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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0639**

State of Minnesota,
Respondent,

vs.

Dylan David Tonn,
Appellant.

**Filed May 6, 2019
Reversed and remanded
Cochran, Judge**

Hennepin County District Court
File No. 27-CR-17-5011

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

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

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

UNPUBLISHED OPINION

COCHRAN, Judge

In this direct appeal, appellant argues that the district court erred in denying his motion to suppress the evidence seized because (1) the officers did not have actual or apparent authority to enter the hotel room, (2) the officers did not have reasonable suspicion to seize appellant, and (3) appellant did not voluntarily consent to the search of his hotel room. Because the seizure was not supported by reasonable suspicion, we reverse and remand.

FACTS

On the morning of January 21, 2017, a uniformed police officer was patrolling in the area of the Red Roof Inn in Plymouth, Minnesota. While parked near the hotel, he noticed a man later identified as C.J. enter the front passenger side of a vehicle parked in the hotel parking lot. The police officer watched C.J. rummage under the seat, exit the vehicle after about a minute, walk back toward the hotel, and go up a side staircase that led to the guest rooms. Approximately 10 to 15 minutes later, C.J. returned to the vehicle and rummaged under the seat again for possibly a few minutes, and then returned to the hotel via the same route. After C.J. returned to the hotel the second time, the police officer observed another man, later identified as A.S., exit the hotel and enter the same vehicle. A.S. reached under the front seat of the car as well, and the police officer grew suspicious that a drug transfer was taking place within the car.

The police officer approached A.S. and asked whether there were any narcotics in the vehicle. A.S. stated that there was a marijuana pipe in the car. The police officer then

contacted a canine officer to assist in a search. After the canine alerted to the presence of narcotics, the police searched the car. The police found marijuana residue and a marijuana pipe in the car. The police also determined that the vehicle was registered to A.S.

The police officer asked A.S. whether he was renting a room at the hotel. A.S. replied that he was staying in room 340 but was not the renter. The police officer then asked A.S. to bring both officers up to the hotel room, and A.S. agreed.

Upon arriving at room 340, A.S. used a room key to open the door for the officers. The uniformed police officers entered the room and saw appellant Dylan David Tonn asleep on one of the beds. One of the officers announced their presence, and Tonn woke up. At the time, the officer was standing near the bed, within an arm's length of Tonn. When he awoke, Tonn appeared groggy. The officer told Tonn that they were there to investigate unregistered guests and narcotics. The officer asked Tonn whether he was the renter of the room and Tonn responded that he was. The officer asked whether there were any drugs in the room and whether they could conduct a search. Tonn responded that there were no drugs in the room and that the officers could search the room. During the search, the officer looked inside a sunglasses case and found two separate baggies, each of which contained cocaine. The bags weighed approximately 0.54 grams and 1.72 grams, respectively. Tonn was arrested and charged with fifth-degree controlled substance in violation of Minn. Stat. § 152.025, subd. 2(1) (2016).

At a hearing held on May 25, 2017, Tonn moved to suppress the evidence found in the hotel room as “fruit of the poisonous tree.” He argued that he was unlawfully seized and the officers did not receive valid consent to search the room. At the hearing, the police

officer who first made contact with A.S. testified regarding the search and the circumstances leading up to it. He also testified that he believed that Tonn had unregistered guests in the room, but he provided no testimony that he asked Tonn, C.J., or A.S. who was registered. The officer also acknowledged that he had not spoken with any employees of the hotel to determine who was registered prior to entering room 340. Tonn testified at the hearing as well. There were no other witnesses.

Following the hearing, the district court issued an order denying Tonn's motion to suppress. The district court found that: (1) Tonn did not have standing to challenge the initial stop of A.S. or any expansion of that stop; (2) A.S. had actual authority to let the officers into the hotel room; (3) even if A.S. lacked actual authority, he had apparent authority to allow access; (4) Tonn was seized when the officers entered the hotel room; (5) the seizure was supported by reasonable suspicion that there were drugs and unregistered guests in the room; (6) the officers had reasonable suspicion to expand the seizure and ask Tonn for consent to search the room; and (7) Tonn's consent was voluntary.

Following the denial of his motion, Tonn waived his jury-trial rights and stipulated to the state's evidence, preserving the dispositive pretrial issue for appeal. The district court found Tonn guilty and sentenced him to a stay of imposition of sentence for three years.

This appeal follows.

DECISION

When reviewing a pretrial order denying a motion to suppress evidence, this court independently reviews the facts and decides whether the district court erred in not

suppressing the evidence as a matter of law. *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004). We review the district court’s factual findings for clear error and its legal determinations de novo. *State v. Diede*, 795 N.W.2d 836, 843 (Minn. 2011).

Both the United States and Minnesota Constitutions guarantee protection against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. This constitutional protection “extends to persons staying in hotel rooms.” *State v. Thomas*, 598 N.W.2d 389, 391 (Minn. App. 1999), *review denied* (Minn. Sept. 28, 1999). A search or seizure conducted without a warrant is presumptively unreasonable. *State v. Lugo*, 887 N.W.2d 476, 486 (Minn. 2016). There are several exceptions to the warrant requirement, including when a search is conducted with consent. *State v. Hatton*, 389 N.W.2d 229, 232 (Minn. App. 1986) (citing *Katz v. United States*, 389 U.S. 347, 357-58, 88 S. Ct. 507, 514-15 (1967)), *review denied* (Minn. Aug. 13, 1986). Generally, evidence obtained pursuant to an unconstitutional search or seizure must be suppressed. *Mapp v. Ohio*, 367 U.S. 643, 654-55, 81 S. Ct. 1684, 1691 (1961); *State v. Jackson*, 742 N.W.2d 163, 177-78 (Minn. 2007).

Tonn argues on appeal that the district court erred in denying his motion to suppress because (1) the officers did not have actual or apparent authority to enter the hotel room, (2) the officers did not have reasonable suspicion to seize him, and (3) he did not voluntarily consent to the search of his hotel room. We address Tonn’s arguments in turn.

I. A.S. had actual authority to consent to the officers’ entry of the hotel room.

Tonn argues that the district court erred when it concluded that A.S. possessed actual authority to consent to the officers entering the hotel room. When the facts of a case are

not in dispute, this court reviews the reasonableness of a search de novo. *Thomas*, 598 N.W.2d at 391. “[A] third party having common authority over premises or effects may consent to a search.” *In re Welfare of D.A.G.*, 484 N.W.2d 787, 789 (Minn. 1982). The common authority of an individual over a premises rests upon the “mutual use of the property by persons generally having joint access or control.” *Thomas*, 598 N.W.2d at 392 (quotation omitted).

Here, the record shows that A.S. possessed actual authority. A.S. told officers that he was staying in room 340. While he was not the renter of the room, he possessed a room key. Additionally, Tonn testified that he had been staying at different hotels with A.S. for the past few nights and they decided to “get a hotel [room] together.” A.S. was not a mere guest, but had mutual use of the room, evidenced by joint access. *See State v. Hatton*, 389 N.W.2d at 233 (stating that while “a mere guest of a premises may not give consent to search those premises when his or her interest is inferior to that of the host,” a person who has joint access to the premises has common authority to give consent). The district court did not err when it concluded that A.S. had actual authority to consent to the police officers entering the hotel room.

II. The police did not have a reasonable suspicion to seize Tonn.

Tonn argues that even if A.S. had actual authority to allow the police to enter the hotel room, the police officers impermissibly seized him after they entered the room. A police officer may “temporarily seize a person to investigate that person for criminal wrongdoing if the officer reasonably suspects that person of criminal activity.” *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). The officer must have “a particularized and

objective basis for suspecting the particular person stopped of criminal activity.” *Lugo*, 887 N.W.2d at 486. “[R]easonable suspicion requires something more than an unarticulated hunch.” *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (quotation omitted). The burden is on the state to establish a reasonable suspicion. *State v. Flowers*, 734 N.W.2d 239, 256 (Minn. 2007).

This court reviews the district court’s findings of fact for clear error. *Diede*, 795 N.W.2d at 843. When reviewing “the district court’s determination that its factual findings support a reasonable suspicion of criminal activity justifying the police officer’s search or seizure,” this court applies a de novo standard. *Id.*

A seizure occurs when an officer “by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” *Cripps*, 533 N.W.2d at 391 (quotation omitted). A person is seized if the totality of the circumstances show that a reasonable person would not have believed that he or she was able to disregard the police questions or terminate the encounter. *Id.* The district court concluded that Tonn was seized because he was “awoken by the presence of two uniformed police officers” and questioned by the police without being told he could terminate the encounter or disregard the police questioning. The district court emphasized that one officer was “so close to [Tonn] that he ‘could have reached down and touched his foot.’” Based on the totality of the circumstances, the district court concluded that a reasonable person in Tonn’s position “would not have believed that he could leave the motel room at that point or otherwise terminate the encounter.”

On appeal, the parties do not challenge the district court’s determination that Tonn was seized by the police. The question before us, then, is whether the police officer articulated a sufficient individualized basis for suspecting Tonn of criminal activity to justify the seizure. *See id.* (stating that to reasonably suspect a person of criminal activity, the police officer “must be able to articulate at the omnibus hearing that he or she had a particularized and objective basis for suspecting the seized person of criminal activity”).

Tonn argues that his seizure was unlawful because the police officer did not point to any articulable facts to demonstrate reasonable suspicion that Tonn was engaged in criminal activity. Tonn contends that the district court erroneously relied on facts that were not specific to Tonn in concluding that the seizure was lawful. The state maintains that the officers had reasonable suspicion because (1) the officers suspected additional drug activity in the hotel room and (2) the officers believed Tonn had unregistered guests staying in his room. Based on an objective examination of the undisputed facts in this case, we agree with Tonn that the state has failed to demonstrate “a particularized and objective basis” for suspecting that Tonn—as opposed to A.S. or C.J.—was engaged in criminal activity.

At the suppression hearing, the police officer did not articulate any facts that demonstrated a reasonable basis for suspecting that Tonn was engaged in criminal activity prior to being seized. All the facts prior to the seizure related to C.J. and A.S. At the hearing, the police officer testified that he watched C.J. enter a vehicle in the Red Roof Inn parking lot, reach under the seats, exit the vehicle, and return to the hotel. The police officer did not know where C.J. went once he entered the hotel. After C.J. repeated these actions a second time and was back inside the hotel, the police officer observed A.S. exit

the hotel and enter the same vehicle. The police officer approached A.S. in the parking lot because he suspected a drug transfer was taking place. The police officer asked A.S. whether he was staying at the hotel and whether there were any more drugs in the room. A.S. confirmed that he was staying in room 340 and denied knowing whether any narcotics were in the hotel room. While searching the car, the police officer discovered a pipe and marijuana residue, consistent with personal use, but no other drugs.

While the police officer alluded to the potential of additional drugs or drug activity in the hotel room based on the conduct of C.J. and A.S., the drugs discovered in the vehicle were consistent with personal use, not drug trade. And, the police officer did not provide any facts at the suppression hearing to flesh out his hunch that, because there were personal-use drugs found in the parked car, there also would be drugs in the hotel room. This is especially true considering that the police officer did not see where C.J. went after he entered the hotel staircase, and A.S. returned to the hotel escorted by the officers. The record thus fails to support the state's argument that the police officer articulated a reasonable basis to suspect additional drug activity in the hotel room.

Even if it was reasonable for the police officer to suspect that there were drugs in the hotel room based on the conduct of C.J. and A.S., the police officer did not testify to any specific and articulable facts that would objectively lead the police to suspect Tonn of criminal drug activity. All the facts relating to suspected criminal drug activity prior to the police seizing Tonn involved A.S. and C.J. The car where the personal-use drugs were found belonged to A.S., and only A.S. and C.J. were seen in the vehicle. At best, the police officer articulated a reasonable basis to suspect that A.S. and C.J. were engaged in criminal

drug activity, but not Tonn. Any suspicion of criminal drug activity by Tonn, who was asleep in the room when the police entered, was at most “an unarticulated hunch.” See *Diede*, 795 N.W.2d at 844 (“Mere proximity to, or association with, a person who may have previously engaged in criminal activity is not enough to support reasonable suspicion of possession of a controlled substance.”). In sum, the state failed to meet its burden to demonstrate a reasonable, articulable suspicion that Tonn was engaged in criminal drug activity. See *Flowers*, 734 N.W.2d at 256 (holding that the state did not meet its burden because there was no testimony by officers to support reasonable, articulable suspicion). Because the police officer’s testimony in this case was insufficient to demonstrate a reasonable suspicion of criminal drug activity by Tonn, the seizure was not supported on this basis.

The record also shows that the police officer did not point to any facts that objectively supported his belief that there were unregistered guests in the hotel room. Minnesota law mandates that hotel guests provide registration information for each person staying in the room and categorizes the failure to do so as a misdemeanor offense. Minn. Stat. §§ 327.11, .13 (2016). But the police officer’s testimony reflects a mere hunch that Tonn had violated this statute. A.S. told the police officer that he was staying in room 340 but was not the renter. This statement alone is not indicative of any statutory violation. The police officer did not follow up with any additional questions about whether he was registered, and the officer did not contact the hotel staff to check whether A.S. or C.J. were registered prior to seizing Tonn. Because the police officer did not point to any facts that

supported his suspicion of unregistered guests in Tonn's room, his suspicion amounted to a mere hunch and did not support the seizure.

In sum, based on the specific, undisputed facts of this case, we conclude that the district court erred when it determined that the seizure was supported by a reasonable suspicion because the state did not demonstrate that the police had a particularized and objective basis for suspecting criminal activity by Tonn sufficient to justify the seizure. *Cripps*, 533 N.W.2d at 391. Because his seizure was unlawful, Tonn is entitled to the suppression of any evidence obtained as a result of the exploitation of this illegality. *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 417 (1963); *State v. Holland*, 865 N.W.2d 666, 670 (Minn. 2015) (citing *Wong Sun*).

“When the police obtain a person's consent to search after unlawful police conduct has occurred, the state must demonstrate both (1) that the subsequently obtained consent was voluntarily given and (2) that the connection between the unlawful conduct and the evidence is so attenuated as to dissipate the evidence of the ‘taint’ of the unlawful conduct.” *State v. Barajas*, 817 N.W.2d 204, 217 (Minn. App. 2012) (quoting *United States v. Lakoskey*, 462 F.3d 965, 975 (8th Cir. 2006)), review denied (Minn. Oct. 16, 2012).

To determine whether consent is voluntary, courts look at “the totality of the circumstances, including the nature of the encounter, the kind of person the defendant is, and what was said and how it was said.” *State v. Harris*, 590 N.W.2d 90, 102 (Minn. 1999) (quotation omitted). Consent is voluntary if a “reasonable person would have felt free to decline the officer's requests or otherwise terminate the encounter.” *State v. Dezso*, 512

N.W.2d 877, 880 (Minn. 1994) (quotation omitted). Whether consent to a search was voluntary or was the product of duress or coercion is a question of fact, which this court reviews for clear error. *Diede*, 795 N.W.2d at 846.

Here, the encounter between the officers and Tonn occurred mid-morning in his hotel room. Tonn was awoken by the officers announcing their presence. The officers asked Tonn whether they could look around the room, and Tonn responded that they could. Tonn has had two previous interactions with police officers and testified that he “thought [he] could” refuse the officers’ request to search the room. While Tonn testified that he was scared and confused after the officers entered his room, “involuntariness of a consent to a police request is not to be inferred simply because the circumstances of the encounter are uncomfortable for the person being questioned.” *Deszo*, 512 N.W.2d at 880. Based on the totality of the circumstances, the district court did not clearly err in finding that Tonn voluntarily consented to the search of the hotel room.

Having found that Tonn’s consent was not involuntarily given, we must next evaluate the relationship between his consent and the unlawful seizure that preceded it. “When determining whether the taint is purged from unlawfully obtained evidence, we consider (1) the temporal proximity between the illegal search or seizure and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.” *Barajas*, 817 N.W.2d at 218 (quotation omitted).

Regarding the first factor, the officers obtained Tonn’s consent immediately after seizing Tonn. The officers entered the hotel room, announced their presence, asked whether any narcotics were present in the room, and asked for Tonn’s consent to search.

As to the second factor, there were no intervening circumstances that would have led the officers to independently discover the drugs. Police found the drugs in a sunglasses case during the search that was conducted immediately after asking Tonn for consent to search the room. The first and second factors weigh strongly in favor of concluding that the taint of the unlawful seizure was not purged.

Lastly, we consider the purpose and flagrancy of the official misconduct. “[T]he primary purpose of the exclusionary rule is to deter police misconduct.” *State v. Hardy*, 577 N.W.2d 212, 217 (Minn. 1998). And even if the officers were acting in good faith, permitting the police to request consent and search the room without reasonable suspicion would undermine the purpose of the exclusionary rule. *See Barajas*, 817 N.W.2d at 219 (stating that “permitting the police to obtain consent after conducting an unlawful search so as to circumvent the exclusionary rule, even if the police conducted the unlawful search in good faith, would undermine” the exclusionary rule (emphasis omitted)). The third factor weighs in favor of concluding that the taint was not purged.

Because the taint of the unlawful conduct was not purged, the district court’s decision to admit the evidence found during the search was error. Tonn is entitled to the suppression of any evidence obtained as the result of the exploitation of the illegal seizure.

Reversed and remanded.