

*This opinion is nonprecedential except as provided by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
A22-1079**

State of Minnesota,
Respondent,

vs.

Jonathan Gabriel Hernandez Silva,
Appellant.

**Filed July 10, 2023
Affirmed
Rodenberg, Judge***

Steele County District Court
File No. 74-CR-20-329

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

Daniel A. McIntosh, Steele County Attorney, Sheilan F. Hamasoor, Assistant County Attorney, Owatonna, Minnesota (for respondent)

Mark D. Nyvold, Fridley, Minnesota; and

Anthony Ho, Apple Valley, Minnesota (for appellant)

Considered and decided by Gaïtas, Presiding Judge; Larson, Judge; and Rodenberg,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

RODENBERG, Judge

Jonathan Gabriel Hernandez Silva appeals after he was convicted of second-degree possession of a controlled substance while possessing a firearm in violation of Minn. Stat. § 152.022., subd. 2(a)(2)(i) (2018). He contends that the district court erred in denying his motion to suppress evidence obtained during a pat-down search after a traffic stop because (1) the district court erroneously found that law enforcement felt “rock-like” contents in his left pants pocket while conducting the pat-down search for weapons, and (2) law enforcement improperly expanded the scope of the search. Because the district court’s factual findings are supported by the record and because law enforcement had sufficient justification at each step of expanding the pat-down search, we affirm.

FACTS

Owatonna Police Officer Benjamin Metcalf was on patrol on February 18, 2020, when he observed a car failing to yield in an alleyway. He also observed that the car had a snow-covered license plate and an object hanging from the rear-view mirror. Officer Metcalf signaled the vehicle to stop. Appellant, the driver, stopped the car.

Officer Metcalf’s actions during and after the stop were recorded by a body-worn camera. The officer approached the driver’s side of the car and asked appellant to produce his driver’s license. Appellant could not locate his driver’s license. He gave Officer Metcalf his full name and date of birth. Officer Metcalf turned back toward his squad car and, as he did so, he shined a flashlight into appellant’s car and observed a knife on the floor. Officer Metcalf asked appellant whether he had any other weapons in the car.

Appellant responded that he had a .380 pistol in his waistband and that he had a permit to carry the firearm. Appellant stated that he did not have his permit to carry the firearm on his person but that the permit was in a backpack located in the trunk of his car.

Officer Metcalf asked appellant to exit his car so the officer could secure appellant's pistol and to allow appellant to locate his permit to carry the firearm. Officer Metcalf removed the pistol from appellant's waistband and then decided to conduct a pat-down search for any additional weapons. As Officer Metcalf began the pat-down search, appellant told the officer that he had a knife in his right pants pocket. Officer Metcalf removed the knife and then continued his pat-down search.

Officer Metcalf shifted his attention to appellant's left pants pocket. He patted that area and felt something that he believed to be a bag of "narcotics." Officer Metcalf asked appellant about the contents of the pocket. As he did so, appellant reached toward the pocket. Officer Metcalf told appellant "don't be reaching" and then asked appellant, "what's the baggie right here?" Appellant responded, "maybe my license," and then asked, "what baggie?" Appellant again reached toward his left pants pocket. Officer Metcalf stopped appellant and repeated his question, asking "[w]hat would be in there?" Appellant responded, "personal stuff." Officer Metcalf continued, "It feels like a baggie of something, narcotics, ok? So, I'm going to reach for it, ok?" He reached into appellant's pocket, removed the bag, and said, "yup," before handcuffing appellant. Officer Metcalf walked appellant back to the squad car where appellant asked about the contents of the bag and Officer Metcalf responded "white powdery residue . . . That's what I felt when I was

in your pocket, that's why I pulled it out." Officer Metcalf field tested the substance and determined that it was methamphetamine.

After he was charged with possessing methamphetamine while also possessing a firearm, appellant moved to suppress the methamphetamine seized from his left pants pocket. The parties stipulated to the admission of the video evidence of the stop generated by the officer's body-worn camera. The parties further agreed that the district court could "use details in the Complaint just for context, date, time, location, things like that."

The district court took the motion to suppress under advisement after both parties submitted post-hearing memoranda. The district court concluded that "Officer Metcalf had probable cause to suspect criminal activity" and reasoned that, when Officer Metcalf conducted the pat-down search, he "immediately believed the baggie in [appellant's] pocket contained a narcotic, which he suspected was cocaine." The district court concluded that the expansion of the search and subsequent seizure of the narcotics was lawful because, "[e]ach of [appellant's] responses justified the next inquiry and required additional time to investigate. Ultimately, each incremental action was related to officer safety and ultimately led to the pat-down search, which revealed a second knife and the contraband."

Accordingly, the district court denied appellant's motion to suppress.

Appellant stipulated to the state's case under Minn. R. Crim. P. 26.01, subd. 4, to obtain appellate review of the district court's pretrial ruling. The district court then found appellant guilty of second-degree possession of a controlled substance—specifically possession of just under 24 grams of methamphetamine—while possessing a firearm in

violation of Minn. Stat. § 152.022, subd. 2(a)(2)(i). The district court sentenced appellant to 48 months in prison.

This appeal followed.

DECISION

Appellant argues on appeal that the district court erred by finding as fact that the baggie in appellant's left pocket contained a "rock-like" substance, because that term appears nowhere in the record other than in the complaint, which was signed by someone other than the arresting officer. Appellant further argues that the officer's expansion of the traffic stop to include the pat-down search of his left pants pocket was unsupported by reasonable and articulable suspicion.

In reply, the state argues that appellant failed to preserve the issue of whether the officer relied on the existence of a "rock-like" substance in appellant's pocket, because appellant did not raise that issue in his suppression motion at the district court. The state further argues that appellant "twice agreed" to the facts recited in the complaint and that appellant therefore waived or forfeited the argument he advances on appeal.

"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). We review reasonable suspicion and probable cause determinations de novo. *In re Welfare of G.M.*, 560 N.W.2d 687, 690 (Minn. 1997).

I. Appellant adequately preserved the argument he raises on appeal.

We begin by addressing the state’s argument that appellant did not present to the district court the arguments he makes on appeal.

An appellate court will generally not “consider issues raised for the first time on appeal, even constitutional questions of criminal procedure.” *State v. Hughes*, 758 N.W.2d 577, 582 (Minn. 2008). “This rule is not absolute, however, and we may address an issue in the interests of justice if addressing the issue will not work an unfair surprise on a party.” *Gauster*, 752 N.W.2d at 508 (quotation omitted).

The state directs us to appellant’s notice of motion and motion to suppress, which moved the district court for an order “[s]uppressing the evidence seized as a result of investigative questioning during the traffic stop.” Appellant included a one sentence justification for the motion: “The questioning expanded the scope of the stop and was not supported by independent reasonable, articulable suspicion.” *State v. Askerooth*, 681 N.W.2d 353, 365 (Minn. 2004). The state contends that appellant’s motion only challenged Officer Metcalf’s questioning during the stop, not the pat-down search and the expansion of it, and the state therefore reasons that appellant cannot challenge the expansion of the pat-down search on appeal.

The state’s argument discounts both parties’ memoranda to the district court and the district court’s order denying appellant’s motion.

Appellant argued in his post-hearing memorandum to the district court that both the officer’s actions preceding the search *and* the search itself were unlawful, citing caselaw that discusses unlawful searches. *See State v. Dickerson*, 481 N.W.2d 840, 846 (Minn.

1992). Appellant’s memorandum added that “[b]roadening the scope of Officer Metcalf’s investigation to an interrogation of [appellant] regarding the contents of his pockets was impermissible and not supported by reasonable, articulable suspicion.” The state’s own post-hearing memorandum also addressed the issue now raised on appeal. It argued that the pat-down search did not “offend the constitutional protection against expansion of a traffic stop.”

The district court considered the lawfulness of the pat-down search in its order. In doing so, the district court discussed caselaw concerning unlawful searches, including *State v. Lemert*, 843 N.W.2d 227, 230 (Minn. 2014), and *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

Appellant adequately preserved his challenge to the constitutionality of the search of his pants pocket and subsequent seizure of the contents thereof.

II. Appellant did not waive arguments concerning whether the district court improperly relied on the facts contained in the complaint.

The state next contends that appellant waived any argument regarding the district court’s reliance on facts alleged in the complaint. The state asserts that appellant “twice agreed” to the complaint’s facts by stipulating that the district court could use the complaint to decide appellant’s suppression motion and by agreeing to a stipulated evidence trial.

The transcript from the omnibus hearing reflects that the parties had an agreement that the district court could “use details in the Complaint just for context, date, time,

location, things like that.”¹ Although the parties’ agreement concerning the permissible use of the complaint is not the model of clarity, and the complaint was not received as an exhibit, the parties did agree that the district court could use the factual recitations in the complaint for limited purposes. And the recording from the officer’s body-worn camera was marked and received as an exhibit.

Appellant’s argument that the record does not support the district court’s finding that the officer perceived a “rock-like” substance in appellant’s left pocket was not waived. Appellant retains the right to argue on appeal that the record does not support the district court’s factual findings.

As for the state’s argument that appellant waived or forfeited the argument he now makes because appellant agreed to a stipulated-facts trial, this appeal is from the denial of appellant’s motion to suppress, not from the finding of guilt after the stipulated-facts trial. It cannot be that appellant’s stipulation under rule 26.04, subdivision 4 of the rules of criminal procedure precludes him from arguing error in the earlier denial of his motion to suppress. The very purpose of the rule 26.04, subdivision 4, process is to allow appeals of dispositive pretrial issues.

III. The district court did not err when it denied appellant’s motion to suppress.

Appellant challenges the district court’s determination that the methamphetamine in appellant’s pocket was lawfully seized during the officer’s pat-down search for weapons

¹ At the time of oral argument, the omnibus hearing transcript was not part of the record. The state moved this court after the oral argument to correct or modify the record to include the transcript of the omnibus hearing. We granted the motion to supplement the record by order dated April 27, 2023, and we consider the record as so supplemented.

after appellant's vehicle was stopped for traffic violations. Appellant does not challenge the constitutionality of the traffic stop, the officer's initial inquiry about whether appellant had weapons in the car, the officer's request that appellant get out of the car, or the officer's having removed appellant's handgun from appellant's waistband. Appellant argues first that the district court erred by finding that the officer, in performing the protective pat-down search, felt a "rock-like" substance in appellant's left pants pocket. He argues second that the expansion of the traffic stop to include seizure of the contents of his left pants pocket was unsupported by reasonable and articulable suspicion.

A. The district court's use of the term "rock-like" in describing the baggie located in appellant's left pants pocket is supported by the record.

As for appellant's first argument, it is true that the officer never uses the term "rock-like" in exhibit 1—the body-worn camera recording. The complaint—signed by a different police officer than the arresting officer—does use that term.

An investigative search under *Terry v. Ohio*, 392 U.S. 1 (1968), "permits a protective frisk for weapons." *Dickerson*, 481 N.W.2d at 844. When police are assured that an individual has no weapons, "the frisk is over." *Id.* The state has the burden of demonstrating that a search was "sufficiently limited in scope and duration." *Florida v. Royer*, 460 U.S. 491, 500 (1983). "The legality of a pat search depends on an objective examination of the totality of the circumstances." *Lemert*, 843 N.W.2d at 230.

"If a police officer lawfully pats down a suspect's outer clothing and [an object's] identity [is] immediately apparent . . . [and] the object is contraband, its warrantless seizure would be justified." *Dickerson*, 508 U.S. at 375-76; *see also State v. Krenik*, 774 N.W.2d

178, 185 (Minn. App. 2009) (stating we have recognized the plain-feel exception to the warrant requirement), *rev. denied* (Minn. Jan. 27, 2010). Immediately apparent “does not mean that an officer must be certain about the object’s identity; rather an officer must have probable cause to believe that the item is contraband before seizing it.” *Krenik*, 774 N.W.2d at 185 (quotation omitted); *see also Texas v. Brown*, 460 U.S. 730, 741 (1983) (stating the phrase “immediately apparent” in referring to a plain-view doctrine “was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary”).

The district court found that “each expansion of the scope and duration of the stop was proper and lawful.” Regarding the seizure of methamphetamine from appellant’s left pants pocket, the district court stated:

Based on his training and experience, Officer Metcalf immediately believed the baggie in that pocket contained a narcotic, which he suspected was cocaine. When he asked Defendant what was in the pocket, Defendant became evasive and did not directly answer. Given these circumstances, Officer Metcalf had probable cause to suspect criminal activity. This permitted him to seize and examine the baggie and its contents. *Dickerson*, 508 U.S. at 377 (“The seizure of an item whose identity is already known occasions no further invasion of privacy.”). The contents were later determined to be methamphetamine, also an unlawful chunky rock-like substance.

Appellant argues that the district court erroneously relied on the complaint to find that Officer Metcalf felt “rock-like” contents as he conducted the pat-down search. And the complaint does use that term. But the district court’s adoption of the term “rock-like” appears at the point where the district court recounts the events that occurred throughout

the stop, not in its analysis of Officer Metcalf's *reasoning* for expanding the stop. Instead, and as noted above, the district court found as fact that Officer Metcalf felt a baggie in appellant's pocket that he "immediately believed . . . contained a narcotic, which he suspected was cocaine." And the district court used this finding to conclude that the seizure of the methamphetamine was lawful. Put differently, the district court did not conclude that the officer was justified in expanding the pat-down search to appellant's left pants pocket because the contents were "rock-like." Instead, the district court focused on what is plainly apparent from the video evidence and the officer's recorded statements to appellant concerning his immediate recognition of the pocket's contents as a plastic bag containing a "narcotic."

Our decision in *Krenik* supports the district court's findings and reasoning here. In *Krenik*, an officer conducting a pat-down search of Krenik felt a "smoking glass tube" that, based on the officer's experience, she recognized as often being used with narcotics. 774 N.W.2d at 180. Although the officer testified on cross-examination that the glass pipe "could have been something else," we concluded that the object that the officer "felt in Krenik's pocket during the pat search was sufficiently apparent . . . to permit a warrantless seizure of the pipe under the plain-feel exception to the warrant requirement." *Id.* at 185-86.

Here, Officer Metcalf's retrieval of the bag of methamphetamine from appellant's pocket satisfied the "immediately apparent" standard of *Krenik*. *Id.* at 185. The officer expresses aloud as he is patting the area of the pocket that he felt what he believed to be "narcotics."

Appellant argues that, because Officer Metcalf did not describe the contents of the baggie as “rock-like” in the recording, and instead used other terms such as “bulge” and “white powdery residue,” it was not immediately apparent that appellant possessed contraband. But our review of the body-worn camera recording does not support this argument.

Officer Metcalf can be heard on exhibit 1 to explicitly state when patting down appellant that “It feels like a baggie of something, narcotics, ok?” He only uses the phrases “bulge” and “white powdery residue” later. He does not use the phrase “rock-like substance.” The district court’s adoption of that term, possibly from the complaint’s use of it, is supported by the body-worn camera recording. The image below is taken from an approximately 20-second portion of the recording where the officer’s body-worn camera is focused on the bag itself. It is evident that the bag contains at least one larger rock-like object along with a finer-grain powder.



[Caption – Clear plastic bag containing narcotics.]

This video evidence is ample support for the district court’s use of the term “rock-like” to describe the contents of the baggie seized from appellant’s pocket, wholly aside from the use of that term in the complaint. This was not a tiny amount of methamphetamine that required the officer to manipulate the bag and its contents to determine what it was. The bag contained almost 24 grams of material. The size of the bag and the amount and composition of its contents are such that the bag would have been readily apparent to an officer patting the outside of appellant’s pants pocket.

Although Officer Metcalf did not testify at the suppression hearing, the pictures and sound on the body-worn camera recording clearly demonstrate that the officer felt a plastic bag in appellant’s left pants pocket, which he immediately concluded was likely illicit drugs by plain feel.² Our review of exhibit 1 reveals an appropriately circumscribed pat-down search for weapons after the officer had ascertained that appellant possessed at least one firearm and two knives.

B. The record supports the district court’s conclusion that each expansion of the traffic stop by the officer was supported by reasonable and articulable suspicion.

Appellant next argues that the expansion of the traffic stop to include a pat-down search of his pants pockets was unsupported by a reasonable and articulable suspicion.

² Officer Metcalf’s body-worn camera recording, as it exists in the record, presents some technical issues. The video is clear throughout, but the audio cuts out at the twelve-minute mark of the video, for reasons not disclosed in the record. Nevertheless, the portion of the video that is particularly relevant for purposes of this appeal is not affected by the audio issues.

Even if a traffic stop is valid at its inception, the stop may become invalid if “it becomes intolerable in its intensity or scope.” *Askerooth*, 681 N.W.2d at 364 (quotation omitted). An officer can expand the scope of a stop to include investigation of additional criminal activity “only if the officer has reasonable, articulable suspicion of such other illegal activity.” *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002). “Evidence obtained as a result of a seizure without reasonable suspicion must be suppressed.” *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011).

Here, the officer had located a knife in appellant’s car and located and secured a firearm from appellant’s waistband before patting appellant’s pants pockets. He located a knife in appellant’s right pants pocket before patting down appellant’s left pants pocket. On this record, he was obviously constitutionally permitted to continue the pat-down search to include the left pants pocket after discovering the other weaponry appellant possessed. *See Lemert*, 843 N.W.2d at 232 (allowing a protective pat-down search where there is a reasonable and articulable suspicion that a detained person may be armed and dangerous). Patting the area of appellant’s left pants pocket was reasonable and constitutionally permissible. It appears to us that no other course of action would have been reasonable based on exhibit 1.

Appellant began “reaching” toward his left pants pocket as the officer began the pat-down search of the left pants pocket, as reflected by the officer’s comments on exhibit 1. And the officer spontaneously stated as he patted the left pocket that he felt what appeared to him to be a sizeable bag of “narcotics.” At that point, there was probable cause to believe that the substance in appellant’s left pants pocket was contraband.

This officer's careful and considered expansion of the stop and the seizure of the methamphetamine in appellant's pocket did not offend appellant's constitutional rights.

Affirmed.