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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0609**

State of Minnesota,
Respondent,

vs.

Jeffrey Allen McCarthy,
Appellant.

**Filed February 3, 2020
Reversed and remanded
Hooten, Judge**

Otter Tail County District Court
File No. 56-CR-18-2648

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

Michelle Eldien, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jason Steffen, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Hooten, Judge; and Bryan, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

In this direct appeal from final judgment, appellant argues that his conviction for fifth-degree controlled-substance and paraphernalia crimes must be reversed because the

district court erred by directing the state to file a supplemental brief on the attenuation doctrine, which neither party raised in their initial briefs on the defendant's suppression motion, thereby violating his right to an impartial judge. Appellant also argues that, although the district court found that officers violated appellant's Fourth Amendment rights by unlawfully seizing him, the district court erred by failing to suppress evidence discovered as a result of the unlawful seizure because the district court determined that a subsequent discovery that appellant had an arrest warrant attenuated the taint of the unlawful seizure. We reverse and remand.

FACTS

Shortly before midnight on September 11, 2018, appellant Jeffrey McCarthy was observed walking across the parking lot of a grocery store by Deputy Aaron Sprout of the Otter Tail County Sheriff's Office. Deputy Sprout was parked in his marked squad car next to the marked squad car of Officer Jared Bachelder of the Perham Police Department. When Deputy Sprout saw McCarthy, he recalled that the week prior, a young male fled on foot from him several blocks from the grocery store. The young man was wearing a hooded sweatshirt with the hood up "so [Deputy Sprout] didn't get a good look at him." Despite this, Deputy Sprout believed that the "male walking through the parking lot looked somewhat similar to the male who fled" from him the week before. A primary similarity appeared to be that McCarthy, just like the male who fled the week prior, was carrying a backpack. The male from the week prior, who looked to be about 16 to 18 years old to Deputy Sprout, had dropped the backpack while fleeing, and the backpack was placed in police custody. A search of the backpack revealed marijuana.

Deputy Sprout approached McCarthy on foot, while Officer Bachelder waited for a moment and then drove his squad car across the parking lot to meet them, in case “it was the same person [who fled] and they decided to run again.” Deputy Sprout asked to speak with McCarthy, and McCarthy agreed. The deputy asked him for identification, and McCarthy gave him his state-issued identification card. McCarthy told Deputy Sprout that he had just gotten off work and was walking towards a vending machine to buy a beverage because he was thirsty. Deputy Sprout took McCarthy’s identification to Officer Bachelder’s squad car to run a check, while Officer Bachelder stayed near McCarthy. Deputy Sprout discovered that McCarthy had a warrant for his arrest.

Deputy Sprout placed McCarthy under arrest and searched him. Inside McCarthy’s backpack, officers found a glass vial containing a white crystalline substance that field tested positive for methamphetamine, 1.9 grams of a “green leafy substance” that field tested positive for marijuana, and a glass pipe.

The state charged McCarthy with fifth-degree possession of a controlled substance under Minn. Stat. § 152.025, subd. 2(1) (2018), possession of a small amount of marijuana under Minn. Stat. § 152.027, subd. 4(a) (2018), and possession of drug paraphernalia under Minn. Stat. § 152.092(a) (2018).

McCarthy filed a motion to suppress all evidence obtained from the stop. The district court held a contested omnibus hearing in October 2018. Both parties submitted briefs following the hearing. The state argued that no seizure occurred and the district court should therefore deny McCarthy’s motion to suppress. In response to the state’s sole argument that there was no seizure, the district court ordered the state to submit an informal

brief addressing the following questions: “First, may the Court consider the application of the attenuation doctrine if the State does not raise this issue as part of regular arguments or submissions?” and “Second, if the answer to the first question is yes, does the attenuation doctrine preclude suppression of the fruits of the unlawful stop of Defendant?”

Following brief submissions by both the state and McCarthy, the district court issued an order denying McCarthy’s motion to suppress in part. The district court granted McCarthy’s motion to suppress the statements he made to officers prior to his arrest, but denied his motion to suppress the physical evidence derived from the search of his person.

A stipulated facts trial was held in December 2018. *See* Minn. R. Crim. P. 26.01, subd. 4. The district court found McCarthy guilty of fifth-degree possession of a controlled substance and possession of drug paraphernalia. He was later sentenced to 13 months in prison, stayed for five years. McCarthy appeals.

D E C I S I O N

I. The district court did not fail to be impartial by ordering the state to file supplemental briefing on an issue not raised by either party.

McCarthy argues that his conviction must be reversed because the district court failed to be impartial by ordering the state to file a supplemental brief on the attenuation doctrine when neither party raised the issue to the district court.

A. The district court judge was impartial.

Whether a district court deprived a party of the right to an impartial judge is a constitutional question that we review de novo. *State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005). “Although the right to a trial before an impartial judge is not specifically

enumerated in the Constitution, this principle has long been recognized by the United States Supreme Court.” *Id.* Judges must “avoid the appearance of impropriety and should act to assure that parties have no reason to think their case is not being fairly judged” in order to maintain public trust in the judiciary. *Pederson v. State*, 649 N.W.2d 161, 164–65 (Minn. 2002). “A judge’s conduct must be fair to both sides, and a judge should refrain from remarks which might injure either of the parties to the litigation.” *Dorsey*, 701 N.W.2d at 250 (quotations omitted).

McCarthy does not cite to any caselaw regarding the district court’s authority to order supplemental briefing on an issue not raised by the parties. Rather, McCarthy argues that this case is similar to *Dorsey*, a case in which the supreme court granted a new trial because the district court judge failed to be impartial.

In *State v. Dorsey*, the district court questioned the veracity of a factual statement made by Dorsey’s key witness, investigated the fact independently, and revealed the results of the investigation in open court. *Dorsey*, 701 N.W.2d at 249. The supreme court ruled that the district court deprived Dorsey of the right to an impartial judge and fact finder because: (1) the judge’s comments indicated that she did not believe the testimony of the witness based on facts not in evidence, and (2) the judge independently investigated a fact not in the record. *Id.* at 250. Similarly, McCarthy asserts that the district court “direct[ed] the State to make an argument she felt would be more persuasive than the one it had already made,” giving the state “the opportunity to prevail on a dispositive motion it would otherwise have lost.”

But this case is easily distinguishable from *Dorsey*. Most importantly, the nature of the district court's conduct in these cases is inherently different, and the conduct in *Dorsey* naturally lends itself to partiality. In *Dorsey*, the district court made findings of fact based on evidence not in the record and instead based its findings on facts investigated by court staff upon her request. *Id.* at 243. The district court disregarded its duty "to make factual determinations solely on the basis of evidence in the record." *Id.* at 250; *see also Johnson v. Hillstrom*, 33 N.W. 547, 548 (Minn. 1887) (providing that the finder of fact must only rely upon facts in evidence). Instead, the district court judge investigated those facts, violating her duty to be an impartial arbiter, and stepped into the role of "an investigator for the prosecution." *Dorsey*, 701 N.W.2d at 250.

In this case, the district court requested supplemental briefing on a *legal issue*, not a factual dispute. The district court did not make factual findings based on evidence not in the record and did not play the role of an investigator for the state. Instead, the district court recognized its "duty to apply the law accurately *and* [its] duty to the fair and orderly administration of justice" when it ordered supplemental briefing. Additionally, the judge specifically requested that the parties address whether or not the district court had authority to consider a legal matter not raised by the parties. Based on these differences, *Dorsey* does not support McCarthy's argument that the district court judge was partial.

B. The district court had authority to address a legal issue not raised by the parties.

The state argues that the district court judge was impartial because the district court's conduct in ordering supplemental briefing was proper. The state first cites to the authority of *appellate* courts to address and decide an issue not raised below. *See McKenzie*

v. State, 872 N.W.2d 865, 872 (Minn. 2015) (noting that an appellate court may decide an issue not determined by the district court under certain circumstances). Relying on Minn. R. Crim. P. 11.02 regarding omnibus hearings, the state then argues that the district court was required to address all issues at the hearing, even those not raised by the parties, in order to “promote a fair and expeditious trial.” Minn. R. Crim. P. 11.02 cmt.

While appellate courts may order supplemental briefing on an issue not raised below, *see, e.g., State v. Shattuck*, 689 N.W.2d 785, 786 (Minn. 2004), neither this court nor the supreme court has specifically addressed whether a district court may order supplemental briefing on a matter not raised by the parties. Despite this, the state’s argument that the district court must address all necessary issues at the omnibus hearing is persuasive. As the comments to the rules of criminal procedure state, “[t]he court must also on its initiative under Rule 11.02 ascertain and hear any other issues that can be heard and disposed of before trial and any other matters that would promote a fair and expeditious trial.” Minn. R. Crim. P. 11.02 cmt. And in some cases, we have ordered a district court to reopen an omnibus hearing when the district court sua sponte raised an issue but did not give the parties an opportunity to be heard on the issue. *See, e.g., State v. Menth*, No. A05-1547, 2006 WL 1984730, at *3 (Minn. App. July 18, 2006). Because the district court considered whether an exception to the exclusionary rule was dispositive, and the parties had an opportunity to be heard on the issue, the district court’s order for supplemental briefing was not improper.

After receiving supplemental briefing, the district court addressed McCarthy’s assertion that the judge was not impartial by raising an objection based on the attenuation

doctrine that the state failed to make on its own. *See State v. Schlien*, 774 N.W.2d 361, 367 (Minn. 2009) (providing that a judge “should not act as counsel for a party by raising objections which the party should make”). The district court concluded that it did not make an objection that the state should have made, but “raised a legal question about the argument Defendant himself has made.” The district court noted that, in this state and others, district courts have applied exceptions to the exclusionary rule even when a party has not raised that exception. *See, e.g., State v. Sherman*, No. A13-0080, 2014 WL 349643, at *4 n.3 (Minn. App. Feb. 3, 2014), *review denied* (Minn. Apr. 15, 2014) (noting that the district court sua sponte raised the inevitable discovery doctrine and ruled in the state’s favor).

Other states have addressed the issue of whether a district court may sua sponte raise the inevitable discovery doctrine. *See Guthrie v. Weber*, 767 N.W.2d 539, 547 (S.D. 2009) (reviewing other jurisdictions). Although the attenuation doctrine is a separate exception to the exclusionary rule, it is one of the three exceptions that involves “the causal relationship between the unconstitutional act and the discovery of evidence.” *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (identifying the three doctrines: independent source, inevitable discovery, and attenuation). Some courts have held that a court’s sua sponte ruling is proper when it appears that no additional evidence could be offered to defeat the theory of an exception. *See People v. Clark*, 857 P.2d 1099, 1125–26 (Cal. 1993), *disapproved on other grounds, People v. Doolin*, 198 P.3d 11 (Cal. 2009); *State v. Dickinson*, 184 P.3d 305, 309–10 (Mont. 2008). Other jurisdictions have held that a court may sua sponte raise an issue only when both parties are given an opportunity to be heard

on the issue.¹ *United States v. Sinkler*, 267 Fed. Appx. 171, 174 (3d Cir. 2008); *People v. Hicks*, 539 N.E.2d 756, 762 (Ill. App. Ct. 1989); *State v. Badgett*, 512 A.2d 160, 171 n.10 (Conn. 1986).

In this case, the district court concluded that it had discretion to raise the attenuation doctrine and gave the parties an opportunity to address the issue before making its ruling. The district court's conduct in ordering supplemental briefing on a legal matter not raised by the parties was proper, especially in light of the parties' opportunity to address the issue before the district court made its ruling. Therefore, the district court did not violate McCarthy's right to an impartial judge.

II. The district court erred by failing to suppress the physical evidence found as a result of the illegal stop.

McCarthy argues that the district court erred by applying the attenuation doctrine to his case, thereby admitting the physical evidence found as a result of the search of his backpack incident to his arrest. The state no longer argues that the stop was legal, but asserts that the district court properly applied the attenuation doctrine to discovery of evidence as a result of the illegal stop. "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. Diede*, 795 N.W.2d 836, 849 (Minn. 2011).

¹ The Minnesota Supreme Court has applied a similar standard when a district court sua sponte raises the limitation periods in Minn. Stat. § 590.01, subd. 4(a) and (c). *Weitzel v. State*, 883 N.W.2d 553, 560 (Minn. 2016) ("Before ruling on the issue, however, the court must give notice to the parties and afford them the opportunity to be heard.").

The district court concluded that the present case was factually similar to the United States Supreme Court’s decision in *Strieff*.² In *Strieff*, police received an anonymous tip that there was drug activity at a particular residence. 136 S. Ct. at 2059. For about a week, an officer conducted intermittent surveillance of the residence and observed visitors to the home leaving minutes after arriving. *Id.* One day, the officer observed Strieff leaving the home, detained him, and asked for his identification. *Id.* at 2060. The officer discovered that Strieff had an outstanding warrant for a traffic violation and arrested him. *Id.* When the officer searched Strieff incident to his arrest, he found a baggie of methamphetamine and drug paraphernalia on his person. *Id.* The state charged Strieff with possession of methamphetamine and drug paraphernalia. *Id.*

² Since the United States Supreme Court’s decision in *Strieff* in 2016, at least one state supreme court has declined to follow *Strieff* based on greater protections afforded by its state constitution than the federal constitution. The Washington Supreme Court held that the *Strieff* decision “clearly conflicts with our state exclusionary rule by admitting illegally seized evidence and allowing the State to benefit from the unconstitutional actions of its officers.” *State v. Mayfield*, 434 P.3d 58, 72 (Wash. 2019). Other state courts have distinguished *Strieff* in similar circumstances. The Kansas Court of Appeals has held that, while the existence of an outstanding warrant should not be minimized, “it is not controlling . . . just because it appeared to be controlling in *Strieff*.” *State v. Manwarren*, 440 P.3d 606, 617–18 (Kan. Ct. App. 2019). The Kentucky Court of Appeals noted that the United States Supreme Court “did not intend to conflate the definition of flagrant conduct with that of intentional conduct” in *Strieff* and concluded that, even when the officers did not have bad faith or ill motive, their conduct was purposeful and flagrant. *Commonwealth v. Garrett*, 585 S.W.3d 780, 797 (Ky. Ct. App. 2019). Although we need not reach the issue of whether the Minnesota Constitution affords greater protection than the Fourth Amendment as applied in *Strieff*, we note that Minnesota courts have declined to follow United States Supreme Court decisions when there is “a sharp departure from our traditional understanding of the protections from unreasonable seizures.” *State v. Askerooth*, 681 N.W.2d 353, 362 (Minn. 2004).

The United States Supreme Court granted certiorari to “resolve [the] disagreement about how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant.” *Id.* The Supreme Court recognized that there are three exceptions to the exclusionary rule that involve “the causal relationship between the unconstitutional act and the discovery of evidence”—the independent source doctrine, the inevitable discovery doctrine, and the attenuation doctrine. *Id.* at 2061. The Supreme Court defined the attenuation doctrine as: “Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.” *Id.* (quotation omitted).

The Supreme Court then discussed whether the attenuation doctrine applies to a case in which the intervening circumstance relied on by the state is the “discovery of a valid, pre-existing, and untainted arrest warrant.” *Id.* To make this determination, the Supreme Court applied the three factors articulated in *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254 (1975): (1) “the temporal proximity between the unconstitutional conduct and the discovery of the evidence to determine how closely the discovery of [the] evidence followed the unconstitutional search”; (2) “the presence of intervening circumstances”; and (3) “the purpose and flagrancy of the official misconduct.” *Strieff*, 136 S. Ct. at 2061–62 (quotations omitted).

Regarding the first factor, the Supreme Court held that the discovery of the drugs, which occurred only minutes after the illegal stop, favored suppression. *Id.* at 2062. But

the Supreme Court held that the second factor strongly favored admission because “the warrant was valid, it predated [the officer]’s investigation, and it was entirely unconnected with the stop.” *Id.* The Supreme Court stated that “once [the officer] discovered the warrant, he had an obligation to arrest Strieff.” *Id.* Regarding the third factor, the Supreme Court held that it strongly favored admission because the totality of the circumstances showed that the officer was at most negligent by assuming that Strieff had only recently entered the home to do a drug transaction. *Id.* at 2063. Even though the officer’s “decision to initiate the stop was mistaken, his conduct thereafter was lawful.” *Id.* For these reasons, the Supreme Court held that the evidence was admissible because “the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant.” *Id.*

When applying the *Brown* factors to this present case, we hold that the facts are distinguishable from those in *Strieff*.³ As the Supreme Court held in *Strieff*, the first factor, temporal proximity, favors suppression of the evidence. This factor favors suppression “unless substantial time elapses between an unlawful act and when the evidence is obtained.” *Strieff*, 136 S. Ct. at 2062 (quotation omitted). In this case, approximately two to five minutes passed from the time Deputy Sprout first approached McCarthy to when he learned of the arrest warrant for McCarthy, his subsequent arrest of McCarthy, and the discovery of the drugs and the drug paraphernalia on his person. Just like in *Strieff*, since

³ The *Brown* factors are similar to the factors we often use when determining whether evidence is the fruit of the poisonous tree. *State v. Olson*, 634 N.W.2d 224, 229 (Minn. App. 2001). The factors considered include “(1) the purpose and flagrancy of the misconduct; (2) the presence of intervening circumstances; (3) whether it is likely that the evidence would have been obtained in the absence of the illegality; and (4) the temporal proximity of the illegality and the evidence alleged to be the fruit of the illegality.” *Id.*

only minutes passed after the illegal stop and the discovery of the drugs, the short time interval favors suppression.

The second factor, the presence of intervening circumstances, favors admitting the evidence. In *Strieff*, the Supreme Court held that because: (1) the warrant was valid, (2) the warrant predated the officer's investigation, and (3) the warrant was entirely unrelated to the stop, the warrant was an intervening circumstance. *Id.* In this case, there is nothing in the record to show that the warrant for McCarthy's arrest was invalid, that the warrant did not predate the investigation, or was in any way related to the stop. This factor favors admitting the evidence found on McCarthy's person.

The third factor, the purpose and flagrancy of the misconduct, supports suppression of the evidence. In *Strieff*, the Supreme Court held that the officer's misconduct was neither purposeful nor flagrant, but simply negligent. *Id.* at 2063. The Supreme Court found that the officer made two good-faith mistakes: (1) the officer did not see when Strieff arrived and therefore did not have confirmation that he was a short-term visitor who may have been buying drugs, and (2) the officer should have asked Strieff to speak with him, instead of demanding him to do so. *Id.* The Supreme Court considered these mistakes "errors in judgment" that did not rise to the level of a purposeful or flagrant violation of Strieff's constitutional rights. *Id.*

In this case, the deputy's misconduct was flagrant and purposeful. Deputy Sprout, who was armed and in uniform, approached McCarthy and asked to speak with him based on the deputy's belief that he looked "somewhat similar" to a young male who fled from the officer the previous week. But, as Deputy Sprout admitted, he was 50 feet away from

the young male who fled and “didn’t get a good look at him” because he was wearing a hooded sweatshirt with the hood pulled up. Despite this, because McCarthy was wearing a backpack, the deputy “decided that [he] would like to speak to [McCarthy],” presumably because the deputy believed McCarthy may have had drugs. Deputy Sprout therefore stopped McCarthy based on a “mere whim, hunch, or idle curiosity.” *State v. Davis*, 910 N.W.2d 50, 54 (Minn. App. 2018). Exiting a suspected drug house as occurred in *Strieff* provides a much stronger basis for believing someone may be participating in a crime than wearing a backpack and somehow looking “somewhat similar” to another person who the officer could not describe with any particularity and whose physical characteristics the officer admittedly did not get the opportunity to see.

The deputy in this case was not engaged in an active investigation of a particular residence or location like the officer in *Strieff*. Additionally, there was no corroborating evidence in McCarthy’s case, unlike the week-long surveillance of the residence present in *Strieff* that revealed that visitors often left shortly after arriving and were frequent enough to raise the suspicion that the occupants of the home were dealing drugs. *Id.* at 2059. The only indication to Deputy Sprout that McCarthy was suspicious was that he was walking in the same general area as a person who fled from the deputy a week prior, who looked “somewhat similar” to him, and who was wearing a backpack like McCarthy.

The state concedes the stop was baseless. The deputy stopped McCarthy for wearing a backpack, but the young male who fled from Deputy Sprout had discarded his backpack, and the backpack was in police custody. And once Deputy Sprout saw on his identification card that McCarthy was nearly 26, when the person who fled was 16 to 18

years old, Deputy Sprout no longer had a reason to continue the investigative detention by requiring McCarthy to wait, along with Deputy Bachelder while Deputy Sprout went to the squad car and ran a check on McCarthy's identification card. *State v. Johnson*, 645 N.W.2d 505, 509 (Minn. App. 2002) (holding that when an officer walks away with a person's identification card, a reasonable person would not feel free to leave and that person is effectively seized). Based on this record, Deputy Sprout's conduct was not simply negligent, like in *Strieff*. His conduct was purposeful and flagrant and favors suppression of the evidence.

Because two of the three *Brown* factors favor suppression, the district court erred by admitting the evidence found on McCarthy. We reverse and remand for the district court to vacate its pretrial motion to admit the evidence found on McCarthy's person.

Reversed and remanded.