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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0836**

State of Minnesota,
Respondent,

vs.

James Martin Rusthoven,
Appellant.

**Filed April 22, 2019
Affirmed
Halbrooks, Judge**

Swift County District Court
File No. 76-CR-17-367

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Danielle Olson, Swift County Attorney, Benson, Minnesota (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Following his conviction of two counts of driving while impaired (DWI), appellant challenges the district court's denial of his motion to suppress evidence that was obtained

as a result of a traffic stop. Appellant argues that the officer impermissibly expanded the scope of the stop by conducting a weapons frisk when there was no reasonable basis to believe that he was armed and dangerous. We affirm.

FACTS

While on patrol on August 31, 2017, Deputy Michael Hoffman of the Swift County Sheriff's Office saw a speeding truck. The deputy initiated a traffic stop and observed that the driver, appellant James Rusthoven, was "very fidgety [and] very agitated." When Deputy Hoffman asked Rusthoven if he was under the influence of a controlled substance, Rusthoven became "even more agitated."

The deputy returned to his squad car to look up Rusthoven's driver's license. The search revealed that Rusthoven's license was restricted, requiring that, if any drugs were found in his system, his license would be invalidated. The deputy returned to speak with Rusthoven and observed that

his arms were constantly moving, just back and forth, up and down. He would take his hat over [sic] very quickly and put it on very quickly and he was always, you know, it appeared that he was always digging around inside the vehicle or moving his arms inside the vehicle.

Deputy Hoffman asked Rusthoven to exit the vehicle, but Rusthoven refused. This made the deputy "fairly nervous." The deputy waited to take further action until a second deputy arrived.

When a second deputy arrived, Deputy Hoffman asked Rusthoven to exit his vehicle again. After several requests from both deputies, Rusthoven did so. Deputy Hoffman

performed a pat-down search for weapons and thought that he felt a methamphetamine pipe in Rusthoven's front pocket. Deputy Hoffman told Rusthoven that he was under arrest.

A further pat-down search was conducted and the deputies found a second methamphetamine pipe on Rusthoven. Deputy Hoffman conducted field sobriety tests on Rusthoven because "even standing with him outside he was still—all of his movements were still very—very quick, very erratic, very exaggerated reflexes whenever—whenever he would make a movement." Rusthoven performed half of the walk-and-turn test before giving up.

Pursuant to a search warrant, a sample of Rusthoven's blood was obtained, and it tested positive for methamphetamine and amphetamine. The state charged Rusthoven with one count of DWI for operating a motor vehicle under the influence of a controlled substance, in violation of Minn. Stat. § 169A.20, subd. 1(2) (2016), and one count of fifth-degree drug possession, in violation of Minn. Stat. § 152.025, subd. 2(1) (2016). The state later amended the complaint to include a second DWI count for operating a motor vehicle under the influence of a schedule I or II controlled substance, in violation of Minn. Stat. § 169A.20, subd. 1(7) (2016). Prior to trial, the state dismissed the fifth-degree drug-possession charge.

Rusthoven moved to suppress all evidence obtained as a result of the stop, challenging the deputy's basis for stopping him and ordering him out of the vehicle in addition to the basis for probable cause for the arrest. An omnibus hearing was held just days before the jury trial. Deputy Hoffman was the sole witness. The next day, the district court denied Rusthoven's motions, finding that each expansion of the stop was justified.

Following trial, the jury found Rusthoven guilty of both DWI counts. The district court sentenced Rusthoven to 54 months in prison. This appeal follows.

D E C I S I O N

Rusthoven challenges the district court's denial of his motion to suppress, arguing only that Deputy Hoffman did not have reasonable, articulable suspicion that Rusthoven might be armed and dangerous when he conducted a pat-down search for weapons. When reviewing a pretrial order on a motion to suppress evidence, we review the district court's factual findings for clear error and legal determinations de novo. *State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012). We review de novo the district court's determination that a reasonable, articulable suspicion existed to justify the search. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

Both the United States and Minnesota Constitutions protect against “unreasonable searches and seizures.” U.S. Const. amend. IV; Minn. Const. art. I, § 10. To be constitutional, “each incremental intrusion during a traffic stop [must] be tied to and justified by one of the following: (1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness, as defined in *Terry*.” *State v. Askerooth*, 681 N.W.2d 353, 365 (Minn. 2004). The supreme court has summarized *Terry* as follows: “[E]ven in the absence of probable cause, the 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. Flowers*, 734 N.W.2d 239, 250 (Minn. 2007) (quotations omitted); accord *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884 (1968).

“The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883. The basis of an officer’s suspicion must be reasonable based on the totality of the circumstances. *State v. Smith*, 814 N.W.2d 346, 351 (Minn. 2012). Because of their special training, police officers have been permitted to make inferences and deductions that might elude an untrained person when articulating a reasonable suspicion. *Flowers*, 734 N.W.2d at 251-52. A police officer who possesses the requisite suspicion may “conduct a *carefully limited search* of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.” *Id.* at 253 (quotation omitted).

Here, the district court found that there was a reasonable, articulable suspicion that Rusthoven was armed and dangerous based on his “movements throughout the cab of his pickup from the time that the stop was initiated, along with [Rusthoven’s] furtive movements, his agitation, and his refusal to comply with Deputy Hoffman’s initial order for him to exit the vehicle.” The district court cited to our decision in *State v. Richmond* in support of its decision. In *Richmond*, we held that there was reasonable, articulable suspicion based on a totality of the circumstances:

(1) Richmond made a “furtive movement” by reaching toward his car’s passenger compartment; (2) [he] was nervous and fidgety after he was stopped; and (3) [he] was unable or unwilling to answer the officer’s questions. After the officer asked him to locate his driver’s license, Richmond began reaching all over his body, jacket, and coat pockets. [The officer] became concerned for his safety and ordered Richmond from the car. After removing Richmond from the car, [the officer] became more concerned because Richmond

looked at the officers as though he was trying to decide whether to run.

602 N.W.2d 647, 651 (Minn. App. 1999), *review denied* (Minn. Jan. 18, 2000). We find the similarity of the majority of the facts in *Richmond* and the facts in this case compelling.

Based on the totality of the circumstances, Deputy Hoffman reasonably believed that Rusthoven was armed and dangerous. The deputy observed indicia of drug use and found that Rusthoven's license was restricted from prior drug use. In addition, Rusthoven was unwilling to cooperate with the deputies' requests to exit the vehicle. Based on those facts, combined with Rusthoven's "erratic and agitated" movements, including "digging around inside the vehicle," "moving his arms inside the vehicle," and "fidgeting with everything," the deputy reasonably believed that Rusthoven was armed and dangerous. At that point, given the totality of the circumstances, Deputy Hoffman possessed reasonable suspicion that criminal activity was afoot and that Rusthoven was armed and dangerous, justifying a pat-down frisk for weapons.

Rusthoven argues that his agitation and questionable movements were the result of mere nervousness and are therefore insufficient to justify a frisk under *State v. Harris*. 590 N.W.2d 90 (Minn. 1999). But Rusthoven's reliance on *Harris* is misplaced. In *Harris*, the supreme court discussed whether officers had reasonable, articulable suspicion that Harris was transporting a controlled substance when he was sitting on a bus at a Greyhound station. *Id.* at 100. The officers characterized Harris's actions as being consistent with suspicious counter-surveillance of the depot and noted that drug carriers often display the same actions while appearing nervous. *Id.* But the supreme court held that Harris's

actions—exiting the bus, entering the depot, and looking around before returning to the bus—without more, did not amount to reasonable suspicion that he was transporting drugs. *Id.* at 100-01.

Rusthoven’s argument does not align with the holding in *Harris* for several reasons. First, he cites to the supreme court’s discussion of reasonable suspicion that Harris was transporting drugs to justify *stopping* Harris, not a reasonable belief that he was armed and dangerous to justify *frisking* Harris. *See id.*; *see also State v. Diede*, 795 N.W.2d 836, 852 (Minn. 2011) (“While nervousness alone may not be sufficient to provide a reasonable suspicion of criminal activity, it may be added to the totality of other circumstances to support a conclusion that drug-related criminal activity is afoot.”). Second, the supreme court did not discuss what role Harris’s nervousness played in finding that there was no reasonable suspicion he was transporting drugs.¹ Instead, the *Harris* court held that the criteria the officers looked for, specifically exiting the bus, looking around, and returning to the bus while appearing nervous, could describe “any multitude of innocent persons.” 590 N.W.2d at 101. For these reasons, Rusthoven attempts to expand the holding in *Harris* by asserting that, “[f]idgeting and agitation are common manifestations of nervousness, which is not sufficient to justify a frisk.”

¹ Later in the opinion, the supreme court did discuss whether Harris’s nervousness, paired with the large bulge in his jacket and Harris’s statement that he did not know what was in his jacket sleeve, amounted to a reasonable belief that he was armed and dangerous. *Harris*, 590 N.W.2d at 104. The supreme court found that a pat-down search, at this point in the scenario, was justified. *Id.*

As the state points out, caselaw supports the district court’s finding that the deputy had a reasonable belief that Rusthoven was armed and dangerous because he was fidgety, agitated, made furtive movements, and refused to comply with the deputy’s requests. *See, e.g., Flowers*, 734 N.W.2d at 252 (concluding that officers had a reasonable belief the defendant was armed and dangerous based on “suspicious movements” that lasted 45 seconds); *Richmond*, 602 N.W.2d at 651 (finding that officers had a reasonable belief the defendant was armed and dangerous based on his furtive movements, fidgety and nervous behavior, and unwillingness to answer the officers’ questions).² Had Deputy Hoffman only observed that Rusthoven was nervous, there would not be enough, under the totality of the circumstances, to justify a pat-down search for weapons. *See In re Welfare of M.D.B.*, 601 N.W.2d 214, 216 (Minn. App. 1999), *review denied* (Minn. Jan. 18, 2000) (finding that the officer did not reasonably believe that the bicycle-riding minor, who seemed nervous, was looking around as if to find an escape route, and had no identification was armed and dangerous). But Rusthoven was more than just nervous—he was fidgety and had erratic movements; he continually reached around within the cab of his vehicle; he responded to the deputies with agitation; and he refused to comply with the deputy’s requests to exit the vehicle. When viewed together, the circumstances support the reasonable belief that

² Federal caselaw supports this conclusion as well. *See United States v. Evans*, 994 F.2d 317, 321 (7th Cir. 1993) (concluding that it was reasonable to believe the defendant was armed and dangerous based on the police’s observation that he “leaned forward at a forty-five degree angle for several seconds, as to place or retrieve something under the seat”); *United States v. Colin*, 928 F.2d 676, 678 (5th Cir. 1991) (holding that defendant’s movement of “stooping down and moving from side to side” in a vehicle justified the officer’s decision to frisk the defendant (quotation omitted)).

Rusthoven was armed and dangerous. The district court therefore properly denied Rusthoven's motion to suppress.

Affirmed.