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**STATE OF MINNESOTA
IN COURT OF APPEALS**

A18-0658

A18-0659

State of Minnesota,
Respondent,

vs.

Phillip Joseph Porter,
Appellant.

Filed March 18, 2019
Affirmed in part, reversed in part, and remanded
Jesson, Judge

Hennepin County District Court
File No. 27-CR-17-27513

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Jesson, Judge; and Klaphake,
Judge.¹

¹ Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

JESSON, Judge

During a traffic stop in Minneapolis, police officers noticed a passenger in the car digging in his pants. Worried that the passenger, appellant Phillip Joseph Porter, might be concealing or grabbing a gun, an officer drew his own gun and ordered Porter out of the car. As Porter got out of the car, he handed the officers a jar filled with marijuana. A subsequent search of Porter revealed heroin, cocaine and methamphetamine. Porter was charged with seven counts pertaining to the drugs. Porter asserts that the district court erred in denying his motion to suppress evidence obtained as a result of the traffic stop. And Porter contends that the district court erred in sentencing him to concurrent terms for all seven counts. Because we conclude that the search of Porter's pants and removal of the objects was a lawful search incident to arrest, we affirm the district court's denial of Porter's motion to suppress. But we reverse Porter's sentences and remand for resentencing because the district court erred in imposing multiple sentences for conduct arising out of a single behavioral incident.

FACTS

On October 30, 2017, Minneapolis police officers Sean Lessard and his partner were patrolling in Minneapolis in an area known as a "high narcotics trafficking area . . . or an open-air drug market." During their patrol, the officers were running license plates and discovered a car whose owner had a revoked license. While attempting to determine whether the owner was driving the car, the officers noticed two equipment violations: a cracked windshield and an issue with the driver's side mirror. The officers stopped the car.

As Officer Lessard approached the driver's side window of the car, he observed Porter digging in his pants. It appeared as though Porter was reaching for or trying to conceal something. After noticing Porter's movements, Officer Lessard stepped back, pulled out his service weapon and ordered Porter to put his hands where they could be seen. Instead, Porter opened the back door of the vehicle and handed Officer Lessard a jar containing 12.779 grams of marijuana and said "[t]his is all I have."

After Officer Lessard ordered Porter to put his hands on the driver's seat headrest, and he did not comply, Officer Lessard removed Porter from the vehicle and handcuffed him in order to conduct a pat-frisk. During the frisk, Officer Lessard removed papers and money from Porter's jacket pocket, and also noticed an "immediate foreign object" in the front of Porter's pants, "just below the belt line." Officer Lessard's first concern was that the object might be a gun. But when Officer Lessard patted the area, he realized it was not a weapon when he noticed a "crinkly" noise associated with the packaging materials used to store narcotics. This noise led Officer Lessard to believe the object in Porter's pants contained drugs.

Officer Lessard testified that he did not want to search Porter any further out on the street, so Porter was transported to the police station where the search could be conducted privately. During the search of Porter's pants, the officers found two packages containing methamphetamine, heroin, crack, powder cocaine, and pills. As a result, the state charged Porter with seven drug offenses.

Porter filed a motion to suppress the evidence obtained as a result of the stop, arguing that, even if the initial stop was lawful, the officers impermissibly expanded its

scope by removing Porter from the car at gunpoint and searching him without any reasonable, articulable suspicion that a crime had been committed. After hearing the arguments, the district court denied Porter's motion, finding that the stop was lawful based on the equipment violations; the removal and frisking of Porter was justified; and that the officers legally took Porter to the police station to conduct a further search.

The case proceeded to a jury trial and Porter was found guilty on all seven counts.² The district court sentenced Porter to concurrent terms on each count, and his probation was revoked on a prior third-degree controlled substance conviction. Porter appeals.

DECISION

I. Because the search of Porter's pants was a lawful search incident to arrest, the district court did not err by denying Porter's motion to suppress evidence.

When this court reviews a pretrial order on a motion to suppress evidence, we independently review the facts and decide whether the district court erred in suppressing or 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. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016).

The United States and Minnesota Constitutions protect against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. A police officer

² In violation of Minn. Stat. §§ 152.021, subd. 1(3) (first-degree sale of heroin), .022, subds. 2(a)(3) (second-degree possession of heroin), 1(1) (second-degree sale of cocaine), .023, subds. 2(a)(1) (third-degree possession of cocaine), 1(1) (third-degree sale of methamphetamine), .025, subds. 2(1) (fifth-degree possession of methamphetamine), 1(1) (fifth-degree sale of marijuana) (2016).

may temporarily detain a person if the officer reasonably suspects, based on the totality of the circumstances, that the person is engaged in criminal activity. *State v. Flowers*, 734 N.W.2d 239, 251 (Minn. 2007). The reasonable suspicion standard is “not high” but requires at least a minimal level of objective justification for the stop. *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotation omitted). The stop must be “justified at its inception” by specific, articulable facts, and the officer’s actions during the stop must be “reasonably related to and justified by the circumstances that gave rise to the stop in the first place.” *State v. Diede*, 795 N.W.2d 835, (Minn. 2011) (quotation omitted). To expand the scope or duration of a stop beyond its original purpose, an officer must have reasonable, articulable suspicion of other criminal activity. *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002). But to arrest an individual, an officer must have probable cause—a reasonable belief that the individual has committed a crime. *In re Welfare of G.M.*, 560 N.W.2d 687, 695 (Minn. 1997).

Porter concedes that the officers had a valid basis to stop the car in which he was a passenger given the two equipment violations. *See State v. George*, 557 N.W.2d 575, 578 (Minn. 1997) (stating that “if an officer observes a violation of a traffic law, however insignificant, the officer has an objective basis for stopping the vehicle”). And on appeal, he does not challenge the initial expansion of the stop when the officer (after seeing Porter stuffing something—perhaps a gun—into his pants) drew his gun and ordered Porter out of the car to be handcuffed and frisked. *See Askerooth*, 681 N.W.2d at 364 (concluding that each incremental intrusion during a stop must be justified by the circumstances that made the stop permissible, and an intrusion not closely related to those circumstances

invalidates the search or seizure unless independent probable cause or reasonable suspicion exists); *see also State v. Harris*, 590 N.W.2d 90, 104 (Minn. 1999) (explaining that pat search was justified by unusual nervousness, secretive movements, and attempt to conceal object). But Porter contends that after the initial pat frisk, when the officer determined that the bulge in Porter’s pants was probably not a gun, the officer’s next step exceeded the scope of an appropriate frisk pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968).³ Transporting a handcuffed Porter by squad car to the police station for a more thorough search was an arrest, he asserts. Under Minnesota law, an arrest is the “taking of a person into custody that [he] may be held to answer for a public offense” and “includes actually restraining a person or taking into custody a person who submits.” Minn. Stat. § 629.30, subd. 1 (2018). And an arrest, as Porter notes, must be supported by probable cause. *See G.M.*, 560 N.W.2d at 695.

Based upon the uncontested facts that Porter attempted to conceal something in his pants and did not comply with the officer’s order to place his hands on the headrest, and that Porter handed the officer a jar of marijuana, we conclude that even if taking Porter to the station constituted an arrest (an issue we do not reach), the officers had the requisite

³ *Terry* permits a protective frisk for weapons. 392 U.S. at 27, 88 S. Ct. at 1883. Under *Terry*, “police may stop and frisk a person when (1) they have a reasonable, articulable suspicion that a suspect might be engaged in criminal activity and (2) the officer reasonably believes the suspect might be armed and dangerous.” *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (citing *Terry*, 392 U.S. at 30, 88 S. Ct. at 1884). And when the officer is assured that no weapon is present, the frisk is over. *Id.* at 844. If the officer feels an object, during the course of the frisk, that cannot possibly be a weapon, “the officer is not privileged to poke around to determine what that object is; for purposes of a *Terry* analysis, it is enough that the object is not a weapon.” *Id.*

probable cause.⁴ Probable cause requires officers to have a reasonable belief that an individual has committed a crime. *State v. Bradley*, 908 N.W.2d 366, 369 (Minn. App. 2018). In *State v. Ludtke*, a factually similar case, an officer stopped a speeding car in which Ludtke was a passenger. 306 N.W.2d 111, 112 (Minn. 1981). During the stop, the officer noticed a plastic bag containing marijuana protruding from Ludtke's shirt pocket. *Id.* The officer seized the marijuana and proceeded to frisk the driver. *Id.* When returning the driver to the car, the officer observed Ludtke reaching into the back seat in a secretive manner. *Id.* Ludtke was ordered out of the car and frisked by the officer. *Id.* And during the frisk, the officer found a knife in Ludtke's pants pocket and a plastic bag containing cocaine. *Id.* The supreme court upheld the search because the officer saw a bag of marijuana in Ludtke's shirt pocket and felt a soft object in *Ludtke's* pants pocket that the officer reasonably believed to be narcotics. *Id.* at 113; *see also State v. Dickerson*, 481 N.W.2d at 846 (concluding that in *Ludtke*, the officer's observation that Ludtke attempted to hide something, the discovery of a knife during a frisk of Ludtke, and the presence of a plastic bag containing *anything* on Ludtke's body gave police probable cause to believe he was in possession of a controlled substance, justifying a search incident to arrest). Similarly, here, before the actions that Porter characterizes as an arrest, Porter attempted to conceal something in his pants, disobeyed the officer's orders, opened the car door, and

⁴ While the district court did not rely on the search-incident-to-arrest exception when denying the motion, "[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." *State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003).

handed the officer a jar of marijuana. Further, the officer noticed a “crinkly” package during the frisk. These circumstances provided probable cause to arrest Porter.

And once the officers had probable cause to arrest Porter, they had authority to conduct a search incident to arrest. *State v. Varnado*, 582 N.W.2d 886, 893 (Minn. 1998). Because the search of Porter’s pants was a lawful search incident to arrest, the district court did not err in denying Porter’s motion to suppress evidence.

II. The district court erred by imposing multiple concurrent sentences.

Porter contends that the district court erred by imposing multiple concurrent sentences which had the effect of increasing his criminal-history score. When doing so, the district court utilized *State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981). Under *Hernandez*, a district court sentencing a convicted defendant on the same day for multiple convictions based on multiple offenses that were not part of “a single behavioral incident or course of conduct” can increase the defendant’s criminal-history score incrementally as each successive sentence is imposed. 311 N.W.2d at 480-81.

But here, as the state concedes, Porter’s convictions clearly arose from a single behavioral incident. The district court acknowledged this as well. And Minnesota law prohibits the imposition of multiple sentences, including concurrent sentences, for multiple offenses that arise from a single behavioral incident. Minn. Stat. § 609.035, subd. 1 (2016). “Whether multiple offenses arose out of a single behavioral incident depends on the facts and circumstances of [a] particular case.” *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). To determine whether multiple offenses arose from a single behavioral incident, this court examines whether they were motivated by a single criminal objective

and whether they were unified in time and place. *Id.* Here, Porter was convicted of fifth-degree sale of marijuana, and six other drug-related charges. Porter's marijuana conviction arose out of handing the police officers the jar filled with marijuana, but the remaining drug convictions arose out of the packages found in the front of Porter's pants. Because Porter handed the police officers the marijuana, which justified his arrest, they searched him incident to arrest, and discovered the other drugs hidden in his pants. And, the drugs found on Porter were found on the same day, during a search incident to arrest justified by the marijuana, meaning the offenses were unified in time and space, and all seven convictions arose out of a single behavioral incident. *See State v. Papadakis*, 643 N.W.2d 349, 358 (Minn. App. 2002) (holding that multiple convictions for possession of different drugs on the same day were appropriate, but multiple sentences were not). Because the convictions arose out of a single behavioral incident, the district court erred in imposing multiple, concurrent sentences. We reverse Porter's sentences and remand for resentencing.⁵

Because Porter handed a jar containing marijuana to the officer and it was immediately apparent that the object in Porter's pants was contraband, we conclude that the search of Porter's pants and the seizure of the contraband was a lawful search incident to arrest. As a result, we affirm the district court's denial of Porter's motion to suppress evidence obtained as a result of the traffic stop. But because the district court erred by

⁵ Porter also asserts that if his convictions are reversed, his case must be remanded to vacate the probation revocation. Because we are not reversing Porter's convictions, we do not reach this argument.

imposing multiple sentences for a single behavioral incident, we reverse and remand for resentencing.

Affirmed in part, reversed in part, and remanded.