

SUPREME COURT OF NORTH DAKOTA

State v. Asbach

871 N.W.2d 820 (N.D. 2015) · Decided December 1, 2015

OPINION

State v. Asbach 871 N.W.2d 820

SANDSTROM, J.

SANDSTROM, Justice. [¶ 1] Tyler Asbach appeals from a judgment entered after he conditionally pled guilty to a drug-related offense, reserving the right to challenge the denial of his motion to suppress evidence. We conclude: (1) Asbach was not illegally seized while the police officer was conducting duties related to the traffic stop; (2) the district court failed to make specific findings of fact as to whether the police officer acted in bad faith as required under the first part of the inevitable discovery test when searching beyond the scope of the consent to search; and (3) there was sufficient evidence to support a finding that contraband found in Asbach's suitcase would have inevitably been discovered after Asbach's suitcase was searched without his consent, satisfying the second part of the inevitable discovery test. We affirm in part, reverse in part, and remand. *822I [¶2] On April 30, 2014, Asbaeh was stopped by Bismarck Police Officer Colt Bohn for making an improper left turn. According to Bohn's testimony at the suppression hearing, he approached the vehicle, spoke with Asbaeh and a passenger, Clinton Walker, and was told Asbaeh was from Washington and Walker was from Indiana. Walker told Bohn he rented the vehicle in Indianapolis, drove to Washington to pick up Asbaeh, and they were returning to Indianapolis to visit Asbach's mother. [¶ 8] After briefly speaking with Asbach and Walker, Bohn testified he returned to his vehicle and checked the status of their driver's licenses and checked whether there were any outstanding warrants. Bohn also called for backup to allow him to speak with Asbaeh and Walker separately to confirm their stories. Asbach told Bohn that Walker, his second cousin, drove to Washington and picked him up, and they were on their way back to Indianapolis to visit Asbach's mother, who was having surgery. Asbaeh told Bohn he did not know what type of surgery his mother was having, but indicated it was "for something gross." Bohn asked Asbaeh whether he could search the vehicle, but Asbaeh stated he could not give consent because Walker rented the vehicle. Bohn testified he then spoke with Walker, who stated he and Asbaeh, his third cousin, were traveling to Indianapolis to visit Asbach's mother, who was having carpal tunnel surgery. Walker told Bohn he rented the vehicle in Indianapolis on April 25, and it was due to be returned on May 2. Bohn requested to search the vehicle, and Walker consented. Bohn testified approximately twelve minutes elapsed from the time of the stop until the time Walker gave consent to search the vehicle. Bohn stated Asbaeh had not been given a ticket or warning for the traffic violation before Walker consented to a search of the vehicle. [¶4] Bohn testified he is a

certified drug recognition expert for the Bismarck Police Department and has attended multiple drug recognition and interdiction trainings, including trainings to look for suspicious indicators that may signal something is inside the vehicle that should not be. He testified renting a vehicle in Indianapolis, driving it to Washington to pick somebody up, and driving it back to Indianapolis in a very brief time was suspicious. He also stated the inconsistent stories about what kind of surgery Asbach's mother was having and how Asbaeh and Walker were related raised his suspicions that a search of the vehicle might reveal drugs. [¶ 5] Bohn searched the vehicle while Asbaeh and Walker stood with the backup officer. After searching the interior of the vehicle, Bohn asked Walker to open the trunk, and Walker complied. The trunk contained several items, including backpacks, three large duffle bags, and a suitcase. Bohn testified he did not ask who owned the items in the trunk before he searched them. One of the first items removed and searched was a suitcase with a tag indicating it belonged to Asbaeh, and Bohn testified he did not notice the tag until after he had searched the suitcase. Inside the suitcase, Bohn found a large, heat-sealed bag containing numerous items with marijuana leaves on them, which he believed were marijuana edibles. In one of the large unmarked duffle bags, Bohn found a heat-sealed package of marijuana. Asbaeh and Walker never requested the search be stopped. Asbaeh and Walker were arrested and taken into custody. According to the affidavit - attached to the complaint, Walker claimed ownership of the marijuana found in the duffle bag after his arrest.

*823[¶ 6] Asbach was charged with possession of marijuana with intent to deliver and possession of tetrahydrocannabinols (edible THC). Asbach moved to suppress the evidence found in the search, arguing he was illegally seized after the purposes of the traffic stop were completed. The district court, denied the motion to suppress, finding Bohn did not take any action outside the duties related to the traffic stop and Asbach was not illegally seized. The court also found the officer's search of Asbach's suitcase without first obtaining his consent was illegal, but under the inevitable discovery doctrine, the contraband discovered in Asbach's suitcase was admissible because the suitcase would have been searched after marijuana was discovered in Walker's bag. Asbach conditionally pled guilty to the charges, reserving the right to appeal the denial of his motion to suppress.

[¶ 7] The district court had jurisdiction under N.D. Const, art. VI, § 8, and N.D.C.C. § 27-05-06. Asbach's appeal is timely under N.D.R.App.P. 4(b). This Court has jurisdiction under N.D. Const, art. VI, §§ 2 and 6, and N.D.C.C. § 29-28-06. II [¶ 8] Asbach argues the district court erred in denying his motion to suppress because he was detained longer than necessary for a traffic stop and without reasonable suspicion. Asbach also argues the court erred in concluding the contraband found in his suitcase was admissible under the inevitable discovery doctrine. Asbach is not challenging Bohn's, stop of the vehicle. [¶ 9] This Court has discussed its standard of review of a district court's findings of fact in preliminary proceedings: A trial court's findings of fact in preliminary proceedings of a criminal case will not be reversed if, after the conflicts in the testimony are resolved in favor of affirmance, there is sufficient competent evidence fairly-

capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence. We do not conduct a de novo review. We evaluate the evidence presented to see, based on the standard of review, if it supports the findings of fact. *City of Fargo v. Thompson*, 520 N.W.2d 578, 581 (N.D.1994) (internal citations omitted). A [¶ 10] Asbach argues Bohn completed his duties related to the traffic stop after speaking with Asbach and any investigation after that was an extension of the traffic stop in violation of Asbach's constitutional right against unreasonable seizures under the Fourth Amendment of the United States Constitution and Article 1, § 8, of the North Dakota Constitution. [¶ 11] "An officer may detain an individual at the scene of a traffic stop for a reasonable period of time necessary for the officer to complete his duties resulting from the traffic stop." *State v. Deviley*, 2011 ND 182, ¶ 9, 803 N.W.2d 561 (quoting *State v. Franzen*, 2010 ND 244, ¶ 8, 792 N.W.2d 533). The officer may check the driver's license and registration, ask the driver about his destination and purpose, and request the driver step over to the patrol car. *State v. Guscette*, 2004 ND 71, ¶ 7, 678 N.W.2d 126. The officer may also ask a passenger similar questions to confirm the information the driver provided. *United States v. Brown*, 345 F.3d 574, 578 (8th Cir.2003). The investigative detention may continue as long as reasonably necessary to conduct duties relating to a traffic stop and to issue a warning or citation. *Deviley*, at ¶ 9.

*824[¶ 12] "The Fourth Amendment of the United States Constitution is violated by the continued seizure of a traffic violator after the purposes of the initial traffic stop are completed...." *Id.* See also *United States v. Peralez*, 526 F.3d 1115, 1119 (8th Cir.2008) ("A constitutionally permissible traffic stop can become unlawful ... 'if it is prolonged beyond the time reasonably required to complete' its purpose." (quoting *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005))). On-scene investigation into other crimes detours from the purpose of the stop. *Rodriguez v. United States*, — U.S. —, 135 S.Ct. 1609, 1616, 191 L.Ed.2d 492 (2015). If, during the course of completing the duties resulting from a traffic stop, "the officer develops reasonable suspicion that other criminal activity is afoot, the officer may expand the scope of the encounter to address that suspicion." *Peralez*, at 1120; see also *Rodriguez*, at 1615. This Court has applied an objective standard to decide whether reasonable suspicion exists:

To determine whether a reasonable suspicion exists, we consider the totality of the circumstances and apply an objective standard, taking into consideration the inferences and deductions an investigating officer would make based on the officer's training and experience. The question is whether a reasonable person in the officer's position would be justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in unlawful activity. Whether the facts support a reasonable and articulable suspicion is a question of law. *Deviley*, 2011 ND 182, ¶ 8, 803 N.W.2d 561 (quoting *Franzen*, 2010 ND 244, ¶ 12, 792 N.W.2d 533 (quotation marks and citations omitted)). [¶ 13] Here the district court found: Officer Bohn did not take any action outside the duties resulting from a valid traffic stop. Officer Bohn approached the vehicle asked for identification and vehicle information from [Asbach and Walker]. He inquired

about their destination, the purpose of their trip, and verified their information. He asked Asbach to step out of the vehicle, inquired about their trip and asked for consent to search the vehicle. After being told Asbach could not consent to a search, Officer Bohn approached Walker and inquired about the destination and purpose of the trip before asking Walker for consent to search the vehicle. Walker granted consent. At the time Walker gave Officer Bohn consent to search the vehicle only twelve minutes had passed since the vehicle was stopped. This is not an unreasonable amount of time for an officer conducting a traffic stop to spend verifying the passenger and vehicle information, inquiring about the destination and purpose for the trip, and asking for consent to search the vehicle. Additionally, “[w]hen a motorist gives consent to search his vehicle, he necessarily consents to an extension of the traffic stop while the search is conducted.” [State v. Mertz, 362 N.W.2d [410,] 412 [(N.D.1985)]. As a result, Officer Bohn’s actions conformed with the appropriate steps to be taken during a traffic stop and because Walker consented to a search, the duration of the stop was lawfully extended. As a result, Asbach was not illegally seized. [¶ 14] The length of the traffic stop was related to Bohn’s performance of his duties related to the stop. He checked Asbach’s and Walker’s driver’s licenses, checked for outstanding warrants, and spoke with each of them about their trip. Bohn testified approximately twelve minutes elapsed from the time of the stop to *825the time he was given consent to search the vehicle. In addition, Asbach was not issued a warning or citation before consent was given to search the vehicle. We conclude there is sufficient competent evidence supporting the district court’s finding that Bohn was conducting his duties related to the traffic stop and Asbach was not illegally seized. B [¶ 15] Asbach argues the district court erred in concluding evidence found when his suitcase was searched beyond the scope of consent was admissible under the inevitable discovery doctrine. [¶ 16] In State v. Phelps, 297 N.W.2d 769, 775 (N.D.1980), this Court adopted a two-part test to determine whether the State may rely on the inevitable discovery exception to the exclusionary rule: First, use of the doctrine is permitted only when the police have not acted in bad faith to accelerate the discovery of the evidence in question. Second, the State must prove that the evidence would have been found without the unlawful activity and must show how the discovery of the evidence would have occurred. As to the second part of the test, the United States Supreme Court has held evidence obtained because of unlawful police conduct may be admissible if the State proves by a preponderance of the evidence that the challenged evidence would have otherwise been discovered by lawful means in the course of the investigation. State v. Olson, 1998 ND 41, ¶ 16, 575 N.W.2d 649; Nix v. Williams, 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). [¶ 17] The district court found Walker’s consent to search the vehicle and trunk did not extend to Asbach’s suitcase, in which edible THC was found. Although the court found Bohn’s search of Asbach’s suitcase was illegal, it concluded the evidence discovered in the suitcase was admissible under the inevitable discovery doctrine: In the present case, had Officer Bohn set aside Asbach’s luggage before conducting a search, he would have searched Walker’s bags pursuant to valid consent, located contraband and would have gained probable cause to search the remainder

of the vehicle under the automobile exception. As a result, the inevitable discovery rule applies and the evidence seized will not be suppressed. [¶ 18] The district court's analysis on inevitable discovery addresses only the second part of the test, and therefore we will discuss the second part of the inevitable discovery test first. The second part of the test requires the State to prove, by a preponderance of the evidence, the challenged evidence would have been found without the unlawful activity and to show how the discovery of the evidence would have occurred. Olson, 1998 ND 41, ¶ 16, 575 N.W.2d 649; Phelps, 297 N.W.2d at 775. [¶ 19] Asbach told Bohn he could not consent to a vehicle search because Walker rented the vehicle. Walker consented to a vehicle search and opened the trunk when Bohn asked him to. Several items were in the trunk, and one of the items, a suitcase, had a tag identifying it as Asbach's. After finding marijuana edibles in the suitcase, Bohn searched a large duffle bag and, found marijuana inside. Bohn testified he did not ascertain ownership of the items in the trunk before he searched them. Neither Walker nor Asbach limited the scope of the search or claimed ownership of any of the items in the trunk before or during the search.

*826[¶ 20] Asbach is not challenging the validity of Walker's consent or his authority to consent to the vehicle search. Asbach argues there is no evidence to support a finding that Walker owned the duffle bag containing marijuana. Asbach argues Bohn should have ascertained ownership of the items in the trunk before searching them, 'because' it was possible none of Walker's items in the trunk contained anything illegal. Asbach and Walker were the only occupants of the vehicle, Asbach did not claim ownership of the bag during or after the search, and the affidavit attached to the complaint stated Walker claimed ownership of the marijuana found in the duffle bag when he was interviewed after his arrest. We conclude there was sufficient evidence in the record to support a finding the duffle bag containing marijuana was Walker's. Had Bohn searched only Walker's bag under valid consent and discovered marijuana, there would have been probable cause to search Asbach's suitcase under the automobile exception. See Olson, 1998 ND 41, ¶ 17, 575 N.W.2d 649; see also State v. Reis, 2014 ND 30, ¶ 18, 842 N.W.2d 845, (holding officers may search the vehicle and any containers in the vehicle that may contain the object of the search under the automobile exception), We conclude the court's finding that the State satisfied the second part of the inevitable discovery test was not clearly erroneous.

[¶ 21] The inevitable discovery test also requires the State- to prove the police have not acted in bad faith to accelerate the discovery of the challenged evidence. Phelps, 297 N.W.2d at 775. The district court, however, did not make any factual findings about whether Bohn acted in bad faith when he searched Asbach's suitcase without consent. Absent any findings on bad faith, we are unable to properly review whether the State satisfied the first part of the inevitable discovery test. We reverse and remand to allow the district court to make specific findings of fact on the issue of whether Bohn acted in bad faith when he searched Asbach's suitcase without consent. Ill [¶ 22] The district court judgment and order denying Asbach's motion to suppress is affirmed in part,

reversed in part, and remanded for proceedings consistent with this opinion. [¶ 23] GERALD W. VANDE WALLE, C.J., concurs. LISA FAIR McEVERS, J., concurs in the result.