

*This opinion is nonprecedential except as provided by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
A22-1429**

State of Minnesota,
Respondent,

vs.

Yar Wiw Bithow, Sr.,
Appellant.

**Filed August 21, 2023
Affirmed
Reyes, Judge**

Stearns County District Court
File No. 73-CR-20-4510

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

Janelle P. Kendall, Stearns County Attorney, River D. Thelen, Assistant County Attorney,
St. Cloud, Minnesota (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Reyes,
Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant argues that his convictions of unlawful possession of a firearm, fifth-degree possession of a controlled substance, and obstruction of legal process must be reversed because the district court erred by denying his pretrial suppression motion, which

was based on the assertion that the state intended to rely on illegally obtained evidence. We affirm.

FACTS

On July 4, 2020, at approximately 11:58 p.m., Officer R., along with several other officers from the Stearns County Sheriff's Office, were dispatched on a gun complaint at an apartment building in the City of St. Cloud. Dispatch reported to the officers that a fight broke out among three Black males, one of whom possessed a handgun, and that the incident involved "an assault that people were held at gunpoint." The dispatch further reported that one Black male was wearing a red coat and one had afro-style hair. It was unclear whether the description referred to the same person or two different people, and no other description of the suspects was provided.

Within five minutes of receiving the dispatch call, Officer R. arrived at the apartment building. Upon arriving, Officer R. observed several people outside the apartment building, some people going inside the building, and others who appeared to be leaving the scene. Because the 911 call involved a gun, Officer R. had concerns that the person carrying the handgun might still be in the area.

Officer R. observed appellant Yar Wiw Bithow, Sr., a Black male, walking away from the apartment building. Appellant was in the parking lot approximately ten to fifteen feet away from the building and only a few feet away from other people close by. Based on the general suspect description and appellant's close proximity to the building, Officer R. suspected that appellant might be involved in the reported incident. As appellant started walking away, Officer R. ordered him to stop and walked over to him. Officer R. told him

that he would pat him down to “ensure [that] he had no weapons on him for [his] safety and his partner’s safety” and requested that appellant “put his hands on the back of his head.”

Appellant failed to comply with Officer R.’s directive, and Officer V. became involved. Appellant continued to “pull his hands away,” so Officer R. and Officer V. “grabbed his hands” and unsuccessfully tried to get them behind his head. Appellant voluntarily dropped to his knees but began reaching towards his waistband. Officer R. then observed “the butt of what [Officer R.] believed from his training and experience to be the grip of a handgun” and yelled “gun” to alert the other officers. This prompted the officers to force appellant to lie on the ground.

While appellant was on the ground, Officer R. warned him that if he continued to resist, Officer R. would deploy his taser. Appellant continued to resist, keeping his hands under him, so Officer R. tased appellant for about ten seconds. Even then, the officers were “unable to get [appellant’s] hands out from under him” which prompted Officer R. to tase him a second time. After the second tase, the officers were able to handcuff appellant. Officers secured a loaded silver black .380 handgun from his waistband. Appellant was prohibited from possessing a handgun. They also found him in possession of a controlled substance.

Respondent State of Minnesota charged appellant with: (1) possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subds. 1(2) (Supp. 2019), 2(b) (2018); (2) possession of a felony controlled substance in the fifth degree in violation of

Minn. Stat. § 152.025, subds. 2(1), 4(b) (2018); and (3) gross-misdemeanor obstruction of legal process with force in violation of Minn. Stat. § 609.50, subds.1(1), 2(2) (2018).

Appellant moved to suppress the evidence, challenging his detention and search. The district court held a contested omnibus hearing at which Officer R. testified on behalf of the state. The district court denied appellant's motion, and a jury trial followed. The jury found appellant guilty. The district court sentenced appellant to 60 months for possession of a firearm or ammunition by an ineligible person, with a concurrent 21-month sentence for possession of a controlled substance in the fifth degree, and a 365-day concurrent sentence on obstructing legal process with force. This appeal follows.

DECISION

Appellant Appellant argues that the district court erred by denying his motion to suppress evidence because Officer R. did not have reasonable, articulable suspicion to support his seizure and search of appellant. We are not persuaded.

When reviewing a pretrial order denying a motion to suppress evidence, appellate courts review the district court's factual findings for clear error and its legal conclusions de novo. *State v. Brown*, 932 N.W.2d 283, 289 (Minn. 2019).

The Fourth Amendment to the United States Constitution and the Minnesota Constitution protect the "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. Warrantless searches and seizures are generally unreasonable. *State v. Bernard*, 859 N.W.2d 762, 766 (Minn. 2015). As a result, evidence obtained during a warrantless search is inadmissible unless an exception to the warrant requirement applies.

State v. Diede, 795 N.W.2d 836, 846 (Minn. 2011). “One such exception is the protective pat search for weapons.” *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992).

Under *Terry v. Ohio*, 392 U.S. 1 (1968), “police may stop and frisk a person when (1) they have 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.” *Dickerson*, 481 N.W.2d at 843 (citing *Terry*, 392 U.S. at 30). “The appropriate inquiry is whether a reasonably prudent person in the specific circumstances would believe that his or her safety was in danger. *In re Welfare of M.D.R.*, 693 N.W.2d 444, 450 (Minn. App. 2005) (quotations omitted), *rev. denied* (Minn. June 28, 2005). “[T]he reasonable suspicion standard is not high.” *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotation omitted). If both *Terry* factors are present, “police may conduct a carefully limited search of the outer clothing of [the detained] person in an attempt to discover weapons.” *Dickerson*, 481 N.W.2d at 843 (Minn. 1992) (quoting *Terry*, 392 U.S. at 30).

When determining whether reasonable, articulable suspicion exists, courts consider the totality of the circumstances. *See State v. Flowers*, 734 N.W.2d 239, 251 (Minn. 2007). “These circumstances include the officer’s general knowledge and experience, the officer’s personal observations, information the officer has received from other sources, the nature of the offense suspected, the time, the location, and anything else that is relevant.” *Appelgate v. Comm’r of Pub. Safety*, 402 N.W.2d 106, 108 (Minn. 1987). In addition, an officer may draw inferences and deductions “that might well elude an untrained person.” *Id.* (quotation omitted).

Here, the record shows that Officer R. arrived within five minutes of the 911 call around midnight. Officer R. testified that, because of the vague suspect description he received from dispatch coupled with appellant's appearance and close proximity to the building, he suspected that appellant was involved in the reported incident. The Minnesota Supreme Court has stated that "there are cases where the number of persons [] in the area is so small that a stopping for investigation may be made without any description whatsoever." *Id.* (holding that officer had a particularized and objective basis for suspecting that defendant had been involved in the burglary when the report was made at 2:25 a.m. and there was very little traffic in the area). Moreover, Officer R. testified that he conducted the limited search of appellant because of his concern for his safety, his partner's safety, and the safety of everyone else at the scene. While Officer R. did not have a thorough description of the suspects, he used his general knowledge and experience of appellant's proximity to the location where the gun complaint had been reported, time, and the description of the reported incident to suspect that appellant might be involved in the incident. We therefore conclude that Officer R. had reasonable, articulable suspicion to stop and frisk appellant.

Furthermore, Officer R. was permitted to stop and frisk appellant to freeze the scene. The supreme court has "recognized that in order to freeze the situation, the stop of a person present at the scene of a recently committed crime of violence may be permissible without trampling on the Fourth Amendment prohibition against unreasonable search and seizure." *Wold v. State*, 430 N.W.2d 171, 174 (Minn. 1988) (citations omitted). Officer R. was investigating a gun complaint that involved multiple individuals allegedly held at gun

point. When Officer R. and other officers arrived at the scene, they attempted to freeze the scene by stopping people nearby, including White males in close proximity. Because of appellant's close proximity to the scene, Officer R. sought to freeze the situation by detaining appellant. Based on this record, the district court did not err by denying appellant's motion to suppress the evidence because Officer R. had reasonable, articulable suspicion to stop and frisk appellant and freeze the situation.

Affirmed.