

*This opinion is nonprecedential except as provided by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
A20-0899**

State of Minnesota,
Respondent,

vs.

Dewayne Romel Holmes,
Appellant.

**Filed May 10, 2021
Affirmed
Larkin, Judge**

Ramsey County District Court
File No. 62-CR-19-7412

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

John J. Choi, Ramsey County Attorney, Alexandra Meyer, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrew J. Nelson, Special
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Gaïtas, Presiding Judge; Larkin, Judge; and Cochran,
Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges his conviction for unlawful possession of a firearm, arguing that the district court erred by denying his pretrial motion to suppress the firearm as the product of an unconstitutional search and seizure. We affirm.

FACTS

Respondent State of Minnesota charged appellant Dewayne Romel Holmes with receiving stolen property and unlawful possession of a firearm. Holmes moved the district court to suppress the firearm and dismiss the charges, arguing that the firearm was the product of an unconstitutional traffic stop, which was unlawfully expanded to include a pat-down search. The district court held a hearing on Holmes's motion to suppress. Instead of witness testimony, the parties submitted four exhibits for the district court's consideration: (1) a map of the area where the incident occurred, (2) videos from a police squad car and body camera, (3) a photograph of the firearm, and (4) police reports regarding the incident.

The stipulated record showed that shortly after 4:00 a.m. on October 2, 2019, an officer of the Mounds View Police Department was parked in the parking lot of an abandoned business at the southeast corner of the intersection of Edgewood Drive and County Road I. Edgewood Drive runs north to south, and County Road I runs east to west. The officer observed a vehicle travel east on County Road I, slow down, and turn north on Edgewood Drive. The vehicle immediately made a U-turn and "rapidly" traveled south on Edgewood Drive, crossed through the intersection again, and passed the abandoned

business where the officer was parked. The officer “got the impression that the vehicle had seen [his] squad car and was trying to avoid [him].” He turned south on Edgewood Drive to follow the vehicle and observed the vehicle parked in the first available residential driveway south of the abandoned business. The vehicle’s lights and ignition were off, and the officer did not see anyone get out of the vehicle.

The officer pulled his squad car into the driveway behind the vehicle. He stopped near the end of the driveway. The vehicle was parked farther up the driveway, next to the house. The officer shone a spotlight on the vehicle and saw two people inside lying back in their seats. Based on those actions, he believed that the occupants were trying to hide from him. The officer looked up the vehicle’s license plate number and learned that the vehicle did not register to that address. The officer called for backup.

The officer exited his squad car, approached the vehicle, and tapped on the driver’s-side window. Holmes was the driver of the vehicle. The officer asked Holmes what was going on, and Holmes said that he and the passenger were just “sitting in the parking lot right here, talking.” Holmes stated that he was dropping the passenger off at her friend’s house and that he initially made a wrong turn at the intersection because he did not know where the house was located. When the officer asked follow-up questions, the passenger said she did not know her friend’s last name or address.

The officer asked Holmes to exit the vehicle, and Holmes complied. The officer did so to separate Holmes and the passenger because “their story was not lining up.” Two additional police officers arrived at the scene. Once outside the vehicle, Holmes began to wander around the driveway and did not comply with police requests to stand in a particular

place. He raised his voice, insisted that he had done nothing wrong, and made comments about being “a Black man” and that he wanted people to hear him. He repeatedly demanded that the police knock on the front door of the house to talk to the resident. The police feared that Holmes was looking for an escape route because he kept turning his body away and took steps toward the backyard of the house. After a couple of minutes, the police decided to pat down Holmes for weapons because of Holmes’s “lack of cooperation, escalating behavior, evasive actions, and out of fear that he was going to run.”

During the pat-down search, Holmes placed his hands on the hood of a police squad car but held his waist against the car, causing the police to believe that Holmes was trying to conceal something in the front of his waistband. The police handcuffed Holmes, patted down the front of his waist, and recovered a handgun from his front pocket. The police later learned that Holmes was ineligible to possess a firearm.

Eventually, the resident of the house came outside and spoke with the police. She said that she did not recognize the vehicle, did not know Holmes or the passenger, and was not expecting any visitors.

The district court denied Holmes’s motion to suppress the firearm and dismiss the charges, concluding that the police actions were reasonable. Holmes waived his right to a jury trial and stipulated to the prosecution’s case to obtain review of a pretrial ruling under Minn. R. Crim. P. 26.01, subd. 4. In exchange, the state agreed to dismiss the charge of receiving stolen property. As to the remaining charge of unlawful possession of a firearm, Holmes admitted that he had two prior convictions for crimes of violence and therefore was ineligible to possess a firearm. The district court found Holmes guilty of unlawful

possession of a firearm. The court entered judgment of conviction for that offense and sentenced Holmes to 60 months' imprisonment. Holmes appeals.

DECISION

“When reviewing pretrial orders on motions to suppress evidence, [appellate courts] 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). We review the district court’s factual findings for clear error and its legal determinations de novo. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009).

I.

The United States and Minnesota Constitutions protect “[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; Minn. Const. art. I, § 10. Evidence obtained by the police as the result of an unconstitutional seizure must be suppressed. *See State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011).

Under principles established in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), a police officer may “stop and temporarily seize a person to investigate that person for criminal wrongdoing if the officer reasonably suspects that person of criminal activity.” *Id.* (quotation omitted). “Reasonable suspicion must be based on specific, articulable facts that allow the officer to be able to articulate . . . that he or she had a particularized and objective basis for suspecting the seized person of criminal activity.” *Id.* at 842-43 (quotations omitted).

The reasonable-suspicion standard is not high. *Id.* at 843. Nevertheless, it requires more than an unarticulated hunch. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). The standard is met “when an officer observes unusual conduct that leads the officer to reasonably conclude in light of his or her experience that criminal activity may be afoot.” *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotation omitted). When determining whether an officer reasonably suspected criminal activity, we consider the totality of the circumstances. *State v. Martinson*, 581 N.W.2d 846, 852 (Minn. 1998).

Under the Minnesota Constitution, “a person has been seized if in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter.” *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). Holmes argues that he was seized as soon as the officer pulled his squad car into the driveway behind his vehicle. In district court, the state disputed whether a seizure occurred at that point. But on appeal, the state contends that we need not determine when the seizure occurred because reasonable suspicion existed when the officer first pulled into the driveway. We agree and assume, without deciding, that Holmes was seized as soon as the officer pulled into the driveway behind his vehicle.

Holmes argues that the officer who initiated the seizure failed to articulate reasonable suspicion justifying the seizure. That officer’s police report explained the circumstances that led him to seize Holmes. One circumstance was the early morning hour. *See State v. Uber*, 604 N.W.2d 799, 800-02 (Minn. App. 1999) (listing time of night as one factor that justified a traffic stop that occurred at 2:00 a.m.). The officer also noted that

Holmes turned left but immediately made a U-turn and drove rapidly in the opposite direction, causing the officer to believe that Holmes had seen his squad car and was trying to avoid him. Holmes then turned into the first available driveway past the abandoned business where the officer had been parked. The vehicle was parked in the driveway with its lights and ignition off, and the officer did not observe anyone exit the vehicle.

The officer described other circumstances that caused him to suspect Holmes of wrongdoing, including that the occupants of the vehicle were lying back in their seats, which led him to believe that they were trying to hide from him, and that the vehicle's license plate number was not registered to the address at which the vehicle had parked. But those observations occurred after the officer initially seized Holmes by pulling into the driveway. Accordingly, those circumstances cannot support the officer's initial seizure of Holmes. *See Diede*, 795 N.W.2d at 843-44 (stating that it is inappropriate to rely on circumstances that did not yet exist at the time of the seizure when determining whether there was reasonable suspicion of criminal activity).

The state argues that the officer reasonably suspected Holmes of criminal activity based on Holmes's evasive conduct. Evasive conduct in response to police presence can contribute to reasonable suspicion of criminal activity. *State v. Johnson*, 444 N.W.2d 824, 827 (Minn. 1989). In *Johnson*, the Minnesota Supreme Court explained:

On the one hand, if a driver merely appears startled at the sight of a police officer passing him and then slows down a bit and if a reasonable police officer would not infer any wrongdoing from the driver's response, then the officer does not have a particular and objective basis for suspecting the driver of criminal activity and may not stop the driver. On the other hand, if the driver's conduct is such that the officer reasonably

infers that the driver is deliberately trying to evade the officer and if, as a result, a reasonable police officer would suspect the driver of criminal activity, then the officer may stop the driver.

Id. The supreme court rejected the proposition that evasive conduct alone, without other evidence of criminal behavior, cannot justify an investigative stop. *Id.* at 825.

Holmes argues that *Johnson* has been effectively overruled and that evasive conduct alone cannot justify a traffic stop. But in this case, the officer did not rely on evasive conduct alone; his suspicions were also aroused by the early morning hour. We therefore need not address Holmes's argument that a seizure may not be based on evasive conduct alone.

In *Johnson*, the Minnesota Supreme Court concluded that reasonable suspicion of criminal activity existed based on the following circumstances: the driver of an otherwise unoccupied vehicle made eye contact with a trooper, immediately turned off the highway, quickly turned into a driveway or side street, and then returned to the highway within a minute without an additional passenger. *Id.* at 827. In *State v. Petrick*, the supreme court similarly concluded that a driver's evasive conduct justified a traffic stop. 527 N.W.2d 87, 89 (Minn. 1995). In *Petrick*, a police officer was preparing to make a U-turn when he saw the defendant's vehicle driving the opposite direction, shortly after 1:00 a.m. *Id.* at 87. After the officer made the U-turn, he saw the defendant, who had just driven past him, turn into the first available driveway, turn off the vehicle's headlights, and continue up the driveway without headlights. *Id.* The supreme court determined that the officer's subsequent seizure of the defendant was objectively reasonable because the officer had a

reasonable basis to infer that the defendant was deliberately attempting to evade him and to suspect the defendant of wrongdoing. *Id.* at 89.

In contrast, this court determined that reasonable suspicion did not justify a traffic stop based on the following circumstances: a police officer drove behind the defendant's vehicle, saw the defendant quickly turn into a driveway and speak with the property owner, and learned that the defendant's vehicle was registered to a woman from another city. *State v. Schrupp*, 625 N.W.2d 844, 845, 848 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). Although the officer believed that the defendant may have been trying to avoid him, this court concluded that none of the circumstances created an objectively reasonable inference of criminal behavior. *Id.* at 848.

In this case, Holmes's U-turn immediately after turning left provided little reason to suspect him of criminal activity. The officer stated that he "got the impression that the vehicle had seen [his] squad car and was trying to avoid [him]." But unlike *Johnson*, in which the defendant made eye contact with the trooper, there was no evidence that Holmes actually saw the squad car prior to making the U-turn. Nevertheless, Holmes's subsequent turn into the nearest driveway after making the U-turn and driving past the parked squad car was stronger evidence of evasive conduct. As was the case in *Petrick*, Holmes was driving in the early morning hours and turned his vehicle into the first available driveway after passing a squad car. He then turned off the vehicle and its lights. But unlike the circumstances in *Schrupp*, Holmes did not get out of the vehicle after he parked in the driveway.

We recognize that Holmes’s conduct may have been consistent with innocent behavior. See *Martinson*, 581 N.W.2d at 852 (stating that innocent activity may justify the suspicion of criminal activity). Indeed, “*Terry* accepts the risk that officers may stop innocent people.” *Illinois v. Wardlow*, 528 U.S. 119, 126, 120 S. Ct. 673, 677 (2000). But the police may not do so based on “mere whim, caprice, or idle curiosity.” *Marben v. State, Dep’t of Pub. Safety*, 294 N.W.2d 697, 699 (Minn. 1980) (quotation omitted). Those are not the circumstances here. Based on the totality of the circumstances, we conclude that Holmes’s evasive driving conduct in the early morning hours gave rise to reasonable suspicion of criminal activity justifying his seizure by the police.

II.

Holmes contends that, even if the initial investigative seizure was justified, the officer unlawfully expanded the scope of the seizure to include a pat-down search. Although reasonable suspicion may support a traffic stop, the justification for that initial stop “will not necessarily provide a basis for subsequent expansions of the scope” of the stop. *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004). Each incremental intrusion during a traffic stop must be “tied to and justified by one of the following: (1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness, as defined in *Terry*.” *Id.* at 365.

“*Terry* holds that police may stop and frisk a person when (1) they have a reasonable, articulable suspicion that a suspect might be engaged in criminal activity and (2) the officer reasonably believes the suspect might be armed and dangerous.” *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff’d*, 508 U.S. 366, 113 S. Ct. 2130

(1993). The purpose of a frisk for weapons is to allow police officers to pursue their investigation without fear of violence. *Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 1923 (1972). “The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883. During a routine traffic stop, “a pat-down search is improper unless some additional suspicious or threatening circumstances are present.” *State v. Varnado*, 582 N.W.2d 886, 890 (Minn. 1998).

A search for weapons is not justified solely because a person who has been seized by the police seems nervous and looks side to side, possibly searching for an escape route. *In re Welfare of M.D.B.*, 601 N.W.2d 214, 216 (Minn. App. 1999), *review denied* (Minn. Jan. 18, 2000). Conversely, a pat-down search may be justified if a person who has been temporarily detained by the police assumes a hostile and threatening attitude. *Id.* (citing *State v. Curtis*, 190 N.W.2d 631, 636 (Minn. 1971)). Here, Holmes argues that there was no evidence that he was armed, dangerous, or acting in a threatening manner. He further argues that the officer’s primary concern was that he would run away, which by itself is insufficient to justify a pat-down search.

Although the report of the officer who initiated the seizure emphasized his fear that Holmes may have been looking for an escape route, the officer also noted Holmes’s “lack of cooperation,” “escalating behavior,” and raised voice. The video from the officer’s body camera shows that a reasonably prudent man in the circumstances would have been warranted in the belief that his safety was in danger. Holmes was uncooperative after he

exited his vehicle. He continued to wander around the residential driveway despite the officer's requests for him to stand in one place. Although Holmes was initially calm, he became aggressive and raised his voice when the officer asked him to stop walking around. Holmes claimed that he had done nothing wrong. He said that he wanted people to hear him. He demanded that the police knock on the front door of the house. Holmes continued to yell loudly and interrupt the officer when the officer attempted to calm him.

Again, an officer need not be absolutely certain that a suspect is armed before conducting a pat-down search; "the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883. Based on Holmes's hostile and threatening attitude after he exited the vehicle, that standard is met in this case. Thus, Holmes's pat-down search was constitutionally justified.

In conclusion, the district court did not err by denying Holmes's motion to suppress the firearm and dismiss the charges.

Affirmed.