

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0380**

State of Minnesota,
Respondent,

vs.

William Dean Brown,
Appellant.

**Filed March 22, 2021
Affirmed
Hooten, Judge**

McLeod County District Court
File No. 43-CR-19-1415

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

Michael K. Junge, McLeod County Attorney, Lauren M. Johnson, Assistant County Attorney, Glencoe, Minnesota (for respondent)

Zane Umsted, Special Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Hooten, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

Appellant challenges the district court's denial of his motion to suppress evidence obtained through a dog sniff and resulting search of a car, arguing that the facts known to

the police officer at the time of the dog sniff did not support a reasonable, articulable suspicion that he may have had drugs in the car. We affirm.

FACTS

On September 3, 2019, Officer Andrew Fiebelkorn of the Glencoe Police Department pulled over appellant William Dean Brown for driving a car with expired plates. The car belonged to Brown's girlfriend. Officer Fiebelkorn learned that Brown had a revoked driver's license and an arrest warrant from the Department of Corrections. He then arrested Brown, finding a cut straw in Brown's pocket which he secured in the squad car. He also looked in the front and rear passenger areas of the car, finding nothing suspicious. After Officer Fiebelkorn rolled up the windows and locked the car, he took Brown to jail. They left the car locked and parked in a gas station parking lot.

After Officer Fiebelkorn booked Brown and gave him a *Miranda* warning,¹ Brown agreed to speak with him. Officer Fiebelkorn asked about the warrant, noting that his information showed the warrant connected to a conviction for drug possession, and Brown responded that he was convicted in 2013 for possessing 16 pounds of marijuana. Officer Fiebelkorn next asked Brown about his drug-use history, to which Brown answered that he used marijuana three to five months ago. Brown also denied ever using heroin, admitted to using cocaine "back in the day," gave an inaudible response about methamphetamine, and denied using any non-prescribed medications. Officer Fiebelkorn asked Brown about the cut straw, which Brown explained that he chewed to relieve chronic dry mouth caused

¹*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

by a gun accident in his youth that damaged a large portion of his face including the saliva glands in his mouth. Brown's girlfriend then called his cell phone, asking about her car. Officer Fiebelkorn held the phone to Brown's face so he could talk with her, and explained to Brown and his girlfriend that she could pick up the car keys from the jail at any time. After the phone call, Officer Fiebelkorn again asked Brown about the warrant, and Brown explained the warrant was likely because he failed to maintain contact with his probation officer because he had problems with authority. Officer Fiebelkorn turned Brown over to the jail staff at 9:31 p.m.

Several hours later, Officer Fiebelkorn reviewed a report describing a May 2019 arrest of Brown. Officer Fiebelkorn subsequently described his understanding of the May arrest, writing that

[in May, the arresting deputy] had located a "fanny pack" under the passenger seat of the vehicle [Brown] was driving at that time. It also stated he located a digital scale with a crystal like residue on it along with empty Ziploc style baggies under the passenger seat in the "fanny pack." Under the driver[']s seat; a black in color case that contained 2 baggies with a crystal like substance inside believed to be methamphetamine. Between the two baggies it was approximately 20 grams of a crystal like substance believed to be methamphetamine.

After reviewing the May report, Officer Fiebelkorn returned to the gas station and found the car still there shortly before 3:24 a.m. on September 4. He looked through the window into the rear passenger compartment, spotting a tan bag on the floor partially under the front passenger seat. He called a sheriff's deputy to request a dog sniff. The dog, Kilo, alerted by the driver's door. Following Kilo's alert, Officer Fiebelkorn applied for and received a warrant to search the car for controlled substances. He discovered

methamphetamine, marijuana, a grinder, and a scale in the tan bag, and more marijuana in the trunk. He also applied for and received a warrant to search Brown's phone for information related to drug dealing, and he found communications suggesting that Brown was dealing drugs.

The state charged Brown with one count each of first-degree sale and first-degree possession of methamphetamine. Minn. Stat. § 152.021, subds. 1(1), 2(a)(1) (2018). Brown moved to suppress the evidence obtained through the dog sniff and car search, and to subsequently dismiss the complaint for lack of probable cause to charge. The district court denied the motion. Brown and the state then reached an agreement in which the state dismissed the sale charge and Brown entered a plea under Minnesota Rules of Criminal Procedure 26.01, subdivision 4, stipulating to the state's evidence and preserving the district court's suppression ruling for appellate review. The parties agreed that the appellate ruling on the suppression issue would dispose of the case. Minn. R. Crim. P. 26.01, subd. 4(c). The district court then found Brown guilty of the possession charge based on the stipulated evidence and sentenced Brown to 108 months imprisonment. Brown appeals.

DECISION

Brown contends that the district court erred by denying his motion to suppress the evidence recovered by the police in connection with the dog sniff. "Where, as in this case, the facts are not in dispute and the decision to suppress is a question of law, we may independently review the facts and determine whether, as a matter of law, the evidence

needs to be suppressed.” *State v. Richardson*, 622 N.W.2d 823, 825 (Minn. 2001). Based on the following analysis, we conclude that the district court did not err.

I. The totality of the circumstances supports a reasonable, articulable suspicion that Brown may have possessed drugs in the car.

Brown specifically argues that the totality of the circumstances known by Officer Fiebelkorn could not support a reasonable, articulable suspicion that Brown may have possessed drugs in the car when the officer requested a dog sniff. The U.S. and Minnesota Constitutions prohibit the government from unreasonable searches and seizures of a person, their house, their papers, and their effects. U.S. Const. amend. IV; Minn. Const. art. I, § 10. “A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.” *City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 121 S. Ct. 447, 451 (2000). A motor vehicle is an “effect” ordinarily requiring that any search or seizure be reasonable. *State v. Wiegand*, 645 N.W.2d 125, 131 (Minn. 2002). But “the privacy expectation surrounding an automobile is less than that of a home because the automobile generally does not serve as the repository of personal effects. . . . [and] because of the significant governmental regulation of vehicles.” *Id.* Additionally, “a sniff by a dog that simply walks around a car is much less intrusive than a typical search.” *Id.* (quotation omitted). Therefore, “a dog sniff around the exterior of a legitimately stopped motor vehicle is not a search . . . [under] either the Fourth Amendment or the Minnesota Constitution,” but the “limited[] privacy right in a motor vehicle . . . require[s] a reasonable, articulable suspicion of drug-related criminal activity before law enforcement

may conduct a dog sniff.” *Id.* at 133, 135.² A police officer may conduct a dog sniff of a motor vehicle if he has a reasonable, articulable suspicion of drug-related activity occurring in the car. *Id.* at 135.

When determining whether an officer had a reasonable, articulable suspicion, we use an “objective, totality-of-the-circumstances test,” which asks “whether the facts available to the officer at the moment of the [search] would warrant a man of reasonable caution in the belief that the action taken was appropriate.” *State v. Smith*, 814 N.W.2d 346, 351–52 (Minn. 2012) (quotations omitted). “The test for appropriateness, in turn, is based on a balancing of the government’s need to search or seize and the individual’s right to personal security free from arbitrary interference by law officers.” *Id.* at 352 (quotation omitted). An officer must know sufficient facts to articulate “reasonable grounds for believing that drugs may be present in the place they seek to test.” *State v. Carter*, 697 N.W.2d 199, 212 (Minn. 2005). These facts, taken together, must rise to “a minimal level of objective justification.” *Smith*, 814 N.W.2d 352 (quotation omitted). “[M]ere whim, caprice, or idle curiosity” is insufficient. *Wiegand*, 645 N.W.2d at 134 (quotation

² A dog sniff of a car, whether stopped for a traffic violation or parked in a public area, is not a search governed by the Fourth Amendment of the United States Constitution. See *Illinois v. Caballes*, 543 U.S. 405, 409, 125 S. Ct. 834, 838 (2005) (“the use of a well-trained narcotics-detection dog . . . during a lawful traffic stop, generally does not implicate legitimate privacy interests.”); *United States v. Friend*, 50 F.3d 548, 551 (8th Cir. 1995) (“[A] dog sniff of a car parked on a public street or alley . . . is so limited an intrusion on protected privacy interests as to not amount to a search for Fourth Amendment purposes.”), *vacated on other grounds*, 517 U.S. 1152, 116 S. Ct. 1538 (1996). But the Minnesota Constitution provides greater protections against government intrusion into private lives, requiring at minimum a reasonable, articulable suspicion to permit a dog sniff of a car regardless of whether it is stopped by police or parked in public. See, e.g., *Wiegand*, 645 N.W.2d at 135.

omitted). We judge the reasonableness of the suspicion against “possible innocent explanations for the alleged suspicious activity.” *State v. Baumann*, 759 N.W.2d 237, 240 (Minn. App. 2009), *review denied* (Minn. Mar. 31, 2009). In the right circumstances even “wholly lawful conduct might justify the suspicion that criminal activity [is] afoot.” *State v. Martinson*, 581 N.W.2d 846, 852 (Minn. 1998) (quotation omitted). Evidence resulting from an unreasonable dog sniff must be excluded from trial. *Smith*, 814 N.W.2d at 350 (Minn. 2012). We conclude that Officer Fiebelkorn had a reasonable, articulable suspicion that Brown may have possessed drugs in the car, justifying a dog sniff.

The record indicates that Officer Fiebelkorn knew the following facts when he requested the dog sniff: Brown had a probation violation warrant connected to a 2013 third-degree controlled substance conviction,³ he had a cut straw in his pocket, he admitted to using marijuana within the last three to five months, he admitted to using cocaine at some point in the past, he was arrested in May 2019 driving a car with 20 grams of a substance that the arresting deputy believed was methamphetamine located in a case under the front seat, and there was a tan bag under the front passenger seat of the car Brown was driving

³ We note that though neither party raised any arguments about the impact of Brown’s probation on the constitutionality of the dog sniff, “[p]robationers have a significantly diminished expectation of privacy because probation is a form of criminal sanction and probationers do not enjoy the absolute liberty to which every citizen is entitled. . . . And, the government has a legitimate interest in monitoring probationers to facilitate reintegration into the community and monitor compliance with probation conditions.” *State v. Bursch*, 905 N.W.2d 884, 890 (Minn. App. 2017) (quotations omitted). Furthermore, though Brown’s probation conditions are not part of the record, “a warrantless search of a probationer, supported by reasonable suspicion and authorized by a condition of probation, is reasonable within the meaning of the Fourth Amendment” and the Minnesota Constitution. *Id.* (quotation omitted); see *State v. Anderson*, 733 N.W.2d 128, 137 (Minn. 2007) (concluding the same).

when Officer Fiebelkorn arrested him. The district court concluded that the totality of the circumstances in the record supported its conclusion that Officer Fiebelkorn had a reasonable, articulable suspicion that Brown may have possessed drugs in the car.

The record of Officer Fiebelkorn's actions and statements reinforces the district court's conclusion. Officer Fiebelkorn specifically secured the cut straw when he found it in Brown's pocket, noted it in his arrest report, and asked Brown about it in the same line of questioning about Brown's drug conviction and recent history of drug use. The straw was not notable except in connection to possible drug use,⁴ so the officer's actions and questions show he suspected that Brown used the straw in connection with drugs. Officer Fiebelkorn also noted in his arrest report that he believed Brown lied about his recent drug use history because Brown was arrested in May 2019 for possession of methamphetamine. Officer Fiebelkorn further highlighted in his report that the police arrested Brown in May 2019 because he possessed drug paraphernalia in a bag located beneath his passenger seat and methamphetamine in a case located beneath his driver's seat. Finally, when Officer Fiebelkorn returned to the car and looked through the rear windows, he saw a tan bag under the front passenger seat, consistent with the method Brown used to conceal drugs and drug paraphernalia when he was arrested in May.

The record also shows that Officer Fiebelkorn articulated some of these facts to a fellow officer when he requested the dog sniff. Officer Fiebelkorn called a sheriff's deputy to request the dog sniff the car. The deputy's contemporaneous report says that Officer

⁴ Cut straws are commonly used to snort methamphetamine. *See State v. Torres*, No. C6-03-300, 2003 WL 21961986, at *1 (Minn. App. Aug. 19, 2003).

Fiebelkorn described the following facts on the call: that he “observed a tan bag under the front passenger seat . . . [,] that Brown had a Department of Corrections warrant for 3rd degree controlled substance . . . [,] that Brown was on probation for 3rd degree controlled substance and on 5/9/19 was charged with 3rd degree controlled substance by Deputy Kroll . . . [, who] located methamphetamine in a bag under the front passenger seat of the vehicle Brown was driving.”

The facts described above support a reasonable inference that Brown lied to the officer about his recent drug history, including his May arrest for methamphetamine possession, his use of the cut straw in his pocket, and his probation violation for a previous drug conviction. Under the totality of the circumstances, this reasonable inference, along with Officer Fiebelkorn’s observation of the tan bag beneath the car seat, were sufficient to create a reasonable, articulable suspicion that Brown may have possessed drugs in the tan bag in the car when the officer called for the dog sniff.

II. The May 2019 arrest report was not too stale to support a reasonable, articulable suspicion that Brown may have possessed drugs in the car.

Brown argues that the May 2019 arrest report was stale when Officer Fiebelkorn read it, so it could not support a reasonable, articulable suspicion that Brown may have possessed drugs in the tan bag in the car. Staleness generally arises when analyzing whether the factual circumstances satisfy the higher standard of probable cause necessary to justify a search warrant. *See State v. Souto*, 578 N.W.2d 744, 750 (Minn. 1998). Probable cause requires facts establishing a “direct connection . . . between the alleged crime and the particular place to be searched,” *id.* at 747–48, while a reasonable,

articulable suspicion for a dog sniff requires only objectively articulable facts that reasonably support a suspicion that a drug crime may be occurring at the location to be sniffed, *Carter*, 697 N.W.2d at 212. A reasonable, articulable suspicion is a lower standard than probable cause. See *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007). So information that may be too stale to support probable cause may still be fresh enough to support a reasonable, articulable suspicion that drugs may be present in the location to be sniffed.

Information may become stale and unable to support a reasonable search if it is too old and/or deals with circumstances that are likely to change rapidly. *Souto*, 578 N.W.2d at 750. The information must provide “proof . . . of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.” *Sgro v. United States*, 287 U.S. 206, 210, 53 S. Ct. 138, 140 (1932). There is no bright-line time period that will render information stale. *State v. King*, 690 N.W.2d 397, 401 (Minn. App. 2005), *review denied* (Minn. Mar. 29, 2005). Instead, we analyze whether information is stale by considering “whether there is any indication of ongoing criminal activity, whether the articles sought are innocuous or incriminating, whether the property sought is easily disposable or transferable, and whether the items sought are of enduring utility.” *Souto*, 578 N.W.2d at 750. Based upon this record and the case law, we conclude that the information about Brown’s May 2019 arrest was not too stale to support a reasonable, articulable suspicion that he may have possessed drugs in the tan bag in the car.

Brown argues that there was no indication of ongoing drug activity in September that would make the May report relevant or informative. We disagree. Officer Fiebelkorn

discovered a cut straw in Brown's pocket that he suspected, based on Brown's behavior and answers to questions, to be connected to drug use. He also knew of Brown's ongoing failure to maintain contact with his probation officer, and he reasonably inferred that Brown lied to him that evening about his recent drug history. These facts and reasonable inferences support Officer Fiebelkorn's reasonable and articulable suspicion that Brown may have been avoiding contact with his corrections agent to conceal ongoing drug use and that Brown may have been engaged in ongoing drug activity, including possessing drugs in the car that evening.

Brown also argues that drugs are incriminating, easily disposable, and have little enduring utility because they are rapidly consumed or sold. Brown therefore contends that the drug information in the May 2019 arrest report went stale before September, and nothing from that arrest could support a conclusion that Brown continued to possess drugs. But Officer Fiebelkorn did not base his suspicion of ongoing drug activity solely on the May arrest report; he knew additional facts supporting a reasonable, articulable suspicion that Brown possessed drugs in the car. The report was relevant because it supported a reasonable inference that Brown lied about his recent drug history and described Brown's method of concealing drugs and drug paraphernalia by hiding them in bags and cases under car seats. Officer Fiebelkorn suspected, based on the May arrest report, that if Brown possessed drugs in the car, they were likely in the tan bag which he observed under the car seat.

Because Officer Fiebelkorn observed sufficient indications of ongoing drug activity by Brown, the May arrest report was not too stale to support a reasonable, articulable suspicion that Brown may have possessed drugs in the tan bag in the car.

III. The totality of the circumstances established a sufficient nexus between Brown, the car, and drugs to support a reasonable, articulable suspicion that Brown may have possessed drugs in the car.

Brown next argues that the May arrest failed to establish a nexus between drugs and the car, so it could not support a reasonable, articulable suspicion that Brown may have possessed drugs in the car. As with staleness, nexus concerns generally arise in the context of probable cause. *See generally State v. Yarbrough*, 841 N.W.2d 619, 622 (Minn. 2014). Information must establish a nexus “between the evidence sought and the place to be searched” before it can support probable cause for a search. *Id.* But since a reasonable, articulable suspicion, is a lower standard than probable cause, it does not require a nexus nearly as strong as that required for probable cause. Also, because “[a] nexus may be inferred from the totality of the circumstances,” *Yarbrough*, 841 N.W.2d at 622, we do not examine the May arrest by itself, but instead examine the totality of the circumstances to determine whether all of the facts known by Officer Fiebelkorn established a sufficient nexus between drugs and the car. Applying the relevant law to the facts here, we find Brown’s arguments unpersuasive.

Brown first argues that the May arrest failed to establish a nexus between Brown’s car and his girlfriend’s car because, while the May arrest may be evidence of drug activity in Brown’s car, it provides no evidence of drug activity linked to his girlfriend’s car. Brown also argues that the May arrest failed to establish a nexus between himself and

drugs because the substance found in his car in May was only “believed to be methamphetamine,” the nature of the substance was never confirmed through a lab test, and Brown was never charged for a drug crime based on his May arrest. Brown contends that a trained officer looking at these facts would reasonably conclude that the May arrest did not sufficiently link Brown, drugs, and his girlfriend’s car, so it could not support a reasonable suspicion that Brown may have possessed drugs in the car in September.

We disagree with Brown’s suggestion that Officer Fiebelkorn knew that the substance was not tested or that Brown was not charged. When analyzing a reasonable, articulable suspicion, we look at only the facts known by the officer at the moment of the dog sniff. *See Smith*, 814 N.W.2d at 351–52. Brown correctly points out that the record suggests that the BCA never tested the substance seized during the May arrest and the state never charged him, apparently because the substance vanished from the BCA mail room prior to testing and the McLeod County Sheriff’s Department never forwarded the arrest to the county prosecutor for formal charges. But the record also suggests that neither the sheriff nor the prosecutor learned about the missing substance from the BCA until late September, at least two weeks after Officer Fiebelkorn called for the dog sniff on September 4. The record establishes only that Officer Fiebelkorn reviewed the May arrest report before calling for the dog sniff. It does not suggest that he knew the subsequent developments after the May arrest or that he somehow learned that the substance seized in conjunction with the May arrest was missing weeks before the sheriff and prosecutor knew. Without any evidence in the record, we see no reason to assume that when Officer

Fiebelkorn called for the dog sniff, he knew that the BCA never tested the drugs and the state never charged Brown.

We also disagree with Brown's suggestion that Officer Fiebelkorn should not have relied on the May arrest report because the substance was only "believed to be methamphetamine." Brown seems to imply that this belief was not reliable enough for Officer Fiebelkorn to trust it in forming a reasonable suspicion. "[M]istaken facts may still support a particularized and objective basis for suspecting a person of criminal activity . . . as long as the officer's mistake was itself objectively reasonable and consistent with the purpose for the officer's intrusion on individual privacy under the totality of the circumstances." *State v. Poehler*, 935 N.W.2d 729, 733 (Minn. 2019). Brown does not point to any evidence that the arresting deputy in May dishonestly, unreasonably, or mistakenly believed that the substance was methamphetamine, or that Officer Fiebelkorn relied on that belief unreasonably, dishonestly, or mistakenly. We find no support in the record for Brown's suggestion. Without any information to suggest that the May arrest report was wrong, Officer Fiebelkorn could honestly and reasonably rely on it when he called for the dog sniff, even if the suspected methamphetamine from the May arrest was later misplaced by, or lost in transit to, the BCA.

We finally disagree with Brown's nexus arguments because these arguments do not address whether the totality of the circumstances established a sufficient nexus. Even if we accept Brown's contention that the May arrest, alone, cannot establish a nexus between drugs and Brown's girlfriend's car, our earlier analysis shows that the totality of the circumstances supported a reasonable, articulable suspicion that Brown may have

possessed drugs in the tan bag in the car. Based on the same analysis, we also conclude that the totality of the circumstances provided a sufficient nexus to support that suspicion.

Brown finally contends that, based on his previous arguments, we should not consider the May arrest in our analysis, and that the totality of the circumstances *without* the May arrest could not support a reasonable, articulable suspicion. We do not address this argument because we conclude that we can consider the May arrest.

Affirmed.