

SUPREME COURT OF NORTH DAKOTA

State v. Gefroh

2011 ND 153 (N.D. 2011) · Decided August 15, 2011

SUMMARY

The North Dakota Supreme Court affirmed an order suppressing cocaine found in Kevin James Gefroh's pocket during a traffic stop. The court held that the automobile exception supported a warrantless search of the vehicle after a drug-sniffing dog alerted, but did not justify the warrantless search of Gefroh's person.

OPINION

KAPSNER, J.

KAPSNER, Justice. [¶ 1] The State appeals the district court order granting Kevin James Gefroh's motion to suppress evidence. The State argued law enforcement officers had probable cause to search for contraband, and because of the automobile exception to the warrant requirement, a warrant was not required to search Gefroh's person.

We affirm the order suppressing the evidence found on Gefroh's person. I [¶ 2] The Ward County Narcotics Task Force had information suggesting Gefroh received a shipment of controlled substances and had been selling controlled substances.

After receiving this information, Officer Craig Sandusky saw Gefroh leave a bar with two women and noticed Gefroh had three different registration tabs displayed on his license plate. Officer Sandusky called Officer David Chapman's police canine unit to follow Gefroh. Officer Chapman followed Gefroh's vehicle and *431observed the different registration tabs and saw Gefroh make an illegal left turn.

Gefroh was stopped for the traffic violations. Officer Chapman had a drug-sniffing dog walk around the vehicle during the traffic stop, while Gefroh was still sitting in his vehicle, and the drug-sniffing dog indicated the presence of controlled substances at the passenger-side door of the vehicle. Gefroh made furtive movements toward his jacket pockets while sitting in his vehicle.

Gefroh was asked to step out of his vehicle, and he complied. Law enforcement officers searched Gefroh's vehicle and found a plastic bag with what appeared to be marijuana residue, but they did not arrest him at this point. According to Officer Trevor Huber, Gefroh stared at Officer Huber and put his hand by the right side of his body and made furtive movements.

Officer Huber performed a pat-down search on Gefroh and discovered four bundles of white powder that tested positive for cocaine. Gefroh was arrested after the officers discovered the cocaine. [¶ 3] Gefroh was charged with unlawful possession of cocaine with intent to deliver. Gefroh made a motion to suppress his statements and all physical evidence obtained by law enforcement during the stop, arguing he was illegally seized and searched.

At the suppression hearing, the State asked, “And did you search Mr. Gefroh and the truck because the dog alerted on him?” Officer Sandusky replied, “I believe Officer Huber searched Gefroh because of his actions during the stop, and once he was out of the vehicle. And yes the vehicle was searched, as well.” The district court ordered the cocaine found in Gefroh’s pocket suppressed because the automobile exception to the warrant requirement did not justify the warrantless search of Gefroh’s person, and the officers exceeded the scope of a proper pat-down search for weapons.

On appeal, the State argued the automobile exception allowed the search of Gefroh’s person. II [¶ 4] The district court concluded the pat-down search of Gefroh conducted by Officer Huber was initially justified out of concern for the safety of the police officers. “A law enforcement officer may conduct a frisk or a pat-down search of a person only when the officer has a reasonable and articulable suspicion that the individual is armed and dangerous.” *State v. Beane*, 2009 ND 146, ¶ 9, 770 N.W.2d 283 (quoting *State v. Harlan*, 2008 ND 220, ¶ 6, 758 N.W.2d 706); see also *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct.

1868, 20 L.Ed.2d 889 (1968). Officer Huber testified Gefroh made several “furtive gestures” while seated in his vehicle. After leaving his vehicle, Gefroh continued to reach for his jacket pocket several times and refused to keep his hands on the tailgate of his vehicle as instructed by Officer Huber. [¶ 5] During the pat-down search, Officer Huber discovered a “soft object” in Gefroh’s pockets, which was later determined to be bundles of cocaine.

Citing *Harlan*, the district court noted that the scope of a pat-down search is limited and concluded the search of the contents of Gefroh’s pocket was not justified. 2008 ND 220, ¶ 6, 758 N.W.2d 706 (“The scope of a constitutionally valid pat-down search is limited to the patting of a suspect’s outer clothing for such concealed objects that might be used as weapons....

A pocket search is justified when the patting ‘reveals the presence of an object of a size and density that reasonably suggests the object might be a weapon.’ ”). The district court found there was no testimony indicating Officer Huber believed the soft object could be a weapon, and concluded Officer Huber lacked a reasonable and articulable suspicion Gefroh’s pocket contained a weapon. [¶ 6] The State did not argue the district court erred in its decision that the search of Gefroh’s pocket was not justified by the pat-down search.

The State argued the district court's error was in deciding the automobile exception to the warrant requirement did not apply, and "[the district court] then further turned a search of the defendant based on probable cause into a 'Terry' pat down search for weapons based on the officers other concerns." At oral argument before this Court, the State's attorney was asked if he would agree with the district court if the search had simply been a pat-down search.

The State's attorney said, "I absolutely would, but I don't believe that's what it was." Later, the State's attorney was asked if another exception to the warrant requirement applied, and the State's attorney responded, "No, it was a search based on probable cause and the automobile exception." The State did not appeal the issue of the district court's decision on the scope of the pat-down search for weapons and the subsequent search of Gefroh's pocket, and we will not address the issue.

See *State v. Duchene*, 2007 ND 31, ¶ 10, 727 N.W.2d 769 ("Issues not briefed by an appellant are deemed abandoned, and thereby become the law of the case and will not be considered on appeal."). Ill [¶ 7] The State argued the district court erred in suppressing the cocaine evidence because the search of Gefroh's person was within the automobile exception to the warrant requirement.

The State argued the exception applied because Gefroh, the driver of the stopped vehicle, was still in the vehicle when law enforcement officers established probable cause controlled substances were present. This Court will not reverse a district court decision on a motion to suppress on appeal if there is sufficient competent evidence capable of supporting the court's findings, and if the decision is not contrary to the manifest weight of the evidence.

State v. Johnson, 2011 ND 48, ¶ 9, 795 N.W.2d 367. Whether a finding of fact meets a legal standard is a question of law, and questions of law are fully reviewable on appeal. *Id.* [¶ 8] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." U.S. Const. amend.

IV. Under the Fourth Amendment, the government must obtain a warrant before conducting a search when a person has a reasonable expectation of privacy, unless the search falls within a recognized exception to the warrant requirement. *State v. Dudley*, 2010 ND 39, ¶ 7, 779 N.W.2d 369 (citing *State v. Gregg*, 2000 ND 154, ¶ 23, 615 N.W.2d 515). A recognized exception to the requirement is the automobile exception, which allows law enforcement officers to search a vehicle for illegal contraband without a warrant upon establishing probable cause the vehicle contains contraband.

Id. (citing *State v. Zwicke*, 2009 ND 129, ¶ 9, 767 N.W.2d 869). Under the automobile exception, law enforcement officers may search for illegal contraband without a warrant when probable cause exists. Probable cause exists to search a vehicle if it is established that "certain identifiable

objects are probably connected with criminal activity and are probably to be found at the present time at an identifiable place.” If a warrantless search of an automobile is made with probable cause, based on a reasonable belief arising out of the circumstances known to the officer that the automobile contains articles *433which are subject to seizure, the search is valid.

Id. (quoting *Zivicke*, at ¶ 9) (quotations and citations omitted). Once probable cause that a vehicle contains contraband is established, officers may search the vehicle because the ready mobility of the vehicle is an exigent circumstance justifying the exception to the warrant requirement. *Zivicke*, at ¶ 11. [¶ 9] The State argued law enforcement officers had probable cause to search Gefroh and his vehicle because the drug-sniffing dog indicated the presence of a controlled substance.

Allowing a drug-sniffing dog to sniff a vehicle is not a search within the meaning of the Fourth Amendment. *State v. Ressler*, 2005 ND 140, ¶ 21, 701 N.W.2d 915 (citing *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983)). A drug-sniffing dog indicating the presence of a controlled substance establishes probable cause. Id. (citing *United States v. Lingenfelter*, 997 F.2d 632, 639 (9th Cir.1993)).

The drug-sniffing dog indicated the presence of a controlled substance on the passenger-side door of the vehicle, which provided the law enforcement officers with probable cause the vehicle contained contraband. The automobile exception to the warrant requirement and probable cause the vehicle contained a controlled substance allowed officers to search the vehicle. [¶ 10] Gefroh argued the automobile exception to the warrant requirement justified only the search of the vehicle, but did not justify the search of his person without a warrant.

The State argued the officers could properly search Gefroh because every part of a vehicle and its contents that may conceal the object of the search may be searched. See *Wyoming v. Houghton*, 526 U.S. 295, 301, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999) (citing *United States v. Ross*, 456 U.S. 798, 825, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982)).

The State contended Gefroh and his pockets were containers within the vehicle, because he was sitting in the vehicle when probable cause was established. [¶ 11] In *United States v. Di Re*, the United States Supreme Court found no grounds to expand the automobile exception to justify the arrest and search of the person within a car. 332 U.S. 581, 587, 68 S.Ct.

222, 92 L.Ed. 210 (1948). It had been argued the automobile exception should justify the warrantless search of a person in cases where the object of the search could easily be concealed on a person. Id. at 586, 68 S.Ct. 222.

The government recognized that persons may not be searched just because they are on premises subject to a search warrant. Id. at 587, 68 S.Ct. 222. The Court compared that situation to one where a vehicle is subject to a search warrant, which would not allow the search of a person, and

decided it was not rational that a warrantless search of a vehicle would be greater in scope than a search pursuant to a warrant.

Id. The Court stated, “We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.” Id. [¶ 12] The Supreme Court in *Houghton* recognized the “heightened protection afforded against searches of one’s person,” and reiterated that case law supported a distinction between the person and a container within a vehicle.

526 U.S. at 303, 119 S.Ct. 1297 (citing *U.S. v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948); *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979)). The issue in *Houghton* was whether passengers’ property may be searched during a vehicle search, and the Court held passengers’ property may be searched the same as the *434driver’s property.

Id. at 307, 119 S.Ct. 1297. The Court stated case law did not support a distinction between the possessions of a driver and passenger, but did support a distinction between the person and a container within a vehicle. Id. at 303, 119 S.Ct. 1297.

The Court said, “Even a limited search of the outer clothing... constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.” Id. (quoting *Terry v. Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). [¶ 13] We hold the automobile exception did not justify the warrantless search of Gefroh’s person.

The dog-sniff of the vehicle established probable cause the vehicle contained a controlled substance, but the pockets of the clothes Gefroh was wearing were not “containers.” The State also argued that Gefroh, as the driver of the vehicle, was part of the contents of the vehicle.

The State offers no support for its arguments that would render Gefroh a container or contents of the vehicle, rather than a person entitled to “heightened protection” against searches of his person. The district court correctly decided the automobile exception justified the search of the vehicle, but not Gefroh’s person.

The district court correctly ordered the cocaine evidence suppressed. IV [¶ 14] The automobile exception to the warrant requirement did not justify the warrantless search of Gefroh’s person. The State did not offer another justification for the search.

We affirm the district court order suppressing the evidence resulting from the search of Gefroh’s person. [¶ 15] MARY MUEHLEN MARING, and DANIEL J. CROTHERS, JJ., concur.