in all stop cases, the decision for the [district] court at the suppression hearing depends on whether the officer is able to articulate at the hearing a ‘particular and objective basis for suspecting the particular person stopped of criminal activity.’” *Id.* (emphasis added) (quoting *Cortez*, 449 U.S. at 417-18, 101 S. Ct. at 695). We therefore hold that the rule from *Johnson* applies to both traffic and pedestrian stops.

We now apply *Johnson* to the facts of this case. Here, “[w]ithin seconds” of observing respondent, the police saw him look “over his shoulder toward the squad car and

. . . run through a back yard off the alley.” On these facts, the officers reasonably inferred that respondent was deliberately trying to evade them.

We next consider whether respondent’s deliberately evasive conduct caused the officers to reasonably suspect respondent of criminal activity. Immediately after observing the police behind him in a marked vehicle, respondent took off running, away from the police and through a residential yard. Although respondent’s presence in a north Minneapolis alley at 5:45 a.m. while wearing dark clothing did not give rise to reasonable suspicion of criminal activity, his immediate, unprovoked, headlong flight from the police through a residential yard supported a reasonable inference that he was involved in criminal activity. *See Wardlow*, 528 U.S. at 129-30, 120 S. Ct. at 679 (Stevens, J., concurring in part, dissenting in part) (explaining that the inference that can reasonably be drawn about the motivation for a person’s flight will depend on a number of different circumstances, including the direction and speed of the flight). Because respondent’s flight caused the officers to reasonably suspect him of criminal activity, respondent’s seizure was constitutional.

In *Johnson*, the supreme court stated that its decision “should not be interpreted in any way as making it easier for police to justify stopping motor vehicles.” 444 N.W.2d at 827. Similarly, this court does not intend its application of the *Johnson* rule to a pedestrian stop to in any way make it easier for the police to justify stopping pedestrians. However, “[t]he touchstone of the Fourth Amendment is reasonableness.” *Johnson*, 813 N.W.2d at 5 (quotation omitted). And in rare cases such as this one involving immediate, unprovoked,

headlong flight from the police, deliberately evasive conduct alone can give rise to reasonable suspicion of criminal activity justifying a warrantless investigative seizure.

Use of Service Weapon

Respondent's brief suggests that his seizure was unlawful because Officer Spies had his gun drawn during the foot chase. He argues, "[T]he police chasing down someone at gunpoint on the street, who has run away for no particular reason, should be discouraged, not earn endorsement from prosecutors and courts." He further argues that the police should have followed respondent, "without guns drawn, [found] him, and simply ask[ed], 'Why are you running?'"

It is unclear why Officer Spies's use of his service weapon during the chase is relevant to the determination of whether there was a lawful basis to initiate the chase. Although Officer Spies's use of his service weapon is relevant to a determination of whether a seizure occurred, that issue was not contested in district court or on appeal. See *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993) (stating that "the display of a weapon by an officer" is among the circumstances that may indicate a seizure has occurred (quotation omitted)).

Officer Spies's use of his service weapon may also be relevant to a determination of whether the seizure was reasonably executed. "A *Terry* analysis involves a dual inquiry." *Askerooth*, 681 N.W.2d at 364. "First, [an appellate court] ask[s] whether the stop was justified at its inception. Second, [it] ask[s] 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." *Id.* (citations omitted). But in this case, the issue raised and

determined in district court was whether the seizure was justified at its inception, and not whether the use of a firearm during the seizure rendered its execution unreasonable. Indeed, in district court, respondent did not argue that the seizure was unreasonably executed because Officer Spies had his gun drawn during the chase.

Nonetheless, at oral argument to this court, respondent encouraged this court to hold that the seizure was unreasonable based on the manner of its execution. We decline to consider the manner of execution because we are not satisfied that the factual record is adequately developed or that the issue is adequately briefed. *See State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003) (“A respondent can raise alternative arguments on appeal in defense of the underlying decision when there are sufficient facts in the record for the appellate court to consider the alternative theories, there is legal support for the arguments, and the alternative grounds would not expand the relief previously granted.”).

We limit our review to the district court’s ruling that “the officers had no reasonable articulable suspicion to seize [respondent],” because “[t]here were no specifics articulated by the officers as to why they chased [respondent] other than it was 5:45 a.m., in a high crime neighborhood, and [respondent] looked in their direction then ran.” Based on the reasoning of *Johnson*, we conclude that respondent’s deliberately evasive conduct alone provided reasonable suspicion of criminal activity that justified his warrantless seizure.

Conclusion

Because the *Johnson* holding that evasive conduct alone may justify an investigative seizure is not limited to traffic stops, we apply it here. Under that holding, respondent’s deliberately evasive conduct gave rise to reasonable suspicion of criminal activity

justifying his seizure by the police. We therefore reverse the district court's order suppressing the gun and dismissing the charge against respondent, and we remand for further proceedings.

Reversed and remanded.