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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0656**

State of Minnesota,
Respondent,

vs.

Vincent Edward Britton,
Appellant.

**Filed February 19, 2019
Reversed
Cleary, Chief Judge**

Hennepin County District Court
File No. 27-CR-17-13676

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and Reilly, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

On appeal from his conviction for ineligible possession of a firearm in violation of Minn. Stat. § 624.713, subd. 1(2) (2016), appellant Vincent Edward Britton argues that the

district court: (1) erred by denying his request to represent himself; (2) erred by denying his motion to suppress the firearm; and (3) abused its discretion by excluding alternative-perpetrator evidence. Because the police officer improperly expanded the scope of the investigative stop, we suppress the evidence and reverse the conviction.

FACTS

On June 2, 2017, Officer Sean Lessard, of the Minneapolis Police Department, was on patrol in a marked squad car in North Minneapolis. At the suppression hearing, Officer Lessard testified that he observed a vehicle with a non-operable brake light and activated his overhead lights to conduct a traffic stop. After initiating the stop, Officer Lessard testified that he observed the driver, Britton, make a furtive movement, reaching under his seat as if to take something out or place something under his seat. Officer Lessard also testified that he saw Britton make a side-to-side movement prior to stopping his vehicle.

Officer Lessard exited his squad car and approached the stopped vehicle. Officer Lessard testified that as he approached the vehicle, he observed, what he believed to be, marijuana flakes on the rear driver-side floorboard. Officer Lessard asked Britton for his driver's license and proof of insurance; Britton did not have proof of insurance, but provided his driver's license. After noticing that the passenger in the vehicle was not wearing a seatbelt, Officer Lessard also asked the passenger for identification. The passenger provided a name, but he did not have any identification.

Officer Lessard returned to his squad car to verify Britton's driver's license and the passenger's name.¹ The name that the passenger provided did not appear in any of the police databases. Because he was working alone that day and believed the passenger had given him a false name, Officer Lessard called for an additional squad car.

After a second police officer arrived, Officer Lessard asked the passenger to step out of the vehicle. As the passenger stepped out, Officer Lessard noticed an empty "corner baggie" on the front passenger-side floorboard, an item that he testified is often used to package narcotics. After he brought the passenger back to his squad car, Officer Lessard separately questioned the passenger and Britton as to how they knew each other. The passenger told Officer Lessard that he knew Britton through his uncle; Britton told Officer Lessard that he knew the passenger "through a girl."

After questioning Britton about the passenger, Officer Lessard asked Britton if he had a gun. He responded that he did not. Officer Lessard asked Britton to step out of the vehicle. He searched Britton and found around \$1,700 in cash in his pockets. Officer Lessard then searched under the driver's seat, and discovered a loaded handgun in a sock. Officer Lessard arrested Britton and confined him in a squad car.

A few days after the incident, the state charged Britton with ineligible possession of a firearm in violation of Minn. Stat. § 624.713, subd. 1(2) due to his prior felony convictions. Britton challenged the admission of the firearm into evidence. Britton argued

¹ At trial, Officer Lessard testified that he also ran a search for the vehicle's license plate number in the police databases, but the results of the search indicated that the vehicle was not on file. There was no mention of this search at the suppression hearing.

that the firearm should be excluded from admissible evidence because the officer expanded the scope of the traffic stop without reasonable, articulable suspicion of illegal activity. The district court denied Britton's motion, finding that the search was justified based on Officer Lessard's observations of Britton's furtive movement prior to the stop, in addition to the alleged marijuana flakes and "corner baggie" in the vehicle.

Britton stipulated that he was an ineligible person to possess a firearm, and trial proceeded on the issue of possession. A jury found Britton guilty of the charged offense. Following the jury verdict, Britton waived his right to a jury trial as to whether he was a dangerous offender under Minn. Stat. § 609.1095, subd. 2 (2016) (increased sentence for dangerous offender who commits a third violent crime). The district court, pursuant to a joint sentencing recommendation, sentenced Britton to a 90-month prison term.

D E C I S I O N

The district court clearly erred by denying Britton's motion to suppress the firearm.

Britton challenges the district court's denial of his suppression motion. When considering the denial of a pretrial suppression motion, this court reviews the district court's factual findings for clear error and its legal conclusions de novo. *State v. Molnau*, 904 N.W.2d 449, 451 (Minn. 2017). A finding of fact is clearly erroneous if, after reviewing the record, this court "reaches the firm conviction that a mistake has been made." *State v. Kvam*, 336 N.W.2d 525, 529 (Minn. 1983). A determination as to the existence of reasonable, articulable suspicion or probable cause is reviewed de novo. *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999). "The State bears the burden of establishing that the

challenged evidence was obtained in accordance with the constitution.” *State v. Edstrom*, 916 N.W.2d 512, 517 (Minn. 2018), *pet. for cert. filed* (U.S. Nov. 19, 2018).

The United States and Minnesota Constitutions guarantee the right to be secure against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. 1, § 10. But a law enforcement officer may conduct a brief investigatory stop of a person if the officer has a reasonable, articulable suspicion that the person might be engaged in criminal activity. *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011) (citing *Terry v. Ohio*, 392 U.S. 1, 19-21, 88 S. Ct. 1868, 1879-81 (1968)).

A *Terry* analysis involves a dual inquiry. *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004). First, we ask whether the stop was justified at its inception. *Id.* Second, we ask whether 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.* Because Britton concedes that the initial stop was justified, we focus on the second *Terry* prong.

“An initially valid stop may become invalid if it becomes ‘intolerable’ in its ‘intensity or scope.’” *Id.* (quoting *Terry*, 392 U.S. at 17-18, 88 S. Ct. at 1878). A stop is valid so long as each incremental intrusion is strictly tied to and justified by the circumstances which rendered the initiation of the stop permissible. *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012). An 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. *Id.*

The reasonable-suspicion standard is “not high.” *Diede*, 795 N.W.2d at 843 (quotation omitted). But it “requires at least a minimal level of objective justification.”

State v. Timberlake, 744 N.W.2d 390, 393 (Minn. 2008) (quotation omitted). A police officer’s “hunch, intuition, gut reaction, [or] instinctive sense” is insufficient to meet the standard. *State v. Baumann*, 759 N.W.2d 237, 240 (Minn. App. 2009), *review denied* (Minn. Mar. 31, 2009). “Reasonable suspicion must be based on specific, articulable facts that allow the officer to 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.” *Diede*, 795 N.W.2d at 842-43 (quotation omitted).

Here, Officer Lessard initiated a traffic stop after observing a vehicle with an inoperable brake light. It concerns us that the district court credited Officer Lessard’s testimony regarding an alleged “furtive movement” by Britton when that testimony is not supported by the squad video, by the district court’s own admission. Police squad and body cameras capture direct video evidence. But the “furtive movement,” as described by Officer Lessard, does not appear on the squad video. Moreover, at the suppression hearing, Officer Lessard did not explain why the movement did not appear on the squad video and did not pinpoint on the squad video when the movement occurred. Nor did he suggest that the movement occurred out of the range of the video recording.² The district court credited Officer Lessard’s testimony, even while acknowledging that “you can’t necessarily see that on the squad video.” Because the officer’s testimony is not supported by the squad video,

² In contrast to his testimony at the suppression hearing, at trial, Officer Lessard pointed to the moment on the video where he observed Britton make the “furtive movement” and explained that the movement occurred off camera. Because we are reviewing the district court’s suppression ruling, we view the record evidence presented to the district court and do not consider testimony from the trial when assessing reasonable, articulable suspicion at a pretrial suppression hearing.

we conclude that the district court's finding that Britton made a "furtive movement" is clearly erroneous.

Officer Lessard also testified that, as he approached the stopped vehicle, he briefly observed what he thought to be marijuana flakes on the floorboard of the rear driver-side. But the photograph admitted at the suppression hearing shows a few unidentifiable green flakes, and given the dearth of evidence—a momentary glance at the footwell of the empty rear passenger area as confirmed by the squad video—it was unreasonable for the officer to conclude that the flakes justified further intrusion.

After Officer Lessard approached the vehicle, Britton was unable to produce proof of insurance, a ticketing offense. *See* Minn. Stat. § 169.791, subd. 2 (2016). At this point, the individualized suspicion relating to the driver is complete. Officer Lessard testified that after confirming the driver had no proof of insurance, he observed that the passenger was not wearing a seatbelt and asked him for identification. Britton argues that Officer Lessard unreasonably expanded the scope of the stop when he sought the passenger's identification to cite him for a seatbelt violation pursuant to Minn. Stat. § 169.686, subd. 1 (2016). But Britton did not raise the argument that occupants of a vehicle are only required to wear a seatbelt when the car is in motion at the district court. Generally, appellate courts will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). We therefore decline to consider this argument.

At the time that Officer Lessard returned to his squad car to verify Britton's driver's license and the passenger's name, he was aware that Britton did not have proof of insurance and that the passenger was not wearing a seatbelt. After he was unable to confirm the

passenger's name, Officer Lessard reasonably suspected that the passenger had given him a false name. Officer Lessard subsequently removed the passenger from the stopped vehicle, and as he stepped out, Officer Lessard observed an empty "corner baggie" on the front passenger-side floorboard. Officer Lessard brought the passenger back to the squad car and asked for additional identifying information. The passenger provided an address, but the address did not match Officer Lessard's database information.

At this point in the stop, Officer Lessard testified that his concern was that the passenger was lying about his name. Officer Lessard was permitted to question Britton about the passenger to investigate his suspicions that the passenger had provided a false name. However, reasonable suspicion that the passenger engaged in illegal activity by providing a false name does not provide a basis to expand the scope of the stop to force the driver out of the car; fully search that driver (not just pat-search him for officer safety); and then search the vehicle. *See Askerooth*, 681 N.W.2d at 365 ("[T]he basis for the intrusion must be individualized to the person toward whom the intrusion is directed.").

The record does not support a finding that Officer Lessard developed reasonable, articulable suspicion that Britton engaged in additional illegal activity other than the original basis for the stop. On the day of the incident, Britton operated a vehicle with a non-working brake light and failed to produce proof of insurance for the vehicle—both minor traffic violations that do not justify custodial arrest. *See* Minn. Stat. § 169.89, subd. 1 (2016) (stating that a traffic violation is generally a petty misdemeanor); *State v. Ortega*, 770 N.W.2d 145, 150 (Minn. 2009) ("The crime for which probable cause [to arrest] exists must be one for which a custodial arrest is authorized."); Minn. R. Crim.

P. 6.01, subd. 1(a) (directing officers to issue citations for misdemeanor offenses absent certain circumstances). Given the circumstances individualized to Britton, there was no reasonable, articulable suspicion of any additional criminal activity beyond the original circumstances of the stop. The district court erred in denying Britton's motion to suppress the firearm.

Because we reverse the district court's denial of Britton's suppression motion, we need not address his arguments that the district court erred in denying his request to represent himself or abused its discretion in excluding alternative-perpetrator evidence.

Reversed.