

*This opinion is nonprecedential except as provided by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
A21-0363**

State of Minnesota,
Respondent,

vs.

Rebecca Jane King,
Appellant.

**Filed February 28, 2022
Affirmed
Bryan, Judge**

Crow Wing County District Court
File No. 18-CR-18-1989

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

Donald F. Ryan, Crow Wing County Attorney, Kelsey Hopps, Assistant County Attorney,
Brainerd, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Worke, Judge; and Florey,
Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this appeal from final judgments of conviction for two counts of possession of a controlled substance (one felony offense and one gross misdemeanor offense), appellant challenges two decisions of the district court. First, appellant argues that the district court

erred when it determined that the arresting officer properly expanded the scope of the investigation beyond the initial purpose of the traffic stop. We conclude that because the officer had reasonable, articulable suspicion of criminal activity to expand the scope of the traffic stop, the district court did not err by denying appellant's motion to suppress. Second, appellant contends that the district court was prohibited from imposing a sentence for the gross misdemeanor conviction. Because the district court did not impose a sentence for the gross misdemeanor conviction, we affirm.

FACTS

Respondent State of Minnesota charged appellant Rebecca King with the following three offenses: (1) felony possession of methamphetamine, later amended to a gross misdemeanor offense, in violation of Minnesota Statutes section 152.025, subdivision 2(1) (2018); (2) felony possession of marijuana wax, also in violation of section 152.025, subdivision 2(1); and (3) petty misdemeanor possession of drug paraphernalia, in violation of Minnesota Statutes 152.092(a) (2018).¹ King filed a motion to suppress evidence, arguing that the drugs and paraphernalia were obtained in violation of her constitutional rights because the police officer seized the evidence after unlawfully expanding the scope

¹ While appellant's brief is unclear whether King is challenging the drug-paraphernalia conviction, we note that that conviction is not before us in this appeal. The district court entered a conviction on that count in February 2019, and King did not file an appeal within 30 days of entry of that conviction. *See* Minn. R. Crim. P. 28.02, subd. 4(3)(b) (providing that, in misdemeanor cases, defendant must file appeal within 30 days of final judgment or entry of order being appealed). This appeal therefore concerns only the two convictions for possession of controlled substances.

of an initial traffic stop. The district court held an evidentiary hearing on the motion and admitted the squad car video and testimony from the arresting officer.

The evidence presented established the following undisputed facts. At 12:45 a.m. on May 13, 2018, the officer was on duty and observed a car on the highway driving significantly under the speed limit. The officer decided to initiate a traffic stop after the car crossed over the fog line twice. King was a passenger in the car, and the officer spoke with the driver. During the conversation, the officer saw what the officer believed to be the end of a marijuana cigarette. According to the officer's testimony, he was confident that it was a marijuana cigarette. The video of the encounter includes the following exchange between the officer and the driver:

Officer:	What's that in the ashtray there? That looks like a marijuana cigarette.
Driver:	Probably a roll-your-own.
Officer:	Roll-your-own cigarette or marijuana?
Driver:	Cigarette.
Officer:	Can you hand that to me?

The driver handed the cigarette to the officer and the officer smelled it. The officer detected the odor of marijuana. He then commented to the driver that he had never seen a roll-your-own cigarette that looked like that: "Uh oh. So it smells like marijuana to me. In my experience with marijuana, I've never seen a roll-your-own cigarette left like this anywhere." The officer told the driver to exit the vehicle, searched him, and discovered marijuana on him. The officer later removed King and searched her purse, where he discovered methamphetamine, marijuana wax, and a methamphetamine pipe.

The district court denied King's motion to suppress. The district court determined that the officer permissibly expanded the stop because he observed the marijuana cigarette in plain sight. The district court credited the officer's testimony that he was confident that the item was a marijuana cigarette as soon as he saw it, and the district court noted that this belief was corroborated "by the Court's review of the squad video, in which [the officer] immediately remarked that the item 'looks like marijuana.'" The district court also determined that the officer was capable of accurately differentiating between a marijuana cigarette and a tobacco cigarette. Alternatively, the district court also reasoned that the driver voluntarily consented to the officer's inspection of the cigarette because the officer merely requested to see the cigarette and the driver freely handed it to him.

King waived her right to a jury trial and the parties stipulated to the state's evidence to obtain appellate review of the pretrial suppression issue. The district court found King guilty on all three offenses, stayed adjudication of the two drug possession offenses, and entered a conviction for possession of drug paraphernalia, but imposed no sentence for this conviction. Approximately five months later, King violated her probation. The district court revoked the stays of adjudication and the stay of imposition, entering convictions for both drug possession offenses. The district court discharged King from probation on count 1 without imposing a sentence, but proceeded to impose a sentence for count 2:

THE COURT: The record reflects that at present both of these counts, Count 1 and Count 2, are at stay of adjudication status.
As and for disposition in this matter, I do revoke the stays of adjudication so that Ms. King is now convicted of both offenses.

As to Count 1, the conviction is at a gross misdemeanor level. Correct, counsel?

DEFENSE COUNSEL: Yes, Your Honor.

THE COURT: And Ms. King is discharged from probation as to Count 1.

As to Count 2, this is a felony level offense. The stay of adjudication is revoked. We do need to impose sentence. It's a lengthy court file.

Counsel, the guideline sentence in Count 2?

DEFENSE COUNSEL: Year and a day, Your Honor.

COUNTY ATTORNEY: Correct.

THE COURT: As to Count 2, you are committed to the custody of the Commissioner of Corrections of this state for a period of one year and one day. However, execution of this sentence is stayed. You are otherwise reinstated on probation on all of the previously imposed terms and conditions, with the additional condition that you cooperate with cognitive skills at the direction of probation.

The amended warrant of commitment reflects the terms of probation imposed as a condition of the initial stay of adjudication under the heading "Sentence Details," with the following dates: "Start Date: 02/14/2019" and "Discharge Date: 02/14/2021." After this, the amended warrant of commitment includes an entry noting that King was "Convicted and discharged from probation," with the following date: "Effective 02/09/2021." King appeals.

DECISION

I. Motion to Suppress

King argues that the district court erred when it denied her motion to suppress evidence. Because the officer had reasonable, articulable suspicion of criminal activity based on his observation of the marijuana cigarette, the district court correctly determined that the officer could expand the scope of the traffic stop.

Both the United States Constitution and the Minnesota Constitution guarantee an individual's right against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A traffic stop is considered an investigative seizure. *State v. Askerooth*, 681 N.W.2d 353, 359-60 (Minn. 2004) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). Under the *Terry* framework, courts undertake a “dual inquiry,” determining first “whether the stop was justified at its inception,” and second “whether the actions of the police during the stop were reasonably related to and justified by the circumstances that gave rise to the stop in the first place.” *Askerooth*, 681 N.W.2d at 364. Under the second prong of this inquiry, each incremental intrusion during a traffic stop must be based on either “(1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness, as defined in *Terry*.” *Id.*, at 365.

An officer may expand the scope of a stop to investigate other suspected illegal activity if the officer has reasonable, articulable suspicion of such illegal activity. *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002). In determining whether reasonable suspicion exists, appellate courts consider the totality of the circumstances. *State v. Flowers*, 734 N.W.2d 239, 251 (Minn. 2007). For reasonable suspicion to exist, there must be “specific, articulable facts” that allow the officer to show that he “had a particularized and objective basis for suspecting the seized person of criminal activity.” *State v. Diede*, 795 N.W.2d 836, 842-43 (Minn. 2011) (quotations omitted). In articulating reasonable suspicion, officers are permitted to rely on “inferences and deductions that might well elude an untrained person.” *Flowers*, 734 N.W.2d at 251-52. We review the district court's factual findings in this case for clear error and its legal determinations de novo. *State v.*

Gauster, 752 N.W.2d 496, 502 (Minn. 2008). We independently review the facts to determine, as a matter of law, whether the district court erred by not suppressing the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

King does not dispute that the officer's initial stop of the car was justified, based on the driver's commission of a traffic violation (crossing the fog line).² Nor does King assign error to the district court's factual findings. Instead, King argues that the district court erred when it determined that, based on those facts, the officer had reasonable, articulable suspicion to expand the scope of the traffic stop by asking the driver about the "roll-your-own" cigarette.³ We agree with the district court that the officer had reasonable, articulable suspicion to expand the scope of the traffic stop.

While speaking with the driver, the officer saw what appeared to be a marijuana cigarette in plain sight. The district court credited the officer's testimony that he was confident that it was marijuana as soon as he saw it, and the district court found that the officer could accurately differentiate between a marijuana cigarette and a tobacco cigarette. Further, the district court credited the officer's statement that he had never seen a "roll-

² The supreme court has recognized that, "if an officer observes a violation of a traffic law, however insignificant, the officer has an objective basis for stopping the vehicle." *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997).

³ To the extent that statements in King's brief can be construed as separately challenging the seizure of the marijuana cigarette, we conclude that the officer was justified. In *State v. Hanson*, the supreme court noted that, when officers stopped a car and saw "a hand-rolled cigarette surrounded by leafy material" on the seat, the officers were justified in reaching in and seizing the cigarette, "which was obviously a marijuana cigarette." 364 N.W.2d 786, 788-89 (Minn. 1985). Based on *Hanson*, the officer here had probable cause to seize the cigarette. Given this determination, we need not address the district court's determination that the driver voluntarily consented to the seizure of the cigarette.

your-own” tobacco cigarette that looked like that. The officer’s observation of the marijuana cigarette provided reasonable suspicion to inquire further and expand the scope of the investigation to one regarding unlawful possession of controlled substances. Because the officer had a constitutionally sufficient basis to expand the traffic stop, the district court did not err by denying King’s motion to suppress.

II. Multiple Sentences

King also argues that the district court erred by sentencing her on both counts of possession of a controlled substance. The state agrees. On our review of the record, however, we conclude that the district court did not impose a sentence for the gross misdemeanor drug possession offense charged in count 1.

The parties agree that King can only be sentenced for the felony drug possession offense charged at count 2. Minn. Stat. § 609.035, subd. 1 (2018) (“[I]f a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses.”); *State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012) (explaining that Minn. Stat. § 609.035 “contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident” (quotation omitted)); *State v. Papadakis*, 643 N.W.2d 349, 357 (Minn. App. 2002) (“Possession of two controlled substances at the same time and place, for personal use, is a single behavioral incident.”); *State v. Reese*, 446 N.W.2d 173, 180 (Minn. App. 1989) (recognizing that “possession of two controlled substances at the same time and place, with no discernible criminal objective other than personal use, bars the imposition of separate sentences”), *rev. denied* (Minn. Nov. 15, 1989).

According to the sentencing transcript, after revoking the stay of adjudication for counts 1 and 2, the district court entered convictions for both counts: “As and for disposition in this matter, I do revoke the stays of adjudication so that Ms. King is now convicted of both offenses.” The district court confirmed that count 1 was for a gross misdemeanor level offense, discharged King from probation on count 1, imposed a sentence only for count 2, and stayed execution of that sentence:

THE COURT: As to Count 1, the conviction is at a gross misdemeanor level. Correct, counsel?

DEFENSE COUNSEL: Yes, Your Honor.

THE COURT: And Ms. King is discharged from probation as to Count 1.

As to Count 2, this is a felony level offense. The stay of adjudication is revoked. We do need to impose sentence. . . .

. . . .

As to Count 2, you are committed to the custody of the Commissioner of Corrections of this state for a period of one year and one day. However, execution of this sentence is stayed.

In addition, the amended warrant of commitment reflects the conviction for count 1, and the discharge from probation for count 1, but includes no imposed sentence for count 1. Based on our review, therefore, the district court did not impose a sentence for count 1. *See Spann v. State*, 740 N.W.2d 570, 573-74 (Minn. 2007) (instructing appellate courts to look to the official judgment of conviction as conclusive evidence of “whether an offense

has been formally adjudicated”). To the extent that the parties believe the amended warrant of commitment contains any erroneous information, they may petition the district court to make specific corrections.

Affirmed.