

DA 17-0511

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 185N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TAMMY SUE FOWLER,

Defendant and Appellant.

APPEAL FROM: District Court of the Third Judicial District,
In and For the County of Powell, Cause No. DC 16-64
Honorable Ray Dayton, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Shannon Sweeney, Sweeny Law, PLLC, Anaconda, Montana

For Appellee:

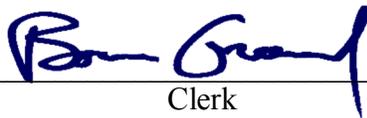
Timothy C. Fox, Montana Attorney General, Christopher D. Abbott,
Assistant Attorney General, Helena, Montana

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Submitted on Briefs: June 19, 2019

Decided: August 6, 2019

Filed:


Clerk

Justice Dirk M. Sandefur delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 On or about June 23, 2016, the Butte-Silver Bow County Sheriff's Department notified the City of Deer Lodge Police Department of a tip that an unidentified male and female companion may soon be transporting illegal drugs to or through the City of Deer Lodge in a red Chevrolet Camaro with a specified license plate number. A subsequent records check revealed that the registered owner of the vehicle was Dusty Cooper, an individual previously known to Deer Lodge police as involved in illegal drug activity. Additional checking revealed an outstanding felony warrant for Cooper's arrest.

¶3 On June 25, 2016, Deer Lodge police officer Randy Cavalea encountered the red Camaro in Deer Lodge with three occupants—an unknown male driver, an unknown female passenger in the front seat, and another male in the back. Upon circling around and relocating the vehicle after it was briefly out of sight, Cavalea recognized the male in the backseat as Cooper. Intent first on arresting Cooper pursuant to the outstanding warrant and then further investigating the drug activity tip, Cavalea stopped the Camaro on Main Street in Deer Lodge. After approaching on foot, he ordered the male in the backseat out of the car, confirmed he was Cooper, and placed him under arrest.

¶4 Also familiar with Cooper and similarly aware of the tip and related information, Montana Highway Patrol Trooper James Handy arrived at the scene and, seeing Cavalea standing outside the Camaro with Cooper, stopped to assist. After Cavalea secured Cooper in his patrol car, the officers walked up on either side of the Camaro where they separately spoke with the driver and female passenger. On the driver's side, Officer Cavalea identified the driver as Kurt Rouser who advised that they were returning from a youth wrestling camp in Townsend and were giving Cooper a ride home. Rouser identified the female passenger (Tammy Sue Fowler) to Cavalea as Tammy Fowler Pacuiran. After Rouser was unable to produce proof of registration and insurance, Cavalea left him to continue searching for those documents and walked away to communicate with his dispatcher regarding Cooper's warrant and to run driver's license and warrants checks on Rouser.

¶5 On the passenger side, Trooper Handy approached to speak with the woman and immediately observed a soft-side cooler near her in the car. When Handy asked what was in the cooler, Fowler displayed a mixed drink in her hand, answered that the cooler contained a bottle of whiskey, and opened the cooler to reveal a partially empty whiskey bottle. When Handy requested proof of identification, he observed Fowler retrieve her purse from a large handbag and begin searching for her identification. In the process, Handy observed two pink cases in the open purse—one similar to a reading glasses case. He later testified that the glasses case caught his attention based on his training and experience that people commonly conceal illegal drugs and paraphernalia in eyeglass cases. After observing Rouser unable to locate proof of registration and insurance and

Fowler unable to locate proof of identification, Handy took down Fowler's name and date of birth and walked back to confer with Officer Cavalea. After they briefly discussed the apparent no-insurance and open container violations, Handy walked back to his patrol car to run identification and warrants checks on Fowler.

¶6 In the meantime, Officer Cavalea returned to the driver's side of the Camaro, advised Rouser of the reason for Cooper's arrest, advised Fowler of the open container violation, and confirmed Rouser's inability to locate proof of vehicle insurance or registration. Rouser explained that he was driving the car in advance of buying it from Cooper and did not know where Cooper kept the proof of registration. While waiting for Trooper Handy to complete his checks on Fowler, Cavalea asked Rouser to again explain what was going on that day before the stop. After Rouser repeated his earlier account, Cavalea told him to stand by while he consulted with Handy on how to "address this issue."

¶7 At Handy's patrol car, Officer Cavalea advised that he was intent on further investigating the drug activity tip but that the stories given by Cooper and Rouser seemed to be consistent, he didn't "see any indicators," "they're not acting funny," and thus didn't believe that sufficient cause existed to search the Camaro for drugs.

¶8 At Handy's suggestion, the officers returned to the Camaro where Cavalea asked Fowler to step out of the car with her purse to speak with the officers alone. Behind the car, Handy advised Fowler they had no issue with her suspended driver's license because she wasn't driving but that she would be cited for the open container violation. As captured on Cavalea's body camera, Handy then asked, "the pink container in your purse, what's in that?" In response, Fowler removed a zippered pouch from her purse, said "dice," for "a

mean dice game,” and unzipped the pouch to reveal what Handy later described as “some dice” or other “personal property.” The following sequence then ensued:

Handy: And the other little glass case looking thing?

Fowler (looking into her purse): Oh, my glasses.

Handy: Yes, right there . . . Is that just a glass case?

Fowler (pulling out and holding up the closed case): Yeah, that’s just my glass case.

Handy: What’s in that? Can you show us? Is there anything in there?

Fowler (setting the closed case on trunk lid): Yeah, it’s paraphernalia.

Handy: Paraphernalia?

Fowler: Yeah, mm-hum, it’s mine.

Handy: What is it, why don’t you just pull it out?

Fowler (picking up the closed case and gripping it to open it): It’s a pipe.

Handy: Like a marijuana pipe, or—?

Fowler (still in the process of opening the case): Yes—no.

Handy: Is it a meth pipe?

Fowler (opening the case and removing and setting down a pipe): Mm, hmm.

Fowler later again admitted that the pipe was a meth pipe but denied possessing any methamphetamine. After further questioning, Cavalea placed Fowler under arrest.

¶9 Based on the body camera recording counter, seventeen minutes and 10 seconds elapsed from time of the initial stop until Fowler opened the glasses case to acknowledge and display the meth pipe. Only twelve minutes and forty seconds elapsed from the time

Officer Cavalea returned to the Camaro after securing Cooper's arrest and the time that Fowler acknowledged and displayed the meth pipe. Eleven minutes and thirty seconds elapsed from the time that Cavalea first returned to the Camaro after Cooper's arrest and the time that he asked Fowler to exit the vehicle to speak with them alone.

¶10 Upon subsequent booking at the Powell County jail, an officer discovered a small Ziploc bag containing a white substance in Fowler's clothes. A preliminary field test kit indicated the substance as methamphetamine. The State ultimately charged Fowler with felony possession of dangerous drugs and misdemeanor possession of drug paraphernalia.

¶11 On the asserted ground that the officers lacked sufficient particularized suspicion to prolong the traffic stop by asking her to step out of the car for further questioning about the suspected drug activity, Fowler moved for suppression of her incriminating statements and the resulting seizures of the pipe and methamphetamine. Based on Cavalea's body camera recording and the unrebutted hearing testimony of Trooper Handy and Officer Cavalea, the District Court denied the motion.

¶12 Pursuant to a plea agreement reserving her right to appeal the suppression motion ruling, Fowler later pled guilty to felony possession of dangerous drugs in return for the State's non-binding recommendation for 2-year deferred imposition of sentence. The District Court subsequently sentenced her in accordance with the plea agreement. Fowler timely appeals.

¶13 The Fourth and Fourteenth Amendments to the United States Constitution and Article II, Section 11 of the Montana Constitution guarantee the right to be free from unreasonable government searches and seizures. The temporary traffic stop and

investigatory detention of Fowler prior to formal arrest was a warrantless constitutional seizure. *City of Missoula v. Kroschel*, 2018 MT 142, ¶ 10, 391 Mont. 457, 419 P.3d 1208 (seizure occurs when an officer “‘in some way’ restrains a person’s liberty by . . . show of authority that . . . would cause an objectively reasonable person to believe that the person is not free to leave”).

¶14 Except under certain recognized exceptions, warrantless searches and seizures are *per se* unreasonable. *Kroschel*, ¶ 10. Temporary investigative stops are a recognized exception to the warrant requirements of the United States and Montana Constitutions. *Kroschel*, ¶ 11. “[A] law enforcement officer may briefly stop and detain a person for investigative purposes without a warrant or probable cause for an arrest if, based on *specific and articulable facts known to the officer*, including rational inferences therefrom based on the officer’s training and experience, the officer has an objectively reasonable, particularized suspicion that the person is engaged, or about to engage, in criminal activity.” *Kroschel*, ¶ 11 (internal citations omitted). Upon a valid investigative stop, officers may, *inter alia*, request a person’s name, address, and an explanation of the person’s conduct or circumstances in regard to the particularized suspicion for the initial stop or continuation thereof. *Kroschel*, ¶¶ 13, 15 (citing § 46-5-401(2)(a), MCA). *See also Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 185, 124 S. Ct. 2451, 2457 (2004) (“[a]sking questions is an essential part of police investigations”). Whether and to what extent an officer had a “particularized suspicion of criminal activity is a question of fact under the totality of circumstances.” *Kroschel*, ¶ 11 (internal citations omitted); *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981).

¶15 Here, based on an informant tip relayed from the Butte-Silver Bow County Sheriff's Department, Officer Cavalea was on the lookout for a red Camaro, registered to Dusty Cooper, traveling through Deer Lodge with two unidentified male and female occupants reported to be transporting or otherwise in possession of illegal drugs. Cavalea knew Cooper and that he was the subject of an active felony arrest warrant. Upon encountering the Camaro traveling through Deer Lodge with unknown male and female occupants as described in the tip, Cavalea also saw another man he recognized as Cooper in the backseat. Officer Cavalea thus had sufficient particularized suspicion to stop the vehicle to confirm his identification of Cooper and execute on the active arrest warrant.

¶16 Officer Cavalea and Trooper Handy were both independently aware of the particulars of the suspected drug activity tip regarding Cooper's red Camaro and the predicted male and female occupants later identified as Rouser and Fowler. The record reflects that both were further acutely aware that the circumstances of their encounter with the Camaro and its occupants largely corroborated the particulars of the tip, thereby furthering the officers' suspicion that the occupants were transporting or otherwise in possession of illegal drugs.

¶17 Fowler does not challenge the initial stop or continuation of the stop after Cooper's arrest to allow the officers to identify Rouser and Fowler and run identity and warrants checks. However, she asserts that the justification for continuing the stop was gone after they confirmed her identity and the lack of outstanding wants or warrants without developing any additional particularized information sufficient to further prolong the stop and question her about the contents of the pink eyeglass case in her purse.

¶18 “Upon making a valid investigative stop, law enforcement officers must act with reasonable diligence to quickly confirm or dispel the predicate suspicion for the stop.” *Kroschel*, ¶ 13 (citing *United States v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568, 1575 (1985)). “The duration and scope of an investigative stop must be carefully limited to its underlying justification.” *Kroschel*, ¶ 13 (internal citation and punctuation omitted). “[T]he duration and scope of a stop may not exceed what is reasonably necessary to confirm or dispel the predicate suspicion for the stop.” *Kroschel*, ¶ 13 (internal citations omitted). However, “[b]ased on additional information developed during the initial lawful duration and scope of an initial investigative stop,” officers “may develop new or broader particularized suspicion of criminal activity justifying expansion of the scope or duration of the stop beyond that justified by the officer’s initial observations.” *Kroschel*, ¶ 19 (internal citations omitted). “[A]ssessment of the reasonableness of the duration and scope of an investigative stop must recognize that the State’s compelling interest in effective law enforcement demands that officers in the field have reasonable latitude to reach, follow up on, and confirm or dispel initial suspicions of criminal activity.” *Kroschel*, ¶ 13 (quoting *State v. Sharp*, 217 Mont. 40, 47, 702 P.2d 959, 963 (1985) (internal punctuation omitted).

¶19 Fowler correctly points out that after Trooper Handy confirmed her identity and the lack of outstanding wants or warrants, the officers failed to develop any *new* information furthering their initial suspicion of drug activity. We further agree that Handy’s observation of the eyeglass case in Fowler’s purse, and his knowledge that people commonly conceal illegal drugs and paraphernalia in eyeglass cases, was insufficient alone to support anything more than a generalized suspicion that Fowler’s case actually contained

such items in this case. We thus agree that Handy's generalized suspicion regarding Fowler's eyeglass case would have been inadequate to ripen an otherwise insufficient suspicion of drug activity into a particularized suspicion had such suspicion not already existed. However, independent of Trooper Handy's generalized suspicion, the officers already had particularized suspicion of illegal drug possession to investigate further after Cooper's arrest based on the unchallenged initial informant tip¹, their knowledge regarding Cooper's prior involvement in illegal drug activity, and the observed circumstances of the encounter corroborative of the tip (i.e., red Camaro registered to Cooper timely traveling through Deer Lodge with an unidentified male driver, female passenger, and Cooper). With or without Handy's general suspicion regarding eyeglass cases, we hold that the District Court correctly concluded that the officers had sufficient particularized suspicion under the totality of the circumstances of record to continue to detain the occupants of the Camaro after Cooper's arrest to investigate whether illegal drugs were present in the vehicle and, within that scope, inquire about the contents of the eyeglass case observed in Fowler's purse.²

¶20 Based on the relatively brief 12-minute extension of the stop after securing Cooper's arrest, the continuing existence of the officers' particularized suspicion of illegal drug

¹ Fowler does not challenge the threshold veracity or reliability of the initial informant tip. *See State v. Pratt*, 286 Mont. 156, 161-68, 951 P.2d 37, 40-44 (1997) (discussing relevant considerations in assessment of threshold reliability of informant information as an element of particularized suspicion—citing *Ala. v. White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 2416 (1990)).

² The acknowledged fact that, before speaking with Fowler alone, the officers did not have legal justification to search the vehicle under the higher probable cause standard does not vitiate or diminish their continuing initial suspicion under the lesser particularized suspicion standard.

activity, and the nature of the officers' questioning, we hold that, as to Fowler, the scope and duration of the stop did not exceed what was reasonably necessary to confirm or dispel the predicate particularized suspicion for prolonging the stop after Cooper's arrest. Therefore, we affirm.

¶21 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶22 Affirmed.

/S/ DIRK M. SANDEFUR

We concur:

/S/ JAMES JEREMIAH SHEA

/S/ INGRID GUSTAFSON

/S/ BETH BAKER

/S/ JIM RICE