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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0820**

State of Minnesota,
Respondent,

vs.

Ricky Antoinne Osborne,
Appellant.

**Filed April 29, 2019
Reversed and remanded
Worke, Judge**

St. Louis County District Court
File No. 69DU-CR-17-467

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General,
St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jevon C. Bindman, Steven
Schleicher, Special Assistant Public Defenders, Minneapolis, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Slieter, Judge; and Klaphake,
Judge.*

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

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that the police lacked reasonable suspicion to seize him, and therefore the district court erred in denying his motion to suppress. Appellant also argues that the evidence was insufficient to prove beyond a reasonable doubt that he possessed heroin with the intent to sell, and he raises additional pro se issues. Because we reverse and remand the district court's denial of appellant's motion to suppress, we express no opinion on appellant's claims regarding the sufficiency of the evidence, and do not reach his pro se issues.

FACTS

On February 2, 2017, appellant Ricky Antoine Osborne and M.B. were observed by investigators with the Lake Superior Drug and Violent Crimes Task Force exiting an apartment complex in West Duluth, which contained an apartment under observation as a suspected heroin-dealing location. Task-force investigators followed Osborne and M.B. to a café, where they were observed sitting across from each other in a booth, eating, with a tan backpack on the bench next to M.B.

While Osborne and M.B. were eating at the café, the task force carried out a search warrant for the upstairs unit of the apartment complex. In her affidavit supporting the application for the warrant, Investigator Kopp identified the apartment as belonging to A.M.H. and his sister. The affidavit states that, based on information provided by a confidential reliable informant, Investigator Kopp believed that "a group of black males" were selling heroin out of A.M.H.'s apartment.

Investigator Kopp's affidavit also states that after stopping an individual whose car was parked behind the apartment building, the individual informed her "that '[T.]' who lives at . . . the upstairs apartment was a 'runner' for several black males selling heroin in the Duluth area. [T.] has also allowed some of these black males to stay at his apartment." Neither Osborne nor M.B. were named in the warrant.

When officers executed the search warrant, they only located one black male within A.M.H.'s apartment. They did not suspect this individual of being a dealer. As a result of their failure to locate the suspected dealers within the apartment, task-force officers detained Osborne and M.B. at the café. After being detained, Osborne consented to a search of his person, wherein the officer discovered \$629 in cash and a digital scale.

Investigator Kopp took photos of Osborne and M.B. and sent them to officers at the apartment, who showed them to people detained during the execution of the search warrant. These detained individuals identified Osborne as "Rick Mo," and told the officers they observed him breaking up a big chunk of heroin in A.M.H.'s apartment. Another cooperating individual in A.M.H.'s apartment stated they saw M.B. bagging up heroin in the apartment. Investigator Kopp then obtained a warrant to search Osborne and the tan backpack.

During the search of Osborne, officers discovered \$4,400 in cash hidden under the soles of his shoes and another \$265 in his pocket. During the search of the backpack, the officers found, among other things, a toothbrush, a cognac bottle, a water bottle, a Samsung tablet, and a mug with a false bottom that contained two separately packaged amounts of chunky, compressed powder weighing 10.1 grams and 39.9 grams, which contained a

mixture of acryl fentanyl, heroin, furanyl fentanyl, diphenhydramine (Benadryl), and caffeine.

DNA testing of the toothbrush, water bottle, and cognac bottle all produced matches for Osborne and excluded M.B. The mug with the false bottom did not produce a match suitable for comparison, and the drugs were not DNA tested due to the presence of fentanyl. The Samsung tablet was opened to the Facebook login page of rickmo33@gmail.com. Marijuana was also found in the false bottom of the mug, which M.B. claimed was his.

The state charged Osborne with first-degree sale of ten or more grams of heroin, Minn. Stat. § 152.021, subd. 1(3) (2016). The parties agreed to submit Osborne's motion to suppress the evidence seized following the search of his person and the backpack to the district court without hearing on September 15, 2017. The district court denied the motion to suppress on November 4, 2017. Osborne waived his right to a jury trial, and the matter was tried to the district court on January 3, 2018. The district court found Osborne guilty of aiding and abetting first-degree sale of ten-or-more grams of heroin, and sentenced Osborne to a term of 128 months in prison. This appeal followed.

D E C I S I O N

Reasonable suspicion for the stop

Osborne argues that the police lacked reasonable suspicion to seize him, and therefore the district court erred in denying his motion to suppress. "When reviewing a district court's pretrial order on a motion to suppress evidence, we review the district court's factual findings under a clearly erroneous standard and the district court's legal

determinations de novo.” *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quotation omitted).

When the search of the apartment failed to result in the seizure of anyone suspected of supplying heroin, investigators approached and detained Osborne and M.B. in the café. There is no dispute that Osborne was seized within the meaning of the Fourth Amendment, or that the seizure was not pursuant to a warrant or probable cause. The only issue raised on appeal is whether the seizure was supported by a reasonable articulable suspicion of wrongdoing.

“A police officer may stop and 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 be able to articulate specific facts which objectively support their suspicion. *State v. Lugo*, 887 N.W.2d 486 (Minn. 2016). “An assessment of reasonable suspicion must be based on the totality of the circumstances . . . and a trained police officer is entitled to draw inferences and deductions that might well elude an untrained person.” *Id.* at 486-87 (citation and quotations omitted).

The district court based its determination of reasonable suspicion upon the totality of the following circumstances:

- 1) according to the reports of two confidential reliable informants¹, “a group of black males” were selling heroin

¹ A third CRI is referred to in the affidavits supporting the search warrant application for the backpack and DNA sample, and in Sergeant Wilson’s police report, who reported that two African-American individuals were selling heroin out of A.M.H.’s apartment. Because no mention is made of this fact prior to the search of A.M.H.’s apartment, the record does not clearly establish whether this information was learned from individuals inside the

out of A.M.H.'s apartment, and A.M.H. was a runner "for several black males selling heroin in the Duluth area;"

- 2) on the day the search was to be executed, police observed two black males leave the apartment complex via the back door; and
- 3) when the apartment was searched, the suspected dealers were not located. Osborne and M. B. were then detained in the café so that individuals discovered in the search of the apartment could confirm that they were the heroin dealers.

The investigators who seized Osborne in the café relied only upon two specific objective facts to support their suspicion that Osborne was the heroin dealer: he was African-American, and he was seen leaving the apartment complex via the backdoor.

While the race of a suspect can be a factor justifying an investigatory stop, it cannot be the sole factor. *State v. Yang*, 774 N.W.2d 539, 551 (Minn. 2009). In *Yang*, the supreme court upheld the reasonableness of a stop when it was based upon, in addition to the race of the suspects, the facts that "the driver averted his eyes, the occupants began to talk rapidly and make furtive gestures, and the back-seat passenger repeatedly looked back at the officer." *Id.* at 552. Here, the record is silent as to any suspicious behavior on the part of Osborne and M.B. prior to their seizure, other than the fact they were observed leaving the apartment complex and matched the racial profile of the suspected dealers.

Just as with the race of a suspect, their "presence in a known drug house is a relevant, but not conclusive, factor" to consider in weighing a finding of reasonable suspicion. *Lugo*, 887 N.W.2d at 487. The record establishes that police observed Osborne leaving the

apartment following the execution of the search warrant, or was obtained by the police prior to Osborne's seizure.

apartment complex, but the record does not clearly establish² that Osborne was present in A.M.H.'s apartment, the *only* unit under police observation as a known drug house.

As in *Yang*, the police in *Lugo* could point to other suspicious behavior on the part of the suspect besides his presence in a known drug house to justify the seizure: “[appellant] took an unusually long time to stop . . . he leaned over in his seat, as though he was trying to hide something . . . [appellant] had recently been arrested for fleeing an officer and for drug possession . . . [appellant] lied about the identity of the car’s owner . . . [and] said, ‘man just take me to jail please.’” *Id.* The present matter is distinguishable from *Lugo* on two bases. First, the district court did not find, and the record does not support, that Osborne was observed leaving A.M.H.’s apartment. Rather, the record only supports that Osborne was observed leaving an apartment complex via the backdoor, the upstairs unit of which was under observation as a known drug house. Second, the only “suspicious” activity demonstrated by Osborne was the fact that he matched the racial profile of the suspected dealers.

Taken together, *Yang* and *Lugo* stand for the proposition that race and presence in a known drug house are permissible factors to consider when determining whether reasonable suspicion existed to justify an investigatory stop, but neither is a sufficient factor unto itself. The police did not observe Osborne leaving the specific apartment under observation as a known drug house, and lacked any other objective indicators of suspicious

² The state asserts that *only* the upstairs apartment is accessible by the backdoor, whereas Osborne maintains that the record merely indicates that the upstairs apartment is *accessible* by the backdoor. The district court did not make a finding on this issue, and we can locate no record evidence to support either contention.

activity of the type relied upon in *Yang* and *Lugo*. Therefore, the district court erred in determining that the police possessed a reasonable suspicion to justify the investigatory stop. The district court's denial of Osborne's motion to suppress is reversed and the matter remanded to the district court.

Sufficiency of the evidence and pro se issues

Having determined that the district court erred in not suppressing the evidence obtained pursuant to the improper seizure of Osborne, we do not reach Osborne's arguments regarding the sufficiency of the evidence relied upon by the district court at trial. Similarly, Osborne raises a number of additional claims in his pro se brief, all of which are either conclusory and unsupported by legal argument, duplicative of the issues raised in the principal brief, or were not raised before the district court.

Reversed and remanded.