This opinion is nonprecedential except as provided by Minn.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
A24-0618

State of Minnesota,
Appellant,

vs.

Andre Lorenzo Dee,
Respondent.

Filed January 21, 2025
Affirmed
Cochran, Judge

Hennepin County District Court
File No. 27-CR-23-12784

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

Mary F. Moriarty, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for appellant)

Frederick J. Goetz, Goetz & Eckland P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Cochran, Judge; and Jesson, Judge.[*]

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

NONPRECEDENTIAL OPINION

COCHRAN, Judge

In this pretrial appeal, appellant State of Minnesota challenges the district court's order granting respondent Andre Lorenzo Dee's motion to suppress drug evidence seized by police as a result of a frisk of Dee for weapons. The state argues that the district court made clearly erroneous factual findings regarding the frisk and erred in its legal analysis of the constitutionality of the frisk. Because the challenged factual findings are supported by the record and the district court properly applied the law, we affirm.

FACTS

The following facts are drawn from evidence presented at the suppression hearing. On June 17, 2023, two officers (Officers A and B) of the Bloomington Police Department were on patrol when one of the officers observed a car with expired registration tabs. The car was also exceeding the speed limit.

The officers initiated a traffic stop. As the driver was pulling over, Officer A observed the passenger "recline[] in his seat a little bit" and begin "digging really hard around his waistline." These movements caused Officer A to suspect, based on his training and experience, that the passenger was attempting to conceal something in his waistband. The passenger was later identified as Dee.

During the traffic stop, Officer B noticed a small piece of tin foil on the floor of the car. He knew from his experience that tin foil can be used to smoke narcotics. Officer A then noticed another piece of tin foil in the driver's side cubby area. Officer A asked the driver to get out of the car.

After the driver exited the car, the driver consented to a search of his person. During the search, Officer A found a small amount of cocaine and around 31 pills of fentanyl. Officer A arrested the driver and then ordered Dee out of the car to allow the officers to search the car for additional contraband.

Before Dee exited the car, Officer A was concerned that Dee might be concealing a weapon due to his earlier furtive movements. As Dee was getting out of the car, he let out a groan and proceeded slowly. Once out of the car, Dee was bent over and stood angled away from the officer. Officer A also observed "a big bulge" in Dee's right shorts pocket.

Officer A asked Dee if he would consent to a search. Dee declined. To ensure his safety, Officer A frisked Dee's shorts for weapons. A video of the frisk was recorded by Officer A's body-worn camera and entered into evidence. As reflected in the recording, Officer A started the frisk by moving his hand up and down over the outside of Dee's right shorts pocket, in the area of the bulge. Officer A then moved his hand toward the inside of Dee's right leg and up toward the waistband, where he continued to feel Dee's shorts. At this point, Officer A can be seen sliding his fingers over Dee's shorts for about four seconds. He then rests his hand on an object under Dee's shorts and asks Dee: "what's in the sack?" Next, the recording shows Officer A removing his hand from Dee's shorts and reaching for his handcuffs. As Officer A begins to handcuff Dee, Dee breaks free and attempts to flee on foot. Officers A and B thereafter apprehended Dee and searched him incident to arrest.

During the search incident to arrest, Officer A located the sack that he felt during the weapons frisk. The sack contained about 200 fentanyl pills. The officers also located

a bag that fell out of Dee's left shorts leg as he attempted to flee. That bag contained over 1,000 fentanyl pills.

The state charged Dee with first-degree sale of a controlled substance. Minn. Stat. § 152.021, subd. 1(4) (2022). Before trial, Dee moved to suppress all evidence seized as a result of the weapons frisk, arguing the frisk violated the constitutional prohibition against unreasonable searches and seizures.

Suppression Hearing

At the suppression hearing, the district court heard testimony from Officers A and B. The district court received the body-worn camera video into evidence as well as video from the squad car and several photographs.

Officer A testified about the circumstances surrounding his weapons frisk of Dee. He stated that he was suspicious that Dee may have a weapon due to his furtive movements in the car and due to the way Dee acted upon exiting the car. Officer A also testified that, while frisking Dee for weapons, he knew that the object that he felt just beneath the right side of Dee's waistband "was very much not a weapon." He further testified that the object was "recognizable immediately" as "a small sack" containing "the little pills that [Officer A] had just found on the driver."

Officer B also testified about the weapons frisk. He stated that he observed Dee's furtive movements in the car before pulling the car over, and that Dee's movements caused both officers to be concerned that Dee might have a weapon on his person. Officer B further testified that Officer A conducted the weapons frisk of Dee by himself. In response

to a question from the prosecutor as to whether Officer A manipulated the item located below Dee's waistband, Officer B stated that he "couldn't see that side of [Dee's] body."

Following the hearing, the parties submitted legal briefs. In his brief, Dee argued that (1) the police unlawfully expanded the scope of the traffic stop by seizing Dee and frisking him for weapons; and (2) even if a frisk of his person for weapons was warranted, Officer A went beyond the constitutionally permissible scope of a frisk for weapons. The state responded that the police had a reasonable, articulable suspicion that Dee was engaged in criminal activity and might be armed and dangerous, and therefore the frisk for weapons was permissible. The state further argued that the police stayed within the lawful bounds of the weapons frisk when Officer A felt the sack containing the fentanyl pills near Dee's waistband because the identity of the sack of pills as contraband was "immediately apparent."

In a written order, the district court granted the motion to suppress. The district court determined that "the "protective frisk [for weapons] was warranted" but also determined that the scope of the "frisk was unlawful." In reaching this determination, the district court explained that the "[s]tate bore the burden to establish the legality of the search and the record [wa]s insufficient to meet that burden because of the unaddressed discrepancy between the testimony [of Officer A] and the video" recording of the frisk. The district court noted that the state did not explain why Officer A "slid[] his fingers over the bag and then [held] his hand on top of the bag for about another eight seconds" if he immediately knew that the item was not a weapon and instead was illegal contraband. The district court determined that "[w]ithout evidence of the reasons for [Officer A's]

decisions . . . this level of manipulation exceeds constitutionally permissible bounds." As a result, the district court suppressed all evidence seized as a result of Officer A's frisk of Dee.

The state appeals.

DECISION

When appealing a pretrial order, the state must "clearly and unequivocally" show that (1) the district court's ruling was erroneous; and (2) the ruling will have a "critical impact" on the state's ability to prosecute the defendant. *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005) (quotation omitted). Critical impact is a "threshold issue" that the state must show before an appellate court will consider whether a pretrial order is erroneous. *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017) (quotation omitted). Accordingly, we first consider whether the excluded evidence will have a critical impact on the state's ability to prosecute the case.

I. The critical-impact threshold is met.

The state argues that the district court's decision will have a critical impact on its ability to prosecute the case against Dee because the decision to suppress the drug evidence has completely destroyed, or at a minimum significantly reduced, the likelihood that the state will be able to successfully prosecute Dee for first-degree sale of a controlled substance. The state emphasizes that the district court's order suppressed evidence of the drugs found in Dee's possession, including evidence of the drugs found as he attempted to flee. Dee does not dispute that the state can show that the district court's order will have a critical impact on the case. We agree.

A pretrial order has a critical impact on the outcome of the trial if it "completely destroys" the state's case or when it "significantly reduces the likelihood of a successful prosecution." *McLeod*, 705 N.W.2d at 784 (quoting *State v. Joon Kyu Kim*, 389 N.W.2d 544, 551 (Minn. 1987)). Whether the suppression of a particular piece of evidence will have a critical impact on a state's case depends "in large part on the nature of the state's evidence against the accused." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995). When considering the nature of the state's evidence, we "first examine all the admissible evidence available to the state" to determine the impact of the absence of the suppressed evidence. *In re Welfare of L.E.P.*, 594 N.W.2d 163, 168 (Minn. 1999). We then consider "the inherent qualities of the suppressed evidence," including "its relevance and probative force" and "its origin." *Id.*

Here, the state charged Dee with first-degree sale of a controlled substance alleging he sold at least 50 grams of a narcotic drug. Minn. Stat. § 152.021, subd. 1(4). The district court's order suppressed all evidence of drugs that were found in Dee's possession. Without this evidence, the only admissible evidence in the record before us of Dee's guilt appears to be Dee's proximity and association with the driver, who was arrested for possession of a small amount of cocaine and 31 fentanyl pills. This evidence is of limited probative value in proving that Dee sold at least 50 grams of narcotics. *Black's Law Dictionary* 1458 (12th ed. 2024) (defining probative value as "[t]he degree to which one fact tends to make probable another posited fact"). On the other hand, the large quantity of fentanyl pills—over 1,200 in total—that police seized from Dee is highly probative of first-degree sale. *See id.* And the origin of the drugs was Dee himself, further bolstering

the importance of the evidence to the state's case. *See L.E.P.*, 594 N.W.2d at 168. Consequently, we conclude that the state has shown that exclusion of the drug evidence resulting from the weapons frisk of Dee has a critical impact on the state's ability to prosecute its case.

II. The district court did not abuse its discretion when it granted the motion to suppress.

Having concluded that the critical-impact test is met, we next consider the state's argument that the district court abused its discretion when it granted Dee's motion to suppress. We review a district court's evidentiary rulings for an abuse of discretion. *State v. Heller*, 12 N.W.3d 452, 464 (Minn. 2024). "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). "A finding is clearly erroneous when there is no reasonable evidence to support the finding or when an appellate court is left with the definite and firm conviction that a mistake occurred." *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012).

The United States and Minnesota Constitutions protect the people from "unreasonable searches and seizures" of their person. U.S. Const. amend. IV; Minn. Const. art. I, § 10. "Warrantless searches and seizures are generally unreasonable." *State v. Taylor*, 965 N.W.2d 747, 752 (Minn. 2021). In the absence of a warrant, the state has the burden to prove that a search or seizure falls within a "specifically established and well delineated exception[] to the warrant requirement." *State v. Sargent*, 968 N.W.2d 32,

37 (Minn. 2021) (quotation omitted). One such exception was established by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 29-31 (1968), and is known as a *Terry* protective search. Under this exception, when a law-enforcement officer has a reasonable, articulable suspicion that the person is engaged in criminal activity and may be armed and dangerous, the officer is entitled to temporarily stop the person and "conduct a carefully limited search of the outer clothing of such person[] in an attempt to discover weapons which might be used to assault [the officer]." *Id.* at 30; *see also State v. Flowers*, 734 N.W.2d 239, 250 (Minn. 2007). "The purpose of this limited search is not to discover evidence of [a] crime, but to allow the officer to pursue his investigation without fear of violence . . . ." *Flowers*, 734 N.W.2d at 251 (citation omitted). Consequently, a *Terry* protective search "must . . . be confined in scope to an intrusion reasonably designed to discover [weapons]." *Terry*, 392 U.S. at 29; *see also Sargent*, 968 N.W.2d at 38 (explaining a *Terry* stop that is initially valid may become invalid if it exceeds its permissible scope).

Relatedly, the United States Supreme Court has also addressed when the Fourth Amendment permits an officer to seize an item discovered during a *Terry* protective search that is not a weapon. *Minnesota v. Dickerson*, 508 U.S. 366 (1993). If an "officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes [it] immediately apparent" that the object is "contraband," the officer may lawfully seize the object as part of the *Terry* protective search. *Id.* at 375. This exception to the warrant requirement, known as the plain-feel exception, also has been recognized as applying to

Article 1, section 10, of the Minnesota Constitution. *State v. Burton*, 556 N.W.2d 600, 603 (Minn. App. 1996), *rev. denied* (Minn. Feb. 26, 1997).

The phrase "immediately apparent" as used in the plain-feel exception does not require the officer to be entirely certain the object is contraband, but the officer does need probable cause to seize the object. *Dickerson*, 508 U.S. at 376; *State v. Krenik*, 774 N.W.2d 178, 185 (Minn. App. 2009), *rev. denied* (Minn. Jan. 27, 2010). Probable cause is defined as facts sufficient to "warrant a [person] of reasonable caution in the belief that certain items may be" contraband. *State v. Holland*, 865 N.W.2d 666, 671 (Minn. 2015) (quoting *Zanter*, 535 N.W.2d at 631-32) (other quotation omitted). However, if an officer has already determined that there is no weapon in an area being frisked, "the officer's continued exploration" of a person's clothing exceeds the scope of a permissible *Terry* protective search for weapons and does not fall within the plain-feel exception. *Dickerson*, 508 U.S. at 378 (affirming the Minnesota Supreme Court's decision that "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket" exceeds the scope of a lawful *Terry* protective search for weapons when the officer "already knew" the pocket contained no weapon). The legality of a warrantless frisk for weapons "depends on an objective examination of the totality of the circumstances." *State v. Lemert*, 843 N.W.2d 227, 230 (Minn. 2014).

Here, the district court concluded that "the degree and nature of Officer [A's] weapons frisk exceeded the scope of the plain feel" exception. (Quotation omitted.) In reaching this conclusion, the district court emphasized that there was conflicting evidence as to whether Officer A knew immediately that the object he felt near Dee's waistband was

contraband. The district court recognized Officer A's testimony that he "knew right away that the sack contained fentanyl pills" made "it plausible" that the plain-feel exception was met, particularly because the district court found this testimony to be credible. But the district court went on to explain that Officer A's testimony was inconsistent with the body-worn camera video. The district court noted that the video shows Officer A "sliding his fingers over the bag and then holding his hand on top of the bag for about another eight seconds as he asks [Dee], 'you got a sack down here. What's in this sack?'" The district court emphasized that the state did not explain—and the record does not explain—why Officer A was sliding his fingers over the sack if he knew immediately that it contained drugs. Given the discrepancy in the evidence and the lack of an explanation as to why Officer A ran his fingers over the sack "in a way that goes beyond a pat search," the district court determined that the state failed to meet its burden to establish the legality of the frisk. And because "the scope of the pat frisk" was unlawful, the district court suppressed all evidence obtained as a result of the frisk.

The state raises two arguments in support of its contention that the district court abused its discretion when it granted the motion to suppress. First, the state argues that the district court clearly erred when it found that Officer A "slid[] his fingers over the bag" in Dee's waistband. Next, the state argues that the district court erred as a matter of law in its analysis of the "plain-feel" exception. We address each argument in turn and conclude that neither is persuasive.

A. The state's claim of clearly erroneous fact-finding lacks merit.

The state first argues that the district court clearly erred when it found "the body-worn camera footage shows Officer [A] sliding his fingers over the bag and then holding his hand on top of the bag for about another eight seconds as he asks [Dee], 'you got a sack down here. What's in the sack?'" The state maintains that this finding is inconsistent with the recording from the officer's body-worn camera because the recording shows that the officer's hand "is just resting on top of the sack without moving or manipulating the sack."

"We give great deference to a district court's findings of fact and will not set them aside unless clearly erroneous." *State v. Andersen*, 784 N.W.2d 320, 334 (Minn. 2010). Factual findings are clearly erroneous when "there is no reasonable evidence to support the finding or when an appellate court is left with the definite and firm conviction that a mistake occurred." *Rhoads*, 813 N.W.2d at 885. If the evidence reasonably supports the district court's findings, "we will not disturb those findings." *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008).

Our review of the body-worn camera video leads us to reject the state's argument and conclude that the district court's factual finding is not clearly erroneous. The video shows the officer sliding his fingers up and down near Dee's waistband where the sack was located and then resting his hand near Dee's waistband after doing so—just as the district court found. And, while the amount of time during which the officer can be seen "resting his hand" near Dee's waistband (after sliding his fingers) is closer to four seconds than the eight seconds found by the district court, this small difference in time is not manifestly

contrary to the evidence because it is a matter of only a few seconds. In sum, the district court's factual finding regarding the officer sliding his fingers and then resting his hand has reasonable support in the evidence. *See Rhoads*, 813 N.W.2d at 885. Therefore, we conclude that the factual finding is not clearly erroneous.[1]

B. *The district court did not err as a matter of law in its analysis of the plain-feel exception.*

The state next argues that the district court erred as a matter of law when it determined that "the degree and nature of [the officer's] weapons frisk exceeded the scope of the 'plain feel' rule." The state contends that the district court erred because it did not conduct the proper legal analysis. In support of its position, the state relies on *In re G.M.*, 560 N.W.2d 687 (Minn. 1997). In *G.M.*, the Minnesota Supreme Court outlined the factors that must be met under *Dickerson* for police to lawfully seize an item under the plain-feel rule as follows: "1) police were lawfully in a position from which they viewed the object, 2) the object's incriminating character was immediately apparent, and 3) the officers had a lawful right of access to the object." *Id.* at 693. The state argues that the district court erred because it "ignored the first and third conditions entirely." This argument lacks merit.

While the district court did not expressly address the *G.M.* factors, it did make determinations on the criteria set forth in the first and second factors. With regard to the

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[1] We also note that the state's focus on the number of seconds is misplaced because the amount of time that the officer's hand rested on Dee's waistband after sliding his fingers is not relevant to whether the officer exceeded the scope of the *Terry* protective search. The critical fact for purposes of our analysis is whether the officer engaged in "sliding and otherwise manipulating the contents of the defendant's pocket." *Dickerson*, 508 U.S. at 378.

first factor, the district court in effect determined that Officer A was lawfully in a position to feel the sack near Dee's waistband when it determined that the frisk of Dee for weapons was justified. With regard to the second factor, the district court determined that the state had not met its burden to establish that the incriminating character of the sack was immediately apparent because of an "unaddressed discrepancy" between Officer A's testimony and the recording of the frisk. Thus, the district court determined that the state did not meet the second *G.M.* factor. Because the state was required to meet all three factors specified in *G.M.* for the plain-feel exception to apply, there was no need for the district court to address the third factor. *See id.* We therefore reject the state's argument that the district court erred by not addressing all three factors set forth in *G.M.*

The state also challenges the district court's legal conclusion that the state failed to meet its burden to show that the object's incriminating nature was immediately apparent (the second factor). The state contends that the district court's conclusion on the second factor is inconsistent with the district court's determination that Officer A testified credibly that he knew immediately that the sack near Dee's waistband contained illegal drugs. The state's argument is unpersuasive because it ignores the countervailing video evidence of the frisk.

Before the district court, the state had the burden to show that Officer A had probable cause to believe based on a pat search, without any manipulation, that the sack contained contraband. *Dickerson*, 508 U.S. at 378; *Krenik*, 774 N.W.2d at 185. In determining whether the state met its burden, the district court was required to consider the evidence as a whole, not solely Officer A's testimony. *Lemert*, 843 N.W.2d at 230 ("[T]he

legality of a pat search depends on an objective examination of the totality of the circumstances.").

Here, the district court did just that and properly determined that the state had not met its burden. The district court considered Officer A's testimony, which it found to be credible. The district court also considered the video evidence showing the frisk conducted by Officer A. The district court determined that the recording of the frisk showed Officer A "sliding his fingers over and then resting his hand on the area in a way that goes beyond a pat search for weapons." The district court noted that the recording shows Officer A "asking [Dee], 'what's in the sack,' suggesting that he might not have known right away." Based on its review of the evidence, the district court determined that there was a discrepancy between the officer's testimony and the video evidence. And, after weighing the evidence, the district court determined that the record was insufficient for the state to meet its burden to establish the legality of the frisk. Given the discrepancy in the evidence, we discern no error in the district court's conclusion, notwithstanding the testimony of Officer A.

The state's reliance on *Krenik* to argue otherwise misses the mark. The state contends that *Krenik* supports its view that Officer A's testimony by itself is sufficient to establish that there was probable cause to believe that the item in question was contraband and could be lawfully seized. We disagree because *Krenik* is factually distinct. In *Krenik*, we affirmed the district court's determination that the plain-feel exception was met. 774 N.W.2d at 184-86. In reaching this decision, we relied on the testimony of a police officer that she knew that an object that she felt during a frisk for weapons was "a smoking

glass tube" and recognized it as contraband from her prior experience. *Id.* at 185. But here, unlike in *Krenik*, the record contains video evidence that is inconsistent with the officer's testimony. Moreover, the state's argument that Officer A's testimony by itself is sufficient to meet the state's burden of proof ignores *Lemert*, which requires the district court to consider the totality of the circumstances. 843 N.W.2d at 230. For these reasons, we reject the state's argument that the district court erred as a matter of law when it determined that the state failed to meet its burden to show that the plain-feel exception applies.[2]

In sum, the district court did not abuse its discretion when it granted Dee's motion to suppress evidence discovered as a result of the *Terry* protective search for weapons.

Affirmed.

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[2] The state makes two other arguments that we decline to address. First, the state argues that Dee's act of resisting arrest and attempted flight purged any taint of the illegal frisk. The state did not make this argument before the district court. Generally, we do not consider issues raised for the first time on appeal unless "the interests of justice require their consideration and addressing them would not work an unfair surprise on a party." *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989). The state does not argue that the interests of justice require consideration of this issue. We therefore conclude the state has forfeited the issue.

Second, the state argues that "[t]he district court erroneously determined Officer [A] was not allowed to touch the contraband in [Dee's] waistband after determining it was immediately apparent contraband." This argument is based on a misreading of the district court's order. A close reading of the order reflects that it does not include such a determination. Instead, the district court determined that "the issue is whether Officer [A] touched the bag beyond legal limits to make [the] determination [of probable cause]." The district court then went on to analyze that issue. Because the district court did not determine that Officer A "was not allowed to touch the contraband in [Dee's] waistband after determining it was immediately apparent contraband," we decline to address the state's argument in this regard.