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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2004**

State of Minnesota,
Respondent,

vs.

Mark Terrance Ross,
Appellant.

**Filed December 14, 2020
Affirmed in part, reversed in part, and remanded
Hooten, Judge**

Rice County District Court
File No. 66-CR-17-2469

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

John L. Fossum, Rice County Attorney, Terence J. Swihart, Assistant County Attorney,
Faribault, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Abigail H. Rankin, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Hooten, Judge; and Gäitas,
Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

In this direct appeal from the judgment of conviction for unlawful possession of
ammunition and a hypodermic needle, appellant argues (1) the evidence against him should

have been suppressed as a result of an unlawful pat search conducted without a reasonable belief that appellant was armed and dangerous, and (2) the district court failed to exercise its discretion in imposing a 60-month executed sentence. We affirm in part, reverse in part, and remand.

FACTS

While patrolling on October 8, 2017, Faribault Police Officer Mallory House observed appellant Mark Ross on the Four Seasons apartment complex property and confirmed that he had been trespassed from the property. Officer House testified that she observed Ross entering and exiting a garage on the property with a dog, and that once Ross saw that she noticed him, he picked up a bicycle that was leaning against a garage and rode off of the Four Seasons property.

Later, Officer House found Ross at another apartment complex, stopped him, and asked him what he was doing at the Four Seasons apartments. Ross denied being at the property, being on a bicycle, or associating with a dog, although he later expressed concern about the dog.

Officer House testified that she observed Ross to be very nervous and fidgety, putting his hands in his pockets, looking around, pacing, and not following directions. As she sat in her squad car to gather Ross's information, she told him several times to remain in front of the squad car. Ross informed Officer House that he could not hear due to deafness in one of his ears. Then, Ross said he was going to sit on the curb and walked beyond the squad car on the passenger side. Ross next walked back in front of the squad car to show Officer House the no-trespass notice that he was holding from Four Seasons

apartment complex. Ross again informed Officer House that he could not hear her. Officer House testified that Ross was moving up and down the side of her squad car, making it difficult for her to tell which direction he was trying to go, and that he kept putting his hands into his pockets despite her instructions that he not do so. While Officer House indicated that she did not find Ross's behavior threatening or menacing, she was frustrated that he was moving around and was especially concerned that Ross was putting his hands in his pockets.

Officer House also testified that she knew Ross from prior contacts with him, including assault investigations, potential burglary reports, and suspicious calls. Specifically, she stated that she had previously responded to one incident during which she observed Ross and three others actively involved in assaulting one another with various weapons, including a frying pan and a knife. Officer House stated that she did not believe Ross was charged based on that incident. When asked if she was familiar with Ross's history "in terms of cases that have actually been brought against him in court," Officer House responded "[j]ust this one."

Officer Ross testified that, based on her training and previous interactions with Ross, she determined that it was an officer safety concern for him to be reaching into his pockets during the incident at issue in this case. She exited her squad car and told Ross, "You're moving around too much for me." Officer House pat searched Ross for what she deemed officer safety reasons. She testified that she felt "rigid objects" in his pocket, and "became concerned that they could be used as a weapon." She removed the objects and found a syringe and several rounds of live ammunition.

The state charged Ross with possession of ammunition by an ineligible person, possession of a hypodermic needle, and trespass. At a contested omnibus hearing on Ross's motion to suppress the syringe and ammunition found in his pockets during the pat search, Officer House was the state's only witness. The district court denied Ross's motion, relying on Minn. Stat. § 629.34 (2016) to support its conclusion that the "officer had probable cause to arrest and that a search incident to arrest is appropriate when the officer has probable cause to arrest, which she did in this case." The district court also determined that Officer House properly searched Ross for officer safety reasons based on her knowledge of Ross's history and his behavior at the scene.

A jury found Ross guilty of unlawfully possessing ammunition and a hypodermic needle; the trespass charge was dismissed at the state's request. Before sentencing, Ross stipulated that he had prior convictions. Ross admitted that he had pleaded guilty to second-degree felony assault and that he was "ineligible to possess firearms or ammunition going forward."

At the sentencing hearing, the district court admitted exhibits 1 and 2, certified copies of Ross's two prior felony convictions. Exhibit 1 was a felony sentencing order for a fifth-degree assault committed on June 25th, 2005. Exhibit 2 was a felony sentencing order for "Assault – Second Degree" committed on August 15, 2005. Exhibit 2 does not mention whether Ross used or possessed a firearm or other dangerous weapon in the commission of the second-degree assault, nor does it list the statute Ross violated. At the hearing, the state argued that because of Ross's prior conviction for second-degree assault, which the state claimed involved the use of a firearm, his sentence for the possession of

ammunition count was enhanced to a mandatory 60-month executed sentence pursuant to Minn. Stat. § 609.11, subds. 5(b), 8(b) (2016). Ross argued that the district court, acting within its discretion, should impose a stayed sentence because he had been law abiding since 2008 with no serious felonies since that time.

After considering the parties' arguments, the district court rejected Ross's assertions that it had discretion, noting both that its "hands were tied based upon what the legislature had passed," but also that this case raised concerns about mass incarceration and its effects. The district court concluded that it was "obliged by the statute to execute a sentence of 60 months" for the possession of ammunition charge. The district court imposed a concurrent 90-day sentence for the possession of a hypodermic needle count and, at the state's request, dismissed the trespass count. Ross appeals.

DECISION

I. The district court did not err in denying Ross's motion to suppress evidence seized during a warrantless pat search.

Ross argues that the district court erred by denying his motion to suppress evidence seized by Officer House during a warrantless pat search. He contends that the district court erred in applying both the search-incident-to-arrest exception and the presently-armed-and-dangerous exception to the warrant requirement. "When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). "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).

The Fourth Amendment to the United States Constitution and article I of the Minnesota Constitution protect citizens from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A search performed without a warrant is *per se* unreasonable unless it falls under a delineated exception to the warrant requirement. *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999). The state has the burden of demonstrating the applicability of any such exception. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). If the state fails to meet its burden, the search or seizure is unlawful and any evidence obtained as a result must be suppressed. *State v. Metz*, 422 N.W.2d 754, 756 (Minn. App. 1988).

A. Search-incident-to-arrest exception

On appeal, Ross argues—and the state appears to concede—that the district court erred in applying the search-incident-to-arrest exception to this case. The police may arrest a suspect without a warrant when the officer has probable cause to believe that the suspect has committed a crime. *State v. Moorman*, 505 N.W.2d 593, 599 (Minn. 1993). Minn. R. Crim. P. 6.01, subd. 1(a) permits custodial arrests for misdemeanors only under certain circumstances. Under subdivision 1(a), law enforcement officers who decide to charge someone with a misdemeanor and act without a warrant “must issue a citation and release the defendant unless it reasonably appears: (1) the person must be detained to prevent bodily injury to that person or another; (2) further criminal conduct will occur; or (3) a

substantial likelihood exists that the person will not respond to a citation.” Minn. R. Crim. P. 6.01, subd. 1(a). Under Minn. Stat. § 629.34, subd. 1(c)(1) (2016), a police officer may arrest a person without a warrant when a public offense, including a misdemeanor, has been committed or attempted in the officer’s presence. *Smith v. Hubbard*, 91 N.W.2d 756, 761 (Minn. 1958).

In denying appellant’s motion to suppress, the district court determined that rule 6.01 did not apply. Specifically, the district court noted that rule 6.01 was “a rule of court. It’s not a statute governing the actions of law enforcement. It’s a rule of court. So it applies to court proceedings.” The district court instead applied only Minn. Stat. § 629.34, determining that the statute allows for arrest when a public offense occurs in the officer’s presence, which it concluded to be the situation in this case. Relying solely on section 629.34, the district court found that Officer House had probable cause to arrest Ross, and that a search incident to arrest was therefore appropriate.

The parties argue that both rule 6.01 and section 629.34 must be satisfied for a custodial misdemeanor arrest to be lawful. The state asserts that “the procedural rule within [r]ule 6.01 and the statute within section 629.34 were effectively merged, creating a rule of law out of two different authorities.” The state thus contends that in order for an officer to make a warrantless arrest of an individual for a misdemeanor, the individual must (1) be in a public place, (2) commit the offense in the presence of an officer, and (3) meet one of the elements of rule 6.01. The parties’ arguments are correct based on *State v. Richmond*, where we found that Minn. Stat. § 629.34 applied, yet continued on to analyze whether rule

6.01 was satisfied. 602 N.W.2d 647, 653 (Minn. App. 1999), *review denied* (Minn. Jan. 18, 2000).

Both parties agree that Ross’s offense of trespass is a misdemeanor and that the trespass was committed in Officer House’s presence, which does support a custodial arrest under section 629.34. Minn. Stat. § 609.605, subd. 1(b)(8) (2016). But, Officer House provided no testimony that Ross needed to be detained because he might injure himself or someone else, would engage in further criminal conduct, or was unlikely to respond to a citation. Accordingly, based upon this record, we hold that rule 6.01 was not satisfied, and the district court erred in applying the search-incident-to-arrest exception to the warrant requirement.

B. Presently-armed-and-dangerous exception

Ross argues that the district court also erred in applying the presently-armed-and-dangerous exception to the warrant requirement. “[I]n 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 that suspect might be armed and dangerous.” *Flowers*, 734 N.W.2d at 250 (quotation omitted). “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 v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883 (1968). In determining whether reasonable suspicion exists, Minnesota courts “consider the totality of the circumstances and acknowledge that trained law enforcement officers are permitted to make inferences and deductions that would be beyond the

competence of an untrained person.” *State v. Richardson*, 622 N.W.2d 823, 825 (Minn. 2001). The reasonable-suspicion standard is “less demanding than probable cause,” but requires more than an unarticulated “hunch.” *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008).

“To allow a weapons search in the absence of *any* threatening circumstances is a dramatic departure from the longstanding holding in *Terry*.” *In re Welfare of M. D. B.*, 601 N.W.2d 214, 217 (Minn. App. 1999), *review denied* (Minn. Jan. 18, 2000). But an officer may perform a protective search of a person if (1) the person is known to be habitually armed or to have a record of assaultive behavior; (2) the person assumes a hostile or threatening attitude; or (3) through cursory examination, the police have a valid reason to believe the person is engaged in the commission of a more serious crime. *State v. Curtis*, 190 N.W.2d 636, 637 (Minn. 1971). If the police officer conducts a pat search and “feels an object whose contour or mass makes its identity immediately apparent” as contraband, a warrantless seizure of the object is justified. *State v. Burton*, 556 N.W.2d 600, 601 (Minn. App. 1996), *review denied* (Minn. Feb. 26, 1997) (quotation omitted).

Ross argues that the *Curtis* factors do not support Officer House’s warrantless pat search because (1) Ross was not known to be habitually armed, (2) Officer House was not investigating a violent or serious crime in which a weapon is usually involved, (3) Officer House’s only knowledge of any prior assaultive behavior by Ross related to a call a year earlier in which Ross was not charged, and (4) Officer House testified that she was unfamiliar with any court cases involving Ross besides this one.

Next, Ross argues that even if Officer House was aware of Ross's prior criminal record, "*Terry* does not authorize a search based solely on criminal history." Ross contends that the state failed to produce the evidence necessary to support a finding that Officer House believed Ross was armed and "capable of immediately causing permanent harm." *State v. Varnado*, 582 N.W.2d 886, 889 (Minn. 1998). Ross claims that evidence that Officer House believed she was in danger—much less immediate danger—is lacking from the record, citing Officer House's testimony that Ross did not threaten or menace her in any way. He also argues that Officer House never testified that she suspected Ross was armed. Ross does not discount Officer House's testimony that people reaching their hands into their pockets is an officer safety issue. However, he responds that even though there was a squad car video on during the stop, there is no video or audio evidence to support Officer House's testimony that Ross was repeatedly putting his hands in his pockets.

Ross further alleges that his behavior exhibiting nervousness or fidgety actions does not provide the basis for a pat search because it was unaccompanied by a hostile attitude or a suspicion of more serious criminal behavior. Ross contends that the record shows that he was cooperative because he approached Officer House's squad car as directed, stayed near the squad car while Officer House sat inside, and produced the trespass notice he was alleged to have violated.

Responding to Ross's arguments, the state notes that even though Officer House had just seen Ross leaving the Four Seasons apartment complex on a bicycle and possessing a dog, Ross denied those facts. The state also cites the following evidence as supporting Officer House's concerns for her safety and her decision to do a pat search: (1)

Officer House's testimony that Ross was "nervous, fidgety, grabbing a lot, putting his hands in his pockets, looking around, pacing, and not following directions"; (2) Ross's attempt to sit on the curb; (3) Ross's movements up and down the side of Officer House's squad car; (4) Officer House's frustration that Ross was moving around and not following her directions; and (5) Officer House's testimony that she was concerned about Ross putting his hands in his pockets and considered such behavior to be an officer safety issue based on her training. Finally, the state emphasized Officer House's familiarity with Ross from suspicious calls, potential burglary reports, and assault investigations, one of which involved the use of a weapon.

Based on the totality of these circumstances encountered and observed by Officer House in her interaction with Ross, we conclude that the district court did not err in finding that Officer House had a reasonable, articulable suspicion from her perspective as a trained police officer that Ross may be armed and dangerous. As set forth above, the evidentiary record contains specific and articulable facts supporting Officer House's concern that Ross presented an officer safety risk. The district court, by implicitly finding Officer House's testimony to be credible, was able to discount Ross's argument that the squad car video did not capture his movements on the basis of evidence that Officer House was unable to get him to stand still in front of the squad car where the video was positioned. We also acknowledge that Officer House, as a trained law enforcement official, is permitted to make inferences and deductions that would be beyond the competence of an untrained person. *Richardson*, 622 N.W.2d at 825. Officer House indicated that based on this training, she considered Ross's behavior to be an officer safety issue. Because we conclude that the

presently-armed-and-dangerous exception applied to Officer House’s warrantless pat search of Ross, we hold that the district court did not abuse its discretion in denying Ross’s motion to suppress evidence seized during the search.

II. Did the district court err by determining that it did not have the discretion to depart and sentencing Ross to the mandatory minimum?

Ross argues that the district court erred by not exercising its discretion in considering a downward departure. We review a district court’s decision not to depart from the sentencing guidelines for an abuse of discretion. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). A district court abuses its discretion when its decision is premised on legal errors or its decision is unsupported by the record. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). We review questions of law de novo. *State v. Barker*, 705 N.W.2d 768, 771 (Minn. 2005).

A defendant convicted of being a prohibited person in possession of a firearm or ammunition, who has been previously convicted of a second-degree assault, is subject to a mandatory minimum sentence and “shall be committed to the commissioner of corrections for not less than five years.” Minn. Stat. § 609.11, subds. 5(b), 8(b). Generally, a district court has the discretion to depart from this mandatory minimum sentence if substantial and compelling reasons support departure. Minn. Stat. § 609.11, subd. 8(a) (2016); *see State v. Olson*, 325 N.W.2d 13, 17–19 (Minn. 1982). But a district court does not have the discretion to depart from the mandatory minimum sentence if the defendant has committed a prior crime, listed in Minn. Stat. § 609.11, subd. 9 (2016), in which the defendant “used or possessed a firearm or other dangerous weapon.” Minn. Stat. § 609.11, subd. 8(b).

Upon the state's request for a mandatory minimum sentence under section 609.11, a district court "shall allow the state to prove beyond a reasonable doubt to a jury . . . the factors in support of the state's request." Minn. Stat. § 244.10, subd. 5(a) (2016). Whether a defendant, at the time of the commission of an offense to which a mandatory minimum sentence applies, used or had possession of a firearm "shall be determined by the fact finder at the time of a verdict or finding of guilt at trial or the entry of a plea of guilty based upon the record of the trial or the plea of guilty." Minn. Stat. § 609.11, subd. 7 (2016). "[T]he decision to apply the mandatory minimum sentence, like a decision to depart from the guideline presumptive sentence, requires judicial fact-finding." *Barker*, 705 N.W.2d at 773.

A criminal defendant has the right to a jury trial to determine whether aggravating sentencing factors exist. *See Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004). "[A]ny facts supporting a departure above the maximum guidelines sentence requires either a jury to find those facts beyond a reasonable doubt or the defendant to admit to those facts." *State v. Bradley*, 906 N.W.2d 856, 858 (Minn. App. 2017), *review denied* (Minn. Feb. 28, 2018). A defendant may waive his rights to a *Blakely* jury trial, but

[a]n express, knowing, voluntary, and intelligent waiver of the right to a jury determination of facts supporting an upward sentencing departure is required before a defendant's statements at his guilty-plea hearing may be used to enhance his sentence beyond the maximum sentence authorized by the facts established by his guilty plea.

State v. Dettman, 719 N.W.2d 644, 646 (Minn. 2006).

Ross argues that the district court's imposition of an enhanced sentence under Minn. Stat. § 609.11, subd. 8(b), was inappropriate for two reasons: first, Minn. Stat. § 609.11 requires a jury determination to trigger a hard mandatory sentence, and second, the facts used to increase Ross's sentence were not found by a factfinder. Ross contends that subdivision 8(b) only applies here if the state demonstrates that (1) Ross had a prior conviction of an offense listed in subdivision 9, and (2) Ross used or possessed a firearm or other dangerous weapon in the commission of that offense. Ross argues that both of these factors must be found by a factfinder.

Ross admits that his second-degree assault conviction is an enumerated crime listed in subdivision 9. However, in claiming that the district court erred by failing to exercise its discretion, Ross argues that his prior assault conviction is "not enough to invoke the hard mandatory sentence of subdivision 8(b)" without a jury finding at the time of verdict that the prior conviction involved the use or possession of a firearm or dangerous weapon. Ross contends that since a jury did not make the findings required to trigger the application of subdivision 8(b), the district court was not required to impose a 60-month sentence to comply with section 609.11.

The state responds that prior convictions do not need to be presented to the jury. The state assumes that Ross's second-degree assault conviction necessarily implies that he used a dangerous weapon in the commission of the offense, since conviction of second-degree assault requires the use of a dangerous weapon. Essentially, what the state is arguing is that it may use documentation evidence of Ross's prior conviction for second degree assault to show both that (1) Ross had a prior conviction of an offense listed in

subdivision 9, and (2) Ross used or possessed a firearm or other dangerous weapon in the commission of that offense, such that it was not necessary to have a *Blakely* trial regarding whether Ross used or possessed a firearm in commission of the offense.

In this case, the state is correct to assert that Ross's prior convictions did not need to be presented to the jury because Ross stipulated that he had a prior conviction of second-degree assault, waiving his right to a jury determination of that fact. However, Ross's mere stipulation that he had a prior conviction of second-degree assault was insufficient, without more, to waive his right to have a jury determine that this prior conviction involved the use of a firearm or dangerous weapon. The plain language of Minn. Stat. § 609.11, subd. 7, requires the jury to determine whether the prior conviction included the use of a firearm or dangerous weapon, even if the conviction is one that necessarily requires the use of a firearm or dangerous weapon. Notably, subdivision 7 does not list any caveats to this requirement:

The question of whether the defendant or an accomplice, at the time of the commission of an offense listed in subdivision 9, used a firearm or other dangerous weapon or had in possession a firearm *shall be determined by the fact finder* at the time of a verdict or finding of guilt at trial or the entry of a plea of guilty based upon the record of the trial or the plea of guilty.

Minn. Stat. § 609.11, subd. 7 (emphasis added).

The state provides no authority that would allow the district court to disregard subdivision 7's plain language. In this case, all that was contained in the record was Exhibit 2, a felony sentencing order for "Assault – Second Degree" committed on August 15, 2005. The order does not contain a statute number for the offense nor does it contain any of the

underlying facts supporting the conviction. Ross could have stipulated that he used a firearm or dangerous weapon in the commission of the second-degree assault as set forth in Exhibit 2, thereby waiving his right to a *Blakely* trial under Minn. Stat. § 609.11, subd. 7, but he did not do so. Because Ross did not specifically waive his right to have a jury determine whether his prior conviction involved the use of a firearm or dangerous weapon, and the state failed to submit this question to the jury, the district court was not required to execute the imposed sentence under subdivision 8(b).

Given that the record does not support a finding that Ross stipulated that the second-degree assault charge for which he was convicted involved the use or possession of a firearm or dangerous weapon, and the mere proof of the conviction is insufficient to prove this additional fact, we hold that the district court erred by failing to empanel a *Blakely* jury to consider the issue. We reverse Ross's sentence due to the district court's error and remand to the district court for resentencing. On remand, the district court may empanel a sentencing jury to determine whether Ross's prior conviction meets the requirement of subdivision 7 that would trigger a mandatory sentence under subdivision 8(b). See *Hankerson v. State*, 723 N.W.2d 232, 237 (Minn. 2006) (holding that a sentencing trial following a *Blakely* infringement does not violate a defendant's double-jeopardy rights because it is not a second prosecution).

Affirmed in part, reversed in part, and remanded.