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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0449**

State of Minnesota,
Respondent,

vs.

Michael Karl Berzins,
Appellant.

**Filed January 28, 2019
Affirmed
Rodenberg, Judge**

McLeod County District Court
File No. 43-CR-17-1036

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael K. Junge, McLeod County Attorney, Daniel R. Provencher, Assistant County Attorney, Glencoe, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Rodenberg, Judge; and Cochran, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant challenges his convictions for driving while under the influence of a controlled substance (DWI) and controlled-substance possession, arguing that the district

court erred in denying his motion to suppress evidence found during a warrantless search of appellant's SUV after his arrest. Appellant also argues that the district court erred by imposing two sentences for his controlled-substance possession and controlled-substance DWI because they were part of the same behavioral incident. We affirm.

FACTS

While patrolling during the early-morning hours on July 2, 2017, Glencoe Police Officer Andrew Fiebelkorn began following appellant's SUV and watched it cross over the center line. After seeing the traffic violation, Officer Fiebelkorn stopped the SUV and approached it on the driver's side. Before Officer Fiebelkorn could identify himself, the SUV driver asked why he had been stopped. Officer Fiebelkorn explained that he stopped the SUV because it had gone over the center line. Officer Fiebelkorn then asked the driver for his driver's license and insurance information. Officer Fiebelkorn identified the driver as appellant Michael K. Berzins. Two other passengers were in the SUV, a female in the front-passenger seat and a male in the rear-passenger-side seat.

While speaking with appellant, Officer Fiebelkorn noticed that appellant was "on the nod," which the officer testified to mean that appellant was falling asleep while talking to him. Officer Fiebelkorn also observed that appellant had "droopy eyelids" and scabs on his arms and hands. Based on his experience working as a police officer and on the appearance and location of the scabs, Officer Fiebelkorn identified such scabs as indicative of hypodermic-needle use.

Based on his observations of appellant's scabs, droopy eyelids, and nodding off, Officer Fiebelkorn asked appellant to step out of the SUV to perform field sobriety tests.

Two other officers arrived on scene to assist Officer Fiebelkorn. Appellant's performance on the field sobriety tests indicated impairment. Officer Fiebelkorn arrested appellant for controlled-substance DWI and placed him in the back seat of a squad car.

Based on his interaction with appellant, Officer Fiebelkorn believed that evidence of drug use would be found inside the SUV. He decided to search it. Officer Fiebelkorn began his search with the driver's-side and center-console areas. In those areas, he found hypodermic needles, one of which appeared to have methamphetamine inside it. In the back seat on the driver's side of the car, Officer Fiebelkorn found a lunch pail containing needles, spoons, a scale, and a pill grinder containing a crystal-like substance that Officer Fiebelkorn believed was methamphetamine. In the area where one of the passengers had been sitting, Officer Fiebelkorn found another hypodermic needle and a small plastic bag containing approximately two grams of a crystal-like substance. Both the needle and the bag contained methamphetamine.

Later that morning, Officer Fiebelkorn obtained a search warrant for a sample of appellant's blood. The sample was drawn and later tested positive for the presence of methamphetamine.

The state charged appellant with fifth-degree possession of a controlled substance under Minn. Stat. § 152.025, subd. 2(1) (2016), and fourth-degree controlled-substance DWI under Minn. Stat. § 169A.20, subd. 1(2) (2016). Appellant moved to suppress the drug evidence obtained from the search of his SUV. After an evidentiary hearing, the district court denied appellant's motion to suppress. Appellant stipulated to the state's case to obtain appellate review of the district court's pretrial ruling under Minn. R. Crim. P.

26.01, subd. 4. The district court found appellant guilty of felony fifth-degree possession of a controlled substance and misdemeanor fourth-degree controlled-substance DWI. Appellant was sentenced to 21 months in prison for the fifth-degree possession offense, and 90 days in jail for the DWI offense, the sentences to run concurrently.

This appeal followed.

DECISION

I. The district court did not err by denying appellant's motion to suppress evidence obtained from the warrantless search of appellant's vehicle incident to his lawful arrest.

Appellant argues that the district court erred by denying his motion to suppress evidence obtained from the warrantless search of his vehicle, because the search was not justified under the search-incident-to-arrest exception to the warrant requirement under *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710 (2009).

In reviewing a pretrial order on a motion to suppress evidence, we review the district court's findings of fact for clear error, but we review its legal determinations de novo. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009). "We may independently review facts that are not in dispute and determine, as a matter of law, whether the evidence need be suppressed." *Id.* (quotation omitted).

Both the United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. To avoid suppression of the evidence acquired from a warrantless search, the state must show that an exception to the warrant requirement applies. *State v. Metz*, 422 N.W.2d 754, 756 (Minn. App. 1988).

A search incident to a lawful arrest is a well-recognized exception to the warrant requirement under the Fourth Amendment. *Gant*, 556 U.S. at 338, 129 S. Ct. at 1716. Under this exception, and incident to a lawful arrest, police may make a contemporaneous search of a vehicle if a defendant has access to the area or if there is reason to believe that evidence of the crime of arrest might be found in the vehicle. *Id.* at 343, 129 S. Ct. at 1719.

On appeal, appellant does not argue that the arresting officer did not have probable cause to arrest him for controlled-substance DWI. The district court determined that it was reasonable for Officer Fiebelkorn to believe that drug-use evidence might be found in appellant's SUV based on appellant's droopy eyelids, nodding off, puncture marks with scabs on his arms and hands, and appellant's having failed two field-sobriety tests. The district court concluded that the warrantless search of appellant's SUV was valid under the search-incident-to-arrest exception to the warrant requirement.

Appellant argues that the search of his SUV was not valid under *Gant* because it was unreasonable for the officer to believe that evidence of driving while impaired would be in appellant's SUV. Appellant asserts that "[t]he crime of DWI focuses upon evidence obtained from the driver, not other physical evidence, because it is the driver's state of intoxication that is prohibited." He claims that, because he was arrested "solely for the crime of DWI," the officer already had the necessary evidence of the crime of arrest.

In *Gant*, the Supreme Court identified searches similar to this one as lawful. *Gant*, 556 U.S. at 344, 129 S. Ct. at 1718-19. In *Gant*, officers arrested Gant for driving with a suspended license, handcuffed him, and locked him in the back of a patrol car. *Id.* at 335, 129 S. Ct. at 1714. Officers searched his car and found cocaine in the pocket of a jacket

on the backseat. *Id.* The Supreme Court held that the search was unlawful because Gant was secured at the time of the search and officers did not believe that evidence of the crime of arrest (driving with a suspended license) would be in Gant's car. *Id.* at 344, 129 S. Ct. at 1719 (stating that circumstances unique to the vehicle context justify a search incident to lawful arrest when officers reasonably believe evidence relevant to the crime of arrest might be found in the vehicle). The Court explained that the search was unreasonable in *Gant* because, "[a]n evidentiary basis for the search was also lacking Gant was arrested for driving with a suspended license—an offense for which police could not reasonably expect to find evidence in Gant's car." *Id.*

Here, after Officer Fiebelkorn arrested appellant for a controlled-substance DWI, the officer formed a reasonable belief that drugs—evidence of the crime of arrest—would be found in appellant's SUV. Officer Fiebelkorn's observation of multiple signs of drug use reasonably led the officer to believe, based on his training and experience, that "controlled substances are usually inside the vehicle along with the driver."

Officer Fiebelkorn was not limited to searching appellant's person to obtain controlled-substance-DWI evidence because Officer Fiebelkorn articulated a reasonable belief that drugs would be found in the car. *See Davis v. United States*, 564 U.S. 229, 234-35, 131 S. Ct. 2419, 2425 (2011) (stating that after *Gant*, an automobile search incident to a recent occupant's arrest is constitutional if the police have reason to believe that the vehicle contains evidence relevant to the crime of arrest). The district court determined that Officer Fiebelkorn articulated a "reason to believe" that appellant's car contained evidence of drug use. The facts he gathered while speaking with and arresting appellant

supported his belief. The record supports the district court's determination that Officer Fiebelkorn searched appellant's car based on a reasonable belief that drugs would be found in the SUV. Accordingly, the district court did not err in denying appellant's motion to suppress.

Appellant also argues that the search was not valid under *Gant* because “[n]o possibility existed that appellant could reach into the car after his arrest.” *Gant* stated that vehicle searches incident to an occupant's arrest are permitted *either* “if the arrestee is within reaching distance of the passenger compartment” *or* “it is reasonable to believe the vehicle contains evidence of the offense of arrest. *Gant*, 556 U.S. at 351, 129 S. Ct. at 1723. Here, the district court did not determine that the search was permitted because appellant could have reached into the passenger compartment. Instead, the district court applied *Gant*'s reasoning concerning vehicle searches when an officer reasonably believes that evidence of the crime of arrest is located in the car. *Gant*, 556 U.S. at 351, 129 S. Ct. at 1723.

II. The district court did not err by sentencing appellant for each offense.

Appellant also argues that the district court erred by imposing both a 21-month sentence for the drug-possession offense and a 90-day concurrent sentence for the DWI offense. Appellant asks us to reverse and remand with instructions to the district court to vacate his DWI sentence. The state agrees that appellant should not have been separately sentenced for the DWI offense.

We first consider the significance of the state's concession on appeal that appellant should not have been separately sentenced for the two offenses. An appellate court's duty

on appeal is to determine if the district court erred, and if so, to correct the error. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). And appellate courts never presume error. *Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949). Consequently, it is for the appellate court and not for the state to determine if the district court has erred. An appellate court's responsibility is to decide cases in accordance with the law. *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990). If the state mistakenly or erroneously concedes an issue on appeal, the concession does not bind the appellate court. *State v. Warren*, 419 N.W.2d 795, 799 (Minn. 1988). Therefore, our determination of whether appellant has demonstrated error considers, but is not constrained by, the state's concession.

“[I]f a person's conduct constitutes more than one offense . . . , the person may be punished for only one of the offenses.” Minn. Stat. § 609.035, subd. 1 (2016). The Minnesota Supreme Court has interpreted section 609.035 to bar multiple sentences for crimes that arise from a single behavioral incident. *State v. Bookwalter*, 541 N.W.2d 290, 293 (Minn. 1995). When the facts are not in dispute, as is the case here, we review de novo whether multiple offenses form part of a single behavioral act. *State v. McCauley*, 820 N.W.2d 577, 591 (Minn. App. 2012), *review denied* (Minn. Oct. 24, 2012).

An analysis of whether two offenses arise from a single behavioral incident depends first on whether each crime has an intent element. *State v. Bauer*, 792 N.W.2d 825, 827-28 (Minn. 2011). The supreme court has treated DWI offenses as nonintentional crimes.¹

¹ Appellant was convicted under Minn. Stat. § 169A.20, subd. 1(2). The statute reads, “[i]t is a crime for any person to drive, operate, or be in physical control of any motor vehicle . . . when: (2) the person is under the influence of a controlled substance.” Minn. Stat. § 169A.20, subd. 1(2). Appellant was sentenced under Minn. Stat. § 169A.27, subd. 1

See State v. Clement, 277 N.W.2d 411, 412-13 (Minn. 1979) (stating that appellant’s offense of driving under the influence of alcohol was nonintentional and different from and unrelated to his offense of possession of tear gas). Because possession crimes require proof that the defendant had actual knowledge of the nature of the substance in his possession, fifth-degree controlled substance possession is an intentional crime. *State v. Ali*, 775 N.W.2d 914, 918 (Minn. App. 2009), *review denied* (Minn. Feb. 16, 2010).²

When the offenses of conviction include both intentional and nonintentional crimes, we consider whether the offenses “(1) occurred at substantially the same time and place and (2) arose from a continuing and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment.” *State v. Fichtner*, 867 N.W.2d 242, 253-54 (Minn. App. 2015) (quotation omitted), *review denied* (Minn. Sep. 29, 2015). The application of this test “depends heavily on the facts and circumstances of the particular case.” *Bauer*, 792 N.W.2d at 828.

(2016) which states that “[a] person who violates section 169A.20, subdivision 1, 1a, 1b, or 1c (driving while impaired crime), is guilty of fourth-degree driving while impaired.” Minn. Stat. § 169A.27, subd. 1. Fourth-degree DWI is a misdemeanor. *Id.* subd. 2 (2016).

² Appellant was convicted of fifth-degree controlled substance possession under Minn. Stat. § 152.025, subd. 2(1) (2016). The relevant portion states that, “[a] person is guilty of controlled substance crime in the fifth degree and upon conviction may be sentenced as provided in subdivision 4 if: (1) the person unlawfully possess one or more mixtures containing a controlled substance classified in Schedule I, II, II, or IV, except a small amount of marijuana.” Minn. Stat. § 152.025, subd. 2(1). Appellant was sentenced in accordance with subdivision 4(b) of the statute based on his previous controlled-substances convictions.

Appellant did not raise this issue at sentencing. Accordingly, the district court made no express findings concerning whether the two offenses arose from the same behavioral incident. We are not precluded from reviewing the issue despite appellant not having raised it to the district court. See *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (stating that an appellant does not waive his right to challenge an unauthorized sentence on appeal by failing to raise the issue at sentencing). But in its order, the district court made findings on the elements of each offense and found appellant guilty of both offenses, and it imposed a conviction and sentence for each offense. In doing so, the district court implicitly found that the offenses did not arise from a single behavioral incident.

Appellant argues that the offenses occurred at substantially the same time and place because “appellant possessed the drugs in the car’s center console as he drove intoxicated.” He argues that his possession and DWI offenses “manifested coincident errors in judgment: using drugs and then driving under the influence of those drugs.”

The record does not establish that the offenses here occurred at the same time and place or that the offenses arose from a “continuing and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment.” *Fichtner*, 867 N.W.2d at 253-54.

On the first question, the record suggests that appellant’s possession began long before his impaired driving. The scabs and puncture marks on appellant’s arms indicated that he was a regular user of methamphetamine and appellant’s scabs did not appear fresh to the experienced officer. This is not a case like *City of Moorhead v. Miller*, where DWI and open-bottle offenses were treated as part of the same behavioral incident. 295 N.W.2d

548, 550 (Minn. 1980). In *Miller*, the circumstances suggested that the two offenses began on the date of arrest. *Id.* Not so here. There was a small bag of methamphetamine and multiple items of paraphernalia throughout the vehicle that appellant was driving. The drug was in multiple syringes and other locations in the vehicle. Moreover, appellant's presentence investigation (PSI) also suggests that his methamphetamine possession occurred long before he drove on July 2. The PSI reports that appellant admitted to being a regular user of methamphetamine and that, starting in January 2017 and up to and past the date of the offenses, he used methamphetamine daily. Therefore, although the two offenses of conviction coincided on July 2, the possession offense seemingly began before the driving offense.

Concerning the second same-behavioral-incident consideration, the record indicates that the offenses were distinct, and did not arise from a "continuing and uninterrupted course of conduct, manifesting an indivisible state of mind." Appellant's possession of methamphetamine was complete once he got into the car with the controlled substances, and that possession crime did not depend on whether appellant decided to drive. *See State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016) (stating that although possession is a continuing offense, a possession crime is completed when the offender takes possession of the prohibited item). Appellant's decision to drive while under the influence of methamphetamine was made after his decision to possess and use methamphetamine. *See State v. Zimmerman*, 352 N.W.2d 452, 454 (Minn. App. 1984) (explaining that in the absence of other facts, such as intent to sell, the objective of possession is the "personal use of mind-altering drugs"). And appellant continued to possess a bag of

methamphetamine, paraphernalia, and a scale while driving. These items evidence that appellant's possession of the methamphetamine was more than "coincident" with the DWI offense. *Fichtner*, 867 N.W.2d at 253-54.

Appellant cites to caselaw where we have reached different conclusions on whether drug possession and controlled-substance DWI were part of the same behavioral incident. But different outcomes in different cases can be expected because the analysis is "not a mechanical test, but involves an examination of all the facts and circumstances." *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997). The facts and circumstances in this case reveal that appellant possessed the methamphetamine before he committed the DWI offense. The two offenses were not part of the same behavioral incident.

The record supports the district court's implicit determination that appellant's offenses were not part of a single behavioral incident. The district court did not err by sentencing appellant separately for each offense.³

Affirmed.

³ As noted, appellant's sentences were concurrent.