STATE OF MINNESOTA
IN COURT OF APPEALS
A11-257

State of Minnesota,
Respondent,

vs.

Daniel Steven Orttel,
Appellant.

Filed December 5, 2011
Affirmed
Schellhas, Judge

Anoka County District Court
File No. 02-CR-09-8493

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Anthony C. Palumbo, Anoka County Attorney, Kathryn M. Timm, Assistant County Attorney, Anoka, Minnesota (for respondent)

Charles L. Hawkins, Minneapolis, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges the district court's order denying his motions to suppress evidence obtained from a search of his home. Appellant argues that (1) the judge who issued the search warrant did not have a substantial basis for concluding that probable

cause existed, (2) the officer who applied for the search warrant intentionally or recklessly made misrepresentations that are material to establishing probable cause, and (3) the state failed to present sufficient evidence at the suppression hearing to meet its burden of proof. We affirm.

FACTS

On April 16, 2009, Detective Patrick Nelson of the Anoka County Sheriff's Office submitted an application for a search warrant for an Andover home with a supporting affidavit to the district court. In the supporting affidavit, Detective Nelson stated that on April 5, T.T., J.A., C.P., and a female known as "Stich" drove to a residence in Andover, Minnesota. When they arrived, J.A. and C.P. went inside the home, and T.T. and Stich stayed in the vehicle.

T.T. told a responding officer that while he was sitting in the vehicle, A.A. exited the home and attempted to break the vehicle's windows. At first, T.T. confronted A.A., but then he ran down the road because he believed that A.A. intended to assault him. After he ran, he called the police.

When police arrived, J.A., C.P., and the vehicle were gone, but T.T. was at the scene. An officer spoke on the phone with a male who identified himself as C.P., but T.T. said he could hear the voice and that it was not C.P. The male refused to return to the scene to provide a statement to police.

Detective Nelson interviewed J.A. and C.P. by telephone ten days later. J.A. said that he did not know any of the people inside the home, that he saw a male leave the home and return, and that he heard the male say that he broke all of the windows on

somebody's car. Another male hit J.A. in the head with a "wood instrument," and a third male grabbed a firearm, loaded it with bullets, and stated, "Don't make me shoot no one for no reason." J.A. was able to get around a fourth male, who was blocking the door, and run to the vehicle, which was "stuck in a ditch after hitting some mailboxes."

C.P. told Detective Nelson that he entered the home of his friend, C.H., with J.A. "and right away felt something strange was going to happen." C.P. saw a male enter the home and heard him state that he broke all of the windows on somebody's car. C.H. then grabbed a handgun, loaded it, pointed it at C.P., and C.P. ran out of the home.

Detective Nelson stated in his affidavit that he confirmed that C.H. lived at the Andover home with his father, appellant Daniel Orttel. Detective Nelson also stated that C.H. has a history of assault, disorderly conduct with police, receiving stolen property, criminal defamation, and harassment. Detective Nelson requested a nighttime, unannounced search warrant for the residence to search for firearms and ammunition, a "[w]ood instrument similar to a bat but shaped like a bowling pin," and any items showing constructive possession of the described items. The district court issued a nighttime, unannounced search warrant for the home.

Officers searched the home and found potentially explosive devices inside a gun safe in Orttel's room. The Minneapolis Bomb Squad identified the devices as "'blasting cap' detonating devices." Detectives were unable to locate any permits or licenses authorizing Orttel to possess these devices. Respondent State of Minnesota therefore charged Orttel with unlawful possession of explosives in violation of Minn. Stat. § 299F.80, subd. 1 (2008).

Orttel moved the district court for a *Franks* hearing, arguing that Detective Nelson's application for the search warrant contained "intentional or reckless misrepresentations of fact or omissions of fact material to a finding of probable cause." *See Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978). To support his motion, Orttel submitted three affidavits from people who were at the home on April 5, including A.A. Orttel also moved to suppress evidence seized based on alleged violations of his constitutional rights.

On May 7, 2010, the district court heard both of Orttel's motions. Defense counsel suggested that Orttel was challenging two search warrants, stating:

> We are moving to suppress the first search warrant based upon the fact that it was based on stale information.
>
> We are challenging the search warrant because it's based upon . . . knowing or reckless misrepresentations.
>
> We are challenging the validity of the execution of the search warrant, that the search went beyond the scope of the warrant that was signed. That it was a general warrant in nature based upon the items defined to be searched for and seized and the grounds that were alleged for that seizure.
>
> We are challenging the knock and announce and night time search provisions as being inappropriately issued.
>
> We are challenging the validity of the second warrant based upon the illegality of the first warrant and being fruits thereof.
>
> We are challenging the probable cause to support the charges of the possession of the blasting caps.

Defense counsel also noted a pending civil forfeiture action regarding cashier's checks that were seized at the home and requested that the issue of probable cause be left open until he could investigate the matter further. The district court granted his request.

As to Orttel's motions, Detective Nelson testified that when the responding officer telephoned C.P. on the night of April 5, the person who claimed to be C.P. did not mention anything about a gun, terroristic threats, or assaultive behavior. When Detective Nelson later telephoned the same number, he spoke with C.P. and J.A., whom he identified over the phone by name, birthdate, and address. Detective Nelson explained that C.P. and J.A. were together when he spoke with them by telephone.

Neither party introduced the search warrant, application, or supporting affidavit into evidence at the hearing. At the end of the hearing, the district court stated that it had one search warrant in the file, not two. The state noted that it only had one search warrant in its file as well and requested to speak with Detective Nelson. The court stated, "Sounds like the parties aren't on the same accord of what they want me to consider. Anything else you want to talk about today?" Defense counsel noted that the court had closed the record. The hearing transcript does not reveal that the issue of whether one or two search warrants existed was resolved.

Defense counsel requested time to submit a written argument, and the court granted the request. The court gave defense counsel until May 21 to submit written argument and the state until May 28. Sometime *after* May 28, defense counsel requested permission to submit his written argument late but then indicated that he would submit a memorandum late without receiving the court's permission or the consent of the

prosecutor. On June 25, when defense counsel still had not submitted his memorandum, the court issued its order.[1]

The district court denied Orttel's suppression motions. The court found as to the *Franks* issue that Orttel failed to make a substantial preliminary showing of deliberate falsehood or disregard for the truth by Detective Nelson and that a *Franks* hearing therefore was not warranted. But because "the State did not object to the defense showing," the "hearing went forward" and the court addressed the issue on the merits. The court concluded that the information excluded from the warrant (that Detective Nelson's communications with J.A. and C.P. were by telephone, not in person, and that J.A. and C.P. were together at the time) "may have been marginally relevant for the signing judge's probable cause determination," but Detective Nelson's exclusion "does not rise to the level of reckless disregard for the truth, and it is certainly a far cry from deliberate falsehood." The court concluded that Orttel failed to show "by a preponderance of the evidence that any part of Detective Nelson's affidavit should be set to one side, thus the warrant was proper as presented to the signing judge." The court found as to Orttel's alleged constitutional violations that an unannounced, nighttime search was justified, and concluded that the search was executed within the scope of the warrant.

[1] In its order, the district court addressed the issue of probable cause for the search warrant that was contained in the court's file, and the court assumed that the documents contained in the court file pertain to the first warrant. The district court file contains a signed search warrant, application, and supporting affidavit. Orttel included unsigned copies of these documents in the appendix to his brief submitted in this appeal. The record indicates that the police seized the blasting caps pursuant to this warrant.

The state amended the charge to illegal possession of explosives for a legitimate purpose in violation of Minn. Stat. § 299F.80, subd. 2 (2008). Orttel waived his right to a jury trial, and the parties submitted the case to the court on stipulated facts to preserve evidentiary issues for appeal in accordance with Minn. R. Crim. P. 26.01, subd. 4, and *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). The district court convicted Orttel of the amended charge, imposed a 90-day stayed sentence and a $50 fine, and placed Orttel on unsupervised probation for one year.

This appeal follows.

D E C I S I O N

Admonition to Counsel

Before addressing the parties' arguments on appeal, we take this opportunity to express our concern about the carelessness with which counsel for the parties approached the suppression hearing in district court and the appeal in this court.

First, each party failed to introduce into evidence at the suppression hearing the search warrant, application and supporting affidavit. This left the district court in the position of having to assume that the documents in the court file constituted the search warrant, application, and supporting affidavit challenged by Orttel. Second, defense counsel failed to timely submit his written argument in support of suppression until more than one month after the due date and three days after the court issued its order denying Orttel's motions. Third, both parties included in the appendices to their briefs copies of an unsigned search-warrant application and an unsigned search warrant, despite the fact that the district court file contains the signed originals of these documents. Fourth,

appellate counsel represented in his statement of the case that a transcript had already been delivered to the parties and filed with the district court administrator when no transcript had been filed with the district court administrator. Indeed, this court did not receive a transcript until more than one week after oral arguments in this case. We caution counsel to adhere to a higher standard of practice—the creation of a clear and complete record in and for the district court and one upon which this court can conduct its proper review. No party should leave the record in such a state that a district court or this court must engage in guesswork or assumptions. We remind counsel that an incomplete record may result in this court's inability to conduct a proper review and may result in dismissal of the appeal.

Arguments on Appeal

Orttel argues that (1) the judge who issued the search warrant did not have a substantial basis for concluding that probable cause existed, (2) the officer who applied for the search warrant intentionally or recklessly made misrepresentations that are material to establishing probable cause, and (3) the state failed to present sufficient evidence at the suppression hearing to meet its burden of proof.

As noted above, the district court addressed both the suppression issue and the *Franks* issue. "When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We accept the district court's underlying factual determinations unless they are clearly erroneous. *State v. Lemieux*, 726 N.W.2d 783, 787

(Minn. 2007). "Findings of fact are not clearly erroneous if there is reasonable evidence to support them." *State v. Colvin*, 645 N.W.2d 449, 453 (Minn. 2002).

Probable Cause for Search Warrant

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The Fourth Amendment requires that a search warrant contain a description of the place to be searched and the person or things to be seized. U.S. Const. amend. IV. Evidence obtained during an unlawful search or seizure is inadmissible to support a conviction, unless an exception to this exclusionary rule applies. *James v. Illinois*, 493 U.S. 307, 311, 110 S. Ct. 648, 651 (1990) (stating that Supreme Court has carved out exceptions to exclusionary rule); *Harris*, 590 N.W.2d at 97 (stating that evidence obtained after unlawful seizure must be suppressed); *State v. Olson*, 634 N.W.2d 224, 229 (Minn. App. 2001) (citing *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417 (1963)) (stating that fruit of illegal conduct is inadmissible), *review denied* (Minn. Dec. 11, 2001).

Orttel argues that the search warrant was invalid because it was not supported by probable cause. "When reviewing a district court's decision to issue a search warrant, our only consideration is whether the judge issuing the warrant had a substantial basis for concluding that probable cause existed." *State v. Jenkins*, 782 N.W.2d 211, 222–23 (Minn. 2010) (quotation omitted), *cert. denied sub nom. Jenkins v. Minnesota*, 131 S. Ct. 1533 (2011). "We review the district court's factual findings for clear error and [its] legal determinations de novo." *Id.* at 223. "We give the district court's factual determinations great deference." *Id.* "In doing so, we are to consider the totality of the circumstances and

must be careful not to review each component of the affidavit in isolation." *Id.* (quotation omitted).

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). "Elements bearing on this probability determination include information establishing a nexus between the crime, objects to be seized and the place to be searched." *Id.* Furthermore, "the resolution of doubtful or marginal cases should be largely determined by the preference to be accorded warrants." *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985) (quotation omitted).

Detective Nelson's supporting affidavit provided the names and birthdates of T.T., J.A., and C.P., three of the four individuals who visited the Andover home on April 5, 2009. When Detective Nelson called J.A. and C.P. on April 15, they corroborated T.T.'s statement that a man, A.A., attempted to break the windows of the vehicle. Both J.A. and C.P. related that someone entered the home and claimed that he had just broken all the windows on somebody's car. And J.A. told Detective Nelson that one of the males inside the home hit him in the temple area of his head with a wood instrument and another male grabbed a firearm, loaded it, and said, "Don't make me shoot no one for no reason." C.P. told Detective Nelson that C.H. loaded a handgun and pointed it at him. Through

independent investigation, Detective Nelson confirmed that C.H. resided at the Andover home with Orttel.

Orttel does not challenge the witnesses' basis of knowledge; Orttel challenges the reliability of the witnesses. Orttel did not raise this issue below. Generally, an appellate court will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Orttel did not argue this issue at the suppression hearing; he argued the issue in his post-hearing memorandum submitted to the district court after the submission deadline. The issue is therefore waived. And even if it were not waived, the argument fails on the merits. "[S]tatements from citizen witnesses . . . may be presumed to be credible." *State v. Harris*, 589 N.W.2d 782, 789 (Minn. 1999). And a tip from a private citizen informant is presumed reliable. *Marben v. State, Dep't of Pub. Safety*, 294 N.W.2d 697, 699 (Minn. 1980). "This is particularly the case when informants give information about their identity so that the police can locate them if necessary." *State v. Davis*, 732 N.W.2d 173, 183 (Minn. 2007). An informant's reliability may also be demonstrated by sufficient police corroboration of the information supplied. *State v. Wiberg*, 296 N.W.2d 388, 396 (Minn. 1980). "[T]here is no mandate that every fact . . . be corroborated, that a certain number of facts be corroborated, or that certain types of facts must be corroborated." *State v. Holiday*, 749 N.W.2d 833, 841 (Minn. App. 2008). "[C]orroboration of [even] minor details lends credence to an informant's tip and is relevant to the probable-cause determination." *Id.* The affidavit provided J.A. and C.P.'s names; birthdates; and the make, model, and license plate number of C.P.'s car,

indicating reliability because J.A. and C.P. could be held responsible for providing false information. And Detective Nelson corroborated that C.H. resided at the residence.

Orttel argues that the "search warrant application in this case fails to establish the required fair probability that the weapon would be found in the home." Orttel did not raise this issue below. Generally, an appellate court will not consider matters not argued to and considered by the district court. *Roby*, 547 N.W.2d at 357. Orttel did not argue this issue at the suppression hearing; he argued the issue in his post-hearing memorandum submitted to the district court after the submission deadline. The issue is therefore waived. And even if it were not waived, the argument fails on the merits. Both J.A. and C.P. told Detective Nelson that a male inside the home grabbed and loaded a firearm. C.P. specifically identified the male as C.H., who resided in the home. And J.A. stated that another male inside the home assaulted him with a wooden instrument. The affidavit provided a sufficient nexus between the firearm and wooden instrument and the home.

Orttel argues that the search warrant lacked probable cause because the information in the application was stale. Orttel made this argument to the district court, and although the court did not explicitly address staleness in its order, we conclude that the court implicitly rejected Orttel's staleness argument.

"Appellate courts have refused to set arbitrary time limits in obtaining a warrant or to substitute a rigid formula for the judge's informed decision." *State v. Jannetta*, 355 N.W.2d 189, 193 (Minn. App. 1984), *review denied* (Minn. Jan. 14, 1985). Instead, the approach is one of flexibility and common sense, determined by the circumstances of each case. *Id.* To avoid staleness, "proof must be of facts so closely related to the time of

the issue of the warrant as to justify a finding of probable cause at that time." *State v. Souto*, 578 N.W.2d 744, 750 (Minn. 1998) (quoting *Sgro v. United States*, 287 U.S. 206, 210, 53 S. Ct. 138, 140 (1932)). "Factors relating to staleness include whether there is any indication of ongoing criminal activity, whether the articles sought are innocuous or incriminating, whether the property sought is easily disposable or transferable, and whether the items sought are of enduring utility." *Id.* "Probable cause has been held not stale even after the passage of several months where the items sought are of enduring utility to their taker." *State v. DeWald*, 463 N.W.2d 741, 746 (Minn. 1990) (quoting *State v. Flom*, 285 N.W.2d 476, 477 (Minn. 1979)) (quotation marks omitted).

Detective Nelson applied for and received a search warrant for the home 11 days after the incident at the home. Although the warrant application does not indicate any ongoing criminal activity and the items sought seem to be easily disposable, a wooden instrument shaped like a bat or bowling pin and a firearm seem innocuous and likely have enduring utility to the owner. *See id.* at 747 (concluding that knives similar to one used during a crime and a blunt instrument may be innocuous). We conclude that given the short timeframe and the nature of the items, the information pertaining to the items sought was not stale.

Based on the totality of the circumstances, including the basis of knowledge and reliability of the informing witnesses, the issuing judge had a substantial basis for concluding that probable cause existed.

Alleged Misrepresentations in Application for Search Warrant

In reviewing an alleged *Franks* search-warrant-application deficiency, an appellate court reviews the district court's findings to determine whether the application contained a statement or omission that was false or in reckless disregard of the truth for clear error. *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010). An appellate court reviews de novo "whether the alleged misrepresentations or omissions were material to the probable cause determination." *Id.*

"Although a presumption of validity attaches to a search-warrant affidavit, this presumption is overcome when the affidavit is shown to be the product of deliberate falsehood or reckless disregard for the truth." *State v. McGrath*, 706 N.W.2d 532, 540 (Minn. App. 2005) (citing *Franks*, 438 U.S. at 171, 98 S. Ct. at 2684), *review denied* (Minn. Feb. 22, 2006). "A search warrant is void, and the fruits of the search must be excluded, if the application includes intentional or reckless misrepresentations of fact material to the findings of probable cause." *State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989).

"A misrepresentation is 'material' if when set aside" probable cause no longer exists to support the warrant. *Id.* But even a material misrepresentation must be deliberate or reckless before a warrant will be invalidated; "innocent or negligent misrepresentations will not invalidate a warrant." *Id.* When determining whether an affiant knowingly, or with reckless disregard for the truth, included false representations in an affidavit, courts apply a preponderance-of-the-evidence standard. *McGrath*, 706 N.W.2d at 540 (citing *Franks*, 438 U.S. at 156, 98 S. Ct. at 2676). If the district court

determines that the affiant deliberately falsified or recklessly disregarded the truth in his affidavit, the court should set aside the false statements, supply any omissions, and then determine whether the affidavit still establishes probable cause. *State v. Doyle*, 336 N.W.2d 247, 250 (Minn. 1983) (citing *Franks*, 438 U.S. at 155–56, 98 S. Ct. at 2676).

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

Franks, 438 U.S. at 171–72, 98 S. Ct. at 2684.

In a *Franks* hearing, the defendant has the burden of showing by a preponderance of the evidence that the affiant knowingly or recklessly included a false statement in the affidavit. *See McGrath*, 706 N.W.2d at 540. The state argues that Orttel failed to meet his burden of proof—showing that the affiant knowingly or recklessly included a false statement in the affidavit because he failed to introduce the warrant and application into evidence at the hearing.

The district court concluded that Orttel failed to meet the threshold showing required for a *Franks* hearing. In support of Orttel's motion for a *Franks* hearing, he submitted three affidavits from individuals who were at the home on April 5. The three individuals provided a different version of the events, essentially challenging the credibility of the witnesses that Detective Nelson spoke with. But the affidavits did not challenge Detective Nelson's credibility. Orttel failed to make any specific allegations of deliberate falsehood or reckless disregard for the truth by Detective Nelson. The district court did not err by concluding that a *Franks* hearing was not warranted.

But the district court noted in its order that "the State did not object to the defense showing and the hearing went forward." The district court then denied Orttel's motion on the merits. At the hearing, Detective Nelson testified that when the responding officer called C.P. on the night of April 5, the person claiming to be C.P. did not mention anything about a gun, terroristic threats, or assaultive behavior. Detective Nelson subsequently called C.P. at the same number and spoke with C.P. and J.A. whom he identified by name, birthdate, and address. Detective Nelson also testified that when he spoke with C.P. and J.A. by phone, they were together.

The district court found that "[a]lthough some of this information may have been marginally relevant for the signing judge's probable cause determination, Detective Nelson's exclusion of any of this information does not rise to the level of reckless disregard for the truth, and it is certainly a far cry from deliberate falsehood." The fact that the person contacted by the responding officer claiming to be C.P. did not mention anything about a gun, terroristic threats, or assaultive behavior is insignificant because

T.T. heard the voice and informed the officer that the person was not C.P. And, as the district court noted, the fact that C.P. and J.A. were in the same location and provided statements by telephone is not "fatal to their credibility." Further, Detective Nelson confirmed that he was talking to C.P. and J.A. by comparing their name, birthdate, and address to his records. The district court's finding that Orttel failed to prove by a preponderance of the evidence that Detective Nelson intentionally misrepresented facts or recklessly disregarded the truth is not clearly erroneous.

Sufficiency of Evidence to Satisfy State's Burden of Proof

When a defendant contests the admissibility of evidence on federal constitutional grounds, "a pretrial fact hearing on the admissibility of the evidence will be held" and the district court will rule on the admissibility of evidence "[u]pon the record of the evidence elicited at the time of such hearing." *State ex. rel. Rasmussen v. Tahash*, 272 Minn. 539, 554, 141 N.W.2d 3, 13 (1966). "It will be the *obligation of the state to proceed first* . . . identifying the evidence which will be offered against the defendant and showing that the circumstances under which it was obtained were consistent with constitutional requirements." *Id.*, 141 N.W.2d at 13–14 (emphasis added).

Orttel argues that the state failed to meet its burden of proof—that the seizure of evidence under the search warrant did not violate his constitutional rights—because it failed to introduce the warrant and application into evidence at the hearing. But the district court had the signed search warrant, application, and supporting affidavit in its file. We have reviewed the search warrant; the warrant application; the supporting affidavit; the transcript of the hearing in which the state and Detective Nelson referenced

a specific provision in the search warrant; the district court's order in which it is clear that the court relied on the search warrant and application; and both parties' arguments, which clearly refer to the search warrant and application. We conclude that the district court did not err in determining that the state satisfied its burden of proof—that the seizure of evidence under the search warrant did not violate Orttel's constitutional rights.

Affirmed.