STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1303

State of Minnesota,
Respondent,

vs.

Harvey Joseph St. John,
Appellant.

Filed June 3, 2013
Affirmed
Schellhas, Judge

Mille Lacs County District Court
File No. 48-CR-10-2689

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

Janice S. Jude, Mille Lacs County Attorney, Daniel N. Rehlander, Assistant County Attorney, Milaca, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and Worke, Judge.

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

SCHELLHAS, Judge

Appellant challenges his convictions, arguing that the district court erred by denying his motion to suppress the controlled substance and drug paraphernalia found on his person. We affirm.

FACTS

On December 2, 2010, Sergeant Charles Strack of the Little Falls Police Department, who also was an investigator with the Central Minnesota Drug and Gang Task Force, applied for a search warrant in Mille Lacs County District Court. The search-warrant application requested permission to conduct a no-knock search of room 432 at a hotel in Mille Lacs County and of appellant Harvey St. John and his girlfriend, R.M., for "[c]ontrolled [s]ubstances including marijuana, methamphetamine, cocaine, and heroin" and "[e]quipment, paraphernalia and other items used for ingesting or selling controlled substances," among other things. Also on December 2, Sergeant Strack sought another search warrant to search E.S. and room 750 in the same hotel for drugs and drug paraphernalia, among other things.

In the search-warrant-application affidavit pertaining to room 432, St. John, and R.M. (subject search warrant), Sergeant Strack stated that the police knew that E.S. was "active in the use and or sale of controlled substances included but not limited to methamphetamine and prescription narcotics," that E.S. "has [i]n his possession a handgun during these controlled substance transactions," and that E.S. had been involved in a police-officer shooting in 2002. Sergeant Strack also stated that he and Special Agent

Patrick Broberg met with hotel security personnel, who had video footage of E.S. entering and leaving room 750; that he and Special Agent Broberg learned that E.S. was meeting frequently with subjects who were known to Special Agent Broberg to be active in the use and sale of controlled substances; that the subjects had been identified by hotel security and had rented room 432; and that Sergeant Strack monitored E.S. entering and leaving room 432 several times on December 2. Sergeant Strack further stated that, at approximately 4:22 p.m., he brought his United States Police Canine Association certified K9, Ellie, to the hotel to perform an open-air sniff of the hallway on the seventh floor of the hotel outside rooms 750, 751, and 752 and that K9 Ellie alerted to the bottom of the door of room number 750. At approximately 4:41 p.m., K9 Ellie conducted an open-air sniff of the hallway on the fourth floor of the hotel outside rooms 430, 431, and 432, where K9 Ellie alerted to the bottom of the door of room 432.

Sergeant Strack also stated in the search-warrant-application affidavit that Special Agent Broberg told him that St. John, R.M., and R.S., a person staying at the hotel whom E.S. had been seen visiting, are known controlled-substance "user[s]/dealers" in the Mille Lacs County area. Special Agent Broberg told Sergeant Strack that the North Central Drug Task Force has worked narcotics investigations on St. John, R.S., and R.M. in the past. Sergeant Strack also stated that Investigator Michael Dieter of the Mille Lacs Tribal Police Department had observed a hand-to-hand transaction between R.S. and E.S. and that Sergeant Strack knew through his training and experience that hand-to-hand transactions are consistent with the sale of controlled substance and the exchange of United States Currency.

The district court issued both search warrants for which Sergeant Strack applied, and, on the evening of December 2, Sergeant Strack and a team of police officers and drug investigators executed the search warrants. The police found Schedule-IV controlled-narcotics pills and methamphetamines in room 750 but did not find anything listed in the search warrant or other evidence of illegal activity in room 432. Participating Special Agent John Wersal located St. John in the hotel parking lot, and the police detained him there. At that location, Sergeant Jeff Schafer of the Mille Lacs Tribal Police Department performed a "safety search" of St. John and discovered a glass pipe. St. John admitted that the glass pipe was used to smoke methamphetamines but claimed that the pipe belonged to somebody else. The pipe field-tested positive for methamphetamine.

Respondent State of Minnesota charged St. John with fifth-degree possession of a controlled substance under Minn. Stat. § 152.025, subd. 2(a)(1) (2010), and possession of prohibited drug paraphernalia under Minn. Stat. § 152.092 (2010). St. John moved to suppress the evidence, conceding that the search warrant was valid as to a search of room 432 but arguing its invalidity as to him on the basis that no sufficient nexus existed between the purported illegal activity and his person. The district court denied St. John's motion to suppress; St. John proceeded with a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 4; and the district court found him guilty of both charges.

This appeal follows.

D E C I S I O N

The district court found that probable cause supported the subject search warrant because the individuals in rooms 432 and 750 were known drug users, police observed

considerable activity between the two hotel rooms, police witnessed what they believed was a drug transaction that involved an occupant from each room, and police corroborated the presence of drugs through a successful dog sniff. The court did not differentiate between probable cause to search room 432 and the persons of St. John and R.M. St. John argues only that the search-warrant application and affidavit lacked probable cause for the search of his person. If the application for the search warrant is not supported by probable cause, the "evidence seized during the search" is "unlawfully obtained and must be suppressed." *State v. Carter*, 697 N.W.2d 199, 212 (Minn. 2005).

"When reviewing a district court's decision to issue a search warrant, [an appellate court's] 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). Appellate courts "review the district court's factual findings for clear error and the district court's legal determinations de novo." *Id.* at 223. This court gives great deference to the district court's factual determinations and must "consider the totality of the circumstances and must be careful not to review each component of the affidavit in isolation." *Id.* (quotation omitted). "Doubtful or marginal cases should be largely determined by the deference to be accorded to warrants." *State v. Miller*, 666 N.W.2d 703, 712 (Minn. 2003) (quotation omitted).

The issuing judge's task is 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.'"

Jenkins, 782 N.W.2d at 223 (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.*

St. John contends that (1) the affidavit supporting the search warrant did not establish a nexus between E.S. and him, (2) the alleged drug transaction that police observed did not involve him and therefore did not provide probable cause to search him, and (3) the narcotics-detection dog sniff was invalid because it was not supported by reasonable suspicion.

Nexus between E.S. and St. John

The district court found that the supporting affidavit established the existence of "considerable contact between the people in room 750 and those in room 432, the room where defendant was staying." St. John argues that, because the affidavit did not explicitly state that St. John was staying in room 432, or that St. John had met with E.S., the affidavit does not establish a nexus between St. John and room 432, or a nexus between St. John and E.S. We disagree.

When interpreting an affidavit supporting a search warrant, "courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than commonsense, manner," *State v. Bagley*, 286 Minn. 180, 192, 175 N.W.2d 448, 456 (1970) (quotation omitted), and must "consider the totality of the circumstances and must be careful not to review each component of the affidavit in isolation," *Jenkins*, 782 N.W.2d at 223 (quotation omitted). Here, reading the supporting affidavit in a

"commonsense" manner, *Bagley*, 286 Minn. at 192, 175 N.W.2d at 456 (quotation omitted), and not "review[ing] each component of the affidavit in isolation," *Jenkins*, 782 N.W.2d at 223 (quotation omitted), the district court reasonably inferred that the "known subjects," who had rented room 432 and with whom E.S. had been meeting, were St. John, R.M., and R.S. The affidavit therefore established a nexus between E.S. and St. John.

Citing *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889 (1968), St. John argues that, even if the supporting affidavit established that he met with E.S., the information would fail to establish reasonable suspicion that he possessed drugs. His argument is unpersuasive. In *Sibron*, the Supreme Court concluded that a police officer's search of a suspect, based solely on the suspect's conversations with known heroin addicts, was unconstitutional because the "inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." 392 U.S. at 62, 88 S. Ct. at 1902. But in this case, substantially more than his meetings with E.S. linked St. John to the possession of drugs. The issuing judge could reasonably infer from the supporting affidavit that St. John was staying in a room with an individual who had purchased drugs the same day the search occurred. Further, the affidavit established that, during a legal narcotics-detection dog sniff, the dog alerted at room 432, demonstrating that St. John's hotel room 432 contained drugs the same day that he was searched. Unlike in *Sibron*, where the police officer knew nothing about the suspect, *id.*, in this case, the supporting affidavit established that the police knew St. John to be a

"controlled substance user / dealer[] in the Mille Lacs County area." St. John's reliance on *Sibron* is misplaced, and his argument is unpersuasive.

Drug transaction between E.S. and other individual

The district court noted the observation by police of an apparent drug transaction between E.S. and one of the individuals staying in room 432. St. John argues that the court erred because its finding "did not accurately track the allegation" in the supporting affidavit, which only established that Sergeant Strack saw an exchange of cash between R.S. and E.S., and whether R.S. and E.S. "'exchanged cash' at the hotel provided no basis to search [St. John] for drugs."

The judge issuing a warrant must consider "information establishing a nexus between the crime, objects to be seized and the place to be searched" and determine whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Jenkins*, 782 N.W.2d at 223 (quotation omitted). Issuing judges are "entitled to draw common-sense and reasonable inferences from the facts and circumstances set forth in an affidavit." *State v. Brennan*, 674 N.W.2d 200, 204 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. Apr. 20, 2004). Here, nothing in the affidavit explicitly tied R.S. to St. John. But, as noted above, the district court reasonably inferred from the supporting affidavit that R.S. was staying in room 432 with St. John and R.M. and, therefore, it was reasonable to infer that the transaction between R.S. and E.S., which Sergeant Strack attested in his experience was "consistent with the sale of controlled substance[s]," shows that St. John had access to controlled substances and would have controlled substances on his person.

Narcotics-detection dog sniff

St. John argues that the narcotics-detection dog sniff performed by certified K9 Ellie was not legal because it was not supported by reasonable suspicion and therefore that the dog's alerting to drugs outside the hotel rooms did not support the search warrant. But St. John did not challenge the narcotics-detection dog sniff in the district court and the court therefore did not make any findings or conclusions about the legality of the dog sniff. "Issues not raised in the district court but raised for the first time on appeal are considered waived." *State v. Campbell*, 814 N.W.2d 1, 4 n.4 (Minn. 2012). Although we could decline to consider the issue, we nevertheless do so but find St. John's argument to be unpersuasive.

The Minnesota Constitution prohibits unreasonable searches and seizures. Minn. Const. art. I, § 10. Evidence resulting from an unreasonable seizure "generally must be suppressed." *State v. Wiggins*, 788 N.W.2d 509, 512 (Minn. App. 2010), *review denied* (Minn. Nov. 23, 2010). The protection against unreasonable searches and seizures extends to guests in hotel rooms. *State v. Thomas*, 598 N.W.2d 389, 391 (Minn. App. 1999), *review denied* (Minn. Sept. 28, 1999); *see also State v. Perkins*, 582 N.W.2d 876, 878 (Minn. 1998) (noting that the constitutional prohibition of police officers entering dwellings to make a warrantless arrest extends to "[g]uests in a motel room" who "are accorded . . . privileges of privacy"); *cf. Florida v. Jardines*, 133 S. Ct. 1409, 1413, 1415, 1417–18 (2013) (concluding that police use of a narcotics-detection dog sniff on front porch of home, based on an unverified tip that marijuana was being grown there, was

illegal search under Fourth Amendment because it was a trespassory invasion of home's curtilage, where "privacy expectations are most heightened" (quotation omitted)).

A police officer who develops a reasonable, articulable suspicion under the totality of the circumstances that a drug-related criminal activity is taking place may legally conduct a narcotics-detection dog sniff. *See State v. Wiegand*, 645 N.W.2d 125, 137 (Minn. 2002) ("[I]n order to lawfully conduct a narcotics-detection dog sniff around the exterior of a motor vehicle . . . , a law enforcement officer must have a reasonable, articulable suspicion of drug-related criminal activity."); *see also State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (applying totality-of-the-circumstances test to narcotics-detection dog sniff in the common hallway of an apartment building). "Reasonable suspicion must be based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Davis*, 732 N.W.2d at 182 (quotation omitted). While the requisite showing is "not high," it must be more than an "unarticulated hunch" and the police "must be able to point to something that objectively supports the suspicion at issue." *Id.* (quotations omitted).

Here, when Sergeant Strack conducted the narcotics-detection dog sniff, he knew that: E.S., who was "active in the use and or sale of controlled substances," was meeting with St. John, R.S. and R.M., who were also "known . . . to be active in the use and sale of controlled substances"; that St. John was staying in room number 432; and that E.S. was observed "entering and leaving room number 432 several times in a short period." In *State v. Baumann*, on very similar facts, this court concluded that the police had a reasonable, articulable suspicion to conduct a narcotics-detection dog sniff. 759 N.W.2d

237, 239–40 (Minn. App. 2009), *review denied* (Minn. Mar. 31, 2009). In *Baumann*, the sole fact supporting the police officer's decision to conduct a narcotics-detection dog sniff was a statement from the property manager, who "thought that the level of short-term traffic coming to and leaving from" the suspect's apartment "was odd and suspicious" and reported to the police that a "high number of people [were] coming in and out [of] and staying for a short amount of time" at the suspect's apartment. *Id.* This court reasoned that the above fact was "'something more'" than an unarticulated hunch and stated that the "apartment complex resident's expectation of privacy in the common hallway was minimal and that the use of a dog to sniff that common area was minimally intrusive." *Id.* at 241 (citing *Davis*, 732 N.W.2d at 181).

Here, the facts supporting a reasonable, articulable suspicion that a drug-related criminal activity was taking place exceed those in *Baumann*. The facts in the current case "objectively support[] the suspicion" that illegal drug activity was taking place and show that the police relied on more than an "unarticulated hunch." *Davis*, 732 N.W.2d at 182 (quotation omitted). And a hotel hallway is comparable to an apartment hallway. As a hotel guest, St. John had a "minimal" expectation of privacy in the hotel hallway. *See Baumann*, 759 N.W.2d at 241 (citing *Davis*, 732 N.W.2d at 181).

Citing a concurrence in *Sibron*, St. John also argues that the narcotics-detection dog sniff was illegal because it was based only on the fact that St. John was a drug user and had met with E.S., another drug user. In *Sibron*, the Supreme Court concluded a police officer did not have probable cause to search a suspect when the police officer "was not acquainted" with the suspect and "had no information concerning him" but

"merely saw [the suspect] talking to a number of known narcotics addicts over a period of eight hours." 392 U.S. at 62, 88 S. Ct. at 1902. The Supreme Court stated that "[t]he inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." *Id.* But this case is distinguishable from *Sibron*, which involved the question of whether *probable cause* existed to search the suspect's person, *id.*, not whether reasonable suspicion supported a narcotics-detection dog sniff. St. John's reliance on *Sibron* is misplaced.

St. John alternatively argues that, if this court declines to consider his argument that the narcotics-detection dog sniff was unlawful because his trial counsel waived it, we should reverse or remand based on ineffective assistance of counsel. Because we conclude that reasonable suspicion supported the narcotics-detection dog sniff, St. John's argument is unavailing. *See Schleicher v. State*, 718 N.W.2d 440, 449 (Minn. 2006) (stating, when analyzing a trial-error ineffective-assistance-of-counsel claim, that counsel's "failure to raise meritless claims does not constitute deficient performance"); *State v. Dickerson*, 777 N.W.2d 529, 535 (Minn. App. 2010) ("An attorney's failure to raise meritless claims does not constitute deficient performance and cannot provide the basis for a claim of ineffective assistance."), *review denied* (Minn. Mar. 30, 2010).

We conclude that the search-warrant application and supporting affidavit contained sufficient facts for the issuing court to find that there was "a fair probability that contraband or evidence of a crime," *Jenkins*, 782 N.W.2d at 223 (quotation omitted), would be found on St. John's person. Therefore, the district court did not err by denying

St. John's motion to suppress evidence. *See Miller*, 666 N.W.2d at 712 ("Doubtful or marginal cases should be largely determined by the deference to be accorded to warrants." (quotation omitted)).

Affirmed.