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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1546**

State of Minnesota,
Appellant,

vs.

Christian John Donnelly,
Respondent.

**Filed May 18, 2020
Reversed and remanded
Reyes, Judge**

Mille Lacs County District Court
File No. 48-CR-19-292

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

Joe Walsh, Mille Lacs County Attorney, Erica Madore, Assistant County Attorney, Milaca,
Minnesota (for appellant)

Madison Bruber, Assistant Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Reyes, Judge; and Bryan,
Judge.

UNPUBLISHED OPINION

REYES, Judge

In this pretrial appeal, appellant State of Minnesota argues that the district court
erred by suppressing controlled-substance evidence after determining that a trooper

(1) conducted an unreasonable pat-frisk of respondent and (2) searched the vehicle without probable cause. We reverse and remand.

FACTS

On February 11, 2019, respondent Christian John Donnelly and his girlfriend J.N. hit a patch of ice while driving on highway 169 and veered off the road. It had been snowing, and driving conditions were poor. When a Minnesota state trooper arrived at the scene and approached respondent's vehicle, respondent was walking around it. The trooper asked him to sit in his car.

The trooper then approached the passenger side, opened the car door to speak with J.N., and noticed "an overwhelming odor of marijuana emanating from the vehicle." The trooper told the occupants that she could smell the marijuana, notified them that she intended to search the vehicle, and asked them where they kept the marijuana. Both respondent and J.N. denied the presence of marijuana inside the vehicle.

The trooper then asked J.N. to step out of the car. Both vehicle occupants became "hostile, agitated, very defensive, [and] uncooperative." J.N. ignored the trooper's order for approximately one minute. During this time, respondent argued with the trooper and told her that she did not smell marijuana. J.N. became angry and told the trooper to call her superior. The trooper called for backup. J.N. again refused to step out of the vehicle and told the trooper that she needed a warrant to search the vehicle.

After the trooper threatened to remove J.N. forcefully, J.N. became even more agitated, but acquiesced. The trooper pat-frisked J.N. and then instructed her to stand by the tow truck, which had arrived minutes earlier. The trooper instructed respondent, who

continued to be uncooperative, to exit his vehicle and stand by the tow truck, and the trooper conducted a pat-frisk to “check for weapons.” Respondent acquiesced.

The trooper located an object in respondent’s pocket that “felt to be like a one-hitter pipe.” The trooper removed the object and saw that it contained “a white crystal substance,” which later tested positive for methamphetamine. The trooper placed respondent under arrest and then ordered respondent to sit in her squad car. A second trooper arrived, and once the troopers secured both occupants in squad cars, the troopers searched respondent’s vehicle and found marijuana, marijuana wax, drug paraphernalia, accessories for growing marijuana, bullets, and a BB gun.

The state charged respondent with one count of felony fifth-degree possession of a controlled substance in violation of Minn. Stat. § 152.025, subd. 2(1) (2018). Respondent moved to suppress evidence obtained from both the pat-frisk of his person and the vehicle search. Following respondent’s motion, the district court held a contested omnibus hearing at which the trooper testified. The district court granted respondent’s motion to suppress the evidence. This pretrial appeal follows.

D E C I S I O N

I. The district court’s suppression of evidence critically impacted the state’s ability to prosecute.

The state argues that suppressing evidence of the methamphetamine critically impacted its ability to prosecute by preventing it from demonstrating probable cause to prosecute respondent for a controlled-substance crime. We agree.

As a threshold matter, when the state appeals a pretrial order, it must show “how the district court’s alleged error, unless reversed, will have a critical impact on the outcome of the trial.” Minn. R. Crim. P. 28.04, subd. 2(2)(b); *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017). If a district court’s ruling “significantly reduces the likelihood of a successful prosecution,” it has a critical impact. *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987). Suppressing the methamphetamine evidence meets the critical-impact requirement, allowing us to consider the state’s appeal. *See id.*

II. The trooper reasonably decided to conduct a pat-frisk.

The state argues that analysis of the five factors from *State v. Flowers*, 734 N.W.2d 239, 253 (Minn. 2007), supports the reasonableness of the pat search. We agree.

Both the United States and Minnesota Constitutions guarantee “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV; see Minn. Const. art. I, § 10; *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003). “When reviewing a pretrial order on a motion to suppress, we review the district court’s factual findings [for clear error],” *State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012) (citation omitted), and its determinations of reasonable, articulable suspicion de novo, *State v. Diede*, 795 N.W.2d 836, 843 (Minn. 2011). Warrantless searches and seizures are per se unreasonable unless an exception to the warrant requirement applies. *State v. Horst*, 880 N.W.2d 24, 33 (Minn. 2016). But a trooper does not need a warrant to conduct a pat-frisk for weapons if the trooper (1) has “a reasonable, articulable suspicion that a suspect might be engaged in criminal activity” and (2) reasonably believes that the suspect might be armed and dangerous. *State v. Dickerson*,

481 N.W.2d 840, 843 (Minn. 1992) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884 (1968)). If both requirements are met, a trooper may “conduct a carefully limited search of the outer clothing of such person[] in an attempt to discover weapons which might be used to assault [the trooper].” *Terry*, 392 U.S. at 30, 88 S. Ct. at 1885 (often referred to as a *Terry* pat-frisk). However, a trooper is entitled to seize contraband, including drug paraphernalia, found during a pat-frisk if the incriminating character of the contraband is immediately apparent to the trooper such that it gives rise to probable cause for the seizure. See *Minnesota v. Dickerson*, 508 U.S. 366, 376, 113 S. Ct. 2130, 2137 (1993).

“We evaluate whether a reasonable, articulable suspicion [to conduct a pat-frisk] exists from the perspective of a trained police officer, who may make ‘inferences and deductions that might well elude an untrained person.’” *State v. Lemert*, 843 N.W.2d 227, 230 (Minn. 2014) (quoting *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 695 (1981)). “[T]he reasonable suspicion standard is not high,” but it requires more than an unarticulated “hunch.” *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotations omitted). The purpose of a *Terry* pat-frisk “is not to discover evidence of crime, but to allow the officer to pursue [the] investigation without fear of violence.” *Flowers*, 734 N.W.2d at 251 (quotation omitted).

We analyze the objective reasonableness of a pat-frisk based on the totality of the circumstances and consider five factors: (1) the number of troopers and trooper cars involved; (2) the nature of the crime and whether the trooper has reason to believe the suspect might be armed; (3) the strength of the troopers’ articulable, objective suspicions; (4) whether the persons under observation behave erratically or make suspicious

movements; and (5) the need for the troopers to take immediate action and no opportunity for them to make the stop that leads to the pat-frisk in less threatening circumstances. *Id.* at 251, 253 (citing *United States v. Raino*, 980 F.2d 1148, 1149-50 (8th Cir. 1992)).

Here, the district court applied the five-factor *Flowers* analysis and determined that the trooper conducted an unreasonable pat-frisk because only the first *Flowers* factor supported the reasonableness of the search. We conclude in our de novo review that the five *Flowers* factors support the reasonableness of the pat-frisk.

Number of troopers and trooper cars involved

We agree with the district court's analysis that, because the vehicle occupants outnumbered the trooper, this factor supports the reasonableness of the pat-frisk. *See id.* at 253.

Nature of the crime and reason to believe that suspect might be armed

The district court relied on the fact that no weapons were in view to conclude that this factor had not been met. However, the lack of a visible weapon does not preclude a trooper from reasonably deducing that respondent may possess one. *See Dickerson*, 481 N.W.2d at 843. The standard requires that, objectively, a trooper may "reasonably believe[]" that respondent "might be armed" as opposed to having proof that respondent was armed. *See id.*; *Lemert*, 843 N.W.2d at 230. Even though the nature of the suspected drug crime did not necessarily suggest the presence of a weapon, the totality of the circumstances includes observing a hostile or threatening attitude, see *State v. Curtis*, 190 N.W.2d 631, 636 (Minn. 1971), which respondent displayed after being confronted about

the overwhelming smell of marijuana. This factor supports the reasonableness of the pat-frisk.

Strength of trooper's articulable, objective suspicions

When the trooper noted that she smelled the odor of marijuana, the vehicle occupants became hostile. The outnumbered trooper then called for backup. Even though the trooper did not see a weapon, the situation presented reasonable grounds for her to make “deductions that might well elude an untrained person.” *Lemert*, 843 N.W.2d at 230. This factor supports the reasonableness of the pat-frisk.

Erratic behavior of, or suspicious movements by, the persons under observation

Because the erratic behavior “of persons under observation” is relevant, we consider both respondent and J.N.’s hostile behavior. *See Flowers*, 734 N.W.2d at 253. Hostility qualifies as erratic behavior that could lead a trooper to objectively conclude that the vehicle occupants were attempting to conceal something. *See Curtis*, 190 N.W.2d at 636 (stating that suspect’s hostile or threatening attitude is relevant for determining justification of weapon search); *In re Welfare of M.D.B.*, 601 N.W.2d 214, 216 (Minn. App. 1999) (listing motorist’s hostile and threatening attitude as factor that might justify pat-frisk (citing *Curtis*, 190 N.W.2d at 636)), *review denied* (Minn. Jan. 18, 2000). This factor also supports the reasonableness of the pat-frisk.

Need for immediate action

Because the trooper found herself in a situation in which the vehicle occupants acted increasingly hostile, may have been attempting to conceal something, and backup would not arrive for several minutes, the trooper could have made the reasonable inference that

respondent “may [have] gain[ed] immediate control of a weapon.” *State v. Waddell*, 655 N.W.2d 803, 810 (Minn. 2003). “Officer safety is a paramount interest.” *State v. Varnado*, 582 N.W.2d 886, 891 (Minn. 1998). Thus, this factor supports the reasonableness of the pat-frisk.

“[T]he reasonable suspicion standard is not high.” *Timberlake*, 744 N.W.2d at 393. We conclude that, under the totality of the circumstances, the trooper reasonably feared for her safety when outnumbered by hostile individuals and made the objectively reasonable inference that respondent might be armed.

III. The trooper had probable cause to search the vehicle.

The state argues that *State v. Ortega*, 770 N.W.2d 145, 149 n.2 (Minn. 2009), which clarified that the odor of marijuana is insufficient to justify a search incident to arrest unless the trooper can discern from the odor that the person possesses a criminal amount of marijuana, does not apply to the motor-vehicle exception to the search-warrant requirement. We agree that the trooper appropriately searched the vehicle, though we need not opine on the state’s substantive argument because we conclude that the trooper had separate and sufficient probable cause to search the vehicle.

We review factual findings for clear error and legal determinations de novo. *Milton*, 821 N.W.2d at 798. The state bears the burden of proving that an exception to the warrant requirement for seizures applies. *Licari*, 659 N.W.2d at 250.

The parties here agree that the seizure occurred once the trooper asked respondent to step out of the vehicle so that she could search the vehicle, and both parties acknowledge

that the motor-vehicle exception is at issue.¹ The motor-vehicle exception allows a trooper to search a vehicle if there is “probable cause to believe the search will result in a discovery of evidence or contraband.” *State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016) (quotation omitted). Assessing probable cause requires us to objectively consider whether the totality of the circumstances and the specific facts warranted “a [person] of reasonable prudence in the belief that contraband or evidence of a crime will be found.” *State v. Lee*, 585 N.W.2d 378, 382 (Minn. 1998).

Here, the trooper made a reasonable decision to conduct a pat-frisk, which resulted in the discovery of methamphetamine on respondent’s person. The discovery of methamphetamine, the possession of any quantity of which is a crime,² when coupled with respondent becoming hostile and agitated once the trooper told him that she could smell marijuana in his vehicle and becoming significantly more hostile when pat-frisked, suffices for a trooper of reasonable prudence to believe that the vehicle contained evidence of contraband. *See Lee*, 585 N.W.2d at 382. Because we determine that the discovery of methamphetamine coupled with respondent’s hostility provided the trooper with probable cause to search the vehicle for evidence of controlled-substance crimes, we need not opine on the state’s argument that the odor of marijuana alone provides probable cause to search

¹ Investigations to determine if the occupants of a stopped vehicle need assistance are generally held not to be seizures. *See, e.g., State v. Lopez*, 698 N.W.2d 18, 23 (Minn. App. 2005). However, an investigation becomes a seizure when a trooper, by means of physical force or show of authority, restrains the liberty of a citizen. *State v. Klamar*, 823 N.W.2d 687, 692 (Minn. App. 2012).

² *See* Minn. Stat. § 152.023, subd. 2(a)(4) (2018).

a vehicle. We conclude that the district court erred by granting respondent's motion to suppress, and we reverse and remand for trial consistent with these proceedings.

Reversed and remanded.